ETICA & POLITICA
ETHICS & POLITICS

XXII, 2020, 3

www.units.it/etica

Edizioni
Università
di Trieste

ISSN 1825-5167

Etica & Politica / Ethics & Politics, XXII, 2020, 3

M o n o g r a p h i c a I

THE ONTOLOGY OF THE SUBJECT IN GIORGIO AGAMBEN

M o n o g r a p h i c a I I

DIRITTO, INFRADIRITTO, CONTRODIRITTO. STRUMENTI DI REGOLAZIONE E TUTELA DEI DIRITTI FONDAMENTALI

Symposium I

Desmond Manderson, *Danse Macabre. Temporalities of Law in the Visual Arts*

Symposium II

Oliver Marchart, *Thinking Antagonism: Political Ontology after Laclau*

Monographica I

THE ONTOLOGY OF THE SUBJECT IN GIORGIO AGAMBEN

Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 9-11
ISSN: 1825-5167

POLITICS IS AN ONTOLOGICAL ISSUE
GUEST EDITOR'S PREFACE

CARLO CROSATO
Department of Philosophy and Cultural Heritage
Ca' Foscari University of Venice
car.crosato@gmail.com

ABSTRACT
According to Giorgio Agamben, in order to become a subject, and consequently to give itself a history, the individual must first say itself, and by saying itself it is destined to inhabit its most authentic ethical dwelling in an ever-partial and situated way. Such ethical dwelling is identified as the impotent and totipotent infancy which, translating itself perpetually into act, is inaccessible in its breadth and in its complete availability to pure use. The present issue of «Etica&Politica/Ethics&Politics» aims at probing Agamben's ontology of the subject in critical terms, drawing its premises from previous or external studies to the Homo sacer series, and investigating its political repercussions in Homo sacer.

KEYWORDS
Agamben, politics, ontology, ontology, politics

With the launch of the *Homo sacer* series, Giorgio Agamben became a reference point for the international philosophy. Thanks to translations in many languages and the diffusion of his thought in many countries, Agamben has been known, studied and criticized more abroad than in Italy. His contribution to the development of political philosophy towards a new and promising way, as well as his introduction of new concepts in the field, are widely acknowledged. His thinking does not simply shed light on the rules of the political game. At the same time, he does not merely denounce the exclusion of a large mass of individuals from that game. The subjects that Agamben observes with greater interest are placed on a hybrid margin between the inside and the outside: they are not protagonists, yet they are not even completely extraneous to the political discourse which is actually established on their marginalization.

Agamben's political philosophy is, first of all, an observation of structural movements and internal logics assumed by the historical forms of politics. The programmatic line exposed at the beginning of the *Homo sacer* project is to

complete and correct some of Michel Foucault's intuitions about biopolitics, understood as the geometry of modern power. The modern era is the moment in which the relation between power and life becomes more evident. Yet, on a closer inspection, power captures life since ancient times, declining this relation in various ways but always tracing a zone of suspension on which the decision between an inside and an outside can be taken.

While Foucault observed the infra-juridical plots that fill the wider meshes of the law, Agamben looks at the outer edge – which is never completely external –, describing a zone of indistinction from which a sovereign decision defines life. As a matter of fact, he reflects on the interweaving of sovereign and biopolitical logic in order to identify a relationship between power and life which, before becoming normative, is primarily ontological.

Therefore, the topic extends beyond a strictly political issue. In 2002, in *L'Aperto*, Agamben returns on a variety of issues already touched in his previous studies and shows how the same logic of exception is not only at the basis of the birth of law and politics, but also of the human being itself: the definition is a space to be constantly conquered through the set of distinctions and articulations that have always marked the boundary around the concept of man, both as a natural datum and a political task.

The human being, conceived as a borderline concept which is never reducible to an elementary dimension, is rather to be understood as a process of humanisation or animalisation, in which life oscillates between its natural data and the attempt to give itself a history – until the contemporary moment when the historical task has ended up coinciding with the natural datum. In the effort to give oneself a history, life becomes human, and the human being rediscovers itself as a subject, that is, an individual aware of its own location as well as of the affirmation of its concrete form of life.

According to Agamben, the bond that politics establish with the living being and with human life primarily shows the way the West gives shape to its own categories and objects. Agamben polarizes political thinkers: some define him as heretical or impolitical, whereas some others consider him a sort of prophet. In order to understand his political philosophy, it is necessary to embed it in a much wider and more complex ontological framework, which the success of the *Homo sacer* series has obscured for a certain period, but in which Agamben calibrated the logical tools of his criticism of politics and, most of all, of metaphysics, language, and history.

Agamben's political philosophy is an ontology, because it consists in a critical look aimed at exploring the way man thinks and speaks, thereby giving itself a history. In other words, politics is first and foremost an ontology because it deals with the ways in which the human being defines, finds and prepares a well-

defined dwelling for itself. In Agamben's thought, the conception of the human being goes beyond the status of an "animal endowed with language": the human is such by receiving a language that is not its own, and with which it initiates the history of the forms of life.

Rejecting the image of a subject that has always been self-adherent to itself, Agamben identifies the language as the transcendental dimension in which the process of subjectification initiates. Only in the immediate self-presence of the enunciation – a process of appropriation of the symbolic and linguistic apparatus – the human being determines itself as a subject. Such process of subjectification, however, is indissolubly linked to a process of desubjectification, since the subject, in recognizing itself as such only by saying "I", and therefore placing itself in the enunciative instance, recognizes itself only as an infra-linguistic and self-referential function. As a consequence, the human being as a subject constantly finds itself confined in a form of life that makes its existence possible, thereby destining it to historical determination.

In order to become a subject, a human life, and consequently to give itself a history, the individual must first say itself, and by saying itself it is destined to inhabit its most authentic ethical dwelling in an ever-partial and situated way. Such ethical dwelling is identified as the impotent and totipotent infancy which, translating itself perpetually into act, is inaccessible in its breadth and in its complete availability to pure use.

The present issue of «Etica&Politica/Ethics&Politics» aims at probing Agamben's ontology of the subject in critical terms, drawing its premises from previous or external studies to the *Homo sacer* series, and investigating its political repercussions in *Homo sacer*: the paradox of sovereignty, the figures of inert resistance, the destituent gesture through which Agamben imagines a very problematic overcoming of the metaphysical-nihilism bound and, with it, of the subject-object dichotomy.

Is it possible to think of a political life free from any figure of a relationship, which is both lived "together" and beyond any kind of relationship? With what ontological categories is it possible to think such a life? What does it mean to overcome the subject-object dichotomy? How can we access such a form-of-life, if every decision to access it is already a cut into the totipotential dimension? In what way the deactivation of Western ontology allows a way of emancipation, and how can such emancipation be lived by a subject who is no longer a subject but a simple contemplation of power?

Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 13-47
ISSN: 1825-5167

A MATHEMATISED ARCHAEOLOGY OF ONTOLOGY
AGAMBEN'S MODAL ONTOLOGY MAPPED ONTO BADIOU'S MATHEMATISED ONTOLOGY

WILLIAM WATKIN
Arts and Humanities
Brunel University, London
william.watkin@brunel.ac.uk

ABSTRACT
This paper looks at the central portion of The Use of Bodies called An Archaeology of Ontology. Specifically, it concerns itself with Agamben's historiographic approach to ontology as regards the construction of ontology via the concepts of presupposition, relation and mode. Placing these comments within the frame of the whole book, the study of use of bodies in part I and form-of-life in part III, the paper suggests that, contrary to Agamben's own assertions, it is possible for an ontology to escape the historical destiny mapped out for it by First philosophy and foreclosed by Kant. This possibility makes itself known if one accepts that Agamben's definition of the ontology to come as a modality of the use of bodies as a habitual form-of-life, is indeed another way of stating that said ontology is directly mappable onto Badiou's work on existence as categorical functional relations between objects in Logics of Worlds. For use of bodies read functions between objects, and Agamben's modal and Badiou's mathematised ontologies suddenly fall into a powerful if restless alignment.

KEYWORDS
Agamben, Badiou, ontology, category theory, philosophical archaeology

There is no doubt in my mind that, as the years pass, *The Use of Bodies* will be seen as one of Giorgio Agamben's masterpieces. The signs are already auspicious, it is, after all, the concluding volume of the immense, epoch-defining *Homo Sacer* sequence that ends with probably the clearest statement yet of what Agamben conceives of as the politics and philosophy to come, after the successful indifferential suspension of the major signatures of the metaphysical tradition. Yet there are also more obscure augurs encoded in the book, specifically about Agamben's relationship to his great rival and friend, Alain Badiou. For those well-versed in the full body of work by both men, the very title *The Use of Bodies* is surely meant as an oblique, yet unmistakeable, comment by Agamben on Badiou's mathematised

ontology and his categorical theory of worlds. As I have argued in one of the two sister pieces to this article, for use of bodies read functions of objects and you have, basically, the summary of Badiou's *Logics of Worlds*. In the same piece I also show that the analogical method Agamben adopts from Enzo Melandri is better mapped onto the analogical conception of relationality in Badiou's reading of categories, namely the mapping of a function from source to domain (Watkin forthcoming). If one goes even deeper, then one can also say that Agamben's choice of the term 'bodies' is a direct challenge to Badiou's influential theory of the event. In *Logics of Worlds* bodies are the clusters of objects that gather around the nonrelational object of a world, the event, forming a radical nonrelational world within a world. The reason I dwell on this is that the whole point of *The Use of Bodies* and in a sense the entire sequence of books comprising *Homo Sacer* is, as in Badiou, a revolution in being, existence and politics. That the Agambenian sense of bodies is radically at odds with Badiou's, suggests that while both men appreciate that any theory of existence of any value in this third millennium of philosophy, must be based on a modal or functional logic, and a liberation of subjects from being 'subjects of...' to 'bodies that...', Agamben is clearly sending a message to Badiou, albeit as we shall see, a truculently encrypted one. Yes, he argues, ontology must become modal, category theory is a form of modal logic, and subjects must also become bodies, but if the politics to come is one of habitual use, as he argues across the book, then Badiou's theory of the event as intermittently disruptive of, and nonrelational to, functional world relations, is just another version of the philosophy of difference that Agamben has spent his career since *Language and Death* in 1982, undermining, rejecting, and part-replacing.

The purpose of my returning to Agamben's *The Use of Bodies* for a third and final time, is to ask for my own part, whether an accommodation can be found between Agamben and Badiou, around the concept of indifferential thought. I cannot answer that question here: it is a topic for my future work. Instead, across the two accompanying essays, *Agamben's Impotentiality and The Use of Bodies* and *Inoperativity as Category: Mathematising the Analogous, Habitual, Useful Life in Agamben's The Kingdom and the Glory, The Signature of All Things and The Use of Bodies* I show how first Agamben's indifferential method is problematized by some of the most basic axioms of sets, such that the logical paradoxes he delights in debunking may not be inconsistent at all. And then, more constructively, how Agamben's work is mappable on to category theory due to his commitment to analogical thought. Categories are analogical modes of relation between two objects. What all these papers are proposing is, first, that *The Use of Bodies* is a sustained engagement with Badiou's work, even if Badiou's name is never mentioned. The model Agamben has adopted here echoes that used in *What is an Apparatus?* which basically appropriates the terms of Badiou's work, as a mode of critique,

without ever speaking directly to, or about, Badiou[1]. And second, that Agamben's entire project, and his futural politics of habitual use based on his formulation of a modal ontology, lives or dies on how he responds to the revolution in the language of thought that occurs with George Boole's invention of extensional reasoning and Georg Cantor's application of this to the ontology of sets (Bar-Am 2008).

The question is a simple one: does the archaeological method of indifferential suspension of the articulation of common and proper such that the ruling signatures of metaphysics are rendered inoperative work, after the rationality of metaphysics alters in the mid-19th century such that the logical paradox of common and proper that Agamben sees as intrinsic to all signatures, is no longer paradoxical? Is the new language of being, extensional logic, another version of metaphysics, or the resolution of its problems? In the central portion of *The Use of Bodies* Agamben seems to pursue this problem both directly and obliquely by taking the terms of Badiou's ontology and his objective phenomenology, and then trying to implicate them in First philosophy. In what follows I will try to trace this odd conversation, and in a sense speak up for Badiou and my own commitment to extensional reasoning as and when appropriate. This is not to suggest that Agamben is wrong, there are many elements of Agamben's project that I would favour over Badiou's, but my aim here is simply to give voice to the issues at hand missing from Agamben's writing. The complexity of this project is perhaps beyond the already generous word count here so I have to assume the reader understands the basics of sets and categories. If they do not, then I refer them to the following resources in reverse order of direct relevancy (Badiou 2005; Badiou 2009; Badiou 2014; Watkin 2017; Watkin 2021). In miniature, sets reduce beings to ranked indifferent multiples. Upon which are founded categorical worlds composed of commutative triangles of objects defined entirely by their functional relations. These worlds have a halting point, the minimum, effectively Agamben's *archē*. They have a transcendental functor or name of the world, Agamben's *signature* (Agamben 2009: 33-80). Within which any two related objects can be both exemplary or subordinate due to the enveloping functions, Agamben's paradoxical *paradigms* (Agamben 2009: 9-32). I will return to the specifics of categories later when we discuss how the commutative triangle maps onto Agamben's conception of communicability.

In what follows we will be considering the central portion of *The Use of Bodies* called *An Archaeology of Ontology*. Specifically, Agamben's historiographic approach to ontology as regards the construction of ontology via the concepts of presupposition, relation and mode. Placing these comments within the frame of the whole book, the study of 'use of bodies' in Part I and 'form-of-life' in Part III, I suggest that, contrary to Agamben's own assertions, it is possible for an ontology to escape the historical destiny mapped out for it by First philosophy (and foreclosed by Kant). This possibility makes itself known if one accepts that Agamben's

[1] I have traced an earlier example of this technique of Agamben's in Watkin 2016: 85-99.

definition of the ontology to come as a modality of the use of bodies (as a habitual form-of-life), is indeed another way of stating that said ontology is directly mappable onto Badiou's work on existence as categorical functional relations between objects in *Logics of Worlds* For 'use of bodies' read functions between objects, and Agamben's modal and Badiou's mathematised ontologies suddenly fall into a powerful, if restless, alignment. I suppose the central question is why, if Agamben is aware of this, does he not directly address it, accept elements of Badiou he can accept and challenge those he questions? If, for example, one is able to accept some of Badiou's work on modal categories extensively expressed in *Logics of Worlds* then, as my accompanying work suggests, the lack of detail Agamben provides as to how habitual use as form-of-life would actually function, is suddenly flooded with new and potentially world-altering complexity. I commence with sketching out this potentially rich complexity in my essay *Inoperativity as Category*, (Watkin forthcoming) but to get there, we need to cross the troubled swamps of the Western ontological tradition. So come with me, if you are willing, into Agamben's archaeology of ontology qua articulation and mode, analogically mapped onto Badiou's mathematised ontology thanks to sets, and his objective phenomenology of existence thanks to categories.

1. AN ARCHAEOLOGY OF ONTOLOGY

Agamben opens the central section of the three-part study of bodies and their uses with an attack on the presuppositions of First philosophy, rejecting its primacy based on its 'conceptual formulations' by arguing instead it is always inscribed in 'doctrine'. Although he does not say this directly, one cannot but assume however that this is as much a rejection of Badiou's ontological position, he is often presented as doctrinal[2], as it is of Aristotle's. For example, when Agamben goes on to describe ontology as "the originary place of the historical articulation between language and world, which preserves itself in the memory of anthropogenesis, of the moment when that articulation was produced" (Agamben 2016: 111), he is drawing clear water between his conception of ontology and Badiou's widely-known commitment to ontology. Agamben's historicised reading of ontology is such that when ontology changes, then the 'destiny' of ontology does not. What is transformed rather is "the complex of possibilities that the articulation between language and history has disclosed as 'history' to the living beings of the species *Homo Sapiens*" (Agamben 2016: 111). Thus, the revolution in ontology inaugurated by the Cantor event according to Badiou is, for Agamben, simply a new articulation between language (extensional logic) and the world such that extensional logic, in replacing syllogistic

[2] François Laruelle's complaint re: the infection of Maosim across Badiou's *oeuvre* (Laruelle 2013).

logic, merely installs Cantor and later Badiou in the doctrinal position of the new Aristotle. As if to rub salt into the wounds of this subtle assault, on this reading Agamben's sustained fascination with *anthropogenesis*, explained here as the "becoming human of the human being" is defined as "the event that never stops happening", appropriating Badiou's most famous term and undermining its fundamental qualities of rarity and instantaneity. Which naturally entails that reading First philosophy, qua ontology, means that as a philosopher one "watches over the historical *a priori* of *Homo Sapiens*, and it is to this historical *a priori* that archaeological research always seeks to reach back" (Agamben 2016: 111). In a few short sentences, therefore, Agamben appears to dispense with Badiou without ever naming him as such.

From this opening position we can ascertain that ontology, for Agamben, is accessible only as a result of his archaeological method outlined in *The Signature of All Things*. That the centrality of ontology to the West is the articulation of *human* being. The event in question is both singular, the event of anthropogenesis, and yet also recurrent, never stops happening. And that any new destiny for ontology will constitute a reconfiguration of the paradigms and economy of the overall signature [Being][3]. A signature which he will go on to say is the original, foundational signature of the West. Finally, one is able to deduce that the role of the philosopher is to map the origins of ontology in First philosophy, onto the latest manifestations of the philosophy of being, for example ontology is mathematics or later the onto-logical in Badiou. Not only is this a breathtakingly economic expression of Agamben's mature position on ontology, but perhaps because of this, each of these statements is a contradiction of Badiou's thesis that ontology is mathematics or at least a contradiction of Badiou's claims re: the event due to this 'doctrinal' statement. Let's consider the evidence thus far and see if our thesis that this is an attack on Badiou holds water.

First, Badiou insists that ontology is mathematics which contravenes Agamben's proposal that ontology is a reconstitution of the terms of First philosophy. Although first philosophy concerns a substance of Being that underlies all other beings, the fact is that the rise of set theory – after Boole and Cantor – rejects firmly the theory of classes as the basis of existence (Potter 2004; Tiles 1989). Extensional logic is able to establish a foundation without recourse to issues of essence, or named properties. In this way it is, I contend, the first fully consistent refutation of First philosophy as bequeathed to us by Aristotle, consistent in that set theory remains a central pillar of mathematics used by thousands of mathematicians every day covering millions of calculations. Thus, Badiou seems justified in arguing that ontology is

[3] To systematise Agamben's use of the term and I suppose to insist the Agamben community accept the systematic nature of his archaeological method, when I am speaking of a term specifically in terms of its signatory function I capitalise it. From this paper on I believe it is also necessary to place it in square brackets to indicate that we take signatures to be set-compositional functions.

mathematics, not the study of substances. Yet, Agamben's argument is a critique of the structural form of First philosophy and not just its terms. In this sense, his is, interestingly, an extensional mode of reasoning. Agamben is reaching for the abstract structural recurrence of the articulation that originates in Aristotle. Part of this articulation is the assumption in our ontology of a fundamental co-relation between language and world. It is true, however, that Badiou cannot be readily captured by this formulation because set theoretical ontology rejects the linguistic turn. For Badiou multiples are 'real', or at least their being is, and their consistency is not a trick of language, but a discovered truth. Sets are not a mode of language about the world, but a means of counting multiples. Accepting these provisos to be the case, at the same time one must admit that sets are articulated, and they do combine a materiality, multiples are real, and a language of sorts, after all maths is a mode of discourse as Badiou himself avers (Badiou 2005: 8). In addition, the foundationalist claims that Agamben will go on to attack as presupposition, exist in some order in Badiou who advocates, for example, the controversial axiom of foundation in set theory.

Agamben, then, is presenting his archaeology as an extensional model for all subsequent claims to ontology and arguing that ontology is the prevalence of this articulated model, into which each manifestation in history is a mode of intensionality. His point, resembling the strategy of early Derrida, is that any claim for ontology is by necessity a return back to the First philosophy co-relational model and cannot be otherwise even if it claims otherwise, perhaps especially if. And that for all the revelations of the mathematising of ontology, extensionally speaking, all ontological claims when rendered content neutral, if they are to be classed as part of the doctrinal historicisation of ontology since the Greeks, will manifest the identical architecture of articulation between language and world. Badiou is unapologetic in *Logics of Worlds* of defining his entire project as onto-logical, or, in other words, an articulation between set theory and worlds. Thus, by implication according to Agamben Badiou is simply the new Aristotle and his ontology just another chapter in the historicising of ontology.

Resuming, with these thoughts in hand, Agamben's overall critical program we can see in each case a definite implied negation of Badiou.

- Ontology, for Agamben, is accessible only as a result of the archaeological method. Ontology, for Badiou, is accessible only if it is mathematised.
- The centrality of ontology to the West is the articulation of *human* being. Whereas for Badiou the centrality of ontology is the statement being is-not and the manner by which maths makes this consistent as a permanent definition of being.
- The event in question is both singular, the event of anthropogenesis, and yet also recurrent, never stops happening. In contrast, the event in Badiou is singular and non-repeatable. In Badiou's work the functional

repetition of the event, inquiry in *Being and Event* for example, is a process of mapping the evental effects in a world, in real time, progressively, without recursion[4]. In addition, for Badiou being is not a question of humanism, he refutes this aggressively in the *Preface* to *Logics of Worlds,* thus there is no human event. Events are truths, inhuman truths.

- Any new destiny for ontology will constitute a reconfiguration of the paradigms and economy of the overall signature [Being], such that the mathematising of ontology will just be another repetition of this, not, as we have just argued, the end of the influence of Aristotelianism in the development in the 19th century of extensional logic, actual infinity and sets.
- Finally, the role of the philosopher is to map the origins of ontology in First philosophy, onto the latest manifestations of the philosophy of being. In contrast, the role of Badiou's work is to outline the consistency of the set theorised being as a basis for the process of demonstrating that events exist, impact on a world, in a manner that is true and generative of subjects loyal to and investigative of this truth.

To summarise this set of counter-positions, for Badiou, extensional logic is the end of Aristotelian First philosophy because it replaces syllogism with extensional modes of reasoning, negates classes in favour of sets, has no need for essences, replaces substance with the void and has a workable proof for actual infinity. For Agamben, any such claim is second-guessed by Aristotle's influence, his role as effectively a metaphysical signature, and so just another example of metaphysics qua articulation. He has, it would appear, out-extended his great rival by *indifferentiating* the content of Badiou's claims, rendering their content neutral so as to observe their functional genericity qua articulation, and found them to be, structurally, just another example of the historical narrative of ontology qua articulation, or the great myth of the ontico-logical that Badiou is more than happy to sign up to.

2. HISTORICAL *A PRIORI*

As Agamben proceeds from this occluded, but to me unmistakable, rejection of Badiou's ontology *qua* mathematics, he takes up a term from Foucault, as he often does, possibly originating in Husserl, the "historical *a priori*", as a way of presenting his own archaeological method as a means of expressing the central paradox of

[4] Recursion has, in Badiou, a clear functions. It is recurrence that allows on to deduce from any number however large, back to the certainty that it is well-founded at its lowest level on the empty set or in-divisible one. This mode of recurrence, basically indifferentiated, generic ranking function qua multiple, exists for the event, but only if one ceases for a moment to test the event through subject-based inquiry of the yes/no, and retroactively looks back to say that this string of ordered-pair multiples has to be well-founded, even if we have no conception at this point how large this set of relations is going to be.

communicability. Communicability presented in Agamben as the linguistic function per se, or the *sayability* of saying, (Watkin 2015: 255-260), matched in Badiou by the presentation of presentation as such or the presentative function (Watkin 2017: 36-40). Both are extensional reductions of language and mathematics respectively to their functional, operationality. Agamben here calls the paradox of communicability, Agamben is little more than a philosophical debunker of metaphysical paradox: "A constitutive dishomogeneity: that between the ensemble of facts and documents on which it labors and a level we can define as archaeological, which though not transcending it, remains irreducible to it and permits its comprehension" (Agamben 2016: 112). The historical *a priori* is another way of expressing the communicability of statements as expressed in Agamben's work and my own as a development of Foucault's theory of intelligibility (Watkin 2015: 3-28), or not what a statement says but that it can be said. A position that could be summarised as *content as sanction*.

Later Agamben can be spotted ambling on past historical *a prioris* to indicate how the question of First philosophy of being was finally shelved by Kant who moved the debate from articulation of anthropogenesis through language and world, to knowledge and the knowing subject. And how the issue returned in the nonphilosophy of Michel Foucault, Walter Benjamin and Emile Benveniste's investigations of the transcendental through language "by not attending to the level of meaningful propositions but by isolating each time a dimension that called into question the pure fact of language, the pure being given of the enunciated, before or beyond their semantic content" (Agamben 2016: 113). In other words, Agamben's consideration of ontology qua anthropogenesis is concerned with an ontology of *communicability*: the 'pure fact' of language or the pure presentation of presentation as such. Not of what the speaking subject says, but how the speaking subject is constituted by the communicable function of the articulated relation between their possession of language as a means of dialectical diaresis with the world at large. Metaphysics qua communicability. In my recent work I have come to rename this mode of communicability *commutativity*, which is the basic structural relation of all categories in Badiou. I will explain this shift in term in the final part of the essay. For now, all we need do is register that the importance of this shift is that categories are not an issue of language but of relationality, such that commutativity is not defined by being intelligible, Foucault's intuition, but by being visible, defined in terms of categories as universally exposed. This leads one to ask the question: is language the real determinant of the articulation Agamben highlights? According to Agamben it must be, because that is what is handed down by the tradition through the repeated use of the signature [Language], subject of his indifferential suspension *The Sacrament of Language* (Agamben 2010), but what is language in reality, a mode of expression, communication or relation? In that he defines language himself as oath, it is clear even Agamben takes language to be a mode of action, not a

form of communication, added to which an oath is a modality of relation not expression per se. This will become clearer as he considers ontology as demand later. Is it not the case that communicability itself is a mode of relationality expressible most effectively by categories? And that the moment of anthropogenesis can be defined as *zoon logon echon* only if this conception of *logon* as language is accepted to be a misdirection of attention away from the truth of what it is that actually produces anthropogenetic separation? After all, according to Badiou, the onto-logical articulation is not determined by language but by multiples, not determined by reference but by relation.

In stark contrast to Badiou, communicability, for Agamben, is always historically located (categorical commutativity is essentially atemporal). As he goes on to argue, somewhat contentiously, the communicability function of language as determined by a historicisation of the question of being qua language has been replaced by an ahistorical presupposition of being: "It is now put forward as a neutral ahistorical or post-historical effectuality" (Agamben 2016: 114). This can only be a refutation of Badiou's mathematisation of Being and beings. This being the case, Agamben feels that the archaeology of being should be conducted by a "genealogy of the ontological apparatus that has functioned for two millennia as a historical *a priori* of the West" (Agamben 2016: 114). This is surely the conception of relational articulation qua diaresis, dialectics, and hierarchy. Yet, at the same time the history of said communicability is retroactively constructed, so is not historically 'true' in the sense that most might take that word to mean. Yet again, because the reconstruction of the *archē* in each case is effectively, structurally the same (extensional), and because Agamben suggests here any innovation in ontology repeats this articulation no matter what, as the meaning of [Ontology][5] is articulation per se, there is a stable and consistent 'truth' to ontology. In this sense one could argue that ontology is real in its structural inevitability or at the very least, to apply Gottlob Frege here, it is a truth object. And further, that ontology is mathematics if one defines mathematics as the most fundamental form of articulation, represented by the abstract, extensional potential of the equation. Although for many that might be taking things too far.

With these comments in hand, the signature [Ontology] can be said to extend over objects in a world not as a form of reference, but as a mode of structuration. Ontology is not the result of an articulation between, say, human and being, but is said articulation, a point he first made in *The Open* and which he will go on to confirm later in this middle section. If the repetition of ontology as articulation is no surprise to the careful scholar, the conclusion he draws here has more shock value: "One can define philosophical archaeology as the attempt to bring to light

[5] Agamben's favoured way of showing he is talking about a signature, not just the ordinary language sense of a term, is to capitalise it but this is not always systematic and doesn't capture for me the idea of the signature as the transcendental name of a set. Therefore when I am speaking of a term as a signature I use square brackets which is a common way to designate sets.

the various historical *a prioris* that condition the history of humanity and define its epochs. It is possible, in a sense, to construct a hierarchy of the various historical *a prioris*, which ascends in time toward more and more general forms. Ontology or first philosophy has constituted for centuries the fundamental *a priori* of Western thought" (Agamben 2016: 112). This is the first statement in Agamben's extensive *body of work* that clearly outlines a history and hierarchy of signatures, something my own work has studiously rejected because in theory it delegitimizes the whole method by accepting there is a signatory origin (Watkin 2015: 107-136), opening Agamben up to the predictable, yet valid, criticisms of the Derridean community.

There is, it appears, for Agamben at least, one signature that precedes all others and in this sense founds them, and that signature is [Ontology]. [Ontology] defined as an articulation between language and the world as the mode of the anthropogenesis of the human being, or the living being that has language. On this reading [Ontology] is the halting point of philosophical archaeology, meaning that it is effectively analogical to the empty set of Badiou's ontology. 'Empty' because the content of the signature is irrelevant and historically contingent. It is the structural form of articulation that is important, not because of what it allows one to say of being, but because of what it tells us about why we can say being in the first place. Basically, Badiou's point in his maxim being is-not. 'Set' because its job is to collect together statements as archetypes of a particular signatory position. In fact, each of the works in *Homo Sacer* is essentially a signatory set, poverty, office, life, body, excavated archaeologically to unearth its *archē*, then populated with all its paradigms across time and space, with the aim of indifferentially suspending the signature by the end of the book. One can go further and state that as Badiou shows that the entirety of being is composed from the oscillation between the void set as included and then as belonging, then it is true that, as Agamben says, [Ontology] as such is articulation, written in Badiou as: ∅ [∅]. But wrong to say that there is a historical origin of articulation. And wrong to say the articulation is between language and world, when in fact it is between two ways of counting a multiple. This point is encapsulated in the first of the trilogy of pieces I have written on *The Use of Bodies* where I demonstrate that the axiom of separation is able to prove that the assumed paradox Agamben identifies between potential and actual, the basis of his conception of impotential in the concluded section of *The Use of Bodies*, is, as regards the extensional logic of sets, simply not paradoxical and so absolutely resistant to indifferential suspension[6]. All of which comes down to what I think of a most important question in continental philosophy as metaphysical critique at the present time. *Is extensional logic an event that continental thinkers simply disregarded for a century, Badiou's*

[6] Similarly Agamben can say the [Ontology] is the first signature if he accepts first in terms of the halting point of the empty set, which refutes any Derrida-inflected attacks on Agamben's commitment to origins.

position and my own, or just another example of metaphysics as articulation, Agamben's position and possibly your own?

Forced against my will to accept that there is a meta- or founding signature of signatures, consoled by the fact I can still justify this if I apply the axiom of separation to Agamben's work, then I am also coerced into assuming that language is no longer a mode of expression or communication, but the functional basis of the emergence of the human. Language does not say, it does. Language makes humans. It does so by the articulation between being, the world, and the expression of said being, language. On my reading this historical primacy is impossible qua content. It cannot be the case that First philosophy is first in a historical sense, and that everything is traceable to Aristotle, because this is not what the *archē* means for Agamben. Each time we reach back to First philosophy, it is first for the first time, or it is a new event of primacy. As such, primacy qua foundation is reconstructed for our current needs. And yet, admittedly, the *archē* as foundation and firstness is one of the central components of the archaeological method. The communicability of a signature for us is necessarily dependant on a first moment or an origin it would seem. This firstness cannot be actual primacy, so one is forced to deduce that it is a functional position: the foundational moment qua function. In both of Badiou's definitions of 'primacy', the empty set for set theory and the minimum for categories, these foundational moments are functional results of counting and relating that come after the systems they found as consistent. For example, the empty set is something you count back to from wherever you are until you get to a set which does not succeed from another. This retroactive founding of a set of proper elements on a commonality that however does not exist until the proper elements call it into being, is the archetype of the Agambenian, indifferential, suspensive method.

Left like this, Badiou's work would be easy to suspend, and in a sense dispense with. Yet to do so would open Agamben up to a kind of philosophical check-mate as if the *archē* is to be foundational, and he insists on that, it can only be 'first', according Badiou's extensional ontology, if it is emptied of content and rendered an extensionally indifferent, foundational element due to the axiom of separation and the definition of sets as collection not fusion (extensional not intensional). Yet if you empty the *archē* of content, it ceases to have the function of *archē* as named archetypal moment. People, to put it crudely, are only happy to accept an origin if it is a content-rich, temporally specific moment. But then again, in accepting as Agamben does, that the signature is content neutral, its naming does not refer to objects but is rather the generic naming function qua gathering of archetypes into a signatory set, if the content-neutral signature is founded by the arche, then by definition the *archē* must be devoid of specific content also.

This back and forth we are experiencing due to the problematics of the foundational moment – it only functions if it is specific, it only functions if it is indifferent – is the essence of Agamben's indifferential suspensive method, as I have detailed

elsewhere in *Agamben and Indifference*. But it is also what Agamben will go on to call it in the first chapter of this middle section of his study: the otological apparatus of presupposition. And there is much that is yet to be said on this topic. Before we turn to that let's sum up where we have got to thus far. What Agamben is reaching for in the final book of the series is a historically populated theory of consistent, functional worlds. The role of archaeology is to excavate the historical *a prioris* that render communicable and specific the manifestation of the ontological articulation. As such, articulation qua being shares functional parallels with Badiou. For Agamben, the articulation of being constitutes what we call being. As I have detailed elsewhere, being is a content neutral modality of functional relation that requires a specific means of co-relational hierarchy, the economy of paradigms, a specific transcendental function, the signature, and a foundational base, the arche[7]. In this way, as being is-not is to the counting of being, so being as *archē* is to the historicising of being. Meaning that Agamben's archaeological method is a historical manifestation of the mathematics of being, not so much in terms of set theoretical ontology but, as I have argued already elsewhere, in terms of logics of worlds. So that while there are many points of divergence between Agamben and Badiou, the parity between their work, if you dig deep enough, outlines for the wider community where ontology is travelling to in the new century. Think of the two men as bickering, but constant companions, sojourning along parallel, functionally analogical paths.

3. THE ONTOLOGICAL APPARATUS OF PRESUPPOSITION

Remarkably, we have only come to terms with the brief introduction to the middle section of the book, a section divided into three chapters through which we will now proceed systematically with different levels of emphasis. The first chapter is a consideration of the archaeological elements of ontology since the Greek arche, primarily the idea of presupposition which is another way of demonising Badiou's presupposition of the real of the void thanks to such axioms as separation and foundation. The second chapter is a consideration of relation which we will skip, not least because we have considered relation and nonrelation in the book elsewhere[8]. The final, the proposition that our post-indifferentially suspended ontology has to be a *modal* ontology. It is this idea of a modal ontology that must concerns us the most going forward with Agamben into the future, he assures us. For the record, these three areas pertain directly to Badiou's extensive ontological project. The presuppositive impulse is the search for the First, the foundational, the consistent that has come to define being, and its relative invisibility until Heidegger, as apodictic, tautological, self-evident. In Badiou a central part of his entire ontology is the halting

[7] This analogical mapping of signatures onto categories is explained in full in Watkin forthcoming.
[8] Watkin forthcoming.

point or empty set and its participation in the validity of a constructive definition of being determined by is-not-ness that is not negative. Defined by the combination of axioms of separation and foundation. While the second, relation, and the third, modal, are more determined by Badiou's later work on categories in that category theory is a modal logic and in Badiou's work its main function is to formalise relations between objects in worlds.

Returning to the *Ontological Apparatus*, Agamben begins by tracing the *archē* of being as articulation between that which is said of being, and that which is not said of being but lies under being as the *hypokeimenon* or *sub-jectum*. The three mechanisms for access to the foundation are singularity, proper names and deixis, all mechanisms used by analytical philosophy of the last century, in particular the Frege—Carnap—Quine extensional axis, to capture being as logical, relational extension. The secondary level is the genera: this certain man belongs to the species man. Thanks to Badiou we are able to assert that what Agamben is outlining here is not, in fact, the role of language as he purports, but the role of sets, as the above example of genera clearly shows, allowing us to state emphatically that the originary relational articulation of being does not concern language as communication, expression, content, reference or signification, but instead language as a modality of collection. This will be our main bone of contention between the two theories of modal ontology. Agamben concludes here that being, like life, is "always interrogated beginning with the division that traverses it" (Agamben 2016: 115); or being is not articulated into an onto-logical pairing but rather being is articulation qua articulation. The major development of the modern age therefore is surely the realisation of the possibility of being as *not* traversed by a division between essence and class that was the basis of the development of extensional reasoning by Boole, Cantor and Frege. The specificity of the object is not determined by its being a multiple in a particular location in a set, ranked 3 in a set of 6 say. In ranking, the multiple is singular, no other multiple can be third because being third is the being of said multiple. It is a proper name, it is *The Third*. And it is defined by *deixis*: its role is indicative and denotative. What The Third points to in reality is the position of third-ness, a space entirely filled by an indifferent multiple that is located as that which succeeds from second-ness. On this reading, Aristotelian class is replaced by Cantor's set, and the central function that is identified here is that of collecting. Thus, the truth, I would argue, of the archaeology of ontology is that its definition as diaresis is a mode of relation between *ousia* and *gramme*, as Jacques Derrida defines it, that is then replaced in set theory with an entirely new mode of relationality, that between two indifferent multiples. The significance being that the relation between two indifferent multiples does not succumb to diaresis, at least not as Agamben conceives of it. This will become the intractable problem of the entire book in fact.

Agamben's consideration of Aristotle's *Categories* which follows then perhaps misses the point that classes have been replaced by sets through a radicalisation of

nonrelational relationality, non-relation, and finally un-relation. One could argue that in truth the narrative in question is no longer that of being as articulation reconstituted in the same modality of communicability, but the end of a historical epoch of communicability, and the assumption of a new mode of communicability. As I argue in *Badiou and Communicable Worlds*, a shift from communicability as communication, to communicability as commutativity. Nonrelational relationality, a formulation that occupies much of the *Epilogue* of the book, is the means by which two beings can be related when they are content neutral and essence functional. Essence functional means they operate as if they possess 'essence', in the same sense that the transcendental functor of the maximal category in Badiou operates functionally as transcendental, but is anything of the sort. This is facilitated by the nonrelational function of being as foundation and actual infinity as transcendental. All of which is founded on a more fundamental issue which is that rank is simply a metaphor or mode of thought that makes being both exposed and useful to mathematicians, outlined by Badiou in the explosive second appendix to *Being and Event,* but that "fourth" is in fact just an ontological essence-function: there is in the world fourthness. Which is further reducible to a pre-founding indifferentiated, generic proposition represented by the formula, $\emptyset$ [$\emptyset$] or the empty set first as included and then as belonging, from which all of nature, all multiples, can be deduced.

Ignoring this avenue of enquiry,Agamben instead doggedly commences his study of the presupposition as language qua communicability, a topic on his mind since his very early and, to my mind, methodologically flawed *Infancy and History*. Language, for Agamben, through reading Aristotle, is the presuppositional basis of the *hypokeimenon* meaning that language is effectively the subject in our history. The subject becomes human through the presupposition of language. Agamben's innovation here is to redefine *ousia* away from the critique of *ousia* posed by extensional reasoning, namely that essence simply does not exist. As he says: "*The primary ousia is what is said neither on the presupposition of a subject nor in a subject, because it is itself the subject that is pre-sup-posed—as purely existent—as what lies under every predication*" (Agamben 2016: 118). What he is suggesting, surely, is that essence is not some Greek superstition, but is rather the very foundation of communicability. The essence of a thing is the presupposition of its communicability, for only humans possess communicability, if you take it to be just a linguistic function[9]. The essence of a thing is that it can be exposed by communicability. In this way, essence returns to sets, but entirely reconfigured as the pure communicability function per se. Essence is the ability of a being to appear in a category due to language.

[9] A central diaresis between Agamben and Badiou over communicability is that the commutative communicability that I develop in reading of Badiou is based on an objective phenomenology meaning that commutative communicability as facilitating universal exposition is in-human and thus a-historical.

Agamben decides to call this essence-functional modality of appearing, remember Badiou names his objectal phenomenology logics of appearing, the 'pre-supposing' relation:

> As soon as there is language, the thing named is presupposed as the non-linguistic or non-relational with which language has established its relation. This presuppositional power is so strong that we imagine the non-linguistic as something unsayable and non-relational that we seek in some way to grasp as such, without noticing that what we seek to grasp in this way is only the shadow of language. The non-linguistic, the unsayable is...a genuinely linguistic category: it is in fact the 'category' par excellence—the accusation, the summons worked by human language, which no non-speaking living being could ever conceive. That is to say, the onto-logical relation runs between the beings presupposed by language and their being in language. What is non-relational is, as such, above all the linguistic relation itself (Agamben 2016: 119).

It is all here basically, which is why I have cited it at length. The initial conception of non-relation is that of the non-relationality of the unsayable that language then tries to express. This is the basis of Agamben's ground-breaking critique of the philosophy of difference qua the unsayable and ineffable in *Language and Death.* This non-relation is the basis, or rather excuse, for the metaphysics of relation that then defines the entire history of Western thought. Language presupposes something 'before' language and this means that the conception of something as exceeding language is in fact a fundamental category of language. Not only a category, it is the defining category because it stipulates that there is a division between a being and the world that cannot be expressed in language but which exists because of it. However, the fundamental non-relation is not this constructed mode of relationality due to the assumed non-relation, because said non-relation is in fact totally within the signature of relationality. The second non-relationality of language then is the communicable function of language. The communicable relation is non-relational first because it is indifferent. It is the abstract and generic pure communicability as such, or the utterance as generic. Second, according to Badiou at least, it is non-relational because it depends on the pure presentation of presentation as such qua being, which is in-different[10]. Yet it seems here that Agamben is criticising Badiou on at least three points. The first is that he clearly appropriates Badiou's term onto-logical in the negative vein, rather than Heidegger's onto-ontological or ontico-ontological[11]. The second is that he blatantly uses the word category; it is in his work on categories where Badiou develops this idea. As both of these pieces of proof have the quality

[10] In my work non-relation differs significantly from nonrelation in the same way as in Badiou in-difference is not the same as indifference.

[11] More work by scholars perhaps needs to be done on this term onto-logy which thus far I have traced back to Aristotle via Section 29 part b of Heidegger's *Plato's Sophist.* It may be that Agamben is citing Badiou, but if he is unaware of this and is citing Aristotle via Heidegger, it may of course be that Badiou's choice of onto-logy is doing the same. This is an interesting avenue of archaeological enquiry, but not central to our overall argument here.

of deniability as one could say he is just engaging with Aristotle, third, perhaps most telling, example is that he attacks the very presuppositional tool of set theory that allows Badiou to argue that multiples are real. I will explain.

Badiou argues that the language of mathematics is such that for many mathematicians it does not presuppose a real world. Such constructivist mathematicians, Gödel is one, require only an internal consistency of the system and a communicable transmissibility with the community. In contrast, Badiou contends, the axiom of separation plus the issue of notation (language) proves that there is something real. The axiom of separation in set theory states that every set has at least one subset so that we can always speak of every multiple as both a container and as something contained, or belonging and included. The importance for philosophy of the axiom of separation is that,

> the theory of the multiple, as general form of presentation, cannot presume that it is on the basis of its pure formal rule alone—well-constructed properties—that the existence of a multiple (a presentation) is inferred. Being must be already-there; some pure multiple, as multiple of multiples, must be presented in order for the rule to then separate some consistent multiplicity, itself presented subsequently by the gesture of the initial presentation (Badiou 2005: 47-8).

Separation therefore is able to demonstrate set theory in terms of realism rather than mere construction. Logic alone, the abstract notation $\lambda(\alpha)$, is not enough to present presentation, because the formula already admits to separation between the two terms. Rather, logic is what comes after a multiple is presented so that all forms of separation, sets of sets, subsets of subsets and so on, presume the existence of the multiple in the first instance, even if that multiple as such is presented retroactively after the consistency of a situation of multiples as a set that has been constructed. This is clearly the basis for the retroactive logic of the final phrase, which describes the process of presentation of presentation, Badiou's early version of communicability significantly modified by the later emphasis on commutativity. What this implies is that for sets to be constructible using abstract formal language they first have to exist, as the axiom of separation shows that in order to describe a set as the elements which are included in that set, $\lambda(\alpha)$, the elements as such must already be presentable in said presentation.

What we can draw from this is that for Badiou, confirming Agamben's critique, separation is a fundamental presupposition of being. That said, his conception of presupposition does not match that presented by Agamben, at least not perfectly. For example, the separation of language in mathematics does not concern language as a mode of reference to the external world. In constructivist maths the words of the language do not refer to things 'out there' but values, positions, variables and functions in here, in the 'language'. Second, the separative nonrelationality of set theory represented by the axiom of separation refutes the dialecticisation of diaresis, even though Badiou himself calls it a dialectic between belonging and inclusion

(meaning dialectic and diaresis are not synonymous). It is true that foundational belonging arrives at the empty set, and that the empty set is the basis of ontology, but it is not the case that the empty set conforms to any of the issues of Aristotelian classes, quite the opposite as we have consistently stated. Is it possible that Agamben has not fully come to terms with the dramatic implication of the indifference of the multiple? That he has pursued a structural issue, dialectical nonrelational relationality, and thus ignored what I call relational nonrelationality in my analysis of the *Epilogue*, or to put it otherwise, the way in which two beings can come into relation outside of the diaresis of the metaphysical tradition? (Watkin forthcoming). Either way, Badiou is stating, and this cannot be denied, that at the basis of every multiple *is* a language, mathematical notation, but said multiples only exist in language because they are extensional and so do not express in language real things, but construct in language 'real' truths.

Truth objects, according to Frege at least, exist in language because of language, this is the infamous linguistic turn. The point being that from the mid-19th century on, Western thought was able to extricate itself from the double-bind of the metaphysical tradition by entering entirely into language qua language. This allows extensional set theory, for example, to first occupy the communicative function, second, use it to solve the problems of being, and third to hollow it out from the inside thus making communicability into sets, not simply the non-linguistic element of the linguistic. In early Badiou, the communicability of sets is the pure presentation of their presentation, or their reality due to being as non-relational. In this way it is not quite accurate to call this the linguistic relation itself, rather it is the mathematical mode of writing pure relationality as such qua ranking succession: $\lambda(\alpha)$ or $\emptyset$ $[\emptyset]$. If the real or void comes 'before' sets, it is generated due to set theory retroactively, by placing the void into a symbol, $\emptyset$, so as to be able to separate it into a set $[\emptyset]$, and so is, in a sense, a 'derived' result of set theory. The reality of the multiple is not the foundation of set theory but a result of sets. Set theory does not need it to function, in fact many set theoreticians prefer Gödel's constructivist model, but due to set theory the axiom of foundation allows one to state that, due to separation, multiples can be said to exist before their notational capture, expression, communicable intelligibility. Or, the presupposition of sets for Badiou thanks to the axiom of foundation is that multiples are real, before they can be captured by notational language, in agreement with the neo-Platonic intuitions of Frege.

Returning to the Agamben text, the final point obviously pertains to the category. Here, Agamben and Badiou are on the same page. It is almost as if Agamben is using his problems with sets to negate categories, while at the same time unconsciously expressing category theory, in terms of modal ontology and elsewhere in the book in terms of analogy. For he is right, according to my own conclusions, that the category itself par excellence is the nonrelationality of the pure function of

communicability. But again is wrong to say that the communicable function is based on language. In fact, as he himself makes clear in later work like *The Sacrament of Language* and his various early considerations of the tablet, (see Watkin 2015: 122-124, 160-1, 245-270), the truth is that communicability does not communicate. Category theory can be expressed algebraically, in a language, but its real power is to be located in its topology. Unless one is to argue that commutative triangles are a form of language which I believe to be impossible and retain at least Agamben's sense of the signature [Language], then one has to conclude that communicability as the performance of non-relation through categories is only expressible if you accept that the pure linguistic function, the communicability of communicability as such, is not actually linguistic in essence, which is the conclusion of my most recent work in the field (Watkin 2021). Language qua relation is simply one 'language' that can be expressed by category theory, which was developed to provide a meta-structural way of speaking of all mathematical languages in the same language. And while it may be the case that, historically, Agamben's anthropogenesis is the emergent separation between a being and its world due to language, the third age of life he himself advocates at the end of the book, must be something quite different. If *human* being is articulation due to separation, as Agamben argues, what is being qua habitual use of bodies, placed on the timeline of anthropogenesis as the cancellation of this repeated emergence, to be called?

4. ANTHROPOPHANY AND ANTHROPOGENESIS

We are now, thanks to sets as foundation of categories due to indifference and bodies as habitual, nonrelational use, able to emerge out of the two and a half millennia long enslavement of being by language, *zoon logon echon*, into a new potential that Agamben himself is advocating. Pure communicability of this order must be ranked as the third age of relation. The first is the radical non-relationality of the animal. The animal knows of no separation between itself and the world, thus there is no relation as there is no separation. Animal is world, and their actions totally determined by their genes which is not the genes of a being but the total interpenetration of the animal by the world. The world is constituted for the animal by its genes, in that the genes themselves are determined entirely by the conditions of the world. The second age is of course the age of human being or of anthropogenesis. This came to a close over a period of the past 150 years. Its closure really began with Boole and Cantor, but in our tradition we usually commence with Friedrich Nietzsche, ending of course with Agamben. The third age of relation, our nascent age, will surely be remembered years from now as the golden age of relation. From relation as total immersion in in- or non-relation, through relation as strictly curtailed by dialectic, our new mode of relationality is again a total interpenetration of subject and world, only this time not non-relationally, as it was with the animal, but

due to relation, free relation, the choice to relate not dictated by genes or metaphysics. This is in essence the exhilarating conclusion of *The Use of Bodies*, a form-of-life determined by a use of bodies facilitated by the human capacity for impotentiality that redefines the metaphysical, sovereign subject away from a being at work, towards a body of use. This golden age we are ineluctably emerging into is one I propose we call the age of *anthropophany*, or the appearance of the human as non-curtailed by information (genes), or language (metaphysics), and functionally facilitated by communicability defined as sets and their categories. It is another way of stating beings are determined by free-relationality within an actual infinity of a generic, rather than categorical mode. By this I mean, after my work on generic indifference (Watkin 2017: 189-220), in a world a being takes up a relation with another in a non-hierarchical manner, operating locally as if there is a transcendental functor, for Agamben the signature, for Badiou the category, but without our ability to define what that functor will be. This is a kind of liberated category theory or generic category theory that Badiou believes impossible (Badiou 2014: 15-16), but which Agamben's work may in fact prove to be workable, desirable, and truly radical.

Grounding this a little in the actual text to hand, Agamben concludes this section by stating that the structure of presupposition leads to the "interweaving of being and language, ontology and logic that constitutes Western metaphysics" (Agamben 2016: 119), surely a direct attack on Badiou? For language read logic. Agamben then maps out the process of division into existence (*ousia*) and predicate (what is said of being) concluding: "The task of thought will then be that of reassembling into a unity what thought—language—has presupposed and divided...Being is that which is a presupposition to the language that manifests it, than on presupposition of which what is said is said. (It is this presuppositional structure of language that Hegel [...] will seek at the same time to capture and to liquidate by means of the dialectic)" (Agamben 2016: 119)[12]. The clear negation of dialectics at this point is the final assault on Badiou who, after Hegel, using an openly admitted dialectical structure, tries to use mathematical language (logic) to both capture being and also the liquidate the dependence of being on a language.

Agamben now turns to Aristotelian classes and the difference between to predicate and to indicate. Essence is that which coming before language can only be pointed at: *tode ti*, a certain this. *Deixis* is taken by the tradition as the limit point of subjectivation, a primary essence which the subject cannot capture by the defining feature of its being, language. This is traced over several pages that we will skip because in this analysis at least it is hopefully obvious that the paradoxes and limitations of this archaeology of ontology have been superseded by extensional sets replacing Aristotelian classes. He next moves to the problem of singular being, again one removed by indifferent multiples. Finally, he considers the temporality of being

[12] *Ousia* is not usually translated as existence but is how Agamben takes the term to mean here at least.

in Heidegger which again we will discount due to the replacement of temporality with retroactive reasoning, and regressive successive deduction. Instead what holds our attention is what these sections set up, namely the return to the conception of anthropogenesis:

> The articulation between language and world that anthropogenesis has disclosed as 'history' to the living beings of the species *Homo Sapiens*. Severing the pure existent (the *that it is*) from the essence (the *what it is*), and inserting time and movement between them, the ontological apparatus reactualizes and repeats the anthropogenetic event, opens and defines each time the horizon of acting as well as knowing, by conditioning, in the sense that has been seen as a historical *a priori*, what human beings can do and what they can know or say (Agamben 2016: 128-9).

The second age of control of the human as anthropogenesis them can be defined here according to a number of mechanisms:

- Articulation of language and world.
- Historicisation of being as arrival at articulation through evolved acquisition of language.
- Dividing ontology from existence or that it is (sets) from what it is (categories).
- Inserting time and movement, *archē* and *oikonomia.*
- Ontology itself as the repeated reactualisation of the signature [Being] over time.
- Always locating acting and knowing within the communicable traditions of metaphysics.

In contrast to this, what I am proposing, after Agamben thanks to Badiou, as anthropophany, is not an articulation of language and world, although the very title *Logics of Worlds* admittedly suggests such. Instead, categories present a graphic, tabular, topological triangulation of the functional relationality of objects. Categorical worlds are not historical entities and categories are not a historically derived metaphysics of existence. Badiou is guilty of dividing ontology from existence in pursuit of the event, this is true. In addition, he is too concerned with defining sets as ontology, again in pursuit of the event. In our case, rather, sets define indifference, ontology is a mere derivation of indifferentialism, and categories result in a consistent theory of communicability stabilised thanks to sets and possible due to indifference. For Badiou, the onto-logical is a method for defining the event, for my own work sets and categories are part of the wider rationalism of indifferent communicability. Badiou refutes time and movement in his work, putting to one side the event, which is a temporal category, sets and categories are atemporal[13], and he

[13] There is a sequence to both sets and categories which takes time to work through, but this is not the same as temporality qua historiality.

purposefully avoids the description of either as modes of intensity of becoming because of Gilles Deleuze. Indeed, the real benefit of insistence on the event is not a viable theory of revolutionary singularity, but a credibly atemporal and noneconomical philosophy. The great discovery of mathematised being is that change is a stability.

It is clear that Agamben sees Badiou's ontology as just another way of reactualising the division of being and its re-articulation. Our position is that this fails to take into account the radical shift in the 19th century from classes to extensional sets. It is not the case that Badiou easily falls into a metaphysics of scission in that sets radically negate classes. Any extensional theory after Boole and Cantor may still use scission and dialectic, but it seems hasty of Agamben to assume that this, by definition, means they are metaphysics in the old sense as originating from First philosophy. Metaphysics, after all, is a specific conception of scission and relation due to classes. Sets are not separative in this way, nor relational after that fashion.

The final point, however, retains some validity. Badiou is unrepentant in his theory of the four conditions, such that the conditions of worlds are seemingly impossible to disrupt, however sustained our fidelity to an event. That said, our reading of communicability as commutativity is a radical new direction in the theory of communicability, again demonstrating that, due to sets, collecting and relating are totally reconceived away from the metaphysical tradition. That Badiou uses them to save ontology so as to propose singularity does not however alter the fact that indifferential suspension is simply the opening of the gate of indifferential reasoning. Such that anthropophany is a highly complex and detailed mode of reasoning, not simply the historical continuation of the dialectics of scission. Agamben is wrong to concentrate on language as anthropogenesis, when the truth is that language here is actually a term for a certain ontology of relation and being. In contrast, the logics of worlds does not constitute the relationality of subjectivity due to language about worlds as the 'language' of categories and the 'language' of sets does not reproduce the bifurcated conception of language Agamben's critique of the philosophy of language as difference will not let go of. Language is not a word about a thing. The language of sets does not use 'words', but is about collecting 'numbers', and is non-referential and in this sense non-linguistic. While in categories it is arguable that the 'logic' is not linguistic at all. The objects in question are not pointed to or used to refer, but are used functionally in a topologically tabular, graphic model of appearing not referring.

Having established this basic framework Agamben details precisely how it functions. Due to limits of space and patience I will again summarise.

- Every *archē* is transformed into a presupposition by the presuppositional structure of language.
- Anthropogenesis: the event of language pre-supposes as not (yet) linguistic and not (yet) human that which precedes it.

- "Apparatus must capture in the form subjectivation the living being, presupposing it as that on the basis of which one says, was what language, in happening, presupposes and renders its ground" (Agamben 2016: 129).
- In Aristotle's ontology *hypokeimenon* or pure that it is, names this presupposition.
- "[T]he singular and impredicable existence must be at once excluded and captured in the apparatus" (Agamben 2016: 129).
- In this way it is more ancient than any past tense, referring to an "originary structure of the event of language" (Agamben 2016: 129).
- The name, especially the proper name, is "always already presupposed by language to language" (Agamben 2016: 129).
- Precedence in question is not chronological "but is an effect of linguistic presupposition".

From this impressive list Agamben concludes:

> Hence, the ambiguity of the status of the subject-*hypokeimenon*: on the one hand, it is excluded insofar as it cannot be said but only named and indicated; on the other hand, it is the foundation on the basis of which everything is said. And this is the sense of the scission between "that it is" and "what it is," *quod est* and *quid est*: the *ti en einai* is the attempt to overcome the scission, by including it in order to overcome it (Agamben 2016: 129).

Although I believe this entire chapter is an implied attack on Badiou, two elements disallow this as an effective critique of Badiou's ontology. The first is that Agamben's sense of impredicative is derived from metaphysics, while in set theory multiples are able to participate in an impredicative status that is immanent to the situation. An indifferent multiple is impredicative in the 'what it is', in that the fourth multiple is fourth, without this being a predicate of its being or existence. The second pertains to this 'what it is' structure. The specificity of a multiple in a set is not a 'what it is'. The fourth multiple does not possess 'being fourth' or 'being four' as a what, quality or predicate. Precisely because indifferent multiples are quality indifferent. Ironically, Agamben's critique fails because he has not fully applied his own term, indifference, and has not excavated further the actual history of metaphysics, the negation of classes by extensional logic in the mid-19th century, even though the entire multi-volume sequence *Homo Sacer* is concerned with the archaeology of metaphysics due to its signatures.

Agamben concludes by asking: "Is there really such an articulation of being –at once divided and unitary? Or is there not rather in the being so conceived an unbridgeable hiatus? [...] Existence is identified with essence by means of time. That is to say, *the identity of being and existence is a historical-political task*. And at the same time it is an archaeological task" (Agamben 2016: 132). For me he is directly

attacking the atemporality of Badiou by ignoring Badiou's contention that events happen in time, even if their truths are universal and atemporal. He is accusing, it would seem, Badiou of political conservatism in pursuit of political radicalism, a justified accusation perhaps. But at the same time again this is ignorant of the truth of any historicised ontology, meaning it can be suspended, the unbridgeable hiatus, but it can also change. The hiatus in question is real, between 19th century extensional logic and 20th century continental philosophy, but it is not unbridgeable.

The chapter closes as Agamben recounts this history of division between Being and beings: "The bare life of the *homo sacer* is the irreducible hypostasis that appears between them to testify to the impossibility of their identity as much as their distinction" (Agamben 2016: 133). Both life and time here are negated as possibilities of defining being according to Aristotle,

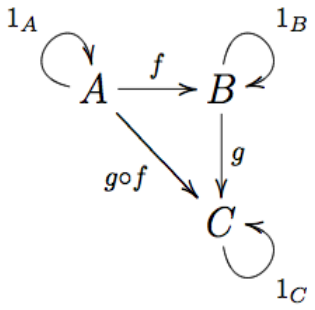
> time—at once chronological and operative—is no longer graspable as the *medium* of the historical task... The Aristotelian ontological apparatus, which has for almost two millennia guaranteed the life and politics of the West, can no longer function as a historical *a priori*, to the extent to which anthropogenesis, which it sought to fix in terms of an articulation between language and being, is no longer reflected in it (Agamben 2016: 133).

Communicability-as-metaphysics has come to a close, and communicability-as-indifference now takes over. Anthropophany replaces anthropogenesis, for better or worse, as the third, and possibly final, chapter in the history of being as coerced: by genes, by metaphysics, by mathematics.

5. CATEGORY THEORY AS MODAL ONTOLOGY: FROM COMMUNICABILITY TO COMMUTATIVITY

The thesis that closes out the *Homo Sacer* project is that we need to move towards a modal ontology. That Badiou's use of category theory as a means of structuring existence in worlds is a modal ontology is therefore significant. What categories allow Badiou to speak of is the possibilities of being, due to the necessities of set theory ontology. Categories, in effect, present a means by which diverse worlds of multiple beings existing in their infinite possibilities, can be rendered shockingly consistent by a simple requirement. This is that of universal exposition: if they exist they appear in a world determined by functional relations with at least one other object that also appears as visible in this world.

The position of universal exposition, this is an anarchist appearing along with a communist in the world of the demo to use one of Badiou's examples, is defined formally in category theory by the commutative triangle. Here is the basic diagram of the commutative triangle that defines practically all categorical worlds.



We have here our objects, A, B and C, and the arrows that travel between them: $A \rightarrow B$, $B \rightarrow C$, and $\mathrm{A} \rightarrow \mathrm{C}$. These are commonly called morphisms. We also have a composite arrow. The arrow from A to C is functionally the same as the combined arrows from A to B and B to C making the arrow combination A to B to C a composite or composable. It is composed of more than one function, here written f and g, and this composition of functions is, functionally, the same as the function directly from A to C, called $g \bullet f$. In category theory notation you read from right to left. Thus, we can say the line between A and C is composed of the two functions that exist between A and B and B and C, so that the two directional choices are functionally the same. This is called a commutative diagram. Commutative means you can swap the two sides of an equation and get the same result. For example, $\mathrm{A} \rightarrow \mathrm{C} = \mathrm{A} \rightarrow B \rightarrow \mathrm{C}$, or here $C \bullet B \bullet A = C \bullet A$. What this formalises is that you can find an analogy between A and C directly, or you can travel via B such that you might say this is a demonstrator on a demo, A to C, or this is an anarchist which is on a demo, A to B to C, such that when you also say, this is a communist on a demo, although anarchist and communist are ontologically distinct, in terms of the triangle of their relations, they are the same. They are both [something-ists, on the same demo]. Thus, their difference is rendered identical: they both possess B-ness defined here as [something-ist on a demo].

What commutativity states is that all objects and their relations are visible from a superior position, here A, which is able to say, these two demonstrators are 'the same' when it comes to being demonstrators, even if they appear different when it comes to their local differentiation or their being in favour of collectivisation or not. Commutativity is, basically, the topology of communicability as sanction, except the sanction is largely im-potent in Badiou. A is in the position of universal exposition simply because it is the category in question, not because it is, for example, the government or the police. Spoken of modally, two women on a demo with different political allegiances, anarchist and communist, necessarily have to be taken as two demonstrators if the world in question is said to be a demo. But within said world these two individuals, who normally hate each other meaning their separation is absolutely necessary, find it possible to be taken as the same objects, because they share in common a functional, analogical relation. Let's say they both object to the new restrictions on labour relations in the public sector in France.

Modally speaking, the being qua multiple of each of the demonstrators is necessary as sets are not modal but strictly classical[14]. The appearance of a being in the world is also necessary: multiples have to exist in some sense in some world if you wish to treat them as intensional objects rather than extensional, generic, indifferent abstractions. Yet how they appear is modal, possible, infinitely varied, depending on the way a world 'sees' them analogically as regards their functional relations with other appearing objects in that world. If, however, two varied multiples appear as functionally analogical in a world say due to the position of universal exposition, I see these two women as members of the same demo world, then their modal possibilities are rendered necessary, in order to appear in this world they must possess these functional relations in common meaning their necessary ontological difference becomes a necessary existential identity.

What is essential here is to realise that what is taken by Agamben to be a primarily linguistic function, communicability as sayability as he will go on to explain below, is in fact not linguistic but topological. Ontologically at least, communicability is really commutativity. It is not that such and such a thing can be said of being, as Foucault intuits, but that such and such a being can be seen to appear in said world due to possessing an analogical functional relation with at least one other being. Modally speaking, the possibility of a being is the infinite ways it can appear in infinite worlds. The necessity of an existential being is that in order to appear it must be visible, meaning it must be susceptible to universal exposition due to commutativity. The significance of this is that, contrary to the tradition, the modal relation of Being and beings that Agamben goes on to analyse, is captured perfectly by category theory without the aporias, logical impasses and so on that Agamben, inevitably, will identity from the tradition of modality outside of categorisation. Or, Badiou's onto-logy is not the same as Aristotle's.

The two stipulations Agamben commences with, that Being depends on beings and vice versa but in an asymmetrical fashion, happen to be true of categories. Objects can only appear in the world as aspects of existing multiples. Plus while multiples can appear in infinite possibilities in worlds, at no point can any of these versions of a being alter the 'essence' of the being qua multiple. This is an important piece of information first, because it allows Agamben to implicate Badiou in the failures of metaphysics as articulation, here between Being and beings. And yet second, in that category theory is mathematically irrefutably stable, categories are everywhere and indeed determine our world to a large degree because of their impact on software, Agamben's contention that modal articulation needs indifferential suspension, like his contention that impotentiality needs the same, is incorrect. Like the application of separation to impotentiality, the application of commutativity to

[14] Being is necessary. Fourthness is necessarily fourthness on the global-local determination. There are no degrees of fourthness. In addition, two beings occupying fourthness are the same being not two different examples of fourthness.

modes of being obviates the need for indifferential suspension because the point of said suspension is logical impossibility masked by *oikonomia*. And both sets and categories are, in contrast, logically absolutely consistent. Neither sets or categories have anything to hide, indeed they have everything to expose.

6. TOWARD A MODAL ONTOLOGY

Category theory is truly transmissible, exceptionally consistent a modal logic of functional relations based on the value of universal exposition called commutativity which, in the hands of Badiou, becomes a very extensive modal ontology. It is with this context in mind therefore that we now turn to the final round in this centralised skirmish with the history of ontology as articulation so as to juxtapose the two methodologies here, Badiou's mathematisation of modal ontology vs Agamben's archaeology of modal ontology. The archaeological excavation begins, aptly enough, with the paradox of classes as expressed by Leibniz re: monads possessive of essence and quality and yet remaining monads before we move on to the development of mode, the central term for Agamben's final sense of ontology. "The idea of mode was invented to render thinkable the relation between essence and existence. They are distinct and at the same time absolutely inseparable. Their relation is, however, asymmetrical". The asymmetry of their relation is because, according to his source Suarez, "the separation of one element from the other is not reciprocal, which means one extreme can remain without the other, but not vice versa" (Agamben 2016: 155). What this determines for the tradition is that modal being cannot exist by itself or be separated from that which it is the mode of. Thus, mode reverses Aristotelian *hypokeimenon* in favour of essence, Agamben argues, but in such a way that makes the movement into individuation impossible. Either individuation is an essence, or individuation adds nothing to essence, the logical impossibility of being conceived of in terms of class dispensed with in fact by extensional sets, although Agamben doesn't state this. This problem then becomes resolved by taking existence not as an entity but a mode of being, a solution developed from the debate between Leibniz and Des Bosses leading to the conclusion: "Existence is not a mode of essence or a difference of reason alone: it is a demand" (Agamben 2016: 159). These comments encourage the movement on to consider Spinoza's failure "to resolve the ambiguity between ontological and logical that the Aristotelian apparatus had left as a legacy to Western thought" (Agamben 2016: 161). Agamben then concludes on this tradition:

> The undecidability of logic and ontology is, in this sense, consubstantial with the concept of mode and must be brought back to the constitutive undecidability of Aristotelian onto-logy, inasmuch as the latter thinks being insofar as it is said. This means that the ambiguity of the concept of mode cannot be simply eliminated but must rather be thought as such. It is possible that the dispute between philosophy

> inappropriately defined as continental and analytic philosophy has its root in this ambiguity and can therefore be resolved only on the terrain of a rethinking of the theory of modes and of the categories of modality (Agamben 2016: 161).

One can only applaud this final sentiment for indeed our own work, with its concentration on mathematics, is effectively an attempt to resolve the self-same dispute through a rethinking of the categories of modality, which in our case means category theory as a modal logic of relational appearance qua existence. However, not unexpectedly perhaps, there remain several issues to contend with, secretly embedded in Agamben's extended olive branch. First, it seems probable that the terminology of onto-logy is referring to onto-logical element of *Logics of Worlds* even though he never says as this, indeed the whole paragraph seems to be a commentary on Badiou's *work*. Second, the problem with Aristotle is clear, to think means to be said. This however is not an issue for Badiou's extensional ontology, nor a problem if you understand that saying as command is saying as doing, and that the emphasis of being is doing, of which saying is only one element. For example, categories are the mathematics of 'doing', in that functions are modes of doing things, not saying them. On this reading, anything can be possessive of being outside of a subjective orientation of ontology. Mode then is resolvable because it is not actually proscribed by the Aristotelian ambiguity of classes, eliminated by set theory. Finally, his point of the resolution of the two traditions is to do with a modality of thought, best represented by the mathematisation of existence through categories, not a repurposing of modal logic in terms of necessary and possible or Kripke's logic, but as regards the modality of categories.

It is inevitable that such discussions will come up against Heidegger at some point, here in terms of the assumption that being is never without beings and beings never without being. This paradox is resolved by set theory, of which no mention here, so we will move on from that conceptual quagmire. It is, as far as we are concerned, a pseudo-problem. Leaving Heidegger to one side we find Agamben stating, seemingly after Badiou: "Between being and modes the relationship is neither of identity nor of difference, because the mode is at once identical and different—or rather, it entails the coincidence, which is to say the falling together, of the two terms" (Agamben 2016: 164). This positioning appears impossible from inside the tradition he is excavating, until you accept that multiples are indifferent, in which case this contention is, contrary to the 2500 years of cogitation from the tradition, surprisingly easy to resolve. Speaking of Spinoza in this regard, again rather than Badiou, he comments on "the neutralization and disappearance of identity as much as difference" with the demand to stop thinking in the substantial "while mode has a constitutively *adverbial* nature, it expresses not 'what' but 'how' being is" (Agamben 2016: 164). All of these are correct but rudimentary intimations of two facts: beings are indifferent multiples which exist modally as relational objects in categorical worlds due to commutative exposition.

Doggedly with Spinoza, rather than Cantor or categories, Agamben ignores the above implication and instead turns his thought to the immanent cause: "an action in which agent and patient coincide, which is to say, fall together". Modes, on this reading, constitute themselves as existing for example in the ancient verb *paesarse*: walking-yourself into existence. This, as ever, moves Agamben to refer to an ontology of the middle voice "in which the agent (God, or substance) in effectuating the modes of reality affects and modifies only itself. Modal ontology can only be understood as a medial ontology" (Agamben 2016: 165)... In the first part of this book, we have called 'use' a medial process of this kind. In a modal ontology, being uses-itself, that is to say, it constitutes, expresses and loves itself in the affection it receives from its own modifications" (Agamben 2016: 165). Use then, as we have shown in the sister paper, *Inoperativity as Category*, is another name for function, bodies is another name for objects. Or, put aside Leibniz, Suarez, Des Bosses and Spinoza, and you can see that a modal logic of mediality is in fact another way of saying category theory. Just as one can say, again as I have detailed in the accompanying work *Agamben's Impotentiality*, that the mediality he makes so much of here, that is then defined in terms of impotentiality across the entire volume, picking up his life-long interest in Aristotle and the aporia of potentiality, is dispensed with when you apply the axiom of separation to being. Indeed, the axiom of separation proves that a being can be both Being and existential being depending on whether it is counted as belonging (set) or included (subset), in a manner that is not asymmetrical (a multiple is a set a set is a multiple) aporetic, metaphysical (in the sense of being as articulation), or paradoxical. In fact, famously, it is because of this oscillation that being is proven to be consistent for, we contend, the first time in its history. That Agamben knows this is obvious, that he chooses instead to linger among the failed, grandiose projects of the history of the problem, seems almost perverse this late on in the game, albeit totally in keeping with his archaeological rather than rationally deductive method.

Agamben now returns to the earlier Aristotelian consideration of the proper name and *ti en einai* in this case as regards the name Emma[15]. He explains:

> Essence cannot be without the relative nor being without the entity, because the modal relation—granted that one can speak here of a relation—passes between the entity and its identity with itself, between the singularity that has the name Emma and her being-called Emma. Modal ontology has its place in the primordial fact...that being is always already said...Emma is not the particular individuation of a universal human essence, but insofar as she is a mode, she is that being for whom it is a matter, in her existence, of her having a name, of her being in language (Agamben 2016: 167).

The difference here between the historical conception of modality and the mathematics of categories is this presupposition about 'language' as anthropogenesis.

[15] I am unable to find a clear reference to where this example re the name Emma originates, from Aristotle or from a later work Agamben perhaps assumes the reader is familiar with.

Instead of assuming communicability qua language, as I hope is clear, my most recent work rather defines communicability to be a function of exposition, just as Badiou is transparent that mathematised being is a result or product of counting not of language. To be in language, as regards the modal logic of existence that is category theory, does not mean to be communicated, as the tradition has had it to be for centuries, but simply to be in a position of exposition. What is odd and perhaps exasperating is that this section on modal ontology basically summarises Badiou's method if one dramatically alters the terms in play so that the named singularity is now not a named singularity but a ranked multiplicity that exists not due to the name being a manifestation of the being, but the relation being a mode of the multiple. Agamben continues to ignore this fact when he goes on to state: "Our goal here is not the interpretation of Spinoza or Leibniz's thought but the elaboration of categories that escape from the aporias of the ontological apparatus" (Agamben 2016: 168). This is precisely our point but turns out to be a promise which he then resolutely fails to uphold in the rest of the chapter. The interpretation of categories outside of a metaphysics of being as articulation of being between language and world exists, it is called category theory and is extensively analysed in Badiou's *Logics of Worlds*. Either Agamben thinks this text does not escape the ontological apparatus, a valid possibility in that categories, in Badiou, are founded on sets, and sets, for Agamben, could be guilty of a kind of ontology as articulation, although, as I have shown, this is not entirely true. Or he is studiously ignoring it to such a degree that, a rather like Foucault's famous comment on the Victorians and sex, the more he chooses not to write about Badiou's ontology, the more he ends up doing precisely that.

7. DEMAND

We return at this potential break-through moment to the demand and Leibniz's conception of potential being as a demand to be. Here we begin to diverge from Badiou again because the functional demand of categories is not: "Being, come into existence!" Rather, function takes over from demand, or demand is now thought of as one of several functions. The reason why something exists rather than does not is not due to a worldly demand of existence, but rather the issue is: can said thing be seen to exist in this world? One clear differentiation here is that Leibniz does not see demand as a logical category. To demand, for him, is not to entail. Agamben goes on to define the demand ontologically as "it is not of the order of essence (it is not a logical implication contained in the essence), but neither does it coincide with actual reality. In the onto-logical, it consists of the threshold—the hyphen—that unites and at the same time separates the ontic and the logical, existence and essence" (Agamben 2016: 169). The demand, on this reading, is the command of the tradition that being should be divided and articulated, that a multiple is not, on its own,

enough, that worlds must be populated, that relationality must be developed. Agamben ruminates:

> Thus, demand is the most adequate category to think the ambiguity of logic and ontology that the Aristotelian apparatus has left as an inheritance to Western philosophy. It corresponds neither to language nor to the world, neither to thought nor to the real, but to their articulation. If ontology thinks being insofar as it is said, demand corresponds to the *insofar* that at once separates and unites the two terms (Agamben 2016: 169).

Demand is tantamount to our reading of communicability, combined with the Nietzschean purpose of intelligibility one finds in Foucault, which is of course exposition of power. The demand of exposition defines the fundamental nature of power, not just that something can be exposed but that it must be exposed. It is the ontological demand of the history of our concepts that requires that being be exposed as existing. In a sense, it is this demand that forced Badiou to write *Logics of Worlds* because of the wider demand of an existential complexity of relation. It is also in accord with the importance of demand in relation to his conception of the event. I find in it echoes of Deleuze's comment that language is nothing more than command, itself an assertion that effectively adds considerations of power to speech act theory. It is the violent requirement of the tradition to negate indifference in favour of relation that my work battles against. But sadly, it is not an accurate summation of modal categories. Worlds are not categorical due to demand, they are categorical due to ontology. And ontology is not consistent due to a demand, rather worlds are rendered unstable thanks to the demands of the event.

Agamben goes on to part confirm this intimation when he defines demand as follows: "If language and world stand opposite one another without any articulation, what happens between them is a pure demand—namely, a pure *sayability*. *Being is a pure demand held in a tension between language and world*. The thing demands its own sayability, and this sayability is the meaning of the word. But, in reality, there is only the sayability: the word and the thing are only its two fragments" (Agamben 2016: 170). The issue of sayability obviously takes this back to the communicable function qua language. Where my work innovates, if I may be so bold, is that sayability is only one example of the larger categorical function called commutativity. When commutativity takes over from communicability then we are able to define a praxiological overview of language, not in terms of what language says, but what it does. The meaning communicated by language is not therefore, primarily, the meaning held in the words. The content of speech is always a shibboleth, a code word, between members of a community, that defines the 'same page' mentality necessary for communication. The meaning of the speech is precisely this process of exposition, coupled with the conception of power, sanction. Language as communicability as sanction: this is the demand as modal ontology.

Agamben, due to his sources, obviously goes in an opposite direction by thinking of demand in relation to potential. Demand is here not possibility, this being could be, but potential. All the same his obliqueness is finally lifted as we realise that his interest in the modal is in truth an interest in the history of the possible as parsed through the necessary. The possible then is another way of saying potential, the necessary is the articulation that being must be sayable. Leading to the usual metaphysical circumlocutions: "*If existence becomes a demand for possibility, then possibility becomes a demand for existence"* (Agamben 2016: 170). Adding in, according to Leibniz, that the possible doesn't demand to exist, but the real "demands its own possibility [...] Being itself, declined in the middle voice, is a demand which neutralizes and renders inoperative both essence and existence, both potential and act. These latter are only the figures that demand assumes if considered from the point of view of traditional ontology" (Agamben 2016: 170).

Being as demand is the same as saying being as object of relations in the world. Communicability, therefore, emerges out of the articulation of being, the means by which it founders through Agambenian indifference, and then the potential that is opened up by Badiou's conception of ontology by mathematising beings into multiples, the lack of detail as regards relationality for the wider community, and the development of categorical communicability. When Agamben says being "is nothing other than its modifications" this is basically Badiou's entire project summarised" (Agamben 2016: 170). Leading Agamben to accept that "demand and not substance is the central concept of ontology" (Agamben 2016: 170), if one takes demand not as logical entailment nor moral imperative. One might almost think he is trying to negate Badiou here, only to accidently condone him, after all Badiou's insistence that being is real is surely framed as an appeal to substance.

We find ourselves dragged back one last time to Spinoza and *conatus*, specifically defining being as a kind of self-manifestation: because of its demand it constitutes itself. By this reading multiples demand to exist, are constituted only by existing. This is not, however, what Badiou contends. The ontological world is complete without existence. In fact, existence is only needed, according to him, to allow for the event which cannot exist as a pure multiple alone. All the same the next section on conatus concerns a forgotten idea of ductus, a classic Agamben gambit, a tension preserved in a certain figure, which is revealing. What is fascinating in particular is how it describes a dynamic and ever-altering relation between ontology and category that is missing from the monolithic Badiou: "human nature crosses over into existence in a continuous way and precisely this incessant emergence constitutes its expressivity... singular existence—the mode—is neither a substance nor a precise fact but an infinite series of modal oscillation, by means of which substance always constitutes and expresses itself" (Agamben 2016: 172). Here we can draw the differences between the two thinkers in favour of Agamben. Badiou, for example, lacks a purposiveness as regards categories determined in time (signatures). His

conception of commutativity also lacks the demand impetus of power: categories want to expose you. Again, while Badiou is able to speak of a mode of a being in a world, his system is flat-footed in terms of concerning the modalities of a being through a world in time and across worlds in the timeline of said being. This is, presumably, because he wishes to avoid the Deleuzian, Bergsonian idea of continuous becoming, a valid position, but it also means that he has no mechanism for explaining the prevalence of certain worlds, only any world whatsoever, an approach that throws all its impetus into one political outcome, the event, but which means it then fails politically on at least one other count, the critique of power due to the signature of life in biopolitics say. Leaving the extended chess match perhaps in a perpetual endgame that will inevitably result in a draw, if either part were willing to concede this, which appears, on the face of it, at the present juncture, an impossible result. And so the game drags on...

8. CONCLUSIONS

Agamben's intention in the middle portion of *The Use of Bodies* is clearly expressed in the final part of the final sentence. He is questing for a conception of life where the life that one lives, being, and the life through which one lives, modal beings, is capable of coincidence rather than articulation, such that: "What appears in this coincidence is no longer a presupposed life but something that, in life, ceaselessly surpasses and overtakes it: a form-of-life" (Agamben 2016: 191). It is a well-constructed and exciting sentiment that the final part *Form-of-Life* comes close to fulfilling, but after many volumes and decades of promises, for many I would imagine close is just not enough. The overall problem, I think, across the magisterial *The Use of Bodies* is what to make of Agamben's critique of the metaphysics of diaresis, after the innovations of extensional reasoning and their eventual impact on continental thought in the work of Badiou, a historical trajectory of belatedness Agamben is more than aware of. If, as I believe, extensional reasoning has obviated the need for a justification of his method of indifferential suspension, at the same time it has strengthened his claims for the tri-partite archaeological method. Said method is a mode of historicised set theory after all, signatures are the names of sets of archetypes with a temporal halting point or arche, as much as it analogically maps onto category theory as well. The clear power of Agamben's philosophy is surely a kind of historical necessity underlining the apparent contingency of terms when outlined historically rather than rationally. But, this being said, what is the justification for his ignoring the great historical developments in extensional logic when they directly impact on the entirety of his work? If modal ontology is the definition of Agamben's ambition, why does Agamben only historicise modal logic, neglecting to formalise it through reading Kripke or, more pointedly, Badiou's *Logics of Worlds* and category theory?

As for his relationship with Badiou, I recall that letter between Russell and Frege. Russell's famous letter of 1902 stopped Frege in his tracks, sent him into despair, but ultimately spurred him on to his greatest work, and of course left us Russell's paradox, one of the most important conceptual formulations of the last hundred years. Why is it that Agamben, seeing the innovations in modal thought in Badiou's work, is unable to accede to Badiou's insights and modify his work accordingly? Maybe it is because Agamben is right in his implied critique of Badiou's ontology. A most unnerving moment for my own work in reading and rereading *The Use of Bodies* is the lingering doubt that Agamben is correct and Badiou's ontology is simply articulation, coupled to the desperate hope that it however escapes ontology as articulation due to the peculiarity of sets. If the ability to dislodge you from entrenched positions is the definition of great work, then Agamben's conclusion to *Homo Sacer* is unquestionably great. Yet, it would be greater if it admitted to the fact that the three main aspects of the work all require a sustained engagement with his peers, rather than the ghosts of thinkers long gone. His consideration of separation, after all, explodes under the pressure of the mathematised axiom of separation and the non-relationality of multiples. His insistence on looking at analogy through the rather obscure Melandri seems perverse when categories are a workaday, globally-accepted form of advanced analogical thought. Finally, fascinating though his history of modal ontology is, it seems outflanked entirely by contemporary work by Badiou and the analyses I put forward on categorical modal ontology.

In contrast, the idea of a historical *a priori* as an alternative to mathematised reasoning is revelatory and salutary. At no point has it been clearer that what is missing from Badiou's objective phenomenology is a reason why certain worlds persist over time and space, and the role of power rather than rational consistency over the relative stability of the signatures of our commonly-held worlds. Category theory is a brilliant way of looking at the stability of some of all of our worlds, but falls short of speaking to the persistence of that set of worlds we simply cannot appear to divest ourselves of, generation after generation, century after century. And it is true that I was as disappointed as any with the predictable onto-logy structure Badiou eventually sides with, as there is no denying it, such a project, necessary for Badiou because of his obsession with the event, is just another entry into the annals of both metaphysical articulation of language and world, and the blind adherence to a valorisation of singularity in the philosophy of difference since Hegel.

Read in these terms it is absolutely necessary that we concede that Badiou's revelatory maxim being is-not is to the counting of being, analogically as being-as-*archē* is to the historicising of being. Meaning that Agamben's archaeological method is a historical manifestation of the mathematics of being, not so much in terms of set theoretical ontology but, as I have argued already elsewhere, in terms of logics of worlds. If we accept that Badiou's articulation is a-linguistic, represented by the alteration of Agamben's communicability to the topological sense of commutativity,

then we are able, perhaps, to instigate a brief truce by accepting Badiou's ontology is articulation, but just as there are various types of relation, difference and indifference, so too there are, if you will, bad forms of articulation and good. Agamben scholars have to concede that mathematised ontology requires a significant reconsideration of indifferential suspension, the three-part method and the calls to think modally and analogically. Badiou's followers need to admit that *Logics of Worlds* lacks a theory of historical consistency of certain worlds, and surprisingly, a workable theory of power. The truth is, the two great thinkers are not so far apart. They both utilise a theory of sets. They both accept that ontology must be modal. They both agree that all future thinking concerns the use or function of bodies or objects. They each, in their way, advocate a theory of communicability (commutativity). And finally, neither man would be able to even begin down their parallel, analogically, perhaps destinally equivalent paths to being, if it were not for their commitment to the rationality of indifferential reasoning.

Is a mathematised archaeology of ontology possible? I hope to have shown that the answer is yes. The issue is rather, considering our tendency in continental philosophy to draw stark oppositions and then construct critical articulations between different positions such that our reasoning depends on the promulgation of said oppositions, can the wider community read Agamben through Badiou and Badiou through Agamben simultaneously, and without prejudice? In the end, inspired by another thinker from the analytical tradition of extensional thought, we need to accept that archaeological ontology and mathematised ontology are two equally consistent languages apposite for differing approaches to the same worlds we all exist in. If we are able, therefore, to apply Carnap's principle of tolerance, then a mathematised archaeology of being, and a historicised mathematics of beings is surely within our collective grasp.

BIBLIOGRAPHY

Agamben, G. 2009. *The Signature of All Things: On Method*. Translated by L. D'Isanto and K. Attell. New York: Zone Books.

Agamben, G. 2010. *The Sacrament of Language: An Archaeology of the Oath*. Translated by A. Kotsko. Stanford: Stanford University.

Agamben, G. 2016. *The Use of Bodies*. Translated by A. Kotsko. Stanford: Stanford University Press.

Badiou, A. 2005. *Being and Event*. Translated by O. Feltham. London: Continuum Press.

Badiou, A. 2009. *Logics of Worlds*. Translated by A. Toscano. London: Continuum, 2009.

Badiou, A. 2014. *Mathematics of the Transcendental*. Translated by A.J. Bartlett and A. Ling. London: Bloomsbury.

Bar-Am, N. 2008. *Extensionalism: The Revolution in Logic*. Berlin: Springer.

Laruelle, F. 2013. *Anti-Badiou*: *On the Introduction of Maosim into Philosophy*. Translated by R. Mackay. London: Bloomsbury.

Potter, M. 2004. *Set Theory and its Philosophy*. Oxford: Oxford University Press.

Tiles, M. 1989. *The Philosophy of Set Theory*: *An Historical Introduction to Cantor's Paradise*. Mineola: Dover.

Watkin, W. 2015. *Agamben and Indifference*. London: Rowman&Littlefield International.

Watkin, W. 2016. *The Time of Indifference: Mandelstam's Age, Badiou's Event and Agamben's Contemporary*. In «CounterText», 2.1, pp. 85-99.

Watkin, W. 2017. *Badiou and Indifferent Being*. London: Bloomsbury.

Watkin, W. 2021. *Badiou and Communicable Worlds.* London: Bloomsbury.

Watkin, W. Forthcoming. *Inoperativity as Category: Mathematising the Analogous, Habitual, Useful Life in Agamben's* The Kingdom and the Glory*,* The Signature of All Things *and* The Use of Bodies, in «Journal of Italian Philosophy».

Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 49-69
ISSN: 1825-5167

'STATE OF EXCEPTION' OR 'THRESHOLD OF INDISCERNIBILITY'?
A STUDY ON THE BEGINNINGS OF GIORGIO AGAMBEN'S *HOMO SACER* PROJECT

VALERIA BONACCI
Departments of History of Philosophy
University Paris-Sorbonne (Paris IV)
valeriabonacci@gmail.com

ABSTRACT
The aim of this article is that of bringing the inextricably ontological and political enjeu of Agamben's work into light, through the investigation of the beginning of the *Homo Sacer* series and of the shift that such a beginning produces within the author's philosophical project. More precisely, through a comparison of the first two texts of the series, *Homo Sacer. Sovereign Power and Bare Life, Homo Sacer I* (1998) [1995], and *State of Exception, Homo Sacer II, 1* (2005) [2003], we will show how, in many respects, the philosophical question raised by Agamben in the first volume proves to be problematic, although it finds its most precise formulation in the period of time which spans from the first volume to the second. Our hypothesis is that the punctual recovery of the main inquiries of *Homo Sacer* I within *State of Exception* and, in particular, the recovery of the strategic interpretation of the debate between Carl Schmitt and Walter Benjamin, coincides with a crucial in-depth analysis that allows Agamben to introduce the paradigms of *inoperativity* and use in the specific meaning that these terms have in the subsequent developments of the series, i.e., as key notions through which Agamben elaborates his philosophical rethinking of the nexus between ontology and politics.

KEYWORDS
Agamben, Benjamin, inoperativity, use, indiscernibility, state of exception, Homo Sacer

The aim of this article is that of bringing the inextricably ontological and political *enjeu* of Agamben's work into light, through the investigation of the beginning of the *Homo Sacer* series and of the shift that such a beginning produces within the author's philosophical project. More precisely, through a comparison of the first two texts of the series, *Homo Sacer. Sovereign Power and Bare Life, Homo Sacer* I (1998) [1995], and *State of Exception*, *Homo Sacer* II, 1 (2005) [2003], we will show how, in many respects, the philosophical question raised by Agamben in the first volume proves to be problematic, although it finds its most precise formu-

lation in the period of time which spans from the first volume to the second. Our hypothesis is that the punctual recovery of the main inquiries of *Homo Sacer I* within *State of Exception* and, in particular, the recovery of the strategic interpretation of the debate between Carl Schmitt and Walter Benjamin, coincides with a crucial in-depth analysis that allows Agamben to introduce the paradigms of *inoperativity* and *use* in the specific meaning that these terms have in the subsequent developments of the series, i.e., as key notions through which Agamben elaborates his philosophical rethinking of the nexus between ontology and politics. Undoubtedly, *Homo Sacer I* represents one of the most important philosophical essays of the twentieth century. Since its publication, the text has had an as widespread as controversial reception. If we think about the messianic tone of Agamben's antecedent books, such as *The Coming Community* or *Means Without Ends*, *Homo Sacer I* constitutes a *détour* in the philosopher's path, not so much in the sense of a halt, but rather in the sense of a shift towards a further level of complexity. And the key to such a shift is the reflection on *indiscernibility* (indiscernibilità) which configures itself as the real philosophical protagonist of *Homo Sacer I*. The topos of *indiscernibility* emerges as a recovery and further development of the critique made by Benjamin against the apparatus of the 'state of exception', and specifically against its key theorisation by Carl Schmitt. According to *Homo Sacer I*, the 'state of exception' unveils the arcane functioning of the apparatuses of Western powers, and constitutes the key to the comprehension both of the totalitarian drift of contemporary democracies and of the *impasse* that politics and thought manifest in dealing with it. The apparatus of emergence coincides with a state in which the law is in force by means of its very suspension, illegal provisions take on a juridical appearance, therefore the state of exception becomes impossible to comprehend – nor be revoked – through recourse to the binary categories upon which our political tradition is based (not only licit/illicit, private/public, but also: inside/outside, identity/difference). Agamben goes back to Benjamin's strategy, which consists in showing how the apparatus of the exception presupposes at its core a *threshold of indiscernibility* between its polarities – *nomos* and *anomie*, sovereignty and life, to use Agamben's terms – a threshold which invalidates any attempt to inscribe it in a juridical context, thus marking a point of no return with respect to any traditional political form. Although this philosophical strategy is evident in the book, we will show how *Homo Sacer I* does not get to coherently distinguish the apparatus of the *exceptio* from the *topos* of indiscernibility – to use Benjamin's words in the eighth thesis *On the Concept of History* (Benjamin 1991; Benjamin 2006): the merely virtual *Ausnhamezustand* from the "real state of exception" – and we will identify in this lack of distinction the cause of the criticisms that have been made as to an indirect apology for the Schmittian doctrine.

In this study, we will try to demonstrate how at the basis of this *impasse* lies an undeveloped conception of man's praxis as a *threshold of indiscernibility*, or as an *unsubstantial medium*, between the polarities of the power apparatuses, which, although it is present in a crucial passage of *Homo Sacer I*, it is not, however, fully developed there. We will also show how, in the next volume of *Homo Sacer, State of Exception*, this problematic issue takes Agamben back to the debate between Schmitt and Benjamin, and induces him to center this debate around the figure of the praxis as a 'pure medium' as formulated by Benjamin in *Critique of Violence*. Through this new interpretation, Agamben comes to indicate man's praxis as a threshold which is situated at the centre of the apparatus of the exception, and which allows its functioning – i.e. the separation and simultaneous articulation of *nomos* and anomy, law and life – a threshold which, nevertheless, the apparatus tries to hide and dissimulate in its operation, because it reveals its polarities as indiscernible. In the conclusion, we will show how, in *State of Exception*, the development of the Benjaminian conception of acting as a 'pure medium' leads Agamben to confront the *impasse* of *Homo Sacer I*, by indicating man's praxis as an 'inoperative use', i.e. as a threshold in which potentiality and act, law and life, become indistinguishable, and we will consider how this conception constitutes the basis for the reformulation of the nexus between ontology and politics that Agamben will develop more thoroughly in the last section of the *Homo Sacer* series[1].

[1] It may be appropriate to note at this point a brief methodological premise concerning the manner of a 'genealogical' approach to Agamben's work. In 2013, I had the fortune of being invited by Agamben himself to transcribe and edit, with the help of two other Italian researchers, his philosophical diaries, an incredibly imposing work, considering that they consist of almost thirty notebooks of 120 pages each, dating from 1968 to today, and which are characterized, for the most part, by a labyrinth of "citations without quotation marks" that need to be collocated and translated. At the time, the publication had been entrusted to a publishing house which then gave up on the project, and which is now been reconsidered by another publishing house. For more than a year, I worked on the notebooks from the 2010s, that were also coeval to the texts that I was focusing my research on at the time. What immediately caught my attention was how, right from the beginning of that very decade, a different number of notations and reflections were already hinting at what Agamben would have thematised ten years later in essays like *The Highest Poverty* and *The Use of Bodies*, and on which he was probably already working for a while. In this sense, to attribute the introduction of a concept to a specific text of Agamben's might seem reductive. However, I believe that in philosophical works it is impossible to separate the analysis of a concept from the process through which such a concept reaches its formulation, since the peculiar trait of any genuine philosophical notion is, to use Feuerbach's definition which Agamben often recalls, its capacity to be developed (*Entwicklungsfähigkeit*) within an itinerary in which it never reaches a final definition and never ceases to transform itself. This is valid also for those key notions like the state of exception and the topos of indiscernibility, whose conception still continues to develop throughout the years.

1.

"The tradition of the oppressed teaches us that the 'state of exception' in which we live is the rule. We must arrive at a concept of history which corresponds to this fact. Then we will have the production of the real state of exception before us as a task; and this will improve our position in the struggle against Fascism" (quoted and translated in Agamben 2017b: 48; Italian original edition Agamben 2019: 60[2]). Walter Benjamin's eighth thesis *On the Concept of History*, with its annotations on the indiscernibility of law and life in the contemporary 'state of exception', constitutes the starting point of *Homo Sacer I*, in that it represents the lens through which Agamben reads Michel Foucault's inquiry into biopolitics. And it is in the way of a cross-reading of these two authors that the research entailed in the first volume of the series takes shape:

> Only a reflection that, taking up Foucault's and Benjamin's suggestion, thematically interrogates the link between bare life and politics, a link that secretly governs the modern ideologies seemingly most distant from one another, will be able to bring the political out of its concealment and, at the same time, return thought to its practical calling (Agamben 2017b: 7-8; Agamben 2019: 20).

The research hypothesis, formulated in the first few pages of the book, is that the mutual reference between 'sovereign power' and 'bare life' constitutes something like the unthought assumption of Western tradition, an assumption which makes all the theories that try to play one term against the other complicit. 'Bare life' is the translation of the Benjaminian syntagm '*bloßes Leben*', and it functions as a key term in *Homo Sacer I* in reference to Foucault's inquiries into the process through which, within modernity, the biologic life of the individuals becomes the stake of politics, which then turns into biopolitics. "For millennia", we read in *The Will To Knowledge*, "man remained what he was for Aristotle: a living animal with the additional capacity for political existence; modern man is an animal whose politics calls his existence as a living being into question" (Foucault 1976: 172)[3]. However, according to Agamben, it is not sufficient to think this progress of the Western tradition as a discontinuity, or as an overturning, like a "threshold of biological modernity"[4], to use Foucault's words, which separates antiquity from modernity. Through a Benjaminian lens, what appears to be decisive to Agamben is the fact that in the Western tradition law and life emerge as at once divided and articulated, as the two poles of an 'apparatus', in which both intertwine to the point that they become undecidable. Foucault himself, in particular in his late 1970's lectures, shows how, with the "resulting increase in importance of the nation's

[2] The very last sentence is not quoted by Agamben, see W. Benjamin 1991: 697; W. Benjamin 2006: 392.

[3] Quoted in Agamben 2017b: 6; Agamben 2019: 18.

[4] See Agamben 2017b: 6; Agamben 2019: 18.

health and biological life as a problem of sovereign power" this latter gets into a process of emptying, or of rarefaction, to the point that the figure of sovereignty gradually changes into a "government of men", into a mere "administration of the bodies" (Agamben 2017b: 6; Agamben 2019: 18).

While Foucault does not confront himself with the measure of the 'state of emergency', which characterises the birth of the twentieth century totalitarian regimes to then become a governmental paradigm in contemporary democracies, according to *Homo Sacer I* it is this apparatus, which forms the core of Benjamin's reflection, that allows us to think the process described in Foucault's lectures. The text shows how the 'state of exception' – the *Ausnhamezustand* of Carl Schmitt's theory – coincides with a *suspension* of the juridical order, within which the law *remains* in force; and argues how, through such a suspension of the law, the political dimension of the individuals comes to coincide with their biological existence, with their 'bare life'. Therefore, the state of exception appears to be a threshold concept, which is neither ascribable to the sphere of the *nomos*, nor to the sphere of the *physis*, in which law and life reveal themselves as undistinguishable. Starting from this concise reconstruction of the central argument of the text, we can already formulate the question which will direct our inquiry: does the indiscernibility of law and life describe the functioning of the state of exception, or is it a threshold contained within it, that hints at its possible deactivation? A question which, in terms of the first two volumes of *Homo Sacer* (whose arguments we will here try to reconstruct) can be provisionally formulated in the following manner: how can we possibly comprehend the Benjaminian admonishment to the production of the 'real state of exception (*wirchlick Ausnhamezustand*)', as opposed to the merely 'virtual' one theorised by Schmitt? As hinted above, our hypothesis is that, despite Agamben's attempt to play the Benjaminian 'real state of exception' against the Schmittian 'virtual one', in *Homo Sacer I* the topos of indiscernibility is used to describe the position of both authors without an evident philosophical strategy, and that such an ambiguity invalidates the book's central argument.

2.

In *Homo Sacer I* the research on contemporary biopolitics leads, in the first place, to the development of another Foucaultian assumption, that is to investigate – to use Foucault's words – the "shadow that the present casts onto the past"[5]. If, in the state of exception, the norm is in force as suspended, and the bare life of

[5] Agamben often mentions Foucault's definition of his own archaeological inquire as a "shadow cast onto the past by the present" although never reporting the source of this quotation. The definition is probably derived from Foucault 1969: 234, and then loosely reformulated. I would like to thank Andrea Cavalletti for helping me to find this passage.

the citizens becomes the place of politics, how should we retrospectively think about the nexus between law and life in the Western tradition?

Through a well-known and provoking reading of Aristotle's *Politics*, *Homo Sacer I* shows how in classical Greece 'life' is split into two distinct poles: *zoé*, the natural life, and *bios*, the politically qualified life, which nevertheless define themselves through their very contrast. When Aristotle indicated: "The end of the perfect community [...] he did so precisely by opposing the simple fact of living (*to zēn*) to politically qualified life" (Agamben 2017b: 6; Agamben 2019: 18), and in such a way as to also reveal how, only through such an *exclusion* of life, can the boundaries of the *bios* be defined. The *separation*, the contrast, between *bios* and *zoé*, attests itself as an *implication*, hidden but still constitutive, of the natural life into the polis. In as far as the sphere of the *bios* defines itself by way of the exclusion of the *zoé*, the separation of natural life proves to be something like an internal limit which prevents the *bios* from realizing itself, and which underpins the different polarization of the terms during modern times, when bare life emerges as the constitutive dimension of contemporary politics[6]. If, in the *polis*, the boundaries of the *bios* are defined through the exclusion of the *zoé*, in the state of emergency it is the *suspension* of the law which discloses the domain of bare life as the sphere of politics. The bare life, as Agamben concludes, "remains included in politics in the form of the exception, that is, as something that is included solely through an exclusion" (Agamben 2017b: 12; Agamben 2019: 25). *Homo Sacer I* defines the exception (the Latin term *exceptio* literally means the 'capture of the outside') as the nexus of the inclusive exclusion between life and law in our tradition, a tradition within which the two poles reveal themselves as always being at once divided and articulated. The coming into light of this relationship allows Agamben to highlight how the crucial role of the natural life in modernity does not mark a discontinuity with respect to the ancient times. The "shadow which the inquiry into the present casts onto the past" is situated beyond the biopolitical boundaries traced by Foucault, and it reveals "the production of a biopolitical body" as "the original activity of sovereign power" in the Western tradition (Agamben 2017b: 9; Agamben 2019: 21).

The relevance of Schmitt's thought for *Homo Sacer I*s researches can be better appreciated in the light of these inquiries. As it is known, in *Political Theology* the rank of the sovereign derives from his capacity to "decide on the exception", that is, to suspend the juridical order, in so far as such a suspension does not call into question the validity of the law, but rather defines the domain upon which it finds its very application, by delimiting the sphere of life: "Here the decision is not

[6] In his essay *Agamben and the Question of Political Ontology*, M. Abbott defines 'bare life' as the "unthought ground of the metaphysics underpinning our political system, a presupposition that, after the failed attempt to exclude it in the classical world, has returned to haunt us in modernity". See Abbott 2014: 20.

the expression of the will of a subject hierarchically superior to all others, but rather represents the inscription within the body of the *nomos* of the exteriority that animates it and gives it meaning. The sovereign decides not the licit and illicit but the originary inclusion of the living in the sphere of law or, in the words of Schmitt, 'the normal structuring of life relations' which the law needs" (Agamben 2017b: 25; Agamben 2019: 37). While the theories of the state of exception generally try to frame it within the fact/law opposition, thus indicating it, on the one hand, a juridical provision, or, on the other hand, simply a concrete exception, the relevance of the Schmittian doctrine cannot but reside, for Agamben, in its way of presenting the state of exception as a threshold concept that founds the very structure of the juridical reference, i.e. the relationship of the sphere of law to the sphere of fact: "The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule [...] To refer to something, a rule must both presuppose and yet still establish a relation with what is outside relation (the nonrelational). The relation of exception thus simply expresses the originary formal structure of the juridical relation" (Agamben 2017b: 19-20; Agamben 2019: 32-33). It is only through the suspension of order that the sovereign can trace a new boundary between anomy and *nomos*, separate, exclude life from the law, and, at the same time, include life into its domain, as the sphere upon which law places its application. Thus, the specific manner of the Schmittian theory is that of "inscrib[ing] anomie within the very body of the *nomos*" (Agamben 2005: 54, now in Agamben, 2017b: 213; Agamben, 2019: 220), so as to make the suspension of the order, the demarcation of the juridically empty sphere of life, the very foundation of law and its application. Therefore, if this is the complexity of the functioning of law, if that which is separated from the *nomos* – anomy, life – is already included in it through its exclusion, in what way is it possible to call into question such a relationship, to neutralise the device of the *exceptio*?

3.

Homo Sacer I's critique of contemporary philosophy can be better understood in light of this analysis of the Schmittian doctrine. *In Homo Sacer I*, Agamben discusses the attempt developed by the twentieth century French philosophy to deactivate the law apparatus through the figure of *difference*. If law's nature does not consist so much of a distinction between what is licit and what is illicit, but rather, and ultimately, in the presupposition of a nexus of an inclusive exclusion between law and life, it will not be sufficient to appeal to an 'otherness', to an 'other' in respect to the law, in order to deactivate it. *Homo Sacer I* mentions a passage from *Entretien infini*, in which Blanchot defines the process of the '*grand enfermement*' described by Foucault in the *Histoire de la folie,* as an attempt by power

to "confine the outside", to "interiorise what exceeds it", a process by virtue of which "the system designates itself as exterior to itself" (Blanchot 1969: 292)[7]. To Agamben, such a description of power appears to be ephemeral. As he writes, if "exteriority [...] is truly the innermost centre of the political system, and the political system lives off it in the same way that the rule, according to Schmitt, lives off the exception" (Agamben 2017b: 33; Agamben 2019: 45), then, any opposition between an inside and an outside of the system will fall within the mechanism of the *exceptio*.

However, the question which the apparatus of the exception poses to contemporary thought is, according to Agamben, even more radical. Agamben reconstructs the debate between Gershom Scholem and Benjamin around the status of the law in Kafka's *The Trial*. The situation described therein, whereby the "law is all the more pervasive for its total lack of content" (Agamben 2017b: 47; Agamben 2019: 59), is interpreted by Scholem as a "being in force without significance (*Geltung ohne Bedeutung*)" as proper to the law. According to Agamben, such an indication of the anomic foundation of the *nomos* connotes both the post-heideggerian reflection on the ontological structure as abandonment (the reference here is in particular to Jean-Luc Nancy) and deconstructionism, which reads the "entire text of tradition as being in force without significance" and conceives it as "absolutely impassable" (Agamben 2017b: 47; Agamben 2019: 60). However, Agamben states, these theories describe exactly the status of the law in the contemporary state of exception:

> The task that our time imposes on thinking cannot simply consist in recognizing the extreme and insuperable form of law as being in force without significance. Every thought that limits itself to this does nothing other than repeat the ontological structure that we have defined as the paradox of sovereignty (or sovereign ban) [...] A pure form of law is only the empty form of relation. Yet the empty form of relation is no longer a law but a zone of indistinguishability between law and life (Agamben 2017b: 51-52; Agamben 2019: 64).

Therefore, provided that the functioning of power consists in the inclusive-exclusion of law and life (in which the law is in force as suspended) how does the topos of indiscernibility allow us to pursue the deactivation of the power apparatus, and to formulate a "completely new politics – that is, a politics no longer founded on the *exceptio* of bare life"? (Agamben 2017b: 13; Agamben 2019: 25).

4.

The place in which *Homo Sacer I* deals with such a question is the reconstruction of the debate between Schmitt and Benjamin on the state of exception, in re-

[7] Quoted in Agamben 2017b: 19; Agamben 2019: 31.

spect to which the comparison between Scholem and Benjamin serves as an introduction. In response to the conception of *Geltung ohne Bedeutung*, intended as 'spectral figure of the law', that "Scholem, not at all suspecting that he shares this thesis with Schmitt, believes is still law", and "which is in force but is not applied or is applied without being in force" (Agamben 2017b: 220; Agamben 2019: 225), Benjamin objects that a law which is in force without signifying is not a law anymore as it becomes indiscernible from life. In the Kafkian village, Agamben glosses, "the existence and the very body of Joseph K. ultimately coincide with the Trial; they become the Trial" (Agamben 2017b: 47; Agamben 2019: 59). This indiscernibility of law and life is indicated as the key to the figure of the 'real state of exception' which Benjamin, in his eighth thesis *On the Concept of History*, opposes against Schmitt's 'state of exception' which is identified as a merely 'virtual' one.

Benjamin's thesis obviously refers to the Nazi Reich's state of exception, proclaimed in 1933 with Hitler's seizure of power. According to Schmitt's perspective, the suspension of Weimar's constitution should have led to the foundation of a new order, coinciding with a new subordination of life to law, of anomy to *nomos*. But in fact, as the state of exception was never revoked, it therefore became, as shown in the eighth thesis also, 'the rule'. To Benjamin's eyes, the suspension of the law brings into light a threshold of undecidability between *nomos* and anomy, law and life, which neutralises any attempt to newly separate and subordinate them in a juridical relationship, thus marking a point of no return in respect to all traditional political forms. But in what way does the indiscernibility between law and life, which characterises the 'real state of exception', distinguish itself from their inclusive exclusion, which identifies the merely virtual *Ausnhamezustand*? Agamben recapitulates the two different interpretations of the state of exception as follows:

> We have seen the sense in which law begins to coincide with life once it has become the pure form of law, law's mere being in force without significance. But insofar as law is maintained as pure form in a state of virtual exception, it lets bare life (K.'s life, or the life lived in the village at the foot of the castle) subsist before it. In a real state of exception, law that becomes indistinguishable from life is confronted by life that, in a symmetrical but inverse gesture, is entirely transformed into law [...] Only at this point do the two terms distinguished and kept united by the relation of ban (bare life and the form of law) abolish each other and enter into a new dimension (Agamben 2017b: 48, translation modified; Agamben 2019: 60-61).

Nonetheless, at this stage of the analysis, such a conclusive statement of the argumentation reveals itself as highly enigmatic, because it seems to provoke a shift in Agamben's discussion. If, in the previous pages, the indiscernibility of law and life characterised Benjamin's position, a position that unmasked the artifice of the state of exception in such a way as to reveal it as a pretence of deciding on an *undecidable* – in the later lines of this very same paragraph the indeterminacy of law

and life seems to characterise Schmitt's theory. Confronted with the jurist's position, 'the real state of exception' is described by Agamben as "a life entirely transformed into law" but also as a "mutual abolition" of the two terms. This ambiguity of the text allows us to render a problematic aspect of *Homo Sacer I* into light, and one which, in our view, lies at the basis of many criticisms that have been drawn around this key text and the ensuing misunderstandings. This problematic issue concerns the distinction of the apparatus of the exception – the inclusive-exclusion – from the topos of the threshold of indiscernibility. We can start by considering how the lexicon of indiscernibility (notably, indifference, undecidability, indistinction, etc. all terms that Agamben uses in a co-extensive manner) is used in *Homo Sacer I* both to describe Schmitt's doctrine and to indicate Benjamin's position. At times the indiscernibility is thought as the functioning of the state of exception, coinciding with the mechanism of the inclusive-exclusion of law and life, at other times as a threshold between them, which does not reduce itself to the exception, and which points at its possible neutralization. "The sovereign decision", as we saw, for instance, in the first part of the text, "traces and from time to time renews this threshold of indistinction between outside and inside, exclusion and inclusion, *nomos* and physis, in which life is originarily excepted in law" (Agamben 2017b: 26; Agamben 2019: 38), and, while examining the figures of the *exceptio* – sovereignty, bare life, the concentration camp, the Muselmann – Agamben describes them in terms of a "threshold of indifference between nature and culture, between violence and law" (Agamben 2017b: 33, translation modified; Agamben 2019: 45). In the light of these considerations, the topos of indiscernibility seems to coincide with the mechanism of the *exceptio* and, in so far as this is the place in which law and life acquire their meaning through their inclusive exclusion, its possible deactivation can only configure itself as a "mutual abolition of the terms", that is, as a perfectly empty destitution of the apparatus, at the risk of attesting it as a formal and metaphysical dimension. However, in other passages, the indiscernibility, in as much as it is an "unlocalizable zone of indistinction" between law and life, manifests an intrinsic ambiguity of the Schmittian apparatus which cannot be reduced to it and "that, in the last analysis, necessarily acts against it" (Agamben 2017b: 20; Agamben 2019: 32). And in such a direction point also Benjamin's considerations around the 'real' state of exception, considered as the coming into light of a threshold of indiscernibility between law and violence, which unmasks any attempt to go back to a separation or subordination of the terms in a juridical context.

Does the topos of indiscernibility therefore describe the ambiguity which characterises the relationship between law and life in the inclusive-exclusion[8], or does it

[8] In his 2014 essay entitled *Agamben and Indifference*, William Watkin states that the question of the relation between the apparatus of inclusive-exclusion and the figure of indifference has never been investigated in the Anglophone critical literature on Agamben: "A question that I believe no

stand for a threshold which gives us a glimpse of a possible neutralization of this apparatus?

5.

A step in the direction of the dissolution of this difficulty is taken in the section entitled *Threshold*, which connects the first and the second parts of the book, through a reading of Benjamin's essay *Critique of Violence* which Agamben defines as a "necessary and, even today, indispensable premise of every inquiry into sovereignty" (Agamben 2017b: 54; Agamben 2019: 67). Even if Agamben does not reach a conventional conclusion, this brief chapter forms the basis for the new interpretation of the debate between Schmitt and Benjamin which, as we shall also see, he develops in the subsequent volume of *Homo Sacer*: *State of Exception*. In his *Critique*, Benjamin shows how every position of a new law, inasmuch as it presupposes the position of a boundary between anomy and *nomos*, contains an intrinsic anomic, violent act, which the *nomos* tries to dissimulate, but which comes into light in its reference, ambiguous but nonetheless constitutive, to a *violence* which preserves the law,

> Hence the necessity of a third figure to break the circular dialectic of these two forms of violence [...] The definition of this third figure, which Benjamin calls 'divine violence', constitutes the central problem of every interpretation of the essay. Benjamin in fact offers no positive criterion for its identification and even denies the possibility of recognizing it in the concrete case. What is certain is only that it neither posits nor preserves law, but rather 'de-poses (*entsetzt*)' it (Agamben 2017b: 55; Agamben 2019: 67).

If the dialectical oscillation between life and law, violence and law, describes the functioning of the state of exception, the divine violence, as a 'third' term among them, will not be a substantial term that would act as a dialectical opposite to law. However, it will not even indicate the ambiguous oscillation between the two terms, in fact, the very same sovereign violence, as Agamben immediately recognises, is neither identifiable with the violence that poses the law, nor with that which preserves it, in as far as it constitutes itself through their inclusive exclusion:

one has yet raised" (Watkin 2014: 190). It is peculiar how, in his text, which still has the merit of putting the topos of indiscernibility in Agamben's work into sheer focus, Watkin describes the implication of such a conception as an (empty) suspension of all the oppositional categories of our tradition, in which "the very same indifference becomes indifferent" (Watkin 2014: 191, *passim*). If, as we have shown, these are Agamben's conclusions in some of the *Homo sacer I* remarks, especially in those passages where the apparatus of inclusive-exclusion and the topos of indiscernibility seem to coincide, then the implications of this notion can only be grasped in relation to the notion of a *threshold* which, as we shall also see, Agamben connotes as 'use'.

> The violence exercised in the state of exception clearly neither preserves nor simply posits law, but rather conserves it in suspending it and posits it in excepting itself from it. In this sense, sovereign violence, like divine violence, cannot be wholly reduced to either one of the two forms of violence whose dialectic the essay undertook to define (Agamben 2017b: 55; Agamben 2019: 68).

Therefore, the interpretation of Benjamin's essay deals with the crucial problem of *Homo Sacer I*, the distinction between the inclusive-exclusion of violence and law, which characterises 'sovereign violence', and the topos of indiscernibility, which connotes 'divine violence' as key to its possible deactivation. The paragraph continues as follows and it is worth quoting it in full:

> This does not mean that sovereign violence can be confused with divine violence [...] Sovereign violence opens a zone of indistinction between law and nature, outside and inside, violence and law. And yet the sovereign is precisely the one who maintains the possibility of deciding on the two to the very degree that he renders them indistinguishable from each other. As long as the state of exception is distinguished from the normal case, the dialectic between the violence that posits law and the violence that preserves it is not truly broken [...]. The violence that Benjamin defines as divine is instead situated in a zone in which it is no longer possible to distinguish between exception and rule. It stands in the same relation to sovereign violence as the state of actual exception, in the eighth thesis, does to the state of virtual exception. This is why (that is, insofar as divine violence is not one kind of violence among others but only the dissolution of the link between violence and law) Benjamin can say that divine violence neither posits nor conserves violence, but deposes it (Agamben 2017b: 55; Agamben 2019: 68).

The Schmittian sovereign, by suspending the constitution, reveals a 'zone of indistinction' between violence and law. Even though he installs himself in this threshold, where anomy and *nomos* are at once divided and articulated, he still has the pretence of dissimulating such an indistinction, i.e. the pretence of deciding upon it, by way of the separation of the two terms and of their subsequent subordination within the creation of a new law. Nevertheless, despite this attempt to dissimulate it through the device of inclusive-exclusion, it is only through the presupposition of a threshold of indiscernibility between violence and *nomos* that the law can *at once* distinguish and articulate the two terms. This means that no less essential to the functioning of the *nomos* – the separation of law and life into two distinct spheres, and their subsequent juridical subordination through the mechanism of *exceptio* – is the act of presupposing and dissimulating the threshold of indiscernibility of the two terms. If therefore, *positing* the law equates to installing oneself in a threshold of indistinction of law and life, but at the same time *hiding* such an indistinction, and dissimulating it through the device of the exception, *deposing* the law should equate to *exposing* this threshold of indistinction, to bringing it into light.

Benjamin's attempt to think divine violence, or pure violence, as a third term, as a medium which is irreducible to the dialectic oscillation between violence and

law, should therefore coincide with such an *exposition*. However, Benjamin's inquiry does not take this direction. Agamben argues how, in his *Critique*, "with a seemingly abrupt development", instead of defining the divine violence he "concentrates on the bearer of the link between violence and law, which he calls 'bare life (*Bloß Leben*)'" (Agamben 2017b: 55-56; Agamben 2019: 69). We can consider then how Agamben takes up Benjamin's strategy, by formulating the task of the deactivation of the law apparatus through the unfolding of the mystery of 'bare life', indicated in the paradigm of the '*homo sacer*'. However just like the *homo sacer* represents the "originary form of the inclusion of bare life in the juridical order" and thus "names something like the originary 'political' relation, which is to say, bare life insofar as it operates in an inclusive exclusion as the referent of the sovereign decision" (Agamben 2017b: 72; Agamben 2019: 84), in the same way all the figures through which the text tries to think the indiscernibility of anomy and *nomos*, law and life, are an expression of the dialectical oscillation of the two poles in the inclusive-exclusion – and therefore not an expression of a threshold between them, in which they reveal themselves as indiscernible, thus entering into a 'new dimension'. The '*homo sacer*', the 'muselmann', the 'concentration camp', are all figures through which sovereign power and bare life include each other while excluding themselves, without ever touching each other, but only in the menace of death. Thus, these figures result from the inclusive-exclusion apparatus, but do not allow us to think about a 'third term' in which the two poles would show themselves in a new configuration. In such a manner, the Benjaminian reference to this third term, to a medium that would exhibit the indiscernibility between violence and law by neutralizing their dialectical oscillation, is a theme that remains undeveloped in the text[9].

6.

If we read the subsequent volume of the *Homo Sacer* series, *State of Exception*, in the light of this issue we can consider how Agamben confronts precisely this question. We can notice how in this book, Agamben never defines the state of

[9] This issue is at the root of some of the critiques that have been raised against *Homo Sacer* and of the many misunderstandings of the book. Some earlier commentators, in particular in the Anglophone world, understand the apparatus of inclusive-exclusion as the logic which governs the entire Western tradition as by a hidden and unsurmountable necessity. Despite the problematic aspects that we are highlighting in *Homo Sacer I*, these critiques, exemplified by Catherine Mill's position in *The Philosophy of Agamben* (2008), simplify the philosophical issue opened by the book and, as we will show, become unable to capture the soteriological intent of Agamben's research, such as it developed in the subsequent volumes of *Homo Sacer* project. In the same direction as Mill's, we could place many of the essays contained in M. Calarco, S. DeCaroli (eds.), *Giorgio Agamben. Sovereignty and Life* (Calarco and DeCaroli 2007), and in A. Norris (ed.), *Politics, Metaphysics and Death: Essays on Giorgio Agamben's* Homo Sacer (Norris 2005).

exception, from Schmitt's doctrine point of view, as a zone of indiscernibility of law and life, but always as a 'dialectical oscillation' between the two poles, which describes the functioning of the apparatus of inclusive-exclusion. "Schmitt's theory of the state of exception", we read at the beginning of the chapter dedicated to the German jurist, "proceeds by establishing within the body of the law a series of caesurae and divisions whose ends do not quite meet, but which, by means of their articulation and opposition, allow the machine of law to function" (Agamben 2017b: 196; Agamben 2019: 203). In the light of the argument that we have reconstructed so far, the core sense of such an analysis emerges in the book's fourth chapter where Agamben returns to the debate between Schmitt and Benjamin on the state of exception. The analysis of the Schmittian doctrine of the state of exception that is developed in this chapter is much more detailed than the one we found in *Homo Sacer I*, and it culminates in a new interpretation of the debate between the two authors. According to a widespread view, the origin of such a debate coincides with Benjamin's reading of *Political Theology* (1922) to which he reacts by introducing the figure of the 'sovereign indecision' in *The Origin of German Tragic Drama* (1926; Benjamin 1974; Benjamin 1998). Although, Agamben shows how Schmitt's book from 1922 can already be considered as a response to Benjamin, and, more precisely, as a response to the essay that had come out one year earlier: the *Critique of Violence* (1921). This article was published by Benjamin in the *Archiv für Sozialwissenschafter und Sozialpolitik*, a journal of which Schmitt was a collaborator and which he had regularly cited in his works from 1915 onward. If "Benjamin's interest in Schmitt's theory of sovereignty has always been judged as scandalous", Agamben writes, implicitly answering some of the critiques raised against *Homo Sacer I* – "turning the scandal around we will try to read Schmitt's theory as a response to Benjamin's critique of violence" (Agamben 2017b: 212; Agamben 2019: 219).

This reconstruction of the debate between the two authors assumes a strong philosophical value in the text. As we have seen, the aim of Benjamin's essay is

> to ensure the possibility of a violence [...] that lies absolutely 'outside (*außerhalb*)' and 'beyond (*jenseits*)' the law and that, as such, could shatter the dialectic between law-making violence and law-preserving violence [...] Benjamin calls this other figure of violence 'pure' (*reine Gewalt*) or 'divine,' and, in the human sphere, 'revolutionary' [...] The proper characteristic of this violence is that it neither makes nor preserves law, but deposes it (*Entsetzung des Rechtes*) and thus inaugurates a new historical epoch (Agamben 2017b: 212; Agamben 2019: 219).

In the first part of his inquiry, Agamben shows how, in the essay that had come out the year prior to the publication of *Political Theology* with the title *The Dictatorship* (1921), Schmitt had thought the state of exception through the figure of the 'sovereign dictatorship', which suspends the constitution in force in order to create a new law. In this book, the dictatorship's relationship with the juridical or-

der coincided with the nexus between *constituting* and *constituted* power. This hendiadys, as Agamben notices, corresponded exactly to the one criticised by Benjamin in his essay *Critique of Violence*, and more precisely with the relationship between the 'law-positing violence' and the 'law-preserving violence'. The text paraphrases the Benjaminian argumentation: "Violence that is a means for making law" – i.e., in the specific terms of the argument we are reconstructing, the suspension of *nomos*, the *separation* between anomy and *nomos* as foundation of constituting power – "never deposes its own relation with law and thus instates law as power (*Macht*), which remains 'necessarily and intimately bound to it'" (Agamben 2017b: 220; Agamben 2019: 227). That is to say, it institutes constituted power as a power which must guarantee the application of law resorting to violence, i.e. through an *articulation* between anomy and *nomos*. The aim of Benjamin's essay is to show how the dialectical oscillation between 'law-positing violence' and 'law-preserving violence' presupposes at its core the *mutual reference* between violence and law as a nexus which is not reducible to one of the two poles, neither to their separation nor to their articulation, a nexus in which violence and law show themselves as at once divided and articulated, in such a way as to attest themselves as undecidable. As Agamben reminds us, Benjamin has a relational, not substantial, conception of purity, so that the criterion for the purity of violence lies in its relationship to the law: violence is pure in as much as it is not separable from, nor can it be subordinated to law – as in the Schmittian apparatus – but rather manifests itself as co-originary, or, more precisely, as indiscernible from law[10].

One year later, in *Political Theology*, Schmitt does not define anymore sovereignty through the hendiadys of constituted-constituting power, rather, he develops the figure of the decision upon the exception: according to the well-known definition: "The sovereign stands outside (*außerhalb*) of the normally valid juridical order, and yet belongs (*gehört*) to it, for it is he who is responsible for deciding whether the constitution can be suspended *in toto*" (Schmitt 1990: 13)[11]. Agamben argues how this shift in the jurist's theory, its elaboration of sovereignty as a *limit figure* of the law, which stands neither outside nor inside the law, is in the end an attempt to provide an answer to the Benjaminian critique of the oscillation between 'law-positing violence' and 'law-preserving violence'; and precisely an attempt to capture pure violence within the *nomos* as a threshold that exceeds both types of violence, both constituent and constituted power. As Agamben writes:

> It is in order to neutralize this new figure of a pure violence removed from the dialectic between constituent power and constituted power that Schmitt develops his theory of sovereignty. The sovereign violence in *Political Theology* responds to the pure violence of Benjamin's essay with the figure of a power that neither makes nor

[10] See Agamben 2017b: 218-210 and Agamben 2019: 225-226.

[11] I quote the translation of *State of Exception*, in Agamben 2017b: 195; Agamben 2019: 202.

> preserves law, but suspends it [...] That this place is neither external nor internal to the law – that sovereignty is, in this sense, a *Grenzbegriff* [limit concept] – is the necessary consequence of Schmitt's attempt to neutralize pure violence and ensure the relation between anomie and the juridical context (Agamben 2017b: 213; Agamben 2019: 220).

The Schmittian doctrine of the state of exception derives from an attempt to capture the dimension of pure violence as a medium, a threshold in which law and life are *at once* divided and articulated, an attempt to include it into the sphere of law by the way of its dissimulation. This dissimulation consists in the separation of law and violence into two distinct spheres by way of the suspension of the law and in their juridical subordination in the position of a new law. If it is only the pure violence, in which law and life are at once divided and articulated, that allows the functioning of the apparatus of inclusive exclusion, no less essential for such apparatus will be the dissimulation of the threshold of pure violence, in so far as this reveals the two terms as indiscernible.

Nonetheless, Benjamin shows how such an attempt to dissimulate, to 'capture' pure violence, is ephemeral: the suspension of the law of the state of exception does not lead to constitute a new order, but rather, as he will also argue in his thesis *On the Concept of History*, it 'becomes the rule', proves to be inseparable by the normal order. In this way, the state of exception reveals a presupposition of a threshold of indiscernibility between law and life at its very core, that undermines every possible juridical configuration of the two terms, thus marking a point of no return with respect to any traditional political form. In the *Critique of Violence* we can already find a conclusion akin to the position of the eighth thesis, in the discussion of the figure of the 'police', which Agamben, however, does comment on. According to Benjamin, the state of exception is essentially a 'police state' in which: "The separation of law-making and law-preserving violence is suspended" (Benjamin 1977: 189; Benjamin 2002: 240). He defines police as a "kind of spectral mixture" of the two types of violence: "It is law-making, because its characteristic function is not the promulgation of laws but the assertion of legal claims for any decree, and law-preserving, because it is at the disposal of these ends" (Benjamin 1977: 189; Benjamin 2002: 239-240). The police institution, as well as the "decision upon the exception", represents an attempt made by power to suspend the difference between law and life and to seize the threshold of pure violence – a threshold in which the two poles are at once divided and articulated (the only key that makes its functioning possible) but, at the same time, an attempt to hide it, to dissimulate this threshold through the inclusive exclusion of law and life, because it reveals them as indiscernible. In this sense, we can understand how in the *Trauerspielbuch*, by referring to the Schmittian definition of the sovereign as "the one who decides upon the state of exception", Benjamin surreptitiously alters the content of the definition by writing that the most important function of the sovereign

is, in reality, that of excluding the state of exception[12]. Indeed, through the suspension of the juridical order, the sovereign allows the 'real state of exception' to emerge, in so far as he reveals a threshold of indistinction between life and law, but, at the same time, he tries to 'exclude' it, to dissimulate it through the *exceptio* of law and life.

7.

But, in what way does Benjamin think pure violence, this threshold of indiscernibility of law and life in which their inclusive-exclusion appears to be neutralised? As we have considered, if the positing of law consists in a *dissimulation* of such a threshold, the deposition of law will come to coincide with its *exposition*. Agamben, then, paraphrases the *Critique*:

> While violence that is a means for making law never deposes its own relation with law and thus instates law as power (*Macht*), which remains 'necessarily and intimately bound to it', pure violence exposes and severs the nexus between law and violence and can thus appear in the end not as violence that governs or executes (*die schaltende*) but as violence that purely acts and manifests (*die waltende*) (Agamben 2017b: 220; Agamben 2019: 226).

The instrumental conception of violence, as a 'means' for the positing of law, consists, according to Benjamin, in the very attempt to hide, to dissimulate its 'medial' character. 'Pure means' will therefore be the violence which does not dissimulate itself in the aim – its aim being the positing or conservation of law – but rather the violence which exposes itself in its 'mediality', i.e., as a violence that is neither separated from law nor subordinated to it, in other words, as a violence indiscernible from law[13]. It is interesting to notice how in his essay Benjamin portrays such a manifestation of violence as essentially non-violent. If the conventional meaning of violence is tied to its dissimulation in the end of law, if violence and law historically gain their sense through their inclusive exclusion, then, in the exposition of the medial nature of violence, both violence and law change to a new dimension. Agamben expands this idea by going back to the debate between Scholem and Benjamin around Kafka's interpretation,

> Kafka's most proper gesture – the text argues - consists not (as Scholem believes) in having maintained a law that no longer has any meaning, but in having shown that

[12] See Agamben 2017b: 213-214; Agamben 2019: 221.

[13] "Here appears the topic", Agamben writes "which flashes up in the text only for an instant, but is nevertheless sufficient to illuminate the entire piece—of violence as 'pure medium,' that is, as the figure of a paradoxical 'mediality without ends' – a means that, though remaining such, is considered independently of the ends that it pursues [...] pure violence is that which does not stand in a relation of means toward an end, but holds itself in relation to its own mediality" (Agamben 2017b: 219; Agamben 2019: 226-227).

> it ceases to be law and blurs at all points with life. In the Kafka essay, the enigmatic image of a law that is studied but no longer practiced corresponds, as a sort of remnant, to the unmasking of mythico-juridical violence effected by pure violence [...]. The decisive point here is that the law—no longer practiced, but studied—is not justice, but only the gate that leads to it (Agamben 2017b: 220; Agamben 2019: 227-228).

The apparatus of inclusive exclusion, which is at the root of the application of law, consists, as we have shown, in the dissimulation of the medial character of violence, or of potentiality as we could also say in reference to other places of Agamben's work. Benjamin counterposes to juridical violence a "no longer practiced, but studied" law, that is, a law whose potentiality remains inseparable from its application and which, in as far as it exposes the indiscernibility of the two dimensions, does not unveil any idea of justice, but rather limits itself to exhibiting "the gate that leads to it"; i.e., it reveals justice as a threshold, as the purely medial nature of the relationship between violence and law, potentiality and act. The conclusion in the following passage has a crucial role in the *Homo Sacer* project, in as much as this coincides with the introduction of the notions of *inoperativity* (*inoperosità*) and of *use* (*uso*), intended in the medial meaning that they have in the subsequent volumes of the series:

> What opens a passage toward justice is not the erasure of law, but its deactivation and inoperativity [*inoperosità*] — that is, another use of the law. This is precisely what the force-of-law (which keeps the law working [*in opera*] beyond its formal suspension) seeks to prevent (Agamben 2017b: 221; Agamben 2019: 228).

Agamben can therefore affirm that the specific performance of the state of exception consists in an attempt to "prevent another use" of law, i.e. an "inoperative use" of law, in so far as he has come to show the apparatus of the suspension of law – the inclusive exclusion – as the 'capture' of an inner threshold of indiscernibility of law and life. *Homo Sacer I* did not manage to show such a threshold, at the risk of attesting the inclusive exclusion as a formal, insurmountable dimension, i.e., as a metaphysical device. *State of Exception* can now show how the dialectical oscillation of law and life derives from the capture of man's praxis as inoperative use, pure mediality – and from the attempt to dissimulate it, insofar as it reveals violence and law as indiscernible. In the passage quoted above we can thus identify the *arché* of the notion of use formulated in the subsequent volumes of *Homo Sacer* project and, with it, that of the very same archaeological method used by Agamben, even if the word archaeology has not appeared in the book yet. The attestation of 'use' as the threshold of indiscernibility which gets caught in the heart of the apparatuses of power, allows us to define the sense of *Homo Sacer*'s historical and philosophical inquiry, an inquiry which neither describes a metaphysical mechanism which cannot be bypassed, nor can it be resolved in the hypostatization of an originary praxis which precedes law:

> And just as the victory – the text argues - of one player in a sporting match is not something like an originary state of the game that must be restored, but only the stake of the game (which does not preexist it, but rather results from it), so pure violence (which is the name Benjamin gives to human action that neither makes nor preserves law) is not an originary figure of human action that at a certain point is captured and inscribed within the juridical order (just as there is not, for speaking man, a prelinguistic reality that at a certain point falls into language). It is, rather, only the stake in the conflict over the state of exception, what results from it and, in this way only, is supposed prior to the law (Agamben 2017b: 218; Agamben 2019: 225).

Throughout these considerations we can perceive the echo of another Benjaminian assumption contained in *The Origin of German Tragic Drama*, which describes the origin as that which does not precede the historical becoming, but arises from it. In so far as the archaeological inquiry takes us back to 'use' as to a threshold of indiscernibility that gets caught in the heart of the apparatuses of power, it attests 'use' as an unexpressed possibility, a latent potentiality, therefore an *arché* not in the sense of a past experience, but rather in the sense of a chance of change that occurs in the present:

> What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it. And use, which has been contaminated by law, must also be freed from its own value. This liberation is the task of study, or of play. And this studious play is the passage that allows us to arrive at that justice that one of Benjamin's posthumous fragments defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical (Agamben 2017b: 221; Agamben 2019: 228).

In contemporary politics, the law coincides with the state of exception which has "become the rule". In so far as this reveals at its core a threshold of indiscernibility of violence and law – man's praxis as pure medium, or use – it discloses the task of the "production of the real state of exception". This coincides with a dimension which is situated beyond the law, but not in the sense of a reference to an outside of the law, but rather in the sense of a 'liberation' of the use caught at its centre. Such a liberation consists in a medial praxis defined as a 'study' or 'game', in which every opposition between means and end, potentiality and act is neutralised, and the dimension of justice reveals itself as non-juridifiable. It is in this liberation that the profound sense of the archaeological method which Agamben will reformulate in the subsequent volumes of the project lies. To go back to the *arché* of a phenomenon, or of an apparatus, means to return to a latent threshold of indiscernibility at its core, and thus to disclose a new possible use of it[14].

[14] Agamben returns to the analysis of *State of Exception* in his more recent work titled *Karman*. Here, he identifies, in the Benjaminian formulation of the "mediality without end", a polemic against Kant's definition of the beautiful as "purposiveness without purpose (or end)": "But while purposiveness without purpose is, so to speak, passive, because it maintains the void form of the end without being able to exhibit any determinate goal, on the contrary, mediality without end is in

BIBLIOGRAPHY

Abbot, M. 2014. *The Figure of this World*. Edinburgh: Edinburgh University Press.

Agamben, G. 1998. *Homo Sacer. Sovereign Power and Bare Life*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 2005, *State of Exception*. Translated by K. Attell. Chicago: University of Chicago Press.

Agamben, G. 2017a. *Karman. Breve trattato sull'azione, la colpa e il gesto*. Torino: Bollati Boringhieri.

Agamben, G. 2017b. *The Omnibus Homo Sacer*. Stanford: Stanford University Press.

Agamben, G. 2018. *Karman. A Brief Treatise on Action, Guilt and Gesture*. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2019. *Homo Sacer. Edizione integrale 1995-2015*. Macerata: Quodlibet.

Benjamin, W. 1974. *Ursprung des deutschen Trauerspiels*. In Id., *Gesammelte Schriften, I, 1*, ed. by R. Tiedmann and H. Schweppenhäuser. Berlin: Suhrkamp, pp. 203-409

Benjamin, W. 1977. *Zur Kritik der Gewalt*. In Id., *Gesammelte Schriften, II, 1*, ed. by R. Tiedmann and H. Schweppenhäuser. Berlin: Suhrkamp, pp. 179-203.

Benjamin, W. 1991. *Über den Begriff der Geschichte*. In Id., *Gesamtausgabe I, 2*, ed. by R. Tiedmann and H. Schweppenhäuser. Berlin: Surkhamp, pp. 691-706

Benjamin, W. 1998. *The Origin of the German Tragic Drama*. Translated by J. Osborne. London- New York, Verso.

Benjamin, W. 2002. *Critique of Violence*. In Id., *Selected Writings, Vol. I, 1913-1926*, ed. by M. Bullock and M. W. Jennings. Cambridge-London: The Belknap Press, Harvard University Press, pp. 236-252.

Benjamin, W. 2006. *On the Concept of History*. In Id., *Selected Writings, Vol. IV, 1938-1940*, ed. by M. Bullock and M. W. Jennings. Cambridge-London: The Belknap Press, Harvard University Press, pp. 389-401.

Blanchot, M. 1969. *L'Entretien infini*. Paris: Gallimard.

Calarco, M. and DeCaroli, S. 2008 (editors). *Giorgio Agamben. Sovereignty and Life*. Stanford: Stanford University Press.

Foucault, M. 1969. *L'Archéologie du savoir*. Paris: Gallimard.

Foucault, M. 1976, *La Volonté de savoir*. Paris: Gallimard.

some way active, because it shows itself as such in the very act in which it interrupts and suspends its relation to the end" (Agamben 2018: 82; Agamben 2017a: 134). According to Agamben, "[t]he pure means loses its enigmatic character if it is restored to the sphere of gesture from which it comes". "Just as, in the gesticulation of a mime, the movements that are usually directed to a certain goal are repeated and exhibited as such – that is, as means – without there being any more connection to their presumed end, and, in this way, they acquire a new unexpected efficacy, so too does the violence that was only a means for the creation or conservation of law become capable of deposing it to the extent in which it exposes and renders inoperative its relation to that purposiveness" (Agamben 2018: 82; Agamben:2017a: 134-135).

Mill, C. 2008. *The Philosophy of Agamben*. Stockfields: Acumen.

Norris, A. 2005 (editor). *Politics, Metaphysics and Death: Essays on Giorgio Agamben's Homo sacer*. Durham-London: Duke University Press.

Schmitt, C. 1990. *Politische Theologie, Vier Kapitel zur Lehre von der Souveranität*. München-Lepizig: Duncker & Humboldt.

Watkin, W. 2014. *Agamben and Indifference*. London-New York: Rowman & Littlefield.

Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 71-86
ISSN: 1825-5167

OUTSIDE OF BEING: AGAMBEN'S POTENTIAL BEYOND ANTHROPOCENTRISM

CARLO SALZANI
Unit of Ethics of Human-Animal Relations
Messerli Forschungsinstitut in Wien
carlosalzani@gmail.com

ABSTRACT
Potential or potentiality is the central idea of Agamben's philosophy and informed from the very beginning his work, though implicitly at first. If the term entered Agamben's vocabulary only in the mid 1980s, it constitutes nevertheless already the logical structure of the experience of infancy, which is in fact not the actuality but the potentiality of speech. And it already marked, in Heideggerian fashion, human exceptionality: if only human beings have infancy, it is because only humans have the potentiality not to speak, that is, to remain in in-fancy. This is, for Agamben, the very structure of potentiality – not only the potentiality of something, but that not to do or be something –, and it is what gives humans a freedom denied to nonhuman animals. The article analyses the concept of potential in Agamben's philosophy, highlighting its fundamental anthropocentrism and logocentrism. However, with the 'biopolitical turn' of the 1990s and the publication of The Open in 2002, Agamben progressively seeks a way to overcome this still metaphysical structure, and will find it in the concept of 'outside of being' which precisely concludes The Open.

KEYWORDS
Giorgio Agamben, potentiality, animality, anthropocentrism, logocentrism, end of metaphysics

1. AGAMBEN'S POTENTIAL AND ANTHROPOCENTRISM

It has been noted early on, especially in his reception in English, that Agamben's central idea – that which is truly 'his own' and that all his works seek to express – is that of 'potential'[1]. He says so himself very clearly, when he declares in the opening

[1] The Italian term Agamben uses is *potenza*, which is the common translation of the Aristotelian δύναμις (*dunamis*). In Agamben scholarship in English, a sort of 'norm' has been established by Daniel Heller-Roazen's early translations to render *potenza* as 'potentiality'; in Agamben's use, however, at times the connotation of the term approaches that of 'potency' and 'power', in a productive ambiguity often lost in the English translation. In his more recent translations, Adam Kotsko often recurs to the term 'potential', which is how *dunamis* is counterposed to 'act' (like 'potentiality' to 'actuality'). Here I will alternatively use all these terms according to the existing translations and the

of *On Potentiality*: "Following Wittgenstein's suggestion, according to which philosophical problems become clearer if they are formulated as questions concerning the meaning of words, I could state the subject of my work as an attempt to understand the meaning of the verb 'can' [*potere*]. What do I mean when I say: 'I can, I cannot'?" (Agamben 1999: 177). This point, as Leland de la Durantaye notes (2000: 4), is extended into a general definition of philosophy as such in *Bartleby, or On Contingency*, where Agamben writes: "In its deepest intention, philosophy is a firm assertion of potentiality, the construction of an experience of the possible as such" (Agamben 1999: 249). At a first glance, this declaration seems to collide with another famous Agambenian statement, appeared between the two quotations above, two years after *On Potentiality* was delivered as a conference paper (Agamben 1987) and four years before the original publication of *Bartleby* (Agamben 1993): in *Experimentum Linguae*, the 1989 preface to the French edition of *Infancy and History*, Agamben in fact writes:

> If for every author there exists a question which defines the *motivum* of his thought, then the precise scope of these questions coincides with the terrain towards which all my work is orientated. In both my written and unwritten books, I have stubbornly pursued only one train of thought: what is the meaning of 'there is language'; what is the meaning of 'I speak'? (Agamben 1993a: 5).

This apparent conflict has led to different emphases in the interpretations of Agamben's philosophy, whereby de la Durantaye, for example, singles out potentiality as his central idea (De la Durantaye 2009: 4ff.) whereas Alex Murray, among others, opts for language (Murray 2010: 11).

This conflict, however, as it has also been noted early on, is only apparent. In fact, as Daniel Heller-Roazen remarked, the originality of Agamben's project consists precisely in "*conceiv[iving] the existence of language as the existence of potentiality*", and the reflection on language must therefore be a reflection on the mode of existence of potentiality (in Agamben 1999: 13; emphasis in the original). Or, as de la Durantaye puts it, the two declarations quoted above are, in their deepest intuition, the same, they are "different facets of a single question", and the "experimentum linguae [is in fact] an experience of pure potentiality" (De la Durantaye 2000: 5). Agamben clearly explains this point precisely in *Experimentum Linguae*:

> The double articulation of language and speech seems, therefore, to constitute the specific structure of human language. Only from this can be derived the true meaning of that opposition of *dynamis* and *energeia*, of potency and act, which Aristotle's thought has bequeathed to philosophy and Western science. Potency – or knowledge – is the specifically human faculty of connectedness as lack; and language, in its split

convenience of the context, though the productive polysemy of the Italian *potenza* must always be kept in mind.

> between language and speech, structurally contains this connectedness, is nothing other than this connectedness (Agamben 1993a: 7).

The ontological split between *dynamis* and *energeia*, between potential and act, rests thus on the specific structure of human language and its double articulation in *langue* and *parole*, in a potential *langue* that, in each single instance, can (or can decide not to) actualize itself in a concrete and specific *parole*. Therefore, Agamben concludes, "the only possible answer" to the question of potentiality, to the question about "the grammar of the verb 'to be able' [... ,] is an experience of language" (Agamben 1993a: 7; cf. Colebrook and Maxwell 2016: 37-41). This point will mark Agamben's philosophy in all its phases, and in *The Sacrament of Language* – the volume of the *Homo Sacer* series specifically devoted to language – it takes the following form: "Man is not limited to acquiring language as one capacity among others that he is given but has made of it his specific potentiality; *he has, that is to say, put his very nature at stake in language*" (Agamben 2011: 68, emphasis in the original). This structure qualifies Agamben's reflection on potentiality as intrinsically logocentric.

As it is well known, the cornerstone of Agamben's ontology of potential is his reading of the Book Theta of Aristotle's *Metaphysics*, to which he returns time and again, from *On Potentiality* up to *What is Real?* (Agamben 2018) and beyond, in a double movement of referral to and distancing from Aristotle. In turn, Agamben's interpretation owes much to Heidegger's 1931 lecture course on Aristotle's Book Theta (Heidegger 1995a): like Heidegger and against Aristotle, Agamben emphasizes the ontological precedence of potentiality over actuality, but, unlike Heidegger, who based his interpretation on the notion of "ownmost potentiality-for-being" [*eigensten Seinkönnen*], Agamben's many readings all dwell on the 'potentiality not to' or 'impotentiality' as its essential and intrinsic peculiarity. This point has been well explained and interpreted in Agamben scholarship and there is no need to linger on it here. What I want to emphasize here is instead that, together with the centrality of the question of potential for Western ontology, Aristotle and Heidegger have also bequeathed to Agamben a logocentric and anthropocentric vantage that imprisons the originality of his project within the worn-out frame of human exceptionalism.

As in Aristotle, Heidegger and the whole Western tradition, also in Agamben human potential is always counterpoised to – or rather defined against – animal unfreedom through customary constructs such as "uniquely among living beings, man..." (Agamben 2011: 68). The basic formulation is already presented in *On Potentiality*:

> Other living beings are capable only of their specific potentiality; they can only do this or that. But human beings are the animals who are capable of their own impotentiality. The greatness of human potentiality is measured by the abyss of human impotentiality (Agamben 1999: 182, emphasis in the original).

Human *potenza* (in the sense of potential/potentiality, but also in that of potency and power) is what ultimately marks human freedom compared to non-human unfreedom, as shown by the lines following immediately after:

> the root of freedom is to be found in the abyss of potentiality. To be free is not simply to have the power to do this or that thing, nor is it simply to have the power to refuse to do this or that thing. To be free is [...] *to be capable on one's own impotentiality*, to be in relation to one's own privation. This is why freedom is freedom for both good and evil (Agamben 1999: 182-183).

And this is why freedom is an exclusively human precinct. In line with the exceptionalist tradition stretching from Aristotle to Heidegger and beyond, Agamben's potential is marked by *logos*/language and freedom, which are precisely what separates, according to this tradition, human from nonhuman animals.

This anthropocentric logocentrism marks already the Italian title of the 1987 conference paper that the English translation *On Potentiality* does not retain: the original title is in fact *La potenza del pensiero*, that is, the potential *of thought*, of a very and exclusively human *logos*. And this link between potentiality and *logos*, whereby potentiality is inherently the 'potentiality of thought', had already been established in the *Threshold* opening *Idea of Prose*, where Damascius, the last scholarch of the School or Athens, finds in the wax writing tablet the perfect paradigm of 'absolute' and 'pure' potentiality – precisely that of thought (Agamben 1995: 34)[2]. This link also marks the various figures of Agamben's soteriology (all identified, along the lines of Heidegger's *Dasein*, by potentiality), from the 'whatever singularity' of *The Coming Community*, construed upon the *experimentum linguae* and 'condemned' to be their own (im)potentiality (Agamben 1993b: 44, 82-83), to the 'form-of-life' of the *Homo Sacer* project, intrinsically bound to 'thought' as the "*experimentum* that has as its object the potential character of life and of human intelligence" (Agamben 2000: 9). As intrinsically bound to *logos*, moreover, the potential of both whatever singularity and form-of-life is pitched against what Agamben calls 'biological destiny' or 'biological vocation' (Agamben 1993b: 43; 2000: 4): biology, as for the whole Western tradition, is here reduced to *necessity* (instead of being seen as condition of possibility), to a prison from which only *logos* can grant an escape and that thus inevitably incarcerates nonhuman animals as the Aristotelian *aloga zoa*[3].

Biology, in this tradition, is not a neutral science but rather a powerful *dispositif*, an apparatus aimed at marking division lines by reducing nonhuman animals to their 'animality', by literally 'animalizing' them, in order for the freedom of humans

[2] The image of the writing tablet with nothing actually written on it to symbolize the potentiality of the intellect comes of course from Aristotle's *De Anima* (3.4, 430a1).

[3] In these formulations, biology reminds of the notion of 'fate' as deployed by Benjamin in the early 1920s. Cf. Benjamin 1996.

to emerge. Therefore, as Agamben writes in *Form-of-Life*, "human beings – as beings of power [*potenza*] who can do or not do, succeed or fail, lose themselves or find themselves – are *the only beings* for whom happiness is always at stake in their living, *the only beings* whose life is irremediably and painfully assigned to happiness" (Agamben 2000: 4, emphases added). Humans are *the only beings*, as the later essay *The Work of Man* argues, who have no pre-established (in the sense of biologically determined) "work", no necessary *energeia* as "a proper nature and essence", and are thus open and "free" for happiness and politics (Agamben 2007: 1-10). This (all-too traditional) demonization of biology as unfreedom finds its clearest expression in the chapter *The Idea of Infancy* of *Idea of Prose*, where Agamben writes:

> Animals are not concerned with possibilities of their soma that are not inscribed in the germen: contrary to what might be thought, they pay no attention whatsoever to that which is mortal (the soma is, in each individual, that which in any case is doomed to die), and they develop only the infinitely repeatable possibilities fixed in the genetic code. They attend only to the Law – only to what is written (Agamben 1995: 95).

Only human beings are "in the condition of being able [*poter*] to pay attention precisely to what has not been written, to somatic possibilities that are arbitrary and uncodified", truly free from "any genetic prescription" (Agamben 1995: 95). *Only human beings*, as the only truly potential beings, are truly free.

2. THE APPARATUS OF INFANCY

The Idea of Infancy can be taken as paradigmatic for the anthropocentric bias of Agamben's potential not only because it more explicitly and more clearly exposes the workings of the dichotomy between biology/necessity/unfreedom and *logos*/potentiality/freedom, but also because it constitutes in a sense a sort of turning point in the evolution of the concept of potential in Agamben's philosophy. As, among others, de la Durantaye has pointed out (2000: 22-23), during the 1980s the concept and the terminology of infancy progressively fade out and are replaced by the vocabulary of potentiality; 'infancy', therefore, would be a sort of forebear of potentiality, and *The Idea of Infancy* (originally published in 1985) stages precisely the passage from one concept to the other.

In the early phase of Agamben's reflection, infancy had taken central stage as the transcendental experience through which the human animal becomes 'Man'[4]. The eponymous first essay of *Infancy and History* identifies in infancy (where

[4]That Agamben uses the neutral universal 'man' (*uomo*) instead of (the politically correct) 'human being' (*essere umano*) is not only due to a still very common and widespread practice in Italian academia and society at large, which marks a certain 'gender blindness' characteristic of Agamben's writings; it also signals the specific normative notion of patriarchal humanity that is here counterpoised to animality.

etymologically the prefix in- negates the Latin verb *fari*, to speak) not a subjective and psychological state chronologically preceding language and that ceases to exist once the in-fant acquires language, but rather the transcendental gap separating *langue* and *parole* – in the later vocabulary: the potentiality of speech and its actualization – that forces the human animal into speech as subjectivation and always persists beside language as its (im)possibility. Again, this argument is construed upon the disavowal of animality:

> It is not language in general that marks out the human from other living beings – according to the Western metaphysical tradition that sees man as a *zoon logon echon* (an animal endowed with speech) – but the split between language and speech, between semiotic and semantic [...], between sign system and discourse. Animals are not in fact denied language; on the contrary, they are always and totally language. In them la *voix sacrée de la terre ingénue* (the sacred voice of the unknowing earth) – which Mallarmé, hearing the chirp of a cricket, sets against the human voice as *une* and *non-decomposée* (one and indivisible) – knows no breaks or interruptions. Animals do not enter language, they are already inside it. Man, instead, by having an infancy, by preceding speech, splits this single language and, in order to speak, has to constitute himself as the subject of language – he has to say *I* (Agamben 1993a: 51-52)

It is important for Agamben to point out that this infancy is not the human developmental stage – the child – and in *On Potentiality* (written only two years after the publication of *Idea of Prose*) he will connote, with Aristotle, the potentiality of the child as 'generic potentiality', that which necessitates an alteration and a becoming to develop into actuality (e.g., the child learning to read and write); 'true' potentiality is instead the 'existing potentiality', that of the poet who can already read and write and has thus the potential to write poems (Agamben 1999: 179; cf. Faulkner 2010)[5]. However, the first connotation keeps creeping up into the various uses of the concept, together with a number of suggestions from a sentimentalized view of childhood, marking thus infancy with a fundamental ambiguity (Faulkner 2010) that probably led in the end to its abandonment. This is precisely what happens in *The Idea of Infancy* where, on the one hand, infancy denotes 'pure potentiality', but, on the other, also clearly refers to a physical and psychological phase, precisely and chronologically tied to language learning.

The ambiguous paradigm of infancy in *The Idea of Infancy* is the axolotl, a neotenic salamander native of Mexico that is used as a key to interpret the process of anthropogenesis. Like the axolotl, who retains larval (or infantile) traits in

[5] In *Bartleby* (1999: 246-247) Agamben uses Avicenna's metaphor of writing to illustrate the various levels of potentiality: "There is a potentiality (which he calls material) that resembles the condition of a child who may certainly one day learn to write but does not yet know anything about writing. Then there is a potentiality (which he calls possible) that belongs to the child who has begun to write with pen and ink and knows how to form the first letters. And there is, finally, a complete or perfect potentiality that belongs to the scribe who is in full possession of the art of writing in the moment in which he does not write (*potential scriptoris perfecti in arte sua, cum non scripserit*)".

adulthood, perhaps "man did not evolve from individual adults but from the young of a primate which, like the axolotl, had prematurely acquired the capacity for reproduction" (Agamben 1995: 96). This 'eternal infancy' of man would explain human potentiality: the human being is "so completely abandoned to its own state of infancy, and so little specialized and so totipotent that it rejects any specific destiny and any determined environment in order to hold onto its immaturity and helplessness" (Agamben 1995: 96). Here Agamben makes use of the theory of neoteny as a key feature in human evolution first proposed in the 1920s and still discussed today in evolutionary debates. The term 'neoteny' (extended youth) was coined in 1884 by the German zoologist Julius Kollmann (1834-1918) precisely to describe the axolotl, but it was applied to human evolution and popularized by the Dutch anatomist Louis (Lodewijk) Bolk in the 1920s in a series of papers which culminated in the 1926 pamphlet *Das Problem der Menschwerdung* (*The Problem of Hominization*). It is in this text that one finds Bolk's famous definition that also Agamben quotes (without quotation marks): "Man, in his bodily development, is a primate fetus that has become sexually mature" (Bolk 1926: 8).

The evolutionary advantages of neoteny rest on the fact that, by slowing down growth and extending the childhood phase, the organism indefinitely prolongs the phase of learning that guarantees heightened receptiveness, mental flexibility and plasticity of behavior (i.e., its *potentiality*), and it is obvious why this hypothesis was and is able to exert so much fascination, especially on philosophers like Agamben. It is paradoxical, however, as Sergei Prozorov points out (2014: 73), that the example Agamben chooses to illustrate the exclusively human phenomenon of infancy belongs to the animal realm. In fact, the phenomenon of retarded development is common in nature (Gould 1996: 148), and the risk that the proponents of this hypothesis run, including Agamben, is to build upon it a teleological construct that sees neoteny as the peak of a pyramid culminating in the human species (Mazzeo 2014: 120).

As contemporary supporters of the neoteny hypothesis remark, humans also present peramorphic (i.e., non-pedomorphic, non-neotenic) traits, such as large noses and long legs, so only some juvenile traits are retained while others are relinquished; neoteny is thus not an all-or-nothing hypothesis and does not explain hominization as such (Gould 1977: 364-65). More disturbingly, these supporters, such as American biologist and zoologist Stephen Jay Gould, must distance themselves from the ideological distortions that Bolk impressed on the neoteny hypothesis: in line with some racial theories of the 1920s, Bolk used neoteny to 'rank' human races from the least neotenic (black Africans) to the most neotenic (white Western Europeans), whereby the degree of neoteny also expressed a racial hierarchy (black Africans as inferior – more apish, 'less human' – and white Europeans as superior) (Bolk 1926: 38; Bolk 1929: 25-27). Gould underlines Bolk's racist intellectual dishonesty in ranking white Europeans at the top, since, from a purely anatomical

point of view, Asians and not Western Europeans are the most neotenic, and women are more neotenic than men (Gould 1977: 358-59; Gould 1996: 149-50). The neoteny hypothesis as a racist apparatus, moreover, was not an epiphenomenon of the 'racist' 1920s, but is still present and actual: for example, in the 1970s, precisely when Agamben was developing his theory of infancy, the German-born British psychologist Hans Jürgen Eysenck (1971: 1973) proposed again a neotenic argument to justify the inferiority of black people (cf. Gould 1996: 150).

Finally, neoteny in animals is also one of the major factors in domestication, *which is the biopolitical apparatus par excellence*[6]: juvenile behaviors and characters are selected in order to domesticate more easily the species, since young animals are less aggressive and more easily manageable. Neoteny – and infancy with it – is therefore just another apparatus in what Agamben will later call the 'anthropological machine', just another stick to draw divisions and separations along racist, sexist and speciesist lines. The later notion of potentiality will divest itself of many of the ambiguities of infancy, but it will retain nonetheless a logocentric and anthropocentric bias which strongly limits its efficacy in biopolitical discourses. Though Agamben from the very beginning freely (albeit cursorily) acknowledges the intrinsic *violence* of human *potenza* (as potential, potency and power) – as at the end of *Language and Death*, where he blames for the violence of human action its lack of (biological) foundation (Agamben 1991: 105-106)[7], or in *Experimentum linguae*, where he blames the original split in language (Agamben 1993a: 7)[8] – he will have to take a

[6] The complex of techniques and knowledge (or power-knowledge) deployed to achieve the subjugation of bodies and the control of populations that characterizes biopower is what defines, first and foremost (both chronologically and conceptually), the human domestication of animals, which can therefore be considered the *ur-form* of biopower. This is already evident in the Foucauldian paradigm of 'pastoral power': the image of the good shepherd caring for its flock and tending to all its needs from birth to death not only unveils the essence of biopower (where 'care' is a function of domination), but also clearly spells out the material and historical origins of this form of power. That traditional biopolitical thinkers from Foucault to Agamben and beyond did not focus on these origins is due again to the anthropocentric bias of this tradition. On this point see, among many others, Wadiwel 2015.

[7] "Violence is not something like an originary biological fact that man is forced to assume and regulate in his own praxis through sacrificial institution; rather it is the very ungroundedness of human action (which the sacrificial mythologeme hopes to cure) that constitutes the violent character (that is, *contra naturam*, according to the Latin meaning of the word) of sacrifice. All human action, inasmuch as it is not naturally grounded but must construct its own foundation, is, according to the sacrificial mythologeme, violent. And it is this sacred violence that sacrifice presupposes in order to repeat it and regulate it within its own structure. The unnaturalness of human violence – without common measure with respect to natural violence – is a historical product of man, and as such it is implicit in the very conception of the relation between nature and culture, between living being and logos, where man grounds his own humanity. *The foundation of violence is the violence of the foundation*".

[8] "The double articulation of language and speech seems, therefore, to constitute the specific structure of human language. Only from this can be derived the true meaning of that opposition of *dynamis* and *energeia*, of potency and act, which Aristotle's thought has bequeathed to philosophy and Western science. Potency – or knowledge – is the specifically human faculty of connectedness as lack; and

much more radical step to evade the Scylla and Charybdis of logocentrism and anthropocentrism that keep threatening to engulf his soteriological proposal.

3. OUTSIDE OF BEING

Agamben's 'biopolitical turn' of the early 1990s forced him to reconsider his anthropocentric bias and to distance himself (at least partially) from his previous logocentrism, since in biopolitics political life becomes increasingly indistinguishable from the (animal) life of the body and (human) animality takes thus a radically new political role. In biopolitics, the clear and neat Heideggerian 'abyss' separating human and nonhuman animals – precisely via the concept of potentiality – becomes more and more blurred and murky, and this also meant for Agamben a rethinking or refashioning of the concept of potential.

This rethinking begins at least with the chapter *Potentiality and Law* of *Homo Sacer*, where the Aristotelian analysis of potentiality is said to provide nothing less than the 'paradigm of sovereignty' to Western philosophy:

> For the sovereign ban, which applies to the exception in no longer applying, corresponds to the structure of potentiality, which maintains itself in relation to actuality precisely through its ability not to be. Potentiality (in its double appearance as potentiality to and as potentiality not to) is that through which Being founds itself *sovereignly*, which is to say, without anything preceding or determining it (*superiorem non recognoscens*) other than its own ability not to be. And an act is sovereign when it realizes itself by simply taking away its own potentiality not to be, letting itself be, giving itself to itself (Agamben 1998: 46, emphasis in the original).

In this sense, "potentiality and actuality are simply the two faces of the sovereign self-grounding of Being" (Agamben 1998: 47), they build up the ontological structure that characterizes Western metaphysics. Heidegger (1995a) had already claimed that the Aristotelian subjection of potentiality to actuality had marked the entire history of metaphysics by determining its fundamental ontology; but Agamben takes here a step further: it is not the subjection of one to the other, but rather the very split of Being into potentiality and actuality that constitutes the structure of metaphysics. When he calls here for a radical rethinking of the relation between potentiality and actuality and for a new ontology of potentiality, therefore, Agamben points precisely "beyond this relation" (Agamben 1998: 44):

> one must think the existence of potentiality without any relation to Being in the form of actuality – not even in the extreme form of the ban and the potentiality not to be,

language, in its split between language and speech, structurally contains this connectedness, is nothing other than this connectedness. Man does not merely know nor merely speak; he is neither *Homo sapiens* nor *Homo loquens*, but *Homo sapiens loquendi*, and this entwinement constitutes the way in which the West has understood itself and laid the foundation for both its knowledge and its skills. The unprecedented violence of human power has its deepest roots in this structure of language".

> and of actuality as the fulfillment and manifestation of potentiality – and think the existence of potentiality even without any relation to being in the form of the gift of the self and of letting be. This, however, implies nothing less than thinking ontology and politics beyond every figure of relation, beyond even the limit relation that is the sovereign ban (Agamben 1998: 47).

Since, as we have seen, the opposition of potential and act originates from the double articulation of language into *langue* and *parole*, language itself is caught in the same *sovereign* logic:

> Language as the pure potentiality to signify, withdrawing itself from every concrete instance of speech, divides the linguistic from the nonlinguistic and allows for the opening of areas of meaningful speech in which certain terms correspond to certain denotations. Language is the sovereign who, in a permanent state of exception, declares that there is nothing outside language and that language is always beyond itself. The particular structure of law has its foundation in this presuppositional structure of human language. It expresses the bond of inclusive exclusion to which a thing is subject because of the fact of being in language, of being named. To speak [*dire*] is, in this sense, always to "speak the law," *ius dicere* (Agamben 1998: 21).

This anthropocentric logocentrism of human potential comes increasingly under fire in Agamben's biopolitical critique precisely because it ultimately constitutes the ontological frame of Western metaphysics from which his soteriology seeks a messianic way out. So, just like the critique of operativity points to a new ontology of potentiality beyond the sovereign split/relation between potentiality and actuality, also the critique of language points to a new 'use' beyond its communicative and signifying – that is, sovereign – structure (cf. Salzani 2015). The end of the parable begun in *Infancy and History* and especially *Language and Death* with the analysis of human language in contraposition to animal 'voice', where it was argued that there is no 'human voice' "as the chirp is the voice of the cricket or the bray is the voice of the donkey" (Agamben 1993a: 3), is the conclusion of *The Sacrament of Language*, where Agamben writes:

> It is perhaps time to call into question the prestige that language has enjoyed and continues to enjoy in our culture, as a tool of incomparable potency, efficacy, and beauty. And yet, considered in itself, it is no more beautiful than birdsong, no more efficacious than the signals insects exchange, no more powerful than the roar with which the lion asserts his dominion (Agamben 2011: 71).

What William Watkin calls "Agamben's turn against language" (2014: 249) is his later emphasis on the fact that language as well is but a historical contingency emanating from a now-exhausted metaphysical tradition, that language as well is ultimately a 'signature' (Watking 2014: 249) of Western metaphysical anthropocentrism (and humanism[9]).

[9] On the 'human' itself as signature, cf. Salzani 2019.

It can be and has been argued (especially Castanò 2018; also e.g. Prozorov 2014 and Colebrook and Maxwell 2016) that the overcoming of the metaphysical split between *dynamis* and *energeia* and between *langue* and *parole* (as also between voice and *logos* and all the other dichotomies generated by this split), which endows Western ontology with its deadly negativity, has always been Agamben's agenda and the goal of his messianic philosophy. Therefore, a substantial continuity should be seen beneath the superficial 'turn' that biopolitics impressed upon his thought, and the apparent discontinuity between his anthropocentric/logocentric and non- (or less) anthropocentric/logocentric phases should be toned down. However, it is only in *The Open* that an explicit 'way out' from the negative deadlock of anthropocentric metaphysics is concretely named: if "potentiality and actuality are simply the two faces of the sovereign self-grounding of Being" (Agamben 1998: 47), then Being is the name itself of Western metaphysics, and the only way out is 'Outside of Being'. This is of course the title of the last chapter of *The Open*, and it is here that a proper anti-metaphysical and post-anthropocentric strategy should be sought.

The core of *The Open* is devoted to a reading of Heidegger's take on animality which basically rehearses Agamben's own anthropocentric theory of potentiality. As it is well known, in *The Fundamental Concepts of Metaphysics* (1995b) Heidegger adopted Jakob von Uexküll's notion of *Umwelt* as the species-specific, spatio-temporal, subjective reference frame of animal life, which ultimately cages animality within a limited set of possibilities, determined by what Uexküll called "carriers of significance" and Heidegger re-named "disinhibitors". Heidegger called "captivation" (*Benommenheit*) the animal's limited and deterministic relation with its disinhibitors, and it is the impossibility to escape the limits of its captivation that constitutes the animal's 'poverty in world". The *Dasein*, to the contrary, experiences in profound boredom "the disconcealing of the originary possibilitization (that is, pure potentiality) in the suspension and withholding of all concrete and specific possibilities" (Agamben 2004: 67). For Heidegger,

> [w]hat appears for the first time as such in the deactivation [...] of possibility, then, is *the very origin of potentiality* – and with it, of Dasein, that is, the being which exists in the form of potentiality-for-being [*poter-essere*]. But precisely for this reason, this potentiality or originary possibilitization constitutively has the form of a potential-not-to [*potenza-di-non*], of an impotentiality, insofar as it is *able to* [*può*] only in beginning from a *being able not to* [*poter non*], that is, from a deactivation of single, specific, factical possibilities (Agamben 2004: 67).

This is basically the form that Agamben's own theory of potentiality had taken until then, but in *The Open* it is presented as the culmination of the metaphysical tradition: excluding animal life from potentialities and freedom represents the core workings of the anthropological machine. Agamben's trademark call for a *désoeuvrement* of metaphysical machines and apparatuses implies here a deposition of his own anthropocentric philosophy of potentiality.

Instead of listening, with Heidegger, to Being's self-disclosure in language, Agamben evokes thus an exit from Being itself based on the very deposition of language and/as *logos*. The chapter *Outside of Being* opens in fact with an epigraph taken from Furio Jesi's *Esoterismo e linguaggio mitologico* (*Esotericism and Mythological Language*, 1976): "Esotericism means: the articulation of modalities of non-knowledge". What interests Agamben here, as it clearly emerges from an essay on Jesi originally published in 1999, is the self-expropriation and self-abolition Jesi identified in Rilke's esotericism as "modalities of non-knowledge" (Agamben 2019). *Outside of Being* revolves in fact around a definitive "farewell to the *logos* and to its own history" (Agamben 2004: 90) that Agamben calls *ignoscenza*, a neologism he coins from the Latin verb *ignoscere*, which is at the root of "ignorance" (Italian: *ignoranza*), but that in Latin means instead "to forgive". The English translator choses to render it as 'a-knowledge', pointing out, however, that it should best be understood as a sort of 'forgetful forgiveness' (Agamben 2004: 99n3). The *désoeuvrement* of the anthropological machine as farewell to *logos* and a-knowledge, Agamben writes, "means in this sense not simply to let something be, but to leave something outside of being, to render it unsavable" (Agamben 2004: 91). "[O]nly with man can there be something like [B]eing, and beings become accessible and manifest" (Agamben 2004: 91), so bidding farewell to the *logos* and its permanent state of exception means to take leave of Being and knowledge:

> The zone of nonknowledge – or of a-knowledge – that is at issue here, Agamben writes, is beyond both knowing and not knowing, beyond both disconcealing and concealing, beyond both being and the nothing. But what is thus left to be outside of being is not thereby negated or taken away; it is not, for this reason, inexistent. It is an existing, real thing that has gone beyond the difference between being and beings (Agamben 2004: 91-92).

It is admittedly not very clear what this exit from Being would concretely involve – hence the criticisms, like those of Krzysztof Ziarek (2008) or Matthew Chrulew (2012), that the power relations between humans and animals in Agamben's scheme would ultimately remain unchanged. The jamming of the anthropological machine and the deposition of the human-animal divide would not destroy the terms of the dichotomy – this is precisely the point of Agamben's notion of *désoeuvrement* – but would de-activate their functions and thereby open them to a new 'use', which cannot however be foreseen and foreordained. So one cannot tell in advance what a new 'use' of humanity and animality would or could look like. The important point, however, is that the old use – the discourse of Being and/as anthropocentrism – would be deposed: the animal, Agamben writes, insofar as "knows neither beings nor nonbeings, neither open nor closed, it is outside of being; it is outside in an exteriority more external than any open, and inside in an intimacy more internal than any closedness. To let the animal be would then mean: to let it

be *outside of being*" (Agamben 2004: 91). Likewise, to le 'Man' be outside of Being would mean the deposition of anthropocentrism itself.

What this all means for a philosophy of potentiality is sketched out or hinted at in the epilogue to *The Use of Bodies*, the final volume of the project *Homo Sacer*, titled *Toward a Theory of Destituent Potential*. The concept of destituent potential (*potenza destituente*) is the attempt to fulfill the task Agamben had set for himself twenty years before in the chapter *Potentiality and Law* of *Homo Sacer* (which is in fact extensively quoted: 2016: 267-68): that of thinking potential beyond any relation to act and actuality. To this end, in *The Use of Bodies* Agamben recurs to the notion of 'contact' as developed by Giorgio Colli: the 'metaphysical interstice' or the moment in which two entities are separated only by a void of representation. "In contact," Colli wrote, "two points are in contact in the limited sense that between them there is nothing: contact is the indication of a representative nothing, which nevertheless is a certain nothing, because what it is not (its representative outline) gives it a spatio-temporal arrangement" (Colli qtd. in Agamben 2016: 237). So, for Agamben, destituent potential is a potential

> that is capable of always deposing ontological-political relations in order to cause a contact [...] to appear between their elements. Contact is not a point of tangency nor a quid or a substance in which two elements communicate: it is defined only by an absence of representation, only by a caesura. Where a relation is rendered destitute and interrupted, its elements are in this sense in contact, because the absence of every relation is exhibited between them (Agamben 2016: 272).

A life no longer divided from itself and finally appearing in its free and intact form (Agamben 2016: 272-273) would be, as Claire Colebrook and Jason Maxwell propose (2016: 103), 'mere life' as "a life that is perfect potentiality because it need not act in order to be what it is – as the zone of a new ethics beyond humanism and recognition"[10]. Whether this is enough for a philosophy of potential to genuinely overcome anthropocentrism remains an open question.

Ultimately, the frame of Agamben's thought remained consistent throughout his long and rich career, and all successive recalibrations never removed the human from the center of his work (cf. Colebrook and Maxwell 2016: 167). That is to say that he did not really follow up on the clear anthropo*de*centrism of *Outside of Being* and soon 'relapsed' into his more traditional (and more anthropocentric) vocabulary and categories. By 'abandoning' his work for other to continue it (Agamben 2016: xiii), however, Agamben has assigned a clear task to the coming philosophy,

[10] Prozorov (2014: 152-153) notes that the distinction between *zoé* and *bios* makes sense only for human life, and the same holds for the notion of 'bare life', which is precisely the product of the inclusionary exclusion of *zoé* from *bios* and is thus 'species-specific' (Shukin 2009: 10). However, as, among others, Cary Wolfe (2013: 46) remarks, in biopolitics the animal becomes "the site of the very ur-form of [the biopolitical] *dispositif* and the face of its most unchecked, nightmarish effects", and thus, Anat Pick (2011: 15) adds, animals "constitute an exemplary 'state of exception' of species sovereignty", where relations of power operate with the fewest obstacles, in their exemplary purity.

that of picking up his demand to bidding farewell to anthropocentrism and ferry philosophy beyond the dire straits of metaphysics at its end: outside of Being.

BIBLIOGRAPHY

Agamben, G. 1991. *Language and Death: The Place of Negativity*. Translated by K. Pinkus and M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1993a. *Infancy and History: The Destruction of Experience*. Translated by L. Heron. London: Verso.

Agamben, G. 1993b. *The Coming Community*. Translated by M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1995. *Idea of Prose*. Translated by M. Sullivan and S. Whitsitt. Albany: SUNY Press.

Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999. *Potentialities: Collected Essays in Philosophy*. Edited and translated, with an introduction, by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 2000. *Means Without End. Notes on Politics*. Translated by V. Binetti and C. Casarino. Minneapolis: University of Minnesota Press.

Agamben, G. 2004. *The Open: Man and Animal*. Translated by K. Attell. Stanford: Stanford University Press.

Agamben, G. 2007. *The Work of Man*. Translated by K. Attell. In *Giorgio Agamben: Sovereignty and Life*, ed. by M. Calarco and S. DeCaroli, Stanford: Stanford University Press, pp. 1-10.

Agamben, G. 2011. *The Sacrament of Language: An Archaeology of the Oath*. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2016. *The Use of Bodies*. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2018. *What Is Real?* Translated by L. Chiesa. Stanford: Stanford University Press.

Agamben, G. 2019. *On the Impossibility of Saying "I": Epistemological Paradigms and Poetic Paradigms in the Work of Furio Jesi*. Translated by Kevin Attell. In «Theory & Event», 22.4, pp. 1047-1057.

Benjamin, W. 1996. *Fate and Character*. In *Selected Writings*, ed. by M. Bullock and M.W. Jennings, vol. 1, 1913-1926. Cambridge: The Belknap Press of Harvard University Press, pp. 201-206.

Bolk, L. 1926. *Das Problem der Menschwerdung*. Jena: Gustav Fischer.

Bolk, L. 1929. *Origin of Racial Characteristics in Man*. In «American Journal of Physical Anthropology», 13.1, pp. 1-28.

Castanò, E. 2018. *Agamben e l'animale: La politica dalla norma all'eccezione*. Aprilia: Novalogos.

Chrulew, M. 2012. *Animals in Biopolitical Theory: Between Agamben and Negri*. In «New Formations», 76, pp. 53-67.

Colebrook, C. and Maxwell J. 2016. *Agamben*. Cambridge: Polity Press.

De la Durantaye, L. 2000. *Agamben's Potential*. In «Diacritics», 30.2, pp. 1-24.

De la Durantaye, L. 2009. *Giorgio Agamben: A Critical Introduction*. Stanford: Stanford University Press.

Eysenck, H.J. 1971. *Race, Intelligence and Education*. London: Temple Smith.

Eysenck, H.J. 1973. *The Inequality of Man*. London: Temple Smith.

Faulkner, J. 2010. *Innocence, Evil, and Human Frailty: Potentiality and the Child in the Writings of Giorgio Agamben*. In «Angelaki», 15.2, pp. 203-219.

Gould, S.J. 1977. *Ontogeny and Phylogeny*. Cambridge: The Belknap Press of Harvard University Press.

Gould, S.J. 1996. *The Mismeasure of Man*. New York: W.W. Norton & Company.

Heidegger, M. 1995a. *Aristotle's Metaphysics Theta 1-3: On the Essence and Actuality of Force*. Translated by W. Brogan and P. Warnek. Bloomington: Indiana University Press.

Heidegger, M. 1995b. *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude*. Translated by W. McNeill and N. Walker. Bloomington: Indiana University Press.

Jesi, F. 1976. *Esoterismo e linguaggio mitologico. Studi su Rainer Maria Rilke*. Firenze: D'Anna.

Mazzeo, M. 2014. *When Less is More: Neoteny and Language*. In «Cahiers Ferdinand de Saussure», 67, pp. 115-130.

Murray, A. 2010. *Giorgio Agamben*. London: Routledge.

Pick, A. 2011. *Creaturely Poetics: Animality and Vulnerability in Literature and Film*. New York: Columbia University Press.

Prozorov, S. 2014. *Agamben and Politics: A Critical Introduction*. Edinburgh: Edinburgh University Press.

Salzani, C. 2015. *Il linguaggio è il sovrano: Agamben e la politica del linguaggio*. In «Rivista italiana di filosofia del linguaggio», 9.1, pp. 268-280.

Salzani, C. 2019. *L'umano come segnatura*. In «I quaderni di poesia», 7: *Lo scrigno delle segnature: lingua e poesia in Giorgio Agamben*, ed. by J. D'Alonzo and L. Dell'Aia, pp. 37-51.

Shukin, N. 2009. *Animal Capital: Rendering Life in Biopolitical Times*. Minneapolis: University of Minnesota Press.

Wadiwel, D. *The War Against Animals*. Amsterdam: Brill.

Watkin, W. 2014. *Agamben and Indifference: A Critical Overview*. London: Rowman and Littlefield.

Wolfe, C. 2013. *Before the Law: Humans and Animals in a Biopolitica Frame*. Chicago: The University of Chicago Press.

Ziarek, K. 2008. *After Humanism: Agamben and Heidegger*. In «The South Atlantic Quarterly», 107.1, pp. 187-209.

Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 87-108
ISSN: 1825-5167

SCENES OF INDIFFERENCE. THE ADDRESSEE OF THE ADVENTURE

ALICE LAGAAY
Design Department
University of Applied Sciences Hamburg
alice.lagaay@haw-hamburg.de

MALTE FABIAN RAUCH
Institute for Philosophy and Art History
DFG Research Project "Cultures of Critique"
Leuphana University Lüneburg
malte_fabian.rauch@leuphana.de

ABSTRACT
The article, born of a dialogue between two thinkers of negativity and the neuter, elaborates Agamben's philosophy of indifference through a series of (dis)connected scenes or thematic episodes. These scenes do not so much describe as perform indifference, insofar as they pursue the same themes through in-different variations. In seeking to critically articulate Agamben's 'archeaology of the subject' by assessing the manner in which Agamben's thought picks up and differs from Foucault and Heidegger as well as the lesser known Salomo Friedlaender/Mynona, the text evokes a range of avenues into deactivation, inoperativity, indifference, and the event. The deliberately performative approach both addresses and seeks to embody the spirit of adventure at work in Agamben's thinking by exploring a plane and practice of thought "below" or beyond surface assumptions of identity and position – where ways of being, forms of life, and modes of thinking and writing attune, and are acquiesced to, as necessarily open and plural. The essay seeks to show how Agamben's attempts to render inoperative the metaphysical determinations of the human as subject are keyed to a specific form of address, an address that can be understood as a response to Jean-Luc Nancy's question "who comes after the subject"?

KEYWORDS
Active/Passive, Aesthetics of Existence, Subjectivity, Anthropogenesis, Creative Indifference, Deactivation, Inoperativity, Event, Form of Life, Freedom, Ways of Being.

Viens, viens, venez, vous ou toi auquel ne saurait convenir l'injonction,
la prière, l'attente.

Maurice Blanchot, *Le Pas au-delà* (Blanchot 1973: 185)

1. PROLOGUE

Whether the ambages (torturous wanderings) that will have constituted this present adventure culminate in tragedy or comedy, or in the elucidation of something at the source of both, in between or beyond the two (Agamben 1999d: 20-21, 132), will perhaps not become clear, if ever it does, until the tale has ended. But it began, or so the story goes, with an encounter between two acquaintances connected at first only by their professed mutual interest in the notion of 'indifference'—already an oxymoron of sorts, it would seem, insofar as the very word 'interest' brings into play a *making*, i.e. constituting of difference which the 'indifferent' would appear to automatically neutralize. Into the scene of this strange predilection came a call: the invitation to contribute to a volume of texts in which an ensemble of addresses would be brought together, responding in manifold ways to the digestion of the 'subject' of Giorgio Agamben's philosophy. Our quest in what is truly an adventure of sorts, since we do not where exactly we are headed, nor yet quite how to get there, is to explore our common interest in the notion of indifference, to contextualise it, but also, to seek to *apply* it (for want of a better word), that is, to find a form best suited to elucidating its resonance in both the contexts of our respective lives and philosophical work. Although the present text is the result of a dialogue in progress, and therefore not complete, we have chosen not to 'perform' it as a dialogue, but rather to present a series of 'scenes'. These scenes, or 'thematic episodes', are held together perhaps less by the dramaturgical arch of reason and logical consequence most habitually associated with academic narration ("firstly, secondly, in conclusion"), but they communicate with each other as dis-connected (and only *thereby* as relatable) vignettes, each describing a theoretical 'region' with its own idiom, vocabularic landscape and horizon of thought. Informed by a sensitivity for the relation between content and form, our text exposes itself willingly as but an exercise in the practice of a language of indifference (one learns to speak by speaking) that necessarily leans into the performative contradiction inherent in seeking to speak in a common *voice*.

Setting out from a shared interest in indifference, our conversation has revolved around certain scenes in Agamben's work where the question of the subject becomes topical. We do not seek to give a comprehensive, synoptic or synthetic account of Agamben's various problematizations of the subject. And we certainly do not wish to offer a general introduction to the notion of indifference (already given in the important study by Watkin 2015). Rather, we propose to revisit certain scenes in Agamben's work that we have found ourselves drawn to in the process of our

unfolding conversation. Questions that have animated our discussion have been: what necessitates Agamben's critique of the subject? Why does the idea of the human and of life—of human life—become so important in his attempt to think about "who comes after the subject", to use Jean-Luc Nancy's poignant phrase?[1] How does Agamben's response to this thought that "comes towards us and calls us forth" differ from those of his interlocutors, such as Foucault, Deleuze and Heidegger? How can we conceive indifference as a form-of-life? And in what ways (or not) does Agamben's thinking relate to that of Salomo Friedlaender, arguably the only philosopher who prior to Agamben thought extensively about the relation between subjectivity, life and indifference? Our hope is that the staging of scenes communicates something of the rhythm of our dialogue, of the pulse and hopefully innovative potential of collective, collaborative thinking and writing—and that this pulsating rhythm of thought, with its flow and interruptions, gaps and repetitions, is responsive to the task of understanding philosophy as a practice in which thinking, that is to say living, is not separate from life. The scenes are indifferent to one another: they suggest no logical progression or chronological succession. They occupy the same empty space, pursue the same theme through in-different variations and can therefore be read in any order. We thus engage in exegesis, reconstruction and argumentation, but above all we seek to open up questions and avenues for future thought narrations, recognitions and, *retrouvailles* of indifferent truth.

2. THE ADVENTURE (A 'PRIMAL' SCENE?)

In 2015, Giorgio Agamben published a slim volume entitled *The Adventure*, a characteristically learned yet playful dérive through the history of philosophy, philology, literature and religion in the course of which he subtly introduces some of the most urgent concerns of his work. Rather than presenting it as an amusing or exciting episode, Agamben seeks to restore a different, perhaps more exigent meaning to the adventure, to consider it as "a specific way of being" (2018: 42). To the extent that it is a particular 'way' of being, distinct, that is, from any other way of being, being on this or any adventure requires that the addressee be in the driving seat: they have to have chosen or acquiesced to the adventure. And yet of course their being open to the adventure means that they are also passive in the sense that the adventure necessarily involves events that happen to them, challenges that befall them, situations that call them to act in response. Agamben explains the active-

[1] The question "Who Comes after the Subject?" was initially posed by Jean-Luc Nancy on the occasion of his invitation to edit an issue of the international review *Topoi*. In the introduction, Nancy writes: "Not only are we not relieved of thinking this some *one* [...] but it is precisely something like this thought that henceforth comes toward us and calls us forth" (Nancy 1991: 5). For a questioning of the 'who' implied in Nancy's question, see Haines and Grattan (2017) biopolitical reframing, *Life After the Subject*.

passive—or, perhaps, archi-passive—stance of the addressee by evoking the manner in which each and every individual must come to know their own rapport to the figures of demon, chance, love, necessity and hope—and how these interrelate with one another.

The book's fourth chapter is dedicated to the notion of "the event", an important concept in twentieth century philosophy but one that had played no dominant role in Agamben's work until this point. In this elaboration, however, it appears as the philosophical key to thinking a way of being designated by the adventure. What is in question here is how the event of the adventure finds its addressee, that is to say, how one becomes involved in the adventure of the event, how one is called upon by it: neither by freely choosing it, nor by merely submitting to a random incident. The modality of the address must somehow move out of this active-passive dualism to allow for a different kind of passivity, an attunement. To approach this modality, Agamben rehearses, on a few dense pages, some central motifs of his thought and glosses Gilles Deleuze's and Martin Heidegger's respective theories of the event. Engaging in a subtle dialogue with these thinkers, Agamben here works towards something that could be understood as a response to Nancy's question about the "some one" who comes after the subject. For the "specific way of being" that is at stake in the adventure concerns precisely the being of its addressee, which in turns is deeply linked to the mode of the address.

Of course, the question "who comes after" can be framed or heard in a multitude of ways – each evoking a different mode of address and pointing to a particular register of difference or indifference. Much of the philosophical interest of the question stems from its problematization of the constraints that grammar here seems to enforce upon thought. As Derrida once put it in response to Nancy: "What we are seeking with the question 'Who?' perhaps no longer stems from grammar, from a relative or interrogative pronoun that always refers back to the grammatical function of subject. How can we get away from this contract between the grammar of the subject or substantive and the ontology of substance or subject?" (Derrida 1991: 101) Beyond the sequentiality of narrative, the purely chronological ("first this happened and then, as a consequence, that...", "first this person arrived on the scene, and then, by chance, there was an encounter..."); and beneath the surface level of semantics that poses the question of the identity of the agent who comes 'after' the other (Bernado's "who's there?"[2], "who—or what—is the being that does the coming after?"), there is the question of intention and of what it means to actively, purposefully pursue (come after) or indeed to be pursued. ("What is the issue that clamors for attention, what is it that haunts you, keeps you up, won't let you rest or ignore it?", and "What or who commands the urgency or grants the right to ignore all duty; what is it that allows you to sleep soundly despite it all?"). Who follows whom, in other words, and what difference does it make which way around it is? And what

[2] Hamlet I, 1.

does any or all of it have to do with the calling—that apparently one either may or may not have—to *philosophize*? ("...nothing either good or bad, but thinking makes it so"[3]).

At first, Agamben recounts Carlo Diano's distinction of form (Platonian *eidos*) and event, where the latter is considered as a singular, concretely situated and embodied experience. What interests Agamben about this understanding is that the 'someone' who is addressed by the event—or the adventure—does not pre-exist it as a stable subject. Rather, Agamben suggests, the order is reversed, such that one could say that "the adventure subjectivizes itself, because happening (*l'avvenire*) to someone in a given place is a constitutive part of it" (Agamben 2015: 68). The decisive questions then become: what kind of being is called upon by the event? How is the truth or even mere facticity of the event discerned? Who is addressed by the event and how? Agamben briefly flags his theory, inspired by Émile Benveniste, that in order to be in the position of the "I" of an address, one must take up the instances of discourse designated by linguistic shifters. Of the address of the adventure, Agamben therefore says: "The adventure, which has called him into speech, is being told by the speech of the one it has called and does not exist before this speech" (Agamben 2015: 70). For Agamben, the event is therefore essentially a linguistic address; yet this address is no mere (contingent) proposition, but the event of language as such, which solicits the speaking being.

To specify the nature of the address, Agamben then turns to Deleuze's notion of the event as sense. As subtly and indirectly as ever, Agamben is here not only citing but also challenging Deleuze. Of course, Deleuze understands the event in opposition to the subject, or even as a pure form of de-subjectivation; but he still has recourse to the notion of the will to specify the address of the event. It is a question, Deleuze asserts, "of attaining this will that the event creates in us" (Deleuze 1990: 148). To will the event means, for him, to be willing "to release its eternal truth, like the fire on which it is fed"; and hence the addressee wills "not exactly what occurs, but something in that which occurs, something yet to come which would be consistent with what occurs [...]" (Deleuze 1990: 149). To become worthy of the event, the addressee must will its release, must will its truth, which for the early Deleuze is a decidedly tragic one: "It is in this sense that the *Amor Fati* is one with the struggle of free men" (Deleuze 1990: 149). After having cited Deleuze's claim that "the event is not what happens (the accident), rather it is, in what happens, the pure expressible that signals and awaits us", Agamben approvingly specifies that the happening of the adventure is not "the subject's free choice; it is not a matter of freedom" (Agamben 2015: 72). And yet, Agamben insists that the Nietzschean doctrine of *amor fati* "is the opposite of an adventure" and one may suspect that this is due to the fact that the will cannot serve as the concept that links the event and its addressee (Agamben 2015: 72). Instead, Agamben writes: "Desiring the event

[3] Hamlet II, 2.

simply means feeling it as one's own, venturing into it, that is, fully meeting its challenge, but without the need for something like a decision. It is only in this way that the event, which as such does not depend on us, becomes an adventure; it becomes ours, or, rather, we become its subjects" (Agamben 2015: 71-72). Not the will, but desire individuates the event. Yet Agamben adds that this desire "is a form of impassivity that knows that events, perfect in themselves, are ultimately indifferent, and that only the individual's acceptance and use of them is important" (Agamben 2015: 74-75). An impassive desire for an indifferent, whatever, event: such is the strange modality—defying the opposition of active and passive—that the address of the adventure takes, according to Agamben[4].

From this exceedingly indirect criticism of Deleuze, Agamben goes on to discuss Heidegger's understanding of the event. He briefly glosses the well-known semantic ambiguity that Heidegger claims to be present in the German *Ereignis*, insofar as Heidegger relates this noun back to the verb *er-eignen*, to appropriate. For him, the very name 'event' amounts to a crystallization of what he once called "the most difficult thought of philosophy" (Heidegger 1991: I:20): the thought of being as time, or being without any foundation in any particular beings. But Agamben here puts the notorious question of time to one side and focuses, again, on how Heidegger understands the 'addressee' of the event, that is to say, on his comments regarding the mutual appropriation of being and event. The event, Heidegger asserts, "appropriates man and Being to their essential togetherness" (Heidegger 1969: 38). Radically recasting Heidegger's understanding of this reciprocity (which involves a criticism we will pick up on later), Agamben argues that what is at stake here is the becoming human of the human, the event of anthropogenesis: "The living being becomes human—it becomes Dasein—at the moment when and to the extent that Being happens to him; the event is, at the same time, anthropogenetic and ontogenetic; it coincides with man's becoming a speaker as well as with the happening of Being to speech and of speech to Being" (Agamben 2015: 77-78). How can, one may ask, ontology and anthropogenesis be so easily conflated? How can ontology, as Agamben puts it in *The Use of Bodies*, be "the memory and repetition" of anthropogenesis (2016: 111)? How can this be anything but a metaphysical reduction of ontology to anthropology? And yet, the preceding discussion indicates that what is at stake is precisely the opposite, namely that one think the address of an unknown addressee who has *suspended the confines of the sub-iectum*. Who, then, is the addressee of this adventure? Who desires, impassively, the event of

[4] It would be necessary to compare and contrast this form impassive desire with Blanchot's deconstruction of the active-passive opposition in terms of *patience*: "Patience opens me entirely, all the way to a passivity which is the *pas* ('not') in the utterly passive, and which has therefore abandoned the level of life where *passive* would simply be the opposite of *active*. In this way we fall outside inertia; the inert thing which submits without reacting, becomes as foreign as its corollary, vital spontaneity, purely autonomous activity" (Blanchot 1982: 13-14).

anthropogenesis? And why does Agamben—despite all the anti-, trans- and post-humanisms at work in contemporary theory—hold on to the name of "the human"?

3. ARCHAEOLOGY OF THE SUBJECT

Giorgio Agamben's first published book, *The Man Without Content*, develops a critical analysis of the place of contemporary art through a sustained interrogation of artistic subjectivity. Read from today's vantage point, one can trace how Agamben here approaches some of the questions that will become vital in his subsequent work. For what appears as a 'regional' analysis of artistic subjectivity is, actually, a problematization of the notion of the subject as such and the attempt to outline a different understanding of human life and doing. The diagnosis from which Agamben sets out is the fact that art has been predominantly understood in terms of aesthetics, be it through the lens of art criticism or, philosophically, in relation to a theory of aesthetic judgement. According to Agamben, this privileging of the spectator is far from innocent, inasmuch as it is based on a radical split, which is experienced by the artist as fatal: "To the increasing innocence of the spectator's experience in front of the beautiful object corresponds the increasing danger inherent in the artist's experience, for whom art's *promesse de bonheur* becomes the poison that contaminates and destroys his existence" (Agamben 1991a: 5). While he does not yet employ this terminology, Agamben thus analyzes aesthetics as something that he will later refer to as an "apparatus": a mechanism that becomes operative by division and exclusion. This is because both positions—artist and spectator—can only be articulated through a laceration of the cultural fabric of transmission: the spectator judges the artwork in a disinterested fashion, whereas the artist feels cut off from the audience and rebels against this dire state as the fate of art. The artists Agamben has in mind are those who expressed a radical negativity in relation to art, such as Antonin Artaud, who called for a destruction of the disinterested experience of art. Agamben's exigent undertaking is to align himself with these artistic attacks on aesthetics, while trying, at the same time, to move beyond their purely destructive gesture[5].

Faced with the predicament of aesthetics, Agamben calls for a "destruction" of aesthetics in the technical, Heideggerian sense of dismantling the historical categories that are constitutive of the aesthetic regime. For Heidegger, the destruction of the history of ontology meant, first and foremost, calling the Cartesian subject into question, which has been the "*fundamentum inconcussum*" of modern philosophy—the very source of the mathematical projection of nature, of the dualism of subjectivity and objectivity, of the privileging of self-presence and of the oblivion of

[5] Here we focus solely on how *The Man Without Content* sets up Agamben's engagement with the notion of subjectivity. The intricate structure of this much neglected book remains unexplored here. For a more detailed analysis, see Rauch 2020.

being-in-the-world (c.f. Heidegger 2001: 46). In a familiar yet very distinct way, Agamben argues that the regime of aesthetics is premised on the understanding of the artist as a subject. According to Agamben, one might say, aesthetics captures the artist in the position of the subject and it is this capture that Agamben's first book is meant to undo. Once culture is torn apart, Agamben argues, the artist is bound to take the position of the free, creative subject that elevates itself above transmitted contents: "The artist then experiences a radical tearing or split, by which the inert world of contents in their indifferent, prosaic objectivity goes to one side, and to the other the free subjectivity of the artistic principle, which soars above the contents as over an immense repository of materials that it can evoke or reject at will" (Agamben 1991a: 35). Here, artistic freedom appears as premised on a radical split from the audience and all transmitted contents.

Historically, the trajectory Agamben refers to is the process by means of which art becomes autonomous. Far from portraying this as a history of emancipation, however, Agamben insists that the emergence of the autonomous artist is, in truth, tantamount to the emergence of an eminently destructive figure, inextricably tied to the termination of Western metaphysics in nihilism. For, once the artist is defined solely by her subjective freedom, this freedom becomes bare, worthless, purely formal and hence purely negative. One may object to this genealogy on the grounds that art is thus finally set free from religious and cultic constraints. But Agamben is not contesting this and certainly does not advocate the 'goodness' or 'innocence' of a pre-modern state of art. What he is suggesting, rather, is that this freedom takes a strangely limited form, insofar as its sole content is the negation of what has been culturally transmitted. Henceforth, the artist is a subject "without content", since she is bound to invent ceaselessly and since the only path of such ceaseless invention is the negation of anything given, ultimately the negation of transmissibility as such: "Artistic subjectivity without content is now the pure force of negation that everywhere and at all times affirms only itself as absolute freedom that mirrors itself in pure self-consciousness" (Agamben 1991a: 56). Thus, according to Agamben, the fate of art is deeply intertwined with the operative categories of modern subjectivity. And much of Agamben's early work is informed by the attempt to offer a different account of artistic doing and a different 'negative' modality than the destruction of transmissibility.

The key of Agamben's archaeological argument is that "the crisis of art in our time is, in reality, a crisis of poetry, of *poiesis*", which he understands in Heideggerian terms as the "very name of man's *doing*, of that pro-ductive action of which artistic doing is only a privileged example" (Agamben 1991a: 59). Cast in this perspective, the anti-aesthetic endeavours of artists such as Duchamp appear as symptoms of a crisis in the regime of human making. Agamben tries to flesh this out through the contrast between praxis, which is defined by the "the will that finds its immediate expression in an act", and *poiesis*, which is marked by the passive

"experience of production into presence, the fact that something passed from non-being to being, from concealment into the full light of the work" (Agamben 1991a: 69). In a few tightly argued pages, Agamben follows the relation of *praxis*, *poiesis* and *ergon* from antiquity to modernity, arguing that the idea of human doing has been increasingly understood in terms of praxis. Eventually, in modernity, Agamben suggests, all human doing is understood as work and the human is understood as "the living being (*animal*) that works (*laborans*) and, in work, produces himself and ensures his dominion over the earth" (Agamben 1991a: 70-71). Hence Agamben's dire diagnosis: "The point of arrival of Western aesthetics is a metaphysics of the will, that is, of life understood as energy and creative impulse" (Agamben 1991a: 72). What is eclipsed in modernity is, then, an idea of human life that allows for *poetic* passivity, since all human doing is understood in terms of the subject's active will. And yet, what arguably remains unanswered in this sketch is the role of philosophy—which assigns the truth to art while its own place remains unsolicited—as well as the addressee of Agamben's analysis—who seems to stand uneasily between art and philosophy. In short, what remains unanswered in Agamben's earliest deconstruction of the metaphysics of subjectivity is the actual 'subject' of this address: "Who Comes after the Subject?"

Strikingly, in some of his most recent essays, Agamben returns to many of the concerns he raised in his very first book. Tracing once more the rise of the aesthetic regime, Agamben notes that: "[A]rt has withdrawn from the sphere of activities that have their *energeia* outside themselves, in a work, and has been transposed into the circle of those activities that, like knowing or praxis, have their *energeia*, their being-at-work, in themselves" (Agamben 2019: 7). Yet, if one compares these analyses with *The Man Without Content*, it becomes clear that the decisive element that has been added to the analysis is a notion that Agamben has framed variously as inoperativity, deactivation and indifference. Arguing against the metaphysical signature of art as "creation"—traces of which he finds even in Gilles Deleuze's work—Agamben notes that: "Politics and art are neither tasks nor simply 'works': they name, rather, the dimension in which linguistic and bodily, material and immaterial, biological and social operations are deactivated and contemplated as such" (Agamben 2019: 27). In *The Man Without Content*, Agamben's analysis remained haunted by the shadow of an idea of "the original space of man"[6] that could be re-

[6] See especially the following passage, where art is essentially identified with an understanding of the sacred that recalls Heidegger's highly problematic locutions on the topic but also stands firmly in the tradition of French thought reaching from Marcel Mauss to Georges Bataille—i.e., exactly that tradition which Agamben will later criticize in the harshest terms: "[A]rt is the gift of the original space of man, *architectonics* par excellence. Just as all other mythic-traditional systems celebrate rituals and festivals to interrupt the homogeneity of profane time and, reactualizing the original mythic time, to allow man to become again the contemporary of the gods and to reattain the primordial dimension of creation, so in the work of art the *continuum* of linear time is broken, and man recovers, between past and future, his present space" (Agamben 1991a: 101-102).

appropriated, and it is precisely against these metaphysical residues that Agamben develops his understanding of something we may call an ethics of inoperativity. Accordingly, the section devoted to ethics in *The Coming Community* commences almost with a reversal of the claim found in Agamben's first book: "The fact that must constitute the point of departure for any discourse on ethics is that there is no essence, no historical or spiritual vocation, no biological destiny that humans must enact or realize" (Agamben 2009: 43). Instead of an original space, the human ethos here turns into a question of potentiality and inoperativity. What is "proper" to human life is the absence of anything proper, any essence or origin. Reiner Schürmann has aptly characterized such a severance of action from metaphysical categories as "a life 'without why'", which means, essentially, "a life without a goal, without *telos*" (Schürmann 1987: 10)[7]. Yet, while Agamben endorses the idea of a "without why", he has always remained critical of the various anti-foundational philosophies of difference and their elaboration of non-finality in terms of scatter, dissemination, or an irreducible manifoldness.

4. ENCOUNTERS: FOUCAULT AND HEIDEGGER

In *The Use of Bodies*, the un-finished conclusion of the *Homo Sacer* series, Agamben weaves together several threads of his work. As in his previous analyses, the subject appears as a central category in the originary fracture between being and language that pervades the history of philosophy in its entirety: "Western ontology is from the very beginning articulated and run through by scissions and caesurae, which divide and coordinate in being subject (*hypokeimenon*) and essence (*ousia*), primary substances and secondary substances, essence and existence, potential and act, and only a preliminary interrogation of these caesurae can allow for the comprehension of the problem that we call 'subject'" (Agamben 2016: 105). Throughout his work, Agamben offers a range of archaeologies of subjectivity—or of processes of subjectivation—and attempts to outline a non-exclusionary understanding of human life in contradistinction to these. One can see the germs of this analysis in *Language and Death*, where the human can only become a speaking being by suppressing the animal voice: "Man is that living being who removes himself and preserves himself at the same time—as unspeakable—in language; negativity is the human means of having language" (Agamben 1991: 85). And one can of course observe a familiar strategy in *Remnants*, where the subject is considered as "a field of forces always already traversed by the incandescent and historically determined currents of potentiality and impotentiality, of being able not to be and not being able not to be" (Agamben 1999b: 147-148). In these differently inflected archaeologies

[7] The "without why" is borrowed from Heidegger, who, in turn, borrows the phrase from Meister Eckhart via Angelus Silesius (Heidegger 1997: 57-58). Also see Schürmann's important gloss (Schürmann 2001: 61-62).

of the subject, the human is always captured in the position of a sub-iectum, which in turn is always articulated on the basis of scissions. Given this persistent problematization of the subject, it is no coincidence that the two Intermezzos in *The Use of Bodies* are dedicated to Heidegger and Foucault's responses to the question 'who comes after the subject'. In these strategically positioned excursions, Agamben takes issue with the two key references for his project on the grounds that their attempts remain entrapped in circles of metaphysical divisions and dualisms.

In relation to Foucault's "aesthetics of existence", Agamben sets out by challenging Pierre Hadot's reading, since the latter "does not succeed in detaching himself from a conception of the subject as transcendent with respect to its life and actions, and for this reason, he conceives the Foucauldian paradigm of life as work of art according to the common representation of a subject-author who shapes his work as an object external to him" (Agamben 2016: 100). According to Agamben, however, the crucial gesture of Foucault's late idea of "the care of the self" is that it eliminates any such externalism; in fact, "this care is nothing but the process through which the subject constitutes itself" (Agamben 2016: 104). Here, the subject has no priority in the sense of a constitutive or foundational function; it is thought in purely relational terms. Foucault speaks of the "etho-poetic" function of the various technologies through which individuals can attempt "to question their own conduct, to watch over and give shape to it" (Foucault 1990: 13). Hence, insofar as the self coincides with this relational process, it "can never be posited as subject of the relationship nor be identified with the subject that has been constituted in it. It can only constitute itself as constituent but never identify itself with what it has constituted" (Agamben 2016: 105). In an essay dedicated to the late Foucault, Reiner Schürmann coins the helpful concept of "anarchist subject" to describe this form of auto-constitution that tries to skirt all essentialist foundations. The anarchist subject, Schürmann argues, "constitutes itself in micro-interventions aimed at resurgent patterns of subjection and objectification" (Schürmann 2019: 29). And yet, although the Foucauldian self thus seems to be deprived of its transcendental function, it turns, Agamben argues, into a hypostasis once it is conceived *as constituted* within the process. There is, therefore, a non-coincidence between constituted and constitutive elements, between self and subject in Foucault's work, which the insistence on process and relationality cannot solve: "As constituent power and constituted power, the relation with the self and the subject are simultaneously transcendent and immanent to one another" (Agamben 2016: 106). What Agamben seeks to retain from Foucault is the idea of thinking the life of the self immanently, yet he deems it necessary to skirt the aporia of auto-constitution that led Foucault into this impasse.

Agamben's confrontation with Heidegger also turns on the question of coincidence and co-belonging, but the focus of his analysis shifts. Returning to the investigations begun in *Language and Death* and worked out in *The Open*, Agamben

challenges Heidegger's attempt to propose a fundamental ontology of Dasein that would have detached itself from the metaphysics of subjectivity. Essentially, Agamben takes Heidegger to task for being unable to think "the relation between the living human being and Da-sein" (Agamben 2016: 179). Pointing to Heidegger's frequent comments about the co-belonging yet non-coincidence of the human and Dasein, Agamben argues that what remains unthought in Heidegger is the notion of life, of the living human being, which Heidegger must presuppose and repress at once. What Heidegger understands as the opening of the human to the clearance of being appears, to Agamben, precisely as the exclusion of animality. This is an argument that Agamben first advanced in relation to Heidegger's suppression of the animal voice in *Language and Death* and then extended into a general scrutiny of Heidegger's treatment of animal life in *The Open.* In these texts, Agamben's resistance towards Heidegger's understanding of Dasein insists—from different angels—on the fact that Heidegger's conceptualization of disclosure is permeated by the disavowal, silencing and suppression of animal life. And to the degree that the 'opening' of the human world is predicated on the annihilation of animality, "being is traversed by the nothing"[8]. Here, Heidegger's strategy to elaborate an anti-foundational notion of Dasein is essentially taken to be held captive by the exclusion of life.

This long-standing engagement with Heidegger is at play when Agamben, in *The Use of Bodies*, claims that: "The 'there' of Dasein takes place in the non-place of the living human being" (Agamben 2016: 180-181). Agamben is obviously aware of Heidegger's insistence, throughout his work, that Dasein cannot be thought of as an 'addition' to animal life, lest the exposition would fall back into a metaphysical understanding of the human as a biological substance. Yet, if Heidegger refuses, for this very reason, to grant the status of Dasein to the fact of mere living, this cannot hide the fact that such an understanding of mere living remains the unarticulated and irreducible condition of his fundamental ontology: "[I]f the human being is truly such only when, in becoming Dasein, it is opened to Being, if the human being is essentially such only when 'it is the clearing of Being', this means that there is before or beneath it a non-human being that can or must be transformed into Dasein" (Agamben 2016: 181). To think the human as 'the open'. Agamben

[8] "From the beginning, being is traversed by the nothing; the Lichtung is also originarily Nichtung, because the world has become open for man only through the interruption and nihilation of the living being's relationship with its disinhibitor" (Agamben 2004: 69-70). This is strictly analogous to the argument found in *Language and Death*: "And if metaphysics is not simply that thought that thinks the experience of language on the basis of an (animal) voice, but rather, if it always already thinks this experience on the basis of the negative dimension of a Voice, then Heidegger's attempt to think a 'voice without sound' beyond the horizon of metaphysics falls back inside this horizon. Negativity, which takes place in this Voice, is not a more originary negativity, but it does indicate this, according to the status of the supreme shifter that belongs to it within metaphysics, the taking place of language and the disclosure of the dimension of Being. [...]. The thought of Being is the thought of the Voice" (Agamben 1991: 61).

suggests once again, Heidegger is bound to think the open as suppression and suspension of animality. Formally similar to the aporia in which Foucault's thought was caught, Heidegger here remains unable to think the co-belonging of the two terms—the human and Dasein—and ultimately succumbs to a dualism that elevates the human openness above 'mere' animal life. Challenging this conception, Agamben claims that: "Only a conception of the human that not only does not add anything to animality but does not supervene upon anything at all will be truly emancipated from the metaphysical definition of the human being" (2016: 183).

Comparing the digressions into Foucault and Heidegger, it becomes evident that, for Agamben, both authors fail because of similar problems in moving beyond an essentialist understanding of the subject. Heidegger thinks Dasein without any foundation as the pure opening to being; but Dasein's non-base is, in truth, the suppression of animal life, which pervades in the guise of a metaphysics of nothingness. Foucault, on the other hand, thinks 'the care of the self' as an immanent, purely relational process; but his insistence on self-creation and positing ends up in a dualism between constituted and constitutive elements that fractures the supposed immanence of the process.

5. SALOMO FRIEDLAENDER/MYNONA

A concept of indifference is the central motif in the prolific writings of a still posthumously to be 'constructed' author[9], namely Salomo Friedlaender (1871-1946) a.k.a. Mynona (the German word for anonymous in reverse). Friedlaender/Mynona (F/M) was quite well known in his time, a century ago, albeit arguably less so for his prolific philosophical writings than for his satirical grotesques, which were printed in expressionist journals like *Der Sturm* and *Die Aktion* and performed/read out in various avant-garde venues frequented by expressionist artists, writers and other intellectuals of the day. The central concept of 'creative indifference'. which he consistently sought to elaborate and refine over decades and throughout numerous publications as well as in extensive works many of which have only been published very recently[10], served as a constant thematic compass even in his less explicitly philosophical, more literary texts. The general gist of this notion can be briefly summarized as a philosophical position which urges the individual to find a point of balance midway between what we generally think of as opposites—

[9] "F/M [ist] ein noch in Konstruktion befindlicher Autor" (Thiel 2012: 8).

[10] Salomo Friedlaender's collected works (both philosophical, literary and including a vast correspondence throughout his life with a wide range of cultural figures of his time) are still in the process of being published in over thirty volumes thanks to the extraordinary effort and dedication of Hartmut Geerken and Detlef Thiel. A first extensive anthology of his works translated in English is expected to be published in 2021 in the performance philosophy book series at Rowman & Littlefield Int. (eds. A. Lagaay & D. Thiel).

what he terms polarities—and to creatively engage with the world from this neutral point of indifference. According to F/M, who grounds his thinking first in a close reading of Nietzsche and later, after distancing himself from the later, in a radical 'completion' of Kantian principles ("This is *electrified Kant*" Friedlaender/Mynona 2015: 31 – trans. A.L.), all outward expression, indeed all expression *tout court*, is only possible, i.e. only (o)utterable, within and thanks to a necessary (linguistic) paradigm of perpetually evermore distinct differentiation. This paradigm of differentiation, he claims, is relatable in all instances to the principle of polar oppositionality and has its logical counterpart in a theoretical point of indifference *within* (as opposed to outside) the subject. Conceptualising and moving towards this precise inward point (not zone!) of indifference within themselves, the subject can be freed from the burden, as it were, of 'division' or 'divuation' and become the centre of the world—its most general, universal and absolute origin. Although itself devoid of all characteristic and therefore impossible to express or articulate in words, this zero point is what F/M in later texts refers to as 'heliocentre', 'magical I', or '*Weltperson*' (world persona). It is a theoretical (i.e. non-empirical) 'person' who or which by virtue of having disconnected itself from any individual characteristic, rendered all distinct functions, all adjectives, inoperative (so to speak), is necessarily general, universal and free. Of particular interest is the clear insistence with which F/M seeks to dismiss any suggestion that this theory may be driven by, or associated with, a metaphysical, moral or even religious vein. To quote just one instance in which F/M declares this, in a letter to Traut Simon in 1939, he writes:

> Bitte trauen Sie mir nicht die Geschmacklosigkeit zu, Ihnen etwa gar Moral zu predigen. Ich spreche weder von Moral noch von Religion noch auch nur von Philosophie, sondern ganz nüchtern von purer Lebenstechnik. Denn das Leben will so erlernt und betrieben sein wie eine Präzisionstechnik. (Please do not presume I would be so tasteless as to preach to you a moral. I speak neither of morality nor of religion nor even of philosophy, but quite simply of a pure life technique. For life wants to be learned and practiced like a precision technique (8th March 1939, Friedlaender/Mynona 2020: GS Vol. 31: 210).

At the time of its publication in 1918, F/M's philosophical monograph *Schöpferische Indifferenz* (Creative Indifference) clearly sent considerable ripples of positive contagion and affect throughout the cultural scene of its time. There is, for instance, evidence that it influenced Walter Benjamin, through whom a more or less direct reverberation into Giorgio Agamben is conceivable[11]. F/M's book is also explicitly credited by Fritz Perls as having been a major influence on his development of

[11] Detlef Thiel (2012) has assembled ample material demonstrating the affect F/M had on Benjamin. He also provides a thorough analysis of the relationship between F/M and Schelling, Husserl and Derrida respectively (Adorno, Bloch, Kubin, Scholem, Simmel, Unger are just a few of the other contemporaries he explores in some detail). Agamben makes at least one explicit reference to F/M in Agamben 2011: 71. But his description of the process of creative indifference as "dialectical" is misleading. Cf. Thiel 2012: 143.

Gestalt Therapy[12]. The potential line of conduction that connects these very different contexts of experience to or via the notion of 'creative indifference' is thought provoking in itself insofar as it suggests a position in which the philosophical subject and its bio-political correlation not only coincide with each other, but also with the experience of a psychological self as well as with the subject's embodied, physical and structural i.e., in a certain sense, 'objective' being (Gestalt) – all the while being potentially anonymous and general – once could say: *inoperative*.

That there be a necessary connection between these various parallel dimensions of subjectivity might seem intuitively obvious, and yet, in the actual practice of theory, especially in the context of academic discourse, more often than not, whilst the philosophical and the political may increasingly be being discussed in terms of each other, the subjective position from which the very question of their respective relativity or indeed equivalence (or not) to the registers of *lived* empirical life, i.e. to practices and experiences of actual (human) being is posed, still verges on the taboo—despite the efforts of multiple forms of feminism, queer studies and post- and decolonial studies[13]. It tends to be implied, for instance, that engaging in philosophical discourse, especially of the kind that mainly involves close reading or textual exegesis, and especially if done so in a professional academic context, has little or nothing to do with one's own person (which includes aspects of character, gender, class, race, situatedness, and calling). A scholar's particular passage through a given theory—their 'adventure' in discourse—need not be measured or brought to bear in any way on their personal, biographical life, or only retrospectively so, that is to say, posthumously, once they become historical 'objects'—suddenly open to a new dimension of scholarly scrutiny. (One may think here of Agamben's apt comparison of the photos in Paul Ricœur's biography, which "depicted the philosopher solely in the course of academic conferences", and the images of Debord in *Panégyrique*, which attempt to put life—"the clandestine"—into the foreground, in however insufficient a way [Agamben 2016: xviii][14]). To leave traces of personal inclination or attitude in philosophy is generally only welcome in the form of the anecdotal—i.e. with the clear function of backing up, illustrating or colouring in whatever abstract topic, theory or position happens to be in discussion; but its affect must be

[12] "I recognise three gurus in my life. The first one was S. Friedlander (sic.) who called himself a Neo-Kantian. I learned from him the meaning of balance, the zero-centre of opposites (...) His philosophical word – creative indifference – had a tremendous impact on me. As a personality he was the first man in whose presence I felt humble, bowing in veneration. There was no room for my chronic arrogance" (Perls 1969 quoted in Frambach/Thiel 2015: 245).

[13] Indeed, some of these elisions also affect Agamben's work, as brought out, for instance, with regard to the relation of biopolitics and black feminist race theory in Weheliye 2014 and with regard to feminist critique in Deutscher 2008.

[14] In fact, one could also consider in this regard Agamben's *Autoritratto nello studio*, where he charts his own trajectory—not only in writing, but also by showing photographs of the places and studies he worked in, the people he lived and thought with, as well as the artworks and books that made an impact on him. See Agamben 2017.

understood as serving additional and incidental information only, not making an essential difference. Beyond the mere anecdote, drawing on anything too distinctly personal or individual would amount to a confusion of register—not only is it not the "done thing" (cf. "That's How We Do It", Agamben 2016: 240-244), but still now, in philosophy, it would tend to fly in the face of what Derrida aptly diagnosed as the "dream or the ideal of philosophical discourse [...] to make tonal difference inaudible, and with it a whole desire, affect, or scene that works (over) the concept in contraband [...] [t]hrough what is called neutrality of tone, philosophical discourse must also guarantee the neutrality or at least the imperturbable serenity that should accompany the relation to the true and the universal" (Derrida 1992: 29).

Perhaps it is in this sense that F/M's conception of an a-personal person, at the very core of the in-dividual takes on a promising potential—in relation to Agamben. For this 'zero-point' that is conceived as both indifferent and as the source of creation seems to allow intuitively for something that is personal yet not private, intimate (because inwardly oriented) yet by definition communally shareable and indeed intended to be so, that is, in a sense, always already shared. Agamben clarifies this with the distinction he makes in *The Coming Community* between the notion of a boundary as closure (a locked door with no key, an unclimbable wall), in contrast to that of a threshold. "The outside," he insists, "is not another space that resides beyond a determinate space, but rather, it is the passage, the exteriority that gives it access [...]. The threshold is not, in this sense, another thing with respect to the limit; it is, so to speak, the experience of the limit itself, the experience of being-within an outside" (Agamben 2009: 68). It is, in other words, the lived experience of one's vibrant intellectual ability to in-differentiate oneself that gives rise to the differentiation of the "world". For F/M it is a dynamic process, an oscillation between inside and outside, outside and in, that never completely settles either side of the boundary, but that with deliberate practice can give way to a glimpse of the infinite. Agamben is no less hyperbolic: "This *ek-stasis* is the gift that singularity gathers from the empty hands of humanity" (Agamben 2009: 68).

The test of how to compose philosophical discourse from the position of this anonymous and therefore 'collective' voice that is mine but not mine alone would be perhaps a form of writing that disturbs the assumption of objectivity, not necessarily by divulging intimacies but by applying a method of collaboration and indistinction with regard to voice from the start. As such, the question we seek to ask here, not just in theoretical terms but also in terms of the very practice of engaging, as we do, in reading and writing philosophical discourse, really is *who speaks in this empty space?* Who is the thinking, scholarly or other genre of author, who, devoid of all particular characteristics, having suspended all difference, and turned themselves towards their innermost zero point, having come, that is, as close as (only) humanly possible to the point of neutral indifference, having witnessed and become charged by its creative potential, now speaks not just from the position of *anybody*

but *for everyone*, and yet is still capable of formulating the philosophy of that subject? *Who*, in other words, *are we* (that is not us)?

What if, moreover, that 'voice of thinking' (if not necessarily that of reason!) that displays its thought here in the form of a monologue or thesis (as opposed, for instance, to a dialogue between "two"), makes no effort to conceal the fact that it is not the result of a singular voice (if such a thing were ever to be potentially audible as such) but at least of, and likely more than, two?

6. INDIFFERENCE AS FORM-OF-LIFE

What most clearly distinguishes Agamben's thinking from Heidegger's Dasein and Foucault's care of the self—but also from Friedlaender's Kantian notion of the subject as well as from most contemporary philosophers in the post-Heideggerian and post-structuralist traditions—is how stubbornly he holds on to the concept of the human, while obviously refusing any essentialist determination of the concept. In many ways, a non-metaphysical elaboration of human life is at the very center of Agamben's thought, and it is only on the basis of this elaboration that his thought on ethics and politics becomes comprehensible.

Agamben's elaboration relies on a set of closely related concepts, which imply or even merge into one another: impotentiality, inoperativity, deactivation, use, form-of-life, to name but a few. There is, however, something like a relay that holds these concepts together, and this relay is the notion of indifference. In fact, Agamben precisely tries to think human life as an indifferentiation of the scissions to which preceding articulations succumbed, not as a substance to be determined in ontic terms. Against Heidegger's thinking of difference as difference, Agamben holds: "It is not a question of having an experience of difference as such by holding firm and yet negating the opposition but of deactivating the opposites and rendering them inoperative" (Agamben 2016: 239). This is the general approach that orients Agamben's attempt to move past the subject. For instance, in contradistinction to Heidegger's anti-biologist determination of Dasein, Agamben claims that it is not a question of seeking "new—more effective or more authentic—articulations" of the divide between the human and the animal. The point is, rather, to expose "the central emptiness, the hiatus that—within man—separates man and animal, and to risk ourselves in this emptiness: the suspension of the suspension, Shabbat of both animal and man" (Agamben 2004: 92). What is crucial here is that the human is not defined in biological or any other substantialist terms; but solely by what Agamben calls here an "emptiness" and which he elsewhere refers to as "void", "absence of relation", or "contact". This is Agamben's way of acknowledging the absence of any human essence or identity. The 'nature' of the human, as he writes elsewhere, is such that the human "appears as the living being that has no work, that is, the living being that has no specific nature and vocation" (Agamben 2007: 2). Yet Agamben

refuses to think this void, as Heidegger does, for instance, in terms of nothingness. The 'privative' aspect of this void is not difference or negation, but a suspension that reveals human impotentiality; it is an indifference of all articulations that are based on dualisms and scissions.

Here, we encounter something that is, perhaps, the most difficult aspect for Agamben's thought. For what Agamben tries to think is a non-essentialist account of the human—of human life and human doing—that does not introduce any divisions for its articulation. It can, however, appear as if Agamben did exactly this, for example when he claims that: "Other living beings are capable only of their specific potentiality; they can only do this or that. But human beings are the animals who are capable of their own impotentiality" (Agamben 1999c: 82). Is "impotentiality" here not simply introduced as the quality or capacity that distinguishes the human from animality? Impotentiality, however, is precisely not a given quality or capacity. It is not a feature of the human that can be actualized as the human comes to its own self-presence. Rather, it is a purely privative quality or capacity. Hence it is absolutely common and absolutely immanent inasmuch as, and this is the decisive point, it is absolutely indeterminate. In his earlier writings, Agamben often drew on the idea that the dispossession of all specific qualities or 'works' could allow for this appropriation of the improper 'as such'. Among the most provocative variations of this line of argument is the claim that pornography and advertising, in their brutal commodification of the living body, "are the unknowing midwives of this new body of humanity" (Agamben 2009: 49). Or that the emergence of a planetary petty bourgeoisie offers the possibility for "making of the proper being-thus not an identity and an individual property but a singularity without identity, a common and absolutely exposed singularity", which would allow humanity to "enter into a community without presuppositions and without subjects, into a communication without the incommunicable" (Agamben 2009: 65). In his more recent work, Agamben opts, instead, for an insistence of deactivation to vindicate indifference. The quick succession and linkage of Agamben's key concepts bears witness to the difficulty involved in holding the different elements of the argument together. "A living being," Agamben writes towards the end of *The Use of Bodies*, "can never be defined by its work but only by its inoperativity, which is to say, by the mode in which it maintains itself in relation with a pure potential in a work and constitutes-itself as form-of-life, in which *zoè* and *bios*, life and form, private and public enter into a threshold of indifference [...]" (Agamben 2016: 247). That is to say: there is no essence or *ergon* unifying the different modes of human life. It is striking to note that Agamben comes back to the figure of the artist at this decisive juncture in *The Use of Bodies*, suggesting that it is possible that in the "artistic condition there comes to light a difficulty that concerns the very nature of what we call form-of-life" (Agamben 2016: 246). The gloss that Agamben supplies on the artist in relation to the notion of form-of-life is revealing:

> And the painter, the poet, the thinker—and in general, anyone who practices a *poiesis* and an activity—are not the sovereign subjects of a creative operation and of a work. Rather, they are anonymous living beings who, by always rendering inoperative the works of language, of vision, of bodies, seek to have an experience of themselves and to constitute their life as form-of-life (Agamben 2016: 247).

The only 'determinacy' that Agamben's understanding of the human has is, thus, an indeterminacy: the indifferentiation of preceding articulations based on division and scission. There is, as Agamben is always at pains to insist, no "immediate access to something whose fracture and impossible unification are represented by these apparatuses" (Agamben 2005: 87)[15]. Hence, it is the suspension of the fractures at the heart of metaphysical humanism that allows for a different understanding of the human, not the return to some primordial human innocence. And the artistic *poiesis* is, from the beginning of Agamben's work until its most recent manifestations, framed as an exemplary case of this suspensive movement. If the language of the speaking subject is premised on exclusion of the animal voice, and if this scission is paradigmatic for the scissions running through the history of philosophy, then the poet's suspension of this understanding of language is paradigmatic for thinking the possibility of a different use. In so doing, the poet offers a guiding thread for Agamben's project of a general suspension of all apparatuses that divide life. There arguably is something quite classical in this gesture of investing art with the capacity of 'healing' the scissions that lacerate life. But in *The Use of Bodies*, Agamben seeks to think the concept of "use", first explored in *The Highest Poverty*, as a form of human doing that would extend the paradigm of artistic suspension to all regions of life, without, of course, implying any aesthetization of life. Rather, life, insofar as it is lived in the immanence of use, would constitute itself as form-of-life: "It defines a life—human life—in which singular modes, acts, and processes of living are never simply facts but always and above all possibilities of life, always and above all potential. And potential, insofar as it is nothing other than the essence or nature of each being, can be suspended and contemplated but never absolutely divided from act" (Agamben 2016: 207). Here, it becomes evident how indifference, form-of-life and the idea of anthropogenesis are related. Since what is at stake in the immanence of life designated by the terms "use" and "form-of-life" is, precisely, a modification of human life such that it would no longer be premised on exclusion and division. And what is at stake in a mode of being designated by the ontology of indifference is the mode of life that has suspended and rendered indifferent all metaphysical articulations of human life. The thought of indifference is the thought of a non-exclusionary life.

[15] In this passage, Agamben continues: "There are not *first* life as a natural biological given and anomie as the state of nature, and *then* their implication in law through the state of exception. On the contrary, the very possibility of distinguishing life and law, anomie and nomos, coincides with their articulation in the biopolitical machine" (Agamben 2005: 87). For Agamben, this structure holds true for any metaphysical articulation of the human.

7. EPILOGUE

The greatest danger in thinking indifference and inoperativity is, perhaps, to consider them as absolute or transcendent features that could be actualized once and for all—pointing to a peaceful, if empty neutrality stripped of all differences, dualisms and qualities. Often, these concepts seem to intervene in Agamben's texts as a resolution of sorts, as if they designated the definitive neutralization of a metaphysical paradigm. And yet, Agamben notes that what we call a form-of-life is "a life in which the event of anthropogenesis—the becoming human of the human being—is still happening" (Agamben 2016: 208). Accordingly, the whole group of concepts organized around the idea of indifference do not denote anything that can be fully actualized or come to self-presence (F/M's non-gendered "zero-point" of indifference is in this sense truly a utopia). On the contrary, these concepts allow one to think an abandonment of life to the plurality of its modes, such that it can never stabilize itself in any identity or essence while coinciding with its lived experience. That the 'nature' of the human is its impotentiality translates into the demand that every mode of life must make room for an aberration of the actual. If philosophy is "the memory and repetition" of anthropogenesis (Agamben 2016: 111), then this is not because it knows the truth of the human essence, but because it is one of the practices that answers to this aberrant demand. For Agamben, becoming-human means, then, becoming otherwise than being, other than identity, other than self-same: "The anthropogenetic event has no history of its own and is as such unintelligible; and yet it throws humans into an adventure that still continues to happen (*avvenire*)" (Agamben 2018: 83). The drama that continues to unfold is thus neither tragic nor comic, and the characters embarked on its adventure not predestined to one fate or another, but they are called to acquiesce to a journey. Joining voices in discourse, that is to say, losing one's voice, is an attempt not just to formulate but to practice a form of indifference. Philosophy is one of the practices that tells of and participates in this anonymous tale.

BIBLIOGRAPHY

Agamben, G. 1991. *Language and Death: The Place of Negativity.* Translated by K. E. Piktus and M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1999a. *The Man Without Content.* Translated by G. Albert. Stanford: Stanford University Press.

Agamben, G. 1999b. *Remnants of Auschwitz: The Witness and the Archive.* Translated by D. Heller-Roazen. New York: Zone Books.

Agamben, G. 1999c. *On Potentiality.* In *Potentialities: Collected Essays in Philosophy.* Translated by D. Heller-Roazen. Stanford: Stanford University Press, pp. 177-184.

Agamben, G. 1999d. *The End of the Poem: Studies in Poetics.* Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 2004. *The Open. Man and Animal.* Translated by K. Attell. Stanford: Stanford University Press.

Agamben, G. 2005. *State of Exception*. Translated by K. Attell. Chicago - London: Chicago University Press.

Agamben, G. 2007. *The Work of Man*. Translated by K. Attell. In *Giorgio Agamben: Sovereignty and Life*, ed. by M. Calarco and S. DeCarloli. Stanford: Stanford University Press, pp. 1-11.

Agamben, G. 2009. *The Coming Community*. Translated by M. Hardt. Minneapolis - London: University of Minnesota Press.

Agamben, G. 2011. *Nymphs.* Translated by A. Minervini. In Khalip, J. and Mitchell, R, *Releasing the Image. From Literature to New Media*. Stanford: Stanford University Press, pp. 60-80.

Agamben, G. 2016. *The Use of Bodies*. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2017. *Autoritratto nello studio*. Milan: Nottetempo.

Agamben, G. 2018. *The Adventure*. Translated by L. Chiesa. Cambridge - London: MIT Press.

Agamben, G. 2019. *Creation and Anarchy: The Work of Art and the Religion of Capitalism.* Translated by A. Kotsko. Stanford: Stanford University Press.

Blanchot, M. 1973. *Le Pas au-delà*. Paris: Gallimard.

Blanchot, M. 1982. *The Writing of the Disaster*. Translated by Ann Smock. Lincoln: University of Nebraska Press.

Deleuze, G. 1993. *Logic of Sense.* Translated by M. Lester. New York: Columbia University Press.

Derrida, J. 1991. *'Eating Well', or the Calculation of the Subject: An interview with Jacques Derrida*. Translated by P. Connor and A. Ronell. In *Who Comes after the Subject?*, ed. by E. Cadavo, P. Connor and J.-L. Nancy. New York - London: Routledge, pp. 96-119.

Derrida, J. 1992. *Of an Apocalyptic Tone Newly Adopted in Philosophy.* In *Derrida and Negative Theology*, ed. by H. Coward and T. Foshay. New York: State University of New York Press, pp. 25-72.

Deutscher, P. 2008. *The Inversion of Exceptionality: Foucault, Agamben and 'Reproductive Rights'*. In «South Atlantic Quarterly», 107.1, pp. 55-70.

Foucault, M. 1990. *The Use of Pleasures: Volume 2 of The History of Sexuality*. Translated by Robert Hurley. New York: Vintage.

Frambach, L., Thiel, L. (ed. by). 2015. *Salomo Friedlaender und die Gestalttherapie*. Köln - Bergisch Gladbach: EHP - Verlag Andreas Kohlhage.

Friedlaender, S., Mynona. 2005-2020. *Gesammelte Schriften*, ed. by H. Geerken & D. Thiel. Herrsching: Waitawhile.

Friedlaender, S., Mynona. 2015. *Das Magische Ich. Elemente des kritischen Polarismus. Gesammelte Schriften* Vol. 19, ed. by H. Geerken & D. Thiel. Herrsching: Waitawhile.

Haines, C., Grattan, S. 2017. *Life After the Subject.* In «Cultural Critique», 96, pp. 1-36.

Heidegger, M. 1969. *Identity and Difference.* Translated by J. Stambaugh. New York: Harper & Row.

Heidegger, M. 1991. *Nietzsche*, vols. 1-2. Translated by David Farrell Krell. San Francisco: Harper Collins.

Heidegger, M. 1997. *Der Satz vom Grund.* In *Gesamtausgabe*, vol. 10, ed. by P. Jaeger. Frankfurt am Main: Klostermann.

Heidegger, M. 2001. *Being and Time.* Translated by J. Macquarrie and E. Robinson. Oxford - Cambridge: Blackwell.

Lagaay, A. and Thiel, D. Forthcoming. *Introduction to Salomo Friedlaender/Mynona. 20th Century Performance Philosopher.* London: Rowman & Littlefield International.

Lagaay, A. and Geerken, H. 2020: *Explosions of 'creative indifference'. Salomo Friedlaender, Sun Ra, sereditpity and the idea of a 'heliocentre'.* In Cull Ó Maoilearca, L. and Lagaay, A., *The Routledge Companion to Performance Philosophy.* London: Routledge, pp. 415-423.

Nancy, J.-L. 1991. *Introduction.* In *Who Comes after the Subject?*, ed. by E. Cadavo, P. Connor and J.-L. Nancy. New York - London: Routledge, pp. 1-8.

Perls, F. 1969. *Gestalttherapie in Aktion.* Stuttgart: Klett-Cotta.

Rauch, M. F. Forthcoming. *Archaeologies of Contemporary Art: Negativity, Inoperativity,* Désoeuvrement. In «Journal of Italian Philosophy».

Schürmann, R. 2019. *On Constituting Oneself an Anarchistic Subject.* In *Tomorrow the Manifold: Essays on Foucault, Anarchy, and the Singularization to Come*, ed. by M. F. Rauch and N. Schneider. Zurich: diaphanes, pp. 7-30.

Schürmann, R. 2001. *Wandering Joy: Meister Eckhart's Mystical Philosophy.* Great Barrington: Lindisfarne.

Schürmann, R. 1987. *Heidegger on Being and Acting: From Principles to Anarchy.* Translated by Chr.-M. Gros. Bloomington - Indianapolis: Indiana University Press.

Thiel, D. 2012. *Maßnahmen des Erscheinens. Friedlaender/Mynona im Gespräch mit Schelling, Husserl, Benjamin und Derrida.* Nordhausen: Verlag Traugott Bautz.

Watkin, W. 2015. *Agamben and Indifference.* London: Rowman & Littlefield International.

Weheliye A. 2014. *Habeus Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human.* Durham: Duke University Press.

109 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 109-128
ISSN: 1825-5167

L'OPERA D'ARTE E LA MORTE DI DIO. NIETZSCHE E AGAMBEN[1]

VANESSA LEMM
College of Humanities, Arts and Social Sciences
Flinders University, South Australia
vanessa.lemm@flinders.edu.au

ABSTRACT
In this article I situate Agamben's theses on 'inoperativity' in dialogue with motifs drawn from Nietzsche's discussion of the death of God and his conception of the 'work of art without artist.' I argue that Agamben helps us to get beyond the Existentialist interpretation of the human subject as creator of its own life (bios) by proposing an anarchic conception of giving artistic form to life (zoe) that deconstructs the position of mastery over life assigned to modern subjectivity and decentres the idea of the human agency in the process of creation. However, I also suggest that Agamben's conception of the artistic life downplays or avoids other features of Nietzsche's thinking on the death of God and creation that are tied to animality and the divinity of nature. In the first section, "The Work of Art without Artist and the Deactivation of the Artistic Machine" I discuss Agamben's archaeology of the work of art and his thesis that since the Renaissance, the work of art has been produced through what he calls the 'artistic machine.' I examine his proposal to deactivate this machine by thematizing the dimension of human life he calls 'inoperativity,' and what this means for his understanding of the process of creation as anthropogenesis. I also raise the question of whether, by deactivating the artistic machine, Agamben may paradoxically be re-activating what he has previously called the 'anthropological machine.' The second section, "The Death of God and the Death of Man," compares and contrasts the difference between Nietzsche's and Agamben's accounts of anthropogenesis and the relation between animality and divinity. It argues that the death God as the death of the human being in Nietzsche leads to a naturalistic conception of creativity inspired by Greek and Renaissance art that provides some insights into how to deactivate the 'work-artist-operation machine' without falling into the 'anthropological machine.' This article concludes with a third section, "Contingency, Resistance and Self-Overcoming" on the difference between Nietzsche's and Agamben's conceptions of contingency and resistance in the generation of a form-of-life. For Nietzsche a form of life is generated essentially in and through a process of continuous self-overcoming. In Agamben, a form of life is constituted through a dialectical tension between creation and resistance, the artist's potential (impersonal) and potential not-to (personal). Whereas in Agamben the contingency of creation is located within the action, in Nietzsche creation happens to the activity as an event external to it.

KEYWORDS
Death of God, Agamben, Nietzsche, work of art, artist, inoperativity, creativity and contingency

[1] Per una versione più breve e in lingua inglese di questo articolo, cfr. Lemm 2020a. La presente traduzione è stata condotta da Carlo Crosato su richiesta dell'autrice.

Le ripercussioni dell'idea nietzscheana della morte di Dio non sono percepibili solo nella sfera religiosa, ma anche nel modo in cui pensiamo il significato della creazione, e in particolare il ruolo della creatività nella vita. La riflessione di Agamben sulla creatività come "inoperatività" è il più recente e rilevante contributo al dibattito, verosimilmente avviato dall'Esistenzialismo, intorno a come la morte di Dio si relazioni alla vita intesa come materia prima per la creazione artistica (Agamben 2017). In questo articolo, le tesi di Agamben sull'"inoperatività" saranno confrontate con motivi risalenti alla riflessione di Nietzsche sulla morte di Dio e alla sua concezione dell'"opera d'arte senza artista". Agamben ci aiuterà a superare l'interpretazione esistenzialista del soggetto creatore della propria vita (*bios*) mediante un'idea anarchica di forma artistica di vita (*zoe*), in grado di decostruire la posizione di dominio sulla vita attribuita al soggetto moderno e de-centrare l'azione umana nel processo di creazione[2]. Si suggerirà altresì che la concezione agambeniana di vita artistica minimizza o elude altri aspetti del pensiero nietzscheano sulla morte di Dio e sulla creazione legati all'animalità e alla divinità della natura.

Nelle interpretazioni esistenzialiste, il tema della morte di Dio è inteso come un evento liberatorio che apre all'essere umano la possibilità di divenire l'unico autore della propria vita (*bios*) e di assumere la piena responsabilità di darle un senso (cfr. Sartre 1946): l'attuazione di tale libertà è il segno distintivo della nostra umanità. Esempio di una simile interpretazione esistenzialistica è la lettura di Julian Young (Young 2014: 111-25), secondo cui la morte di Dio non è riducibile alla sola morte del Dio della Cristianità, essendo piuttosto un concetto che si estende a «tutto ciò che attua la funzione di assegnare un significato alla vita umana che un tempo era attribuita a un dio» (Young 2014: 111)[3]. Coerentemente con la tradizione dell'esistenzialismo, Young parte dal presupposto che il significato non sia da considerarsi come un dato o come qualche cosa che siamo chiamati a scoprire, bensì come qualche cosa che produciamo e scegliamo secondo volontà. Al fine di superare il nichilismo, ossia l'assenza di significato derivante dalla morte di Dio, l'individuo è chiamato a creare il proprio percorso di vita e diventare così il creatore della propria vita (Nehamas 1985: 90-91). L'eroica autocreazione della nostra vita (*bios*) si colloca «al di là del bene e del male», e quindi ciò che rileva non è se si siano compiute scelte buone o cattive, ma se la nostra vita sia l'autentica espressione della nostra creatività, di cui siamo responsabili.

In senso lato, il problema di questa lettura esistenzialista della morte di Dio risiede nel fatto che l'essere umano in quanto autocreatore torna a occupare la posizione lasciata vacante dal Dio cristiano, eleggendo se stesso *alter deus*[4].

[2] Seguo qui la distinzione tra *bios* e *zoe* proposta da Agamben in Agamben 1995.

[3] Cfr. Vattimo 1998: 28, in cui l'autore sostiene che la morte di Dio rappresenta la dissoluzione dei valori assoluti in una pluralità di interpretazioni.

[4] Si veda anche la considerazione dell'umanità come un *alter deus* in Habermas, il quale osserva Schelling, Feuerbach e Marx sovvertire il tema biblico del Dio creatore dell'uomo, trasformandolo

Tradizionalmente si è associato questo ideale prometeico all'insegnamento di Nietzsche intorno all'*Übermensch*, nuova figura di essere umano capace di superare l'orizzonte del mondo cristiano in direzione di maggiori libertà e creatività. E però Nietzsche non ha mai concesso che lo *Übermensch* potesse occupare la posizione di Dio; piuttosto, come ha correttamente segnalato Löwith, «il superamento del cristianesimo si identifica con il superamento dell'uomo» (Löwith 1982: 286)[5]. La figura esistenzialista dell'individuo creatore della propria vita è eccessivamente concentrata sull'assunzione "eroica" del dominio sulla formazione della vita, perdendo così di vista ciò che si potrebbe chiamare il carattere an-archico della creazione, intesa come processo privo di fondamenti metafisici e aperto invece al caos e alla radicale contingenza. D'altra parte, l'appello nietzscheano a diventare «poeti della nostra vita» (Nietzsche 1965: 174) non invita a un lavoro di (auto)costituzione e di attuazione delle proprie facoltà di creare secondo volontà, quasi che chi siamo e ciò che diventeremo fossero dimensioni "padroneggiate" o "possedute" dall'individuo: per Nietzsche, come si dirà in seguito, il processo di creazione non è mai un processo *individuale* (solipsistico) in senso stretto, ma dipende da una relazione "intempestiva" con la propria condizione storica. Nietzsche menziona l'«azione» (Nietzsche 1970a: 144) dell'artista tra virgolette suggerendo che in realtà non esiste qualche cosa come un "azione" e che la parola si riferisce al nostro fraintendimento del processo di creazione, come se l'artista, con le parole di Agamben, «un bel giorno, [...] decide[sse], come il Dio dei teologi, non si sa come e perché, di mettere in opera [la sua potenza o la sua facoltà di creare]» (Agamben 2017: 27)[6]. Il processo di creazione in Nietzsche non si verifica secondo volontà e non riflette una scelta esistenziale in cui volontà e scelta siano motori della creazione della forma di vita individuale.

Dal punto di vista esistenzialista, la creazione è espressione della facoltà di creare secondo volontà, piuttosto che – con le parole di Agamben – una complicata dialettica tra resistenza e creazione, fra potenza-di e potenza-di-non, fra una dimensione personale e una impersonale della vita. Come affermato da Heidegger, l'esistenzialismo rimane all'interno della metafisica della soggettività (Heidegger 2008). Inoltre quella esistenzialista è una concezione dis-incarnata dell'(auto)creazione, che finisce per rafforzare l'idea che la vita animale (*zoe*) sia accidentale, effimera, forse persino dannosa per l'autorealizzazione artistica dell'individuo (*bios*). L'antropocentrismo che orienta la prospettiva esistenzialista ignora le dimensioni non-

nel tema antropologico secondo cui la divinità è creazione dell'essere umano cfr. Habermas 1978: 231-300.

[5] Cfr. Heidegger 2006: 246-316, specialmente p. 301, in cui l'autore confuta la tesi per cui la morte di Dio significherebbe che Nietzsche avrebbe rimpiazzato semplicemente Dio con l'essere umano.

[6] Cfr. Nietzsche 1970a: 72-73, in cui Nietzsche afferma di temere «che non ci sbarazzeremo di Dio perché crediamo ancora nella grammatica...».

umane della vita (*zoe*) e trascura come questa animalità incida sul nostro «imparare dagli artisti» a diventare «i poeti della nostra vita» (Nietzsche 1965: 88-89, 174)[7].

È possibile apprezzare la complessità (umana e non-umana / personale e impersonale) della concezione agambeniana della vita e della creatività confrontandosi con la risposta di Foucault alla nietzscheana morte di Dio, depositata nella sua «estetica dell'esistenza» (Foucault 1989: 259)[8] e nella nozione strettamente correlata di «ontologia del presente» (Foucault 1998: 261), dal momento che Agamben colloca nel solco foucaultiano la sua «archeologia dell'opera d'arte», «indagine sul passato [che] non è che l'ombra portata di un'interrogazione rivolta al presente» (Agamben 2017: 9). L'«estetica dell'esistenza» di Foucault è agli antipodi rispetto all'etica esistenzialista dell'autenticità di matrice sartriana e alla concezione associata di creazione (cfr. Norris 2018): Foucault sostiene che «piuttosto che attribuire l'attività creatrice al genere di relazione che un individuo ha con se stesso, dovremmo ricondurre ad un'attività creatrice il genere di relazione che egli ha con se stesso» (Foucault 1989: 265). Qui la creatività non è un attributo del sé; è piuttosto la vita (*zoe*) dell'individuo a essere una funzione dell'attività creatrice[9]. Foucault denuncia che

> nella nostra società l'arte sia diventata qualcosa che è in relazione soltanto con gli oggetti, e non con gli individui, o con la vita. E che l'arte sia un qualcosa di specializzato, e che sia fatta da quegli esperti che sono gli artisti. Ma perché la vita di tutti gli individui non potrebbe diventare un'opera d'arte? Perché una lampada o una casa potrebbero essere un'opera d'arte, ma non la nostra vita? (Foucault 1989: 264-265).

Secondo Foucault, l'«arte grande e rara» di «"dare uno stile" al proprio carattere» (Nietzsche 1965: 167-168) è l'arte di condurre una vita creativa.

Nella prima sezione, "L'opera d'arte senza artista e la disattivazione della macchina artistica" si discuteranno l'archeologia dell'opera d'arte di Agamben e la sua tesi secondo cui dal Rinascimento l'opera d'arte sarebbe stata prodotta attraverso ciò che lui chiama "macchina artistica". Si prenderà in esame la sua proposta di disattivare questa macchina attraverso la tematizzazione della dimensione della vita umana che egli chiama "inoperatività", e si chiarirà il significato di tale proposta nella sua comprensione del processo di creazione come antropogenesi. Verrà altresì sollevata la questione se, disattivando la macchina artistica, Agamben non

[7] Cfr. anche Ansell-Pearson 2000: 177: «L'umano è dall'origine della sua formazione e della sua deformazione coinvolto in un divenire oltreumano, e questo è un divenire che dipende da forze vitali non-umane, organiche e inorganiche».

[8] Foucault riconosce che l'espressione "estetica dell'esistenza" è ispirata al progetto nietzscheano di dare uno stile al proprio carattere (Foucault 1989: 265).

[9] Questo è un aspetto controverso fra gli studiosi di Foucault. Alcuni interpreti, come Esposito 2004 collocano la fonte della resistenza al potere nella dimensione della vita legata all'animalità (*zoe*), mentre altri, come Revel 2008 identificano la fonte della resistenza nella storicizzazione radicale della *bios* individuale. Secondo la mia interpretazione, sia Nietzsche che Foucault rinvengono una relazione tra animalità e storicità più solidale di quanto sostenuto da questi due punti di vista, come chiarirò di seguito.

finisca paradossalmente per riattivare quella che ha precedentemente chiamato "macchina antropologica" (cfr. Agamben 2002). La seconda sezione, "La morte di Dio e la morte dell'uomo", mette a confronto le idee nietzscheana e agambeniana di antropogenesi e di rapporto tra animalità e divinità. Si sosterrà che la morte di Dio e la morte dell'essere umano in Nietzsche conducono a una concezione naturalistica della creatività ispirata all'arte greca e all'arte rinascimentale, capace di fornire alcune intuizioni su come disattivare la "macchina opera-artista-operazione" senza ripiombare dentro la "macchina antropologica". L'articolo si conclude con una terza sezione, "Contingenza, resistenza e superamento di sé", in cui si affronterà la differenza tra le concezioni di Nietzsche e di Agamben di contingenza e resistenza nella generazione di una forma-di-vita[10]. Per Nietzsche, una forma di vita si genera essenzialmente in e attraverso un processo di continuo superamento di sé. In Agamben, una forma di vita è costituita da una tensione dialettica tra creazione e resistenza, la potenza-di (impersonale) e la potenza-di-non (personale) dell'artista. Mentre in Agamben la contingenza della creazione è rinvenibile intrinsecamente rispetto all'azione, nel concetto di creazione di Nietzsche la creazione avviene all'attività come evento esterno ad essa.

1. L'OPERA D'ARTE SENZA ARTISTA E LA DISATTIVAZIONE DELLA MACCHINA ARTISTICA

Intervistato nel 2004 in merito alla sua idea di vita filosofica, Agamben risponde menzionando «la nozione nietzscheana di opera d'arte senza artista» (Rauff 2004: 612-613; cfr. Lemm 2017). Si tratta di un riferimento che Agamben reperisce in un frammento presente negli scritti postumi di Nietzsche: «L'opera d'arte, dove appare senza artista, per esempio come corpo, come organismo... In che misura l'artista non sia che un grande preliminare. Il mondo come opera d'arte che partorisce se stessa» (Agamben 1994: 140). Questo passo veicola un'intima relazione tra la vita incarnata e l'arte, tra la creatività della natura e l'opera d'arte, e apre l'orizzonte di un approccio post-umanista alla creazione. Il medesimo tenore è eminente nel saggio di Heidegger, *La parola di Nietzsche «Dio è morto»* (Heidegger 2006: 301), in cui, com'è noto, viene affermato che la morte di Dio in Nietzsche annuncia la "fine" della metafisica[11] e l'avvento del nichilismo[12]. E però Heidegger sostiene anche che

[10] Nella locuzione agambeniana "forma-di-vita", "vita" si riferisce alla relazione e alla reciproca esclusione tra *zoe* e *bios*. Su Agamben e forma-di-vita, cfr. Vatter 2016.

[11] Secondo Vattimo, «sia l'annuncio nietzschiano della morte di Dio sia l'annuncio heideggeriano [...] della fine della metafisica poss[ono] essere trattati come modi generali di caratterizzare l'esperienza della tarda modernità» (Vattimo 2002: 16).

[12] «Sfuggire al nichilismo, che sembra presente sia nell'affermazione dell'esistenza di Dio e nella sottrazione a *questo* mondo di un significato ultimo, sia nella negazione di Dio e nella sottrazione a *ogni cosa* di significato e valore: questo è il problema più grande e persistente di Nietzsche» (Kaufmann 1974: 101).

Nietzsche è l'ultimo dei metafisici, e che la sua concezione dell'opera d'arte riflette ancora la metafisica della soggettività[13]. Per quanto ne so, Agamben non offre un'ampia esegesi dei passaggi di Nietzsche in merito alla morte di Dio; eppure è proprio sul rapporto tra Dio, la creazione e la soggettività artistica presente nell'interpretazione heideggeriana della morte di Dio in Nietzsche che si basano le riflessioni presenti in *Creazione e anarchia*. A differenza di Heidegger, Agamben cerca di distinguere la creatività dalla soggettività, per collegarla invece con quella che egli chiama "inoperatività", ossia il fatto che non vi sia un'"opera" intrinseca alle attività umane essenziali[14]. È proprio l'inoperatività a far segno verso l'apertura di un processo di creazione oltre il nichilismo, in direzione dell'"l'opera d'arte senza artista".

In *Archeologia dell'opera d'arte*, Agamben ricostruisce la concezione dell'opera d'arte dalla *Metasifica* e dalle *Etiche* di Aristotele, passando per la figura dell'artista nel Rinascimento, fino all'arte contemporanea di Marcel Duchamp. Laddove «i greci privilegia[vano] l'opera rispetto all'artista (o all'artigiano)», essenzialmente perché secondo loro «l'*energeia*, l'attività produttiva vera e propria», non risiede nell'artista bensì nell'opera (Agamben 2017: 16), nel Rinascimento

> l'arte è uscita dalla sfera delle attività che hanno la loro *energeia* fuori di esse, in un'opera, e si è spostata nell'ambito di quelle attività che, come la conoscenza o la prassi, hanno in se stesse la loro *energeia*, il loro essere-in-opera. L'artista [...] come il teoreta, rivendica ora la padronanza e la titolarità della sua attività creativa (Agamben 2017: 18).[15]

Nella concezione rinascimentale «l'arte non risiede nell'opera, ma nella mente dell'artista» (Agamben 2017: 19), in un accostamento fra Dio e la creazione artistica: «È da questo paradigma che deriva la sciagurata trasposizione del vocabolario teologico della creazione all'attività dell'artista, che fin allora nessuno si era sognato di definire creativa» (Agamben 2017: 19). Per analogia rispetto al Dio creatore, l'artista rappresenta una natura umana definita dalla sua attività creativa. La connessione, stabilita fin dal Rinascimento, fra opera d'arte, artista, attività creativa, dà forma a ciò che Agamben chiama "macchina artistica" (Agamben 2017: 20), un meccanismo che si mantiene in perfetta continuità con l'idea cristiana di creazione,

[13] «Creare possibilità della volontà, le uniche in base a cui la volontà di potenza si libera a se stessa, è per Nietzsche l'essenza dell'arte» (Heidegger 2003: 284). Sull'idea che in Heidegger l'arte sia la condizione fondamentale e precipua per il realizzarsi della volontà di potenza, cfr. Enders 2012: 109. L'arte come volontà di potenza nel pensiero nietzscheano è per Heidegger lo stadio finale della moderna metafisica del soggetto. Heidegger sostiene anche che la figura dell'"artista-filosofo" si scontra contro la negazione della vita da parte del nichilismo della metafisica cristiano-platonica creando nuove forme e valori. Su questo, cfr. Sinnerbrink 2012: 420.

[14] Agamben si chiede se esista «un'opera propria dell'uomo, o se questi non sia per caso come tale essenzialmente *argos*, senz'opera, inoperoso» (Agamben 1996: 109).

[15] Agamben sottolinea come i Greci contrapponessero le attività che producono un'opera alle attività intrinsecamente improduttive e in cui l'*energeia* è invece nello stesso soggetto, come il vedere o il conoscere (Agamben 2017: 15).

conservando nella modernità l'idea di un Dio creatore. Da tale punto di vista, l'idea rinascimentale di opera d'arte secolarizza l'idea della creazione divina, eleva l'artista allo *status* di nuovo Dio e così svaluta l'opera d'arte come semplicemente contingente ed effimera (Agamben 2017: 19-20). Sin dal Rinascimento, l'artista diviene l'operatore supremo di quella macchina artistica che "meccanicamente" sforna opere d'arte.

Le basi teologiche della moderna "macchina artistica" sono evidenti nelle concezioni "misteriche" della religione dei primi del Novecento, che accostano l'azione sacra della liturgia e la prassi delle avanguardie artistiche (Agamben 2017: 19-22). Liturgia e *performance*, per Agamben, possono essere intese come forme di prassi «in cui l'azione stessa pretende di presentarsi come opera» (Agamben 2017: 25). Una simile *performance* trova la sua più estrema e forse ultima espressione nei *ready-made* di Duchamp, che Agamben definisce «atti esistenziali (e non opere d'arte)» (Agamben 2017: 25): «Direi che Duchamp aveva capito che ciò che bloccava l'arte era proprio quella che ho definito la macchina artistica, che aveva raggiunto nella liturgia delle avanguardie la sua massa critica»[16]. Duchamp disattiva la «macchina opera-artista-operazione» introducendo nel museo l'oggetto ordinario, forzandolo così a presentarsi come un'opera d'arte (Agamben 2017: 25-26). Ovviamente l'opera non è un'opera, l'operazione non è un'operazione e l'artista non è un artista: Duchamp «non agisce come artista, ma, semmai, come filosofo o critico o, come amava dire Duchamp, come "uno che respira", un semplice vivente» (Agamben 2017: 26).

Nella lettura offerta da Agamben, Duchamp esemplifica l'idea nietzscheana di "opera d'arte senza artista": i *ready-made* di Duchamp disattiverebbero l'analogia tra il Dio creatore e l'essere umano come creatore. È in questo senso che la morte di Dio implica la morte dell'artista come altro dio: la morte di Dio significa che gli esseri umani non sono più «i titolari trascendenti di una capacità di agire o di produrre opere» (Agamben 2017: 27). Agamben suggerisce così che gli artisti andrebbero pensati come dei «viventi che, nell'uso e soltanto nell'uso delle loro membra come del mondo che li circonda, fanno esperienza di sé e costituiscono sé come forme di vita» (Agamben 2017: 27-28). Il processo di creazione dopo la morte di Dio si situa, per Agamben, oltre il paradigma di (auto)padronanza che sottende l'idea moderna di soggettività. L'arte diviene «il modo in cui l'anonimo che chiamiamo artista, mantenendosi costantemente in relazione con una pratica, cerca di costituire la sua vita come una forma di vita». In tale processo, «come in ogni forma-di-vita, è in questione nulla di meno che la sua felicità» (Agamben 2017: 28)[17]. Ci

[16] E ancora: Duchamp «sapeva perfettamente di non operare come artista. Sapeva anche che la strada dell'arte era sbarrata da un ostacolo insormontabile, che era l'arte stessa, ormai sostituita dall'estetica come una realtà autonoma» (Agamben 2017: 25).

[17] La riflessione di Agamben intorno all'essere umano come artista o come autore è esemplificata dal suo approccio metodologico alla concezione deleuziana di atto di creazione: «Perché se si segue fino in fondo questo principio metodologico, si arriva fatalmente a un punto in cui non è possibile

troviamo qui in una posizione opposta rispetto a quella di Heidegger secondo cui la morte di Dio conduce all'egemonia e al parossismo della soggettività moderna. C'è però da comprendere cosa significhi per Agamben che Duchamp «non agisce come artista» ma come «un semplice vivente». Forse Agamben ci sta suggerendo che nel *ready-made* di Duchamp è il vivente (*zoe*) che dà forma a se stesso? Qual è la relazione fra vita e creazione esemplificata in Duchamp?

Dopo la morte di Dio, il processo di creazione non conduce più a un'opera o a un prodotto, come nella concezione rinascimentale dell'opera d'arte, e l'artista non persegue più un ideale di bellezza o di verità come nell'analogia della creazione di Dio. La macchina artistica si arresta, permettendo all'artista di "girare a vuoto", e apre così nuove possibilità di vita, o quelle che Agamben definisce anche nuove possibilità d'uso (Agamben 2017: 51-52). La disattivazione o l'inoperosità della macchina artistica è centrale nella comprensione agambeniana dell'atto della creazione dopo la morte di Dio.

La riflessione sull'inoperosità getta luce sulla tesi di Agamben sulla relazione interna tra creazione e anarchia. Sviluppando l'intuizione di Deleuze che collega la creatività alla resistenza, Agamben sostiene che l'atto della creazione non è una semplice «opposizione a una forza esterna» (Agamben 2017: 33), dal momento che «la potenza che l'atto di creazione libera [deve] essere una potenza interna allo stesso atto, come interno a questo deve essere anche l'atto di resistenza» (Agamben 2017: 34). Agamben identifica un principio interno, una negatività o una resistenza, all'opera nell'atto creativo. A sostegno della sua tesi, Agamben risale alla *Metafisica* di Aristotele, secondo cui «colui che possiede – o ha l'abito di – una potenza può tanto metterla in azione che non metterla in atto» (Agamben 2017: 35)[18]. Sulla base di questo assunto aristotelico, Agamben può sostenere che «l'uomo può avere signoria sulla sua potenza e aver accesso a essa solo attraverso la sua impotenza; ma – proprio per questo – non si dà, in verità, signoria sulla potenza *ed essere poeta significa: essere in balia della propria impotenza*» (Agamben 2017: 38). Cruciale per la tesi agambeniana è che «il passaggio all'atto può solo avvenire trasportando nell'atto la propria potenza-di-non» (Agamben 2017: 38). Per Agamben, "potenza-di-non" è un altro nome per indicare la contingenza inscritta nell'atto di creazione: «A imprimere sull'opera il sigillo della necessità è, dunque, proprio ciò che poteva non essere o poteva essere altrimenti: la sua contingenza» (Agamben 2017: 40).

distinguere fra ciò che è nostro e ciò che spetta invece all'autore che stiamo leggendo. Raggiungere questa zona impersonale di indifferenza, in cui ogni nome proprio, ogni diritto d'autore e ogni pretesa di originalità vengono meno, mi riempie di gioia» (Agamben 2017: 31). Qui la creazione o la produzione è simile a uno "sviluppo" in cui l'autore si perde, uno sviluppo che, una volta giunto a compimento, non può più essere ricondotto all'origine, a un soggetto o a un autore. Secondo Agamben, questo principio metodologico risale all'idea di Feuerbach di *Entwicklungsfähigkeit*, per cui cfr. Agamben 2008: 8, 85 ss.

[18] Questa interpretazione neo-aristotelica è centrale nella filosofia agambeniana, per cui cfr. Agamben 2005; de la Durantaye 2009.

L'idea che nella creatività ci sia il trasferimento nell'atto di una potenza-di-non viene confrontata da Agamben con l'immagine offerta da Simondon della natura dell'essere umano come

> un essere a due fasi, che risulta dalla relazione fra una parte non individuata e impersonale e una parte individuale e personale. Il preindividuale non è un passato cronologico che, a un certo punto, si realizza e risolve nell'individuo: esso coesiste con questo e gli resta irriducibile (Agamben 2017: 41).[19]

Per Agamben, nell'atto della creazione, l'impersonale «precede e scavalca il soggetto individuale» e l'elemento personale «ostinatamente gli resiste» (Agamben 2017: 41). In questa dialettica, l'elemento impersonale rappresenta «la potenza-di, il genio che spinge verso l'opera e l'espressione», mentre il personale rappresenta la potenza-di-non che «resiste all'espressione e la segna con la sua impronta» (Agamben 2017: 41). Da questo punto di vista, l'opera riflette sia l'elemento impersonale, potenza creativa, sia l'elemento personale, che gli resiste, nella loro reciproca tensione.

La riflessione agambeniana sull'inoperosità può essere intesa come un commento alla concezione di Nietzsche della morte di Dio e del diventare «poeti della nostra vita». Agamben descrive la tensione tra potenza e impotenza analogamente alla tensione tra stile e maniera che prende forma nella vita creativa del poeta: «Lo stile è un'appropriazione disappropriante (una negligenza sublime, un dimenticarsi nel proprio), la maniera una disappropriazione appropriarne (un presentirsi o un ricordarsi nell'improprio) (Agamben 2017: 79-80). Il modello della vita del poeta può essere esteso a «ogni uomo parlante rispetto alla sua lingua e [a] ogni vivente rispetto al suo corpo, [essendovi] sempre, nell'uso, una maniera che prende le distanze dallo stile, uno stile che si disappropria in maniera» (Agamben 2017: 80). Questa tensione tra «da una parte appropriazione e abito, dall'altra perdita ed espropriazione» definisce ciò che Agamben definisce "uso" (Agamben 2017: 80), nozione alla base della comprensione dell'umano come essere vivente senza opera, laddove «i moderni sembrano incapaci di concepire la contemplazione, l'inoperosità e la festa altrimenti che come riposo o negazione del lavoro» (Agamben 2017: 49).

Agamben conclude sostenendo che la contemplazione e l'inoperosità sono «gli operatori metafisici dell'antropogenesi» (Agamben 2017: 50). «La domanda

[19] La concezione di Simondon dell'umano come essere a due fasi ha forti affinità con l'idea nietzscheana dell'umano come creatura e creatore: «Nell'uomo *creatura* e *creatore* sono congiunti: nell'uomo c'è materia, frammento, sovrabbondanza, creta, melma, assurdo, caos; ma nell'uomo c'è anche il creatore, il plasmatore, la durezza del martello, la divinità di chi guarda e c'è anche un settimo giorno – comprendete voi questa antitesi?» (Nietzsche 1972a: 134). Vale la pena ricordare che Roberto Esposito ha associato l'impersonale all'animale e così offre una lettura di Simondon che potrebbe riconciliare i punti di disaccordo fra Agamben e Nietzsche a proposito di creatività e animale (Esposito 2007).

sull'opera o sull'assenza di opera dell'uomo» è di tale importanza perché da essa dipende «la possibilità di assegnargli una natura e un'essenza propria» (Agamben 2017: 48). Connettendo creatività e inoperatività, Agamben intende liberare «il vivente uomo da ogni destino biologico o sociale e da ogni compito predeterminato» e aprire così l'essere umano a «quella particolare assenza di opera che siamo abituati a chiamare "politica" e "arte"» (Agamben 2017: 50-51).

Agamben dà conto della creatività come inoperosità sfruttando l'artista come modello per il "costituirsi" di una "forma-di-vita". Tuttavia, le considerazioni di Agamben secondo cui la potenza-di-non è intrinseca all'essere umano, e la sua creatività è una funzione della resistenza personale alla dimensione impersonale della vita che gli umani condividono con la vita non umana, solleva la questione se l'inoperosità come operatore metafisico dell'antropogenesi non riattivi paradossalmente la "macchina antropologica" che Agamben ha descritto ne *L'aperto*. L'inoperosità ricostituisce l'uomo attraverso un meccanismo di esclusione mediante il quale l'animale, la vita (*zoe*), il corpo, gli istinti, ecc., sono esclusi in quanto "inumani"? Nella prossima sezione, si mostrerà come la concezione nietzscheana di creazione e creatività fornisca alcuni suggerimenti su come disattivare la "macchina opera-artista-operazione" senza ripiombare nella "macchina antropologica".

2. LA MORTE DI DIO E LA MORTE DELL'UOMO

L'inoperosità è considerata da Agamben un operatore antropogenetico post-metafisico. L'essere umano è strutturalmente un essere inoperoso, la cui profonda umanità è legata alla consapevolezza di esser privo di una propria "opera". Per parte sua, Nietzsche non intende la creazione come un processo umanizzante: per Nietzsche, la morte di Dio implica la morte dell'essere "umano", e dunque mette in questione l'idea stessa di (antropo)genesi: «Non vedo perché l'organico in genere debba una volta aver preso *inizio* -- [*entstanden sein muss*]» (Nietzsche 1975: 115). Nell'interpretazione offerta da Löwith, dopo la morte di Dio, l'essere umano non ha più fissa dimora fra l'animalità e il divino[20]. Come tale, l'evento della morte di Dio non lascia vuoto solo il posto di Dio, ma anche quello dell'essere umano. In un frammento postumo, Nietzsche annota: «L'uomo non esiste: perché non è esistito un primo uomo – così ragionano gli animali» (Nietzsche 1986: 51). Contrariamente ad Agamben, per il quale la contemplazione è uno degli operatori dell'antropogenesi, la vita filosofica non si salva dall'antiumanismo nietzscheano. Come ha

[20] «Se Dio è morto, l'uomo perde la posizione che finora occupava quale creatura intermedia fra esser-Dio ed esser-animale. Egli sta su se stesso come su un cavo teso sull'abisso del nulla e sospeso nel vuoto» (Löwith 1985: 43-44). Ancora Löwith: «Tutto quanto il complesso dell'umanità tradizionale non è più obbligatorio per la nuova determinazione dell'uomo in Nietzsche» (Löwith 1982: 477).

correttamente segnalato Azzam Abed, dopo la morte di Dio «nel filosofo non rimane altro che l'animale» (Abed 2015: 125-126)[21].

Alcuni commentatori hanno sostenuto che il significato del naturalismo radicale di Nietzsche è che la specie umana produce cultura o arte come se le estrapolasse da precise istruzioni insite nel suo codice genetico, così come gli alberi producono mele (cfr. Leiter 2002: 10). L'arte realizzerebbe dunque il "destino biologico" della specie umana. A ben vedere, però, il naturalismo nietzscheano non può essere definito né ateistico né positivistico (cfr. Figl 2000; Schacht 1983); anzi, Nietzsche considera l'ateismo sintomatico di quel positivismo scientifico che egli rigetta (cfr. Nietzsche 1965: 129-130)[22]. A differenza di Agamben, il quale, seguendo Arendt, segnalerà l'urgenza di liberare l'umano dal suo «destino biologico» prendendo le distanze dalla natura (Agamben 2017: 50-51), Nietzsche invoca che l'uomo sia ritradotto alla natura (Nietzsche 1972d: 139-142; cfr. Lemm 2020b): le nozioni di "codice genetico" o "destino biologico" sono ombre di Dio che vanno superate, per diventare davvero "fisici" e, così, genuinamente creativi. «Dobbiamo diventare coloro che meglio apprendono e discoprono tutto quanto al mondo è normativo e necessario [...] mentre fino a oggi tutte le valutazioni e gli ideali sono stati edificati sull'*ignoranza* della fisica e *in contraddizione* con essa» (Nietzsche 1965: 193-196). I fisici di Nietzsche liberano la natura dalla figura del Dio creatore, scoprendo così che la natura stessa è creativa e artistica. Si tratta della sdivinizzazione della natura di cui Nietzsche segnala l'urgenza: «Quando sarà che tutte queste ombre di Dio non ci offuscheranno più? Quando avremo del tutto sdivinizzato la natura! Quando potremo iniziare a *naturalizzare* noi uomini, insieme alla pura natura, nuovamente ritrovata, nuovamente redenta!» (Nietzsche 1965: 117-118). Per Nietzsche, questa natura «nuovamente redenta» può disvelare ciò che crea e dà forma alla vita, ossia l'animalità dell'essere umano, la naturalità «nuovamente ritrovata» dell'essere umano. La critica mossa da Nietzsche alla concezione tradizionale della cultura (a cui mi sono già riferita in termini di "civilizzazione" (Lemm 2009)) scioglie l'animale e libera così la possibilità di creare nuove forme di vita. La morte di Dio così come morte dell'umano consente di recuperare una nuova relazione tra natura e creatività, e comprendere finalmente cosa significhi per l'animale umano essere "più naturale" e creativo.

Ma se l'essere umano non è altro che un animale, che cosa significa per questo animale creare forme di vita? Da un punto di vista nietzscheano, il parallelo istituito da Agamben tra la dimensione personale (individuale/umana) e impersonale (non individuale/animale) della vita umana, da un lato, e, dall'altro, una produzione in cui l'individuo lascia il proprio segno sulla tensione artistica all'espressione

[21] A riguardo, scrive Nietzsche: «Ogni animale, e quindi anche la *bête philosophique*, tende istintivamente a un *optimum* di condizioni favorevoli, date le quali può scatenare completamente la sua forza attingendo il suo *maximum* nel sentimento di potenza» (Nietzsche 1972d: 309).

[22] A proposito di questi passaggi nietzscheani, si veda la brillante interpretazione di Gentili 2001: 241 ss.

resistendole, rimane tutta interna a una comprensione molto tradizionale della creazione come processo produttivo di forme culturali attraverso il contenimento delle espressioni vitali dell'animalità, degli istinti e delle pulsioni. La rappresentazione agambeniana dell'artista come qualcuno che «spinge verso l'opera e l'espressione» e «precede e scavalca il soggetto individuale», fa eco allo stereotipo dell'artista come animale la cui espressione disinibita e caotica di impulsi e passioni, ossia delle energie artistiche anarchiche, deve essere imbrigliata, controllata e contenuta dall'individuo affinché tale resistenza lasci un segno e trasformi la vita (*zoe*) in una forma culturale superiore (*bios*): «La resistenza agisce come una istanza critica che frena l'impulso cieco e immediato della potenza verso l'atto e, in questo modo, impedisce che essa si risolva e si esaurisca integralmente in questo» (Agamben 2017: 39).

Con l'immagine della morte di Dio, Nietzsche revoca in questione la tradizionale comprensione della cultura come conferma della posizione di superiorità dell'essere umano. Dopo la morte di Dio, la cultura non può più essere assunta come discrimine tra uomo e animale: «Non deriviamo più l'uomo dallo "spirito", dalla "divinità", lo abbiamo ricollocato tra gli animali» (Nietzsche 1970b: 179-180). In senso nietzscheano, il rapporto tra creazione e resistenza pensato da Agamben deve essere invertito: non è l'umano (il personale) a dover resistere all'imposizione dell'animale (l'impersonale) al fine di creare, essendo piuttosto la creatività a venire alla luce nella misura in cui l'animale resiste alle costrizioni della forma umana. Stando alla critica nietzscheana al Cristianesimo, ciò contro cui dobbiamo resistere e che va definitivamente superato è ogni forma culturale di dominio sulla vita, quelli che Nietzsche definisce «delitti contro la vita». Il problema della visione cristiana del mondo non è la sua vicinanza a Dio, ma il fatto che essa deturpi la vita: «Quel che *ci* divide non sta nel fatto che non ritroviamo Dio né nella storia, né nella natura e neppure dietro la natura – bensì nella circostanza che noi sentiamo quel che viene venerato come Dio, non come "divino", ma come miserabile, assurdo, dannoso, non soltanto come errore, ma come *delitto contro la vita*» (Nietzsche 1970b: 229). Nietzsche intende dissipare il pregiudizio secondo cui la "cultura" sarebbe un carattere distintivo e nobilitante della specie umana, e a tal fine invita a sdivinizzare la natura e per poi «origliare gli idoli» che si nascondono nella storia, nella natura o dietro essa (Nietzsche 1970a: 53-54). Ma ciò che davvero differenzia il naturalismo di Nietzsche da un naturalismo positivistico moderno è l'affermazione della vita e della creatività della natura, il cui esempio è offerto dai Greci e dal Rinascimento.

Le differenze tra Agamben e Nietzsche in merito al rapporto tra animalità e creatività ricadono proprio nelle loro visioni contrastanti in merito al Rinascimento. Se Agamben contrappone la concezione della creazione come inoperatività all'esempio rinascimentale della produttività artistica, Nietzsche intende la creatività rinascimentale come un modo di divenire più naturale, più animale, dell'essere umano nel suo superamento dell'essere umano come creatore secondo il modello del Dio

cristiano, in direzione dell'apertura di una molteplicità di nuovi dei[23]. Per Nietzsche, il Rinascimento rappresenta un superamento del Dio cristiano, mentre Agamben in *Creatività e anarchia* suggerisce di intenderlo come il momento in cui il Dio cristiano viene reintegrato nella forma della macchina artistica. Nietzsche celebra il Rinascimento come l'epoca in cui si supera la visione cristiana del mondo e l'idea associata di creazione divina, ritornando a un'idea greca della natura, intesa come caos e creatività: «Il carattere complessivo del mondo è [...] caos per tutta l'eternità, non nel senso di un difetto di necessità, ma di un difetto di ordine, articolazione, forma, bellezza, sapienza e di tutto quanto sia espressione delle nostre estetiche natura umane» (Nietzsche 1965: 117). Nietzsche dunque accoglie il Rinascimento e analogamente sfrutta la fine del Cristianesimo come fondamento da cui superare una menzogna millenaria mediante un ritorno all'origine della filosofia greca (Löwith 1982: 285-286). Dal suo punto di vista, la figura dell'artista nel Rinascimento celebra la divinizzazione della natura (umana) ed esemplifica una naturalezza «più naturale» dell'essere umano (Nietzsche 1972b: 352). Nel Rinascimento, l'arte diventa natura e la natura arte[24]. Contrariamente all'antropogenesi descritta da Agamben, con la morte di Dio Nietzsche indica la vita per un ritorno alla vita animale (*zoe*), sorgente di creatività. Questa relazione immanente tra animalità e creatività in Nietzsche si riflette nel carattere an-archico dell'arte e della creazione: mentre Agamben colloca il carattere anarchico della creazione nella potenza-di-non dell'individuo, Nietzsche la riscopre nell'animalità dell'essere umano.

3. CONTINGENZA, RESISTENZA E SUPERAMENTO DI SÉ

Le diverse concezioni di Nietzsche e Agamben del tenore an-archico della creatività hanno un riscontro nelle loro visioni divergenti della contingenza e della resistenza in seno alla creazione di una forma-di-vita. Laddove Agamben inscrive la contingenza nella potenza-di-non, Nietzsche concepisce la contingenza della

[23] Contro il naturalismo positivistico, Nietzsche sostiene che Dio e gli dei sono il risultato dell'antropomorfosi: tutti gli dei sono prodotti dagli umani e perciò sono mortali e finiti. Nietzsche prevede la nascita di nuovi dei in un'epoca che egli descrive come empia e disumana: «Lo sappiamo, il mondo in cui viviamo è sdivinizzato, immorale, "inumano"» (Nietzsche 1965: 258). E sostiene che divino è il fatto che ci siano molti dei, ma non l'unico Dio cristiano cfr. Löwith 1985: 39. Di qui, Vattimo può sostenere che uno dei principali esiti filosofici della morte del Dio metafisico sia la rinnovata possibilità dell'esperienza religiosa, la rinascita del sacro nelle sue molteplici forme cfr. Vattimo 2002: 15-20, 26-27. La morte di Dio non è la morte degli dei: in realtà, Nietzsche vede nella creazione di nuovi dei una delle più alte espressioni della creatività. Su nuove divinità e una nuova religione in Nietzsche cfr. Figl 2000; Lampert 2006.

[24] Nella sua prima opera, Agamben dà nota del "più alto compito" relativo alla figura nietzscheana dello *Übermensch* e all'eterno ritorno dell'uguale come «un diventar natura dell'arte che è, al tempo stesso, un diventare arte della natura» (Agamben 2002: 139). Si tratta di una posizione piuttosto differente rispetto a quella assunta in *Creazione e anarchia*. Sulla relazione tra recitare un ruolo come artificio e il carattere come natura, si veda anche Nietzsche 1965: 224-226.

creazione come una relazione con il fuori, con l'esteriorità (cfr. Foucault 2004a; 2004b), secondo cui l'opera d'arte rappresenta una esternalizzazione dell'essere umano che assume la forma dell'evento.

Collocandosi nella prospettiva della morte di Dio nietzscheana, è lecito porsi la domanda se le categorie aristoteliche di "potenza di agire" e "potenza di non agire", che Agamben chiama in causa per spiegare il processo di creazione, non siano esempi di «fatti interiori», quelle «cause spirituali» che Nietzsche inserisce tra i «quattro grandi errori». Il processo di creazione, secondo Nietzsche, non può essere spiegato come un movimento o uno stato interiore all'artista o all'individuo, essendo la creazione un evento più che un'azione. La contingenza è dunque sempre e necessariamente l'accadere di un'esteriorità, l'incontro con un corpo. Essere un artista o creare una forma di vita significa abbracciare la contingenza del mondo e amarla: un *amor fati*. Il rapporto tra contingenza e necessità in Nietzsche culmina nella sua visione dell'eterno ritorno dell'uguale, entro cui, affermando la vita in tutte le sue forme, imprimiamo «sull'opera il sigillo della necessità» (Agamben 2017: 40)[25]. La creatività nel senso nietzscheano non è in balia di «ciò che poteva non essere o poteva essere altrimenti», come in Agamben (Agamben 2017: 40).

È per questo che Nietzsche osserva il processo di creazione come quella complessa relazione tra l'artista e il suo tempo che può essere detta il "genio". Stagliandosi sul divenire storico, che Nietzsche concepisce come un alternarsi di permanenza e dissoluzione, il genio emerge nella sua radicale contingenza, culminando in un'opera impossibile da attribuire a un artista. Egli descrive l'inattualità della creazione come fine e punto di svolta, un'esplosione che irrompe nel corso della storia:

> I grandi uomini sono, al pari delle grandi epoche, materie esplosive in cui è accumulata una forza enorme; il loro presupposto, storicamente e filosoficamente, è sempre lo stesso: che si sia lungamente raccolto, accumulato, risparmiato e conservato in vista di loro – che per lungo tempo non si sia verificata alcuna esplosione. Se la tensione nella massa si è fatta troppo grande, basta lo stimolo più accidentale per chiamare al mondo il «genio», l'«azione», il grande destino (Nietzsche 1970a: 143-144).

Nietzsche intende le grandi "azioni" come eventi che non possono essere ricondotti a un atto o una causa individuale, inseparabilmente intrecciati a una costellazione storica entro cui si originano e prendono a esistere. In tale costellazione storica, il genio forse non è altro che uno stimolo accidentale che annuncia l'azione nel mondo (Nietzsche 1965: 159-160). L'idea della creazione come evento rispecchia la dimensione storica della contingenza nella concezione della creatività di Nietzsche, provenendo dal suo rifiuto della trascendenza come conseguenza diretta della morte di Dio.

Esiste, poi, una seconda dimensione della contingenza implicata nell'idea nietzscheana della creazione, che già altrove ho definito "dimenticanza dell'animale"

[25] Sull'intimo legame tra la morte di Dio e l'eterno ritorno dell'uguale in Nietzsche, cfr. Löwith 1985; Figl 2000.

(Lemm 2009). Nel naturalismo di Nietzsche, l'oblio animale istituisce il legame tra animalità e creatività (Lemm 2008); e tale oblio è ritrovato da Nietzsche nelle nature vigorose, piene, in cui c'è «una sovrabbondanza di forza plastica, imitatrice, risanatrice e anche suscitatrice d'oblio» (Nietzsche 1972d: 238). L'oblio definisce la creatività del genio della cultura che «si consuma, non si risparmia» (Nietzsche 1970a: 145); esso è anche la fonte del virtuoso, la cui «forza sta nel suo dimenticare se stesso» (Nietzsche 1972c: 400-401); ed è propria del donatore amato da Zarathustra, poiché la sua anima «trabocca [fino a] fargli dimenticare se stesso» (Nietzsche 1973: 10). Nietzsche descrive il processo di creazione come un movimento naturale paragonabile a quello di un fiume che sfonda gli argini. Lo straripamento del sé nell'atto della creazione è involontario e ineluttabile (cfr. Nietzsche 1970a: 143-145; Nietzsche 1973: 3), e impossibile da attribuire a un soggetto intenzionale, a una decisione consapevole o a un atto volontario. L'oblio (animale) non è, per Nietzsche, né una capacità, né una facoltà, né una potenza; è piuttosto una forza vitale attiva nel processo creativo. Tale processo dipende da forze plasmatrici non umane, che non possono essere possedute e che, tuttavia, ci appartengono intrinsecamente. Si può dunque descrivere l'artista come colui nel quale l'animalità e l'esistenza di essere vivente sono tornate a essere creative e produttive.

In Nietzsche, l'oblio animale stringe una relazione agonistica con la memoria, in cui l'oblio cancella le forme precostituite e apre la possibilità di creare nuove forme. Questo movimento è paragonabile alla tensione dinamica osservata da Agamben tra stile, «una negligenza sublime, un dimenticarsi nel proprio», e maniera, «un presentirsi o un ricordarsi nell'improprio» (Agamben 2017: 79-80). Per Nietzsche la creazione comporta perdite radicali (cfr. Bataille 1992): è un movimento espropriante, con il quale il cosiddetto "eroe" subisce (*Untergang*), si abbandona, trabocca e si consuma[26]. L'irruzione di tutta la potenza accumulata nell'azione del genio è pensabile come un dono[27]:

> Il genio – nell'opera e nell'azione – è necessariamente un dissipatore: lo spendersi è la sua grandezza... L'istinto dell'autoconservazione è, per così dire, sospeso; la strapotente pressione delle forze erompenti gli inibisce ogni salvaguardia e ogni cautela in questo senso. Si chiama ciò «olocausto»; si esalta in ciò il suo «eroismo», la sua indifferenza verso il proprio bene, la sua dedizione a una idea, a una grande causa, a una patria: ma sono tutti fraintendimenti... (Nietzsche 1970a: 145).

[26] In merito alla «forza sovrabbondante, gravida d'avvenire», che urge nel creatore, cfr. Nietzsche 1965: 249. Si veda anche Nietzsche 1965: 90-92, in cui Nietzsche descrive l'eroe tragico come una «specie di *deviazione dalla natura*»: «forse il cibo più gradevole per la superbia dell'uomo: è per cagion sua che egli ama in generale l'arte come espressione di una elevata ed eroica innaturalezza e convenzione». Nietzsche individua una relazione tra arte e religione: entrambe offrono una visione semplificata e trasfigurata dell'individuo come un eroe, come qualcosa del passato e come un tutto (Nietzsche 1965: 88-89).

[27] Cfr. Nietzsche 1973: 88-93. Secondo Deleuze, la vita come volontà di potenza «*è essenzialmente creatrice e donatrice*» (Deleuze 1978: 130).

È solo abbandonando noi stessi che la vita ci dà forma, ed è distruggendo la forma precostituita che ci si ricrea come forma nuova. E tuttavia, mentre ad Agamben la tensione tra stile («perdita ed espropriazione») e modo («appropriazione e abito») si stabilisce in una forma d'"uso" e "costituisce" una forma-di-vita (Agamben 2017: 80), nel pensiero di Nietzsche questa tensione, questa lotta non si risolve in una figura definitiva. La creazione è an-archica perché, lungi dal perseverare in un'identità o in una forma, Nietzsche concepisce la (auto)creazione come un continuo (auto)superamento.

La nozione di superamento di sé che Nietzsche associa all'*Übermensch* è intimamente correlata al suo pensiero sulla morte di Dio. L'umano non è un nuovo Dio; piuttosto, come già affermato, «il superamento del Cristianesimo si identifica con il superamento dell'uomo» (Löwith 1982: 286)[28]; e, in altre parole, la morte di Dio richiede un continuo superamento di sé dell'essere umano[29]. Per Nietzsche, non ci può essere un superamento definitivo della figura di Dio:

> Nella vecchia Europa, mi sembra che anche oggi sia pur sempre la maggioranza ad aver necessità del Cristianesimo, perciò esso continua sempre a trovare chi gli presta fede. Così infatti è l'uomo: anche se un articolo di fede potesse essere mille volte confutato – posto che egli lo sentisse necessario –, continuerebbe sempre a tenerlo per «vero» [...]. [È] *quell'istinto della debolezza,* che in realtà non crea religioni, metafisiche, convincimenti di ogni specie, ma... li conserva (Nietzsche 1965: 211-212).

Dio resta (*bleibt*) (Nietzsche 1965: 129-130) e allunga la sua «immensa orribile ombra» sull'Europa (Nietzsche 1965: 117)[30]. Questo è il motivo per cui per Nietzsche permane sempre l'urgenza di vincere Dio: la libertà creativa non è scontata, ma va costantemente riconquistata (Nietzsche 1970a: 139-141). Perciò non possiamo semplicemente abbandonare la macchina artistica al suo destino, come suggerisce Agamben: prima che essa inizi a "girare a vuoto", come l'artista-filosofo spirituale Agamben prevede, c'è ancora del lavoro da fare.

[28] Heidegger si premura di precisare che sarebbe scorretto assumere la morte di Dio nietzscheana come la mera sostituzione di Dio con l'umano: «Il posto che, *metafisicamente* pensato, è proprio di Dio, è il luogo della effettuazione causativa e della conservazione dell'essente in quanto essente creato. Questo luogo di Dio può restare vuoto [...] L'oltreuomo non subentra né ora né mai al posto di Dio: il posto a cui accede il volere dell'oltreuomo è un altro ambito di un'altra fondazione dell'essente in un altro suo essere. Questo altro essere dell'essente è frattanto divenuto – e ciò segna l'inizio della *metafisica* moderna – la *soggettività*» (Heidegger 2006: 301).

[29] In una nota scritta durante la stesura de *La gaia scienza*, Nietzsche afferma: «Se dalla *morte di Dio* non ricaviamo una magnanima *rinuncia* e una continua vittoria *su di noi*, dobbiamo *portarne la perdita*» (Nietzsche 1986: 422).

[30] In merito alle ombre di Dio in Nietzsche cfr. Campioni 2008; Frank 1998.

BIBLIOGRAFIA

Abed, A. 2015. *Nietzsche versus Paul*. New York: Columbia University Press.

Agamben, G. 1994. *L'uomo senza contenuto*. Macerata: Quodlibet.

Agamben, G. 1995. *Homo sacer. Il potere sovrano e la nuda vita*. Torino: Einaudi.

Agamben, G. 1996. *Mezzi senza fine. Note sulla politica*. Torino: Bollati Boringhieri.

Agamben, G. 2002. *L'aperto. L'uomo e l'animale*. Torino: Bollati Boringhieri.

Agamben, G. 2005. *La potenza del pensiero. Saggi e conferenze*. Vicenza: Neri Pozza.

Agamben, G. 2008. *Signatura rerum. Sul metodo*. Torino: Bollati Boringhieri.

Agamben, G. 2017. *Creazione e anarchia. L'opera nell'età della religione capitalista*. Vicenza: Neri Pozza.

Ansell-Pearson, K. 2000. *On the Miscarriage of Life and the Future of the Human: Thinking Beyond the Human Condition with Nietzsche*. In «Nietzsche-Studien», 29, pp. 153-177.

Bataille, G. 1992. *La nozione di dépense*. Traduzione a cura di F. Serna, in Id., *La parte maledetta*. Torino: Bollati Boringhieri, pp. 1-22.

Campioni, G. 2008. *Nietzsche. La morale dell'eroe*. Pisa: ETS.

Deleuze, G. 1978. *Nietzsche e la filosofia*. Traduzione a cura di S. Tassinari. Firenze: Colportage.

De la Durantaye, L. 2009. *Giorgio Agamben: A Critical Introduction*. Stanford: Stanford University Press.

Enders, M. 2012. *Heideggers Deutung von Nietzsches Proklamation des Todes Gottes*. In *Heidegger & Nietzsche*, a cura di B. Babich, A. Denker e H. Zaborowski. Leiden: Brill, pp. 97-120.

Esposito, R. 2004. *Bios. Biopolitica e filosofia*. Torino: Einaudi.

Esposito, R. 2007. *Terza persona: politica della vita e filosofia dell'impersonale*. Torino: Einaudi.

Figl, J. 2000. *'Tod Gottes' und die Möglichkeit 'neuer Götter'*. In «Nietzsche-Studien», 29, pp. 82-101.

Foucault, M. 1989. *Sulla genealogia dell'etica: compendio di un work in progress*. Traduzione a cura di M. Bertani, in *La ricerca di Michel Foucault. Analitica della verità e storia del presente*, a cura di H.L. Dreyfus e P. Rabinow. Firenze: Ponte alle Grazie, pp. 257-281.

Foucault, M. 1998. *Che cos'è l'Illuminismo?*. Traduzione a cura di S. Loriga, in *Archivio Foucault 3: Estetica dell'esistenza, etica, politica*. Milano: Feltrinelli, pp. 253-261.

Foucault, M. 2004a. *Preface to Transgression*. Traduzione a cura di C. Milanese, in *Scritti letterari*. Milano: Feltrinelli, pp. 55-72.

Foucault, M. 2004b. *Il pensiero del di fuori*. Traduzione a cura di C. Milanese, in *Scritti letterari*. Milano: Feltrinelli, pp. 111-134.

Frank, D. 1998. *Nietzsche et l'ombre de Dieu*. Paris: Presses Universitaires de France.

Gentili, C. 2001. *Nietzsche*. Bologna: ilMulino.

Habermas, J. 1973. *Prassi politica e teoria critica della società*. Traduzione a cura di A. Gajano. Bologna: ilMulino.

Heidegger, M. 2006. *La parola di Nietzsche «Dio è morto»*. Traduzione a cura di V. Cicero, in Id., *Holzwege. Sentieri erranti nella selva*. Milano: Bompiani, pp. 247-316.

Heidegger, M. 2008. *Lettera sull'"umanismo"*. Traduzione a cura di F. Volpi. Milano: Adelphi.

Kaufmann, W. 1974. *Nietzsche: Philosopher, Psychologist, Antichrist*. Princeton: Princeton University Press.

Lampert, L. 2006. *Nietzsche's Philosophy and True Religion*. In *A Companion to Nietzsche*, a cura di K. Ansell-Pearson. London: Wiley-Blackwell, pp. 133-147.

Leiter, B. 2002. *Nietzsche On Morality*. London: Routledge.

Lemm, V. 2008. *The Biological Threshold of Modern Politics: Nietzsche, Foucault and the Question of Animal Life*. In *Nietzsche, Power and Politics: Nietzsche's Legacy as a Political Thinker*, a cura di H.W. Siemens e V. Roodt. Berlin: De Gruyter, pp. 679-699.

Lemm, V. 2009. *Nietzsche's Animal Philosophy: Culture, Politics and the Animality of the Human Being*. New York: Fordham University Press.

Lemm, V. 2017. *Points of Reference: Friedrich Nietzsche*. In *Agamben's Philosophical Lineage*, a cura di A. Kotsko e C. Salzani. Edinburgh: Edinburgh University Press, pp. 171-177.

Lemm, V. 2020a. *The Work of Art and the Death of God in Nietzsche and Agamben*. In *Agamben and Existentialism*, a cura di C. Dickinson e M. Norris. Edinburgh: Edinburgh University Press.

Lemm, V. 2020b. *Homo Natura: Nietzsche, Philosophical Anthropology and Biopolitics*. Edinburgh: Edinburgh University Press.

Löwith, K. 1982. *Da Hegel a Nietzsche. La frattura rivoluzionaria nel pensiero del secolo XIX*. Traduzione a cura di G. Colli. Torino: Einaudi.

Löwith, K. 1985. *Nietzsche e l'eterno ritorno*. Traduzione a cura di S. Venuti. Bari-Roma: Laterza.

Nehamas, A. 1985. *Nietzsche: Life as Literature*. Cambridge: Harvard University Press.

Nietzsche, F. 1965. *La gaia scienza*. Traduzione a cura di F. Masini, in *Opere complete di Nietzsche*, vol. V.2. Milano: Adelphi, pp. 11-276.

Nietzsche, F. 1970a. *Il crepuscolo degli idoli, ovvero come si filosofa col martello*. Traduzione a cura di F. Masini, in *Opere complete di Nietzsche*, vol. VI.3. Milano: Adelphi, pp. 51-163.

Nietzsche, F. 1970b. *L'Anticristo*. Traduzione a cura di F. Masini, in *Opere complete di Nietzsche*, vol. VI.3. Milano: Adelphi, pp. 165-262.

Nietzsche, F. 1972a. *Al di là del bene e del male*. Traduzione a cura di F. Masini, in *Opere complete di Nietzsche*, vol. VI.2. Milano: Adelphi, pp. 1-209.

Nietzsche, F. 1972b. *Considerazioni inattuali II. Sull'utilità e il danno della storia per la vita*. Traduzione a cura di S. Giametta, in *Opere complete di Nietzsche*, vol. III.1. Milano: Adelphi, pp. 257-355.

Nietzsche, F. 1972c. *Considerazioni inattuali III. Schopenhauer come educatore*. Traduzione a cura di M. Montinari, in *Opere complete di Nietzsche*, vol. III.1. Milano: Adelphi, pp. 357-457.

Nietzsche, F. 1972d. *Genealogia della morale. Uno scritto polemico*. Traduzione a cura di F. Masini, in *Opere complete di Nietzsche*, vol. VI.2. Milano: Adelphi, pp. 211-367.

Nietzsche, F. 1973. *Così parlò Zarathustra*. Traduzione a cura di M. Montinari, corrispondente a *Opere complete di Nietzsche*, vol. VI.1. Milano: Adelphi.

Nietzsche, F. 1975. *Frammenti postumi 1884-1885*, a cura di S. Giametta, corrispondente a *Opere complete di Nietzsche*, vol. VII.3. Milano: Adelphi.

Nietzsche, F. 1986. *Frammenti postumi 1882-1884*, a cura di L. Amoroso e M. Montinari, corrispondente a *Opere complete di Nietzsche*, vol. VII.1.2. Milano: Adelphi.

Norris, M.A. 2018. *Existential Choice as Repressed Theism: Jean-Paul Sartre and Giorgio Agamben in Conversation*. In *Religions*, 9.106, pp. 1-12.

Rauff, U. 2004. *An Interview with Giorgio Agamben*. In «German Law Journal», 5.5, pp. 609-614.

Revel, J. 2008. *Identità, natura, vita: tre decostruzioni biopolitiche*. In *Foucault, oggi*, a cura di M. Galzigna. Milano: Feltrinelli, pp. 134-149.

Sartre, J.P. 1946. *L'existentialisme est un humanisme*. Paris: Éditions Nagel.

Schacht, R. 1983. *Nietzsche*. New York: Routledge.

Sinnerbrink, R. 2012. *Heidegger and Nietzsche on the End of Art*. In *Heidegger and Nietzsche*, a cura di B. Babich, A. Denker e H. Zaborowski. Leiden: Brill, pp. 417-428.

Vatter, M. 2016. *Law and Life Beyond Incorporation: Agamben, Highest Poverty, and the Papal Legal Revolution*. In *Agamben and Radical Politics*, a cura di D. McLoughlin. Edinburgh: Edinburgh University Press, pp. 234-263.

Vattimo, G. 1998. *La fine della modernità*. Milano: Garzanti.

Vattimo, G. 2002. *Il Dio che è morto*. In Id., *Dopo la cristianità. Per un cristianesimo non religioso*. Milano: Garzanti.

Young, J. 2014. *The Death of God and the Meaning of Life*. London: Routledge.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 129-168
ISSN: 1825-5167

COSTITUZIONE ESTETICA O DESTITUZIONE ESTATICA
OLTRE LA NOZIONE MODERNA DI SOGGETTO MEDIANTE L'ESPERIENZA DEL LINGUAGGIO. FOUCAULT E AGAMBEN

CARLO CROSATO
Ca' Foscari University of Venice
Department of Philosophy and Cultural Heritage
car.crosato@gmail.com

ABSTRACT
This article addresses the critique of the modern notion of Subject that Foucault and Agamben have led drawing from the contact with the language and its materiality. Starting from the discovery of the merely functional nature of the subject, the two authors have taken radically divergent ways to look for the possibility of crossing the boundary that the modern subject has drawn around his logical and rational realm. In his restless experimentation, Foucault has highlighted the need for an emancipated and ungovernable experience, with particular emphasis on the study of literary texts which, abandoning all expressive ambitions, allows to find out the inherent vitally of language. It will be noticed how, through several changes of direction, Foucault would later return to spread light on the ethical-esthetical evenemential breaks achieved by the engagement of the historical thickness of language. I will also deal with the study of the ontological breadth that Agamben gives to his reflection on language, with the aim of retracing, through the contact with poetry, the transcendental origin of every statement, intended as a moment in which man, taking the word, makes himself a historic being.

KEYWORDS
Subject, language, literature, poetry, esthetics, ethics, Foucault, Agamben.

1. AL DI LÀ DELL'ARCHIVIO FOUCAULTIANO

Nel capitolo conclusivo di *Quel che resta di Auschwitz*, Agamben istituisce un collegamento tra il programma di superamento della linguistica saussuriana proposto da Benveniste attraverso una metasemantica costruita sulla «semantica dell'enunciazione» (Benveniste 1974: 65), e le intuizioni sistematizzate da Foucault ne *L'archeologia del sapere*, dirette allo studio della funzione enunciativa di ogni sequenza linguistica. I due autori, sostiene Agamben, sarebbero così accomunati dall'attenzione alla materialità del discorso in senso filosofico e non strettamente

segnico, al suo aver luogo (Agamben 2001: 15-17), alla dimensione che funge da condizione di esistenza, sempre presupposta da ogni evento linguistico. Primo obiettivo delle pagine che seguono sarà comprendere che cosa in Foucault e in Agamben significhi entrare in contratto con questo "aver luogo": il filosofo francese, infatti, orienta l'attenzione sulla materialità mediale del linguaggio, ma soprattutto a partire dalla seconda metà degli anni Sessanta, e non senza ripensamenti e rotture, questo accesso sarà funzionale allo studio dell'evento, di positività di cui dar conto in quanto coinvolte in geometrie storicamente determinate e determinanti una precisa rarefazione di discorsi e funzioni discorsive (Foucault 1997: 52-53); per Agamben, invece, è urgente ricostruire l'orizzonte ontologico su cui si staglia ogni atto linguistico, lo stesso aver luogo del linguaggio in sé considerato.

Sono differenze dovute all'intenzione di Agamben di riscoprire tutte le implicazioni delle novità così promettenti riscontrabili nella prospettiva foucaultiana. A Foucault, afferma Agamben, va riconosciuto il merito di aver orientato lo sguardo verso il linguaggio nella sua esistenza bruta (Agamben 1978: X-XI): non più osservato in quanto mero mezzo di comunicazione bensì nella sua evenemenzialità, il linguaggio non è più avvicinato a partire da un soggetto – sia esso trascendente o psicosomatico. Foucault, secondo Agamben, ha saputo criticare i cardini del pensiero moderno, in particolare la produzione del soggetto trascendentale astratto da tutti gli attributi antropologici e psicologici, e la sua riduzione al puro "io" che si dice. E tale critica è stata avanzata conducendo a estreme conclusioni le premesse dello stesso pensiero moderno, in particolare il dislocamento dell'esperienza linguistica dal piano delle proposizioni a un piano a-semantico, a un puro dire, unico oggetto certo dell'autocoscienza, ma invero oggetto privo di contenuto se non il proprio stesso essere evento enunciativo. Proprio nell'atto di autoelezione a sovrano della storia, nel punto in cui àncora la propria autocoscienza a una trascendentalità depurata da condizioni psicologiche o storiche, il soggetto finisce per ridursi a mera funzione derivata di quel dire che avrebbe dovuto confermare la sua posizione.

Prendere sul serio il dirsi dell'io moderno significa

> considerare il discorso nel suo puro aver luogo e il soggetto come «l'inesistenza nel cui vuoto s'insegue senza tregua l'effondersi indefinito del linguaggio».

La citazione riportata da Agamben proviene da *La pensée du dehors*, articolo foucaultiano del 1966, in cui il filosofo italiano individua l'occasione per interrogare l'enunciazione come «*la soglia fra un dentro e un fuori*»; una soglia in prossimità della quale

> il soggetto si scioglie da ogni implicazione sostanziale e diventa una pura funzione o una pura posizione (Agamben 1998: 130-131. La citazione è da Foucault 2001a: 547).

Foucault declina questo progetto ponendo in primo piano le trame concrete che producono e condizionano il soggetto proprio laddove la filosofia moderna ha voluto depurarlo di ogni condizione antropologica o storica. Lo strumento messo a punto da Foucault è quello dell'archivio, «il sistema che governa l'apparizione degli enunciati come avvenimenti singoli», regolando il passaggio tra tutto ciò che il linguaggio consente di dire e ciò che un'epoca ha effettivamente potuto dire (Foucault 1997: 173). Il soggetto vi emerge come un nodo di discorsi e relazioni, in una prospettiva che lo stesso Foucault, soprattutto a partire dalla fine degli anni Settanta ma non senza importanti avvisaglie negli anni precedenti, prenderà a considerare problematica per la difficoltà che essa comporta nel delineamento di pensieri e azioni capaci di emanciparsi dall'anonimo brusio di enunciati e relazioni di potere: su questa soglia Foucault pare collocare la sua linea "fra un dentro e un fuori".

Il tenore ontologico della sua riflessione conduce invece Agamben a superare l'archivio foucaultiano in direzione della lingua. Agamben si colloca «fra la *langue* e il suo aver luogo, fra una pura possibilità di dire e la sua esistenza come tale», illuminando un dicibile che non è più ciò che le procedure storiche di formazione discorsiva permettono di dire, bensì una «potenza in atto *in quanto potenza*» (Agamben 1998: 134-135). Più che a questo o quell'atto discorsivo concreto, Agamben sosta sulla stessa attualizzazione della potenza: qui è collocata la soglia a cui Agamben risale per prevedere una via di emancipazione dalla paradossale dinamica che, mentre permette all'individuo di collocarsi e dotarsi di un'identità dicendo "io", lo destina a essere una mera lacuna del discorso, una sua funzione. Una via di emancipazione che, si vedrà, perciò risulta assai differente dall'etica foucaultiana.

Prima di procedere a un confronto sulla questione etica, indaghiamo gli ambiti di gestazione della critica foucaultiana al soggetto moderno, inoltrandoci fin dentro gli scritti letterari che, paralleli alle indagini archeologiche degli anni Sessanta, testimoniano lo sforzo costante di aprire spazi di rinnovamento senza ricadere in un'ipostatizzazione del soggetto. In seguito, si darà conto del modo in cui, a sua volta in aperta critica nei confronti della fenomenologia husserliana e affrontando la materia letteraria e poetica, Agamben sviluppa l'apertura ontologica utile a integrare e correggere la prospettiva foucaultiana.

2. IL DIFFICILE OLTREPASSAMENTO DELLA LINEA

2.1. Il riconoscimento di una soglia tra un dentro e un fuori è un problema che Foucault incontra già in *Storia della follia* e poi, in termini più generali, in *Le parole e le cose*. La storicizzazione del discorso sulla follia lo conduce alla comprensione della dinamica moderna mediante cui la ragione informa ogni discorso di sapere, configurando strutture di controllo all'interno delle quali essa si rinserra

per fissare il proprio dominio e classificare ciò che le è altro, e che è per questo privato del diritto reciproco. Si tratta di configurazioni che negli anni Foucault ridefinirà *episteme*, formazioni discorsive, regimi di verità, con l'intenzione di sottrarle all'assolutezza e alla permanenza astorica delle strutture dello strutturalismo. Foucault ne descriverà con impegno la pretesa consistenza interna, e al contempo si troverà attratto verso il limite che tali configurazioni designano attorno a sé. Avvicinare tale linea, sostare su quella soglia, infatti, significa sia rappresentare queste griglie in tutta la loro storicità e contingenza, sia aprire la possibilità di un loro superamento. È grande lo scalpore che crea l'idea che anche la configurazione di saperi in cui si trova definito l'uomo abbia una data di nascita e una data di fine: a quella che nel '66 sembra una idea estemporanea, segue un profondo lavorio attorno alle «condizioni di possibilità della rottura possibile con ciò che si è» (Revel 2003: 26), con l'uomo e con la figura del soggetto moderno mediante cui l'uomo si elegge sovrano della storia, per divenire non solo altri – e perciò dialetticamente ricompresi nel dominio del medesimo –, ma radicalmente diversi.

Griglie di intelligibilità e regimi veritativi che, nella loro pluralità e nella loro storicità, sembrano mantenere una geometria sovranitaria che rende la loro evasione difficile da pensare. Di tale geometria, sotto il segno dell'eccezione, Agamben ha dato una definizione dal tenore ontologico, in grado di sfidare l'intera forma del pensiero occidentale, e non solo la sua configurazione moderna. Così, se Foucault fin dal 1966 indica la modernità come l'orizzonte storico e culturale in cui si consuma la vicenda dell'uomo, con ampiezza ontologica Agamben, parlando di origine trascendentale più che cronologica, indaga i processi di umanizzazione e disumanizzazione mediante cui da sempre l'uomo cerca di definire la propria coincidenza a sé (Salzani 2019). Che l'uomo sia luogo di transito di processi di umanizzazione e disumanizzazione è manifestato, per Agamben, dal fatto che chiunque intenda offrire una definizione davvero esaustiva dell'umano si troverebbe a dar testimonianza di lati dell'esperienza così estremi da strappare la stessa possibilità di parlare. Parimenti, essendo il soggetto situato nell'intreccio dei vettori che catturano in termini disposizionali la vita, non solo parlare del soggetto implica una qualche inevitabile oggettivazione, ma lo stesso parlar di sé del soggetto comporta, per Agamben, un processo al contempo soggettivante e desoggettivante perfino più profondo del mero assoggettamento che in Foucault accompagna la soggettivazione.

Del paradosso di una soggettivazione sempre legata a processi di cattura della soggettività, di una soggettivazione cioè sempre e inevitabilmente emergente come positività di discorsi e relazioni di potere Agamben presenta il caso più estremo, quello del Musulmano di Auschwitz. Un paradosso, afferma Agamben, sfiorato una sola volta da Foucault, nel testo *La vie des hommes infâmes* del 1977, prefazione a un'antologia di documenti burocratici nei quali avviene un paradossale incontro tra il soggetto e le trame di saperi e poteri. Proprio nel momento in cui

l'individuo è bollato d'infamia, esso viene portato alla luce in quanto inconoscibile impenetrabilità. Si viene così proiettati di fronte all'interrogativo dell'oltrepassamento della linea, dell'urgenza di «passare dall'altra parte, di ascoltare e far comprendere il linguaggio che viene da altrove o dal basso», non nei termini – già condizionati dalle trami disposizionali – di un soggetto che si confessa, quanto in quelli di un'esperienza "selvaggia", irriducibilmente ingovernabile, che piega a sé il discorso del potere. «Il punto più intenso delle vite, quello in cui si concentra la loro energia è proprio là dove si scontrano con il potere, si dibattono con esso, tentano di utilizzare le sue forze o di sfuggire alle sue trappole», resistenti loro malgrado e per una vocazionale incontenibilità, per una forma propria e in assegnata (Foucault 2001b: 241).

2.2. Lo sforzo di muovere in direzione di un'esteriorità rispetto a trame eteroimposte accompagna già il fugace ma significativo avvicinamento del giovane Foucault allo sforzo operato da Binswanger nello studio della dimensione onirica al di là sia del positivismo psicologico sia di forme filosofiche a priori. Nel sogno «la rete dei significati sembra dissimularsi» (Foucault 2001a: 96), e vi si può osservare l'immaginazione del soggetto libero che si fa mondo. Rompendo l'«oggettività che affascina la coscienza vigile», la *Daseinsanalyse* interroga il soggetto non come mero significato, ma come significante, non come immagine raffreddata e desiderio appagato, ma come immaginazione inesauribile (Foucault 2001a: 107 e 143. Cfr. Luce 2009: 28 ss). Un movimento che la *Daseinsanalyse* illumina nel sogno, ma che Foucault già nel '54 proietta sull'espressione poetica, come lavoro di continuo rifiuto, negazione del desiderio realizzato, grazie a cui si rivelano tutte le forme possibili che un'esistenza può assumere.

Lo slancio fenomenologico dell'introduzione a *Sogno ed esistenza* risulta già notevolmente attenuato nello studio dello stesso anno, *Maladie mentale et personalité*, in cui la domanda sul movimento originario dell'esistenza è sostituita dall'attenzione all'orizzonte epistemico in cui, mediante l'uso degli strumenti delle scienze naturali, viene formulata la definizione del patologico. Quelli della metà degli anni Cinquanta sono passaggi cruciali: matura l'allontanamento dalla fenomenologia, corrente che aveva offerto il primo movente per interrogarsi su un'esperienza irriducibile al discorso scientifico, e avviene un sensibile avvicinamento allo strutturalismo, prospettiva concentrata sulla descrizione di condizioni culturali e oggettive del reale.

Il confronto con lo strutturalismo conduce Foucault a prendere progressivamente le distanze dalla pretesa fenomenologica di mettere tra parentesi il mondo oggettivo al fine di affermare i privilegi di una presunta soggettività non assoggettata, originaria e produttrice di senso: tale figura, sosterrà Foucault con sempre maggiore forza, lungi dall'essere originaria, è essa stessa il prodotto di una precisa configurazione storica. In questa fase, l'urgenza di "oltrepassare la linea" assumerà

gradualmente il significato di liberarsi dalla nozione moderna di soggetto, smascherando tale concetto come un evento che ha consolidato l'ordine epistemico che l'ha prodotto e ha legittimato forme di sapere e di potere rispetto alle quali Foucault intende rinvenire possibilità di discontinuità[1]. Questa rottura, tuttavia, non va intesa come un pacifico e completo affidamento al metodo strutturalista o come un più generico interesse esclusivo per le strutture oggettive parimenti astoriche e incapaci di accogliere la discontinuità (Revel 1996: 41). Se è vero che lo strutturalismo offre il movente sperimentale per assumere una posizione critica nei confronti della soggettività moderna e del soggetto della fenomenologia, è parimenti vero che il continuo confronto con i testi letterari, fino alla rilettura di Nietzsche che con tali testi è legato da un reciproco rimando (De Cristofaro 2008: 31-36), restituisce l'inquieta ambizione di Foucault di smarcarsi certo da un soggetto astorico, senza tuttavia arenarsi nelle secche di una oggettività irrefutabile. L'inquieto smarcamento prima dalla fenomenologia e in seguito dallo strutturalismo permette insomma di comprendere come la giovanile urgenza di sostare sul limite, di trasgredirne l'impermeabilità, non possa arrendersi alla riduzione del soggetto a pura positività strutturata, rimanendo piuttosto aperta alla ricerca di un'autonomia sempre storicamente collocata rispetto alle forme del limite di cui si fa esperienza (Domenicali 2018: 106-110), di una differenza irriducibile – com'è invece l'alterità – al medesimo (Revel 1997).

2.3. Quella tra differenza e alterità non è una distinzione di poco conto nell'esercizio foucaultiano del limite, se si considera la binarietà dal vago sapore hegeliano che ancora in *Storia della follia* funziona lizza l'alterità al discorso sovrano del medesimo. E non è una distinzione secondaria perché proprio il recupero critico della movenza dell'inclusione di qualcosa in quanto escluso è ciò che caratterizza l'osservazione agambeniana dell'ontologia occidentale.

L'intera vicenda intellettuale agambeniana è volta a mettere in luce la negatività intrinseca alla metafisica occidentale, che impiglia a sé anche i tentativi di aggirarne gli esiti, come nel caso della comunità negativa di Bataille (Agamben 1988). Da parte sua, anche Foucault non manca di rilevare l'inanità di un oltrepassamento che, trasgredendo il limite imposto dalle formazioni storiche di saperi e poteri, indirettamente finisce per confermarlo. Nel '63, lo stesso Foucault si confronta con Bataille, e in particolare con il suo concetto di trasgressione inteso come «un gesto che concerne il limite» e che «supera e non cessa di riprendere a superare una linea che, dietro a essa, subito si richiude [...] recedendo così di nuovo fino all'orizzonte dell'insuperabile» (Foucault 2001a: 264-265). Nella ricerca di occasioni per produrre alterità e discontinuità, limite e trasgressione si implicano vicendevolmente, e anzi «devono l'uno all'altra la densità del loro essere» (Foucault

[1] Temi centrali nel corso *L'ermeneutica del soggetto*, dell'81-82, come si tornerà a vedere. Cfr. Luce 2015.

2001a: 265). L'anomalia è già momento del medesimo, che la ricomprende come mera alterità entro il proprio statuto privilegiato, ne ritraduce con il proprio lessico e la propria sintassi il linguaggio, la arruola per la legittimazione del limite[2].

È in prossimità di queste riflessioni che Foucault matura le proprie intuizioni in merito al fatto stesso che «i discorsi esistono» (Foucault 2011: 34), alla materialità dei discorsi che Agamben intenderà valorizzare e superare. Dalla frustrazione del gesto trasgressivo entro una geografia capace di pacificarsi in senso dialettico, Foucault prende a indagare ordini linguistici autonomi, eterogenei, sperando di incontrarvi voci che l'ordine precostituito non riesce a riassorbire, che con la loro irriducibile positività, oltre la volontà di verità che le circonda (Catucci 2007), producono una *impasse* tra i saperi (si pensi a certe esperienze letterarie e alla loro combinazione con la follia (Foucault 2001a: 440-448)[3]) e tra i poteri (di qui la fascinazione di Foucault nei confronti degli infami e di Rivière (Foucault 1973)).

2.4. Il riferimento filosofico cui Foucault fa appello nel '66, dopo aver brevemente esitato presso la trasgressione in senso battailleano, è il *dehors* di Blanchot, inteso come esperienza di superamento della completa presenza a sé dell'*io penso* cartesiano, attraverso lo spazio vuoto aperto dall'*io parlo* della parola letteraria. È in questa occasione che Foucault matura le riflessioni che Agamben cita in *Quel che resta di Auschwitz* come punto di raccordo tra la sua riflessione e quella foucaultiana. Anche l'*io parlo*, come l'*io penso*, appare capace di porsi come polo di raccolta e organizzazione di tutto un linguaggio; e tuttavia la lettura di Blanchot consente a Foucault di immaginare un'inversione di tale movimento, grazie alla quale «il vuoto in cui si manifesta l'esiguità senza contenuto dell'"io parlo"» appaia essere l'apertura assoluta, una breccia attraverso cui il linguaggio possa diffondersi all'infinito, proprio mentre il soggetto, lungi dal riscoprirsi responsabile del discorso, si ritrova disperso fino a scomparire in un indefinito recupero di sé da parte del linguaggio[4]. L'io dell'*io parlo* illumina uno spazio di proliferazione del linguaggio di cui non è sovrano. Sospesa l'illusione di un soggetto-autore della cui interiorità essa sarebbe manifestazione, la letteratura può rendere possibile «un passaggio al "di fuori"», in cui il linguaggio si libera dalla funzione rappresentativa e in cui «la

[2] Analogamente al potere con la voce dei folli, anche nel trattamento riservato sia dalla grammatica di Port-Royal che dalla linguistica moderna alle parole, Foucault ritrova «la medesima volontà di analizzare la grammatica, non come un insieme di precetti più o meno coerenti, bensì come un sistema in cui si dovrebbe poter trovare una ragione per tutti i fatti, perfino per quelli che sembrano i più devianti». Di nuovo questa idea di un limite che, minacciato, si richiude attorno al gesto trasgressivo per riportare ogni possibile anomalia a coerenza, rendendo completamente vana l'idea di un'esperienza ingovernabile (Foucault 2001a).

[3] Curioso, a proposito, l'aneddoto ricordato da Eribon, secondo cui pare che, concludendo la propria dissertazione orale di dottorato, Foucault abbia affermato l'urgenza di un talento poetico per essere all'altezza del tema di ragione e follia, e che Canguilhem rispose «ma lei ce l'ha, signore» (Eribon 1990: 133). In generale, cfr. Righetti 2011: 6-20.

[4] Si veda anche Foucault 2001a: 278-289.

parola letteraria si sviluppa a partire da se stessa», aprendo spazi di dispersione anziché di adesione a sé di segni e soggetti, e tenendosi

> sulla soglia di ogni positività, non tanto per afferrarne il fondamento e la giustificazione, ma per ritrovare lo spazio dove essa si dispiega, il vuoto che le serve da luogo, la distanza nella quale essa si costituisce e dove sfuggono, non appena osservate, le sue certezze immediate (Foucault 2001a: 549).

Foucault riformula la sua domanda inerente l'oltrepassamento della soglia come istanza che si rifiuta di essere apologia della positività, e che osserva il fuori non come uno spazio avvicinato e gestito da un gesto sovrano – muovendo verso il quale si ricadrebbe nuovamente in una dimensione autocelebrativa del dentro –, bensì luogo di positività differenti.

«L'essere del linguaggio non appare di per sé che nella sparizione del soggetto»; ma laddove Agamben concentrerà la propria attenzione su questa apertura ontologica in quanto tale, Foucault si affaccia sull'apertura della potenza trascendente del linguaggio come risorsa di discontinuità storica, oltre le linee d'ordine esistente, prima fra tutte quella che il soggetto sovrano traccia attorno a sé e dalla quale si dipartono, come cerchi concentrici, le possibilità di dire la propria interiorità. A questo proposito, Foucault immagina una *conversion* dei moti di riflessione e finzione, per piegarli altrove rispetto a dove rischierebbero sempre di precipitare[5]. Lungi dal lavorare in senso centripeto come conferma dell'interiorità, il linguaggio riflessivo deve rivolgersi «verso un'estremità nella quale deve continuamente contestarsi». Laddove negare in termini dialettici significa «fare entrare ciò che si nega nell'interiorità inquieta dello spirito», la conversione della riflessione conduce a una negazione del proprio discorso, un costante passaggio fuori di sé perché il linguaggio sia «libero per un ricominciamento» impossibile da riconciliare. Anche la finzione viene ribaltata in senso centrifugo, in modo che non sia più impegnata nella conservazione del brillamento della positività, bensì dispieghi le proprie immagini, vivificandole mediante l'illuminazione della loro trasparenza: l'immagine viene eviscerata, perché – e questa è un'espressione su cui converrà tornare a breve – si possa vedere «come sia invisibile l'invisibilità del visibile» (Foucault 2001a: 551-552).

La richiesta che Foucault, con Blanchot, rivolge alla letteratura in questi anni, nella sua ricerca di una via di accesso a una ben intesa esperienza selvaggia, è perciò quella di un discorso «libero da qualsiasi centro, liberato da ogni luogo originario e che costituisce il suo proprio spazio come il di fuori verso il quale, fuori del quale esso parla» (Foucault 2001a: 552-553). Non più funzione di un soggetto che si presume trascendentale, questo fuori parla di un'esperienza "selvaggia", capace di far segno verso una possibile fonte di nuovi ordini. Il soggetto non è cancellato, bensì liberato dal peso dell'autonarrazione moderna, perché esso sia dotato del

[5] A tal proposito, Foucault 2001a: 821-824.

coraggio di avanzare incessantemente oltre l'ordine del già detto, verso uno spazio non ancora illuminato, in cui il linguaggio rimane estraneo e inconcepibile. Tale esperienza, Foucault la descrive come l'urgenza di sporgere verso qualcosa che da sempre ci accompagna come ciò con cui non abbiamo legami: il fuori è così osservato come una domanda inevasa oltre un limite che è il vero negativo su cui sbatte il linguaggio del soggetto moderno. Un limite oltre il quale Foucault sfiora la potenza del linguaggio incaricandola però sempre dell'onere di attuarsi altrimenti.

2.5. Vi sono alcune interessanti occasioni in cui Foucault esplora la possibilità di scaricare il linguaggio dell'onere dello strumento in mano a un soggetto sovrano. Sono esempi degni di nota, perché mostrano come egli, pur entrando in contatto con delle esperienze che l'avrebbero permesso, non spinga la sospensione della comunicatività fino all'orizzonte ontologico entro cui Agamben illumina il *factum loquendi* in se stesso. Più che gettare luce sull'orizzonte della potenza, il tenore storico della ricerca foucaultiana è attratto dall'operatività concreta di nuovi ordini linguistici: in tali sperimentazioni, Foucault rinviene una sorta di esoterismo strutturale, una vitalità interna al linguaggio capace di stravolgere gli equilibri, in primo luogo quello della rappresentatività al servizio del soggetto.

Già nell'estate del 1957[6], durante le scrittura della tesi di dottorato, Foucault entra in contatto con le opere di Raymond Roussel, autore di cui descriverà la capacità di restituire l'esperienza di una «nascita sempre rinnovata di un infinito rapporto fra le parole e le cose» (Foucault 1978; le parole sono tratte da Foucault 2001a: 449-452. Cfr. Deleuze 2002), restituendo un tenore dionisiaco alla parola. «Il disparato di Roussel non è affatto bizzarria dell'immaginazione: è il casuale del linguaggio instaurato nella sua onnipotenza all'interno di ciò che dice». Ruotando attorno a metagrammi o scomponendo i suoni di frasi prese a caso per costruire immagini differenti, il procedimento di Roussel fa muovere nello spessore visibile del racconto una serie discorsiva invisibile che organizza meticolosamente il suo svolgimento (Roussel 1935). Quello che, a tutta prima, pare un casuale effluvio di immagini erranti che si dipanano in un linguaggio piano e recepibile, o, ciò che è peggio, fantasia ispirata dall'interiorità dell'autore, è tale solo se osservato dalla prospettiva del soggetto nella sua esplorazione di sé e del mondo: gli accostamenti visibili nel racconto, in realtà, obbediscono a un'economia discorsiva tutta nuova, a una vera e propria necessità interna, che risponde alla stessa materialità delle parole libere dall'urgenza rappresentativa e governate da una trama invisibile che ora si rende visibile in quanto invisibile; al fatto «che vi sia del linguaggio» (Foucault 1978: 47).

La figura di Roussel torna a essere evocata, oltre che nella Prefazione di *Le parole e le cose*, anche in un articolo che Foucault scrive nel 1970 come introduzione a *La Grammaire logique* di J.P. Brisset, in cui compare anche la figura enigma-

[6] Si veda Foucault 2001b: 1418-1427.

tica di L. Wolfson (Foucault 2001a: 881-893; Deleuze 1970; Sabot 2019). Roussel, nell'assunzione della «costrizione della casualità e dell'associazione», denuncia l'uso strumentale del linguaggio e rivendica la capacità produttiva della materia fonica. Brisset, da grammatico e schizofrenico, riuscirà a spingersi anche oltre, abbandonando l'intenzione di Roussel di estendere un testo narrativo e combinando la capacità compositiva di omofonie, assonanze, metagrammi, e quella della sua psicosi, e finendo per trasgredire ogni norma compositiva della morfosintassi francese in senso intimamente e paradossalmente poetico (Breton 1973: 235) che confonde inesorabilmente letteratura e linguistica, etimologia e mitologia, invenzione e logica. Ed è proprio questo intreccio, che scompagina gli stessi ordini del sapere scientifico, che attira l'attenzione di Foucault.

Con lo spirito del grammatico, Brisset non solo sospende l'aspetto rappresentativo del linguaggio, ma si esercita nella ricerca di una paradossale lingua primitiva. Anziché risalire la catena delle differenziazioni storiche che le diverse lingue hanno subìto, al fine di recuperare pochi atomi elementari e originari, Brisset moltiplica fra di loro le sillabe del francese, intendendo la primitività come quello «stato fluido, mobile, indefinitamente penetrabile del linguaggio, una possibilità di circolarvi in tutti i sensi, il campo libero a tutte le trasformazioni, capovolgimenti, tagli, la moltiplicazione in ogni punto, in ogni sillaba o sonorità, dei poteri di designazione» (Foucault 2001a: 882-883). Brisset, insomma, non si colloca nello iato discreto tra parole corrispondenti di differenti lingue, ma al contrario riempie, nella sua sola lingua, lo spazio tra una parola e l'altra, ottenendo così un'emulsione da cui sembrano rinascere, come in successivi lanci di dadi, nuove parole. Ogni parola non rappresenterebbe così l'evoluzione storica di un determinato significato, bensì la contrazione di interi discorsi, di catene di enunciati che è possibile svolgere e riavvolgere senza limiti, ribaltando l'interiorità in un'esteriorità che si autoproduce. Brisset approfondisce e colma lo spazio che separa ogni parola dalle altre della medesima lingua, opponendosi alla ricerca etimologica di una corrispondenza tra le parole e le frasi delle differenti lingue storiche; di qui, l'assoluta intraducibilità delle produzioni di Brisset, ma anche la fuoriuscita della parola dal campo del sapere e l'emersione dentro a essa di una potenza produttiva autonoma, non riportabile a una legge generale stabile. È come se la *parole* – l'operatività del discorso – avesse una propria soggettività, di cui il soggetto tradizionale, con la sua urgenza di significato rappresentativo, non pare poter prendere immediatamente controllo.

La terza figura considerata da Foucault è quella di Wolfson, uno schizofrenico il cui turbamento nei confronti della madre gli impedisce di sopportare la sua lingua natia, e lo costringe a bombardare la propria quotidianità con una molteplicità di lingue straniere mediante cui costruire una propria lingua. L'ordine interno è rovesciato verso l'esterno, sbaragliando ogni familiarità e producendo una sorta di apolidia diffusa. Tra le occasioni per aprire un varco entro l'ordine del discorso

che Foucault indaga negli anni Sessanta – altre verranno depositate in *L'ordine del discorso*, quando Foucault inizierà a pensare il problema dei discorsi in funzione di quello del potere (Foucault 2004a: 26 ss) –, quella offerta da Wolfson è certamente la più radicale, poiché declina in una Babele di dieci lingue il gioco già praticato in francese da Brisset.

Si tratta di figure che permettono di sostare a contatto con la perpetua rinascita della lingua, con ciò che consideriamo massimamente familiare eppure si palesa così inquietante nelle mani del grammatico che la restituisce alle sue stesse leggi. La critica foucaultiana al soggetto cartesiano sfiora così occasioni le cui condizioni appaiono promettenti ma assai onerose: alla dissoluzione del soggetto cartesiano come origine autoeletta sovrana del linguaggio, seguono esempi in cui il soggetto è privato della sua integrità, casi di perdita del soggetto *tout court* in una condizione di disfacimento del singolo. Permanendo nel contesto ontologico dell'operatività che ha prodotto il soggetto moderno, la ricerca di una differenza affermativa e ontologicamente forte conserva residui della figura del soggetto, limitandosi a degradarne la consistenza. Dotare il linguaggio di una tale vitalità propria rischia anzi di ribaltare gli esiti della sperimentazione in una forma di feticismo, ipostatizzando la vitalità insita nei soggetti parlanti e trasformandola in una potenza a essi estranea, con il risultato di precipitare nuovamente nella negatività di un soggetto resistente suo malgrado e di un discorso che parla sempre un ordine altro.

Il passaggio attraverso la trasgressione e il rischio del suo riassorbimento in termini dialettici, da un lato, e, dall'altro lato, un pensiero del fuori a tal punto radicale da dissolvere la stessa intenzionalità del singolo, costituisce il segno di una domanda che, fin dai primi passi della ricerca foucaultiana, rimane aperta, generando sperimentazioni e ripensamenti costanti e sempre nuovi. L'ideazione di forme di resistenza a ordini discorsivi e di potere che in tanto assoggettano in quanto concedono una identità soggettiva, sembra dover inevitabilmente passare per il rischio di minare le stesse condizioni di esistenza dell'individuo e la sua stessa capacità di resistenza.

3. IN PROSSIMITÀ DEL DICIBILE IN QUANTO TALE

3.1. Conservando l'attenzione sulle griglie che storicamente determinano lo spessore dei discorsi al di là della loro dimensione puramente proposizionale, negli anni Ottanta Foucault ricalibrerà la propria indagine sul soggetto in direzione delle forme di immanenza come pratiche di soggettivazione e come lavoro su di sé «all'interno del campo storico delle pratiche e dei processi entro cui [il soggetto] non ha smesso di trasformarsi» (così in una bozza della conferenza *Sexuality and Solitude* tenuta a New York nel 1981; questa bozza confluirà in un dossier intitolato *Gouvernement de soi et des autres*, inedito, di cui abbiamo testimonianza nella nota firmata da Gros, in Foucault 2003: 472-473). E proprio rispetto all'attualità

delle forme cui mira Foucault è possibile misurare la distanza dell'iniziativa agambeniana, il cui tenore ontologico è rivolto al trattenimento della potenza, intesa come dimensione in cui è in gioco la stessa categoria del soggetto. Una distanza che si riflette sui concetti di "materialità" del linguaggio che i due autori coinvolgono. Una nozione che Foucault specifica non essere assimilabile a quella della semiotica, tanto meno afferente alle «unità descritte dalla grammatica o dalla logica» (Foucault 1997: 145), essendo piuttosto ciò che storicamente governa l'apparizione e la trasformazione, e in generale il funzionamento degli eventi discorsivi. Come si comprenderà, pur avvicinando tale concetto a partire dal confronto con le intuizioni foucaultiane e dagli studi della linguistica, Agamben distingue la sua idea di linguaggio sia dalla storicità delle prime sia dalle proprietà normative considerate dai secondi. Di qui l'oltrepassamento in chiave filosofica della linguistica, al fine di esporre il fatto stesso che vi sia il linguaggio; scopo in funzione del quale la filosofia non si presenta come un metalinguaggio che tematizza la lingua come sistema di segni e regole, e nemmeno può fermarsi alla mera storicità di ciò che viene detto, ma anzi risale all'orizzonte ontologico su cui segni, regole e storia sono possibili, a ciò che sempre viene presupposto e che solo un dire di frontiera fra filosofia e poesia sa illuminare davvero (Agamben 2016: 44-45; Agamben 2005: 57-75; Agamben 1968: 113).

3.2 Alla discussione di questi argomenti e alla loro relazione con il soggetto Agamben giunge mediante un confronto preliminare fra le nozioni antica e moderna di esperienza e conoscenza. Se il problema antico era la relazione tra il molteplice e l'uno, tra la pluralità degli individui e l'intelletto divino, con l'epoca moderna il problema diviene quello del rapporto con l'oggetto da parte di un soggetto unico, punto archimedico astratto di coincidenza tra conoscenza ed esperienza: l'*ego cogito* cartesiano il cui punto d'appiglio alla realtà è l'autocertezza conquistabile ogniqualvolta egli si concepisce dubitante di tutto (Agamben 1978: 11-13; Descartes 2007: II, 10-13). Ridotto ogni contenuto psichico eccetto il puro atto del pensare, Cartesio giunge a un soggetto che, nella sua purezza originaria è, a ben vedere, «un ente puramente linguistico-funzionale» sussistente giusto il tempo dell'enunciazione "io penso, io sono", e difficilmente raggiungibile al di fuori di essa, denudato com'era di ogni suo predicato. Lungi dal rilevare questa funzionalità puramente enunciativa del soggetto appena concepito – funzionalità rilevata da Foucault in senso storico, anche con l'appoggio dello strutturalismo, e da Agamben in senso ontologico, rifacendosi alla linguistica contemporanea –, Cartesio sostanzializza l'Io, fornendo le basi per un nuovo soggetto metafisico che possa sostituirsi all'anima della psicologia cristiana e al *nous* greco. Agamben ricostruisce l'influenza che tale mossa avrà sui pensatori successivi, descrivendo lo sforzo del pensiero post-cartesiano per recuperare la realtà, messa fra parentesi dal dubbio iperbolico, e l'impegno del pensiero post-kantiano nel recupero di una qualche

conoscibilità del soggetto: è su tale linea, oltrepassata ora in un senso ora nell'altro, che Agamben vede la filosofia moderna mantenersi in equilibrio precario.

Nel Novecento, affrontando il problema dal lato dell'urgenza di restaurare un'unita coerente e conoscibile nella corrente inafferrabile degli *Erlebnisse*, alla ricerca di un dato originario per l'esperienza di coscienza, Husserl mediterà la possibilità di recuperare un'esperienza trascendentale dell'io cartesiano. Sia per la riflessione trascendentale che per quella puramente psicologica, secondo Husserl, «l'inizio è dato dall'esperienza pura e per così dire ancora muta», precedente sia la soggettività sia una supposta realtà psicologica, la cui manifestazione davvero prima è però da lui identificata con «l'ego cogito cartesiano» (Husserl 2009: II, § 16), ossia con il momento della sua espressione, «con il suo divenire da *muta*, *parlante*» (Agamben 1978: 33). Sul crinale di una riflessione impegnata nella ricerca dell'esperienza pura di un soggetto trascendentale che fosse, al contempo, rivolto verso la realtà oggettuale, Agamben incontra l'ipotesi husserliana di un'esperienza pura, che non si sia ancora fatta presupposizione inconoscibile di una trascendenza e non si sia fatta incoerente rincorsa di oggetti: un'esperienza muta che, però, paradossalmente Husserl identifica con l'*ego cogito* cartesiano, realtà che è già mediata da un'espressione logica di sé. Di qui, il compito di interrogare in modo compiuto questa urgenza del soggetto di esprimersi per aversi: compito che lo stesso Foucault aveva avvicinato smascherando l'*io parlo* alle spalle dell'*io penso*, e che la linguistica contemporanea avrebbe saputo sviluppare, aprendo la via alla piena considerazione del discorso nel suo puro aver luogo e del soggetto come «l'inesistenza nel cui vuoto s'insegue senza tregua l'effondersi indefinito del linguaggio» (citazione da Foucault riportata in Agamben 1998: 130-131).

Rieccoci dunque al punto di contatto fra Foucault e Agamben. A partire da esso, il pensatore francese prende a elaborare la sua critica del soggetto come nodo di trame disposizionali, prima in senso discorsivo e poi in senso analitico-politico, e, successivamente, si impegna nel ripensamento delle vie emancipative verso nuove forme di vita. Per parte sua, Agamben intraprende un'interrogazione ontologica che vede nel soggetto un effetto del farsi storico dell'uomo mediante il linguaggio; tale interrogazione lo condurrà a retrocedere anche rispetto alle determinazioni storiche, non per far segno verso un dire differente, bensì verso l'orizzonte in cui, non essendo ancora stato detto nulla, il soggetto viene a dirsi. Quella che la disattivazione dei dispositivi del pensiero occidentale recupera è un'intenzione pura, in cui la "linea" che la filosofia moderna ha superato in un senso o nell'altro, si dissolve lasciando posto a una dimensione estatica precedente la dicotomia soggetto-oggetto. «Qualcosa come una "contemplazione senza conoscenza" un pensiero privo di carattere cognitivo» (Agamben 1997)[7], in una revisione ontologica in cui la

[7] Nel 2009, durante una lezione presso la European Graduate School, *The Problem of Subjectivity*, il cui testo è inedito, Agamben racconta l'esperienza di Fernand Deligny, pedagogista, il quale, avendo a che fare con bambini autistici, trascriveva i loro movimenti su fogli trasparenti che, so-

verità sia definibile come la stessa intelligibilità, la stessa conoscibilità, la stessa dicibilità che spezzano il rapporto presunto diretto tra soggetto e oggetto[8]. Questa è la dimora della medialità assoluta e, perciò, dell'etica (Agamben 2001: 39-40), più adeguata all'uomo. La via d'accesso a questa potenza trattenuta nell'atto è l'esperienza di un linguaggio non presupponente che spezza la movenza strutturalmente nichilistica della metafisica, e che permetta all'uomo di riscoprire il proprio (infondato) statuto poetico[9].

3.3. Di tale *dehors* di pura potenzialità presupposta e mai davvero tematizzabile, e del suo statuto eminentemente linguistico, dagli anni Ottanta Agamben non ha mai smesso di occuparsi (Salzani 2015). In una conferenza del 1984, l'occasione per affrontare lo statuto della presupposizione è la lettura della *Lettera VII* di Platone, in cui, con un'espressione variamente interpretata nei secoli, il filosofo greco introduce tra gli elementi necessari per l'instaurazione della conoscenza "la cosa stessa", connotandola come qualche cosa che, seppure conoscibile, risulta impossibile da dire a causa di una debolezza intrinseca del linguaggio, che non le si può mai adeguare (*Lettera VII* 342a8 - 343a3).

Laddove la tradizione attribuisce alla "cosa stessa" una natura mistica, con cura filologica Agamben propone di tradurre il passo platonico definendo la "cosa stessa" come ciò «attraverso cui ciascuno degli enti è conoscibile e vero» (Agamben 2005: 14). L'interpretazione del dettato platonico restituisce la "cosa stessa" non più come «l'ente nella sua oscurità, come oggetto presupposto al linguaggio e al processo conoscitivo», bensì come «ciò *per cui* esso è conoscibile, *la sua stessa conoscibilità e verità*». Nella conoscenza di qualcosa, Agamben invita così a collocarci «nel medio stesso della sua conoscibilità, nella pura luce del suo rivelarsi e annunciarsi alla conoscenza» (Agamben 2005: 14-15), di fronte al fatto che le cose dicibili risiedono entro un'apertura mediale che, pur non risultando dicibile dal linguaggio, le rende conoscibili e dicibili. La "cosa stessa" non sarebbe perciò una cosa fra le altre, ma la stessa dicibilità, «la stessa apertura che è in questione nel linguaggio, che *è* il linguaggio», che è presupposto indicibile di ogni discorso in atto (Agamben 2005: 18). Forse, scrive Agamben, la "cosa stessa" «è, nel suo intimo, oblio e abbandono di sé», e può essere trattenuta solo in quanto presupposta,

vrapposti, restituivano alcune costanze e ricorrenze: queste *lignes d'erre*, sostiene Agamben, sono i contorni di una forma-di-vita, condizione d'atto senza essere soggetto sovrano.

[8] Alcuni spunti per pensare l'esistenza di una pura potenza vengono dalle riflessioni di Averroè sull'intelletto materiale: «Il tentativo di pensare, a proposito dell'intelletto materiale, l'esistenza di una pura potenza come un quarto genere d'essere [...] contiene [...] degli spunti per una concezione alternativa del soggetto rispetto a quella che si è affermata a partire da Descartes. [...] Averroè pensa il *subiectum* non come una sostanza autonoma, ma, per così dire, come una pura esigenza della potenza. L'averroismo pensa, cioè, il soggetto come soggetto di una potenza, e non soltanto di un atto» (Agamben 2020: 32).

[9] Argomento già toccato da Agamben 1970, e poi ripreso in merito alla medialità in Agamben 2018. In merito, si veda anche Spina 2019.

secondo una movenza di "eccezione" che conserva e dissimula la linea tra il dentro e il fuori nell'alternarsi di ordini positivi in atto (Zartaloudis 2010: 239-277; Prozorov 2014: 66 ss).

Della negatività cui è destinata tale apertura perché ogni ordine e ogni proposizione possano essere attuati, Agamben aveva già largamente trattato due anni prima, nel seminario *Il linguaggio e la morte*, in cui essa è denominata "Voce". Per il suo particolare statuto, Agamben stabilisce di usare la *V* maiuscola, essendo essa non l'esperienza di un semplice stile vocale o un'emissione sonora – come nel caso degli animali –, pur permanendo al di qua della più complessa enunciazione comunicativa tra umani: essa è l'esperienza più elementare del linguaggio, consistente in una pura intenzione di significare, un «puro voler-dire, in cui qualcosa si dà a comprendere senza che ancora si produca un evento determinato di significato» (Agamben 1982a: 45). Non una proposizione di senso, bensì un puro evento di linguaggio la cui esistenza, come Dio nella prova ontologica di Anselmo, è presupposta in ogni nominazione linguistica significante (Agamben 2005: 27).

Intimamente caratterizzata dall'oblio e dall'abbandono, la Voce è la negatività intrinseca al non esser più mero suono, e non essere ancora un significato; ma soprattutto è la negatività consustanziale all'emersione del significato determinato, in funzione del quale la dimensione dell'aver-luogo e della pura intenzione inespressa retrocede, così come il puro essere rispetto all'ente (Agamben 2005: 20 ss). La Voce «è *fondamento*, ma nel senso che essa è ciò che va *a fondo* e scompare, perché l'essere e il linguaggio abbiano luogo», si concretino nella storia.

La pura intenzione scompare, ma rimane ancorata – in quanto esclusa – all'aver-luogo concreto dell'essere e del linguaggio grazie a delle strutture linguistiche, specialmente agli *shifters*, quegli elementi che, per se stessi, non veicolano alcun significato, ma che possono funzionare nel discorso in atto perché sospendono la loro incapacità di significare e illuminare lo stesso evento di linguaggio (Clemens 2008: 43-65). Consustanziale all'atto enunciativo, lo *shifter*, nullo e vuoto fuori dall'enunciazione, si rivela essere il luogo in cui dal significare si passa all'indicare. Ma a che cosa esso faccia segno è rimasto un problema fino a quando la linguistica moderna ha spiegato come l'indicazione avvenga sempre in direzione di qualche cosa che, nell'enunciazione, è immancabilmente presente: l'istanza di discorso in quanto tale, in quella sua dicibilità che il significato ricaccia sempre nell'oblio. Gli *shifters* sono segni vuoti che acquisiscono senso non appena vengono assunti in un'istanza di discorso. Per questo essi hanno la funzione non tanto di operare l'articolazione dall'indicazione sensibile alla dimensione linguistica, quanto invece «di permettere il passaggio dalla *lingua* alla *parola*», da un codice linguistico a una parola in atto: eccoci ricollocati in quel passaggio che Foucault invece ha interrogato solo nel senso dell'archivio, e che Agamben invece considera per esaltare l'istanza stessa del discorso, il luogo in cui il linguaggio si fa evento storico in atto.

Nell'evento di parola, lasciandosi alle spalle la totipotenza di una Voce già intenzionata a significare pur non essendo significato attuale, l'uomo si definisce perpetuamente come soggetto nella storia. Ogni fondazione costituente l'atto ricaccia la potenza in un oblio ineffabile e quasi mistico, e su tale negatività poggia la struttura – per questo, intimamente nichilistica – della metafisica occidentale, del pensiero e della pratica anche politica, che Agamben propone di superare mediante «un'esperienza di parola che non supponga più alcun fondamento negativo» (Agamben 1982a: 67), e che esponga il *factum loquendi* nella sua pura esistenza.

«Solo l'esperienza della pura esistenza del linguaggio dischiude al pensiero la pura esistenza del mondo» (Agamben 2005: 65). La dimensione aperta che è sempre stata chiamata "essere" dalla tradizione filosofica occidentale a ben vedere, osserva Agamben, ha l'ampiezza «dell'aver-luogo del linguaggio e metafisica è quell'esperienza di linguaggio che, in ogni atto di parola, coglie l'aprirsi di questa dimensione». Gli *shifters*, perciò, si rendono operatori anche di un distacco dal mondo storico e ontico, permettendo uno sguardo verso l'apertura stessa dove l'uomo si trova a conoscere e dire. È per tornare a dimorare in questa apertura, intesa come dimensione di trattenimento in atto della potenza, che Agamben interroga il linguaggio, sottraendolo dalle mani di un presunto soggetto sovrano, sedicente polo di conoscenza trascendentale. D'altronde, alla luce di queste considerazioni, con le parole di Benveniste, qual è la "realtà" del pronome io, se non «unicamente una "realtà di discorso"»? È in questi termini che la linguistica contemporanea può aiutare a ripensare la nozione di trascendenza, riconoscendo il primato genealogico del linguaggio.

3.4. Con l'ontologia heideggeriana, la filosofia occidentale torna a pensare l'Essere come la stessa apertura priva di fondamento in cui si ritrova a vivere l'uomo. Tale infondata apertura, che significa l'impossibilità di un rapporto determinato con il mondo, è dovuta all'assenza nell'uomo di una voce propria, che gli permetta una codifica diretta di ciò che lo circonda. Una condizione di angosciante sospensione nel linguaggio (Agamben 1982b), che Heidegger ha illuminato senza tuttavia riuscire a sostare in quella pendenza in quanto tale. Un avvicinamento a questa apertura totipotenziale è ritenuto possibile da Agamben a partire dalla capacità della linguistica di Benveniste di far segno verso il confine tra linguistica e filosofia, tra lingua e il fatto del linguaggio: come Heidegger ha riflettuto sull'Essere, così Benveniste avrebbe fatto segno verso la stessa dimensione di evento del linguaggio entro cui sola ogni cosa può esser detta. Le due aperture, ontologica e linguistica, coincidono dal momento che l'uomo ci si trova dentro senza far di esse una proprietà; e coincidono al punto che Agamben può scrivere che «la trascendenza dell'essere e del mondo è la trascendenza dell'evento di lin-

guaggio rispetto a ciò che, in questo evento, è detto e significato» (Agamben 1982a: 69).

La linguistica di Benveniste, secondo Agamben, ritorna sulla distinzione saussuriana tra *langue* e *parole*, superandola sovrapponendole la distinzione tra la sfera del semiotico e la sfera del semantico e affermando l'impossibilità del passaggio dall'una all'altra (Agamben 1978: 52-55), se non attraverso l'evento singolare (e quindi non più parte del semiotico) che logicamente precede ciò che viene comunicato (e quindi non ancora parte del semantico). All'altezza dell'enunciazione – che ci riporta di nuovo a contatto con quella dimensione intenzionale che Agamben chiama Voce, e di cui gli *shifters* sono indicatori –, Benveniste offre la possibilità di considerare la natura linguistica dell'io, non essendo la soggettività altro che la capacità di ogni locutore di «porsi come un *ego*»; una capacità non riconducibile a un presunto sentimento muto di autoadesione di ognuno con sé o a un esperienza psichica ineffabile dell'*ego*. La soggettività, fondata sulla possibilità offerta dal linguaggio a ogni locutore di dirsi *ego*, è perciò «la trascendenza dell'io linguistico rispetto a ogni possibile esperienza» (Agamben 1978: 43; McLoughlin 2013; Attell 2019).

L'immediatezza della rappresentazione di sé cui Husserl subordinava l'esperienza di formazione linguistica del soggetto, risulta perciò inattingibile, non essendovi un concetto "io" capace di comprendere tutti gli "io" che vengono enunciati dai vari locutori. Ciò che vale per tutti gli *shifters*, cioè di non riferirsi ad altro che a una realtà di discorso, vale anche per il pronome della prima persona singolare; ma nel caso di "io", questo significa che

> la configurazione della sfera trascendentale come una soggettività, come un «io penso», si fond[a] in realtà su uno scambio fra trascendentale e linguistico. *Il soggetto trascendentale non è altri che il «locutore», e il pensiero moderno si è costruito su questa assunzione non dichiarata del soggetto del linguaggio come fondamento dell'esperienza e della conoscenza.*

Lo studio del soggetto è lo studio di un elemento del discorso, di un momento dello stesso farsi storico del discorso. Il risultato della ricerca di una soggettività pura arriva sempre e immancabilmente a una dimensione linguistica, nella cui trascendenza il soggetto si forma. Il soggetto è sempre un locutore: Agamben nega la possibilità di reperire nel soggetto una trascendentalità muta, perché è proprio mettendo fine al silenzio ed esprimendosi che il soggetto si appropria del linguaggio e si forma, è nel linguaggio e attraverso di esso che l'essere umano si costituisce come soggetto. "Io" non corrisponde a un individuo reale o a un concetto ineffabile ed esterno al linguaggio ma, con le parole di Agamben, è «l'ombra della lingua», «l'affiorare nell'essere di una proprietà esclusivamente linguistica» (Agamben 1998: 113). E tuttavia – e qui sta l'urgenza di oltrepassare la linea – il linguaggio è un dispositivo (Agamben 2006: 22) che, mentre dona la possibilità di farsi

soggetti, al contempo cattura e – scrive Agamben ben oltre il concetto foucaultiano di "assoggettamento" – desoggettiva (Agamben 1998: 108-109).

L'uomo diviene soggetto identificando se stesso nel linguaggio, nel momento in cui la lingua prende luogo; il soggetto dice sé impossessandosi del linguaggio, ma invero accettando di divenire un essere parlante espropriato di sé. Un gesto non storico, ma che, anzi, è «storicizzante» (Agamben 1978: 47), dà il via alla storia, permette all'uomo di farsi essere storico: è su questa soglia antropogenetica che Agamben situa la linea da oltrepassare, per usare l'espressione foucaultiana, scoprendo la sovranità del linguaggio e la mossa mediante cui esso tiene l'uomo sospeso in un bando inevadibile (Agamben 1995: 25-26). Il rapporto che Agamben intesse con la poesia porta a maturazione quello proposto da Foucault dal momento che non cerca un nuovo ordine del dire, ma anzi offre un'occasione per sostare nella soglia – in cui la linguistica e la filologia lasciano il posto alla filosofia (Agamben 1977: 181-189) – fra appropriazione ed espropriazione del linguaggio, liberandosi dall'illusione del soggetto sovrano che fa del linguaggio un mezzo di comunicazione proprio nel momento in cui il linguaggio è ragione della sua desoggettivazione.

3.5 È su tali basi che la ricerca di un'esperienza originaria conduce Agamben a qualche cosa che precede il soggetto e il gesto di appropriazione del linguaggio. Agamben definisce *infanzia* questa esperienza, descrivendola come l'origine trascendentale di ogni atto enunciativo, soglia di ogni evento linguistico in cui, impossessandosi di volta in volta del linguaggio e collocandosi nel passaggio tra *lingua* e *parola*, il soggetto si determina (Agamben 1978: 49). L'urgenza di superamento della linguistica saussuriana, reso possibile da Benveniste, risale alla fine degli anni Settanta, quando, con riferimento al *Cours de linguistique générale*, Agamben rimprovera a Saussure di aver attribuito un primato ontogenetico alla *langue* mediante l'ipostatizzazione degli elementi di *parole*, laddove essa è piuttosto «una costruzione della scienza a partire dalla parola» (Agamben 1980: 157). Ciò che Saussure non avrebbe colto è perciò la priorità ontologica dell'«istanza concreta di discorso [...] immediatamente e concretamente esperibile». Queste considerazioni risultano interessanti perché permettono di mettere in luce la proiezione di categorie ontologiche da parte di Agamben sulle intuizioni di Saussure, tutte tese invece a ricercare l'oggetto precipuo e funzionale della linguistica. A ben vedere, infatti, già per Saussure, la *langue* non è il *primum* ontologico dell'esperienza linguistica, bensì l'oggetto cui la scienza del linguaggio attribuisce maggior rilievo data la sua stabilità e il suo carattere sociale (Saussure 1976: 37).

Chiarito il tenore ontologico che Agamben proietta sulle riflessioni di Saussure, si comprende il senso di accordare alla distinzione tra semiotico e semantico di Benveniste il merito di aver chiarito che fra il piano astratto e impersonale della *langue* e quello concreto della *parole* non è possibile alcun passaggio (Agamben

2016: 90; Agamben 1978 57; D'Alonzo 2018). E tuttavia Agamben sembra trascurare che Benveniste gioca la propria distinzione tra semiotico e semantico tutto internamente alla dimensione della *langue*, ampliandola di molto rispetto a quella saussuriana: in essa confluiscono non solo i segni e le strutture e i sistemi che essi compongono, ma anche le frasi, che sono più che semplici somme di segni (Benveniste 1966: 117-131). È entro il dominio della *langue* che Benveniste rileva l'irriducibilità dei «mondi distinti» di segni e frase; ed è ancora nella declinazione semantica della *langue* che si inserisce «l'attività del locutore» come operatore della combinazione tra i contesti infra- ed extralinguistico in cui le frasi sono impiegate (Benveniste 1974: 224-225). Questa è la collocazione attribuita da Benveniste al locutore e all'enunciazione, intendendo quest'ultima come «l'atto stesso di produrre un enunciato» (Benveniste 1974: 80).

Langue e *sémiotique* perciò non sono coestensivi, constando la prima anche delle dimensioni enunciativa e discorsiva. Fra i due modi di significazione interni alla *langue*, quello del segno e quello della frase che invece Saussure aveva escluso dalle competenze della linguistica, Benveniste istituisce uno iato impossibile da ricucire; ed è su questo iato che opera l'enunciazione, lasciando alla dimensione della *parole* il solo enunciato. Per Saussure, la *parole* si distingue per la libertà delle sue combinazioni, e nulla impone che ciascuna combinazione di segni – sintagma – sia liberamente generata. Manca per Saussure un criterio netto per distinguere, entro il dominio dei sintagmi, «il fatto di *langue*, contrassegno di un uso collettivo, e il fatto di *parole*, che dipende dalla libertà individuale» (Saussure 1976: 173). Esattamente a questa altezza si inserisce Benveniste attribuendo alla linguistica della *langue* il compito di studiare la frase, e superando di fatto l'idea che essa sia una mera sequenza segnica. Di qui la distinzione tra semiotico e semantico, per specificare l'irriducibilità della frase alla somma dei segni che la compongono; e il contemporaneo passaggio in secondo piano della coppia *langue-parole*, con il riconoscimento dell'autonomia del discorso (D'Alonzo 2018: 150-151). L'autonomia della frase e la sua dignità scientifica sono i punti di maggiore innovazione che Benveniste ha apportato nel dialogo con Saussure. Punti per affermare i quali è necessario riconoscere la stretta inerenza dell'enunciazione al piano semantico, ciò che Agamben manca di fare preferendo vedere nell'enunciazione una funzione di «ponte su quello iato» aperto fra piani di significazione (Agamben 2008b: 63).

Tali difficoltà interpretative si riflettono sul concetto di origine trascendentale che è l'infanzia, che Agamben colloca nello iato tra *langue* e *parole*, come esperienza dell'aver-luogo del linguaggio, della possibilità di prendere parola. Una possibilità che però, proiettando sulla distinzione saussuriana delle pretese ontologiche e sovrapponendole le riflessioni di Benveniste, coincide anche con l'impossibilità radicale dell'esperienza dello spazio aperto tra *langue* e *parole*. Ha dunque senso chiedersi con D'Alonzo come sia possibile superare lo iato aperto

fra questi che Agamben considera a tutti gli effetti fenomeni eterogenei; in che cosa consista l'esperienza dell'infanzia e «come si fa a parlare se fra lingua e parola c'è un abisso che sembra incolmabile?» (D'Alonzo 2018: 154). La conseguenza che maggiormente tocca gli argomenti fin qui trattati, tuttavia, è che se la distinzione fra semiotico e semantico è, rigorosamente intesa, tutta interna alla *langue*, il luogo di istituzione del soggetto e, per converso, di possibile esperienza dell'infanzia non è lo spazio fra *langue* e *parole*, bensì interno alla *langue*. Questo ricolloca l'esperienza dell'aver-luogo del linguaggio, che Agamben esplicitamente afferma essere possibile solo nell'atto concreto di parola che dovrebbe corrispondere al piano semantico, tra il semiotico e il semantico, in una posizione di trascendenza non solo rispetto alla *parole* di Saussure ma anche rispetto all'enunciazione benvenistiana, privandoci così dell'opportunità di osservare l'enunciazione e il locutore nella loro attualità storica ed empirica. Aspetto, quest'ultimo, coerente con l'iniziativa di incaricare la filosofia del solo compito di studiare il *factum loquendi* nella sua monologicità (D'Alonzo 2015: 50-53), riducendo il soggetto a mera concrezione linguistica mediata dai pronomi.

4. FRA COSTITUZIONE ESTETICA E DESTITUZIONE ESTATICA

4.1. La critica del soggetto nella definizione che la filosofia moderna, da Cartesio a Husserl, ne ha offerto, colloca Foucault fin dagli studi giovanili fra due fuochi: da un lato, condizioni storiche del discorso e dell'azione impossibili da padroneggiare per un soggetto sempre condizionato e prodotto; dall'altro, l'urgenza di immaginare, oltre le secche dello strutturalismo o, più genericamente, del determinismo, la possibilità di un'esperienza emancipata dai vincoli in cui il soggetto moderno si è costretto. Importante snodo in queste riflessioni è una conferenza del 1969, dunque coeva a *L'archeologia del sapere*: *Qu'est-ce qu'un auteur?*, il cui movente è rappresentato dalle critiche ricevute da Foucault per l'uso fatto in *Le parole e le cose* del materiale bibliografico, delle «masse verbali» e «degli strati discorsivi». Soprattutto il confronto con gli autori era stato criticato, e Foucault tenta di giustificarlo mediante l'intento di scoprire «le condizioni del funzionamento di pratiche discorsive specifiche», di scoprire, con spirito intimamente poetico, un differente "ritmo", al di là delle unità tradizionali (Foucault 2001a: 819).

Il tema del linguaggio come sistema simbolico e mezzo di comunicazione – obiettivo critico già ne *Le parole e le cose* e nella prefazione che Foucault scrive per l'edizione americana dell'*Anti-Edipo* di Deleuze e Guattari (Foucault 1983) – nella conferenza del 1969 viene sviluppato non solo con riferimento alla funzione dell'autore, paradigma del soggetto sovrano dei discorsi che produce, ma anche con attenzione particolare alla figura del lettore, non interprete passivo ma una fra

le positività direttamente coinvolte in un'ontologia plurale[10]. Sono interrogativi che anche Barthes in quegli anni si sta ponendo, aprendo il campo a intuizioni inerenti una «spersonalizzazione» che mina le basi della figura dell'autore, dando voce al linguaggio (Barthes 1988: 52) e permettendo il riconoscimento delle condizioni storiche che precedono il gesto di inscrizione dell'individuo nel linguaggio e che lo stesso Foucault, nella sua lezione inaugurale al *Collège de France*, confesserà di voler assecondare (Foucault 2004a: 3).

Barthes definisce l'enunciazione «un procedimento vuoto» che può funzionare anche senza che tale "vuoto" sia colmato ricorrendo alle persone degli interlocutori. Analogamente, nella conferenza del '69 Foucault parla di un vuoto che, se non colmato dal feticcio di altre sintesi precostituite, rende accessibile la materialità dei discorsi, le «modalità della loro esistenza: i modi di circolazione, di valorizzazione, di attribuzione, di appropriazione dei discorsi», la sempre mutevole dimensione irriducibile alle regole della grammatica e della logica, come alle leggi dell'oggetto. Proprio riscoprendo nell'autore una delle specificazioni assunte dal soggetto che presume di padroneggiare il linguaggio come strumento comunicativo, egli afferma l'urgenza

> di rivoltare il problema tradizionale. Non porre più la domanda: come può la libertà di un soggetto inserirsi nello spessore delle cose e dare loro un senso, come può animare, dall'interno, le regole di un linguaggio e chiarire così le finalità che le sono proprie? Ma porre piuttosto queste domande: come, secondo quali condizioni e sotto quali forme, qualcosa come un soggetto può apparire nell'ordine dei discorsi? Quale posto può occupare in ogni tipo di discorso, quale funzione esercitare, e obbedendo a quali regole? In breve, si tratta di togliere al soggetto (o al suo sostituto) il suo ruolo di fondamento originario, e di analizzarlo come una funzione variabile e complessa del discorso.

Solo capovolgendo in questo senso l'interrogazione, non partendo più da un'origine soggettiva, ma anzi assumendo il soggetto nella sua funzionalità interna al discorso, si può accedere a quello spazio aperto di un linguaggio che ci precede, in cui avviene il passaggio dalla *langue* alla *parole*, interrogato da Foucault non come condizione ontologica bensì come serie di condizioni storiche. È un aspetto non secondario, se si intende comprendere, da un lato, il modo in cui Foucault, a partire dalla sua proposta anarcheologica, pensa di riprendere il discorso intorno alla soggettivazione, e, dall'altro, l'insoddisfazione di Agamben nei confronti di tale proposta, cui fa seguito un ampliamento di respiro ontologico.

Una simile operazione è interessante perché, con la dissoluzione della sovranità dell'autore e con l'apertura di una dimensione plurale del testo, Foucault acquisi-

[10] Tema centrale del confronto fra Derrida e Foucault sulla postura ermeneutica da adottare nello studio di Cartesio. Cfr. Derrida 1990. Foucault risponderà nel 1971 con *Mon corps, ce papier, ce feu*, posto in appendice nelle edizioni della *Storia della follia* a partire dall'edizione del '72; ma si veda anche l'intervista *Michel Foucaul Derrida e no kaino* (2001a: 1149-1163). Più in generale, cfr. Perego 2018.

sce elementi di analisi che confluiranno poi nella sua analitica del potere. Ma, a ben vedere, la morte dell'autore, l'evenementalizzazione del testo e di ogni discorsività, e il coinvolgimento dello scrivente e del lettore in una sperimentazione attiva e non più in una mera ricerca ermeneutica dell'origine, ha già un valore intimamente politico. Ricucendo le riflessioni inerenti alle intuizioni di Nietzsche, Bataille, Blanchot, Klossowski – ma anche la drammatica esperienza di Roussel, Brisset, Wolfson – con il lavoro sulla soggettivazione degli anni Ottanta, in un'intervista del 1980 Foucault afferma che il problema che è urgente porsi «non è quello della costruzione di sistemi, bensì quello di compiere esperienze dirette, personali» (Trombadori 2005: 31); proprio quella messa in gioco, rischiosa perché completa, che è al centro del concetto di *parrhesia*, come lavoro di critica radicale e costituzione di sé. Una costituzione di sé che, nel proprio nucleo, è animata da un'esperienza-limite di dislocazione del soggetto da sé, dall'intreccio di dispositivi che lo producono: primo fra essi, proprio il discorso strategico che lo definisce come attore sovrano della storia, origine di senso, e che paradossalmente gli impedisce di essere davvero originale (Trombadori 2005: 31); e in seguito i dispositivi che attribuiscono a ciascuno un'identità definitoria.

4.2. Con la critica della figura dell'autore, Foucault muove passi decisivi, attraverso la critica della filosofia del soggetto e l'inscindibile coppia soggettivazione-assoggettamento, in direzione di uno sforzo autopoietico, volto a sostituire la pedissequa interpretazione di una funzione con delle pratiche autocostitutive. Un percorso che, in primo luogo, conduce Foucault a riscoprire alle spalle della nozione tradizionale di soggetto la costruzione di un'interiorità che viene indotta a manifestarsi, a esprimersi perché siano rimirabili le sue parole e controllabili le sue azioni[11]; fino agli anni Ottanta, quando rispetto a questa interiorità, presunta originaria e invero minuziosamente governata, facendo tesoro delle sperimentazioni archeo-genealogiche Foucault preferirà suggerire un'etica capace di dislocare in senso critico l'individuo[12]. Oltrepassare la linea significherà ora ripensare il rapporto del soggetto con la verità non come completa adesione originaria di sé con sé, ma come pratica di dislocamento sempre in atto, di smarcamento da sé.

E ciò avviene, anche negli anni Ottanta, rimanendo concentrati sulle condizioni normative attuali rispetto a cui smarcarsi per poter dire la propria verità, che è sempre una verità di sé storica (Cavallari 2016; Crosato in via di pubblicazione). Sono illuminanti a questo punto le intuizioni di Foucault in merito a un *ethos* di ispirazione cinica, capace di relazionarsi in maniera concreta e problematica con il proprio presente, di «distaccarsi» dalla congiuntura epistemica e politica da cui ci

[11] In merito al ruolo dell'esame e della confessione, si possono vedere i corsi sul *Potere psichiatrico* (1973-1974) e su *Gli anormali* (1974-1975).

[12] Come momento di apertura alle riflessioni degli anni Ottanta, si veda Foucault 2015b. Per un sorvolo generale sulle questioni appena menzionate, cfr. Dean-Zamora 2019: 75-101.

si trova preceduti e prodotti (Foucault 2001b: 1416). Questo non implica tanto un'analisi ontologica delle modalità di produzione del soggetto come tale, quanto invece un posizionamento coraggioso del soggetto nei discorsi, lavorando sullo spessore disposizionale che ne definisce la collocazione storica più che sull'ordine proposizionale. Quella che a partire dal 1980 Foucault chiama "anarcheologia" consiste nello svincolarsi rispetto alle fratture che ogni ordine di senso cela, e che già archeologia e analitica del potere hanno reso evidenti come, al contempo, punti di attacco e fronti di lotta (Foucault 2014: 86; Avelino 2018).

Guadagnata una prospettiva sulle condizioni pragmatiche e sugli ordini materiali che governano storicamente il dicibile, Foucault propone il modello della *parrhesia*, pratica consistente nell'irruzione discorsiva atta a rivelare la storicità di ogni assetto d'ordine (Foucault 2015a: 66-69)[13]. Foucault la definisce mediante un confronto con l'atto di discorso performativo, inerendo entrambi alla materialità del discorso in modo tale da sospendere il valore denotativo del linguaggio e facendo coincidere *dictum* e *factum* (Agamben 2008a: 74 ss), ma agendo essi in maniera speculare rispetto a tale materialità.

L'atto linguistico performativo è assunto come paradigma della stretta parentela tra soggettivazione e assoggettamento, dal momento che il suo spazio d'avvento è tale da assegnare mere funzioni discorsive e imporre coerenza rispetto agli enunciati che lo precedono e lo rendono possibile, espropriando il soggetto della propria singolarità e dettando norma a una circostanzialità del tutto indifferente alla singolarità etica del soggetto chiamato a garantire una *performance* (Lorenzini 2015: 266-267; Sforzini 2019). L'atto parresiastico è presentato da Foucault come un evento speculare, in cui «questa indifferenza non è possibile» (Foucault 2015a: 69). Ciò non significa né restituire sovranità a un soggetto trascendentale operante da un fuori assoluto, né osservare il discorso parresiastico come espressione di un'interiorità soggettiva: entrambe queste realtà sono, anzi, prodotto dell'ordine di pensiero oggetto di critica. Ribaltare le pretese performative avanzate dall'ordine discorsivo significa in primo luogo agire sulla materialità dei discorsi a prescindere dal loro contenuto semantico; significa cioè irrompere in maniera singolare, e legarsi alla propria enunciazione e agli effetti di scompaginamento provocati dalla propria incoerenza nel senso di un rilevamento della contingenza delle relazioni di potere esistenti e delle funzioni che esse ammettono.

La *parrhesia* è al contempo un atto di desoggettivazione e di irriducibile soggettivazione etico-politica proprio in quanto, mediante essa, ci si sottrae dalla funzione soggettivante-assoggettante imposta dall'ordine esistente, e si mette in gioco la propria stessa vita nella sua insostituibile concretezza, al di là dei regimi di veridizione accettati. Il soggetto fa della propria vita manifestazione della propria parola, attraversando obliquamente l'ordine disposizionale vigente senza farsene cattura-

[13] In termini generali, cfr. Ferrando 2012. Per il dibattito sul problema del soggetto in Foucault: Flynn 1985; Rovatti 1986; Dews 1989; Leclercq 2007; Galzigna 2008; Rovatti 2008.

re, senza funzionalizzarsi a esso, ma anzi facendone emergere lo spessore, la contingenza, la storicità della volontà di potenza che lo puntella, e perciò la criticabilità. Così, viene disattivato il dispositivo che produceva il soggetto come sovrano del linguaggio proprio mentre lo riduceva a mera funzione anonima: attraverso un atto che non proviene da fuori e non conduce verso l'esterno, essendo piuttosto lo sforzo di tendere la miriade di segmenti che compongono la trama entro cui ciascuno si trova prodotto e, proprio mediante questa tensione, dire la propria verità, che è sempre una verità storica.

4.3. Una volta rinunciato alla nozione di un soggetto puro di stampo cartesiano, le possibilità di trasformazione emopoietica (Foucault 2016: 73) del soggetto non possono che procedere da una mossa immanente al sistema di autorappresentazioni che circondano il soggetto, e dall'irruzione di un discorso che forza le geometrie date entro ciascun regime di verità. Non potendo mai uscire in senso assoluto dalla matassa di poteri-saperi verso un illusorio recupero della purezza originaria, la cura di sé che predispone alla soggettivazione corrisponde a una presa di consapevolezza di ciò che si è, della propria collocazione entro giochi di forze e delle possibilità di proporre per sé un posizionamento nuovo che, al contempo, riassesti le geometrie circostanti (Marzocca 2016: 14-15). Non l'evasione – mai possibile – dai limiti, ma un passaggio in prossimità dei molteplici limiti che dettano ordine alla realtà, al fine di condizionare gli schemi regolativi interni e curvarne le trame costitutive. «Un'*attitudine limite*», oltre l'«alternativa del fuori e del dentro» (Foucault 2001b: 1393), che prima di tutto renda osservabili i modi in cui l'uomo è reso soggetto e al contempo assoggettato a un ordine che lo funzionalizza, e, in secondo luogo, apra la possibilità di inventare differenti pratiche e nuovi tracciati di soggettivazione (Cesaroni 2013: 140). Il soggetto, in quanto punto di emergenza di un intrico di dispositivi, ritrova attorno a sé non solo una disarmante complicità di forze che lo trattengono, ma anche i punti di attacco per altrettanti fuochi di resistenza. Così, lungi dal proporre uno sforzo volontaristico a partire da un punto originario o finale, Foucault afferma non esserci punto di resistenza esterno al rapporto di sé con sé.

> Se consideriamo la questione del potere politico [...] come un campo strategico di relazioni di potere, con tutto quello che di mobile, trasformabile, reversibile, esse comportano, in questo caso ritengo che la riflessione su tale nozione debba necessariamente allora passare, sia da un punto di vista teorico, sia da un punto di vista pratico, attraverso l'elemento costituito da un soggetto che è definito dal rapporto di sé con sé (Foucault 2003: 221).

La posta in gioco è chiaramente etica e politica. D'altra parte, il lavoro foucaultiano degli ultimi anni, che risale fino al problema antico del «modo in cui l'individuo si costituisce soggetto morale delle proprie azioni» (Foucault 2004b: 30-37), ha come proprio movente l'urgenza di praticare il governo di sé. Ed è solo

in relazione al governo di sé e alla costituzione di sé come soggetti morali che Foucault introduce il tema dell'estetica dell'esistenza: la costruzione della propria vita come opera d'arte ha senso solo in funzione di una *epimeleia heauton*, da non confondere, come invece farà Hadot, con «una specie di dandismo» o con «l'affermazione e la sfida, a un tempo, di uno stadio estetico e individuale non superabile», ossia con una estetizzazione dell'esistenza gelosamente avvinghiata all'io (Foucault 2003: 14; Hadot 1989). Le pratiche del sé, mediante cui gli uomini hanno cercato «di fare della loro vita un'opera che esprima certi valori estetici e risponda a determinati criteri di stile» sono pratiche problematizzanti e già immediatamente eto-poietiche (Foucault 2014b: 15-17).

Leggendo i Greci, Foucault può affermare che «la cura di sé è etica in se stessa; ma implica dei rapporti complessi con gli altri» (Foucault 2001b: 1533). È sempre all'interno di una complessa – e inevadibile – trama relazionale che Foucault pensa le sue forme di emancipazione. Nell'intrico delle tecnologie del potere e delle razionalità che le orientano, il soggetto non è definibile come il punto di origine che trascende assolutamente la storia e vi dimora in modo sovrano – come invece vorrebbe la nozione di soggetto derivante dalla tradizionale sfera dell'*officium*. Se si mettono in sequenza le considerazioni foucaultiane degli anni Sessanta sull'urgenza di disfarsi del vincolo tra autore e opera e quelle degli anni Ottanta contenenti l'invito a vivere la vita come un'opera d'arte (Foucault 2001b: 1211), si intende come il ripensamento dell'etica contempli una figura di soggetto irriducibilmente costituente, ma che, non più sovrano, è sempre processo e relazione problematica con il sé costituito. Anzi, il soggetto, desostanzializzato in favore di una soggettivazione sempre *in fieri*, è definito da una relazione di problematizzazione e autocostituzione. Rimangono tuttavia il sospetto di una ipostatizzazione scivolata dal soggetto al sé, e il rischio di rendere al contempo stabile e mobile il sé, soggetto e oggetto di distacco (Foucault 2014b: 14), producendo così un effetto *à la* Barone di Münchhausen (Redaelli 2011: 79-91). Di tale problematicità riguardo all'attività etica del soggetto avverte Agamben, in una serie di puntualizzazioni depositate in *L'uso dei corpi*, e volte a un ripensamento, non più in chiave storica ma in chiave ontologica, della «stessa concezione dell'etica e del soggetto» (Agamben 2014a: 138).

Di contro alla concezione tradizionale di un potere definito costituente in quanto crea e separa da sé un potere costituito che fungerà da legittimazione della sua azione fondativa, lo sforzo foucaultiano di ripensare in termini di immanenza la relazione costitutiva soddisfa la definizione agambeniana per cui «costituente è, in verità, soltanto quel potere – quel soggetto – che è capace di costituir sé come costituente» (Agamben 2014a: 143). Agamben, tuttavia, approfondisce la discussione di questo primo promettente passo nel rinnovamento della concezione di etica: come l'essere spinoziano, che si autocostituisce e si autorappresenta rimanendo sempre immanente a sé in quanto costituentesi, e senza mai separarsi da sé in una

sostanza, così dovrebbe essere anche la relazione con sé che determina il modo in cui l'individuo si costituisce come soggetto del proprio agire. La costante *déprise* foucaultiana è correttamente definita come un'attività costantemente costituente; e però, rigorosamente intesa, proprio come tale essa non dovrebbe mai precipitare in una forma costituita. «La cura di sé – commenta Agamben – passa necessariamente per un *opus*» (Agamben 2014b: 138). Facendo della sua estetica una costituzione del sé sempre intrisa di rapporti di potere e, entro questi, sempre tesa ad affermarsi come forma di vita determinata, Foucault ricadrebbe nella contraddizione di una pratica che si vuole inesauribilmente costituente e, al contempo, si concreta in una forma costituita.

Il meccanismo a cui nemmeno Foucault riesce a sottrarsi è quello per cui «qualcosa viene diviso, escluso e respinto al fondo e, proprio attraverso questa esclusione, viene incluso come *archè* e fondamento» (Agamben 2014a: 334). Un meccanismo che, scrive Agamben chiudendo il proprio progetto *Homo sacer*, è «costitutivamente connesso all'evento di linguaggio che coincide con l'antropogenesi». E ancora nel linguaggio avviene la soggettivazione come, al contempo, avvento del soggetto e sua cattura nell'evento enunciativo (Heron 2011), in maniera del tutto analoga a come il potere costituito confisca la carica potenziale del potere costituente, sottraendole la forza destituente capace di abbattere tale fissità.

È proprio in un gesto destituente che Agamben intravede la promessa di una soluzione alle difficoltà fra cui Foucault si è trovato preso fino agli ultimi giorni della sua vita. Difficoltà che si renderebbero evidenti nel momento in cui, dal piano teorico, Foucault passa al piano pratico, in cui a occupare il campo sono soggetti che si vogliono liberi, che intendono cioè soggettivarsi in una certa forma di vita, ma che, per condurre se stessi come tali, non possono evitare di entrare in relazioni di potere, assoggettando altri o essendo da altri assoggettati. La determinatezza della forma di vita in cui Foucault si ostina a vedere la messa in opera della relazione con sé, la determinatezza quindi del soggetto in cui si completa la sempre *in fieri* relazione di sé con sé, costringe all'ingresso in relazioni di potere:

> Come potere costituente e potere costituito, la relazione con sé e il soggetto sono l'una per l'altro insieme trascendenti e immanenti. E, tuttavia, è proprio l'immanenza fra sé e soggetto in una forma di vita che Foucault ha cercato ostinatamente di pensare fino alla fine mostrandosi, certamente, capace di accogliere l'esempio antico della cura e della costituzione di sé, ma al contempo ostinandosi a tener ferma la coappartenenza – tipicamente cristiana – di tale costituzione di sé con il soggetto (Agamben 2014a: 145).

Foucault, afferma Agamben, non riesce a liberarsi davvero della figura del soggetto perché, ponendo in primo piano il tema della cura di sé rispetto a quello dell'uso, non porta alle dovute conseguenze la movenza costituente in quanto tale. Non ne osserva, cioè, la inesauribile potenzialità: si concentra piuttosto sul tema

etico di una cura concretata in un gesto di comando su sé o sugli altri per farsi forma di vita attuale, credendo di identificare in tale "rapporto con sé in quanto soggetto di uso di sé e del mondo" la vera e concreta libertà dell'umano, e ponendo in secondo piano l'uso stesso, relazione di indeterminazione tra soggetto e oggetto in cui ogni possibilità rimane aperta (Agamben 2014a: 56-64) e in cui le relazioni di potere intimamente connesse alla violenza nichilistica della metafisica occidentale sono sospese.

> Se le relazioni di potere rimandano necessariamente a un soggetto, [Foucault non sembra vedere la possibilità] di una zona dell'etica del tutto sottratta ai rapporti strategici, di un Ingovernabile che si situa al di là tanto degli stati di dominio che delle relazioni di potere (Agamben 2014a: 148).

4.4. La figura wittgensteiniana della mosca inconsapevole del bicchiere in cui è intrappolata ricorre in Foucault e in Agamben con due significati differenti. In Foucault, la figura della mosca nel bicchiere o, secondo una suggestione infantile, del pesce rosso nella boccia, è utile a descrivere ciò che negli anni Sessanta veniva chiamato *episteme*, e che poi è dissolto in formazioni discorsive meno monolitiche e, infine, in complessi disposizionali: ognuna di queste figure parla di una configurazione storica di saperi e poteri che strutturano l'esperienza dell'individuo, il quale stenta a rendersene conto e a predisporre metodi emancipativi (Veyne 2010: 157). La stessa paradossale espressione, ricorrente negli anni Ottanta, di "ontologia dell'attualità" piega l'attenzione ontologica in senso storico.

Agamben nel '84 usa la figura della mosca nel bicchiere non per rappresentare una configurazione storica, bensì la stessa ontologia che struttura il pensiero e l'azione occidentali secondo la geometria della presupposizione e dell'eccezione. Questo attribuisce al suo "fuori" non il significato di una differenza, bensì quello dell'orizzonte stesso in cui ogni differenza può avvenire (Agamben 2019). Illuminare tale orizzonte è compito comune di filosofia e teologia della rivelazione, anche se oggi, dopo la morte di Dio, pare più accessibile alla prima, che sorveglia le nostre parole, senza che di esse si possa fare il verbo divino. Così «il pensiero contemporaneo ha finito col riconoscere l'inevitabilità, per la mosca, del bicchiere in cui è prigioniera» (Agamben 2005: 33).

Nel 1990, in relazione al legame contemporaneo tra politica e linguaggio, poi, rifacendosi alle intuizioni di Debord, vede nella società dello spettacolo un'occasione per l'emersione della comunicatività in quanto tale: la società dello spettacolo è la separazione in una sfera autonoma di ciò che unisce gli uomini e che, così separata, impedisce la loro comunicazione. Proprio nell'alienazione operata nello spettacolo, «è la nostra stessa natura linguistica che ci viene incontro rovesciata» (Agamben 2001: 64), non in vista di una rivelazione, ma manifestando anzi il nulla di tutte le cose. Agamben ne parla come di uno svelamento nullificante: la politica del nostro tempo si presenta come un «devastante *experimentum linguae*, che disarticola e svuota su tutto il pianeta tradizioni e credenze, ideologie

e religioni, identità e comunità» (Agamben 2001: 66; si veda anche Agamben 1996b: 60-73). E nella scoperta di tale dimora di mezzi senza fine e di potenza trattenuta Agamben vede la definizione della politica che viene, priva della violenza sovrana, come l'apertura dello spazio dell'erranza umana, dell'«essere-in-un-mezzo come condizione irriducibile degli uomini» (Agamben 1996b: 92).

Tale esperienza oggi accessibile grazie all'alienazione spettacolare del linguaggio conduce verso un superamento dei concetti di appropriazione e di espropriazione, permettendo di pensare «la possibilità e le modalità di un *uso libero*» (Agamben 1996b: 93)[14]. Ecco dunque la categoria di "uso", che Agamben aveva incontrato negli ultimi lavori foucaultiani, ma che lì rimaneva in ombra rispetto a quella più "operativa" di "cura".

La riscoperta di questo concetto avviene in Agamben mediante la sua riconduzione al termine greco corrispondente, *chrēsis*. E ciò avviene in primo luogo nel 2000, nell'interpretazione del messianismo paolino, in cui il verbo *cháō* permette di apprendere la contrapposizione tra la proprietà, atteggiamento di messa in opera del mondo secondo gli ordini e le identità attribuite dalla storia, e l'uso, condotta di «depropriazione» che non conduce alla fondazione di nuove forme di vita – alla ricostituzione, alla messa in opera, all'atto, alla cura, alla proprietà –, quanto alla sospensione profanatoria della disposizionalità, e dunque alla conservazione di una potenza d'uso (Agamben 2000: 31-32 e 91-93).

Nell'economia di questa depropriazione, come ogni altro dispositivo, è coinvolto anche il linguaggio. Significativamente, anche Agamben, per spiegare tale disattivazione, la descrive in maniera speculare rispetto all'autoreferenzialità dell'atto performativo, che, revocando la dimensione costativa, non descrive il mondo ma ne predispone uno, riordina la realtà in riferimento a sé. Non è però l'ordine così costituito a rappresentare l'oggetto della critica: Agamben ricerca una specularità non rispetto all'ordine predisposto dall'atto performativo, bensì rispetto alla stessa gestualità costituente di cui esso rappresenta un ottimo paradigma legale. «Come, nello stato di eccezione, la legge sospende la propria applicazione solo per fondare, in questo modo, la sua vigenza nel caso normale, così, nel performativo, il linguaggio sospende la sua denotazione proprio e soltanto per fondare il suo nesso con le cose». La prospettiva soteriologica che Agamben affianca al messianismo paolino – e, a ben vedere, anche benjaminiano (Agamben 2005: 36-56; Heller-Roazen 2019) – è invece orientata verso l'esperienza della «pura parola» capace di aprire lo spazio della «gratuità dell'uso». Più che l'esperienza di un nuovo ordine discorsivo, si tratta di

> un'esperienza della parola che – senza legarsi denotativamente alle cose né valere essa stessa come una cosa, senza restare indefinitamente sospesa nella sua apertura

[14] Si veda già Agamben 1977: 55-64. Per la disattivazione della catena mezzo-fine, si veda Agamben 1996b: 45-53.

> né chiudersi nel dogma – si presenta come una pura e comune potenza di dire, capace di *un uso libero e gratuito del tempo e del mondo* (Agamben 2000: 126).

Giocato ancora come una postura alternativa all'ontologia dell'effettualità, l'uso viene ripreso nell'ultimo volume di *Homo sacer*. In quel luogo, a partire dalle peculiarità grammaticali e dalla polisemia del verbo greco *chrestai*, Agamben spiega che esso, né attivo né passivo, era per il greco antico una forma diatetica media, in cui la distinzione – così netta per il pensiero moderno – tra soggetto e oggetto sfuma: il soggetto, anzi, è il luogo stesso in cui avviene il processo e, viceversa, il soggetto è interno al processo, non come autore che trascende la sfera degli oggetti e governa la propria azione, ma come colui che compie qualcosa che si compie in lui. Così che, proprio per il fatto di "usare", il soggetto non agisce transitivamente su un oggetto, ma «implica e affeziona innanzitutto se stesso nel processo»; parimenti, «il soggetto non sovrasta l'azione, ma è egli stesso il luogo del suo accadere».

Si può comprendere finalmente da cosa intendesse prendere le distanze Agamben quando osservava la cura foucaultiana finire in una certa forma di vita, in un atto soggettivo e di rottura e ricostituzione dell'ordine storico. Ponendo in primo piano la relazione d'uso, Agamben ambisce a retrocedere rispetto all'autonarrazione del soggetto sovrano, per sostare presso una dimensione originaria in cui lo stesso soggetto risulta essere una delle possibilità aperte in uno scenario in cui «soggetto e oggetto sono disattivati e resi inoperosi e, al loro posto, subentra l'uso come nuova figura della prassi umana» (Agamben 2014a: 48-55).

Solo ora è possibile osservare come l'esperienza poetica, apra la strada verso un simile scenario soteriologico. D'altra parte, come si è visto, la figura dell'individuo che, creando un nuovo linguaggio, perde se stesso nella follia, in qualche misura creava problema a Foucault, il quale non intendeva sacrificare la figura del soggetto, ma offrirle una capacità ricostituente concreta e consapevole. È invece verso una destituzione della dicotomia soggetto-oggetto e verso la dimora etica al contempo impotente e totipotente che Agamben spinge la propria idea di uso del linguaggio: avvicinandola proprio grazie alla poesia, vera e propria «relazione a un inappropriabile» (Agamben 2014a: 116) ed esposizione della pura medialità in cui sola «la lingua riposa in se stessa», inoperosa e puramente dicibile, in cui proprio e altro, intimo ed estraneo, soggetto e oggetto si indeterminano; luogo in cui il soggetto è sospeso sul punto di dire (Agamben 2009: 275).

4.5. La lingua, e in particolare la lingua materna, pare essere per ciascuno ciò che vi è di più intimo e proprio; eppure, a ben vedere, la lingua non è questione privata, ma è per statuto uso comune. Soprattutto, essa giunge al parlante

dall'esterno: viene trasmessa e perfino imposta all'infante[15], che con essa deve familiarizzare. Che essa resti irriducibilmente estranea al parlante, sono testimonianza «i *lapsus*, i balbettamenti, le improvvise dimenticanze e le afasie», come per il corpo i *tic* tourettici (Agamben 2014a: 121).

È il poeta ad abitare questa zona di indistinguibilità tra ciò che è proprio e ciò che è improprio: egli, per far uso della lingua, si libera delle convenzione e degli aspetti più familiari della lingua, si rende «straniera la lingua che dev[e] dominare, inscrivendola in un sistema di regole arbitrarie quanto inesorabili», al punto che essa pare giungere suggerita da un principio divino, una musa. Il gesto del poeta viene descritto da Agamben come «un'appropriazione disappropriante (una negligenza sublime, un dimenticarsi nel proprio)» e al contempo come «una disappropriazione appropriante (un presentirsi o un ricordarsi nell'improprio)» (Agamben 2014a: 122-123). Una destituzione dell'ordine non per proporne uno nuovo, ma per rimanere nella soglia in cui ogni ordine è possibile, ogni denotazione è sospesa, ogni proprietà sovrana è inaccessibile – e proprio in questi termini si comprende l'occasione persa da Foucault, che pur aveva preso a interrogare Roussel, Brisset e Wolfson in una dimensione espropriante di ciò che è più intimo.

Abitare la soglia tra la patria e l'esilio è la vocazione del poeta, che avvicina i limiti del linguaggio non verso un "ancora non detto", e nemmeno verso un nuovo ordine del dire: il poeta abita la soglia in cui finiscono il discorso e l'enunciare logico attraverso cui il soggetto colloca se stesso (Agamben 1996a: 95); una soglia presso la quale «comincia non l'indicibile, ma la materia della parola» (Agamben 2013: 15), ciò che, solitamente «*consegnato* all'oblio», immancabilmente avanza un appello al poeta (Agamben 2013: 27; in generale, cfr. Dell'Aia 2019). Egli rompe il dire logico e indica verso la «sobria, stremata dimora» (Agamben 2013: 34) in cui il linguaggio avviene all'uomo, dunque: questo il primo e più elementare significato della lingua poetica, ossia la visitazione della verità come erranza che salva rispetto a qualsiasi destinazione chiusa e definitiva; un salvataggio inaccessibile a ciascuna lingua storica, presa nella propria logica, nella propria grammatica, nel proprio significare comunicativo, e accessibile, attraverso «le rovine del linguaggio» (Agamben 2010: 25), solo nel recupero poetico «di ciò che si perde» (Agamben 2017).

La peculiarità del linguaggio poetico non risiede tanto nella quantità, nel ritmo, nel numero delle sillabe, bensì nella possibilità di «opporre un limite metrico a un limite sintattico». È la figura dell'*enjambement* ad attirare l'attenzione di Agamben, essendovi in essa «una non-coincidenza e una sconnessione fra elemento metrico e elemento sintattico, fra ritmo sonoro e senso, quasi che [...] la poesia vivesse soltanto del loro intimo discordo». Il verso rompe il nesso sintattico del *logos*, e

[15] L'acquisizione della lingua è descrivibile come un paradossale processo di oblio: «È come se l'acquisizione del linguaggio fosse possibile solo attraverso un atto di oblio» (Heller-Roazen 2005: 11).

con l'*enjambement*, accenna al discorso prosastico e al contempo lo spezza. In questa cesura del verso, Agamben individua lo spazio di erranza e ricerca angosciata che è il pensiero, in cui solo avviene la Voce umana come articolazione intenzionata a significare.

Altrettanto interessante è lo statuto della lingua di cui i poeti fanno uso. Si tratta di una lingua che, rifacendosi a una riflessione di Pascoli, Agamben definisce "morta" o, meglio, l'«esperienza della morte della parola» (Agamben 1996a: 68)[16], intendendo con ciò la rottura della dimensione della comprensione logica, sostituita, grazie a una voce ignota – glossolalia, xenoglossia, onomatopea, ... –, da un «desiderio di sapere» (Agamben 1996a: 69), di una pura tensione errante rispetto a un suono che è inteso essere non più suono animale ma non ancora significato compiuto. Il pensiero si apre a una «dimensione inaudita» (Agamben 1996a: 70), che sospende l'ordine logico non al fine di proporne di nuovi, ma di sostare nel puro voler-dire, nella morte della parola che non simbolizza più nulla ma indica una intenzione di significare. Una dimensione in cui è il luogo dell'avvenire di ogni vocazione, di ogni determinazione.

All'oblio del *factum loquendi*, il dettato poetico sostituisce l'opportunità di far morire la parola, la sua dimensione semantica e la sua logica discorsiva, per riportare a evidenza l'esperienza impotente e totipotente – e perciò desoggettivizzata (Agamben 1996a: 96)[17] – dell'infanzia. Un'inversione consistente nella riconquista di un terreno dimenticato e scisso; e di tale inversione si può dar conto notando che Agamben, che con Pascoli definisce la lingua del poeta una "lingua morta", quando si confronta con la poetica di Andrea Zanzotto parla della lingua del poeta come di un *lógos erchómenos*, una lingua veniente: la poesia è dunque una lingua che, morendo nella sua dimensione logica, si ripresenta rinnovata annunciando la pura potenza inesauribile del linguaggio; in questo non è davvero una lingua, bensì segno verso la dimensione evenemenziale e senza destino in cui ogni storicità può avvenire (Agamben 2013: 29-31).

Una lingua che muore nella sua dimensione semantica per dar luce a una "lingua" irriducibilmente veniente e, assieme a essa, a una comunità che viene: una lingua morta – impotente – che vivifica il luogo dell'erranza totipotente e del pendere senza voce, che è il pensiero. L'espressione che Agamben prende da Zanzotto ha un forte tenore teologico: il sintagma *logos erchomenos* è un riferimento alla figura del Cristo, colui che viene. Tale sintagma nomina negli scritti del poeta trevigiano «un'esperienza particolare del linguaggio», quella della lingua dialettale,

[16] Di una Voce così intesa, si trova una prima notizia in un passo agostiniano, in cui si riporta l'esperienza di chi, udendo una parola desueta o "morta", sia mosso dalla tensione amorosa di comprenderne il significato, percependo in quella articolazione di sillabe qualche cosa come un'intenzione di dire.

[17] Introducendo, nel 1980, il testo *Monsieur Teste* di Valéry, Agamben annotava che «La poesia ha da sempre fatto dell'alienazione la condizione normale dell'atto di parola: essa è un discorso in cui *Io* non parla, ma riceve da altrove la sua parola» (Agamben 2005: 103).

materna, nella sua inscindibile relazione con la lingua paterna, l'italiano[18]. Si può cogliere la suggestione della fluidità del dialetto, che sgorga e raggiunge l'uomo, affiancandola alle osservazioni di tenore geografico, offerte, per esempio, da Gobber, che, pur sottolineando il comune aspetto di «insiemi organizzati di elementi, fatti per essere gestiti da una comunità di parlanti», evidenzia come le lingue storiche, per la loro strutturazione, stiano fra loro in relazione di distacco, mentre i dialetti si susseguono sul territorio secondo un *continuum* (Gobber 2006: 29-34). La reciproca tensione statutariamente presente tra la lingua dialettale e una lingua grammaticalmente fissata – a cui Agamben dà un valore ontologico estraneo, per esempio, alle intuizioni linguistiche di Berruto su bilinguismo, diglossia, dilalia (Berruto 1995) – è paradigma del bilinguismo costitutivo di ogni autentica intenzione poetica e, in termini più ampi, di ogni uso libero del linguaggio.

L'interesse rivolto in anni recenti da Agamben alla poesia dialettale è dovuto al fatto che il dialetto, nella sua sorgività inesauribile e impossibile da sistematizzare, si presenta secondo il filosofo come una lingua che rimanda oltre a sé, e permette di guardare nella direzione del luogo inconoscibile da cui il linguaggio viene all'uomo e, prima ancora, nella direzione del non aver un linguaggio dell'uomo, della sua urgenza di riceverlo donde esso provenga.

Tornando alle considerazioni da cui questo articolo ha preso le mosse, Agamben cita Zanzotto e Pasolini (Pasolini 1995: 70), quando indicano nel dialetto un paradigma capace di collocarsi tra *langue* e *parole*, non però come l'ordine dell'archivio foucaultiano, ma prima di esso e rivolgendo lo sguardo in direzione opposta rispetto a quella della costituzione e ricostituzione degli ordini discorsivi: non tanto verso la possibilità di dire in un certo modo o in un certo altro modo, quanto sostando sulla possibilità stessa di dire, nella dimensione della potenza in atto in quanto potenza; e, nella cesura che separa questa dall'archivio che regola l'atto enunciativo, scoprire il soggetto non come funzione di un intreccio di dispositivi o come agente di una forma di vita, bensì come soglia irriducibile di esistenza o annichilimento della parola.

5. CONCLUSIONE

L'urgenza di liberare la propria ricerca dalle tradizionali filosofie del soggetto, conduce Foucault in una irrequieta riflessione che, fin dai primi passi giovanili, tocca il problema del linguaggio. L'interesse che Foucault rivolge a precise speri-

[18] Le osservazioni di ordine filosofico di Agamben sembrano parallele a quelle storiografiche proposte da De Mauro: «La lingua comune, insomma, non si offriva al singolo come una realtà "naturali" immediatamente acquisibile vivendo la vita associata di ogni giorno, privata o pubblica. Fuori della Toscana e fuori di Roma, la lingua comune era un possesso da acquisire attraverso applicazione e studio scolastico, dunque un possesso riservato a coloro che avevano frequentato la scuola» (De Mauro 1963: 34-35).

mentazioni letterarie rappresenta la necessità di illuminare quella che si può definire un'esperienza selvaggia, libera dal concetto di un soggetto sedicente trascendentale e sovrano e, invero, prodotto da una configurazione culturale storicamente collocabile. Parallelamente allo sforzo in prossimità dei dispositivi che definiscono i discorsi nella loro storicità, Foucault dà seguito a tale urgenza avvicinando figure capaci di frantumare l'ordine dei discorsi, in primo luogo la funzione rappresentativa che il soggetto sovrano suppone essere al servizio della propria interiorità. Si tratta di sperimentazioni che permettono a Foucault di gettare luce sulla vitalità intrinseca del linguaggio, sulla possibilità che essa conserva di disporre nuovi ordini discorsivi.

È certo, tuttavia, che, permanendo all'interno di uno scenario di discontinuità storiche e interrogando il linguaggio nelle forme attuali che esso rende accessibili, in questi anni Foucault si scontra con l'esosità delle esperienze letterarie che studia. Foucault permane entro l'orizzonte ontologico dell'operatività che ha prodotto il soggetto moderno, e così la ricerca di discontinuità affermative si limita a degradare la consistenza della figura del soggetto, anziché minarla alle sue radici. Inoltre, avendo dotato il linguaggio di una simile vitalità creativa rischia di trasformare la sperimentazione letteraria in una forma di feticismo, che proietta nel linguaggio la vitalità insita nei soggetti parlanti e la trasforma in una potenza a essi estranea e incontrollabile.

L'impresa tentata da Agamben di sottrarsi rispetto a un'ontologia dell'operatività, permette di tematizzare il linguaggio a partite dall'origine trascendentale di ogni atto discorsivo attuale, a partire cioè dall'aspetto non storico ma storicizzante che accompagna ogni presa di parola. Nello iato che Foucault indaga nel senso delle griglie di attualizzazione del linguaggio, Agamben sosta interrogando la dimensione che trascende ogni attualizzazione e ogni soggettivazione, in cui risiedono al contempo l'impotenza e la totipotenza umane. Occasione per indagare quello iato è la critica della nozione saussuriana di *langue* e la pretesa di sovrapporre alla distinzione *langue-parole* quella di Benveniste tra semiotico e semantico. L'ontologizzazione della distinzione saussuriana e la sovrapposizione a essa della distinzione benvenisteana compromettono la possibilità di indagare l'aver-luogo del linguaggio all'interno della concreta attività linguistica slegando il linguaggio dalla dimensione monologica a cui invece rischia di relegarlo Agamben, e aprendo l'indagine anche delle condizioni sociali, fisiche, biologiche e pragmatiche che fungono da condizione dell'esistenza reale del linguaggio. Il rischio è dunque quello di reificare la facoltà del linguaggio, separandola in maniera netta dalla realtà individuale e storica entro cui sola essa ha davvero senso.

Insistendo sull'aspetto irriducibilmente evenemenziale del discorso, invece, Foucault riesce a condurre la propria critica del soggetto rielaborandola nel senso di una ontologia all'attualità. Negli anni Ottanta, Foucault propone una concezione di etica che non si disfa della capacità emancipativa del soggetto, ma la declina

come una pratica immanente alla storia e relativa alle disposizioni prescrittive che la animano, pur dovendosi muovere fra l'impoliticità del gesto trasformativo individuale e il rischio di una politica tutta giocata sulla strategia comunicativa e demagogica (Bazzicalupo 2018), in assenza di riferimenti normativi stabili.

BIBLIOGRAFIA

Agamben, G. 1968. *L'albero del linguaggio*. In «I problemi di Ulisse», 63, pp. 104-114.

Agamben, G. 1970. *L'uomo senza contenuto*. Milano: Rizzoli.

Agamben, G. 1977. *Stanze. La parola e il fantasma nella cultura occidentale*. Torino: Einaudi.

Agamben, G. 1978. *Infanzia e storia. Distruzione dell'esperienza e origine della storia*. Torino: Einaudi.

Agamben, G. 1980. *La parola e il sapere*. In «Aut Aut», 179-180, pp. 155-166.

Agamben, G. 1982a. *Il linguaggio e la morte. Un seminario sul luogo della negatività*. Torino: Einaudi.

Agamben, G. 1982b. *La fine del pensiero / La fin de la pensée*. Paris: Le Nouveau Commerce.

Agamben, G. 1988. *Bataille e il paradosso della sovranità*. In *George Bataille: il politico e il sacro*, a cura di J. Risset. Napoli: Liguori, pp. 115-119.

Agamben, G. 1995. *Homo sacer. Il potere sovrano e la nuda vita*. Torino: Einaudi.

Agamben, G. 1996a. *Categorie Italiane. Studi di poetica*. Venezia: Marsilio.

Agamben, G. 1996b. *Mezzi senza fine. Note sulla politica*. Torino: Bollati Boringhieri. Si è citato:

pp. 45-53, *Note sul gesto*, originariamente in «Trafic», 1 (1992);

pp. 60-73, *Glosse in margine ai Commentari sulla società dello spettaco*lo, prefazione a G. Debord, *Commentari sulla società dello spettacolo*, Milano: Fausto Lupetti 1990;

pp. 87-93, *Note sulla politica*, originariamente in «Futur antérieur», 9 (1992).

Agamben, G. 1997. *Verità come erranza*. In «Paradosso», 2-3, pp. 13-17.

Agamben, G. 1998. *Quel che resta di Auschwitz. L'archivio e il testimone*. Torino: Bollati Boringhieri.

Agamben, G. 2000. *Il tempo che resta. Un commento alla «Lettera ai Romani»*. Torino: Bollati Boringhieri.

Agamben, G. 2001. *La comunità che viene*. Torino: Bollati Boringhieri.

Agamben, G. 2005. *La potenza del pensiero. Saggi e conferenze*. Vicenza: Neri Pozza. Si è citato:

pp. 7-23, *La cosa stessa*, conferenza tenuta a Forlì il 26 ottobre 1984, originariamente pubblicata in Aa.Vv., *Di-segno. La giustizia nel discorso*, Milano: Jaca Book 1984;

pp. 24-35, *L'idea del linguaggio*, originariamente in «Aut Aut», 201 (1984);

pp. 36-56, *La trasparenza del linguaggio*, in «Alfabeta», 38-39 (luglio-agosto 1982), pp. 2-4, qui in una versione più estesa con titolo *Lingua e storia. Categorie linguistiche e categorie storiche nel pensiero di Benjamin*;

pp. 57-75, *Filosofia e linguistica. Jean-Claude Milner: Introduction à une science du langage*, pubblicata in francese in *Annuaire philosophique*. Paris : Seuil 1990;

pp. 93-108, *L'io, l'occhio, la voce*, in origine introduzione a P. Valéry, *Monsieur Teste*. Milano: Feltrinelli 1980.

Agamben, G. 2006. *Che cos'è un dispositivo?*. Roma: nottetempo.

Agamben, G. 2008a. *Il sacramento del linguaggio. Archeologia del giuramento*. Roma-Bari: Laterza.

Agamben, G. 2008b. *Signatura rerum. Sul metodo*. Torino: Bollati Boringhieri.

Agamben, G. 2009. *Il Regno e la Gloria. Per una genealogia teologica dell'economia e del governo*. Torino: Bollati Boringhieri.

Agamben, G. 2010. *La ragazza indicibile*. In G. Agamben e M. Ferrando, *La ragazza indicibile. Mito e mistero di Kore*. Milano: Electa, pp. 7-32.

Agamben, G. 2013. *Idea della prosa*. Macerata: Quodlibet.

Agamben, G. 2014a. *L'uso dei corpi*. Vicenza: Neri Pozza.

Agamben, G. 2014b. *Opus Alchymicum*. In Id., *Il fuoco e il racconto*. Roma: nottetempo, pp. 113-142.

Agamben, G. 2016. *Che cos'è la filosofia*. Macerata: Quodlibet.

Agamben, G. 2017. *Che cosa resta?*, disponibile sul sito dell'editore Quodlibet.

Agamben, G. 2018. *Per un'ontologia e una politica del gesto*. In «Giardino di studi filosofici», consultabile nel sito dell'editore Quodlibet.

Agamben, G. 2019. *Porta e soglia*. In L. Dell'Aia e J. D'Alonzo, *Lo scrigno delle segnature. Lingua e poesia in Giorgio Agamben*. Amsterdam: Istituto Italiano di Cultura, pp. 3-8.

Agamben, G. 2020. *Intelletto d'amore*. In Id. e J.B. Brenet, *Intelletto d'amore*. Macerata: Quodlibet.

Attell, K. 2019. *«La voce umana». Agamben e Derrida* (traduzione della rielaborazione del secondo capitolo di Id., *Giorgio Agamben. Beyond the Threshold of Deconstruction*, 2015). In *Giorgio Agamben. Ontologia e politica*, a cura di D. Bonacci. Macerata: Quodlibet, pp. 57-81.

Avelino, N. 2018. *Foucault, il sapere politico e l'agire anarchico*. In *Contro-parola. Foucault e la parrēsia*, a cura di V. Segreto. Milano-Udine: Mimesis, pp. 207-232.

Barthes, R. 1988. *La morte dell'autore*. Traduzione a cura di B. Bellotto, in *Il brusio della lingua. Saggi critici IV*. Torino: Einaudi, pp. 51-56.

Bazzicalupo, L. 2018. *Erosione e rilancio della parrēsia: estetica della politica e differenziazione etica*. In *Contro-parola. Foucault e la parrēsia*, a cura di V. Segreto. Milano-Udine: Mimesis, pp. 21-37.

Benveniste, É. 1966. *Problèmes de linguistique générale*, vol. I. Paris: Gallimard.

Benveniste, É. 1974. *Problèmes de linguistique générale*, vol. II. Paris: Gallimard.

Berruto, G. 1995. *Fondamenti di sociolinguistica*. Roma-Bari: Laterza.

Breton, A. 1973. *Anthologie de l'humour noir*. Paris: Le Livre de poche.

Catucci, S. 2007. *La cura di scrivere*. In *Dopo Foucault. Genealogie del postmoderno*, a cura di E. De Conciliis. Milano: Mimesis, pp. 231-243.

Cavallari, C. 2016. *Archeologia, genealogia, attitudine. La politica della verità di Michel Foucault*. In *Politiche della filosofia. Istituzioni, soggetti, discorsi, pratiche*, a cura di P. Cesaroni e S. Chignola. Roma: DeriveApprodi, pp. 201-221.

Cesaroni, P. 2013. *Verità e vita. La filosofia in Il coraggio della verità*. In *La forza del vero. Un seminario sui Corsi di Michel Foucault al Collège de France (1981-1984)*, a cura di Id. e S. Chignola. Verona: ombre corte, pp. 132-160.

Clemens, J. 2008. *The Role of the Shifter and the Problem of Reference in Giorgio Agamben*. In *The Work Giorgio Agamben. Law, Literature, Life*, a cura di J. Clemens, N. Heron, A. Murray. Edinburgh: Edinburgh University Press, pp. 43-65.

Crosato, C. In via di pubblicazione. *Telling the Truth, or Not. Notes about the Concept of Ethics in Foucault and Agamben*. In «Journal of Italian Philosophy».

D'Alonzo, J. 2015. *Filosofia del linguaggio e critica alla linguistica nei primi scritti di Giorgio Agamben*. In «Rivista italiana di Filosofia del linguaggio», 1, pp. 46-58.

D'Alonzo, J. 2018. *Agamben lettore di Benveniste, tra linguistica e filosofia*. In «Italianistische Zeitschrift für Kulturwissenschaft und Gegenwartsliteratur», 3, pp. 137-156.

De Cristofaro, E. 2008. *Il senso storico della verità. Un percorso attraverso Foucault*. Genova: il melangolo.

De Mauro, T. 1963. *Storia linguistica dell'Italia unita*. Bari: Laterza.

Dean, M. e Zamora, D. 2019. *Le dernier homme et la fin de la révolution. Foucault après Mai 68*. Montréal: Lux.

Deleuze, G. 1970. *Schizologie*. In L. Wolfson, *Le schizo et les langues*. Paris: Gallimard.

Deleuze, G. 2002. *Raymond Roussel et l'horreur du vide* (1963). In Id., *L'Île déserte. Textes et entretiens 1953-1974*. Paris: Les Éditions de Minuit, pp. 102-104.

Dell'Aia, L. 2019. *La poesia e il memorabile*. In Id. e J. D'Alonzo, *Lo scrigno delle segnature. Lingua e poesia in Giorgio Agamben*. Amsterdam: Istituto Italiano di Cultura, pp. 11-22.

Derrida, J. 1990. *Cogito e storia della follia*. Traduzione a cura di G. Pozzi, in Id., *La scrittura e la differenza*. Torino: Einaudi, pp. 39-79.

Descartes, R. 2007. *Meditazioni metafisiche*. Traduzione a cura di L. Urbani Ulivi. Milano: Bompiani.

Dews, P. 1989. *The Return of the Subject in the Late Foucault*. In «Radical Philosophy», 51, pp. 37-41.

Domenicali, F. 2018. *Biopolitica e libertà. Dieci capitoli su Foucault*. Napoli-Salerno: Orthotes.

Eribon, D. 1990. *Michel Foucault*. Paris: Flammarion.

Ferrando, S. 2012. *Michel Foucault, la politica presa a rovescio. La pratica antica della verità, nei corsi al Collège de France*. Milano: Franco Angeli.

Flynn, Th.R. 1985. *Truth and Subjectivation in the Late Foucault*. In «The Journal of Philosophy», 82.10, pp. 532-540.

Foucault, M. 1973. *Moi Pierre Rivière, ayant égorgé ma mère, ma sœur et mon frère...*. Paris: Éditions Gallimard.

Foucault, M. 1978. *Raymond Roussel*. Traduzione a cura di E. Brizio. Bologna: Cappelli.

Foucault, M. 1983. *Introduction*. In G. Deleuze, F. Guattari, *Anti-Oedipus. Capitalism and Schizophrenia*. Minneapolis: University of Minnesota Press, pp. XI-XIV.

Foucault, M. 1997. *L'archeologia del sapere. Una metodologia per la storia della cultura*. Traduzione a cura di G. Bigliolo. Milano: Rizzoli.

Foucault, M. 2001a. *Dits et Écrits. Vol. 1*, Paris: Gallimard; da cui si è citato:

pp. 93-147, *Introduction*, originariamente in L. Binswanger, *Le Rêve et l'Existence* (1954), Paris: Desclée de Brouwer, pp. 9-128;

pp. 261-278, *Préface à la trasgression*, originariamente in «Critique», 195-195: Hommage à G. Bataille (1963), pp. 751-769;

pp. 278-289, *Le langage à l'infini*, originariamente in «Tel quel», 15 (1963), pp. 44-53;

pp. 440-448, *La folie, l'absence d'œuvre*, originariamente in «La Table ronde», 196: Situation de le psychiatrie (1964), pp. 11-21;

pp. 449-452, *Pourquoi réédite-t-on l'œuvre de Raymond Roussel?*, originariamente in «Le Monde», 6097 (22 agosto 1964), p. 9;

pp. 546-567, *La pensée du dehors*, originariamente in «Critique», 229 (giugno 1966), pp. 523-546;

pp. 760-780, *Introduction*, originariamente in A. Arnauld e C. Lancelot, *Grammaire générale et raisonnée* (1969), Paris: Republications Paulet, pp. III-XXVII;

pp. 817-849, *Qu'est-ce qu'un auteur?*, originariamente in «Bullettin de la Société française de philosophie», 63.3 (1969), pp. 73-104;

pp. 881-893, *Sept propos sur le Septième ange*, originariamente in J.P. Brisset, *La Grammaire logique* (1970), Paris: Tchou, pp. 9-57;

pp. 1149-1163, *Michel Foucaul Derrida e no kaino*, intervista originariamente in «Paideia», 11 (1 febbraio 1972), pp. 131-147.

Foucault, M. 2001b. *Dits et Écrits. Vol. 2*, Paris: Gallimard; da cui si è citato:

pp. 237-253, *La vie des hommes infâmes*, originariamente in «Les Cahiers du chemin», 29 (15 gennaio 1977), pp. 12-29;

pp. 1202-1230, *À propos de la généalogie de l'éthique: un aperçu du travail en cours*, originariamente in H. Dreyfus e P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 1983², pp. 229-252;

pp. 1381-1397, *Qu'est-ce que les Lumières?*, originariamente pubblicato in inglese, con il titolo *What is Enlightenment?*, in *The Foucault Reader* (1984), a cura di P. Rabinow, New York: Pantheon Books, pp. 32-50;

pp. 1410-1417, *Polémique, politique et problématisations*, originariamente pubblicato in inglese, con il titolo *Polemics, Politics and Problematizations*, in *The Foucault Reader* (1984), a cura di P. Rabinow, New York: Pantheon Books, pp. 381-390;

pp. 1418-1427, *Archéologie d'une passion*, intervista originariamente pubblicata in inglese nel volume *Raymon Roussel. Death and the Labyrinth* (1984), New York: Doubleday, pp. 169-186;

pp. 1527-1548, *L'éthique du souci de soi comme pratique de la liberté*, intervista originariamente pubblicata in «Concordia. Revista internacional de filosofia», 6, luglio-dicembre 1984, pp. 99-116.

Foucault, M. 2003. *L'ermeneutica del soggetto. Corso alla Collège de France (1981-1982)*. Traduzione a cura di M. Bertani. Milano: Feltrinelli.

Foucault, M. 2004a. *L'ordine del discorso e altri interventi*. Traduzione a cura di A. Fontana, M. Bertani e V. Zini. Torino: Einaudi.

Foucault, M. 2004b. *L'uso dei piaceri. Storia della sessualità 2*. Traduzione a cura di L. Guarino. Milano: Feltrinelli.

Foucault, M. 2011. *Le beau danger*. Paris: Éditions de l'École des hautes études en sciences sociales.

Foucault, M. 2014. *Del governo dei viventi. Corso al Collège de France (1979-1980)*. Traduzione a cura di D. Borca e P.A. Rovatti. Milano: Feltrinelli.

Foucault, M. 2015a. *Il governo di sé e degli altri. Corso al Collège de France (1982-1983)*. Traduzione a cura di M. Galzigna. Milano: Feltrinelli.

Foucault, M. 2015b. *Que'est-ce que la critique?*. In Id., *Qu'est-ce que la critique? Suivi de La culture de soi*. Paris: Vrin, pp. 33-80.

Foucault, M. 2016. *Il coraggio della verità. Il governo di sé e degli altri II. Corso al Collège de France (1984)*. Traduzione a cura di M. Galzigna con P.P. Ascari, L. Paltrinieri, E. Valtellina. Milano: Feltrinelli.

Galzigna, M. 2008. *Introduzione*. In *Foucault, oggi*, a cura di M. Galzigna. Milano: Feltrinelli, pp. 7-26.

Gobber ,G. 2006. *Capitoli di linguistica generale*, Milano: I.S.U. Università Cattolica.

Hadot, P. 1989. *Réflextions sur la notion de culture de soi*. In Aa.Vv., *Michel Foucault philosophe*. Paris: Seuil, pp. 261-270.

Heller-Roazen, D. 2005. *Echolalias: On the Forgetting of Language*. New York: Zone Books.

Heller-Roazen, D. 2019. *Leggere ciò che non è mai stato scritto* (traduzione dell'introduzione scritta per la raccolta *Potentialities*). In *Giorgio Agamben. Ontologia e politica*, a cura di D. Bonacci. Macerata: Quodlibet, pp. 25-55.

Heron, N. 2011. v. «Subject». In A. Murray e J. Whyte, *The Agamben Dictionary*. Edinburgh: Edinburgh University Press, pp. 187-189.

Husserl, E. 2009. *Meditazioni cartesiane*. Traduzione a cura di F. Costa. Torino: Bompiani.

Leclercq, J. 2007. *Morte dell'uomo ed emergenza del sé: rileggere Michel Foucault*. Traduzione a cura di A. Cutro. In *Dopo Foucault. Genealogie del postmoderno*, a cura di E. De Conciliis. Milano: Mimesis, pp. 263-280.

Lorenzini, D. 2015. *Performative, Passionate, and Parrhesiastic Utterance: On Cavell, Foucault, and Truth as an Ethical Force*. In «Critical Inquiry», 41.2, pp. 254-268.

Luce, S. 2009. *Fuori di sé. Poteri e soggettivazioni in Michel Foucault*. Milano-Udine: Mimesis.

Luce, S. 2015. *La doublure di Foucault. Il pensiero del "fuori" e le pratiche del vero*. In «Materiali foucaultiani», 4.7-8, pp. 123-136.

Marzocca, O. 2016. *Foucault ingovernabile. Dal bíos all'ethos*. Milano: Meltemi.

McLoughlin, D. 2013. *From Voice to Infancy. Giorgio Agamben on the Existence of Language*. In «Angelaki», 18.4, pp. 149-164.

Pasolini, P.P. 1995. *Empirismo eretico*. Milano: Garzanti.

Perego, V. 2018. *Foucault e Derrida. Tra fenomenologia e trascendentale*. Napoli-Salerno: Orthotes.

Prozorov, S. 2014. *Agamben and Politics. A Critical Introduction*. Edinburgh: Edinburgh University Press.

Redaelli, E. 2011. *L'incanto del dispositivo. Foucault dalla microfisica alla semiotica del potere*. Pisa: ETS.

Revel, J. 1996. *Foucault, le parole e i poteri. Dalla trasgressione letteraria alla resistenza politica*. Roma: manifestolibri.

Revel, J. 1997. *Il limite di un pensiero del limite*. In «Aperture», 2, pp. 36-44.

Revel, J. 2003. *Michel Foucault, un'ontologia dell'attualità*. Soveria Mannelli: Rubbettino.

Righetti, S. 2011. *Letture su Michel Foucault. Forme della "verità": follia, linguaggio, potere, cura di sé*. Napoli: Liguori.

Roussel, R. 1935. *Comment j'ai écrit certains de mes livres*. Paris: Alphonse Lemerre.

Rovatti, P.A. 1986. *Il luogo del soggetto*. In *Effetto Foucault*, a cura di P.A. Rovatti. Milano: Feltrinelli, pp. 71-76.

Rovatti, P.A. 2008. *Il soggetto che non c'è*. In *Foucault, oggi*, a cura di M. Galzigna. Milano: Feltrinelli, pp. 216-225.

Sabot, P. 2019. *Le langage au pouvoir. Foucault, lecteur de Brisset*. In «Phantasia», 8, pp. 5-12.

Salzani, C. 2015. *Il linguaggio è sovrano: Agamben e la politica del linguaggio*. In «Rivista italiana di filosofia del linguaggio», 1, pp. 268-280.

Salzani, C. 2019. *L'umano come segnatura*. In *Lo scrigno delle segnature. Lingua e poesia in Giorgio Agamben*, a cura di L. Dell'Aia e J. D'Alonzo. Amsterdam: Istituto Italiano di Cultura, pp. 37-51.

Saussure, F. de 1976. *Cours de linguistique générale*. Paris: Payot.

Sforzini, A. 2019. *La vérité aux limites du discours: la «performance» politique des cyniques*. In «Phantasia», 8, pp. 31-37.

Spina, S. 2019. *Per un'etica e una politica destituenti. La questione del gesto nel pensiero di Giorgio Agamben*. In «Lessico di Etica Pubblica», 10.1, pp. 111-122.

Trombadori, D. 2005. *Colloqui con Foucault. Pensieri, opere, omissioni dell'ultimo maître-à-penser*, Roma: Castelvecchi.

Veyne, P. 2010. *Foucault. Il pensiero e l'uomo*. Traduzione a cura di L. Xella. Milano: Garzanti.

Zartaloudis, T. 2010. *Giorgio Agamben. Power, Law and the Uses of Criticism*. New York: Routledge.

169 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 169-194
ISSN: 1825-5167

SACRIFICE AND DESUBJECTIVATION. THE REVOLUTIONARY SUBJECT IN BATAILLE AND THE VERY EARLY AGAMBEN

DANIEL MCLOUGHLIN
Faculty of Law
University of New South Wales
daniel.mcloughlin@unsw.edu.au

ABSTRACT
Desubjectivation is central to Agamben's political thought. In the Homo Sacer project, Agamben identifies two different forms of desubjectivation: the first is the stripping of identity by the state; the second is an experience of letting go of the self which, he argues, provides resources for resisting contemporary biopolitics. In Homo Sacer, Agamben is also profoundly critical of Georges Bataille's thought for reproducing the logic of the sovereign ban, which is the most extreme mechanism that the state uses to deprive people of their identity. In this essay, however, I argue that Agamben's first account of the emancipatory potentials of desubjectivation, his 1970 essay On the Limits of Violence, echoes themes that are central to Bataille's thought. Agamben argues that violence can only break with the history of domination through a non-instrumental action that involves the negation of both self and other, and he formulates this idea by drawing on the example of sacrifice, Marx and Engels' analysis of proletarian revolution, and the existential problem of mortality and the limits of language. I show that while Agamben's analysis of self-negating violence draws on a range of sources, including Hannah Arendt and Walter Benjamin, the key claims of the essay reflect the account of desubjectivation that Bataille develops through his reflections on sacrifice, subjectivity, and the social.

KEYWORDS
Agamben, Bataille, revolution, sacrifice, desubjectivation

Agamben is perhaps best known for his analysis of the relationship between sovereignty and biopolitics. In a 2004 Interview with Agamben, Vacarme asks him about the "flip side" of this analysis—the "minor biopolitics" of movements, such as those of undocumented immigrants, the unemployed, or those with AIDS, who "already practice a politics with an awareness—and an experience—of the state of exception" (Vacarme 2004: 115). In response, Agamben gives an account of contemporary politics as a dialectic between processes of subjectivation and desubjectivation. The modern State is, he argues, an apparatus that strips people of their

traditional identities and forms of belonging. This is a reference not only to the sovereign exception, which suspends the legal recognition of individuals and populations, but to spectacular capitalism, which undermines tradition and strips people of their identities through the commodification of culture (Agamben 1993: 63-64, 83; Agamben 2000: 85). However, Agamben also points out that the regulation of subjectivity and identity is central to the functioning of modern power, as indicated by the work of Michel Foucault. As such, alongside the destruction of tradition and community, there is a process of resubjectivation that is managed by the State, through which people take on an identity that allows them to be governed.

According to Agamben, the development of biopolitics complicates the problem of identifying a "revolutionary subject", which many people continue to think "in terms of class, of the proletariat" (Vacarme 2004: 116). While "these are not obsolete problems", the categories of class and subjectivity have become an essential part of the mechanisms of government, and the risk of using them is that one "reidentify oneself, that one invest this situation with a new identity, that one produce a new subject, if you like, but one subjected to the State" (Vacarme 2004: 116). Agamben's response to this dilemma is to argue that the potential for resisting contemporary biopolitics does not lie in constituting a new revolutionary identity, but rather, in practicing a form of desubjectivation that is distinct from the one produced by the State: "Desubjectivation does not only have a dark side. It is not simply the destruction of all subjectivity. There is also this other pole, more fecund and poetic, where the subject is only the subject of its own desubjectivation" (Vacarme 2004: 124). And, according to Agamben, one finds just a moment of poetic desubjectivation in Foucault's late work on government, which not only analyses the care of the self, but also "states the apparently opposite theme: the self must be let go of...'the art of living is to destroy identity'" (Vacarme 2004: 117).

Agamben provides his clearest and most fully developed account of the 'poetic' experience of political desubjectivation in the final two volumes of the *Homo Sacer* project, *The Highest Poverty* and *The Use of Bodies*[1]. According to Agamben, the human is a being defined by inoperativity or impotentiality, that is, our capacity to suspend our ways of being and acting (Agamben 1999b: 182-183)—and, in these works, he develops an account of the 'coming politics' as a praxis in which a "work is deactivated and rendered inoperative, and in this way, restored to possibility, opened to a new possible use" (Agamben 2015: 247). The account of the politics of inoperativity that Agamben develops in the concluding volumes of the *Homo Sacer* project has, however, been ably discussed by others in the context of this special edition, and elsewhere (DeCaroli 2016; Bignall 2016; Vatter 2016; Bernstein 2017; Prozorov 2017; van der-Heiden 2020). While much remains to be said about these works, the present essay does not focus on Agamben's most recent account

[1] Part One of *The Use of Bodies* concludes with an extended analysis of Foucault's late work on the subject (Agamben 2015: 95-108).

of the emancipatory potentials of desubjectivation, but upon the earliest—and my argument is that this is to be found in an engagement with a seemingly unlikely source, namely, the thought of Georges Bataille.

In an interview from 1980, Michel Foucault states that Bataille's work provided his own generation of thinkers with important conceptual resources with which to challenge the phenomenology that was dominant at the time. Where phenomenology cast the subject as a transcendental foundation for the meaning of everyday experience, Bataille pursued limit experiences that had "the function of wrenching the subject from itself, of seeing that the subject is no longer itself, or that it is brought to its annihilation or its dissolution" (Foucault 1994: 241). Foucault argues that this practice of desubjectivation was an attempt to open out new possibilities for living, and he conceptualises his own philosophical practice in these Bataillean terms: "However boring, however erudite my books may be, I've always conceived of them as direct experiences aimed at pulling myself free of myself, at preventing me from being the same" (Foucault 1994: 242). He also claims that while the turn to Bataille (and, along with him, Nietzsche and Blanchot) was a break with Marxist orthodoxy, it was a "path toward what we expected from communism" (Foucault 1994: 249). This is because the young generation of philosophers, who confronted a society that had permitted Nazism, and a global politics structured by American Capitalism and Stalinist Communism, "wanted a world and a society that were not only different but that would be an alternative version of ourselves; we wanted to be completely other in a completely different world" (Foucault 1994: 247-8).

While Agamben obviously owes a great deal to Foucault, he is not known for being influenced by Bataille. Indeed, whenever Bataille's name appears in Agamben's work, it is as a target of criticism—and the most strident of these is the claim that Bataille's thought is "useless to us" because it offers only a "real or farcical repetition" of the relationship between sovereignty and bare life that founds political power (Agamben 2000: 7; see also Agamben 1989a: 54; Agamben 1998: 112-123; Agamben 2004: 7-8). Commentators on the relationship between the two thinkers have understandably tended to emphasise these attacks (Stronge 2017: 1; Hirsche 2014; Biles 2011). However, in her entry on Bataille in *Agamben's Philosophical Lineage*, Nadine Hartmann argues that the "persistent downplaying" of Bataille's thought "in Agamben's mature project is itself symptomatic" (Hartmann 2017: 109), and suggests that Agamben might be more indebted to Bataille than his frequent criticisms seem to suggest. In this essay, I develop Hartman's suggestion that Agamben's relationship to Bataille is more complicated than it initially appears to be. However, instead of examining those texts in which Agamben mentions Bataille, as does Hartmann, I turn to a very early text in which his name does not appear, but which, I argue, is important for understanding the development of Agamben's thought, his critique of Bataille, and his later account of the politics of desubjectivation.

David Kishik tells us that a young Giorgio Agamben travelled to Paris in May of '68 "to take part in the final chain of events that turned the city on its head during that restless spring" (Kishik 2012: 1)[2]. However, Agamben has also said that he was "not completely at ease with 1968" due to the fact that he was reading the work of Hannah Arendt, who his "friends on the left considered a reactionary author, of which you absolutely could not talk" (Sofri 1985)[3]. The following year, Agamben penned an essay entitled *On the Limits of Violence*, which draws heavily on Arendt and Walter Benjamin to argue that revolutionary politics has been undermined by an instrumental theory of violence that is tied to a teleological understanding of history. In response, Agamben attempts to theorise a non-instrumental form of action that would, as such, have the capacity to call a "messianic halt" to history and "open a new chronology and a new experience of temporality" (Agamben 2009: 109). This is, he argues, what is at stake in both the ancient practice of sacrifice, Marx and Engels account of proletarian revolution, and the existential confrontation with death—and, drawing on these examples, he argues that a truly revolutionary violence "negates the self as it negates the other; it awakens a consciousness of the death of the self, even as it visits death on the other" (Agamben 2009: 108). Agamben's account of this revolutionary form of violence is brief and enigmatic, and he does not provide citations for many of the ideas that underpin it. Nonetheless, one can detect echoes of some of Agamben's early influences in the argument, including Benjamin, Heidegger, and Arendt, who I will draw upon to help illuminate his analysis. However, the key claim of Agamben's essay is that the revolutionary suspension of history can only occur through a process of self-negation, an argument that he develops by drawing on the example of sacrifice. In this essay, I am going to show that there are some remarkable similarities between Agamben's account of self-negating violence and Georges Bataille's thinking on sacrifice, sovereignty, and subjectivity[4].

[2] Kishik does not, however, specify the sense in which he 'took part' in these events.

[3] Agamben does not elaborate on the particular reason for his friends' hostility to Arendt. She had, however, published a number of books critical of the continental revolutionary tradition and of Marxism in particular by the time Agamben travelled to Paris. *The Origins of Totalitarianism* (1951) equated the Soviet Union with Nazi Germany and helped to popularise a term which went on to play a major ideological role in the Cold War. *The Human Condition* (1958) expresses the utmost admiration for Marx, before going on to critique his definition of the human as a labouring being. *On Revolution* (1963) is very critical of the French Revolution, which it compares very unfavourably with the American revolutionary experience.

[4] There are also some remarkable similarities between Agamben's analysis of revolutionary violence and some of the central theses of Furio Jesi's *Spartakus: Symbology of a Revolt*. Jesi and Agamben were both young scholars living in Rome in the late 1960s and Agamben has since drawn upon and written about his work (Agamben 2004: 26, 89; Agamben 1996). Like *On the Limits of Violence*, *Spartakus* was written in 1969, and it draws on the example of sacrifice to theorise revolt as an experience that suspends historical time (2014: 46). Jesi develops this argument, in part, by drawing on the work of Mircea Eliade, whose *Cosmos and History* argues that sacrifice regenerated time through a return to origin, which is the same account of sacrifice that we find in Agamben's essay (1954: 35-6). Citing Eliade, Jesi also argues, like Agamben, that these sacrificial rituals involved the destruction of

This suggests that Agamben first articulates his account of the emancipatory potentials of political desubjectivation through an engagement with the very thinker whose work he later declares to be 'useless'.

1. BATAILLE ON SACRIFICE AND SELF-NEGATION

The "'enigma of sacrifice' was a lifelong obsession" for Bataille (Biles 2011: 129). Throughout his work, Bataille opposed the practice of sacrifice to the productivism and instrumental rationality that dominates the modern world. However, the theoretical details of this analysis shift over time depending upon the circumstances to which Bataille was responding and the theoretical resources upon which he drew. A great deal could thus be said about the role that sacrifice plays in Bataille's thought, and we do not have space here for an extensive treatment of the issue. In what follows, I am simply going to highlight two different aspects of Bataille's thinking on sacrifice that are particularly relevant to Agamben's account of revolutionary desubjectivation: first, I illustrate the relationship between sacrifice and revolutionary politics that Bataille articulates in his 1933 essay *The Notion of Expenditure*; second, I examine the relationship between sacrifice and subjectivity in Bataille's thought by turning to his 1953 magnum opus, *The Accursed Share*, and the posthumously published *Theory of Religion*.

The Notion of Expenditure argues that utility is the supreme value of the modern world, which esteems individual activity only where it contributes to the production and conservation of material goods. However, drawing on Marcel Mauss' research amongst the Northwestern American Indians, Bataille argues that the earliest forms of economic exchange did not take the rational and utilitarian form of a barter, as classical economics presumed, but rather, involved a practice of giftgiving that squandered wealth (Bataille 1985: 121). Generalising Mauss' insight, Bataille points out that humanity has long engaged in a wide variety of activities that involve expenditure going beyond the need to preserve life and reproduce labour power: the wearing of jewellery; artistic production; competitive games; cultic practices that require "a bloody wasting of men and animals in sacrifice" (Bataille 1985: 119) and "luxury, mourning, war, cults, the construction of sumptuary monuments, games, spectacles, arts, perverse sexual activity (i.e. deflected from genital finality)" (Bataille 1985: 118). According to Bataille, these forms of unproductive expenditure, which he argues had no end beyond themselves, played a central role in the social and

the subject through the confrontation with death (Jesi 2014: 157). However, I focus on Agamben's relationship to Bataille, rather than Jesi, for two reasons. First, Bataille's work is the earliest articulation, and hence the likely conceptual source, of the relationship between sacrifice, death and desubjectivation, which then appears in the work of both younger theorists. Second, establishing a connection between Bataille's concerns and the account of revolutionary desubjectivation that Agamben develops in this early essay casts a different light on his later critique of Bataille.

economic organisation of the pre-modern world. The capitalist economy, by contrast, is predicated upon acquisition, accumulation, and rational calculation, and so, in modernity, "everything that was generous, orgiastic, and excessive has disappeared" (Bataille 1985: 124). While the bourgeoisie still consume, they refuse the obligation to engage in social expenditure, and instead display their wealth behind closed doors: as a result, "the people's consciousness is reduced to maintaining profoundly the principle of expenditure by representing bourgeois existence as the shame of man and as a sinister cancellation" (Bataille 1985: 125).

Bataille not only draws on Mauss' anthropology of the gift economy to critique contemporary society, but to identify forms of resistance to it. In the early 1930s, Bataille joined the ultra-left Democratic Communist Circle (CCD), and in 1934 he participated in a massive general strike that gave rise to the Popular Front between the Communist and Socialist Parties. *The Notion of Expenditure* appeared in the CCD journal, *Critique Sociale*, and in it, Bataille identifies class struggle as the "grandest form" of unproductive social expenditure, arguing that workers have developed the principle "on such a scale that it threatens the very existence of the Masters" (Bataille 1985: 126). However, the vision of revolutionary praxis that Bataille develops by drawing analogies with "festivals, spectacles, and games" is an idiosyncratic one that does not emphasise the role of the party, or the democratic practice of workers councils, but rather, the intoxicating experience of revolt—and this is due, in part, to the fact that he reads the Marxian concern with class struggle through the lens of Durkheim's sociology. In *The Elementary Forms of Religious Life*, Durkheim argues that religious rituals are able to bind a community around a common set of religious symbols due to the capacity of a collective assembly to generate strong emotions: "Once the individuals are gathered together, a sort of electricity is generated by their closeness and launches them to an extraordinary height of exaltation" (Durkheim 1995: 217). Bataille drew his analysis of the sacred from the French School of Sociology via the work of Mauss and, as Michel Richman notes, he shared its belief that "the social whole is greater than the sum of its parts, the collectivity induces transformations within its participants, and that such transformation is accessible and sustainable only within a *mouvement d'ensemble*" (Richman 2002: 5). However, the political ends to which Bataille set his analysis of the sacred differed substantially from his sociological sources. Durkheim was primarily concerned with the capacity of collective assemblies to generate social cohesion: they are, he argues, "the act by which society makes itself, and remakes itself, periodically" (Durkheim 1995: 425). Bataille, by contrast, was interested in the ways that the emotions produced by collective assemblies could be mobilised to subvert a modern society to which he was fundamentally opposed (Richman 2002: 14). Thus, in *The Notion of Expenditure*, he argues that the only way for the poor to reclaim social power is through "the revolutionary destruction of the ruling class in other words, through a bloodied and in no way limited social expenditure" (Bataille

1985: 121). Similarly, in *The Popular Front in the Streets*, Bataille criticises the bureaucratic processes of parties, and argues that the masses are driven to insurrection by "the contagious emotion that, from house to house, from suburb to suburb, suddenly turns a hesitating man into a frenzied being" (Bataille 1985: 162).

As we will see in the next section of this essay, Agamben's account of revolutionary praxis in *On the Limits of Violence* echoes this phase of Bataille work insofar as it highlights the parallels between class struggle, revolt, and sacrificial violence. However, the way Agamben analyses sacrifice and revolution also contains echoes of Bataille's later work, which casts sacrifice as an example of the experience of desubjectivation that occurs at the limits of language and knowledge. While Bataille's association with the CCD was decisive for works such as *The Notion of Expenditure*, his alliance with the organised left was to prove short-lived. By the mid-1930s, Bataille had become disillusioned with the capacity of the left to resist the rising tide of fascism, in part, because he believed that the rationalism of socialist thought limited its ability to harness the libidinal energies that fascism was tapping into at the time (Galetti 2018: 24; Surya 2002: 220-221). Bataille's critique of the left played an important role in his founding the infamous secret society *Acéphale* in 1936, along with the journal of the same name, which developed a "ferociously religious" (Bataille 2018: 124) thought heavily indebted to Sade and the Nietzschean themes of the death of God, tragedy, and the Dionysian[5]. One year later, he established *The College of Sociology* with his friend Roger Caillois, which hosted a series of lectures analysing "all manifestations of social existence in which the active presence of the sacred is clear" (Hollier 1998: 5). At the beginning of the War, however, Bataille abandoned these projects, retreated to the countryside, and his work began to emphasise "inner experience" and the question of subjectivity. By the time of his major post-War works, then, Bataille's analysis of sacrifice had undergone a transformation, and he had come to theorise social institutions of useless expenditure as an experience of the "sovereign freedom" that inheres in the subject[6].

Bataille describes sovereignty as an "aspect of existence" that is "opposed to the servile and subordinate" (Bataille 1989a: 197). Sovereignty thus means, first and foremost, the freedom from work, which is only ever performed under the compulsion of the body's need to survive, or at the will of another, and is always performed for some useful end. Because sovereignty is the antithesis of work, it is exemplified in acts of useless consumption: "The sovereign individual consumes and doesn't labour, whereas at the antipode of sovereignty the slave and the man without

[5] In the first volume of *Acéphale*, Bataille went as far as to criticise political action as such, because it necessarily imposed an end upon existence, and were therefore alien to the practice of useless expenditure that was so important to his thought (Bataille 2018: 123; Galetti 2018: 24).

[6] Bataille's first treatment of the relationship between sacrifice and the structure of subjectivity is *Sacrifices*, which he wrote only months after *The Notion of Expenditure* (see Bataille 1985: 130-136). However, it is only in his post-War work that Bataille works through this relationship at length, and so it is upon this phase of his thought that I draw.

means labor and reduce their consumption to the necessities" (Bataille 1989a: 198)[7]. Bataille's later work repeats his earlier argument that modernity has eliminated the institutions and practices of useless expenditure (or what he now calls sovereignty) that characterised the pre-modern world. However, he now also takes aim at Soviet communism, which he describes as a "world of denied sovereignty" (Bataille 1989a: 291). While the atheism of communism freed humankind from subordination to God, and its insistence on equality freed people from the sovereignty of the ruling class, Bataille claims that this was on condition of 'man' "having renounced for himself everything that is truly sovereign" (Bataille 1976: 352-353; quoted in Nancy 1991: 16). On his account, communism was the most extreme outcome of the development of the modern economy, as it sought to perfect production by "revolutionary means" (Bataille 1989: 93) and subordinate the "irreducible desire that man is" to "those needs that can be brought into harmony with a life entirely devoted to producing" (Bataille 1976: 352-353; quoted in Nancy 1991: 16).

While the modern world has destroyed the institutional forms that sovereignty once took, Bataille claims that the possibility of sovereign experience persists because it is a constitutive feature of subjectivity. According to Bataille, the subject is not a substance that underpins and guarantees our knowledge of the world, but a negativity that is constituted through the relation to the object. On his account, animals do not experience a distinction between themselves and their environment (Bataille 1989b: 19); and it is the use of tools that first interrupts the "immanence" in which the human animal is originally immersed. Tools are things that we create and are therefore distinct from the naturally given world and from ourselves (Bataille 1989b: 29); as such, they provide the "nascent form of the non-I" that allows us to understand ourselves as a subject opposed to a world of objects. Bataille argues that the use of tools also introduces the means-ends schema into our relationship with the world, as we always employ them to achieve a purpose (we use the hammer to drive a nail into wood, which we use to build a house, which we use to keep ourselves dry and warm, and so on). The effect of this instrumental activity deprives things of their immediate nature, as "the purpose of a plow is alien to the reality that constitutes it; and, with greater reason, the same is true of a grain of wheat or a calf" (Bataille 1989b: 41). Our work upon the world also gives rise to the temporality of duration and denies us access to the present moment, as we begin to repress our desire for immediate pleasure in favor of a satisfaction that arrives when we complete the project. According to Bataille, then, work makes us human, but at the price of alienation from immanence: we are no longer "in the world like water," as

[7] This account of sovereignty is indebted to Kojeve, who places the dialectic between Master and Slave at the centre of his reading of Hegel's *Phenomenology of Spirit.* Bataille attended Kojeve's lectures and his thought was deeply marked by this encounter. Agamben has frequently commented on the relationship between Bataille and Kojeve and their treatment of negativity and the end of history (see Agamben 1991: 49-53; Agamben 2004: 5-12).

is the animal (Bataille 1989b: 19); instead, we are subjects in a world of objects, which we can only know inasmuch as they are external to us, and to the extent we attribute them meaning by incorporating them into our projects.

What Bataille calls "sovereign experience" involves the dissolution of the structures of instrumentality, temporality, and knowledge, that arise from the use of tools. If work employs a means to achieve an end, sovereignty involves the "enjoyment of possibilities that utility doesn't justify" (Bataille 1989a: 198). This non-instrumental enjoyment necessarily transforms the experience of temporality: whereas the worker delays the gratification of their desires to attain the end towards which they are working, sovereignty involves the full enjoyment of the present without view to anything other than the moment. Sovereignty thus involves a miraculous interruption of the normal temporal order and the projects that structure it, and in this sovereign moment, the anticipation and futurity that mark the human experience of time dissolve into nothing. Finally, the experience of sovereignty undermines the relation to the object that makes possible knowledge of the world. Bataille writes that knowledge is always the result of "an operation useful to some end...to know is always to strive, to work; is always a servile operation, indefinitely resumed, indefinitely repeated" (Bataille 1989a: 202). The intense consciousness of the moment that occurs in the sovereign experience dissolves one's rational understanding of the world as a collection of objects that can be known, and instead generates a relation of un-knowing that neutralises "every operation of knowledge within ourselves" (Bataille 1989a: 203). For Bataille, then, the subject is only constituted through its relation to the object, and is thus the non-non-I. The nothingness of this subject is revealed as such in sovereign experiences of useless consumption that dissolve the relation to the object that constitutes the subject and thereby demonstrate that "at bottom, I am this subjective and contentless existence" (Bataille 1989a: 378).

Bataille locates this kind of anti-utilitarian moment in a host of subjective experiences and cultural forms, including "laughter, tears, poetry, tragedy and comedy...play, anger, intoxification, ecstasy, dance, music, combat, the funereal horror, the magic of childhood, the sacred...the divine and the diabolical, eroticism...beauty...crime, cruelty, fear, disgust" (Bataille 1989a: 230). However, he sees sacrifice as the most important of the historical institutions through which societies made it possible for individuals to undergo the dissolution of the relation between subject and object. The practice of sacrifice removes something from the profane realm and gives it over to the sacred in a ritual that usually involves the killing or consumption of the victim. From the perspective of the religious believers, this gives them access to a spiritual realm that stands over against the human world of utility. For Bataille, however, the ineffable realm that believers think is the world of spirit is, in fact, the immanent relation to the world that we lost as a result of becoming human. What is important about the act of sacrifice, on his account, is that it destroys the utility of the object: "The thing – only the thing – is what sacrifice means

to destroy in its victim" (Bataille 1989b: 43)[8]. As an act of useless consumption, sacrifice is concerned only with the present moment, and is therefore "the antithesis of production, which is accomplished with a view to the future (Bataille 1989b: 49). In returning an object of utility to the immanence from which it comes, the individual who sacrifices also asserts that they are not reducible to the profane realm things and projects, as they also belong also to the "sovereign world of Gods and myths, to the world of violent and uncalculated generosity" (Bataille 1989b: 44). Finally, Bataille argues that sacrifice has the capacity to interrupt the individual's capture by the utilitarian order by forcing those who participate into an existential confrontation with death:

> Death is the great affirmer, the wonder-struck cry of life. The real order does not so much reject the negation of life that is death as it rejects the affirmation of intimate life, whose measureless violence is a danger to the stability of things, an affirmation that is fully revealed only in death…that intimate life, which had lost the ability to fully reach me, which I regard primarily as a thing, is fully restored to my sensibility through its absence. Death reveals life in its plenitude and dissolves the real order (Bataille 1989b: 46-7).

Sacrifice thus not only played a crucial economic and social role in pre-modern societies: it also produced profound subjective effects in those who took part in the ritual. In sacrifice, "the individual identifies with the victim in the sudden movement that restores it to immanence" (Bataille 1989b: 51) and they are, as such, forced to confront the inevitability of their own destruction; as a result, the one who sacrifices escapes the structures of reason, and brushes up against the immanent world that is lost when we become human.

However, Bataille also points to the limits of historical institutions, such as sacrifice, through which sovereignty was experienced. He describes the monopolisation of sovereignty by the aristocracy as the "perversion" of the sovereign freedom that belongs to all human beings, who "possess and have never entirely lost the value that is attributed to gods and human beings" (Bataille 1989a: 197). Bataille also argues that the objective order of sovereignty tended to obscure the subjective experience of freedom, and that when this inner experience was thematised historically, it was treated as a mystical experience, rather than as a product of human subjectivity and a manifestation of its limits. Moreover, the religious framework that sacrifice provided for understanding the experience of sovereignty means that the form of subjectivity that accompanies it was consumed by anguished as a result of its being overawed by the sacred realm (Bataille 1989b: 95). While the modern world has destroyed the institutions of sovereignty, Bataille suggests that, along with the development of the "clear consciousness" of modern science, this offers the possibility

[8] Bataille argues that killing is not necessary – it is just the most extreme form of negation of the "real order" and therefore discloses the "deep meaning" of the practice of useless expenditure (Bataille 1989b: 47-9).

of a more conscious and egalitarian experience of the sovereign freedom that is inherent to human beings: "Sovereignty designates the movement of free and internally wrenching violence that animates the whole, dissolves the whole, and reveals the impossible in laughter, ecstasy, or tears. But the impossible thus revealed is not an equivocle position; it is the sovereign self-consciousness that, precisely, no longer turns away from itself" (Bataille 1989b: 110-111). Indeed, in Bataille's later work, it is not sacrifice that is the contemporary exemplar of sovereign experience, but the "sovereign thought" of Friedrich Nietzsche, whose transvaluation of all values refuses the servile world, and gives to humanity a "gift that nothing limits; it is the sovereign gift, the gift of subjectivity" (Bataille 1989a: 371).

Bataille's work draws upon the history of sacrifice to both critique the productivism and instrumental rationality of modernity and identify forms of praxis that might break with it. However, the way that he understands useless expenditure, and the possibility for such practices in the contemporary world, shifts over time. In his earliest analysis of the sacred, he draws on Durkheimian sociology to identify class struggle as the contemporary form of unproductive expenditure, and casts insurrection as a collective assembly that transforms and binds together its participants and which, as such, has the capacity to put an end to the reign of the bourgeoisie. By the time of his later, more theoretically developed work, Bataille has abandoned his concern with class struggle, and he casts the sacrificial confrontation with death as the exemplary historical instance of sovereign experience. For the later Bataille, then, sacrifice reveals something about the nature of subjectivity, which is a nothingness that comes to light as such through acts of useless consumption. This allows him to identify forms of resistance to the instrumentalism of modernity in a range of limit experiences in which the subject undergoes its own desubjectivation, from laughter and poetry, to the thought and life of Friedrich Nietzsche. The earlier Bataille thus draws upon the history of sacrifice to argue that the revolutionary subject emerges through the intoxicating experience of insurrecionary class struggle. For the later Bataille, we might say that it is the subject as such that is 'revolutionary,' or at least a site for breaking free from the instrumental order of things—but only insofar as that subject is understood to be a negativity that is revealed as such through experiences of desubjectivation.

2. ON THE LIMITS OF REVOLUTIONARY VIOLENCE

In February of 1970 a young Giorgio Agamben wrote to Hannah Arendt thanking her for the "decisive experience" her work had given him—and to this letter, he appended a copy of *On the Limits of Violence* (Agamben 2009: 111). The essay opens by drawing on Arendt's *The Human Condition* to analyse the origins of the political tradition, and to argue that this tradition is experiencing a crisis that undermines its fundamental presuppositions. It concludes by making the rather enigmatic

argument that revolutionary violence is the "unsayable that perpetually overwhelms the possibility of language and eludes all justification" (Agamben 2009: 109). Now that I have laid out some of the key aspects of Bataille's thinking on sacrifice, class struggle, and subjectivity, I am going to argue that Agamben's essay reads Arendt's account of revolutionary new beginnings through a theory of sacrificial violence that echoes themes central to Bataille's thought. In the process, Agamben articulates some of the fundamental themes that he will wrestle with over the ensuing decades, and which become central to his political thought some twenty years later.

Agamben notes that Greek thought opposed politics to violence: "To be political (to live in the *polis*) was to accept the principle that everything should be decided by the word and by persuasion, rather than by force or by violence" (Agamben 2009: 104). This political opposition was, in turn, dependent upon a distinction between corporeality, on the one hand, and truth, language and the soul on the other. The political life was predicated on the belief that "truth, in and of itself, could exert persuasive power on the human mind" (Agamben 2009: 104). The body, by contrast, was associated with violence, which "denies the liberty of its victim" and "cannot reveal inner creative spontaneity, only bare corporeality" (Agamben 2009: 105). However, Agamben argues that modernity has radically undermined the classical distinction between violence and politics. Rational persuasion is of little use against the catastrophic forms of violence invented by modern technology. Propaganda is now used to overpower the will and "reduce humans to nature" in an exercise of "linguistic violence" (Agamben 2009: 105). And, most importantly, revolutionary politics seeks to use political violence to usher in the new: as Marx puts it, "violence is the midwife of every old society which is pregnant with the new one" (Marx 1976: 916)[9].

Agamben takes Marx's belief in the creative capacities of violence as the starting point for his critique of the revolutionary tradition. While revolutionary politics has tried to use violence to put an end to exploitation and domination, it has often reproduced the very problems it sought to cure. Agamben claims that these failures are due to the "historical Darwinism" of revolutionary thought, which casts society as being subject to the "linear progression of necessary laws, similar to the laws governing the natural world" (Agamben 2009: 106). Within this schema, revolutionary violence is justified because it hastens the development of the economic laws that govern human history. Yet this vision of history establishes a "reign of mechanistic necessity that contains no space for free and conscious human action" (Agamben 2009: 106) and thereby eliminates the capacity to bring something new into the world that Marx associated with revolutionary praxis. This was to have a profoundly

[9] While Agamben does not cite Arendt on these matters, his analysis of propaganda reflects Arendt's concern with its corrosive effect on politics, as articulated in *The Origins of Totalitarianism* and *Lying in Politics*. As we will see later in this essay, his argument that revolutionary politics seeks to bring about the new through violence echoes a key claim of *On Revolution*.

damaging effect on the course of twentieth century politics, as it was "the model adopted by totalitarian movements" whose "self-proclaimed exclusive right to revolutionary violence fostered involutional processes within authentic revolutionary movements" (Agamben 2009: 106).

Agamben develops his response to the crisis of the Western political tradition and the failures of revolutionary politics by turning to Walter Benjamin's *Critique of Violence*. Benjamin's essay describes political history as a "dialectical rising and falling" of the law-making violence that founds a legal order and the law-preserving violence that sustains it (Benjamin 1978: 300). Both natural law and positivist legal theory assume that such violent means can be used to achieve justified ends (Benjamin 1978: 278). On Benjamin's account, however, law is not built upon the justice of the ends it sanctions, but rather, upon the need to establish order and assert power, a task that is pursued through violence. The irreducible gap between law and justice leads Benjamin to the conclusion that the historical function of the law is "pernicious" and its destruction "obligatory" (Benjamin 1978: 297), an obligation to which he responds by attempting to theorise a violence that does not have an instrumental relation to a legal end. According to Benjamin, a violence that does not found or preserve a law, but seeks to suspend or depose it, has the capacity to abolish State power and found a "new historical epoch" (Benjamin 1978: 300)—and, while he provides a number of examples such a violence that deposes the law, the most important of them is the proletarian general strike.

Benjamin's analysis of the general strike draws heavily upon Georges Sorel's *Reflections on Violence*, a work that was influenced by the ideas of Emile Proudhon and the politics of revolutionary syndicalism. According to Sorel, the proletarian general strike is a political myth in which "the revolution appears as a revolt, pure and simple" (Sorel 1999: 129) and "the passage from capitalism to socialism is conceived as a catastrophe whose development defies description" (Sorel 1999: 110). This proletarian mythology, which developed out of the strike practices of revolutionary unions (*syndicats*), tends to intensify class struggle by dividing society into the two hostile camps described in the first chapter of *The Communist Manifesto*; it radicalises the working class by casting minor and every day incidents as part of the drama of a wider social war; and it is utterly hostile to any compromise with the existing order. According to Sorel, the politics of the *syndicats* generated the possibility of a revolutionary praxis that would be qualitatively different from the bourgeois revolutions, which had used State authority to "impose a certain social order in which the minority governs" (Sorel 1999: 166). This is because the proletarian general strike seeks to smash the authority of the State, rather than trying to take it over in order to wield its power—and, in so doing, the proletariat rejects the division between ruler and ruled that the State form necessitates, in favour of self-organisation. This conception of the general strike was taken up and advocated by the 'new school' of Marxist thinkers, amongst whom Sorel included himself, who had begun

to study the syndicalist movement and discovered that they had a great deal to learn from the working class. It was anathema, however, to those socialist politicians who spoke of the self-emancipation of the working class and the withering away of the State, while acting in ways that reinforced their own power and strengthened the machinery of government. Amongst these would be representatives of the working class, then, there developed a contrary vision of a political general strike, in which the *syndicats* would be placed under the control of political committees, and the aim of insurrection was to pass power "from one group of politicians to another – the people still remaining the passive beast that bears the yoke" (Sorel 1999: 149).

Benjamin reads Sorel's analysis of the general strike through the lens of his critique of legal violence. What he calls the partial strike seeks to extract concessions from the existing state and it is, as such, a manifestation of law preserving violence. The political general strike tries to overturn the existing order by seizing the State and is thus an example of law creating violence. However, this form of strike does nothing to escape the problem of domination, as the "mass of producers" simply "change their masters" (Benjamin 1978: 291). These instrumental forms of violence thus lack the capacity to fundamentally transform the political and economic situation. In the proletarian general strike, by contrast, the proletariat withdraws *in toto* from the system of capitalist exploitation backed by State violence, and is determined "to resume only a wholly transformed work, no longer enforced by the State" (Benjamin 1978: 292). The proletarian general strike is thus an 'anarchistic' and non-instrumental form of violence that has the capacity to break with the history of domination because it does not seek material gain through the State, but rather, "sets itself the sole task of destroying state power" (Benjamin 1978: 291).

Benjamin's analysis of the deposition of the law is fundamental for Agamben's political thinking, and he returns to it repeatedly throughout his work as he attempts to theorise the 'coming politics' (Agamben 1998: 63-65; Agamben 2005a: 60-64; Agamben 2015: 269). However, in his first treatment of the *Critique*, Agamben claims that while Benjamin and Sorel pose the essential problem for revolutionary politics, the action they propose remains teleological because it is determined by the end of ousting the existing State. What Agamben is looking for, by contrast, is a violence "that contains its own principle and justification" (Agamben 2009: 107)— and to theorise such an action, he turns to the sacred violence found in the religious rituals of the ancient world. Agamben writes that sacred violence "reveals itself where humans intuit the essential proximity of life and death, violence and creation" (Agamben 2009: 108). When the community was under threat, or "the cosmos seemed empty and vacant", ancient communities would perform sacred rites that, through the "extreme act" of spilling their own blood, produced "an irruption of the sacred and an interruption of profane time" (Agamben 2009: 107). This violence gave the ancients the capacity to regenerate time and begin history anew because it resurrected the "primordial chaos" that gave birth to society, making

"humans contemporaries of the gods", and granting them "access to the original dimension of creation" (Agamben 2009: 107). Agamben then draws an analogy between sacrifice and Marx and Engels' claim that "the revolution is necessary, not only because the ruling class cannot be overthrown in any other way, but also because the class overthrowing it can only in a revolution succeed in ridding itself of all the muck of ages and become fitted to found a new society" (Marx and Engels 1974: 95). What Marx and Engels indicate, according to Agamben, is that revolutionary violence can only break with the history of domination when the revolutionary class negates itself in the process of negating the ruling class. According to Agamben, then, sacrifice and proletarian revolution are both actions that call history to a "messianic halt" through a violence that does not simply aim at the negation of the existing order but which, rather, "negates the self as it negates the other; it awakens a consciousness of the death of the self, even as it visits death on the other" (Agamben 2009: 108).

Having drawn the problem of self-negation out of Marx and Engels and the example of sacrifice, Agamben concludes his essay by arguing that revolutionary violence should be understood in relation to death, which is the ultimate form of negation. This also means that revolutionary violence should also be understood in its relation to the limits of language, which is "the power we wield against death" (Agamben 2009: 109). Language and culture cannot give us access to the originary sphere in which creation and destruction coincide because they are an attempt to 'make peace' with death (the Greeks separated the word from violence precisely because the latter can threaten death). "Only by going beyond language", Agamben writes, "by negating the self and powers of speech humanity gains access to the original sphere where the knowledge of mystery and culture breaks apart, allowing words and deeds to generate a new beginning" (Agamben 2009: 109). "Revolutionary violence alone" can cross the threshold of language, through the "stunning realisation of the indissoluble unity of life and death, creation and negation" (Agamben 2009: 109).

Agamben's analysis of revolutionary violence throws up a number of major interpretative issues. On the face of it, his embrace of the emancipatory possibilities of sacred violence seems to be rather problematic: one of the few commentators on the essay, David Kishik, is clearly troubled by this aspect of Agamben's argument, as he describes the justification of the "physical killing of a sacrificial victim" as a "hypocritical convenience", and calls the idea of the negation of the other as self-negation "dubious" (Kishik 2012: 93). The stakes of Agamben's argument are also somewhat obscure, particularly in the final sections of the essay, which theorise revolutionary violence in relation to mortality and the limits of language. As such, the essay could all too easily be criticised for retreating from concrete political analysis to metaphysical abstraction, in much the same way as Agamben's later account of the 'coming politics' (Sinnerbrink 2005: 259; Power 2010; Behrman 2013).

Agamben's account of revolutionary self-negation is difficult to unpack, however, in part because he does not provide citations for key ideas that he employs. One can, nonetheless, detect echoes of some of Agamben's influences in the argument which can help to cast light on his claims and his conceptual concerns—and the most important of these influences, I argue, are Hannah Arendt and Georges Bataille.

Arendt analyses revolutionary violence, and indeed politics as such, as an expression of the human capacity to bring about the new. Arendt writes: "Beginning, before it becomes a historical event, is the supreme capacity of man; politically, it is identical with man's freedom" (Arendt 1968: 479). This "supreme capacity" is not only key to the political experience of freedom, but the essence of politics as such: what makes "man a political being", she writes, "is his faculty for action; it enables him to get together with his peers, to act in concert...to embark on something new" (Arendt 1972: 179; see also 1958: 178). Arendt's thought also ties the faculty for beginning anew that is at stake in political action to two fundamental conditions of human existence, namely, natality and speech. According to Arendt, the capacity to act politically is predicated on the fact of birth, which is the first beginning that makes all others possible by bringing something unique into the world, namely, a human being that has the capacity to act and create the new (Arendt 1958: 9). She also argues that the political importance of speech lies not in the fact that it conveys information, but rather, that it allows us to be recognised by others as a singular being: "Speech corresponds to the fact of distinctness and is the actualisation of the human condition of plurality, that is, as a distinct and unique being amongst equals...in acting and speaking, men show who they are, reveal actively their unique personal identities and make their appearance in the human world" (Arendt 1958: 178-9).

Arendt's concern for new beginnings underpins the account of revolutionary politics that she develops in her 1963 study, *On Revolution*. In this context, Arendt argues that the French and American revolutions brought something new into the world by connecting the exercise of violence to political freedom and to historical novelty. Arendt distinguishes freedom, which involves self-government through participation in political life, from liberation, which means to be freed from restraint and oppression. While liberation from oppressive circumstances is a precondition for the exercise of political freedom, what made the French and American Revolutions unique is that they combined the desire a liberty by the broad masses of the poor with an attempt to create a new form of republican government that institutionalised freedom. The act of founding a new constitution demonstrated that the social and political order was contingent, leading to a sense that "the course of history" was beginning again and "that an entirely new story, a story never known or told before, is about to unfold" (Arendt 1963: 21). However, Arendt also argues that the revolutionary experience of freedom with respect to history was quickly undermined, in the case of the French Revolution, by an equally powerful

experience of necessity, with those taking part feeling that had been swept up in an irresistible torrent of violence that led from the bourgeois republicanism of 1789, through Jacobinism and the Terror, to Thermidor and the Napoleonic Wars. According to Arendt, this provided the model for Hegel's account of history as a dialectical process that is driven by necessity, but which leads, in the end, to a realm of freedom—an account of history that would, she argues, have a considerable influence on the revolutionary tradition, not least due to the work of Marx, who was "the greatest pupil Hegel ever had" (Arendt 1963: 47)[10].

In *On the Limits of Violence*, Agamben defends Marx against Arendt's argument that he is a thinker of historical necessity, arguing that he "constantly criticised" the Hegelian attempt to reconcile necessity and freedom (Agamben 2009: 106). Nonetheless, like Arendt, he insists that revolutionary thought and politics institutes a connection between violence and historical novelty, and that this political experience has been occluded by a teleological theory of history that understands revolutionary praxis as an expression of necessity. Agamben's debt to Arendt helps to explain the intermingling of ontological and political themes in his essay, which also attempts to rethink revolutionary violence in light of the ontological capacity of the human being to create the new, and the relationship between this faculty and language. However, Agamben also feeds these Arendtian concern through concepts that reflect his debt to Benjamin. First, he casts revolutionary violence as a messianic suspension of history, which is an obvious reference to Benjamin. Second, he describes this as an event in which creation and negation coincide, which is also an idea that is most likely drawn from Benjamin, given that it is central to Agamben's later reading of *Theses on the Philosophy of History* (1999b: 148-159). In the process, he opens out a substantial difference between his account of the human capacity to begin anew and that of Arendt, who argues that the connection between new beginnings and political action makes natality the central category of political thought, whereas for metaphysics the fundamental problem is mortality (Arendt 1958: 9). Agamben, by contrast, insists that the new comes about through the coincidence of creation and negation—and in *On the Limits of Violence*, he interprets this to mean that the messianic suspension of history occurs through a confrontation with death. The claim that mortality is the existential condition of possibility for the emergence of the new generates a further difference from Arendt who, as we have seen, argues that action also needs to be understood in relation to speech. Agamben, by contrast, asserts that beginning anew requires that we negate ourselves, and

[10] While Arendt does not make the point explicitly, this critique of Marx as a theorist of historical necessity, and the malign influence that this idea had on the course of revolutionary politics, echoes her earlier argument that Stalinism justified the total domination of human beings, and the absolute erasure of their freedom, on the basis of the laws of history that Marx had ostensibly discovered (Arendt 1968: 461-464).

this requires an experience of the unsayable, because language attempts to reconcile us to death.

Agamben's focus on mortality and the experience of being deprived of language both reflect the concerns of his former teacher, Martin Heidegger. Agamben attended Heidegger's seminars at Le Thor in Provence in 1966 and 1968 (Agamben 2009: 103) and has said that it was through his encounter with Heidegger's thought that philosophy first became possible for him (Agamben 1999a: ii). In *Being and Time*, Heidegger famously argues that *Dasein* is characterised by its being-towards-death (Heidegger 1962: 279-311). It is our mortality that makes it possible for *Dasein* to gather itself from its fallenness in everydayness and to grasp itself as a whole through an authentic decision (Heidegger 1962: 341-348)[11]. According to Heidegger, this decision becomes possible through an experience of the mood of anxiety, which discloses our thrownness in the world (Agamben 1962: 341-348) and, in so doing, deprives us of speech (Heidegger 1977: 101; see also Agamben 1991: 57). It is highly likely, then, that Agamben's concern with mortality and the experience of the unsayable are influenced by his recent and decisive encounter with Heidegger.

Nonetheless, I claim that the particular way Agamben's interprets these issues in *On the Limits of Violence* also suggests the influence of Bataille upon his thought. The first and most obvious connection between the two thinkers is that they each theorise the confrontation with death through the historical example of sacrificial violence. Now, there are certainly differences in the way that each thinker interprets the sacrifice, with Bataille casting it as a form of useless expenditure, and Agamben arguing that it produces a suspension of time[12]. Yet there are also a number of remarkable similarities between the two. In the first place, Agamben deploys the analysis of sacrificial violence in a way that echoes Bataille's philosophical strategy, that is, by attempting to theorise a non-instrumental form of action that can break with the bourgeois order and respond to the limits of the dominant forms of revolutionary politics. Second, both thinkers interpret sacrifice as an act that forces those who participate into an existential confrontation with their own death through the act of killing another; and both cast this experience as a loss of the self that occurs at the

[11] Agamben later engages in a major critical confrontation with this aspect of Heidegger's thought. In *Language and Death*, he argues that the "call of conscience" that allows *Dasein* to gather itself and decide authentically is a manifestation of the negative ground that defines metaphysics (Agamben 1991: 54-62).

[12] It is not clear where Agamben takes his analysis of sacrifice from. As noted earlier, his account of sacrifice as an interruption and regeneration of time echoes that of Mircea Eliade in *Cosmos and History*, who Furio Jesi draws upon at around the same time that Agamben writes his essay. However, these aspects of sacrifice were not unknown to Bataille and the circle around him: in a Lecture delivered at the College of Sociology in May 1939, Roger Callois, put forward a *Theory of the Festival* that highlights many of the same features of festival that Agamben highlights in *On the Limits of Violence*: the restoration of possibility through the re-enactment of primordial chaos; the coincidence of death and rebirth; and the suspension of calendar time (Hollier 1989: 281-303)

limits of language and which thereby transforms the experience of temporality. Third, Agamben formulates the experience of sacrificial self-negation by reference to the Nietzschean theme of the Dionysian, which is central to Bataille's thought: "Violence, when it becomes self-negation, belongs neither to its agent nor its victim; it becomes elation and dispossession of self – as the Greeks understood in their figure of the mad god" (Agamben 2009: 109). Indeed, *On the Limits of Violence* concludes by comparing this Dionysian experience to the Hegelian image of the absolute as a "Bacchanalian revel in which no member is not drunk" (Agamben 2009: 109)—a link that is also made in Walter Otto's *Dionysius*, which is extracted extensively in *Acéphale* Volume 3/4 (Bataille 2018: 192). As Rebecca Comay argues, while there are some similarities between Heidegger and Bataille, given their common critique of instrumental rationality, and their insistence on the groundlessness of existence, there is a profound difference between Heidegger's thinking of death in *Being and Time*, which emphasises authenticity and self-possession, and Bataille's account of sacrifice as an ecstatic experience of abandonment and the dissolution of the self (Comay 1990: 72-77). Agamben's emphasis on the loss of the self, and his invocation of the theme of Dionysian ecstasy to describe this experience, are thus particularly strong pieces of evidence that his interpretation of sacrificial self-negation is influenced by Bataille.

My claim, then, is that Agamben first formulates the idea that desubjectivation has an emancipatory potential in this early account of the revolutionary subject; that while his account of revolutionary violence draws on Arendt's concern with new beginnings and Benjamin's messianism, the key moment of this argument is his account of sacrificial violence as an existential confrontation with death; and that the way that Agamben formulates this idea suggests the influence of Bataille upon his thinking. What remains unclear, however, is exactly what Agamben means when he argues that a revolutionary new beginning requires the negation of the self through the negation of the other. What would it mean to practice such a sacrificial politics in the context of a revolutionary process? Is Agamben advocating, for example, a revolutionary terror that puts the class enemy to death? If so, his account of revolutionary violence would certainly stand in stark contrast to that of Arendt, for whom the "lost treasure" of revolutionary politics is its attempt to found new spaces for the exercise of freedom through political action (Arendt 1963: 217-285). Indeed, at much same time that Agamben wrote his critique of revolutionary violence by drawing on Arendt's work, she penned *On Violence*, which applauded the student movements for their appetite for democratic political action, while roundly criticising their rhetorical and conceptual embrace of violence (Arendt 1972: 114-123).

To unpack the political implications of Agamben's argument, it is instructive to compare his analysis of revolution and desubjectivation to that of Bataille. We have seen that Bataille uses the example of sacrificial violence in different ways in different phases of his work. At the time that he was involved in the CCD, he drew quite

direct parallels between the violence of sacrificial festivals and that of insurrectionary class struggle. In his later work, however, the violence of sacrifice becomes a way for Bataille to theorise the "movement of free and internally wrenching violence" (Bataille 1989b: 110) associated with sovereign experience, which he identifies in a range of different practices, from poetry, to drunkenness, and laughter. Agamben's account of revolutionary violence contains echoes of both these approaches to theorising sacrificial self-negation. Like the early Bataille, he explicitly links sacrifice and revolutionary praxis, emphasises class struggle and revolt through the example of the proletarian general strike, speaks of revolutionary violence involving the killing of another, and compares the unsayable experience of revolutionary violence to a Dionysian and drunken revel. However, like the later Bataille, Agamben casts sacrifice and revolutionary violence as examples of a constitutive feature of human existence, namely, the dissolution of the subject that occurs at the limits of language. If, then, we take Bataille's later work as a model for the way that Agamben is theorising revolutionary violence, and cast the experience of desubjectivation as an 'aspect of existence' that appears in a variety of experiences and social phenomena, then the negation of self and other that enables the emergence of the new could occur through means other than physical killing, but which, like this act, brings human beings up against the limits of language and subjectivity.

This is precisely what is at stake in Agamben's other major example of revolutionary desubjectivation, namely, Marx and Engels's claim that the proletariat must "rid itself of the muck of ages" in order to "found society anew" (Marx and Engels 1974: 95). The passage that Agamben cites from *The German Ideology* appears at the end of an extended analysis of the relationship between the proletariat and the possibility of a communist revolution. According to Marx and Engels, previous revolutions had seen the oppressed challenge their exploitation by the dominant class, while "the mode of activity... remained unscathed and it was only a question of a different distribution of this activity, a new distribution of labour to other persons" (Marx and Engels 1974: 94). A communist revolution, by contrast, puts an end to class society by doing away with the exploitative labour that has provided its basis (Marx and Engels 1974: 94). According to Marx and Engels, this requires the expropriation of the means of production by the proletariat; however, this can only occur through revolutionary struggle, the motivation for which comes from the development of a "communist consciousness" that is familiar with the exploitation and immiseration of the proletariat, and is thereby convinced of the "necessity of a fundamental revolution" (Marx and Engels 1974: 94). Since a successful revolution requires that the proletarian majority mobilise against the bourgeoisie, a large scale and radical change in the views of those that make up bourgeois society is needed; and this process of political education is, in turn, most effectively produced through involvement in a collective revolutionary process: "For the success of the cause itself, the alteration of men on a mass scale is necessary, an alteration which can only

take place in a practical movement, a revolution" (Marx and Engels 1974: 94). For Marx and Engels, then, a communist revolution abolishes class by eliminating the economic, legal and political conditions that constitute it, and this requires the widespread dissemination of a communist consciousness and the destruction of those beliefs constituted within a class divided society, all of which is to occur through the revolutionary process.

To put Marx and Engels' argument in the terms of Agamben's essay, previous revolutions have only asserted the class of the oppressed in the act of negating their oppressors; a revolution that is genuinely capable of rupturing history by putting an end to exploitation and domination must negate the revolutionary subject in the very act of negating the other[13]. This, in turn, requires a mass of individuals who undergo the "death of the self" through the revolutionary process of negating their class enemy. What Agamben's reference to *The German Ideology* suggests is that, while the example of sacrifice, and the existential confrontation with death that it involves, are central to his account of revolutionary violence, the negation of the self through the death of the other does not necessitate actual violence and the physical killing of another (although in a revolutionary process it may well). Instead, the example of sacrifice helps him to formulate the idea of self-negation or desubjectivation that he sees as the fundamental ontological condition of new beginnings, and which is necessary for revolutionary violence to bring about the new. This, in turn, allows Agamben to identify what he sees as the truly revolutionary content of Marx's analysis of revolution, namely the dissolution of the proletariat through the elimination of class; and, by implication, to criticise those versions of socialism and communism that valorise the identity of the working class, a theoretical tendency that he would warn against many years later in his interview with Vacarme[14].

[13] Agamben returns to and complicates his reading of Marx and Engels' account of proletarian self-negation in his reading of Paul's Letter to the Romans in *The Time That Remains*. In this context, he highlights the way that Marx and Engels criticise Max Stirner, who emphasises the revolt of the individual, and instead try to theorise a form of praxis in which this coincides with collective political action aimed at institutional transformation. However, Agamben also criticises the role that the party plays in Marx and Engels' thought, arguing that it would not be necessary if individual revolt and the political revolution were genuinely indistinguishable. He then juxtaposes Marx and Engels account of to the anarchist-nihilism of Benjamin. See Agamben 2005b: 29-33.

[14] Agamben's emphasis on self-negation is an important antidote to the misunderstanding of Marx's account of proletarian revolution that, according to the social theorist GM Tamas, has characterised much of the left. Tamas argues that most socialists and communists has have defined the proletariat in cultural terms, as the working class, rather than in terms of their structural function within the capitalist mode of production. This has been accompanied by a celebration of the superior moral virtues of the working class in comparison to their bourgeois oppressors, and a politics that seeks the elimination of the ruling class and flourishing of the working class, rather than, as in Marx, the attempt to eliminate the structural conditions that constitute class as such. On Tamas' account, this theory has its origins in Rousseau, rather than Marx. See (Tamas 2006). Jessica Whyte was the first to draw on Tamas to analyse Agamben's work, and I am indebted to her for introducing me to his work (Whyte 2014). It is also worth noting that the importance that Agamben assigns to the dissolution of the

3. CONCLUSION

The crux of Agamben's early analysis of revolutionary violence is the argument that the new emerges through the negation of self and other. While Agamben's argument draws upon a range of influences, I have shown that he develops this key claim through an analysis of sacrificial violence that mirrors themes central to Bataille's thinking. I have also suggested that, while the essay does involve a rhetorical embrace of violence that echoes the early Bataille, the central argument is that violence can only usher in the new when the revolutionary subject embraces its own dissolution or desubjectivation. Now, as we saw in the introduction to this essay, the theme of desubjectivation is central to Agamben's critique of contemporary politics in the *Homo Sacer* project. By the time of *Homo Sacer*, he is also deeply critical of Bataille's thought for reproducing the structure of the sovereign ban, which is the most extreme mechanism through which the State deprives individuals and populations of their identity[15].

If my argument is correct, the criticism of Bataille that Agamben develops from *Stanzas* through *Language and Death*, *Homo Sacer*, and *The Open* appears to be a gradual attempt to distance his thinking from a theorist to whom he had initially drawn close. However, the claim that the experience of desubjectivation contains an emancipatory potential remains crucial for Agamben's later political thought, which develops the idea of inoperativity as an antidote to the biopolitical management of life.

The argument that I have put forward in this essay raises the prospect that Agamben's politics of inoperativity may, in fact, be more influenced by Bataille than his criticisms would seem to indicate. Indeed, it is notable that some of Agamben's examples of the coming politics are practices that Bataille theorises in terms of sovereignty: in his interview with Vacarme, for example, Agamben states that one brushes up against a zone of desubjectivation in the "everyday mysticism of intimacy" (Agamben 2004: 117); elsewhere, he claims that ancient festivals such as Charivari "point toward a zone in which life's maximum subjection to law is reversed into freedom and license...in other words, they point towards the real state of

proletariat in this early essay puts him at odds with Arendt's position on this same issue. At much the same time that Agamben wrote his critique of revolutionary violence, Arendt gave an interview in which she argued that capitalism had deprived the working class of property, and that the Soviet Union had then abolished the proletariat as such by destroying the legal rights and institutions, such as labour unions and the ability to strike, that had defined the class (Arendt 1972: 215). On her account, the only viable response to the fate of the masses in both capitalist and communist countries is to restore property to those that have been deprived of it (Arendt 1972: 214-5).

[15] It is also possible that Bataille is an implicit target of *The Kingdom and the Glory*. Bataille argues that glorious display is an example of sovereignty that, as a form of useless consumption, is antithetical to the productivism of bourgeois modernity (Bataille 1989a: 200, 295). According to Agamben, however, the 'governmental machine' of contemporary capitalism relies on practices of glorification whose genealogy he traces back to the ancient and medieval worlds (Agamben 2011).

exception as the threshold of indifference between anomie and law" (Agamben 2005: 72-3). However, the work of thinking through the proximity and distance between Bataille, and Agamben's later account of the emancipatory politics of desubjectivation, remains to be done[16].

BIBLIOGRAPHY

Agamben, G. 1991. *Language and Death: The Place of Negativity*. Translated by K. Pinkus. Minneapolis: University of Minnesota Press.

Agamben, G. 1993. *The Coming Community*. Translated by M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1996. *Il talismano di Furio Jesi*. In F. Jesi, *Lettura del "Bateau ivre" di Rimbaud*. Macerata: Quodlibet, pp.5-8.

Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Translated by D Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999a. *Agamben, le chercheur d'homme*. In «Libération», 1, pp. II.

Agamben, G. 1999b. *Potentialities: Collected Essays in Philosophy*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 2000. *Means without End: Notes on Politics*. Translated by C. Casarino and V. Binetti. Minneapolis: University of Minnesota Press.

Agamben, G. 2004. *The Open: Man and Animal*. Translated by K. Attell. Stanford: Stanford University Press.

Agamben, G. 2005a. *State of Exception*. Translated by K. Attell. Chicago: Chicago University Press.

Agamben, G. 2005b. *The Time That Remains: A Commentary on the Letter to the Romans*. Translated by P. Dailey. Stanford: Stanford University Press.

Agamben, G. 2009. *On the Limits of Violence*. Translated by Elisabeth Fay. In «Diacritics», 39.4, pp. 103-111.

Agamben, G. 2011. *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government.* Translated by L. Chiesa with M Mandarini. Stanford: Stanford University Press.

Agamben, G. 2015. *The Use of Bodies*. Translated by A. Kotsko. Stanford: Stanford University Press.

Arendt, H. 1958. *The Human Condition*. Chicago: University of Chicago Press.

Arendt, H. 1963. *On Revolution*. New York: Viking Press.

Arendt, H. 1968. *The Origins of Totalitarianism*. San Diego, New York, London: Harcourt Brace and Company.

[16] I would like to thank Carlo Crosato for his editorial work and his suggestions along the way; James Martel, for inviting me to present an early version of this essay, and for the discussions that ensued; and both Carlo Salzani and Justin Clemens for kindly looking over drafts of the essay.

Arendt, H. 1972. *Crises of the Republic*. San Diego, New York, London: Harcourt Brace and Company.

Bataille, G. 1976. *Oevres Completes Vol. 8*, Paris: Gallimard, pp. 352-353.

Bataille, G. 1985. *Visions of Excess: Selected Writings, 1927-1939*. Translated by A. Stoekl. Minneapolis: University of Minnesota Press.

Bataille, G. 1989a. *The Accursed Share: Volumes II & III*. Translated by R. Hurley. New York: Zone Books.

Bataille, G. 1989b. *Theory of Religion*. Translated by R. Hurley. New York: Zone Books.

Bataille, G. 2018. *The Sacred Conspiracy: The Internal Papers of the Secret Society of Acéphale and Lectures to the College of Sociology*. Translated by N. Lehrer, J. Harman and M. Barash. London: Atlas Press.

Behrman, S. 2013. *Giorgio Agamben in Perspective*. In «International Socialism: A Journal of Socialist Theory», 140. http://www.isj.org.uk/index.php4?id=918&issue=140

Benjamin, W. 1986. *The Critique of Violence*. Translated by E. Jephcott. In Id., *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. by P. Demetz. New York: Schocken Books, pp. 277-300.

Bernstein, J. 2017. *Idiocy/Privacy*. In «Research in Phenomenology», 47.3, pp. 449-459.

Biles, J. 2011. *The Remains of God: Bataille/Sacrifice/Community*. In «Culture, Theory and Critique», 52.2-3, pp. 139-142.

Bignall, S. 2016. *On Property and the Philosophy of Poverty: Agamben and Anarchism*. In *Agamben and Radical Politics*, ed. by D. McLoughlin. Edinburgh: Edinburgh University Press, pp. 49-70.

Comay, R. 1990. *Gifts Without Presents: Economies of 'Experience' in Bataille and Heidegger*. In «Yale French Studies», 78, pp. 66-89.

DeCaroli, S. 2016. *What is a form-of-life: Giorgio Agamben and the Practice of Poverty*. In *Agamben and Radical Politics*, ed. by D. McLoughlin. Edinburgh: Edinburgh University Press, pp. 207-233.

Durkheim, E. 1995. *The Elementary forms of Religious Life*. Translated by K.E. Fields. New York: Free Press.

Foucault, M. 2000. *Power: Essential Works of Michel Foucault, 1954-1984*, ed. by J.D. Faubion. New York: The New Press.

Hartmannn N. 2019. *Georges Bataille*. In *Agamben's Philosophical Lineage*, ed. by A. Kotsko and C. Salzani. Edinburgh: Edinburgh University Press, pp. 109-116.

Heidegger, M. 1962. *Being and Time*. Translated by J. Macquarie and E. Robinson. Oxford and Cambridge: Blackwell.

Heidegger, M. 1977. *Basic Writings*. Edited by D. Krell. New York: HarperCollins Publishers.

Hollier, D. (ed. by) 1988. *The College of Sociology*. Translated by B. Wing. Minneapolis: University of Minnesota Press.

Kishik, D. 2012. *The Power of Life: Agamben and the Coming Politics*. Stanford: Stanford University Press.

Marx, K., and Engels, F. 1974. *The German Ideology: Part One* London: Lawrence & Wishart.

Marx, K. 1976. *Capital, Volume 1: A Critique of Political Economy*. Translated by B Fowkes. London: Penguin.

Power, N. 2010. *Agamben's Missing Subjects*. In «Theory & Event», 13.1. http://muse.jhu.edu/journals/theory_and_event/

Prozorov, S. 2017. *Living à la Mode: Form-of-life and Democratic Biopolitics in Giorgio Agamben's The Use of Bodies*. In «Philosophy and Social Criticism», 43.2, pp. 123-143.

Richman, M. 2002. *Sacred Revolutions: Durkheim and the Collège de Sociologie*. Minneapolis: University of Minnesota Press.

Sinnerbrink, R. 2005. *From Machenschaft to Biopolitics: A Genealogical Critique of Biopower*. In «Critical Horizons», 6, pp. 239-265.

Sorel, G. 1999. *Reflections on Violence*. Translated by T.E. with J. Jennings. Cambridge: Cambridge University Press.

Smith, J.E. 2016. *Form-of-Life and Antagonism: On Homo Sacer and Operaismo*. In *Agamben and Radical Politics*, ed. by D. McLoughlin. Edinburgh: Edinburgh University Press, pp. 189-206.

Surya, M. 2002. *Georges Bataille: An Intellectual Biography*. Translated by K. Fijalkowski and M. Richardson. London: Verso.

Tamas, G.M. 2006. *Telling the Truth About Class*. In «Socialist Register», 42, pp. 228-268.

Vacarme. 2004. *'I Am Sure You Are More Pessimistic Than I Am': An Interview with Giorgio Agamben*. In «Rethinking Marxism», 16. 2, pp. 115-124.

Van der Heiden, G.J. 2020. *Exile, Use and Form-of-Life: On the Conclusion of Agamben's Homo Sacer Series*. In «Theory, Culture and Society», 37.2, pp. 61-87.

Vatter, M. 2016. *Law and Life Beyond Incorporation: Agamben, Highest Poverty, and the Papal Legal Revolution*. In *Agamben and Radical Politics*, ed. by D. McLoughlin. Edinburgh: Edinburgh University Press, pp. 207-233.

Whyte, J. 2014. *'The King Reigns but he Does not Govern': Thinking Sovereignty and Government with Agamben, Foucault and Rousseau*. In *Giorgio Agamben: Legal, Political and Philosophical Perspectives*, ed. by T. Frost. London: Routledge, 154-155.

195 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 195-209
ISSN: 1825-5167

NOT NOT. A NOTE ON THE FIGURES OF POWER IN GIORGIO AGAMBEN

JUSTIN CLEMENS
English & Theatre Studies
The University of Melbourne
jclemens@unimelb.edu.au

ABSTRACT
When one starts to read the work of Giorgio Agamben, one cannot not be struck by his erudition, his eye for previously overlooked or under-interpreted details in the philosophical, political, artistic and legal archives, not to mention his commitment to rethinking those received traditions according to new means. Yet what is also very striking is Agamben's unceasing attention to the apparition and construction of what I will term figures of power. At the beginning of Means Without End, Agamben asks himself "Is today a life of power available?". If Agamben's word here is 'life', it is just as critical to understand that such a term is not to be taken in its biological acceptation; on the contrary, what he means by 'life' must be something other than a scientific category. I will make a number of suggestions as to why the word 'figure' has some pertinence in this context, and why it leads, on the one hand, to a new analysis of operations of negation, and, on the other, to a paradoxical kind of non- or extra-ontological act of impotentiality.

KEYWORDS
Giorgio Agamben, Fredric Jameson, Figure, Inoperativity, Testimony.

> Thus history, with all its concrete force, remains forever a figure, cloaked and needful of interpretation. In this light the history of no epoch ever has the practical self-sufficiency which, from the standpoint both of primitive man and of modern science, resides in the accomplished fact; all history, rather, remains open and questionable, points to something still concealed.
> (Erich Auerbach, *Figura*)

One cannot not be struck by Giorgio Agamben's erudition, his eye for previously overlooked or under-interpreted details in the philosophical, political, artistic and legal archives, not to mention his commitment to rethinking those received traditions according to new means. Yet what is also very striking — and, to my mind, decisive — is Agamben's unceasing attention to the apparition and reconstruction of what I will term *figures of power*. At the beginning of *Means Without End*,

Agamben asks himself "Is today a *life of power* available?" (Agamben 2000: 9) If Agamben's word here is 'life', it is just as critical to understand that such a term is not to be taken in its biological acceptation; on the contrary. I will make a number of suggestions as to why the word 'figure' has some pertinence in this context, and why it leads, on the one hand, to an analysis of non-classical operations of negation, and, on the other, to a kind of non- or extra-ontological act.

These "figures of power" are of an extraordinary variety. Some are fictional, some are historically attested; some bear proper names and are or were once 'living' 'bodies'; others have no proper name, have had no 'real' body or even no possible real body, and are neither living nor dead; some are creatures of law, others appear in different guises altogether. Moreover, despite the moniker that I give them here, they by no means participate in 'power' in the usual senses of the word, as great, forceful, glorious, celebrated, or so on. Certainly, some are household names — but it is not for that that they are of interest. Rather Agamben's commitment to such figures derives precisely from their exceedingly equivocal status, whether in terms of their lack- or minimum- of being, or their frustrated or failed actions. They are perhaps better nominated along the lines proposed by the title of Quentin Tarantino's 2009 World War II film *Inglourious Basterds*: both *inglourious*, in the sense of having botched the job in a humiliating fashion, and *basterds*, from a covert and broken lineage — just as the title itself is both botched in its spelling and inheritance[1]. In a word, these figures never manage to have, to be, or to do with any success, at least according to received criteria; they are in some sense *failed experiments* that, in their very failure, expose something essential about the operations of politics, as they do indeed sketch the lineaments of other more utopian forms-of-life.

Amongst these figures, we could immediately, if not exhaustively, name: the melancholic, the fetishist, Beau Brummell, Herman Melville's Bartleby the Scrivener, Fyodor Dostoyevsky's Prince Mishkin, Franz Kafka's "man from the country", as well as the Ks of *The Trial* and *The Castle*, Robert Walser's assistants, Arnaut Daniel's Ayna, John Keats, St. Paul, St Francis, porn stars, Guy Debord, and many others. If it is also importantly the case that Agamben has changed his position over the course of his writing on the relative 'merits' — a quite dissatisfactory word in this context — of some of these figures, it is still necessary to emphasize that they are not mere abstract concepts but bear upon the vicissitudes of a kind of incarnation, even as these essential vicissitudes preclude them from assuming any stable or substantial identity, not even the minimal identity of a body. After all, Agamben concludes *Homo Sacer* by remarking (in a rigorously anti-Foucauldian fashion) that: "The 'body' is always already a biopolitical body and bare life, and nothing in it or the

[1] One of the reasons often adduced for the notorious misspellings in Tarantino's title is to distinguish the film from the 1978 Italian war film directed by Enzo Castellari, *Quel maledetto treno blindato*, which appeared in English as, precisely, *The Inglorious Bastards*.

economy of its pleasure seems to allow us to find solid ground on which to oppose the demands of sovereign power" (Agamben 1998: 187). That said, there is always also an essay at a restitution of 'some body' in Agamben, if, as I have noted, the ontological status of such a body is not, properly speaking, reparable.

Agamben's attempt to present new kinds of negation as coeval with the peculiar unaccomplishments of such figures must also be underlined. As Jessica Whyte remarks, "Agamben's concern [is] with a redemption that would also be a self-negation" (Whyte 2017: 264). For Whyte, it is the central category of 'inoperativity' that serves to indicate in Agamben an enigmatic detachment both from work's instrumental function and from its compulsion, from the division of labour and from "the assignment of individuals to fixed vocations" (Whyte 2017: 269; see also Abbott 2014)[2]. Although in complete agreement with this claim, I will seek to examine some of the particular figures in which Agamben discerns such a paradoxical "revocation of all vocation" in more detail, in order to bring out further peculiarities in the singular negations he pinpoints.

Yet commentary has not always fully acknowledged the centrality of such figures to Agamben's work — they are often simply considered part of the conceptual furniture — and when they are discussed, their nature and implications are just as often misrecognised. Common misunderstandings present Agamben's figures as either too local to bear the weight of conceptual import that they are allegedly meant to, or, to the contrary, as too ahistorical to effectively capture the specificity of their historical site. My examination here seeks to provide a minimal formula for Agamben's use of figures that, to my knowledge, has not elsewhere been so precisely delineated. Let me begin by taking a recent example of such misunderstandings as an entrée to the arcana of Agamben's figural developments.

In the course of a discussion of the status of the proletariat in his extraordinary commentary on *Representing Capital*, Fredric Jameson cannot help himself from providing a catty little footnote about the work of Giorgio Agamben (and, incidentally, Michel Foucault). Jameson's footnote 81 reads:

> Agamben's pseudo-biological concept in *Homo Sacer* proves in reality, like those of Foucault, to draw on categories of domination (as it would have been difficult for it to do otherwise, given his example of the concentration camps). This is why the destitution of unemployment [Jameson's focus in his exegesis of *Capital*] is the more fundamental and concrete form, from which such later conceptualizations derive: what is concrete is the social, the mode of production, the humanly produced and historical; metaphysical conceptions such as those involving nature or death are ideological derivations of that more basic reality (Jameson 2011: 125).

[2] Although Abbott's work presents the very word 'figure' in its title, it is directed more to the question of 'this world', than it is to the *figure* itself. See also Colebrook and Maxwell 2016: although they do not thematize 'figure' directly (nor is the term indexed), it occurs relatively frequently in their text, and they have interesting suggestions to make as to its import.

Jameson's project is an examination of capitalism's genius in creating simultaneous overwork and unemployment for its minions, in and for which the figure of the unemployed worker appears as a tormenting symptom: a product of capital's system of alienation, exploitation and expropriation that cannot be reabsorbed into the system itself, indeed must itself be considered an anomaly within that system. A worker has nothing to sell but their labour-power, an alienation which they must undertake in order to live; yet, in unemployment, they are precisely unable to alienate themselves in the form of extorted labour, and, thereby suspended between 'life' and 'death', barely subsist in a necessarily transient form of alienation-from-alienation which cannot either be understood as a return to mere natural life, nor sublimated at a higher level. In this appalling dialectical suspension, 'natural life' coincides directly with the 'unproductive life', as well as with a kind of 'waste life'. Yet, *qua* symptom, this phenomenon in fact proves to be an essential aspect of a *particular* mode of production; accordingly, it is reified whenever it is understood as exceeding such a chronotopic order, as, for example, a paradigm of transhistorical routines of in-human domination.

In making this point, Jameson targets what he considers to be Agamben's deleterious metaphysical ('quasi-biological') idealisation of the categories of life and death, moreover conceiving this putative idealisation as taking an effect for a cause. In properly dialectical fashion (as Jameson himself likes to say), it is not simply the case that Agamben and Foucault are 'wrong'. It is instead that their captivation by technologies of domination — whether sexuality, madness, servitude or incarceration — effaces what is, in the last instance, the concrete operations of politico-economic systems ('the mode of production'). In doing so, they produce analyses that, no matter how strong and persuasive, nonetheless miss their true object. The 'concentration camp victim' in this optic is itself — at least for the committed theoretical understanding that Jameson proposes — a dissimulating avatar or derivative of the actuality of the fundamentally historical situation of the unemployed worker, just as the antinomian animus of Agamben and Foucault (however different these thinkers might otherwise be) mistakenly takes the situated forms of sovereignty or biopolitics as the addressees of its assaults.

For Jameson, then, to attend to 'domination' first and foremost is to in some sense take established powers at face value, the law, police, punishment and so forth, as if their existence could be understood outside their location in the mode of production, and, *a fortiori*, as if they were not ultimately expressions of such a mode[3]. Whatever 'relative autonomy' (*à la* Althusser) one might want to grant to the various institutions of a complex mode, the 'absent cause' that such a mode is, is further tied to 'History or Necessity' — the double-name that constitutes Jameson's

[3] As Jameson puts it in a different but related context, "The value of the molecular in Deleuze, for instance, depends structurally on the preexisting molar or unifying impulse against which its truth is read" (Jameson 2002: 38).

own version of Spinoza's *Deus sive Natura* — which is the "ground and untranscendable horizon" of such modes' taking-place at all, as it is figured in their relations, the residues of more ancient modes, and the multiplicities of the forms that simultaneously express and misprision it.

Yet from Agamben's standpoint (and, we would also agree, from Foucault's, if in a very different sense), such concepts as 'the economic', 'the mode of production', and 'History' are themselves necessarily abstractions and outcomes of processes that are at once smaller and larger than such categories can allow. For instance, it is rather an archaeology of the concept of the economy itself — and its realization — that is lacking or repressed in most discussions of the 'economy', political or otherwise. And, to the extent that such an archaeology is lacking, we paradoxically find, for example, that the 'dismal science' of economics that purports to explicate and intervene into the operations of the economy inadvertently sponsors versions of empiricism that presuppose the very stakes of what is in question, or, alternately, propose new kinds of mystification.

From such a perspective, Jameson would himself be guilty of both sins at once. Here is Jameson expatiating on the absolute priority of history or necessity as the proper ground for his project:

> One does not have to argue the reality of history: necessity, like Dr. Johnson's stone, does that for us. That history — Althusser's 'absent cause,' Lacan's 'Real' — is *not* a text, for it is fundamentally non-narrative and nonrepresentational; what can be added, however, is the proviso that history is inaccessible to us except in textual form, or, in other words, that it can be approached only by way of prior (re)textualization. Thus, to insist on either of the two inseparable yet incommensurable dimensions of the symbolic act without the other... is surely to produce sheer ideology (Jameson 2002: 67).

For Jameson, then, the work of interpretation holds itself expressly in a division that cannot be either reduced to the priority of matter or text, one over and against the other, nor resolved by asserting their complete non-relation. Yet it is then in such a context that Jameson's project throws up telling symptoms of its own, such as when he holds that Agamben assigns a 'quasi-biological' basis to the 'concept' of *homo sacer*. Jameson's biologizing misreading — familiar as such are in their genre — has serious consequences.

First of all, Agamben is not subscribing to a metaphysical or 'quasi-biological' concept of life per se, but in 'life-in-relation-to-law'; such a phenomenon self-evidently cannot be merely an abstract, scientifically-established or socially-independent 'life', precisely because it emerges from real practices of law-making[4]. Yet this

[4] In a personal communication Daniel McLoughlin has claimed that, for Marx, "Class is an absolutely historical category, one that functions differently in different modes of production, but also one that functions in a specific way under the capitalist mode of production". This too holds for Agamben's figure of *homo sacer* to some extent, but which is, as I attempt to show below, rather a kind of

does not mean that Agamben is simply tracing sets of historical and procedural mutations in law-making and law-enforcing as they bear on political action. Rather, as I will show in more detail below, Agamben is attempting to practice an archaeology of a 'category' topologically adjacent to but not fully treated by the analyses of domination undertaken by republican, anarchist and Marxist traditions: the key here is that this 'category' is integrally tied to figures that are constitutively unable to be subsumed entirely into categorical thought, whether philosophical, political or legal. Furthermore, in accordance with Walter Benjamin's dictum to think "dialectics at a standstill" — that is, the attempt to catch the machinery of being in an intervallic moment — this figure-category doublet that Agamben pursues has an a-dialectical structuring while nevertheless remaining fully 'historical'. Even if one accepts that this category is today global, even globalised by the world-system of capitalism, integrated and reconfigured within it, that does not entail that its workings are reducible to or express capitalism.

The crucial consideration is that Agamben's category is on *the other side* of how domination is usually understood. For Agamben, domination is not simply a question of the bodies directly seized and nominated by the law — whether 'slave' or 'citizen', for instance — but those bodies from which the law has expressly *withdrawn*, thereby exposing them to the absolutely hazardous nature of 'bare life'. For Agamben, such an exposure is first attested and formalized in the marginal figure of Roman law that is *homo sacer*, but is thereafter extended and transformed, reaching its absolute limit in the death camps of Nazism. Moreover, it implicates another 'category' that is certainly not easily reducible to any particular mode of production: that category is language as such. We will see below how Agamben focuses his attentions on figures that are simultaneously at the limits of 'bodies and languages', to the point of their non-relation where they are forcibly separated into silence and paradox. Moreover, the real historical development of such phenomena is tied integrally to the production of limit figures that simultaneously, if enigmatically, expose their limits; if one refuses to recognise that these categories are literally unthinkable without such figures, one has already illicitly abstracted from the matter at stake.

In a word, Jameson's critique of Agamben at once mischaracterizes the latter's project, at the very moment that it mimes the latter's argumentation. Agamben is not only not proposing nor relying upon any quasi-biological conception of life, but nor is he taking up any received analyses of domination. Even more determining in the present context, I do not believe that Jameson could even make his own self-professed 'scandalous assertion' — that Capital "is not a book about politics, and not even a book about labour: it is a book about unemployment" (Jameson 2011: 2) — without drawing from the heterodox Hegelian tradition that includes Alexandre

cyst not-quite-reducible to any mode of production. I would like to thank Daniel and Jessica Whyte for their extensive feedback in the writing of this paper.

Kojève, Raymond Queneau, Maurice Blanchot, Jean-Luc Nancy, and Agamben himself. For is 'inoperativity' or 'unworking' not one of the most determined motifs of this tradition, and certainly for Agamben himself? (See Salzani 2011: 106-7 for a brief but illuminating summary).

Indeed — and perhaps this is the moment to state my thesis here as explicitly as possible — the 'figures of power' in Agamben's work are at least double, as befits the notorious doubleness of the genitive itself, at once objective and subjective. On the one hand, there are the figures of 'objective' power: *homo sacer*, the *Muselmann*, abject and terrifying creatures produced at the limits of earthly might. On the other, there are the figures of 'subjective' power: Ayna, Bartleby, Mishkin. Put another way: there are limit creatures, and there are threshold creatures, to abuse Agamben's own vocabulary a little. But the difference between them is highly volatile and obscure and, indeed, they cannot often be told apart — not least by Agamben himself. Take the list that concludes the first volume of *Homo Sacer*, in which Agamben invokes the *Flamen Diale*, the *homo sacer*, the bandit, the exile, the *Führer*, the *Muselmann*, Wilson the biochemist, all of whom tend towards a status summed up by Friedrich Hölderlin's extraordinary proposition that "at the extreme limit of pain, nothing remains but the conditions of time and space" (Agamben 1998: 185). I am not so sure, however, that even "the conditions of time and space" remain absolute in the end for those unstable figures of the transfiguring threshold that Agamben subsequently investigates. But this means that, for Agamben, 'ontology'— in my opinion, ultimately a moniker for 'Aristotle' — is also put into question by figures of power (see Agamben 2015 for his most extended and incisive assault on Aristotelian metaphysics-politics).

Why are these figures *irreducibly* double and confused? Why even name them *figures*? Because of the nature of sovereignty itself. Take the very definition upon which Agamben draws for his analysis, from Pompeius Festus' *On the Significance of Words*: it asserts that the *homo sacer* is "one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide" (Agamben 1998: 71). Yet why must this figure emerge as a *figure* at all and not be characterized as a simple legal *principle* or *category*, 'slave', for example, which, as a category, is indeed also a kind of figure, but one immediately and clearly subsumed under the generalities of principle and conceptual definition? One of the most determining aspects of *Homo Sacer* is that it points precisely to *a figure which cannot simply be a concept*, because such a figure is at the *limit* of all legal categories.

Let's take one example, from an eminent contemporary theorist of Republicanism. Quentin Skinner almost invariably begins by citing:

> the rubric *De statu hominis* from the opening of the *Digest* of Roman law, perhaps the most influential of all the classical discussions of the concept of civil liberty. There we read that 'the fundamental division within the law of persons is that all men and

> women are either free or are slaves.' After this we are offered a formal definition of the concept of slavery. 'Slavery is an institution of the *ius gentium* by which someone is, contrary to nature, subjected to the dominion of someone else.' This in turn is said to yield a definition of individual liberty (Skinner 2002: 9).

Note the order and consistency with which the *Digest* moves from principle ("the fundamental division") to conceptual definition ("Slavery is...") to individual consequences. Note, moreover, how Skinner himself follows the *Digest's* own logic in his own exegesis: he is a believer in the latter's efficacy. But this is not at all the case for *homo sacer*, which, because it exposes the very limits of the biopolitical machine *as such*, cannot receive such a treatment: its *very definition presents as a contradiction on the verge of the unrecognisable*. As a figure, *homo sacer* is at once a 'real', 'attestable' body and a walking exception to law-as-imposition, at once human and no-longer-human. It therefore no longer conforms to the logic of "the fundamental division", and its analysis hence cannot proceed by categorical deduction or empirical description. In Agamben's own terms, the *homo sacer* is a *remnant* of Roman law, a lingering, marginal enigma at the very edges of perceptibility[5].

Let us moreover add that, if across his writings, he naturally discusses the emergence, constitution and transformation of philosophical, political, legal and economic categories over time, Agamben also never fails to point to the figures that they produce as (mostly) unnoticed, nugatory waste. If this can be done at almost every point in Agamben's work, we will take the urgent 'example' of the *Muselmann* here, for reasons that should quickly become evident. If the Nazis perpetrated mass industrial genocide in the deathcamps, another kind of personage emerged as an unintended, unexpected, insistent-yet-obscure by-product: what was new about the Nazi camps was not simply that they were established and run as a highly-organised system of mass extermination, but a machine which *inadvertently* produced humans who-were-no-longer-human. Almost all the obscene procedures now familiar from the vast historical literature — racialised identification and exclusion, genocide, slave-

[5] Although this is not the place for such a demonstration, it is nevertheless worth marking in a footnote: Agamben's true 'prime precursor' (as Harold Bloom might have said) is not, as most commentators claim, Martin Heidegger, Walter Benjamin or Michel Foucault, but Jacques Lacan (and, indeed, psychoanalysis more generally). First, the emphasis on figures of the subject (in classical psychoanalysis, 'Dora', 'The Rat Man', 'The Wolf Man', etc.) that are at once utterly singular and nonetheless generic ('hysteria', 'obsessional neurosis', etc.); second, that this emphasis illuminates the idiocy of discussing 'ideas' that leaves out or subordinates the vagaries of the bodies that birth, bear, and transmit them; third, in the attentiveness to the extraordinary details of 'the remains of the day'; fourth, to the paradoxical topology of what Lacan called 'extimacy' or what Agamben denominates as the involutions of sovereignty; fifth, that 'influence' itself is an 'anxiety', that is, 'not without object', while being the only affect that does not lie. Part of the difficulty in recognising this inheritance is due to our constitutional misrecognition of proper names and citations as if they provided unmediated evidence of the real forces with which we must contend. Nor is this to say that Agamben's work is 'merely' psychoanalytic; rather, that he further radicalizes one of the erratic lines of truth that analysis first broached. See, for instance, Brower 2017, Restuccia 2017 and Clemens 2013.

labour, fodder for murderous scientific-experiments, bureaucratic doublespeak — had in fact had recent precedents elsewhere, and did not in themselves constitute a radical biopolitical novelty, although they certainly composed an expansion and intensification[6]. With the *Muselmann*, however, we are confronted by a new phenomenon, a human-being-stripped-of-its-essence.

For the figure of the *Muselmann* falsifies what philosophy (Aristotle, again!) had always maintained was the essence of the human: its speaking being. The *Muselmann* had been *de facto* separated from language. Though surviving as a 'quasi-biological' organism, the *Muselmänner* could no longer be recognised as human — as Agamben underlines, pointing carefully to critical passages in the camp testimonies themselves — not only by the Nazis, but by fellow camp inmates. What the extermination camps thereby also revealed is that 'man' (the mortal speaking being) can really be separated from his 'essence' (speech) and consigned by the most extreme expression of power to be what even the most radical genres of popular culture can hardly image or imagine — except perhaps in the dissimulating and archaizing form of the zombie.

It is at such a point that even the most incisive commentaries on Agamben tend to swerve away from the horror that he is attempting to describe. To advert to Jameson's claims above, for example, one might well say 'I am an unemployed worker', and such a statement could indeed be variously true or false, constative or performative, veridical or fictional, depending on the circumstances. Yet under no circumstances can one say "I am a *Muselmann"* and that statement be constative, precisely because one of the distinguishing marks of the *Muselmänner* is that they are *defined by the separation of language(s) from their body*. The *Muselmann* is not an identity; one cannot 'affirm' it from any position nor under any description; it is an unsurpassable limit between the human and inhuman, that, once revealed, cannot be wished away: "The final biopolitical substance to be isolated in the biological continuum" (Agamben 1999: 85), a *survivance* without qualities.

So Agamben's attention is not simply to the concentration camp victims *per se* — not to the murdered nor survivors — but to a limit figure that was realized amongst them. Yet, again, such a figure is nonetheless *not alone*, and Agamben delineates its figural neighbourhood in a number of moments. One of these is the personage known only as Hurbinek: an infant who had perhaps been born in the camp, was paralysed from the waist-down, who had like the others a number tattooed on his tiny wrist, and somehow survived for some years, just until liberation — yet had never been taught to speak. Hurbinek whistles and articulates strange sounds, which no-one in the camp can quite understand — *mass-klo, matisklo* — but which become

[6] See however Milner 2004, who points to another singular characteristic of the camps: that a new technical device, the gas chamber, was developed to obliterate Jews *en masse*, the only known people in world history for which a new technology of extermination was specifically invented. Agamben himself cites Primo Levi's claim that the unprecedented organisation of the *Sonderkommando* was "National Socialism's most demonic crime".

an object of speculation amongst the prisoners. Thus it is amongst these latter that an extraordinary figure of the witness is born: the survivor who testifies to and for those who could not testify.

The paradoxes are extreme: the *Muselmann* cannot bear witness, it is impossible; yet he is the absolute witness of what took place; thus the witness who survives cannot be a full witness, precisely through his survival; yet he must bear witness to what he did not truly witness. As Agamben writes:

> testimony is the disjunction between two impossibilities of bearing witness; it means that language, in order to bear witness, must give way to a non-language in order to show the impossibility of bearing witness. The language of testimony is a language that no longer signifies and that, in not signifying, advances into what is without language, to the point of taking on a different insignificance — that of the complete witness, that of he who by definition cannot bear witness (Agamben 1999a: 39).

This means that all such testimonies as Levi's necessarily have a 'fictional' aspect to them in order that they remain truthful — yet they themselves thereby *prove* something about the 'empirical' or 'real' that an attention to the empirical as such must necessarily miss. And it also means that Agamben's own act of witnessing is to bear witness to this situation, to "the devastating experience in which the impossible is forced into the real" (Agamben 1999a: 148). Auschwitz was a laboratory in which impossibility was in fact actualized; yet, submerged in such impossibility, a handful of witnesses contingently, impossibly, inscribed several fragments of unheard-of impossibilities.

This returns us to Agamben's central abiding ontological theme: that of rethinking potentiality, beyond Aristotle and his categorical closures. The potential is not actual, but it must be able to be actualized, to actualize itself, or it would not be potential; yet, in becoming actual, such potential must be exhausted and, therefore, potentiality destroys itself in its fulfilment; if some potential remained after actualization, if it were not indeed exhausted in its act, then it would not really be potential since it would never in fact be actualizable. Otherwise put, a subject would only exist as the potential for (their own) destruction; which would not, strictly speaking, be a subject at all. It is therefore to the varied *figures of impotentiality* that Agamben turns, to something that remains in the actual that is not potential, but rather *what-is-not-but-is-not-not,* the traces of inexhaustible inoperativity that remain in exhausted potential.

So we are now in a position to enumerate a number of different modalities of the figural in Agamben. In his early work, we find that the figural tends to be of an emblematic nature, for instance Dürer's melancholy angel at the close of *The Man Without Content*, or the melancholic and fetishist of *Stanzas* (Agamben 1999b; Agamben 1993b). As emblematic, these figures tend to stand as ciphers for otherwise unrepresentable phenomena of the fallen world, which, in the extreme tension of their apparition, exhibit the putting-into-relation of the non-relational. The

melancholic is one who, confronted with a lack, acts as if this lack were rather a loss in order then to be able to dream of its potential recapture; the fetishist, in a different but consonant fashion, denies absence by multiplying a phantasmagoria of substitute objects.

At the same time, Agamben places such figures in apposition to one another, where, thereby constellated, they together — like the Southern Cross or the Great Bear — come to serve as imaginary celestial orientations for effective earthly navigation. As this work develops, it moves towards a reconstruction of impossible figures of 'oneiric' imagination: the Ayna of Arnaut Daniel's work, an inhuman body in which the form of the poem touches on Paradise in the very non-communicability of their rift. We also find singular figures such as Bartleby or the Ks, who create paradoxical operations dedicated to stalling the machine of law; or the linguistic inventions of the Gypsies, who seem to have been lying in different ways to everyone they meet as to their own provenance and movements (see the essay on Bartleby in Agamben 1999c; 'K' in Clemens 2008; the essay on *Languages and Peoples* in Agamben 2000)[7].

In the texts upon which we have been focusing here — the early *Homo Sacer* volumes — a new figural note is introduced. For if, as I have noted, *homo sacer* 'himself' is certainly exemplary, he is now divided from, as he is essentially bound to, the figure of the sovereign exception and, moreover, as a remnant. This new mode of division-binding that afflicts the figure of *homo sacer* is further developed in *Remnants of Auschwitz*, where, as I have attempted to demonstrate, the caesura is further radicalized in the indissociable-yet-irreducible figures of the *Muselmann*-witness: impossibility having collapsed into necessity in the camps, something was nevertheless (impossibly) subtracted from impossibility in this disjunctive double-headed figure.

Yet this means that such figures must never quite succeed for Agamben, 'success' here designating a triumph of actualization: indeed, they can neither be simply 'cancelled' nor 'affirmed'. As he puts it in a gloss on St Paul's term *hōs mē*, 'as not': "The messianic does not simply cancel out this figure, but it makes it pass, it prepares its end. This is not another figure or another world: it is the passing of the figure of this world" (Agamben 2005: 25). We will see the return of this doctrine throughout Agamben, if often modulated into terms appropriated from the figures in question themselves.

Take the essay titled *The Inappropriable* in which Agamben turns to the problematic of poverty amongst the Franciscans, whose ambitions were professed in the catchphrases *vivere sine proprio* (to live without property) and *secundum formam sancti evangeli* (to live according to the form of the Holy Gospels). Such an ambition

[7] Indeed, 'K' provides a perfect example of Agamben's insistence on the figure over the category: the essay opens precisely by amending Davide Stimilli's suggestion that K stands for *kalumnia* (slander) to *kalumniator* (the slanderer).

meant that it was widely considered impossible to subject the Franciscans to the law: in their renunciation of all ownership, of all rights to property, the law had no purchase. Evidently, such a position was a source of consternation amongst the jurists. If Francis himself had wilily kept his formulas utterly indeterminate in regards to the form of law — elsewhere Agamben speaks of how Aquinas speaks of "a paradoxical *individuation by indetermination*" (Agamben 1993a: 56) — under the attacks from a variety of authorities, including the Avignon Curia, the Franciscans defensively started to reconceive their ideal of propertylessness by means of a distinction between use and ownership. In doing so, however, their attempt to separate the two negatively forged a link which enabled their enemies to subsequently bring back into the fold of law proper (Agamben 2019). And yet, something remains of the Franciscan attempt— a trace, a remnant, a figure — that can still be attested to today, can be invoked and put to new uses.

To sum up: the determining trajectory in Agamben's *oeuvre* that I have been tracing here typically proceeds as follows:

> 1. Agamben identifies a moment of disclosure or upsurge of a 'gesture' at the limit, whether that of the witness vis-à-vis the *Muselmann*, or that of the Franciscan assault on property with *vivere sine proprio*;
>
> 2. Agamben then traces the covering-over and institutionalization, the juridification, of such gestures in the attempt to extend or preserve them, e.g., in the very defence of their practices against the Curia, the Franciscan theorists, despite themselves, reintroduced the very form of law their gesture sought to contravene or evade;
>
> 3. by means of this reconstruction, Agamben seeks not only to "blow the image of the past out of the continuum of history", to invoke the famous phrase of Walter Benjamin, but, in doing so, to revivify such gestures in all their contemporaneity and untimeliness (he himself acts as a kind of "witness of the witness", to transmit the intransmissible);
>
> 4. in doing so, he not only proffers new concepts of inoperativity (the inappropriable, unworking, etc.) for the quashed ambitions of ancient anomia, but simultaneously delineates an 'inglorious' body or figure that constitutes a trace of resistance against sovereignty both then and now;
>
> 5. this act of witnessing on Agamben's part is figural insofar as it is also anachronic, aneconomic, asexual: as he notes in *What is the Contemporary?*, to be contemporary is to entirely in one's own time, but, in seeing the darkness of that time, it is 'simultaneously' not entirely subject to that time (Agamben 2009).

In other words, the figures of redemption to which Agamben attends are the residues of a double subtraction. First, as emerging from limit-cases of law, whereby the *homo sacer*, the *wargus*, the coma patient, the *Muselmann* are unassignable

according to any positive category. Second, they are just as much the attempts to exit from the logic of this first subtraction. So the *Muselmann* is unthinkable without the witness's testimony, or the legends that are told about the wolf-man, or the poetic construction of an impossible body. Yet this double subtraction is never quite accomplished, either; it teeters on the abyss of its own disappearance. It to this double-subtraction-in-torsion that Agamben seeks always to attend, and always to the singularity of those operations that unleash a generic impotentiality.

That such 'unleashing' is near-nugatory from the point of the established powers of the world is part of its difficulty; that it also cannot be simply integrated into a concept without falsification is another. This is also surely why so much of the critical commentary on Agamben — such as the case of Jameson with which I began — consistently misreads his project as simply producing concepts and categories, and as if the figures he investigates were only instances of, or supports for, such concepts[8]. So when Skinner targets the citizen/slave dichotomy as the central category of Republican dismantling, or Jameson complains that unemployment is "the more fundamental and concrete form" in comparison to the camp victim, the problem is that they are both absolutely correct. But, being so, they miss the paradoxes thrown up at the limits of such forms.

What Agamben is doing is quite different: the figures are primary, and the 'concepts' that he subsequently constructs are 'critical' in the sense that they, again following Benjamin, are to be irrecuperable by fascism, not least because they cannot be entirely captured by law (being constructed at a new threshold at the limit of law). We could even present Agamben's fundamental process diagrammatically:

$$\{[C \rightarrow (F_l] \leftarrow F_t) \rightarrow X\} \leftarrow A$$

Where: C = the category in question; F_l = the limit figure; F_t = the threshold figure that responds to F_l; X = the enigma of a form-of-life to which Ft points; A = Agamben himself; the brackets indicate the key couplings; the arrows singular forms of incapacity. In the case I have spent most time on here, C = Camp, F_l = *Muselmann*, F_t = witness, X = the enigma of in-separation of bodies and languages.

Moreover, in each case C, the figures it produces at its limits are singular, *not-quite-equivalent*, just as the figures of poems are not reducible to each other without loss. Note that *it is impossible for a category not to produce a figure it is incapable*

[8] This failure is particularly frustrating in Jameson's case, given that he himself asserts of Marx's use of figures in *Capital*: "I hazard the suggestion that figuration tends to emerge when the object of conceptuality is somehow unrepresentable in its structural ambiguity" (Jameson 2011: 33-34). Moreover, such figuration for Jameson has two other aspects: 1) it expresses totality; 2) it renders "momentarily visible" heterogenous levels of that totality. This is, on the one hand, extraordinarily proximate to Agamben's own position; while, on the other, it exposes Jameson's unwavering commitment to metaphysical categories.

of including[9]. A figure marks a category's limits; there is no category without such a figure; this figure is split between the categorical paradox it incarnates and an impotential it indicates.

As Agamben writes in *The End of the Poem*, "What characterizes poetic atheology as opposed to every negative theology is its singular coincidence of nihilism and poetic practice, thanks to which poetry becomes the laboratory in which all known figures are undone and new, parahuman or semidivine creatures emerge" (Agamben 1999d: 91). Yet such an emergence is also a disappearance: it has the structure of an event. Hence, in a note on the work of Robert Walser, Agamben comments: "'Figure' — that is, precisely the term that expresses in Saint Paul's epistles what passes away in the face of the nature that does not die — is the name Walser gives to the life that is born in this gap" (Agamben 1993a: 60). Or, as he adds, in his later return to Saint Paul, "this remnant is the figure, or the substantiality assumed by a people in a decisive moment, and as such is the only real political subject" (Agamben 2005: 57). *Inglourious* and *basterd* as they may be, these passing figures are indeed true figures of a life of power.

BIBLIOGRAPHY

Abbott, M. 2014. The Figure of This World: Agamben and the Question of Political Ontology. Edinburgh: Edinburgh University Press.

Agamben, G. 1993a. The Coming Community. Translated by M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1993b. Stanzas: Word and Phantasm in Western Culture. Translated by R.L. Martinez. Minneapolis: University of Minnesota Press.

Agamben, G. 1998. Homo Sacer: Sovereign Power and Bare Life. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999a. Remnants of Auschwitz: The Witness and the Archive. Translated by D. Heller-Roazen. New York: Zone Books.

Agamben, G. 1999b. The Man Without Content. Translated by G. Albert. Stanford: Stanford University Press.

Agamben, G. 1999c. Potentialities: Collected Essays in Philosophy. Edited and translated with introduction by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999d. The End of the Poem: Studies in Poetics. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

[9] Another marginal remark: Agamben's scattered, characteristically critical remarks about Jacques Derrida seem to me to hinge on the fact that, for Agamben, this operation is Derrida's *idée fixe*; as such, Derrida has formulated the problem adequately, but then consistently fails to take up the figural challenge it projects.

Agamben, G. 2000. Means Without End. Translated by V. Bineti and C. Casarino. Minneapolis: University of Minnesota Press.

Agamben, G. 2005. The Time That Remains: A Commentary on the Letter to the Romans. Translated by P. Dailey. Stanford: Stanford University Press.

Agamben, G. 2008. 'K'. In The Work of Giorgio Agamben, ed. by J. Clemens et al.. Edinburgh: Edinburgh University Press.

Agamben, G. 2009. What is an Apparatus? Translated by D. Kishik and S. Pedatella. Stanford: Stanford University Press.

Agamben, G. 2015. The Use of Bodies. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2019. Creation and Anarchy: The Work of Art and the Religion of Capitalism. Translated by A. Kotsko. Stanford: Stanford University Press.

Brower, V.W. 2017. Sigmund Freud. In Agamben's Philosophical Lineage, ed. by A. Kotsko and C. Salzani. Edinburgh: Edinburgh University Press, pp. 242-251.

Clemens, J. 2013. Psychoanalysis is an Antiphilosophy. Edinburgh: Edinburgh University Press.

Jameson, F. 2002. The Political Unconscious: Narrative as a Socially Symbolic Act. Oxon: Routledge Classics.

Jameson, F. 2011. Representing Capital: A Commentary of Volume One. London and New York: Verso.

Milner, J.-C. 2004. Les Penchants criminels de l'Europe démocratique. Paris: Verdier.

Restuccia, F. 2017. Jacques Lacan. In Agamben's Philosophical Lineage, ed. by A. Kotsko and C. Salzani. Edinburgh: Edinburgh University Press, pp. 252-261.

Salzani, C. 2011. Inoperative/Deactivation. In The Agamben Dictionary, ed. by A. Murray and J. Whyte. Edinburgh: Edinburgh University Press, pp. 106-7.

Skinner, Q. 2002. Classical Liberty and the Coming of the English Civil War. In Republicanism: A Shared European Heritage, Vol. II: The Values of Republicanism in Early Modern Europe, ed. by M. van Gelderen and Q. Skinner. Cambridge: Cambridge University Press, pp. 9-28.

Whyte, J. 2017. Marx. In Agamben's Philosophical Lineage, ed. by A. Kotsko and C. Salzani. Edinburgh: Edinburgh University Press, pp. 262-271.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 211-234
ISSN: 1825-5167

DESTITUENT POWER AND THE PROBLEM OF THE LIVES TO COME

TOM FROST
Leicester Law School
University of Leicester
tom.frost@leicester.ac.uk

ABSTRACT
The figure of form-of-life is a life lived as a 'how' or a mode of living, beyond every relation. Form-of-life is a form of impotent, destituent power that seeks to deactivate the biopolitics that continuously divides and separates life itself. Agamben's work is remarkably silent on the question of reproductive rights. The pregnant woman's life is regulated continuously by biopolitics, yet Agamben does not discuss this regulation. The woman's relationship with her foetus is difficult to reconcile with Agamben's philosophy that seeks to think beyond every relation. In addition, the right to abortion is difficult to reconcile with form-of-life. It is not clear how a woman seeking an abortion is not exercising a sovereign decision to create bare life. I use the UK's abortion laws as a way to interrogate Agamben's figure of form-of-life, and to illustrate how, by not accounting for reproductive rights, Agamben's thought remains incomplete.

KEYWORDS
Destituent power; potentiality; form-of-life; abortion; reproductive rights.

1. INTRODUCTION*

The figure of form-of-life is a life lived as a 'how' or a mode of living. Form-of-life is a form of destituent power that seeks to live inoperatively. This article first sketches out the qualities and nature of form-of-life, showing how it lives as a monad, inseparable from its context because it is not in relation to it but is in 'contact' with it. Form-of-life struggles to account for liminal forms of life, such as the embryo or foetus. Agamben's work is remarkably silent on the question of reproductive rights. The pregnant woman's life is regulated continuously by biopolitics, yet Agamben does not discuss this regulation. The woman's relationship with her foetus is difficult to reconcile with Agamben's form-of-life. Form-of-life as a modal existence presupposes an ability to live one's life in a manner of contemplative use. However,

* I would like to thank Shaneez Mithani (University of Sussex) for her support and suggestions on various drafts of this piece, as well as helping with conducting the research, and Carlo Crosato (Università Ca' Foscari di Venezia) for his thoughtful and insightful comments on a previous draft of the essay.

contemplative use still necessitates some kinds of actions or behaviour which it is not possible for the unborn given their stage of cognitive development. In addition, the pro-choice right to abortion is difficult to reconcile with form-of-life. It is not clear how a woman seeking an abortion is not exercising a sovereign decision to create bare life. The implications of Agamben's philosophy of life can be argued to place him close to the doctrine of the Catholic Church and a pro-life position. I use the UK's abortion laws as a way to interrogate Agamben's figure of form-of-life, and to illustrate how, by not accounting for reproductive rights, Agamben's thought remains incomplete and difficult to separate from anti-feminist and pro-life politics.

2. FORM-OF-LIFE

Agamben, in his thought, makes clear that today 'life' (which must include the question of the status of the foetus or embryo) is no longer just a biological question:

> [T]oday ... life and death are not properly scientific concepts but rather political concepts, which as such acquire a political meaning precisely only through a decision (Agamben 1998: 64).

As Agamben explains in *The Open*, the concept of 'life' never is defined as such. There is no neutral ground with respect to the question of who counts as a full person or human being in our political order. This is absolutely the case with respect to abortion and the debates surrounding pro-life and pro-choice positions. What this means is that:

> [T]his thing that remains indeterminate gets articulated and divided time and again through a series of caesurae and oppositions that invest it with a decisive strategic function ... everything happens as if, in our culture, life were *what cannot be defined, yet, precisely for this reason, must be ceaselessly articulated and divided* (Agamben 2004: 13).

Western ontology divides, separates, excludes and pushes vegetative life to the bottom, where it functions as a foundation for sensitive life and intellectual life (Agamben 2016: 264). In *What is an Apparatus?* Agamben explains that:

> The event that has produced the human constitutes, for the living being, something like a division ... This division separates the living being from itself and from its immediate relationship with its environment (Agamben 2009: 16).

This ceaseless articulation and division is "the fundamental activity of sovereign power" which produces bare life through a decision (Agamben 1998: 181). This division is crucial for how life is treated in modernity. The division of life, which operates on a number of levels – vegetal and relational, organic and animal, animal and human (Aristotle 1984b; Agamben 2004: 13). These divisions pass as a "mobile border" within living man, and operate as an apparatus through which the decision

of what is human and what is not human is possible (Agamben 2004: 15). All living beings are in a form of life, but not all are (or not all are always) a form-of-life (Agamben 2004: 277).

Agamben's task in his thought is clear – to investigate the very divisions and caesurae which have separated man from 'non-man', the human from the animal, over and above taking positions on the so-called 'great issues' of the day such as human rights (Agamben 2004: 16). Man is essentially *argos*, inoperative, unable to be defined through work or vocation, and without a nature or essence (Agamben 2017: 52). As life has no essence, setting an arbitrary starting point for the beginning of life must be unacceptable under this thought. However, we will see that Agamben's thought still retains a certain tenderness for the unborn which cannot be captured by his view of man as *argos*.

Inoperativity cannot be thought of as "idleness or inactivity but as a praxis or potentiality of a special kind, which maintains a constitutive relation with its own inoperativity" (Agamben 2017: 53). This inoperativity consists of contemplating one's own potentiality to act:

> [I]s a matter of ... an inoperativity internal to the operation itself, a *sui generis* praxis that, in the work, first and foremost, exposes and contemplates potentiality, a potentiality that does not precede the work, but accompanies it, makes it live, and opens it to possibilities. The life that contemplates its own potentiality to act and not to act becomes inoperative in all its operations, lives only in its livableness (Agamben 2017: 54).

To be potential is to be capable of impotentiality (Agamben 1999b: 182). I am quoting from the English translation of the Italian essay *La potenza del pensiero* (Agamben 2005), published as *On Potentiality*. Despite this translation, the English essay loses something of the original Italian. Agamben's argument concerning potentiality rests on a reading of Aristotle's *Metaphysics*, and his use of *dunamis*. In Book Theta Aristotle states:

> esti de dunaton touto hōi ean huparxēi hē energeia hou legetai ekhein tēn dunamin, outhen estai adunaton [A thing is capable of which it is said to have the potentiality] (Aristotle 1984a, 1047a 24-26).

Dunamis is an ambiguous term in Aristotle. Attell argues that two senses of the term are relevant for Agamben: possibility and capacity. The former indicates something like pure logical possibility. The second sense indicates that someone is able to realise a potentiality or capability if external conditions do not prevent the exercise of that potentiality (Attell 2009: 39-40). I can exercise a capacity if nothing prevents me from doing so. While external conditions of possibility may determine whether I can exercise certain capacities, they do not determine the *existence* of these capacities. Agamben reading of Aristotle argues that potentialities persist even when they are not in act (Attell 2009: 40).

Dunamis's counterpart is *adunamia*. This is "potentiality not to" or "impotentiality". Without *adunamia*, *dunamis* or potentiality would immediately lead to actuality. The two form an indissoluble pair (Attell 2009: 41). Kevin Attell has translated a long passage from *La potenza del pensiero* which explains Agamben's defence of potentiality, and which has not been translated into English:

> [T]he impotentiality of which it is said that in the moment of the act will be nothing cannot be anything but that *adunamia* which, according to Aristotle, belongs to every *dunamis*: the potentiality not to (be or do). The correct translation would thus be "What is potential is that for which, if the act of which it is said to have the potential come about, nothing will be of the potential not to (be or do)" [...] But how are we then to understand "nothing will be of the potential not to (be or do)"? How can potentiality neutralise the impotentiality that co-belongs with it? A passage from *De interpretation* provides us with some precious indications. With regard to the negation of modal statements, Aristotle distinguishes and, at the same time, puts in relation the problems of potentiality and modal enunciations. While the negation of a modal statement must negate the mode and not the *dictum* (thus the negation of "it is possible for it to be" is "it is not possible for it to be" and the negation of "it is possible for it not to be" is "it is not possible for it not to be"), on the plane of potentiality things are different and negation and affirmation do not exclude one another. "Since that which is potential is not always in act", writes Aristotle, "even the negation belongs to it: indeed, one who is capable of walking can also not walk, and one who can see can not see" (21b 14-16). Thus, as we have seen, in book *Theta* and in *De Anima*, the negation of potentiality (or better, its privation) always has the form: "can not" (and never "cannot"). "For this reason it seems that the expressions 'it is possible for it to be' follow each other, since the same thing can and can not be. Enunciations of this type are therefore not contradictory. However, 'it is possible for it to be' and 'it is not possible for it to be' never go together" (21b 35-22a2). If we call the status of the negation of potentiality "privation", how should we understand in a privative mode the double negation contained in the phrase: "nothing will be of the potential not to "be or do"? Insofar as it is not contradictory with respect to the potentiality to be, the potentiality not to be must not simply be annulled, but, turning itself on itself, it must assume the form of a potentiality not to not be. The privative negation of "potentiality not to be" is therefore "potential not to not be" (and not "not potential not to be"). What Aristotle then says is ... If a potentiality not to be originally belongs to every potentiality, one is truly capable only if, at the moment of the passage to the act, one neither simply annuls one's own potentiality not to, nor leaves it behind with respect to the act, but lets it pass wholly into it as such, that is, is able not to not pass to the act (Agamben 2005: 284-285; Attell 2009: 43-44).

Actuality must be seen as the precipitate of the self-suspension of impotentiality (Attell 2009: 44). An existence *as* potentiality is not the potential to do something but also the potential to *not-do*, the potential not to pass into actuality (Agamben 1999b: 180). This potential not to be is capable of being and not being. Being or doing is founded on both the potentiality toward being or doing, and also on a modification of the potentiality not to be or do (Attell 2009: 42). Being-able is an essential 'having', *hexis*, constitutive of the living being (Seshadri 2014: 475). To be

human is to be consigned to a potential to not be or do (Seshadri 2014: 478). Freedom is not a question of will or status, or a way of being (or form of life) but it is a way of being in a relation to privation. Man is therefore capable of mastering his potentiality and accessing it only through his impotentiality:

> Only a potentiality that is capable of both potentiality and impotentiality is then a supreme potentiality. If every potentiality is both potentiality to be and potentiality not to be, the passage to the act can only take place by transferring one's own potentiality-not-to in the act (Agamben 2017: 41).

Agamben valorises a human *dunamis* that does not lead to act or work. He defines the human as founded on a paradoxical idleness or resistance with respect to act and work (Attell 2009: 48). This construction appears to presuppose that the inoperative being is a being with agency. An inoperativity that accompanies the work and opens it to possibilities implies an ability to open work to possibilities. Inoperativity seeks to found human actions on their impotentiality

> Thus, inoperativity ... is the space ... that is opened when the apparatuses that link human actions in the connection of means and ends ... are rendered inoperative. It is, in this sense, a politics of pure means (Agamben 2018: 85).

This inoperative life is 'form-of-life'.

3. FORM-OF-LIFE AND DESTITUENT POWER

Form-of-life is not thinking a better or more authentic form of life (Agamben 2016: 277). Agamben's community subtracts itself from every determinate aspect of belonging and simply exists as neither this nor that (with no essence), but solely 'thus' or 'whatever' (Agamben 1993: 1-3, 17-21).

Form-of-life is "a being that is its own bare existence, [a] life that, being its own form, remains inseparable from it" (Agamben 1998: 188). This life is not *bared* or *stripped* in the sense of being separated from its form but rather is exposed in a nudity that is nothing but the pure appearance of the inapparent, the complete exposure of the opaque, the revelation of the absence of secrets (Agamben 2010: 91). This form-of-life is encountered throughout Agamben's works: the 'glorious body' that is nothing but the earthly body divested of its functions and open to a new use (Agamben 2010: 91-103), objects of profanation and play (Agamben 2007: 73-91), and Franciscan monasticism (Agamben 2013: 122).

All these figures have in common is their subtraction from every particular predicate and their exposure in the bare facticity of their existence or 'being-thus' (Prozorov 2016: 180). They all equally have in common the fact that they are examples of already existing life, rather than existing as liminal figures whose status as living is under question. Being-thus is "neither this not that, neither thus nor thus, but *thus*, as it is, with all its predicates (all its predicates is not a predicate)" (Agamben 1993:

93). "Being-thus" means being "the thus" itself, rather than being what determines the thus. Being-thus is not a conservation of what already is, the status quo. Form-of-life lives "the thus", the exhibition of the being itself, rather than a determined aspect. This determined aspect is central to forms of life, or ways to live.

A form-of-life is the most idiosyncratic aspect of everyone; their tastes, which safeguards its secret in the most impenetrable and insignificant way:

> If every body is affected by its form-of-life as by a clinamen or a taste, the ethical subject is that subject that constitutes-itself in relation to this clinamen, the subject who bears witness to its tastes, takes responsibility for the mode in which it is affected by its inclinations. Modal ontology, the ontology of the *how*, coincides with an ethics (Agamben 2016: 231).

At the point where form-of-life is constituted, it renders *destitute* and inoperative all singular forms of life. A form-of-life is that which ceaselessly deposes the social conditions in which it finds itself to live, without negating them, but simply by using them (Agamben 2016: 274). At the point at which the apparatuses which divide life are deactivated, potential becomes a form-of-life is constitutively destituent (Agamben 2016: 277).

The ethical subject must constitute itself – again indicating that form-of-life relates to an already existing being with the capacity for living ethically. This reading of form-of-life is consistent with Agamben's description that form-of-life has a double tension inside of it. It is a life inseparable from its form, and also separable from every thing and every context. It must live its own mode of being, as a monad, inseparable from its context because it is not in relation to it but is in *contact* with it (it is a non-relational existence) (Agamben 2016: 232). It is worth quoting Agamben's definition of 'contact' in its entirety:

> Just as thought at its greatest summit does not represent but "touches" the intelligible, in the same way, in the life of thought as form-of-life, *bios* and *zoè*, form and life are in contact, which is to say, the dwell in a non-relation. And it is in contact – that is, in a void of representation – and not in a relation that forms-of-life communicate. The "alone by oneself" that defines the structure of every singular form-of-life also defines its community with others. And it is this *thigein* [thought], this contact that the juridical order and politics seeks by all means to capture and represent in a relation. It will therefore be necessary to think politics as an intimacy unmediated by any articulation or representation: human beings, forms-of-life are in contact, but this is unrepresentable because it consists precisely in a representative void, that is, in the deactivation and inoperativity of every representation. To the ontology of non-relation and use there must correspond a non-representative politics (Agamben 2016: 237).

It is this contact or *thigein* (which Agamben also terms *touching*), when two entities are separated only by their void of representation, that the legal order and 'representative' politics seek to capture and represent in the form of a relation which will always already have a negative ground (Agamben 2016: 237). Form-of-life is without relation. Drawing on Plotinus's description of the happy life of the

philosopher as one of 'exile', Agamben contends that such an exile is akin to being "one alone with one alone", an exile of intimacy (Agamben 2016: 235). Forms-of-life are in contact but this consists in the inoperativity of every representation; this must be signified by a non-representable politics (Agamben 2016: 237). Form-of-life is its own mode of being which is continually generated by its manner of being (Agamben 2016: 224).

To summarise, forms-of-life communicate by contact, in a void of representation that is also a care for the inappropriable – a care for opacity. This contact participates in an ontology of nonrelation and use from which derives, in the final instance, a politics of intimacy in which life is inappropriable and inseparable from its form – a life that actively preserves its sense of nonknowledge and the generative limits of its own mystery (Bordeleau 2017: 490). This intimacy and intimate relation is not expounded upon by Agamben, but there is a clear connection which could be made between the idea of an intimate relation and the relation which exists between the child (both born and unborn) and the mother. As we will see when considering the UK's abortion laws, the intimate child/mother relationship poses questions for form-of-life which it struggles to answer.

4. TOWARD A MODAL ONTOLOGY

Agamben's ontology is a modal ontology. Modal verbs have developed a function in Western philosophy. Modal verbs ("I can", "I want", "I must") are deprived of meaning. Agamben argues that they are *kena*, or 'void', and acquire a meaning only if they are followed by a verb in the infinitive (for example, "I can walk", "I want to eat") (Agamben 2018: 48-49).

Agamben makes clear that mode expresses not 'what' but 'how' being is (Agamben 2016: 164). It is important to specify here that I am not trying to represent form-of-life as a form of life. Agamben is interested in living the 'how' of being itself, which is not the identity or context of a form of life. Modal ontology can only be understood as a 'middle voice', or a medial ontology. Singular existence – the mode – is neither a substance nor a precise fact but an infinite series of modal oscillations, by means of which substance always constitutes and expresses itself (Agamben 2016: 172). Thinking the concept of mode involves conceiving it as a threshold of indifference between ontology and ethics. Agamben sees ethics as not able to be trapped by or through any determined form of life. Agamben explains:

> Just as in ethics character (*ethos*) expresses the irreducible being-thus of an individual, so also in ontology, what is in question in mode is the "as" of being, the mode in which substance is its modifications (Agamben 2016: 174).

The mode (being-thus) in which something is, is a category belonging irreducibly to ontology and to ethics. The claim of modal ontology should be terminologically

integrated: a modal ontology is no longer an ontology but an ethics; an ethics of modes is no longer an ethics but an ontology (Agamben 2016: 174). Living a life as a form is an ethical existence.

The 'mode' and 'modal existence' define the peculiar status of singular existence (Agamben 2016: 152). Agamben sees initiating an ethical life as concerning how we conceive of and experiment with the *how* of a form-of-life. It involves ways of envisaging an absolutely immanent life on the threshold of its political and ethical intensification (Agamben 1998: 5). Agamben desires "to bring the political out of its concealment and, at the same time, return thought to its practical calling" (Agamben 2016: 232).

This form-of-life is a monad. The relationship between monad and monad is complex. The more form-of-life becomes monadic, the more it isolates itself from other monads. However, each monad always already communicates with the others, by representing them in itself, "as in a living mirror" (Agamben 2016: 232). Every body is affected by its form-of-life as by a clinamen. The ethical subject is that subject which constitutes-itself in contact (a void of representation) to this clinamen, and focuses on *how* it lives its life (Agamben 2016: 231). In this sense, the community to come will be akin to a life lived through its mode or manner of being (Agamben 2016: 228).

This clinamen presupposes a capacity for being, and a capacity for realising this 'how'. For Agamben this is where living and life coincide, but what are the limits of this living? The 'how' presupposes a living. To live life as a form, as pure means, indicates that one *must* actively act to bring about this condition, it is not something that can be passively accepted. Crucially, Agamben makes clear that form-of-life is something "that does not yet exist in its fullness" and can only be attested to in places that "necessarily appear unedifying". Form-of-life articulates a zone of irresponsibility, in which the identities and imputations of the juridical order are suspended (Agamben 2016: 248). What needs to be done is apply Walter Benjamin's principle according to which the elements of the final state are hidden in the present, not in progressive tendencies but in insignificant and contemptible areas (Agamben 2016: 227).

5. FORM-OF-LIFE AND THE UNBORN

Agamben's project is one of radical indifference, a radical passivity. This is a taking flight which does not imply evasion: rather a movement on the spot, in the situation itself (Vacarme 2010: 121). This sense of passivity must be differentiated from passivity in the sense that it is ordinarily understood. A foetus or a new-born baby is 'passive' in the sense that they are not able to consciously or actively act but this is not the sense of passivity referred to by Agamben. Rather, Agamben's passivity engages with the 'how'. Form-of-life as a modal existence presupposes an ability

to live one's life in a manner of contemplative use. This passive manner is very different from a passivity which is an 'acceptance of letting something happen to oneself, without an active response or resistance'. However, contemplative use still necessitates some kinds of actions or behaviour which it is not possible for the unborn given their stage of cognitive development. Form-of-life, which renders the sovereign decision inoperative, can only be accessed through a decision, an active stance.

It is in focusing on this 'how' that this article constructs an argument that form-of-life would not be possible or achievable for liminal figures, precisely because they are not fully able to live a life as a 'how'. Form-of-life as a monad always communicates with others. This monad represents other forms of life in itself, as a 'living mirror'. I wish to defend the claim that form-of-life does not encompass the figures of the embryo and foetus, due to Agamben's failure to engage with any form of explicit reproductive politics.

Following Agamben's construction of form-of-life, a pro-choice position would make the foetus the object of a sovereign decision which determines whether it has value or not. The decision can claim that this potential life has no essence which requires protecting or saving. Contrarily, the pro-life position would oppose reproductive choices which would terminate a pregnancy. However, this would (by any measure) severely curtail women's reproductive choice. Furthermore, pro-life positions project onto the unborn an image of an essence and a life to be protected – a sovereign decision has been made to assign a value to the potential life of the unborn even before it can live its life as a how. Under Agamben's schema, both pro-life and pro-choice positions repeat the division of life which is the fundamental activity of sovereign power. Pro-choice politics allow for the sovereign decision over the unborn; pro-life politics have already decided that the unborn are lives that are worth protecting.

Before expounding on this argument, I first turn to the exoteric references in Agamben's thought on the unborn. When Agamben does consider the thresholds between human and inhuman, he tends to stress a consideration of a "new living dead man, a new sacred man" (Agamben 1998: 131), and not the production of the threshold "prelife" or "prior to human life". For example, in *Remnants of Auschwitz*, Agamben contended that:

> The human being is thus always beyond and before the human, the central threshold through which pass currents of the human and the inhuman, subjectification and desubjectification, the living being's becoming speaking and the *logos*' becoming living (Agamben 2002, 135).

However, this formulation is problematic as it appears to presuppose the existence of a 'human' in order for the human/inhuman distinction to operate. This in turn raises questions of how the human is defined. As Andrew Norris has said:

> What, for instance, are we to do when we are dealing with agents or things that have not already been recognised as the bearers of rights? Here the reassertion of rights is simply not an option. We must decide whether a neomort – a body whose only signs of life are that it is 'warm, pulsating and urinating' – is in fact a human being at all, an agent or a thing (Norris 2005: 14).

This is a decision which Agamben has not explicitly engaged with, or attempted to answer directly.

This is not to say that Agamben's thought does not obliquely reference questions of birth, and unborn and the definition of life. Reading Aristotle's *De Anima*, Agamben notes that: "It is important to observe that Aristotle does not at all define what life is", but rather "merely divides it up in isolating the nutritive function and then orders it into a series of distinct and correlated faculties (nutrition, sensation, thought)" (Agamben 1999a: 231). In Aristotle, a generic term – life - is defined first by its minimal substance (plant life, the faculty of nutrition) and progressively complicated by the predication of a series of hierarchical faculties leading from the plant to the animal to the human soul (Cooper 2009: 144). Agamben's philosophy works in the reverse order to Aristotle's. He wants to dwell upon the irreducible substance that underlies all forms of life; the substance without which no organised form of life would be possible. This is where Aristotle locates the absolutely minimal, nutritive or vegetative life of the plant. Agamben reminds us that this minimal vegetative life must also be understood in temporal terms, as the first stage in the generation of human life, foetal life being the human equivalent of the plant within a classification of nature (Agamben 1999a: 231).

Despite relying on this underlying framework for his thought Agamben remains mute on the figure of potential life, and does not develop the connection between the foetus and vegetative life. This is curious at first glance, especially considering that Michel Foucault, whose work Agamben is so influenced by, did not shy away from discussing issues of reproductive rights and abortion (Deutscher 2008: 55-56; Foucault 1980: 56; Foucault 1988: 114). Yet Melinda Cooper argues that this is an entirely logical expression of his politics of witnessing. In *Remnants* he makes clear that the true witness can only ever be mute:

> What cannot be stated, what cannot be archived is the language in which the author succeeds in bearing witness to his incapacity to speak. In this language, a language that survives the subjects who spoke it coincides with a speaker who remains beyond it (Agamben 2002: 162).

The speaker "who remains beyond it" is the unborn. The true testimonial is one that bears witness to the "silent voice" (Agamben 2002: 129), "the "infant" in the etymological sense, a being who cannot speak" (Agamben 2002: 121), who remains in "a position even lower than that of children" (Agamben 2002: 113). To understand what Agamben means here by an infant in a position even lower than that of children, we need to explore the position of children in his writing.

It is true that Agamben makes references to infancy and children who have died without being baptised. On the former point, infancy is understood as a wordless, mute condition that precedes speech; infancy coexists with language and is expropriated by it in the constitution of the subject, which would be the ethical subject which lives its life as a 'how' (Mills 2008: 21). Catherine Mills explains it best – infancy is the experience from which the human subject emerges (Mills 2008: 22). Man constitutes himself as a speaking subject by falling away from the originary, transcendental experience of infancy, a sort of experience prior to linguistic appropriation but related to language (Agamben 2006: 55). Crucially, infancy is a beginning which constitutes the subject of experience and language, but this state does not refer to a biologically or developmentally inclined conception of subject formation:

> In-fancy is not a simple given whose chronological site might be isolated, nor is it like an age or a psychosomatic state which a psychology or a paleoanthropology could construct as a human fact independent of language (Agamben 2006: 4).

Human infancy is linked to the human potentiality which is language (Agamben 2006: 54). Infancy, for Agamben:

> [C]oexists in its origins with language – indeed, is itself constituted through the appropriation of it by language in each instance to produce the individual as subject (Agamben 2006: 55).

Yet if man must constitute himself as a speaking subject, how can this apply to the neomort? Again, Agamben does not answer this point.

On the point of unbaptised children, Agamben makes the point that those children would find their souls in Purgatory (Agamben 1995: 78). These souls would be subject to God's forgetfulness, but because they do not know God has forgotten them, so instead of being punished they are in a state of "natural felicity" (Agamben 1995: 78). Those souls in purgatory are not indicative of the unborn, but are a philosophical argument from Agamben contending that we need to reach that self-same state of grace, through the very 'how' of form-of-life. This could imply that those unbaptised children represent form-of-life, although again this is not a connection which is made. Notwithstanding this, the mention of young children without mentioning reproductive rights is telling.

Elsewhere in writing about infancy, Agamben has held out the child as an exemplary figure, a 'cipher' for form-of-life (Agamben 1995: 95-98). This should not be misunderstood, but nor should it be ignored. This claim does not mean that children necessarily live their lives as a form. Nor could it apply to the figure of the unborn (and it is not intended to apply to the unborn). Rather the idea of a child as a 'cipher' is important. To live one's life like a child is what Agamben sees as setting the stage for the politics to come. It is as if Agamben is channelling the words of Jesus in the Gospel of Matthew:

> Truly I tell you, unless you change and become like little children, you will never enter the kingdom of heaven. Therefore, whoever takes the lowly position of this child is the greatest in the kingdom of heaven. And whoever welcomes one such child in my name welcomes me.[1]

And in turn, Agamben would seem to disagree with Paul's approach:

> When I was a child, I talked like a child, I thought like a child, I reasoned like a child. When I became a man, I put the ways of childhood behind me.[2]

This is notable as Paul's corpus of work has greatly influenced Agamben's own thought. To live a life as a child (which is left undefined in terms of age) is to live one's life as a form. This is a phrase which is full of implied meaning. Agamben places great importance on the lives of children, without mentioning the politics of reproduction which would have played a role in their being born. Agamben also treats the event of birth as a threshold through which the child is not only separated from the unborn, but through which both figures occupy different spaces in his philosophy.

Whereas the child appears as the cipher for form-of-life, Melinda Cooper has cogently argued that there is a consistency across Agamben's work: the 'unborn' appears unequivocally as the 'tragic hero' of an age in which onto-theology is assumed to be irremediably in decline (Agamben 1991: 96). Cooper distinguishes between the born and the unborn. The child is a cipher, the unborn an exemplar. In *Language and Death*, the last volume where Agamben explicitly mentions the unborn, he argues that:

> Only ... not being born ... can overcome language and permit man to free himself from the guilt that is built up in the link ... between life and language. But since this is precisely impossible, since man is *born* (he has a birth and a nature), the best thing for him is to return as soon as possible whence he came, to ascend beyond his birth through the silent experience of death (Agamben 1991: 90).

For Cooper, Agamben's work places him "irresistibly" on the terrain of Roman Catholic debates about the unborn's status, although this is not admitted by Agamben. Cooper argues that Agamben's history and diagnosis of modern state violence is consistent with that of the Catholic Church. He adheres to the standard themes of late twentieth-century Catholic doctrine – the evocation of Auschwitz and state eugenics coupled with a denunciation of biomedicine, medical vegetative states, legal brain death and euthanasia. Agamben only differs in his political and ethical response to the presumed violence of the modern state, which consists in a radical refusal of all politics of rights, dignity or legal personhood, calling for "an ethics of

[1] Matthew 18: 3-5.

[2] 1 Corinthians 13: 11.

a form of life which begins where dignity ends" (Agamben 2002: 69). This would be a non-relational form-of-life.

For Cooper, Agamben renders the language of pure potentiality into the Christian idiom of the *gift of life*, asking what it would mean to conceive of life as the potential not-to-actualise:

> Contrary to the traditional idea of potentiality that is annulled in actuality, here we are confronted with a potentiality that conserves itself and saves in actuality. Here potentiality, so to speak, survives actuality and, in this way, *gives itself to itself* (Agamben 1999b: 184)

His writings on 'potentiality' and 'potential life' are clearly applicable to abortion debates, but Agamben has never acknowledged the potential connections between his writings and those of the Roman Catholic Church. Agamben's philosophy sets itself the 'impossible' task of rendering into language the experience of the 'silent scream':

> Philosophy, in its search for another voice and another death, is presented, precisely, as both a return to and surpassing of tragic knowledge; it seeks to grant a voice to the silent experience of the tragic hero and to constitute this voice as a foundation for man's most proper dimension (Agamben 1991: 90).

The "silent experience of the tragic hero" is the silent experience of the foetus. And for Cooper it is the 'impossible' task of rendering into language the voice of the unborn that leads Agamben to his solution of a theology in suspended animation (Cooper 2009: 155-156). How can we explain Agamben's silence on this question of the unborn?

Despite Agamben's statements and claims, the figure of form-of-life leaves open for debate the questions of when life (or form-of-life) starts, and the mother's relation to, and power over, the unborn child. The monad of form-of-life always communicates with others (Agamben 2016: 232). Forms-of-life are in contact but this consists in the inoperativity of every representation (Agamben 2016: 237). Despite Cooper's arguments, it is arguable as to whether form-of-life would apply to the unborn (although it would, in contrast, apply to the unborn child's mother). Cooper may be read as suggesting that the unborn in Agamben is, like with the Catholic Church, a being in need of protection. There are several arguments that indicate the unborn could not live its life as a form. Firstly, form-of-life is not able to recognize itself or be recognized, as the contact between monads is situated beyond every possible recognition and relation (Agamben 2016: 248). Agamben accepts that it is not possible to think of existence and a community beyond all relation, but the relationality that exists for form-of-life is of a different kind than that produced by apparatuses such as the law. In *Nudities* he claims:

> The desire to be recognised by others is inseparable from being human. Indeed, such recognition is so essential that, according to Hegel, everyone is ready to put his

> or her own life in jeopardy in order to obtain it. This is not merely a question of satisfaction or self-love; rather, it is only through recognition by others that man can constitute himself as a person (Agamben 2010: 46).

By seeking to explain contact as 'beyond' all possible recognition, Agamben can be read as proposing that forms of recognition are not enough to recognise form-of-life. Recognition (which as a cognitive ability is not something available to the unborn) is not beyond form-of-life; rather, the opposite is true. Next, Agamben mentions that a form-of-life is the most idiosyncratic aspect of everyone; their tastes, which safeguards its secret in the most impenetrable and insignificant way: "The subject who bears witness to its tastes, takes responsibility for the mode in which it is affected by its inclinations" (Agamben 2016: 231). Tastes are elements of an individual's personality, choices and being and therefore presuppose a certain level of cognitive development and cognitive ability. An adult could have tastes; a foetus does not.

In addition, the notion of 'others' remains indistinct. Who are these 'others'? Others are necessary for form-of-life to communicate with one another (Agamben 2016: 237). The ethical subject is the subject which constitutes itself in contact with a clinamen, an inclining from one toward another, which focuses on how it lives its life (Agamben 2016: 231). This contact presupposes an existing, thinking being. Agamben clearly states that each form-of-life, or monad, always already communicates with others (Agamben 2016: 232). This position implies that form-of-life must have the ability to communicate with others. It does not preclude a form-of-life which represents itself as a living mirror in a life which is not form-of-life – an example here may be a parent who represents themselves in their newborn child. However, if the 'other' is not able to represent itself as a living mirror in another, or if it is not possible to live a life as a how, then that other cannot be said to live its life as a form. The ethical subject *must* be one who has agency – the patient in a persistent vegetative state, for example, was described by Agamben as an example of *homo sacer* (Agamben 1998: 163-164). There remains an aporia in Agamben's thought on precisely these questions – forms of life which are not able to be forms-of-life. Agamben's silence on the question of reproductive rights and the position in his schema of the unborn means that form-of-life has a problematic construction, which can be illustrated through the lens of the UK's abortion laws.

6. ABORTION AND THE WOMAN AS BARE LIFE

Agamben's writings can lead to foetal life being considered (in anti-abortion contexts) as a form of politicised bare life exposed to sovereign violence (Deutscher 2008: 67). If foetal life is conceived as a form of *homo sacer*, then what has happened to the body of the woman? The woman's relationship with her foetus, and the right to abortion, is very difficult to reconcile with form-of-life. It is not

immediately clear how a woman seeking an abortion is not exercising a sovereign decision over bare life. This is the paradox of figuring the woman as a threatening and competing sovereign power over the foetus that is falsely figured as *homo sacer*: to do so is simultaneously to reduce the woman to a barer, reproductive life exposed to the state's hegemonic intervention as it overrides the woman erroneously figured as a "competing sovereign" exposing life. As she is figured as that which exposes another life, she is herself gripped, exposed, and reduced to barer life (Deutscher 2008: 67).

This is the consequence of what Catherine Mills has termed Agamben's 'gender-blindness' (Mills 2014: 114). This does not mean that there are no references to women in Agamben's work, but women are dealt with superficially, and questions of gender remain absent. Agamben does mention "the woman" as one of many social-juridical entities that supersede "the Marxian scission between man and citizen":

> The Marxian scission between man and citizen is thus superseded by the division between naked life [bare life] ... and the multifarious forms of life abstractly recodified as social-juridical entities (the voter, the worker, the journalist, the student, but also the HIV-positive, the transvestite, the porno star, the elderly, the parent, the woman) that all rest on naked life (Agamben 2000: 6-7).

This naked or bare life involves the separation of life and prevents it from cohering into a form-of-life (Agamben 2000: 6).

Deutscher argues that it is "surely fair" to name the woman's reproductive body as that which Agamben would prefer not to mention in these considerations of life (Deutscher 2008: 67). I suggest this is avoided precisely because such a figure would have to also rest on naked life, and equally would 'prevent' a form-of-life from cohering. The woman appears as a roadblock to the coming politics and form-of-life, rather than any kind of form-of-life in her own right. As a result Agamben's project overlooks sexual difference and questions relevant to a feminist reading (Ziarek 2008: 93), and is inhospitable to an interrogation of gender. In the words of Astrid Deuber-Mankowsky:

> As in all of *Homo Sacer* which turns centrally upon bare life, neither natality nor gender, neither sexuality not the relations of the sexes, neither the heterosexual character of the symbolic order and of political culture nor the interest of women in the reproduction of life is thematised. The entire sphere of the question of sexual difference ... is banned from Agamben's horizon (Deuber-Mankowsky 2002: 103).

In Mills's view, there is a long tradition of casting women as the privileged figures of ephemerality, unable to gain access to the universal, yet nevertheless instrumental in man's access to it. This is a tradition Agamben seems to be a part of. He does not offer an analysis of gender as part of his figurations of sexual fulfilment and happiness (Cavarero 1992: 32-47). This is the case with Agamben's reference to pornography, which has the promise to show "the utopia of a classless society"

(Agamben 1995: 73). The truth content of pornography is its claim to happiness (Agamben 1995: 73-74). In explaining this 'happiness', Agamben invokes the figure of a woman, stating that it is only in representing the pleasure of the woman on her face that pornography shows that the potential for happiness is present in every moment of daily life (Agamben 1995: 74). The woman remains central to our understanding the happy life, but is not a part of it herself.

I argue that this gender blindness is the reason why foetal life is not developed (as it logically should be) in relation to form-of-life. To engage with foetal life and questions of when life begins (and the rights which that life may have), has to involve engagement with the life of the mother. Quite apart from matters of philosophy, as a factual and biological matter the existences of the mother and the unborn are intertwined. As Penelope Deutscher has explained, there is a "conjoined malleability" in the status of pregnancy and of the woman attributed with decision-making. By this Deutscher means that women may be deemed capable of impeding life or revoking life or reversing its status (Deutscher 2017: 121). Women's status in relation to reproductivity means that they have an additional capacity as political beings which men lack. In Agamben's analysis, modern political humans bear the capacity to be reduced to bare life. But women can be exposed to a barer reproductive life, as they can be figured as a competing sovereign power over the foetus, with the latter acquiring the status of a pseudo *homo sacer* (Deutscher 2017: 127).

A paradigmatic example of this is shown through UK law, where the unborn foetus is not a person in law[3]. Despite this, the House of Lords (which before being replaced by the Supreme Court in 2009 was the highest court in the UK) has ruled that the foetus is 'neither a distinct person separate from its mother, nor merely an adjunct of the mother, but was a unique organism to which existing principles could not necessarily be applied'[4]. Neither lacking rights nor a full rights-bearing being, the foetus is nevertheless a *sui generis* form of life, which explains why – in the UK – there are a variety of legal and medical hurdles which need traversing before a woman can exercise her right to choose.

My argument regarding the shortcomings of form-of-life is illustrated even through those defences of Agamben's silence on the matter. Deutscher attempts to construct such an argument by arguing that those examples of bare life in Agamben's work are those which one could identify as having been human and then being stripped of that status – for example the PVS patient (Deutscher 2008: 57-58). Foetal life, as it is not situated at the threshold of depoliticization of previously politicised life, does not 'fit' Agamben's series of figures of bare life. Rather, Deutscher hypothesises, the foetus could represent the "zone of contested and intensified political stakes" surrounding the threshold between 'prelife' and nascent, human, rights-bearing life (Deutscher 2017: 58). Deutscher continues:

[3] *In re MB (Medical Treatment)* [1997] 2 FLR 426, 444 (CA).

[4] *Attorney General's Reference (No 3 of 1994)* [1998] AC 245 (HL).

> Thus the ambiguous politicised life least separable from some women's bodies happens to be a formation least appropriate for Agamben's analysis. An emergent foetus usually is not considered to have had a political, legal, or linguistic status subsequently suspended (Deutscher 2017: 58).

Even if we were to accept this argument on its face, it still means Agamben is silent as to the 'zone of contested political stakes' surrounding prelife and rights-bearing life. The foetus attracts legal protection and attention. Abortion is the zone of contested political stakes par excellence. UK abortion laws illustrate that zone, and key to the legal regimes are the roles of the woman and her doctor.

7. ABORTION IN THE UK

The UK has three separate legal systems – England and Wales, Scotland and Northern Ireland, with three separate legal regimes for regulating abortion. Abortion remains a criminal offence in England and Wales by way of a Victorian statute, the Offences Against the Person Act 1861 (OAPA)[5]. The abortion offences in the OAPA are contained in sections 58 and 59. Section 58 makes it a criminal offence to administer drugs or use instruments to procure an abortion and section 59 makes it a criminal offence to supply or procure drugs or any instrument for the purpose of procuring an abortion. Both offences carry a maximum sentence of life imprisonment, and both would cover actions by the woman and a doctor seeking to end a woman's abortion[6]. The 1861 provisions made no exception for therapeutic abortion and make no distinction between abortions which occur early or late in pregnancy (Sheldon 2016a: 338-39). The OAPA does not apply in Scotland, where abortion remains an offence at common law (Brown 2015: 30). Unlike the OAPA, the Scots common law recognised the lawfulness of therapeutic terminations (Brown 2015: 32, citing Baird 1975).

The OAPA is not the only statute covering abortion in the UK. The Infant Life (Preservation) Act 1929 (ILPA), which applies in England and Wales, prohibits the intentional destruction of 'the life of a child capable of being born alive ... before it has an existence independent of its mother', unless this is done "in good faith for the purpose only of preserving the life of the mother"[7]. There is equivalent legislation in Northern Ireland[8]. Interpreting the 1929 Act, the Court of Appeal made clear that a termination would be permitted if it preserved the life of the mother; and it would be lawful to prevent the woman becoming a mental or physical wreck[9]. The 1929 Act does not apply in Scotland; it is unnecessary in Scotland as the High

5 See *R (Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin) [332] (Munby J).

6 Offences Against the Person Act 1861, 24 & 25 Vict, ss.58-59 (UK).

7 Infant Life (Preservation) Act 1929, 19 & 20 Geo.5 c.34, s.1(1).

8 Criminal Justice (Northern Ireland) Act 1945 c.15, s.25(1) (Northern Ireland).

9 *R v Bourne* (1939) 1 KB 687, 694 (CA).

Court of Justiciary has 'inherent power to extend the scope of existing crimes to cover unusual situations and, possibly, to create new crimes' (Sheldon 2016a: 340n35; Norrie 1985).

The Abortion Act 1967 created exceptions to the statutory abortion offences in England and Wales, and the common law offences in Scotland. It was not extended to Northern Ireland. There are four such exceptions. Each requires a decision, and agreement between, the woman and her doctors. Section 1(1)(a) states that an abortion can be carried out before the twenty-fourth week if the continuation of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family. Section 1(1)(b) allows abortions where doing so would prevent 'grave permanent injury' to the physical or mental health of the patient. Section 1(1)(c) allows abortions where the pregnancy involves risk to the life of the pregnant woman. Section 1(1)(d) allows abortions where there is a 'substantial risk' that the child would be born seriously handicapped, either physically or mentally[10]. The 1967 Act was never originally intended to allow for "abortion on request"[11]. However today the Act has *de facto* legalised abortion in Great Britain (Sheldon 2016a: 343).

The Abortion Act was crafted in such a way to place medical professionals, rather than the woman, at the centre of the procedure. Two 'medical practitioners' must be of the good faith opinion that an abortion should be carried out, after a woman makes a request for an abortion. A good faith opinion means that the doctors have not been dishonest or negligent in forming that opinion. The Act allows doctors to take account of the pregnant woman's actual or reasonably foreseeable environment when making a decision about the impact of the continuance of a pregnancy on a woman's health. This would include the woman's social and financial circumstances.

The requirement for two medical professionals was intended as a check on rogue doctors (Sheldon 2016b: 289). In practice it means that doctors in Great Britain must endorse and agree with a woman's decision to terminate her pregnancy. The Act deliberately creates a broad area of clinical discretion in this area (Sheldon 2016a: 343); doctors were argued to be in the best position to determine when a termination was appropriate, or if necessary, to persuade and support a woman to maintain a pregnancy[12]. Such discretion in medical matters is not unusual – in

10 Abortion Act 1967, s.1(1), as amended by the Human Fertilisation and Embryology Act 1990 c.37, s.37(1).

11 David Steel MP, HC Deb, 22 July 1966, vol. 732, col. 1075.

12 David Steel MP, HC Deb, 22 July 1966, vol. 732, col. 1076; David Steel MP, HC Deb, 13 July 1967, vol. 750, col. 1348.

previous cases English courts have awarded professionals such as doctors a wide range of discretion to judge the competence of the actions of peers[13].

Northern Ireland was always the polity which had the strictest abortion laws in the UK, being governed by the OAPA and the Criminal Justice (Northern Ireland) Act 1945. In 2018, the UK Supreme Court ruled that the abortion laws in Northern Ireland violated Article 8 of the European Convention on Human Rights, as they did not allow abortion in cases of fatal foetal abnormality, rape and incest[14]. The UK Parliament's response was section 9(2) of the Northern Ireland (Executive Formation etc) Act 2019. This repealed the OAPA offences in Northern Ireland and mandated that the UK Government implement the recommendations found in the UN Committee on the Elimination of Discrimination against Women Report on abortion in Northern Ireland, published in 2018 (UN CEDAW 2018). This Report recommended that the UK adopt legislation to provide for abortion in Northern Ireland in the cases of a threat to the pregnant woman's physical or mental health, rape and incest, and severe and fatal foetal abnormality. The UK Government did not wish to include rape, incest or other sexual crimes as express criteria for abortions to occur as it would require the victim of sexual crimes to provide evidence or prove the connection between the sexual offence and the pregnancy. Such an approach would result in a legal framework which excludes some victims of sexual crime who are unable to evidence that the pregnancy is a result of such a crime. By March 2020, the UK Government will regulate for unconditional abortion in Northern Ireland in the first 12 or 14 weeks of pregnancy, with similar exceptions that exist in the Abortion Act operating after that unconditional period.

Central to the exceptions in the Abortion Act and the new laws in Northern Ireland is a decision to terminate the pregnancy made by the woman. In Northern Ireland this decision is unconditionally the woman's in the first few months of pregnancy. In Great Britain this decision must be endorsed by her doctors. Agamben clearly states that "sovereign is he who decides on the value or nonvalue of life as such" (Agamben 1998: 142).

This statement must be read, in my view, alongside the claim that form-of-life, as a monad, always already communicates with others, insofar as it represents them in

[13] See *Bolam v Friern Health Management Committee* [1957] 1 WLR 582 (QB); *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL). Most recently in 2015 the Supreme Court modified the *Bolam* and *Bolitho* tests to contend that doctors need to disclose risks which "a reasonable person in the patient's position" would be likely to attach significance to the risk: *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [87] (Lord Kerr and Lord Reed). Yet it is still a question of medical judgment as to when a doctor judges a reasonable patient would attach significance to any risk.

[14] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland); Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion)* [2018] UKSC 27 [1]–[3] (Lady Hale); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5; 213 UNTS 221, art. 8.

itself, as in a living mirror (Agamben 2016: 232). The monad is developed from Leibniz's work, where he referred to them as "perpetual living mirror(s) of the universe". For Leibniz, all matter is connected together, so each body is affected by bodies which are in contact with it, as well as bodies adjoining itself as well (Leibniz 1898: 251). Agamben's monadology is left undeveloped in *The Use of Bodies*. However elsewhere in Agamben we can piece together what this monadic existence involves. We read that form-of-life uses-itself by constituting and expressing itself through an infinite series of modal oscillations (Agamben 2016: 165, 172). These oscillations are generated by the conduct of the singular being itself, through its being in language (Agamben 2016: 167; Agamben 1993: 19).

Therefore forms-of-life as living mirrors will represent themselves in each other through the very acts of being in language. This means that it would not just be a foetus, or the unborn, that would be unable to represent themselves through being in language. The individual lacking capacity or competence, the comatose patient, the infant unable to speak, an individual with dementia, the PVS patient – all lack the ability to represent themselves. This can be supported by Agamben's injunction that form-of-life itself that has sovereign power over its own constitution:

> Potentiality (in its double appearance as potentiality to and as potentiality not to) is that through which Being founds itself *sovereignly*, which is to say, without anything preceding or determining it ... other than its own ability not to be (Agamben 1998: 46).

A being unable to act sovereignly would not be living its life as a form.

We can therefore distinguish between a sovereign decision which determines whether life has value or not, and a sovereignty which founds Being through its own potential to be and not to be. The former decides which life is worth living; the latter is a how, a way to live one's life.

But here we encounter a paradox. A woman realises her form-of-life through living her life as a how. Yet her reproductive decisions over whether to keep or terminate a pregnancy, whether to use contraception, whether to have children or not, appear (under Agamben's schema) to be sovereign decisions over which potential lives are to exist or not. And it should be recalled that Agamben pronounces potentiality's negation 'evil':

> [The] only ethical experience (which, as such, cannot be a task or a subjective decision) is the experience of being (one's own) potentiality, of being (one's own) possibility – exposing, that is, in every form one's own amorphousness and in every act one's own inactuality. The only evil consists instead in the decision to remain in a deficit of existence, to appropriate the power to not-be as a substance and a foundation beyond existence or to regard potentiality itself, which is the most proper mode of human existence, as a fault that must always be repressed (Agamben 1993: 44; Prozorov 2014: 184-185).

Regarding potentiality as a fault that must be repressed – does this not imply that the most paradigmatic example of potential life – the unborn – should not be repressed? Agamben never deals with this issue directly, but it is hinted towards:

> [T]here is in effect something that humans *are and have to be*, but this something is not an essence or properly a thing: it is the simple fact of one's own existence as possibility or potentiality (Agamben 1993: 43).

If the clinamen and potential life of the unborn means that the woman cannot terminate a pregnancy, then Agamben's thought is, like Cooper has argued, definitively pro-life. The woman has another life inside her. Her decisions will impact another being whose organic life is not in question but whose rights are unclear and variable.

If this position is accepted, then it must also be true that it is not possible for a woman to live her life as a form. This is because, in a pro-life reading, a woman would not be able to exercise any reproductive choices which would involve a decision over potential life. Excising reproductive choice from a woman's form of life would severely curtail a woman's freedom. The woman is an ephemeral figure, resting on naked life, unable to live her life as a how because she is unable to exercise a decision over a fundamental part of being a woman – how and whether to reproduce. Her sovereign decision creates bare life. Agamben implies *any* abortion or contraceptive decision other than one which protects the life of the unborn makes the woman the arbiter of the creation of *homo sacer*. The woman becomes equivalent to the concentration camp guard, an abstract figure of oppression.

However, the paradoxes surrounding abortion do not end there. In Great Britain, a woman's decision to seek a termination must be agreed to by doctors. The procedure is, in turn, regulated by the State through legislation. The woman is subject to the decisions of the State and the doctors who can pass judgment on whether she has satisfied the requirements to be allowed an abortion, and what value the life of the foetus has. As Deutscher explained, the State and the woman exercise competing sovereign decisions over the value of life. The woman is both bare life *and* sovereign. Form-of-life simply cannot account for this complex situation.

8. CONCLUSION

This article has attempted to interrogate Agamben's form-of-life with respect to the liminal figure of the unborn. Form-of-life can provide a template for fully formed beings to live their lives. However, it struggles to account for 'liminal' figures – the unborn human is one of them. Living a life as a 'how', and as a form, is not easy to apply to the unborn. A form-of-life has tastes, and constitutes itself in contact with a clinamen, communicating with others, which focuses on how it lives its life. This subject of form-of-life, given how Agamben describes it, must be one who has

agency. The unborn is certainly a form of life, but I have argued it cannot be considered (based on Agamben's own argument) a form-of-life.

What is more, under Agamben's philosophy, the woman is difficult to separate from the figure of the sovereign exercising a decision over the value of life as such. For Agamben, all lives are potentially reducible to bare life after a sovereign decision. Yet following Agamben's thought, women (and not men) also are paradoxically a threatening and competing sovereign power. This is because a woman, in exercising decision-making over her reproductivity, can decide on the value of the life of the foetus as such. I should stress that this conclusion is the logical result of Agamben's overlooking of sexual differences and feminism in his work. The UK's abortion laws show how the pregnant woman, and her doctors, exercise control and a decision over whether a pregnancy is or is not to continue.

Furthermore, Agamben's focus on 'potentiality', language and witnessing place him, as Melinda Cooper has argued, squarely with the Catholic Church in defending life. Agamben adheres to the standard themes of contemporary Catholic doctrine, including the denunciation of biomedicine and euthanasia, and his writings on potentiality are clearly applicable to abortion debates. The woman remains an ephemeral figure in these writings on potentiality, and in failing to engage with reproductive rights on any level, Agamben's form-of-life remains a cornerstone of a pro-life philosophy, but a pro-life philosophy which is not admitted to by the author himself.

BIBLIOGRAPHY

Agamben, G. 1991. *Language and Death: The Place of Negativity*. Translated by K.E. Pinkus and M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1993. *The Coming Community*. Translated by M. Hardt. Minneapolis: University of Minnesota Pres.

Agamben, G. 1995. *Idea of Prose*. Translated by M. Sullivan and S. Whitsitt. New York: State University of New York Press.

Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999a. *Absolute Immanence*. In *Potentialities: Collected Essays in Philosophy*, ed. by. D. Heller-Roazen, Stanford: Stanford University Press, pp. 220-241.

Agamben, G. 1999b. On Potentiality. In *Potentialities: Collected Essays in Philosophy*, ed. by. D. Heller-Roazen, Stanford: Stanford University Press, pp. 177-184.

Agamben, G. 2000. *Means Without End: Notes on Politics*. Translated by C. Casarino and V. Binetti. Minneapolis: University of Minnesota Press.

Agamben, G. 2001. *For a Philosophy of Infancy*. In «Public», 21, pp. 120-122.

Agamben, G. 2002. *Remnants of Auschwitz: The Witness and the Archive*. Translated by D. Heller-Roazen. New York: Zone Books.

Agamben, G. 2004. *The Open: Man and Animal*. Translated by K. Attell. Stanford: Stanford University Press.

Agamben, G. 2005. *La potenza del pensiero*. In G. Agamben. *La potenza del pensiero: Saggi e conferenze*. Vicenza: Neri Pozza. pp. 273-168.

Agamben, G. 2006. *Infancy and History: On the Destruction of Experience*. Translated by L. Heron. New York: Verso.

Agamben, G. 2007. *Profanations*. Translated by J. Fort. New York: Zone Books.

Agamben, G. 2009. *What is an Apparatus? and Other Essays*. Translated by D. Kishik and S. Pedatella. Stanford: Stanford University Press.

Agamben, G. 2010. *Nudities*. Translated by D. Kishik and S. Pedatella. Stanford: Stanford University Press.

Agamben, G. 2013. *The Highest Poverty: Monastic Rules and Form-of-Life*. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2016. *The Use of Bodies*. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2017. *The Fire and the Tale*. Translated by L. Chiesa. Stanford: Stanford University Press.

Agamben, G. 2018. *Karman: A Brief Treatise on Action, Guilt and Gesture*. Translated by A. Kotsko. Stanford: Stanford University Press.

Aristotle. 1984a. *Metaphysics*. In *The Complete Works of Aristotle, Volume Two*, ed. by. J. Barnes. Princeton: Princeton University Press.

Aristotle. 1984b. *On the Soul*. In *The Complete Works of Aristotle, Volume One*, ed. by. J. Barnes. Princeton: Princeton University Press.

Attell, K. 2009. *Potentiality, Actuality, Constituent Power*. In «Diacritics», 39, pp. 35-53.

Baird, D. 1975. *Induced Abortion: Epidemiological Aspects*. In «Journal of Medical Ethics», 1, pp. 122-126.

Bordeleau, E. 2017. *Initiating Life: Agamben and the Political Use of Intimacy*. In «The Journal of Speculative Philosophy», 31.3, pp. 481-492.

Brown, J. 2015. *Scotland and the Abortion Act 1967: Historical Flaws, Contemporary Problems*. In «Juridical Review», 2, pp. 29-50.

Cooper, M. 2009. *The Silent Scream – Agamben, Deleuze and the Politics of the Unborn*. In *Deleuze and Law*, ed. by. R. Braidotti, C. Colebrook and P. Hanafin. London: Palgrave Macmillan, pp. 142-162.

Cavarero, A. 1992. *Equality and Sexual Difference: Amnesia in Political Thought*. In «Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity», ed. by G. Bock and S. James. New York: Routledge. pp. 32-47.

Deuber-Mankowsky, A. 2002. *Homo Sacer, das bloße Leben und das Lager*. In «Die Philosophin», 25, pp. 95-115. English translation by C. Diehl available at https://adm.blogs.ruhr-uni-bochum.de/publikationen.

Deutscher, P. 2008. *The Inversion of Exceptionality: Foucault, Agamben, and "Reproductive Rights*. In «South Atlantic Quarterly», 107.1, pp. 55-70.

Deutscher, P. 2017. *Foucault's Futures: A Critique of Reproductive Reason*. New York: Columbia University Press.

Foucault, M. 1980. *Body/Power*. In: *Power/Knowledge: Selected Interviews and Other Writings. 1972-1977*, ed. by C. Gordon, New York: Pantheon Books, pp. 55-62.

Foucault, M. 1988. *Power and Sex*. In *Politics, Philosophy, Culture: Interviews and Other Writings, 1977-1984*, ed. by A. Sheridan, New York: Routledge, pp. 110-124.

Foucault, M. 2003. *Society Must Be Defended: Lectures at the Collège de France, 1975-76*. Translated by D. Macey. New York: Picador.

Keown, J. 1988. *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982*. Cambridge: Cambridge University Press.

Leibniz, G W. 1898. *Monadology*. Oxford: Oxford University Press.

Mills, C. 2008. *Playing with Law: Agamben and Derrida on Postjuridical Justice*. In «South Atlantic Quarterly», 107.1, pp. 15-36.

Mills, C. 2014. *The philosophy of Agamben*. London: Routledge.

Norrie, K. 1985. *Abortion in Great Britain: One Act, Two Laws*. In «Criminal Law Review», pp. 475-488.

Norris, A. 2005. *Introduction: Giorgio Agamben and the Politics of the Living Dead*. In *Politics, Metaphysics and Death: Essays on Giorgio Agamben's "Homo Sacer"*, ed. by A. Norris. Durham, NC: Duke University Press, pp. 1-30.

Prozorov, S. 2014. *Agamben and Politics: A Critical Introduction*. Edinburgh: Edinburgh University Press.

Prozorov, S. 2016. *Agamben, Badiou and Affirmative Biopolitics*. In *Agamben and Radical Politics*, ed. by D. McLoughlin. Edinburgh: Edinburgh University Press, pp.165-188.

Seshadri, L. 2014. *Agamben, the Thought of Sterēsis: An Introduction to Two Essays*. In «Critical Inquiry», 40, pp. 470-479.

Sheldon, S. 2016a. *The Decriminalisation of Abortion: An Argument for Modernisation*. In «Oxford Journal of Legal Studies», 36, pp. 334-365.

Sheldon, S. 2016b. *British Abortion Law: Speaking from the Past to Govern the Future*. In «Modern Law Review», 79, pp. 289-316.

UN Committee on the Elimination of Discrimination Against Women (CEDAW). 2018. *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 23 February 2018, CEDAW/C/OP.8/GBR/1, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fOP.8%2fGBR%2f2&Lang=en.

Vacarme. 2010. *"I am sure that you are more pessimistic than I am ...": An interview with Giorgio Agamben*. In «Rethinking Marxism», 16.2, pp. 115-124.

Ziarek, E. 2008. *Bare Life on Strike: Notes on the Biopolitics of Race and Gender*. In «South Atlantic Quarterly», 107.1, pp. 89-106.

235 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 235-246
ISSN: 1825-5167

MIND YOUR MANNERS. AGAMBEN AND PHISH

SERGEI PROZOROV
Department of Social Science and Philosophy
University of Jyväskylä
sergei.prozorov@jyu.fi

ABSTRACT
In the final volume of his Homo Sacer series Giorgio Agamben develops the concept of destituent power, a power that unworks itself in every constitution and renders itself inoperative in its every operation. This concept helps elucidate Agamben's more enigmatic notion of form-of-life. Whereas the power of sovereign biopolitics is constitutive, i.e. constituting a determinate actual bios out of the indefinite potentialities of zoe, form-of-life exemplifies the power of rendering actual and determinate forms inoperative or destitute. Rather than attempt to devise a 'proper' form of life, Agamben seeks to free life from the gravity of all tasks or vocations imposed on it by privileged forms. What matters to Agamben is less the form itself but rather the manner, in which it is lived. Whereas style designates a consistent model that defines a form of life in its recognizable identity, manner refers to a failure or refusal to fully appropriate or identify with this style. The article traces the development of the idea of form-of-life in Agamben's work, discusses the ontological implications of Agamben's argument in The Use of Bodies and concludes by discussing the American jam band Phish as the paradigm of Agamben's form-of-life.

KEYWORDS
Giorgio Agamben, power, subjectivity, style, manner

1. INTRODUCTION

In *The Use of Bodies*, the final volume of his *Homo Sacer* series, Giorgio Agamben develops the concept of destituent power, a power that unworks itself in every constitution and renders itself inoperative in its every operation. This concept helps elucidate Agamben's enigmatic idea of form-of-life, which he has developed since the early 1990s. Understood in destituent terms, form-of-life is diametrically opposed to the constitutive power of sovereign biopolitics that negates the indefinite possibilities of *zoe* in constructing a determinate and actual form of *bios*. In contrast, the power that defines form-of-life renders these actual and determinate forms inoperative or destitute, restoring to them their potentiality (see Kishik 2012; Prozorov 2014).

This understanding of form-of-life has important ethico-political implications. Rather than attempt to devise anything like a proper form of life, to be affirmed, defended or implemented as a matter of a political project, Agamben seeks to free life from the *gravity* of all tasks or vocations imposed on it by such proper and privileged forms: no life has to be in a certain form and no form must be actualized in life. This entails an important shift in the ethico-political discourse from the more substantive consideration of the forms of life in question towards the manner in which they are lived. In this article we shall probe Agamben's distinction between style and manner in order to illuminate the destituent character than defines form-of-life. Whereas style for Agamben refers to a more or less consistent, recognizable and repeatable model or identity, manner pertains to the deviation from this model or identity that precludes one's full identification with it. It is this deviation, however slight and imperceptible, that introduces an element of destitution into the style, opening it to new possibilities of use.

Our argument in this article will unfold in three steps. We shall first trace the development of the notion of form-of-life in Agamben's key works, culminating in the analysis of destituent power in *The Use of Bodies*. We shall then address the ontological implications of the move towards the destituent understanding of form-of-life, tracing the way Agamben endows the apparently banal dimension of lifestyle, habit, fashion, etc. with an ontological significance, as being ends up thoroughly dispersed in its manners. Thirdly, we discuss Agamben's recent distinction between style and manner and address the question of the specifically destituent manner that defines a form-of-life. Following Agamben's own methodological precepts (Agamben 2009a), we seek to produce a paradigm of this destituent manner. Agamben's own paradigms are famously hyperbolic and extreme, which has led to the misunderstanding of many of his insights, e.g. the state of exception illustrated by the Roman figure of homo sacer or the idea of potentiality illustrated by Melville's Bartleby (see Prozorov 2014: 108-112; Whyte 2009; Passavant 2007). Yet, particularly given Agamben's shift of focus towards the rather more mundane realm of habits, fashions, lifestyles in *The Use of Bodies*, more familiar and less eccentric paradigms may be in order. Thus, in the final section of this article we shall offer the American jam band Phish as the paradigm of Agamben's form-of-life, in which 'destitution coincides without remainder with constitution, [and] position has no other consistency than in deposition' (Agamben 2016: 275).

2. FORM OF LIFE BETWEEN CONSTITUTION AND DESTITUTION

The concept of form-of-life remains one of the more elliptic and elusive concepts in Agamben's work. At the end of the first volume of the *Homo Sacer* series, this concept is introduced as a resolution of the problem of the inclusive exclusion of bare life into the political order that defines the logic biopolitical sovereignty.

> Just as the biopolitical body of the West cannot be simply given back to its natural life in the oikos, so it cannot be overcome in a passage to a new body – a technical body or a wholly political or glorious body – in which a different economy of pleasures and vital functions would once and for all resolve the interlacement of *zoe* and *bios* that seems to define the political destiny of the West. This biopolitical body that is bare life must itself instead be transformed into the site for the constitution and installation of a form of life that is wholly exhausted in bare life and a *bios* that is only its own *zoe* (Agamben 1998: 188).

While biopolitical sovereignty operates by capturing and separating bare life from the positive forms of bios, Agamben makes the opposite move of articulating *zoe* and *bios* into a new figure, in which 'it is never possible to isolate something like naked life' (Agamben 2000: 9). While bare life was obtained by the negation of *zoe* within *bios*, this articulation of *zoe* and *bios* produces a new unity, which Agamben calls *form-of-life*, the hyphenation highlighting the *integrity* of this figure, in which life and its form are inseparable (Agamben 2000: 11).

In the *Kingdom and the Glory*, Agamben elaborates this notion of the form-of-life through an engagement with the theological idea of 'eternal life' (*zoe aionios*). In Pauline messianism 'eternal life' does not refer to a hypothetical extension of life indefinitely, but rather designates a specific quality of life in the messianic time, characterized by the becoming-inoperative of every determinate identity or vocation, which now appear in the suspended form of the 'as not' (*hos me*) – the notion Agamben addressed at length in *The Time that Remains* (2005). "Under the 'as not', life cannot coincide with itself and is divided into a life that we live and a life for which and in which we live. To live in the Messiah means precisely to revoke and render inoperative at each instant every aspect of the life that we live and to make the life for which we live, which Paul calls 'the life of Jesus', appear within it" (Agamben 2011: 248). In this reading, eternal life has nothing to do with the afterlife but is rather a way of living *this* life that renders inoperative all its specific forms of *bios*, its functions, tasks and identities.

Agamben then proceeds from the theological to the philosophical context to elaborate this figure of eternal life in terms of the Spinozan idea of *acquiescentia* (self-contentment), "the pleasure arising from man's contemplation of himself and his power of activity" (Spinoza cited in Agamben 2011: 250). In Agamben's interpretation, it is precisely this contemplation of one's own power that articulates inoperativity and potentiality, opening one's existence to a free use (see Chiesa and Ruda 2011).

> [The] life, which contemplates its (own) power to act, renders itself inoperative in all its operations, and lives only (its) livability. In this inoperativity the life that we live is only the life through which we live: only our power of acting and living. Here the *bios* coincides with the *zoe* without remainder. Properly human praxis is sabbatism that, by rendering the specific functions of the living inoperative, opens them to possibility (Agamben 2011: 251).

Insofar as this 'sabbatical' life renders all positive forms of *bios* inoperative, it coincides with *zoe*, yet insofar as *zoe* is no longer negated as a foundation of *bios*, it does not take the degraded form of bare life. Rather than reduce political life to a pseudo-natural life through acts of dehumanization, the 'eternal life' of contemplation affirms the potentiality of the human being and thus functions as a "[metaphysical] operator of anthropogenesis, liberating the living man from his biological or social destiny, assigning him to that indefinable dimension that we are accustomed to call 'politics'. The political is neither a *bios* nor a *zoe*, but the dimension that the inoperativity of contemplation, by deactivating linguistic and corporeal, material and immaterial praxes, ceaselessly opens and assigns to the living" (Agamben 2011: 251). What is eternal about this 'eternal life' is then evidently not its span, but rather the excess of potentiality over actuality that is freed when the actual positive forms of life are rendered inoperative in the mode of contemplation.

In *The Use of Bodies* these themes of deactivation, inoperativity and potentiality are elaborated under the rubric of *destituent power*. Whereas the power of sovereign biopolitics is *con*-stitutive, i.e. producing a determinate actual *bios* out of the indefinite potentialities of *zoe*, form-of-life exemplifies the power of rendering actual and determinate forms *de-stitute*, restoring to them their potentiality (Agamben 2016: 207-213, 263-279). Instead of the biopolitical apparatus, in which life was fractured into the unqualified *zoe*, presupposed and negated in the name of the attainment of the political life of *bios*, we end up with a life that generates its forms in its own living and which forms itself to enjoy its own living, a life that is inseparable from the form it takes. "It is generated in living and for that reason does not have any priority, either substantial or transcendental, with respect to living. It is only a manner of being and living, which does not in any way determine the living thing, just as it is in no way determined by [the living thing] and is nonetheless inseparable from it" (Agamben 2016: 224). Life forms itself in myriad modes and does not coincide with any of its specific forms, since it is present in all of them. Whatever form life takes, it retains within it the potential to be otherwise and thereby brings an element of destitution into its every constitution and renders inoperative its every operation.

3. FROM BEING THROWN TO BEING CARRIED

Agamben's development of the idea of form-of-life throughout the *Homo Sacer* project may be further illuminated in the context of his continuous engagement with Heidegger's ontology. Indeed, the first formulation of form-of-life in *Homo Sacer* began with a parallel between the opposition between *bios* and *zoe* and the Heideggerian distinction between essence and existence: "Today *bios* lies in *zoe* exactly as essence, in the Heideggerian definition of Dasein, lies in existence" (Agamben 1998: 188). If the essence of the human is unpresentable in terms of

positive predicates ('what one is') but consists in the sheer facticity of its existence ('that one is'), then the form of *bios* proper to the human is indeed its own *zoe*, whose sheer facticity is no longer the negated foundation of bios but rather its entire content, there being no other form, essence, task or identity imposed on it. What Agamben calls form-of-life is then "a being that is its own bare existence, [a] life that, being its own form, remains inseparable from it" (Agamben 1998: 188).

While the discussion in *Homo Sacer* did not go beyond these remarks on this parallel, in *The Use of Bodies* Agamben chooses to distance his idea of form-of-life from Heideggerian ontology. He argues that despite Heidegger's affirmation of possibility as the constitutive aspect of Dasein, his figure of Dasein nonetheless remained stuck with or riveted to its being-there, its thrownness which it had to assume as a task. In contrast to this grave pathos of being-consigned, which Agamben himself relied on in *The Remnants of Auschwitz* to theorize shame as the structure of subjectivity (Agamben 1999b: 87-134), Agamben's own modal ontology rather recalls the para-existential ontology developed by Heidegger's student, Oskar Becker. Against the unwarranted privileging of being-thrown in Heidegger, Becker affirmed a light and adventurous experience of "being-carried" (*Getragensein*): thrown as Dasein might be, it does not land irrevocably in some determinate 'there' but is carried away in the very throw itself (Agamben 2016: 189-91).

Similarly, for Agamben life is never stuck in a form it must assume but is rather carried by it, when we adopt or uphold a particular form, or carried away from it, when we withdraw or recoil from a form we find oppressive or obscene. In his early critique of Heidegger Emmanuel Levinas (1993) similarly problematized Heidegger's figure of being as the inescapable, something we are stuck with and have to be. In his *Reflections on the Philosophy of Hitlerism* (1990) he also addressed the political implications of this ontological standpoint, which consist in founding political community and praxis not on the possible but on the necessary, the given and the inescapable. Levinas's own account of ethics as first philosophy is rather marked by the exigency of escaping the inescapable, which requires breaking outside of ontology as the realm of the necessary (Levinas 1998: 3-20). In contrast, Agamben seeks to redefine the ontological domain itself as that of movement rather than substance. It is not a matter of escaping being but of being itself as escape, as the movement from one form of life to the other, of being carried and carried away at one and the same time.

This ontological shift explains Agamben's renewed attention to the domain that is usually seen as unworthy of philosophical attention, i.e. the realm of lifestyle, habit, fashion and taste, in which life is carried from one form to another. Rather than treat lifestyle in strictly aesthetic terms, Agamben proposes to reinscribe it in terms of ontology and ethics that, moreover, are found to coincide in it. Just as Agamben's 'modal ontology' approaches being as nothing other than its

modifications, so his ethics has its entire content in the manifold tastes, habits, manners or styles that comprise the subject's forms of life:

> It is necessary to decisively subtract tastes from the aesthetic dimension and rediscover their ontological character, in order to find in them something like a new ethical territory. It is not a matter of attributes or properties of a subject who judges, but of the mode in which each person, in losing himself as subject, constitutes himself as form-of-life. The secret of taste is what form of life must solve, has always already solved and displayed. If every body is affected by its form-of-life as by a clinamen or a taste, the ethical subject is that subject that constitutes itself in relation to this clinamen, the subject who bears witness to its tastes, takes responsibility for the mode in which it is affected by its inclinations. Modal ontology, the ontology of the how, coincides with an ethics (Agamben 2016: 231).

This is not a new theme in Agamben's work, as he dealt with the ontological status of habits as early as *Language and Death* and discussed manner and taste as key concepts of politics and ethics in *The Coming Community* (Agamben 1991: 91-98; Agamben 1993: 27-29, 63-65). What is novel is the centrality these questions assume at the end of the *Homo Sacer* project. If the analysis of sovereignty and biopolitics in the first volumes critically targeted the confluence of ontology and politics, whereby e.g. the logic of sovereignty corresponded to the Aristotelian doctrine of potentiality, and the inclusive exclusion of bare life in the state of exception corresponded to the relationship between existence and essence in ontology (Agamben 1998: 39-48, 182), the final volume is concluded by articulating ontology and ethics in an affirmative vision of form-of-life:

> Just as in ethics character expresses the irreducible being-thus of an individual, so also in ontology what is in question in mode is the 'as' of being, the mode in which substance is its modifications. The mode in which something is, the being-thus of an entity is a category that belongs irreducibly to ontology and to ethics (which can also be expressed by saying that in mode they coincide). In this sense, the claim of a modal ontology should be terminologically integrated in the sense that, understood correctly, a modal ontology is no longer an ontology but an ethics (on the condition that we add that the ethics of modes is no longer an ethics but an ontology) (Agamben 2016: 174).

It is this articulation of ontology and ethics that inserts the hyphens into the syntagm 'form of life', transforming something utterly trivial into a highly specific experience that nonetheless remains available to all: "All living beings are in a form of life, but not all are a form-of-life" (Agamben 2016: 277). Agamben repeatedly emphasizes that it is not a matter of offering some specific, new, hitherto unheard of practice as an *alternative* to the existing or predominant forms: where would it come from and what good would it do? "It is not a matter of thinking a better or more authentic form of life, a superior principle, or an elsewhere that suddenly arrives at forms of life and factical vocations to revoke them and render them inoperative. Inoperativity is not another work that suddenly arrives and works to deactivate and depose them: it coincides completely and constitutively with their destitution, with

living a life" (Agamben 2016: 277). Instead, it is a matter of adopting a different perspective on something entirely familiar and banal - quite simply, our habits, hobbies, tastes, manners, quirks, etc. To constitute a form-of-life out of a form of life we must not abandon any of them for some great unknown, but rather live these very familiar forms otherwise than we have tended to. In other words, what is affirmed is not any specific form but only the *manner* in which any form whatsoever could be lived.

In *The Fire and The Tale* Agamben contrasts manner and style in the following way: "In any good writer, in any artist, there is always a manner that takes its distance from the style, a style that disappropriates itself as manner" (Agamben 2017: 9). Similarly, in *The Use of Bodies* style marks the "most proper trait" of a poetic gesture and manner "registers an inverse demand for expropriation and non-belonging" (Agamben 2016: 86-87). If style refers to a consistent model that defines a form of life in its recognizable and repeatable identity, manner consists in a deviation from this model that introduces into a style a modicum of deactivation or destitution. It is clear that the aspects that Agamben discusses under the rubric of form-of-life cannot be found on the level of style but pertain only to the level of manner, in which the style in question is carried along by a living being in idiosyncratic and unpredictable ways.

It is of course possible to argue that some styles lend themselves more easily to be used in the manner of form-of-life, while others are more likely to resist such use. We need only recall Agamben's own tirade against mobile phones and their users in *What is an Apparatus?* to see that he is no stranger to strong statements of preference for some forms of life over others (Agamben 2009b: 16-17). Similarly, in *The Use of Bodies* Agamben disdainfully discusses personal ads in a French newspaper, in which those looking for a life companion vainly try to communicate their form of life in terms of a list of identity predicates and/or possessions: blond hair, good sense of humour, fondness for opera, fly fishing or fox hunting (Agamben 2016: 230). Nonetheless, even in this discussion Agamben explicitly recognizes that the problem is not so much the form, style or apparatus itself but rather the manner in which it is used, which can never be entirely defined by the form in question. Just as in *Profanations* even pornography was shown to be amenable to a profanation that ushers in a "new form of erotic communication" (Agamben 2007: 90), so in *The Use of Bodies* Agamben argues, with reference to Kafka, that "it is not justice or beauty that moves us but the mode that each one has of being just or beautiful, of being affected by her beauty or her justice. For this reason, even abjection can be innocent, even 'something slightly disgusting' can move us" (Agamben 2016: 232). The truth of a form of life is its form-of-life and for that reason it cannot be contained within the form itself. Thus, the most minor, insignificant and even 'slightly disgusting' forms, from speed dating to food porn, may be practiced in the manner of form-of-life, even though each of us will probably draw the line at

practicing some of them. In the final section we shall venture to develop a paradigm of this destituent manner that would further elucidate Agamben's argument.

4. FREEFORM LIFE

What is this manner that can make even slightly disgusting behaviors and practices appealing? As we have seen in the first section, Agamben's formal notion of form-of-life is characterized by deactivation, inoperativity and destitution – all negative attributes that appear to have no other content than what they negate. Yet, Agamben does not simply affirm destitution against constitution, potentiality against actuality, manner against style, but ventures to define a way of living in which both are present at once, i.e. an act that retains and manifests its potentiality not to be, a constitutive practice that brings destitution into its every act, a style qualified and disappropriated by a manner.

We may call this manner of living that retains the potentiality for its own transformation in every form it assumes a *freeform* life, by analogy with freeform improvisation in jazz and rock music. The analogy with musical improvisation is quite helpful for grasping the specificity of this manner of living, especially in contrast with the more familiar understanding of life as a series of freely chosen forms. In a paradigmatic improvisation, there is a theme (harmonic framework or chord progression), within which improvisation begins to unfold and to which it might also return (especially in jam-band improvisation in rock). While improvisation may begin as a set of variations on that theme, the theme need not be present at every time in the improvised section, which may rather unfold in an entirely spontaneous manner, veering into all possible directions. Unlike some forms of free improvisation, in which no main theme is discernible at all, in more familiar modes of improvisation the theme nonetheless remains defined at least at the beginning as well as possibly at the end. In the same way, a life that retains the potentiality for transformation in whatever form it dwells in may be easily recognizable in its form yet perpetually surprising in the specific manner in which it assumes this form, as the form in question is stretched to its limits, brought in relation with its opposites, recontextualized in numerous ways, all the while carrying that undefinable air of familiarity. Freeform life is therefore not a matter of a succession of forms that we freely take up and uphold, as e.g. in the (neo)liberal politics of entrepreneurial self-fashioning, but rather a matter of a *free relation to form as such*, not just a freedom to form but a freedom exercised within the process of formation itself, even if this formation ultimately yields little else than the endless playing with the same theme.

This freedom-in is paradigmatic for the process of artistic creation more generally. For Agamben, the process of creation is never reducible to the faithful execution of a style that would simply actualize a given model but is always combined with the opposed process of 'decreation' that resists this actualization, leaving a mark of

incompleteness, hesitation and, ultimately, the potentiality of being otherwise on every work (Agamben 1999a: 270; Agamben 2019). Similarly, Jean-Luc Nancy identified drawing as the paradigm of artistic creation, since its work is indissociable from the activity, never taking on a definitive form but retaining the dynamic moment of formation within itself. "Drawing is not a given, available, formed form. On the contrary, it is the gift, invention, uprising or birth of form. 'That a form comes' is drawing's formula and this formula implies at the same time the desire for and the anticipation of form, a way of being exposed to what comes, to an unexpected occurrence, or to a surprise that no prior formality will have been able to precede or preform" (Nancy 2013: 3).

The idea of freeform life is thus more than a fancy name for the freedom of the subject in relation to the preconstituted forms of life or the equality of these forms in relation to each other. A freeform life involves both the subject and the variety of incommensurable forms in a reciprocal transformation: the subject captivated by the form gives it vitality and diffusion, making an otherwise lifeless form into a form of life, while the same process transforms the subject in accordance with the form, changing his or her life in a particular way, but always in a tentative fashion, retaining the possibility of deactivation in every action it takes. Evidently, retaining this possibility does not entail any injunction to actualize it in every setting. Such injunctions make no sense because the potentiality in question is strictly infinite. We could in principle change one's lives every second, yet what would be the point in that? What is at stake in freeform improvisation is not the ceaseless production of novelty, which quickly becomes tedious and oppressive, but rather the potentiality for the new to emerge in the midst of the most familiar and repetitive, which thereby exhibit their own transience and mutability. Just as in a jazz or rock improvisation, you never know how long the performers will stay on any particular theme, so a freeform life is as such compatible with a remarkable durability of forms of life: it is possible to improvise relentlessly, while retaining a signature sound over decades.

This is perhaps the secret of the popularity of Phish, an American jam band founded in 1983 that has enjoyed a strongly dedicated fanbase over decades. While Phish released fifteen studio albums during their career that sold over eight million copies, they are best known for their live shows that feature extensive improvisation. In the summer of 2017 Phish performed thirteen sold out shows at Madison Square Garden in New York City and completed the year with a similarly sold out four night run ending on New Year's Eve. Although the band has not produced any hit singles and have rarely, if ever, been played on the radio, their concerts have gained enormous popularity and, similarly to the live recordings of the Grateful Dead in previous decades, became more popular than studio releases. The band has released dozens of 'official' live albums and, in addition to that, practically every show has been recorded unofficially to be traded by the fans since the band's early days.

What is it about Phish that generates such excitement about their performances? It would certainly be difficult to understand it by listening only to their studio albums, which feature more or less conventional classic rock songs with jazz, funk and country influences. Numerous critics of the band focus precisely on the quality of the studio material, complaining about the absence of memorable songs. If one remains focused on the songs themselves as the ultimate criterion for evaluation, then it becomes almost inexplicable why these generally unremarkable songs would generate a demand for concert tickets that the most popular mainstream pop and rock acts would envy and struggle to match. Would not extended jam sessions based on those songs be adding insult to injury, making the audience sit through a thirty-minute version of what was not even particularly likeable as a three-minute song?

The puzzle is resolved if we approach improvisation at Phish concerts in terms of the destituent manner that defines a freeform life. Extended jamming does not merely introduce additional variations to a pre-existing song, making the same song merely last longer. Instead, improvisation only takes up the songs in question as templates for improvised experimentation, which may involve chopping up and re-arranging them, playing parts of different songs together or playing a song in reverse order. Rather than play their songs with additional solos and variations, Phish play *with* their own songs, using the established forms of the songs in unpredictable ways, thereby ending up rendering the familiar unfamiliar and introducing difference into repetition. Just as in Agamben's argument even something 'slightly disgusting' can still be moving or touching when practiced in the destituent manner of form-of-life, even the less than memorable Phish compositions sound much better when ceaselessly de- and re- composed in the manner that restores to these songs the potentiality, transience and hesitation that characterize the process of artistic (de)creation (see Agamben 2019). Similarly to Nancy's pleasure in drawing, what is enjoyed in Phish performances is not the definitive form produced by the artists but the manifestation of formation within every form, in which creation and decreation become indiscernible.

In the extended jams at every show Phish songs are de- and re-created all over again and it is this free relation to the familiar songs that the audience looks forward and rapturously responds to in these performances. While we usually expect the concerts of our favorite bands to feature faithful renditions of familiar songs, at a Phish concert fidelity to established forms is abandoned for a free relation to form and this freedom involved in the process of formation is exposed on stage every night. Rather than ceaselessly try to invent new forms, becoming other with every album, Phish has performed the same act of free formation for over thirty years with admirable dependability, which is why many fans are not content with seeing only one show and instead book tickets for the entire residency. They both know exactly what they are going to hear (the freeform experimentation with the familiar songs) and have not the slightest idea how this freeform jam is going to sound like

on any given night. In this manner, repetition and novelty, composition and improvisation, creation and decreation become indiscernible, exposing in every form the contingency of its coming to presence. By the same token, a freeform life is not defined by the novelty it produces in actuality but by the potentiality for being otherwise that it exhibits in every activity it practices.

This is why we must rigorously distinguish our idea of a freeform life from the valorization of innovation and transformation that characterizes today's neoliberal governance. Neoliberalism prescribes constant change in one's life as a matter of the actualization of one's potentialities, whereby one ends up being all that one can be. The neoliberal subject must move from form to form without any respite of decreation. The perception that everything is possible, that I can be or do both this and that conceals one's subjection to the apparatuses of government that feed on that very potentiality in setting human beings to work in actuality:

> The idea that anyone can do or be anything – the suspicion that not only could the doctor who examines me today be a video artist tomorrow but that even the executioner who kills me, is actually, as in Kafka's *Trial*, also a singer – is nothing but the reflection of the awareness that everyone is simply bending him- or her self according to the flexibility that is today the primary quality that the market demands from each person (Agamben 2010: 44-45).

Freeform life is free precisely *from* this injunction to perpetual transformation, which may be just as or even more oppressive than a mere prohibition. A four-hour Phish concert does not attempt to actualize all the potential of the band members by demonstrating their flexible skills in playing every possible genre of music. On the contrary, the band's freeform jamming has retained a signature sound for decades, which nonetheless contains within itself and exhibits the potentiality for being otherwise. Freeform life does not involve a ceaseless procession of new forms but rather the exposure in every form of the contingent force of its formation. Just as Phish play with their songs, suffusing their most familiar works with a sense of indeterminacy and hesitation, a freeform life plays with the forms it dwells in, bringing a measure of formlessness into every form it takes up. It matters little that the forms might be unremarkable, as long as they retain this potentiality of their own decreation.

BIBLIOGRAPHY

Agamben, G. 1991. *Language and Death: The Place of Negativity*. Translated by K. Pinkus and M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1993. *The Coming Community*. Translated by M. Hardt. Minneapolis: University of Minnesota Press.

Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999a. *Potentialities: Collected Essays in Philosophy*. Edited and translated, with an introduction, by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999b. *Remnants of Auschwitz: The Witness and the Archive*. Translated by D. Heller-Roazen. New York: Zone Books.

Agamben, G. 2000. *Means Without End. Notes on Politics*. Translated by V. Binetti and C. Casarino. Minneapolis: University of Minnesota Press.

Agamben, G. 2005. *The Time that Remains: A Commentary on the Letter to the Romans*. Translated by P. Dailey. Stanford: Stanford University Press.

Agamben, G. 2007. *Profanations*. Translated by J. Fort. New York: Zone Books.

Agamben, G. 2009a. *The Signature of All Things: On Method*. Translated by L. D'Isanto and K. Attell. New York: Zone Books.

Agamben, G. 2009b. *What is an Apparatus? and Other Essays*. Translated by D. Kishik and S. Pedatella. Stanford: Stanford University Press.

Agamben, G. 2010. *Nudities*. Translated by D. Kishik and S. Pedatella. Stanford: Stanford University Press.

Agamben, G. 2011. *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*. Translated by L. Chiesa and M. Mandarini. Stanford: Stanford University Press.

Agamben, G. 2016. *The Use of Bodies*. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2017. *The Fire and the Tale*. Translated by L. Chiesa. Stanford: Stanford University Press.

Agamben, G. 2019. *Creation and Anarchy: The Work of Art and the Religion of Capitalism*. Translated by A. Kotsko. Stanford: Stanford University Press

Chiesa, L. and Ruda, F. 2011. *The Event of Language as Force of Life: Agamben's linguistic vitalism*. In «Angelaki», 16.3, pp. 163-180.

Kishik, D. 2012. *The Power of Life: Agamben and the Coming Politics*, Stanford: Stanford University Press.

Levinas, E. 1990. *Reflections on the Philosophy of Hitlerism*. Translated by S. Hand. In «Critical Inquiry», 17.1, pp. 62-71.

Levinas, E. 1993. *On Escape*. Translated by B. Bergo. Stanford: Stanford University Press.

Levinas, E. 1998. *Otherwise than Being, or Beyond Essence*. Translated by A. Lingis. Pittsburgh: Duquesne University Press.

Nancy, J.L. 2013. *The Pleasure in Drawing*. Translated by P. Armstrong. New York: Fordham University Press.

Passavant, P.A. 2007. *The Contradictory State of Giorgio Agamben*, «Political Theory», 35.2, pp. 147-174.

Prozorov, S. 2014. *Agamben and Politics: A Critical Introduction*, Edinburgh: Edinburgh University Press.

Whyte, J. 2009. *I Would Prefer Not To: Giorgio Agamben, Bartleby and the Potentiality of the Law*. In «Law and Critique», 20, pp. 309-324.

247 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 247-273
ISSN: 1825-5167

THAT WHICH IS BORN GENERATES ITS OWN USE. GIORGIO AGAMBEN AND KARMA

STEVEN DECAROLI
Department of Philosophy
Goucher College, Baltimore (Maryland)
sdecaroli@goucher.edu

ABSTRACT
The publication of Karman marks an unexpected expansion of Giorgio Agamben's field of inquiry, placing his work in dialogue with texts and concepts drawn from the Buddhist tradition. At the center of Agamben's investigation is the question of how it is possible for humans to become blameworthy and according to the history he presents the notion of fault is joined to the Sanskrit karman ("intentional action") by way of an etymological link with the Latin crimen, meaning "an action insofar as it is sanctioned", which is to say, a crime. This shared lineage of karman/crimen betrays, however, a striking difference in the manner in which the two traditions address the problem of intentional action. Agamben recognizes this and locates within Buddhism an alternative to the Western conception of intentional action that does not imply a fixed subject for whom infinite responsibility and purposiveness can be irrevocably attached. This essay extends Agamben's inquiry by emphasizing the importance of habituation in formulating an ethics without a subject and by highlighting the place of habituation in the theory of karmic causation.

KEYWORDS
Karma, Agamben, Buddhism, Habit, Culpability, Free Will

> The path is obscured by small completions.
> The Zhuangzi

The publication of Karman marks an unexpected expansion of Giorgio Agamben's field of inquiry. Although the central themes of the text are familiar enough—action, crime, guilt—and must be seen as a continuation of his previous investigations into Western political ontology, his decision to place these ideas in conversation with texts and concepts from the Buddhist tradition, specifically the Sanskrit concept of karman/karma, is unexpected. Principally known for his scholarship concerning the traditions of the Judeo-Christian West, this shift in Agamben's focus not only comes as a surprise to those familiar with his writings, but also offers a rare

opportunity to place his work in dialogue with the expansive philosophical heritage of the Buddhist tradition.

But why turn to karman?[1]

1. CULPA

Of particular importance to the story Agamben tells in *Karman* is the fact that, according to the nineteenth century linguist, Adolphe Pictet, who would introduce the thirteen-year-old Ferdinand de Saussure to the analytic study of Indo-European languages, the Latin *crimen*, which forms the root of the word 'crime', "likely corresponds to the Sanskrit *karman*, [meaning] 'work' in general, good or evil" (Pictet 1877: 436). Although Pictet's etymology is by no means verified, and Agamben notes this, the linguistic intersection between *crimen* and *karman* frames the investigation.

According to the sources Agamben cites, *crimen* refers to action insofar as it has been sanctioned, which is to say, insofar as certain punitive consequences have been attached to the action, rendering it imputable to a subject through the operation of the trial. Although the meaning of *karman* is quite different, it is nevertheless possible to align the two concepts insofar as *karman* similarly joins intentional action with imputable consequences, ordering the world according to karmic laws whose internal principle unfolds according to the ascription of causal effects, rather than through the attribution of fault. On this point Agamben cites the Italian Sanskritist, Raniero Gnoli: "Every action, good or evil, when done consciously, produces an effect or fruit that will inevitably mature . . . *Karman* belongs to the nature of things (*dharmata*), which, as the Indian doctors say, is unquestionable, is a natural law, independent in its development from our concepts of moral justice, recompense, and punishment . . . The fruit, on its part, is so to speak an automatic, involuntary consequence of conscious action, ethically indifferent" (Gnoli 2001-4: xxii-xxiii).

Although he begins by aligning *crimen* and *karman*, Agamben's underlying concern is to demonstrate how differently the two traditions from which these concepts emerge confront the problem generated by the principle of imputation common to each. Within the European context, which is Agamben's principle focus, imputation will coincide with the emergence of a strong conception of individual will and personal freedom around which attribution and juridical blame will coalesce. By contrast, out of the Indian tradition, channeled through Buddhism, what will emerge instead is a profound denial of selfhood and an understanding of agency that does not presuppose the existence of an essential self or soul, while nevertheless

[1] Although it is more common to use the spelling *karma*, I have opted for the less common *karman* because this is the rendering Agamben uses throughout the book.

supporting a doctrine of successive births that receives the effects of previous karmic deeds and extends them into the future.

Despite their different formulations, however, Agamben suggests the possibility of discovering in *crimen/karman* the common source of something like an Indo-European ethic, without which "both the Buddhist doctrine of a liberation of people from the karmic sphere of 'enchained doing' [*saṃsāra*] and the connection of guilt and punishment, of virtuous action and its recompense, which stands at the foundation of Western law and morality, would simply make no sense" (Agamben 2018: 29). Both traditions evolve in response to the problem of imputation, but because they chart very different paths, each represents for the other a probing alternative. In contrast to the Indian tradition, attempts by Western philosophers and theologians to comprehend right action and provide a foundation for moral sanction have relied on presuppositions tethered to the idea of an autonomous will and to a sovereign self to which the will is assigned. Despite occasional exceptions, European thought has more or less continually sought to uphold this conceptual edifice, in the shadow of which the bond between action and guilt has steadily developed. "Our hypothesis", Agamben writes, describing the trajectory of his investigation, "is in fact that the concept of *crimen*, of action that is sanctioned, which is to say, imputable and productive of consequences, stands at the foundation not only of law, but also of the ethics and religious morality of the West" (Agamben 2018: 29). To which he adds, signaling both a caution and an opportunity, "If this concept [*crimen*] should fail for some reason, the entire edifice of morality would collapse irrevocably" (Agamben 2018: 29).

The task of testing the solidity of the Western idea of sanctioned action, together with the will and the collection of divisive concepts that encircle it—guilt, responsibility, fault—is the principle undertaking of Agamben's *Karman*, and the single question that motivates the investigation, the same question Kafka assigns to Joseph K. in the pages of *The Trial* and which Agamben adopts as the book's epigraph, is simply this: "How can a human being be guilty?" It is the oddly self-evident quality of the question that the pages of *Karman* seek to explain, because the ease with which we ascribe guilt to subjects, implicating them in a discourse of culpability, has everything to do with the particular manner in which we have come to understand human action.

Essential to Agamben's analysis is an account of the causal machinery at work in law, through which culpability (*culpa*) becomes possible. According to the etymology Agamben sketches, the Latin *causa* denotes that which is at issue in a trial, the affair over which there is a dispute that gives rise to litigation, and marks "the point at which a certain act or fact enters into the sphere of the law" (Agamben 2018: 5). To speak of *causa* in this way is to specify a threshold across which a certain action passes into the domain of law and becomes, as it were, a legal object, acquiring legal standing. For certain actions a supplemental set of effects is generated that exceeds

the natural effects brought about by the action itself and the trial is the mechanism whereby those supplemental effects become real. Whereas every action naturally produces effects, only certain actions, insofar as they are juridically relevant, trigger legal effects which it is the function of the trial to impute to a subject capable of bearing the consequences of legal judgment. The overall apparatus of the trial is responsible, then, not only for making real certain legal effects, but also for assigning these effects, in the form of penalty, to legal subjects who, brought into being by the same juridical discourse, have acquired a general capacity to bear the consequences of judgment, thereby being made culpable. Nothing illustrates more clearly the power of the trial to ascribe culpability than the fact that culpability is not limited to human beings.

At the end of the nineteenth century a number of historical surveys of animal prosecution were published—Karl von Amira's *Animal Punishment and Animal Trials* (*Thierstrafen und Thierprocesse*) (1891), Carlo d'Addosi's *Delinquent Beasts* (*Bestie Delinquenti*) (1892), and Edward Evans' *The Criminal Prosecution and Capital Punishment of Animals* (1906)—all of which chronicle in detail animal trials conducted not only in antiquity, but throughout medieval Europe and even into the early decades of the eighteenth century. Dogs, pigs, rats, moles, cows, even insects were arraigned in court on a broad range of charges and trials were conducted without abridgment: evidence was heard, witnesses were called, and in most cases the accused animal benefitted from legal counsel. "In the writings of medieval jurisprudents", Edward Evans reports, "the right and fitness of inflicting judicial punishment upon animals appear to have been generally admitted. Thus Guy Pape, in his *Decisions of the Parliament of Grenoble*, raises the query, whether a brute beast, if it commit a crime, as pigs sometimes do in devouring children, ought to suffer death, and answers the question unhesitatingly in the affirmative" (Evans 1906: 108). Likewise, in the writings of Antonius Mornacius we learn that in 1610 a Franciscan novice was torn to pieces by several mad dogs who were "by sentence and decree of the court put to death" (Evans 1906: 176). It is surely reasonable, Evans observes, that mad dogs should be killed, but "the remarkable feature of the case [as in other such cases] is that they should be formally tried and convicted as murderers by a legal tribunal" (Evans 1906: 176).

Despite the scope of his study, however, Evans fails to investigate, or even to raise as an issue, the mechanism whereby culpability is assigned to animal life. How is it possible that certain animal behaviors could be removed from the domain of natural activity, which is unimputable, and thereby become culpable? Undoubtedly it is only because animal prosecutions are no longer commonplace that the culpability of animals strikes us as curious, but the frequency of such cases nevertheless demonstrates how variable the attribution of culpability can be. More surprising still is the practice of extending culpability to lifeless objects, as we find in classical Greece. Judicial proceedings of this kind, known collectively as *apsychon dikai*

(prosecutions of lifeless things), were conducted before a special court, the *prytaneum*, to which Plato himself attests. In the *Laws*, for instance, we read: "If a lifeless thing rob a man of life—except it be lightning or some bolt from heaven—if it be anything else than these which kills someone, either through his falling against it or its falling upon him, then the relative shall set the nearest neighbor to pass judgment on it, thus making atonement on behalf of himself and all his kindred, and the thing convicted they shall cast beyond the borders, [*exorizein*, to ex-terminate in the literal and original sense of the term, to take beyond the *termini*] as was stated in respect of animals" (873e-874a) (Plato 1967: 267).

Despite their variety, it is important to keep in mind that what we encounter in each of these cases is culpability rather than fault. This distinction is crucial and helps to explain why humans and animals might face identical forms of prosecution. If, for instance, a sanction prohibits the taking of a human life then, should an animal kill a person, its actions would be as culpable as those of a human who did the same ("*culpa* refers to behavior that, without intending it, has caused some injury" (Agamben 2018: 9)). To be culpable is not the same as to be at fault and by all indication "in the formation of the most ancient laws, something like fault simply does not appear" (Agamben 2018: 8). Law's original function was to introduce penalty in response to unwelcomed actions, not to ascribe guilt to agents. After all, an inanimate object cannot possibly be at fault, nor can it be found guilty in a moral sense, but it is entirely possible for a doorpost, an ox cart, or a stone to be held culpable. Even Evans acknowledges that, "[f]rom the standpoint of ancient and mediaeval jurisprudents the overt act alone was assumed to constitute the crime; the mental condition [i.e., motivation] of the criminal was never or a least very seldom taken into consideration" (Evans 1906: 200). Thus, what we find in the earliest legal codes—such as those from the *Law of the Twelve Tables*: "If a father sells his son three times, the later shall be free from paternal authority" or "When a patron defrauds his client, he shall be dedicated to the infernal gods"—is not criminal legislation in the modern sense, but *regulation expressed as causation*, and for this reason should perhaps be understood descriptively rather than prescriptively, as a causal scheme, not unlike rules of a game which constitute the game by defining the causal environment that orders it, i.e., if a certain action is done, then certain effects will follow. Rules join certain actions to certain consequences, but the entire procedure (action, rule, judgment and penalty) transpires without necessitating the attribution of fault. "By all evidence, the law here limits itself to sanctioning a connection between an action and a juridical consequence. What is assigned is not a fault so much as a penalty in the broad sense" (Agamben 2018: 8).

When the ascription of fault finally arrives, it does so gradually through the expansion of the concept of culpability, first through Christian moral theology and later with the appearance of the modern subject, thereby joining responsibility to an increasingly autonomous individual. What we are dealing with here, Agamben

suggests, is "a gradation of fault" (Agamben 2018: 9) according to which, to a greater or lesser degree, the imputation of action is transformed over time according to the degree to which agency is involved.

> We are accustomed to consider this evolution, which culminates in the modern principle according to which responsibility is founded in the last instance in the free will of the subject, as a progressive one. In reality, we are dealing with a strengthening of the bond that ties agents to their action, which is to say, an interiorization of guilt, which has not necessarily expanded the real freedom of the subject in any way. The connection between action and agent, which was originally defined in an exclusively factual way, is now founded in a principle inherent in the subject, which constitutes the subject as culpable. That means that fault has been displaced from the action to the subject who, if he or she has acted *sciente et volente*, [knowingly and willingly], bears the whole responsibility for it (Agamben 2018: 9).

Fault is attributed not to actions, but to the orientation of the will and therefore can appear only after agency has been extended to the subject. Fault and agency arise together, united by the juridical discourse that *crimen* inaugurates. Over time, and initially under the influence of Roman jurisprudence, penalty is separated from its role as the causal consequence of performing prohibited action and becomes instead the price payed for legal disobedience as such. Eventually, one is no longer penalized for performing a prohibited act, but for having willfully chosen to disobey a legal command and in so doing one commits, properly speaking and in the modern sense, a crime. "The sanction, which was initially nothing other than the immediate and unmotivated consequence of a certain action, now becomes the apparatus that . . . drives the behaviors that transgress its command outside itself as faults and crimes" (Agamben 2018: 19). All of this suggests that the nature of freedom in modern times has been largely misconstrued. Because fault is possible only to the extent that one is free (i.e., possesses agency) the expansion of human freedom has had the dubious effect of strengthening the connection between agents and their actions, binding human beings more tightly to their culpability and to their guilt.

This, then, returns us to the initial question that motivates Agamben's investigation: "How can a human being be guilty?". From what has been said thus far, it should be clear that any answer to this question must include an account of free will as it emerged during the early Christian era, especially since the ancient world seems to have had little need for it. But it is also necessary to consider, as a part of this undertaking, the longstanding antagonism between volition and habituation that accompanies the historical expansion of human agency. Although Agamben does not address habituation in *Karman*, he does so in a number of other texts, most notably in *The Use of Bodies*, and it seems to me that without a sufficient understanding of habituation not only is it not possible to fully explain why Agamben turns to *karman*, but it is not possible to understand the nature of *karman* as such.

2. HEXIS

In the section of the *Summa theologica* known as 'the treatise on habits', Aquinas follows Aristotle in maintaining that habits arise in proportion to the frequency of their operation, for "by like acts like habits are formed" (*ex similibus actibus similes habitus causantur*) (Ia IIae q.50 a.1) (Aquinas 1920: 768). Regarding the relationship of habit to the will, around which so much controversy has accumulated, we read in Aquinas that every power that is directed toward action "needs a habit whereby it is well disposed to its act", (Ia IIae q.50 a.5) (Aquinas: 1920: 771) and since the will is a power directed toward action, we must therefore admit the presence of habit within the will. In support of this, Aquinas turns to a passage from Averroes's commentary on *De Anima*, which maintains that the Aristotelian understanding of habit (*hexis*) is principally related to the will inasmuch as "habit is that which one uses when one wills" (*habitus est quo quis utitur cum voluerit*) (Ia IIae q.50 a.5) (Aquinas 1920: 771)—a dictum Aquinas cites repeatedly[2]. Problems arise, however, the moment we try to clearly distinguish the habitual from the willful, particularly with regard to moral judgment and with respect to virtuous action more generally. It is for this reason that anyone who wishes to understand the Aristotelian theory of virtue presented in the *Nicomachean Ethics* must do so by first clarifying what is meant by the concept of *hexis*, because it is under the category of *hexis* that Aristotle situates virtue and frames its meaning. What must be grasped is the extent to which virtue is a type of habit.

Although *hexis* has typically been translated into English as habit, drawing from *habitus*, which was its Latin equivalent and which Aquinas tells us serves as a suitable substitute since both words have their root in the verb 'to have' (Ia IIae q.49 a.1) (Aquinas 1920: 763), care must be taken not to associate the term too closely with the notion of a simple reflex or routine. Such a misstep quickly leads to an apparent inconsistency of which Aristotle's practical philosophy has been mistakenly accused, namely, that since actions performed out of habit are insufficiently voluntary to be considered moral, moral skill cannot be said to arise from habituation. But even if we are careful not to project contemporary connotations onto the classical usage of the term, the precise relationship between habit and will remains ambiguous, especially when we read that the will operates by means of habit. How are we to account for the autonomy of the will while at the same time maintain the habitual nature of its operation? Any solution to this dilemma must not only contend with the semantic difference that lies between *hexis* and our modern understanding of habit, but must also confront discrepancies between ancient and modern conceptions of the

[2] For instance, (Ia IIae q.49 a.3), (Ia IIae q.52 a.3) and (Ia IIae q.63 a.2). The quotation also appears repeatedly in Aquinas's earlier works. See for example, the *Scriptum super libros Sententiarum* (*Commentary on the Sentences of Peter Lombard*) (III, d.23, q.1 and III, d.34, q.3). See also, the *In decem libros Ethicorum expositio* (*Commentary on the Ten Books of the Ethics*) III, 6: "A habit is that quality by which a person acts when he wishes" (*habitus est quo quis agit cum voluerit*).

will, because the precise historical meaning of habituation is joined to the fate of what it means to exercise volition.

In the second volume of *The Life of the Mind*, which is devoted to reflections on the faculty of the will and by extension to the problem of freedom, Hannah Arendt opens with the peculiar difficulty presented by the fact that "[t]he faculty of the Will was unknown to Greek antiquity and was discovered as a result of experiences about which we hear next to nothing before the first century of the Christian era" (Arendt 1971: 3)[3]. Although there is no complete consensus as to whether the concept of the will was strictly lacking from the Greek philosophical context—there are numerous Greek terms that designate degrees of volition (*boulēsis*, *thelema*, *proairesis*)—it is broadly accepted that the ancients did not employ the notion of the will as the medieval world would come to understand it, particularly with respect to the nature of freedom. And this opinion is not limited to current scholarship. Hobbes claims, for instance, that although the ancients considered in great detail the nature of causality, "the third way of bringing things to pass, distinct from necessity and chance, namely freewill, is a thing that never was mentioned amongst them, nor by the Christians in the beginning of Christianity", and it was quite some time before the doctors of the church "exempted from this dominion of God's will the will of man; and brought in a doctrine, that not only man, but also his will, is free" (Hobbes 1841: 1). If this is in fact the case, then among the principle problems confronting the Christian philosophers of subsequent centuries was the need to reconcile this *tertium quid*, together with the theological problems in relation to which it arose as a solution, with the philosophical systems of the classical world in which the absence of the concept of the free will posed no fundamental difficulties.

It is within the space of this problem concerning the will and its relation to action that Agamben's *Karman* locates a significant part of its inquiry. According to Agamben's explanation, "the will acts as an apparatus whose goal is to render masterable—and therefore imputable—what the human being can do" (Agamben 2018: 44) and this process begins with one of the great achievements of Aristotle, which was to conceive of human action in terms of potential and act. It is so common for us to think in these terms, Agamben observes, that we often fail to recognize the pragmatic nature of its creation, which was to secure a connection between actions and subjects. "[I]t is precisely in the context of the Aristotelian theory of potential that we see appear for the first time in classical Greek thought something that resembles a concept of will in the modern sense" (Agamben 2018: 45). Because Aristotle must explain how it is possible to move from potential to act, he is obliged to deploy a

[3] The Greeks, she tells us, do not even have a word for what we consider to be the free will. "*Thelein* means 'to be ready, to be prepared for something', *boulesthoi* is 'to view something as [more] desirable', and Aristotle's own newly coined word, which comes closer than these to our notion of some mental state that must precede action, is *pro-airesis*, the 'choice' between two possibilities, or, rather, the preference that makes me choose one action instead of another" (Arendt 1971: 16).

concept (*proairesis*) to name the source of this possibility. Although in using *proairesis* "Aristotle could not have in mind anything like the free will of the moderns . . . it is significant that, to cure in some way the split he himself had introduced into potential, he had to introduce into the latter a 'sovereign principle' that decides between doing and not doing" (Agamben 2018: 46)—"from which the theologians will elaborate the doctrine of the freedom of the responsibility of human actions" (Agamben 2018: 45).

This sovereign principle is extended as it passes through Christian theology where the will is transformed into a solid foundation for human freedom. It was, "a matter of transforming a being who *can*, which the ancient human being essentially is, into a being who *wills*, which Christian subjects will be" (Agamben 2018: 44). What Agamben is suggesting here is that "the passage from the ancient world to modernity coincides with the passage from potential to will, from the predominance of the modal verb 'I can' to the modal verb 'I will'", (Agamben 2018: 49) thereby securing responsibility for human action. Neither in Hebrew nor in New Testament Greek is there any precise terminology for the concept of the will and it is not until the fourth century—first in debates over the doctrine of divine will and then in Augustine's reflections on the will (*voluntas*) surrounding the circumstances of his own conversion—that the concept receives its full articulation.

In her doctoral dissertation, which has as its theme the concept of love in Augustinian thought, Arendt at one point turns her attention to the passages from the *Confessions* in which Augustine tells the story of his conversion. For Augustine, she explains, "time and again, habit is what puts sin in control of life" (Arendt 1996: 82) because habit is that which not only binds us to this world, obscuring our true nature, but also conceals the future from us by orienting us toward the past. In each case, habit serves not to fortify the will, but to disfigure it because the routines of habituation stand in the way of volition, conforming it to *cupititas* and to sin. For Augustine, the great danger in allowing the will to become habituated to earthly concerns is, of course, that the soul's capacity to embrace divine command is diminished. For although the soul is unitary, under the influence of habit volition "is wrenched in two and suffers great trial, because while truth teaches it to prefer one course, habit prevents it from relinquishing the other" (Augustine 1961: 175). Thus, the soul, divided by habit, turns away from divine law and from the guidance of conscience through which the law is conveyed internally. Sincere commitment on the level of the intellect to live according to new moral principles, in addition to the profound change of spiritual conviction brought on by conversion, encounters resistance when extended to the inclinations of the body, and habit marks the earthly remnant that stands opposed to everything the spirit now yearns for. "These two wills within me, one old, one new, one servant of the flesh, the other of the spirit, were in conflict and between them they tore my soul apart" (Augustine 1961: 164).

What is essential to understand, however, is that the will has no natural orientation toward which its potential is directed and so remains susceptible to external influence. Although our wills are free to choose to do those things that we want, what we want is not genuinely up to us. Augustine comes to realize this. Although the will is free, it is only free insofar as it is able to choose what it desires and habituation tends to reorient those desires, directing them away from God's law. The challenge of obedience arises from this misalignment. In order for the will to choose what is right it must first desire what is right, and according to Church doctrine, refined by Augustine in his debate with Pelagius, the instrument of this guidance is grace. According to *De Correptione et Gratia* (*Treatise on Rebuke and Grace*), Augustine teaches that it is by divine intercession alone that humanity acquires the power to resist sin, and this is not simply by being shown what is to be done, but by being supplied the means of doing it—"For the grace of God [is] that by which alone men are delivered from evil, and without which they do absolutely no good thing, whether in thought, or will and affection, or in action; not only in order that they may know, by the manifestation of that grace, what should be done, but moreover in order that, by its enabling, they may do with love what they know" (3.ii) (Augustine 1872: 71-72). Or, as we find in Bernard of Clairvaux's *De gratia et libero arbitrio*, (*On Grace and Free Will*), a text which Aquinas will repeatedly quote: "It is in virtue of free choice that we will, it is in virtue of grace that we will what is good" (Bernard 1920: 28).

It is possible to see then, that, under the canopy of Christian eschatology, grace comes to supplant habit as the preferred means through which the pure potentiality of the will, which designates the radical nature of its freedom and the specific quality of humankind's moral nature, acquires the tendency toward specific action. Whereas *hexis* is guided by means of exposure to practice, exercise, and examples, grace springs from the direct influence of God, installed not to eliminate choice but to guide action in the face of habitual tendencies that run counter to divine command, resulting in the acquisition of what Bernard calls "moral habits" (*habitus acquisiti*) (Bernard 1920: 32, fn. 5). Grace, like habit, imparts not the act but the disposition to act.

A careful analysis shows that we are not dealing with two distinct terms—habit and grace—but with the articulation of the same conceptual dilemma under the influence of two divergent ontological environments. Indeed, the doctrine of the Church, following Aquinas, speaks of "habitual grace" (*gratia habitualis*) (Ia IIae q.110 a.2) (Aquinas 1920: 1084). And it is due to these differing frameworks that habit and grace are destined to collide, leading to an antagonism that has never been satisfactorily reconciled. On the one hand, according to the ecclesiastic presentation, grace is said to accompany free will so that the tendencies of habit may be overcome, but yet on the other, because grace expresses the direct influence of God, it is difficult to see how such influence does not run contrary to the very notion of free will it

professes to support. How, in other words, is it possible for freedom to persist under conditions that are not only beyond one's control, but which are made possible only through the unearned generosity of God? The will's freedom is once again placed into question, compromised by the bestowal of grace that moves it.

There is no clearer indication of the inability to reconcile free will and grace (and along with it the reconciliation of free will and habit) than the ecclesiastical factionalism that materialized around the subject during the late sixteenth century. The dilemma has never been definitively decided, either philosophically or canonically, and resulted in the convening of the *Congregatio de auxiliis divinee gratiae* (1598-1607) under Clement VIII, which concluded not only without a theological resolution to the controversy—articulated primarily by a protracted dispute between Dominicans and Jesuits concerning the nature of grace and free will—but with a détente imposed by papal decree which shut down the controversy by accepting the viability of the three major positions (Augustinian, Thomistic, and Molinist), and by explicitly forbidding the opposing factions from condemning each other as heretical.

Grace merely reproduces in the domain of theology the antagonism between habit and volition that we began with. Whenever freedom is advanced as an absolute there will always appear the impossibility of satisfactorily answering the problem of how the will remains free while nevertheless being affected by external influences, whether empirical or transcendent. Even within the Christian context of its original formulation, the concept of free will which the West has relied upon almost without exception to ground its moral and political institutions remains undecided. This is why, as Agamben claims quite directly, if this term were to fail, if the free will were to let go of the burden it has carried, the ethico-political scaffolding of the West would have to change. Whenever free will is precluded, as it was across much of the ancient world and as it is in Indo-Buddhist philosophy, human responsibility is not expressed principally in terms of obedience to command but in dedication to techniques, and what is perfected in the domain of human action is the fluency of skill, not the sincerity of obligation.

3. ALTERA NATURA

In the opening pages of a careful study dedicated to explaining the absence of the will in classical antiquity, Albrecht Dihle cites a list of Greco-Roman authors, each of whom speak of the limitations place on the gods by the laws of nature. "Not even for God are all things possible" (*ne deum quidem posse omnia*), Pliny the Elder writes in the *Naturalis historiae*, "he cannot cause twice ten not to be twenty or do other things along similar lines, and these facts unquestionably demonstrate the power of nature" (II.5) (Pliny 1967: 187). And Seneca, after opening an inquiry into the benevolence of the gods, refers us to constraints placed upon them by their own nature: "And what reason have the gods for doing deeds of kindness?", he

asks, to which he answers simply, "it is their nature". And therefore, "one who thinks that they are unwilling to do harm, is wrong; they *cannot* do harm" (95.49) (Seneca 1928: 89). When Greco-Roman thinkers speculated on theological problems what they almost always arrived at was a divine figure restricted by the ontological limitations of the given world, thereby distinguishing it from Christian cosmology where the will of the divine, rather than the order of nature, set humanity's moral bearing. "[W]hen Greeks found out about the Christian idea of creation", Agamben explains in an account of the schism between ancient and Christian cosmology, "what remained incomprehensible in it for them was precisely the idea that it did not result from a necessity or a nature, but from a gratuitous act of will" (Agamben 2018: 56). To act properly in such a world is to be motivated more by intellect than by will, to decide according to reason rather than obedience, which Seneca captures succinctly in the dictum, "I do not obey God, rather I agree with him" (96.2) (Seneca 1928: 105). These worlds were not the manifestations of a creator who fashions reality *ex nihilo* but of a God who instead, as Dihle puts it, "molds what was without shape . . . animates what was without life . . . brings to reality what was merely a potential" and, above all, "does not transcend the order which embraces himself as well as his creatures" (Dihle 1982: 4).

In the works of Epicureanism, where the gods are removed almost entirely from the natural world and all things populate a single plane without hierarchy, this vision of a thoroughly immanent cosmos is pushed even further. And nowhere is this expressed more completely than in Lucretius's *De rerum natura* where the full autonomy of nature is affirmed. "Nature is her own mistress and is exempt from the oppression of arrogant despots, accomplishing everything by herself spontaneously and independently, free from the jurisdiction of the gods" (2.1090-1093) (Lucretius 2001: 62-63). Subtracting from his description of nature every teleological element, Lucretius presents us with an image of a universe that is comprehensively un-designed. "It was certainly not by design that the particles fell into order", he writes, "they did not work out what they were going to do, but because many of them by many chances struck one another in the course of infinite time and encountered every possible form and movement, they found at last the disposition [*disposituras*] they have" (1.1022-1030) (Lucretius 2003: 41). Not only is it the case that the gods have no hand in crafting the natural world, but nature too proceeds without a plan, and thus, for Lucretius, every explanation of nature that privileges the language of purpose is fundamentally misguided. No organ was created for the sake of being used and in this sense, there is nothing that an organ is *for*. The eye was not created for the sake of sight, nor the ear for hearing, nor the legs for walking. Instead, he insists, in a passage the has lost none of its disruptive force, "I maintain that all the parts were in being before there was any function for them to fulfill" (4.841-842) (Lucretius 2001: 123).

What we encounter here, in this sweeping reversal of the causal relationship between organ and function, is a complete undoing of the teleological character of natural philosophy, together with the notions of purpose and will that it often implies, and with it a reorientation of ontology around the notion of use. It is significant, then, that Agamben cites these passages from *De rerum natura* not only in *Karman*, but also in *The Use of Bodies*, between which they form a sort of bridge. "It is in Lucretius", he writes, "that use seems to be completely emancipated from every relation to a predetermined end, in order to affirm itself as the simple relation of the living thing with its own body, beyond every teleology" (Agamben 2016: 51). What is being developed in these passages, and across both investigations, is an ontology of use, wherein Agamben extends Lucretian naturalism so as to reimagine human action—conceiving it as potential without act, means without ends[4]. Those who are under the impression that actions follow from agents, or insist that organs precede their functions, are participants in a misleading reversal of the order of existence. "Such explanations, and all other such that men give", Lucretius writes, zeroing in on this point, "put effect for cause and are based on perverted reasoning; since nothing is born in us simply in order that we may use it, but that which is born generates its own use [*quod natum est id proceat usum*]" (4.831-835) (Lucretius 1966: 307). It is precisely in this reversal that we begin to glimpse an overlap with *karman*, which, as Agamben observes, describes the domain of human action according to an analogous understanding of causation.

Supporting this ontology of use is the legacy of habituation. Having abandoned teleological explanation, which comprehends action only insofar as it is aligned with a predetermined end, Lucretius must instead rely on action alone, in the absence of a purpose that defines it. And it is precisely here that habit makes its appearance, replacing the paradigm of agency with that of use. "[T]he living being does not make use of its body parts" Agamben explains, addressing this alternative ontology, "but by entering into relation with them, it so to speak gropingly finds and invents their use. The body parts precede their use, and use precedes and creates their function" (Agamben 2016: 51). Parts find their way in the world by exploring it, by encountering it again and again until a way of acting is generated that eventually becomes so habitual that it seems to be the natural condition of the body part to operate in the way it does. The legs, to take one of Lucretius's examples, are not made for walking but only become able to walk through repetitive exposure to specific behaviors, just as the same legs, exposed to dancing, over time take on that quality. The action constitutes the nature of the thing and does not extend beyond it. What is brought into being, in other words, is the act itself. And the very same is true,

[4] Agamben describes this as a shift from action to use. Early in *The Use of Bodies* we read: "One of the hypotheses of the current study is, by calling into question the centrality of *action* and *making* for the political, that of attempting to think *use* as a fundamental political category" (Agamben 2016: 23, emphasis added).

Agamben suggests a few pages later, with respect to the subject of action, the self. "This self", he writes, "is therefore not something substantial or a preestablished end but coincides entirely with the use that the living being makes of it" (Agamben 2016: 54). Consequently, and despite every impression to the contrary, the self, including the sense of its own agency, is not the source of action, but is rather an effect.

> [T]he self coincides each time with the relation itself and not with a predetermined telos. And if use, in the sense that we have seen, means being affected, constituting-oneself insofar as one is in relation with something, then use-of-oneself coincides with *oikeiosis*, insofar as this term names the very mode of being of the living being. The living being uses-itself, in the sense that in its life and in its entering into relationship with what is other than the self, it has to do each time with its very self, feels the self and familiarizes itself with itself. *The self is nothing other than use-of-oneself* (Agamben 2016: 55).

According to the ontological paradigm offered to us by Lucretius, but also in line with what we have seen thus far of Agamben's own philosophical understanding, actions that coincide with use must be understood to operate in the absence of agency. In *The Use of Bodies*, in a chapter entitled *Habitual Use*, Agamben explains that if habit is always already a use-of-oneself, "then there is no place here for a proprietary subject of habit, which can decide to put it to work or not. The self, which is constituted in the relation of use, is not a subject, is nothing other than this relation" (Agamben 2016: 60). Thus, habit, insofar as it corresponds with self-use, is, properly speaking, the name given to action without a subject. Joining subjectless action directly to concepts that lie at the center of his onto-political project, Agamben concludes: "*Use, as habit, is a form-of-life*" (Agamben 2016: 62).

Before turning to *karman*, and to the manner in which it supplements Agamben's understanding of use, let us briefly turn to the passages from the *Nicomachean Ethics* where Aristotle presents the theory of habituation upon which he establishes his theory of virtue. With respect to the general theory of virtues, *hexis* designates a stable, durable trait constitutive of a person's character, which originates neither from natural temperament nor from convention, but from repeated experience and exercise. It is for this reason that as far back as Roman antiquity, *hexis* has been described as a second nature (*altera natura*). But what are we to make of this second nature and how does it rank with respect to the first?

> Virtue, then, being of two kinds, intellectual and moral, intellectual virtue in the main owes both its birth and its growth to teaching (for which reason it requires experience and time), while moral virtue comes about as a result of habit, whence also its name is one that is formed by a slight variation from the word for 'habit'. From this it is also plain that none of the moral virtues arises in us by nature; for nothing that exists by nature can form a habit contrary to its nature. For instance the stone which by nature moves downwards cannot be habituated to move upwards, not even if one tries to train it by throwing it up ten thousand times; nor can fire be habituated to move downwards, nor can anything else that by nature behaves in one way be trained to behave

> in another. Neither by nature, then, nor contrary to nature do virtues arise in us; rather we are adapted by nature to receive them, and are made perfect by habit (1103a14-1103a25) (Aristotle 1991: 1742-1743).

The significance of *hexis* being rooted in the verb 'to have' is made apparent from this passage for, with respect to the general theory of virtues, Aristotle employs *hexis* to designate a durable attribute of character that originates neither from natural temperament nor from convention, but from repeated exercise. The manner in which *hexis* indicates a type of having is therefore not at all the same as when we say that someone 'has' an object in the form of possession. Indeed, in the case of 'having' a habit, it might be more appropriate to say that one is held by the habit. What differentiates *hexis* from mere possession, and the reason it stands in close proximity to character (*ethos*), is that *hexis* indicates a manner of having that is a kind of holding—an active, ongoing state. For this reason, *hexis* is contrasted with *diáthesis*, which indicates a more temporary state. In the *Categories* we read that, "A *hexis* differs from a *diáthesis* in being more stable and lasting longer. . . It is what are easily changed and quickly changing that we call *diáthesis*, e.g. hotness and chill and sickness and health and the like" (8b27-9a9) (Aristotle 1991: 14). *Hexis* designates an enduring, rather than transient, quality but not an essential quality. It is a state of character, a disposition, arising not from natural inclinations, but from the cultivation of stable behavioral preferences, a field of activity shaped by practice, becoming "through length of time, part of a man's nature and irremediable or exceedingly hard to change" (8b26-8b29) (Aristotle 1991: 14). It follows from this, then, that the task assigned to ethics, in the absence of every law and command, is nothing other than to guide the effective acquisition of habit, to enable the positive attainment of an *altera natura*.

In keeping with the passage quoted above, *altera natura* is distinguished from *prima natura* principally with respect to its cause, for *hexeis* of all types differ from natural capacities (*dunámeis*)—such as the ability to see, to hear, or to walk—to the extent that they are acquired through practice and repeated action. For this reason *hexis* is presented as a distinctly human type of potentiality. Unlike natural potentials which are limited to specific ends and do not require habituation to pass into action, virtues require habit because human potentiality remains open to many ends. Whereas, according to Aristotle, the potential of a natural agent is bound to a specific and necessary end and for this reason "natural things cannot become accustomed or unaccustomed", human potentiality is "passive" with respect to action and is therefore capable of receiving dispositions, which over time and through repeated application become durable inclinations. As Aristotle explains, in a passage reminiscent of Lucretius,

> [O]f all the things that come to us by nature we first acquire the potentiality and later exhibit the activity (this is plain in the case of the senses; for it was not by often seeing or often hearing that we got these senses, but on the contrary we had them before we

> used them, and did not come to have them by using them); but virtues we get by first exercising them, as also happens in the case of the arts as well. For the things we have to learn before we can do, we learn by doing, e.g. men become builders by building and lyre-players by playing the lyre; so too we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts (1103a25-1103b2) (Aristotle 1991: 1743).

The comparison with Lucretius is striking, not only because Aristotle's unreservedly teleological description of natural capacities is so clearly at odds with that of Lucretius ("it was not by often seeing or hearing that we got these senses"), but also because there are points concerning the acquisition of virtues where the two philosophers seem to be in agreement. In contrast to abilities that are acquired congenitally, such as sight and hearing, those aptitudes associated with human virtues are different insofar as they arise directly from use. One is not born brave, Aristotle tells us, but becomes so by acting bravely, and more generally, "virtues we get by first exercising them". What separates Lucretius from Aristotle, thereby securing for *De rerum natura* the radical quality of its ontological paradigm, is Lucretius's insistence that the natural and the habitual operate according to the same mechanism. It is not only the human being that acquires its nature secondarily, as a disposition that follows from activity, as Aristotle suggests; it is all of nature that operates in this fashion. For Lucretius, *the cosmos acts before it is*. And for this reason, everything that exists does so as *altera natura*. There is no primary nature.

The world Lucretius describes is a horizontal one, composed of aggregations of material and behavioral patterns that form semi-stable arrangements (*dispositurasi*) that do not answer to a transcendent model or plan; rather each corresponds only to itself as it reaches out laterally to those other arrangements and patterns that constitute the elements of its surroundings. Extending Lucretius's vision, it is possible to conclude that the world is, in effect, not a collection of objects, but rather a network of arrangements/dispositions assembled over time through habituation, operating at a variety of scales. Whereas the commonsense way of understanding the world assumes the real existence of objects, each with their own natures, together with the belief that their causal interactions are somehow linear—epitomized by the distorted analogy of dominos falling—the model offered by habituation, by contrast, is of a *causal field*. Causation is topological, not sequential. Nothing arises from a single cause. Whatever comes into being does so immanently, as one of the possibilities of nature, sustained by countless interactions within a field of conditions, for which we find a precise Buddhist expression in the principle of dependent origination (*pratītyasamutpāda*), one of the core tenants of Buddhist thought for which the appropriate analogy is not a linear series but an interconnected net (*Indrajāla*). "There is no real production", the fifth century Buddhaghosa teaches, "there is only interdependence" (Conze 1983: 149).

4. KARMAN

The final chapter of *Karman* begins with a declaration: "The politics and ethics of the West will not be liberated from the aporias that have ended up rendering them impracticable if the primacy of the concept of action—and of will, which is inseparably jointed to it—is not radically called into question (Agamben 2018: 60). This statement sets the stage for Agamben's direct engagement with *karman*, because unlike the Judeo-Christian tradition of the West, which has sought at almost every turn to anchor the subject in the freedom of the will, the Indo-Buddhist tradition has sought refuge in the opposite direction, in the overcoming of the ego in pursuit of a very different sort of freedom.

As we have seen, for Agamben, the legal apparatus finds its primary function not in the regulation of action, nor even in the application of penalty, but in "the creation of a subject for human action" (Agamben 2018: 77). The subject is the shadow that the law casts in its wake, produced as the effect of an onto-juridical philosophy that requires for its operation a center of imputation for voluntary action. It is the removal of this subject, and the will by which it conceives of its own operation, from our understanding of action, that is the task Agamben bestows to Western philosophy, fully aware of the enormous edifice that threatens to be brought down in the process. From this standpoint it becomes possible, at last, to appreciate Agamben's turn to *karman* and in doing so to grasp the full significance of the Indo-Buddhist endeavor to separate action from the subject, *karman* from *ātman*. "Oh monks", Agamben writes, quoting from the sutras, "I teach only one thing, namely *karman*. The act exists, its fruit exists, but the agent, who passes from one existence to the other to enjoy the fruit of the act, does not exist" (Agamben 2018: 78).

The challenge of reconciling the apparent inconsistency contained in karmic teachings—between the principle that life is conditioned by actions across successive rebirths and the principle that maintains the inexistence of a permanent self capable of receiving the consequences of those actions—has preoccupied Indo-Buddhist scholars for centuries and Agamben finds in their work a strategy that aligns closely with his own. "If one translates [their work], not without a certain arbitrarity, into the terms of our investigation", he writes, "the Buddha's strategy becomes perfectly coherent: it is a matter of breaking the connection that links the action-will-imputation apparatus to a subject", (Agamben 2018: 78) which Agamben's historical study has sought to reveal the possibility of within certain corners of the Western tradition. "Action", he continues, advancing the Buddhist position, "exists in the wheel of coproduction conditioned according to the purely factual principle 'if this, then that', and for this reason, it seems to implicate in transmigration those who recognize themselves in it; *the subject as responsible actor is only an appearance due to ignorance or imagination* (or, in terms of this investigation, this subject is a pretense produced by the apparatuses of law and morality).Yet this means that the problem

becomes that of thinking in a new way the relation—or non-relation—between actions and their supposed subject" (Agamben 2018: 78, emphasis added). Should Western scholars adopt this undertaking as their own, or even accept it as a problem to be confronted, the expansive discourse on *karman* within the Buddhist canon can be for them an invaluable source of guidance.

There is no single meaning that can be ascribed to the concept of *karman*. Like every fundamental philosophical principle, its significance for the tradition to which it belongs is expressed through the gradual semantic adjustments that are the very condition of its preservation. The term *karma/karman* appears for the first time in the *Rig Veda* where it bears the limited meaning of action associated with the proper performance of ritual practice. It is not until the time of the *Upaniṣads* that its usage expands to include the normative dimension of intentional actions and the fruit (*phala*) of those actions. In a celebrated passage from the *Bṛhadāraṇyaka Upaniṣad* it is stated that "According as one acts, according as one conducts himself, so does he become. The doer of good becomes good. The doer of evil becomes evil. One becomes virtuous by virtuous action, bad by bad action" (IV.4.5) (1931: 140). The implication here, which is inherited by the Buddhist tradition, is that intentional action gives rise to character in the sense that repeated behavior, by becoming habitual, forms a tendency or disposition (*saṃskāra*) within the doer which conditions future deeds. *Karman* is the principle that describes this process, articulating the relation that obtains between one's actions and one's state of being.

The sequencing here is important and echoes the description of character found in Aristotle. It is not character that determines behavior, but behavior that determines character. The act precedes the agent. The Buddhist tradition will make much of this causal reversal because, whereas the Brahmanical tradition retains the belief that the self (*ātman*) is enduring, separate and independent, thereby supplying a tangible solution to the difficult problem of explaining the transference of karmic consequences across lifetimes, Buddhism will chart a different path according to which the self does not exist in any permanent sense. The pre-Buddhist notion of a core self that travels across lifetimes was given up by Sakyamuni for the idea of the transmission of dispositional patterns alone (*saṃskāras*) according to the karmic process whereby the self is made and remade through actions, giving rise to the pretense of agency and self-consciousness. But simply because the existence of an enduring self is an illusion does not mean that the associated experience is false. An illusion does not mean that something is not real, it simply means that something is not what it appears to be, that we have somehow misattributed its cause.

This is true of all phenomenological reality. Our perceptions are, of course, acutely different from the way things exist in the actual world. The green we see when we look at spring leaves is present only in the perceptual model supplied by our brain. Color is internally constructed, a mental model for navigating our environment, and yet even though we know this to be the case it is terribly difficult not

to assume that the things we perceive are in fact real. The brain gives all perception an ascribed character of reality and the same is true for our *sense* of self, which is quite simply the perceptual model we have of our own existence, shaped by the constraints of a profoundly social, intersubjective environment. World-modeling is a feature of all organisms and is necessary for survival, but for organisms capable of modeling social behavior this capacity is amplified, especially in the case of animals capable of using language. It is within the linguistic domains inhabited by human beings, where a sense of agency appears as a dominant part of the perceptual model, epitomized by the grammatical use of the first-person pronoun, that properly intentional actions arise. The unfolding of intentional action generates consequences for the individual, but also for those who share a common semantic world, by propagating the conceptual elements that populate that world, thereby altering what is considered real within it. We hear echoes of this in the well-known opening verse of the *Dhammapada*: "All experience is preceded by mind, led by mind, made by mind" (2008: 3). These actions, and the enduring positive and negative effects they propagate are, broadly speaking, karmic.

Indian Buddhism identifies five modes of activity (*niyama*) which constrain the arising and ceasing of conditioned phenomena and *karman* refers only to the mode corresponding to action which arises from intention (*cetanā*). The well-known definition of *karman* in the *Nibbedhika Sutta* states this precisely: "Intention, I tell you, is *kamma*. Intending, one does *kamma* by way of body, speech, and intellect" (AN 6.63) (1997). What must be avoided here, however, is the mistake of associating the intentionality of *karman* too closely with moral fault. Although *karman* is properly associated with the belief that virtuous action leads to desirable births, whereas malicious action results in future births characterized by suffering, this does not occur because the doer is being rewarded or punished for the deed. Although meritorious action may result in a pleasurable rebirth, this temporary satisfaction nevertheless remains within the bounds of *saṃsāra* and does not lead to the cessation of *karman*, which is the condition for achieving an enlightened state (*nirvāṇa*), for despite its positive nature, meritorious activity remains intentional. It is intentionality (*cetanā*) itself that is problematic and the generator of *karman*, not because these are actions we can legitimately be blamed for, but because intention is the effect of a model of the world that is false, generating conditions that then appear to us as the result of a subjective agent. Although intending does not necessarily involve rational deliberation, there is no intentionality without a sense of self that directs the mind towards a particular end. Thus, anytime we act intentionally we unavoidably strengthen the illusion of the self, attaching ourselves more firmly to it, and thereby extend its karmic effects. We desire to see our existence in the world as the result of a plan behind which stands an agent as its cause, but that experience, which includes the desire for agency itself, is the effect of an illusory process, and this illusion is the principle effect of *karman*.

In a passage that not only distinguishes the intentional nature of *karman* from moral responsibility, but also returns us to the theme of culpability, Karin Meyers explains:

> Although the fact that karma has a pleasant or painful result according to whether *cetanā* is wholesome or unwholesome (in addition to other contributing factors) makes it tempting to read *cetanā* in terms of our own intuitions about moral responsibility, there is an important conceptual distinction between facts pertaining to the etiology of karma and those pertaining to moral responsibility, and we should not assume there is a direct correlation between the two. Moral responsibility, specifically, culpability is an important topic in commentaries on the monastic rule, for example, but does not figure prominently in the etiological analyses of karma one finds in the *Abhidharma*. This makes sense given that the former has to do with the conduct of persons in a social context governed by a rule and the latter, primarily with the impersonal operations of karma. While moral responsibility is perhaps always at issue in a theological context wherein God is understood to legislate moral law and judge individual desert, it need not be so in the Buddhist context where action is understood to have results according to an impersonal natural order (Meyers 2010: 164-165).

Significantly, Agamben draws our attention to this very issue, citing a passage from the *Aphorisms of Shiva* (*Śivasūtra*) of Vasugupta to illustrate how the moralization of *karman* in terms of merit and demerit is not only a mistake, but is itself a karmic effect. Shiva, who is described as exempt from karmic rebirth, is said to be present in all sentient beings, thereby suggesting that for all creatures non-karmic action is possible. Standing in the way of such action, however, is a flawed manner of perceiving the world. *Maya*, the "power of obscuring", distorts our understanding and one of the elements that results from this distortion is the flawed assumption that *karman* operates punitively, according to merit and demerit. "Those who are imprisoned in the 'bond of Maya' know and feel, but their discernment is limited to the vision of bonds. For this reason, 'in the bond of Maya moral merit and demerit are founded—namely, karmic responsibility for actions carried out'" (Agamben 2018: 78). What the text communicates, Agamben suggests, anticipating the historical development of karmic theory away from a simple punitive model, "is that the relationship of the awakened self with its actions is no longer the karmic one of merit and demerit, of means and end, but is instead similar to that of dancers with their gestures" (Agamben 2018: 79)—this last point we will return to.

To rethink action in relation to the subject demands, therefore, a reversal of sorts. Despite the way it seems, the self in all of its obviousness is not the cause of karmic action, the responsible subject who is assessed according to proper conduct, but is rather its principle effect, to which we are deeply and habitually attached. The more we attempt to make sense of our experiences in terms of the ego, judging them according to merit and demerit, the deeper we plant this illusion of the self. This circle of intentional action whereby the ego differentiates itself from the very world it strives to makes sense of, is *karman*, i.e., a form of cognitive causality

together with the habits of behavior and awareness it creates and perpetuates. From the Buddhist point of view, then, to say that there is no self is, in fact, not to say that the self does not exist. Rather, it is to recognize that what we experience as the self is precisely this projected appearance of permanence, the future effects of which unfold according to the laws of *karman* and are the source of suffering. As Buddhaghosa teaches in the *Visuddhimagga*, In the ultimate sense, all the truths should be understood as empty because of the absence of any experiencer, any doer, anyone who is extinguished, and any goer. Hence this is said:

> For there is suffering, but none who suffers;
> Doing exists although, there is no doer.
> Extinction is, but no extinguished person;
> Although there is a path, there is no goer
> (XVI.90) (Buddhaghosa 2010: 528-529)

Lucretius sought to comprehend the world on the basis of action alone, in the absence of every relation to a predetermined end. The organs of the body were not designed for the use they acquired ("you have no reason at all to believe that they could have been made for the purpose of usefulness" (855-857) (Lucretius 1966: 309)), but instead the actions of the parts over time coalesced into organs that only much later give the appearance of having preceded their activity. Buddhaghosa outlines a similar strategy, expressed in the language of Buddhism, concerning the unfolding of human action. There is no doer that stands before the deed, it is rather the deeds that form over time patterns of activity that seem to implicate the existence of an agent that governs them. In both cases, the ontology under consideration privileges actions not actors, and the causal mechanism that must be explained is the pathway by which behaviors promote habitual tendencies in the absence of a subject that precedes them. The conventional assumption that being is properly understood either in terms of an origin from which it originates or an end toward which it is drawn (that potentiality is predetermined by actuality) is dismissed as a mistake. *Nothing, in fact, moves from potentiality to actuality.* Reality is constituted not by actualities, but by actions, their repetition, and the durable dispositions that flow from them. Altered in this way, the entire problem space of Western ontology is transformed and with it the meaning of ethics.

What does ethics look like against the background of an ontological commitment that admits only actions without imputable subjects? Such a system would run counter to every religious and juridical instinct of the modern world, deactivating from the outset the responsible subject upon which its institutions are founded. From what has been said thus far, however, it seems clear that any such ethics would need to foreground the role of habituation and thereby, at least in this respect, follow the model set down by Aristotle. And this is precisely what we find. In a study devoted to the fourth century Indian philosopher, Vasubandhu, Meyers demonstrates that it is precisely a concern with habituation, in the absence of moral agency, that

characterizes his early approach to Buddhist ethics. "The cultivation (*bhāvanā*) of the path is not primarily an exercise of free or rational choice", she writes, describing a process whereby intentionality gives way to the spontaneity of disposition, "but a process of habituation by which the mind comes to gravitate towards virtuous objects or ends as a result of attending to these objects with appropriate views, desires and moral sentiments. This training requires effort, but the end result is the effortless virtue that results from a well-disciplined personality" (Meyers 2010: 177-178). What we encounter here is not a demand to make a proper moral choice, but a call to embody a certain attitude, to transform one's disposition in response to a series of encounters and practices so as to adopt, as it were, a second nature. According to the Christian moral tradition, habit is a difficulty to be overcome, whereas for Buddhism our capacity for habituation is a condition for the possibility of ethics. Capturing precisely this tension, which also troubles the debate between Aristotle and Augustine, Meyers concludes: "In short, the control that motivates Vasubandhu's theory of action is not the ability to resist habitual conditioning, but the self-control born of habituation" (Meyers 2010: 254).

To yield to a change of disposition (*saṃskāra*, but also *hexis*), guided by practice, is not merely to undergo a transformation of personal attitude, it is also to change the appearance of the world, and in this sense *karman* does important ontological work within Buddhist philosophy. The self and the world arise together, and *karman* describes the process whereby sentient beings constitute their world or realm (*loka*) as environments inseparable from their own activity as subjects. The world we inhabit is brought into being by the way in which we perceive it, and the way in which we perceive the world retroactively constitutes our identity. Over time, these views become mutually reinforcing. We respond to the world in the way we perceive it and because we perceive the world not only in terms of facts, but also in terms of values, there are enormous ethical implications to perception—implications that are missed when the primary focus is on adherence to moral duty. "From karma the various worlds arise" (Vasubandhu, IV.1), writes Vasubandhu, and tradition describes five realms into which karmic rebirth is possible. As the *Nibbedhika Sutta* describes it: "There is kamma to be experienced in hell, kamma to be experienced in the realm of common animals, kamma to be experienced in the realm of the hungry ghosts [*preta*], kamma to be experienced in the human world, kamma to be experienced in the world of the devas. This is called the diversity in kamma" (AN 6.63) (1997). Or, as Vasubandhu himself explains, in a more visceral manner, although the *preta* drink bile, blood and urine, this is not because the *preta* live on some other world where all rivers are polluted. It is due to *karman* that *preta* experience as feted what we taste as water. The point being, of course, that when one experiences the world through anger, one enters the realm of hell. When one experiences the world through greed, one lives an insatiable life in the realm of the *preta*. One need not take these statements literally to grasp their meaning: samsaric

existence, and the suffering that characterizes it, is dispositional, inseparable from the habituated actions of mind and body.

This generative element of *karman*, capable of fabricating worlds, finds its most delicate expression in a distinction that is absolutely fundamental to Buddhism, namely, the non-duality that characterizes the relationship between *nirvāṇa* and *saṃsāra*. Although many sources describe this subtle relationship, its definitive presentation is found in the stanzas of the *Mūlamadhyamakakārikā*, written by the second century monk, Nāgārjuna—the only Buddhist philosopher cited by Agamben prior to the publication of *Karman*[5]. Nāgārjuna writes,

> Whatever is the limit of *nirvāṇa*
> That is the limit of *saṃsāra*.
> There is not even the slightest difference between them,
> or even the subtlest thing
> (25.20) (Nāgārjuna 1995: 75)

In his commentary on these verses, Jay Garfield explains: "To be in samsara is to see things as they appear to deluded consciousness and to interact with them accordingly. To be in nirvana, then, is to see those things as they are—as merely empty, dependent, impermanent, and nonsubstantial, but not to be somewhere else, seeing something else". To which he adds, a few lines later, "Nagarjuna is emphasizing that nirvana is not someplace else. It is a way of being here" (Garfield 1995: 332). In other words, *nirvāṇa* entails a shift in the way one is; an ontological transformation that somehow deactivates the demand of *saṃsāra* by rendering that demand inoperative in the very location where it exists. Realizing an enlightened state, then, is a manner of accomplishment that does not involve any kind of completion, recuperation or retrieval, but rather a new relationship to the given. "*Nirvāṇa*", Agamben writes in the final pages of *Karman*, "is not another world that is produced when the world of aggregates has been annulled, another thing that follows the end of all things. But neither is it a nothing. It is the not-born that appears in every birth, the non-act (*akṛta*) that appears in every act (*kṛta*) in the instant . . . in which imaginations and errors conditioned by ignorance have been suspended and deactivated". (Agamben 2018: 85)[6]. Drawing these principles into the space of

[5] For a discussion of Agamben's engagement with Nāgārjuna see DeCaroli, Steven 2012.

[6] It should be noted that Agamben's use of the term 'not-born' (alongside 'non-act') is significant and bears an important legacy in Buddhism. Bankei Yōtaku's (1622-1693) Zen teachings center almost entirely on the idea of the unborn (*fushō zen*). And in the *Genjōkōan* Dōgen (1200-1253) tells us that, "according to an established teaching of the Buddha Dharma, one does not say that life becomes death. Thus we speak of the 'unborn' (*fushō*). And it is an established Buddha-turning of the dharma wheel that death does not become life. Thus we speak of the 'unperishing'" (Dōgen 2009: 257). But what is it to say that something is unborn (*fushō*)? The Japanese *fushō* translates the Sanskrit *anutpāda*: *an-* meaning 'not', *utpāda* meaning 'coming forth, or birth'. Taken together *anutpāda* simply means 'having no origin' and within the discourse of Buddhism the term is closely associated

his ongoing political investigation and joining them more broadly to themes that characterize his philosophical project, he concludes, "Thus, inoperativity is not another action alongside and in addition to all other actions, not another work beyond all works: It is the space . . . that is opened when the apparatuses that link human actions in the connection of means and ends, of imputation and fault, of merit and demerit, are rendered inoperative. It is, in this sense, a politics of pure means" (Agamben 2018: 85).

The concept of inoperativity, which has played an enormous role in Agamben's reconceptualization of both ontology and political action, is here united with fundamental tenets of Buddhist practice, opening a space not only for their intersection, but for a deeper consideration of practice in the context of Agamben's philosophy. For our purposes, however, the importance of practice emerges from the fact that it concerns action and from the standpoint of Buddhism this practice/action, properly understood, is not on the way to an accomplishment, not exerted in the interest of an achievement, not a means to an end, but remains purely practice/action as such—a commitment best exemplified in the Zen tradition, and perhaps especially in the words of Dōgen, who never tired of teaching that the essence of Buddhism is *shikantaza*, Just sitting. Just acting.

Glimpses of a comparable understanding of practice can be found in Agamben's writings as well. Consider, for instance, his commentary in *The Use of Bodies* on what he calls 'contemplation'—action which, in the very act of acting, dissolves the subject of action: "Contemplation is the paradigm of use", he says, "Like use,

with *śūnyatā*, being empty of intrinsic nature. The unborn, or the not-born, does not refer to that which does not yet exists, as if things wait in the wings lined up to be born into the world. The shifting of natural elements over time create arrangements that never actually snap into existence as wholes. There is just a slow transformation which never reaches a point of transition when it is possible to say, now this is born, this has been fully actualized. But nevertheless, things *are* born. When Agamben speaks of "the not-born that appears in every birth", the existence of birth is affirmed. In what sense? The born is that which comes into being conventionally, as a distinction made between this-and-that which appears factual. But in each case, that which is born conventionally remains unborn in a more fundamental sense—empty, impermanent and changing. In this way, the born and the unborn are aspects of the same phenomenal entity.

The same can be said, of course, of death and the idea of extinction. The realization of *śūnyatā*, which is to say, the non-essentialist view of existence in which the notion of something like completion has no place and really makes no sense. Once an essentialist ontology is replaced with an ontology of action or use, the doctrine of karmic rebirth becomes far less puzzling. After all, the principle of death as a concept is premised on the assumption that something comes to an end, but without a substantial self this notion of an ending is incomprehensible, making it perfectly reasonable to speak of the continuation of action into the future, beyond anything we might temporarily identify as a self. Death is not a loss—it is simply the rearrangement of parts. It is significant then, that Lucretius, who shares with Buddhism an ontological view that privileges action, should devote many pages of *De rerum natura* to a strenuous argument against the fear of death. To fear death, he argues, is to be taken in by the false belief that you—your conscious self—will be present after your life ends so as to experience the loss, which is no different, and no less implausible, as lamenting the non-existence of your life that preceded your birth.

contemplation does not have a subject, because in it the contemplator is completely lost and dissolved" (Agamben 2016: 63). And in an interview from 2004, conducted long before the publication of either *The Use of Bodies* or *Karman*, Agamben says something quite similar in reflecting on the practice of the self.

> One way the question could be posed is: what would a practice of self be that would not be a process of subjectivation but, to the contrary, would end up only at a letting go, a practice of self that finds its identity only in a letting go of self? It is necessary to 'stay,' as it were, in this double movement of desubjectivation and subjectivation, between identity and nonidentity. This terrain would have to be identified, because this would be the terrain of a new biopolitics (Agamben 2004: 117).

Elsewhere, Agamben ascribes the name 'gesture' to this special non-subjective form of self-use, denoting a manner of action that is neither a means to an end, nor an end in itself, thereby approximating non-karmic action. Gesture is activity that, in the very manner in which it is carried out, at the same time stops itself, exposes itself, and holds itself at a distance. "This holds both for the operations of the body and for those of the mind: gesture exposes and contemplates the sensation in sensation, the thought in thought, the art in art, the speech in speech, the action in action" (Agamben 2018: 84).

There is much more to be said regarding the place of practice in Agamben's philosophy, especially because his discussion of the topic is rather limited. But when the topic does arise, not only do we find that it aligns with certain aspects of Buddhist practice, but that alignment follows at a more basic level from a set of shared ontological commitments which, as we have seen, offer a corrective to the ontological assumptions of the West, the effects of which are visible in the institutions and procedures that surround the juridical subject. Agamben's task in *Karman* has been to show that the edifice of Western morality and law is trapped in something like a karmic cycle, fixed within a samsaric state characterized by self-centered action joined to culpability, through which continual attempts are made to fix the damage done by the invention of the responsible subject by doubling down on the notion of free will. Criminality (*crimen*) stands at the center of this cycle, its viability dependent upon a profound ontological misunderstanding of the world, which enables culpability to be imputed to a subject that does not exist in the manner we think it does. Caught in an ongoing intensification of the ego vis-à-vis a celebration of political and economic freedom, the modern world does not recognize the trap it has set for itself. From a Buddhist perspective, to the extent we exercise capacities associated with free will and volition, we tend to reduce freedom precisely because, in doing so, we fortify the principle source of suffering. The task of exposing this dilemma stands at the center of Agamben's onto-political project and, insofar as it overlaps with the central tenets of Buddhism, suggests a path to a very different sort of freedom, one which begins by showing how the onto-political ideals of the West, and the institutions that have emerged from them, have forged the bonds of

saṃsāra, exemplified by the figure of the free and responsible subject, as if these were the very means of its liberation.

BIBLIOGRAPHY

Agamben, G. 2004. "I Am Sure That You Are More Pessimistic Than I Am . . .": An Interview with Giorgio Agamben. In «Rethinking Marxism», 16.2, pp. 115-124.

Agamben, G. 2018. Karman: A Brief Treatise on Action, Guilt, and Gesture. Translated by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. 2016. The Use of Bodies. Translated by A. Kotsko. Stanford: Stanford University Press.

Aquinas, T. 1920. Summa theologica, 2nd edn. vol. 1. Translated by the Fathers of the English Dominican Province. New York: Benziger Brothers.

Arendt, H. 1996. Love and Saint Augustine. Chicago: Chicago University Press.

Arendt, H. 1971. The Life of the Mind. New York: Harcourt.

Aristotle. 1991. Nicomachean Ethics, in The Complete Works of Aristotle, vol. 2. Translated by W. D. Ross. Princeton: Princeton University Press.

Aristotle. 1991. Categories, in The Complete Works of Aristotle, vol. 1. Translated by J. L. Ackrill. Princeton: Princeton University Press.

Augustine. 1961. Confessions. Translated by R. S. Pine-Coffin. New York: Penguin Books.

Augustine. 1872. De Correptione et Gratia, in The Anti-Pelagian Works of Saint Augustine, Bishop of Hippo, vol. 3. Translated by P. Holmes. Edinburgh: T&T Clark.

Bernard of Clairvaux. 1920. Concerning Grace and Free Will. Translated by W. W. Williams. New York: The Macmillian Company.

Bṛhadāraṇyaka Upaniṣad. 1931. in Thirteen Principle Upanishads. Translated by R. E. Hume. London: Oxford University Press.

Buddhaghosa. 2010. Visuddhimagga. Translated by Bhikkhu Ñãnamoli. Kandy, Sri Lanka: Buddhist Publication Society.

Conze, E. 1983. Buddhist Thought in India. London: George Allen & Unwin.

DeCaroli, S. 2012. The Idea of Awakening: Giorgio Agamben and the Nāgārjuna References. In «Res Publica: Revista de Filosofía Política», 28, pp. 101-138.

Dihle, A. 1982. The Theory of the Will in Classical Antiquity. Berkeley, University of California Press.

Dōgen. 2009. Genjōkōan, in Buddhist Philosophy: Essential Readings. Translated by Bret W. Davis. Oxford: Oxford University Press.

Evans, E. 1906. The Criminal Prosecution and Capital Punishment of Animals. London: William Heinemann.

Garfield, J. 1995. The Fundamental Wisdom of the Middle Way. Oxford: Oxford University Press.

Gnoli, R. (ed.). 2001-4. La rivelazione del Buddha. vol. 1. Milan: A. Mondadori.

Hobbes, T. 1841. The Question Concerning Liberty, Necessity and Chance, in The English Works of Thomas Hobbes of Malmesbury. vol. 5. London: John Bohn.

Nāgārjuna. 1995. The Fundamental Wisdom of the Middle Way. Translated by J. Garfield. Oxford: Oxford University Press.

Nibbedhika Sutta. 1997. Translated by Bhikkhu Thanissaro. Access to Insight (https://www.accesstoinsight.org).

Lucretius. 1966. De rerum natura, Translated by W. H. D. Rouse. Cambridge, MA: Harvard University Press.

Lucretius. 2001. On the Nature of Things. Translated by M. F. Smith. Indianapolis: Hackett Publishing.

Lucretius. 2003. Poem on Nature. Translated by C. H. Sisson. New York: Routledge.

Meyers, K. 2010. Freedom and Self-Control: Free Will in South Asian Buddhism. Dissertation. The University of Chicago.

Pictet, A. 1877. Les origines indo-européenes. 2nd ed. vol. 2. Paris: Sandoz et Fischbacker.

Plato. 1967. Laws. vol. 2. Translated by R. G. Bury. Cambridge, MA: Harvard University Press.

Pliny. 1967. Natural History. vol. 1. Translation by H. Rackham. Cambridge, MA: Harvard University Press.

Seneca. 1928. Ad Lucilium epistulae morales. vol. 3. Translated by R. M. Gummere. London: William Heinemann.

The Dhammapad. 2008. Translation by G. Fronsdal. Boston: Shambala Publications.

Vasubandhu. 2012. Abhidharmakośa-Bhāsya. vol. 4. Translated by G. L. Sangpo. Delhi: Motilal Banarsidass Publishers.

275 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 275-286
ISSN: 1825-5167

BEGINNINGS ARE HARD. GIORGIO AGAMBEN AND THE REGRESSIVE SUBJECT

PIOTR SAWCZYŃSKI
Department of International and Political Studies
Jagiellonian University in Kraków
piotr.sawczynski@gmail.com

ABSTRACT
The article analyzes Giorgio Agamben's methodological tool of regression against the background of Jewish messianism. Although the term is obviously borrowed from Freudian psychoanalysis, Agamben's reading of regression has a distinct messianic spin: it means a movement toward prelinguistic existence (infancy), prior to the ontological split within the subject generated by language. This quasi-Edenic narrative might be called a 'Heideggerian moment' of Agamben's thought but I argue – with reference to Infancy and History and Signature of All Things – that it is actually deeply rooted in Jewish tradition. The aim of the article is to 1) demonstrate the cryptotheological background of regression to infancy and 2) critically analyze Agamben's idea of 'regressive' subjectivity beyond the principle of signification.

KEYWORDS
Giorgio Agamben, subject, language, regression, infancy, Jewish messianism

> We must dream backwards, toward the source, we must row back up the centuries, beyond infancy, beyond the beginning, (...) toward the living center of origin
> (Octavio Paz, The Broken Waterjar)

1. INTRODUCTION

In his widely discussed essay *Progress or Return?*, Leo Strauss contemplates two fundamental political and religious concepts – progress and return – in the context of Jewish tradition. He famously argues that the modern ideal of progress has backfired, leading us to "the brink of an abyss" (Strauss 1997: 87) and bringing about an unprecedented crisis of Western civilization. Consequently, a contemporary man needs to be 'redeemed' from progress and brought back to tradition. The application of the messianic idiom to the critique of progress might be surprising, but

Strauss's argument is that messianic idea in Judaism has been primarily associated with restoration, not progress; progressive messianism is merely a secular, political distortion of its original, restorative message.

To support his thesis, Strauss refers to the findings of Gershom Scholem, whose work was mostly devoted to the analysis of the messianic idea in Jewish kabbalah. "As I learn from Scholem" – says Strauss – "Kabbala prior to the sixteenth century concentrated upon the beginning; it was only with Isaac Luria that Kabbala began to concentrate upon the future – upon the end. Yet even here, the last age became as important as the first. It did not become more important" (Strauss 1997: 88). He then quotes Scholem's *Major Trends in Jewish Mysticism* where we read that "for Luria «salvation means actually nothing but restitution, reintegration of the original whole, or *tikkun*, to use the Hebrew term. (...) The path to the end of all things is also the path to the beginning»" (Strauss 1997: 88)[1]. This leads Strauss to conclude that Jewish messianism is in its essence concerned with *teshuva,* or return; the life of the Jew might be "a life of anticipation, of hope, but the hope for redemption is restoration – *restitutio in integro*" (Strauss 1997: 88).

What Strauss fails to add in his impressive apology of the origins is that the messianism of modern Jewish kabbalah is much more nuanced. Although single excerpts might indeed show Luria as a conservative spirit, Scholem repeatedly highlights "a strictly utopian impulse" (Scholem 1971: 13) of the Lurianic myth. His fundamental essay *Toward an Understanding of the Messianic Idea in Judaism* explicates that when Luria and his disciples speak of re-establishing the original perfection, they do not mean the return to any actual origins but to the potentiality which – due to fundamental cosmological ruptures[2] – failed to actualize. In Scholem's own words, the Lurianic *olam ha-ba* "does not correspond to any condition of things that has ever existed even in Paradise, but at most to a plan contained in the divine idea of Creation" (Scholem 1971: 13). Consequently, *tikkun* is "not so much a restoration of Creation (...) as its first complete fulfillment" (Scholem 1969: 117).

The dispute between Strauss and Scholem – two of the most prominent Jewish thinkers of the twentieth century – is a useful framework for the analysis of Giorgio Agamben's methodological tool of regression which I carry out in this article. Although the term is obviously borrowed from Freudian psychoanalysis, Agamben's reading of regression has a distinct messianic spin: it means a movement toward prelinguistic existence, prior to the ontological split within the subject generated by language. This quasi-Edenic narrative might be called a 'Heideggerian moment' of

[1] The original to be found in Scholem 1946: 256, 274.

[2] Lurianists invested in the mythical image of *shevirat ha-kelim* ("breaking of the vessels") - a founding catastrophe which results in a general deficiency and displacement of things in this world. In Scholem's words: "Nothing remains in its proper place. Everything is somewhere else, (...) in exile, (...) in need of being redeemed" (Scholem 1969: 112-113). More on these cosmological ruptures to be found in Fine 2003.

Agamben's thought, but I argue that it is actually deeply rooted in Jewish tradition. To demonstrate this crypto-theological background, I refer both to *Signatura rerum* [*The Signature of All Things*] – the work in which Agamben's theory of regression is elaborated – and *Infanzia e storia* [*Infancy and History*] where the concept of prelinguistic existence (infancy) is used to speculate about life inseparable from language. I propose to think of regression as a dialogue with both the restorative messianism put forward by Strauss and its dialectical variations to be found in Scholem, but also argue that Agamben's 'regressive' messianism – ingenious as it is – remains hopelessly torn between the phantasm of original perfection and the utopia of a return "to that which never was" (Agamben 1991: 97). Specifically, it is my contention that the theory of infancy contradicts the premises of regression which is supposed to set the ground for its coming, and makes Agamben's idea of regressive subject highly problematic.

Surprisingly, although the concept of regression is of primary importance for Agamben's methodology and ontology, it has been a subject of hardly any systematic research. It is usually just briefly mentioned by scholars in the context of paradigm and signature, whose theories indeed make up the core of *The Signature of All Things* (McQuillan 2010; Snoek 2010). The only elaborate analysis of regression as such is to be found in Colby Dickinson's *Agamben and Theology* (2011), where it is aptly related to the idea of infancy. However, as Dickinson's book is written from a Christian perspective, it fails to comment on the Jewish messianic background of Agamben's regression. My paper fills this serious gap and brings out the camouflaged Jewish references to demonstrate the idea of regression as an important contribution to the debate on the actuality of messianism. At the same time, it critically analyzes the relation of regression to infancy, and sheds some light on their theoretical incongruity.

2. REGRESSION

The concept of regression appears in a chapter of *The Signature of All Things* titled *Philosophical Archaeology*[3], where Foucauldian terminology is applied to redefine philosophical inquiry into the past. Agamben argues that *arché*, being the proper object of any archaeological practice, is not a factitious origin that chronologically precedes the present, nor a metaphysical principle from which all things have developed. It is rather "the point from which the phenomenon takes its source" (Agamben 2009a: 89), and the moment when dominant discourses have been constituted. As such, the archaeology both Foucault and Agamben have in

[3] The notions of archaeology and genealogy, whose Agamben fails to differentiate, are important for his later works and are to be found e.g. in the subtitles of *The Kingdom and the Glory* (Agamben 2011a) and *The Sacrament of Language* (Agamben 2011b).

mind needs history to "dispel the chimeras of the origin" (Agamben 2009a: 83)[4] and recognize fundamental tensions inherent in each historical practice.

If we realize how much Agamben's philosophy owes to Martin Heidegger, his critique of sources and tradition cannot help but evoke Heidegger's famous distinction into "history" (*Geschichte*) and "historicity/historicality" (*Geschichtlichkeit*). As we read in *Being and Time,* "historicity as a temporal mode of being (...) is prior to what is called history (...); it is the ground for the fact that something like the discipline of 'world history' is at all possible" (Heidegger 1996: 17). What any revisionist spirit might find appealing is especially Heidegger's project of revealing this ground and returning to the 'true' origins of phenomena that so far have been concealed or made inaccessible by the dominant metaphysical tradition. However, Agamben is careful to make it clear that the *arché* he thinks of is neither to be found in a distant past, nor is it metahistorical in its nature. Rather than Heidegger, then, he follows Friedrich Nietzsche in his abandonment of the term *Ursprung* ("origin") in favour of *Entstehung* ("emergence"), not in the sense of genesis, but the dynamic arising of things (Agamben 2009a: 83)[5]. He thereby demonstrates once again that philosophical archaeology is not about the nature of the past but about the emergence of the present, and, as such, it favours process of formation over an alleged essence of things.

Quite surprisingly, but perhaps in accordance with his strategy of covering tracks, Agamben fails to mention that this is precisely how origin was conceptualized by Walter Benjamin, another of his philosophical masters. Instead of rejecting the term, like Nietzsche and Foucault, Benjamin chooses its "strong misreading" (Bloom 2003) and comes up with the idea of origin *as* emergence. Although origin – he argues in the preface to the work on German tragic drama – is a historical category, it has nothing to do with the idea of genesis as the inception of some phenomena at a certain moment in time. To think of origin as the very first link in the chronological chain of causes and effects would correspond to the conception of "homogeneous and empty" time that Benjamin harshly criticized as "bourgeois" (Benjamin 2006: 396)[6]. Rather, the origin is "an eddy in the stream of becoming" (Benjamin 2003: 45), an operative force convulsing the body of history from the inside, which makes it not metahistorical, but transhistorical. As Agamben himself aptly puts it elsewhere, in a clear polemic with the Straussian idiom of restoration, "the return to the origin that is at issue here thus in no way signifies the reconstruction of something as it once was, the reintegration of something into an origin understood as a real and eternal figure of its truth" (Agamben 1999c: 152).

[4]The original to be found in Foucault 1998: 373.

[5] See also Foucault 1998.

[6] To make things a little more confusing, let us note that Benjamin rejects the notion of *Enstehung* for precisely the same reasons why Nietzsche failed to invest in *Ursprung:* he associates it with descent, not emergence.

It is exactly this idea of the origin that Agamben's messianism of regression seems modelled on. In a crucial fragment of his essay, Agamben points to a structural analogy between the philosophical archaeology he has just worked out and the psychoanalytic regression therapy[7]. In a classical Freudian approach, regression was defined as a backward movement of the subject to an earlier stage of development in response to some traumatic memories that could not be handled in a more adaptive way. The task of the analysis, sometimes called therapeutic regression, was to identify the repressed, unconscious origin of trauma in order to help the patient work through it and eventually neutralize its effect on consciousness (Heimann and Isaacs 2002: 169). Agamben follows the psychoanalytic intuition not without making a slight but meaningful adjustment to it. What he calls "archaeological regression" (Agamben 2009a: 98) is a therapy that confronts the historical 'repressed' not by exploring the unconscious but rather identifying and deconstructing the very source of the split into conscious and unconscious. In other words, instead of seeking a moment prior to binary divisions, Agamben chooses to work on the moment they have been generated. Why is that? Picturing the 'before' as a state of prelapsarian unity, he claims, means following the logic of the split: only in the world governed by the principle of divisions is the mirage of original non-division possible as its opposite. The alternative would be to think from beyond the split, where nothing like a historical origin exists, there is just spontaneous emergence or arising. What Agamben's regression then leans toward is not "to restore a previous stage, but to decompose, displace, and ultimately bypass it in order to go back not to its content but to the modalities, circumstances, and moments in which the split, by means of repression, constituted it as origin" (Agamben 2009a: 103).

We have already seen that for Agamben the idea of restoring a previous stage is nothing but a phantasm. However, what we are regressing to in the archaeological practice remains yet unclear: is it some other past or is it past at all? In other words, what is the temporal structure of such regression? Further in the essay, Agamben notes that, technically speaking, his project is more about the present than the past, or, if we insist on this word, about the past that "somehow has remained present" because it "has not been lived through" (Agamben 2009a: 102). One can easily capture here similarities to Scholem's account of the Lurianic 'return' as the restitution of potentiality, which Agamben must also have in mind when he speculates on coming back to "a present where we have never been" (Agamben 2009b: 52)[8]. However, as the liberation of history is always projected into what is going to come, the practice of regression also points to the future, and, in Agamben's view, it somehow complements the angel of history whose powerful image has been drawn by Benjamin

[7] Agamben credits an Italian philosopher Enzo Melandri with first exposing the analogies between Foucault's and Freud's methodology.

[8] That Agamben was well acquainted with the utopian-restorative idiom of the Jewish kabbalah is to be seen in Agamben 1999b: 167-168.

in his famous ninth thesis. If Benjamin's angel is driven into the future while "turned toward the past" (Benjamin 2006: 392), the 'angel' of regression moves backward with a gaze fixed on the future. When they catch a fleeting glimpse of each other, claims Agamben, it becomes clear that the "invisible goal" (Agamben 2009a: 99) of their procession in time is the present.

If the implicit allusions to the Jewish kabbalah and explicit references to Benjamin are not yet enough to speak of regression as a messianic enterprise, the ultimate argument is offered by the author himself who terms regression – perhaps a little self-ironically – an "almost soteriological" practice (Agamben 2009a: 98). The idiom of messianism is further applied in the final paragraphs of the essay when Agamben recapitulates the relation of archaeology to history. Their interdependence, he argues, corresponds to the relation between redemption and creation in the three monotheistic religions (Agamben 2009a: 107-108). While creation obviously precedes redemption in time, it is only the latter that makes creation intelligible and meaningful. As such, the work of redemption follows in chronology but precedes in rank, which is precisely how archaeology relates to history. And if Agamben might want to quote Scholem's kabbalistic reflections, he could put the relationship even more aptly: it is only redemption that for the first time brings fulfillment to creation.

3. INFANCY

Calling in the big theological guns implies that the stakes of regression are much higher than just a reconceptualization of the origin. Indeed, Agamben's methodological essay shall not be discussed alone, but rather as a chronological follower and logical antecedent of *Infancy and History*. Only read against this early work on the relation of time and language, archaeological regression fully reveals its significance. Through the concept of infancy, Agamben tries to convince us that the fracture underlying our vision of history constitutes all the condition of being-human. There is a formative split upon which our lives are founded; the split generating further divisions that we, as mankind, are hopelessly involved in. Its persistence stems from the fact that the founding split is produced by the essential property of being-human: the use of language, and can only be neutralized, Agamben contends, through an infantile experience of wordlessness. His archaeological project is thus about regressing to an infancy in order to deactivate the divisions produced by our language and think of humans as speaking beings beyond this negative grounding.

But first things first. From Humboldt and Hamann on, modern philosophy has demonstrated how language and human subjectivity are intertwined. All post-transcendental critiques of the subject accentuate that consciousness independent of language is a phantasm, and human is only constituted as the individual through the use of words. However, to argue it is the capacity of speaking which differentiates

humans from other animals is highly anachronic – modern life sciences have proved that a number of animals use advanced sound communication. What is really characteristic of human animals, Agamben points out, is rather a constitutive gap between actual speech and the symbolic system of language. Unlike other animals, who are born in language – "they are always and totally language" (Agamben 1993: 52) – humans receive it from the outside, and can only enter the kingdom of speech once they have learned to use meaningful sounds[9]. For Agamben, this distance between the semiotic (language signs) and semantic (discourse) has some serious consequences for the subject. First, we do not own our language but have to wrest it for ourselves; as such, language is not a human property as the Aristotelian tradition of *zōon logon echon* has affirmed, but an external apparatus from which we are originally alienated. Second, as already mentioned, the foundational rupture into the living self and the speaking self generates further separations, like the political opposition of the individual and the common. It is therefore the separating nature of language that Agamben makes responsible for the specious alternative of liberalism and communitarianism that determines our political spectrum (Agamben 2007: 9). Last but not least, if human discourse has to be mediated by the sign system, the price we pay for sophisticated communication based on general and abstract terms is the loss of immediacy; animals are one with their language, we are not. The entrance into language is also reductionist in the sense that the moment we actualize our linguistic capacity and start to produce words, we lose the original potentiality to say anything in any language. As Daniel Heller-Roazen puts it, "it is as if the acquisition of language were possible only through an act of oblivion, a kind of linguistic infantile amnesia" (Heller-Roazen 2005: 11).

The infantile, pre-subjective experience of language is precisely what Agamben wants to save in his messianic enterprise. Infancy[10], he argues, is not just the psychosomatic stage of human development when an individual has not yet learned to speak. It is rather the original form of language in a Benjaminian sense of the word – a fleeting experience of ineffability that not only chronologically precedes but also kairotically coexists with conventional language (Agamben 1993: 48). As such, infancy is a gap in the structure of language, "a break with the continual opposition of diachronic and synchronic, historical and structural" (Agamben 1993: 49-50), which pushes beyond its boundaries toward the pure potentiality of speech.

There is also another phrase which grasps the elusive nature of infancy: the state of exception. In Agamben's widely discussed work on this political and legal phenomenon we read that it introduces a "zone of indistinction" (Agamben 2005a: 26), in which one can no longer tell the difference between norm and anomaly.

[9] This problem is elaborated in *Language and Death* (Agamben 1991) where Agamben explicates this original distance through the idea of the Voice, being the negative metaphysical foundation of human 'being-in-language'.

[10] Or rather: in-fancy.

Analogically, the experience of original wordlessness makes it impossible to distinguish the inside of language from its outside, and the crucial split into the living and speaking being is – at least momentarily – deactivated. In other words, when infancy is incorporated to our linguistic nature as a formative exception, a chance opens for the human animal to coincide with his language while still being separated. And if we remember that man is only subjectified by the discontinuity between discourse and language, it is then perfectly right to call infancy "both remnant of the animal and potential for the post-human" (Watkin 2010: 13)[11].

4. CONCLUSIONS

Read against infancy, regression is no longer a humble methodological tool, but a fundamental metaphysical concept which challenges the divisions that have so far determined Western ontology, the linguistic split within the subject being of supreme importance. However, at times Agamben's theories of regression and infancy look antinomic rather than complementary, and these are precisely some discrepancies that I would like to bring out now. The first one concerns the status of origin *vis-à-vis* the unconscious. As already noted, Agamben conceives of infancy as the unchronological origin to be sought *in* and not before language. At the same time, the elusive nature of infancy reminds him of Freud's concept of the unconscious: whereas the latter "occupies the submerged part of psychic territory" (Agamben 1993: 48), the former is latent on the margins of language. As if anticipating objections, Agamben is quick to stipulate that the unconscious he means is not precedent of consciousness but rather originally coexistent with it in the form of "interior monologue" (Agamben 1993: 48). In other words, it is the unchronological origin of consciousness just like infancy is the unchronological origin of language. However, even if we take Agamben's 'kairotical' theory of the unconscious at face value and weave it into his reading of the origin, it is still fundamentally inconsistent with the premises of regression. As we remember, his main objection to psychoanalysis formulated in *Philosophical Archaeology* was that by investing in the unconscious, it reinforces the psychic division into the Ego and the Id instead of trying to deactivate it. Archaeological regression, on the contrary, shall not be about exploring the unconscious but about questioning the dualistic nature of the self. How does this relate, one could ask, to the discussion of infancy as the unconscious of language? It looks like the reproduction of the psychological split (conscious/unconscious) is the price Agamben has decided to pay for the deactivation of the linguistic one (language/discourse). But if we recall there are no mental states beyond language and human psyche is always 'linguistic', is there any split made inoperative at all?

[11] More on infancy as a chance to deactivate the anthropological machine in Agamben 2004.

Second, and more importantly, there is the problem of deactivation which motivates both regression and infancy. According to Agamben's major thesis, the separation introduced to our creaturely lives by the apparatus of language is that into the living being and the speaking being. Unlike other animals, whom Karl Marx describes as "immediately one with [their] life activity" (Marx 2010: 276), the human animal has no direct relation to language, and it is thanks to this gap between life and speech that the experience of infancy is possible. Without it, Agamben admits, man would be fully united with his nature, there would be no "historicity of language" (Agamben 1993: 52) and no history at all. However, it is crucial to notice a significant paradox inscribed in infancy: while it seems to reassure the anthropological difference between human and other animals, it is also tested by Agamben as a means to deconstruct the difference by deactivating the mechanisms that separate humans from the system of language. In other words – indeed a trademark of Agamben's messianism – what generates divisions is also supposed to make them inoperative. To do this, as we have seen, infancy establishes a zone of indistinction in the likeness of the state of exception, which results in the original split being not erased but neutralized, likewise the alienation of human subjects from their own animality. It is precisely this parallel to the state of exception, I argue, that seems the most problematic here. In a fragment of *Homo Sacer* devoted to the analysis of exception, Agamben makes it clear that on the threshold of indistinction between law and life the latter is absorbed by the former, much more powerful as governed by the principle of sovereignty (Agamben 1998: 53). He also claims that law is not the sole domain of sovereignty, whose attribute is the "unlimited power" (Schmitt 2005: 10) over life; another one is language. The question must be asked, then, if the indistinction that infancy generates between man and language does not result in the human subject being fully *subjected* to the linguistic apparatus? Obviously, Agamben specifies that it is only the sovereign state of exception where language wholly "coincides with reality itself" (Agamben 2005b: 105)[12]; the messianic state of exception produced by infancy would be that of "immediate mediation" (Agamben 1999a), where humans coincide with language while still being separated from it. But are there any safety measures to secure the minimum of separation once it has been blurred by Agamben's *experimentum linguae*? Is the "tiny displacement" (Agamben 2007: 53) of sovereignty and messianism not just too tiny this time?

This problem returns in the important essay *The Idea of Language*, where Agamben meditates on the religious concept of revelation to conclude that it is not so much the truth of being that is revealed in the word of God but the truth of language. The truth, he argues, is that "humans can reveal beings through language but cannot reveal language itself" (Agamben 1999a: 40). Why is that? As we learn

[12] Although this remark is on law and not language, Agamben famously argues that both these apparatuses are structurally analogous and governed by the logic of sovereign exception (Agamben 1998: 20-21; Agamben 2005a: 36-37).

from the Lurianic kabbalah, the power of words, being the original domain of divinity, is too great for finite creatures to absorb; it is only through fractures and separations that this power might be diminished and words used to communicate. It means that – as Scholem puts it – "only that which is fragmentary makes language expressible" (Biale 1985: 87); any direct, unmediated access to language has been barred and had it not, words would be "unmerciful" to human subjectivity (Scholem 2003: 216)[13]. Although expressed in religious terms, these kabbalistic intuitions offer a significant critique of language which fails to be convincingly confronted by Agamben's profane messianism. As a result, how to neutralize the linguistic split within the human subject without exposing him to the "unmerciful" power of language remains unclear. What is clear, though, is another discrepancy between regression and infancy: whereas the first was meant to redefine subjectivity by deactivating its negative grounding, the latter risks reinforcing this negativity by empowering the linguistic sovereign. It seems like at a crucial point these two messianic concepts hopelessly miss each other; they resemble the angels of history who just exchange glances while moving in two different directions.

As we have seen throughout the discussion, the regression to infancy is about 'restoring' the full potentiality of our linguistic origins. As such, it backs up Scholem's kairotical idea of return against Strauss's longing for the actual beginnings. Paradoxically, though, the idiom of "immediate mediation" brings Agamben much closer to the Straussian way of thinking, where separations and discontinuities are considered obstruction rather than safeguard. While these inconsistencies of his crypto-theological project might be considered a flaw, they are actually symptomatic of all Jewish messianism, with the idea of return to the origins hopelessly stretched between restoration and utopia. One could thus say that as long as Agamben's thinking lives on antitheses, it remains faithful to its crypto-theological background; but would it not be itself a paradoxical conclusion to the philosophy which makes for deactivation of opposites?

This research was funded by the National Science Centre grant number 2017/27/N/HS1/01636.

BIBLIOGRAPHY

Agamben, G. 1991. *Language and Death: The Place of Negativity*. Translated by K.E. Pinkus and M. Hardt. Minneapolis and Oxford: University of Minnesota Press.

[13] The comment on the "unmerciful light of revelation" originally appears in Scholem's letter to Benjamin from 1 August 1931 a propos Franz Kafka's prose.

Agamben, G. 1993. *Infancy and History: The Destruction of Experience*. Translated by L. Heron. London.New York: Verso.

Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. 1999a. *The Idea of Language*. In *Potentialities: Collected Essays in Philosophy*. Translated by D. Heller-Roazen. Stanford: Stanford University Press, pp. 39-47.

Agamben, G. 1999b. *The Messiah and the Sovereign: The Problem of Law in Walter Benjamin*. In *Potentialities: Collected Essays in Philosophy*. Translated by D. Heller-Roazen. Stanford: Stanford University Press, pp. 160-174.

Agamben, G. 1999c. *Walter Benjamin and the Demonic: Happiness and Historical Redemption*. In *Potentialities: Collected Essays in Philosophy*. Translated by D. Heller-Roazen. Stanford: Stanford University Press, pp. 138-159.

Agamben, G. 2004. *The Open: Man and Animal*. Translated by K. Attell. Stanford: Stanford University Press.

Agamben, G. 2005a. *State of Exception*. Translated by K. Attell. Chicago-London: University of Chicago Press.

Agamben, G. 2005b. *The Time that Remains: A Commentary on the Letter to the Romans*. Translated by P. Dailey. Stanford: Stanford University Press.

Agamben, G. 2007. *The Coming Community*. Translated by M. Hardt. Minneapolis-London: University of Minnesota Press.

Agamben, G. 2009a. *The Signature of All Things: On Method*. Translated by L. D'Isanto and K. Attell. New York: Zone Books.

Agamben, G. 2009b. *What Is the Contemporary*. In *What Is an Apparatus? And Other Essays*. Translated by D. Kishik and S. Pedatella. Stanford: Stanford University Press, pp. 39-54.

Agamben, G. 2011a. *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*. Translated by L. Chiesa and M. Mandarini. Stanford: Stanford University Press.

Agamben, G. 2011b. *The Sacrament of Language: An Archaeology of the Oath*. Translated by A. Kotsko. Stanford: Stanford University Press.

Benjamin, W. 2003. *The Origin of German Tragic Drama*. Translated by J. Osborne. New York-London: Verso.

Benjamin, W. 2006. *On the Concept of History*. In *Selected Writings*, ed. by M. Bullock and M.W. Jennings, vol. 4, 1938-1940. Cambridge: Harvard University Press, pp. 389-400.

Biale, D. 1985. *Gershom Scholem's Ten Unhistorical Aphorisms on Kabbalah: Text and Commentary*. In «Modern Judaism», 5.1, pp. 67-93.

Bloom, H. 2003. *A Map of Misreading*. Oxford-London: Oxford University Press.

Dickinson, C. 2011. *Agamben and Theology*. New York-London: T&T Clark International.

Fine, L. 2003. *Physician of the Soul, Healer of the Cosmos: Isaac Luria and His Kabbalistic Fellowship*. Stanford: Stanford University Press.

Foucault, M. 1998. *Nietzsche, Genealogy, History*. In *Aesthetics, Method, and Epistemology*, ed. by J.D. Faubion. New York: The New Press, pp. 369-392.

Heidegger, M. 1996. *Being and Time*. Translated by J. Stambaugh. Albany: State University of New York Press.

Heimann, P. and Isaacs S. 2002. *Regression*. In M. Klein, P. Heimann, S. Isaacs, and J. Riviere, *Developments in Psychoanalysis*. New York and London: Karnac, pp. 169-197.

Heller-Roazen, D. 2005. *Echolalias: On the Forgetting of Language*, New York: Zone Books.

Marx, K. 2010. *Economic and Philosophical Manuscripts of 1844*. Translated by M. Milligan and D.J. Struik, in K. Marx and F. Engels, *Marx & Engels Collected Works: Volume 3, Karl Marx March 1843-August 1844*. London: Lawrence & Wishart, pp. 229-346.

McQuillan, C. 2010. *Philosophical Archaeology in Kant, Foucault, and Agamben*. In «Parrhesia», 10, pp. 39-49.

Schmitt, C. 2005. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by G. Schwab. Chicago-London: University of Chicago Press.

Scholem, G. 1946. *Major Trends in Jewish Mysticism*. Translated by G. Lichtheim. New York: Schocken Books.

Scholem, G. 1969. *On the Kabbalah and Its Symbolism*. Translated by R. Manheim. New York: Schocken Books.

Scholem, G. 1971. *Toward an Understanding of the Messianic Idea in Judaism*. Translated by H. Halkin, in Id., *The Messianic Idea in Judaism: And Other Essays on Jewish Spirituality*. New York: Schocken Books, pp. 1-36.

Scholem, G. 2003. *Walter Benjamin: The Story of a Friendship*. Translated by H. Zohn. New York: New York Review Books.

Snoek, A. 2010. *Agamben's Foucault: An Overview*. In «Foucault Studies», 10, pp. 44-67.

Strauss, L. 1997. *Progress or Return? The Contemporary Crisis in Western Civilization*. In Id., *Jewish Philosophy and the Crisis of Modernity: Essays and Lectures in Modern Jewish Thought*. Albany: State University of New York Press, pp. 87-136.

Watkin, W. *The Literary Agamben: Adventures in Logopoiesis*, Continuum: London.

287 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 287-296
ISSN: 1825-5167

HOMO SCHIZOID. DESTITUENT POWER AND NONRELATIONAL LIFE

DAVID KISHIK
Marlboro Institute for Liberal Arts & Interdisciplinary Studies
Emerson College
david_kishik@emerson.edu

ABSTRACT
For about thirty years, between 1940 and 1970, a strange entity made a passing and hesitant appearance on the radar of the West's intellectual history. Homo schizoid found its decisive articulation in the writings of Ronald Fairbairn and Harry Guntrip, two psychoanalysts who are barely known outside of professional circles. By now, this figure is all too often either forgotten or, even worse, confused with its psychotic relative, the schizophrenic. Giorgio Agamben and his commentators have made no serious effort to investigate the schizoid position in their attempt to imagine a politics that transcends the idea of relation and an ethics freed from the need for recognition. So this paper is guided by three questions: What does the notion of homo sacer have to do with homo schizoid? Is Agamben's approach to life as something that is never defined but only divided somehow connected to the split or skhizein which gives the schizoid its name? Finally, will the schizoid persist as a personality disorder, or can it become the harbinger of a destituent power?

KEYWORDS
Agamben, Fairbairn, Guntrip, Laing, Psychoanalysis, Object Relations Theory, Schizoid

> We are together and very close, but between us there is not an articulation or a relation that unites us. We are united to one another in the form of our being alone.
> Giorgio Agamben (2017: 1243)

For about thirty years, roughly between 1940 and 1970, a strange entity made a passing and hesitant appearance on the radar of the West's intellectual history. After some preliminary psychiatric groundwork laid down in the first decades of the twentieth century by Eugen Bleuler and Ernst Kretschmer, *homo schizoid* found its decisive articulation in the writings of Ronald Fairbairn and Harry Guntrip, two psychoanalysts who are barely known outside of professional circles. The figure of the schizoid also played an important role in the thought of Melanie Klein and Donald Winnicott, as well as in

R. D. Laing's *The Divided Self*, which introduced this figure to a larger audience. By now, however, *homo schizoid* is all too often either forgotten or, even worse, confused with his psychotic relative, the schizophrenic.

Agamben and his commentators have made no serious effort to investigate the schizoid position as part of their attempt to imagine a politics that transcends the idea of relation and an ethics freed from the need for recognition. Nor was there any sustained use of object relations theory (on which the schizoid logic is based) to help navigate the currents of subjectification and desubjectification on which Agamben's thought likes to sail. Which is not surprising, partly because his work is focused on the "essentially ontologico-political and not only psychological meaning of the division of the parts of the soul" (Agamben 2017: 1210).

Be that as it may, what does Agamben's notion of *homo sacer* have to do with *homo schizoid*? Is his approach to life as something that is never defined but only divided somehow connected to the split or *skhizein* which gives the schizoid its name? How does Winnicott's description of the infant's sensation of *infinite falling* relate to Agamben's notions of the ban, banishment, and abandonment? Can the feeling that Laing defines as *ontological insecurity* help in making sense of the psycho-political nexus in which we currently live? Will the schizoid persist as a personality disorder, or will it become the harbinger of what Agamben calls, in the epilogue to the entire *Homo Sacer* book series, *destituent power*? What follows is only a sketch for a future portrait of a twenty-first century schizoid man.

"Life, without feeling alive" is one evocative formulation of the schizoid condition in Laing's book (1990: 40). "This shut-up self, being isolated, is unable to be enriched by outer experience, and so the whole inner world comes to be more and more impoverished, until the individual may come to feel he is merely a vacuum" (Laing 1990: 75). First, the schizoid distances himself from an external life he deems impoverished, especially when compared to the rich life he cultivates within. But after a while, he "longs to get *inside* life again, and get life *inside* himself, so dreadful is his inner deadness" (Laing 1990: 75).

Introverted, self-sufficient, withdrawn, unemotional, impersonal, distant, lonely: these are some of the more common descriptors associated with schizoid personalities. Alternately, consider Franz Kafka's *The Burrow*, a story about some paranoid-schizoid animal (as Klein might diagnose it) who digs an increasingly complex maze of underground tunnels in an attempt to fend off an unspecified external threat. The animal's long and belaboured monologue, which constitutes the entire story, gradually leads the exhausted reader to realize that the structure's protection is, in fact, an entrapment, that the perceived sense of freedom is actually a prison, and that the burrow might even be the burrower's own grave.

This reading echoes Agamben's claim in *Nudities* that another one of Kafka's protagonists, K from *The Trial*, is persecuted not by external forces, but only by internal ones; that he actually accuses himself of a crime he did not commit. In other words, K slanders himself. Instead of following Agamben's rationalization for this suicidal move, let us turn instead to Lionel Trilling, who points out that from the get-go K "is without parents, home, wife, child, commitment, or appetite; he has no connection with power, beauty, love, wit, courage, loyalty, or fame" (quoted in Laing 1990: 40). These are the trial's conditions of possibility, rather than its outcome, and this is the ground for Kafka's position as a schizoid paradigm in Laing's influential analysis.

The schizoid tends to let go of many needs and desires, treating her emptiness as an ideal of human existence, thus becoming detached, meeting everything and everyone with a Bartleby-like silent resistance. She prefers not to actualize her potential. The self, by itself, feels that it deserves nothing. The less one wishes, the safer one feels, the further one retreats, the harder it gets for others to break through her shell. The more the world disappoints, the more appealing the schizoid strategy becomes. But this split or *schiz* between the inner self and the outer world is not simply the subject's realistic reaction to a particular threatening object. It inevitably becomes the schizoid's relentless mode of being once a patina of futility begins to descend on her entire surroundings. Like mice, the schizoid strategy is to timidly venture out and then quickly retreat back in to regroup. Like Arthur Schopenhauer's porcupines, the schizoid dilemma is that when they are close to each other they sting, but by keeping a distance they get cold.

How does one become the schizoid one is? When personal relationships frustrate us, we often feel either anger or hunger. "When you cannot get what you want from the person you need, instead of getting angry you may simply go on getting more and more hungry" (Guntrip 1992: 24). This *love made hungry* is at the core of the schizoid experience. Such social malnutrition makes it difficult to digest meaningful interpersonal connections, which can then be easily substituted by unemotional relations that only give instant gratification but little nourishment (for example, through casual sex). Because love is to a schizoid what sugar is to a diabetic. While anger or aggression can lead one to feel guilty, schizoid withdrawal leads one to feel *nothing*. If hate becomes destructive, it is still possible to love someone else. But if love seems destructive, then there is no exit strategy. True hell is the life of a person who cannot shake this conviction that hell is other people.

The opposite of love is not hate. "Hate is love grown angry because of rejection. We can only really hate a person if we want their love" (Guntrip 1994: 45). The true opposite of both love and hate is *indifference*, which is the most common schizoid mood: "Having no interest in a person, not wanting a relationship and so having no reason for either loving or hating" (Guntrip 1994: 45. According to William Watkin, indifference

is the cornerstone of Agamben's philosophical edifice). While narcissists need to be seen and to receive constant approval from others, schizoids would much prefer to disappear, since they could not care less whether they get either positive or negative feedback. To substitute their failed relations with people, they can construct and engage with an elaborate world of internal objects (philosophical or mathematical, artistic or fantastic). This inner experience encases the subject in a closed system that slowly dims the light coming from the external world.

How can a psyche cope with the trauma of being forsaken? Fairbairn's answer is called *the moral defense*: imagine a father who broke his young daughter's arm. The abused child will usually convince herself (and anyone who asks, like a doctor) that all of it happened because she was bad. Otherwise she will need to face a truth about her father that is too hard to bear. Put otherwise, "it is better to be a sinner in a world ruled by God than to live in a world ruled by the devil" (Fairbairn 1972: 67). This bind leads to the first splitting: God, like father, must be wholly good, while the child, like humanity (at least since St. Augustine), must take the full blame. For the adult schizoid, as for Kafka's K, life is but a life sentence, served daily in the ordinary world.

The terms of the split may vary—good and evil world, true and false self, inner subject and outer object, relational and vegetal life, mind and body, culture and nature, subject and object—because *homo schizoid* is essentially a machine that produces every dualistic division under the sun. Hence for Fairbairn, "everybody without exception must be regarded as schizoid", since "the basic position in the psyche is invariably a schizoid position" (Fairbairn 1972: 7). These grand claims ring true to the extent that "the fundamental schizoid phenomenon is the presence of splits in the ego; and it would take a bold man to claim that his ego has so perfectly integrated as to be incapable of revealing any evidence of splitting at the deepest levels" (Fairbairn 1972: 7). The nature and severity of these fissions fluctuate, but their ability to trigger a person to cancel external relations and live a detached and withdrawn life—where dualistic distinctions can only stay static—is their true existential threat.

With all the current talk about loneliness as a public health crisis, the deeper schizoid issue, of which loneliness is often merely a symptom, is rarely discussed, though its infantile origins are well known, thanks in part to Winnicott's work on good-enough mothering and John Bowlby's attachment theory. Due to compromised parental care, a person can grow up feeling "stranded in an impersonal milieu, a world empty of any capacity to relate to him and evoke his human potential. He can develop the worst of all psychopathological states, the schizoid condition of withdrawn isolation, fundamental loneliness, profoundly out of touch with his entire outer world; so that people seem like 'things' and the material world around him seems like a flat unreal imitation" (Guntrip 1994: 277). In the beginning, an object betrayed a subject's trust. Since then,

everything slowly concentrated into a point without extension of a being that feels utterly alone. To use today's parlance, schizoid life is (self-inflicted) social death, or social distancing, even under the confident disguise of a Stoic existence.

Haunted by his ontological insecurity, by doubting his very being, Laing describes a schizoid patient's startling method of defending his empty core: "Under the conviction that he was nobody, that he was nothing, he was driven by a terrible sense of honesty to *be* nothing...Being anonymous was one way of magically translating this conviction into fact... He was going from anywhere to anywhere: he had no past, no future. He had no possessions, no friends. Being nothing, knowing nobody, being known by none, he was creating the conditions which made it more easy for him to believe that he *was* nobody" (Laing 1990: 131-132). Under the rule of an Object Relations Ontology, such object privation is a will to nothingness, which is at least still a will, as Friedrich Nietzsche insists in his not-unrelated genealogy of the ascetic ideal, though the subject who is doing the willing, according to the schizoid ideal, seems to be missing in action.

The above case study bears striking resemblance to Ludwig Binswanger's description of his schizophrenic patient Lola Voss, in her desperate attempt to hold on to every straw due to her fear that with any step she takes, the metaphorical thin ice on which she walks might break. Binswanger contrasts Voss's state to that of a secure existence, with both feet firmly planted on the ground, confident of itself and of the world. Voss lacks this "indisputable protection of existence from falling, sinking, breaking through into an abyss", resulting in a naked being that is not quite *there* in the world (Binswanger 1963: 290). A bare life, perhaps, separated from its form. Hence Laing's pivotal notion of *ontological insecurity* (following Binswanger, following Martin Heidegger). But is anyone's existence truly secure? Don't we all try to hold each other lest we fall? So why do we constantly let relationships dissolve and keep to ourselves?

The schizoid is a general position. Schizophrenia is an acute manifestation of a breakdown of the schizoid strategy. Or schizophrenia is the limit case of the schizoid configuration. For our non-clinical purposes, we could add that a schizoid is a functioning schizophrenic. Schizoids hold themselves together by employing a variety of defense mechanisms—their symptoms—as they struggle to partake in everyday life and maintain what they have, who they are, and most importantly, *that* they are, without breaking apart to expose their fragile, fragmented, nihilistic, and catatonic self, which is kept locked, as it were, in a safe. Does this description begin to explain why schizophrenia got such disproportionate public attention over the years, while the schizoid form of life remains largely unknown? But isn't it a bit like trying to explain nuclear power by focusing exclusively on meltdowns? Instead of exploding, schizoids implode.

Inspired by Gilles Deleuze and Félix Guattari's approach to schizophrenia (2015: 70), we also see *homo schizoid* as a "conceptual persona who lives intensely within the

thinker and forces him to think", rather than as a "psychosocial type who represses the living being and robs him of his thought". Part of the task is to discover the cultural manifestations of our deeply schizoid world. Another task is to imagine schizoism as a line of flight, by turning apathy into pathos. The goal, in short, is not to block the schizoid experience, but to put it into new use. This, however, is where the comparison to *Anti-Oedipus* ends (for a compelling alternative account, see Louis Sass's *Madness and Modernism*). Fairbairn and Guntrip's thought is an *ante*-Oedipal stance, focusing on the infantile condition that precedes the child's later contention with the parents. For Guntrip (1992: 278), "schizoid problems represent a flight from life, oedipal problems represent a struggle to live". For Fairbairn, the schizoid structure, not Sigmund Freud's Oedipal complex, is humanity's most fundamental and inescapable force.

Freud defines an object as the target of a drive, which is either libidinal or aggressive in its nature. Drives are always innate, basically uncontrollable, and often dangerous forces. In order for them to be kept in check they require education, socialization, and sometimes therapy (as well as the Church, according to Augustine). In Freud's theory, libido comes first, and then the subject who contains it latches on to this or that sexual object to get some relief. Freudian psychoanalysis focuses on the individual as a discrete entity, ultimately divorced from its interpersonal context. Society is then imposed on already-complete persons for their own protection. The Freudian dogma cannot integrate the Winnicottian realization that there is no such thing as a baby, that there is always a baby and *someone*.

Fairbairn defines an object as whatever a subject relates to, though anyone who ever ventured beyond the mere name of his 'object relations' theory knows that by object he principally means another person with whom the human subject develops an emotional and meaningful relationship. Without relying on the concept of the drive—which is an unverifiable hypothetical construct—he postulates that at bottom "we seek persons, not pleasures", as Guntrip sums it up (1992: 21). Pleasure is just a means to the true end: relating to others. Jay Greenberg and Stephen Mitchell, who wrote the definitive account of this psychoanalytic paradigm shift, elaborate: "The problem for Freud is the inherent opposition among instinctual aims and between instinctual aims and social reality; the problem for Fairbairn is that the person cannot maintain the integrity and wholeness of his experience of himself within his necessary relations with others and is forced to fragment himself to maintain contact and devotion to the irreconcilable features of those relations" (1983: 167). Yet Fairbairn takes his priorities to be more fundamental than Freud's: splitting over repressing, a schizoid position over a depressive one, schizophrenia over melancholia.

We can now see how the moral defense is unwittingly employed by Freud (but also by Thomas Hobbes and Nietzsche) in conceiving our civilization and its discontents.

Guntrip wonders about the origin of "man's age-old conviction that all his troubles come from his possession of mighty if nearly uncivilizable instincts of his animal nature", which "turns out to be our greatest rationalization and self-deception. We have preferred to boost our egos by the belief that even if we are bad, we are at any rate strong in the possession of 'mighty instincts'. Men have resisted recognition of the truth that we distort our instincts into antisocial drives in our struggle to suppress the fact that deep within our make-up we retain a weak, fear-ridden infantile ego that we never completely outgrow" (1992: 125). In short, we would rather pretend that we are bad than admit that we are weak.

To be bad is not to control your inner beast and resist the process of socialization. To acknowledge your fundamental schizoid weakness is not only to bring about a "shift in the center of gravity in psychodynamic theory", but also to lead to what Guntrip believes to be a "radical reassessment of all philosophical, moral, educational, and religious views of human nature" (1992: 126). In his final analysis, both sexual and aggressive conflicts are "defenses against withdrawal, regression, and depersonalization" (1992: 129). We use them because we do not want to face "the terrors of realizing how radically small, weak and cut off, shut in and unreal" we ultimately are (1992: 129). Human beings are violable long before (and long after) they are violent. Hence the elementary psychopathological problem is this "schizoid problem of feeling a nobody, of never having grown an adequate feeling of a real self" (1992: 129).

But isn't this also a good description of our biopolitical problem? Doesn't object relations theory end up articulating our *precarious life*, as Judith Butler calls it? For better or for worse, the coming politics as envisioned by Agamben and others (including the antirelational or antisocial turn in queer, afropessimist, and decolonial thought) is schizoid politics. If we accept Agamben's view of the human "as having been and still being an infant" (2007: 58), as what "is always the place—and, at the same time, the result—of ceaseless divisions and caesurae" (2012: 16), as "the suspension of the immediate relation of the animal with its environment" (2017: 1197), then the human must be understood as *homo schizoid*, with all its ego-weakness and defiant destitution (for a cinematic illustration of this set of problems, see Jordan Peele's *Us*).

In Jean-Luc Nancy's *Abandoned Being*, which inspired Agamben's notion of the ban, we find this explanation of the crucified's last words to his heavenly father: "What the 'God of love' means is that love alone can abandon...and it is by the possibility of abandonment that one knows the possibility, inverted or lost, of love" (Nancy 2009: 41). Is it a coincidence that both Moses and Oedipus were abandoned at birth, while Jesus was also abandoned at death? And what about Abraham's dreadful abandonment of Isaac, not to mention Ishmael? Agamben, like Kafka, is not interested in the ways that law applies to life, but in how the law (Abrahamic, Roman, paternal, or otherwise)

constantly abandons a life. Nancy's intervention would be to wonder about the existence of some primary or perverse love, which must precede this pervasive legal abandonment. Agamben, however, seems to want to throw the relationship baby out with the abandonment bathwater. Like Cartesian doubt, the mere threat of exclusion means for Agamben that he cannot trust any inclusive embrace whatsoever.

Since our political space is far from being a benevolent *holding environment*, as Winnicott calls it, every relation is at least potentially an abandonment. For Agamben, "the relation of abandonment is not a relation" (2017: 52), because it is an abandonment of the very possibility of a relation. As an aside, notice the curious use of abandonment as a literary gesture throughout Agamben's writings: his readers are often asked to abandon a concept, idea, tradition, or institution. He even claims that *Homo Sacer* as a whole is an investigation that "cannot be concluded but only abandoned" (2017: 1019). And there is also the case of his book dedicated to the most colossal act of abandonment in human history, *Remnants of Auschwitz*, which opens with an *in memoriam* to no one other than his mother, plus this quote: "To be exposed to everything is to be capable of everything" (2017: 765). And a life that begins and ends with an experience of abandonment, of a failed relation, is a life that can never be separated from its schizoid form.

One surprising source for Agamben's radical attempt to dream up a schizoid politics "set free from every figure of relation" (2017: 1269) is Jacques Lacan, even though the latter's influence is mainly limited to the former's *Stanzas*, from 1977. While remaining committed to Freud's Oedipal complex and the concept of the drive, Lacan also made an important contribution to object relations theory, to which Seminar IV from 1956 is dedicated. It revolves around his insistence that the true object to which the subject wants to relate is, in some fundamental sense, always already lost, so all attempts to find it again remain insufficient. Since he sees object lack as the origin of desire, Lacan can later add that true *jouissance* and real sexual relations are virtually impossible. What he calls *objet petit a* is not a real object, but something which we can neither get a hold on nor let go of. If Fairbairn thinks that we don't seek pleasures but persons, then Lacan adds that we don't seek persons but phantasms. Hence the Lacanian subject is also a schizoid of sorts, at least according to its recent characterization as "the-one-all-alone", whose relations to others are nothing but a growing string of frustrations (Miller 2005).

Agamben's antipathy toward relations has one telling exception. In his most recent engagement with Michel Foucault, he rejects the idea of a subject as a kind of author or sovereign who acts and *relates* to an object. There is, in fact, no subject but only subjectification, a process of transforming oneself by *relating* to oneself: "'Self' for Foucault is not a substance nor the objectifiable result of an operation (the relation with

itself): it is the operation itself, the relation itself. That is to say, there is not a subject before the relationship with itself and the use of the self: the subject is that relationship and not one of its terms" (Agamben 2017: 1118). Ethics is not a relation to a norm but a relation of the self to itself, which, according to Foucault, is "not just a brief preparation for life; it is a form of life" (quoted in Agamben 2017: 1120).

As a way to conclude (or abandon) this paper, let us turn to one of the most poignant manifestations of Agamben's schizoid tendencies, to be found in an early allusion to St. Francis, which is also an early formulation of his critique of intersubjective recognition as the basic building block of ethics. In *The Idea of Prose* from 1985, we read: "Every struggle among men is in fact a struggle for recognition and the peace that follows such a struggle is only a convention instituting the signs and conditions of mutual, precarious recognition. Such a peace is only and always a peace amongst states and of the law, a fiction of the recognition of an identity in language, which comes from war and will end in war" (81-2). As an alternative model to the Hegelian dialectics of mutual recognition, Agamben alludes to this beautiful Franciscan tale, quoted here in full:

> One day blessed Francis, while at St. Mary's, called friar Leo and said: "Friar Leo, write this down." And Leo responded: "Behold I am ready." "Write down what perfect joy is," Francis said, "A messenger comes and says that all the masters of theology in Paris have entered the Order: write, this is not true joy. Likewise all the prelates beyond the Alps, archbishops and bishops; likewise the King of France and the King of England: write, this is not true joy. Or, that my friars went among the infidels and converted them all to the Faith; likewise that I have from God enough grace that I can heal the infirm and work many miracles: I say to you that in all these things there is not true joy."
>
> Then Francis said, "So what is true joy? I return from Perugia and in the dead of night I come here and it is winter time, muddy and so frigid that icicles have congealed at the edge of my tunic and they pierce my shins so they bleed. And covered with mud and in the cold and ice, I come to the gate, and after I knock for a long time and call, there comes a friar and he asks: 'Who is it?' I respond: 'Friar Francis.' And he says: 'Go away; it is not a decent hour for traveling; you shall not enter.' I appeal to him again and he responds to me insisting: 'Go away; you are a simpleton and an idiot; you do not measure up to us; we are so many and such men, that we are not in need of you!' And I stand again at the gate and I say: 'For the love of God take me in this night.' And he responds: 'I will not! Go away to the place of Crosiers [referring to the Hospital of Fontanelle, run by the Order of Crosiers] and ask there.' I say to you, if I endure all this patiently and without dismay therein lies perfect joy, true virtue and the salvation of the soul" (quoted in DeCaroli 2012: 132).

This story about the joy of non-recognition, reminiscent of Kafka's *Before the Law*, can be updated and restated as a rather disturbing prayer: "May I be denied entrance to my own country, home, or office. May I be locked out of my phone, email, or social media. May I be canceled". For many, this is the stuff nightmares are made of. For

schizoids, especially those who hold on to even a modicum of social privilege, it is a secret blessing. They understand that, rather than to fight for the inclusion of others, the truly radical and exemplary ethical position today is to *exclude thyself*.

BIBLIOGRAPHY

Agamben, G. 1995. *The Idea of Prose*. Translated by M. Sullivan and S. Whitsitt. Albany: State University of New York Press.

Agamben, G. 2007. *Infancy and History: The Destruction of Experience*. Translated by L. Heron, London: Verso.

Agamben, G. 2012. *The Open: Man and Animal*. Translated by K. Attell. Stanford: Stanford University Press.

Agamben, G. 2017. *The Omnibus Homo Sacer*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.

Binswanger, L. 1963. *Being-in-the-World*. New York: Harper & Row.

DeCaroli, S. 2012. *The Idea of Awakening: Giorgio Agamben and the Nagarjuna*. In «Res Publica», 28, pp. 101-138.

Deleuze, G. and Guattari, F. 2015. *What is Philosophy?*. Translated by G. Burchell and H. Tomlinson. London: Verso.

Fairbairn, R. 1972. *Psychoanalytic Studies of the Personality.* London: Routledge.

Greenberg, J. and Mitchell, S. 1983. *Object Relations in Psychoanalytic Theory.* Cambridge: Harvard University Press.

Guntrip, H. 1992. *Schizoid Phenomena, Object-Relations and the Self.* London: Routledge.

Guntrip, H. 1994. *Personal Relations Therapy.* Northvale: Aronson.

Laing, R. 1990. *The Divided Self*. London: Penguin Books.

Miller, J.A. 2005. *A Fantasy*. In «Lacanian Praxis», 1, pp. 5-16.

Nancy, J.L. 2009. *The Birth to Presence*. Translated by B. Holmes and Others. Stanford: Stanford University Press.

Monographica II

DIRITTO, INFRADIRITTO, CONTRODIRITTO. STRUMENTI DI REGOLAZIONE E TUTELA DEI DIRITTI FONDAMENTALI

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 299-301
ISSN: 1825-5167

LAW, INFRA-LAW, COUNTERLAW. REGULATORY INSTRUMENTS AND FUNDAMENTAL RIGHTS PROTECTION

GUEST EDITORS' PREFACE*

ILARIO BELLONI
Dipartimento di Giurisprudenza
Università di Pisa
ilario.belloni@unipi.it

GIUSEPPE CAMPANELLI
Dipartimento di Giurisprudenza
Università di Pisa
giuseppe.campanelli@unipi.it

LORENZO MILAZZO
Dipartimento di Giurisprudenza
Università di Pisa
lorenzo.milazzo@unipi.it

ABSTRACT
The text aims to deliver a brief presentation of the special issue devoted to "Law, infra-law, counterlaw. Regulatory instruments and fundamental rights protection".

KEYWORDS
Infra-law, Counterlaw, Rights, Sources of law, Rule of law.

As it is well known, Foucault noticed in *Discipline and Punish* that, on the one hand, «the process by which the bourgeoisie became in the course of the eighteenth century the politically dominant class was masked by the establishment of an ex-

* Translation from Italian by Serena Vantin.

plicit, coded and formally egalitarian juridical framework, made possible by the organization of a parliamentary, representative regime»[1], while, on the other hand, «the general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines», whose functioning guaranteed *de facto* «the submission of forces and bodies»[2].

According to Foucault, the disciplines could be described as «infra-law» if they operated following truly 'legal' logics and principles in order to disseminate their effects «on a different scale, thereby making it more meticulous and more indulgent»[3]. Their role though was rather that «of introducing insuperable asymmetries and excluding reciprocities» the law otherwise appeared to have to ensure. Thus «the disciplines should be regarded as a sort of counterlaw», even when they operate in a regular and institutional way[4].

Although adopting considerably different research approaches and scientific, political, cultural perspectives, the authors of this monographica – whose idea developed in the framework of a research project titled "Diritto senza politica. Le forme della produzione giuridica nell'epoca transnazionale", directed by Rolando Tarchi and entirely funded by the University of Pisa – endorse the assumption that the stream of the counterlaw still recurrently flows, despite its 'disciplinary' peculiarities, covered by the general form imposed to law by the liberal and democratic «legal project»[5].

Particularly in some areas of the legal system, the issue of the protection of rights is notably, and sometimes tragically, addressed. More broadly, informal regulatory instruments are widely used in order to regulate specific matters or, more often, the conducts of certain groups of subjects in ways that are occasionally incompatible with the principles of the rule of law. Along these lines, the authors will focus on some administrative and governmental practices characterised by the use of infra-legal regulatory instruments, aiming at identifying their most problematic aspects and their impact on the protection of rights, with particular regard to those pertaining to the most vulnerable subjects.

Lorenzo Milazzo, who introduces the section, briefly traces the theoretical framework in which the concepts of *infra-law* and *counterlaw* are more clearly shown in order to emphasise their potentialities and limits. Iside Gjergji, who devoted remarkable academic studies to the infra-law relative to migrant people, returns on

[1] M. FOUCAULT, *Surveiller et punir. Naissance de la prison*, Paris 1975, Eng. tr., *Discipline and Punish. The Birth of the Prison,* Translated from the French by A. Sheridan, New York 1995, 222.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*, 223.

[5] P. COSTA, *Il progetto giuridico: ricerche sul liberalismo classico*, Milano 1974.

this crucial issue, concisely presenting the colonial and postcolonial history of the 'government by administrative deeds', and thus recognizing a possible development of that practice in the current 'tweeting-governance'.

Silvia Talini pays attention to the system of criminal enforcement and to the *infra-criminal* or restrictive practices that feature the penitentiary system. She suggests that the proliferation of these practices depends on the 'surreptitious' assignment, achieved by public authorities, of a vast additional power which is 'not provided for by the Constitution' and whose exercise is beyond «the constitutional review reserved – as is well known – to primary legislation».

Francesco Marone and Andrea Pertici explore the regulatory instruments conferred to ANAC (National Anti-Corruption Authority) by legislative decree no. 50/2016, with specific regard to the *guidelines* by which the Authority implemented the 2016 Public Contract Code.

Ilario Belloni turns his attention to the ways 'non-human animals' have been handled in our societies. Their treatment appears, in fact, to be widely regulated through infra-legal instruments and measures, that frequently became an actual counterlaw.

Finally, Antonello Lo Calzo makes use of the conceptual categories that broadly ground this research in order to analyse the ways in which the State's apparatus governed, or tried to govern, the current sanitary emergency, particularly emphasising the regulatory and innovative function that the publication of the FAQ, on the websites of the Ministries involved in the management of the crisis, has unexpectedly adopted.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 303-321
ISSN: 1825-5167

INFRADIRITTO, CONTRODIRITTO E 'REGRESSIONE DEL GIURIDICO'

LORENZO MILAZZO
Dipartimento di Giurisprudenza
Università di Pisa
lorenzo.milazzo@unipi.it

ABSTRACT
Since the 1970s, critical legal scholarship has made use of the concept of 'infra-law' to draw attention to a certain set of administrative and governance practices. These practices are characterised by a wide use of regulatory instruments that are easily taken away from public and sometimes even legal control. They allow, therefore, the regulation of specific matters, as well as the condition of particular subjects, in ways that are incompatible with the explicit principles of the rule of law, without these principles having to be called into question. In this essay I will try to delineate the theoretical context in which the concept of infra-law is more clearly shown and its limits and potentialities become comprehensible.

KEYWORDS
Infra-law, counter-law, sovereignty, disciplines, rights.

1. COS'È L'INFRADIRITTO?

Nel 1972 Raymond Marcellin e Joseph Fontanet, l'uno ministro degli interni e l'altro ministro del lavoro nel governo gollista di Jacques Chaban-Delmas, emisero due circolari, divenute in seguito tristemente note come "circolari Marcellin-Fontanet", con le quali ordinavano, fra le altre cose, ai funzionari delle loro amministrazioni di negare il permesso di soggiorno agli stranieri che non potessero dimostrare di avere sottoscritto un contratto di lavoro di durata non inferiore a un anno e di avere la disponibilità di un alloggio "decente" in cui risiedere[1]. Le circolari furono vigorosamente contestate dai migranti, dalle associazioni costituitesi a tutela dei loro diritti e dai sindacati, lievemente riviste nel 1973 dal governo successivo e poi annullate nel 1974 dal Consiglio di Stato, secondo il quale – come ricordava Costa-Lascoux quindici anni dopo – non era con delle circolari che poteva essere regolata

[1] M. ZANCARINI-FOURNEL, *La question immigrée après 68*, in *Plein Droit*, nn. 53-54, 2-3 (2002), 6; D. LOCHAK, *Les circulaires Marcellin-Fontanet*, in *Hommes & migrations. Revue française de référence sur les dynamiques migratoires*, n. 1130, 3 (2020), 14-17.

la materia dell'ingresso e del soggiorno di cittadini stranieri nel territorio dello stato: «fu allora che ebbe inizio la polemica sull'"infra-diritto" dei migranti»[2].

Costa-Lascoux ricorda anche, d'altra parte, che «il termine "infra-diritto" era stato preso in prestito da [...] Jean Carbonnier»[3], il quale tuttavia non gradiva affatto che i «difensori dei diritti degli immigrati» lo impiegassero per denunciare l'uso o l'abuso di «circolari o altre istruzioni non pubblicate [...] a detrimento del diritto delle persone», ritenendo che in questo modo fosse distorto il significato che nei suoi scritti aveva inteso attribuire all'espressione[4].

Come è noto, Carbonnier avvertì con forza l'esigenza di distinguere il diritto dagli altri sistemi di regolazione del comportamento umano onde evitare i rischi, sui quali più volte aveva richiamato l'attenzione, del *pangiurismo* a cui, a suo avviso, sarebbe stata incline la dogmatica giuridica[5]. «Prima di avventurarsi nel diritto, bisogna convincersi della specificità del giuridico»[6], e per farlo serve un criterio di distinzione sul quale sia possibile fare affidamento[7].

Nell'edizione del 1972 della sua *Sociologie juridique* il sociologo e giurista francese rilevava che per alcuni la *costrizione* costituisce un tratto peculiare del diritto quando svolge «una funzione cosciente» e scaturisce da «un organismo specializzato»[8], mentre per altri «quel che è proprio del diritto è una messa in questione organizzata, un istituto di contestazione [...] dell'applicazione della regola al caso concreto», ossia, con Kantorowicz, la sua *giustiziabilità*[9]. Ben presto tuttavia Carbonnier si convinse che fosse necessario arrendersi «all'evidenza pessimistica: è lo *ius gladii* che definisce al meglio il giuridico»[10], e si deve prendere atto che «il potere di esercitare una costrizione sul corpo dell'uomo fa parte della definizione stessa del diritto»[11]. E... «sì, questa costrizione *svolge una funzione cosciente*, perché è guidata

[2] J. COSTA-LASCOUX, *De l'immigré au citoyen*, Paris 1989, 22-23. Cfr. L. ISRAËL, *Faire émerger le droit des étrangers en le contestant, ou l'histoire paradoxale des premières années du GISTI*, in *Politix*, vol. 16, 62 (2003), 136 ss.

[3] J. COSTA-LASCOUX, *De l'immigré au citoyen*, cit., 6, nota 2.

[4] J. COSTA-LASCOUX, *Le droit à distance, in Jean Carbonnier. L'homme et l'œuvre, sous la direction de R. Verdier*, Paris 2012, 68.

[5] J. CARBONNIER, *Flexible droit. Pour une sociologie du droit sans rigueur* (1969), Paris 1992[7], trad. it., *Flessibile diritto. Per una sociologia del diritto senza rigore*, a cura di A. De Vita, Milano 1997, 23 ss.

[6] J. CARBONNIER, *Sociologie juridique*, Paris 2004, trad. it. di F. Cuculo, *Sociologia giuridica*, Torino 2012, 293.

[7] Ibid. Cfr. F.S. NISIO, *Jean Carbonnier*, Torino 2002, 59.

[8] J. CARBONNIER, *Sociologie juridique*, Paris 1972, 131-132. Cfr. ID., *Sociologia giuridica*, cit., 311.

[9] J. CARBONNIER, *Sociologie juridique*, cit., 135. Cfr. ID., *Sociologia giuridica*, cit., 308.

[10] J. CARBONNIER, *Sociologia giuridica*, cit., 314.

[11] Ivi, 313. Cfr., ivi, 314.

da una strategia: il diritto ha dei nemici», e... «sì, *promana da un organismo specializzato*, perché il possibile impiego delle armi richiede una formazione di tipo militare»[12].

Solo quando questo sia stato chiarito, secondo Carbonnier diviene possibile recuperare l'idea che al diritto «occorr[a] prima esitare, per essere poi pronto al rimpianto»[13]: benché sia possibile «immaginare una norma [*giuridica*] così perfetta da essere incontestabile»[14], ossia una norma la cui applicazione sia incontrovertibile e non possa, pertanto, essere «messa in questione» nel giudizio, per Carbonnier la costrizione «non spiega tutto»: «vi sono delle costrizioni, anche organizzate, anche promananti dal potere costituito, che non giuridicizzano gli ordini che accompagnano, perché questi ordini sono stati emessi *ab irato* o alla cieca – ordini di Ubu Re o di Caligola colpito dal suo cavallo»[15]. L'applicazione della norma giuridica generalmente è controversa e la sua statuizione deve essere comunque l'esito di una deliberazione (individuale o collettiva, poco importa)[16].

L'idea che il diritto possa essere distinto da sistemi non giuridici di regolazione sociale era del resto implicita nella ben nota «ipotesi del non-diritto»[17] (se è vero, come ha osservato Rodotà, che questa ipotesi «non rinvia a un vuoto»[18]) e costituisce il presupposto da cui muove la sua critica all'«ipotesi del pluralismo giuridico», secondo la quale, «nello stesso tempo, nello stesso spazio sociale, possono coesistere diversi sistemi giuridici, senza dubbio il sistema statale, ma altri con esso, da esso indipendenti, eventuali suoi competitori»[19]. Secondo Carbonnier, le cui posizioni al riguardo a quanto pare non mutarono negli anni, si dovrebbe prendere atto, innanzitutto, che «non esiste un pluralismo giuridico» ma esistono semmai «dei fenomeni di pluralismo giuridico» assai diversi fra di loro[20], quali, ad esempio, quelli che si verificano quando vi sono gruppi i cui membri continuano a osservare norme di ordinamenti ai quali erano soggetti un tempo[21] o ad agire in base a norme vigenti in passato e in seguito abrogate[22].

[12] Ivi, 314. Cfr. F.S. NISIO, *Jean Carbonnier*, cit., 183 ss.

[13] J. CARBONNIER, *Sociologia giuridica*, cit., 316.

[14] Ivi, 315.

[15] Ibid.

[16] Ivi, 315-316.

[17] J. CARBONNIER, *L'hypothèse du non-droit,* in *Archives de philosophie du droit*, n. 8, (1963), e in ID., *Flexible droit*, cit., trad. it., *L'ipotesi del non-diritto*, in ID., *Flessibile diritto*, cit., 25 ss. Cfr. F.S. NISIO, *Jean Carbonnier*, cit., 72 ss.

[18] S. RODOTA, *La vita e le regole. Tra diritto e non diritto*, Milano 2018, 20.

[19] J. CARBONNIER, *Sociologie juridique*, cit., 145. Questo passo e i seguenti compaiono anche nelle edizioni successive e sono riportati, qui, nella trad. it. a cura di F. Cuculo, *Sociologia del diritto*, cit., 345.

[20] J. CARBONNIER, *Sociologie juridique*, cit., 146. In ID., *Sociologia giuridica*, cit., 346.

[21] J. CARBONNIER, *Sociologie juridique*, cit., 147. In ID., *Sociologia giuridica*, cit., 347.

[22] J. CARBONNIER, *Sociologie juridique*, cit., 150. In ID., *Sociologia giuridica*, cit., 349.

In questi casi secondo Carbonnier,

> le norme che inducono gli interessati ad agire, anche se costoro le ritengono giuridiche, non lo sono. Non lo sono evidentemente secondo il diritto dogmatico; ma non lo sono a maggior ragione secondo la sociologia del diritto. Perché qualunque sia il criterio sociologico che ci si forgi della giuridicità – che sia *costrizione organizzata* o *giudizio potenziale* – questo criterio manca. Al massimo se ne possono intravedere delle forme fruste, larvate: una pressione psicologica che proviene dall'ambiente, un abbozzo di consulto familiare. Le cose non si svolgono diritto contro diritto, ma infra-diritto (*sous-droit*) contro diritto. Ma, pur se i fenomeni infragiuridici somigliano a quelli giuridici, ne restano sostanzialmente differenti. Non tocchiamo la grande illusione del pluralismo? Crede di aver filmato il combattimento di due sistemi giuridici; ma ciò che mostra è un sistema giuridico alle prese con l'ombra di un altro[23].

Già del resto nel 1963 Carbonnier invitava a non confondere il non-diritto con il «sotto-diritto, quale può prodursi nella sotto-cultura di certi gruppi particolari. I fenomeni qualificati come infragiuridici – così, il diritto folkloristico, o la consuetudine operaia (nel senso di Maxime Leroy) – appaiono come un diritto degradato, o almeno un diritto imperfetto (perché non statuale)»[24].

La nozione di "infra-diritto" che Costa-Lascoux attribuisce ai «difensori dei diritti degli immigrati» è assai sommaria, ma è chiaro in ogni caso che l'*infra-diritto*, o meglio, il *sotto-diritto* di cui parla Carbonnier ha ben poco a che fare con le pratiche amministrative e di governo sulle quali la letteratura giuridica di indirizzo critico richiama l'attenzione quando rileva che gli apparati dello stato fanno uso sistematico di strumenti *infragiuridici* di regolazione che è agevole sottrarre al controllo pub-

[23] J. CARBONNIER, *Sociologie juridique*, cit., 150. In ID., *Sociologia giuridica*, cit., 349-350.

[24] J. CARBONNIER, *L'ipotesi del non-diritto*, cit., 25-26. Cfr. F.S. NISIO, *Jean Carbonnier*, cit., 129 e V. FERRARI, *Lineamenti di sociologia del diritto*. I. *Azione giuridica e sistema normativo*, Roma-Bari 1997, secondo il quale Carbonnier avrebbe individuato la «categoria concettuale specifica» dell'«infragiuridico» (infra-juridique o sous-droit), corrispondente a tutti questi fenomeni normativi che, come dirà in Sociologie juridique, "non risiedono nella società globale, ma nelle frazioni di popolazione, nei gruppi più o meno estesi", quei fenomeni di «preteso altro diritto , [che] restano al di fuori, non integrati nel sistema, allo stato selvaggio"» (ivi, 240). Come è noto André-Jean Arnaud, muovendo dalle intuizioni di Carbonnier, contrappose l'infra-droit al droit imposé e ne elaborò una teoria decisamente articolata (A.-J. ARNAUD, *Critique de la raison juridique. 1. Où va la Sociologie du droit?*, Paris 1981, 325-351. E alle pagine 25-26: «Plus les sources de droit sont strictement définies, et moins la créativité en la matière est reconnue, plus l'imaginaire juridique est refoulé, plus le vécu juridique est rejeté du domaine du droit. Alors naissent d'autres systèmes, parallèlement au droit – qu'on nommera dorénavant droit imposé, pour bien le distinguer du droit spontané qui, s'il n'est pas reconnu dans un système positiviste, peut l'être ailleurs [...]. Parallèlement au droit imposé, "sous lui", dirait J. Carbonnier, voire "contre lui", se forment des systèmes, conçus ou vécus, qui n'ont pas aptitude, chez nous, à s'appeler droit, mais qu'on nommera par commodité, infra-droit : on nomme bien par commodité infra-rouge quelque chose qui n'a rien de rouge!»). Si veda al riguardo M. ATIENZA, *Un filósofo del derecho francés: André J. Arnaud*, in *Cuadernos de la Facultad de Derecho*, 2 (1982), 125-126, 128-129, 131.

blico e talora a quello giurisdizionale (circolari, ma anche istruzioni, manuali, moduli, comunicati e via dicendo) per disciplinare specifiche materie o la condizione di determinati soggetti in modi incompatibili con i principi espliciti dello stato di diritto, senza che tali principi debbano essere rimessi in discussione[25].

Non è facile dire se Danièle Lochak pensasse a Carbonnier quando osservava, nel 1976, che le pratiche di governo a cui erano soggetti gli stranieri in Francia si confacevano a uno stato di polizia assai più che a uno stato di diritto e che essi si trovavano «in una situazione di infra-diritto» perché i testi normativi che ne regolavano la condizione, «non solo per il loro contenuto, ma anche per le loro condizioni di elaborazione e applicazione», non conferivano ai lavoratori immigrati «diritti di cui [potessero] avvalersi né garanzie contro l'arbitrio delle autorità amministrative»[26], ma ne acuivano piuttosto la vulnerabilità e l'insicurezza, elevando a regola la loro precarietà e esponendoli a qualunque genere di sfruttamento e di oppressione[27].

Si potrebbe forse immaginare che avesse in mente le pagine del quinto capitolo di *Le origini del totalitarismo* in cui Hannah Arendt rievocava, citando Carthill, il «massacro amministrativo» compiuto dai «funzionari coloniali»[28] e «dalla spietata burocrazia imperialista»[29] governando per decreti e ordinanze in modo da sottrarsi «ai principi generali di giustizia e libertà individuale vigenti in patria»[30]. I processi di

[25] Cfr. I. GJERGJI, *Circolari amministrative e immigrazione*, Milano 2013; G. CAMPESI, *Polizia di frontiera. Frontex e la produzione dello spazio europeo*, Roma 2015, 36. E. GREBLO, *Geografie della sicurezza*, in *Etica & Politica*, vol. XXI, 1 (2019), 309.

[26] D. LOCHAK, *Réflexion sur un infra-droit*, in *Droit social*, 5 (1976), 43-44.

[27] Ivi, 44: «Les travailleurs immigrés sont le plus souvent régis par des textes confidentiels dont on ne leur donne connaissance qu'au moment où on les leur oppose, et que l'on modifie au gré des circonstances sans respect des droits acquis ; les autorisations dont ils ont besoin pour exercer la plupart des activités, y compris certaines libertés fondamentales, ont pour principale caractéristique, d'être essentiellement précaires et révocables ; dans ces conditions, le pouvoir discrétionnaire dont dispose l'administration pour les accorder ou les refuser – voire pour décider d'expulser l'étranger jugé indésirable – tend inévitablement vers l'arbitraire. Sous un tel régime, le travailleur immigré, constamment contrôlé et surveillé "vulnérable à toutes sortes de pressions et d'exploitations", se trouve évidemment désarmé pour réclamer le respect des quelques droits qui ne lui sont pas refusés». Si veda anche EAD., *Étrangers: de quel droit?*, Paris 1985, 205 ss. Serge Slama notava nel 2016 che a distanza di quarant'anni non si poteva dire che la situazione fosse migliorata (S. SLAMA, *Crise de l'asile: un supra infra-droit à l'abri de tout contentieux ?*, in *Plein droit*, n. 111, 4 (2016), 49). Cfr. anche, ad esempio, F. CREPEAU, *Le réfugié et la protection des chartes*, in *Droits de la personne: l'émergence de droits nouveaux. Aspects canadiens et européens. Actes des Journées strasbourgeoises de l'Institut canadien d'études juridiques supérieures*, Cowansville 1994, 241; E. LA SPINA, *¿Hacia el control «infra-droit» de la integración efectiva en la normativa de extranjería española?*, in *La Revue des droits de l'homme*, 4 (2014), 1-22.

[28] H. ARENDT, *The Origins of Totalitarianism*, New York 1966, trad. it. di A. Guadagnin, *Le origini del totalitarismo*, Torino 1999, 186. Cfr. A. CARTHILL, *The Lost Dominion*, Edinburgh and London 1922, 93.

[29] H. ARENDT, *Le origini del totalitarismo*, cit., 182.

[30] Ibid.

retroazione ampiamente illustrati dalla letteratura postcoloniale sono, del resto, noti da tempo anche ai giuristi[31].

Sta di fatto che, proprio l'anno prima, Foucault in *Sorvegliare e punire* aveva rilevato che, se per un verso «il processo per cui la borghesia è divenuta nel secolo XVIII la classe politicamente dominante si è riparato dietro la messa a punto di un quadro giuridico esplicito, codificato, formalmente egalitario, e attraverso l'organizzazione di un regime parlamentare e rappresentativo»[32], per altro verso «la forma giuridica generale che garantiva un sistema di diritti uguali in linea di principio, era sottesa da meccanismi minuziosi, quotidiani, fisici, da tutti quei sistemi di micropotere, essenzialmente inegalitari e dissimmetrici, costituiti dalle discipline», che effettivamente provvedevano ad assicurare «la sottomissione delle forze e dei corpi». Le discipline, proseguiva Foucault, potrebbero essere descritte come «infra-diritto» se operassero secondo le logiche e i principi propri del diritto per diffonderne gli effetti «cambiandolo di scala e rendendolo con ciò più minuzioso e senza dubbio più indulgente». Ma il loro ruolo non fu questo, bensì piuttosto quello di «introdurre dissimmetrie insormontabili e di escludere la reciprocità» che il diritto sembrava dovesse garantire. Perciò, finiva per concludere Foucault, «bisogna [...] piuttosto vedere nelle discipline una sorta di controdiritto»[33], anche quando operino in modo «regolare ed istituzionale»[34].

Sembra sia dunque Foucault, o forse meglio, quanto egli scrisse e sostenne nei suoi corsi fra il 1975 e il 1976, a offrire il contesto teorico nel quale è più opportuno collocare le riflessioni critiche sull'*infradiritto* che si svilupparono in quegli anni in Francia e che tutt'ora proseguono, in Italia e altrove, consentendo, ad esempio, di mettere in luce alcuni caratteri specifici di quello che è stato definito non a caso il «diritto speciale dei migranti»[35] e, più in generale, le modalità peculiari di regolazione che continuano ad essere riservate a certe materie e, soprattutto, a particolari 'classi' di individui.

[31] Cfr. P. COSTA, *Il fardello della civilizzazione. Metamorfosi della sovranità nella giuscolonialistica italiana*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 33-34 (2004/2005), *L'Europa e gli 'Altri'. Il diritto coloniale fra Otto e Novecento*, Tomo I, 169 ss.; G. BASCHERINI, *«Ex oblivione malum». Appunti per uno studio sul diritto coloniale italiano*, in *Rivista Critica del Diritto Privato*, 2 (2009), 246-247 e 259; I. GJERGJI, *Circolari amministrative e immigrazione*, cit., 71 ss. e, in questo volume, *Immigrazione e infra-diritto: dal governo per circolari alla tweeting-governance*.

[32] M. FOUCAULT, *Surveiller et punir. Naissance de la prison*, Paris 1975, trad. it. di A. Tarchetti, *Sorvegliare e punire. Nascita della prigione*, Torino 1993, 241.

[33] Ivi, 242.

[34] Ivi, 243. Cfr. B. MAZABRAUD, *Foucault, le droit et les dispositifs de pouvoir*, in *Cités*, n. 42, 2 (2010), 150.

[35] A. CAPUTO, *Diritto e procedura penale dell'immigrazione*, Torino 2006, 350 ss. e ID., *Diseguali, illegali, criminali (Una guida alla lettura)*, in *Questione giustizia*, 1 (2009), 85.

2. FOUCAULT: DIRITTO, INFRADIRITTO, CONTRODIRITTO

Il concetto foucaultiano di *infradiritto* emerge là dove le discipline incontrano il diritto. Sulla natura di questo 'incontro' in letteratura si è lungamente dibattuto. Per alcuni lo avrebbero semplicemente soppiantato, per altri le rispettive forme di potere si sarebbero integrate dando vita a un meccanismo articolato e assai efficiente di dominazione e assoggettamento.

Come è noto, Alan Hunt e Gary Wickham sostennero nel 1994 che secondo Foucault il diritto avrebbe costituito «la forma primaria di potere nell'età classica e pre-moderna» e si sarebbe faticosamente trascinato nella modernità attraverso la dottrina della sovranità, che tutt'ora conserverebbe «un ruolo ideologico significativo nel discorso politico» ma che non sarebbe più in grado di descrivere le operazioni effettuali del potere. «Nel mondo reale del potere», infatti, la sovranità e il diritto sarebbero stati soppiantati «dalle discipline e dal governo», che costituirebbero le «manifestazione chiave del potere nella società moderna»[36].

Le conclusioni di Hunt e Wickham sono controverse e per più versi problematiche, ma godono ancora di ampi consensi. Secondo Nicholas De Genova, ad esempio, «uno dei contributi più importanti del lavoro di Agamben consiste[rebbe] nell'aver recuperato il senso critico della duratura rilevanza della sovranità, e nell'invitare così i foucaultiani più ortodossi ad affrontare precisamente uno degli aspetti più scomodi dell'opera di Foucault – la diffusa relegazione delle considerazioni sul potere sovrano a un'epoca pre-moderna, o ancora il riconoscimento di una riconfigurazione moderna, democratizzata (post-moderna) della sovranità, che rimane

[36] A. HUNT-G. WICKHAM, *Foucault and Law: Towards a Sociology of Law as Gover-nance*, London-Boulder, Colorado 1994, 56. Per la verità, come hanno rilevato Golder e Fitzpatrick, «the argument that Foucault failed to take proper account of law's constitutive role in society, or that he offers a straitened portrait of law as a mere instrument of repression which is superseded by more productive and expansive modern modalities of power, has been rehearsed by a number of theorists from a range of different critical positions from the late 1970s until the present day: Nicos Poulantzas, Bob Fine, Pauls Hirst, Carols Smart, Duncan Kennedy, Boaventura de Sousa Santos, and several others, have all critiqued Foucault's understanding of law along these, and similar lines» (B. GOLDER-P. FITZPATRICK, *Foucault's Law*, Abingdon 2009, 12-13, ai quali si rinvia anche per i necessari riferimenti bibliografici). Sulla expulsion thesis e il contesto politico e culturale nel quale fu formulata cfr. C. GORDON, *Expelled questions: Foucault, the Left and the law*, in B. Golder (Ed.), *Re-reading Foucault: On Law, Power and Rights*, New York 2013, 15 ss., le cui conclusioni sono forse fin troppo severe: «Hunt and Wickham's book is a late blossom of a peculiar and now (apparently) largely extinct ideological culture, a work designed to offer pietist-catechistic reassurance for the perplexed in an age of doubt, and it might be said that the subdiscipline of critical legal studies has served over the past two decades, among other things, as the medium through which an obsolete polemic has conditioned the background assumptions of younger, postmodern generations. In its inquisitorial – and, on occasion, demagogic and pruriently defamatory – forensic style, it has a fair amount in common with other exercises in the defence of a lateleftist, dialectically enlightened orthodoxy against alleged postmodernist betrayal» (ivi, 21-22).

però "assolutamente incompatibile" e "sempre più in conflitto" con "le normalizzazioni disciplinari"» e con le relative «tecniche di dominazione», che «il potere sovrano» servirebbe tutt'al più «a dissimulare»[37]. Brett Neilson sembra su posizioni simili quando osserva che «Foucault pone la sovranità come "il vecchio principio" contro cui forme più recenti di potere sono emerse» e che «la descrizione foucaultiana delle trasformazioni storiche della sovranità si arresta a Rousseau e alla Rivoluzione francese» e «da allora [...] rimane sempre la stessa, incorporata nell'operare dello Stato costituzionale moderno». Secondo Neilson, Foucault non sarebbe stato in grado di descrivere, o di prevedere, le trasformazioni più recenti della sovranità, che invece «altri pensatori, tra cui Hardt e Negri e Sassen», avrebbero saputo cogliere analizzando «a fondo il modo in cui la sovranità si è modificata con l'evoluzione delle formazioni transnazionali e denazionalizzate di economia, politica e potere»[38].

Ora, tesi di questo genere rivelano probabilmente una concezione, per così dire, 'naturalistica' della sovranità che sembra distante da quella foucaultiana e che di per sé risulta metodologicamente problematica per chi creda che la sovranità non sia, in realtà, nient'altro che un concetto e che, al pari di ogni altro concetto, "non abbia storia"[39]. Se si ritiene, poi, che la dottrina giuridica della sovranità *fin da principio* abbia imposto una peculiare rappresentazione, *fittizia e normativa*, di relazioni di potere asimmetriche e ineguali non meno di quelle attuali, ci si guarderà bene dal credere che tale dottrina *un tempo* abbia effettivamente offerto *giustificazioni* mentre *oggi* non fa che *dissimulare*, come se fosse possibile o addirittura auspicabile tornare a un regime antico che, a differenza di quello attuale, poteva essere *giustificato* e *accettato* così com'era, nei suoi reali meccanismi di funzionamento.

Se Foucault non giunse a questa conclusione – come del resto sa bene De Genova, che a Foucault riconosce «a sua discolpa» di avere «sempre sostenuto che, mentre si lotta contro il potere disciplinare, non bisogna cercare rifugio nel "famoso diritto formale, detto borghese, e che in realtà è il diritto della sovranità"»[40] – non lo

[37] *Foucault, migrazioni e confini. Risposte di Nicholas de Genova*, in *Materiali foucaultiani*, 2 (2013), 165.

[38] *Foucault, migrazioni e confini. Risposte di Brett Neilson*, in *Materiali foucaultiani*, 2 (2013), 190-191.

[39] F. NIETZSCHE, *Zur Genealogie der Moral. Eine Streitschrift*, Leipzig 1887, trad. it. di F. Masini, *Genealogia della morale. Uno scritto polemico*, Milano 2017, 69 e R. KOSELLECK, *Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung*, in W. Conze (hrsg.), *Theorie der Geschichtswissenschaft und Praxis des Geschichtsunterrichts*, Stuttgart 1972, e ora in R. KOSELLECK, *Begriffsgeschichten. Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*, Frankfurt a. M. 2006, 374. Cfr. G. DUSO, *Storia dei concetti come filosofia politica*, in *Filosofia politica*, 11 (1997), 3 e ora in ID., *La logica del potere. Storia concettuale come filosofia politica*, Milano 2007, 22 ss. e S. CHIGNOLA, *Aspetti della ricezione della Begriffsgeschichte in Italia*, in S. Chignola-G. Duso (a cura di), *Sui concetti giuridici e politici della Costituzione dell'Europa*, Milano 2010, 89-90.

[40] *Foucault, migrazioni e confini. Risposte di Nicholas de Genova*, cit., 165.

si deve solo alle oscillazioni o alle incertezze in cui pure senza dubbio incorre[41], ma anche alle premesse da cui muove, le quali sono almeno in parte differenti da quelle che gli sono attribuite dai sostenitori della «tesi dell'espulsione del diritto».

Il 14 gennaio 1976, nella seconda lezione del corso che avrebbe tenuto quell'anno al Collège de France, Foucault sostenne che

> la teoria del diritto, dal medioevo in poi, ha avuto essenzialmente la funzione di fissare la legittimità del potere: il problema principale, quello centrale, attorno al quale si è organizzata l'intera teoria del diritto, è stato il problema della sovranità. Dire che quello della sovranità è il problema centrale del diritto nella società occidentale, vuol dire che il discorso e la tecnica del diritto hanno avuto essenzialmente la funzione di dissolvere, all'interno del potere, il fatto storico della dominazione e di far apparire due cose, al posto di una dominazione che si cercava di ridurre o mascherare: da un lato, i diritti legittimi della sovranità, dall'altro, l'obbligazione legale all'obbedienza[42].

Non ci si inganni, dunque: *fin dalle origini* il discorso giuridico della sovranità ha simulato e dissimulato, perché il potere, nelle sue modalità reali e mutevoli d'esercizio, potesse apparire tollerabile e fosse accettato; *fin dalle origini* il diritto – o forse dovremmo dire, meglio, la «rappresentazione giuridico-discorsiva del potere»[43] che ne risolve l'esercizio nella legislazione e risolve quest'ultima, a sua volta, nella proibizione e nella minaccia della sanzione[44] – «è stato, per il sistema monarchico, il modo di manifestazione e la forma della sua accettabilità»[45]. Già allora questa rappresentazione, questo discorso non diceva alcunché delle modalità effettive di esercizio del potere: «questa dimensione giuridico-politica [...] non è certamente adeguata al modo in cui il potere si è esercitato e si esercita», *allora ed ora*, «ma è il codice con cui si presenta e con cui ordina che lo si pensi»[46]. Del resto, «il potere è

[41] Cfr., ad esempio, B. GOLDER-P. FITZPATRICK, *Foucault's Law,* cit., 23-24 e M. BRIGAGLIA, *Potere. Una rilettura di Michel Foucault*, Napoli 2019, XV, 1-10, 322.

[42] F. FOUCAULT, *Il faut défendre la société*, Paris 1997, trad. it., *"Bisogna difendere la società"*, a cura di M. Bertani e A. Fontana, Milano 2009, 30-31. Cfr. V. SORRENTINO, *Il pensiero politico di Foucault*, Roma 2008, 63-64.

[43] M. FOUCAULT, *La volonté de savoir*, Paris 1976, trad. it. di P. Pasquino e G. Procacci, *La volontà di sapere. Storia della sessualità 1*, Milano 2010, 73.

[44] Cfr., ad esempio, A. HUNT-G. WICKHAM, *Foucault and Law,* cit., 40-42; B. GOLDER-P. FITZPATRICK, *Foucault's Law*, cit., 16-17; M.A. DA FONSECA, *Michel Foucault et le droit*, traduit du portugais por T. Thomas, Paris 2014, 68 e 104 ss.; M. BRIGAGLIA, *Potere*, cit., 139-140, 256.

[45] M. FOUCAULT, *La volontà di sapere*, cit., 78.

[46] Ibid. Cfr. Y.C. ZARKA, *Foucault et le concept non juridique du pouvoir*, in *Cités*, 2 (2000), Michel Foucault: de la guerre des races au biopouvoir, 47: «La lecture juridico-politique du pouvoir en termes de souveraineté est donc clairement définie comme un piège, comme le piège tendu par le pouvoir lui-même. Le discours juridico-politique est le discours que le pouvoir tient sur lui-même. Le droit, en Occident, est en effet constitutivement lié avec le pouvoir en place»; P. NAPOLI, *Le arti del vero. Storia, diritto e politica in Michel Foucault*, Napoli 2002, 303: «se si riconoscesse al potere un ruolo prevalentemente positivo, costitutivo, la sua esistenza apparirebbe subito meno tollerabile. Sarebbe infatti più difficile fare accettare agli uomini che la loro libertà è spesso consustanziale a

tollerabile a condizione di dissimulare una parte importante di sé. La sua riuscita è proporzionale alla quantità di meccanismi che riesce a nascondere. [...] Il segreto non è per lui un abuso; è indispensabile al suo funzionamento»[47]. Lo è ora e lo era allora, quando il discorso giuridico della sovranità fu per la prima volta elaborato[48].

Fin da principio «la rappresentazione giuridico-discorsiva del potere» è servita a «mascherare», «dissimulare» o «nascondere», «tanto nel suo segreto quanto nella sua brutalità, la dominazione», quali siano state le forme che di volta in volta ha assunto[49]. Foucault intende farsi carico del compito di rivelare ciò che la filosofia politica e la teoria giuridica hanno taciuto, nascosto o dissimulato, mostrando «non soltanto come il diritto sia, in linea di massima, lo strumento della dominazione – il che va da sé – ma anche come, fin dove e sotto che forma, il diritto trasmette o mette in opera rapporti che non sono rapporti di sovranità, ma di dominazione»[50].

«Per far apparire, al posto della sovranità e dell'obbedienza, il problema della dominazione e dell'assoggettamento»[51] è necessario, tuttavia, spingersi oltre i margini estremi del diritto, là dove, per un verso, «scavalcando le regole di diritto che lo organizzano e lo delimitano, il potere si prolunga [...] al di là di esse»[52], e, per altro verso, «l'istanza materiale dell'assoggettamento» costituisce il soggetto stesso a proprio uso e consumo[53]. Per *disseppellire* il problema dell'assoggettamento e della dominazione si deve fare, in altre parole, «esattamente il contrario di quello che Hobbes aveva voluto fare nel *Leviatano* e di quel che probabilmente fanno [...] tutti i giuristi quando si pongono il problema di sapere come, a partire dalla molteplicità degli individui e delle volontà, si può formare una volontà, o almeno un corpo,

processi di controllo, di stimolazione, di identificazione che li plasmano da dentro, senza scalfirne l'autoconsapevolezza». Cfr. anche A. DILTS, *Law,* in L. LAWLOR-J. NALE (Eds.), *The Cambridge Foucault Lexicon*, New York 2014, 244.

[47] M. FOUCAULT, *La volontà di sapere*, cit., 77. Cfr. N. BOBBIO, *La democrazia e il potere invisibile*, in *Rivista italiana di scienza politica*, 10 (1980), 181-203, nonché in ID., *Il futuro della democrazia*, Torino 1984, 95: «Il confronto fra il modello ideale del potere visibile e la realtà delle cose deve essere condotto tenendo presente la tendenza di ogni forma di dominio [...] a sottrarsi allo sguardo dei dominati nascondendosi e nascondendo, ovvero attraverso la segretezza e il mascheramento».

[48] Cfr. D. LOCHAK, *La question du droit,* in *Magazine Littéraire*, n. 207, (1984), 45: «d'autre part on peut se demander si le pouvoir a jamais fonctionné exclusivement ou principalement à la loi et au droit, et si par conséquent la représentation juridico-discursive du pouvoir n'a pas de tout temps été précisément une représentation, une façon pour le pouvoir de se donner à voir comme autre qu'il n'est en réalité».

[49] F. FOUCAULT, *"Bisogna difendere la società"*, cit., 31. Sulla "dominazione" come «asimmetria oppressiva nelle relazioni di potere» cfr. M. BRIGAGLIA, *Potere*, cit., 121 ss.

[50] F. FOUCAULT, *"Bisogna difendere la società"*, cit., 31.

[51] Ibid.

[52] Ivi, 31-32.

[53] Ivi, 32.

unici, ma mossi da quell'anima che sarebbe la sovranità»[54]. Per *disseppellire* il problema dell'assoggettamento e della dominazione si deve fare, sia consentito aggiungere, esattamente il contrario di quello che fanno *quei* giuristi che, nonostante tutto, continuano a cercare nei codici l'«assoluto del diritto» rifiutandosi di vedere il «sangue seccato» sulle loro pagine[55], dimenticandosi, o fingendo di dimenticare, che non vi è alcunché di «neutrale» nelle loro operazioni[56].

È, appunto, volgendo lo sguardo «verso la dominazione [...], verso gli operatori materiali, le forme di assoggettamento, le connessioni e le utilizzazioni dei sistemi locali dell'assoggettamento e, infine verso i dispositivi di sapere»[57] che Foucault assiste all'*invenzione*, «nel XVII-XVIII secolo [...] di una nuova meccanica di potere»[58]: la «meccanica disciplinare»[59]. In principio, ricorda Tadros, le pratiche disciplinari si diffusero negli interstizi del diritto e all'interno del discorso giuridico della sovranità, riempiendo gli spazi di libertà lasciati dal diritto[60]. Ma con l'andare del tempo, nel secolo XIX, le discipline cominciarono a circolare liberamente nello spazio sociale, finendo per scontrarsi «sempre di più col sistema giuridico della sovranità»[61].

Ciononostante l'affermazione del potere disciplinare non condusse «alla scomparsa del grande edificio giuridico della teoria della sovranità»[62], ma al contrario ne rese possibile la democratizzazione «nel momento stesso in cui, nella misura in cui, e per la ragione che la democratizzazione della sovranità veniva fissata in profondità dai meccanismi della coercizione disciplinare»[63] che la stessa teoria della sovranità dissimulava, seppellendoli sotto «un sistema di diritto che ne nascondeva i procedimenti, che cancellava ciò che poteva esserci di dominazione e di tecniche di dominazione nella disciplina, garantendo infine a ciascuno, attraverso la sovranità dello stato, l'esercizio dei propri diritti sovrani»[64].

Il quadro che ne risulta non potrebbe essere più chiaro:

> nelle società moderne, a partire dal XIX secolo e fino ai nostri giorni, abbiamo dunque, da una parte, una legislazione, un discorso, una organizzazione del diritto pubblico articolati intorno al principio della sovranità del corpo sociale e della delega da parte di ciascuno della propria sovranità allo stato; e dall'altra, un fitto reticolato di

[54] Ibid.

[55] Ivi, 53.

[56] Ivi, 49.

[57] Ivi, 37.

[58] Ivi, 38.

[59] Ivi, 41.

[60] Cfr. V. TADROS, *Between Governance and Discipline: The Law and Michel Foucault*, in *Oxford Journal of Legal Studies*, vol. 18, 1 (1998), 90.

[61] Ivi, 94.

[62] M. FOUCAULT, *"Bisogna difendere la società"*, cit., 39.

[63] Ivi, 39. Cfr. M. IOFRIDA-D. MELAGARI, *Foucault*, Roma 2017, 202.

[64] M. FOUCAULT, *"Bisogna difendere la società"*, cit., 39.

> coercizioni disciplinari che assicura, di fatto, la coesione di questo stesso corpo sociale[65].

Perciò se per un verso «l'organizzazione del diritto intorno alla sovranità» e «la meccanica delle coercizioni esercitate dalle discipline»[66] appaiono *concettualmente* incompatibili, per altro verso risultano *strategicamente* interdipendenti al punto da implicarsi reciprocamente[67]: le discipline non hanno espulso il discorso giuridico del potere sovrano dalla modernità perché non hanno potuto fare a meno della sua enunciazione, così come, del resto, il discorso giuridico borghese e democratizzato della sovranità e dei diritti non ha potuto fare a meno, a quanto pare, delle «coercizioni esercitate dalle discipline»[68]. Del resto, osserverà Foucault tre anni dopo, «l'eterogeneità non costituisce mai un principio di espulsione; o meglio ancora, l'eterogeneità non impedisce in nessun caso la coesistenza, la congiunzione, la connessione»[69]. La stessa *simbiosi*[70] fra il *discorso giuridico della sovranità* e il meccanismo disciplinare sembra del resto avere esposto il *diritto* – cioè a dire «la legge», «i codici» e «l'insieme degli apparati, istituzioni, regolamenti che [li] applicano»[71] e dei quali il *discorso giuridico della sovranità* non sarebbe che «l'ideologia»[72] – agli effetti

[65] Ivi, 39-40.

[66] Ivi, 40.

[67] Cfr. D. LOCHAK, *La question du droit,* cit., 46: «Si donc, conceptuellement, la discipline est bien un "contre-droit", l'antithèse d'un pouvoir fondé sur la loi et le droit, en pratique on constate que la règle de droit peut parfaitement servir d'enveloppe à des normes disciplinaires et fonctionner comme vecteur de mécanismes de discipline». Cfr. M.A. DA FONSECA, *Michel Foucault et le droit*, cit., 17, 107, 109, 111, 113-114, 138-140; L. BERNINI, *Le pecore e il pastore. Critica, politica, etica nel pensiero di Michel Foucault*, Napoli 2008, 109; M. BRIGALIGA, *Potere*, cit., 205, 211, nota 8, 264, 292-293; P. CALONICO, *Jeremy Bentham e l'abolizione della schiavitù*, in *Materiali per una storia della cultura giuridica*, vol. 50, 1 (2020), 261-262. Neppure Hunt e Wickham hanno, del resto, difficoltà ad ammetterlo (cfr. ad esempio A. HUNT-G. WICKHAM, *Foucault and Law*, cit., 47).

[68] Cfr. B. GOLDER-P. FITZPATRICK, *Foucault's Law*, cit., 26-29 e 63-71; P. FITZPATRICK, *Foucault's other law*, in B. Golder (Ed.), *Re-reading Foucault*, cit., 53-55.

[69] M. FOUCAULT, *La naissance de la biopolitique: Cours au Collège de France, 1978–79*, Paris 2004, trad. it. di M. Bertani-V. Zini, *La nascita della biopolitica. Corso al Collège de France (1978-1979)*, Milano 2005, 49.

[70] Cfr. B. GOLDER-P. FITZPATRICK, *Foucault's Law*, cit., 23.

[71] F. FOUCAULT, *"Bisogna difendere la società"*, cit., 31.

[72] Ivi, 39: «Indescrivibile e ingiustificabile nei termini della teoria della sovranità, radicalmente eterogeneo, il potere disciplinare avrebbe dovuto normalmente condurre alla scomparsa del grande edificio giuridico della teoria della sovranità. Ma, in realtà, tale teoria ha continuato non solo ad esistere come ideologia del diritto, se volete, ma anche a organizzare i codici giuridici che l'Europa del XIX secolo si è data a partire dai codici napoleonici. Perché la teoria della sovranità ha persistito come ideologia e come principio di organizzazione dei grandi codici giuridici?». Si vedano, tuttavia, O. IRRERA, *Michel Foucault e la critica dell'ideologia nei corsi al Collège de France*, in Euronomade, 19 marzo 2015 e T. GAZZOLO, *Foucault e il diritto: dalla lotta al governo*, in A. Di Lisciandro-L. Scudieri (a cura di), *Michel Foucault. Diritto, sapere, verità*, Milano 2015, 31.

delle discipline, le quali in breve hanno finito per *colonizzarlo*, *invaderlo, usurparlo*[73]:

> Che ai giorni nostri il potere si eserciti contemporaneamente attraverso questo diritto e queste tecniche, che queste tecniche e questi discorsi nati dalle discipline invadano il diritto, che le procedure della normalizzazione colonizzino sempre di più quelle della legge, credo che tutto questo possa spiegare il funzionamento globale di quel che chiamerei una "società di normalizzazione"[74].

Ed è così che le discipline, che costituirebbero un *infradiritto* se, collocandosi ai margini del diritto, si limitassero a diffonderne capillarmente gli effetti operando secondo i suoi principi, si rivelano in realtà un *controdiritto* perché, anche quando abbiano colonizzato o invaso il diritto, restano cionondimeno «assolutamente incompatibil[i]»[75] con il discorso giuridico della sovranità, massime nella formulazione liberale e democratica che nella modernità a questo discorso è stata impressa, benché storicamente ne dipendano proprio come esso dipende dalle (e può produrre i propri effetti grazie alle) discipline.

La questione tuttavia non è banale e richiede d'essere chiarita, poiché probabilmente è assai più problematica di quanto lo stesso Foucault non immaginasse. Non è ben chiaro, in particolare, che cosa precisamente si debba intendere per *controdiritto*, e quali relazioni possano intercorrere fra *diritto*, *controdiritto e discorso giuridico della sovranità*.

3. L'IPOTESI DEL CONTRODIRITTO

Da un punto di vista strettamente normativo, l'idea che il diritto possa contraddire sé stesso può apparire di per sé paradossale. Come Kelsen notava nella sua *Dottrina pura del diritto*, «benché il diritto stesso sembr[i] tener conto del diritto antigiuridico [...] e confermarne l'esistenza prendendo molteplici precauzioni la cui finalità è ritenuta essere l'annullamento del diritto antigiuridico», se davvero «esistesse qualcosa di simile ad un diritto antigiuridico, sarebbe annullata l'unità del sistema di norme, quale trova espressione nel concetto di ordinamento giuridico». Come è noto, per Kelsen l'esistenza di ciascuna norma in un dato ordinamento dipende dalla sua conformità ad una norma ulteriore dell'ordinamento che ne fonda la validità: perciò immaginare che possa esservi una «'norma contraria alla norma' è una contraddizione in termini». E infatti, «non si potrebbe considerare valida norma giuridica quella norma giuridica di cui fosse possibile ritenere che non

[73] F. FOUCAULT, *"Bisogna difendere la società"*, cit., 41. Cfr. A. HUNT-G. WICKHAM, *Foucault and Law*, cit., 58; B. GOLDER-P. FITZPATRICK, *Foucault's Law*, cit., 2 e 24-25; M. BRIGAGLIA, *Potere*, cit., 233.

[74] F. FOUCAULT, *"Bisogna difendere la società"*, cit., 41.

[75] Ivi, 38.

sia conforme alla norma che ne regola la produzione». Una norma come questa «sarebbe nulla, cioè non sarebbe affatto una norma giuridica»[76].

Eppure, come lo stesso Kelsen ha dimostrato, anche su questo piano è possibile conferire uno specifico significato a espressioni come quella di «diritto antigiuridico», e forse anche di conseguenza a quella di «controdiritto», benché ricorra in un contesto discorsivo decisamente molto diverso.

Quando, ad esempio, l'ordinamento attribuisce

> forza di cosa giudicata alla sentenza di un tribunale di ultima istanza, significa che è in vigore non soltanto una norma generale che predetermina il contenuto della sentenza giudiziaria, ma anche una norma generale in base alla quale il tribunale può determinare egli stesso il contenuto delle norme individuali che esso deve produrre. Queste due norme costituiscono un'unità, che si può all'incirca così formulare: il tribunale di ultima istanza è autorizzato o a produrre una norma giuridica individuale, il cui contenuto è predeterminato della norma generale prodotta dalla legislazione o dalla consuetudine, *oppure* una norma giuridica individuale il cui contenuto non è predeterminato in alcun modo, bensì deve essere determinato dallo stesso tribunale d'ultima istanza[77].

Qualcosa di simile avviene, in realtà, tutte le volte che una norma «sia, secondo le disposizioni dell'ordinamento giuridico, annullabile, cioè sia valida fino al momento in cui non è annullata»[78]: chi ritiene che una norma sia annullabile dovrà essere anche disposto ad ammettere che l'ordinamento autorizzi «a produrre o una norma giuridica [...] il cui contenuto è predeterminato» da una norma ulteriore, «*oppure* una norma giuridica [...] il cui contenuto non è predeterminato» da alcuna norma e può, di conseguenza, essere stabilito del tutto arbitrariamente dal suo autore, «con la differenza che la validità di queste norme giuridiche è soltanto provvisoria, cioè può essere annullata seguendo un certo procedimento, mentre questo non si può dire nel caso di una norma individuale prodotta da un tribunale di ultima istanza», la cui «validità è [...] definitiva»[79].

Il caso della legge "incostituzionale" per Kelsen non è in fondo diverso. Negli ordinamenti in cui «il controllo di costituzionalità delle leggi è riservato ad un solo tribunale, questo può essere autorizzato [...] ad annullare la legge come tale», ma finché non l'ha annullata, «la legge è valida e deve essere applicata». Se Kelsen ha ragione, allora «le cosiddette leggi 'incostituzionali' sono leggi costituzionali, annullabili però con un particolare procedimento». Ma questo significa che la Costituzione autorizza il legislatore a porre leggi i cui contenuti non siano conformi ai suoi

[76] H. KELSEN, *Reine Rechtslehre*, Wien 1960, trad. it. di M. Losano, *La dottrina pura del diritto*, Torino 1965, 298.

[77] Ivi, 300.

[78] Ibid.

[79] Ibid.

stessi principi assumendosi tutt'al più il rischio che eventualmente in seguito possano essere annullate[80].

Si potrebbe allora ipotizzare, in questa prospettiva, che, *colonizzando* il diritto, le discipline siano divenute *controdiritto* perché hanno generato, fra le pieghe del diritto, norme valide, quantomeno provvisoriamente, i cui contenuti sono altresì sostanzialmente incompatibili con le regole e i principi degli ordinamenti liberali e democratici nei quali si inseriscono.

Per chi ritenga, d'altra parte, che anche una norma senz'altro invalida in base ai criteri di riconoscimento di un dato ordinamento possa vigere di fatto ed essere considerata a pieno titolo 'diritto' quando trovi generalmente applicazione da parte di giudici e funzionari dello stato che siano persuasi per qualche ragione di essere giuridicamente tenuti ad osservarla[81], per il *controdiritto* si dischiudono possibilità infinite: una norma qualunque, da qualunque fonte sia ricavata (una circolare, un manuale, il modello predisposto per la compilazione di una domanda, la conferenza stampa di un ministro o un suo 'post' su un *social media*[82]) i cui contenuti siano incompatibili con le regole o i principi dell'ordinamento ma che cionondimeno sia applicata dai funzionari dello stato o dalle corti potrà essere considerata, in questa prospettiva, *controdiritto* in senso foucaultiano o *infradiritto* secondo l'uso invalso negli studi critici del diritto a partire dagli anni settanta del secolo passato[83]. È del resto proprio in questa prospettiva che diviene forse possibile apprezzare appieno lo

> scarto notevole tra quello che possiamo definire il diritto teorico (rappresentato dal connubio tra dottrina e giurisprudenza), orientato ancora (e forse necessariamente)

[80] Ivi, 305.

[81] Cfr., ad esempio, A. ROSS, *Om ret og retfærdighed. En indførelse i den analytiske retsfilosofi* (1953), København 1966, 27 (in *Diritto e giustizia*, a cura di G. Gavazzi, Torino 2001,18-19).

[82] Cfr. I. GJERGJI, *Immigrazione e infra-diritto: dal governo per circolari alla tweeting-governance*, in questo volume.

[83] Foucault richiamò forse l'attenzione su questa modalità di governo quando rimproverò al Guardasigilli Alain Peyrefitte di avere "giustificato in anticipo" l'estradizione di Klass Croissant rivolgendosi «all'opinione pubblica e ai giudici» per chiarire loro quale decisione il governo si attendesse: lo stesso «procuratore generale Sadon non ha dovuto fare altro che riprendere le Sue parole sul terrorismo nelle ultime frasi della sua requisitoria per chiedere l'estradizione di Croissant» (M. FOUCAULT, *Alain Peyrefitte s'explique... et Michel Foucault lui répond*, in *Le Nouvel Observateur*, n. 689, 29-29 gennaio 1978, 25 e in D. Defert-F. Ewald (eds.), *Dits et ècrits*, III, Paris 1994, n. 226, trad. it., *Alain Peyrefitte si spiega... e Michel Foucault gli risponde*, in M. FOUCAULT, *La strategia dell'accerchiamento. Conversazioni e interventi 1975-1984*, a cura di S. Vaccaro, Palermo 2009, 88). Del resto, come Foucault avrebbe constatato amaramente intervenendo nuovamente su Le Nouvel Observateur l'anno seguente, «il problema non è tanto quello dell'obbedienza dei giudici a ciò che il potere dice: è piuttosto quello della loro conformità a ciò che il potere tace» (M. FOUCAULT, *Manières de Justice*, in *Le Nouvel Observateur*, n. 743, 5-11 febbraio1979, 20-21, e in D. Defert-F. Ewald (eds.), *Dits et ècrits*, III, cit., n. 260, trad. it., *Maniere di giustizia*, in M. FOUCAULT, *La strategia dell'accerchiamento*, cit., 108).

> ad affermare la prevalenza di un astratto dover essere, frutto di una ricognizione dei principi che regolano il sistema delle fonti del diritto e l'organizzazione del Governo e della pubblica amministrazione oltre che, in certi casi [...], dei profili connessi alla tutela dei diritti individuali, ed il diritto vivente, costituito dalla prassi, nel quale può essere identificato l'«essere» del problema, ovvero il modo in cui l'ordinamento si mostra e si sviluppa in concreto, anche in contrasto con le regole formali che lo disciplinano[84].

Resta, cionondimeno, un'ulteriore ipotesi, che non è possibile trascurare del tutto soprattutto se si considera che alcuni tra i più autorevoli lettori di Foucault hanno ritenuto necessario, per comprenderne il pensiero, tenere ben distinti il diritto vigente storicamente e socialmente e il discorso giuridico della sovranità[85], anche se in realtà non è affatto scontato che effettivamente Foucault ritenesse possibile o opportuno farlo.

Benché gli ordinamenti contemporanei generalmente incorporino nelle loro costituzioni i principi che ne costituiscono l'ideologia, può accadere che tali costituzioni recepiscano istanze incompatibili con questi principi, e non si può certo escludere che Foucault potesse avere in mente anche fenomeni di questo tipo, che certo avrebbero potuto verificarsi e forse per alcuni versi effettivamente si sono verificati quando le discipline sono penetrate nelle costituzioni stesse (l'art. 27 terzo comma della nostra Costituzione può esserne un esempio?[86]).

4. CONCLUSIONI

Se si colloca l'ipotesi dell'*infradiritto* nel contesto del discorso foucaultiano degli anni 1975-1976 su sovranità, diritto e discipline avendo cura di non farsene scivolare fra le dita la consistenza e la radicalità specifica per seguirne gli sviluppi successivi, come se quello che Foucault sostenne allora costituisse di per sé l'esito provvisorio di un percorso di ricerca destinato a trovare altrove la propria definitiva conclusione, salterà agli occhi che l'*infradiritto* cui si riferiscono comunemente gli studi critici quando rilevano, ad esempio, l'esistenza di un *infradiritto* dei migranti o di un *infradiritto* penitenziario o, più genericamente, punitivo[87], in termini foucaultiani

[84] R. TARCHI, *Le circolari ministeriali con particolare riferimento alla prassi*, in U. De Siervo (a cura di), *Norme secondarie e direzione dell'amministrazione*, Bologna 1993, 235. Cfr. anche I. GJERGJI, *Circolari amministrative e immigrazione*, cit., 44.

[85] Si vedano, in particolare F. EWALD, *Norms, Discipline, and the Law*, in *Representations*, n. 30, (1990), 138-139 e V. TADROS, *Between Governance and Discipline*, cit., 80 e 81-82. Ma cfr. anche B. GOLDER-P. FITZPATRICK, *Foucault's Law*, cit., 35-37.

[86] Cfr. L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Roma-Bari 2002[7], 260.

[87] Cfr., in questo volume, I. GJERGJI, *Immigrazione e infra-diritto: dal governo per circolari alla tweeting-governance* e S. TALINI, *Infradiritto e libertà personale. Riflessioni intorno a interpretazione e applicazione del diritto*.

dovrebbe essere considerato in realtà *controdiritto*, indipendentemente dal fatto che abbia o meno carattere o funzioni disciplinari in senso stretto[88].

Ma oltre a questo, Foucault mostra chiaramente che non è appellandosi alla sovranità e al diritto che si potrà opporre efficacemente resistenza alle forme di dominazione che di volta in volta sono dissimulate dal discorso giuridico della sovranità. Ed è questo forse il maggior guadagno teorico che si ricava ricollocando il 'discorso dell'"infradiritto' nel contesto nel quale probabilmente ha avuto origine. Secondo Foucault, come si è visto, non c'è da illudersi: «sovranità e disciplina, legislazione, diritto della sovranità e meccanismi disciplinari sono due parti assolutamente costitutive dei meccanismi generali di potere nella nostra società»[89], e lo stesso «sistema del diritto e il campo giudiziario sono i tramiti permanenti dei rapporti di dominazione e di tecniche di assoggettamento polimorfi»[90]: il *discorso giuridico* e i *rapporti di dominazione* di cui il diritto è tramite, sono concettualmente eterogenei e confliggenti, ma anche strategicamente interdipendenti e complementari.

Del resto, che senso potrebbe avere appellarsi al *diritto* o ai *suoi principi* contro il *controdiritto*, se *controdiritto* è larga parte del diritto stesso[91] e i suoi principi non sono che l'"'ideologia" che occulta e sostiene i suoi meccanismi di funzionamento, senza peraltro che *realmente* l'uno e l'altra possano essere distinti? Invocare il *diritto* contro il *controdiritto* sarebbe vano perché il *giuridico* non è che una *ricodificazione* del *diritto* e dei rapporti di dominazione di cui è tramite; perché la sua *regressione*[92] – provando ad andare, con Foucault, al di là di quello che lo sesso Foucault qui molto probabilmente ha inteso sostenere – non è che la distanza più o meno grande che *stabilmente* separa il *significato* del discorso in cui consiste dalle operazioni che dissimula, cioè a dire dal diritto stesso e dalle forme di dominazione di cui è tramite; perché, infine, l'*enunciazione* di questo discorso è essa stessa una di queste operazioni e al contempo il modo in cui esse devono compiersi per essere efficaci[93].

[88] Cfr. ad esempio R. ERICSON, *Security, surveillance and counter-law*, in *Critical Justice Matters*, n. 68, 1 (2007), 6-7.

[89] M. FOUCAULT, *"Bisogna difendere la società"*, cit., 41.

[90] Ivi, 31. Cfr. P. CHEVALLIER, *Michel Foucault and the question of right*, in B. Golder (Ed.), *Re-reading Foucault*, cit., 173-174 e A. DILTS, *Law*, cit., 246.

[91] M. FOUCAULT, *Sorvegliare e punire*, cit., 244. Cfr. D. LOCHAK, *La question du droit*, cit., 46.

[92] F. EWALD, *Norms, Discipline, and the Law*, cit., 138-139 e 159. Cfr. M. FOUCAULT, *La volontà di sapere*, cit., 128: «Nei confronti delle società che abbiamo conosciuto fino al XVIII secolo, siamo entrati in una fase di regressione della dimensione giuridica: le Costituzioni scritte nel mondo intero, dalla Rivoluzione francese in poi, i Codici redatti e rimaneggiati, tutta un'attività legislativa permanente e rumorosa, non devono creare illusioni: sono le forme che rendono accettabile un potere essenzialmente normalizzatore». Si vedano anche B. GOLDER-P. FITZPATRICK, *Foucault's Law*, cit., 22 e 25 e L. LINCOLN, *Law, literature, morality: Michel Foucault and the problem of judgment*, in B. Golder (Ed.), *Re-reading Foucault*, cit., 91.

[93] Forse proprio l'ostensione di questa connessione fra le modalità effettive e 'minute' di esercizio del potere e gli «apparati di sapere» che il potere forma, organizza, mette in circolazione «quando si

A meno che, di nuovo, non si voglia prendere sul serio la «tesi dell'espulsione» e ipotizzare che per Foucault il *giuridico* sia *regredito* poiché vi fu probabilmente un tempo – l'età di mezzo? la prima modernità? – in cui il discorso giuridico della sovranità *descriveva* fedelmente le operazioni del potere che *giustificava*, per poi concludere che forse a quel tempo potrebbe valere la pena ritornare... Che Foucault fosse di questo avviso, tuttavia, non è affatto scontato: «I bei tempi andati non erano poi così belli [...] Inutile, per drammatizzare il presente, allungarne le ombre con l'immaginaria chiarezza di un sole in declino. Le trasformazioni che avvengono sotto i nostri occhi e che talvolta ci sfuggono non devono indurci a essere nostalgici»[94].

Per quanto non esiti ad ammettere che le lotte politiche dei secoli XIX e XX, pur essendo state lotte per la *vita*, «intesa come bisogni fondamentali, essenza concreta dell'uomo, realizzazione delle sue virtualità, pienezza del possibile», furono formulate proprio «attraverso affermazioni di diritto»[95], neppure per un istante sembra auspicare che si ritorni al «vecchio diritto della sovranità»: non è a *questo* diritto, infatti, che secondo Foucault ci si dovrebbe rivolgere per difendersi dalla coercizione disciplinare, e poi dalle forme di dominazione che persistono nel governo e nella biopolitica, «ma a un *nuovo diritto* che, pur essendo antidisciplinare, dovrebbe

esercita nei suoi meccanismi sottili» costituisce uno dei frutti teorici più preziosi della critica foucaultiana dell'ideologia (M. FOUCAULT, *"Bisogna difendere la società"*, cit., 36; cfr. O. IRRERA, *Michel Foucault e la critica dell'ideologia nei corsi al Collège de France*, cit., 6. Sul legame indissolubile che intercorre fra il diritto e le «"dottrine o "ideologie", ossia sistemi di credenze, discorsi e strategie discorsive che "legittimano" il potere normativo» in cui il diritto consiste si veda M. BRIGAGLIA, *Potere*, cit., 210, 201-211, 230). E proprio per questo l'opposizione fra il discorso giuridico della sovranità e il diritto sulla quale hanno insistito, sia pure con diverse sfumature, Ewald e Tadros, non aiuta a cogliere le modalità effettive di funzionamento del potere (cfr. supra, nota 85). Né, in effetti, convincono del tutto le conclusioni di Stéphane Legrand, che attribuisce a Foucault una peculiare concezione dell'"ideologia' secondo la quale «la pertinence d'un modèle comme analyseur des relations de pouvoir décroit en raison directe de son dépérissement comme opérateur de pouvoir, mais inversement sa faculté à s'imposer comme modèle unique d'analyse du pouvoir croît, elle, en raison directe de ce dépérissement» (S. LEGRAND, *Les normes chez Foucault*, Paris 2007, 39).

[94] M. FOUCAULT, *La stratégie du pourtour*, in *Le Nouvel Observateur*, n. 759, 28 maggio-3 giugno 1979, 57 e in D. Defert-F. Ewald (eds.), *Dits et ècrits*, III, cit., n. 270, trad. it., *La strategia dell'accerchiamento*, in Id., *La strategia dell'accerchiamento*, cit., 113. Cfr. anche ID., *Un système fini face à une demande infinie (entretien avec R. Bono)*, in *Sécurité sociale: l'enjeu*, Paris 1983, 39-63 e in D. Defert-F. Ewald (eds.), *Dits et écrits*, IV, Paris 1994, n. 325, trad. it., *Un sistema finito di fronte a una domanda infinita*, in Id., *Estetica dell'esistenza, etica, politica. Archivio Foucault 3. Interventi, colloqui, interviste. 1978-1985*, a cura di A. Pandolfi, traduzione di S. Loriga, Milano 2020, 189: «Un [...] atteggiamento [...] frequente [...] consiste nel coltivare la finzione che vi sia stato un "buon tempo andato", in cui il corpo sociale era vivo e caloroso, le famiglie unite e gli individui autonomi. Questo quadro felice sarebbe stato incrinato dall'avvento del capitalismo, della borghesia e della società industriale. Si tratta di un'assurdità storica».

[95] M. FOUCAULT, *La volontà di sapere*, cit., 128-129. Cfr. P. NAPOLI, *Le arti del vero*, cit., 322-323 e L. BERNINI, *Le pecore e il pastore*, cit., 125-128.

al tempo stesso essere affrancato dal principio della sovranità»[96]. Foucault tuttavia non chiarisce quali dovrebbero essere i caratteri di questo diritto *nuovo*[97]. Ma se, come pare di intendere, questo "diritto" non è in fondo che «il diritto di vivere, di essere liberi, di andarsene, di non essere perseguitati»; se questo "diritto" non è altro (come se fosse poca cosa...) che il "diritto" di difendersi legittimamente dai governi senza che da questi ci sia alcunché da attendersi[98], senza che vi sia nulla di meglio della «libertà», dell'«indipendenza dai governanti» che i «governati» possano esigere da loro[99]; se in ultima istanza il solo diritto che valga la pena rivendicare è «il diritto assoluto a rivoltarsi contro chi detiene il potere»[100], allora viene da chiedersi se davvero ci sia bisogno che questo *diritto nuovo* continui ad essere *diritto*. Se proprio dobbiamo sforzarci di pensare a qualcosa di nuovo, non può valere forse la pena di pensare a qualcosa che lo sia davvero, chiudendo definitivamente i conti con la sovranità, anziché accontentarci, ancora una volta, di un 'altro diritto', l'ennesimo, che non ha alcunché a che fare con il potere del sovrano (come se a partire dalla modernità fosse possibile separare *realmente* il diritto dal discorso giuridico della sovranità...), ma che ciononostante rischia di sospingerci inavvertitamente, di nuovo, fra le fauci del Grande Leviatano?

[96] M. FOUCAULT, *"Bisogna difendere la società"*, cit., 41 (corsivo aggiunto). Cfr. B. GOLDER-P. FITZPATRICK, *Foucault's Law*, cit., 28.

[97] Cfr. T. GAZZOLO, *Foucault e il diritto*, cit., 38 ss.

[98] M. FOUCAULT, *Va-t-on extrader Klaus Croissant?*, in *Le Nouvel Observateur*, n. 679, 14-20 novembre 1977, 62-63 e in D. Defert-F. Ewald (eds.), *Dits et écrits*, III, cit., n. 210, trad. it., *Klaus Croissant sarà estradato?*, in Id., *La strategia dell'accerchiamento*, cit., 57. Cfr. T. GAZZOLO, *Foucault e il diritto*, cit., 44.

[99] Cfr. M. FOUCAULT, *Klaus Croissant sarà estradato?*, cit., in particolare 53 e 58 e poi ID., *La nascita della biopolitica*, cit., 49. Per un articolato tentativo di ricostruzione dell'itinerario che condusse Foucault dal nuovo diritto antidisciplinare al diritto dei governati di Va-t-on extrader Klaus Croissant? e infine all'indipendenza dei governati, in La nascita della biopolitica, cit., 48-51, si veda P. CHEVALLIER, *Michel Foucault and the question of right*, cit., 179 ss.

[100] M. FOUCAULT, *Face aux gouvernements, les droits de l'homme*, in *Libération*, n. 967, 30 giugno-1 luglio 1984, 22 e in D. Defert-F. Ewald (eds.), *Dits et écrits*, IV, cit., n. 355, trad. it., Contro i governi, i diritti dell'uomo, in ID., La strategia dell'accerchiamento, cit., 236. Cfr. P. NAPOLI, *Le arti del vero*, cit., 381 ss. e M.A. DA FONSECA, *Michel Foucault et le droit*, cit., 219 ss.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 323-339
ISSN: 1825-5167

IMMIGRAZIONE E INFRA-DIRITTO: DAL GOVERNO PER CIRCOLARI ALLA TWEETING-GOVERNANCE

ISIDE GJERGJI
Centre for Social Studies
University of Coimbra (Portugal)
isidegjergji@ces.uc.pt

ABSTRACT
Since its birth in 1861, the Italian state has administered the foreigners' social and legal status – both in the homeland and the colonies – through administrative orders and acts, mainly expressed through circulars, *i.e.* infra-law acts. It has continued to do so even in its democratic phase. More recently, and due to a general global trend toward the linguistification of politics and law, Twitter or Facebook messages are replacing traditional circulars on migration. Political or state authorities increasingly use social media to issue their orders. Infra-law therefore stands out as a permanent normative paradigm for foreign populations, preventing them from accessing legal subjectivity and consequently producing countless negative effects. This article aims to highlight not only that this unchanging form of foreign population management leads to its perpetual subaltern social and economic condition, but also – in contrast to what Weber claims about the structural link between law and capitalism – that it is crucial to capitalism's development because it can best satisfy its need for predictability and calculability.

KEYWORDS
Infra-law, Capitalism, Colonialism, Migration, Governance, Twitter.

1. LA CALCOLABILITÀ NEL SISTEMA NORMATIVO COLONIALE

Natalino Irti afferma che il moderno Stato di diritto «riposa [...] sulla circolarità logica fra decidere, giudicare, e applicare la legge»[1] e aggiunge che, affinché il circolo funzioni ed eserciti il suo potere di previsione e controllo sul futuro, ciascuno degli elementi deve poggiare sugli altri, o addirittura coincidere con questi. Laddove i singoli momenti esistessero in modo disgiunto, il contesto sarebbe dominato da un

[1] N. IRTI, *Un diritto incalcolabile*, Torino 2016, 6.

«incontrollabile soggettivismo della decisione»[2], il che renderebbe pressoché impossibile l'agire economico e sociale nella società moderna, in quanto verrebbe a mancare un elemento essenziale: la calcolabilità.

Georg Simmel, in *Filosofia del denaro*, ha evidenziato come l'estremo bisogno di precisione e prevedibilità sia un aspetto peculiare della società moderna e del capitalismo[3]. Max Weber ha meglio chiarito il punto, ponendo alla base della nascita e dello sviluppo del capitalismo «un diritto che si possa calcolare in modo simile a una macchina»[4]. La calcolabilità – intesa come fattore di controllo e previsione degli eventi, delle relazioni (con la burocrazia e tra privati) e dei profitti – può essere garantita, nell'ottica weberiana, soltanto dalle leggi, dai regolamenti formali emanati dagli Stati moderni con procedure prestabilite.

Il sociologo tedesco ha costruito dunque un legame ontologico tra capitalismo e sistema giuridico, dove l'uno non può esistere senza l'altro. Eppure, questo legame appare oggi sgretolato: il capitalismo contemporaneo e globale affida sempre meno il suo endemico bisogno di calcolabilità agli ordinamenti degli Stati o delle istituzioni sovranazionali[5]. Cerca altrove le proprie garanzie, avvalendosi costantemente di nuove e variabili «officine giuridiche»[6]. Questa progressiva dissoluzione è spesso spiegata attraverso l'introduzione di una distinzione tra il (primo) capitalismo liberale competitivo e il (successivo) capitalismo monopolistico, considerato una degenerazione del primo. Mannheim è stato tra i primi a ricorrere a questa argomentazione: «il principio fondamentale della legge formale [...] prevale soltanto nella fase liberale-competitiva del capitalismo, e non, come credeva Max Weber, nel capitalismo in generale. [...] nello stadio più recente del capitalismo monopolistico [...] troviamo un crescente elemento di irrazionalità giuridica nella forma delle formule legali, che lasciano la decisione del caso alla discrezione del giudice, facendo a meno degli antichi principi della legge formale»[7]. Viene così stabilito un rapporto «tra il

[2] Ivi, 9.

[3] G. SIMMEL, *Philosophie des Geldes*, Leipzig 1900, tr. it. *Filosofia del denaro*, Torino 1984, 629 e ss.

[4] M. WEBER, *Wirtschafts-geschichte. Abris der universalen social und wirtschafts geschichte,* München und Leipzig 1923, tr. it. *Storia economica. Linea di storia universale dell'economia e della società*, Roma 1993, 298.

[5] N. IRTI, *Un diritto incalcolabile, cit.*

[6] N. IRTI, *Nichilismo giuridico*, Roma-Bari 2004, 7. Cfr. anche B. DE SOUSA SANTOS, *Droit: une carte de la lecture déformée. Pour une conception post-moderne du droit*, in *Droit et Société*, n. 10, (1988), 373 e ss.

[7] K. MANNHEIM, *Mensch und Gesellschaft im Zeitalter des Umbaus*, Leiden 1935, tr. it. *L'uomo e la società in un'età di ricostruzione*, Milano 1959, 171-172.

capitalismo liberale competitivo e la legge formale, e tra il capitalismo monopolistico e il crescente irrazionalismo giuridico»[8]. Al primo capitalismo corrisponderebbe lo Stato di diritto, la democrazia, mentre al secondo lo Stato discrezionale o, addirittura, il fascismo.

Tali spiegazioni appaiono superficiali e astratte perché non tengono conto delle condizioni storiche della nascita e dello sviluppo del capitalismo, oltre che dell'effettivo legame che questi tende a instaurare con il diritto. Si deve inoltre rilevare una certa sopravvalutazione del carattere universalistico del diritto occidentale moderno. Per quanto concerne quest'ultimo aspetto, sarebbe sufficiente ricordare quanto scritto da Weber a proposito degli obblighi primari dello Stato moderno (tedesco) e del suo ordinamento, ossia: garantire gli interessi economici e di potenza della nazione (tedesca). Quando il sociologo si trovò ad analizzare la condizione dei contadini polacchi emigrati nella Germania dell'est, non ritenne di stabilire nessuna stretta connessione tra Stato di diritto ed economia come condizione di pace e felicità. Tutto ciò poteva valere per i tedeschi e non per i polacchi, nei cui confronti, secondo Weber, il governo tedesco avrebbe dovuto adottare misure drastiche, quali l'espulsione o la sottomissione al dominio politico ed economico tedesco, in quanto esseri inferiori (per razza, religione e cultura): «Non pace e felicità dobbiamo consegnare ai nostri discendenti affinché le portino con sé nel loro cammino, ma l'*eterna lotta* per il mantenimento e l'esaltazione della nostra specificità nazionale. [...] In ultima istanza sono lotte per la *potenza* anche i processi di sviluppo economico e gli interessi di *potenza* della nazione, dove essi sono posti in questione, sono gli interessi ultimi e decisivi, al servizio dei quali deve porsi la politica economica della nazione. [...] E lo Stato nazionale [...] è l'organizzazione di terrena potenza della nazione»[9]. È bastato introdurre nel quadro analitico dei soggetti non tedeschi – i contadini polacchi – perché il sodalizio tra capitalismo e Stato di diritto mostrasse tutta la sua porosità.

Quanto alle condizioni di nascita e sviluppo del capitalismo, sono pochi ormai coloro che mettono in dubbio la sua nascita nelle colonie[10]. Del resto, quando Marx parla dell'*accumulazione originaria* (riprendendo un'espressione di Adam Smith) si riferisce, *in primis*, alla sanguinosa violenza del processo storico di separazione dei produttori dai mezzi di produzione nelle colonie. È questa la genesi del capitalismo[11] e non gli aneddoti sul duro lavoro, sulla concorrenza tra pari e sui contratti

[8] Ivi, 172.

[9] M. WEBER, *Der Nationalstaat undie Volkswirtschaftpolitik. Akademische Antrittsrede*, Akademische Verlagsbuchhandlung, Freiburg i.B.-Leipzig 1895, tr. it. *Lo Stato nazionale e la politica economica tedesca*, in ID., *Scritti politici*, Roma 1998, 17-18 (3-28).

[10] Cfr., tra tanti, I. WALLERSTEIN, *Historical Capitalism*, London 1983, tr. it. *Il capitalismo storico. Economia, politica e cultura di un sistema mondo*, Torino 1985.

[11] Cfr. S. BECKERT, S. ROCKMAN, *Slavery's Capitalism. A New History of American Economic Development*, Philadelphia 2016.

garantiti dalla legge[12] nei territori delle potenze europee. Il capitalismo, spiega Marx (in una lettera inviata a P. V. Annenkov), è stato generato dal lavoro schiavistico nelle colonie: «[...] La schiavitù diretta è il cardine del nostro industrialismo attuale proprio come le macchine, il credito ecc. Senza schiavitù niente cotone. Senza cotone niente industria moderna. Solo la schiavitù ha conferito alle colonie il loro valore, solo le colonie hanno creato il commercio mondiale e il commercio mondiale è la condizione necessaria della grande industria meccanizzata»[13].

Il sistema coloniale[14] si è retto per secoli su un controllabile decisionismo amministrativo. Le colonie erano considerate «semplici obbietti di dominio da parte dello Stato»[15], perché, come affermava senza nascondimenti il giurista Attilio Brunialti più di un secolo fa, sarebbe stato «assurdo mantenervi le forme parlamentari, i distinti poteri od alcuno di quei meccanismi che ne formano il nostro vanto»[16], in quanto in quei territori era necessario realizzare «una vigorosa tutela dell'ordine, della buona fede e della sicurezza dei commerci»[17]. Lo Stato di diritto non solo non collaborava allo sviluppo del capitalismo europeo nelle colonie, ma era ritenuto d'intralcio. Come ha spiegato Sua Altezza Reale, Amedeo di Savoia Aosta, Viceré d'Etiopia (nel 1937), – nella sua tesi di laurea in giurisprudenza –, per la gestione ottimale delle colonie era necessario lo Stato di polizia: «Subordinata [...] al principio di tutela, l'organizzazione delle colonie presenta dunque le caratteristiche proprie dello Stato di Polizia. E cioè, la metropoli, nella sua unicità organica, si attribuisce rispetto alle popolazioni indigene i poteri e le funzioni assunte nella forma storica dello Stato di polizia del Principe, che si ritiene tutore e rappresentante degli interessi dei sudditi dei quali è tenuto a promuovere la prosperità»[18]. Nello Stato di polizia l'ordine del Principe è legge.

[12] Walter Benjamin ci ricorda inoltre che «un regolamento di conflitti privo affatto di violenza non può mai sfociare in un contratto giuridico. Poiché questo, per quanto sia stato concluso pacificamente dai contraenti, conduce sempre, in ultima istanza, a una possibile violenza. [...] Se vien meno la consapevolezza della presenza latente della violenza in un istituto giuridico, esso decade», W. BENJAMIN, *Schriften*, Frankfurt am Main 1955, tr. it *Angelus Novus. Saggi e frammenti*, Torino 1995, 17.

[13] Il testo della lettera fu scritto in lingua francese da Marx e si può ora leggere in italiano, tradotto da M. Montinari in K. MARX, F. ENGELS, *Opere*, Vol. XXXVIII, Roma 1972, 462.

[14] J-P. SARTRE, *Le colonialisme est un système*, in Id., *Situation V. Colonialisme et néo-colonialisme*, Paris 1964, tr. it *Il colonialismo è un sistema*, in I. GJERGJI, *"Uccidete Sartre!". Anticolonialismo e antirazzismo di un "revenant"*, Verona 2018, 59-79.

[15] U. ALLEGRETTI, *Profilo di storia costituzionale italiana. Individualismo e assolutismo nello stato liberale*, Bologna 1989, 257.

[16] A. BRUNIALTI, *Assab. La prima colonia italiana*, in *Nuova Antologia*, XXXIV, 13 (1882), 137.

[17] Ivi, 136. Cfr., sul punto, anche A. Mazzacane (a cura di), *Oltremare. Diritto e istituzioni dal colonialismo all'età postcoloniale*, Napoli 2006.

[18] A. DI SAVOIA AOSTA, *I concetti informatori dei rapporti giuridici fra gli Stati moderni e le popolazioni indigene delle loro colonie*, Tesi di laurea in giurisprudenza, Università di Palermo 1923, 14.

Sono stati il vigore dell'agire amministrativo e le forme *para-giuridiche*, o *infra-giuridiche*[19] nell'esercizio del potere, a soddisfare il bisogno di calcolabilità del capitalismo nelle colonie e, allo stesso tempo, anche la messa in atto delle elaborazioni ideologiche del colonialismo, compreso il loro corredo di razzismo e gerarchizzazione sociale[20]. I diritti dell'uomo – ricorda Sartre – sono pensati per gli uomini (colonizzatori) e non per i sotto-uomini (colonizzati): «[...] poiché l'indigeno è un sotto-uomo, la Dichiarazione dei Diritti dell'Uomo non lo riguarda»[21].

Quando si analizza il diritto moderno occidentale non si può non tenere conto delle sue trasfigurazioni nelle colonie. La sua storia non è separabile da quella coloniale, non foss'altro perché i territori coloniali erano formalmente parte integrante degli Stati europei. Come si argomenterà di seguito, l'esperienza coloniale ha rappresentato il laboratorio nel quale sono stati sperimentati e messi a punto i dispositivi funzionali di un sistema normativo di tipo amministrativo, capace di controllare e calcolare il futuro con la precisione di una macchina. È a tali dispositivi che occorre volgere lo sguardo per comprendere oggi anche la dissoluzione del legame tra diritto e capitalismo contemporaneo.

L'imposizione del *just in time*, come nuovo paradigma organizzativo nel processo produttivo, – introdotto non per il mero volontarismo di imprese o governi, ma per l'oggettiva necessità del capitalismo di superare le proprie crisi e contraddizioni[22] –, insieme al progresso della tecnologia digitale, hanno prodotto un'accelerazione senza precedenti dei tempi di funzionamento del capitalismo[23]. Tale accelerazione ha progressivamente compresso, o perfino eliminato, la distanza tra tempo futuro e tempo presente, rendendo di conseguenza superflua e improduttiva la legge, la quale è intesa, sin dalla sua genesi, come strumento di calcolabilità del futuro. La legge, infatti, «non dispone che per l'avvenire» recita l'art. 11 delle disposizioni preliminari del Codice Civile. Se il futuro è ora, nella circolarità logica tra decidere, giudicare e applicare la legge viene meno il ruolo della legge. Il *just in time* non ne riconosce l'utilità. Il suo posto, ovviamente, non è lasciato vuoto; è

[19] Il concetto di infra-giuridico è tratto qui dalla definizione di massima fornita dal sociologo del diritto Jean Carbonnier, il quale lo considera un fenomeno normativo (e morale) che si sviluppa in prossimità del diritto assumendone le sembianze, contribuendo infine ad assegnargli una «colorazione particolare», J. CARBONNIER, *Sociologie juridique*, Paris 1978, 218 e ss.

[20] Sul punto cfr. P. BASSO, *Razze schiave e razze signore*, Milano 2000.

[21] J-P. SARTRE, *«Portrait du colonisé», précédé du «Portrait du colonisateur»*, in Id., *Situation V*, Paris 1964, 51 (49-56).

[22] Cfr. D. HARVEY, *The Condition of Postmodernity. An Enquiry into the Origins of Cultural Change*, Cambridge MA & Oxford UK 1989, tr. it. *La crisi della modernità. Riflessioni sulle origini del presente*, Milano 1997; G. CARCHEDI, *Behind the Crisis*, Leiden 2011; G. ARRIGHI, B. J. SILVER, *Chaos and Governance in the Modern World System*, Minnesota 1999, tr. it *Caos e governo del mondo*, Milano 2006.

[23] F. JAMESON, *Postmodernism, or, the Cultural Logic of Late Capitalism*, Durham 1991, tr. it. *Postmodernismo, ovvero la logica culturale del tardo capitalismo*, Roma 2007.

occupato da altre norme – *in primis* da quelle infra-giuridiche, emanate da organi esecutivi/amministrativi dello Stato – con la capacità di controllare e calcolare il (valore del) *presente*.

2. DALL'INFRA-DIRITTO COLONIALE ALL'INFRA-DIRITTO DEGLI STRANIERI

Se lo Stato moderno si qualifica «come Stato in cui sovrana è soltanto la volontà impersonale del legislatore obiettivata nella legge, e tutta l'attività dei pubblici poteri è disciplinata da norme giuridiche, mentre altre norme garantiscono ai cittadini la possibilità di difesa contro ogni eventuale arbitrio delle autorità e dei poteri costituiti»[24], allora agli organi esecutivi/amministrativi non potrebbe essere attribuito alcun potere legislativo. La loro funzione è l'applicazione delle leggi in vigore. Eppure, sin dalla sua nascita, lo Stato moderno si è contraddistinto per la conservazione del potere assolutistico dell'amministrazione statale, seppur dentro un gorgo rivoluzionario che ne ha trasformato la forma[25]. La ragione della sopravvivenza di questo nocciolo di potere assolutistico nel cuore dello Stato moderno è stata individuata nell'«interesse della borghesia a disporre dell'amministrazione come uno dei poteri più gelosi, perché il più idoneo a realizzare in concreto [...] il suo dominio sulla società»[26].

Nelle colonie, come s'è detto, il dominio amministrativo della borghesia è giunto al punto da assegnare buona parte del potere legislativo agli organi esecutivi/amministrativi, i quali hanno finito per produrre impianti normativi articolati e funzionali di tipo infra-giuridico, che, lungi dall'essere espressione di scelte imputabili alle incontrollabili decisioni dei singoli, sono il risultato della sedimentazione di istanze e interessi storicamente determinati e concretamente rappresentati dagli apparati esecutivi/amministrativi. Si tratta di un infra-giuridico coordinato e organizzato, che ha reso possibile la calcolabilità degli eventi e dei profitti del capitalismo nascente e, allo stesso tempo, il controllo e disciplinamento[27] delle popolazioni indigene, alle quali è sempre stato negato l'accesso alla soggettività giuridica. Il loro *status*, per secoli, è dipeso primariamente dagli ordini amministrativi, – emanati soprattutto tramite circolari[28], ossia: da *atti interni* dell'amministrazione, – che, pur non avendo

[24] G. ASTUTI, *La formazione dello Stato moderno in Italia*, Torino 1967, 26.

[25] A. DE TOCQUEVILLE, *L'ancien régime et la révolution*, Paris 1856, tr. it. *L'antico regime e la rivoluzione*, Milano 2004, 101 e ss.

[26] U. ALLEGRETTI, *Amministrazione pubblica e Costituzione*, Padova 1996, 23.

[27] Sul ruolo dell'infra-diritto nel processo storico di disciplinamento di individui e popolazioni cfr. M. FOUCAULT, *Surveiller et punir. Naissance de la prison*, Paris 1975, tr. it *Sorvegliare e punire. Nascita della prigione*, Torino 1976.

[28] Il riferimento è alle cosiddette *circolari-fonte*, aventi un esplicito carattere dispositivo.

alcun valore giuridico, sono di fatto dotati di una forza cogente, derivante da molteplici fattori (interni ed esterni all'amministrazione), *in primis* dal carattere gerarchico della struttura organizzativa dell'amministrazione[29].

Il *dominio per circolari* sulle popolazioni indigene è stata un'esperienza storica che ha riguardato tutte le potenze coloniali, Italia compresa. Lo *status* assegnato a etiopi, somali, eritrei, libici, albanesi, etc. era principalmente delineato nelle circolari dell'amministrazione o dell'esercito[30]. Tale modello di governo fu in seguito adottato anche nel territorio italiano nei confronti degli stranieri, compresi quelli europei, i quali, all'inizio del XX° secolo, con l'avvicinarsi della Prima guerra mondiale, entravano a far parte della categoria dei 'nemici'. Le sperimentazioni delle forme *infra-giuridiche* nell'esercizio del potere furono in seguito ampliate e rafforzate durante il fascismo, quando si realizzò l'espropriazione della funzione legislativa del parlamento da parte degli apparati esecutivi/amministrativi, accentuando al massimo il carattere gerarchico della struttura organizzativa dello Stato e del governo. Tutto ciò ebbe come conseguenza l'utilizzo massiccio della circolare come vero e proprio dispositivo di controllo e disciplinamento sociale. Tramite le circolari-fonte venivano impartiti ordini rapidi (*just in time*, si potrebbe dire) sia per stabilire tempi e modalità di applicazione delle leggi in vigore sia per introdurre norme *extra* e/o *contra legem*, come ad esempio quelle volte a imporre la censura alla stampa e al dissenso politico, oppure quelle tese a introdurre prassi violente e segreganti nei confronti di diverse categorie di soggetti (stranieri, ebrei, rom, oppositori politici, omosessuali, lavoratori, etc.). Quasi tutta la condizione degli stranieri, salvo pochissime norme sparse nei codici e nelle leggi di pubblica sicurezza, era affidata alle circolari ministeriali. Le leggi razziali del 1938 non sono state altro che una normalizzazione a posteriori delle innumerevoli circolari sulla razza, emanate anni o mesi prima[31].

Nel Secondo dopoguerra, nonostante il radicale mutamento del contesto istituzionale e politico, la disciplina dello straniero in Italia è rimasta saldamente nelle mani del potere esecutivo/amministrativo, il quale non ha esitato a imporsi come *dominus* della situazione tramite i suoi tradizionali strumenti: le *circolari*[32]. La prima

[29] Cfr. L. FERRAJOLI, *Politiche contro gli immigrati e razzismo istituzionale in Italia*, in P. Basso (a cura di), *Razzismo di stato. Stati Uniti, Europa, Italia*, Milano 2010, 121 (115-125).

[30] Cfr. A. DEL BOCA, *Gli italiani in Africa orientale*, Roma-Bari 1984; ID., *Gli italiani in Libia*, Roma-Bari 1988; Id. (a cura di), *Le guerre coloniali del fascismo*, Roma-Bari 1991; ID., *I gas di Mussolini*, Roma 1996; ID., *Italiani, brava gente?*, Vicenza 2006.

[31] Cfr. I. GJERGJI, *Circolari amministrative e immigrazione*, Milano 2013, 64 e ss.

[32] Appare utile ricordare qui l'importanza che Antonio Gramsci attribuiva alle circolari nell'analisi della struttura politica e giuridica dello Stato moderno: «[...] Si giudica da ciò che si fa, non da quel che si dice. Costituzioni statali > leggi > regolamenti: sono i regolamenti e anzi la loro applicazione (fatta in virtù di circolari) che indicano la reale struttura politica e giuridica di un paese e di uno Stato», A. GRAMSCI, *Quaderni del carcere*, Vol. II, Quaderni 6-11 (1930-1933), a cura di V. Gerratana, Torino 2007, 1051.

legge organica sulla condizione degli stranieri in Italia è entrata in vigore nel 1990 (L. n. 39/90), ben 42 anni dopo la Costituzione del 1948, la quale all'art. 10, co. 2 esclude esplicitamente la possibilità che la condizione dello straniero possa essere determinata da fonti diverse da quelle legislative[33]. In questo non trascurabile lasso di tempo, lo *status* degli stranieri è stato interamente affidato alle norme contenute nelle circolari, che hanno finito per costruire un complesso sottobosco normativo, in grado di mimetizzarsi negli interstizi dell'ordinamento giuridico, assumendone le sembianze.

La *modalità di governo per circolari* non si è affatto ridotta dopo il 1990, periodo in cui la produzione legislativa in materia di immigrazione si è rivelata a dir poco convulsa. Al contrario, il ricorso alle circolari per la determinazione dello *status* degli immigrati è esponenzialmente incrementato dopo il 1990. E ciò per tre ragioni essenziali: 1) l'aumento della popolazione immigrata in Italia, fattore che ha maggiormente impegnato gli organi esecutivi/amministrativi nella gestione quotidiana del fenomeno; 2) l'estensione di una legislazione *multilevel* (internazionale, comunitaria, nazionale e regionale), che ha spesso richiesto l'intervento dei vertici della struttura amministrativa per dirimere eventuali conflitti normativi e 3) la diffusione del *soft law* internazionale[34].

Le circolari sull'immigrazione di questo periodo si caratterizzano per essere in prevalenza strumenti di *integrazione* e *interpretazione* '*autentica*' delle leggi in vigore, tramutandosi in un «diaframma tra le disposizioni legislative e la loro concreta applicazione»[35]. Tutto ciò ha finito per lasciare sostanzialmente invariato lo sconfinato potere dell'autorità esecutiva/amministrativa nella gestione delle popolazioni immigrate, anche dopo la costruzione di una legislazione ricca in materia.

3. CONTENUTI E CARATTERISTICHE DELL'INFRA-DIRITTO DEGLI STRANIERI IN ITALIA

Una ricostruzione completa dei contenuti e delle caratteristiche delle circolari amministrative in tema di immigrazione è molto difficile da realizzare, in quanto: 1) il loro numero è assai elevato, considerato che ogni singolo ente o ufficio, anche periferico, può produrle; 2) spesso non godono di alcuna forma di pubblicità e/o trasparenza. Si può affermare che tra gli operatori della pubblica amministrazione,

[33] Cfr. G. BUCCI, *Una circolare per circolare. A proposito delle politiche sull'immigrazione*, in *Costituzionalismo.it*, 1 (2004); ID., *Eguaglianza, immigrazione e libertà di circolazione nell'era della mondializzazione dell'economia*, in AA.VV., *Studi in onore di G. Ferrara*, Vol. 1, Torino 2005, 393-492.

[34] Cfr. A. ALGOSTINO, *L'esternalizzazione soft delle frontiere e il naufragio della costituzione*, *Costituzionalismo.it*, 1 (2017).

[35] M. P. CHITI, *Circolare*, in *Enciclopedia giuridica*, VI (1988), 3.

di qualsiasi grado, vi sia un convincimento diffuso in base al quale le circolari amministrative vadano considerate degli atti riservati o, addirittura, segreti[36].

Ciononostante, se si prendono in considerazione soltanto le circolari-fonte emanate dai ministeri, comunemente ritenute le più rilevanti in materia[37], si possono qui proporre alcune sintetiche considerazioni di ordine generale.

I primi dati da registrare sulle circolari governative/ministeriali in tema d'immigrazione sono: a) la loro informalità; b) la validità temporale limitata (anche come conseguenza del rapido *turnover*); c) la formazione in assenza di contraddittorio/mediazione; d) la segretezza (o riservatezza). Analizzando le circolari ministeriali diramate dal 1948 ad oggi, si possono individuare due *classi*, distinguibili per alcune loro caratteristiche peculiari; nella prima *classe* possono essere incluse le circolari emanate prima del 1990, anno in cui entra in vigore la prima legge organica sulla condizione degli stranieri, e nella seconda quelle emanate nel periodo successivo.

Il primo periodo, dunque, è caratterizzato dalla (quasi) totale assenza di disposizioni legislative in materia di immigrazione, mentre il secondo si distingue per la convulsa produzione legislativa in questo specifico settore. Le circolari rientranti nella prima *classe* hanno in comune diverse caratteristiche: in primo luogo, il loro accentuato carattere dispositivo. Si tratta, infatti, di circolari che stabiliscono norme *extra legem*. Altra loro caratteristica eminente è la particolare tecnica redazionale: contengono norme che sono spesso divise in *Titoli*, *Sezioni*, *Capi* e *Articoli*. L'architettura dell'articolato simula in tutto e per tutto quella della *legistica*. Ciò può facilmente rintracciarsi anche nei titoli, i quali riportano spesso espressioni del tipo: «Norme per l'ingresso e il soggiorno», oppure «Disposizioni di massima sull'ingresso e soggiorno degli stranieri», e così via. Nelle circolari aventi un carattere organico vi sono spesso presenti degli ampi preamboli, mediante i quali i ministri o altre autorità illustrano – con linguaggio diretto e scevro da formule – gli indirizzi politici. Il linguaggio argomentativo/discorsivo, libero e non ritualizzato, ha finito per attribuirle anche una capacità pedagogica, dando così vita a una sorta di «paternalismo amministrativo»[38] in materia di immigrazione. Altro elemento che accomuna le circolari della prima *classe* è l'assenza di un'adeguata pubblicità. È piuttosto raro trovare circolari sull'immigrazione pubblicate nella Gazzetta Ufficiale, o in altri documenti istituzionali. Ne è conseguito, inevitabilmente, un grave pregiudizio per gli stranieri, i quali si sono rapportati per lungo tempo con la pubblica amministrazione (prevalentemente questure) in condizione di totale subalternità, derivante *in primis* dall'impossibilità concreta di conoscere e azionare i loro diritti.

Quanto al contenuto, si può affermare che in queste circolari si stabilivano regole atte a determinare una condizione *subalterna* e *inferiorizzata* dell'immigrato nella

[36] Cfr. I. GJERGJI, *Circolari amministrative e immigrazione*, cit., 85 e ss.

[37] Ibidem.

[38] Cfr. J. CARBONNIER, *Sociologie juridique*, cit, 220 e ss.

società e nell'economia italiana[39]. Molte delle attuali disposizioni legislative in vigore in materia di immigrazione hanno origine proprio nelle circolari ministeriali degli anni Sessanta-Settanta del secolo scorso: dal legame indissolubile tra contratto di lavoro e titolo di soggiorno, alle limitazioni al ricongiungimento familiare, alle deboli (o inesistenti) tutele giuridiche, alle impronte digitali e così via[40].

Nella seconda *classe* di circolari, ossia nelle circolari prodotte dal 1990 in poi, si possono individuare altre peculiarità. Queste si differenziano dalle prime per il loro spiccato carattere *interpretativo* o *esplicativo* delle leggi. Tuttavia, non può affermarsi che siano sprovviste di un carattere dispositivo, poiché anche quando si 'limitano' a imporre un'interpretazione 'autentica' intervengono di fatto nelle modalità e nei tempi di applicazione delle disposizioni legislative. In questa fase, però, l'approccio complessivo è frammentario e settoriale. Quanto al loro micro-universo semantico, si può annotare una maggiore aderenza al registro della *legistica*, avendo perso anche quei tratti discorsivi che erano frequenti nelle circolari della prima *classe*. Altro elemento di differenza consiste nella maggiore – seppur caotica – pubblicità delle stesse, sia attraverso i canali ufficiali (Gazzetta Ufficiale, siti web istituzionali) sia tramite quelli 'ufficiosi' (sindacati, associazioni, Ong, enti di ricerca, partiti politici). Il che ha finito per attribuire loro, assai ambiguamente, la validità di fonte giuridica.

Il contenuto è dominato da un'interpretazione restrittiva, e non di rado illegittima, delle leggi in vigore, finendo per restringere o cancellare il godimento effettivo dei diritti formali da parte degli stranieri.

4. IL 'CODICE' DI MINNITI

L'infra-diritto amministrativo dell'immigrazione ha subìto variazioni nel corso del tempo. All'inizio del nuovo millennio, dopo l'affermarsi del federalismo giuridico (a seguito della riforma del Titolo V della Costituzione) e il crescente protagonismo delle amministrazioni periferiche, si è sviluppato l'*infra-diritto di prossimità*, variante localista dell'infra-diritto dell'immigrazione. Il diluvio di ordinanze emesse da sindaci e 'governatori' ha avuto un forte impatto sullo *status* degli stranieri[41]. Allo

[39] I. GJERGJI, *Circolari amministrative e immigrazione*, cit., 117 e ss.

[40] M. PASTORE, *Nuova legge sugli stranieri extracomunitari: disciplina innovativa o razionalizzazione dell'esistente*, in *Questione giustizia*, 2 (1990), 331-345.

[41] Cfr. E. GARGIULO, *Appartenenze precarie. La residenza tra inclusione ed esclusione*, Milano 2019.

stesso tempo, il paradigma della *governance*[42] si è imposto a ogni livello della produzione dell'infra-diritto, dagli organi esecutivi/amministrativi centrali a quelli periferici, portando a un'evoluzione del fenomeno. Un caso emblematico della recente deriva è rappresentato dal «Codice di condotta per le Ong impegnate nelle operazioni di salvataggio dei migranti in mare», fortemente voluto dall'allora ministro degli interni, Marco Minniti.

Il primo aspetto del 'codice' da evidenziare è il suo carattere informale, nonostante il termine altisonante. Il suddetto 'codice' è una mera circolare amministrativa e, come tale, non potrebbe produrre alcun effetto giuridico. Come sottolinea Weber, in uno Stato di diritto «la "validità" di una potestà di comando può essere espressa in un sistema di *regole razionali* statuite (pattuite o imposte) che trovano – in quanto norme generali vincolanti – docilità, se chi è "chiamato" secondo le regole a esercitarla la esige. Il singolo detentore della potestà di comando è allora legittimato da tale sistema di regole razionali e la sua potestà è legittima nella misura in cui viene esercitata in conformità a quelle regole. L'obbedienza viene prestata alle regole e non alla persona»[43].

Il ministro dell'interno non è legittimato a imporre il suo 'codice' – né alle Ong, né ai dipendenti dell'amministrazione, né tanto meno ad altri – in quanto sprovvisto della forza legale dell'ordinamento e, di conseguenza, l'urlo-minaccia di Minniti – «Chi non sottoscrive il codice è fuori!» (*La Repubblica*, 31 luglio 2017) – sarebbe dovuto cadere nel vuoto. Eppure, com'è noto, esso è divenuto operativo, rendendo evidente che gli è di fatto attribuito una validità da parte di chi è chiamato ad applicarlo. Validità che deriva da fonti diverse dall'ordinamento giuridico.

La prima fonte, logica e ontologica, come già detto, è la struttura organizzativa (sempre più) gerarchica dell'amministrazione[44], senza la quale nessuna circolare potrebbe imporsi al suo interno. Una seconda fonte può essere individuata nelle varie istituzioni – Commissione europea, ministri della giustizia e degli interni degli Stati membri dell'Unione europea, governo italiano e altre personalità politiche – che hanno collaborato alla redazione e/o approvazione (di tipo para-legale) del 'codice'. Di ciò, non a caso, ne dà contezza il 'codice' stesso, nel suo preambolo: «In occa-

[42] È stato spiegato che la *governance* è «un fenomeno più ampio di quello del governo. Esso include le istituzioni di governo, ma anche quei meccanismi informali e non governativi attraverso i quali individui e organizzazioni si orientano nei loro campi d'azione», J. ROSENAU, O. CZEMPIEL, *Governance Without Government: Order and Change in World Politics*, Cambridge 1992. Sull'evoluzione del concetto di *governance* cfr. A. ARIENZO, *La governance*, Roma 2013.

[43] M. WEBER, *Wirtschaft und Gesellschaft: die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte*, Nachlaß. *Herrschaft*, Tübingen 1922, tr. it. *Economia e società. L'economia in rapporto agli ordinamenti e alle forze social. Dominio*, Roma 2012, 37-38.

[44] Sul punto cfr. C. DE FIORES, *I pubblici impiegati sono al servizio della nazione? Brevi considerazioni sulla dimensione costituzionale del pubblico impiego tra privatizzazione del rapporto di lavoro e revisione del Titolo V*, in *Diritto pubblico*, 1 (2006), 149 e ss.

sione della riunione informale dei Ministri della Giustizia e degli Affari Interni, tenutasi il 6 luglio a Tallin, sotto la presidenza estone, i Ministri dell'Interno dell'UE hanno accolto con favore l'iniziativa delle autorità italiane intesa a garantire che le navi ONG impegnate in attività di *Search and Rescue* (SAR) operino secondo una serie di regole chiare da rispettare, sotto forma di un codice di condotta [...], in consultazione con la Commissione e in cooperazione con le parti interessate [...]». Come ha spiegato Pierre Bourdieu, «un giudizio autorizzato porta con sé tutta la forza dell'ordine sociale»[45], dal quale trae buona parte della sua legittimazione.

Una terza fonte di legittimazione andrebbe individuata nell'ampia mediatizzazione dell'iniziativa ministeriale, la quale ha finito per produrre una capillare socializzazione della questione, costruendo (fittiziamente) l'idea di una decisione accettata o persino assunta dal basso. Infine, un'altra legittimazione sarebbe dovuta arrivare – come conviene a ogni modello di *governance*[46] – dal coinvolgimento (sostanzialmente forzato) delle Ong in una pseudo-procedura pattizia.

Il rifiuto pubblico di una sola delle Ong convocate è bastato a strappare il velo legittimante posato sul 'codice'. In una lettera pubblica rivolta al ministro degli interni, la suddetta organizzazione umanitaria, oltre a spiegare nel merito le ragioni del rifiuto, ha ribadito di volersi 'limitare' a rispettare le leggi e le convenzioni internazionali in vigore, senza sottoscrivere alcun patto: «Nel comunicare la nostra indisponibilità a sottoscrivere il Codice di Condotta nell'attuale formulazione, intendiamo confermare pubblicamente che tutte le operazioni di MSF in mare si sono sempre volte sotto il coordinamento dell'MRCC e in piena conformità alle norme vigenti, nazionali e internazionali»[47].

Con il 'codice' di Minniti si consolida una crescente tendenza[48] degli organi esecutivi/amministrativi (di tornare) ad assumere il pieno potere legislativo in materia di immigrazione. Con un'importante differenza rispetto al passato: la rivendicazione pubblica dell'infra-giuridico amministrativo come fonte primaria della disciplina dell'immigrazione.

[45] P. BOURDIEU, *Sur l'État*, Paris 2012, tr. it. *Sullo Stato. Corso al Collège de France. Vol. I (1989-1990)*, Milano 2013, *ebook*.

[46] Cfr. I. GJERGJI, *Sulla governance delle migrazioni. Sociologia dell'underworld del comando globale,* Milano 2016.

[47] Il testo integrale della lettera è rinvenibile al seguente indirizzo: http://www.medicisenzafrontiere.it/notizie/news/codice-di-condotta-la-lettera-di-msf-al-ministro-dellinterno.

[48] Tale tendenza era stata già avviata con la circolare del ministero dell'interno n. 14106 del 6 ottobre 2015, tramite la quale sono stati materialmente istituiti i centri *hotspot*, ovvero luoghi di detenzione amministrativa per gli immigrati in fase di identificazione. Si trattava di centri non previsti né regolamentati dall'allora legislazione in vigore. Le disposizioni legislative introdotte negli anni seguenti hanno avuto una mera funzione di ratifica delle disposizioni previste nella circolare sopramenzionata.

5. LA *TWEETING-GOVERNANCE* DI SALVINI

Con Matteo Salvini ministro dell'interno, si rafforza in Italia una tendenza globale di fare sia della politica che del diritto un mero esercizio di comunicazione[49]. Tale processo di linguistificazione[50] si sviluppa soprattutto nelle piattaforme digitali dei *social media*. Sul carattere provvedimentale dei messaggi pubblicati sui *social media*[51], si è già espresso in senso negativo il Consiglio di Stato, Sez. VI, sent. n. 769/2015, affermando che «gli atti dell'autorità politica [...] debbono pur sempre concretarsi nella dovuta forma tipica dell'attività della pubblica amministrazione». Non possono esservi dubbi, pertanto, sul fatto che ogni ordine emanato dalle autorità via *social* rientri inevitabilmente nell'ambito dell'infra-giuridico, difettando dei requisiti necessari stabiliti dall'ordinamento per essere considerato giuridicamente valido.

La comunicazione *social* di Salvini adotta spesso le tecniche binarie dello *storytelling*[52], in quanto strumenti che – dividendo il mondo in due campi contrapposti – semplificano il messaggio, rendendolo tendenzialmente più efficace. Le opposizioni costruite si estendono anche al piano normativo, introducendo spesso una divisione tra norme 'buone' e 'cattive', laddove quelle 'buone' sono emanate direttamente via *social* e sottoposte all'approvazione dei *followers*.

L'analisi fenomenologica dell'infra-giuridico salviniano, per limiti di spazio, si soffermerà qui su un solo caso specifico, ma emblematico: i *tweet* pubblicati sul cd. 'caso Diciotti'[53]. Il caso può dirsi emblematico per due motivi: 1) i *tweet* rappresentano la forma più sintetica e rapida dei messaggi pubblicati sui *social media*, il che li veste di una particolare trasparenza e 2) il 'caso Diciotti' è stato gestito, dal punto

[49] Cfr., sul punto, M. B. RASMUSSEN, *Trump's Counter-Revolution*, Winchester, UK-Washington, USA 2018, tr. it *La controrivoluzione di Trump. Fascismo e democrazia*, Roma 2019; R. ANTUNES, *A política da caverna. A contra-revolução de Bolsonaro*, São Paulo 2019, tr. it. *Politica della caverna. La controrivoluzione di Bolsonaro*, Roma 2019.

[50] Cfr. J. BUTLER, *Excitable Speech. A Politics of the Performative*, New York 1997.

[51] Cfr. C. BERTI, *Right-wing populism and the criminalization of sea-rescue NGOs: the 'Sea-Watch 3' case in Italy, and Matteo Salvini's communication on Facebook*, in *Media, Culture & Society*, (2020), 1-19;

[52] C. SALMON, *Storytelling. La machine à fabriquer des histoires et à formater les esprits*, Paris 2007, tr. it. *Storytelling. La fabbrica delle storie*, Roma 2008.

[53] Sul punto si veda M. BENVENUTI, *Lo strano caso Diciotti. Diritti, rovesci e argomenti in una (brutta) pagina di diritto costituzionale italiano*, in *Costituzionalismo.it*, 2 (2019), 35-115.

di vista provvedimentale, dai profili *social* del ministro, in particolare da quello su Twitter[54].

Ai fini del presente scritto, i fatti salienti sono i seguenti: dopo il salvataggio in mare, in data 16 agosto 2018, 190 cittadini stranieri[55] venivano imbarcati sulla nave «U. Diciotti»; poche ore dopo, al porto di Lampedusa, 13 di loro sbarcavano a causa delle gravi condizioni di salute; dopo 4 giorni di estenuante attesa in mare, la nave veniva autorizzata ad attraccare nel porto di Catania, ma con l'ordine espresso di «non calare la passarella e lo scalandrone»[56]; lo sbarco degli immigrati veniva autorizzato soltanto in data 26 agosto 2018, vale a dire dieci giorni dopo il loro salvataggio in alto mare.

La ragione dello sbarco ritardato è da rintracciarsi nel comportamento del ministro, il quale, se dal lato operativo e istituzionale aveva assunto una condotta omissiva[57], dal lato comunicativo, invece, era diventato eccezionalmente attivo: la sua comunicazione *social* aveva finito per fagocitare il giuridico, ponendosi nel contempo come l'unica officina normativa 'valida' e 'buona'. I numerosi *tweet* ne sono una prova.

Il lancio del *hashtag #chiudiamoiporti*, il 10 giugno 2018, aveva già dato il via alla campagna mediatica e politica del ministro contro lo sbarco degli immigrati (naufraghi) nel territorio italiano. Le parole utilizzate nei suoi cinguettii digitali erano tese a criminalizzare sia gli immigrati (definiti «CLANDESTINI») sia le Ong umanitarie, anche con la finalità di costruire la legittimazione del loro trattamento normativo di tipo extra-infra-giuridico. Allo stesso tempo, le frasi del ministro assumevano, via via, un intenso carattere provvedimentale, sfociando in veri e proprio ordini. Infatti, se all'inizio del 'caso Diciotti', vale a dire dal 16 al 20 agosto, nei cinguettii ministeriali si trovano frasi tese a giustificare il divieto allo sbarco («20 agosto 2018: #Salvini su #Diciotti: l'Europa a parole è due mesi che ci dice che l'Italia non può essere lasciata sola. Aspettiamo i fatti. Intanto con nostre azioni abbiamo ridotto dell'80% sbarchi e affari degli scafisti»), in seguito queste assumono un tono

[54] La dinamica reale dei fatti accaduti nel mese di agosto 2018 che hanno coinvolto la nave «U. Diciotti» è stata ricostruita dal Tribunale dei ministri di Catania, il quale nell'ottobre 2018 ha presentato al Senato domanda di autorizzazione a procedere in giudizio nei confronti del ministro per il reato di sequestro di persona. Senza tale relazione, la ricostruzione dei fatti e della catena decisionale sarebbe stata impossibile, dato che, nell'interazione tra ministero e organi periferici, gli atti scritti tipici della P.A. sono risultati assenti.

[55] Non appare fuori luogo in questo scritto sottolineare il fatto che 130 dei naufraghi stranieri salvati dalla nave «U. Diciotti» erano cittadini eritrei, cioè originari di una delle *ex* colonie italiane.

[56] TRIBUNALE DI CATANIA – SEZIONE REATI MINISTERIALI, *Domanda di autorizzazione a procedere in giudizio ai sensi dell'articolo 96 della Costituzione*, in AP Senato, XVIII legislatura, doc. IV-bis, n. 1, 8 (http://www.senato.it/service/PDF/PDFServer/BGT/1097913.pdf).

[57] Il prefetto Bruno Corda ha riferito che l'ordine di attendere provenisse direttamente dal ministro: «...ho più volte conferito e sollecitato il Prefetto Piantedosi, il quale in un paio di occasioni mi ha detto di attendere perché questa era l'indicazione del Ministro Salvini...» (TRIBUNALE DI CATANIA – SEZIONE REATI MINISTERIALI, *Domanda di autorizzazione*, cit., 19).

perentorio, nel tentativo di prendere le sembianze delle norme giuridiche e trasformare il tweeting-ministro nel 'legislatore buono', la cui legittimità non può che derivare dall'approvazione dei *follower*, opportunamente sollecitati a dire la loro. Una breve ma significativa selezione di tali enunciati può agevolare la comprensione del processo delineato:

> «22 agosto 2018: Pare che per la nave Diciotti, ferma a Catania, la Procura stia indagando "ignoti" per "trattenimento illecito" e sequestro di persona. Nessun ignoto, INDAGATE ME! Sono io che non voglio che altri CLANDESTINI sbarchino in Italia. Se mi arrestano, mi venite a trovare Amici?»;
>
> «23 agosto 2018: #Salvini: il mio obiettivo è il #NOWAY australiano. Su #Diciotti sono tutti immigrati illegali»;
>
> «23 agosto 2018: #Salvini: l'Italia non è più il campo profughi d'Europa. Con la mia autorizzazione, dalla #Diciotti, non scende nessuno»;
>
> «24 agosto 2018: #Salvini: per quanto mi riguarda dalla #Diciotti non sbarca NESSUNO».

La *governance cinguettante* può considerarsi l'ultima tappa evoluzionistica dell'infra-giuridico in materia di immigrazione. Il posto delle circolari – che, al confronto, appaiono anacronistiche, in quanto ancora 'pesanti' e lente (sono pur sempre atti scritti che richiedono una parvenza di giustificazione, un numero di protocollo, etc.) – è stato occupato dagli *enunciati performativi*[58], i quali non servono a descrivere un atto, ma a compierlo. Stando all'insegnamento di Searle, i *tweet* dispositivi di Salvini sul 'caso Diciotti' potrebbero definirsi *atti illocutori*, forme di comportamento piuttosto che semplici emissioni verbali[59], attraverso i quali si vuole indurre i *follower* a compiere o non compiere una determinata azione. I destinatari dei cinguettii performativi, infatti, sono diversi da quelli delle circolari. I *tweet* interpellano tutti, in piena disintermediazione, dipendenti pubblici e cittadini terzi, italiani e stranieri, volendo acquisire una validità più ampia e molecolare rispetto a quella ottenuta dalle circolari, potenziando nel contempo il loro carattere immediato, ossia *just in time*. Inoltre, tendono a ricavare la propria legittimazione, oltre che dal carisma del ministro[60] e dal carattere gerarchico dell'organizzazione ammi-

[58] J. AUSTIN, *How to Do Things with Words*, Oxford, 1962, tr. it *Come fare cose con le parole*, Milano 2005.

[59] J. R. SEARLE, *Speech Acts: An Essay in the Philosophy of Language*, Cambridge 1969, tr. it. *Atti linguistici. Saggi di filosofia del linguaggio*, Torino 2009.

[60] Ovviamente, il carisma è qui inteso come virtù (o potere) che discende direttamente dall'ufficio e non dalla personalità di colui che lo ricopre *pro tempore*. Sul punto cfr. M. WEBER, *Wirtschaft*

nistrativa, anche dalla sostanziale equiparazione tra dipendenti dell'amministrazione e cittadini terzi, essendo inclusi tutti nella maxi-categoria dei *follower*. Questi esprimono la propria approvazione/legittimazione attraverso i «like», che sono in grado di fornire (l'illusione di) una dimensione partecipativa alle decisioni politico/amministrative, facendole apparire condivise, o addirittura *bottom-up*, in pieno stile *governance*.

Anche in questa circostanza, sembra utile ribadire che i *cinguettii* performativi del ministro non sono ascrivibili alle sue incontrollabili decisioni soggettive, ma ai calcolati interessi delle forze politiche, economiche e sociali da egli rappresentate in un dato momento storico. La relazione del presidente del Consiglio, Giuseppe Conte, tenuta nella seduta del Senato del 12 settembre 2018, dove ha pubblicamente rivendicato la condotta del ministro dell'interno come rappresentativa degli orientamenti politici e normativi del governo, ne è una prova inconfutabile.

6. CONCLUSIONI

Lo sviluppo costante dell'infra-diritto degli stranieri – che vede nei due casi sopra descritti (il 'codice' di Minniti e il 'caso Diciotti') delle manifestazioni epifenomeniche delle sue più recenti metamorfosi – testimonia la sostanza del potere dell'autorità esecutiva/amministrativa nella gestione delle popolazioni straniere[61]. L'infra-diritto di tipo amministrativo produce norme *extra* e *contra legem*, impone determinate interpretazioni delle leggi (quando esistono), modella le prassi quotidiane delle istituzioni e dei suoi operatori[62], condiziona l'agire sociale ed economico; si erge, in particolare, a paradigma normativo delle popolazioni straniere, le quali sono di fatto espulse dalla soggettività giuridica e segregate nella condizione di sudditanza.

Il carattere invariabile di questa modalità di gestione, indipendentemente dalle fasi storiche e dalle forme di Stato e di governo, sia fuori che dentro il territorio italiano, disvela il fatto che tale trattamento non sia tanto frutto di una miopia, distrazione o incapacità persistente delle istituzioni di includere gli stranieri nello Stato di diritto, ma che, al contrario, esso rappresenti una chiara e lungimirante strategia di tipo sistemico. L'infra-diritto amministrativo degli stranieri non si spiega con l'irrazionale soggettivismo delle decisioni; al contrario, esso è un disegno normativo coerente e ordinato, perché esprime istanze storicamente determinate. L'assegnazione di un duplice potere agli organi esecutivi/amministrativi – il potere di *disporre*

und Gesellschaft: die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte, Nachlaß. *Herrschaft*, Tübingen 1922, tr. it. *Economia e società. L'economia in rapporto agli ordinamenti e alle forze social. Dominio*, cit.

[61] Cfr. D. LOCHAK, *Étrangers de quel droit?*, Paris 1985; S. SLAMA, *Crise de l'asile: un supra infra-droit à l'abri de tout contentieux?*, in *Plein droit*, n. 111, (2016), 49-56.

[62] F. HOULE, *La zone fictive de l'infra-droit: l'intégration des règles administratives dans la catégorie des réglementaires*, in *Revue de droit de McGill/McGill Law Journal*, vol. 47, 1 (2001), 161-194.

(potere legislativo) e di *ordinare* (potere di controllo) – è tesa a soddisfare la necessità strutturale di pianificazione, controllo e calcolabilità dell'attuale sistema socio-economico. Il calcolo, per essere preciso come una macchina (parafrasando Weber), non può prescindere dal controllo della variabile più imprevedibile di tale sistema: la forza-lavoro. Se si considera il fatto che la stragrande maggioranza della popolazione immigrata sia da sempre costituita da individui che, per vivere, indipendentemente dalle ragioni di partenza, sono costretti a vendere la propria forza-lavoro nel mercato del lavoro, allora il quadro può apparire più chiaro[63].

Da questa prospettiva, si può affermare che esercitare un costante dominio esecutivo/amministrativo su certi segmenti di popolazione rappresenta la *condicio sine qua non* storica per la nascita e lo sviluppo del capitalismo, dalle colonie al territorio nazionale[64].

[63] P. BASSO, *Tre temi chiave del razzismo di stato*, in Id. (a cura di), *Razzismo di stato. Stati Uniti, Europa, Italia*, cit., 127-214.

[64] Sui nessi tra processi migratori contemporanei e colonialismo storico esiste ormai una sterminata letteratura sviluppata prevalentemente dalla scuola postcoloniale, la quale annovera tra i suoi nomi più illustri: Gayatri Chakravorty Spivak, Homi Bhabha, Ranajit Guha, Anibal Quijano, Arturo Escobar, Walter Mignolo, etc. In Italia un suo rappresentante di spicco è Sandro Mezzadra, il quale ha approfonditamente indagato il rapporto tra colonialismo e fenomeno migratorio globale in diversi lavori: S. MEZZADRA, B. NEILSON, *Confini e frontiere. La moltiplicazione del lavoro nel mondo globale*, Bologna 2013; S. MEZZADRA, *La condizione postcoloniale. Storia e politica nel presente globale*, Verona 2008; S. MEZZADRA, *Diritto di fuga. Migrazioni, cittadinanza, globalizzazione*, Verona 2006. Chi scrive, pur riconoscendo molti meriti agli autori che adottano i paradigmi scientifici della scuola postcoloniale, si colloca distante dal loro tracciato teorico. Per una spiegazione dettagliata di questo differente posizionamento mi sia consentito rinviare alla lettura del mio recente lavoro: I. GJERGJI, *"Uccidete Sartre!". Anticolonialismo e antirazzismo di un "revenant"*, cit.

341 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 341-357
ISSN: 1825-5167

INFRADIRITTO E LIBERTÀ PERSONALE: RIFLESSIONI INTORNO A INTERPRETAZIONE E APPLICAZIONE DEL DIRITTO

SILVIA TALINI
Dipartimento di Giurisprudenza
Università degli Studi Roma Tre
silvia.talini@uniroma3.it

ABSTRACT
The work starts with an analysis of the principles of rehabilitation and the prohibition of inhuman treatments which stem from the Italian Constitution (article 27, third paragraph) and the Prison Act (Law no. 354/1975). Starting from a study of statutory law and its practical application the paper provides a description of the "infra-penalties" in the Italian criminal system in order to bring out critical points and questionable compatibility with the Italian Constitution.

KEYWORDS
Personal freedom, Constitution, Penitentiary, Legal certainty, Rule of law.

1. CONSIDERAZIONI INTRODUTTIVE: DALL'"INFRADIRITTO" ALLA "INFRA-PENALITÀ"

Michel Foucault nella sua opera più nota, *Sorvegliare e punire*, descrive una forte torsione del "diritto", astrattamente inteso, per effetto delle discipline: la loro funzione subirebbe un'allarmante (e silente) metamorfosi nel passaggio dal piano astratto-teoretico a quello concreto. Scrive il filoso francese: «in apparenza le discipline non costituiscono altro che un infra-diritto. Sembrano immergere fino al livello infinitesimale delle singole esistenze, le formule generali definite dal diritto; o ancora, appaiono come metodi di un apprendistato che permette agli individui di integrarsi alle esigenze generali». Dunque le discipline, sotto il profilo della loro funzione teorica, «perpetuerebbero lo stesso tipo di diritto cambiandolo di scala e rendendolo con ciò più minuzioso e senza dubbio più indulgente»[1]. Le stesse

[1] M. FOUCAULT, *Surveiller et punir. Naissance de la prison*, Paris 1975, trad. it. di A. Tarchetti, *Sorvegliare e punire. Nascita della prigione* (1975), Torino 2014 (rist.), 242.

discipline, purtuttavia, nella loro opera di capillare traduzione del diritto costituiscono, piuttosto, «una sorta di controdiritto» che assolve alla funzione «di introdurre dissimmetrie insormontabili e di escludere le reciprocità». E dunque: «se il giuridismo universale della società moderna sembra fissare i limiti dell'esercizio dei poteri, il suo panoptismo diffuso ovunque vi fa funzionare, di contro al diritto, un meccanismo immenso e minuscolo insieme, che sostiene, rinforza, moltiplica la dissimmetria dei poteri e rende vani i limiti che le sono stati posti».

Si tratta di un fenomeno in grado di incidere significativamente sulla libertà della persona tanto da indurre lo stesso Autore a parlare di "infra-penalità". Le discipline «incasellano uno spazio che le leggi lasciano vuoto; qualificano e reprimono una serie di comportamenti che per il loro interesse relativamente scarso sfuggono ai grandi sistemi di punizione» utilizzando una serie di procedimenti, «che vanno dal lieve castigo fisico, a modeste privazioni, a piccole umiliazioni. Si tratta di rendere penalizzabili le più minuscole frazioni della condotta, e, nello stesso tempo, di conferire una funzione punitiva ad elementi, in apparenza indifferenti, dell'apparato disciplinare: al limite, ogni cosa potrà servire a punire la minima cosa; ogni soggetto si troverà preso in una universalità punibile-punente»[2].

Così quelli che apparivano come i rigidi confini della "punizione" subiscono un implicito ampliamento comprendendo, di fatto, «tutto ciò che è capace di far sentire (...) l'errore commesso, (...) di umiliare, di dar un senso di confusione: un certo freddo, una certa indifferenza, un tormento, una umiliazione, una destituzione di posto».

È dunque evidente come il settore dell'esecuzione penale – a cui lo sguardo dell'Autore francese è in prevalenza rivolto – non possa che rappresentare uno dei principali ambiti in cui tale "infra-penalità" sia in grado di riversare i suoi effetti, facendo coesistere due tipologie di limitazioni: quelle "manifeste", come conseguenza dell'applicazione di una sanzione penale a seguito di una pronuncia di condanna, e quelle "silenti" discendenti dall'infra-penalità intesa come insieme di restrizioni ulteriori ed eterogenee che sfuggono, di fatto, ai principi posti dal sistema punitivo (e costituzionale).

Trascorsi quarantacinque anni dalla prima pubblicazione di "Sorvegliare e punire" occorre dunque domandarsi se, nonostante l'evoluzione della normativa penitenziaria, le riflessioni sin qui (sinteticamente) richiamate conservino la loro attualità e dove possa individuarsi l'argine costituzionale agli effetti illeciti della infra-penalità nel sistema di esecuzione delle pene.

[2] *Idem*, 195.

2. IL "PROGETTO GIURIDICO": UMANITÀ E FINALISMO RIEDUCATIVO NEL SISTEMA COSTITUZIONALE E NELLA NORMATIVA PENITENZIARIA

Nel tentativo di comprendere quale sia l'attuale incidenza dell'infradiritto (e dell'infra-penalità) all'interno del sistema di esecuzione, non può prescindersi da alcune brevi riflessioni preliminari in ordine a senso e funzione della pena nell'ordinamento costituzionale e, soprattutto, sul sistema delle fonti chiamato – almeno sotto il profilo formale – a regolarlo. In effetti, è solo prendendo le mosse da un'analisi concernente la struttura giuridica che il diritto pone a protezione della persona ristretta, che può comprendersi quando una restrizione oltrepassi i limiti posti dai principi costituzionali divenendo, fraudolentemente, "controdiritto".

Parametro costituzionale di riferimento, perno attorno a cui ruota la tutela della persona privata della libertà, è l'articolo 27, terzo comma, della Costituzione a norma del quale: «Le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato». È una finalità che non si identifica con l'indottrinamento morale del detenuto o con l'obbligatorietà del pentimento; il percorso rieducativo deve tendere unicamente al reingresso della persona nel consesso sociale, identificandosi con il termine "risocializzazione"[3].

A sostegno dei principi contenuti nell'art. 27, terzo comma è posta un'articolata trama costituzionale in cui rileva, *in primis*, il «principio supremo della libertà-dignità»[4] discendente dal combinato disposto degli articoli 2 e 3 Cost. che, seppur non direttamente rivolti all'esecuzione penale, si pongono quali "àncore normative" dei diritti inviolabili riconosciuti alla persona in quanto tale, a prescindere da ogni valutazione in ordine alle condotte poste in essere[5]. Tale principio supremo è dunque espressione di tutti i valori metagiuridici legati ai doveri di solidarietà e al rispetto della dignità e, pervadendo l'intera Costituzione repubblicana, impone una sua garanzia in riferimento a tutte le azioni in cui la personalità umana si manifesta (ivi compresa la commissione di condotte illecite). La valenza inderogabile degli articoli

[3] Cfr. E. DOLCINI, *La "rieducazione del condannato" tra mito e realtà*, in V. Grevi (a cura di), *Diritti dei detenuti e trattamento penitenziario*, Bologna 1981, 57; G. BETTIOL, *Il mito della rieducazione*, in AA.VV., *Sul problema della rieducazione del condannato*, Padova 1964, 11-12.

[4] La nota espressione è contenuta in F. MODUGNO, *I "nuovi diritti" nella giurisprudenza costituzionale*, Torino 1995, 107.

[5] Sulla lettura congiunta degli artt. 2 e 3 Cost. cfr., *ex plurimis*: P. CARETTI, *I diritti fondamentali*, Torino 2010; A. RUGGERI e A. SPADARO, *Dignità dell'uomo e giurisprudenza costituzionale (Prime notazioni)*, in V. Angiolini (a cura di), *Libertà e giurisprudenza costituzionale*, Torino 1992, 224 ss.; A. BALDASSARRE, *Diritti inviolabili*, in *Enciclopedia giuridica*, XI (1989), 1 ss.; P. BARILE, *Diritti dell'uomo e libertà fondamentali*, Bologna 1984, 56. Per una riflessione recente sul principio di libertà-dignità della persona quale paradigma che si pone al centro della trama costituzionale in materia di diritti fondamentali, v. M. RUOTOLO, *Corso di diritto costituzionale*, Torino 2020, 119-122.

2 e 3 Cost. anche nel sistema di esecuzione delle pene comporta, dunque, che i pubblici poteri devono assicurare il pieno rispetto dei diritti inviolabili e della dignità di ciascun detenuto, rendendo effettivo ogni percorso rieducativo rivolto al reinserimento sociale[6].

Nella complessa architettura costituzionale a tutela della persona ristretta rileva, inoltre, l'articolo 13 quale insostituibile baluardo posto dai Costituenti a difesa della libertà personale: ribadendo al primo comma la sua inviolabilità[7], esso delinea i rigidi confini entro i quali la stessa possa soffrire limitazioni in ragione di esigenze di pubblica sicurezza. Si tratta dei noti istituti della riserva di legge e di giurisdizione: ogni prescrizione – sostanziale o procedurale – che importi restrizioni alla libertà personale deve necessariamente essere introdotta mediante fonte primaria, così garantendo il controllo democratico sulle misure idonee a incidere sui diritti fondamentali[8]. Contemporaneamente la riserva di giurisdizione impone che ogni forma

[6] Una compressione dei diritti dei detenuti è dunque legittima solo in presenza di contrapposti interessi costituzionali come la garanzia di specifiche esigenze di sicurezza. Tra le numerose sentenze dei giudici costituzionali in argomento, cfr. nn. 114/1979; 349/1993, 26/1999.

Sulla dignità in relazione allo stato di detenzione, cfr. M. RUOTOLO, *Dignità e carcere*, Napoli 2014, 9 ss.; G. SILVESTRI, *La dignità umana dentro le mura del carcere*, in M. Ruotolo (a cura di), *Il senso della pena. Ad un anno dalla sentenza Torreggiani della Corte EDU*, Napoli 2014, 177 ss.; L. LIMOCCIA, *Diritto penitenziario e dignità umana*, Napoli 2012.

[7] Il concetto di "inviolabilità della libertà personale", intesa anche come diritto all'autodeterminazione o all'autorealizzazione del singolo, è stato progressivamente ampliato – anche grazie ai numerosi interventi della giurisprudenza costituzionale – nel senso di ricomprendervi la garanzia non solo della libertà fisica ma, più ampiamente, della "libertà psicofisica" (F. MODUGNO, *I "nuovi diritti"*, cit., 11 ss.). In questo senso è stato autorevolmente affermato che il concetto di libertà personale deve essere inteso come non del tutto comprimibile nemmeno durante lo stato di detenzione, in quanto «esprimente l'autorelazione del singolo con sé come unità psico-fisica» (M. RUOTOLO, *Diritti dei detenuti e Costituzione*, Torino 2002, 65).

Ampiamente, sull'articolo 13 Cost., tra i molti, cfr. P. CERETTI, G. TARLI BARBIERI, *I diritti fondamentali. Libertà e diritti sociali*, Torino 2017, 195 ss.; L. Elia e M. Chiavario (a cura di), *La libertà personale*, Torino 1977; A. PACE, *Libertà personale (diritto costituzionale)*, in *Enciclopedia del diritto*, XXV (1974), 287 ss.; G. AMATO, *La libertà personale*, in P. Barile (a cura di), *La pubblica sicurezza. Atti del congresso celebrativo del centenario delle leggi amministrative di unificazione*, Vicenza 1967; A. BARBERA, *I principi costituzionali della libertà personale*, Milano 1967.

In particolare sul rapporto esistente tra libertà personale e autorità, G. AMATO, *Individuo e autorità nella disciplina della libertà personale*, Milano 1967.

[8] Si affianca a tale previsione la riserva di legge in materia penale contenuta nell'art. 25, secondo comma, Cost.: «Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso».

Sul punto cfr., tra i molti, A. BONOMI, Status *del detenuto e ordinamento costituzionale*, Bari 2018; F. BRICOLA, *Commento all'art. 25, secondo comma, Cost.*, in *Commentario alla Costituzione diretto da G. Branca*, Bologna 1981, 231 ss.; F.C. PALAZZO, *Il principio di determinatezza nel diritto penale*, Padova 1979, 232-233.

[8] G. ZAGREBELSKY, *Manuale di diritto costituzionale. Il sistema delle fonti del diritto*, 1, Torino 1992, 54 ss. Analogamente G. GALLI, *La politica criminale in Italia negli anni 1974-1977*, Milano 1978, 128.

di «detenzione, ispezione o perquisizione personale», nonché «qualsiasi altra restrizione della libertà personale» sia adottata mediante atto motivato dell'autorità giudiziaria competente, così garantendo l'effettività del controllo giudiziale nella delicata fase esecutiva di qualsivoglia misura restrittiva della libertà. Ogni limitazione al contenuto di tale diritto eccedente il rispetto dei richiamati scopi acquista, pertanto, un illegittimo valore afflittivo supplementare, «inammissibile in un ordinamento basato sulla centralità della persona, che trova nella privazione della libertà personale il limite massimo di punizione non oltrepassabile»[9].

Gli sforzi compiuti dai Costituenti verso un radicale mutamento di paradigma nel modo di concepire ristretti, luoghi di detenzione e – più ampiamente – il sistema di esecuzione penale, hanno trovato formale attuazione a metà degli anni '70: nella riforma penitenziaria[10], umanizzazione e risocializzazione permeano l'intera materia modellandola secondo le indicazioni offerte dalla Costituzione. Il radicale mutamento rispetto al passato[11] traspare non solo dal contenuto delle singole disposizioni quanto, anche, dalla loro collocazione sul piano sistematico: il nuovo ordinamento penitenziario (di seguito o.p.) si apre parafrasando il dettato costituzionale disponendo che: «Il trattamento (...) deve essere conforme a umanità e deve assicurare il rispetto della dignità della persona. Esso è improntato ad assoluta imparzialità, senza discriminazioni (...)» (articolo 1, comma 1, o.p.).

Dunque nel nuovo sistema di esecuzione i principi di umanità e finalismo rieducativo esprimono la loro portata come «tendenza alla riduzione delle forme di coercizione e violenza (fisica e psichica) sui corpi»[12], modificando l'idea secondo cui la pena detentiva rappresenti l'unica risposta agli illeciti, eseguita mediante un trattamento afflittivo e in un luogo isolato. L'esecuzione penale, al contrario, diviene un sistema complesso nel quale devono predisporsi interventi capaci di offrire a ciascun ristretto – mediante la garanzia dei suoi diritti (artt. 1, 4, e 15 o.p.) – nuovi strumenti e competenze per la vita futura.

Può quindi dirsi che la riforma penitenziaria del '75, almeno sotto il profilo astratto-normativo, abbia assolto all'obbligo di adempimento indicato dall'art. 27, terzo comma, Cost. rappresentando il punto di arrivo di una lenta e progressiva evoluzione concettuale del c.d. "rapporto punitivo", il quale, purtuttavia, presenta

[9] G. SILVESTRI, *La dignità umana dentro le mura del carcere*, cit., 179.

[10] L. 26 luglio 1975 n. 354 ("Norme sull'Ordinamento penitenziario e sull'esecuzione delle misure privative e limitative della libertà") il cui Regolamento di esecuzione è contenuto nel d.P.R. 30 giugno 2000, n. 230.

[11] Il precedente Regolamento penitenziario (R.D. 18 giugno 1931, n. 787), approvato in epoca fascista, si fondava su una visione profondamente afflittiva della sanzione penale; accanto alla pena di morte l'unica sanzione applicabile era il carcere, un luogo isolato in cui i detenuti non erano titolari di diritti.

[12] M.C. CASTALDO, *La rieducazione tra realtà penitenziaria e misure alternative*, Napoli 2001, 7.

ontologicamente una costante storica condizionante: lo stato di soggezione-subordinazione della persona ristretta al potere pubblico mediante la segregazione fisica del corpo e la perdita della maggior parte del potere decisionale.

È in questa fisiologica condizione che devono rintracciarsi, ancora oggi, quegli effetti "occulti" e "sfuggenti" prodotti dall'infradiritto. In effetti, oltre agli ambiti cui la disciplina ordinamentale ha offerto copertura positiva esistono, innegabilmente, diverse "aree grigie" nella concreta disciplina della vita penitenziaria che troppo spesso sfuggono ai principi imposti dal richiamato "progetto giuridico" in ambito di esecuzione penale.

3. LE CIRCOLARI MINISTERIALI COME POSSIBILI "VETTORI" DI INFRA-PENALITÀ

A seguito della riforma penitenziaria del '75 autorevole dottrina ha rilevato come una delle novità più significative del nuovo assetto normativo potesse rinvenirsi nell'aver regolato la materia penitenziaria con legge formale[13]: per la prima volta in Italia la disciplina riguardante l'organizzazione penitenziaria e il trattamento dei detenuti è disposta in ossequio alle richiamate riserve di legge poste dagli articoli 13, secondo comma e 25, secondo comma, della Costituzione. Non si tratta di un mutamento avente natura puramente formale, avendo reso possibile – almeno sotto il profilo delle fonti del diritto – la sottoposizione delle disposizioni contenute nell'ordinamento penitenziario al controllo di costituzionalità, fino ad allora precluso, di porre al riparo i diritti da possibili atti arbitrari dell'esecutivo e di limitare il potere discrezionale delle autorità penitenziarie nella loro applicazione[14].

Tuttavia volgendo lo sguardo dal "progetto giuridico" alla disciplina in concreto, si rileva come tale cambiamento abbia ormai perso gran parte della sua rilevanza soprattutto per effetto del sempre crescente (ab)uso della decretazione d'urgenza in materia penitenziaria[15] e, per ciò che in questa sede maggiormente interessa, alla crescente incisività assunta dalle circolari amministrative, soprattutto in riferimento alla regolamentazione di numerosi aspetti inerenti alla vita detentiva.

Lontani dal porsi come meri provvedimenti interni, volti ad organizzare azione, struttura e funzionamento delle attività spettanti alle amministrazioni pubbliche, le circolari posseggono sempre più spesso un sostanziale contenuto precettivo avente

[13] G. ZAGREBELSKY, *Manuale di diritto costituzionale*, cit., 54 ss.

[14] *Idem*, 54 ss.

Analogamente G. GALLI, *La politica criminale in Italia negli anni 1974-1977*, Milano 1978, 128.

[15] Sul punto sia consentito un rinvio a S. TALINI, *La privazione della libertà personale. Metamorfosi normative, apporti giurisprudenziali, applicazioni amministrative*, Napoli 2018, 49-50 e cap. 2, par. 2.4.

valenza esterna[16], senza tuttavia che sia possibile sottoporle al vaglio del controllo da parte del Giudice delle leggi. Il pericolo, evidentemente, risiede proprio nella creazione di un'"infra-penalità" per mezzo dell'attribuzione "occulta" di un vasto potere integrativo – non previsto dalla Costituzione – alle pubbliche amministrazioni, in grado di creare vere e proprie disposizioni che, pur incidendo su diversi aspetti della vita dei cittadini sono poco conoscibili, possono mutare assai velocemente[17] e sfuggono al controllo di costituzionalità riservato – come noto – alle fonti di rango primario.

Il rischio di una proliferazione di restrizioni derivanti dalla "infra-penalità" generata dalle circolari, è tanto maggiore in quei settori come l'esecuzione penale in cui il legislatore è intervenuto con pochi e lacunosi interventi di riforma, lasciando ampio margine di azione agli atti di natura integrativo-discrezionale delle autorità penitenziarie con il pericolo di una sempre crescente «manipolazione amministrativa delle norme»[18].

[16] In riferimento alla difficile qualificazione giuridica da attribuire alle circolari, cfr. F. BASSI, *Circolari amministrative*, in *Digesto delle discipline pubblicistiche*, III (1989), 54 ss., secondo cui potrà parlarsi di rilevanza esterna delle circolari solo per quelle «mediante le quali un'autorità sopraordinata detti una o più regole di comportamento vincolanti per i destinatari. Soltanto in tali ipotesi l'osservanza o meno di una circolare amministrativa può produrre effetti esterni, traducendosi nel rispetto o nella violazione del dovere di obbedienza del pubblico dipendente che trova la propria fonte in un atto normativo esterno dell'ordinamento generale statuale». Si veda altresì M.S. GIANNINI, *Circolare*, in *Enciclopedia del diritto*, VII (1960), 1 ss., per il quale le circolari, che nascono dal gergo militare come mezzo attraverso il quale il comando diffonde i propri ordini, non costituiscono atti amministrativi a sé stanti, concretizzandosi in strumenti volti a portare a conoscenza gli atti interni delle pubbliche amministrazioni di contenuto eterogeneo.

In generale sulla posizione e sulla funzione delle circolari all'interno del sistema amministrativo cfr., tra i molti, F. SAITTA, *Sulle circolari amministrative e sul loro trattamento processuale*, in *Nuove autonomie*, 3 (2012), 487 ss.; G. DI GENIO, *Sulla irrilevanza normativa delle circolari amministrative*, in *Il diritto dell'economia*, 2 (2009), 359 ss.; V. PEDACI, *Circolari amministrative e loro efficacia legislativa*, in *Nuova rassegna di legislazione dottrina e giurisprudenza*, 5 (2009), 533 ss.; A. CATALANI, *Circolari amministrative ed interpretazioni della legge statale*, in *Rassegna parlamentare*, 2 (2001), 53 ss.

Sul rapporto tra principio di proporzionalità e azione amministrativa, M. CARTABIA, *Diritto amministrativo e diritti fondamentali*, in L. Torchia (a cura di), *Attraversare i confini del diritto. Giornata di studio dedicata a Sabino Cassese*, Bologna 2016, 11 ss.

[17] Sul punto le Sezioni Unite della Corte di Cassazione hanno affermato che «la circolare non vincola neanche la stessa autorità che l'ha emanata, la quale resta libera di modificare, disattendere e correggere l'interpretazione adottata» (Cass. civ., sez. Un., 2 novembre 2007, n. 23031).

[18] L'espressione, come noto, si deve a F. BRICOLA, *Introduzione*, in Id. (a cura di), *Il carcere riformato*, Bologna 1977, 1. L'Autore osserva come la disciplina giuridica dell'esecuzione delle pene (soprattutto detentive) costituisca «uno dei settori più esposti alle varie pratiche nelle quali, nello Stato di diritto, si realizza l'illegalità ufficiale attraverso la non applicazione e la manipolazione amministrativa delle norme». Sulla manipolazione amministrativa delle disposizioni in ambito penitenziario, più di recente, F. FIORENTIN, *Lesioni dei diritti dei detenuti conseguenti ad atti e provvedimenti dell'amministrazione penitenziaria*, in *Giurisprudenza di merito,* 2010, 2810 ss.

In effetti, diverse sono le occasioni in cui il contenuto delle circolari ha suscitato – e tuttora suscita – forti dubbi di compatibilità con il sistema delle attribuzioni costituzionali.

Emblematico è il caso di due circolari[19] contenenti il divieto di ricevere libri, riviste e stampa da parte dei familiari, così come l'invio di tale materiale all'esterno, gravante sui detenuti sottoposti al regime differenziato di cui all'art. 41-*bis* o.p.[20]. Sottraendo i predetti divieti all'applicazione dell'art. 18-*ter* o.p. che, in ossequio alla riserva di giurisdizione di cui all'art. 15, secondo comma, Cost., conferisce alla sola autorità giudiziaria il potere di limitare, o sottoporre a visto di controllo, la corrispondenza in arrivo e in partenza dei detenuti, le due circolari introducono delle limitazioni aventi una forte rilevanza sui diritti alla corrispondenza, all'informazione e allo studio dei ristretti. La questione è stata parzialmente risolta dalla Corte costituzionale a seguito del consolidamento della giurisprudenza di legittimità in relazione ai divieti imposti dalle richiamate circolari: non ritenendo l'invio e la ricezione di libri rientranti all'interno della nozione di "corrispondenza", i giudici hanno rigettato la questione in riferimento alla violazione della riserva di giurisdizione *ex* art. 15, secondo comma, Cost.[21], ritenendo legittimi i divieti contenuti nei due atti amministrativi.

Non essendo questa la sede per entrare nel merito dalla delicata questione che la Corte era chiamata a risolvere circa la definizione dei confini costituzionali della nozione di "corrispondenza" in relazione all'osservanza della predetta riserva, la pronuncia – per ciò che qui interessa – appare un'occasione mancata, stante l'assenza di qualsiasi indicazione in ordine alla necessità di limitare il potere "creativo" delle circolari amministrative entro gli stretti limiti delle attribuzioni costituzionali[22].

[19] Circolare n. 8845/2011 del 16 novembre 2011 e circolare dell'11 febbraio 2014.

[20] In sintesi può dirsi che il regime detentivo speciale di cui all'art. 41-*bis* o.p. ("Situazioni di emergenza"), oltre a consentire l'adozione da parte del Ministro della Giustizia di provvedimenti restrittivi necessari a ripristinare l'ordine e la sicurezza compromessa da rivolte ovvero da altre gravi emergenze carcerarie (primo comma), permette allo stesso Ministro, quando ricorrano gravi motivi di ordine e sicurezza pubblica, di sospendere le ordinarie regole del trattamento nei confronti di talune categorie di detenuti (secondo comma). A ciò si aggiunge la preclusione, per alcuni condannati, di accedere alle misure alternative alla detenzione e ai benefici premiali secondo i meccanismi descritti dall'art. 4-*bis* o.p. ("Divieto di concessione dei benefici e accertamento della pericolosità sociale dei condannati per taluni delitti").

In materia la dottrina è ampissima, si veda di recente anche in riferimento alle opere citate, L. PACE, *Libertà personale e pericolosità sociale: il regime degli articoli 4*-bis *e 41*-bis *dell'ordinamento penitenziario*, in M. Ruotolo e S. Talini (a cura di), *Dopo la riforma: i diritti dei detenuti nel sistema costituzionale*, Napoli 2019, 437-511.

[21] Corte cost., 8 febbraio 2017, n. 122.

[22] Sul punto M. RUOTOLO, *I diritti alla corrispondenza, all'informazione e allo studio dei detenuti in regime di 41*-bis. *A proposito delle limitazioni nelle modalità di ricezione ed inoltro di libri, giornali e riviste*, in *Cassazione penale*, 2 (2015), 843-853.

Occasione tanto più significativa se posta in riferimento alla più volte richiamata impossibilità per la Corte di sindacare direttamente il contenuto di tali atti[23].

Analoghi dubbi in ordine alla liceità delle compressioni inerenti i diritti dei ristretti sono sorti riguardo alla circolare n. 0202222 del DGDT del 20 maggio 2011 che consente, ancora in riferimento ai reclusi sottoposti al regime speciale, la ricezione di uno o due capi firmati ma non la formazione di interi guardaroba costituiti da generi di lusso. La Magistratura di sorveglianza di Reggio Emilia, accogliendo il ricorso presentato da due detenuti, aveva disapplicato la circolare: nessuna limitazione ulteriore, oltre a quelle previste nel decreto ministeriale che applica il regime speciale, può essere imposta dell'amministrazione. Tale pronuncia è stata tuttavia ritenuta viziata da illogicità manifesta da parte della Corte di Cassazione, secondo cui il limite all'acquisto dei beni di lusso è volto a preservare la parità tra i detenuti e a non riproporre posizioni di predominio[24].

Non volendo, ancora una volta, entrare nel merito della questione è qui sufficiente rilevare come la circolare non si sia limitata a disciplinare, o definire più nel dettaglio, una restrizione già contenuta all'interno della normativa penitenziaria introducendo una limitazione ulteriore rispetto a quelle contenute nel decreto applicativo del regime speciale che incide sulla vita detentiva del ristretto. La criticità, in altri termini, non si riscontra nell'introduzione di una limitazione funzionale al perseguimento di obiettivi legati ad esigenze di sicurezza e di gestione interna degli istituti penitenziari, quanto nello strumento utilizzato per raggiungere tale fine.

Devono da ultimo essere richiamate le circolari adottate delle autorità amministrative nel corso dell'emergenza sanitaria da COVID-19. I primi provvedimenti hanno introdotto diverse restrizioni in riferimento all'accesso per operatori e "terze persone" negli istituti penitenziari localizzati nei comuni della cd. "zona rossa" prevedendo, allo stesso tempo, la sospensione dei trasferimenti dei detenuti da e verso gli istituti rientranti nella competenza di alcuni provveditorati regionali[25]. Con

[23] Per un'esaustiva disamina che dal problema della qualificazione giuridica delle circolari amministrative giunge a puntuali riflessioni circa la loro incisività nel sistema dell'esecuzione penale, A. IANNUZZI, *Sulla natura giuridica e sul ruolo delle circolari amministrative nell'ordinamento penitenziario*, in R. Cardin e L. Manca (a cura di), *I diritti umani dei detenuti tra diritto internazionale, ordinamento interno e opinione pubblica*, Napoli 2016, 141 ss.

[24] Cass. pen., sez. I, 16 ottobre 2013, n. 42605. In argomento. F. PICOZZI, *È applicabile anche ai detenuti "41-*bis*" il divieto di possedere vestiti costosi?*, in *Cassazione penale*, 7-8 (2013), 2801 ss.

[25] Il riferimento è alle circolari adottate tra il 22 e il 26 febbraio 2020 e, in particolare, alla circolare del 22 febbraio. Più nel dettaglio a seguito della dichiarazione dello stato di emergenza, determinato dalla Delibera del Consiglio dei Ministri del 31 gennaio 2020 il Dipartimento dell'Amministrazione penitenziaria (DAP) è intervento attraverso circolari e note del 22 febbraio ("Raccomandazioni organizzative per la prevenzione del contagio del coronavirus"), del 25 febbraio ("Ulteriori indicazioni per la prevenzione del contagio del coronavirus") e del 26 febbraio (Indicazioni specifiche per la prevenzione del contagio da corona virus – regioni Piemonte, Liguria, Lombardia, Veneto, Friuli Venezia Giulia, Trentino Alto Adige, Emilia Romagna, Marche, Toscana e Sicilia). A tali circolari si affiancano

specifico riferimento agli ingressi e alle visite dall'esterno, se nei primi atti l'amministrazione aveva richiesto un'autocertificazione, senza distinzione tra familiari, volontari e associazioni (con l'esclusione del personale dell'amministrazione e delle aziende sanitarie), successivamente le circolari sono intervenute in termini assai più restrittivi andando progressivamente a limitare – e successivamente a precludere – gli ingressi e le uscite dagli istituti attraverso la sospensione dei colloqui, delle attività dei volontari e delle associazioni, dei permessi premio, della semi-libertà e del lavoro esterno[26].

Si tratta, dunque, di provvedimenti che hanno condotto ad una profonda compressione dei diritti delle persone ristrette; basti pensare, a mo' di esempio, al diritto al lavoro, all'istruzione e alla formazione professionale, al diritto al reinserimento sociale tramite la garanzia delle attività trattamentali o al diritto al mantenimento dei rapporti affettivi, fortemente compresso mediante la sostituzione dei colloqui in presenza con incontri a distanza tramite videochiamata o un incrementato del numero delle telefonate consentite[27].

Dunque, pur non potendosi negare la situazione di profonda (ed improvvisa) emergenza che i citati provvedimenti sono stati chiamati a fronteggiare, occorre rilevare come le scelte adottate in sede amministrativa abbiano introdotto, sin dai primi atti, vere e proprie limitazioni ai diritti delle persone ristrette disegnando un articolato sistema di provvedimenti che, in modo disorganico – sia nella forma, sia nei contenuti – hanno delineato un quadro difficilmente compatibile con i limiti imposti dal dettato costituzionale al potere discrezionale delle autorità amministrative.

4. LE "ALTRE" IPOTESI DI INFRA-PENALITÀ

Le circolari ministeriali, tuttavia, non sono gli unici atti che possono produrre delle limitazioni potenzialmente idonee alla creazione di infra-penalità.

Su un piano diverso, quello del rapporto tra fonti primarie e secondarie, è stato recentemente rilevato come lo stesso regolamento di esecuzione dell'ordinamento penitenziario (d.P.R. n. 230/2000), non si sia limitato a specificare nel dettaglio le previsioni contenute nella legge n. 354/1975, avendo apportato vere e proprie

quelle adottate dal Dipartimento per la Giustizia minorile e di comunità (DGMC) del 22 e 25 febbraio 2020. Il DAP è da ultimo intervenuto in materia di emergenza sanitaria con "Ulteriori indicazioni" circa l'effettiva implementazione di quanto potesse essere progressivamente stabilito dal Ministero della salute per il trattamento di eventuali casi di Covid-19, nonché circa i trasferimenti per motivi di giustizia.

[26] V., in particolare, le circolari DAP del 25 febbraio 2020 e del 12 e 13 marzo 2020.

[27] Un'esaustiva indagine sui primi provvedimenti adottati negli istituti penitenziari italiani in risposta all'emergenza sanitaria da COVID-19 è contenuta in A. LORENZETTI, *Il carcere ai tempi dell'emergenza Covid-19*, in *Osservatorio AIC*, 3 (2020), 7 aprile 2020.

modificazioni creative direttamente incidenti su posizioni soggettive dei detenuti. È il caso dell'art. 83, secondo comma, reg. esec., a norma del quale il detenuto, prima del trasferimento, deve obbligatoriamente essere sottoposto a perquisizione personale e visitato dal medico che ne certifica lo stato psico-fisico, con particolare riguardo alle condizioni che rendano possibile il viaggio. Secondo la dottrina «tale disposizione, pur mirando a tutelare la salute della persona *in vinculis*, viola tuttavia la riserva di legge prevista dall'art. 32, comma 2 Cost.: essa, infatti, sembra disciplinare compiutamente un'ipotesi di trattamento sanitario obbligatorio o comunque perlomeno di accertamento sanitario obbligatorio»[28].

È inoltre dibattuta la competenza esclusiva attribuita all'Amministrazione penitenziaria, e non alla Magistratura di sorveglianza, ad adottare il provvedimento di assegnazione del detenuto al circuito di Alta sicurezza nonché a disporre i trasferimenti anche in caso di sovraffollamento[29]: si tratta, in effetti, di decisioni che non riguardano esclusivamente le scelte inerenti all'"allocazione" dei singoli detenuti all'interno del circuito penitenziario, incidendo significativamente anche sulla garanzia di alcuni diritti costituzionali. Si pensi, a titolo di esempio, alle differenziazioni inerenti alla partecipazione alle attività trattamentali per i detenuti assegnati al circuito di Alta sicurezza o, in maniera ancor più forte, all'interruzione delle attività di studio o di lavoro in caso di trasferimento e, in quest'ambito, anche alla forte incidenza della traduzione in altro penitenziario sulla sfera affettiva del detenuto come conseguenza dell'allontanamento dall'ambito familiare.

Si tratta, con tutta evidenza, di decisioni che non attengono esclusivamente ai profili gestionali e organizzativi del sistema penitenziario incidendo significativamente – attraverso una loro compressione – anche su diritti costituzionalmente tutelati e funzionali al reinserimento della persona nel consesso sociale.

Occorre da ultimo richiamare quelle ipotesi in cui l'"infra-penalità" discende da un illegittimo atto di diniego adottato dalle pubbliche amministrazioni in riferimento alla garanzia di un diritto espressamente positivizzato. Si fa qui riferimento a quelle situazioni in cui il diritto della persona ristretta è previsto e tutelato dal quadro normativo ma viene negato, *de facto*, a causa di un'illecita compressione della sua sfera applicativa ad opera delle autorità amministrative.

Emblematica, in proposito, la vicenda riguardante il diritto di accesso alle tecniche di procreazione medicalmente assistita (di seguito PMA) per i detenuti sottoposti a regime speciale (art. 41-*bis* o.p.), come parte della più ampia tutela offerta alla genitorialità e al diritto alla filiazione dalla Costituzione (artt. 29, 30 e 31)[30].

[28] A. BONOMI, Status *del detenuto*, cit., 77-80.

[29] In argomento A. PUGIOTTO, *La parabola del sovraffollamento carcerario e i suoi insegnamenti costituzionalistici*, in *Rivista italiana di diritto e procedura penale*, 3 (2016), 1207 ss.

[30] Sul diritto alla genitorialità nel quadro costituzionale cfr., *ex multis*, E. FRONTONI, *Genitori e figli tra giudici e legislatore*, Napoli 2019; F. PATERNITI, *Lo* status *costituzionale dei figli*, in *La*

Come noto la l. 19 febbraio 2004, n. 40[31] riserva l'accesso alle tecniche di fecondazione alle coppie di maggiorenni di genere diverso, coniugate o conviventi, quando sia accertata l'impossibilità di rimuovere altrimenti le cause impeditive della procreazione, rimanendo l'ambito applicativo circoscritto ai soli casi di sterilità o infertilità[32]. In seguito alla sua entrata in vigore, e in assenza di specificazioni in ordine allo stato detentivo, l'Amministrazione penitenziaria era intervenuta sul punto chiarendo che il ricorso alla PMA dovesse ritenersi consentito nei soli casi «di sterilità o infertilità debitamente certificati»[33], non rappresentando l'impossibilità oggettiva di intrattenere rapporti sessuali con il *partner* una particolare condizione di accesso alle tecniche[34].

Il contenuto della circolare fu tuttavia smentito in fase applicativa, traducendosi in numerosi dinieghi all'accesso sia da parte dalla magistratura di sorveglianza sia ad opera delle stesse amministrazioni penitenziarie. Indicativo, in tal senso, il caso da cui trae origine la nota sentenza della Corte di Cassazione n. 7791 del 2008 che per la prima volta ha affermato l'esistenza – o meglio l'applicabilità – del diritto di accesso alle tecniche di PMA anche nei confronti dei detenuti ristretti in regime speciale. Il ricorrente aveva promosso ricorso dinnanzi alla Magistratura di sorveglianza avverso un provvedimento di diniego dell'Amministrazione circa l'accesso alla fecondazione in vitro, nonostante la documentata condizione di infertilità della moglie.

Più nel dettaglio, il detenuto aveva ottenuto un'autorizzazione al prelievo del proprio liquido seminale, al fine di consentire alla *partner* di accedere alla PMA, sia dal G.U.P. del Tribunale di Palermo sia dal Presidente della Corte di Assise. Tuttavia, nonostante i provvedimenti accertassero la sussistenza dei presupposti di legge per l'accesso alle tecniche, l'Amministrazione penitenziaria aveva negato l'autorizzazione al prelievo adducendo, a sostegno del diniego, «la massima tutela del nascituro che la legge n. 40/2004 postula, nel caso concreto non realizzabile data la

famiglia davanti ai suoi giudici. Atti del convegno del Gruppo di Pisa di Catania 7-8 giugno 2013, Napoli 2013, 84 ss.; E. LAMARQUE, sub *art. 30*, in R. Bifulco, A. Celotto, M. Olivetti (a cura di), *Commentario alla Costituzione*, I, Torino 2006, 622-639; R. BIAGI GUERINI, *Famiglia e Costituzione*, Milano 1989, 2 ss.; C. ESPOSITO, *Famiglia e figli nella Costituzione*, in *La Costituzione Italiana*, Padova 1954, 150.

[31] Rubricata "Norme in materia di procreazione medicalmente assistita".

Una disamina delle vicende normative e giurisprudenziali riferite alla legge n. 40/2004 è contenuta in B. LIBERALI, *Problematiche costituzionali nelle scelte procreative. Riflessioni intorno alla fecondazione medicalmente assistita e all'interruzione volontaria di gravidanza*, Milano 2017, 367 ss. Si rinvia a tale opera anche in relazione all'ampia bibliografia richiamata.

[32] Artt. 4 e 5 della l. n. 40/2004.

[33] Circolare DAP del 10 febbraio 2006, n. 260689.

[34] Per un'ampia riflessione sulla mancata garanzia del diritto all'intimità-sessualità nella normativa penitenziaria italiana si rinvia a S. TALINI, *L'affettività ristretta*, in M. Ruotolo e S. Talini (a cura di), *Dopo la riforma*, cit., 245-281.

situazione di detenzione del genitore», nonché l'esistenza di generiche «finalità preventive connesse alla custodia dei soggetti inseriti nel circuito del 41-bis o.p.».

Si crea così una vera e propria "infra-penalità" originata dall'impossibilità per la persona ristretta di esercitare un proprio diritto in ragione di un diniego di natura amministrativa. Fortunatamente i giudici di legittimità, con la richiamata sentenza n. 7791 del 2008, hanno accertato la violazione del diritto e consentito al detenuto di accedere alle tecniche di PMA: l'azione amministrativa deve improntarsi al principio di proporzionalità e nelle situazioni in cui occorre bilanciare sicurezza e garanzia di un diritto «il principio da applicare (...) non può che ispirarsi al criterio della proporzione tra le esigenze di sicurezza sociale e penitenziaria ed interesse della singola persona»; ne discende «che il sacrificio imposto al singolo non deve eccedere quello minimo necessario, e non deve ledere posizioni non sacrificabili in assoluto». La mancata garanzia del diritto di accesso alle tecniche di fecondazione è pertanto illegittima, non potendosi adottare «restrizioni non giustificabili con le esigenze di rispetto della dignità e dell'umanità della persona»[35].

Ancora in riferimento agli illeciti dinieghi opposti dalle autorità amministrative con riguardo alla garanzia di un diritto positivo, si pone la consolidata prassi amministrativa di non ottemperare ai provvedimenti della magistratura (pratica riscontrabile anche nel caso ora citato in riferimento all'ordine del GUP al prelievo rimasto inadempiuto da parte delle autorità amministrative).

Significativa, in tal senso, è stata altresì la cosiddetta vicenda "Rai Sport-Rai Storia". Un detenuto in regime detentivo speciale, aveva presentato reclamo avverso un provvedimento amministrativo che inibiva ai ristretti di cui all'art. 41-*bis* o.p, la visione di alcuni canali tematici lamentando, in seguito al distacco del segnale televisivo, la lesione del diritto all'informazione garantito dall'art. 21 della Costituzione ed espressamente tutelato anche dagli artt. 18 e 18-*ter* o.p. Il giudice del reclamo, ritenendo insussistenti le ragioni di sicurezza atte a giustificare la limitazione – non veicolando le due emittenti Rai messaggi dall'esterno[36] – aveva disposto l'annullamento del provvedimento, ordinando all'amministrazione di riattivare il segnale per i canali "Rai Sport" e "Rai Storia". A tale decisione, tuttavia, aveva fatto seguito un

[35] Considerazioni peraltro ribadite dagli stessi giudici di legittimità nella successiva sentenza del 19 dicembre n. 46728.

[36] Lo stesso giudice ritiene invece legittimo il distacco del segnale televisivo riferito all'emittente MTV «effettivamente adusa alla riproduzione in video di messaggi inviati dal pubblico». Preminenti, in tal caso, sono le esigenze di sicurezza che giustificano la compressione del diritto attraverso l'oscuramento del canale volto a impedire eventuali collegamenti tra il detenuto e l'esterno.

In riferimento al bilanciamento operato dal giudice tra esigenze di sicurezza e tutela del diritto all'informazione, v. M. RUOTOLO, The domestic remedies must be effective*: sul principio di effettività della tutela giurisdizionale dei diritti dei detenuti*, in *Giurisprudenza costituzionale*, 3 (2013), 2084 ss. e, dello stesso Autore nella medesima rivista, *Sul problema dell'effettività della tutela giurisdizionale dei diritti dei detenuti*, 2012, 684 ss.

atto del Ministro della Giustizia in cui espressamente veniva disposta la «non esecuzione» del provvedimento giudiziale adottato dalla Magistratura di sorveglianza[37].

Anche in questa occasione a porre rimedio all'infra-penalità derivante dalla mancata ottemperanza è stata la giurisprudenza: i giudici costituzionali, con la sentenza n. 135 del 2013, hanno risolto il conflitto di attribuzioni sollevato dalla Magistratura di Sorveglianza di Roma affermando che: «non spetta al Ministro della giustizia e ad alcun organo di Governo disporre che non venga data esecuzione ad un provvedimento del magistrato di sorveglianza (...) se il procedimento e la conseguente decisione del magistrato (...) si configurano come esercizio della funzione giurisdizionale, in quanto destinati ad assicurare la tutela di diritti, si impone la conclusione che quest'ultima sia effettiva e non condizionata a valutazioni discrezionali di alcuna autorità», compresa l'eventuale inottemperanza da parte dell'Amministrazione penitenziaria. La stessa Corte precisa altresì come non sussistano «esigenze generali o particolari attinenti all'organizzazione penitenziaria» tali da giustificare la menomazione del diritto di cui all'art. 21 Cost.; l'inottemperanza è, dunque, illegittima perché in contrasto con il sistema delle attribuzioni costituzionali e con la garanzia di una tutela effettiva dei diritti.

I richiamati episodi non costituiscono casi isolati; per anni è stata riscontrata una diffusa carenza di vincolatività – *de facto* – delle decisioni adottate della Magistratura, tanto da indurre i giudici costituzionali a ribadire che le decisioni del giudice della sorveglianza non costituiscono mere «segnalazioni» assumendo, viceversa, la natura di «prescrizioni od ordini, il cui carattere vincolante per l'amministrazione penitenziaria è intrinseco alle finalità di tutela che la norma stessa persegue»[38].

In conclusione, nelle vicende richiamate, la mancata garanzia del diritto non si rinviene in una lacuna normativa o in una pronuncia di segno negativo adottata in sede giurisdizionale, quanto in un vero e proprio diniego di natura applicativo-interpretativa da parte dell'amministrazione che, talvolta, si pone in contrasto anche con una decisione dell'autorità giudiziaria dando vita ad un vero e proprio controdiritto.

5. LA NECESSITÀ DI INDIVIDUARE UN ARGINE COSTITUZIONALE AL "DIRITTO SFUGGENTE"

[37] Decreto del 14 luglio 2011.

[38] Corte cost., 8 ottobre 2009, n. 266 nonché, dieci anni prima, la storica sentenza 8 febbraio 1999, n. 26.

Per un'ampia riflessione critica in ordine alla garanzia del diritto all'effettività dei diritti si rinvia alle considerazioni proposte in S. TALINI, *La privazione della libertà personale*, cit., 285-334. In argomento occorre da ultimo ricordare che nel 2013 è stato introdotto, all'interno del nuovo art. 35-*bis* o.p., un vero e proprio giudizio di ottemperanza attivabile nell'ipotesi di una mancata esecuzione amministrativa degli ordini contenuti in una decisione adottata dalla magistratura di sorveglianza.

Le considerazioni sinora condotte impongono di individuare un "argine costituzionale" in grado di delineare il confine tra interventi giuridicamente leciti e quelli che, al contrario, sono espressione di infra-penalità. In effetti dalle riflessioni che precedono, ben si comprende come l'urgenza di una simile ricerca risieda nella necessità di non consentire, all'interno dell'ordinamento giuridico, la proliferazione di ciò che potrebbe definirsi come un "diritto sfuggente", cioè un insieme di regole o di comportamenti in grado di sottrarsi – di fatto – al rispetto dei limiti imposti dalla Costituzione a tutela dell'inviolabilità dei diritti e del sistema di attribuzioni.

Il discrimine tra uso costituzionalmente legittimo (o meno) delle decisioni amministrative in riferimento al sistema delle attribuzioni delineato dal dettato costituzionale risiede, a parere di chi scrive, in una valutazione casistica del contenuto di ciascuna di esse. Le autorità amministrative, quali parti integranti dell'ordinamento costituzionale[39], possono – e devono – concorrere all'evoluzione interpretativa della normativa purché il loro intervento segua una direzione costituzionalmente orientata[40] e a condizione che gli atti (o le azioni) dell'amministrazione non si traducano in scelte di natura puramente "creativa", svincolate – o addirittura contrarie (come nell'ipotesi della mancata ottemperanza alle decisioni della magistratura) – alla disciplina della libertà personale tutelata dalla doppia riserva di legge e di giurisdizione.

In proposito viene nuovamente in soccorso la giurisprudenza costituzionale, la quale ha chiaramente affermato che la necessità di osservare il principio di legalità sostanziale non consente «l'assoluta indeterminatezza» dell'atto; in materia di interventi amministrativi «non è sufficiente che il potere sia finalizzato dalla legge alla tutela di un bene o di un valore, ma è indispensabile che il suo esercizio sia determinato nel contenuto e nelle modalità, in modo da mantenere costantemente una, pur elastica, copertura legislativa dell'azione amministrativa»[41].

È una strada che l'amministrazione penitenziaria ha più volte mostrato di saper percorrere. In effetti, nonostante gli interventi richiamati nei paragrafi che precedono, le autorità amministrative in diverse occasioni sono state in grado di avviare un percorso costituzionalmente orientato di traduzione amministrativa dei principi

[39] Come noto, il dettato costituzionale attribuisce alla disciplina della Pubblica amministrazione un'apposita sezione (la seconda), all'interno del Titolo III ("Il Governo") della Parte seconda della Costituzione dedicata all'Ordinamento della Repubblica (artt. 97 e 98).

[40] In dottrina è stata da tempo ritenuta superata la c.d. teoria della supremazia speciale, da intendersi, secondo condivisibile definizione, come «attribuzione ad un organo della P.A. di poteri discrezionali particolarmente ampi e volti a disciplinare in modo organico una determinata categoria di soggetti, che per ciò stesso vengono a trovarsi in una posizione di subiezione nei confronti della P.A. particolarmente intensa» (F. MERUSI, *Le direttive governative nei confronti degli enti di gestione*, Milano 1965, 142; v. anche G. NESPOLI, *Potere disciplinare e ordinamento penitenziario*, in *Rassegna di studi penitenziari,* 1977, 707).

[41] Corte cost., 4 aprile 2011, n. 115.

posti a fondamento della normativa penitenziaria. È quanto avvenuto, ad esempio, con l'introduzione – tramite circolari – di un progetto di cambiamento organizzativo degli istituti penitenziari volto a consentire una maggiore libertà di movimento dei detenuti attraverso una nuova gestione degli spazi interni del carcere, distinguendo chiaramente tra «la cella – destinata, di regola, al solo pernotto – e luoghi dedicati alle principali attività trattamentali»[42]. La circolare, facendo leva su una lettura della normativa penitenziaria "alla luce dei principi costituzionali", si è posta come atto amministrativo propulsore di quegli interventi di riforma, richiesti all'Italia dalla Corte EDU nella nota sentenza *Torreggiani e altri c. Italia*[43], volti a contrastare il consolidato fenomeno del sovraffollamento carcerario non solo attraverso una riduzione numerica della popolazione detenuta quanto, anche, mediante un rinnovamento di natura strutturale nel modo di concepire tempo e spazio dell'esecuzione.

È ancora il caso della circolare n. 3478/5928 del 1998 la quale, facendo leva sull'ampia nozione di "famiglia" accolta dal nostro ordinamento costituzionale, ha chiarito alcuni i dubbi interpretativi sorti in riferimento alla disciplina dei colloqui visivi (artt. 18 o.p. e 37 r.e.): la famiglia deve intendersi in senso sociologico comprendendo parenti e affini fino al 4° grado; i conviventi sono coloro che vivono nella stessa abitazione, anche del medesimo sesso e anche per ragioni di cura o amicizia.

Si pensi, da ultimo, alle cosiddette "buone prassi" intese come insieme di azioni intraprese dalle singole Direzioni degli istituti penitenziari al fine di offrire diretta attuazione agli obiettivi posti dai principi costituzionali. Ne sono esempio le decine di attività intraprese negli ultimi anni in tema di "accoglienza" attraverso l'approvazione di progetti che hanno favorito l'incontro tra gli operatori del carcere e quelli del territorio, tra le reti del volontariato e i servizi sanitari[44]. Si pensi, ancora, alle diverse scelte adottate da alcuni istituti al fine di realizzare appositi spazi interni per garantire una maggiore intimità agli incontri tra familiari e detenuti – nonostante l'obbligatorietà del controllo visivo (art. 18, co. 2 o.p.) – come diretta espressione dell'ampia tutela offerta dalla Costituzione alla dimensione affettiva[45].

Individuato il discrimine tra uso costituzionalmente legittimo e non delle decisioni amministrative preme un'ultima riflessione conclusiva. È stato messo in luce, nelle pagine che precedono, come in più occasioni ad arginare gli effetti illeciti di un provvedimento o di una decisione amministrativa sia intervenuta la

[42] Circolare del 13 luglio 2013, n. 251644 ("Linee guida sulla sorveglianza dinamica").

[43] Pronuncia dell'8 gennaio 2013, ric. nn. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 e 37818/10.

[44] Sul punto C. CANTONE, *La funzione delle buone prassi in un sistema penitenziario moderno*, in M. Ruotolo (a cura di), *Il senso della pena*, cit., 107-110.

[45] Si vedano, ad esempio, le esperienze delle c.d. case dell'affettività realizzate negli istituti penitenziari di Milano Bollate (2001) e, più di recente, nel carcere romano di Rebibbia femminile con il progetto M.A.MA (2020).

giurisprudenza. In proposito occorre tuttavia rilevare come nella condizione di privazione della libertà personale, in cui i diritti – ancor più che in altri ambiti – si configurano come proiezioni dei bisogni primari della persona, un'irrinunciabile esigenza risieda nell'istantaneità della garanzia. In effetti se le pronunce giurisprudenziali consentono di porre in larga parte rimedio agli effetti derivanti dalla decisione amministrativa, garantendo – seppur con intensità differenti – la tutela *pro futuro* del diritto, i tempi che la definizione giurisprudenziale richiede rischiano di pregiudicarne in concreto la tutela. Riflessione, questa, tanto più incidente in riferimento a quei diritti, come la salute o la filiazione, ontologicamente condizionati dai mutamenti biologici o clinici che si producono nel corpo o nella psiche della persona.

Per tali ragioni un necessario corollario dell'effettività dei diritti non può che risiedere nell'immediatezza della loro garanzia, possibile solo ove tutti gli "attori" chiamati a offrire concreta attuazione al "progetto giuridico" – amministrazione *in primis* – rispettino il bilanciamento tra esigenze di sicurezza e protezione dei diritti senza travalicare il sistema delle attribuzioni delineato dalla Costituzione.

359 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 359-379
ISSN: 1825-5167

QUANDO UNA DISCIPLINA ATTUATIVA SI SOTTRAE AL CIRCUITO DEMOCRATICO
IL CASO DELLE LINEE GUIDA ANAC PER L'ATTUAZIONE DEI CONTRATTI PUBBLICI E LA LORO DIFFICOLTÀ DI CLASSIFICAZIONE*

FRANCESCO MARONE
Dipartimento di Scienze giuridiche
Università degli Studi "Suor Orsola Benincasa" di Napoli
francesco.marone@unisob.na.it

ANDREA PERTICI
Dipartimento di Giurisprudenza
Università di Pisa
andrea.pertici@unipi.it

ABSTRACT
The article, part of a wider research on "law without politics" – concerning, among other things, the regulation activity of the Independent Administrative Authorities –, analyses the regulation powers of the Anticorruption Authority (ANAC) in the context of the carrying out of the Public Contracts Law (d.lgs. n. 50/2016). It focuses especially on the "guidelines" of the ANAC and their position in the system of the sources of law: in fact, these present normative characters, although they are made by a non-representative institution.

KEYWORDS
Administrative act, ANAC, Authorities, Rule of law, Soft law.

1. PREMESSA: IL DIRITTO SENZA POLITICA E IL POTERE REGOLAMENTARE DELLE AUTORITÀ AMMINISTRATIVE INDIPENDENTI

L'ambito della ricerca da cui il presente approfondimento prende le mosse, quello del diritto senza politica, incrocia certamente la questione dell'attività di regolazione, comprensiva di quella di normazione, delle Autorità amministrative in-

* Il presente scritto è frutto della riflessione congiunta dei due Autori. I §§ 1-2 sono stati redatti da Andrea Pertici, i $$ 3-4 da Francesco Marone, mentre il § 5 è stato redatto congiuntamente.

dipendenti. Queste, in effetti, rispondono a un nuovo modello di relazione tra politica e amministrazione, che è quello dell'indipendenza, con conseguente sottrazione ai poteri di indirizzo e di controllo che il Governo normalmente esercita nei confronti dell'amministrazione pubblica[1], conferendo così legittimazione all'azione della stessa.

Queste Autorità, in sostanza si trovano così separate dal circuito democratico (essendo stato giustamente sottolineato come del loro operato il Governo non possa rispondere di fronte alle Camere[2]), al quale sono riconnesse soltanto attraverso la sottoposizione della loro azione al principio di legalità. Esse operano, infatti, in base ai poteri e secondo le modalità stabilite dalla legge, che conferisce loro anzitutto un potere di regolazione di un settore specializzato, attribuendogli, poi, anche poteri normativi, sia interni, relativi in particolare alla propria organizzazione e funzionamento e ai procedimenti di propria competenza (in questo come tendenzialmente avviene per tutti gli enti pubblici) che, soprattutto, per quanto più interessa alla nostra indagine, esterni. Deve, tuttavia, notarsi come tali poteri normativi siano in alcuni casi previsti con precisione della legge, mentre in altri risultano da previsioni generiche, che hanno portato addirittura a desumere alcuni poteri normativi[3], che rischiano così di risultare troppo estesi.

In effetti, dell'attribuzione di questi poteri normativi – come è stato sottolineato[4] – non vi è traccia nella Costituzione (in cui non sono neppure citate le Autorità amministrative indipendenti), la quale riconosce la possibilità di esercizio del potere regolamentare soltanto al Governo e agli enti territoriali, oltre che – effettivamente già al di fuori degli enti politici – alle Università e alle istituzioni di alta cultura.

In effetti, sono stati sollevati seri dubbi di legittimità costituzionale rispetto all'esercizio di poteri regolamentari da parte delle Autorità amministrative indipendenti[5], nonostante il fondamento degli stessi sia stato ormai oggetto di un'ampia elaborazione dottrinaria[6] ed abbia ottenuto riconoscimento da parte della giurisprudenza (sin dal parere del Cons. Stato, sez. cons. atti normativi, 14/2/2005, n. 11603),

[1] Per tutti, L. CARLASSARE, *Amministrazione e potere politico*, Padova 1974.

[2] V. CERULLI IRELLI, *I poteri normativi delle Autorità amministrative indipendenti*, A*strid Online*, 20.7.2009.

[3] Sottolinea M. CLARICH, *Autorità indipendenti: bilancio e prospettive di un modello*, Bologna 2005, 31, che «le leggi istitutive delle autorità ne definiscono in modo spesso generico la missione, cioè gli scopi, e pongono pochi criteri per l'esercizio dei poteri normativi e amministrativi ad esse attribuiti».

[4] V. CERULLI IRELLI, *I poteri normativi delle Autorità amministrative indipendenti*, cit.

[5] V.M. MANETTI, *Autorità indipendenti (Dir. Cost.)*, in *Enciclopedia giuridica*, IV (1997).

[6] Sul fondamento dei poteri normativi delle Autorità amministrative indipendenti si segnala, in particolare, A. ANSELMO, *I regolamenti delle Autorità amministrative indipendenti al tempo della crisi della legge*, Bagheria 2011; AA.VV., *Attività regolatoria e autorità indipendenti*, Milano 1996; B. BRANCATI, *Il rapporto tra la legge e il potere normativo delle autorità amministrative indipendenti*, in *Studi pisani sul Parlamento*, V, Pisa 2012, 289-306; M.A. CABIDDU, D. CALDIROLA, *L'attività normativa delle Autorità Indipendenti*, in *Amministrare*, 1-2 (2000), 13-44; P. Caretti (a cura di), *I*

seppure in presenza di un'espressa attribuzione legislativa (essendo comunque richiesto il rispetto di una legalità formale particolarmente rigorosa attraverso un procedimento partecipato e la necessità di una motivazione), concludendosi che «il potere regolamentare spetta quale corollario delle attribuzioni loro riconosciute dalla legge»[7].

L'attribuzione della competenza normativa di tipo regolamentare, peraltro, è generalmente ricondotta alle esigenze di regolazione di settori molto specializzati, con necessità di forti competenze tecniche, in continua e rapida evoluzione e la cui disciplina deve quindi essere improntata a una forte flessibilità e duttilità, dovendosi anche considerare come tale attribuzione discenda spesso dallo stesso diritto eurounitario.

Peraltro, questa può essere considerata come una declinazione del processo di neutralizzazione del diritto pubblico a cui ha fatto riferimento la dottrina[8], rappresentando – è stato ancora detto[9] – il tentativo di superare così le difficoltà che la politica riscontra nell'affrontare rilevanti problemi socio-economici.

poteri normativi della Autorità Amministrative Indipendenti, in *Osservatorio sulle fonti 2003-2004*, Torino 2006; F. CINTIOLI, *I regolamenti delle Autorità indipendenti nel sistema delle fonti tra esigenze della regolazione e prospettive della giurisdizione (Relazione al Convegno sulle Autorità amministrative indipendenti, Roma, Consiglio di Stato, 9 maggio 2003)*, in *www.giustizia-amministrativa.it*, 2003; G.P. Cirillo, R. Chieppa (a cura di), *Le Autorità Amministrative Indipendenti*, Padova 2010; M. CLARICH, *Autorità indipendenti: bilancio e prospettive di un modello*, Bologna 2005; G.C. DI SAN LUCA, *Funzione di regolazione e indipendenza del soggetto regolatore*, in *Rassegna di diritto pubblico europeo*, 1-2 (2015), 369-391; S. FOÀ, *I regolamenti delle Autorità Amministrative Indipendenti*, Torino 2002; M. FOGLIA, *I poteri normativi delle Autorità Amministrative Indipendenti*, in *Quaderni regionali*, 2 (2008), 559-608; G. GRASSO, *Le autorità amministrative indipendenti della Repubblica. Tra legittimità costituzionale e legittimazione democratica*, Milano 2006; F. GRECO, *La potestà normativa delle Autorità Amministrative Indipendenti e la partecipazione ai procedimenti di regolazione*, in *GiustAmm.it*, 9 (2014), 9; C. IANNELLO, *Le Autorità Indipendenti tra funzione regolativa e judicial review*, in *Osservatorio sulle fonti*, 1 (2016), 14 ss.; E. JACOVITTI, *Osservazioni sui regolamenti delle Autorità Indipendenti*, in *Archivio giuridico "Filippo Serafini"*, 2 (2010), 251-275; N. LONGOBARDI, *Autorità amministrative indipendenti e sistema giuridico-istituzionale*, Torino 2009; N. MARZONA, *Il potere normativo delle Autorità indipendenti*, in S. Cassese, C. Franchini (a cura di), *I garanti delle regole,* Milano 1996, 86 ss.; S. NICODEMO, *Gli atti normativi delle autorità indipendenti*, Padova 2002; F. POLITI, *I poteri normativi delle autorità amministrative e indipendenti*, in N. Longobardi (a cura di), *Il sistema politico amministrativo e la riforma mancata*, Torino 1999; M.A. RUSSO, *Le Autorità Amministrative Indipendenti e, in particolare, i loro poteri regolamentari*, in *Diritto e Formazione*, 12 (2002), 1793-1807; R. TITOMANLIO, *Potestà normativa e funzione di regolazione. La potestà regolamentare delle autorità amministrative indipendenti*, Torino 2013.

[7] Cons. Stato, comm. speciale, parere 14 settembre 2016, n. 1920.

[8] In senso critico, G. AZZARITI, *Diritto e conflitti. Lezioni di diritto costituzionale*, Roma-Bari 2010, 98 ss.

[9] E. OLIVITO, *In bilico tra gubernaculum e iurisdictio. Osservazioni costituzionalmente orientate sull'Autorità nazionale anticorruzione e i suoi poteri regolatori*, in *Costituzionalismo.it*, 3 (2018), 47.

È in questo contesto già di per sé – come evidente – ricco di aspetti problematici che qui non si sono potuti che richiamare per sommi capi, che si inserisce la più specifica questione delle linee guida dell'Autorità nazionale anticorruzione (ANAC). Queste, rimesse alla competenza di un'Autorità del tutto particolare[10], rappresentano una «novità assoluta»[11], presentandosi per alcuni versi con l'aspetto della *soft law* che sembrerebbe trarsi dalla semantica del *nomen*, espressivo di un potere di direttiva, oltre che dalla propensione per la forma discorsiva dei loro contenuti, ma risultando, invece, dotate di piena cogenza per i destinatari, di cui conformano i comportamenti.

E, in effetti, esse, con il codice dei contratti pubblici del 2016, sono state chiamate a dettare la disciplina attuativa[12], andando a occupare uno spazio precedentemente riservato a un regolamento del Governo, additato come latore di un'eccessiva proliferazione di regole (nella convinzione che ciò potesse essere una delle cause dell'eccesso di burocratizzazione e quindi, tra l'altro, una causa di corruzione). La sostituzione con le linee guida è stata quindi volta – secondo quanto abbiamo detto generalmente avvenire attraverso l'esercizio dei poteri regolatori delle Autorità amministrative indipendenti – a realizzare un sistema più duttile e dinamico, capace di adattarsi rapidamente alle evoluzioni tecniche. In realtà, il nuovo sistema – secondo quanto ripetutamente sottolineato in dottrina – è parso finire per lasciare nelle mani dell'ANAC poteri troppo vasti, mostrando, peraltro, altri limiti, a partire da quello della certezza (che è anche stabilità) del diritto, certamente molto importante per gli operatori economici.

L'insoddisfazione per i risultati così ottenuti sembra essere resa evidente dal fatto che con il d.l. 18 aprile 2019, n. 32, convertito con modificazioni in l. 14 giugno 2019, n. 55 (c.d. "sblocca cantieri"), la disciplina attuativa del codice dei contratti è stata nuovamente affidata ad un regolamento, che, tuttavia, al momento in cui andiamo in stampa, non è ancora stato approvato e che comunque non determinerà il totale superamento della funzione delle linee guida, che continueranno a recare alcuni aspetti della disciplina, mantenendo di piena attualità ed interesse la loro qualificazione, anche e soprattutto per le rilevanti conseguenze che da ciò discende sul piano applicativo. A questi aspetti, quindi ci dedicheremo in modo particolare nelle pagine che seguono.

[10] E. OLIVITO, *In bilico*, cit., 18, ne contesta apertamente la natura di Autorità amministrativa indipendente, ritenendola un ente pubblico.

[11] M. CHIARELLI, *La soft regulation e il caso delle nuove linee guida ANAC*, in *Federalismi.it*, 3 (2019), 4.

[12] Il Consiglio di Stato, con parere 2 agosto 2016, n. 1767 ha riconosciuto tre tipologie di atti attuativi del Codice dei contratti pubblici: a) quelli adottati con decreto del Ministro delle infrastrutture e trasporti, su proposta dell'ANAC, previo parere delle competenti commissioni parlamentari; b) quelli adottati con delibera dell'ANAC a carattere vincolante *erga omnes* (linee guida vincolanti); c) quelli adottati con delibera dell'ANAC a carattere non vincolante (linee guida non vincolanti).

2. IL POTERE REGOLAMENTARE DELLE AUTORITÀ AMMINISTRATIVE INDIPENDENTI E LA SUA LEGITTIMAZIONE (SETTORIALE) ATTRAVERSO LA LEGALITÀ PROCEDIMENTALE

Come abbiamo detto, il fondamento del potere normativo delle Autorità amministrative indipendenti è stato al centro di un'ampia elaborazione dottrinale ed è ormai un dato acquisito dalla giurisprudenza.

In particolare, come accennavamo, il suddetto potere normativo (regolamentare) viene affidato dalla legge alle Autorità in quei particolari settori di loro competenza proprio in virtù dell'elevato livello tecnico delle discipline che devono essere oggetto di regolamentazione[13], che pertanto sembrano poter essere implementate, in modo più efficace dall'Autorità competente piuttosto che dal Governo[14]. Pertanto,

[13] La distinzione tra le materie da lasciare alla regolamentazione del Governo e delle amministrazioni legittimate democraticamente e quelle da affidare, invece, ad Autorità amministrative legittimate "tecnocraticamente" si riflette nella distinzione tra discrezionalità amministrativa e discrezionalità tecnica, elaborata dalla dottrina. Ciò in quanto «il modello delle autorità indipendenti non è compatibile con l'attribuzione estesa di poteri discrezionali in senso proprio, quelli cioè che comportano una valutazione di interessi e che determinano effetti redistributivi di risorse». A tal fine, si distingue tra discrezionalità tecnica, «correlata a valutazioni tecniche o scientifiche che hanno un qualche margine di opinabilità e che possono essere affidate a collegi di esperti», e discrezionalità amministrativa, che «richiede invece una valutazione e una mediazione tra i vari interessi pubblici e privati coinvolti». Così M. CLARICH, *Autorità indipendenti*, cit., 34 e 79, che evidenzia perplessità sull'effettiva funzionalità di tale criterio, in quanto «il confine tra decisione tecnica e decisione politica tende spesso a sfumare in concreto». Naturalmente, la distinzione tra discrezionalità tecnica e discrezionalità amministrativa non può costituire l'unico criterio per individuare l'area di operatività delle Autorità indipendenti, ben potendo l'amministrazione tradizionale compiere valutazioni tecnico-discrezionali. Il carattere "tecnico" della regolamentazione delle Autorità amministrative indipendenti comporta che la giurisdizione sui loro atti riguarda l'esercizio di un potere che, nella maggior parte dei casi, non comporta spendita di discrezionalità amministrativa ma di discrezionalità tecnica: A. PAJNO, *Il giudice delle Autorità amministrative indipendenti*, in *Diritto processuale amministrativo*, 3 (2004), 617 ss. Più in generale, con riguardo al sindacato del giudice amministrativo sulla discrezionalità tecnica, cfr. A. TRAVI, *Circa il sindacato del giudice amministrativo sulla discrezionalità tecnica della pubblica amministrazione*, in *Foro italiano*, 1 (2001), 9-14. Circa la problematicità nel far rientrare le linee guida dell'ANAC nell'alveo della discrezionalità tecnica, F. CINTIOLI, *Il sindacato del giudice amministrativo sulle linee guida di ANAC (convegno "L'amministrazione pubblica nella prospettiva del cambiamento: il codice dei contratti e la riforma "Madia" – Lecce 28-29 ottobre 2016)*, in *www.italiappalti.it*, 15.

[14] Il Consiglio di Stato (sez. 6ª, 2.5.2012, n. 2521) ha sottolineato che «la parziale deroga al principio di legalità sostanziale si giustifica in ragione dell'esigenza di assicurare il perseguimento di fini che la stessa legge predetermina: il particolare tecnicismo del settore impone, infatti, di assegnare alle Autorità il compito di prevedere e adeguare costantemente il contenuto delle regole tecniche all'evoluzione del sistema. Una predeterminazione legislativa rigida sarebbe di ostacolo al perseguimento di tali scopi: da qui la conformità a Costituzione, in relazione agli atti regolatori in esame, dei poteri impliciti».

la legge che attribuisce alle Autorità il potere regolatorio deve individuare con chiarezza almeno il settore in cui tale potere dovrà essere esercitato.

Peraltro, l'esercizio di poteri normativi si giustifica «anche in base all'esistenza di un procedimento partecipativo, inteso come strumento della partecipazione dei soggetti interessati sostitutivo della dialettica propria delle strutture rappresentative»[15], come sottolineato in più occasioni anche dal Consiglio di Stato, superando i dubbi di legittimità costituzionale[16]. Pertanto, ad una legalità sostanziale attenuata

[15] *Ex multis*, Cons. Stato, sez. 6ª, 27.12.2006, n. 7972. Si è parlato in proposito di "fondamento partecipativo" del potere regolamentare delle Autorità amministrative indipendenti. Sul punto, cfr., ad esempio, F. GRECO, *La potestà normativa delle Autorità amministrative indipendenti*, cit., 5; R. CHIEPPA, *Tipologie procedimentali e contraddittorio davanti alle Autorità indipendenti, Relazione al Convegno "Imparzialità e indipendenza delle* Authorities *nelle recenti dinamiche istituzionali e amministrative" (Roma, Consiglio di Stato, 14.12.2005)*, in *www.giustizia-amministrativa.it*, (2006), 3; G. MORBIDELLI, *Sul regime amministrativo delle Autorità indipendenti*, in A. Predieri (a cura di), *Le autorità indipendenti nei sistemi istituzionali ed economici*, Firenze 1997, 1, 200. Più critico G. GRASSO, *Le autorità amministrative indipendenti*, cit., 31 e 40, secondo il quale la cosiddetta "legittimazione procedimentale" non sarebbe sufficiente, da sola, a fondare una legittimazione democratica delle Autorità indipendenti. Similmente anche G. AMATO, *Principio maggioritario e autorità indipendenti*, in *Arel Informazioni*, 1 (2002), 10, sostiene che non si può scambiare la legittimazione democratica, basata sugli istituti classici della rappresentanza politica, con una legittimazione che deriva (solo) da «regole di contraddittorio, trasparenza, motivazione, impugnativa, che soddisfano altrimenti le ragioni della responsabilità». Infine, R. TITOMANLIO, *Funzione di regolazione*, cit., 351, evidenzia che già negli Stati Uniti, "patria" del fenomeno delle *Authorities*, la legittimazione delle Autorità indipendenti è stata ricollegata alla previsione di ampie garanzie partecipative: già nel 1946, infatti, l'*Administrative Procedure Act* ha imposto alle stesse la cosiddetta *"due process clause"*, vale a dire «il rispetto di determinate procedure in contraddittorio sia nell'*adjudication* che nel *rule-making*, confermando il successivo controllo da parte del potere giurisdizionale».

[16] Infatti, lo stesso Consiglio di Stato (sez. 6ª, 2.5.2012, n. 2521) ha avuto modo di affermare che «la dequotazione del principio di legalità sostanziale - giustificata dalla valorizzazione degli scopi pubblici da perseguire in particolari settori e concretizzata nell'attribuzione alle Autorità di settore di ampi poteri regolamentari - impone il rafforzamento del principio di legalità procedimentale che si sostanzia, tra l'altro, nella previsione di rafforzate forme di partecipazione degli operatori del settore al procedimento di formazione degli atti regolamentari». Precedentemente, Cons. Stato, sez. 6ª, 27.12.2006, n. 7972. Anche in dottrina, M. CLARICH, *I procedimenti di regolazione*, in AA.VV., *Il procedimento davanti alle Autorità indipendenti*, Torino 1999, 19, ha affermato che la previsione di garanzie procedurali rinforzate consente «di colmare il *deficit* di legalità sostanziale» derivante dalla stessa indipendenza delle Autorità dal potere politico, «sganciate dal circuito democratico tradizionale». Cfr. anche dello stesso M. CLARICH, *Autorità indipendenti*, cit., 75 ss., ove si osserva che «tanto più ampio è l'ambito della discrezionalità attribuito all'amministrazione, tanto maggiore è la necessità di bilanciare sul piano della legalità procedurale la perdita di legalità sostanziale», mettendo in evidenza l'importanza, a tal fine, della partecipazione al procedimento dei soggetti interessati (purtroppo di rado prevista per l'attività normativa delle Autorità indipendenti). Anche A. PAJNO, *Il giudice delle Autorità*, cit., 617 ss., sottolinea che, venendo meno la legittimazione connessa con il circuito della responsabilità politica, «è necessario che sussista quell'altro elemento di legittimazione democratica che è costituito dal contraddittorio pieno e paritario»: in ciò l'A. ha ritenuto di individuare la ragione profonda che ha condotto a qualificare le Autorità indipendenti come quasi giurisdizionali o paragiurisdizionali, dipendendo la loro legittimazione dalla circostanza che i propri atti siano adottati dopo un contraddittorio pieno. Critici in merito alla possibilità di sopperire al *deficit* di legalità sostanziale

(specialmente nel caso dei regolamenti "indipendenti" delle Autorità) deve necessariamente corrispondere un rafforzamento della legalità procedimentale, mediante la previsione della consultazione dei soggetti interessati e, ove occorra, del preventivo parere degli organi consultivi e delle competenti Commissioni parlamentari. In proposito occorrerebbe tuttavia fare attenzione a che l'ascolto di soggetti "interessati" non finisca per far risuonare soltanto la voce degli interessi più forti[17], mancando la finalità del perseguimento dell'interesse generale (ancorché secondo una visione di parte che dovrebbe essere data dal filtro della politica) di cui dovrebbero essere espressione le norme.

In sostanza, quindi, per quanto una legalità procedurale particolarmente accentuata (soprattutto a fronte delle sempre più frequenti "deleghe in bianco" alle Autorità indipendenti)[18] e la possibilità del controllo giurisdizionale sul loro operato da parte dei giudici amministrativi[19] possano contribuire ad attenuare il *deficit* di legittimazione democratica con cui è esercitata l'attività regolatoria delle Autorità amministrative indipendenti, esso non può comunque essere colmato, e anzi potrebbe soffrire di una visione condizionata dagli interessi più forti (dai quali certamente è condizionabile anche il potere politico, soprattutto con l'espansione del *lobbying*, il quale, tuttavia, è istituzionalmente preposto alla cura dell'interesse generale e chiamato a rispondere del suo adeguato perseguimento almeno nei momenti elettorali).

mediante un potenziamento della legalità procedurale, M. MANETTI, *Profili di giustizia costituzionale in materia di autorità indipendenti*, in *Autorità indipendenti e principi costituzionali (Atti del convegno dell'Associazione italiana dei costituzionalisti, Sorrento 30.5.1997)*, Padova 1999, 229-230, che si riferisce ad una *«generica legittimazione procedurale»*, e G. GRASSO, *e autorità amministrative indipendenti*, cit., 82 ss., che si interroga sul perché, tra tutti i "poteri" dello Stato, tra tutte le amministrazioni e tra tutti gli organi non amministrativi, soltanto le Autorità amministrative indipendenti dovrebbero trovare una legittimazione nel contraddittorio e nel rispetto delle norme generali di cui alla legge n. 241/1990.

[17] Tale problema è stato in effetti ben sottolineato anche rispetto alle teorie pluraliste della democrazia, che – ugualmente – rischiano di lasciar fuori proprio gli interessi più deboli, come efficacemente sottolineato da E.E. SCHATTSHNEIDER, *The Semi-Sovreign People,* New York 1960, secondo il quale *«the flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent»*.

[18] Cfr. M. CLARICH, *Autorità indipendenti*, cit., 155.

[19] Cfr. M. CLARICH, *Autorità indipendenti*, cit., 50. In uno sforzo chiarificatore, T.E. FROSINI, *Attribuzioni delle Autorità e fondamento costituzionale*, in *GiustAmm.it*, 1 (2012), 1, ha individuato, peraltro, ai fini dell'attribuzione di funzioni neutrali di regolamentazione, il rispetto di tre condizioni generali, presenti negli ordinamenti anglosassoni nei quali le *Authorities* sono nate e si sono sviluppate: a) il potere pubblico deve essere attribuito solo se e nella misura in cui è strettamente necessario per garantire il pieno esercizio della libertà tutelata; b) il potere non deve consistere nella tutela di un interesse pubblico tradizionalmente inteso, bensì caratterizzarsi quale strumento di garanzia del bene comune; c) lo spazio di regolazione neutrale richiede che il contesto normativo in cui opera sia caratterizzato da un insieme di regole che siano poche, flessibili, chiare e stabili.

3. GLI STRUMENTI NORMATIVI DELL'ANAC E LE LINEE GUIDA TRA *SOFT* E *HARD LAW*

In questo contesto sono da inserire i significativi poteri normativi attribuiti all'ANAC dal Codice dei contratti pubblici del 2016 (d.lgs. 18 aprile 2016, n. 50).

Infatti, l'ANAC, oltre al potere di adottare regolamenti interni di organizzazione[20], si vede riconosciuto – dall'art. 213, comma 2, d.lgs. n. 50/2016 – un importante armamentario di strumenti di regolazione in materia di contratti pubblici, quali «linee guida, bandi-tipo, capitolati-tipo, contratti-tipo ed altri strumenti di regolazione flessibile, comunque denominati», con cui «garantisce la promozione dell'efficienza, della qualità dell'attività delle stazioni appaltanti».

Tra i nuovi strumenti di regolazione, un ruolo centrale è attribuito alle linee guida, alle quali il Codice fa riferimento in più punti e in particolare agli artt. 36, 80, 83, 84, 110, 177, mentre altri articoli (31, 38) affidano più genericamente ad atti dell'ANAC l'emanazione della disciplina attuativa, che in concreto avverrà comunque per lo più mediante linee guida.

Peraltro, l'art. 217, comma 1, lett. u) del Codice disponeva l'abrogazione del regolamento di esecuzione, di cui al d.P.R. n. 207/2010, a partire dalla data di entrata in vigore dei nuovi atti attuativi, la cui predisposizione è in larga misura demandata all'ANAC.

L'impianto normativo d'attuazione disegnato dal Codice del 2016, come sopra brevemente descritto, è stato, però, oggetto di modifica da parte del d.l. 18 aprile 2019, n. 32, convertito con modificazioni in l. 14 giugno 2019, n. 55 (c.d. "sblocca cantieri"), con cui è stato aggiunto un comma 27-*octies* all'art. 216 del Codice, prevedendo un regolamento "unico" in sostituzione delle diverse disposizioni attuative originariamente previste[21].

Si tratta, in qualche modo, di un ripensamento rispetto al disegno originario del legislatore del 2016, da valutare positivamente, sia al fine di raggiungere una maggiore organicità della normativa di attuazione, sia proprio in relazione a quanto sopra detto circa i poteri regolatori delle autorità indipendenti, che nel caso di specie

[20] Ciò anche in considerazione del fatto che restano ferme, in generale, le funzioni normative già spettanti all'ANAC prima della riforma, oltre che in virtù del fatto che tale potere discende, più in generale, dall'indipendenza anche organizzativa che la legge assicura alle Autorità amministrative. Cfr. F. SORRENTINO, *Le fonti del diritto amministrativo*, in G. Santaniello (a cura di), *Trattato di diritto amministrativo*, Padova 2007, 264. Si fanno rientrare tra i regolamenti di organizzazione anche quello del 16.11.2016, in materia di esercizio del potere sanzionatorio, e quello del 5.10.2016, sui pareri di precontenzioso, nonostante alcune importanti "ricadute" verso l'esterno.

[21] Per un quadro delle modifiche al Codice del 2016, introdotte dal d.l. 32/2019, si veda A. IANNOTTI DELLA VALLE, *Il quadro delle fonti secondarie in materia di appalti all'indomani della conversione in legge del decreto "sblocca-cantieri"*, in D. Capotorto, A. Massari (a cura di), *Gli appalti pubblici dopo la conversione del decreto "sblocca-cantieri"*, Rimini 2019, 17 ss.

sono altrimenti particolarmente vasti e – come vedremo meglio tra poco – non propriamente settoriali[22].

Tuttavia, il regolamento, del quale siamo ancora in attesa, pur qualificato dalla stessa norma di legge che vi fa rinvio come "unico", non copre comunque l'intera attuazione, lasciando quindi all'ANAC lo spazio per intervenire con le sue linee guida.

Pertanto, rimane utile indagare la natura di questi atti, che presentano molti caratteri tipici delle norme giuridiche, pur essendo adottati da un organo estraneo al circuito democratico e privo di responsabilità politica.

Problemi significativi pone, in particolare, l'inquadramento sistematico delle linee guida vincolanti, a partire dall'assimilazione alla *soft law* fino alla qualificazione come regolamenti o come atti amministrativi generali.

Il Consiglio di Stato[23] ha adottato un'interpretazione che assimila sostanzialmente le linee guida[24] agli atti di regolazione del tipo di quelli adottati dalle Autorità Amministrative indipendenti, ritenendo che esse «non hanno valenza normativa ma sono atti amministrativi generali appartenenti al *genus* degli atti di regolazione delle Autorità amministrative indipendenti, sia pure connotati in modo particolare»[25]. Tale qualificazione presenterebbe alcuni indubbi vantaggi: nello specifico «la natura non regolamentare delle linee guida adottate direttamente dall'ANAC consente che la fase di attuazione delle disposizioni del nuovo Codice dei contratti pubblici che rinviano ad esse non incontri i limiti che il sesto comma dell'art. 117 Cost. pone all'esercizio del potere regolamentare statale»[26].

[22] Sia consentito rinviare, per maggiori dettagli, a F. MARONE, *Le linee guida dell'Autorità nazionale anticorruzione nel sistema delle fonti*, in *Rivista trimestrale di diritto pubblico*, 3 (2017), 743 ss.

[23] Cons. Stato, parere 2 agosto 2016, n. 1767; Cons. Stato, parere 14 settembre 2016, n. 1920.

[24] Da una prima analisi delle linee guida allo stato già pubblicate si può evincere che l'ANAC ha optato, sia per quelle vincolanti sia per quelle non vincolanti, per un'"esposizione discorsiva" del contenuto attuativo. Si veda, a tal proposito, Cons. Stato, parere 2 agosto 2016, n. 1767, che segnala la necessità che «laddove si tratti di linee guida vincolanti, l'Autorità delinei in modo chiaro e preciso il "precetto" vincolante da osservare da parte dei destinatari, pubblici e privati, dello stesso» e che «l'indicazione "discorsiva" sia in ogni caso chiara e univoca (e tale indicazione vale anche in caso di linee guida non vincolanti)».

[25] Cons. Stato, parere 2 agosto 2016, n. 1767. A tal proposito, L. TORCHIA, *Il nuovo Codice dei contratti pubblici: regole, procedimento, processo*, in *Giornale di diritto amministrativo*, 5 (2016), 605 ss., ha osservato che «in questa ricostruzione è la natura dell'autorità che, per così dire, "trascolora" sulla natura delle regole. La premessa maggiore è data dalla natura dell'autorità come autorità di regolazione e ad essa consegue che gli atti sono quindi qualificabili come atti di regolazione. Di solito accade, in effetti, il contrario: la premessa maggiore è data dall'attribuzione di poteri qualificati formalmente come poteri di regolazione e da ciò discende la natura dell'autorità come autorità di regolazione».

[26] L'art. 117, comma 6, Cost., prevede che «la potestà regolamentare spetta allo Stato nelle materie di legislazione esclusiva, salva delega alle Regioni». In particolare, nelle materie di cui al secondo comma dell'art. 117 Cost. che interferiscono con materie regionali, non sarebbe consentita l'adozione

Ad avviso del Consiglio di Stato, inoltre, la preferenza accordata per tale soluzione «può essere giustificata solo a patto di inquadrarla nella *soft law*, riconoscendo alle linee guida natura amministrativa, altrimenti si finirebbe per derogare al principio di tipicità delle fonti normative, che presidia la hard law»[27].

Tuttavia, il richiamo, effettuato da più parti, oltre che dallo stesso Consiglio di Stato, alla *soft law* non sembra del tutto soddisfacente rispetto alla natura delle linee guida vincolanti dell'ANAC, nonostante la dicitura "strumenti di regolamentazione flessibile" adoperata dal Codice[28].

L'espressione *soft law* nasce, infatti, per descrivere quel complesso di disposizioni giuridiche, di natura spesso consuetudinaria, nate nell'ambito della *lex mercatoria* o del diritto internazionale, volte a regolare commerci, transazioni e scambi in modo rapido, flessibile e non vincolante[29]. In sostanza, la *soft law* disciplina rapporti

di norme regolamentari statuali. Nel "silenzio" della norma, si è discusso della collocazione dei lavori pubblici tra le materie di competenza statale, regionale o concorrente. A tal proposito, la Corte costituzionale, con sentenza n. 401/2007 (richiamando la precedente sentenza n. 303/2003), ha sottolineato che «i lavori pubblici non integrano una vera e propria materia, ma si qualificano a seconda dell'oggetto al quale afferiscono e pertanto possono essere ascritti, di volta in volta, a potestà legislative statali o regionali. Non è, dunque, configurabile né una materia relativa ai lavori pubblici nazionali, né tantomeno un ambito materiale afferente al settore dei lavori pubblici di interesse regionale. Tali affermazioni non valgono soltanto per i contratti di appalto di lavori, ma sono estensibili all'intera attività contrattuale della pubblica amministrazione che non può identificarsi in una materia a sé, ma rappresenta, appunto, un'attività che inerisce alle singole materie sulle quali essa si esplica».

[27] In questi termini, Cons. Stato, comm. speciale, parere 14 settembre 2016, n. 1920. Lo stesso Consiglio di Stato, d'altra parte, aveva in precedenti occasioni affermato che «la *soft law* può riguardare gli spazi di contorno della regola legale ma non può porsi in modo esuberante come diretta fonte del diritto» (Cons. Stato, sez. 6ª, parere n. 1584/2015), ingenerando in questo modo ulteriori perplessità in merito all'inquadramento di linee guida vincolanti, che prenderanno il posto del regolamento attuativo del Codice dei contratti pubblici, nell'ambito della *soft law*.

[28] Nel senso dell'inappropriatezza del richiamo alla nozione di *soft law* per le linee guida ANAC cfr. C. DEODATO, *Le linee guida dell'ANAC: una nuova fonte del diritto?*, in *GiustAmm.it*, 4 (2016), 6-7; N. LONGOBARDI, *L'Autorità Nazionale Anticorruzione*, cit., 14. Una maggiore pertinenza potrebbe avere, invece, l'accostamento alla *soft law* dei numerosi comunicati del Presidente dell'ANAC, non avendo questi natura vincolante ma solo indicativa (sebbene l'autorevolezza della figura del Presidente dell'ANAC li faccia propendere, di fatto, verso una "quasi vincolatività").

[29] Aiutano a ricostruire la nozione di *soft law* nel suo "ambiente d'origine", tra gli altri, S.M. CARBONE, *I principi Unidroit quale "soft law" applicabile ai contratti del commercio internazionale: tra autonomia privata e ordinamenti statali*, in *Diritto del commercio internazionale*, 4 (2012), 809-824; E. MOSTACCI, *La soft law nel sistema delle fonti: uno studio comparato,* Milano 2008; A. SOMMA, *Soft law sed law: diritto morbido e neocorporativismo nella costruzione dell'Europa dei mercati e nella distruzione dell'Europa dei diritti*, in *Rivista critica del diritto privato*, 3 (2008), 437 ss. In particolare, ad avviso di S.M. CARBONE, *Il diritto non scritto nel commercio internazionale, Due modelli di codificazione*, Napoli 2012, 25, gli strumenti di *soft law*, «per i più limitati tempi relativi alle specifiche modalità di elaborazione ed alla flessibilità che li caratterizza anche in funzione della possibile incidenza sulla loro disciplina di eventuali interventi operati dagli ordinamenti statali e dall'esercizio dell'autonomia privata, maggiormente si prestano a fornire una disciplina dei rapporti del commercio internazionale coerente con le esigenze della pratica degli affari».

non soggetti ad alcuna normazione cogente e viene rispettata in virtù di un'adesione volontaria ai precetti della stessa[30], tanto che è stato detto: *«soft law, no law»*[31].

Il ricorso alla *soft law* da parte delle Autorità amministrative indipendenti si è realizzato con interventi di *moral suasion* (o *dissuasion*), ed ha preso forma, ad esempio, con istruzioni (della Banca d'Italia, della CONSOB), orientamenti interpretativi (dell'ISVAP, della COVIP), determinazioni (dell'AVCP), che sono tutti interventi «caratterizzati da un elevato grado di informalità che si collocano al di fuori del sistema delle fonti normative tipizzate, dando origine a quelle che nel diritto anglosassone sono qualificate come *tertiary rules*», e che «ovviamente non creano regole vincolanti per gli operatori economici»[32].

Al contrario le linee guida dell'ANAC sono pensate e previste per sostituire disposizioni di natura sicuramente regolamentare, come quelle del d.P.R. n. 207/2010, il regolamento di esecuzione del Codice dei contratti pubblici del 2006, la cui abrogazione è subordinata, dall'art. 217 del d.lgs. n. 50/2016, proprio all'entrata in vigore delle linee guida dell'ANAC. Pertanto, si ritiene di poter condividere la tesi secondo cui «se è vero che gli operatori economici e (probabilmente) anche le amministrazioni pubbliche pretendono una regolazione più snella e veloce (rispetto ai tempi e alle modalità di approvazione dei regolamenti), è anche vero che tali esigenze, per quanto meritevoli di considerazione e di soddisfazione, non possono prevalere sugli interessi (perlomeno equivalenti, se non superiori) a una regolazione seria, strutturata, controllata, ma, soprattutto, affidata ad autorità che se ne assumano (potendolo fare) la responsabilità politica»[33].

[30] C. DEODATO, *Le linee guida dell'ANAC*, cit., 6-7.

[31] R. BIN, *Soft law, no law*, in A. Somma (a cura di), *Soft law e hard law nelle società postmoderne*, Torino 2009, 31-40, ove si descrive un mondo che sta sostituendo al popolo i consumatori, alla sovranità politica la *governance*, all'*hard law* il *soft law*. Il *soft law*, pur trovando la propria legittimazione nella legge (*hard law*), se ne discosta «perché contesta la stessa utilità di un diritto "duro", "arcigno", l'opprimente regolazione di provenienza statale»: quindi, in sostanza, «il *soft law*, per definizione, non c'entra con le "fonti di diritto", ossia con l'*hard law*».

[32] S. MORETTINI, *Il soft law nelle Autorità indipendenti, procedure oscure e assenza di garanzie?*, in *Osservatorio sull'Analisi d'Impatto della Regolazione*, 4 (2011), 5.

[33] C. DEODATO, *Le linee guida dell'ANAC*, cit., 7.

A ciò deve aggiungersi che le linee guida dell'ANAC, per espressa previsione normativa, sono sottoposte al sindacato del giudice amministrativo[34], mentre per le previsioni di *soft law* non è espressamente previsto un sindacato giurisdizionale[35].

In definitiva, sembra che le linee guida dell'ANAC non possano essere ricondotte nella *soft law*, nonostante un qualche successo di questo accostamento, sia in dottrina sia in giurisprudenza[36].

In effetti, è stato sottolineato come la *soft law* nel diritto amministrativo sia destinata ad operare solo «in zone del tutto periferiche e marginali», in quanto «gli stringenti principi garantistici del diritto amministrativo non possono certo tollerare che i pubblici poteri si avvalgano di strumenti ambigui e affrancati dal controllo di legalità»[37], preconizzando, per gli anni successivi, un'alternativa: o gli strumenti di *soft law* sarebbero rimasti innocui oppure essi avrebbero assunto una rilevante efficacia precettiva, salendo i gradini della scala normativa, mediante uno snaturamento e un "indurimento" della *soft law*, sicché «il *soft law* diventa [...] una sorta di finzione»[38] per mascherare un potere sostanzialmente di tipo regolamentare.

[34] L'art. 213, comma 2, del Codice, infatti, espressamente prevede che «resta ferma l'impugnabilità delle decisioni e degli atti assunti dall'ANAC innanzi ai competenti organi di giustizia amministrativa». In generale, l'impugnabilità degli atti delle Autorità amministrative indipendenti riveste un'importante funzione sistematica, volta ad evitare contrasti e sovrapposizioni tra attività amministrativa (delle Autorità) e giurisdizionale (dei Tribunali). Sul punto, F. CINTIOLI, *Il sindacato del giudice*, cit., 25, in merito alla possibilità di impugnare ed annullare con effetto *erga omnes* sia le direttive vincolanti che quelle non vincolanti. Cfr. anche G.P. CIRILLO, R. CHIEPPA, *Introduzione*, cit., 24. Infine, in merito all'impugnabilità delle linee guida, E. D'ALTERIO, *Regolare, vigilare, giudicare*, cit., 436 ss., osserva che «l'impugnabilità dei summenzionati atti desta perplessità sulla loro natura, perché lascia intendere che, sebbene qualificati come atti di regolazione flessibile, è possibile che i loro contenuti incidano direttamente sugli interessi dei singoli. La conclusione è, dunque, che non solo potranno essere adottati atti potenzialmente afflittivi (al di fuori del circuito parlamentare) ma gli stessi potranno produrre effetti nei confronti di specifici soggetti, a prescindere dal *nomen iuris* che li caratterizza».

[35] Cfr. G. GRASSO, *Le autorità amministrative indipendenti*, cit., 48-49.

[36] Cfr. Cons. Stato, comm. speciale, parere 14 settembre 2016, n. 1920. In dottrina, tra gli altri, F. GIUFFRÈ, *Le autorità indipendenti nel panorama evolutivo dello Stato di diritto: il caso dell'Autorità Nazionale* Anticorruzione, in I. Nicotra (a *cura di), L'Autorità nazionale anticorruzione*, cit., 30; I. NICOTRA, *L'autorità nazionale anticorruzione e la* soft regulation *nel nuovo codice dei contratti pubblici*, *ivi*, 35-36; R. ROLLI, D. SAMMARRO, *Il nuovo Codice dei contratti pubblici*, cit., 8.

[37] M. MAZZAMUTO, *L'atipicità delle fonti nel diritto amministrativo*, in *Diritto amministrativo*, 4 (2015), 683 ss.

[38] H. RASSAFI-GUIBAL, *De quelques aspect des usages des instruments de soft law comme vectures de normativité économique*, in *Revue de l'Union Européenne*, (2014), 93, richiamato in rapporto alla situazione italiana in M. MAZZAMUTO, *L'atipicità delle fonti nel diritto amministrativo*, cit., 683 ss.

4. IL DIFFICILE INQUADRAMENTO DELLE LINEE GUIDA DELL'ANAC TRA FONTI REGOLAMENTARI E ATTI AMMINISTRATIVI GENERALI

Se la riconduzione delle linee guida alla *soft law* pare quindi difficilmente praticabile, è parimenti assai opinabile la tesi volta a privare *tout court* le linee guida vincolanti dell'ANAC di natura normativa, riconducendole alla categoria degli atti amministrativi generali (in quanto atti di regolazione di un'Autorità indipendente) anziché al *genus* dei regolamenti[39], in linea con quella "fuga dal regolamento"[40] che ha caratterizzato la tendenza normativa degli ultimi anni.

In effetti, i dubbi rispetto all'inquadramento tra gli atti normativi derivano dalla difficoltà di rinvenire nella legge (o nel diritto eurounitario) un fondamento generale del potere normativo (regolamentare) dell'ANAC, come normalmente avviene per le Autorità amministrative indipendenti, in funzione della settorialità della disciplina e della tecnicità degli argomenti[41], mentre risulta molto più semplice riscontrare nelle linee guida i fondamenti di un potere di emanare atti amministrativi generali, che discende dall'attività di regolazione dell'ANAC stessa[42]. Infatti, come già rilevato in dottrina «[...] mentre gli atti di regolazione rispondono all'esigenza di affidare a un'autorità indipendente dal Governo l'introduzione di regole perlopiù tecniche [...] in segmenti di mercato circoscritti nei quali l'Esecutivo, per mezzo delle società partecipate, conserva un interesse (diretto o indiretto) che ne sconsiglia qualsivoglia

[39] F. CINTIOLI, *I regolamenti delle Autorità indipendenti*, cit., ritiene che sia sempre meno agevole ricondurre le singole manifestazioni della potestà regolatoria delle Autorità ai tipi tradizionali e che, pertanto, «la linea di distinzione tra atti normativi e generali [...] sembra sfumare nella sovrapposizione di dati strutturali, procedimentali ed effettuali», per cui il "catalogo" risulterebbe essere molto più ampio: «veri e propri regolamenti, rispondenti ai requisiti classici del tipo; atti di regolazione diretti a determinati soggetti ma potenzialmente espandibili; atti di regolazione che si combinano con atti di autonomia privata; atti di impulso per la conclusione di accordi; atti di indirizzo; segnalazioni; autorizzazioni in esenzione per categorie e fattispecie generali; in breve tutto ciò che è stato riassunto nella formula delle *tertiary rules*». Tale ricostruzione, che pur consente di cogliere le diverse "sfumature" della molteplicità di atti posti in essere dalle Autorità, sembra, però, recare in sé il rischio di smarrire le "coordinate", per cui si preferisce, almeno fino a quando ciò sarà possibile, continuare a fare uso delle categorie dei regolamenti e degli atti amministrativi generali.

[40] Cfr. V. COCOZZA, *La delegificazione*, Napoli 2005, 105-106 e 130; N. LUPO, *Il Consiglio di Stato individua un criterio per distinguere tra atti normativi e atti non normativi*, in *Giornale di diritto amministrativo*, 12 (2012), 1209 ss., e, con particolare riferimento alla vicenda delle linee guida dell'ANAC, C. DEODATO, *Le linee guida dell'ANAC*, cit., 4.

[41] Con specifico riguardo alle linee guida dell'ANAC, si vedano C. DEODATO, *Le linee guida dell'ANAC*, cit., 8; N. LONGOBARDI, *L'Autorità Nazionale Anticorruzione*, cit., 16-17. Per quanto riguarda, più in generale, i fondamenti legislativi del potere regolamentare, si vedano, per tutti, V. COCOZZA, *La delegificazione*, cit., 41; L. PALADIN, *Le fonti del diritto italiano*, cit., 341ss.

[42] Continuando la numerazione di V. COCOZZA, *La delegificazione*, cit., 105-106 e 130, si potrebbe, forse, parlare, a proposito delle linee guida dell'ANAC, di una "terza fuga dal regolamento".

intervento normativo, le linee guida dell'ANAC, al contrario, non presentano i caratteri della tecnicalità e della settorialità, né intervengono in un mercato che esige una regolazione autonoma dal Governo»[43].

In effetti, nel caso dei poteri che il nuovo Codice riconosce all'ANAC non sembrano esserci esigenze di regolazione tali da giustificare la sottrazione di un così vasto ambito materiale alla normazione di dettaglio governativa e, di conseguenza, seppur mediatamente, al circuito democratico.

In proposito, peraltro, la dottrina pare avere correttamente posto il problema generale della possibilità di qualificare quello dei contratti pubblici come un mercato regolato e, conseguentemente, della necessità, e della giustificazione, di un'autorità indipendente di regolazione non prevista dalle direttive europee e non presente nella maggior parte dei paesi europei[44].

In quest'ottica, la dubbia settorialità delle linee guida dell'ANAC che, pur nel mutato quadro normativo successivo all'entrata in vigore del d.l. 32/2019, coinvolgono argomenti di particolare vastità, rilevanza economica e complessità, è tale da far dubitare dell'ammissibilità di un'attribuzione alla stessa di potere normativo di tipo regolamentare. In effetti, a differenza di quanto accada per le altre Autorità indipendenti, all'ANAC sembra essere affidato, in materia di appalti, un potere normativo quasi di carattere generale, senza un'adeguata legittimazione politica e costituzionale, per di più in un settore nel quale le norme di regolazione possono concorrere a definire anche le fattispecie penali.

Se, nonostante tutto quanto detto, si intendesse, quindi, ricondurre le linee guida vincolanti tra gli atti normativi, risulterebbe dirimente il superamento dell'obiezione relativa all'inderogabilità del principio di tipicità delle fonti normative, che andrebbe risolta in via ermeneutica, leggendo le disposizioni del d.lgs. n. 50/2016, relative alle linee guida, come attributive di un potere normativo, di livello regolamentare, all'ANAC.

Tuttavia, rispetto all'attribuzione del potere regolamentare alle altre Autorità mancherebbe nel caso la settorialità, mentre per quanto riguarda il rispetto delle garanzie procedimentali[45], il legislatore, consapevole della grande responsabilità di carattere sostanzialmente politico affidata all'ANAC, ha almeno previsto, all'art. 213, comma 2, d.lgs. n. 50/2016, la preventiva sottoposizione delle linee guida ai

[43] C. DEODATO, *Le linee guida dell'ANAC*, cit., 8-9.

[44] Cfr. L. TORCHIA, *Il nuovo codice dei contratti pubblici: regole, procedimento, processo*, in *Giornale di diritto amministrativo*, 5 (2016), 605 ss.

[45] Più diffusamente, R. TITOMANLIO, *Potestà normativa e funzione di regolazione*, cit., 51-62. Cfr. T.E. FROSINI, *Attribuzioni delle Autorità*, cit.; sul punto, inoltre, F. GIUFFRÈ, *Le autorità indipendenti*, cit., 25-26, che, a proposito della legittimazione democratica delle autorità indipendenti, si riferisce ad una «legittimazione democratica "da funzione", qualitativamente diversa da quella fondata sui meccanismi elettivi di investitura e riposta, per converso, sulla possibilità di considerazione critica dell'operato degli stessi soggetti, tanto da parte della comunità dei "tecnici", quando, possibilmente, da parte di tutti i cittadini».

soggetti interessati, e quindi anche al Parlamento[46], per quanto ciò paia obiettivamente insufficiente a colmare il difetto di legittimazione democratica rispetto all'intervento in ambiti tanto ampi, rilevanti e delicati.

Tali garanzie procedimentali consentirebbero, in sostanza, soltanto di mitigare le perplessità di cui sopra[47]: la legalità procedimentale verrebbe così in soccorso della legalità sostanziale, secondo lo schema tipico dell'attività normativa delle Autorità indipendenti[48], seppure con esiti solo parzialmente soddisfacenti.

A tal proposito possono richiamarsi le osservazioni del Consiglio di Stato che, pur non ponendosi in termini espliciti il problema di un possibile inquadramento delle linee guida quali atti normativi[49], ha ugualmente avvertito il bisogno di sottolineare che la valorizzazione degli aspetti di legalità procedimentale consentirebbe di

[46] Sul parere parlamentare sugli atti di normazione governativi si veda N. LUPO, *Il parere parlamentare sui decreti legislativi e sui regolamenti del Governo*, in *Rivista trimestrale di diritto pubblico*, 4 (1999), 973-1049. Per quanto riguarda, nello specifico, l'ANAC, l'art. 213, comma 2, d.lgs. n. 50/2016, prevede, infatti, che «[...] l'ANAC, per l'emanazione delle linee guida, si dota, nei modi previsti dal proprio ordinamento, di forme e metodi di consultazione, di analisi e di verifica dell'impatto della regolazione, di consolidamento delle linee guida in testi unici integrati, organici e omogenei per materia, di adeguata pubblicità, anche sulla Gazzetta Ufficiale, in modo che siano rispettati la qualità della regolazione e il divieto di introduzione o di mantenimento di livelli di regolazione superiori a quelli minimi richiesti dalla legge n. 11 del 2016 e dal presente codice [...]».

[47] Relativamente alla possibilità di sopperire al *deficit* di legittimazione democratica delle Autorità amministrative indipendenti, per ritenere costituzionalmente fondato il loro potere regolamentare, cfr. R. TITOMANLIO, *Potestà normativa e funzione di regolazione*, cit., 58-62; M CLARICH, *I procedimenti di regolazione*, in *Il procedimento davanti alle autorità indipendenti, Quaderni del Consiglio di Stato*, Torino 1999, 19. Per una disamina delle tesi contrarie, cfr. G. GRASSO, *Le autorità amministrative indipendenti*, cit., 80 ss. Con specifico riguardo alla partecipazione dei soggetti interessati ai procedimenti di regolazione, al contraddittorio, alla funzione consultiva del Consiglio di Stato e all'Analisi di Impatto della Regolamentazione, F. GRECO, *La potestà normativa delle Autorità Amministrative Indipendenti e la partecipazione ai procedimenti di regolazione*, in *GiustAmm.it*, 9 (2014), 9; cfr. anche L. MARUOTTI, *Il contraddittorio nei procedimenti davanti alle autorità indipendenti*, in AA.VV., *Il procedimento davanti alle autorità indipendenti*, in *Quaderni del Consiglio di Stato*, Torino 1999, 60 ss. Con specifico riferimento all'ANAC, cfr. F. GIUFFRÈ, *Le autorità indipendenti*, cit., 30-32; I. NICOTRA, *L'autorità nazionale anticorruzione*, cit., 42-45; più critico R. GRECO, *Il ruolo dell'Anac*, cit., 5, secondo cui la necessità di ampie garanzie partecipative frustrerebbe quell'esigenza di speditezza alla base della scelta dello strumento delle linee guida: infatti, «l'esigenza sottolineata dal Consiglio di Stato di rispettare le garanzie partecipative tipiche degli atti di regolazione delle autorità indipendenti, traducendosi in un inevitabile aggravio procedimentale nella fase di predisposizione e adozione delle linee-guida, rischia di frustrare la conclamata esigenza di disporre di uno strumento di regolazione spedito, oltre che flessibile».

[48] Cfr. Cons. Stato, sez. 6ª, 2.5.2012, n. 2521; Cons. Stato, sez. 6ª, 27.12.2006, n. 7972. Con riguardo alle tematiche di legalità procedimentale e legalità sostanziale, con riferimento in generale alle Autorità indipendenti, cfr. M. CLARICH, *Autorità indipendenti*, cit., 75 ss.

[49] Tuttavia, come si è già accennato, Il Consiglio di Stato, con parere 1 aprile 2016, n. 855, aveva espresso l'opzione, per le linee guida per la determinazione dei livelli standard di qualità e delle categorie e classifiche dei lavori che saranno utilizzate dalle SOA, il modello del decreto ministeriale

sopperire al *deficit* di legittimazione democratica[50], da più parti avvertito: risulta, in primo luogo, necessaria una "sistematica consultazione" dei soggetti interessati (in particolare «la richiesta di parere al Consiglio di Stato è un importante elemento a garanzia della legalità sostanziale»[51]); in secondo luogo, è necessaria un'attenta analisi di impatto della regolazione (AIR)[52] che deve indicare quali siano i veri cambiamenti attesi da quell'intervento; in terzo luogo, è necessario che all'adozione delle linee guida segua un'attenta verifica *ex post* dell'impatto della regolazione (VIR), ai fini di un eventuale adattamento del contenuto delle linee guida alle esigenze emerse nella fase di concreta ed effettiva applicazione; in quarto e ultimo luogo, è necessario evitare, nel medio e nel lungo periodo, un'eccessiva proliferazione di linee guida (con fenomeni definiti dal Consiglio di Stato di c.d. *"regulatory inflation"*).

Tuttavia, come già accennato, sembra almeno dubbio che attraverso la predetta valorizzazione della "legalità procedimentale", secondo le indicazioni del Consiglio di Stato, possa ritenersi fondata una potestà normativa piena dell'ANAC, in considerazione del dato ineliminabile della vastità, delicatezza e rilevanza della materia ad essa affidata[53]. In particolare, la predisposizione di una sorta di "giusto procedimento", che preveda la consultazione di numerosi soggetti interessati, la richiesta di parere al Consiglio di Stato e alle Commissioni parlamentari, sembra essere sufficiente a sopperire al *deficit* di legalità sostanziale di atti amministrativi generali, in

"su proposta dell'ANAC", anziché l'affidamento alla sola Autorità della predisposizione di linee guida vincolanti, dimostrando così di considerare "sostanzialmente normativo" il contenuto di tali linee guida.

[50] In particolare, «[...] gli atti di regolazione adottati dalle Autorità, proprio perché espressione di un potere che è carente sotto il profilo della legalità sostanziale e promananti da soggetti che sfuggono al tradizionale circuito della responsabilità politica, debbano essere adottati nel rispetto di un procedimento articolato, aperto al contraddittorio e alla partecipazione dei soggetti interessati, e sottoposto al vaglio consultivo del Consiglio di Stato» (Cons. Stato, comm. speciale, parere 14 settembre 2016, n. 1920).

[51] Cons. Stato, parere 14 settembre 2016, n. 1920.

[52] Più in generale, l'art. 12, legge 23 luglio 2003, n. 229, assoggetta tutte le Autorità indipendenti all'obbligo di adottare forme di analisi di impatto della regolamentazione (AIR) «per l'emanazione di atti di competenza e, in particolare, di atti amministrativi generali, di programmazione o pianificazione, e, comunque, di regolazione» e di trasmetterle al Parlamento. Sul punto, M. CLARICH, *Autorità indipendenti*, cit., 27, osserva che «l'AIR, che consiste nell'individuazione preventiva e nella valutazione dei costi e dei benefici della regolamentazione, costituisce uno strumento utile per prevenire l'adozione di disposizioni inefficienti, gravose per i destinatari e talora dannose».

[53] C. DEODATO, *Le linee guida dell'ANAC*, cit., 11, ha osservato che «un atto preordinato a produrre effetti di conformazione dell'attività economica dei soggetti privati non può che restare affidato alla responsabilità politica di un'autorità legittimata democraticamente a intervenire sul contenuto dei diritti e degli obblighi dei cittadini (come il Parlamento o, al massimo, il Governo)».

modo che il relativo *iter* di adozione risulti legittimo e attento alle garanzie costituzionali, mentre almeno qualche seria perplessità resta in ordine agli atti normativi[54].

Forse proprio per questo il Consiglio di Stato ha ritenuto più prudente ricondurre le linee guida vincolanti dell'ANAC nella categoria degli atti amministrativi generali, sottolineando, peraltro, come tale inquadramento non comprometta le garanzie partecipative previste per la loro approvazione.

D'altra parte, però, il principio di prevalenza della sostanza sulla forma suggerisce un'ulteriore riflessione sulla qualificazione delle linee guida vincolanti in termini di atti amministrativi generali[55].

Infatti, se l'atto amministrativo generale si caratterizza per produrre effetti in ordine a una situazione concreta e particolare, le linee guida vincolanti, a dispetto del loro *nomen iuris*, sono invece destinate alla generalità degli operatori economici e producono effetti non circoscritti, ma anzi estesi a tutto il vasto mondo dei contratti pubblici[56].

[54] Peraltro, permangono dei dubbi in merito alle stesse garanzie partecipative, che sono risultate più o meno accentuate a seconda dei casi: la concreta conformazione delle modalità e delle forme di consultazione, infatti, è rimessa alla discrezionalità dell'ANAC dall'art. 213, comma 2, del Codice («nei modi previsti dal proprio ordinamento»).

[55] Anche chi, come N. LONGOBARDI, *L'Autorità Nazionale Anticorruzione*, cit., 14, ritiene condivisibile, almeno in linea generale, la riconduzione delle linee guida dell'ANAC agli atti amministrativi deve poi ammettere che «le linee guida dell'ANAC previste agli artt. 83 e 84 del codice definiscono tuttavia il sistema di qualificazione delle imprese, i requisiti di partecipazione alle procedure, il regime delle SOA. Limitano e condizionano l'accesso al mercato degli appalti pubblici e conseguentemente l'esercizio del diritto di impresa. Evidente ne è, pertanto, la portata normativa».

[56] Va messo in evidenza che neanche l'applicazione di quell'atto ad un settore limitato avrebbe potuto escludere, per ciò solo, la sua natura regolamentare. Ciò è stato chiarito dall'Adunanza Plenaria del Consiglio di Stato che ha affermato che «un atto può essere qualificato normativo anche se non si indirizza, indistintamente, a tutti i consociati, e ciò in quanto la "generalità" e l'"astrattezza" che contraddistinguono la "norma" non possono e non devono essere intesi nel senso di applicabilità indifferenziata a ciascun soggetto dell'ordinamento ma, più correttamente, come idoneità alla ripetizione nell'applicazione (generalità) e come capacità di regolare una serie indefinita di casi (astrattezza); pertanto, il carattere normativo di un atto non può essere disconosciuto solo perché esso si applica esclusivamente agli operatori di un settore (nelle specie ai titolari di impianti per la produzione di energia da fonte solare) dovendosi, al contrario, verificare se, in quel settore, l'atto è comunque dotato dei sopradescritti requisiti della generalità e dell'astrattezza» (Cons. Stato, Ad. Plen., 4 maggio 2012, n. 9). Sembra, dunque, condivisibile la posizione di M.P. CHITI, *Il sistema delle fonti*, cit., 436 ss., il quale afferma che «merita infatti ricordare che la nozione acquisita di atti amministrativi generali è quella di atti di carattere provvedimentale, e quindi senza il carattere dell'astrattezza, che determinano effetti giuridici in relazione a tutti i rapporti che abbiano le medesime caratteristiche. Laddove le linee guida hanno sì un'efficacia di carattere generale, ma in quanto atti con carattere astratto. In sostanza, sono un'esplicazione del potere normativo delle amministrazioni pubbliche, attribuito per legge». In particolare, afferma l'A., «ove le linee guida abbiano carattere vincolante *erga omnes*, con previsioni di carattere astratto, si devono ascrivere al genere degli atti regolamentari (per ora atipici) delle autorità amministrative, attribuiti per legge (nel caso la L. n. 11/2016). In breve, non atti amministrativi, ancorché generali; ma atti di regolamentazione». In sostanza, le linee guida, se sono vincolanti, sono da

In considerazione di questo apparente disallineamento tra la forma di atti amministrativi e la sostanza di atti normativi delle linee guida vincolanti dell'ANAC, va effettuata una più approfondita valutazione sulla contemporanea sussistenza dei requisiti della generalità e dell'astrattezza, tenendo in considerazione che soltanto i regolamenti pongono in essere una disciplina astratta, mentre gli atti amministrativi, anche quando rivolti ad una "generalità" di destinatari, sono sempre adottati per disciplinare situazioni concrete e per soddisfare specifiche esigenze pubbliche[57].

A tal proposito, la sentenza dell'Adunanza Plenaria n. 9/2012 aiuta a delineare ulteriormente i confini tra atti amministrativi e atti regolamentari: la lettura di tale sentenza contribuisce alla corretta qualificazione delle linee guida vincolanti dell'ANAC, pur nella consapevolezza della peculiarità del fenomeno delle linee guida, di cui l'Adunanza Plenaria, nel 2012, non poteva tenere certo conto. In particolare, «al fine di distinguere tra atto normativo e atto amministrativo generale occorre fare riferimento al requisito della indeterminabilità dei destinatari, nel senso che atto normativo è quello i cui destinatari sono indeterminabili sia a priori che "a posteriori" (essendo proprio questa la conseguenza della generalità e dell'astrattezza), mentre l'atto amministrativo generale ha destinatari indeterminabili a priori, ma certamente determinabili "a posteriori" in quanto è destinato a regolare non una serie indeterminata di casi ma, conformemente alla sua natura amministrativa, un caso particolare e/o una vicenda determinata, esaurita la quale vengono meno anche i suoi effetti» (Cons. Stato, Ad. Plen., 4 maggio 2012, n. 9).

L'Adunanza Plenaria, quindi, al fine di distinguere tra atti normativi e non normativi, non pone tanto l'accento sulla "settorialità" degli atti, potendo anche atti "settoriali" essere qualificati come normativi, bensì sulla indeterminabilità dei destinatari, che contraddistinguerebbe soltanto gli atti normativi[58].

Pertanto, anche alla luce dei principi espressi dall'Adunanza Plenaria, sembrerebbe non potersi affermare che le linee guida vincolanti dell'ANAC, preposte all'attuazione del Codice dei contratti pubblici fino alla loro permanenza in vigore, per una serie indeterminata di casi e per regolare vicende indeterminate ed indeterminabili, siano sussumibili all'interno della categoria degli atti amministrativi generali.

considerare quali atti di tipo regolamentare; altrimenti sono da considerare quali "atti amministrativi di indirizzo", «come le direttive amministrative (nel diritto nazionale) e gran parte delle comunicazioni della Commissione europea (nel diritto UE) - indicano obbiettivi alle amministrazioni di riferimento, le quali possono motivatamente discostarsene».

[57] Con riguardo alla categoria degli atti amministrativi generali, in relazione agli atti normativi, si veda per tutti A.M. SANDULLI, *Sugli atti amministrativi generali*, cit., 452 ss.

[58] Cfr. N. LUPO, *Il Consiglio di Stato*, cit., 1209 ss.

Inoltre, le linee guida vincolanti dell'ANAC risultano essere idonee alla "ripetizione nell'applicazione"[59] e capaci di regolare una serie indefinita di casi, integrando così i requisiti tipici degli atti normativi, come delineati dall'Adunanza Plenaria del Consiglio di Stato nella già citata sentenza. In sostanza, le linee guida vincolanti dell'ANAC sembrano avere tutte le caratteristiche degli atti normativi[60]: generalità, astrattezza, innovatività, attitudine a integrare la fattispecie astratta e non eccezionalità e temporaneità dei suoi effetti[61].

Tutto ciò rende difficile, quindi, superare la delineata discrasia tra la forma di atti amministrativi generali e la sostanza di atti normativi.

Naturalmente, i problemi di inquadramento non sono soltanto teorici, ma soprattutto gravidi di ricadute pratiche: soltanto ai regolamenti, infatti, è riconosciuta efficacia *erga omnes*; solo per i regolamenti vale il principio *iura novit curia*; solo a questi sono in generale applicabili i principi delle Preleggi sull'interpretazione; soltanto la violazione di un regolamento consente di ricorrere in Cassazione per violazione e falsa applicazione della norma (art. 360 c.p.c. e art. 111 Cost.)[62].

Infine, l'inquadramento delle linee guida dell'ANAC tra gli atti normativi sembra confermare i dubbi sulla legittimità dell'attribuzione di potere normativo alla stessa Autorità, per tutti i motivi sopra esposti (*in primis*, l'assenza di settorialità).

Pertanto, sembra preferibile affidare al Governo l'emanazione di un regolamento di attuazione del Codice dei contratti pubblici, mantenendo così l'unitarietà della regolamentazione, come in effetti ha fatto il legislatore, ritornando sui propri passi, con la novella del 2019, seppure senza andare fino in fondo, poiché non tutta la disciplina attuativa è demandata al regolamento. Resta ancora un ampio spazio

[59] L'attitudine di una norma ad essere applicata innumerevoli volte integra, in particolare, il requisito dell'astrattezza. Cfr. V. CRISAFULLI, *Lezioni*, cit., 21 ss.

[60] Si è già trattato, nelle pagine precedenti, dei caratteri identificativi degli atti normativi rispetto agli atti regolamentari. In dottrina, cfr. A.M. SANDULLI, *Sugli atti amministrativi generali*, cit., 452, e L. PALADIN, *Le fonti del diritto italiano*, cit., 39-46; da ultimo, con specifico riferimento alle linee guida, anche C. DEODATO, *Le linee guida dell'ANAC*, cit., 5 ss.

[61] Deve darsi atto, ad ogni buon conto, che i parametri utilizzati dall'Adunanza Plenaria nella citata sentenza n. 9/2012 non sono condivisi da parte della dottrina (G. DI COSIMO, *I regolamenti nel sistema delle fonti. Vecchi nodi teorici e nuovo assetto istituzionale*, Milano 2005), che predilige un'impostazione formalistica, ritenuta più affidabile e attendibile, che conduca a risultati univoci e sicuri in merito alla qualificazione degli atti. Tale tesi è criticata da C. DEODATO, *Le linee guida dell'ANAC*, cit., 5-6, ove afferma che «le certezze dei canoni formalistici (è un regolamento solo quello che si chiama così) comportano esiti ancora più paradossali e inaccettabili, sintetizzabili nel trattamento come un atto amministrativo (e, quindi, come elusione delle garanzie procedimentali e del vincolo del rispetto delle competenze normative regionali) di un provvedimento, invece, sostanzialmente normativo, solo perché nella legge è stato definito (in maniera fraudolenta) come tale. Meglio, allora, correre il rischio di applicare canoni valutativi non del tutto uniformi, che avallare la prassi, per molti versi incostituzionale [...], di rimettere all'arbitrio del legislatore la scelta della forma (e, quindi, secondo la tesi formalistica rifiutata, anche il regime sostanziale) dell'atto».

[62] R. TITOMANLIO, *Potestà normativa e funzione di regolazione*, cit., 30-31.

di intervento per le linee guida dell'ANAC, ciò che conferma i dubbi teorici sulla sistemazione di tali atti nel sistema delle fonti, suscitando anche qualche perplessità sull'opportunità di affidare un settore cruciale per la vita economica del Paese, quale quello dei contratti pubblici, alla regolamentazione di atti "atipici" di un'Autorità forse già di per sé "atipica".

5. CONSIDERAZIONI CONCLUSIVE

Cercando di trarre qualche considerazione conclusiva, ci sembra che la disciplina attuativa della materia dei contratti pubblici non si sottragga ai nodi problematici del rapporto tra potere pubblico, diritti fondamentali e forme della normazione, che costituiscono il filo conduttore del presente volume.

In particolare, sul piano della collocazione sistematica delle linee guida ANAC resta il dubbio se si stia assistendo ad un "indurimento" della *soft law*[63], mediante la predisposizione di strumenti di "regolamentazione flessibile" che sono in realtà dei veri e propri atti normativi, oppure ad un "ammorbidimento" dell'*hard law,* mediante la sostituzione di una fonte di tipo regolamentare (di cui si riscontrano alcuni aspetti) con atti amministrativi generali (di cui ricorrono altre caratteristiche).

Orbene, proprio perché sembrerebbe prevalere la considerazione delle linee guida come una fonte atipica e non come un atto amministrativo generale, sarebbe stata necessaria maggior chiarezza da parte del legislatore[64] e, forse, uno sforzo ricostruttivo più ampio da parte della giurisprudenza, soprattutto del Consiglio di Stato.

In qualche modo, la "novità" e l'anomalia delle linee guida pare peraltro collegarsi alla atipicità dell'Autorità alla quale il potere di adozione delle stesse è attribuito, dissimile da tutte le altre, con poteri ampi e trasversali (ben più della precedente Autorità di vigilanza dei contratti pubblici che pure operava in un ambito che – come abbiamo visto – non è propriamente riconducibile a un settore), che non paiono avere riscontro nell'ormai lunga e consolidata esperienza delle *Authorities* e che non ha eguali nel panorama europeo[65], demandando ad essa una parte significativa dell'attuazione del Codice dei contratti pubblici.

[63] In questi termini si esprimono, tra gli altri, N. LONGOBARDI, *L'Autorità Nazionale Anticorruzione*, cit., 14; M. MAZZAMUTO, *L'atipicità delle fonti nel diritto amministrativo*, cit., 683 ss.

[64] In dottrina si è avuto modo di osservare che «solo una nuova legge potrà dare un adeguato quadro al tema delle "fonti atipiche" in modo costituzionalmente orientato e corretto», risolvendo così la vaghezza e le contraddizioni della legge delega relativamente alle norme attuative: così M.P. CHITI, *Il sistema delle fonti*, cit., 436 ss.

[65] L. TORCHIA, *Il nuovo Codice dei contratti pubblici,* cit., 605 ss., secondo cui «La presenza di un'autorità indipendente per il mercato dei contratti pubblici non è invece prevista dalle direttive europee, né sussiste nella maggior parte dei paesi europei, con la conseguenza che la qualificazione dei poteri regolatori resta incerta anche per la mancanza di un quadro di riferimento generale e diffuso negli altri ordinamenti soggetti alle regole delle direttive europee in materia. Questa incertezza è resa più acuta dalla natura composita della missione dell'Anac, nella quale non è chiaro se la vigilanza

L'idea di ricorrere agli strumenti di "regolamentazione flessibile" e alle linee guida nasce dalla volontà di venire incontro alle esigenze di disciplinare una realtà economica in continuo sviluppo con strumenti più rapidi ed efficaci[66], ma pare avere finito per complicare ulteriormente il sistema, in termini di scarsa unitarietà della disciplina e di incertezza del diritto e con problemi di coordinamento con i principi generali dell'ordinamento, con i quali, in ultima analisi, rischiano addirittura di confliggere. Di questo pare in effetti essersi reso conto il legislatore quando, nel 2019, ha previsto il ritorno a un regolamento di attuazione, seppure – come abbiamo detto – non sembri avere avuto il coraggio di rivedere completamente le proprie scelte, mantenendo comunque uno spazio di operatività per le linee guida[67].

sui contratti pubblici sia strumentale e finalizzata alla lotta alla corruzione o se, invece, sia la prevenzione della corruzione ad essere strumentale al buon funzionamento del mercato dei contratti pubblici, che costituisce, in Italia come in altri paesi, una leva economica assai rilevante».

[66] I. NICOTRA, *L'autorità nazionale anticorruzione*, cit., 36, sottolinea che «l'intento è di assicurare la stabilità dell'assetto normativo, garantendo che i necessari aggiustamenti avvengano attraverso poteri di *soft law*, capaci di fornire un'interpretazione elastica ed evolutiva delle disposizioni legislative, in modo da delineare un quadro normativo certo per gli operatori del settore e le pubbliche amministrazioni, senza dover ricorrere a continui ritocchi legislativi».

[67] Peraltro, ad oggi, le linee guida rimangono l'unica sede di disciplina attuativa della materia, in considerazione dei ritardi nell'adozione del regolamento di cui sono circolate più bozze, l'ultima delle quali, risalente al luglio 2020, non tiene però conto delle modifiche operate dal c.d. "d.l. semplificazione", cioè il d.l. 16 luglio 2020, n. 76, convertito con modificazioni in legge 11 settembre 2020, n. 120.

381 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 381-394
ISSN: 1825-5167

PERICOLOSE SOGGETTIVITÁ. UOMINI E ANIMALI TRA DIRITTI E DISCIPLINE*

ILARIO BELLONI
Dipartimento di Giurisprudenza
Università di Pisa
ilario.belloni@unipi.it

ABSTRACT
This article intends to suggest an equality between animals and humans, identified both in terms of social "dangerousness" and united by being considered as subjectivities that are constituted as such *in relation to the law* and which must be treated, in biopolitical terms, with a surveillance that is itself a punishment. Through references to practical cases and conceptual definitions – such as those relating to the so-called "problematic bear" – the author tries to bring out a "disciplinary" level, typical of what Foucault identifies as "infra-law", which, even with regard to non-human animals, most of the time resolves itself into a real and proper "counter-law".

KEYWORDS
Infra-law, Counter-law, Foucault, Non-Human/Human Animals, Biopolitics, Rights.

1. UNA BIOPOLITICA ANIMALE

Il passo in cui Foucault si sofferma su ciò che lui stesso definisce come "infra-diritto"[1] – oggetto delle riflessioni di questa sezione monografica della rivista – è contenuto nella parte conclusiva del capitolo terzo di *Sorvegliare e punire*, dedicato, fin dal titolo, al "panottismo"[2]. In questo capitolo Foucault mostra come il panottismo, effetto del governo della società basato sulle "discipline", abbia storicamente

* Il tema delle "relazioni pericolose" – per utilizzare l'espressione divenuta celebre con il romanzo di Choderlos de Laclos e il film di Stephen Frears omonimi – tra uomini e animali è stato trattato più diffusamente nel libro *Derecho salvaje. Hombres y animales entre estado de naturaleza y civilización jurídica* (Madrid 2020) che ho scritto assieme a Chiara Magneschi. Il presente contributo, debitore della ricerca in esso condotta, intende individuare e approfondire la questione biopolitica sottesa alla tematica di riferimento.

[1] Sulla paternità di tale espressione si vedano le osservazioni contenute in L. MILAZZO, *Infradiritto, controdiritto e 'regressione del giuridico'*, in questa sezione monografica della rivista.

[2] M. FOUCAULT, *Surveiller et punir. Naissance de la prison*, Paris 1975, trad. it. di A. Tarchetti, *Sorvegliare e punire. Nascita della prigione*, Torino 1993, 213 ss.

affiancato, superandola, la «forma generale della grande Carcerazione»[3] e come, dunque, il modello della cosiddetta "esclusione" sia stato "avvicinato" dalla (e integrato nella) nascente "società disciplinare". In apertura del capitolo si legge di come veniva "governata" la peste secondo un regolamento cittadino della fine del secolo XVII: nella descrizione – peraltro estremamente attuale – delle tecniche di governo utilizzate per far fronte all'epidemia, Foucault fa riferimento, prima di tutto, a «una rigorosa divisione spaziale in settori: chiusura, beninteso, della città e del "territorio agricolo" circostante, interdizione di uscirne sotto pena della vita, uccisione di tutti gli animali randagi; suddivisione della città in quartieri separati, dove viene istituito il potere di un intendente»[4].

A colpire, tra le altre cose, è il riferimento a elementi che hanno a che vedere con la natura (sebbene già *determinata* in qualche modo dalle attività umane): il "territorio agricolo" e, ancor di più, gli "animali randagi", anche essi "oggetto" delle tecniche governamentali. Si tratta di un riferimento particolarmente utile ai nostri fini: in prima approssimazione – è un aspetto su cui si avrà modo di ritornare – vediamo già qui come il diritto degli uomini si espanda fino ad includere e normare categorie, elementi naturali, che, *loro malgrado*, finiranno per esservi ricompresi e assoggettati.

Ma la domanda da cui vorremmo prendere le mosse, ancora più aderente alla problematica dell'infra-diritto, riguarda la "sorte" degli animali selvatici nella società disciplinare. Quando Foucault, nel prosieguo del capitolo, descrive le modalità di esercizio e i soggetti destinatari delle discipline, di quegli "animali randagi", e, più in generale, della relazione animali umani-animali non umani, non pare esservi più traccia. Dunque – si potrebbe ritenere – la società disciplinare sembra essere *specificamente* (anche nel senso della "specie") umana, antropica. Che ne è allora in essa della "prossimità" animale alla vita degli uomini? In realtà, si vedrà come la questione sia ben più complessa di quanto possa apparire di primo acchito e come anche gli animali si ritrovino ad essere assoggettati alle discipline, destinatari tanto di un diritto "universale" quanto di un infra-diritto che finisce per rivelarsi, nel loro caso ancor più che nel caso degli esseri umani, come un contro-diritto[5].

[3] Ivi, 216.

[4] Ivi, 213.

[5] Questo, d'altronde, è l'effetto proprio delle discipline che consistono nell'infra-diritto, le quali solo apparentemente perpetuerebbero il diritto specificandone i contenuti, mentre in realtà strutturano qualcosa che può essere rappresentato come un "controdiritto", giacché «hanno il ruolo preciso di introdurre disimmetrie insormontabili e di escludere le reciprocità» (ivi, 242); così, per «quanto regolare e istituzionale possa essere, la disciplina, nel suo meccanismo, è un "contro-diritto"» (ivi, 243).

Non è un caso se uno dei (tanti) recenti volumi apparsi sulla biopolitica sia dedicato, fin dal titolo, alla inclusione degli animali nella sfera della biopolitica[6]: l'animale non umano, al pari di quello umano, si ritrova sempre preso in uno spazio che per definizione non può che essere biopolitico, giacché è definito dalla *relazione* con la legge[7]. Uno spazio *frontaliero*, occupato e determinato da quanti (uomini e animali) si trovano *davanti alla legge*, di fronte ad essa, al pari dell'"uomo di campagna" protagonista del celebre racconto kafkiano *Vor dem Gesetz*[8]. Già in termini generali, come indica la parola stessa, il campo della "biopolitica" tratta, *definendola*, della relazione tra "politica" e "vita": una relazione da intendersi non tanto nel senso della vita *politica*, del vivere politicamente, quanto fondamentalmente della *politica della vita*, del governo del "vivente". D'altronde, come notava lo stesso Foucault, per millenni «l'uomo è rimasto qual era per Aristotele: un animale vivente ed inoltre capace di esistenza politica»; l'uomo moderno è invece «un animale nella cui politica è in questione la sua vita di essere vivente»[9]. E la vita stessa non appare certo, in quest'ottica, come «un presupposto», ma come «un 'posto', [come] il prodotto di una serie di cause, di forze, di tensioni che ne risultano esse stesse modificate in un inarrestabile gioco di azioni e reazioni, di spinte e resistenze»[10].

Proprio una politica della vita (animale) è ciò che sembra caratterizzare, più che il "diritto" degli animali, l'infra-diritto che opera nei loro confronti: dai cosiddetti ripopolamenti alle riserve naturali, dalla "protezione" di certe specie alla "soppressione" di altre, considerate particolarmente invasive o dannose per l'ambiente; dalla promozione di una sorta di *continuum* tra vita animale e vita umana alla fissazione di determinati criteri, ispirati alla cosiddetta "vita buona", a cui tale continuità dovrebbe essere informata. E soprattutto, come si vedrà, dall'operatività di un sistema di "discipline" della ferinità all'individuazione di categorie della pericolosità degli

[6] Si tratta del testo di C. WOLFE, *Before the Law: Humans and Animals in a Biopolitical Frame*, Chicago 2013, trad. it. di C. Iuli, *Davanti alla legge. Umani e altri animali nella biopolitica*, a cura e con introduzione di C. Iuli, Milano-Udine 2018.

[7] Si vedano, in tal senso, i contributi raccolti nel volume *Foucault and Animals*, edited by M. Chrulew and D. Wadiwel, Leiden-Boston 2017 nonché la sezione monografica del numero XXII/1 del 2020 della rivista *Etica & Politica*, dedicata al tema "Anti Speciesism between Science and Law" (con interventi di Raffaella Colombo, Kristin Andrews, Giovanni Alberto Biuso, Florence Burgat, Michele Merli Grioni, Cosimo Coen Nicolini, Benedetta Piazzesi, Gianfranco Mormino).

[8] Cfr. F. KAFKA, *Vor dem Gesetz*, in *Selbstwehr. Unabhängige jüdische Wochenschrift*, Jg. 9, Nr. 34, Prag 7.9.1915, poi in ID., *Ein Landarzt. Kleine Erzählungen*, München und Leipzig 1919, trad. it. di E. Castellani, *Davanti alla legge*, in F. KAFKA, *La metamorfosi e altri racconti*, introduzione di F. Masini, Milano 1974, 114 ss.

[9] M. FOUCAULT, *Histoire de la sexualité* I. *La volonté de savoir*, Paris 1976, trad. it. di P. Pasquino e G. Procacci, *La volontà di sapere*, Milano 1978, 127.

[10] R. ESPOSITO, *Bìos. Biopolitica e filosofia*, Torino 2004, 23.

animali selvatici e di *standards* di condotta funzionali alla configurazione di comportamenti *dovuti* da parte degli animali non-umani nei confronti degli animali umani.

2. SOGGETTI DI DIRITTO O SOGGETTI ALL'INFRA-DIRITTO?

Le categorie e le pratiche giuridiche più "specializzate" hanno, in quest'ottica, da sempre operato, e continuano a farlo, *servendo* le logiche e gli scopi della biopolitica, al fine di istituire, ascrivere, distinguere, omologare, tracciare distinzioni e fissare limitazioni, aprire e chiudere gli spazi, operare continuità e determinare interruzioni tra vita umana e vita animale. Accanto (o meglio, sopra) a ciò, i principi generali del diritto e le categorie giuridiche più "onnicomprensive" vengono richiamati e impiegati per tutelare e proteggere la vita animale, oltre a quella umana, secondo quella che Foucault chiamava la «forma giuridica generale» che garantisce «un sistema di diritti uguali in linea di principio»[11], ovvero in base a quel modello tipico del «giuridismo universale della società moderna [che] sembra fissare i limiti dell'esercizio dei poteri»[12]; limiti che – è questa la tesi di Foucault –, a fronte di questo piano "alto" rappresentato dal "diritto", verrebbero in fondo resi vani dall'operatività di un infra-diritto che finisce per sostanziarsi in un contro-diritto.

Del resto, quest'ultimo non costituirebbe che l'altra faccia, l'inevitabile e necessario risvolto del giuridismo universale della società moderna: il panottismo ad essa consustanziale «diffuso ovunque vi fa funzionare, di contro al diritto, un meccanismo immenso e minuscolo insieme, che sostiene, rinforza, moltiplica la disimmetria dei poteri e rende vani i limiti che le sono stati posti»[13]. Il modello del giuridismo universale verrebbe integrato proprio dai principi del diritto, dal sistema dei diritti e dalle categorie e forme giuridiche generali: Foucault, in diversi passaggi, fa dei riferimenti alla categoria della rappresentanza politica, alla forma giuridica del "contratto" e, per quello che ci interessa maggiormente, all'idea di una soggettività giuridica, definita secondo norme universali dai sistemi giuridici moderni[14].

Quest'ultimo riferimento rileva in modo particolare ai nostri fini: difatti, la riflessione sugli animali e la loro concettualizzazione giuridica si sono sempre più contraddistinte e caratterizzate per una possibile e quanto mai auspicabile loro qualificazione in termini di "soggetti di diritto". Non è un caso se già nel 1928 Cesare Goretti intitolava un suo saggio pionieristico sull'animalismo giuridico *L'animale quale soggetto di diritto*[15] e se ancora qualche anno addietro la dottrina di stampo

[11] M. FOUCAULT, *Sorvegliare e punire*, cit., 242.

[12] Ivi, 243.

[13] *Ibidem*.

[14] Cfr. ivi, 241-243.

[15] Cfr. C. GORETTI, *L'animale quale soggetto di diritto*, in *Rivista di filosofia*, 19 (1928), 348-369.

pubblicistico, riferendosi alla condizione giuridica degli animali, insisteva nel mettere in luce il passaggio concettuale «da *res* a soggetti»[16]. Al tempo stesso, in molti degli ordinamenti giuridici contemporanei, pur non essendo ancora stata positivizzata la soggettività giuridica degli animali, si sono "codificate" alcune istanze proprie del dibattito sugli *animal rights*[17] dacché si è affermata la tendenza a formalizzare come dato normativo la categorizzazione di determinati diritti degli animali e, più in generale, la protezione della vita animale accanto a quella umana.

Tuttavia, approfondendo la suggestione foucaultiana, sembra essere proprio questo crinale della soggettività animale a poter rappresentare, ad un tempo, tanto le "maggiori altezze" del diritto quanto un argine, una *cordigliera*, oltre cui non è possibile vedere. Tra i molti riferimenti che si potrebbero operare a conferma di tale tesi, quelli relativi al trattamento di esemplari come i lupi, gli orsi e altre specie accomunate dalla denominazione "fauna selvatica" appaiono particolarmente signi-

[16] Si fa riferimento, in particolare, al contributo di F. RESCIGNO, *I diritti degli animali. Da* res *a soggetti*, Torino 2005, che offre una sintesi efficace del percorso che parte dalle previsioni codicistiche dell'animale come bene-cosa-oggetto di diritti alle più recenti acquisizioni del dibattito e della legislazione sui diritti degli animali. Si vedano altresì su ciò, con interessanti rilievi critici, G. SPOTO, *Il dibattito sulla soggettività giuridica degli animali e il sistema delle tutele*, in *Cultura e diritti. Per una formazione giuridica*, IV (2018), 1/2, 61-78 nonché, in punto di diritto, G. MARTINI, *La configurabilità della soggettività animale: un possibile esito del processo di 'giuridificazione' dell'interesse alla loro protezione*, in *Rivista critica del diritto privato*, 35 (2017), 1, 109-150 e J. M. DE TORRES PEREA, *El nuevo estatuto jurídico de los animales en el Derecho Civil: de su cosificación a su reconocimiento como seres sensibles*, Madrid 2020, che pone in risalto e analizza criticamente il concetto di "dignità" nel dibattito sullo statuto giuridico degli animali.

[17] Il dibattito sugli *Animal Rights*, sviluppatosi, come è noto, negli anni Settanta del secolo scorso, a partire dal celebre saggio *Animal Liberation* di Peter Singer e dai lavori di Tom Regan, si è poi ramificato e incanalato in diverse direzioni, non ultima quella più propriamente "spaziale" e quella relativa all'ambito dei "doveri" tra le specie, che, come si vedrà, avranno a che fare, sotto diversi aspetti, con la prospettiva teorica avanzata nel presente contributo. Spunti interessanti per i nostri fini sono stati offerti, in quest'ottica, da una serie di studi degli ultimi due decenni del dibattito sui "diritti degli animali", come, tra gli altri: J. MOSTERÍN HERAS, *Los derechos de los animales: una exposición para comprender, un ensayo para reflexionar*, Madrid 1994, nonché ID., *Animales y ciudadanos: indagación sobre el lugar de los animales en la moral y el derecho de las sociedades industrializadas*, Madrid, 1995; S. CASTIGNONE, *Povere bestie. I diritti degli animali*, Venezia 1997; A. Mannucci – M. Tallacchini (a cura di), *Per un codice degli animali*, Milano 2001; M. ARÀNEGA – J.-F. DELGADO, *Los derechos y deberes de los animales*, Barcelona 2003; P. DE LORA, *Justicia para los animales. La ética más allá de la humanidad*, Madrid 2003; F. RESCIGNO, *I diritti degli animali*, cit.; J. M. PÉREZ MONGUIÓ, *Los animales como agentes y víctimas de daños: especial referencia a los animales que se encuentran bajo el domino del hombre*, Barcelona 2008; L. BATTAGLIA, *Un'etica per il mondo vivente. Questioni di bioetica medica, ambientale, animale*, Roma 2011; S. CASTIGNONE – L. LOMBARDI VALLAURI, *La questione animale*, in *Trattato di Biodiritto*, diretto da Stefano Rodotà e Paolo Zatti, Milano 2012; D. CERINI, *Il diritto e gli animali. Note gius-privatistiche*, Torino 2012; A. PISANÒ, *Diritti deumanizzati. Animali, ambiente, generazioni future, specie umana*, Milano 2012; L. LOMBARDI VALLAURI, *Scritti animali. Per l'istituzione di corsi universitari di diritto animale*, Gesualdo 2018.

ficativi. Il caso più interessante, a tal proposito, sembra poter essere quello rappresentato dal trattamento dell'orso bruno nell'ordinamento italiano. In questo caso, le "maggiori altezze" del diritto sono visibili nelle intenzioni della legge ordinaria n. 157 del 1992, la quale dichiarava tale animale "specie particolarmente protetta", meritevole, come tale, di protezione "rigorosa". Il successivo D.P.R. 8 settembre 1997 n. 357 recepiva la Direttiva europea CEE/43/92 in materia di conservazione degli habitat naturali (c.d. Direttiva *Habitat*), con cui venivano fissati i termini della tutela degli animali protetti – in specie, dei grandi predatori – prevedendo i divieti di cattura, uccisione, perturbazione del loro ambiente[18].

Una volta che si discenda da queste altezze, la prospettiva sembra però mutare: all'atto di concretizzare sul territorio questa istanza di protezione e di tutela, mettendo in atto meccanismi tipicamente infra-giuridici, la tutela degli orsi si è risolta quasi nel suo contrario. Il *Piano di azione interregionale per la conservazione dell'orso bruno sulle Alpi centro-orientali*, denominato "Pacobace"[19], potrebbe essere considerato nella prospettiva dell'"infra-diritto" foucaultianamente inteso, poiché sembrerebbe perseguire finalità analoghe a quelle del diritto, «cambiandolo di scala e rendendolo con ciò più minuzioso e senza dubbio più indulgente»[20].

Appare tuttavia particolarmente significativa la circostanza per cui questo piano d'azione sia stato nel giro di poco tempo integrato e modificato, fino a renderlo nei fatti "altra cosa" rispetto al progetto originario. In una nota del 2015, pubblicata sul sito istituzionale del Ministero dell'Ambiente e della Tutela del Territorio e del Mare[21], si leggono le giustificazioni addotte a sostegno di tale modifica:

> Nel corso degli ultimi anni si è verificato un notevole incremento demografico della popolazione dell'orso sulle Alpi centro-orientali, con conseguente aumento delle situazioni problematiche, sia in termini di danni diretti causati dai plantigradi, sia di pericolosità, legata all'aumento della frequenza di incontri ravvicinati tra uomo e orso. Ciò ha reso necessaria, anche ai fini di una migliore accettazione sociale della specie, una gestione più rapida ed efficace di quei singoli individui cosiddetti "problematici",

[18] Si veda l'art. 12 della Direttiva, che a sua volta richiama l'Allegato IV, lettera a).

[19] Il Piano è stato redatto da un tavolo tecnico interregionale costituito dai seguenti enti: Provincia Autonoma di Trento, Provincia Autonoma di Bolzano, Regione Friuli Venezia Giulia, Regione Lombardia, Regione Veneto, Ministero dell'Ambiente e ISPRA. È stato poi formalmente adottato dalle amministrazioni territoriali coinvolte e approvato dal Ministero dell'Ambiente e della Tutela del Territorio e del Mare con Decreto direttoriale n. 1810 del 5 novembre 2008. Si tratta del primo esempio in Italia di Piano d'azione concertato, condiviso e approvato dagli enti territoriali coinvolti.

[20] M. FOUCAULT, *Sorvegliare e punire*, cit., 242. Subito prima Foucault, facendo sempre riferimento all'"apparenza" delle discipline che consistono nell'infra-diritto, aveva scritto che «sembrano immergere fino al livello infinitesimale delle singole esistenze, le formule generali definite dal diritto» (*ibidem*).

[21] La nota è consultabile all'indirizzo https://www.minambiente.it/pagina/piano-dazione-interregionale-la-conservazione-dellorso-bruno-sulle-alpi-centro-orientali.

> responsabili di una rilevante quota dei danni economici e delle situazioni di pericolo più significative.

Esplicitata, a proposito degli orsi, la categoria di "individui responsabili" (di danni economici e situazioni di pericolo per gli uomini), la modifica del Piano d'azione si preoccupa di definire in modo più puntuale la tipologia di "orso problematico" al fine di rendere legittime nei confronti di quest'ultimo misure che, lungi dal consistere in una tutela specifica degli orsi delle Alpi centro-orientali, possono arrivare a determinarne la soppressione:

> Le Amministrazioni responsabili dell'attuazione del *Pacobace*, su iniziativa della Provincia di Trento, hanno quindi concordato con il Ministero dell'Ambiente e Ispra una modifica del capitolo 3 del Piano d'Azione, che definisce l'"orso problematico" in maniera più precisa, prevedendo inoltre, nell'ambito della definizione del grado di problematicità dei possibili comportamenti di un orso e relative azioni possibili (Tabella 3.1), l'inclusione della categoria "orso che provoca danni ripetuti a patrimoni per i quali l'attivazione di misure di prevenzione e/o di dissuasione risulta inattuabile o inefficace" tra quelle per le quali può essere consentita l'attivazione di azioni energiche comprese la cattura per captivazione permanente e l'abbattimento. Ferme restando tutte le azioni di dissuasione che dovranno essere poste in essere secondo la normativa vigente, è mantenuta invariata l'obbligatorietà della richiesta di autorizzazione al Ministero per ogni intervento di rimozione.

Non scenderemo nell'analisi minuta del citato capitolo 3 del Piano d'azione, dedicato ai "criteri e procedure d'azione nei confronti degli orsi problematici e d'intervento in situazioni critiche", a cui rimandiamo i lettori interessati; segnaliamo tuttavia, ai nostri fini, la rilevanza della Tabella 3.1 ai fini di un controllo dell'orso problematico ispirato a metodi e criteri propri di quel "panottismo" delineato da Foucault nella pagine citate in apertura di *Sorvegliare e punire* nonché la previsione di tutta una serie di attività e misure di disciplinamento degli orsi classificati come "confidenti", per i quali l'"abituazione" all'uomo è diventata una regola e va pertanto "trattata". Un susseguirsi di classificazioni (l'orso problematico può essere, a seconda dei casi, classificato come "dannoso", "pericoloso" o "confidente"), normazioni, previsioni, controlli e misure (si va dalla previsione dell'applicazione del radiocollare all'orso al fine di consentirne il monitoraggio radiotelemetrico alla predisposizione di misure definite come "più energiche") è ciò che rappresenta l'esito dell'incontro dell'orso non tanto con l'uomo quanto con la legge dell'uomo, ovvero l'attivazione di una relazione che quest'ultima, quasi seguendo il modo di un automatismo, instaura con tutto ciò che trova *davanti a sé*, come se quel "tutto" (elementi naturali, animali e uomini "pericolosi") volesse sfidare la sua "vigenza"[22].

[22] Giorgio Agamben, rileggendo il carteggio tra Scholem e Benjamin, ha fatto riferimento all'idea di una "vigenza senza significato" quale manifestazione tipica che la legge, pur continuando a darsi nella forma del *rapporto*, assumerebbe rispetto a ciò che vive nel suo bando (cfr. G. AGAMBEN, Homo sacer. *Il potere sovrano e la nuda vita*, Torino 1995, 59 ss.).

3. BESTIE DELINQUENTI

Note sono, già solo a livello di cronaca, le specificazioni di quelle misure genericamente definite come "più energiche". I giornali riportano oramai ciclicamente, in concomitanza con la conclusione della stagione estiva, notizie della cattura e dell'uccisione di orsi "problematici" per effetto di ordinanze di governatori e amministratori locali dei territori interessati dalla "pericolosità" di tali animali e dai sempre più frequenti incontri/scontri tra questi e gli animali-umani. Nelle regioni più montuose e boschive dell'Italia, come il Trentino Alto Agide o l'Abruzzo, ritorna con preoccupante regolarità la notizia dell'orso che aggredisce qualcuno, solitamente un turista o un cercatore di funghi addentratisi nei boschi, e che finisce per ciò stesso con l'essere condannato all'uccisione, in base a un'ordinanza appositamente emessa dalle autorità dei luoghi dove si è verificata l'aggressione. Alcuni casi tra questi sono diventati particolarmente popolari ed emblematici, al punto da suscitare un accorato dibattito pubblico, animato tanto dalle istanze animaliste quanto da quelle più propriamente securitarie[23].

Da un certo angolo visuale, la soppressione dell'animale non rappresenta un rimedio *estremo*. Essa appare come l'esito infausto di una *policy* che nelle intenzioni voleva dar vita alla restaurazione di un ordine naturale, ma soprattutto rende al meglio l'idea di una relazione instaurata e praticata dall'uomo nei confronti dell'animale in termini che appaiono *essenzialmente* giuridici, giacché il primo applica al secondo le categorie (giuridiche) che gli sono proprie, quelle che affondano le proprie ragioni nell'ordinamento del "sociale" e che decretano la possibile/doverosa

[23] Tra i casi più eclatanti vi è quello dell'orso Bruno (altresì denominato "Jj1") che, seguendo la propria natura libera e girovaga, all'età di due anni abbandona il natio parco dell'Adamello-Brenta, in Trentino, per dirigersi in Germania. Giunto in terra tedesca, colpevole di aver saccheggiato alcuni esemplari di allevamenti, finisce per essere condannato a morte: la mattina del 26 giugno 2006, dopo un inseguimento durato settimane, viene ucciso in Baviera per decisione delle autorità bavaresi da due colpi di fucile, mentre riposava accanto a un lago. Un mese dopo la sua uccisione, le istituzioni governative decidono di catturare e segregare in un recinto la madre, Jurka, responsabile della "educazione" della sua prole. Più recentemente, questa storia si è ripetuta e ha avuto come protagonisti esemplari di orse, come Daniza, dichiarata "*pericolosa*" dalla Provincia Autonoma di Trento e uccisa da un eccesso di anestetico durante la cattura, e KJ2, uccisa dagli agenti del Corpo Forestale sulla base di un'ordinanza del presidente della medesima provincia perché rea di avere i suoi due cuccioli con sé e di essersi imbattuta in un essere umano aggredendolo (proprio perché temeva per i suoi cuccioli). In questi casi si trattava, peraltro, di animali "particolarmente" protetti, reintrodotti in *habitat* da cui mancavano da decenni (secondo i piani di ripopolamento dell'orso bruno in Trentino previsti dal progetto *Life Ursus*) che hanno finito per essere uccisi o imprigionati non appena il loro carattere e la loro condotta siano stati giudicati "inopportuni". Ma forse la storia divenuta più celebre e avvincente è quella dell'irriducibile orso M49, denominato "Papillon", che è riuscito a evadere per ben tre volte (l'ultima avvenuta qualche mese fa) dall'area recintata in cui è stato ripetutamente rinchiuso: nei suoi confronti è stata ordinata e praticata tutta una serie di "trattamenti" – dalla narcotizzazione alla castrazione – e monitoraggi che fino ad ora non hanno tuttavia prodotto i risultati "sperati".

soppressione dell'animale. Se si guarda infatti alla *logica* della soppressione dell'animale si potranno intravedere in essa i termini, i contorni di una sanzione. La ragione della soppressione, al di là degli effetti cui mira, sembra giustificata dalla condotta dell'orso "problematico", che si sarebbe comportato come una "bestia selvaggia", e non come una creatura "socievole"[24].

Come si avrà modo di vedere a breve, si tratta, in fondo, della stessa logica che gli uomini applicano ai loro simili quando non li considerano (più) degni di far parte del "consorzio umano". Tuttavia, l'estensione all'animale di una logica giuridica propriamente umana sembra sostenuta, favorita o giustificata proprio in quanto all'animale vengano applicate quelle categorie giuridiche appositamente pensate per l'uomo, le quali dunque presuppongono che l'animale sia in qualche modo umanizzabile. Non a caso, storicamente si è accostato talvolta al sostantivo "bestia" l'aggettivo "delinquente"[25], inteso sia nel senso letterale, e cioè come chi "viene meno" (al proprio dovere), sia in senso più specificamente giuridico, ossia come chi compie, o sia capace di compiere, *delitto* – termine che viene proprio da *delinquere* e sta ad indicare la colpa più grave, il reato di maggiore gravità tipico del diritto penale[26].

La "finzione" dell'umanizzazione della bestia rappresenta, d'altronde, il meccanismo attraverso cui le si possono ascrivere i doveri propri di un consorzio civile, fra i quali innanzi tutto quello di non nuocere al prossimo, pena l'applicazione di una sanzione più o meno grave[27]. Ad un animale come l'orso sarebbe, in altri ter-

[24] Cfr. in proposito D. FONDAROLI, *Le nuove frontiere della colpa d'autore: l'orso "problematico"*, in *Archivio Penale*, 3 (2014), 657-668, che sviluppa una trattazione "penalistica" della figura dell'"orso problematico".

[25] "Bestie delinquenti" fu l'espressione emblematica usata – in realtà con scopi di denuncia degli atteggiamenti "giuridicamente" ostili nei confronti degli animali – dal giurista Carlo D'Addosio per intitolare un suo studio del 1892 rimasto immeritatamente poco noto e dedicato ai comportamenti presunti *devianti* degli animali e alle loro implicazioni in termini di giustizia "umana": cfr. C. D'ADDOSIO, *Bestie delinquenti*, con prefazione di Ruggero Bonghi, Napoli 1892 (l'opera è stata opportunamente ripubblicata nel 2012 in ristampa anastatica e con una introduzione di Claudio Corvino dall'editore Arnaldo Forni di Bologna).

[26] Almeno secondo quanto prevede l'ordinamento giuridico italiano e, più in generale, tutti quegli ordinamenti di *civil law* in cui la categoria dei "delitti" è propria del diritto penale (fa eccezione il sistema giuridico spagnolo, in cui è prevista, in aggiunta al *delito*, la tipologia del "delito civil" – nonché del "cuasi delito civil" – per designare gli illeciti civili extracontrattuali). Nel diritto penale italiano, come è noto, i reati si distinguono in "delitti" e "contravvenzioni" in base alla pena prevista (le pene previste dal codice penale italiano per i delitti – ergastolo, reclusione, multa – sono più gravi di quelle previste per le contravvenzioni, come l'arresto e l'ammenda).

[27] Tale rilievo non mette in discussione la questione dei cosiddetti "diritti degli animali", se non per gettare luce su un aspetto che non può che apparire, dopo quanto detto, del tutto paradossale, e cioè quello dei presunti "doveri" degli animali stessi. Ad ogni modo, non è qui il caso di trattare nello specifico il tema della "liberazione animale" – per usare la nota espressione di Peter Singer; del resto,

mini, impedito di essere se stesso: se agisse assecondando la propria natura selvaggia, il suo comportamento, come è stato notato, potrebbe integrare per paradosso gli estremi di una "colpa d'autore"[28], in un processo in cui rivelerebbe punire soprattutto il modo di essere dell'orso piuttosto che il fatto da questi commesso.

La chiave per comprendere tali ambiguità pare peraltro ritrovarsi proprio nella logica insita in quella categoria di "soggettività giuridica", a cui abbiamo accennato in precedenza, e nei tentativi, tanto encomiabili quanto prodromici di *side effects*, di mutuarla per trattare gli animali *nel senso del diritto*: se, infatti, come abbiamo visto, è mutata la considerazione degli animali da mere *res* a soggetti di diritto, ciò può significare poter pensare di proiettare sull'animale quella capacità di essere titolare di situazioni giuridiche soggettive, siano esse attive o passive, ovvero di ritenerlo idoneo a godere di diritti considerandolo al contempo destinatario anche di obblighi[29].

La morte diviene allora per l'animale né più né meno che una pena inflitta a seguito del venir meno ad un comportamento dovuto, ritenuto nei suoi confronti

come si è avuto modo di vedere, lo scopo e l'ambito del presente lavoro non si situano propriamente al centro del dibattito sui diritti degli animali.

[28] Cfr. D. FONDAROLI, *Le nuove frontiere della colpa d'autore*, cit.

[29] I primi tentativi di inquadrare gli animali tra i "soggetti di diritto" non appaiono eccessivamente "preoccupati" – come è naturale che sia, e come è sovente accaduto, in fasi storiche caratterizzate dalla rivendicazione di diritti – dei *side effects* della titolarità dei diritti in capo agli animali, ovvero della contropartita in termini di doveri (o meglio ancora, di obblighi giuridici). Questi tentativi sembrano animati soprattutto da un atteggiamento di fondo compassionevole, da quella «pietà verso gli animali» (nonché da una certa fiducia nel progresso) che portava nel 1920 un filosofo come Piero Martinetti a scrivere che gli uomini arriveranno prima o poi a riconoscere «che vi è fra tutte le creature un rapporto ed un'obbligazione vicendevole ed estenderanno, senza sforzo, a tutti gli esseri viventi quei sensi di carità e di giustizia, che ora considerano come dovuti soltanto agli uomini» (P. MARTINETTI, *La psiche degli animali* (1920), in ID., *Saggi e discorsi*, Torino 1926, ora in ID., *Pietà verso gli animali*, a cura e con una introduzione di Alessandro Di Chiara, Genova 1999, p. 296). Se qui l'appello alla *giustizia* sembra verosimilmente ancora contraddistinto da una prospettiva di tipo morale, prima ancora che giuridico, è con il fondamentale saggio, sopra citato, di Cesare Goretti – successivo di due anni allo scritto di Martinetti – che la prospettiva più specificamente *giuridica* della "soggettività" viene fatta emergere e trattata in riferimento agli animali. Goretti, peraltro, riconosce il fondamento di tale soggettività in una "coscienza giuridica", una sorta di naturale propensione per il *giuridico*, ovvero per la sfera normativa dei rapporti intersoggettivi, che caratterizzerebbe uomini e animali insieme: «Come non possiamo negare all'animale in modo sia pure crepuscolare l'uso della categoria della causalità – scrive Goretti – così non possiamo escludere che l'animale partecipando al nostro mondo non abbia un senso oscuro di quello che può essere la proprietà, l'obbligazione. Casi innumerevoli dimostrano come il cane sia custode geloso della proprietà del suo padrone e come ne compartecipi all'uso. Oscuramente deve operare in esso questa visione della realtà esteriore come cosa propria, che nell'uomo civile arriva alle costruzioni raffinate dei giuristi. È assurdo pensare che l'animale che rende un servizio al suo padrone che lo mantiene agisca soltanto istintivamente. [...] Deve pure sentire in sé per quanto oscuramente e in modo sensibile questo rapporto di servizi resi e scambiati. Naturalmente l'animale non potrà arrivare al concetto di ciò che è la proprietà, l'obbligazione; basta che dimostri esteriormente di fare uso di questi principî che in lui operano ancora in modo oscuro e sensibile» (C. GORETTI, *L'animale quale soggetto di diritto*, cit., 348 ss.).

obbligatorio, "vincolante". E che di vincolo di tratti lo si può affermare se si considera che la pena (di morte) viene comminata per avere l'animale agito al di fuori di una logica in cui pare in definitiva tenuto a muoversi: reimpiantato in un ambiente proprio in quanto selvatico – si pensi precisamente all'orso delle Alpi centro-orientali e ai ripopolamenti che lo hanno riguardato – l'animale viene "umanamente" sanzionato in quanto non sufficientemente umanizzato(si). E questo vale, a ben vedere, sia nel caso in cui l'incontro/scontro tra specie protetta e uomo avvenga all'interno di riserve naturali, sia nel caso in cui l'animale invada spazi di vita propriamente "umani". Si stabilisce difatti una sorta di *continuum* spazio-comportamentale che vale però – si badi – solo per l'animale (es. l'orso che fuoriesce da una riserva e assalta il pollaio di un'abitazione privata) e non per l'uomo (il turista o cercatore di funghi che si spinge oltre il sentiero e si avventura nel bosco, imbattendosi in un orso): si assicura l'animale in riserve e lo si riconduce alla natura che si ritiene meglio gli si addica, e nel contempo si esige che si comporti sempre e comunque in modo da non nuocere all'uomo.

Ciò, del resto, sembra poter rappresentare una tendenza, sempre latente quando non proprio presente nella storia della civilizzazione umana, a trattare gli animali non umani in una modalità duplice, piuttosto ambigua: il regno animale, da un lato, viene "bestializzato" e separato nettamente dal regno umano; dall'altro, si trova ad essere "giuridicizzato", in una sorta di estensione della giuridicizzazione delle società umane. Il diritto passa così dall'essere un tipico prodotto *degli* uomini *per* gli uomini a essere un meccanismo che si espande senza soluzioni di continuità fino a ricomprendere l'universo mondo, ossia tutto ciò che ha vita dove vive l'uomo: a ricomprendere, in una parola sola, la *natura*.

4. UN MODELLO DI DIRITTO "NATURALE"

In quest'ottica, sarebbe plausibile rileggere anche il linguaggio del diritto naturale come quel linguaggio (giuridico) con cui l'uomo parla *alla* natura, tentando di comunicare ad essa cosa sia giusto e cosa sia ingiusto in termini "naturali". Ciò potrebbe forse consentire di comprendere come mai (ovvero quale sia l'origine del fatto per cui) gli animali si trovino, *loro malgrado*, ad essere per molti versi "destinatari" di una normatività di tipo antropico, assoggettati a *standards* giuridici di comportamenti concepiti e richiesti su base umana. Se si va alla ricerca delle scaturigini teorico-filosofiche di tale normatività non si potrà che ritrovarle infatti proprio in quel linguaggio della legge naturale che ha informato la modernità politico-giuridica: relazione naturale tra uomo e animale può voler dunque significare relazione basata su, mediata da, una legge non a caso denominata *naturale*.

In particolare, vi è un modello di legge naturale che sembra poter strutturare giuridicamente al meglio tale relazione, ossia quel modello di ispirazione lockiana[30] che, attraverso una logica di inclusione/esclusione, attua il fine della garanzia della sicurezza di un dato *ordine* (umano *vs.* disordine animale) facendo valere l'argomento della "degenerazione". L'argomento viene sviluppato da Locke a proposito del soggetto "trasgressore" della legge naturale, la quale – egli precisa – «obbliga tutti» ed ha come contenuto immediato il divieto di «recare danno alla vita, alla salute, alla libertà e ai possessi di un altro»[31]. In questa prospettiva la "degenerazione" si pone allora come qualcosa di tangibile: il trasgressore della legge naturale viene da subito identificato come un soggetto «pericoloso per l'umanità (*dangerous to mankind*)»[32], una «creatura dannosa»[33], «un criminale che, [...] con la violenza ingiusta e l'omicidio commesso ai danni di uno, ha dichiarato guerra contro tutta l'umanità, e quindi può essere distrutto come un leone o una tigre, una di quelle bestie selvagge con le quali gli uomini non possono avere né società né sicurezza»[34]. Qui la degenerazione raggiunge il suo compimento massimo e l'umanità del trasgressore viene bestializzata. *Hic sunt leones*, allora: nella riflessione lockiana una *certa* categoria di soggetti viene identificata con le bestie selvagge, da cui non solo occorre ben guardarsi e proteggersi ma verso cui è anche lecito esercitare violenza in funzione di "riparazione" e "repressione"[35].

È chiaro che Locke produce questo argomento in riferimento agli uomini, i quali possono degenerare, degradando al rango delle bestie. Tuttavia, ciò che rileva ai nostri fini è proprio il trattamento delle bestie – siano esse bestie di per sé o piuttosto uomini "bestializzati" – nello stato di natura, ovvero la relazione che si instaura tra il loro rango e quello degli uomini. Relazione che, secondo il diritto naturale,

[30] E non invece il modello di diritto naturale di ascendenza hobbesiana, come si potrebbe di primo acchito pensare in ragione della "ferinità" che, secondo Hobbes, caratterizzerebbe la condizione naturale dell'umanità; in realtà, la ferinità produce, nella ricostruzione hobbesiana, una zona di *indistinzione* tra uomini e animali. Nel modello lockiano, invece, come si vedrà nel testo, i riferimenti alla "bestialità" valgono a tracciare una precisa *distinzione* tra uomini e animali selvaggi (e, assieme a questi ultimi, uomini degradati al rango delle bestie); distinzione che viene da Locke trattata *normativamente*, in termini di esecuzione della legge naturale.

[31] J. LOCKE, *Two Treatises of Government* (1690), ed. by P. Laslett, Cambridge 1960, trad. it. *Due trattati sul governo*, a cura di B. Casalini, Pisa 2007, II trattato, cap. II, § 6, 191.

[32] Ivi, cap. II, § 8, 192.

[33] Ivi, cap. II, § 10, 193.

[34] Ivi, cap. II, § 11, 194. Si veda anche, sempre con lo stesso registro "bestiale", il § 16 del cap. III.

[35] Riparazione e repressione sono, infatti, per Locke «le uniche due ragioni per cui un uomo può legittimamente nuocere ad un altro, che è ciò che si chiama punizione. [...] ogni uomo sulla base di questa ragione, in base al diritto che egli ha di preservare l'umanità in generale, può reprimere, o laddove necessario, distruggere quanto è nocivo ad essa, e può quindi fare a chiunque abbia trasgredito quella legge un male tale da indurlo a pentirsi di averlo fatto, e quindi dissuadere lui, e, con il suo esempio, altri, dal compiere un simile misfatto. In questo caso, e su questa base, ogni uomo ha diritto a punire l'offensore e a rendersi esecutore della legge di natura» (ivi, cap. II, § 8, 192).

viene ad essere basata sul "castigo" e contraddistinta da un uso legittimo (sempre secondo il diritto naturale) della violenza da parte degli uomini nei confronti delle bestie selvagge. Questa forma della relazione può assurgere a vero e proprio modello teorico di riferimento, in base a cui valutare e interpretare tutta la produzione di un diritto positivo minuto (*i. e.* un infra-diritto) che *tratta* quella relazione, operando in modo unilaterale (dagli uomini *verso* gli animali) e giustificando attraverso una ragione presunta "giuridica" tutta una serie di atti, comportamenti e decisioni posti in essere dalle *autorità* umane nei confronti di quanti e di tutto ciò si trovi nel mondo naturale ad esse soggetto. Si tratta, in altri termini, di un modello di antropocentrismo giuridico che prevede uno spazio e un "consorzio" tipicamente *umani* in cui gli animali – e, più in generale, gli elementi naturali – risultano inclusi attraverso una loro esclusione e, al contempo, esclusi per via di una loro inclusione, secondo quella forma delle relazioni che è caratteristica di uno stato di eccezione permanente descritta con grande forza suggestiva da Giorgio Agamben[36].

Come tale infra-diritto e, più in generale, questo modello di relazioni giuridiche possano dare luogo o risolversi essi stessi in qualcosa che abbia i connotati di un vero e proprio contro-diritto è piuttosto agevolmente constatabile una volta che si raffrontino le loro determinazioni ultime con i presupposti teorico-giuridici di partenza, ovvero con i principi e i concetti che la scienza giuridica ha elaborato non di rado nel tentativo di un *superamento* della tradizione del diritto naturale[37]. E, come si è visto, la logica del diritto naturale, di quel modello di diritto naturale sopra indicato, sembra infatti poter riemergere nel percorso inverso, via via che dalle "massime altezze" del diritto si discende fino alle determinazioni ultime del diritto positivo e fin dentro agli interstizi più reconditi della normazione.

Ciò è solo in apparenza un paradosso e tende forse a ribaltare la visione tradizionale della dicotomia giusnaturalismo/giuspositivismo secondo cui il diritto naturale si sarebbe tradotto interamente – esaurendosi – in diritto positivo *ai piani alti*, se così si può dire, ossia al livello dei principi. Illuminare l'infra-diritto, gettare luce sui bassifondi della normazione, portare in superficie questo mondo giuridico "sommerso" può contribuire a una riconsiderazione critica di molti assunti della

[36] Cfr. G. AGAMBEN, Homo sacer, cit., 22 ss.

[37] Il caso della soggettività giuridica è un caso limite particolarmente interessante da questo punto di vista, poiché, se per un verso, la soggettività è servita storicamente come volano per il riconoscimento e l'affermazione di diritti (e, non a caso, la sua "estensione" al mondo animale viene auspicata dai più convinti sostenitori dei diritti degli animali), per altro verso essa mostra come, al di là – o forse, ancora meglio, contestualmente alla produzione – di un puro *soggettivismo* giuridico, si determinino le condizioni per una piena *soggettivazione*, come del resto, la logica dell'assoggettamento alla legge impone. Ciò vuol dire che sullo stesso piano dei diritti si pongono degli obblighi e delle responsabilità che rappresentano l'altra faccia della soggettività, come d'altronde abbiamo visto in riferimento alla "soggettività animale" allorché vengono pretesi dagli uomini comportamenti doverosi da parte degli animali, che essi, in particolare quelli selvatici, non potrebbero *naturalmente* porre in essere.

modernità politico-giuridica come pure di diversi aspetti e fenomeni dell'esperienza giuridica: il caso delle relazioni tra animali umani e animali non umani è, in quest'ottica, solo uno tra i tanti e il fatto di potere accomunare uomini e animali in una prospettiva biopolitica non fa che confermare quanto quest'ultima possa servire al fine di quella riconsiderazione critica.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 395-415
ISSN: 1825-5167

EMERGENZA E INFRADIRITTO. LIMITI AI DIRITTI FONDAMENTALI, REGOLE DI CONDOTTA E CANONI DI INTERPRETAZIONE

ANTONELLO LO CALZO
Dipartimento di Diritto, Economia, Management e Metodi Quantitativi
Università del Sannio di Benevento
antonellolocalzo@alice.it

ABSTRACT
The rapidity of response that emergencies involve can lead to temporary upsets of the system of sources of law. It may happen that with the sources of law, understood in the common sense, we can observe the use of new forms of law making that cannot be set in the well-known notion of "source of law". We wonder if these particular forms of legislative production are able to bind citizens and judges called to verify the compliance of conduct. In the light of various theoretical aspects, however, it seems that there are not arguments capable of demonstrating the binding nature of infra-juridical norms, so they can operate in the system only as interpretative tools.

KEYWORDS
Emergency, Covid-19, Sources of law, Legal certainty, Soft law.

1. PREMESSA. LA CRISI DEL SISTEMA DELLE FONTI NELL'EMERGENZA DA COVID-19 E IL RICORSO A DISPOSIZIONI INFRA-GIURIDICHE

L'attuale pandemia da Covid-19 ha inciso profondamente non soltanto sugli aspetti della vita quotidiana di ogni persona, ma anche su categorie costituzionali che si ritenevano consolidate[1], in particolare, di fronte all'incessante esigenza di regolare tempestivamente situazioni nuove, dettate dall'evolversi e dalla diffusione dell'epidemia, il sistema delle fonti è entrato in crisi e la produzione del diritto – per così dire – ordinaria ha ceduto il passo a nuove modalità di produzione del diritto, non sempre in linea con il dettato costituzionale.

[1] Per una rassegna sugli effetti dell'emergenza sul diritto costituzionale si veda di recente B. Brancati, A. Lo Calzo e R. Romboli (a cura di), *Coronavirus e costituzione. Una integrazione al Manuale di diritto costituzionale*, Pisa 2020.

Da una parte, la difficoltà di conciliare la rapidità del precipitare della situazione con i normali tempi di risposta normativa degli organi deputati alla produzione giuridica (Parlamento e Governo *in primis*, ma anche, nelle materie di loro competenza, Regioni ed Enti locali) ha alimentato una normazione stratificata – come è stata definita, *step by step*[2] – in cui il consueto affidamento nella stabilità normativa era frustrato dall'incessante susseguirsi di provvedimenti in deroga o a modifica di altri immediatamente precedenti.

Dall'altra, la frammentazione del riparto delle competenze ha innescato un meccanismo di produzione del diritto "a macchia di leopardo"[3], con i soggetti territoriali – su tutti le Regioni, ma numerosi sono stati anche gli interventi dei Comuni – che hanno spesso e volentieri adottato disposizioni derogatorie rispetto a quelle fissate a livello centrale dal Governo, con la conseguenza che il godimento di un medesimo diritto è stato fortemente differenziato sul territorio nazionale, con restrizioni più o meno ampie a seconda del "microsistema" delle fonti vigente in un determinato luogo (problematica avvertita sicuramente in maniera più sensibile durante la "prima fase" dell'epidemia).

Se è vero, forse, che l'emergenza non ha comportato un radicale snaturamento del sistema delle fonti[4], tanto da dar vita ad un vero e proprio "contro-sistema delle fonti"[5], ciò non toglie che gli schemi correnti siano saltati a causa di una serie di adattamenti forzati[6], per cui va osservato che le consuete regole di produzione giuridica sono state rispettate più da un punto di vista formale (non rompendosi la ben nota "catena kelseniana") che sostanziale[7]. Nella sostanza, infatti, ci troviamo di

[2] Su questo aspetto M. CALAMO SPECCHIA, *Principio di legalità e stato di necessità al tempo del "COVID-19"*, in *Osservatorio AIC*, 3 (2020), 14; M. BELLETTI, *La "confusione" nel sistema delle fonti ai tempi della gestione dell'emergenza da Covid-19 mette a dura prova gerarchia e legalità*, in *Osservatorio AIC*, 3 (2020), 14.

[3] L'espressione è di A. CELOTTO, *Necessitas non habet legem?*, Modena 2020, 15. Tale sovrapposizione tra livelli normativi, come osserva A. RUGGERI, *Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti*, in *Consulta Online*, 1 (2020), 218, ha l'effetto di disorientare i destinatari e di pregiudicare in modo irrimediabile la certezza del diritto.

[4] Tra i vari si vedano A. MORELLI, *Il Re del Piccolo Principe ai tempi del Coronavirus. Qualche riflessione su ordine istituzionale e principio di ragionevolezza nello stato di emergenza*, in *Diritti regionali*, 1 (2020), 524; R. CHERCHI e A. DEFFENU, *Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni*, in *Diritti regionali*, 1 (2020), 656.

[5] U. RONGA, *Il Governo nell'emergenza (permanente). Sistema delle fonti e modello legislativo a partire dal caso Covid-19*, in *Nomos*, 1 (2020), 8.

[6] A. RUGGERI, *Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese*, cit., 214.

[7] Pone l'accento sulla necessità di ripercorrere i rapporti formali tra le fonti M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in *Rivista AIC*, 2 (2020), 111, pur condividendo, con I. MASSA PINTO, *La tremendissima lezione del Covid-19 (anche) ai giuristi*, in *Questione Giustizia*, 18 marzo 2020, 4, che in periodi di emergenza il rigore delle procedure non può essere sempre argomentato soltanto da un punto di vista formale. Proprio per tale ragione non sono mancate in

fronte ad un sistema delle fonti estremamente confuso, dal quale è difficile per il cittadino ricavare le concrete regole che devono orientare la propria condotta al fine di evitare la sanzione (che in alcuni casi può essere addirittura penale), un sistema che non può – in ogni caso – prescindere dalla assunzione di responsabilità dell'Esecutivo per gli atti adottati[8].

Proprio al fine di rimediare alle incertezze determinate da una produzione giuridica caotica e, per forza di cose, affrettata si è intensificato il ricorso ad atti "chiarificatori" – quali le circolari o le inedite *FAQ* (*Frequently Asked Questions*) – rispetto ai quali si pongono una serie di problemi significativi, forse poco indagati dalla dottrina recente. Infatti, l'attenzione prestata dagli studiosi al tema della produzione giuridica in epoca emergenziale si è concentrata prevalentemente sulle fonti di provenienza governativa, in particolare sul controverso binomio decreto-legge/decreto del Presidente del Consiglio (d'ora in avanti dpcm) e sul modo in cui questo abbia inciso su alcune garanzie che la Costituzione pone in materia di limitazione dei diritti (su tutte la riserva di legge o, comunque, il necessario intervento del Parlamento).

Meno approfondito, si diceva, è stato il tema della produzione normativa infragiuridica, vale a dire di tutte quelle "regole" fissate da atti che non rientrano nel novero delle fonti del diritto, adottati con il fine di chiarire la portata dei testi normativi veri e propri ma che, spesso, recano contenuti innovativi o derogatori rispetto alle fonti in senso stretto, al punto che – attraverso un sistema di pubblicità del tutto non convenzionale (siti internet istituzionali) – «sono diventate le principali regole della vita quotidiana, in un paradossale capovolgimento della gerarchia delle fonti kelseniana»[9]. Ad essere precisi, però, più che un capovolgimento della gerarchia kelseniana, si tratterebbe di atti che, non potendo essere annoverati tra le fonti del

dottrina voci che hanno posto l'accento sugli aspetti "materiali" della produzione normativa nel periodo di emergenza, ad esempio C. PINELLI, *Il precario assetto delle fonti impiegate nell'emergenza sanitaria e gli squilibrati rapporti fra Stato e Regioni*, in *Astrid Online*, 5 (2020), 6, ha rilevato che le incertezze del momento evidenziano «l'inadeguatezza delle normative di settore dettate in riferimento a diversi tipi di emergenza [...] di fronte a un'epidemia che per aggressività e generalità di portata non era mai stata sperimentata in epoca repubblicana». Così anche G. AZZARITI, *Il diritto costituzionale d'eccezione*, in *Costituzionalismo.it*, 1 (2020), III, ritiene che alla base della produzione normativa «non si possano sottovalutare né le esigenze che muovono il Governo a salvaguardare la salute pubblica in una situazione di fatto di estremo pericolo, né la necessità di delimitare il più possibile [...] le deroghe o le sospensioni della legalità ordinaria». Particolarmente critico sull'aspetto sostanziale, e non meramente formale, della produzione normativa d'emergenza è stato G. SILVESTRI, *Covid-19 e Costituzione*, in *Unicost – Unità per la Costituzione*, 10 aprile 2020, il quale ha evidenziato che «l'esordio delle misure di contenimento del contagio epidemico da Covid-19 è stato caratterizzato da un profluvio di Dpcm contenenti discipline delle più varie materie e dei più disparati oggetti [...]. Tutto sotto l'ombrello [...] di una disposizione "in bianco" del d.l. n. 6/2020, meramente attributiva di potere, senza alcuna delimitazione di forma o di contenuto».

[8] G. AZZARITI, *Il diritto costituzionale d'eccezione*, cit., III.

[9] A. CELOTTO, *Necessitas non habet legem?*, cit., 16.

diritto, si collocano al di fuori della "catena normativa di giustificazione"[10], pertanto il tentativo di individuarne il fondamento giustificativo dovrà essere condotto secondo criteri diversi.

1.1. Delimitazione dell'ambito di indagine alla produzione di norme infra-giuridiche: le circolari amministrative e le FAQ ministeriali

Occorre, in via preliminare, circoscrivere l'oggetto dell'indagine, partendo dalla distinzione tra ciò che è diritto in senso proprio e ciò che, invece, può essere qualificato come infradiritto[11].

Oggetto di ampio studio da parte della dottrina è stato il modo in cui il potere normativo del Governo si è esplicato nella gestione dell'emergenza, in particolare sottolineando le "anomalie" che hanno caratterizzato la produzione di norme direttamente vincolanti per i consociati attraverso lo strumento del dpcm (e il suo rapporto con il decreto-legge).

Bisogna chiarire che molto si è dibattuto intorno all'uso del dpcm come fonte idonea a limitare i diritti fondamentali dei cittadini, nonché sulla natura che tali atti

[10] M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, cit., 110.

[11] Volutamente non si estende la presente indagine al potere di ordinanza in quanto, pur non trascurandosi il dibattito intorno alla sua compatibilità con il principio di legalità, è diffusa la riconduzione delle ordinanze al novero delle fonti. Anche se si tratta di un ambito di difficile delimitazione alla luce delle categorie costituzionali positive, tende a prevalere l'idea che siffatti provvedimenti rientrino comunque tra quelli aventi natura normativa. La categoria delle fonti *extra ordinem* può assumere tratti "mobili" comprendendo «quella degli atti o delle procedure non espressamente contemplate dalle fonti positive, e quella degli atti o fatti cui le fonti positive che li contemplano non attribuiscono formalmente una capacità di innovare l'ordinamento che esse esprimono di fatto», tra le quali si collocherebbero le ordinanze. Così M. CAVINO, *Le fonti del diritto*, in S. Sicardi, M. Cavino e L. Imarisio (a cura di), *Vent'anni di Costituzione (1993-2013)*, Bologna 2015, 368. Tuttavia, solo gli atti o i fatti che ricadono nella prima categoria sono in definitiva fonti *extra ordinem*, che non traggono la propria validità da una previa norma di riconoscimento, ma la cui idoneità a produrre diritto potrebbe essere verificata solo *ex post*, in virtù del principio di effettività. V. CRISAFULLI, *Lezioni di diritto costituzionale*, II, Padova 1993, 193 s. A ben vedere, quindi, nemmeno le ordinanze rientrerebbero nell'infradiritto perché trovano sempre la loro fonte abilitante nella legge. Per quanto *prima facie* le ordinanze appaiano più simili agli atti amministrativi che a quelli normativi, è stata rilevata in dottrina la difficile definizione della natura di quelle che «disciplinano in modo generale e astratto certe situazioni». Per cui sembra corretto distinguere questi atti in due tipologie, «dovendosi classificare le ordinanze-amministrative *stricto sensu* aventi un contenuto particolare e concreto [... e] le ordinanze-normative, che possono avere un contenuto generale e astratto» e sono pertanto fonti. Per tale distinzione si veda G. DE VERGOTTINI, *Diritto costituzionale*, Padova 2012, 259 ss. Più in generale sul potere di ordinanza nelle situazioni di emergenza G. MARAZZITA, *L'emergenza costituzionale*, Milano 2003.

avrebbero nella gestione dell'emergenza. È stato anche sostenuto che i dpcm adottati nel caso specifico non sarebbero da annoverare tra i regolamenti governativi, ma sarebbero a tutti gli effetti delle ordinanze[12], atti meramente amministrativi[13].

Senza entrare nel merito di questo argomento, e al solo fine di escludere i dpcm dall'ambito di indagine[14], occorre osservare che tali atti rientrano formalmente tra quelli regolati dall'art. 17, comma 3, della legge n. 400/1988, si tratterebbe in sostanza di regolamenti statali non governativi[15], per i quali la legge si limita a prevedere che si riferiscano a materie di competenza del ministro o di autorità ad esso sottordinate e che non possano dettare norme contrarie a quelle dei regolamenti emanati dal Governo.

Non sono fissati ulteriori vincoli dal punto di vista dei contenuti, pertanto potrà verificarsi sia l'ipotesi che detti atti stabiliscano norme generali ed astratte, sia che si limitino a fissare disposizioni puntuali a carattere provvedimentale. Nel primo caso pare logico ritenere che, al di là della veste formale, i decreti ministeriali abbiano natura normativa e siano a tutti gli effetti fonti del diritto. Stessa osservazione vale, d'altra parte, per i dpcm, che assumono tale denominazione in virtù dell'autorità emanante, provvista della medesima facoltà che l'art. 17 della legge n. 400/1988 riconosce a tutti i ministri.

Nel caso dei dpcm adottati per far fronte alla pandemia ci si trova innanzi ad atti normativi generali ed astratti. I dubbi di legittimità si pongono più sul piano dei rapporti con le altre fonti (legge e decreto-legge) che su quello attinente alla loro natura e alla cogenza tipica delle fonti-atto. Pertanto, che si vogliano definire regolamenti in senso proprio o mere ordinanze amministrative non intacca l'osservazione più generale che si tratti comunque di fonti del diritto.

[12] M. TRESCA, *Le fonti dell'emergenza. L'immunità dell'ordinamento al Covid-19*, in *Osservatorio AIC*, 3 (2020), 10; che rimanda a M. CAVINO, *Covid-19. Una prima lettura dei provvedimenti adottati dal Governo*, in *Federalismi.it*, Osservatorio emergenza Covid-19, 18 marzo 2020, 5; e M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, cit., 120, secondo i quali i dpcm sarebbero da inquadrare tra le ordinanze *extra ordinem*.

[13] Secondo G. SILVESTRI, *Covid-19 e Costituzione*, cit., proprio l'uso dei dpcm avrebbe segnato l'ultimo passo della degenerazione del sistema delle fonti alle ragioni dell'urgenza: dalla legge al decreto-legge, dal decreto-legge all'atto amministrativo.

[14] Anche se non va trascurato – come osserva G. SALVADORI, *Il periplo dell'isolato. La libertà di passeggiare al tempo del COVID-19*, in *Rivista del Gruppo di Pisa*, 1 (2020), 311 ss. – che, per la loro concreta formulazione, anche alcune disposizioni contenute nei dpcm sembrano prive di cogenza (perché si limitano a "raccomandare" un comportamento più che a imporlo). Il problema in questo caso, però, è distinto, perché il difetto di cogenza non deriva dalla natura dell'atto, ma dalla conformazione lessicale della disposizione e ha rappresentato una costante nella gestione dell'emergenza, tanto che anche il recente dpcm 24 ottobre 2020 reca ben cinque "forti raccomandazioni" prive di cogenza.

[15] V. CRISAFULLI, *Lezioni di diritto costituzionale*, cit., 158.

Quando trattiamo dei dpcm, quindi, siamo sempre nel campo del diritto propriamente inteso e non dell'infradiritto. I dpcm costituiscono pur sempre l'emanazione di un potere codificato dall'ordinamento nel rispetto di una procedura espressamente fissata dalla legge, anche se diversa da quella prevista per i regolamenti governativi veri e propri. Ad ogni modo, seppur in subordine rispetto a questi, ne condividono la natura di fonte secondaria e, pur essendo atti formalmente amministrativi, assumono un contenuto materialmente normativo. A ciò va aggiunto, come ulteriore dato significativo, che l'art. 15, lett. d, in combinato con l'art. 6, comma 2, del D.P.R. n. 1092/1985, comprende i dpcm tra gli atti che sono soggetti a pubblicazione nella Gazzetta Ufficiale, assicurandone così l'effettiva conoscibilità da parte dei consociati, al pari delle altre fonti-atto dell'ordinamento[16].

L'attenzione si deve, dunque, concentrare su altri tipi di atti, difficilmente inquadrabili nel novero delle fonti, ma che, quando assumono un contenuto materialmente normativo, sollevano problemi sotto il profilo della certezza del diritto e dell'affidamento del cittadino[17]. Ci si riferisce sia ad atti di uso antico, quali le circolari ministeriali, sia ad atti (o, sarebbe più corretto dire, non-atti) del tutto innovativi come le *FAQ* ministeriali. Si tratta, a ben vedere, di questioni diverse, accomunate però dalla riconducibilità al generale tema della produzione normativa infra-giuridica.

Le circolari sono atti provenienti da un'amministrazione che, conformemente alla prevalente dottrina[18], hanno un'efficacia puramente interna alla stessa e non sono in grado di vincolare i cittadini o gli altri soggetti od organi esterni all'amministrazione[19]. Il problema, nel nostro caso, si porrebbe in relazione a quelle circolari che assumono uno specifico contenuto normativo o, al limite, di interpretazione di

[16] Si pensi al più recente (al momento della chiusura del contributo) dpcm 3 novembre 2020, recante ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, e del decreto-legge 16 maggio 2020, n. 33, pubblicato in Gazzetta Ufficiale, Serie generale, 4 novembre 2020, n. 275 – Suppl. Ordinario n. 41.

[17] La certezza del diritto implica essenzialmente la «prevedibilità delle conseguenze giuridiche di atti o fatti», con particolare riferimento, nel nostro caso, alle conseguenze giuridiche della condotta tenuta e alla prevedibilità dell'intervento degli organi dotati di poteri decisionali. In tal senso L. GIANFORMAGGIO, *Certezza del diritto*, in *Digesto delle discipline privatistiche*, II (1988), 274 ss. Per le implicazioni applicative della certezza del diritto si rimanda ad A. PIZZORUSSO, *Certezza del diritto, II) Profili pratici*, in *Enciclopedia giuridica*, VI (1988), 1 ss.

[18] M.S. GIANNINI, *Circolare*, in *Enciclopedia del diritto*, VII (1960), 1 ss.; M.P. CHITI, *Circolare*, in *Enciclopedia giuridica*, VI (1988), 1 ss.; E. CASETTA, *Manuale di diritto amministrativo*, Milano 2003, 486.

[19] In senso contrario si veda, però, l'approfondita disamina di R. TARCHI, *Le circolari ministeriali con particolare riferimento alla prassi*, in U. De Siervo (a cura di), *Norme secondarie e direzione dell'amministrazione*, Bologna 1993, 235 ss., il quale concentra la sua attenzione, più che sul dato formale, sulla «giustificazione e i limiti del potere di adottare circolari, ovvero di quel fenomeno che è stato felicemente denominato come "integrazione normativa in via amministrativa"» (248).

altre disposizioni normative adottate per fronteggiare l'emergenza[20]. In questa ipotesi parrebbe verificarsi una scissione tra destinatario formale e destinatario sostanziale: mentre, infatti, le circolari si rivolgono e vincolano in maniera relativa i funzionali pubblici chiamati ad applicare la legge, nella sostanza ricadono direttamente sui consociati, i quali potrebbero sentirsi condizionati nell'orientare i propri comportamenti dal contenuto di tali atti piuttosto che dalla legge[21].

Seppur vi possono essere casi in cui, superando un'idea tassativa di atti interni, alle circolari possa riconoscersi efficacia esterna – perché idonee a fissare le regole valevoli per tutti i soggetti che operano in un determinato settore – altra cosa è riconoscere alle stesse una vera e propria cogenza esterna, vale a dire l'idoneità a vincolare il consociato a tenere un determinato comportamento dietro la minaccia di una sanzione[22].

Non sono mancate in dottrina tesi autorevoli tendenti a ricondurre le circolari all'ambito delle fonti del diritto come fonti *extra ordinem* giustificate dal principio di effettività[23], tuttavia, risulta ancora prevalente la tesi secondo cui le circolari a con-

[20] D'altra parte, lo stesso R. TARCHI, *Le circolari ministeriali*, cit., 247, osserva che quella delle circolari amministrative è una categoria priva di unitarietà, essendo riconducibili a questa una pluralità di atti tutti definiti formalmente come "circolari", ma «notevolmente eterogenei quanto a significato, formulazione, contenuto ed effetti».

[21] È frequente che di fronte alla lacunosità dei testi normativi le amministrazioni, e in particolare quelle ministeriali, intervengano con proprie circolari per far fronte a problemi applicativi mutevoli, e questo è anche ciò che è avvenuto nella gestione dell'emergenza. Tuttavia, osserva M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, cit., 129 s., che tale potere debba essere esercitato con particolare parsimonia per evitare che da strumento di chiarificazione di trasformi in strumento di ulteriore incertezza per i cittadini.

[22] Ad una più attenta osservazione non si può negare che, orientando i propri comportamenti sulla base del contenuto di una circolare, i cittadini finiscano per attribuire ad essa vera e propria cogenza giuridica. Tuttavia, pur essendo sottoposta – da V. CRISAFULLI, *Lezioni di diritto costituzionale*, I, Padova 1970, 23 ss. – ad acuta critica l'astratta idoneità di "coercibilità" e "sanzione" a contraddistinguere con carattere di esclusività il fenomeno giuridico-normativo rispetto ad altri fenomeni, non pare che questi concetti siano del tutto superati nel caso concreto, quando l'osservanza del cittadino potrebbe ben essere mossa semplicemente dal timore di evitare una sanzione. Se, però, coercibilità e sanzione mantengono in determinate situazioni concrete – come questa – un loro rilievo puramente empirico, ciò che caratterizza le ipotesi che si stanno esaminando riguarda l'astratta riconducibilità di tali elementi non alla circolare in quanto tale, bensì alla legge che essa pretende di chiarire. I tanto controversi elementi della "giuridicità", pertanto, sarebbero sempre da riferire alla legge e non ad una circolare, con la conseguenza che la fonte della "coazione" andrà sempre rinvenuta in un atto formale. Il cittadino, in pratica, potrà essere sanzionato non perché ha violato il contenuto di una circolare, ma perché ha tenuto una condotta non conforme ad una delle norme ricavabili in via interpretativa direttamente dal testo di legge (o di altro atto-fonte).

[23] A. PIZZORUSSO, *Fonti del diritto*, in *Commentario al Codice civile Scialoja-Branca*, Bologna 1977, 553, ad esempio, ha ritenuto che talune circolari potrebbero qualificarsi come fonti *extra ordinem*. La loro natura sostanzialmente normativa le collocherebbe nella gerarchia delle fonti al grado

tenuto normativo, pur assumendo rilievo giuridico sul piano interno, sul piano generale dell'ordinamento dello Stato non potrebbero mai porsi come fonti del diritto obbiettivo. Ove si pretendesse di attribuire loro questa efficacia il rischio sarebbe quello della lesione delle esigenze garantistiche, sia perché gli atti in questione non sono adottati secondo procedure prestabilite e analoghe a quelle che la legge fissa per i regolamenti[24], sia perché difetterebbero di adeguati strumenti di conoscibilità, visto che la loro pubblicazione in Gazzetta Ufficiale è soltanto eventuale e non necessaria[25].

Corollari di tale tesi sono: da una parte, che le circolari non possano in alcun modo vincolare il cittadino e tantomeno l'autorità giurisdizionale[26]; dall'altra, che trattandosi pur sempre di atti amministrativi subordinati alla legge, ove il loro contenuto si ponesse in contrasto rispetto a questa sarebbero da considerare irrimediabilmente invalidi[27].

A fronte delle elaborazioni dottrinali che si sono succedute nel tempo la giurisprudenza – sia antica che recente – è stata sempre piuttosto ferma nel negare natura di fonte alle circolari a contenuto normativo le quali non potrebbero di per sé recare vantaggi o pregiudizi a terzi esterni all'amministrazione[28]. Anche nel caso in cui la circolare non avesse un contenuto normativo autonomo, ma si limitasse ad interpretare altra norma che l'amministrazione è chiamata ad applicare, in caso di contrasto tra il significato palese della norma di legge e l'interpretazione fornita in circolare, l'autorità sarebbe tenuta a dare applicazione alla legge e non alla circolare

degli atti normativi che possono essere normalmente adottati dal soggetto che ne è l'autore. In sostanza, le circolari normative acquisirebbero in virtù del principio di effettività il rango degli atti regolamentari. Secondo R. TARCHI, *Le circolari ministeriali*, cit., 327, invece, pur riconoscendo la possibilità di produrre norme giuridiche secondo modalità diverse da quelle tradizionali, sarebbe poco utile il semplice tentativo di inquadramento formale delle circolari tra le fonti *extra ordinem*. Piuttosto, sottolinea la circostanza che quando una circolare produce norme dà origine ad un "diritto vivente", in quanto gli operatori orientano i propri comportamenti sulla base dei contenuti della circolare, potendosi trattare anche di soggetti esterni all'amministrazione.

[24] M.P. CHITI, *Circolare*, cit., 4.

[25] D. RISO, *Le circolari a contenuto normativo*, in *LexItalia.it*, 9 (1999). Rilevante è la circostanza che, da un punto di vista procedurale, le circolari non ricevano alcuna menzione nella legge n. 400/1988, né siano oggetto di pubblicazione obbligatoria quando interessano la generalità dei cittadini. Cfr. R. TARCHI, *Le circolari ministeriali*, cit., 238 s. e 267 ss.

[26] Al più le circolari potrebbero fungere da elemento di prova nella valutazione della scelta dell'amministrazione o del pubblico funzionario, senza fornire alcuna prova legale o presunzione, in quanto è fatta salva la possibilità per l'amministrazione di disattendere la circolare per ragioni di pubblico interesse e, segnatamente, nel caso in cui la legge abbia un contenuto distinto da quello della circolare e l'amministrazione sia tenuta ad osservarla. Cfr. M.P. CHITI, *Circolare*, cit., 2.

[27] M.S. GIANNINI, *Circolare*, cit., 4.

[28] Tra le tante si vedano Cass., 10 novembre 1971, n. 3186; Cass., 5 giugno 1971, n. 1674; Cons. Stato, 30 novembre 1979, n. 29; e recentemente, TAR Lombardia, Milano, sez. III, 17 febbraio 2020, n. 311.

«perché diversamente il cittadino che si sentisse leso dal provvedimento potrebbe fondatamente rivolgersi al giudice»[29].

Argomenti analoghi possono essere utilizzati a maggior ragione per gli effetti prodotti dalle *FAQ* rispetto ai consociati – fenomeno del tutto innovativo sul piano del diritto[30] – le quali addirittura sembrano, a differenza della circolari, sfuggire anche alla qualifica formale di atto. Paradossalmente si può dire che le *FAQ* siano pura pubblicità senza atto. Di solito queste consistono nelle risposte a domande standardizzate che gli utenti di un servizio (o di un sito internet) potrebbero rivolgere al gestore, al fine di chiarirne le modalità di fruizione.

Nel caso in questione assumono uno scopo ben diverso, quello di fornire chiarimenti sull'applicazione di un dettato normativo (quello dei decreti-legge e dei dpcm) non sempre completo o, come sembra più evidente, quello di perseguire la vana pretesa di predeterminare ogni possibile aspetto applicativo concreto della norma astratta (ignorando che l'opera di sussunzione non potrebbe per sua natura essere compiuta con misure generali ed astratte, ma solo dal giudice, i cui poteri di interpretazione consentirebbero di adeguare il diritto al caso concreto).

Ciò che emerge, però, è che le *FAQ* non rientrano tra le fonti del diritto in quanto difetterebbero anche della natura di atto: non sarebbero atti di interpretazione autentica in grado di vincolare il destinatario, non sarebbero circolari a contenuto normativo vincolanti per l'amministrazione. Va aggiunto, infatti, che per le *FAQ* non è possibile rilevare il procedimento che ha portato alla loro adozione: non si conosce il soggetto o l'ufficio che ha selezionato le domande e che ha formulato le risposte, non vi sono atti preparatori che danno conto delle scelte fatte, non esiste altra forma di pubblicità che quella tramite sito internet.

Eppure, per la loro concreta formulazione si tratta di misure che, al di là della loro funzione chiarificatrice, finiscono per assumere valore precettivo-costitutivo per il cittadino. Non si limitano a prevedere mere indicazioni comportamentali[31],

[29] TAR Emilia-Romagna, 27 novembre 1975, n. 557. D'altra parte, come osserva A. CATELANI, *L'efficacia esterna delle circolari amministrative contenenti norme giuridiche*, in *Giurisprudenza di merito*, (1979), 264 ss., diversamente argomentando, in caso di contrasto tra circolare e legge, si finirebbe per dare rilevanza esterna a un atto meramente interno, costituendo un obbligo per il cittadino fondato sulla circolare e non sulla legge.

[30] Il Governo sarebbe stato indotto a predisporre questa sorta di "prontuario" interpretativo per fare chiarezza sui contenuti di decreti non sempre di facile lettura. Cfr. L. MAZZAROLLI, «Riserva di legge» *e* «principio di legalità» *in tempo di emergenza nazionale. Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo* extra ordinem*, con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri*, in *Federalismi.it*, Osservatorio Emergenza Covid-19, 23 marzo 2020. Tale prassi ha riguardato sia la c.d. Fase 1 e la Fase 2, che la Fase della "seconda ondata" dopo il dpcm del 3 novembre 2020.

[31] Non si tratterebbe di quelle che F.S. MARINI, *Le deroghe costituzionali da parte dei decreti-legge*, in *Federalismi.it*, Osservatorio Emergenza Covid-19, 22 aprile 2020, 1, definisce come disposizioni meramente ottative, piuttosto si tratterebbe di veri e propri divieti in forma non normativa. Cfr. G. DI COSIMO e A. COSSIRI, *Fase 2. Cioè?*, in *laCostituzione.info*, 29 aprile 2020.

ma, allo scopo di specificare il testo degli atti normativi, finiscono per innovarne il contenuto, vietando in sostanza ciò che secondo la legge o i regolamenti potrebbe essere consentito.

Come vedremo, ci sono stati alcuni casi emblematici in cui le *FAQ* (o altri atti privi della natura di fonte) hanno innovato sensibilmente la portata dei precetti normativi. In questo modo hanno finito per assumere un valore costitutivo-innovativo dell'ordinamento, determinando in concreto i comportamenti che i consociati possono o non possono tenere e, quindi, limitando i diritti costituzionali.

A ciò va aggiunto che, sfuggendo ad ogni classificazione formale ed essendo privi di cogenza verso il singolo, tali atti sarebbero sottratti a qualsiasi forma di impugnazione diretta in sede giurisdizionale[32]. Ciononostante, questi possono essere usati quale metro di valutazione della condotta da parte del Pubblico ufficiale chiamato ad irrogare la sanzione, ridondando così sulla sfera giuridica dell'individuo.

Fin quando *FAQ* e circolari hanno contenuti omogenei rispetto alle altre fonti non si pongono grossi problemi, tuttavia l'esperienza concreta ha evidenziato come vi siano stati casi in cui, attraverso una serie di chiarimenti successivi, si sia giunti a cambiare il contenuto sostanziale dei provvedimenti normativi, compromettendo la certezza giuridica[33]. In ipotesi di contrasto, infatti, i cittadini non saprebbero più se orientare la propria condotta sulla base legale o sul chiarimento, anche perché – sfugge un dato elementare – non rientra nel sapere comune la capacità di distinguere ciò che è fonte (cogente) da ciò che non lo è.

1.2. Casi di concreta incidenza delle norme infra-giuridiche sull'affidamento dei consociati

Le ipotesi da ultimo osservate sembrano rientrare a tutti gli effetti nell'ambito dell'infradiritto, vale a dire di quei precetti che, pur avendo carattere generale ed astratto, non sono contenuti in atti qualificabili come fonti del diritto. La domanda che ci si pone, e alla quale si tenterà di dare una risposta nei successivi paragrafi, è se esista una qualche idoneità di tali atti a vincolare i comportamenti individuali. Il problema, ad essere precisi, si porrà in misura minima quando il chiarimento è del tutto in linea con la legge, ma emergerà in maniera evidente quando avrà carattere derogatorio o, comunque, creativo-innovativo rispetto alla legge, ingenerando nel destinatario del precetto la difficoltà di conformare la propria condotta alla legge, o in alternativa, al chiarimento.

[32] Come M.P. CHITI, *Circolare*, cit., 2, già riconosceva per le circolari – rimandando a risalente dottrina, il singolo sarebbe privo di interesse ad agire, in quanto tale interesse può sorgere soltanto con l'atto adottato in attuazione della circolare. In sostanza, il cittadino non avrebbe interesse ad impugnare una *FAQ* (oltre che per mancanza dell'atto), se non nella forma dell'impugnazione della sanzione comminata secondo i criteri dettati dalla stessa.

[33] M. BELLETTI, *La "confusione" nel sistema delle fonti*, cit., 13.

I casi che si potrebbero riportare sono numerosi, per ovvie ragioni di spazio si fa riferimento, a titolo di esempio, alle questioni che hanno riguardato: la nozione di "congiunti", la distinzione tra "attività sportiva e attività motoria", la possibilità di "passeggiata con il figlio minore".

Per quanto riguarda l'attività sportiva, con i dpcm 8 e 9 marzo 2020 il Governo si era limitato a stabilire, all'art. 1, lett. d), che «lo sport e le attività motorie svolti all'aperto sono ammessi esclusivamente a condizione che sia possibile consentire il rispetto della distanza interpersonale di un metro». Intervenendo a chiarimento della richiamata disposizione il Ministero dell'Interno, con circolare del 31 marzo 2020, stabiliva che «l'attività motoria generalmente consentita non va intesa come equivalente all'attività sportiva (*jogging*), tenuto anche conto che l'attuale disposizione di cui all'art. 1 del decreto del Presidente del Consiglio dei ministri del 9 marzo scorso tiene distinte le due ipotesi, potendosi far ricomprendere nella prima, come già detto, il camminare in prossimità della propria abitazione». A ben vedere, il secondo intervento non può essere qualificato come mero chiarimento, trattandosi di una disposizione che innova i contenuti della prima disposizione, introducendo limitazioni non ricavabili dal testo di quella. In contraddizione con la certezza del diritto la circolare introduce una distinzione tra attività che nel dpcm erano equiparate e ne rimette l'apprezzamento alla discrezionalità dell'operatore chiamato a far osservare la norma[34]. La persona che volesse semplicemente fare una corsa per tenersi in forma, al netto degli ulteriori ed eventuali provvedimenti regionali[35], dovrebbe orientare la propria condotta sulla base di quanto previsto dal dpcm o dalla circolare[36]?

Sempre alla medesima Circolare possono collegarsi i dubbi sorti a seguito della specificazione secondo cui «per quanto riguarda gli spostamenti di persone fisiche, è da intendersi consentito, ad un solo genitore, camminare con i propri figli minori

[34] M. BELLETTI, *La "confusione" nel sistema delle fonti*, cit., 13.

[35] Si pensi, ad esempio, ai più restrittivi divieti adottati al riguardo mediante diverse Ordinanze del Presidente della Regione Campania. V. BALDINI, *Riflessioni sparse sul caso (o sul caos...) normativo al tempo dell'emergenza costituzionale*, in *Diritti fondamentali*, 1 (2020), 979 s.

[36] Problematiche in un certo senso analoghe si sono poste a seguito delle *FAQ* riferite alla "seconda ondata", pubblicate il 10 novembre 2020 a chiarimento del dpcm 3 novembre 2020. Quest'ultimo provvedimento, all'art. 3, comma 4, lett. e), riferito alle zone della c.d. "Area rossa", infatti sembra tener distinta l'attività "sportiva" da quella "motoria", in quanto sulla sua base «*è consentito svolgere individualmente attività motoria in prossimità della propria abitazione* purché comunque nel rispetto della distanza di almeno un metro da ogni altra persona e con obbligo di utilizzo di dispositivi di protezione delle vie respiratorie; *è altresì consentito lo svolgimento di attività sportiva esclusivamente all'aperto e in forma individuale*». La lettura è confermata anche dalla Circolare del Ministero dell'Interno del 7 novembre 2020 che ha precisato come «l'attività sportiva è consentita [...] anche presso aree attrezzate e parchi pubblici, ove accessibili, non necessariamente ubicati in prossimità della propria abitazione». Tuttavia, nelle *FAQ* relative alla "Area rossa", attività sportiva e attività motoria sembrano essere accomunate nel medesimo trattamento ("nei pressi della propria abitazione"), generando in tal modo confusione nei destinatari della prescrizione.

in quanto tale attività può essere ricondotta alle attività motorie all'aperto, purché in prossimità della propria abitazione. La stessa attività può essere svolta, inoltre, nell'ambito di spostamenti motivati da situazioni di necessità o per motivi di salute». Si tratta, a ben vedere, di una specificazione non necessaria, in quanto il comportamento in questione era già perfettamente abilitato dal testo del dpcm che nulla specificava al riguardo, ma che, una volta prevista ha contribuito soltanto ad alimentare ulteriori dubbi (Un solo genitore per figlio? E se il genitore è solo ed ha più figli? E se la coppia ha più di due figli?), dubbi che non si sarebbero posti altrimenti e che lo stesso Presidente del Consiglio è stato costretto a chiarire (inconsuetamente) nel corso di una conferenza stampa[37].

Infine, occorre accennare alla contorta vicenda delle visite ai "congiunti" o "affetti stabili". Con dpcm 26 aprile 2020, il Governo apriva alla possibilità di effettuare visite a non meglio specificati "congiunti". Non esistendo una definizione di tale categoria nell'ordinamento il Governo, con una nota del 27 aprile 2020, precisava che nella nozione dovessero essere compresi «parenti e affini, coniuge, conviventi, fidanzati stabili e affetti stabili». A seguito di ciò sorgeva un ulteriore dubbio: chi sono gli "affetti stabili"? Tentando di dare una risposta all'interrogativo il Viceministro della salute, intervistato il 29 aprile 2020, affermava che si potessero ricomprendere nella categoria anche i rapporti amicali duraturi. Tale apertura, tra l'altro non contenuta in alcun atto, era immediatamente respinta sia per mezzo della Circolare del Ministero dell'interno del 2 maggio 2020 secondo la quale gli affetti stabili presuppongono una «duratura e significativa comunanza di vita e di affetti», sia dalle *FAQ* della Fase 2, pubblicate il giorno successivo, che stabilivano come criteri per la definizione di "congiunti" quelli ricavabili dalla giurisprudenza in materia di responsabilità civile, specificando che nella categoria rientrano «i coniugi, i partner conviventi, i partner delle unioni civili, le persone che sono legate da uno stabile legame affettivo, nonché i parenti fino al sesto grado (come, per esempio, i figli dei cugini tra loro) e gli affini fino al quarto grado (come, per esempio, i cugini del coniuge)»[38]. Nonostante tutti i chiarimenti forniti permangono comunque delle ambiguità, legate al fatto di voler recepire in una norma giuridica un concetto che giuridico non è, quello dell'affetto: non può essere certo la disposizione di un dpcm, e tantomeno una circolare o una *FAQ*, a fissare la soglia al di sopra o al di sotto della quale un affetto si può definire stabile, né in cosa consista una significativa comunanza di vita, semplicemente sono concetti che sfuggono al diritto[39].

[37] A. RUGGERI, *Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese*, cit., 219.

[38] Ulteriori approfondimenti su tali aspetti in A. CELOTTO, *Necessitas non habet legem?*, cit., 66, nota 9; e soprattutto A. CHIAPPETTA, Less regulation for better regulation: *ipertrofia normativa e pressapochismo linguistico ai tempi della pandemia da Covid-19*, in *Forum di quaderni costituzionali*, 2 (2020), 722 ss.

[39] G. DI COSIMO e A. COSSIRI, *Fase 2. Cioè?*, cit.

2. ESISTE UN FONDAMENTO TEORICO CHE LEGITTIMA UN DOVERE DI OSSERVANZA DELLE PRESCRIZIONI INFRA-GIURIDICHE NELLE SITUAZIONI DI EMERGENZA?

Si è detto della differenza tra fonti del diritto propriamente intese e altri atti riconducibili al piano dell'infradiritto. Occorre a questo punto interrogarsi sull'esistenza di un possibile fondamento teorico che possa legittimarne la cogenza in situazioni di emergenza. Anticipando le conclusioni in cui si risponderà in maniera negativa all'interrogativo posto, si tenterà di ripercorrere rapidamente i possibili argomenti che potrebbero, da una parte indurre il singolo consociato a conformare la propria condotta a "norme infra-giuridiche" e dall'altra l'operatore a ricostruire la condotta conforme o vietata alla luce di atti privi di efficacia giuridica.

2.1. Segue: in quanto disposizioni di interpretazione autentica

Il ricorso a disposizioni infra-giuridiche nella gestione dell'emergenza è stato dettato essenzialmente da esigenze interpretative[40], dietro la probabile consapevolezza che il rapido susseguirsi di più atti – spesso in sovrapposizione tra loro – dava vita ad un complesso normativo di difficile decifrazione per il cittadino comune (e, ad essere sinceri, anche per quello dotato di competenze tecnico-giuridiche). Occorre, in primo luogo, chiedersi se sia possibile attribuire alle circolari e alle *FAQ* la medesima efficacia delle fonti che interpretano alla stregua di un'interpretazione autentica compiuta dall'amministrazione.

Secondo autorevole dottrina si definisce di interpretazione autentica quell'atto normativo «il cui contenuto sia la determinazione del significato di una o più disposizioni legislative precedenti»[41] al fine di chiarirne la portata[42].

Le caratteristiche consuetamente attribuite all'interpretazione autentica si identificano nel fatto che, al pari delle altre fonti generali ed astratte, anche quelle interpretative hanno efficacia *erga omnes*, ossia vincolano qualsiasi soggetto dell'ordinamento. In secondo luogo, gli atti normativi di interpretazione autentica non hanno

[40] Riconduce le circolari ad un'attività di interpretazione M. BELLETTI, *La "confusione" nel sistema delle fonti*, cit., 13. R. DI MARIA, *Il binomio "riserva di legge-tutela delle libertà fondamentali" in tempo di COVID-19: una questione non soltanto "di principio"*, in *Diritti regionali*, 1 (2020), 517, invece elogia l'uso delle *FAQ* sotto il profilo della "attività di informazione ufficiale".

[41] R. GUASTINI, *Interpretare e argomentare*, in *Trattato di Diritto civile e commerciale Cicu-Messineo-Mengoni*, Milano 2011, 81 s.

[42] Il fine chiarificatore delle norme di interpretazione autentica non è sempre conseguito in pieno, visto che in talune circostanze un'interpretazione con effetti retroattivi, più che contribuire alla certezza dei rapporti giuridici finisce per compromettere tale valore. Sul punto cfr. M. MANETTI, *I vizi (reali e immaginari) delle leggi di interpretazione autentica*, in A. Anzon (a cura di), *Le leggi di interpretazione autentica tra Corte costituzionale e legislatore*, Quaderni della Rivista di Diritto costituzionale, Torino 2001, 31 ss.

(o, comunque, non dovrebbero avere) carattere innovativo, ma dichiarativo, in quanto si limitano semplicemente a dichiarare il significato di un atto preesistente ed è questa la ragione per cui si ritiene che normalmente abbiano efficacia retroattiva[43]. In terzo luogo, l'interpretazione di un qualsivoglia testo giuridico si definisce autentica quando è compiuta dallo stesso soggetto che è autore del testo interpretato. Ma, in definitiva, non è chiaro in cosa consista questa "autenticità": se essa dipenda dall'identità dell'organo che la fornisce, dallo stesso *nomen* tra atto interpretato e atto interpretante, dalla loro identica collocazione nella gerarchia delle fonti, dalla medesima efficacia vincolante[44].

Lasciando da parte la considerazione che l'interpretazione autentica di un testo normativo di per sé sarebbe sempre una finzione[45], si deve però concludere che nel rapporto tra le fonti normative adottate dal Governo nella gestione dell'emergenza (sia decreti-legge che dpcm) e gli atti adottati con funzione chiarificatrice non possano rinvenirsi gli elementi propri dell'interpretazione autentica.

Innanzitutto, né le circolari né le *FAQ* hanno lo stesso rango delle fonti interpretate, addirittura in entrambi i casi è dubbia la loro stessa riconducibilità al novero delle fonti del diritto. In secondo luogo, anche volendo riconoscere all'amministrazione (e nella specie ai vari ministeri) un potere di interpretazione di atti normativi questa potrebbe esplicare soltanto effetti interni e non *erga omnes*.

In conclusione, la circostanza che tali misure siano adottate al fine di chiarire il significato di altre fonti non consente di attribuire loro la medesima efficacia delle fonti interpretate, così come avviene nell'ipotesi dell'interpretazione autentica. In tal modo, non è attraverso questo argomento che può pervenirsi al riconoscimento dell'idoneità di circolari e *FAQ* a vincolare i consociati nella conformazione delle proprie condotte.

[43] Secondo il costante insegnamento della Corte costituzionale sarebbero di interpretazione autentica «"quelle norme obiettivamente dirette a chiarire il senso di norme preesistenti ovvero a escludere o a enucleare uno dei sensi fra quelli ragionevolmente ascrivibili alla norma interpretata"; i caratteri dell'interpretazione autentica, quindi, sono desumibili da un rapporto fra norme "tale che il sopravvenire della norma interpretante non fa venir meno la norma interpretata, ma l'una e l'altra si saldano fra loro dando luogo a un precetto normativo unitario"». Tra le tante, Corte cost., 14 maggio 2008, n. 132.

[44] R. GUASTINI, *Interpretare e argomentare*, cit., 83.

[45] A. PUGIOTTO, *La legge interpretativa e i suoi giudici. Strategie argomentative e rimedi giurisdizionali*, Milano 2003. La ragione di ciò, è facilmente intuibile, risiede nella circostanza che nei moderni Stati costituzionali una immedesimazione "personalista" tra organo abilitato ad adottare un'interpretazione autentica e autore materiale dell'atto interpretato sarebbe impossibile. Tende, quindi, a prevalere la tesi secondo cui il potere di interpretazione autentica spetta all'organo titolare della potestà normativa secondo i criteri consuetamente determinati dalla Costituzione. Cfr. G. TARELLO, *L'interpretazione della legge*, in *Trattato di Diritto civile e commerciale Cicu-Messineo-Mengoni*, Milano 1980, 245; P. CARNEVALE e A. CELOTTO, *Il parametro «eventuale». Riflessioni su alcune ipotesi atipiche di integrazione legislativa del parametro nei giudizi di legittimità costituzionale delle leggi*, Torino 1998, 58 s.

2.2. Segue: in virtù di un implicito pactum subiectionis

È possibile interrogarsi sull'individuazione del fondamento della cogenza delle norme infra-giuridiche in una dottrina dalle origini antiche, quella contrattualistica. In particolare occorre chiedersi se l'idoneità a vincolare i comportamenti dei consociati da parte di disposizioni non contenute in fonti del diritto possa risiedere in un nuovo e implicito *pactum subiectionis*[46] cui i singoli abbiano aderito in ragione dello stato di emergenza.

La teoria contrattualistica si presenta estremamente complessa e ricca di sfumature, ma reca quale suo filo conduttore l'individuazione del fondamento del potere politico «in un contratto, e cioè in un accordo tacito o espresso fra più individui, accordo che segnerebbe la fine dello stato di natura e l'inizio dello stato sociale e politico»[47].

Sarebbe proprio tale patto a costituire il fondamento della legittimazione dello Stato e dei suoi comandi (espressi nella legge). Seppur sotto diverse accezioni[48] il sistema giuridico nascerebbe da un accordo vincolante e questo consentirebbe di distinguere un comando cogente da un disposto privo di tale portata.

È possibile riproporre questo modello a fondamento della idoneità da parte di atti non-fonte a vincolare i cittadini? Detto in altri termini, ci si chiede se la teoria

[46] La teoria del *pactum subiectionis* è tradizionalmente attribuita a Hobbes, tuttavia essa ha origini molto più antiche e riceve dal filosofo inglese una nuova lettura, fondata sul concetto di sovranità assoluta, che riduce «i diversi contratti a uno solo, un patto unico, che è insieme *pactum unionis*, *subjectionis* e *repraesentationis*», cfr. A. DI BELLO, *Sovranità e rappresentanza. La dottrina dello Stato in Thomas Hobbes*, Napoli 2010, 71. Sovranità assoluta che non sembra troppo azzardato rinvenire in quelle situazioni di emergenza estrema per lo Stato, in cui è in pericolo la sopravvivenza dell'ordinamento. Su tale concetto l'opera di maggiore, seppur controverso, riferimento è C. SCHMITT, *Teologia politica (1922)*, in Id., *Le categorie del politico*, a cura di G. Miglio e P. Schiera, Bologna 1972, 29 ss.

[47] N. MATTEUCCI, *Contrattualismo*, in N. Bobbio, N. Matteucci e G. Pasquino (a cura di), *Dizionario di politica*, Torino 2016, 178.

[48] Per Hobbes, ad esempio, il contratto assume i contenuti del vero e proprio *pactum subiectionis*, ossia dell'accordo con il quali i singoli si spogliano dei loro diritti individuali a favore del Sovrano in cambio della protezione. Vi è in questo caso una sottomissione dei consociati che legittima il comando proveniente dall'autorità. Per Locke, invece, il contratto assume un carattere maggiormente paritario, essendo fondato sulla fiducia (*trust*) tra governati e governanti. I primi non si spogliano di ogni diritto in favore del Sovrano, ma affidano a questo una funzione di garanzia dei propri diritti (per questo i consociati conserverebbero il diritto di resistenza). Infine, per Rousseau il Contratto sociale implicherebbe l'alienazione dei diritti da parte del singolo non a favore del Sovrano, ma della comunità. Questa sarebbe retta dalla volontà generale, per sua natura infallibile perché destinata sempre alla realizzazione del bene comune e, di conseguenza, anche la legge che ne è espressione sarebbe sempre giusta. Cfr. G. FASSÒ, *Storia della filosofia del diritto*, II, Roma-Bari 2001, 113 ss., 162 ss., 286 ss.

contrattualistica possa essere riproposta ove il patto sociale non sia diretto al passaggio dallo stato di natura allo stato sociale, ma alla gestione dello stato di emergenza, vale a dire che si ponga come accordo temporaneo in virtù del quale i consociati affidano poteri straordinari allo Stato per il superamento della situazione emergenziale, consentendo, solo per il tempo a ciò strettamente necessario, di derogare ai normali criteri di produzione del diritto[49].

Non sembra che quello contrattualistico sia un argomento validamente spendibile per giustificare la cogenza di atti non annoverabili tra le fonti del diritto. La ragione di ciò risiede nel fatto che già esiste un ordine costituzionale, istituito sulla base della Carta fondamentale, e l'adesione ad un nuovo patto emergenziale, per quanto temporaneo, implicherebbe una sospensione del primo[50]. È il principio di sovranità popolare consacrato nell'art. 1 Cost. ad impedire che la sovranità, esercitata nelle forme stabilite dalla Costituzione, possa essere esercitata secondo forme diverse e non convenzionali.

2.3. Segue: sulla base della presunta distinzione tra "normatività" e "giuridicità"

Ai fini della dimostrazione della cogenza che circolari e *FAQ* possono avere per il singolo consociato si potrebbe tentare un approccio che parta dalla distinzione tra "normatività" e "giuridicità". In altre parole, si tratterebbe di verificare l'esistenza di una forma di giuridicità "para-positiva" attraverso una positivizzazione del diritto in precetti che, pur essendo scritti, non sono inquadrabili tra le fonti atto, bensì tra le fonti fatto. Si tratterebbe di una forma di produzione giuridica non normativa che si colloca a metà strada tra il diritto positivo (difettando rispetto a questo di un pro-

[49] Nelle moderne costituzioni fondate sulla sovranità popolare la teoria contrattualistica (intesa nel senso della "soggezione") sarebbe superata dalla circostanza che il popolo viene «configurato non già nella veste di parte di un rapporto avente quale altro termine il sovrano, bensì quale titolare unico del potere di dar vita, con un atto unilaterale, all'ordine costituzionale». Così, C. MORTATI, *Costituzione (Dottrine generali)*, in *Enciclopedia del diritto*, XI (1962), 143.

[50] Le costituzioni moderne rappresentano, in buona sostanza, la formalizzazione di un "accordo sociale unilaterale" che è a fondamento di un'aggregazione umana ordinata, visto che, come C. MORTATI, *Costituzione*, cit., 140, osserva, «ogni struttura organizzativa desume il suo ordine primo da un centro unificante e motore, da una costituzione, conforme al tipo di ente sociale cui essa corrisponde, con la funzione della stabilizzazione dei singoli rapporti che si svolgono in esso». Pur non negando l'eventualità che detta costituzione (ma non – si badi – il patto ad essa sottostante) possa subire delle "sospensioni", dettate dall'esigenza della conservazione dell'ordinamento che potrebbe essere pregiudicata dall'osservanza dell'ordine legale, al fine di evitare arbitrii è preferibile che siano gli stessi atti costituzionali a stabilire una disciplina della sospensione. Il fondamento della sospensione andrebbe, quindi, ravvisato sempre nei fini istituzionali (ovvero, nella "costituzione materiale", *ivi*, 196) e non nella semplice necessità fattuale. Ciò implica che il "patto" da cui originano quei fini resti intatto, anzi pare si possa affermare che essi trovino più immediata attuazione, anche attraverso strumenti destinati ad operare «in sostituzione delle norme predisposte per realizzarli in via ordinaria».

cedimento determinato di produzione e degli elementi tipici di pubblicità e conoscibilità) e il mero fatto giuridicamente rilevante (contribuendo ad orientare il singolo consociato o chi è chiamato a far osservare un determinato precetto – questo sì fissato da una norma positiva – nello stabilire se la condotta sia conforme o meno ad esso), alla stregua di quanto avviene – almeno in parte, ma con qualche forzatura[51] – con la c.d. *soft law*[52].

Un dato comunemente acquisito negli ordinamenti moderni, soprattutto a seguito della lezione kelseniana, è quello secondo il quale il diritto si identifica con le norme. La teoria normativista, in tal senso, esaurisce il concetto di giuridico nel concetto di normativo, non potendo esistere qualcosa di giuridicamente rilevante al di fuori di un insieme di norme prodotte dai consociati all'interno di un determinato contesto sociale. È vero che il normativismo non può essere inteso nel senso del più stretto positivismo, secondo il quale la giuridicità si esaurisce nelle disposizioni scritte (altrimenti non potrebbe giustificarsi l'esistenza delle consuetudini), ma è altrettanto vero che l'atto normativo, ove inteso in senso positivo, è il frutto di un procedimento «di solito regolato piuttosto dettagliatamente dal diritto positivo, tramite norme che individuano quale soggetto sia competente ad emanare un certo tipo di atto, con quale procedura, con quale forma di pubblicità, e talvolta con quali vincoli contenutistici»[53]. Secondo la logica kelseniana del diritto, quindi, questo dovrà trovare il suo fondamento in una norma superiore che ne abilita l'idoneità a produrre effetti, secondo una dipendenza di tipo formale e non sostanziale.

Se guardiamo alle circolari e alle *FAQ* possiamo rilevare che queste difettano a monte di una norma sulla produzione, non è possibile riscontrare nell'ordinamento l'esistenza di una fonte di rango superiore che ne abiliti l'idoneità a produrre effetti giuridici. In questo senso, si porrebbe il problema della loro stessa validità secondo criteri kelseniani, mancando una fonte abilitante verrebbe meno non solo la loro stretta idoneità a vincolare i consociati (efficacia), ma la loro stessa configurazione come fonti nel sistema (validità).

[51] Infatti, come è stato opportunamente osservato in questa *Rivista* da F. MARONE e A. PERTICI, *Quando una disciplina attuativa si sottrae al circuito democratico: il caso delle linee guida ANAC per l'attuazione dei contratti pubblici e la loro difficoltà di classificazione tra atti regolamentari e atti amministrativi generali*, «la *soft law* disciplina rapporti non soggetti ad alcuna normazione cogente e viene rispettata in virtù di un'adesione volontaria ai precetti della stessa», per questa ragione non si presterebbe ad essere invocata come modello cui paragonare l'efficacia delle norme infra-giuridiche nei contesti emergenziali.

[52] La *soft law* esprimerebbe, quindi, «una manifestazione affatto peculiare della dinamica giuridica che tuttavia si inserisce nel processo giuridico, integrandolo e perfezionandolo, ossia costruendolo», ciononostante, essa opera come «strumento di regolazione posto al di fuori dal paradigmatico e tradizionale sistema delle fonti (*hard law*)». Cfr. F. CAVINATO, *Soft Law e topografia giuridica*, in *Filodiritto*, 16 febbraio 2018.

[53] G. PINO, *Norma giuridica*, in G. Pino, A. Schiavello e V. Villa (a cura di), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, Torino 2013, 148.

L'attenzione, dunque, potrà spostarsi su un altro punto, quello della ricerca del fondamento della loro validità ed efficacia non in altre fonti dell'ordinamento gerarchicamente superiori, bensì direttamente nell'emergenza intesa di per sé come fonte abilitante suprema.

2.4. Segue: in ragione del brocardo necessitas non habet legem

Per le ragioni appena viste, occorre chiedersi, quindi, in quali termini si pone il rapporto tra l'infradiritto e il brocardo *necessitas non habet legem*, vale a dire: se l'emergenza opera come fatto *extra ordinem* può attrarre nella sfera del giuridicamente rilevante atti privi della natura di fonte? Le circolari e le *FAQ*, che non sono fonti, potrebbero acquisire cogenza in virtù della superiore emergenza, intesa come fatto derogatorio all'ordinario sistema delle fonti?

Per quanto la tesi dell'emergenza come suprema ed autonoma fonte del diritto – collocata al di fuori dell'ordinamento e, quindi, *extra ordinem* – abbia avuto un largo seguito nella dottrina antica[54], oggi tende ad essere sempre più recessiva[55].

Non è mancato chi abbia ritenuto di rinvenire, nel caso odierno, il fondamento della produzione normativa direttamente nell'emergenza[56], ma la tesi largamente prevalente tende ad individuare nella Costituzione e non nella necessità il fondamento dei provvedimenti normativi adottati nella situazione di emergenza[57]. D'altra parte, andrebbe sempre tenuta presente la distinzione tra emergenza come fonte-fatto del diritto e stato di emergenza che legittima l'adozione di atti normativi urgenti per farvi fronte: nel primo caso ci si muoverebbe in un ambito esterno all'ordine costituzionale vigente e, quindi, nella volontà sovrana senza vincoli, nel secondo pur sempre all'interno dei confini tracciati dalla Costituzione[58].

La Costituzione fornirebbe, in pratica, tutti gli strumenti necessari per fronteggiare dal punto di vista normativo le situazioni emergenziali come quella che stiamo

[54] Si pensi, ad esempio, alla nota tesi di S. ROMANO, *Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina e di Reggio-Calabria*, in *Rivista di diritto pubblico e della Pubblica Amministrazione*, (1909), 220, secondo il quale «la necessità si può dire che sia la fonte prima ed originaria di tutto quanto il diritto, in modo che rispetto ad essa, le altre sono da considerarsi in certo modo derivate». Analogamente, O. RANELLETTI, *La Polizia di sicurezza*, in *Trattato di Diritto amministrativo V.E. Orlando*, IV, Milano 1904, 1190 ss.

[55] In tal senso, A. CARDONE, *La "normalizzazione" dell'emergenza. Contributo allo studio del potere* extra ordinem *del Governo*, Torino 2011, 49

[56] V. BALDINI, *Emergenza costituzionale e Costituzione dell'emergenza. Brevi riflessioni (e parziali) di teoria del diritto*, in *Diritti fondamentali*, 1 (2020), 893 ss.

[57] M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, cit., 113; R. ROMBOLI, *L'incidenza della pandemia da Coronavirus nel sistema costituzionale italiano*, in *Consulta Online*, 3 (2020), 517 s. Per ulteriori indicazioni sia consentito rinviare al mio *I fondamenti teorico-costituzionali del diritto dell'emergenza, con particolare riferimento alla pandemia*, in B. Brancati, A. Lo Calzo e R. Romboli (a cura di), *Coronavirus e costituzione*, cit., part. 32 ss.

[58] M. CALAMO SPECCHIA, *Principio di legalità e stato di necessità*, cit., 7.

vivendo. Il principio della *salus publica suprema lex est* «è infatti ritenuto positivizzato in specifici principi costituzionali: quali quelli della unità ed indivisibilità della repubblica, del ripudio della guerra, della tutela della salute pubblica e della sicurezza, delle fonti emergenziali e dei principi supremi sottratti alla revisione costituzione artt. 5, 7, 10, 11, 32, 77, 87, 120, 139), nonché nel sistema delle fonti e dei controlli sulle stesse da questa delineato»[59].

Proprio sotto quest'ultimo profilo devono considerarsi garanzie intangibili quelle della rigidità costituzionale e del *numerus clausus* del novero delle fonti[60]. Gli unici atti abilitati a produrre effetti giuridicamente vincolanti saranno, quindi, quelli riconosciuti come tali dall'ordinamento costituzionale, senza lasciare spazio ad altri atti o fatti che ricevono la loro legittimazione direttamente dall'emergenza.

Per tale ragione, se circolari e *FAQ* non possono essere ricondotte al sistema delle fonti secondo i criteri di riconoscimento fissati a livello costituzionale se ne deve dedurre che non possano implicitamente ricevere tale qualità in virtù del loro collegamento all'emergenza come suprema fonte del diritto.

3. CONCLUSIONI. TUTELA GIURISDIZIONALE DEI DIRITTI E POTERE INTERPRETATIVO DEL GIUDICE RISPETTO ALL'INFRADIRITTO

Le osservazioni sopra esposte consentono di concludere che le esigenze di certezza nella garanzia dei diritti fondamentali non ammettono il ricorso a forme di limitazione mediante atti che non abbiano natura formalmente normativa, non sarebbe lecito cioè ricorrere a forme analoghe alla *soft law* in tale campo perché ciò porterebbe all'esclusivo risultato di generare incertezza nei consociati.

Si può ritenere, quindi, che circolari interpretative e *FAQ* ministeriali non siano atti vincolanti in quanto privi della natura di fonte, nonostante se ne faccia largo uso nelle situazioni emergenziali con l'intento di fornire elementi di chiarezza. La loro concreta utilità sta nel fungere da criterio di orientamento della condotta, ma senza possibilità alcuna di riconoscere loro cogenza giuridica. Per tale ragione il giudice non potrebbe servirsene nella definizione della condotta conforme al precetto in via esclusiva, ma soltanto congiuntamente ad altri elementi normativi e fattuali[61].

[59] R. ROMBOLI, *L'incidenza della pandemia da Coronavirus nel sistema costituzionale*, cit., 517 s.

[60] R. DI MARIA, *Il binomio "riserva di legge-tutela delle libertà fondamentali"*, cit., 513.

[61] Anche chi ha sostenuto l'idoneità delle circolari a produrre norme, negando la loro natura di atti interni, conviene sulla circostanza che tali atti «non potranno mai costituire il "diritto" che il giudice deve applicare, essendo esclusa una loro fungibilità o una equiparazione con le fonti legali». Il giudice, infatti, potrà in ogni caso disattenderli, contrapponendo all'interpretazione seguita dall'amministrazione una propria interpretazione anch'essa ricavata dai medesimi enunciati legislativi. Cfr. R. TARCHI, *Le circolari ministeriali*, cit., 328. La possibilità di operare un parallelo, quanto a "trattamento" da parte del giudice, tra circolari e regolamenti (fonti in senso formale) richiede una ulteriore specificazione. È vero, infatti, che anche il regolamento non vincola il giudice nel caso in cui si ponga

Nulla esclude che le circolari o le *FAQ* possano essere disattese dal giudice al verificarsi di altri presupposti che facciano comunque ritenere che la condotta sia stata rispettosa del precetto normativo secondo canoni di razionalità. La *FAQ* può quindi essere assunta a parametro della liceità della condotta – ad esempio quando il giudice sia investito della questione in sede di impugnazione di una sanzione amministrativa – analogamente ad altri criteri di cui normalmente può servirsi nella ricostruzione e valutazione del fatto (siano essi criteri materiali, fattuali o psicologici).

Il fondamento della liceità della condotta tenuta dal consociato non potrà, pertanto, essere individuato nelle circolari e nelle *FAQ* che sono atti privi di forza vincolante, «tale fondamento è comunque giuridico-positivo, risalente alle previsioni delle fonti primarie (dd.ll.) e di quelle attuative che sono seguite»[62]. Soltanto a queste previsioni dovrà ritenersi soggetto il giudice nel valutare la conformità della condotta, diversamente, ove si volesse attribuire alle circolari e alle *FAQ* una qualche idoneità a condizionarne l'apprezzamento, il rischio sarebbe quello di ledere i propri poteri interpretativi finalizzati all'applicazione della legge. D'altra parte, è un dato ormai incontrovertibile che sia il giudice il soggetto privilegiato nell'operazione ermeneutica del diritto, senza che tale suo ruolo possa in qualche modo essere influenzato da soggetti appartenenti all'amministrazione. Ciò non potrebbe trovare deroghe nei periodi di emergenza in quanto rappresenta uno degli elementi imprescindibili del sistema di garanzia dei diritti e delle libertà costituzionali che, finalizzato in primo luogo ad assicurare una protezione piena della persona, è connaturato all'essenza della Costituzione[63].

Quale valore riconoscere, quindi, alle regole infra-giuridiche nella gestione dell'emergenza? Difficilmente queste saranno in grado di rimediare ai molteplici dubbi applicativi sollevati dalle disposizioni giuridiche prodotte dagli organi a ciò abilitati, sia perché – come si è ampiamente detto – sono sprovviste della cogenza tipica delle fonti giuridiche, sia perché intendono riferirsi ad aspetti della vita concreta che difficilmente possono essere racchiusi in un precetto che ha la pretesa di essere generale e astratto. La loro *ratio* primaria è quindi quella di esplicitare delle regole di buon senso, affidando ai consociati e alla loro responsabilità la funzione di realizzare al meglio i fini perseguiti dalla legge[64].

in contrasto con la legge, potendo essere annullato (dal giudice amministrativo) o disapplicato (dal giudice ordinario), tuttavia sia l'annullamento che la disapplicazione impongono al giudice un intervento che tenga presente l'atto formale il quale costituisce l'oggetto diretto o indiretto di una decisione. Nel caso della circolare, invece, il giudice potrebbe limitarsi a fornire una propria distinta interpretazione della disposizione di legge, diversa da quella contenuta in circolare, senza che si possa ravvisare alcun intervento diretto a rimuoverla o, anche semplicemente, a disapplicarla.

[62] V. BALDINI, *Riflessioni sparse sul caso (o sul caos...) normativo*, cit., 983 s.

[63] R. DI MARIA, *Il binomio "riserva di legge-tutela delle libertà fondamentali"*, cit., 516.

[64] A. CHIAPPETTA, Less regulation for better regulation, cit., 724 ss.

Se però si vuole tentare di individuare un possibile fondamento costituzionale delle norme infra-giuridiche nella gestione dell'emergenza, questo potrebbe rinvenirsi in un'etica della solidarietà che permea l'intero testo costituzionale, anche se spesso viene dimenticato che ciò costituisce il lato oneroso del personalismo il quale, per sua natura, non può essere fatto soltanto di diritti. Il rispetto dei doveri di solidarietà dovrebbe fungere da discrimine nel delicato equilibrio tra deterrenza psicologica e minor compressione dei diritti della persona, affidando ai cittadini un compito attuativo difficilmente sostituibile e contribuendo ad orientare il giudice al quale, in ultima istanza, spetta il compito di verificare la misura in cui – nella specifica situazione concreta – la condotta del singolo sia stata conforme al diritto secondo criteri di razionalità.

Symposium I

Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts,* Cambridge University Press, Cambridge 2019

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 419-422
ISSN: 1825-5167

TIME, ART, AND THE LAW: A MATTER OF PERSPECTIVE

A COMMENT ON DESMOND MANDERSON'S *DANSE MACABRE: TEMPORALITIES OF LAW IN THE VISUAL ARTS*

PATRÍCIA BRANCO
Centro de Estudos Sociais,
Univ. Coimbra (Portugal)
patriciab@ces.uc.pt

ABSTRACT
In this brief comment, I will mainly engage with chapters three and six of Desmond Manderson's *Danse Macabre: Temporalities of Law in the Visual Arts*. In his recent book, Manderson's poignant argument resides in confronting colonial law's structural violence, and how we need to contrast familiar tropes of colonial representation we have regrettably taken for granted. Art, in its various forms, is one way to do it, especially in these times of populist ideologies.

KEYWORDS
Law; Perspective; Life; Death

In this brief comment, I will mainly engage with chapters three and six of Desmond Manderson's *Danse Macabre: Temporalities of Law in the Visual Arts*, entitled, respectively, "Governor Arthur's Proclamation. *Utopian Time*" and "Bennett's Laws. *Colonial Time*". And I would like to start by paraphrasing one of Joni Mitchell's songs, "Both Sides, Now"[1]: "I've looked at law from both sides now/ from life and death and still somehow/ it's law's illusions I recall/ I really don't know law at all".

What is the law? One of the quintessential questions we have all been confronted with... And I believe, moreover, the same kind of question can be asked in regards to time and to art.

Curiously, I started by mentioning a song, or the lyrics of it. Music is art. Dance is art – the book's title talks of dance, but the engagement is with the 'visual arts'. Precisely because, for Manderson, the link between the visual arts and the framing of time is more prominent than with music or with dance (p. 7). Furthermore, there

[1] Included on Mitchell's second album, *Clouds* (1969). Joni Mitchell is a Canadian singer and songwriter. She is also a painter.

is a materiality in the visual arts that is viscerally connected to the law, since the visual arts, for Manderson, embody things like 'structure and authority, governance, regulation, sovereignty, rights, control, and punishment' (p. 17). Images have 'a complexity in their depiction of the relationship of ideas and forces' (p. 84). And thus we must take them seriously, the author warns us (p. 17).

I want to go back to that question, though: what is the law? Any definition of what the law might be will be, itself, incomplete. I really do not know the law at all, as I wrote in paraphrasing "Both Sides, Now". Manderson does not define the law in his book either. However, he links it first to illusion, but mainly to death, to violence, to ghosts stories and horror movies (p. 2-4). Later in the *Foreword* he clearly affirms that the law is 'not just a synonym for norm' (p. 17), even though it 'pours commands' (p. 12). And Manderson also refers to the law as being written (p. 12). Nevertheless, it is the link with death that makes the law matter, the author claims (p. 4). Again, the idea of materiality is always there.

Consequently, other questions arise: what law(s) are we discussing here? And from which point of view? Can we escape a western way of thinking about the law(s)? And can it be filled with life?

I believe that if we keep on asking what the law is, the law will surely be referred to in a variety of ways taking into account geography (North and South, East and West, for real and figuratively), the political, economic and cultural contexts, and language. And, of course, the diversity of functions that are attributed to the normativities of human relations and actions, that speak of the diversity of experiences and uses of law in everyday life. Which means that our lives are made up of an intersection of different systems of law, and not just from one single form of law.

For sure Manderson is aware of this. He clearly refers to colonial law as the law of the white settler in the territories that came to be called Australia by the colonizers. He gives the reader an impressive examination of *Governor Arthur's Proclamation to the Aboriginal People* (c. 1830) in chapter 3, an iconic image that embodies the violence of colonial law, and, by drawing parallels with the enforcement of present Australian laws to Aboriginal populations, the author presents the continuity of such violence. Perhaps, more than being about the law, Manderson's claims present a socio-legal examination of the works of some laws in the lives of Aboriginal people. And thus, the law – whatever we may think of it – is clearly a presence in life, it matters because it affects the living conditions and experiences of those who are implicated in its doings. I would thus counterargument that it is the link with life that makes the law matter.

The continuity of colonial law/violence is a temporality that Manderson picks up in chapter 6, by examining a number of Gordon Bennett's artworks, precisely because Bennett's art brings colonial violence into the present moment, disrupting it, presenting new meanings to colonial representations (p. 182). And thus messing up

the models, doing a sort of inverted art and inverted time – it is a matter of perspective[2], as Bennett's *Triptych: Requiem* brilliantly exposes.

However, in Manderson's examination of Bennett's artworks (as well as of those of other Australian contemporary artists that share with Bennett their Aboriginal descent and critique of colonial representations), and consequently of Australian colonial law's doings, there is an absence crying out to be heard: what happened to the Aboriginal's systems of law? They are very much alive, they make demands, they engage in many ways with the common law system (Robb 2003; Mohr 2010; Gondarra 2011; Pelizzon 2014). These systems of law resist. The *Terra Nullius* fiction may have silenced them, but has not made them inexistent[3]. And although there is a continuity of colonial violence, there is too a continuity of Aboriginal laws and sovereignty, expressed in many ways, as embodied in the materiality of the several Aboriginal tent embassies dotted[4] all over the territory (Pelizzon 2014). They materialize what Santos (2017) refers to as 'innovation on the other side of the line', which means that people under the presence of colonial law and sociability are not just victims: they keep on resisting exclusion, and preserving their laws. Nonetheless, in examining Bennett's *Terra Nullius (Teaching Aid): As Far as the Eye Can See* – a painting clearly connected to the question of the doings of common law via the legal term it encapsulates – Manderson refers exclusively to the invisibility of cultures and peoples (p. 180). And so, perhaps, he falls into the same 'perspective grid'[5] through which the Aboriginal peoples' laws became (un)seen.

Nevertheless, Manderson was bold in his use of Bennett's artworks, and its links to the Aboriginal people. Bennett is contemporary. Moreover, Manderson is very conscious of the fact that none of the artworks he has chosen to examine in his book 'has ventured outside mainstream works from the western fine art tradition' (p. 240). Which is perhaps why 'representations of law in the visual arts are fixated on death' (p. 239). Accordingly, Bennett's paintings voice suffering, death, genocide. They force us to remember and never forget. They 'reconfigure the relation between past and present' (p. 193). His paintings are not the 'traditional[6]' paintings that are usually associated with the Aboriginal people's artworks (Schreiner 2013). Nevertheless, Aboriginal art is profoundly legal (Cunneen 2011). There is thus a tension in Manderson's analysis in regards to the viewpoint of what laws are in question, related, possibly, to his use of western art tradition and its rules on perspective – from which, it seems, we cannot seem to escape.

[2] On reversing perspectivism see Viveiros de Castro (2004). See, as well, Gordon Syron's artwork, *Judgement by His Peers* (1978).

[3] See Sally Morgan *Terra Nullius* (1989).

[4] The idea of the dots is intentional.

[5] The question of the 'mirror', to which Bennett's painting refers to, is very powerful. For Santos (2014), the notion of '[b]eing imagined as reflected in the same mirror' turns the seer and what is seen reciprocally blind.

[6] The notion of tradition is also quite contested.

What I cannot seem to escape is Truganini's gaze, in Bennett's *Triptych: Requiem*. For two reasons. The first has to do with my westernized mind and eye: I see in her Lady Justice, with her eyes wide open. Secondly, the concept of the central vanishing point points, as I see it, towards the recent images of the bushfires that keep on tormenting Australia. The central vanishing point speaks of climate change and ecocide. Of death, I believe Manderson would rightly claim. Events to which one cannot stay indifferent. And so we are faced with time, because we want to keep living. Truganini's gaze adverts us that western perspective has reduced landscape and people to abstractions (p. 183). We need to go back to different perspectives: perhaps Aboriginal techniques will make the landscape and the people complete again[7].

I believe that Manderson's poignant argument resides in confronting colonial law's structural violence, and how we need to contrast 'familiar tropes of colonial representation' (p. 103) we have regrettably taken for granted. Art, in its various forms, is one way to do it, especially in these times of populist ideologies.

REFERENCES

Cunneen C (2010) Framing the Crimes of Colonialism: Critical Images of Aboriginal Art and Law. In K. Hayward, M. Presdee (eds.), *Framing Crime: Cultural Criminology And The Image*. London: Routledge, 115-137

Gondarra OAM D; Trudgen R (2011) The Assent Law Of The First People: Principles Of An Effective Legal System In Aboriginal Communities. In https://www.whywarriors.com.au/2012/02/madayin-law-system-yolngu-of-arnhem-land/ (last accessed 03.02.2020)

Mohr R (2010) Responsibility and the Representation of Suffering: Australian Law in Black and White. *e-cadernos ces* 7: 123-146

Pelizzon A (2014) Aboriginal sovereignty claims: contemporary voices in Australia. *Settler Colonial Studies* 4(4): 368-381

Robb DO (2003) Two Laws - One Land: Reflections of a Larrakia Woman. *The Newcastle Law Review* 7(1): 35-52

Santos BS (2014) *Epistemologies of the South: justice against epistemicide*. Boulder - London: Paradigm Publishers

Santos BS (2017) The Resilience of Abyssal Exclusions in Our Societies: Toward a Post-Abyssal Law. *Tilburg Law Review* 22(1-2): 237-258

Schreiner ATM (2013) How Law Manifests Itself in Australian Aboriginal Art. *Erasmus Law Review* 6(3/4): 167-172

Viveiros de Castro E (2004) Perspectival Anthropology and the Method of Controlled Equivocation. *Tipití: Journal of the Society for the Anthropology of Lowland South America* 2(1): 3-22

[7] Cf. https://www.nytimes.com/2020/01/15/opinion/australia-fires-aboriginal-people.html (last accessed 03.02.2020).

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 423-436
ISSN: 1825-5167

READING IMAGES IN THE END TIMES

KAREN CRAWLEY
Law School
Griffith University (Australia)
k.crawley@griffith.edu.au

ABSTRACT
This review essay engages Desmond Manderson's latest book *Danse Macabre: Temporalities of Law in the Visual Arts,* as an exercise in reading images in the disciplinary field of law and humanities. It situates Manderson's methodology within his broader work in law and aesthetics, discusses its politics in terms of a commitment to Derridean immanent critique, and inquires into the limitations of its scope and approach. It then attempts to use Manderson's book as inspiration to think through the temporal predicament of the climate crisis and the political requirements of climate justice by employing his critical tools in the reading of an artwork.

KEYWORDS
Law, aesthetics, humanities, style, climate crisis

The review essay[1] takes its departure from the latest book of Australian scholar Desmond Manderson, one of the 'founding fathers' of the field of law and humanities, and a highly accomplished scholar and pedagogue. I first encountered Des in 2000 as my Torts lecturer at the University of Sydney, when his fantastic knowledge of history, powerful rhetorical skill, and obvious concern with inequity captured the attention of my young self, a disaffected aesthete with a love of language, suspicion of the instrumentalism of (some of) my legal education, and interest in social justice. Later I was fortunate to be a doctoral student under the auspices of his Canada Research Chair in Law and Discourse at McGill University, and found his expansive approach to 'discourse'[2] intellectually liberating, in its traversal of disciplinary boundaries, knitting together the normative, aesthetic and legal structures that make up our worlds. Against the dogma of legal positivism and the imperatives of critical perspectives that sometimes threaten to subsume law to politics, Des strove to return law to the humanities, 'to ideas of myth and reality, of the historical contingency

[1] I wish to thank Tim Peters, Ed Mussawir, Sarah Keenan and James Parker for conversations that enriched this article.

[2] See Michel Foucault, 'Orders of Discourse' (1971) 10:2 *Social Science Information* 7.

of authority, and of the importance of narrative in the construction of our beliefs.'[3] He always insisted on treating law as a 'resource in signification,'[4] a collective and constructive exercise of meaning-making, and a necessary if not sufficient condition of justice. It is a delight, then, to read and engage with his latest work, *Danse Macabre: Temporalities of Law in the Visual Arts*,[5] which weaves together the many strands of his thinking on law, justice, responsibility, and violence, in a landscape that is familiar to me, but nonetheless contains new and surprising vistas.

Danse Macabre is an erudite and wide-ranging text, bold in its claims and ambitious in its scope. It traverses six hundred years of visual art and legal tradition, closely analysing a number of key artworks across three continents. It responds to what Manderson rightly identifies as 'one of the most urgent tasks of the twenty-first century': the task of understanding 'how the *interpenetration* of aesthetics and politics lies at the heart of ideology, at the heart of what is visible to our discourse and what remains outside of it.'[6] The book is an accomplished work of art criticism through the lens of someone who is embedded in asking questions about law, and it proceeds by treating law *as* representation – a representation with material force (Robert Cover's famous phrase is often ritually invoked to make this point, '(l)egal interpretation takes place in a field of pain and death'[7]) – but nonetheless, a representation, a human construct, which takes form, and generates affect.[8] To write about law *and* art, then, is not sufficient – the relationship between them, Manderson asserts in the book's preface, is 'not analogical but structural."[9] If this interdisciplinary gesture is by now deeply familiar, it is in large part because of Manderson's own extensive scholarship in law and aesthetics, which has demonstrated law's constitutive imbrication with a wide array of representational forms, including music,[10]

[3] Desmond Manderson, 'Apocryphal Jurisprudence' (2001) 23 *Studies in Law, Politics and Society* 81 at 85.

[4] Robert Cover, 'Foreword: Nomos and Narrative' (1983) *Harvard Law Review* 4 at 8, cited in Manderson, 'Apocryphal Jurisprudence' at 92.

[5] (Cambridge University Press, 2019) (*Danse Macabre*).

[6] *Danse Macabre,* at 79, citing Terry Eagleton, Jacques Rancière, and Chiara Bottici.

[7] Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601, cited in *Danse Macabre*, at 7.

[8] Manderson writes elsewhere, 'law exists *only* as representations' and urges us to pay attention to how the fields of culture 'are crucial agents in the iterative and dynamic process by which those representations are made, gain or lose currency, appeal and power.' 'Memory and Echo: Pop cult, hi tech and the irony of tradition' (2013) 27 *Cultural Studies* 11 at 12.

[9] *Danse Macabre*, at 2. The sculpture in Amsterdam's old Town hall 'does not represent or illustrate or 'signify' the court's function, but actually embodies it.' at 4. 'Artworks do not simply represent changing concepts of time and discourses of legal justification... these cultural forms form the bridge between them.' at 16.

[10] Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000); 'Making a Point and Making a Noise: A Punk Prayer' (2016) 12 (1) *Law, Culture and Humanities* 17 (online 2013); 'Towards Law and Music: Sara Ramshaw, Justice as

children's books,[11] ghost stories,[12] novels,[13] television shows,[14] photographs and documentary film,[15] and video games.[16] Against the fetish for novelty that characterises much of what is often called 'cultural legal studies,'[17] Manderson's scholarship shows a marked preference for more classical, even canonical texts, taking the view that contemporary cultural representations contain echoes or traces of much older popular traditions of legal authority and resistance.[18]

Over the past few years, Manderson has turned his attention to the field of 'law and the visual,'[19] and adopted an aesthetic materialism that does not deny the realm of the imaginal or imaginary but insists on the materiality of images, their 'physical presence,'[20] their sensuous embodiment in cultural artifacts that sit before the eyes of a human viewer.[21] *Danse Macabre* is Manderson's first sustained engagement with the particular medium of painting, and the peculiarities of this representational form are uniquely suited to the themes of his inquiry - particularly, his focus on time. In their 'unnatural stillness,'[22] paintings distil time: most obviously the labour time of their maker, which is condensed and stored-up, detectable in the concrete

Improvisation: The Law of the Extempore (Oxford: Routledge, 2013)' (2014) 25(3) Law and Critique 311

[11] Maurice Sendak, *Where the Wild Things Are,* Desmond Manderson, 'From Hunger to Love: Myths of the Source, Interpretation and Constitution of Law in Children's Literature' (2003) 15(1) *Law and Literature* 87.

[12] Henry James, *The Turn of the Screw,* Desmond Manderson, 'Two Turns of the Screw: The Hart-Fuller Debate' in Peter Cane, ed. *The Hart Fuller Debate: 50 Years On* (Hart Publishing, 2009)

[13] D.H. Lawrence, *Kangaroo,* Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Routledge: Abingdon 2012).

[14] Desmond Manderson, 'Trust Us Justice: 24, Popular Culture and the Law' in Austin Sarat, ed., *Imagining Legality: Where Law Meets Popular Culture* (University of Alabama Press, 2011) 22, and 'Memory and Echo,' op cit.

[15] Desmond Manderson, 'Trench, trail, screen: scenes from the scopic regime of sovereignty' in Timothy D. Peters and Karen Crawley, eds. *Envisioning Legality: Law, Culture and Representation* (Routledge, 2017).

[16] Desmond Manderson, 'The Dancer from the Dance: Images and Imaginaries' (2020) 2 *Index Journal* http://index-journal.org/issues/law/part-1-lawscapes/the-dancer-from-the-dance-by-desmond-manderson

[17] See Cassandra Sharpe and Marett Leiboff, eds. *Cultural Legal Studies: Law's Popular Cultures and the Metamorphosis of Law* (Routledge, 2016), Timothy D. Peters and Karen Crawley, eds. *Envisioning Legality: Law, Culture and Representation* (Routledge, 2017), Kim Weinert, Karen Crawley and Kieran Tranter, eds. *Law, Lawyers and Justice: Through Australian Lenses* (Routledge, 2020).

[18] 'Memory and Echo' at 15

[19] Desmond Manderson, ed. *Law and the Visual: Representations, Technologies, Critique* (University of Toronto Press, 2018).

[20] Manderson, ed. *Law and the Visual,* at 4.

[21] 'Images are representations that, at the same time that they are unquestionably reminders of an absence – both the absence of the representing subject and of the represented object – are also unmistakeably *present* to viewers.' *Danse Macabre,* at 17.

[22] Manderson, *Danse Macabre*, at 7.

materiality of their surfaces and the gestures they display.[23] There is also a temporal dimension in the viewer's encounter with paintings: unlike viewing a film, which unfolds over time, paintings are experienced all at once. Eugène Delacroiz had precisely this virtue of painting in mind when he noted that we can see it 'in one instant.'[24] While we have to spend time with film to evaluate it, if we dislike a painting, we can stop looking. This means paintings can present something without necessarily having to make that something appealing to us in conventional ways. The possibility for our encounter with paintings to be confronting or unwelcome is crucial to painting's critical force.

Like any cultural object, paintings are destined to generate encounters across time: between the time of their making and the time(s) of their viewing. For Manderson, the disjuncture between the past of the artwork and the present of the critic is not a problem to be solved, but the very opportunity and occasion for paintings to do their critical work. In *Danse Macabre* he consciously embraces what Mieke Bal calls a 'preposterous' interpretation, re-reading historical images anachronistically through a modern lens in order to incorporate its 'afterlife.'[25] Contrary to the sense of history as monodirectional, moving from past to present, from cause to effect, this approach celebrates juxtaposing, rewriting, reworking, or recasting, recognising that 'the past is altered by the present as much as the present by the past.'[26] *Danse Macabre* is thus an intervention into art history as much as it is into legal theory or jurisprudence. He is not interested in 'a reductive obsession with the historical conditions surrounding the creation of the artwork,' or in 'parsing iconographic details within it.'[27] He is interested in how the painting works on us as viewers, generating 'an electric current that jumps across the synaptic gap from its time to ours.'[28] This is no mere exercise in semiotics. 'Explanation or description are not enough. We must inhabit them, engage with them: think and see the world *with* them both in their own time and ours.'[29]

Manderson's explanation of the critical force of paintings is a culmination of a normative and aesthetic methodology he has developed over two decades. This strategy is early in evidence in his 2003 reading of *Where the Wild Things Are*.[30] Rather than arguing that this iconic children's book *said* something about law or justice, he showed that it *staged a dilemma* between irresolvable positions on

[23] Isabelle Graw, 'The Value of Liveliness' in eds. Isabelle Graw and Ewa Lajer-Burcharth, *Painting Beyond Itself: The Medium in the Post-Medium Condition* (Sternberg Press, 2016) 79, at 100.

[24] Cited in ibid.

[25] *Danse Macabre,* 8, 83-84.

[26] TS Eliot, the quotation which opens Mieke Bal, *Quoting Caravaggio* (Chicago: University of Chicago Press, 1999).

[27] *Danse Macabre,* at 8.

[28] Ibid.

[29] *Danse Macabre,* at 17.

[30] Desmond Manderson, 'From Hunger to Love', n11.

questions of law and justice. On Manderson's reading, Sendak's classic book presents the undecidability or aporia at the heart of legal interpretation and judgment, and thus 'dramatises the inherent difficulties children face in understanding what it means to be obedient.'[31] This same argumentative structure characterised Manderson's analysis of D.H. Lawrence's novel *Kangaroo*, a novel which, on Manderson's reading, stages, at the level of substance, form and imagery, the contradiction between positivist and romantic modes of authority and ideas of justice. *Kangaroo* enacts the oscillation between two irreconciliable poles that legal judgment cannot resolve, only experience.[32] This oscillation has as its point not a quest to overcome or resolve that tension, but to expose, elaborate, and embrace it. The critical work of Lawrence's novel thus lies in its demonstration of the multi-vocality and unresolved contradictions of human experience, which is 'law's fate and its most important asset.'[33] There is simply no escape from interpretation: so too in *Danse Macabre,* Manderson insists that '(i)nterpretation, whether in law or in art, is never-ending. Imperfection is its fate, criticism, and development its process.'[34]

In *Danse Macabre,* Manderson's strategy, generally speaking, is to take an artwork, offer an orthodox reading, stage a counterposing reading, and then show how the critical force of a work lies in the staging of an irresolution, of multiple and conflicting readings. In this, he is making a case for a certain kind of critical force in visual art: art as critique. The approach models the role of a jurist-critic whose task is to unpick and develop the critique that the artwork makes available. The critique is not immanent to the artwork, although it is wedded to it and tied up in its elements. Rather it is the function of the critic in the present to unpick and unpack the critical potential of the artwork. This approach takes its most programmatic form in his masterful reading of J.M.W. Turner's *The Slave Ship,* in which Manderson works through, firstly, an objective reading (what does the painting represent of the world?), secondly, a subjective reading (how does the painting confront the viewer?), and finally, a critical reading (how does the painting implicate or interpellate the viewer?)[35] So Turner's painting is firstly, a reference to a historical event, and a practice of transporting slaves, secondly, an artistic experiment in sentimentality, in inspiring a lofty pity, and finally, 'a site of response that demands something of, and

[31] *Ibid.*

[32] Manderson, *Kangaroo Courts* at 6, 164.

[33] Manderson, *Kangaroo Courts,* at 6.

[34] *Danse Macabre,* at 80. In his earlier work on Levinas and the notion of proximity in the common law of negligence, he memorably compared judicial precedent to a rosary, praising the common law precisely for its unsettled-ness, its capacity to remember and continually worry over 'that knotty problem of the past... The knots thus formed conserve the *memory* of that disruption and authorize the possibility of new ones to further unsettle a purely internal and conceptual system of order.' See Desmond Manderson, 'Proximity: The Law of Ethics and the Ethics of Law' (2005) 28:3 *University of New South Wales Law Journal* 696

[35] *Danse Macabre,* chapter 4. See also Desmond Manderson, "Bodies in the Water: On Reading Images More Sensibly" (2015) 27:2 *Law and Literature* 279.

constitutes something, in *us.*'[36] The critical force of the artwork hinges on its production of an affective dissonance that allows us to question our way of being in the world.[37]

The distinctiveness of Manderson's interdisciplinary gesture in this book is to make the artist into a jurist. His reading of the images gets the artist to make arguments on the terrain of law. This is a textual, grammatical and linguistic approach to reading paintings, which claims that paintings 'argue strongly,' [38] present 'a thesis,' [39] 'create a complicated argument,' [40] present 'a set of potential arguments.'[41] This is achieved by a particular mode of reading images in which each part or element of the image is a figure that can be recomposed into an argument. In Manderson's view there is a point, or a purpose, to be made of the elements of the image, which are themselves particular effects and affects of viewing. These readings frequently proceed by reversing the purported positionality of the figures inside the image (in Bruegel's *Justicia*, the soldiers and citizens are moving 'into the distance, not coming out of it,' which allows him to argue that the vanishing point of the image projects into the future;'[42] Christ is 'looking the other way,'[43] establishing an affinity not with judgment but with the victims.) Each chapter builds to a moment in which the viewer is brought into the frame: Bruegel's blindfold 'turns the tables on his viewers... We are all implicated, the image seems to be saying, in the blindness of the law.'[44] The figure in Reynolds' *Justice* is looking back at 'the artist – or the judge or the viewer – himself.'[45] The eyes in Klimt's lost *Jurisprudence* are looking at us, charging us with the stewardship of law.[46] The reading of Duturreau's *Conciliation* reorients the painting around the figure of the Aboriginal leader whose gaze 'creates in us, here and now, the awareness that we are also being watched and judged;'[47] the chapter on Turner ends with the striking suggestion that we, gazing upon the painting, are actually *on the slave ship,* authors of the colonial violence it depicts, and implicated in the ongoing atrocity of bodies at sea;[48] Gordon Bennett's *Truganini* 'interpellates the viewer, demanding that we look deep inside ourselves.'[49]

[36] *Danse Macabre,* at 107.

[37] See further Mark Antaki, 'Genre, Critique and Human Rights' (2013) 82:4 *Law and Critique* 974 at 977.

[38] *Danse Macabre,* at 11

[39] *Danse Macabre,* at 22

[40] Ibid.

[41] Ibid.

[42] *Danse Macabre,* at 30

[43] *Danse Macabre,* at 32

[44] *Danse Macabre,* at 48.

[45] *Danse Macabre,* at 81.

[46] *Danse Macabre,* at 154-155.

[47] *Danse Macabre,* at 103.

[48] *Danse Macabre,* at 123.

[49] *Danse Macabre,* at 185-186.

As befits not only a historian but also a talented pianist and playwright, Manderson's work is a performance. It's not a treatise so much as a presentation, an immersive and affective experience for the reader. Manderson has a distinctive and daring writerly tone, one in which the style is 'the point,'[50] deliberately cultivated through plays of language ('Gilt by association'[51]), evocative images ('law sits perched like a gibbet at the crossroads of time'[52]), and pithy turns of phrase ('She chooses what to see, the better to see what she chooses'[53]). His writing is sharp, slicing away irrelevancies, and cutting to the heart of the matter, not by reducing complexity, but rather by distilling and layering it. 'A fuller analysis is possible,'[54] he assures us, and we nod, transfixed and expectant. Other writers, he tells us repeatedly, 'miss the point.'[55] Indeed, for a writer so attuned to the multiple conflicting readings that images permit in and across time, his rhetorical force continually promises the reader that *his* reading is the right one. The undeniable pleasure this evokes for the reader has to do with the sense of sharing in the author's revelations, and in his insight. It is skilfully done, and relies on no small amount of charisma. Indeed, we often feel in the realm of a charismatic masculinity that bears more than a passing resemblance to the romantic anti-modernism that so fascinated D H Lawrence in *Kangaroo:* a realm of revelation, intuition, and a rhetorical force to which the reader must simply submit. 'Oh piss off',[56] he writes at one point, and only he could get away with it.

It does, then, seem somewhat unfair, like shooting fish in a bucket, to point out that this magnificent book privileges male artists (Bruegel, Reynolds, Turner, Bennett, Duturreau, Klimt, Cauduro); it is perhaps slightly less unfair to point out that its readings mainly concern themselves with male art historians and legal theorists (Didi Huberman, Derrida, Benjamin, Agamben, Freud). I am confident that Manderson would freely own this limitation as part of what it means to do internal critique within the Western tradition; to use the master's tools, as it were, to dismantle the master's house.[57] This choice of sources is part of his commitment to Derridean deconstruction, which turns the foundations of Western philosophy against themselves, suggesting their provisionality and contingency, their unstable, constitutive exclusions, their latent authoritarianism and violence.[58] So be it then. And yet. As

[50] See *Danse Macabre,* pp 104, 238. Des' fondness for this phrase always reminds me of the 1970 studio album by Harry Nilsson, which became a movie the following year, narrated by Ringo Starr.

[51] *Danse Macabre,* at 39

[52] *Danse Macabre,* at 22

[53] *Danse Macabre,* at 60

[54] *Danse Macabre,* at 59.

[55] See *Danse Macabre,* pp 32, 41, 62, 91, 113.

[56] *Danse Macabre,* at 76.

[57] Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in *Sister Outsider* (Crossing Press, 1984).

[58] Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' trans. Mary Quaintance (1990) 11 *Cardozo Law Review* 919. On Derrida's commitment to immanent critique, see further

Audre Lorde went on to say, the master's tools 'may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.'[59] The contours of this dilemma, which is of course endemic to both art history and legal theory, are often spoken about in terms of 'the politics of citation,'[60] the problem whereby reflecting the selective biases of the Western tradition will necessarily reproduce them. Acknowledging this *as* a problem requires us to pay attention to how the reproduction of a corpus can then reproduce those techniques of selection, making some bodies visible, and placing others beyond the frame.

The question for this reader, though, is not so much *what* lies beyond the frame of *Danse Macabre*, but rather *how* that act of framing works to occlude itself. As Derrida famously observed, to frame is to make something visible and at the same time to connect this visibility to that which cannot be seen (the outside of the frame) and what must not be seen (the frame itself). The characteristic of the frame is 'not that it stands out but that it disappears, buries itself, effaces itself, melts away at the moment it deploys its greatest energy.'[61] The frame is thus a visible invisibility – it's meant to be perceived, but not *noticed*. The mechanics of framing in *Danse Macabre*, upon my reading, are locatable within Manderson's repeated appeals to, and invocations of, the 'we' and 'us' who is unsettled, moved, astonished, and indeed even transformed by its encounter with the artworks he is discussing. It is obvious that such language does not merely hail a reader but interpellate one, and that asking the reader to identify with that 'us' is an invitation to form a relation of trust. By grammatical convention, 'us' and 'we' encompasses both author/critic and reader/viewer, and as the chapters progress, the characteristics of this viewer become further defined: it is a viewer like the author, a Western liberal legal subject, brought face to face with the constitutive injustices and exclusions that underwrite its experience of law (chapters 1, 2 and 5) - and even more specifically, it is an Australian settler, complicit in the bounded territorial logic of the colony, and (invited to be) outraged at its ongoing violence (chapters 3, 4 and 6). This figure – the 'us' that conjoins author and reader in their shared viewing position - is assumed to be

John P. McCormick, 'Derrida on Law; Or, Poststructuralism Gets Serious' (2001) 29:3 *Political Theory* 395.

[59] Lorde, n 57. Margaret Davies makes this point in an interview with Jennifer Hendry, 'Deconstruction leaves the limits in place... you haven't imagined something different.' Jennifer Hendry, 'Book Review: *Law Unlimited: Materialism, Pluralism, and Legal Theory*' (2018) *Journal of Law and Society* 169.

[60] See, among other texts, Sara Ahmed, 'Making Feminist Points' (2013) https://feministkilljoys.com/2013/09/11/making-feminist-points/ and *Living a Feminist Life* (Duke University Press, 2017), Carrie Mott and Daniel Cockayne, 'Citation Matters: mobilising the politics of citation towards a practice of 'conscientious engagement'' (2017) 24 *Gender, Place and Culture: A Journal of Feminist Geography* 954.

[61] Jacques Derrida, *The Truth in Painting*, trans. by Geoff Bennington and Ian McLeod (University of Chicago Press, 1987) 61. This book appears in the bibliography of *Danse Macabre,* but not in the text itself.

internally coherent. Yet as Manderson writes so compellingly, every act of viewing has 'a blind spot,'[62] things that are not seen, or not attended to, because of the position we are standing in. The colonial ruler in Duterrau's painting, we are told, 'desires to see everything and to fix it in its place, but never to be seen himself.'[63] And here, I suggest, lies the blind spot that undoes the coherence of that shared viewing position: the necessarily unstable footing of a white settler on stolen land, called upon to grapple with what fellow settler Fiona Nicolls calls 'falling out of perspective' into an embodied awareness of 'being in indigenous sovereignty,' 'being within my skin.'[64] The chapters of *Danse Macabre* on Governor Arthur's Proclamation (chapter 3) and the work of Gordon Bennett (chapter 6) are damning in their condemnation of Australian Indigenous policy in the past and present; noteworthy, however, is their lack of engagement with writers on indigenous sovereignty and epistemology.[65]

Indeed, Manderson's view of law is not, in fact, a pluralist one. While he situates law in a history grounded in institutions, practices, cultures, and the imperfections of human agents, he is quite comfortable invoking a sort of transhistorical and transcultural entity called 'law' that has as its key feature its representation, and re-presentation, through time: 'Law's eternal voice is anachronic, already present in the future, the future's past, and the past's future.'[66] This is not the legal pluralism of his supervisor and colleague at McGill University, the late great Roderick A. Macdonald, who famously defined law as the 'enterprise of symbolizing human interaction as governed by rules,'[67] and emphasised the role of individual legal subjects actively negotiating multiple overlapping normative orders. Manderson's view of law is darker; he takes seriously the *subjection* in the idea of legal subjects. Gone is the *nomos*, the constitutive narrative, of Cover's 'Nomos and Narrative,'[68] and here is the law of Cover's 'Violence and the Word.' The law of *Danse Macabre* is a law that *reduces*: to text and to judgment and to violence and to death. It is a violent

[62] *Danse Macabre,* at 123.

[63] *Danse Macabre,* at 104.

[64] Fiona Nicoll, 'Reconciliation in and out of perspective: white knowing, seeing, curating and being at home in and against Indigenous sovereignty' in Aileen Moreton-Robinson, ed. *Whitening Race: essays in social and cultural criticism* (Aboriginal Studies Press, 2004) 17. See further Alissa Macoun and Elizabeth Strakosch, 'The Ethical Demands of Settler Colonial Theory' (2013) 3: 3-4 *Settler Colonial Studies* 426.

[65] The literature is of course vast, but includes: Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003); Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Taylor and Francis, 2016), Gary Foley, Andrew Schaap, and Edwina Howell, *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013); Irene Watson, 'Buried Alive' (2002) 13 *Law and Critique* 253; Aileen Moreton-Robinson, ed. *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007); Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minnesota University Press, 2015).

[66] *Danse Macabre,* at 21.

[67] Roderick A. Macdonald and David Sandomierski, 'Against Nomopolies' (2006) 57:4 Northern Ireland Legal Quarterly 610 at 617.

[68] It is not cited in *Danse Macabre.*

perpetrator of murder: 'We can close our eyes, but we cannot stop our ears. Law pours its commands into them like poison from a bottomless jug.'[69] This law, Manderson assures us, is 'not just a synonym for norm.'[70] While he has certainly imbibed the Foucauldian insight about the diffusion of legal power through disciplinary structures and institutions and interactions, Manderson's account of law remains focalised through the nation-state, the figure most associated with the 'discourses that frame our thinking about structure and authority, governance, regulation, sovereignty, rights, control and punishment.'[71] These are primarily top-down forms of power (with rights, of course, being the traditional liberal bulwark against state authority), and hovering behind them is the image of the King, the author and originator of 'sovereign violence,' the all-seeing and sinister eye behind 'the scopic regime of sovereignty.'[72] And why not? It is more than fitting that at the end of this century's second decade, writing from the land of so-called Australia, Manderson should take sovereign violence squarely within his sights. Archism is not going anywhere.[73] State violence finds new ways to reinvent itself, to render more lives disposable and ungrievable, to mock and undermine and derogate from the liberal promise of the rule of law.[74] We have not yet cut off the King's head.[75]

Yet Manderson remains optimistic.[76] Indeed, optimism has always been, to use a metaphor, 'hard-baked' into his method; not a question of style, but of substance. Metaphor, he wrote twenty years ago, 'develops thought as well as explains it.'[77] Its full meaning and implications 'only begin to take shape after its expression.'[78] It is thus an imagistic way of thinking that is also anachronistic: 'a leap of faith and a gesture of hope in the future enhancement of understanding.'[79] *Danse Macabre* is nothing if not hopeful. Manderson is hopeful that we can learn from our encounter with artworks, transform our modes of witnessing, and improve our visual literacy, because we *must.* The stakes of our current historical configuration are simply too

[69] *Danse Macabre,* at 12.

[70] *Danse Macabre,* at 17.

[71] Ibid.

[72] Desmond Manderson, 'Chronotopes in the scopic regime of sovereignty' (2017) 23 Visual Studies 2; 'Trench, trail, screen' n 15.

[73] See James Martel, 'Why Does the State Keep Coming Back? Neoliberalism, the State and the Archeon' (2018) 29(3) *Law and Critique* 359.

[74] 2020 witnessed an unprecedented global outrage against the killings of black people by police, as protests engulfed many states in the United States and were echoed in Canada, Britain and Australia, among other places. The Black Lives Matter movement, begun in 2014, matters more than ever. Racialised policing continues to be a mainstay of social and liberal democracies.

[75] Foucault, 'Truth and Power' in Colin Gordon, ed. *Power/Knowledge: Selected Interviews and Other Writings* 1972-1977 (Pantheon Books, 1978) (1977).

[76] *Danse Macabre,* at 244.

[77] *Songs Without Music,* n 10, at 99.

[78] Ibid.

[79] Ibid.

high for us to carry on with business as usual. As I write in October 2020, sitting on the stolen land of the Turrbal people, Australia is about to enter another summer that will surely break heat records, having survived the worst bushfires in its history in the summer of 2019/2020. These fires are functions of the extraction and accumulation through dispossession that is a direct result of colonialism's ongoing legacy in these lands.[80] Likewise, COVID 19, which has changed the rhythm of our lives beyond measure, and has ended many before their time, is directly linked to the capitalist mode of production in its origins,[81] and runs along the fault lines of racial, gender, and economic inequality in its effects. Both of these disastrous plagues have come about because of the widespread inattention to the fundamental interdependence of human and non-human life that characterises late-capitalist society, politics, and legal thought.

Among these overlapping and intersecting crises of public health, state violence, and environmental devastation, it has become commonplace to speak of living in the end times. (Lately our emails typically begin by saying 'I hope you are surviving these unprecedented times,' or words to that effect.) Apocalypse is 'the new normal.'[82] And while it is a longtime staple of cultural productions,[83] Hollywood depictions of the apocalypse as a single disastrous event - a tsunami, a comet, a volcanic eruption, a nuclear disaster – have ill-prepared us for the 'slow violence'[84] of what we are really facing. Manderson is forthright in speaking of his 'deep commitment that the problems and challenges we now face will require all our senses, passions and imagination.'[85] He is not kidding. Yet the very spaces for the kind of critical thinking required – the space of the university, and of the humanities in particular – are under systemic attack in Australia.[86] Education across law and the humanities

[80] McKenzie Wark, 'The Schadenfreude of History' *Commune* (16 January 2020) https://communemag.com/the-schadenfreude-of-history/

[81] See 'Social Contagion: Microbiological Class War in China' *Chuǎng* (February 2020) http://chuangcn.org/2020/02/social-contagion/ and Mike Davis, 'The Monster Enters' (March/April 2020) 122 *New Left Review.*

[82] Paul Krugman, 'Apocalypse Becomes the New Normal' *New York Times* (January 2, 2020) https://www.nytimes.com/2020/01/02/opinion/climate-change-australia.html

[83] Frank Kermode, *The Sense of an Ending: Studies in the Theory of Fiction* (Oxford University Press, 1967).

[84] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011), Thom Davies, 'Slow Violence and Toxic Geographies: Out of Sight to Whom?' (2019) *Environment and Planning C: Politics and Space.*

[85] *Danse Macabre,* at 243.

[86] Gavin Moodle, 'Why is the Australian Government Letting Universities Suffer?' *The Conversation* (May 19, 2020) https://theconversation.com/why-is-the-australian-government-letting-universities-suffer-138514; Anwen Crawford, 'The Attack on the University is Political' *Overland* (22 September 2020) https://overland.org.au/2020/09/the-attack-on-the-university-is-political/ ; Naaman Zhou, 'Australian universities to cut hundreds of courses as funding crisis deepens' *The Guardian* (30 September 2020) https://www.theguardian.com/australia-news/2020/sep/30/australian-universities-to-cut-hundreds-of-courses-as-funding-crisis-deepens; 'Humanities degrees set to double

risks being reduced to instrumental, job-ready vocational training, with degrees shorn of theoretical complexity, open-ended inquiry, deep engagement with research experts, and the unexpected encounters that stretch human capacity and imagination. The study of law and the humanities is vital to our response to the climate crisis, because the crisis demands that we engage with the interpenetration of politics and aesthetics that infuses our legal imaginaries and determines what we think of as possible.

There is much work to be done, and Manderson's focus on temporalities gives us some critical tools for thinking about the sort of politics that the time requires. The climate crisis is, above all, a temporal one; not just the intrusion of deep, planetary or geological time into human life, but the tension between the delayed impact of past emissions, the narrowness of the window for action, and slow pace of necessary social and economic change.[87] As Elizabeth Kolbert has observed, 'We are living in the climate of the past, but we've already determined the climate's future.'[88] Time is literally running out. We are hurtling ever closer to what Nicole Rogers has called 'wild time,' 'the chaotic future period in which the logic, institutions, modes of interacting and artefacts of civilisation are abruptly or gradually undone as a consequence of climatic and other disruptions.'[89] To intervene in this process we need a politics attuned to the interrelationship between human and natural forces, to the contingency of human culture, and to the interconnected web of gift, inheritance and legacy stretching back millions of years. We need a legal theory that contests the boundaries embedded in the Western legal imaginary (subject/object, nature/culture) and pursue radically different ideas of relationality, interconnectedness and (inter)dependence.[90] And we need to attend to the voices of the people who have already survived an apocalypse,[91] and for whom the destruction and devastation of law, land and governance is not some future threat but the ongoing present

in price as Parliament passes higher education bill' (8 October 2020) https://www.abc.net.au/news/2020-10-08/university-changes-pass-parliament-for-more-expensive-degrees/12743916

[87] James Bradley, 'Unearthed: Last Days of the Anthropocene' *Meanjin* (Spring 2019) https://meanjin.com.au/essays/unearthed/

[88] Ibid, see also Nicole Rogers, *Law, Fiction and Activism in a Time of Climate Change* (Routledge, 1st ed, 2019) at 4.

[89] Rogers, *Law, Fiction and Activism* at 4.

[90] See Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2018)

[91] Claire Coleman, 'Apocalypses Are More Than the Stuff of Fiction – First Nations Australians Survived One' (2017) http://www.abc.net.au/news/2017-12-08/first-nationsaustralians-survived-an-apocalypse-says-author/9224026. See further Callum Clayton-Dixon, *Surviving New-England: A History of Aboriginal Resistance and Resilience Through the First Forty Years of Colonial Apocalypse* (Anaiwan Language Revival Program, 2019), Kyle P. Whyte, 'Indigenous science (fiction) for the Anthropocene: Ancestral dystopias and fantasies of climate change crises' (2018) 1(2) *Environment and Planning E: Nature and Space* 224.

of the colonial project. As William Gibson famously remarked, 'The future is already here. It's just not very evenly distributed.'[92]

As Manderson suggests, 'art's potential lies not so much in its explicit content, but the relationship it establishes with, and the point of view of, a spectator.'[93] Our encounter with artworks can provide an aesthetic shock that changes how we see ourselves in relation to other beings and to the world, 'realigning the various ways in which we are rendered sensitive and insensitive to social, material and earthly relations and forces.'[94] *Danse Macabre* neatly diagnoses the politics of temporalities in the visual arts, suggesting what will propel us forward and what will hold us back. On the one hand, insisting on a unbridgeable gulf between past and present is the work of legend,[95] and of modernity;[96] leaping over that gulf and ignoring 'the messy reality of history'[97] is the work of neoclassical diachrony.[98] On the other hand, insisting on the eruption of the past in the present, their continuity and inseparability, is Turner's *Slave Ship*, the work of Gordon Bennett,[99] and the significance of ghosts.[100] The latter is better. There is no going back, but there is no simply leaving the past behind. The dynamics of the climate crisis is a function of a past – colonialist, imperialist, extractivist, dispossessive - that we must understand in order to intervene in. *Danse Macabre's* investigation of utopian time also shows how appeals to an idealised future can justify the perpetuation of present injustice. The movement for climate justice is a case in point. We cannot defer issues of gender, race, or economic inequality to an imagined future while we deal with the exigencies of carbon reduction, or ask Indigenous people to wait any longer for their rights to air, land and water. Climate justice necessitates we view these struggles as interlinked and equally urgent.

In concluding, I want to draw on Manderson's critical tools by briefly turning to street artist Isaac Cordal's famous installation, *Follow the Leaders,* part of his 'Waiting for Climate Change' series.[101] Installed in a variety of urban locations across Europe, it consists of a group of small human figures, made of cement, partially submerged in water. The figures resemble politicians or businessmen, all male, usually old, all dressed in suits, mostly identical, sometimes with tiny variations in the colours of

[92] Quoted in Joshua Rothman, 'How William Gibson Keeps His Science Fiction Real', *New Yorker* (online, 9 December 2019) [7] https://www.newyorker.com/magazine/2019/12/16/how-william-gibson-keeps-his-science-fiction-real.

[93] *Danse Macabre,* at 107

[94] Daniel Matthews, 'Law and Aesthetics in the Anthropocene: From the Rights of Nature to the Aesthesis of Obligations' (2019) *Law, Culture and the Humanities* (online) at 4.

[95] *Danse Macabre,* at 242.

[96] *Danse Macabre,* at 193.

[97] *Danse Macabre,* at 78.

[98] *Danse Macabre,* at 72.

[99] *Danse Macabre,* at 242.

[100] *Danse Macabre,* at 240.

[101] Isaac Cordal, 'Works', *Isaac Cordal* (Web Page, 2020) http://cementeclipses.com/portfolio/.

their tie. They are talking, discussing, debating, with attitudes of exclamation, gesture, introspection. They are grouped or huddled around a central figure or couple of figures. The water has covered some of them completely, while only the heads and shoulders of others are visible. The scene juxtaposes the sense of urgency in the rising water with the fact that the figures are still carrying on with an interminable talk fest as though unaware they are about to be engulfed. The normal, business-as-usual scene of power brokers squabbling and doing deals is rendered absurd or surreal by the imminent peril. The result is an aesthetic shock. This installation conjoins present inaction and future oblivion, suggesting the powerful traditions we have inherited from the past – male, white, oligarchic, human-centric – will not save us from climate crisis. And where are we, the spectator, positioned? We are watching the scene, suspended in a moment when we can see what is coming but when it is not yet too late to intervene. We are, then, precisely in the time of politics: the time that must work out how to bridge the gap between the present and the future,[102] before the accumulated destruction of the past swallows us all.

[102] *Danse Macabre,* at 218.

437 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 437-447
ISSN: 1825-5167

ARE THERE STILL NO GREAT WOMEN ARTISTS? A FEMINIST RESPONSE TO DESMOND MANDERSON'S *DANSE MACABRE*

SOPHIE DOHERTY
School of Law and Government
Dublin City University (Ireland)
sophie.doherty@dcu.ie

ABSTRACT
A feminist critique of law and art as practices and as sites of knowledge, highlights a shared historical commonality- the exclusion of women. This paper explores the extent to which women's artworks are engaged with in Desmond Manderson's *Danse Macabre: Temporalities of Law in the Visual Arts.* It is noted that within the book, women artists and their artworks are not central, but instead are peripheral to the case studies, all of which are artworks created by men. As such, this contribution begins by contextualising the question, 'Are there still no great women artists?' Following this, the paper then explores the temporality of this question regarding *Danse Macabre* and uses this as a way in which to reflect on the exclusion of women from artistic and legal spheres. Finally, the position of women in Manderson's work is explored. The paper concludes that *Danse Macabre* is an important contribution to many fields, and, in the future, could be revisited and reimagined through women's artwork.

KEYWORDS
Feminism, Justice, Art, Law, Temporality

1. INTRODUCTION

When I[1] was invited to participate in this review symposium, I felt a mix of feelings. I would describe it as firstly, experiencing the brightness of the sun- sheer delight at being invited to respond to such an outstanding piece of work by a much-

[1] I believe it is important to note my positionality when it comes to writing on law and art. My background is in law, particularly, criminal law and feminist jurisprudence. I began to develop an interest in the intersections of law and art while studying Byzantine to Impressionist Art at Ferrum College, Virginia. As such, I do not come to art with the false pretence that I am versed or situated comfortably within the discipline of Art History, but instead I see myself as an outsider writing on art, a "lawyer" writing on what they see, feel, and understand, usually from a feminist perspective. At this

respected scholar. Then, feeling the overwhelming and crushing heat of that sun-fear at the thought of having to critique such an iconic piece of work. Michael Naas explores the latter sentiment in his response to Matthias Fritsch's *Taking Turns with the Earth:* '[w]hat a fearsome task, for how is one to respond in a meaningful and responsible way to a book that is this meticulously researched, this powerfully argued, this broad in its scope and implications.'[2] This sentiment was shared in the initial writing of this paper and as such, this contribution is to be regarded as very much a conversation in which I respond to the book.[3]

Having set the tone of this article, the focus now moves towards its contribution. Firstly, it is important to note the critical discussion upon which this article is founded, that is, an aspect of Desmond Manderson's *Danse Macabre: Temporalities of Law in the Visual Arts* (hereafter *Danse Macabre*) that struck me as a potentially fruitful site of discussion- the absence of women's art. To explore this, I firstly reflect on *Danse Macabre*. I then briefly outline the historical issue of the absence of women in art, and the importance of the 1970s in making women's artworks and lived experiences visible. Following from this, I reflect on women's exclusion from law, noting that both artistic and legal spheres have historically excluded women. Lastly, I discuss the exclusion of women in the context of *Danse Macabre*, highlighting the absence of women's artwork and reflecting on three questions: are there no women artists in this book?; why are there no women artists in this book?; and lastly, should there be women artists in *Danse Macabre*?

I conclude that *Danse Macabre* is an invaluable contribution to many fields and undoubtedly one of the most 'shelf-worthy' books for a variety of scholars, but there is space for a feminist reimagining of the book. As such, this contribution encourages academics working between law and art to remember that there are women artists deserving of recognition in the discussions on visual art, temporality, and law.

2. DANSE MACABRE

Danse Macabre is a perfect addition to Manderson's outstanding works on the interrelations between law and visual art. Indeed, the book incorporates updated and reworked versions of some of Manderson's classic pieces such as 'Blindness

point, I would like to thank Mairead Doherty, Eoin Dillon, Dr Ruth Houghton and Dr Marianne Doherty for their helpful feedback and discussions on earlier drafts of this article.

[2] Michael Naas, 'Their Turn Under the Sun: Matthias Fritsch and the Question of Intergenerational Responsibility' (2020) 2 *Etica & Politica / Ethics & Politics* 523, 524.

[3] This is, in part, owing to the fact that academic conversations have been impacted by the Covid-19 pandemic as the site of conference discussions and debates are now notably different or absent in academic life. Discussions seem very technological and stunted, rather than personal and fluid, and it is hoped that this contribution is characterised by the latter rather than the former.

Visible', part of the edited collection in Manderson's *Law and the Visual: Representations, Technologies and Critique*.[4] Elements of Desmond Manderson and Cristina Martinez's 2016 article, 'Justice and Art – Face to Face' are also used to develop sections of the book, although the book conversion does differ substantially.[5] Chapters Three to Five are also based on earlier versions of articles by Manderson.[6]

While elements of this book have appeared in earlier formats, I do not think that this is a limitation or grounds for criticism and this is for two reasons: firstly, as Manderson acknowledges, the earlier versions have been 'rewritten, revised, and expanded'[7] so this book is a fresh retelling of the works. Secondly, for me, this was almost like the 'Best of Desmond Manderson' as these works, used to frame several of the chapters, are outstanding contributions to the nascent field of law and art.[8] If you wanted a book that not only introduces you to the field of law and art, but also to the mind of one of the most innovative scholars in this field, *Danse Macabre* is for you.

[4] Desmond Manderson, 'Blindness Visible', in Desmond Manderson (ed), *Law and the Visual: Representations, Technologies and Critique* (University of Toronto Press 2018). This piece is reworked and modified for Chapter One of *Danse Macabre*.

[5] Desmond Manderson and Cristina Martinez, 'Justice and Art – Face to Face' (2016) 28 (2) *Yale Journal of Law and the Humanities* 241 is used to develop Chapter Two of *Danse Macabre*. This article is a personal favourite of mine and is one that I would recommend to students and colleagues interested in developing an understanding of the intersections of law and art. A quote that stands out to me from this that really speaks to the essence of why legal scholars should turn towards art is found on the opening page: 'The connection between law and art helps not only to clarify but to develop and more richly comprehend both the history and the implications of legal concepts. Not in philosophy or jurisprudence or political theory is justice's struggle between particular and general most productively encountered, but in the dual cases of portraiture and common law' (241).

[6] Chapter Three is a reworked version of Desmond Manderson's, 'Not Yet: Aboriginal People and the Rule of Law' (2008) 29 *Arena* 219, and Desmond Manderson's 'The Law of the Image and the Image of the Law' (2012–13) 57 *New York Law School Law Review* 153. Chapter Four is also founded on Desmond Manderson's, 'Bodies in the Water' (2015) 27(2) *Law and Literature* 279, while Chapter Five is based on Desmond Manderson's, 'Klimt's Jurisprudence – Sovereign Violence and the Rule of Law' (2015) 35(3) *Oxford Journal of Legal Studies* 515. While each of these previous works cited thus far appear in the book, I would highly recommend accessing the earlier works as the original works differ, at times substantially, from the versions within *Danse Macabre.*

[7] Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts* (Cambridge University Press 2019) xvi.

[8] Throughout this article, I refer to the interdisciplinary field of law and art. In this article, the term 'law and art' derives from the disciplines of Law and Art History. I consider *Danse Macabre* to fall under this field due to the combination of visual art and law. Furthermore, as the book considers temporality, Art History felt like the appropriate discipline to situate the book as Manderson considers the historical framing of each of the artworks in *Danse Macabre.* For further discussion on the term 'law and art' see Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000) and Sophie Doherty, 'Visualising Justice: Sexual Violence, Law and Art' (PhD thesis, Durham University 2020). While this article refers to 'law and art' as an interdisciplinary field, it should be noted that other terms have emerged that capture the study of law and the visual, for example: law and the image, legal aesthetics, law and visual studies.

I was fortunate enough to review this book for the *Law and Literature* journal, and so I do not wish to provide a 'review' per say. Instead, I will shamelessly plug the review at this point[9] and divert to the major discussion point of this article- the lack of engagement with the work of women artists. After reading *Danse Macabre,* one of the key questions that stood out in my mind was, are there no women artists in this book? Then, why are there no women artists in this book? And lastly, should there be women artists in *Danse Macabre*? The absence of women's artwork has been addressed in feminist literature and so, I wish to reflect on Linda Nochlin's famous question, 'Why have there been no great women artists?' before questioning the absence of women artists in *Danse Macabre.*

3. WOMEN IN ART

Traditionally, in art institutions, women were objectified and seen as subjects, rather than creators, of artwork.[10] Women's artwork was largely invisible from galleries, exhibitions, and expositions, however, representations of women - nude, clothed, in marble, and in paint - were commonplace.[11] Spurred by civil rights movements and the second wave feminist movement, this trend was the subject of fierce criticism by feminist artists, theorists and practitioners in the 1970s.[12] Eva Zetterman states that the 1970s is 'recognised as the most important decade' in feminist art history.[13] As the feminist movement in the United States and Europe gained momentum,[14] the relationship between women, art, representation, and art institutions was called into question.

[9] Sophie Doherty, 'Book Review: Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts* (Cambridge: Cambridge University Press 2019) pp. 281' (2020) *Law and Literature* 1, https://www.tandfonline.com/doi/full/10.1080/1535685X.2020.1805915.

[10] Mary D. Garrard, 'Artemisia's Hand' in Mieke Bal (ed) *The Artemisia files: Artemisia Gentileschi for Feminists and Other Thinking People* (University of Chicago Press, 2005) 2 and A.W.Eaton, 'What's Wrong with the (Female) Nude? A Feminist Perspective on Art and Pornography' in Peter Lamarque and Stein Haugom Olsen (eds), *Aesthetics and the Philosophy of Art: The Analytic Tradition, An Anthology* (2nd edn, John Wiley & Sons Inc., 2019).

[11] This tradition of nude women being the subject of artwork has been wonderfully critiqued and creatively parodied by the Guerrilla Girls Collective. For a visual reference, see Guerrilla Girls, 'Do women still have to be naked to get into the Met. Museum?' (*Guerrilla Girls.com*, 2020) < https://www.guerrillagirls.com/naked-through-the-ages> accessed 31/08/2020. For more on the Guerrilla Girls, see Guerrilla Girls, *Guerrilla Girls: The Art of Behaving Badly* (Chronicle Books, 2020).

[12] Laura Meyer, 'Power and Pleasure: Feminist Art Practice and Theory in the United States and Britain' in Amelia Jones (ed) *A Companion to Contemporary Art Since 1945* (Blackwell Publishing, 2006) 317-318.

[13] Eva Zetterman, 'Curatorial Strategies on the Art Scene during the Feminist Movement: Los Angeles in the 1970s' in Ed. Jessica Sjöholm Skrubbe (ed) *Curating Differently: Feminisms, Exhibitions and Curatorial Spaces* (Cambridge Scholars Publishing, 2016) 1.

[14] For an analysis on the different impacts of the American and European feminist movements on art in their respective contexts see Kathleen Wentrack, 'What's So Feminist about the Feministische

In 1971, art critic and historian Linda Nochlin wrote her ground-breaking essay, 'Why have there been no great women artists?'[15] In this pioneering essay, Nochlin provided a feminist critique of the field of art history highlighting the issue of institutional exclusion of women from art.[16] Nochlin writes that

> [...] we tend to accept whatever *is* as natural, this is just as true in the realm of academic investigation as it is in our social arrangements. In the former, too, "natural" assumptions must be questioned and the mythic basis of much so-called "fact" brought to light. And it is here that the very position of woman as an acknowledged outsider, the maverick "she" instead of the presumably neutral "one"—in reality the white-male-position-accepted-as-natural, or the hidden "he" as the subject of all scholarly predicates—is a decided advantage, rather than merely a hindrance of a subjective distortion.[17]

She continues to elaborate on the exclusion of women arguing that

> [...] the so-called woman question, far from being a minor, peripheral and laughably provincial sub-issue grafted on to a serious, established discipline, can become a catalyst, an intellectual instrument, probing basic and "natural" assumptions, providing a paradigm for other kinds of internal questioning, and in turn providing links with paradigms established by radical approaches in other fields.[18]

In her essay, Nochlin introduces the question, "Why have there been no great women artists?"[19] This is a complex question as Nochlin speaks of a feminist's first reaction often being 'to swallow the bait, hook, line and sinker, and to attempt to answer the question as it is put: that is, to dig up examples of worthy or insufficiently appreciated women artists throughout history.'[20]

Thalia Gouma-Peterson and Patricia Mathews articulate the problems with this endeavour explaining that 'such an approach is ultimately self-defeating, for it fixes women within pre-existing structures without questioning the validity of these structures.'[21]

On this question, Nochlin concludes

> [...] that art is not a free, autonomous activity of a super-endowed individual, "influenced" by previous artists, and, more vaguely and superficially, by "social forces," but

Kunst Internationaal? Critical Directions in 1970s Feminist Art' (2012) 33(2*) Frontiers - A Journal of Women's Studies* 76.

[15] Linda Nochlin, 'Why have there been no great women artists?' (1971) *Art News* 22 available on <https://www.artnews.com/art-news/retrospective/why-have-there-been-no-great-women-artists-4201/> accessed 31/08/2020.

[16] ibid.

[17] ibid.

[18] ibid.

[19] ibid.

[20] ibid.

[21] Thalia Gouma-Peterson and Patricia Mathews, 'The Feminist Critique of Art History' (1987) 69(3) *The Art Bulletin* 326, 327.

> rather, that the total situation of art making, both in terms of the development of the art maker and in the nature and quality of the work of art itself, occur in a social situation, are integral elements of this social structure, and are mediated and determined by specific and definable social institutions, be they art academies, systems of patronage, mythologies of the divine creator, artist as he-man or social outcast.[22]

Therefore, it is proposed that one of the core contributions of Nochlin's article is to highlight the practices and ideologies that influence the exclusion of women from the art world.

This question of women's institutional exclusion is one that legal academics will be familiar with. As such, law and art have a shared commonality- the exclusion of women. As *Danse Macabre* is situated in both law and art, the question of exclusion is a relevant one. The duality of the issue of exclusion is discussed in the following section, beginning with art, women, and exclusion.

4. ART, LAW, WOMEN, AND EXCLUSION

As noted in the previous section, women were historically excluded from art, but very much the subject of art in the sense that women were to be looked at. Tal Dekel explains that in the 1970s women artists began to challenge this relationship between women and art, and began to produce art from their lived experiences, thus establishing 'a clear link between their art and their lives as women.'[23] Dekel writes that women artists often

> [...] depicted the quotidian lives of women—small, seemingly unimportant moments. From their perspective, every subject—including those which, prior to that point, had been deemed trivial, minor, and (thus) "feminine"—were worthy of discussion and museum exhibition: issues related to housekeeping and child raising, the difficulties of making a living, over-friendly bosses with a habit of patting their behinds, or body-image issues manifested in the worried looks they gave to their expanding waistline in the mirror.[24]

For example, women artists working in and around the 1970s used conceptual art to explore and criticise socio-political issues, and were very much informed by the feminist and civil rights movements.[25] Deviating from Conceptualism's core characteristics of 'abstract, self-reflexive, and disembodied investigations that had dominated Conceptual art'[26], Jayne Wark explains that these artists cut across the

[22] Nochlin (n 15).

[23] Tal Dekel, *Gendered: Art and Feminist Theory* (Cambridge Scholars Publishing, 2013) 3.

[24] ibid.

[25] Jayne Wark, 'Conceptual Art and Feminism: Martha Rosler, Adrian Piper, Eleanor Antin, and Martha Wilson' (2001) 22(1) *Woman's Art Journal* 44.

[26] ibid 49.

conventions to enable 'silenced voices to find a place from which to speak.'[27] This theme of making the invisible, visible, the silenced, heard, was a theme that permeated the feminist art movement.[28]

Explaining why women artists sought to make these lived experiences visible, Norma Broude and Mary D. Garrard highlight that the purpose of feminism's intervention in art was to 'change the nature of art itself, to transform culture in sweeping and permanent ways by introducing into it the heretofore suppressed perspective of women.'[29] As such, the artwork produced by women artists, informed by the feminist movement during this time, sought to make visible the lives and lived experiences of women. It is here that common ground is found between law and art, as both share a common critique, in theory and in practice, as historically (and arguably, still) they have excluded women's voices.

In terms of law's exclusion of women, Sheryl J. Grana states that the law ignores women as active agents as they are seen to be non-masculine identities aligned with nurturance, intimacy and irrationality.[30] The construction of the legal system and law itself goes against the grain of these qualities as law and legal systems are centred upon objectivity and rationality.[31] Furthermore, Grana suggests that quadraplexation, which she defines as the interplay between reproduction, production, sexuality and socialisation, is written into the law and acts as a sanctioning tool.[32] Therefore, women are seen to be controlled by the law as opposed to men who control the law. Adding to this, Róisín A. Costello explains that

> [f]eminist theories of law are based in the belief that the law has been fundamental in the historical subordination of women and seeks to analyse and explain the manner in which the law has aided this subordination as well as looking to how the law might be used to remedy it.[33]

The subordination of women in art is considered by Michael Hatt and Charlotte Klonk who highlight that women have historically been denied access to art institutions and have therefore had their active creation of art limited.[34] Mary D. Garrard

[27] ibid.

[28] Dekel (n 23) ch 1.

[29] Norma Broude and Mary D. Garrard, 'Introduction: Feminism and Art in the Twentieth Century' in Norma Broude and Mary D. Garrard (eds), *The Power of Feminist Art: The American Movement of the 1970s, History and Impact* (Harry N. Abrams, Inc., 1994) 10.

[30] Sheryl J. Grana, *Women and Justice* (2nd edn, Rowman & Littlefield, 2010) 38.

[31] Alison Young, *Judging the Image: Art, Value, Law* (Routledge, 2005) 13; Desmond Manderson, `Desert Island Discs (Ten Reveries on Pedagogy in Law and the Humanities)' (2008) 2 *Law and Humanities* 255, 256; and, Leslie J. Moran, 'Visual Justice' (2018) 8(3) *International Journal of Law in Context* 431, 431.

[32] Grana (n 30).

[33] Róisín A. Costello, 'Courtroom dialogues and feminist legal theory in Irish literature' (2020) 28(3) *Irish Studies Review* 370, 372.

[34] Michael Hatt and Charlotte Klonk, *Art History: A Critical Introduction to Its Methods* (Manchester University Press, 2006) 151.

attributes this to the 'cultural habit of seeing woman as object-to be-looked at, the site of scopophilic pleasure.'[35] I believe that John Berger captures this precisely when he explains that '[m]en act and women appear.'[36]

While this section has briefly highlighted the historical exclusion of women from law and art, I wish to reflect at this stage upon its relevance in relation to *Danse Macabre*.

5. ARE THERE STILL NO GREAT WOMEN ARTISTS?

As mentioned earlier, the core essence of Nochlin's question, 'Why have there been no great women artists?" as I understand it, is a question on the practices and structures of the exclusion of women. What relevance does this have in a book on law, visual art, and temporality? For me, the question of inclusion and exclusion is a temporal question that cuts across discussions in and between both law and art, and as such, it remains a *timely* question. This temporal questioning of women's exclusion was raised in my reading of *Danse Macabre* as, while reading the book I felt a notable absence of women's art, and thus an exclusive practice was felt.

This is raised in my review of *Danse Macabre* where I highlight that,

> [...] there is a gap in looking at, or considering, the work of women artists whose work can be read as critiquing legal issues and art simultaneously. While there are references to women artists, the conversations or central artworks throughout the book are created by men.[37]

As such, I was reminded of Nochlin's famous question 'Why have there been no great women artists?' This question resonated with me in the same way that Hatt and Klonk frame Nochlin's question: '[w]hat is it about art history that blinds it to the question of sex and gender?'[38] Applying this idea of blindness and exclusion, I asked myself three questions: are there no women artists in this book? Then, why are there no women artists in this book? And lastly, should there be? I now wish to reflect on these questions in turn.

5.1. Are there no women artists in this book?

As outlined in my review of *Danse Macabre*: '[w]hile there are references to women artists, the conversations or central artworks throughout the book are created by men. Conversations and analyses about law, time, and art through women's

[35] Mary D. Garrard, 'Artemisia's Hand' in Mieke Bal (ed) *The Artemisia files: Artemisia Gentileschi for Feminists and Other Thinking People* (University of Chicago Press, 2006) 1.

[36] John Berger, *Ways of Seeing* (Penguin Group, 1972) 47.

[37] Doherty (n 9) 3.

[38] Hatt and Klonk (n 34) 152.

artwork is therefore on the periphery.'[39] To support this viewpoint, that there is an exclusion of women's artwork from *Danse Macabre,* it is necessary to outline the key artists whose works have been engaged with in the book.

In *Danse Macabre*, there are seven chapters, each with a core artwork through which discussions on law, art, and temporality are developed. In each chapter, a concept of time is also proposed. In Chapter One of the book, the concept of anachronic time is examined through Pieter Bruegel's *Justicia,* 1559. Chapter Two explores the concept of diachronic time through Joshua Reynold's *Justice,* 1777. Manderson then turns towards a development of utopian time in Chapter Three through *Governor Arthur's Proclamation to the Aboriginal People,* c. 1830. Chapter Four considers now time through an analysis of J.M.W. Turner's *Slave Ship,* 1840. Following this, Chapter Five explores suspended time through Gustav Klimt's *Jurisprudenz*, 1903–7, while Chapter Six develops colonial time through the work of Gordon Bennett. Finally, Manderson turns towards Rafael Cauduro's *7 Crimenes*, 2007–9 in terms of ghostly time. These seven artworks are created by, or attributed to, men. Women artists are not central case studies in the book, although, they are discussed in relation to the central artworks, for example, Marlene Gilson, Judy Watson, and Fiona Foley are mentioned in relation to Bennett's work. Therefore, discussions on art, law and temporality are largely formed through an analysis of men's artwork, and as such, the discussions are arguably gendered.

While women artists do not feature heavily in the book, women are featured in the artworks, for example, Joshua Reynold's *Justice,* and Gustav Klimt's *Jurisprudenz*. This echoes Berger's comment referred to earlier in the article whereby '[m]en act and women appear.'[40] I mean this in the sense that, women appear in the art, but they are not discussed or centralised as active creators of art. I note this point as in Joshua Reynold's *Justice*, 1777, and Gustav Klimt's *Jurisprudenz,* 1903–7, the women represented are acting in the sense that they active in *doing* something. To explain, the figure of Justice in Reynold's work is standing, looking into the distance and the feminine figures in Klimt's *Jurisprudenz* are captured in action. This then leads to my next question, why are there no women artists centralised in the book?

5.2. Why are there no women artists in this book?

In answering this question, I can only provide a tentative reflection on this, as I would not want to speak for Manderson. As highlighted earlier in the contribution, *Danse Macabre* is composed of various previous and reworked publications of, and collaborations with, Manderson. Therefore, as these previous works are not centred

[39] Doherty (n 9) 3-4.
[40] Berger (n 36).

upon the work of women artists, the consequence is that women artists do not feature as central artworks in *Danse Macabre.*

Perhaps Manderson's positionality as a critical legal scholar from Australia has influenced the scope of the work in the book as *Danse Macabre* engages with jurisprudential scholarship and colonialist representations and effects on Indigenous populations. In saying that, Indigenous women artists have created artwork on these themes, and so the issue of exclusion is still raised. On this, I feel it would be of great use to reflect more critically on positionality in interdisciplinary scholarship as then we can begin to understand the research journey and decision making process in selecting case studies or engaging with artwork. In highlighting and reflecting on one's own positionality in research, one can critically reflect on how we, as writers, become embedded into the research, or how our interests become embedded in the research.[41] At the risk of speaking for Manderson, this section ends here, but welcomes and encourages future conversations on how we select and come to select case studies in research that investigates the intersections of law and art, and indeed temporality.

5.3. Should there be women artists in Danse Macabre?

Towards the end of *Danse Macabre*, on page 240, Manderson states that he hopes the book 'will stimulate new research, including possibilities for thinking about representations of time and of law in non-western and Indigenous art.' There is also 'space to reflect upon the gendered histories of both law and art, and so it is hoped that future research will also engage with these discussions.'[42] In taking on this task, feminist researchers can draw upon existing projects and methodologies for revisiting *Danse Macabre* from a feminist perspective, such as the Feminist Judgements Project.[43] *Danse Macabre* can be used to further discussions and hopefully, in the future, can be revisited and reimagined by feminist scholars. The book is the trunk of a tree that can support, and give foundation to, vast and fruitful branches of scholarship that engage with the themes of law, art, and temporality - one of these being a feminist branch.

[41] Brian Bourke, 'Positionality: Reflecting on the Research Process' (2014) 19(33) *The Qualitative Report* 1.

[42] Doherty (n 9) 4.

[43] See Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010)*;* Elisabeth McDonald, Rhonda Powell, Mamari Stephens, and Rosemary Hunter, (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, 2017); Máiréad Enright, Julie McCandless and Aoife O'Donoghue (eds), *Northern / Irish Feminist Judgments Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017); and, Sharon Cowan, Chloë' Kennedy, Vanessa E. Munro (eds), *Scottish Feminist Judgments (Re)Creating Law from the Outside In* (Hart Publishing, 2019).

6. CONCLUSION

Grounded in both legal and artistic feminist criticisms of the exclusion of women from law and art, this contribution has provided a feminist response to *Danse Macabre*. In this review, I have revisited Nochlin's famous question, 'Why have there been no great women artists?' and distilled the question to the essence of the issue of women and exclusion in art. Reflecting on exclusionary practices, I have highlighted how both law and art share a critical commonality in that they, in theory and in practice, have excluded women. It was then suggested that the question of women and exclusion is a temporal question considering the absence of women's artwork in *Danse Macabre.* Drawing on my initial reflections upon reading the book, I considered three questions: are there no women artists in this book? Then, why are there no women artists in this book? And, finally, should there be?

I wish to conclude by stating that *Danse Macabre* is a wonderful addition to Manderson's body of work. The chapters and concepts are outstandingly constructed with each artwork perfectly illustrating the power of the combination of law, art, and temporality. Each construct of time is as impactful and relevant as the one preceding and following it. Every chapter is meticulously evidenced and researched. However, it is hoped that future engagement with *Danse Macabre* will provide a feminist reimag(in)ing of the relationship between law, art and temporality and include artworks by women and other groups, thus allowing the tree of knowledge on the intersections of law, art, and temporality to grow.

449 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 449-457
ISSN: 1825-5167

TEN WAYS OF 'THINKING WITH' DESMOND MANDERSON

ADAM GEAREY
Department of Law
Birkbeck College, University of London
a.gearey@bbk.ac.uk

ABSTRACT
This paper is an attempt to 'think with' Desmond Manderson's *Danse Macabre*. To celebrate the creative energies that *Danse Macabre* liberates, we need to work with the grain of the text; with its images and metaphors, and to follow the circle that it traces from its own beginning to its end; which is not really an end at all, but the evocation of the possibility of "rebirth", a rhythm, that is in turn linked to the capacity of art to "surprise"- to break the bad repetition of law. Celebrating *Danse Macabre* is 'thinking with' the text—an idea that will be connected to the weak force of ethics---an animus of Manderson's thought. The 'with' takes us to Denise Levertov's poem *A Solitude*-- a performance of a mode of poetic thinking that emanates from Manderson's intellectual sensorium.

KEYWORDS
Being with; thinking with; ethics; weak force; rebirth; rhythm.

I

Manderson, as a reader of Lawrence, would know that it is always better to trust the tale, rather than the teller of the tale:

> Lawrence did not think of a story as the handing over of some truth or other from writer to reader, but rather as a process by which the writer learns something through writing just as the reader learns through reading (Manderson, 1997, p. 56)

This notion of an interpretative principle- or "process"- might help us to read, or, rather, to think with, or move with *Danse Macabre*. It might suggest that, in order to celebrate the creative energies that the book liberates, we need to work with the grain of the text; with its images and metaphors, and to follow the circle that it traces from its own beginning to its end, which is not really an end at all, but the evocation of the possibility of "rebirth" or a rhythm that is in turn linked with the capacity of art to "surprise"- to break the bad repetition of law.

Danse Macabre, then, a circle or a vortex; a process and a circle dance—Robert Duncan's 'ring a round of roses told' (Duncan, 2014, p. 3); a metaphor that would also link Manderson's thinking to an idea of open field composition, Denise Levertov's organic poetry and Lawrence's materialist mysticism. *Danse Macabre* creates a field, of which law is part. The book, and Manderson's work as a whole, can be seen as an ongoing re-working of jurisprudence precisely in this sense: law is no longer to be thought of as a closed system to be unlocked by jurisprudence. It is to be understood by defining and re-defining the fields in, with and through which one thinks and imagines law and its possibilities. Aesthetic jurisprudence – of which *Danse Macabre* is an exemplification- creates its field through the sensorium of the senses. *Danse Macabre* might privilege the visual, but the visual exists within the field traced by Manderson over many texts. To engage with Manderson, then, is to think in terms of what is seen, heard, felt; but it is also a rhythm or movement of thought. Unlike Critical Legal Studies, this is not trashing: it is a way of giving legal thinking "a new honesty, a new dignity and a new legitimacy' (Manderson, 2019, p.7). What new ways can we feel, think, see and sense the law?

The thesis of this essay is that there is a theme that runs through Manderson's work and which animates the forces at play in his work on the visual. Aesthetic jurisprudence offers the possibility of "new life"- another Lawrentian theme: "Look, we have come through." The Lawrentian process and provocation - new life- is a peculiar rebirth. It takes us back to ourselves, to the world in which we always are: the sensorium of ourselves. *Danse Macabre* is predicated on this immersion. Being "before" is the situation of the viewer of the image, but it is also the situation of being "before" the world. It is a complex figure. One would imagine, first of all, that the world is always before us: we fall into a pre-existing world. However, we are also before the world in that the world is given to our interpretation. Interpretation, for Manderson, is sensuous. He is not the kind of thinker to evoke grand claims about the nature of reason- reason is something we are, something we do. Thinking and acting in a world which hums, buzzes, dances around us. A kind of hermeneutic circle; a circle dance. The 'before the image' is the condition of the interpreter 'before the world.'

The sensorium is not simply a celebration of sense. There is the perennial risk of bad repetition. Manderson captures this in the image of the "bardo"- "a liminal place before death and afterlife." The bardo, in this text, will be translated into the sense in which there is a perennial risk of being stuck with things (and oneself) as one is. A non-life defined by the repetition of meanings that do not change. Worlds incapable of transformation. Trapped in a bardo, a sleepwalker; as if Dante's hell included a circle for those who never committed to anything; those whose fate is to drift and to repeat. To be "genuinely committed to ....constant renewal' Manderson (Manderson 1997, p 6) involves work on what resists: the forms of the old that press their power against transformation.

Lawrence, again:

> Are you willing to be sponged out, erased, cancelled
> made nothing?
> Are you willing be made nothing?
> dipped into oblivion (Lawrence, 1980, p.728).

What a peculiar and insistent question. Nevertheless, it is a question posed by Manderson's book. Lawrence, like Manderson, is invoking the common fate of death. For both writers, death is a fact and a metaphor. One has to die to oneself to be made new; to be transformed. Life and death. *Phoenix* is the poem of this difficulty -- a text that must be read with *Danse Macabre.*

II

Look up Des Manderson on line. His web site has a portrait rather than a photograph. Although, there are of course photographs of Professor Manderson, Des is neither the photograph nor the portrait- he is the very plurality of himselves- but-given the choice of self-representation, he appears as a painted image. This is entirely in keeping with the self-presentation of a thinker of aesthetics. We will take it as a clue as how to 'think with'. Thinking with Manderson opens up a process of fraction and refraction, the play of light upon surfaces, things hidden, revealed; glimpsed out of the corner of one's eye like the ghosts that manifest themselves towards the end of *Danse Macabre.*

III

To carry forward some of these terms. Manderson is a thinkers of the 'with'. If we are always before the world in the sense outlined above, then we are always thinking with the world. *Danse Macabre* is 'about' thinking 'with' images. The witness of 'with' needs to be uncovered. 'With' can be traced back to the old English wiþ- which carries the signification of "against." The sense of 'against' can be taken back to the Proto-Germanic *wiþra, and to the Proto-Indo-European (PIE) root *wi. The reconstructed meaning of this root word is "separation" - the opposite of the contemporary meaning of the word. The shift in signification can be traced to Middle English usage when the word changed its meaning entirely, and became linked with the significations of a word which is present in contemporary German *mit* ("with"). As in Heidegger's mitdasein. The PIE radical is **me* ("with") which arguably carries the same meaning as the ancient Greek word for "among, between [or] with" and can also be traced into the Sanskrit word for "together [or] at the same time" (Indo-European Language Revival Association, 2007, 2607).

This brief reconstruction of the word involves us in another circle dance. 'With' begins by signifying separation, and is transformed into a swarm of significations that bring together senses of connection and congruity- in both a physical and a temporal sense. We can hazard a poetic reconstruction of the sensorium of 'with': we are separated from the world in our condition of being with it - and we are with and amongst each other as interpreters of what we are before. To push this a little further. Arguably one can find in the spacing of with/not with - a rhythm, a beat: a sequence where units of time or stress are both 'with' and 'separate' from each other. To see Manderson as a thinker of the 'with'- is- then to find in his arguments about the dance and being before the world a poetics of sensual being in the world.

IV

Danse Macabre is a book about images, but it is also a book about time (the dance as measure, as a design in time). Our point for the moment is to use Manderson's notion redemptive time to work with 'with'- to uncover levels of linguistic time that can help us to understand a form of thinking: every connection is bound up with a disconnection. Thinking the 'with' is thus about working with this gap, with a kind of primordial separation that allows things to be both apart and together. If thought is thought of the 'with'- it is about something that works itself out being "between" or "among"; it is to be found in joining and separating; coupling and decoupling, association and dis-association.

V

Push together two magnets. Try it. What is it that you are experiencing? This is of course a physical force- a natural phenomenon. At best it's a metaphor for what we are thinking about. But metaphors also have force for those that are given to use them.

VI

'With' separates and joins; joins and separates. Thinking 'with' is perhaps the 'nature' of thought- and it would take us to the following problematic: if every 'with' is a 'not with' then to think with (or even about) Des Manderson is to think about an almost infinite set of things joined to but separate from Des Manderson. To make this manageable, there must be a sifting or a winnowing. As the book tells us, we are always 'before' ['we' the thinking thing always with thought to the point of death; after which we can only be thought about]. The sifting must have its own appropriate way of determining the withs that are relevant to the saying of

something. To return to thesis I (above). The best way of grasping this sifting is in the image of an open field. This may strike you as a mixed metaphor. But, we need to conceive the field not as a space in land- but as a space defined by an arrangements of appropriate 'withs'. Appropriateness defined as a field will always be different- as the field itself is plastic and constantly redefined. If this stage in the argument is acceptable, then we can also elaborate a second point from thesis I. The field, the space of sifting, is a poetics. To think with 'with' is poesis. Though is a poetics: a stitching of surfaces. A stitch itself is always a peculiar punctuation of space- holes that serve to link. To stress. Poetic thinking not art as a representation of a prior 'real'- but- the creation of a real- a poem, a fiction, a picture: with which one thinks.

VII

Thinking with Des Manderson will define an open field around a number of withs appropriate to an engagement with his thinking. It may also be the case that in so doing we come across another entirely appropriate theme for thinking with Des Manderson: thought is bound up with ethics. How? The answer will be that thought is ethical when it is a passage through- when the thinker is thinking through in an authentic way. To 'have come through' is ethical work. It suggests an ordeal or something learnt from difficulty. But it is always open to the 'with'. This is why Eliot writes scathingly about the wisdom of old men: the pattern constantly changes. To be working through is to know that what one has gained is entirely provisional. There is always the possibility of a 'with' that has not been seen or experienced; an elsewhere, someone else. Ethics, in *Danse Macabre* and in Manderson's work as a whole- is this experience of vortex or dizziness—the radically openness of ethics.

VIII

The separation between simply being before, and taking on a responsibility for the being before that one thinks separates limbo from commitment. It is also the narrow line that separates the dead form of repetition from creative energy.

There must, then, be some force that compels an ethical responsibility. This problematic is, of course, that of Derrida's reading of Levinas. Levinas has been central to Manderson's thinking. And this is true of *Danse Macabre.* For the moment, we need to work with 'with'- the force of being before one's own responsibility for the 'with' that one asserts. The circularity here is that of a self-summoning 'force'? But it is a weak force. Why?

Because it is not the law. To work this one out, we need to deal with a jurisprudential commonplace.

The law is the law because it assets norms that- in the most sophisticated version available- are necessary for practical reason to take the social form that it does. In other words, one follows the norms of the law not through fear of sanction, but through an internalisation of normative practice which accepts that legal norms enable the coordination of different social ends. Norms, then, have force, even if this force only becomes a violent or coercive force if absolutely necessary- in exceptional circumstances. Ethical norms may have force, but they do not, if this account is to be followed, have the force of law as they lack state sanction in the last instance.

The point of this sketch is not to rake over the ashes of jurisprudence, but, to endeavour to identify a force that is almost too weak for the instruments of conventional jurisprudence to register -- as it comes from elsewhere- even if this elsewhere is very close to us.

The weak force is experienced before the image. One is interpelleted by something. This is a crude way of describing a complex and dynamic experience. We need to think of the force that interrupts the mundane, that draws attention to something that one is before. To call it an ethical force is to say that- experienced in a certain way- it is not like legal normativity nor what passes in jurisprudence as ethical or moral normativity. It is a weak force in the way gravity or magnetism can be weak forces.

IX

As Manderson tells us, we are always before the image as we are before the law. We are always, therefore, in force fields, where powerful forces can overwhelm weak force. But the weaker force can retain its hold. Ethical forces that are bound up with 'being before'- to the extent that they can be masked, can disappear almost completely- and be overwritten by the law. There is the time of judgement; or the process and telos of law itself. But there are other ways of deciding, or, of keeping decision in abeyance. If one wants to think 'with', then one might enter these different modalities. But there is no reason to do so other than one's own commitment to so doing.

X

Levertov's *A Solitude* must be read with *Danse Macabre* as the two texts exist in a field defined by sight, touch, 'being with' and ethics. The poem begins with a description of vision, of seeing. The poet is watching a blind man, whose disconnection from the world of vision is presented as a "great solitude." To be blind is to be removed from the world. Levertov, who was a great gazer on faces, continues to look at the blind man's face. She is sat opposite to him in a train carriage. This

drama of being with takes place in the most mundane of places: "[t]he train moves uptown, pulls in and/ pulls out of the local stops" (Levertov, 2013, p. 179).

Watching the face, she becomes aware that it is animated – and moves to the rhythm of the blindman's thoughts: "[a] breeze I can't feel/ crosses that face as it crosses water". The poem traces the movement of the poet's thought and her interpretations of the thoughts of another:

> ....but what are his image,
>
> he is blind? He doesn't care
> that he looks strange, showing
> his thoughts on his face like designs of light
>
> flickering on water, for he does not know
> what look is.
> I see he has never seen.
> (Levertov, 2013, p. 179)

In Manderson's terms, Levertov's lines enacts the 'before' of the interpreter. The poet before the blind man is the interpreter before the social world of others who think: who are interpreters of a shared world. The poet and the blind man are 'with' in the primordial sense: separate and alone- held together by the enactment of the rhythm or movement of thought. This poem is also helpful as a 'thinking with' Manderson's text as it provides a fine exemplification of the thesis that being before the image is not necessarily the art image – but- the condition of those who inhabit the sensorium of the world. The lines above enact a world that can- at least potentially- be shared. The blind man is strange. But the poem is about a desire to cross a gulf, a separation, that holds in place two different worlds of sense. The desire to cross the blindman's solitude trembles like the spaces that define the verses and allow blocks of sense to exist in a rhythmic organisation – both separate and apart- elements of a field defined by an experience that the poem performs.

The poem moves towards an encounter, a moment of contact:

> When he gets out I get out.
> 'Can I help you towards the exit?'
> 'Oh, alright.' An indifference
> (Levertov, 2013, p. 180).

This is the moment that speech and hearing emerge in the poem. The two characters are presented as acting together. But the offer for help is met with a profound indifference. The earlier movement of thought attempting to work with the terms of another's world is deflated: her offer of help is not met with gratitude. A celebration of something held in common was premature:

> But instantly, even as he speaks,
> even as I hear indifference, his hand

goes out, waiting for me to take it,

and now we hold hands like children
His hand is warm and not sweaty,
The grip firm, it feels good.

The blindman's indifference is modulated by these two verses. The grand caesura that interrupts the single long clause, split over six lines, carries forward the sense of separation and contact: indifference is replaced with something else. The sensorium is not that of sight and images, but touch- and a world of touch that evokes childhood, and then the simply, the sensual pleasure of holding another's hand. Would it be too much to suggest that this experience is again modulated into something that could be described in ethical terms?

After she parts company with the blind man, Levertov's poem continues:

Solitude
walks with me, walks

beside me, he is not with me, he continues
his thoughts alone. But his hand and mine
know one another
(Levertov, 2013, p. 180).

The solitude that was first presented as the condition of the blindman is now the condition of the observer. Solitude has nothing to do with vision, but with whatever happened in the encounter between the two of them. The encounter was based on nothing more than an offer to help; an offer that was met with indifference. This was nevertheless an action directed to an other's aid. An action that was mandated by no norm other than the sense that it was the right thing to do. Indeed, it simply emerges in the poem as such.

The weak – invisible- ethical 'norm' is actually what holds together the shape and form of the poem. For a text so concerned with the movement of thought, the decision to help must thus be analysed; as it re-appears or is mediated by the closing meditation on solitude. The blindman has become solitude. His absence has become its presence: the memory of two hands touching. But that 'two hands know one another': knowledge is in the sensuous experience of the touch. The memory of the touch is set beside the "not with"- the 'not with' informs the final lines:

He knows
where he is going, it is nowhere, it is filled
with presences. He says, I am
(Levertov, 2013, p. 180).

The one so indifferent to help, 'is' in his own world: a world that is filled with as much sensuous pleasure as that of the poet.

Is there is a norm buried deep within this encounter, occasioning these transformations, these reversals of view point, this rhythm of thought?

Go back to the opening line of the poem: "A blind man. I stare at him/ ashamed, shameless. Or does he know it" (Levertov, 2013, p. 179). All along the poem was about what can be known. It is organised around the figures of looking/ seeing and looking/ being seen. The "ashamed, shameless" is the opening investigation of a consciousness that has not yet been transformed- trapped in a repetition of itself (which is nevertheless already a form of doubling, of reflexivity: shame becoming conscious of itself and transforming itself). The poem enacts the sensory knowledge of the one before the world and the other: the movement of the poem itself is an enactment of a weak ethical force, a transformation, a new life, a rhythm, a dance of thought amongst words.

BIBLIOGRAPHY

Robert Duncan, *The Collected Later Poems and Plays* (Berkeley: University of California Press, 2014)

D. H. Lawrence, *The Complete Poems* (Harmondsworth: Penguin, 1980).

Denise Levertov, *The Complete Poems* (New York: New Directions, 2013)

Desmond Manderson, *Kangaroo Courts and the Rule of Law* (London: Routledge, 2012)

Desmond Manderson, *Danse Macabre* (Cambridge: CUP, 2019)

Proto Indo-European Etymological Dictionary (Indo-European Language Revival Association, 2007)

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 459-493
ISSN: 1825-5167

BEYOND THE ATLANTIC GAZE, OR, A MEXICAN VIEW ON ART, DEATH, TIME AND LAW

LUIS GÓMEZ ROMERO
School of Law
University of Wollongong
lgromero@uow.edu.au

ABSTRACT
This article builds on Desmond Manderson's visual jurisprudence to develop a Levinasian encounter with Rafael Cauduro's *7 Crímenes*, a series of murals in the building of the Supreme Court in Mexico City. The article seeks to impulse Manderson's methodology further into the horizons of empathy and intersubjectivity through a phenomenological approach to Mexico's colonial past and present across images, death, time and law.

KEYWORDS
Visual Jurisprudence; Manderson; Cauduro; Lévinas; Atlantic Gaze; Mexican Drug War.

[...] mon frère
que cherches-tu
a travers ces forêts
de cornes de sabots d'ailes de chevaux

toutes choses aiguës
toutes choses bisaiguës

mais avatars d'un dieu animé au saccage
envol de monstres
j'ai reconnu aux combats de justice
le rare rire de tes armes enchantées
le vertige de ton sang
et la loi de ton nom[1]

Aimé Césaire (1983)

[1] "[...] my brother / what are you looking for / through these forests / of hoofs of horns of horses' wings // all piercing things / all doublepiercing things // avatars nonetheless of a god enlivened in rampage / flight of monsters / I recognized in the battles of justice / the rare laughter of your enchanted weapons / the vertigo of your blood / and the law of your name" (All unattributed translations are mine).

INTRODUCTION: ON IMAGES, DEATH, TIME, LAW AND THE (AWKWARD) CANDOR OF ACADEMIC CORRESPONDENCE

Desmond Manderson's *Danse Macabre: Temporalities of Law in the Visual Arts* (2019) embodies a rare and unique academic feat. It is a scholarly *tour de force* on jurisprudence, political philosophy, cultural critique and the history of visual arts – yet its major virtues reside, beyond the mesmerizing erudition displayed across its pages, in how it reaches into our most intimate and transcendental human experiences. Manderson demands his readers to consider seriously the consequences of placing ourselves before time (5-15), before the image (10-19), and before the law (5-10 and 16-19) in an interdisciplinary *danse macabre* performed under the "shadow of death" (2-4). I could only oblige. As a member of the human species, I have few certainties in life. Death, time and law are three of them.

A famous brocard – inspired in Aristotle (1934, 1160a) – articulates a millennial platitude that, in terms of the managerial jargon that is so dear to neoliberal universities nowadays (Ordine 2013, 109 ff), has maintained law as a career with *high rates of employability* across centuries: *ubi societas, ibi jus*. Wherever there is society, there is law.[2] Law partakes equally in the magnificent ingenuity and the fragile integrity of the human beings who produce, interpret and conduct its paths. In this sense, Lon L. Fuller defines law as an "enterprise of subjecting human conduct to the governance of law" (1969, 106) whose purpose is to achieve "the fullest realization of human powers" (5 ff). H. L. A. Hart is not so optimistic: he warns lawmakers to always consider in their craft the frightful human traits of "limited altruism" and inadequate "understanding and strength of will" (2012, 196-197), in order to secure "the modest aim of survival" (191).

As the parabolic blind men who vainly attempted to conceptualize an elephant by touching a single part of its body, both Fuller and Hart provide partial accounts of law that neglect an essential element in the fabric of legal discourses. The *experience of time* shapes law's potentiality for excellence and failure alike. Jacques Derrida observes that time renders law simultaneously "violent and nonviolent, because it depends only on who is before it – and so prior to it –, on who produces it, founds it, authorizes it in an absolute performative whose presence always escapes him" (2002, 270). Derrida argues that all law must have a foundation "suspended in the void or over the abyss" of purely performative illegality or violence (270).[3]

[2] Among the classic formulations of this legal trope see, for example, Hugo Grotius (1913, Prolegomena VIII).

[3] Hans Kelsen's *Grundnorm* – a presupposed norm that provides foundation to every law in a legal system, but is itself not referable to a prior law – is an attempt at overcoming this aporia (see 1992, 196 ff). Nonetheless, as Manderson points out (2003, 89), Kelsen believes the system basically self-functions once it is underway. The *Grundnorm* therefore does not solve the aporia raised by Derrida, who regards every act of legal interpretation as an occasion to decide if prior general norms are applicable to the unique circumstances and persons before the legal decision maker.

Every legal judgment or act of interpretation, in as much as it is not conclusively referable to some previous legal text – statute or case – is "an instance of non-law" whose legality can only be determined by its confirmation after the fact (269). The meaning of law is therefore always just beyond the grasp of the interpreter – just a second ahead, too far though for us to catch up with it.

Law relies on texts whose authority and authenticity are "already past", yet "always to come, always promised" (270). Derrida maintains that the passage of time inevitably opens "an interminable *différance*" between the enunciation of a norm and its application (1992, 204)[4]. The "discourse of law", caught in the abyss between then and now, is indefinitely "delayed, adjourned, deferred" (1992, 202). Legal interpretation is thus the realm of choice of the interpreter, who wanders across an unpredictable openness both inherent to law and essential to justice. In Derrida's view, the intrinsic incalculability of legal discourses "is not bad news", but actually "the political chance of all historical progress" (2002, 242). Justice is possible *precisely* because every legal judgement institutes and validates law anew.

Manderson similarly affirms that "[t]o be before the law is *always* to be before time – waiting for it, confronted by it, subject to it" (2019, 11).[5] Yet there is a crucial difference between Manderson's and Derrida's respective accounts of legal judgment in relation to time. Manderson acknowledges that "[l]egal interpretation takes place in a field of pain and death" (4).[6] He is not willing, however, to settle for Derrida's pragmatic views on the "positing of the law" as "a violence without ground" (2002, 242). The myriad crises of legitimacy that arise from law's temporal aporia are a constant concern in Manderson's work (2000, 98 ff; 2003, 89 ff; 2012a, 75 ff). He has consistently resisted handing over the *moments* of legal judgement – and the ideals of justice that inform them – to "the hierarchical or hieratical process" (2012a, 159) by which they are announced. Manderson, for example, has tracked the grounding of legal judgement into the pedagogical and normative narratives of myth and children's literature (2003, 91 ff). He has laid the foundations of the rule of law in the polarity of the processes through which legal agents expose and criticize the reasons that justify legal decisions (2012a, 179-180; 2012b). Manderson, in sum, is an Aristotelean in the deepest sense of term: he is a scholar (and, more important, a *citizen*) committed to public virtues who would rather live under the rule of law than subjecting himself to the passions and whims of even the best of men (Aristotle 1972, 1286a–1292a).

In *Danse Macabre*, Manderson takes a step further in substantiating the fleeting instant of legal judgement by excavating into visual representations of the complex

[4] Derrida's *différance* (1967, 37 ff) is a pun that characterizes the way in which meaning is created rather than given. In French, the word *différer* can mean either to differ or to defer, depending on context. Derrida claims that the meaning of a term (which depends on its *difference* in relation to other terms) is never fully *present* to us, but instead is *absent* and endlessly *deferred*.

[5] Italics in the original.

[6] An idea famously developed by Robert Cover (1986, 1601).

configurations of thought, action and feeling that frame "our thinking about structure and authority, governance, regulation, sovereignty, rights, control, and punishment" (2019, 17). Drawing from Mikhail Bakhtin's notion of *chronotope* (1981, 84 ff) – a compound neologism derived from the Greek terms χρόνος and τόπος, that is, time and place –, Manderson's visual jurisprudence aims at making evident the temporal and spatial relations in which legal judgement emerges, develops and expires (2019, 14-15). Manderson's methodology consists in *bonding* – both contextually and anachronistically – with visual artworks that expose the absence and embody the presence of the evanescent temporal foundations of both legal discourses and human lives. The works discussed in *Danse Macabre* are quite specifically focused in this way: they are images of Justice (20-81)[7], Jurisprudence (126-156)[8], Proclamation (82-125)[9], (Colonial) Law (157-194)[10], and Crime (195-238)[11].

Danse Macabre is therefore a call to unleash our jurisprudential imagination and shake the temporal boundaries that, from Derrida's perspective, indefinitely postpone legal meaning and entrust justice to the unrestrained hermeneutical inclinations of legal decision makers. Visual artworks, according to Manderson, provide us a solid point of departure for building cultural bridges between our experiences of time, on the one hand; and discourses on legal justification, on the other hand. To achieve this, writes Manderson, we must "go further than a mere semiotics of images or sculptures." We must "inhabit them, engage with them: think and see the world *with* them both in their own time and ours." This is the only way in which we will "really be taking these visual resources seriously" (17)[12].

In this essay, I aim to respond in serious terms to Manderson's call, as articulated in *Danse Macabre* and the rest of his vast and rich work. I follow his lead to inhabit in and bond with Rafael Cauduro's *7 Crímenes* – a series of murals at the back stairs of the building of the Supreme Court of Justice in Mexico City, which Manderson acknowledges as "a masterpiece in both law and art" (2019, 237). Such an endeavour requires me to disclose my relationship to this artwork. Cauduro's phantasmagorical *trompe l'œil* painfully embodies the historical circumstances that pushed me to become an immigrant and, eventually, a Mexican-Australian scholar. For Cauduro, law does not struggle against injustice at all. On the contrary, legal institutions aid and abet injustice. The murals find law guilty of the seven crimes (as the seven capital sins) of justice (Cossío 2009; Manderson 2019, 212): guilty of

[7] Pieter Bruegel the Elder's *Justicia* (1560) and Joshua Reynold's *Justice* (1777). Manderson has also discussed Bruegel's work elsewhere (2018).

[8] Gustav Klimt's *Jurisprudenz* (1903–1907).

[9] *Governor Arthur's Proclamation to the Aboriginal People* (circa 1830) and J. M. W. Turner's *The Slave Ship* (1840).

[10] Gordon Bennet's *Possession Island* (1991).

[11] Rafael Cauduro's *7 Crímenes* (2007-2009).

[12] Italics in the original.

sacrificing innocent victims to futile imperial glories (*Tzompantli*), guilty of the denial of due process (*Procesos Viciados*), guilty of rape (*Violación*), homicide (*Homicidio*), torture (*Tortura*), kidnapping (*Secuestro*), pitiless imprisonment (*Cárcel*) and repression (*Represión*). Cauduro's political is my intimate personal. His murals demand me to place my life in connection to "legally inflicted violence" (239) and, more precisely, necropolitics – that is, the exercise of sovereign violence aimed at killing (Mbembe 2003, 39-40; 2016, 56 ff) – in Mexico, thus forcing me to examine the motives behind my Antipodean exile.

Manderson's visual jurisprudence, however, requests from us generosity to "open the possibility of transformation [of law and justice]" by engaging in "a connection to other lives and experiences that is at once aesthetic and ethical" (2019, 244). This is a two-way street: to touch others, one must accept tangibility; to see others, one must become visible. The essay therefore builds on my *experience* of images, death, time and law in Mexico. The raw material from which it has emerged begs for the outmoded genre of personal letters to express my dissent with a paragraph in Manderson's analysis on how Mexican aesthetic, ethic and legal practices and principles distinctly shape the nexus between these existential milestones in Cauduro's work. An unapologetic admiration for Manderson's jurisprudence, however, circumscribes my disagreement – and the letter, alas, will not follow the conventions of the genre, developing instead with the awkwardness of personal matters dressed in academic forms. A profusion of footnotes somehow shrouds even the most candid attempts at accounting for our love, our melancholy, our hopes, our despair and our fears. Life is larger than the most exhaustive literature review.

Image 1. Rafael Cauduro, *Procesos Viciados*, *Violación* and *Tortura*, from *7 Crímenes*, 2007-2009. Mural, various materials, Suprema Corte de Justicia de la Nación (SCJN), Mexico City (reproduced by kind permission of the SCJN)

The essay ultimately aims at casting light, using Manderson's methodological premises, on the political and jurisprudential dangers inscribed in Manderson's account of Cauduro's work in relation to the Mexican festival of the *Día de Muertos*

(Day of the Dead). Manderson's visual jurisprudence is fertile in critical and cross-cultural normative potentialities. His analysis of J. M. W. Turner's *The Slave Ship*, for example, effectively works as "a diagnosis" and "a prospectus" on the responsibilities that arise from colonialism – past and present. Manderson overcomes the blind spot of ideology by turning his scrutinizing gaze from Turner's past depiction of dismembered bodies drowning in the sea, to the critique of contemporary discourses on asylum seekers and refugees. In other words, Manderson indeed inhabits *The Slave Ship* by moving from the complacency of the spectator to the realization of the ways in which our choice and action are implicated today in the suffering of "bodies in the water" in Australia, Europe and elsewhere (2019, 117-125). When contextualizing Cauduro's work in relation to the Day of the Dead, however, Manderson inadvertentely slips into what I call – drawing from J. G. A. Pocock's (1975; 1999; 2003), Richard M. Morse's (1954; 1964; 1988), and Michel-Rolph Trouillot's historiographies (2002; 2003) – an *Atlantic gaze* over Mexico. The menace of a deeply ingrained Atlantic hostility that has caused much suffering to Mexicans lurks in a single paragraph in the chapter Manderson dedicates to discuss *7 Crímenes*.

The following pages therefore seek to impulse Manderson's methodology further into the horizons of empathy and intersubjectivity through a phenomenological approach to Mexico's colonial past and present across images, death, time and law. I use the term *phenomenology* in its broadest sense, that is, as a method that privileges experience from a first-person point of view to explain objects, time, self and others in their proper contexts. The essay is therefore structured in three sections that relate Manderson's visual jurisprudence to experiences of legal violence in Mexico and, broadly speaking, Latin America. The first section situates *Danse Macabre* in the context of Manderson's broader work, in order to establish the ethical principles of intersubjective responsibility that should inform, in my view, Mandersonian jurisprudential analyses of visual artworks. The second section highlights the dangers inscribed in Manderson's account of the Day of the Dead in relation to his analysis of Cauduro's *7 Crímenes*, as what I call the *Atlantic gaze* broadly assumes that Mexican *mestizo* heritage – manifested, for example, in the idiosyncratic Mexican familiarity with death – amounts to a form of cultural deviancy that welcomes and normalizes violence. The third section compares and differentiates Diego Rivera's *Día de Muertos* and Cauduro's *7 Crímenes*, in order to clarify their respective jurisprudential components in relation to death and the critique of law. This will set the grounds to conclude affirming the pertinence of contemporary radical Mexican aesthetics to transcend the temporalities of injustice and establish new jurisprudences that truthfully respond to the suffering caused by any form of colonialism.

ON THE (VISUAL) ENCOUNTER(S) WITH THE OTHER

> Sin entender comprendo: también soy escritura y en este mismo instante alguien me deletrea[13]
> Paz (1987a, 37)

Manderson provokes us to engage personally with visual artworks as a means to comprehend the fragility of each moment that devises a legal judgement – and to take seriously its consequences. In this sense, we can fruitfully categorize Manderson's methodology as a *jurisprudential practice of visual phenomenology*. There are, *mutatis mutandis*, echoes of Maurice Merleau-Ponty's phenomenology of perception in Manderson's visual jurisprudence. In order to experience visual artworks (and legal temporalities) in the way Manderson does, we require sensing (*sentir*) the world – that is, a "living communication" that "makes it present to us as the familiar place of our life" (Merleau-Ponty 2001b, 64-65). Merleau-Ponty regards our body (*le corps propre*) as the primary *locus* for acquiring and building our knowledge of the world (2001b, 81 ff). Manderson similarly conceives sight as a privileged experience to open ourselves to individuals, cultures and peoples with whom we share a world in common (2019, 179-182). Manderson's visual jurisprudence overlaps in this way with Merleau-Ponty's approach to sight not as a "certain mode of thought or presence to self", but rather as the means given to each of us to be "absent" from ourselves (2011, 81), to "lend" our "body to the world" (16) and therefore reach out to other human beings.

Merleau-Ponty claims that "true philosophy consists in relearning to look at [*voir*] the world" (2001b, xvi). This re-education of our sight involves recognizing that the seer and the visible reciprocate one another (2001a, 181 ff). We cannot "possess the visible", unless we are at the same time "possessed by it" (175-176). Merleau-Ponty asserts the necessity of intertwining our lives with "the lives of others", by intersecting our "perceptual field with that of others" (72-73). The mirroring of our gaze in the "flesh of the world" (*chair du monde*) entails a radical subversion of self-absorption and egotism, even though Merleau-Ponty equivocally characterizes it as a form of "narcissism" (181, 297-299). The reciprocity between the seer and the visible is actually the source of an ethical imperative cancelling sight as an exercise of domination and violence. It is true that, on the one hand, I am able to see myself in the world around me (specifically, in the eyes of others); but, on the other hand, this passage of reflection exposes me as *another to others*. Held in the beholding of eyes different from mine I am obliged to acknowledge, first, that I am not the center the world and, second, that I am exposed (and therefore vulnerable) to different perspectives on myself and everything related to me (Levin 1999, 228-232).

[13] "Without understanding, I realize: I too am written, and at this very moment someone spells me out."

Manderson indeed structures his visual jurisprudence on analogous – yet more demanding – ethical standards. Building on Emmanuel Lévinas' account of the ethical experience embodied in the event of encountering other person (1990; 2012), Manderson admits that, in life as in law, we are "always late" for "the rendezvous with the neighbor" (2019, 1). I previously categorized Manderson as an Aristotelian – his intellectual profile is confessedly Levinasian though (2005a; b; 2006a; b; c; 2009). For Lévinas, ethics speaks about interpersonal relationships, and not about abstract principles or systems of rules. All ethics derive from the face-to-face encounter with one-another. The "other" (*l'autrui*, capitalized in some instances) is someone different from oneself, whose countenance we experience, one at a time, every day. "The true essence of man," writes Lévinas, "is presented in his face"(2012, 323). By "face" (*visage*), Lévinas means "*the idea of the Other in me*" (43).[14] We experience the arrival of the face as an "epiphany" (43, 73, 76, 171 and *passim*) or sudden realization, undergone rather than requested, of the "living presence" (*présence vivante*) (61) of another person – namely, anyone exposed to me, who expresses her or himself simply through her or his undeniable existence, which I cannot reduce to conceptual abstractions. This impossibility of capturing the other conceptually or otherwise indicates her or his "infinity" (Lévinas 2012, 42-45 and *passim*; 2010, 439; 1990, 206 ff) or, in other words, her or his irreducibility to a bounded entity over which my Ego – labelled by Lévinas as "the same" (*le même*) – could exercise power. For Lévinas, the central conflict between justice and injustice involves the opposed conceptions of totality and infinity (24 ff). Totality (injustice) involves the same reducing all difference to itself, while infinity (justice) expresses the acceptance of an irreducible difference between the same and the other.

Lévinas claims that ethics "is not a branch of philosophy, but first philosophy" (340). This means that the traditional philosophical pursuit of knowledge is secondary to the duties that arise from our encounter with the other. Our ethical response to the other provides the foundations and the ultimate perspective for our understanding of the world. It is therefore crucial to pursue justice authentically by honoring the infinity of the face. In Lévinas view, the face is essentially defenceless when standing in front of the natural aggression of our gaze. Its nakedness (*nudité*) expresses an "essential poverty" (*pauvreté essentielle*) (1982, 79; 2012, 234). Recognizing the other therefore amounts to welcoming "a hunger" or a form of fundamental human "indigence" (*misére*)[15], because the face "extends into the nakedness of the body that is cold and is ashamed of its nakedness"(2012, 73). The "epiphany of the face" reveals, in this sense, "the destitution of the wretch [*pauvre*] and the stranger [*étranger*]", while asserting our unavoidable responsibility to their

[14] Italics in the original.

[15] Lévinas also uses the term *dénuement* (destitution) to express the inherent fragility and vulnerability of the other that reveals her or himself through the face.

needs – grounded in the equality that arises from our common destituteness (234-235).

Lévinas claims the face ultimately stands for an elementary commandment – *thou shall not kill* (1982, 79-81; 2012, 217-218) – invested with the authority "of the whole of humanity which looks at us" (2012, 234). Society – or, as Lévinas says, *humankind* – embodies a third party (*le tiers*) that projects the ethical imperative towards the other into the realm of politics. The third party is the neighbor of my neighbor who plays the grammatical function of *they*, that is, people who are different from *you* (the other) and *I* (the self). According to Lévinas, the third party gives birth to a question of consciousness – "What do I have to do with justice?" –, whose answer lies in the necessity of "order, thematization [...] the intelligibility of a system and [...] a co-presence on an equal footing as before a court of justice" (1990, 245). In other words, the third party demands both justice and law. The prohibition of murder, therefore, exhausts neither the duties that arise from the encounter with the other, nor the horizons of justice. In Levinasian ethics, a non-chosen responsibility for the other – from which we cannot escape – shapes and haunts freedom. "The face of a neighbor" (*le visage du prochain*), affirms Lévinas, "signifies for me an irrecusable responsibility that precedes every free agreement, every pact, every contract" (141). The exposure to my neighbor affects me with an immediate closeness that Lévinas calls "proximity" (*proximité*) (16-17 and *passim*). Proximity is "approach, neighborhood, contact" (129); an "immediacy" that enables us "to enjoy and to suffer by the other" (144). Proximity to the neighbor hence grounds our ethical responsibility for others: it is "an extremely urgent obligation, *anachronously* prior to any commitment" (1990, 159).[16]

In his earlier work, Manderson translates Levinasian ethics into a jurisprudence that, first, accepts the responsibility of one person to another that emerges prior to law (2006b, 19, 51-72, 166) and, second, affirms that legal institutions (the third) (73-97, 180-191) must recognize such a responsibility through the openness and responsiveness of proximity (98-145). Manderson argues, fully embracing Lévinas against Thomas Hobbes (1996), that "our personal responsibility to other *is* our state of nature",[17] so it is "a mistake to believe that law has invented this responsibility and finds itself at liberty to withhold such recognition at will" (89-90). Even though Manderson's Levinasian insights into law focus on the duty of care and the tort of negligence as case studies (2006a; c), the consequences of acknowledging that "[r]esponsibility is not a judicial auto-da-fé", but "an influential story as to who we are" (2006b, 11), reach far beyond these legal institutions. "Proximity", writes Manderson, "institutionalizes a kind of permanent revolution in the law, and a refusal to be satisfied with the present order. It institutionalizes a constant doubt and questioning that makes justice possible" (16).

[16] Italics in the original.

[17] Ibid

Danse Macabre continues and expands the project of adopting proximity as the ethical component of law by accepting visual arts "to establish, on an affective level, a connection between our legal practices and the manifold other ways by which we come to comprehend and to develop – to value and to critique – our societies" (2006b, 20; 2019, 239-245). In this sense, Manderson characterizes the blindfold covering the eyes of classic visual representations of justice as an invitation to see "more truly how blind we are" (2018, 43; 2019, 48). The blindness of Pieter Bruegel's (the Elder) *Justicia*, according to Manderson, is "in fact central to her ability to be used or manipulated in the discourse of others" (2018, 41). The blindfold points to *Justicia*'s weakness but it also suggests, in a Levinasian turn, that her vulnerability is actually "a cry for help, a silent appeal that truly constitutes – inaugurates and brings to life – our legal subjectivity, imposing on us a duty that we cannot evade, to bring her to the point of action" (2018, 42). It is up to us to overcome *Justicia*'s blindness toward "violence and cruelty and fear and self-interest and power" (2019, 49). Manderson's visual jurisprudence is, in sum, the call of a Levinasian humanist to *see* the embodied experience of law in "the flesh that gives rise and gives meaning to its texts and its institutions" (2018, 43).

THE ATLANTIC STARES AT THE DAY OF THE DEAD

> "¡Ay, infeliz México mío! [...] del lado opuesto de tu río, te está mirando, hostil y frío, el claro ojo del sajón"[18]
> Nervo (1972, 1656)

Yet the paragraph in which Manderson discusses the Day of the Dead in relation to Cauduro's *7 Crímenes* opens a fissure in the Levinasian ideals that inspire his jurisprudence. In any other hands, Manderson's account of this Mexican festival could develop into a hostile negation of (Mexican) otherness via a self-absorbed complacency on (Atlantic) sameness. Lévinas indeed warns his readers against "the complacency of the Same" and "misunderstanding of the Other" that sustain "[p]hilosophy's itinerary" through "the path of Ulysses whose adventure in the world was but a return to his native island" (1994, 43). Ulysses undertakes tantalizing adventures, but ultimately builds his understanding of everything that can be experienced upon "the unalterable character" of the same (see Lévinas 2012, 132). The prow of Ulysses' ship always points to Ithaca; his project is finding out whether or not his wife has been faithful; his ultimate goal is νόστος (*nostos*) – that is, homecoming. Proximity, however, is not an aesthetic or ethical inquiry into the other as an alternative version of our own selves. The most painstaking analysis of

[18] "Oh, my unfortunate Mexico! [...] from the opposite side of your river, the clear eye of the Saxon, hostile and cold, stares at you."

my neighbor within the boundaries of circular thought does not preclude my fundamental responsibility for her or him. Against the monotony of Ulysses' journey, whose return is granted even before departure, Lévinas vindicates Abraham as the mythical model for truthfully greeting and welcoming the other. "To the myth of Ulysses returning to Ithaca", Lévinas writes, "we would prefer to oppose the story of Abraham leaving his country forever for a yet unknown land, and forbidding his servant to take back even his son to the point of departure" (1963, 610).

In jurisprudential terms, to become Abrahamic means realizing that I only honor justice by avoiding to reduce the other to the categories of the same. A Levinasian jurisprudent must surrender, in the pursuit of justice, to the risk of experiencing a radical transformation of his or her self after responding to the appeal of the other. "I am necessary for justice", asserts Lévinas, "[...] beyond every limit fixed by an objective law" (Lévinas 2012, 274). My responsibility for justice therefore demands going "beyond the straight line of justice" and "behind the straight line of law", into "the land of goodness [...] infinite and unexplored" (ibid). Manderson certainly accompanies Cauduro in a jurisprudential journey into the vast territories of Mexican – and, more broadly, Latin American – simultaneously wrathful and melancholic pleas for justice. Manderson's description of the Day of the Dead, however, could progress into the forms of aggression that characterize the *Atlantic gaze*, that is, a way of looking at Mexico (and Latin America) informed by a worldview that situates the center of the world in the nations, cultures and conceptions of justice that emerged from the colonial ventures undertaken by the Atlantic imperial power embodied in the British Isles (Pocock 1975, 606-607).

As Haitian anthropologist and historian Michel-Rolph Trouillot points out, the "westward move that made the Atlantic the center of the first planetary empires" resulted in "'a first moment of 'globality' [...] culminating in U. S. hegemony after World War II" (2002, 839; 2003, 29). Trouillot points out that North Atlantic political concepts such as *modernity* or *globalization* are "convenient fictions" (2002, 839) that "do not describe the world", but rather "offer visions of the world" (847). These fictions are usually "projected as universals" that "deny their localization, the sensibilities and the history from which they spring" (848). Current dominant North Atlantic (political) fictions reflect "the world domination of the English language, the expansion of Protestantism as a variant of Christianity, and the spread of Anglo-Saxon and Teutonic sensibilities", while reducing "the crucial role of Portugal and Spain in the creation of the West" (2003, 44-45).[19] Trouillot observes that a "related emphasis on the Enlightenment and the nineteenth century, and the downplay of the Renaissance as a founding moment [of European cultures],

[19] Argentine-Mexican philosopher Enrique Dussel similarly affirms that "the concept of modernity occludes the role of Europe's own Iberian periphery, and in particular Spain, in its formation" (1993, 67).

also lead to the neglect of the role of the Caribbean and Latin America in the production of the earliest tropes associated with modernity" (2002, 855; 2003, 45).

The distinction between Atlantic and Spanish models of just polities predates and must be differentiated from contemporary debates on identity politics. Richard M. Morse – an American historian of Latin America[20] – clearly identifies the key features of the Atlantic and Iberian early modern *schools* of political thought. Morse defines Atlantic justice as the outcome of the tension between Thomas Hobbes' apology for the absolutist state and John Locke's atomistic conception of the sovereign individual (1954, 91-93; 1988, 59-66). Morse argues that, from an Atlantic perspective, the state is merely "a passive guarantor of private claims" to the "ample wealth" found in the colonies (1954, 71).

The model of political justice implemented in the Spanish America results from a radically different tension between the political ideals pursued by the Catholic Monarchs. On the one hand, Isabella of Castile embodied the Thomist conception of societal and religious human beings who have mutual obligations – determinable by principles of Christian justice – toward their fellow humans. On the other hand, Ferdinand of Aragon embodied the Machiavellian standards of republican liberties enjoyed under the leadership of amoral princes who are committed to the maintenance and expansion of their respective domains (Morse 1954, 72-73; 1964, 151-159; 1988, 53-59). "Spanish conquistadors, colonizers and catechizers", writes Morse, "carried with them to American shores this dual heritage: medieval and Renaissance, Thomistic and Machiavellian" (1954, 73). In the sixteenth and seventeenth centuries, the distinct Atlantic and Spanish models of political justice emerged as competing paradigms of modernity. The Atlantic model, as Trouillot points out, eventually trumped over the Spanish conception of political justice, which declined into what Peter Goodrich calls a "minor jurisprudence", that is, a collection of "discarded or failed laws, of jurisdictions denied, repressed or absorbed" by an hegemonic and all-powerful "legal tradition" (1996, 3).

The Atlantic gaze hence sustains and reproduces the (Lockean-and-Hobbesian) vision on the otherness of the land now called Latin America and its inhabitants held by the English Pilgrims and Puritans who set foot in New England in the seventeenth century. From their point of view, as Greg Grandin notes, "the Spanish Crown's rule [...] represented the most pernicious of what they had left behind, Catholic in its superstitions, languid in its aristocratic pretensions" (2007, 15-16). The abhorrence of the mixture of Iberian and Amerindian cultures in Latin America "was a goad" to the Anglo settlers, "who believed that the New World [...] did indeed represent a chance to realize God's will on Earth" (16). The combined perception of "bountifulness in which dreams could run unchecked", "corruption that demands reform and imagined innocence that begs for guidance" has ever since

[20] Morse's work is highly appreciated by Latin American intellectuals (see, for example, Paz 1998b, 23-54; Barboza Filho *et al* 2010; Krauze 2018, 27-111)

been wielded by "successive generations" of North Atlantic "Christians, capitalists, and politicians" as a justification for their imperial exploits in the region (ibid).

Manderson unintentionally lets the Atlantic gaze taint an otherwise groundbreaking analysis of Cauduro's *7 Crímenes*. In quite an enlightening approach to Cauduro's artwork, Manderson identifies in *7 Crímenes* the visual development of "a wholly new temporal imagery" (2019, 224) that bonds together past and present in a unique jurisprudential critique of the relations between violence, law and justice. Manderson contrasts Cauduro's representation of human bodies – which "have a corporeality about them which is fresh, but at the same time evanescent" – against the decaying settings in which they are placed, which consist in "crumbling bricks and plaster, peeling paint, [and] rotten wood" (ibid). The figures in Cauduro's Supreme Court murals, Manderson argues, are *ghosts* who connect the memories of those once wronged by law and justice to our present responsibility for their past suffering, which urgently demands recognition and atonement.

Figure 2. Rafael Cauduro, *Violación*, from *7 Crímenes*, 2007-2009. Mural, various materials, SCJN, Mexico City (reproduced by kind permission of the SCJN).

Manderson explains that the ghost is "the persistent after-image of an earlier physical event" that "is trapped in the place it died, destined to replay over and over again the traumatic events that took place there" (2019, 225). According to Manderson, Cauduro – as the protagonist in M. Night Shymalan's film *The Sixth Sense* – "sees dead people". The danger therefore "is not that we might see ghosts but that we might not" – because the "half-life" of Cauduro's specters "brings

together the obligations of memory and of legal change into a single framework" (226) by making visible the "violence that haunts our legal institutions" (228). Manderson persuasively argues that we *need* to see ghosts to exorcise legal violence, which is neither a concluded history nor an eternal myth, but an *event* – in Mexico and elsewhere – whose occurrence in the past continues to have relevance in the present.

Figure 3. Rafael Cauduro, *Cárcel* (detail) from *7 Crímenes*, 2007-2009. Mural, various materials, SCJN, Mexico City (reproduced by kind permission of the SCJN).

There is a second and distinct danger, however, inscribed in the *gaze* looking at the ghosts – a hazard to which not even a scholar equipped with Manderson's erudition is immune. The ghosts that Manderson and Cauduro respectively see are quite different. Manderson relates Cauduro's ghosts to the Mexican Day of the Dead festivities in the following terms:

Cauduro has painted a series of gruesome ghost stories. Rape, murder, torture, violence, blood, despair – scenes from a horror movie play on the walls of the Supreme Court. These images, and their pain, and maybe even the voyeuristic pleasure I took in them, haunt me still. It was as if I had been co-opted to join in the Day of the Dead – *Día de Muertos*, that macabre Mexican festival of excessive skeletons and ghoulish violence. Diego Rivera also painted the Day of the Dead, in the Fiesta courtyard of the SEP [Ministry of Education] series. But for him it is a benign celebration of Mexican cultural traditions, the wellspring of social life and the incubator of revolutionary fraternity. Cauduro deploys the cult for horrific

purposes. His ghosts describe events, trapped in the past, that haunt the present, reliving over and over again the same traumatic experiences (2019, 226).

Diego Rivera and Rafael Cauduro, however, address unrelated themes in their respective murals. Rivera is indeed representing the *Día de Muertos* as "a benign celebration of Mexican cultural traditions." Cauduro's concerns are radically different. He does not "deploy the cult for horrific purposes." The Day of the Dead does not appear anywhere in Cauduro's *7 Crímenes*. The Day of the Dead (celebrated on November 1st and 2nd each year) is, as Manderson notes, rich in skeletons; but its tradition and narratives are not permeated with "rape, murder," or "torture." The Day of the Dead is an icon of Mexican identity – a visit to any Mexican popular handicraft market bears witness to this – that is extraneous to violent crimes tainted in "blood" and "despair." Its mortuary images – the decorated breads, paper cutouts, *cempasúchil* marigolds or sculpted candies in the form of skulls (*calaveras*) – are not morbid. The Day of the Dead, in sum, is not Halloween: it is a melancholic yet defiant response to successive and relentless forms of colonial violence in Mexico. The festival arose from two separate cultural developments, the first deriving from religious and demographic imperatives around death experienced by Indians in colonial times; the second from the politics of Mexican identity shaped in the aftermath of the Mexican Revolution (Brandes 1997; 2006, 17 ff).

In relation to the original colonial circumstances from which the Day of the Dead emerged, Mexican-Chilean anthropologist Claudio Lomnitz describes the process of the Spanish conquest of Mexico as one of simultaneous and frenetic desecration and consecration of death (2005, 63). In the first years of colonization, a demographic catastrophe of unprecedented proportions resulted, first, from the unique biological isolation of the Americas in relation to the Old World (which facilitated the spread of diseases such as smallpox, measles, typhus, and typhoid); and, second, from the rudimentary technology that late-medieval Spain had at its disposal for undertaking a massive transformation of the economy in its colonies. Estimates on the size of Mexico's population on the eve of the Spanish conquest range from 4.5 million to 30 million (67-72). A relentless string of epidemics and famine, which were in part caused by the violence of conquest wars and the reorganization of labor, left by the early years of the seventeenth century a population of only about one million Indians. The sixteenth century was a veritable holocaust that desecrated the death of Amerindians.

Nonetheless, at the same time, on a religious plane the Catholic Church consecrated the bodies and souls of Indians with baptismal waters. Priests also administered agony and death through the sacraments of confession and extreme unction (Lomnitz 2005, 84 ff). Moreover, in Mexico the clergy was concerned with providing Spaniards and Amerindians alike a viable Christian story line that might offer a blueprint for action in the midst of the horrific events of the century.

Dominican friar Bartolomé de las Casas (1484-1566), for example, developed a scathing critique on the violence the Spaniards displayed in the Americas. Las Casas' accusations – which eventually became one of the foundations of the Black Legend – are an example of how the clerics' missionary fervor reviled the "destruction of the Indies" (1997) and attempted to provide some minimal sense of security to Amerindians in the context of early colonization.

The Day of the Dead became ritualistically elaborate in Mexico as a by-product of the massive loss of life combined with religious attempts at preventing or tempering the violence of colonization in the sixteenth century. Early eyewitnesses of these historical events, such as the Franciscan friar Toribio de Benavente "Motolinía" (1482-1568) or the Dominican Diego Durán (1537-1588) reported in their chronicles that All Souls' Day was lavishly observed in Indian villages at the time. Motolinía celebrates the festivity as evidence of the Indians' successful conversion to Catholicism, and approvingly deems the "many offerings that Indian towns give for their dead" as an expression of their natural modesty, humility and generosity, which he contrasted with the gross greed of Spaniards (2014, 78). Less optimistic, Durán looks upon the festival as a lingering pagan custom in which offerings were made separately for the infant dead (*muertecitos*) and for adults (1867, 268-270).

In any case, since its origins the Day of the Dead stood, in the face of the somber realities of colonization, as a process of curating in community the living memories of loved ones who departed too soon. Mexicans celebrating the Day of the Dead usually build private altars (known as *ofrendas*), which display the favorite foods and beverages of their deceased loved ones, either in their homes or the cemeteries where the departed rest. The intent is to encourage the souls of the departed to join the living in a banquet once a year, so both the living and the dead can participate in the celebration of bonds, affects and loving memories that transcend the frontier between life and death. Manderson therefore inaccurately portrays the Day of the Dead as a "macabre" festival of "ghoulish violence" related to the gruesome scenes presented in Cauduro's *7 Crímenes*. This misconception is a minor flaw – articulated in a single paragraph – in the context of Manderson's discussion of Cauduro's series of murals. If I have taken issue with such a paragraph – to the extent of writing a large and complex academic argument around and about it – is because of the nefarious implications that linking a *mestizo* celebration such as the Day of the Dead could have, and actually have had, for Mexicans constantly subject to the scrutiny of the Atlantic gaze.

The Atlantic gaze characterizes Mexicans as carriers of an inbred cultural flaw that came straight down from combining the (assumed) depravity of the Aztecs with the (alleged) Catholic indolence and intolerance of the Spaniards. Joel Robert Poinsett – the first United States Plenipotentiary Minister to Mexico –, for example,

eloquently expressed this viewpoint in a letter addressed to Secretary of State Martin Van Buren in 1829:

> The emigrants from Spain who alone were permitted to settle in the Country [Mexico] were among the most ignorant and vicious of that people, who are notoriously a century behind the rest of Christian Europe [...] The want of means of acquiring knowledge, the absence of all excitement to exertion, the facility of procuring the means of subsistence almost without labor, a mild and enervating climate and their constant intercourse with the aborigines, who were and still are degraded to the very lowest class of human beings, all contributed to render the Mexicans a more ignorant and debauched people than their ancestors had been [...] When therefore we examine the actual condition of this people, we ought always to bear in mind the point from which they set out. They were in every respect, far behind the mother Country which is notoriously very inferior in moral improvement to all other Nations (2002).

From its very origins, the Atlantic gaze defined itself by affirming its self-righteousness in relation to a series of detrimental traits (for example, savagery or cruelty) attributed respectively to the Indians and the Spaniards. Between these two similar, yet distinct others – one considered inhuman and one a degraded human – the Anglo settlers carved out for themselves a series of Atlantic fictions that marked a narrow path toward virtue, piety, mercy, justice and, ultimately, civilization itself (Fernández Retamar 1977; Lepore 1999, xvi). One of the most damaging implications of the Atlantic gaze is that Mexicans are essentially indifferent or even hostile to the core humanist value of the sanctity of life (Lomnitz 2005, 57). In recent years, the idea of the inherent wickedness of Mexicans has fueled, for example, the infamous chants of "Build that Wall" frequently heard in Donald J. Trump's rallies across the United States. The wall symbolizes a (physical) means of containment of the moral degeneracy that supposedly infects Mexicans (Brown 2010, 90-105).

Manderson, of course, would never endorse such prejudices on Mexicans. The distorted conception of Mexicans I described above would be deeply incoherent with the Levinasian ethical groundings of Manderson's jurisprudence, or his Aristotelian commitments to community and justice. There is a significant theoretical problem, however, in connecting the dreadful social and legal violence denounced by Cauduro to Mexican ideas and practices around death, as manifested in the Day of the Dead annual festivities. This theoretical issue has had serious political consequences in the history of Mexico. Americans such as Poinsett or Trump have drawn on this sort of Atlantic misrepresentations of Mexican culture to structure discourses on deviancy aimed at justifying unyielding belligerence against Mexico and Mexicans. In order to prevent the vicious closure of Atlantic stereotypes on death-obsessed Mexicans, the peculiar structural role that the Mexican Revolution allocated to death in Mexican *mestizo* culture requires a nuanced explanation – which I will undertake in the following section – that

evidences its absolute disconnection to the context in which Cauduro's *7 Crímenes* was conceived and developed.

ON DYING AND LIVING (IN MEXICO AND BEYOND)

"Matamos lo que amamos. Lo demás no ha estado vivo nunca."[21]
Castellanos (1972, 171)

The mortality of our being haunts us perpetually. "Death makes law *matter*", notes Manderson (2019, 4).[22] Indeed. Death makes *life* matter – law is nothing but a minimal sphere of life. Martin Heidegger famously defined the human condition as being-toward-death (*Sein zum Tode*) (1967, 235 ff). The basic idea behind Heidegger's complex phenomenology is, paradoxically, quite simple: human beings exist temporally in the interval between birth and death. As soon as we are born, we are at once old enough to die (245). Being is time and, for human beings, time is finite because it ends with our demise. To live an authentic human life thus consists in grasping this finitude and trying to make a meaning out of the fact of our death. Law cannot escape this feature of the human condition.

My potential passing indicates that I am a mortal animal, subject to myriad contingencies in the world around me. I may die right now, as I write these lines, or I may die in fifty years. The day in which I will die is still uncertain, though my death is a certainty that (as Jean-Paul Sartre observes) will come from the outside – for example, in the glaring blow of an accident, in the massive anonymity of a pandemic, or the slow decline of old age – and will hence transform me from the outside (1999, 590-591). Sartre embraces this perspective on death, which he conceives as the perennial possibility of nihilation (*néantisation*) of my possibilities that is nonetheless *beyond* my possibilities (581). Manderson partially agrees with Sartre, as he claims that death determines our entire existence as if we were before "the light that streams from an open doorway", which we are "barred from ever entering" and yet "bathed in it, all at once" (2019, 19).

Manderson, however, does not go as far as Sartre, who conceives both death and birth as "pure fact" (590). Heidegger is more persuasive in framing death beyond a purely biological phenomenon. For Heidegger, my finitude makes my life unique, because my death cannot be transferred to anyone else (1967, 240). I agree. I foresee dying as a deeply intimate moment. Nobody will replace me when I face my own death: I will slip into the unknown, in solitude, away from the social world of affects and signification that frames my life.

[21] "We kill what we love. Anything else has never been alive."
[22] Italics in the original.

Nontheless, as Byung-Chul Han notes, Heidegger's views on the non-transferrable nature of death are ultimately banal. Life is non-transferrable – this is what really matters (Han 2012, 87). Nobody can take my place to live my life. Death is a mirror of life, and life is a mirror of death. Technology, social organization, and collective representations – including law – mobilize life in preparations for death and for the dead, in Mexico and elsewhere.

The Mexican Revolution (1910-1924) ultimately shaped the distinctive Mexican traditions around death. Francisco I. Madero, an aristocratic landowner, launched the Revolution in October 1910 by drawing up the 'Plan de San Luis Potosí', a naïve manifesto that called for the institution of democracy through direct violent action against the dictatorship of Porfirio Díaz.[23] In May 1911, Díaz fled to France and Francisco León de la Barra, who was appointed as interim president, called for elections. Madero became president in November 1911 after a landslide victory. In February 1913, a group of disaffected army officers overthrew and murdered Madero with the blessing and complicity of Henry Lane Wilson, United States ambassador to Mexico (Márquez Sterling 1975, 255-314; Silva Herzog 2010a, 370-385). Wilson was a key actor in bringing to power military dictator Victoriano Huerta, who would eventually fall from grace of American President Woodrow Wilson. In 1914, Wilson dispatched the United States Navy to occupy the Mexican city of Veracruz, forcing Huerta to leave office (Silva Herzog 2010b, 81-117). The bloodbath that followed these successive American interventions in the course of the Revolution left a permanent scar on Mexican cultural imaginaries. Whereas the 1910 census counted 15 million people in Mexico, the 1921 census counted only 14 million (Aguilar Camín and Meyer 1991, 87). In other words, one out of eight Mexicans had been killed between 1910 and 1921 (Zoraida Vázquez 1989, 700-701).

The Revolution renewed the prominence of the elaborated Mexican rituals around death inherited from colonial times. The Day of the Dead gradually became a source of Mexican national pride. In the aftermath of the Mexican Revolution, Diego Rivera (and many other post-revolutionary intellectuals like him) regarded the popular embellishment of death in the celebrations around the Day of the Dead, with its resonance in both Indigenous and Catholic traditions, as a perfect exemplar of Mexican *mestizo* culture and its revolutionary potential. Rivera himself once stated that what made him deeply "Mexican" was his playful familiarity with "the death that awaits all men" (Rivera and Suárez 1962, 185). Octavio Paz similarly claimed, in his 1950 seminal essay titled *El Laberinto de la Soledad*, that "[t]he word death is not pronounced in New York, in Paris, in London, because it burns the lips" (1998a, 63). For Paz, any Mexican, in contrast, "is familiar with death, jokes about it, caresses it, sleeps with it, celebrates it; it is one of his toys and his most enduring love" (ibid). Paz, in other words, believes that living easily in death's

[23] This document is reprinted in Silva Herzog (2010a, 173-186).

presence is a distinctive feature of Mexicans – a cultural trait that Europeans and Anglo-Americans do not share.

It is therefore in the post-revolutionary context that, according to Claudio Lomnitz, Death (capitalized in this case) was adopted as a Mexican totem (*i. e.*, as a figure of collective filiation) (2005, 41-52). From the 1920s onward, after the Mexican Revolution, the symbolic valence on Mexico's intimacy with death emerged as the utmost expression of the cultural fusion between Pre-Columbian Indigenous cultures and Early Modern Spain that Mexican intellectuals considered the very source of Mexican national identity. Mexican familiarity with death also stood up, resulting from this, as an emblem of resistance against the violence of North Atlantic colonialism and imperialism. Rivera, for example, included in the influential frescoes he painted for the Ministry of Education (1923-1924) an area known as *El Patio de las Fiestas*, in which two tableaux (succinctly commented by Manderson) are dedicated to the Day of the Dead: one to the indigenous rite, the other to the urban *fiesta*.

The first tableau shows Indigenous Mexicans celebrating a solemn commemoration of the dead. In the second, we see an explosion of drink, food and flirtation displayed in a bustling popular carnival. A musical band of marionette skeletons presides over the crowd (which includes Rivera himself). Each skeleton is dressed in the attire of a social class: the larger figures playing guitars are a peasant, a revolutionary fighter (who resembles Emiliano Zapata, the quintessential hero of the Mexican Revolution), and a worker; behind them, in the backdrop, are a priest, a soldier (who resembles Victoriano Huerta, the prototypical revolutionary villain), a student, and a capitalist. As Claudio Lomnitz observes, Rivera's urban *Día de Muertos* depicts a *mestizo* society that "comes together and celebrates to the tune of its dead, whose differences are both made eternal and harmonized in death" (2005, 46). The reconciliation in death between opposed classes acknowledges, to some extent, the viability of the social pact stemming from the Mexican Revolution. Mexican contemporary celebrations of the Day of the Dead therefore recognize "an achieved *modus vivendi* between the descendants of mortal enemies" and "a tactical and provisional collective reconciliation in the knowledge that no one escapes death" (50).

Figure 4. Diego Rivera, *Día de Muertos*, 1923-1924. Fresco, 4.22x3.78 m, Secretaría de Educación Pública (SEP), Mexico City (© SEP)

Mexican cultural familiarity with death, however, involves an acceptance of the final stage in the cycle of life – not a normalization of violence. The convulsed historical context from which *7 Crímenes* developed, in this sense, has no connection at all with the Day of the Dead. To commemorate the 200th anniversary of the Mexican Independence and the 100th anniversary of the Mexican Revolution in 2010, the Supreme Court called for proposals on a series of murals addressing "the history of justice in Mexico" (Resnik and Curtis 2011, 362 ff). The sketches Cauduro submitted were, in a remarkable exercise of self-criticism, supported by the majority of justices (García 2006; Manderson 2019, 201). Cauduro began working on the Supreme Court murals around the time President Felipe Calderón

Hinojosa launched, on December 11, 2006, the law enforcement scheme called *Operativo Conjunto Michoacán*. Calderón sent some 6,500 soldiers and federal police officers into the heart of the Mexican central state of Michoacán, where the rival drug cartels of *Los Zetas* and *La Familia* were locked in murderous combat – thus commencing the ongoing hecatomb known as Mexican Drug War (Astorga 2015, 21-23; Boullosa and Wallace 2015, 95-141).

Unlike Rivera, Cauduro is not concerned with defining or acclaiming Mexican identities. *7 Crímenes* is an attempt at understanding, first, the roots of legal violence in Mexico – as promoted and sponsored by the Mexican state and its powerful northern neighbor, the United States – and, second, its bewildering development into progressive anomie.[24] Manderson correctly observes that Cauduro "unambiguously turned his back" on the celebration of the Mexican Revolution brandished in the tradition of Mexican post-revolutionary muralism (2019, 201), as epitomized in the work of *los tres grandes* – Diego Rivera, David Alfaro Siqueiros and José Clemente Orozco (Coffey 2012; Jaimes 2012; Paz 1987b). Manderson, however, misinterprets the reasons that moved Cauduro to break up with his egregious predecessors in the school of Mexican muralism. The display of the cult of the dead is not among his creative incentives, which are culturally simpler and, at the same time, more historically complex than Manderson acknowledges. In 2000, the Institutional Revolutionary Party (*Partido Revolucionario Institucional*, PRI) lost, after 71 years of authoritarian ruling, a presidential election to Vicente Fox of the center-right opposition National Action Party (*Partido Acción Nacional*, PAN). Cauduro, like many other Mexicans, was involved in the political processes and electoral struggles that defeated the PRI, one of the most enduring autocratic regimes of the 20th century. Cauduro, like many other Mexicans, has mourned then and now the setbacks that have plagued Mexico since Fox's electoral victory, including the untrammeled violence unleashed by the involvement of the military in persecuting the crimes associated to drug trafficking (a matter that Manderson only succinctly addresses) (2019, 233). Cauduro actually explained the historical motivations behind *7 Crímenes* in an interview published in the Mexican newspaper *Reforma* a few days before the official take-off of the *Operativo Conjunto Michoacán*:

> I struggle understanding justice in this painful moment in Mexico's history. This country has always been violent, untamed; it has a nihilistic character. A dictatorial process that lasted seventy odd years has just finished; in this moment, we are laying new foundations, a painful birthing. As an artist, I am interested in using this forum [the Supreme Court building]. My job is to give strength to my images, to make them powerful. This is again the pursuit of sign and symbol; the building itself is a symbol. How could I strengthen it? How could I make the viewer invigorate the figures in the mural? Such is the brutal task I have ahead (García 2006)

[24] On current anomie in Mexico, see, for example, Rea and Ferri (2019).

Cauduro characterizes Mexican *history* – not a Mexican *cultural icon* such as the Day of the Dead – as marked by the scourge of violence. Cauduro's grieving specters thus express the profound *historical* despair that arose among Mexicans, at the dawn of the 21st century, from the betrayed hopes in a failed transition to democracy (see, for example, Bartra 2012; Meyer 2017). Realizing that formal democracy is insufficient to guarantee justice is a heartbreaking discovery. I know this because I have been there. When I first encountered Cauduro's murals back in 2011, I caressed the scar a grenadier left in my head when, in 1992 (under PRI's authoritarian rule), I rallied against the constitutional amendments that subverted the protections on agrarian collective property – the *ejido* – originally enshrined in article 27 of the 1917 Constitution.[25] I evoked how, while studying my law degree, the teachers affiliated to the PRI constantly ridiculed my human rights activism as a symptom of a deranged *mysticism of democracy*. I regretted the ineffectiveness and inconsistencies of my personal crusade for a democratic model of public security founded not on fear, but on "taking rights seriously" (Dworkin 1978). My soul throbbed with the memory of the consecutive PAN administrations (2000-2012) that deepened the authoritarian legal and political structures inherited from the PRI regime (Meyer 2013), therefore shattering the incipient confidence Mexicans had on the promises of democracy. I shivered thinking about how the social inequalities that permeate Mexican society (Elizondo Mayer-Serra 2017) intimately materialized in my life when guerrilla fighters of the Popular Revolutionary Army (*Ejército Popular Revolucionario*, EPR) held Macarena, my wife, at gunpoint. I thought anxiously about the uncertain Mexican future of my then newborn daughter, Mariana. I felt the shame of the "egotistical calculus" that, according to Guatemalan writer Alexánder Sequén-Mónchez, determines the life of every immigrant: the terrible moment in which Macarena and I decided that Mexico was the place where we grew up, but would not be the place where we were meant to die (2010, 165). I thought about my mother and Macarena's grandmother, and the rest of our loved ones who would be left behind if we ever succeeded in migrating to another country.

I held back my tears.

A truly Levinasian (or Abrahamic) approach to *7 Crímenes* demands from us to contextualize Cauduro's work in its proper historical horizon, without forcing on it harmful Atlantic fictions that hurt Mexicans. Manderson acknowledges that *7 Crímenes* does not simply provide "snippets of information about the failings of Mexican law and justice", but actually "turns us into active participants in its operations and development" (2019, 217). This is the first step into Abraham's path. By looking at *7 Crímenes* through Abraham's eyes, we can *see* the Supreme Court building in the context of a country, Mexico, which belongs to a world-system built on structural differences between imperialist powers and their colonial or postcolonial preys or clients. Mexico occupies a special position in the intersection

[25] The amendments are reproduced in Tena Ramírez (1999, 1075-1079)

between these coordinates. Lomnitz points out that the country has "the deepest and earliest world-historical experience of itself as a postcolonial and postimperial nation" (2005, 30). As the wealthiest and largest Spanish colony, Mexico at independence had real imperial aspirations. As the United States' neighbor, however, Mexico has ruthlessly been bullied, invaded, occupied, mutilated, and extorted by North Atlantic colonizers. Mexican nationalism (*malgré* Rivera and his ilk) is a testimony to hard survival rather than an anthem to triumphal devotion. Cauduro's ghosts accordingly show us the suffering faces of those crushed under the postimperial and postcolonial realities of the Mexican legal system.

One cannot understand the entrapment of Cauduro's specters in the walls of the Mexican Supreme Court without heeding the historical context that produced them. The Mexican War on Drugs has been one of the bloodiest North Atlantic projects in Mexico. The United States has been consistently involved in the conflict, from blocking and thwarting attempts at legalizing drugs in Mexico in the first half of the twentieth century (Astorga 2016, 54-58; Enciso 2015, 77-90; Walker III 1989, 119-126); to funding the Mexican military directly in recent years, regardless its dismal human rights record (see, for example, Human Rights Watch 2011; Comisión Interamericana de Derechos Humanos 2015; Human Rights Committee 2019), through joint security agreements such as the Mérida Initiative (Boullosa and Wallace 2015, 88, 113; Brewer 2009). Cauduro's ghosts exist because the transgressive pleasures and puritan obsessions of the Atlantic North are decanted into Mexico (and the Global South) in a vicious circle of prohibition, addiction, accumulation, poverty, hatred and repression. The ghosts will continue haunting the Mexican legal system as long as the interlocking histories of Mexico and the United States continue generating, in their mutual obsession for controlling the narcotics trade, the conditions of possibility of the seven crimes of justice.

CONCLUSION: THE TEMPORALITIES OF RADICAL AESTHETICS IN MEXICO

> "Nadie sabe el número exacto de los muertos, ni siquiera los asesinos, ni siquiera el criminal."[26]
>
> Sabines (1997, 229)

By bringing the inevitability of death to the forefront of our thinking about law and visual arts, Manderson pushes us to transcend the ordinary conception of time as "something external and objective" which is measured by the clock, and to think about *temporality* instead – that is, our *experience* of time (2019, 7). Cauduro's temporalities – which are also mine – are marked by a generalized instrumentalization of human existence and a massive destruction of human bodies

[26] "Nobody knows the exact number of victims, not even the murderers, not even the criminal."

and populations in Mexico. In other words, Cauduro's temporalities are not concerned with the festive melancholy of the Day of the Dead, but with the necropolitics of *death-worlds* wrought by the Mexican Drug War, which have reduced thousands of Mexicans to the status of *living dead* (Mbembe 2003, 40). *7 Crímenes* reflects temporalities in which legal violence reveals itself in transparent and obscene ways. Cauduro's work, in this sense, is closer to the radical aesthetics of contemporary Mexican artists such as Teresa Margolles than to the naïve hopes on the world-shattering horizons of the Mexican Revolution that once inspired the muralism of *los tres grandes*.

In 2009, the Mexican Pavilion at the Biennale di Venezia hosted a solo exhibition by Margolles, titled *¿De Qué Otra Cosa Podríamos Hablar?* ("What Else Could We Talk About?"). Margolles sought to confront her audience with the violence generated in Mexico by the war against drugs using forensic materials as artistic resources – for example, blood-impregnated fabrics or the remains of car windows smashed in drive-by shootings (see Medina 2009). Two months before the official opening of the Biennale, Margolles closed the windows of the United States pavilion with draperies tainted in blood of murdered persons who lost their lives along the Mexico-United States border.

Cauduro and Margolles spell out a painful time in the history of a place – Mexico – and its people. Their artwork shows how free entrepreneurship fosters economic and political inequalities; the voracious demand for illicit substances meets an endless supply of violence and fear (tolerated or sponsored by the Mexican and the American states); and the killings that cut down the members of lower social classes become normalized, contained and removed from the everyday lives of the elites. The work of these artists hence illuminates the three colonial temporalities that Manderson describes in the work of Australian Indigenous artist Gordon Bennet. First, the "mystical foundation of authority" (the promise of the rule of law and the social and economic wellbeing it supposedly protects); second, the "deferral of the rule of law" (evident in the corrosive effect that brutal law enforcement practices have on any legal system); and, finally, "the experience of law as a repetitive trauma" (2019, 157). The (colonial) temporalities that oppress Indigenous Australia and Mexico might be geographically distant, but are conspicuously close from a jurisprudential perspective.

Today, almost a decade after Cauduro finished *7 Crímenes* and Margolles shocked the Biennale with her morbid installations, Mexican temporalities remain seemingly stagnant in a murderous Groundhog Day. On 11th May, 2020, incumbent Mexican President Andrés Manuel López Obrador signed a decree that officially deployed the armed forces for civilian law enforcement until 2024. The executive order is, of course, a mere formality. The military has been deployed for law enforcement in Mexico for 14 years as part of a disastrous American-driven public security strategy that has led to 150,000 murders related to organized crime and

73,000 Mexicans considered to be missing or disappeared (Beittel 2020, 6). We, Mexicans, continue focused on death – not because we loathe life, but simply because we are still been killed.

Artists such as Cauduro and Margolles have played their part in denouncing the fateful progress of Mexico's (post)colonial subjection. It is now the turn of jurisprudence for bravely going down Abraham's path to encounter the dead and the mournful specters in Mexico (and Latin America) that North Atlantic fictions have left behind. Jurisprudence may not ever return the same from such a journey – but this risk is, precisely, the promise inherent to Manderson's visual jurisprudence.

CODA: IN MEMORIAM LAETITIA

Jacques Derrida stresses the importance of speaking from the *margins* of philosophy (1972), thus conferring distinctive dignity to the digressions, parentheses, prefaces, notes, annexes and bibliographies with which academics uphold the validity of their work. The preliminary pages of *Danse Macabre* prove the Derridean centrality of the marginal in our understanding of the focal aspects of any intellectual endeavor.

Academics rarely dare to show emotional depth in their scholarly work, but Manderson actually reveals the intimate motivations behind the writing of *Danse Macabre*. In December 2011, Manderson moved back to Australia from Canada "not only to take up the fellowship" which led to the book, but to spend time with his mother, Mardi Manderson, "who was in her late eighties" (2019, xvii). While working on *Danse Macabre*, Manderson had a cup of coffee with her mother almost every morning until her death, in June 2015. "I miss her company still", writes Manderson, "especially on Canberra mornings when the air is crisp and clear and the sky is bright and loud with the screeching birds" (ibid).

I lost my own mother, Leticia Romero, in June 2020, while I was working on this article. Leticia passed away in Mexico, unexpectedly and far away from me. I have had my last cup of coffee with her several months before, in January. The shackles of Covid-19 travel restrictions prevented me from attending her funeral. The pandemic, however, could not stop my family from placing Leticia at the center of the *ofrenda* we prepared for the Day of the Dead this atrocious year.

Figure 5. Luis Gómez Romero, Macarena Iribarne and Mariana Romero-Iribarne, Ofrenda de Muertos, November 2020. Keiraville, New South Wales, Australia.

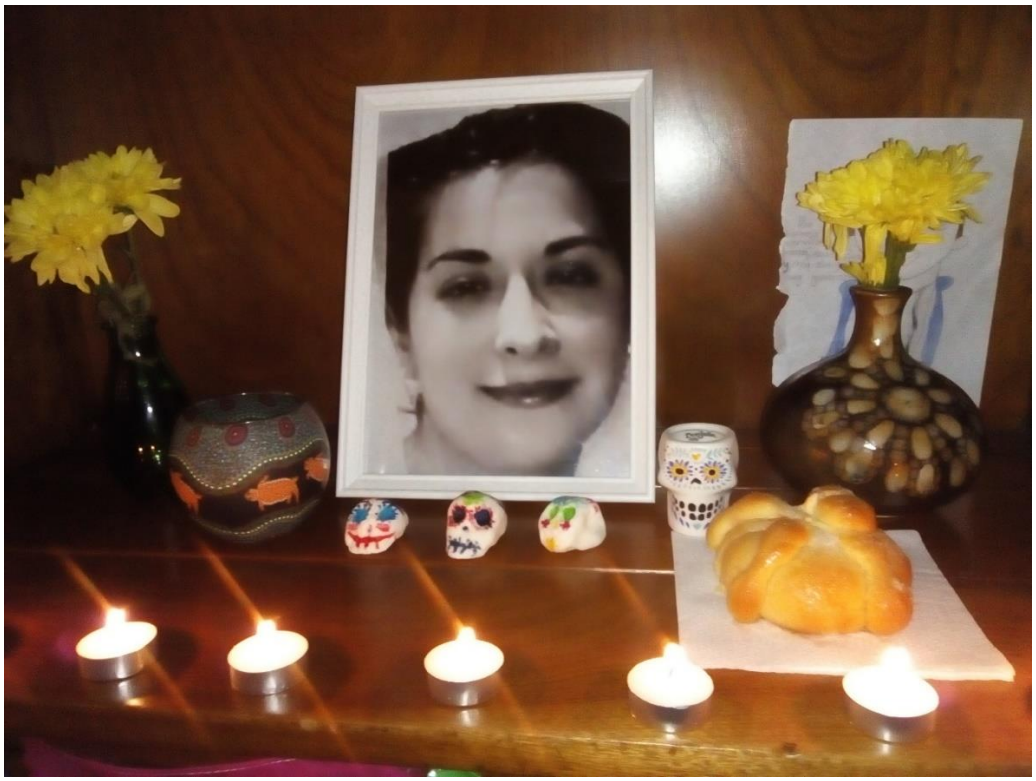


Figure 6. Luis Gómez Romero, Macarena Iribarne and Mariana Romero-Iribarne, Ofrenda de Muertos (detail), November 2020. Keiraville, New South Wales, Australia.

When I was a teenager, Leticia used to tell me that a song by Cuban composer Silvio Rodríguez reminded her of me and my sister. *Te amaré si estoy muerta, te amaré al día siguiente además*. I will love you if I am dead; I will love you the next day as well. From 2020 onward, Leticia will have a privileged place in the *ofrendas* with which my family will continue celebrating the Day of the Dead each year. This is testimony to a love that, as long as I live, has really transcended Leticia's death. Such is the truth that I speak from the margins: the Day of the Dead belongs to my memories of Leticia and those who I loved and have preceded me in the transit to death, which are alien to any form of violence.

BIBLIOGRAPHY

Aguilar Camín, Héctor, and Lorenzo Meyer. 1991. A la Sombra de la Revolución Mexicana: Un Ensayo de Historia Contemporánea de México, 1910–1989. México: Cal y Arena.

Aristotle. 1934. Nichomachean Ethics. Translated by H. Rackham, Loeb Classical Library. Cambridge, Massachussets: Harvard University Press. Original edition, written circa 350 BCE.

Aristotle. 1972. Politica. Translated by Benjamin Jowett. Oxford: Clarendon Press. Original edition, written circa 350-330 BCE.

Astorga, Luis. 2015. "¿Qué Querían Que Hiciera?": Inseguridad y Delincuencia Organizada en el Gobierno de Felipe Calderón. México: Grijalbo.

Astorga, Luis. 2016. El Siglo de las Drogas: Del Porfiriato al Nuevo Milenio. 2nd ed. México: Debolsillo. Original edition, 1996.

Bakhtin, Mikhail. 1981. The Dialogic Imagination: Four Essays. Translated by Caryl Emerson and Michael Holquist. Austin: University of Texas Press. Original edition, 1975.

Barboza Filho, Rubem, et al. 2010. O Código Morse: Ensaios sobre Richard Morse. Belo Horizonte: Universidade Federal de Minas Gerais.

Bartra, Roger. 2012. La Sombra del Futuro: Reflexiones sobre la Transición Mexicana. México: Fondo de Cultura Económica.

Beittel, June S. 2020. Mexico: Organized Crime and Drug Trafficking Organizations. edited by Congressional Research Service. Washington, D. C.: Congressional Research Service.

Boullosa, Carmen, and Mark Wallace. 2015. Narco History: How the United States and Mexico Jointly Created the "Mexican Drug War" Chennai: Or Books.

Brandes, Stanley. 1997. "Sugar, Colonialism, and Death: On the Origins of Mexico's Day of the Dead." Comparative Studies in Society and History 39 (2):270-299.

Brandes, Stanley. 2006. Skulls to the Living, Bread to the Dead: Celebrations of Death in Mexico and Beyond. Malden and Oxford: Blackwell.

Brewer, Stephanie Erin. 2009. "Rethinking the Mérida Initiative: Why the U.S. Must Change Course in its Approach to Mexico's Drug War." Human Rights Brief 16 (3):9-14.

Brown, Wendy. 2010. Walled States, Waning Sovereignty. New York: Zone Books.

Castellanos, Rosario. 1972. "Destino." In Poesía No Eres Tú: Obra Poética (1948-1971), edited by Rosario Castellanos, 171. México: Fondo de Cultura Económica. Original edition, 1960.

Césaire, Aimé. 1983. "Wifredo Lam..." Callaloo 17:102.

Coffey, Mary K. 2012. How Revolutionary Art Became Official Culture: Murals, Museums and the Mexican State. Durham and London: Duke University Press.

Comisión Interamericana de Derechos Humanos. 2015. Situación de los Derechos Humanos en México. San José.

Cossío, José Ramón. 2009. "Las Condiciones del Juzgar." Letras Libres, 86-89.

Cover, Robert. 1986. "Violence and the Word." Yale Law Journal 95 (8):1601-1629.

de las Casas, Bartolomé. 1997. "Brevísima Relación de la Destrucción de las Indias." In Tratados, edited by Lewis Hanke and Manuel Giménez Fernández, 1-199. México: Fondo de Cultura Económica. Original edition, 1552.

Derrida, Jacques. 1967. De la Grammatologie. Paris: Minuit.

Derrida, Jacques. 1972. Marges de la Philosophie. Paris: Minuit.

Derrida, Jacques. 1992. "Before the Law." In Acts of Literature, edited by Derek Attridge, 181-220. New York and London: Routledge.

Derrida, Jacques. 2002. "Force of Law: The 'Mystical Foundation of Authority'." In Acts of Religion, edited by Gil Anidjar, 230-298. New York and London: Routledge. Original edition, 1990.

Durán, Diego. 1867. Historia de las Indias de Nueva Espana e Islas de Tierra Firme. 2 vols. México: Imprenta de J. M. Andrade y F. Escalante.

Dussel, Enrique. 1993. "Eurocentrism and Modernity (Introduction to the Frankfurt Lectures)." boundary 2 20 (3):65-73.

Dworkin, Ronald. 1978. Taking Rights Seriously. Cambridge, Massachusetts: Harvard University Press.

Elizondo Mayer-Serra, Carlos. 2017. Los de Adelante Corren Mucho: Desigualdad, Privilegios y Democracia. México: Debate.

Enciso, Froylán. 2015. Nuestra Historia Narcótica: Pasajes para (Re)Legalizar las Drogas en México. México: Debate.

Fernández Retamar, Roberto. 1977. Acerca de España: Contra la Leyenda Negra. Bogotá: La Oveja Negra. Original edition, 1976.

Fuller, Lon L. 1969. The Morality of Law. 2nd ed. New Haven and London: Yale University Press. Original edition, 1964.

García, Olga. 2006. "Rafael Cauduro Lleva Sus 'Crímenes' a la Suprema Corte." Reforma, Sunday 3rd December, 6, Suplemento Cultural El Ángel.

Goodrich, Peter. 1996. Law in the Courts of Love: Literature and Other Minor Jurisprudences. London and New York: Routledge.

Grandin, Greg. 2007. Empire's Workshop: Latin America, the United States and the Rise of the New Imperialism. New York: Owl Books.

Grotius, Hugo. 1913. De Jure Belli ac Pacis Libri Tres, in quibus Jus Naturae & Gentium, item Juris Publici præcipua explicantur. Translated by John Damien Maguire.

Edited by James Brown Scott. 2 vols. Vol. 1, The Classics of International Law. Washington: Carnegie Institution of Washington. Original edition, 1625.

Han, Byung-Chul. 2012. Tod und Altëritat. Paderborn: Wilhelm Fink. Original edition, 2002.

Hart, H. L. A. 2012. The Concept of Law. 3rd ed. Oxford: Oxford University Press. Original edition, 1961.

Heidegger, Martin. 1967. Sein und Zeit. Tübingen: Max Niemeyer. Original edition, 1927.

Hobbes, Thomas. 1996. Leviathan or The Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil. Oxford: Oxford University Press. Original edition, 1651.

Human Rights Committee. 2019. Concluding Observations on the Sixth Periodic Report of Mexico. Geneva.

Human Rights Watch. 2011. Neither Rights Nor Security: Killings, Torture and Disappearances in Mexico's "War on Drugs". New York.

Jaimes, Héctor. 2012. Filosofía del Muralismo Mexicano: Orozco, Rivera y Siqueiros. México: Plaza y Valdés.

Kelsen, Hans. 1992. Reine Rechtslehre. 2nd ed. Wien: Österreichische Staatdrukerei. Original edition, 1960.

Krauze, Enrique. 2018. El Pueblo Soy Yo. México: Debate.

Lepore, Jill. 1999. The Name of War: King Philip's War and the Origins of American Identity. New York: Vintage.

Levin, David Michael. 1999. The Philosopher's Gaze: Modernity in the Shadows of Enlightenment. Berkeley: University of California Press.

Lévinas, Emmanuel. 1963. "La Trace de l'Autre." Tijdschrift voor Filosofie 25 (3):605-623.

Lévinas, Emmanuel. 1982. Ethique et Infini: Dialogues avec Philippe Nemo. Paris: Fayard Radio France.

Lévinas, Emmanuel. 1990. Autrement qu'Être ou au-delà de l'Essence: Kluwer Academic. Original edition, 1974.

Lévinas, Emmanuel. 1994. Humanisme de l'Autre Homme. Paris: Fata Morgana. Original edition, 1972.

Lévinas, Emmanuel. 2010. Difficile Liberté: Essais sur le Judaïsme. 3rd ed. Paris: Alban Michel. Original edition, 1963.

Lévinas, Emmanuel. 2012. Totalité et Infini: Essai sur l'Exteriorité. Paris: Kluwer Academic. Original edition, 1961.

Lomnitz, Claudio. 2005. Death and the Idea of Mexico. New York: Zone Books.

Manderson, Desmond. 2000. Songs without Music: Aesthetic Dimensions of Law and Justice. Berkeley, Los Angeles and London: University of California Press.

Manderson, Desmond. 2003. "From Hunger to Love: Myths of the Source, Interpretation and Constitution of Law in Children's Literature." Law & Literature 15 (1):87-141.

Manderson, Desmond. 2005a. "The Ethics of Proximity: An Essay for William Deane." Griffith Law Review 14 (2):295-329.

Manderson, Desmond. 2005b. "Proximity: The Law of Ethics and the Ethics of Law." University of New South Wales Law Journal 28 (3):696-719.

Manderson, Desmond. 2006a. "Emmanuel Levinas and the Philosophy of Negligence." Tort Law Review 14:33-50.

Manderson, Desmond. 2006b. Proximity, Levinas, and the Soul of Law. Montréal, Kingston, London and Ithaca: McGill-Queen's University Press.

Manderson, Desmond. 2006c. "Tortologies." Australian Journal of Legal Philosophy 31:14-49.

Manderson, Desmond. 2009. "'Current Legal Maxims in which the Word Neighbour Occurs': Levinas and the Law of Torts." In Essays on Levinas and Law: A Mosaic, edited by Desmond Manderson, 111-127. New York: Palgrave Macmillan.

Manderson, Desmond. 2012a. Kangaroo Courts and the Rule of Law: The Legacy of Modernism. New York: Routledge.

Manderson, Desmond. 2012b. "Modernism, Polarity and the Rule of Law." Yale Journal of Law & the Humanities 24 (2):475-505.

Manderson, Desmond. 2018. "Blindness Visible: Law, Time and Bruegel's Justice." In Law and the Visual: Representations, Technologies and Critique, edited by Desmond Manderson, 23-50. Toronto, Buffalo and London: University of Toronto Press.

Manderson, Desmond. 2019. Danse Macabre: Temporalities of Law in the Visual Arts. New York: Cambridge University Press.

Márquez Sterling, Manuel. 1975. Los Últimos Días del Presidente Madero [Mi Gestión Diplomática en México]. México: Porrúa. Original edition, 1917.

Mbembe, Achille. 2003. "Necropolitics." Public Culture 15 (1):11-40.

Mbembe, Achille. 2016. Politiques de l'Inimitié. Paris: La Découverte.

Medina, Cuauthémoc. 2009. "Espectralidad Materialista." In Teresa Margolles: ¿De Qué Otra Cosa Podríamos Hablar? Pabellón de México, 53 Exposición Internacional de Arte, La Bienal de Venecia, edited by Cuauthémoc Medina, 15-30. México: Instituto Nacional de Bellas Artes.

Merleau-Ponty, Maurice. 2001a. Le Visible et l'Invisible suivi de Notes de Travail. Paris: Gallimard. Original edition, 1964.

Merleau-Ponty, Maurice. 2001b. Phénoménologie de la Perception. Paris: Gallimard. Original edition, 1945.

Merleau-Ponty, Maurice. 2011. L'Œil et l'Esprit. Paris: Gallimard. Original edition, 1964.

Meyer, Lorenzo. 2013. Nuestra Tragedia Persistente: La Democracia Autoritaria en México. México: Debate.

Meyer, Lorenzo. 2017. Distopía Mexicana: Perspectivas para una Nueva Transición. México: Debate.

Morse, Richard M. 1954. "Toward a Theory of Spanish American Government." Journal of the History of Ideas 15 (1):71-93.

Morse, Richard M. 1964. "The Heritage of Latin America." In The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa,

Canada and Australia, edited by Luis Hartz, 123-177. New York: Harcourt, Brace & World.

Morse, Richard M. 1988. O Espelho de Próspero: Cultura e Idéias nas Américas. Translated by Paulo Neves. São Paulo: Companhia das Letras.

Motolinía, Toribio de Benavente. 2014. Historia de los Indios de Nueva España: Relación de los Ritos Antiguos, Idolatrías y Sacrificios de los Indios de la Nueva España y de la Maravillosa Conversión que Dios en Ellos Ha Obrado. México: Porrúa. Original edition, 1858.

Nervo, Amado. 1972. "A México." In Obras Completas, edited by Franciso González Guerrero and Alfonso Méndez Plancarte, 1656. Madrid: Aguilar. Original edition, 1915.

Ordine, Nuccio. 2013. L'utilità dell'inutile: Manifesto. Firenze: Bompiani.

Paz, Octavio. 1987a. "Hermandad." In Árbol Adentro, edited by Octavio Paz, 37. Barcelona: Seix Barral.

Paz, Octavio. 1987b. "Los Muralistas a Primera Vista." In México en la Obra de Octavio Paz, edited by Octavio Paz, 221-227. México: Fondo de Cultura Económica. Original edition, 1950.

Paz, Octavio. 1998a. El Laberinto de la Soledad, Posdata, Vuelta al Laberinto de la Soledad. México: Fondo de Cultura Económica. Original edition, 1950.

Paz, Octavio. 1998b. Sor Juana Inés de la Cruz, o Las Trampas de la Fe. 3rd ed. México: Fondo de Cultura Económica.

Pocock, J. G. A. 1975. "British History: A Plea for a New Subject." The Journal of Modern History 47 (4):601-621.

Pocock, J. G. A. 1999. "The New British History in Atlantic Perspective: An Antipodean Commentary." The American Historical Review 104 (2):490-500.

Pocock, J. G. A. 2003. The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition. 2nd ed. Princeton and Oxford: Princeton University Press. Original edition, 1975.

Poinsett, Joel. 2002. "The Mexican Character." In The Mexico Reader: History, Culture, Politics, edited by Joseph. Gilbert M. and Timothy J. Henderson, 11-14. Durham and London: Duke University Press. Original edition, 1829.

Rea, Daniel, and Pablo Ferri. 2019. La Tropa: Por Qué Mata Un Soldado. México: Aguilar.

Resnik, Judith, and Dennis Curtis. 2011. Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms. New Haven and London: Yale University Press.

Rivera, Diego, and Luis Suárez. 1962. Confesiones de Diego Rivera. México: Era.

Sabines, Jaime. 1997. "Tlatelolco 68." In Recuento de Poemas 1950/1993, edited by Jaime Sabines, 229-231. México: Joaquín Mortiz.

Sartre, Jean-Paul. 1999. L'Être et le Néant: Essai d'Ontologie Phénoménologique. Paris: Gallimard. Original edition, 1943.

Sequén-Mónchez, Alexánder. 2010. El Cálculo Egoísta: Inmigración y Racismo en la España del Siglo XXI. Madrid: Trotta.

Silva Herzog, Jesús. 2010a. Breve Historia de la Revolución Mexicana I: Los Antecedentes y la Etapa Maderista. 2nd ed. México: Fondo de Cultura Económica. Original edition, 1960.

Silva Herzog, Jesús. 2010b. Breve Historia de la Revolución Mexicana II: La Etapa Constitucionalista y la Lucha de Facciones. 2nd ed. México: Fondo de Cultura Económica. Original edition, 1960.

Tena Ramírez, Felipe. 1999. Leyes Fundamentales de Mèxico, 1808-1999. 22nd ed. México: Porrúa. Original edition, 1957.

Trouillot, Michel-Rolph. 2002. "North Atlantic Universals: Analytical Fictions, 1492-1945." The South Atlantic Quarterly 101 (4):839-858.

Trouillot, Michel-Rolph. 2003. Global Transformations: Anthropology and the Modern World. New York: Palgrave-Macmillan.

Walker III, William O. 1989. Drug Control in the Americas. Albuquerque: University of New Mexico Press.

Zoraida Vázquez, Josefina. 1989. "Antes y Después de la Revolución Mexicana." Revista Iberoamericana *55*:693-713.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 495-511
ISSN: 1825-5167

RESPONSE TO *DANSE MACABRE: TEMPORALITIES OF LAW IN THE VISUAL ARTS* BY DESMOND MANDERSON

RACHEL JOY
Australian College of Applied Psychology
rachel.joy@acap.edu.au

ABSTRACT
In responding to Dr. Desmond Manderson's book *Danse Macabre* Dr. Rachel Joy engages with his third chapter, Governor Arthur's Proclamation: Utopian Time. In deploying Governor Arthur's Proclamation to explore ideas of race, representation, law, time and space, Joy argues that Desmond Manderson offers an insightful methodology for making meaning of these historical and deeply political relationships. Today, as in the past, refusal to accept the settler occupation and the laws that belong with it means no access to protections under those laws. Joy call on the powerful truths offered by visual art, to show us that which remains hidden concerning race relations and notions of justice in Australia.
Her response to Manderson moves back and forth between the historical frontier and the present day malevolence of 'the intervention' and the 'BasicsCard' to argue that the racist tropes that informed the violent dispossession of the First Peoples from their country were drawn from the same wellspring that spawned our legal system. As such it is perhaps not entirely surprising that a system devised by the invader in the interests of the settler requires a transaction of assimilation in return for the occupier's justice. Not only must Indigenous peoples assimilate to expect protection under the laws of a sovereign entity that dispossessed them of their country, they must effectively become refugees in their own lands. Should Aboriginal people wish to obtain the limited legal powers that native title law would afford them over their traditional lands, they must first give up their sovereignty and using the system of 'possessive logics' designed by the perpetrators of their dispossession, prove their claim. They must in effect be deterritorialised in order to be re-territorialised on the occupier's terms.

KEYWORDS
Decolonisation, sovereign exception, intervention, relationality, ethics.

As a visual artist who works with both philosophy and the law it was with some excitement that I received my copy of *Danse Macabre* because it is a work that makes a serious project of the interaction between visual images, law and thinking. Moreover, it does so with the intent to better understand how such dynamics work, at least in part, in an Australian context. While there are a great many interesting

aspects of Desmond Manderson's oevre to engage with, here I will limit my attentions to one chapter of this book (Chapter 3, Governor Arthur's Proclamation: Utopian Time) in an attempt to give it the attention it rightly deserves.

In his use of Governor Arthur's Proclamation (fig.1) to explore ideas of race, representation, law, time and space Desmond Manderson offers an insightful methodology for making meaning of these historical and deeply political relationships. It is always a fraught project to attribute meaning to historical objects from the comfortable distance of our contemporary setting and we risk falling prey to the accusation made so pertinently by Jacques Derrida that we cannot help but use the dead for our own ends.[1] While some historians have suggested alternative methods of reading and thus also attributed new meanings to the text,[2] I concur with Manderson's conventional reading of the proclamation. The proclamation was, as are all cultural products, born of its political, historical and social millieu. In this case it was the product of a culture deeply embedded in reading narrative structures from left to right and top to bottom. A commanding example of such narrative structures are the stained glass windows in Christian cathedrals that were intended to tell biblical stories to both the illiterate masses and the powerful alike. The designers of such magical spectacles most certainly understood the illuminated power of the image to convey critical information concerning the temptations of the devil and the ways of the saints, and these images were designed to be read top to bottom and left to right as if in a western style book. The first books printed in Europe were bibles; the Gutenberg bible printed using mass production moveable type was first printed in 1454. The book, being arguably the most important repository of knowledge and power in western culture up until the digital age, set the rubric for the 'reading' of both texts and images. Whether Governor Arthur really wanted genuine communication of British law to the Palawa peoples of Van Demon's Land is arguable - although Manderson's assertion that Surveyor-General George Frankland was inspired to create the board after seeing local bark paintings certainly seems to suggest this – what is important to note is that Arthur wanted to be *seen* to be communicating the law clearly. He was under pressure from missionary and anti-slavery activists[3] as well as others in the House of Lords to act with restraint towards the native population. In order to achieve communicative efficacy it is logical that someone brought up within the bibliophilic culture of European church and state bureaucracy would employ the power of the image to deliver his message and this would in turn rely on the conventions of reading images after the western norm. To suggest otherwise is, I think, rather fanciful. Essentially what the proclamation board shows is that to receive European justice an Aboriginal person needed to assimilate.

[1] Jacques Derrida, *The Work of Mourning*, trans. Pascale-Anne Brault and Michael Naas, (Chicago, University of Chicago Press, 2001).3

[2] Khadija von Zinnenburg Carroll, *Art and the Time of Colony* (London: Ashgate, 2014), 77.

[3] James Boyce, *1835: The founding of Melbourne and the conquest of Australia* (Black Inc: Collingwood, 2013), 36-7.

Refusal to accept the occupation and the laws that went with it meant no access to protections under those laws.

Palawa artist Julie Gough makes powerful use of the images in Governor Arthur's Proclamation in many of the art works she made for the exhibition *The Missing*, in 2011. Gough's works reveal the inequality of the application of the law to frontier interactions. Her work, *The Missing (Midlands silhouettes)* (2011) (fig.2) shows two of the images from the proclamation laser cut in steel in silhouette: the shooting and the spearing images. In their stripped back graphic forms these life-sized silhouettes appropriate the genteel language of 19th century decorative cameo brooches, revealing the truth behind their narrative as being unmistakably one of frontier violence. The work *The Promise* (2011) (fig.3) similarly makes use of silhouette images from the proclamation but this time they are projected as shadows through a colonial era wooden chair onto a wall. The world of memory is invoked through the use of shadows and historical time is called to mind through the use of colonial furniture. In both *The Missing* and *The Promise*, the viewer is confronted with historical truths, the power of the images transformed and reclaimed in the hands of an Indigenous survivor. Gough's work is evidence that art, as Manderson repeatedly argues throughout the book, has the capacity to reveal truths.

Manderson's reading of the 1830's proclamation board deftly explicates the cultural normativity of settler colonial notions of equality before the law. He problematises the idea that an equality based in European ways of being would be desired by Aboriginal people even if it were possible within the dynamics of a colonial legal system established under circumstances that were questionable even by the standards of contemporaneous European jurisprudence pertaining to colonisation. Manderson posits that the Van Demonian equality before the law proclaimed in Arthur's panel was conditional upon assimilation into the white world and that the situation remains as such today. Anthropologist WEH Stanner noted in the 1950's that Aboriginal people might not want to lose their identity, cease to be themselves and become as we are.[4] Indeed, as was put so forthrightly by John Daly, Chair of the Northern Land Council in evidence to the Senate Standing Committee on Legal and Constitutional Affairs, 'Does every Aboriginal person necessarily want to be like you guys?'[5] It would seem, as is evidenced by the outrageously high rates of indigenous incarceration and deaths in custody in this country, that in order to access justice in Australia the answer to such a question must be, yes. Those Aboriginal people who resolutely reject assimilation and live on their own terms are

[4] W.E.H. Stanner, *White Man got no Dreaming* (Canberra: Australian National University Press, 1979), 50.

[5] Commonwealth of Australia, Senate Standing Committee on Legal and Constitutional Affairs, 10 August, John Daly (former Chair, Northern Land Council), p. 47.

perceived, through a deficit model of thinking,[6] as a problem to be solved by social workers, or the welfare and criminal justice systems.

While attempts by the settler colonial state to force the assimilation of Indigenous peoples in Australia are not new they did reach a new extreme with the implementation of the NTER - Northern Territory Emergency Response or 'Intervention', as it has come to be known. Manderson draws clear parallels between the assimilationist 'justice' depicted in the proclamation and that which is promised but yet to come, under 'the Intervention'. While the events might be almost 200 years apart, the thinking behind them is equally racist and colonialist. The implementation of a cashless welfare card - known as the BasicsCard - which effectively quarantines a percentage of the recipient's benefits for purchases made at designated stores is not only a totalitarian wet-dream but displays an especially humiliating paternalism towards a particular group in the community who have been excised from the body politic as regards their rights as citizens. This group of people have been scapegoated on very flimsy evidence of family violence and child abuse that plays into racist tropes of Aboriginal people being portrayed as bad parents. These tropes retain their currency and are repeatedly wheeled out to protect occupier interests - like a grandparents' racist jokes at a family barbeque that somehow still get a laugh, because deep down we haven't substantially changed who we are. Such racist motifs provide/d the justification to remove children from their families under the historical policies that created the stolen generation and still persist today in the form of welfare surveillance and child protection audits. The Aboriginal communities targeted by the intervention have been hugely traumatised by the invasion of their communities by the armed forces. Keep in mind that it was the police and other agents of state services that carried out the abduction of Aboriginal children from their families within living memory. Such outrages can be perpetrated on Aboriginal communities because the people in those communities are viewed as problems to be solved, expendable and exceptions to the protections of the rule of law.

Some of those impacted by the Intervention have made not only visual records of the event but expressed in paint the fear and the injustice of their experiences. The exhibition 'Ghost Citizens: Witnessing the Intervention', which was staged in 2012 at Counihan Gallery in Melbourne, included Kylie Kemarre's Painting *The Intervention at Arlparra Store, via Sandover Highway, Utopia Community, NT* (2010)(fig.4), which depicts the chaotic scenes as police and soldiers herded local people into the store. Sally M. Mulda's *Policeman*, (2012) (fig.5) and Dan Jones', *Loading Truck, Utopia*, (2009) (fig.6) show the arrival of police and with them huge amounts of resources to supply the influx of 'whitefellahs'. In *All dressed up and nowhere to go* (2012) (fig.7), Terese Ritchie presents us with a full length

[6] Cressida Fforde, Lawrence Bamblett, Ray Lovett, Scott Gorringe and Bill Fogarty, "Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia," *Media International Australia* 149 (November 2013): 164.

photographic portrait of an Aboriginal woman dressed in an evening gown decorated with a design of green BasicsCards. Alongside the image is a text from Rachel McDinny, a Yanyuwa woman from Borroloola who explains to whitefellahs the humiliation of trying to live using the BasicsCard,

> you are talking on and on about this BasicsCard, you do not stop talking about it, all day and night. That card is now the boss, it forces me, it rounds me up when I go to buy food and other things. There are shops that have outside, the words No BasicsCard Here, how is this? I feel dreadful, this is unpleasant to say but white people are now above me and I am low down.[7]

Although the immediate human cost of the military incursion into Indigenous communities can be tallied alongside those items one cannot buy using a BasicsCard, the political cost of loss of self –determination may be more far-reaching. As Manderson points out, under the NTER Act 2007, "The control and administration of land held by Indigenous people in a large number of communities and 'town camps' was taken over by the government." This was effectively stealing a second time, land, that had been stolen previously, and preventing its freehold title owners from exercising their property rights in determining who could access the land. The acronym itself tells us something about how the operation was perceived by those who conceived it: they were planning to NTER (enter) someone else's land for the purposes of dispossession. This act destroyed any remaining vestiges of Aboriginal control that had been instituted in the 1970's through the outstation movement whereby many Aboriginal peoples had moved out of town camps and back onto Country with the support of Federal government infrastructure programs and Aboriginal Corporations forming self-governing institutions.

Like Manderson, I have made the argument elsewhere, that Giogio Agamben's state of exception is a useful framework for understanding not just how juridical processes were manipulated to enable British sovereignty over a continent with the planting of a flag on a remote island but that by extension Indigenous Australians are also excepted from full legal rights under settler colonial law. Despite the fact that the doctrine of *Terra Nullius* has been overturned by the *Mabo* judgement, the juridical and political agents of the occupation have contrived to continue to deny Aboriginal people political sovereignty. Prior to occupation Indigenous populations already had their own forms of social and political organisation, so in order for colonization to occur "they needed to be 'deterritorialized' before they could be 're-territorialized' as dependent colonies of the relevant European state."[8] The juridical process by which this was realised in Australia occurred through a number of judgments, the most significant of which are arguably the *Mabo* and *Wik* decisions of the High Court of Australia and the parliamentary responses to these decisions, the

[7] Therese Ritchie, 'All dressed up and nowhere to go' (2012) 118 *Arena Magazine* 30, 30-31.

[8] Paul Patton, *Deleuzean Concepts: Philosophy, Colonization, Politics* (Stanford: Stanford University Press, 2010), 103.

Native Title Act 1993 and the *Native Title Amendment Act* 1998. However, I would argue that the *Northern Territory Emergency Response Act* (2007) now joins this invidious list as having a profoundly detrimental effect on Aboriginal land rights and self-determination. In 1992 *Mabo v Queensland* (No. 2) found that the Meriam people of the Murray Islands in the Torres Strait did in fact have a concept of land ownership and that this sovereignty had not been extinguished by the Crown.[9] In making this ruling the High Court introduced to Australian law the concept of 'native title'.[10] As Elizabeth Povinelli points out "Aboriginal Australians did not have native title prior to English settlement. Whatever practices and beliefs organized indigenous bodies and lands prior to settlement, these were not the thing we now call "native title.""[11] In response to this recognition of sovereignty, the Parliament legislated the *Native Title Act* 1993, which effectively limited the recognition of Aboriginal sovereignty to those claimants who could prove through their traditional laws and customs that they have maintained a continuing connection to land or waters.[12] Those limited rights were further circumscribed, to achieve 'certainty' and 'workability' for the benefit of miners and pastoralists,[13] by the Howard government's *Native Tile Amendment Act* 1998. Commonly known as the 'ten point plan', it was drafted to limit the High Court's 1996 *Wik* decision that native title and pastoral leases could co-exist. The Ten Point Plan "provided for the subordination of native title to other interests" and was "directed to the wholesale diminution of native title rights."[14] Thus it is clear that in exercising 'possessive logics' as agents of the occupation,

> both the Parliament and the courts have been responsible for the alternating delineation, expansion and curtailment of the rights of indigenous Australians. This serves as a reminder that native title, from a settler point of view, is as much about politics as it is about law.[15]

[9] "Appendix six. Extracts from Mabo and Ors vs Queensland, (no.2)" High Court of Australia, Brennan J, (107 ALR1), pp43-47, in ed. Galarrwuy Yunupingu, *Our Land is Our Life , Land Rights – Past, Present, Future*. (St. Lucia: University of Queensland Press, 1997), 233.

[10] "Appendix six. Extracts from Mabo and Ors vs Queensland, (no.2)," P233.

[11] Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*. (Durham: Duke University Press, 2002), 156.

[12] "Appendix seven. Summary of the main provision of the Native Title Act, 1993," in ed. Galarrwuy Yunupingu, *Our Land is Our Life , Land Rights – Past, Present, Future.* (St. Lucia: University of Queensland Press, 1997), 235–7.

[13] Office of Indigenous Affairs, *Towards a More Workable Native Title Act*, Department of Premier and Cabinet Commonwealth of Australia: Canberra, 1996, Para 18.

[14] Richard H. Bartlett, *Native Title in Australia* (Chatswood: LexisNexis Butterworths, 2004), 53.

[15] Maureen Tehan, "A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act," *Melbourne University Law Review* 27, no. 2 (2003), 524.

Prior to *Mabo* the popular view among settlers was that Aboriginal peoples had no legal rights to land. As a judgement made by the agents of the occupation, *Mabo* will always be problematic for those who do not recognise the legitimacy of the High Court to make any ruling. However, the *Mabo* decision did change the political and legal landscape such that "Indigenous interests in land could no longer be ignored."[16] Indeed, then Prime Minister Paul Keating stated in his 1992 Redfern address that *Mabo* should be a '...building block of change...' that might herald new relationships between Indigenous and non-Indigenous Australians.[17] Almost thirty years later, neither the law nor politics have yet delivered even the limited sovereignty extended by *Mabo*, as Indigenous leader and Gugu-Yalanji[18] man Noel Pearson laments, "the failure of law to live up to the promise of *Mabo* is now apparent."[19] Even before Wik and the Native title amendment acts some commentators felt native title as figured by *Mabo* was too weak a form of land tenure to be useful to many Aboriginal groups.[20] As Prime Minister Paul Keating explained,

> It was not, however, of great practical benefit to the majority of Aboriginal peoples and Torres Strait Islanders. Most will not be able to prove the continuing association with their land necessary to claim native title. Many retain a strong attachment to their traditional country, but will be denied native title rights as a result of prior alienation of the land concerned. Many also remain on the margins of this country's economic, social and cultural life.[21]

As it stands, the occupier state remains legally sovereign under white law, and for Aboriginal people to make a land claim they must first relinquish their prior claim to land, their sovereignty, and stake a claim under the limited terms made available to them by the occupier's law. In this way Indigenous Australians are first deterritorialised, when their original sovereignty is denied and then reterritorialised, through the 'possessive logics' of *Mabo, Wik*, the *Native Title* acts and amendments, and most recently the *Northern Territory Emergency Response Act*, all of which gave very limited tenure on the occupier's terms. One might argue that 'the Intervention' once again sought to deny Aboriginal peoples their land rights and that they were being deterritorialised anew.

[16] Tehan, 525.

[17] Paul Keating, "Australian Launch of the International Year for the World's Indigenous People." *Aboriginal Law Bulletin* 3, no. 61 (1993), 5.

[18] The Gugu-Yalanji are an Indigenous people from Cape York in northern Australia.

[19] Noel Pearson"Where We've Come from and Where We're at with the Opportunity That Is Koiki Mabo's Legacy to Australia ," Speech, Alice Springs, N.T., June 3, 2003, <http://www.capeyork-partnerships.com/noelpearson/np-mabo-lecture-3-6-03.doc> 3–4.

[20] Ian Hunter, Hunter, Ian. "Native Title: Acts of State and the Rule of Law." *The Australian Quarterly* 65, no. 4, The Politics of Mabo (Summer 1993), 97.

[21] Paul Keating, "Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill, Second Reading," Speech, Canberra, ACT, February 1995, *Australian Indigenous Law Review* (1996), 46.

The process of deterritorialisation and reterritorialisation leaves Aboriginal people without country within their own country. They have been effectively made stateless and now have to prove ownership of their own land using a system designed to dispossess them and to work in the interests of the occupation.[22] It was partly to highlight this situation of internal exile, of being, as Gary Foley[23] puts it, "aliens in our own land,"[24] that Aboriginal activists set up the 'Aboriginal Tent Embassy' on the lawns outside parliament in Canberra in 1972. The conditions of Giorgio Agamben's concept of *sovereign exception* clearly pertain to the settler colonial legal frameworks that except Aboriginal peoples from the protections afforded other citizens and freehold property holders and attempt to alienate them from their own Country.

When people or places are excepted from the protections of the rule of law grave injustices invariably result. We have seen clear evidence of this in Guantanamo Bay and other US government 'black sites' and closer to home in Australian detention camps where people and places were excised from the care and responsibility that should have been afforded them by both international law and philosophical ethics. The state of exception also allows for governments to take further exceptional actions in order to achieve their aims, such that the invasion of Aboriginal townships by military force is deemed reasonable. The use by government of the military to solve a perceived problem should not perhaps be surprising, springing as it does from a political culture that has been deeply schooled in militarism from its outset. Fear of convict revolt and the very real threat posed by Aboriginal resistance especially in the precarious early years of the colony meant that marshal law and a heavy military presence were common tools of governance. A far cry from the English 'bobby'; police in Australia have always been armed and para-military mounted militias were frequently deployed against Aboriginal peoples in areas of frontier conflict.[25] The Van Demonian 'black line' and 'the Intervention' both involved the military, police and public servants along with the cooption of ordinary citizens to carry out the plans. Military force, it would seem, was historically viewed not only as a legitimate but reasonable response when 'normalizing' Aboriginal people and remains so today. Yet the idea of sending troops into the suburbs of our major capital cities to ostensibly deal with extraordinary levels of well documented domestic violence and child abuse in the non-Aboriginal community would be viewed with outrage. What is the difference? Some people it seems, need to be 'normalized' and

[22] Gary Foley, "The Australian Labor Party and the Native Title Act," in *Sovereign Subjects: Indigenous Sovereignty Matters* , ed. Aileen Moreton-Robinson (Sydney: Allen & Unwin, 2007), 123.

[23] Foley was one of a group of activists' instrumental in establishing the Aboriginal Tent Embassy. For more detail read G. Foley, A. Schaap and E. Howell, eds., *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (London: Routledge, 2014).

[24] Foley, "The Australian Labor Party and the Native Title Act," 123.

[25] Henry Reynolds, *This Whispering in our Hearts*, (Allen & Unwin: St Leonards, 1998), 91-107.

"To normalize is not to be normal or to treat normally. It is to *make* normal"[26] (my italics) as Manderson points out. Apparently some violence is normal: some violence is justified. In 2019, 61 Australian women were murdered by their (male) intimate partner or ex-partner,[27] yet such figures did not provoke a whole-of-government emergency response. Although some might consider so many deaths at the hands of a clearly identifiable group of perpetrators, domestic terrorism, it has not provoked a military response because the murder of so many women in a patriarchal society is also, terrifyingly, deemed normal. If equality before the law is to be served then surely order must be restored to family homes so that rule of law can function? Women, it seems, must also wait for a 'Stronger Future' in which our rights will be protected against violence.

Legal protection for the most vulnerable in our community (be they Indigenous peoples, women, the mentally ill, the poor or homeless) should not be relegated to a future 'yet to come' in the immediate interests of patriarchal white sovereignty. Rather, if our laws were designed and applied with care for the interests of people and the planet today we could all be ensured a future worth living. To begin to create such a legal system requires decolonisation of our settler selves and our institutions. It requires thinking that would allow one to relate ethically to the 'other' or as Emmanuel Levinas states, to 'think for the other' by which he means not that one should do another's thinking for them but that one must engage in the act of thinking with the 'other' as one's highest priority. Thinking for the 'other' makes us attentive to our ethical obligations and in the context of occupied Australia, can "open settler subjects to the possibilities of relations of mutuality rather than domination."[28] Levinas' theory of obligatory ethics is a 'first theory' in that it concerns the ontological nature of human being or how one comes to be in the world. "Ethics comes before identity, which itself embodies intentions, political projects, relations and struggle."[29] For Levinas, human *being* is relational; we come into being because of others. For him ethical relation is itself the foundation of subjectivity; the subject "is not a subject but a relation."[30] The 'I' of subjectivity does not exist prior to this social relation but comes into being through it. The 'I' is established in response to and in responsibility for the call of the other.[31] Without the other there is no 'I'. Levinas's relational being is a particular kind of relationality that involves an

[26] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Allan Sheridan (London: Allen Lane, 1977); Power/Knowledge, ed. Paul Rabinow (New York: Pantheon, 1980); History of Sexuality, trans. R. Hurley (New York: Vintage, 1998).

[27] Destroy the joint, 'Counting Dead Women Project,' https://www.facebook.com/DestroyTheJoint/

[28] Avril Bell, *Relating Settler Indigenous Identities: Beyond Domination* (Basingstoke: Palgrave MacMillan, 2014), 174.

[29] Bell, *Relating Settler Indigenous Identities* , 178.

[30] Emmanuel Levinas, *Basic Philosophical Writings* (Bloomington: Indiana University Press, 1996), 20.

[31] Levinas, 106.

inescapable obligation to the other and also substantiates the singularity of the subject. He explains that,

> To be an I means not to be able to escape responsibility, as though the whole edifice of creation rested on my shoulders. But the responsibility that empties the I of its imperialism and its egoism...confirms the uniqueness of the I. The uniqueness of the I is in fact that no one can answer for me.[32]

The great value of Levinas's ethics to the decolonisation of settler subjects is that the 'other' disrupts the centrality and certainty of the subject and initiates reflection and the possibility of transformation: "The relationship with the other puts me into question, empties me of myself and empties me without end, showing me ever new resources."[33] Levinasian ethics also entail a consciousness of the violence integral to relations based on knowledge.[34] To 'know the other' is a form of capture, it is a violence that relegates the other to existing settler-colonial concepts. Instead, Levinas asserts the centrality and singularity of the 'other', writing,

> Our relation with the other certainly consists in wanting to comprehend him, but this relation overflows comprehension. Not only because knowledge of the other requires, outside of all curiosity, also sympathy and love, ways of being distinct from impassible contemplation, but because in our relation with the other, he does not affect us in terms of a concept. He is a being and counts as such.

This respect and care for alterity, or the unknowable difference of the 'other' is the basis of Levinasian ethics. A response to the 'other' that shows attentiveness to their alterity is one of openness and hospitality. To welcome the 'other' is to engage without self-interest rather than with a sense of judgement or as a strategy to receive something in exchange. The relation to the 'other' is thus not reciprocal but one of "radical generosity."[35] While it may be possible to argue that Levinasian ethics are impossibly conjectural and thus too apolitical to be useful as an 'ethics in the world'[36] I argue that it is precisely from this gap between ethics and politics that the possibility for change arises. Derrida sees this distance between ethics and politics positively as both a rupture and a necessary connection,[37] providing an incitement to deduce a politics from ethics.[38] While refusing to be prescriptive, an engagement between politics and ethics can be a provocation to more self-reflexive forms of political engagement. In the search for a place of ethical encounter between settlers and Indigenous

[32] Levinas, *55*.

[33] Levinas, *52*.

[34] Levinas, 11–12.

[35] Levinas, *56*.

[36] Scott Lash, "Postmodern Ethics: the Missing Ground." In *Theory, Culture and Society* 13, no. 2 (1996): 100.

[37] Jacques Derrida, *Adieu to Emmanuel Levinas* , trans. P.A. Brault and M. Naas (Stanford: Stanford University Press, 1997), 113-117.

[38] Derrida*, Adieu to Emmanuel Levinas* , 115.

peoples Levinas's insistence on the primacy of ethics over politics makes us attentive to the fact that the abandonment of self-interest, and the care for the other's difference, are the foundation of ethical thinking.

Ethical thinking requires time and space in which to occur. Such spatio-temporal zones do exist in Australia but they are often under threat because they challenge the norm. Elsewhere I have argued[39] that art is one such transformative space that offers hope for relational ethics between Indigenous and non-Indigenous peoples. In the essay *Reality and Its Shadow,* Levinas writes "every artwork is in the end...a statue - a stoppage of time,"[40] but art does not reproduce time rather "it has its own time,"[41] the "eternal duration of the interval – the *meanwhile*;"[42] a space of possibility. Another radical spatio-temporal challenge to colonialism is the '*everywhen*'[43] of Indigenous ontologies. In the French painter, Benjamin Duterrau's painting *The Conciliation* (1840) (fig.8), the transformative space of art enables the viewer a consciousness of the 'everywhen' of Indigenous lore/law that both "precedes and outlasts the British."[44] Indigenous law/lore exists now in this country alongside settler colonial law notwithstanding settler inability to see or acknowledge it. In the space of the *meanwhile* the viewer is able to have an awareness of the *everywhen* that has not been extinguished despite the best attempts of the occupation. While Duterrau does employ the problematic 'noble savage' trope in this work, he also gives agency to the Aboriginal resistance fighters depicted negotiating with George Robinson. In doing so, art historian and Trawulwuy man Greg Lehman argues, Duterrau "shifts the Aboriginal nations of Tasmania from anthropological curiosity to players on the world's stage – with the same international rights to justice."[45] Yet I would argue that the painting does more than merely shift Aboriginal players into a space whence they can be understood on European terms, but rather, in the space of the *meanwhile* provided by the painting, viewers are presented with the possibility to acknowledge the *everywhen* of Indigenous law. This may not have been Duterrau's conscious intention – although there is evidence to suggest his deep distress at the demise of Aborignal people he knew while resident in Hobart at the time of Arthur's Proclamation and the 'black line'[46]- but it does not preclude the artwork operating in this way for twenty-first century viewers. It is all a matter of perspective. As Manderson explains, what Duterrau's painting shows us is indeed "a question of

[39] Rachel Joy, "Very Becoming: Transforming our Settler Selves in Occupied Australia" in eds. Christina Santos, Adrian Spahr, Tracey Crowe Morey. *Testimony and Trauma: Engaging Common Ground.* (Brill: Leiden, 2019).

[40] Emannual Levinas, "Reality and Its Shadow", in *The Levinas Reader*, ed. Sean Hand (Oxford: Basil Blackwell, 1989), 137.

[41] Levinas, 139.

[42] Levinas, 141.

[43] Stanner, p24.

[44] Desmond Manderson, *Danse Macabre*. (Cambridge: New York 2019), 156.

[45] Greg Lehman, 'Tasmanian Gothic', *Griffith Review* 39. pp193-205. 204.

[46] Lehman, 202.

temporal perspective, whether we imagine law as creating the empty time that will allow its emergence not yet but later, or on the contrary as entering a time that is already crowded with meaning."[47] This country is already governed by complex lores/laws that have protected the Country and all its inhabitants for hundreds, perhaps thousands of generations. Were settlers to resile from our occupier activities and pay attention to what is already all around us we might find a way to be a part of it instead of offering the hollow utopian legal future of a 'justice not yet' in order to justify the impossible terms of a brutal occupation.

[47] Manderson, 156.

IMAGES

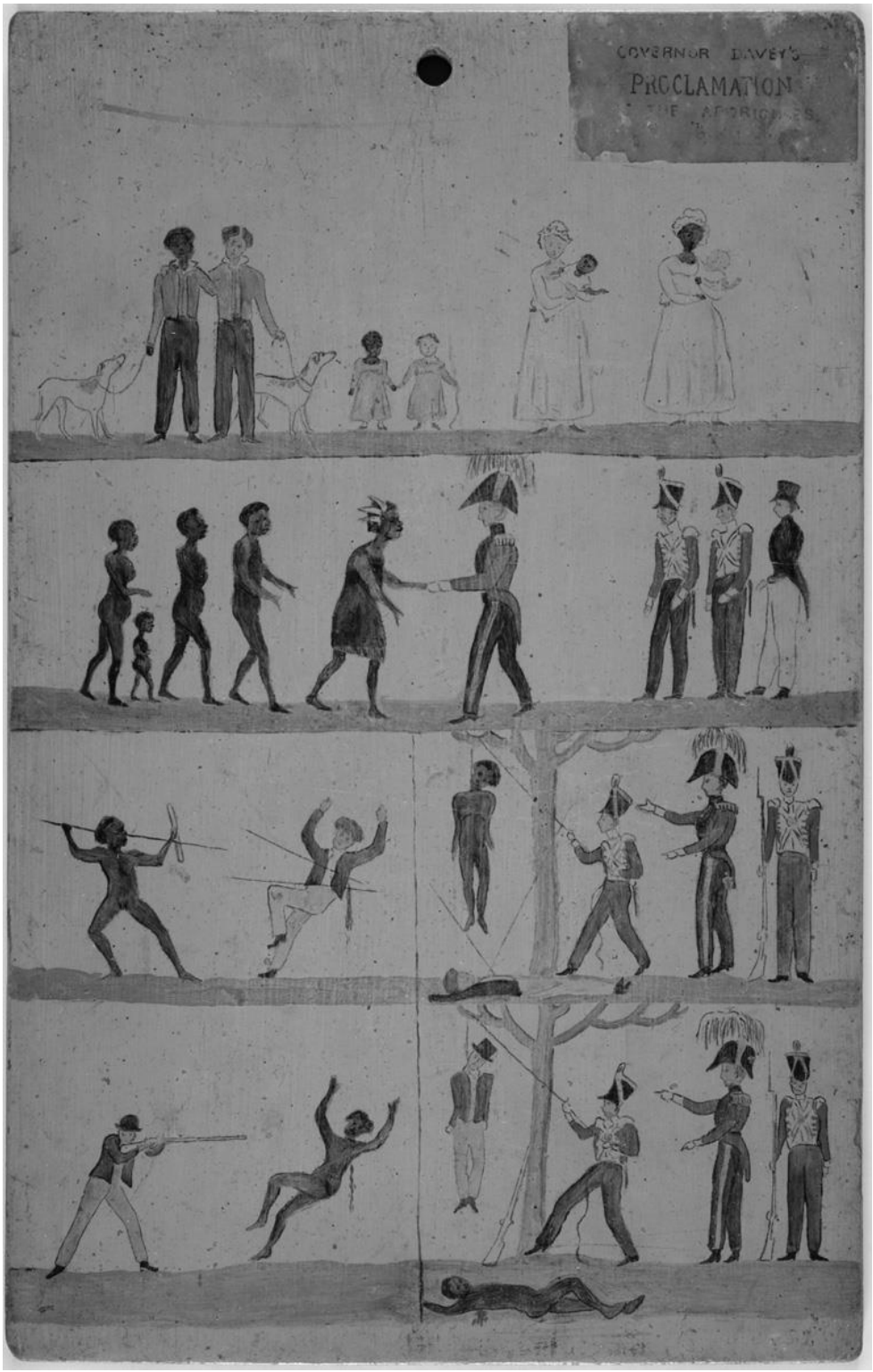


Fig.1. Governor Arthur's Proclamation to the Aboriginal People, c. 1830. Oil on Huon pine board, 35.5 cm Å~ 22.6 cm, State Library of NSW, Sydney. (Courtesy of Mitchell Library, State Library of NSW).

Fig. 2. Julie Gough. *The Missing (midlands silhouettes)* 2011 plywood & steel four items, approx installation: 287h x 420w x 16.5d cm.
https://www.bettgallery.com.au/artists/gough/missing/03missing.html

Fig. 3. Julie Gough. *The Promise* 2011 found chair, shadow casting LED light & kangaroo skin approx: 92h x 37w x 56d plus projection.
https://www.bettgallery.com.au/artists/gough/missing/05promise.html

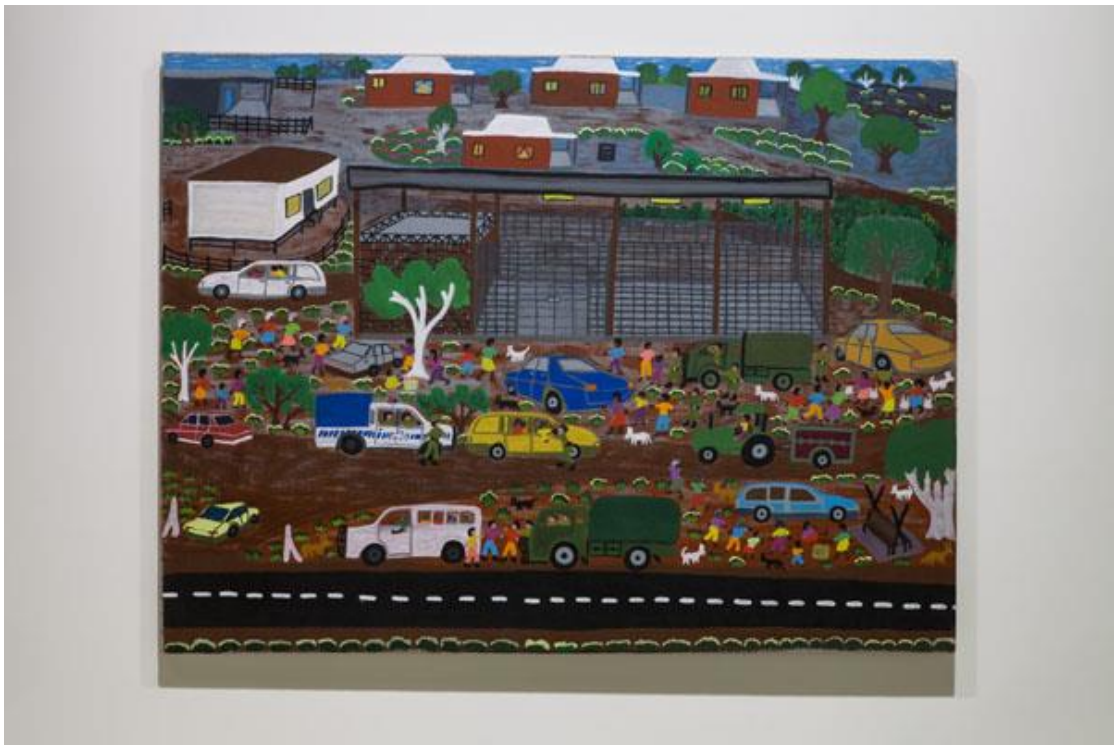


Fig.4. Kylie Kemarre. *The Intervention at Arlparra Store, via Sandover Highway, Utopia Community, NT* (2010). https://www.crossart.com.au/archive/98-2013-exhibitions-projects/190-witnessing-the-intervention-counihan-gallery-melbourne-17-may-to-16-june-2013

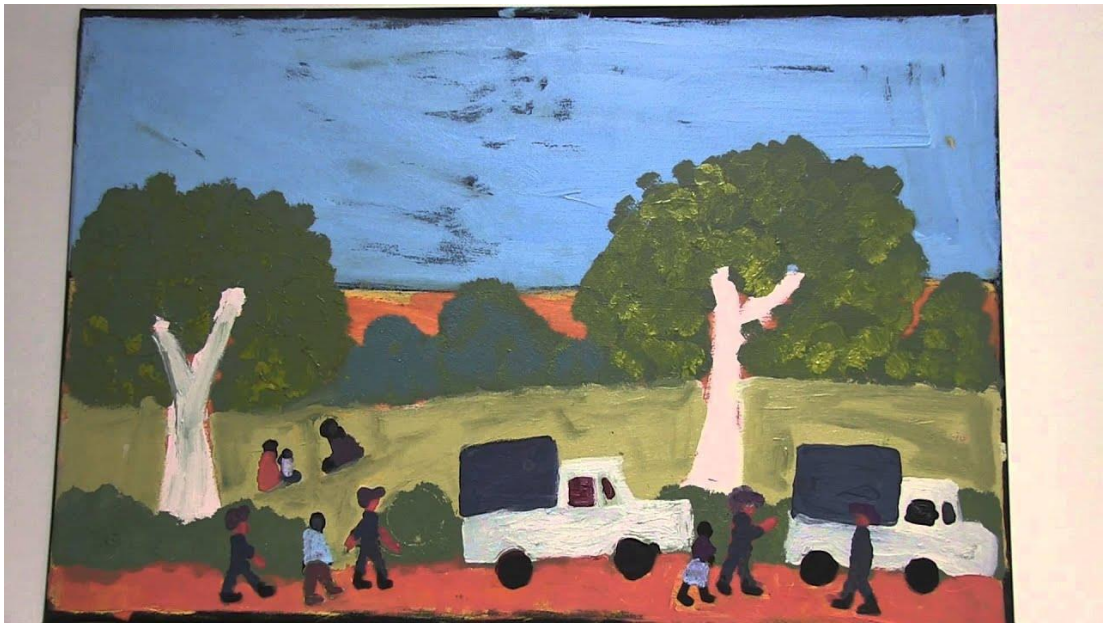


Fig.5. Sally M. Mulda. *Policeman*, (2012) https://www.crossart.com.au/archive/98-2013-exhibitions-projects/190-witnessing-the-intervention-counihan-gallery-melbourne-17-may-to-16-june-2013

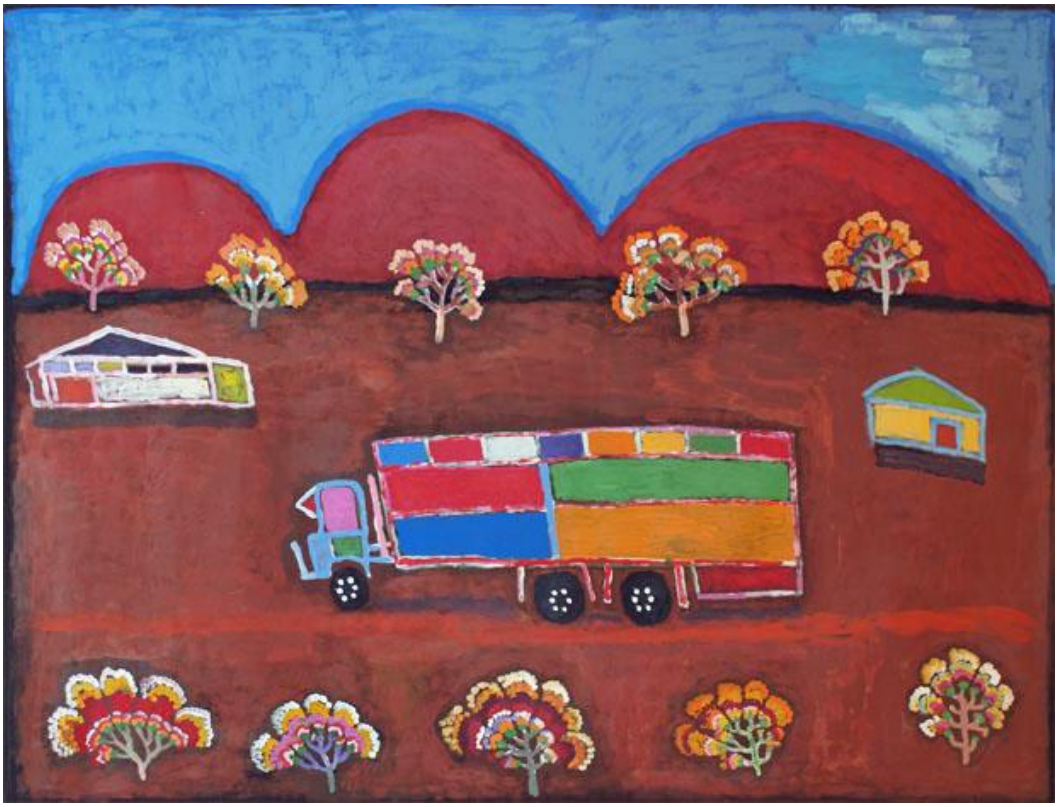


Fig.6. Dan Jones', *Loading Truck, Utopia*, (2009) https://www.crossart.com.au/archive/98-2013-exhibitions-projects/190-witnessing-the-intervention-counihan-gallery-melbourne-17-may-to-16-june-2013

Fig.7. Therese Ritchie, All Dressed Up and Nowhere to go. (2012) Therese Ritchie, 'All dressed up and nowhere to go' (2012) 118 *Arena Magazine* 30, 30-31.

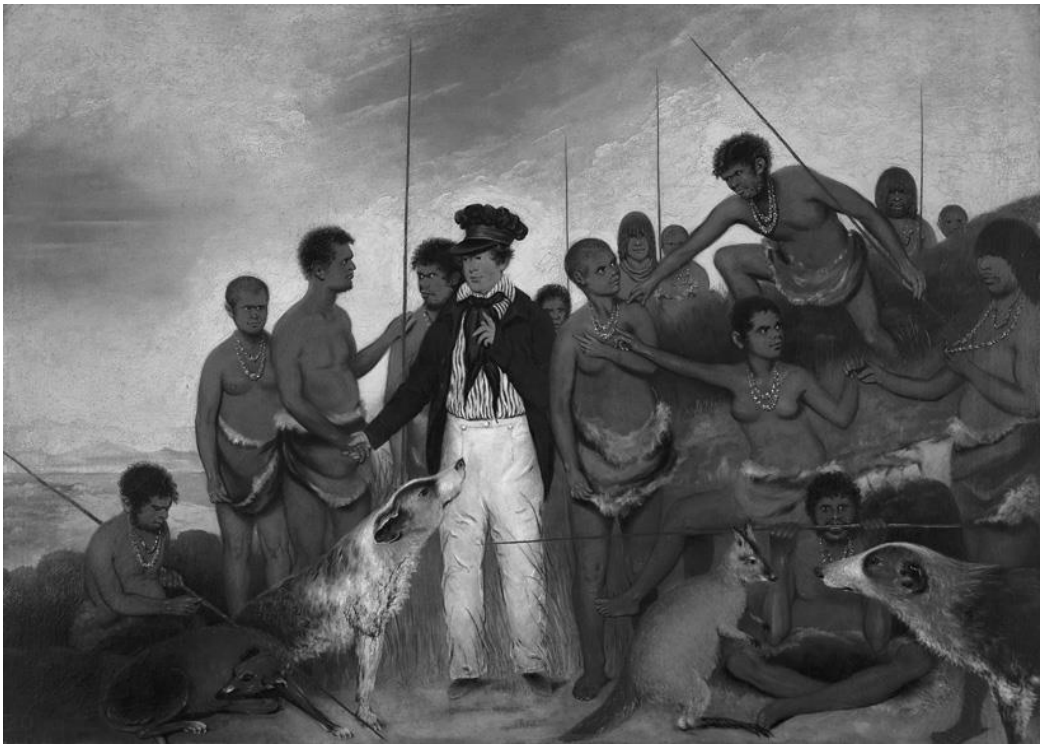


Fig.8. Benjamin Duterrau, *The Conciliation,* 1840. Oil on canvas, 121 cm x 170.5 cm, Tasmanian Museum and Art Gallery, Hobart.

513 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 513-519
ISSN: 1825-5167

WRITING ABOUT, THINKING WITH. REPLY TO CRITICS

DESMOND MANDERSON
Centre for Law Arts and Humanities
ANU College of Law & College of Arts and Social Sciences
Australian National University, Canberra (Australia)
desmond.manderson@anu.edu.au

ABSTRACT
In this essay the author responds to a special journal issue devoted to his latest book, Danse Macabre: Temporalities of Law and the Visual Arts. Critics have drawn attention to ways in which the interdisciplinary theories and methods developed by Manderson can be extended into new lines of inquiry including in relation to gender, Indigenous, and contemporary art. The author embraces these suggestions with specific reference to the political and neo-colonial implications of his discussion of the murals of Rafael Cauduro.

KEYWORDS
Danse Macabre, Manderson, Law, Art, Time, Cauduro, Mexico.

I am delighted to have the opportunity to reply to the wonderful set of engagements with *Danse Macabre* that have been assembled here. The experience of a large number of gifted scholars engaging with one's work is rare and humbling. This is particularly so given the warm-hearted and generous spirit of their essays. I want to thank all the contributors for their kind and overwhelmingly supportive comments on my work. I will not indulge myself by repeating the tenor of those remarks here. I think what I appreciated, along with the several affirmations of the value and importance of my book—a genuflection that can come sometimes feel almost compulsory—was the inimitable character of each of the contributors' voices. From Crawley's perceptive and elegantly crafted prose, to Gearey's linguistic "and spiritual" exuberance, to Romero's impassioned blend of political demand and intimate reflection, I felt I was in the presence of a pool of unique scholars, all willing and able to embrace my work, to see it in all its flawed complexity, and to carry it on in new and much-needed directions.

I will not tax my readers' patience by attempting to respond to each contributor or each point. I will be more than pleased if readers take the trouble (and, alas, the expense) of reading *Danse Macabre* themselves, along with the critical contributions

collected in this volume, and make up their own minds. Certain consistent themes, however, are worth noting. I was startled at how often the responses drew out of my work both its Derridean justice and its Levinasian ethics. The emphasis on both these philosophers in the responses, for example those of Gearey, Joy, Romero, and Crawley, displayed a familiarity with my work as a whole that caught me by surprise, although of course I am mightily pleased. The connection with Derridean approaches to law and legitimacy, for example in 'Declarations of Independence' and *The Gift of Death,*[1] and to the temporality of the provisional and the retroactive, was of course well signaled throughout *Danse Macabre,* particularly in the introductory and concluding chapters and in the discussion of the work of Gordon Bennett.[2]

Less obvious was the emphasis given to Levinas in many of these responses. The text is largely silent on the subject; I make no more than three glancing asides to his ideas, purely for comparative purposes. It is interesting to me how the work I did on Levinas and law over a decade ago[3] should continue to inform readings of which, ironically, Levinas would have been suspicious. After all, Levinas comes rather close on some occasions to treating figurative art as idolatry.[4] As I have argued elsewhere, I think that on this point Levinas is mistaken. Even more than a Levinasian appeal to openness towards the possibility of otherness, the trait which I think my readers here have drawn from the tradition, what has influenced the present book is a defence of the ethical imperatives of aesthetic response which grew out of my disagreement with Levinas. Yet I think there is another sense in which my engagement with the work of Levinas has unquestionably left its trace, *en filigrane,* as the French say, on *Danse Macabre.* As Crawley elaborates, my approach consists, broadly speaking, in two strategies. The first movement lies in resisting a reading of the artwork that looks back at its past, and instead imagines the artwork looking forward into its own future, which is to say, interrogatively, asking questions of the viewer rather than us asking questions of it. And the second movement, though obviously related to it, is to stage two opposed readings of the artwork before introducing a third perspective which positions the viewer themselves within the work or interpellated by it.[5] The first strategy is a kind of temporal anachronism; the second, a kind of spatial anachronism. Both are of course indebted to the work of contemporary art theorists like Didi-Huberman and Mieke Bal. But they are equally indebted to a Levinasian orientation—to a movement which calls our autonomy into question

[1] Jacques Derrida, "Declarations of independence," *New political science* 7.1 (1986): 7-15.

[2] Desmond Manderson, *Danse Macabre: Temporalities of law in the visual arts,* see esp. pp. 2, 161-2, 241-3.

[3] Desmond Manderson, *Proximity, Levinas and the soul of law* (Montreal: McGill-Queen's University Press, 2007).

[4] Emmanuel Levinas, "Reality and its Shadow," in *Collected Philosophical Papers,* trans. Alphonso Lingis (Dordrecht: Martinus Nijhoff, 1987), pp. 1-13; Jill Robbins, "Aesthetic totality and ethical infinity: Levinas on art," *L'espirit createur* 35.3 (1995): 66-79.

[5] Karen Crawley, *Reading Images in the End Times* [in this volume].

and impels us towards a greater responsibility. I think the language of blind spots, to which I frequently allude, particularly in the chapter on JMW Turner, is a way of articulating in a jurisprudential and aesthetic register the demand of Levinasian ethics: "A light is needed to see the light."[6]

What struck me about the responses elicited by this special edition, then, was the consistency of the para-texts in relation to which the words I wrote were read, even though not all of them were explicitly the focus of the book. There was likewise a consistent shape to many of the criticisms or calls for further research. Crudely put, the spirit of those criticisms was that *Danse Macabre* was unconventional in its approach but conventional in its subject matter. I was taken to task for the limited range of the artworks on which I focused, which were without exception drawn from the canons of the Western fine art tradition. As Doherty and Crawley point out, my focus is largely on works by male artists, most relatively well known. These criticisms are, I think, entirely fair. In part, the highly orthodox subject matter of the book was a purposeful choice. I wanted to demonstrate the potential to rethink both legal history and legal theory from an aesthetic and cultural standpoint. The use of relatively familiar artworks or traditions was both a way of drawing my reader in and of showing just how open the field was to a radical rethinking of the relationship of law and art. My choice of mainstream – and therefore masculine and Euro-centric – art was strategic in another way too. It was enough for me to attempt to engage with fairly established historiographic material without venturing into less well-trodden territory. To be honest, the learning curve seemed quite steep enough already.

The question of how a feminist reading of the law-art dialectic might provide different insights is an entirely open one, it seems to me. Although I have increasingly become interested in the work of contemporary Indigenous artists, many of them women—Julie Gough, Judy Watson, and Fiona Foley to name but a few—it remains unclear to me exactly how a feminist reading of their works would be distinctive, specifically when it comes to their treatment of legal themes. I do not raise this in a spirit of skepticism. I only wish to invite a more sustained engagement than simply pointing out the evident lacunae in the kinds of works I have so far addressed. It is surely not really enough to observe that I do not discuss women artists except in passing, though this much is true. Rather, we want to know what a feminist *analysis* of the works of artists both female and male would contribute to the broader questions or insights. I know that Doherty, amongst others, has been pursuing this question and I look forward very much to reading this work in the years to come.

While questions of colonialism and Indigenous peoples are prominent throughout the book, particularly in the chapters on Governor Arthur's Proclamation and Gordon Bennett, the selection of Bennett keeps the discussion steadfastly within

[6] Emmanuel Levinas, *Totality & Infinity,* trans. Alphonso Lingis (The Hauge: Martinus Nijhoff, 1969), p. 192.

the confines of Western art, as does the work of several other Indigenous artists I refer to in that chapter. Crawley and Branco note that the gaze I deploy, even when deploring the colonialism of the Australian legal imaginary, is a thoroughly Western one. I show little familiarity with either Indigenous art or Indigenous law as a living legal tradition. Branco, I think, makes the point with considerable force: "And so, perhaps, he falls into the same 'perspective grid' through which the Aboriginal peoples' laws became (un)seen... There is thus a tension in Manderson's analysis in regards to the viewpoint of what laws are in question, related, possibly, to his use of western art tradition and its rules on perspective – from which, it seems, we cannot seem to escape."[7] This seems about right. As Crawley observes, I am writing from within a cultural position and I see my responsibility in relation to it. In a way, this seems the only ethically honest position to adopt given my own history and background. A more constructive engagement with Indigenous sources, not just in relation to art but law, would significant expand the frontiers of this work. Joy's elaboration of my argument in relation to Governor Arthur's Proclamation, for example, already begins to thicken the aesthetic reference points which I included in *Danse Macabre.* Her discussion of the work of contemporary Indigenous artists highlights a range of work with which I am only glancingly familiar, and certainly suggested new and potentially fruitful lines of inquiry.[8] Furthermore, a better understanding of the literature of Indigenous law and of colonial law from a specifically Indigenous perspective, would yield wholly new insights and responses to both the art and the law.[9] Once again, this certainly indicates important directions my methods and theories can and should travel, and I hope it opens new avenues for research for future scholars.

Luis Gómez Romero's response to *Danse Macabre* takes a different tack and requires, I think, a more detailed response. In a far-reaching and complex discussion, Romero contributes mightily to how we approach Rafael Cauduro's *Crimes of Justice* in the Supreme Court of Mexico. In a particularly important passage, Romero rejects the comparison I draw between Cauduro's work and the Mexican festival of the *Día de Muertos*, including its treatment in a mural by Diego Rivera. I think it is worth emphasizing that it is not, in fact, my interpretation of Cauduro to which Romero takes exception, but the way I contrast it with Rivera. In fact, my chapter on *7 Crímenes* engages very deeply and critically with the work of *los tres grandes,* Rivera in particular, but on very different grounds from those raised by Romero. At times, my friend and colleague seems to imply that in drawing attention to what distinguishes Cauduro's mural from Rivera's, I am suggesting that the Day

[7] Patricia Branco, *Time, Art, and the Law: a matter of perspective. A Comment On Desmond Manderson's* Danse Macabre: Temporalities of Law in the Visual Arts [in this volume].

[8] Rachel Joy, Response to *Danse Macabre: Temporalities of Law in the Visual Arts* by Desmond Manderson [in this volume].

[9] See Irene Watson, *Aboriginal peoples, colonialism and International law: Raw Law* (London: Routledge, 2014).

of the Dead was actually one of Cauduro's "creative incentives."[10] In fact, by contrasting them, as I do, I meant to imply exactly the opposite. Romero emphasizes that Cauduro's ghosts are "not concerned with the festive melancholy of the Day of the Dead, but with the necropolitics of *death-worlds* wrought by the Mexican Drug War."[11] I can only agree, and Romero adds considerably to our appreciation of the importance of this shocking war, imposed on Mexico and enforced by the United States for a century now, in the legacy of corruption and violence that has so damaged Mexico's justice system and civil society.

Nevertheless, Romero rightly rejects my characterization of the *Día de Muertos* as a Mexican Hallowe'en, a "macabre festival" of "ghoulish violence" as I put it.[12] He insists that it is nothing of the sort, and that on the contrary it represents a "defiant response to successive and relentless forms of colonial violence in Mexico."[13] As a way of commemorating "the living memories of loved ones who departed too soon,"[14] the festival bears little relationship to my description of it. It is instead both a form of protest and an act of resilience in the face of a colonial onslaught that has continued for fully five hundred years. In a moving coda, Luis further shows the ways in which the Day of the Dead honours the memory of those closest and dearest to us, including his mother. Luis' analysis offers new and compelling insights, for me at least.

I initially thought that the insufficiency of my understanding of the Day of the Dead made little difference to my analysis of Cauduro, against which it is explicitly contrasted. But Romero pushes the argument further than that. He believes that by lazily echoing familiar tropes of Mexico as a land in thrall to death, I risk confirming a set of age-old prejudices which he describes as "the Atlantic gaze."[15] Former President Donald Trump's reference to Mexican people as drug dealers, criminals and rapists, and his cry to build the wall to keep them out did not—repeat not—come out of nowhere. Anglo-Saxon jurisprudence and North American imperialism have long trafficked the convenient libel that Mexican law and the state are irredeemably tainted by a "cultural flaw" which glorifies violence and death and shows little respect for the sanctity of human life.

Romero's criticisms cut deep for two reasons. First, because it was Luis himself who first introduced me to Cauduro's remarkable work and, moreover, to Mexican muralism, setting in train a research project that has taken me several years to complete. He went so far as to interview a judge of the Supreme Court and the artist himself in order to assist my research. When I travelled to Mexico City to further

[10] Luis Gómez Romero, *Beyond the Atlantic Gaze, or, a Mexican View on Art, Death, Time and Law* [in this volume].

[11] Luis Gómez Romero, *Beyond the Atlantic Gaze* [in this volume].

[12] Desmond Manderson, *Danse Macabre* (Cambridge: Cambridge University Press, 2019), p. 226.

[13] Luis Gómez Romero, *Beyond the Atlantic Gaze.*

[14] Luis Gómez Romero, *Beyond the Atlantic Gaze.*

[15] Luis Gómez Romero, *Beyond the Atlantic Gaze.*

my analysis of the art of the mural movement, particularly in the Supreme Court, I was looked after as if I were a member of the family. For all this, I am eternally grateful. Secondly, because Romero is himself Mexican and knows, with extraordinary depth, the history and the lived experience of law and justice there. There is no doubt that there is much of the story that I tell in my book that Romero knows better than I do, and I am therefore obliged to take these criticisms with the utmost seriousness. The risk of interdisciplinarity is this: missing the point.

As Romero knows, I do not for a minute place any credence in the narratives that, he suggests, have explained "as a cultural trait the contingent institutional arrangements"[16] in many cases forced on Mexico in the name of the horrendous US-sponsored drug wars, a subject on which I have written extensively.[17] I go out of my way to explicitly insist that the problems of legal violence and complicity that Cauduro so graphically illustrates are not in any way 'Mexican' problems at all. I specifically argue that Cauduro is speaking about the endemic power of the state, the police and the law not just in Mexico but "elsewhere" and "around the world". Moreover, I specifically connect Cauduro's critiques of law and injustice both to US practices in the so-called war on terror, to Australian security laws, and to the mandatory detention centres that form Australia's very own gulag archipelago.[18] So I do not think that any fair reading could conclude that my discussion of Cauduro implies an "inbred cultural flaw" that is somehow to blame for the injustices which the mural excoriates.

I do not think, however, that that gets me entirely off the hook. Romero argues that "connecting the dreadful social and legal violence denounced by Cauduro to Mexican ideas and practices around death...has had serious political consequences in the history of Mexico."[19] Luis has grown up under the glare of the Atlantic gaze. The racist assumptions and stereotypes that he refers to have both affected him personally and shaped the discourse of law and justice in Mexico for generations. I have seen the kinds of on-line comments that Romero's own writings about the drug war and US-Mexican relations have attracted. Some of those remarks are arrogant, offensive, and dismissive in exactly the ways that Romero indicates have a very long and vicious history. I have not grown up with that sort of discrimination; Luis has. It has rendered him rightly sensitive to the enduring power of colonialist discourses. In this, I think, I showed a lack of appreciation for the cultural and political context of my analysis. I think he is right to draw attention to what I missed. A fuller appreciation of the virulence and reach of those discourses may and should lead to a

[16] Luis Gómez Romero, *Beyond the Atlantic Gaze*.

[17] Desmond Manderson, *From Mr Sin to Mr Big: A history of Australian drug laws* (Melbourne: Oxford University Press, 1993).

[18] Manderson, *Danse Macabre,* pp. 232-35.

[19] Luis Gómez Romero, *Beyond the Atlantic Gaze*.

better reading of the Day of the Dead, certainly, but more importantly it can contribute to a more politically detailed reading of Cauduro, too.

The depth of his engagement with the history not just of Mexican law but of global and imperial discourses *about* Mexican law allows Romero to introduce new elements to further intensify our engagement with *The Crimes of Justice.* He brings home the colonial and imperial origins of the drug war, as these forces weigh not just on the legal system, but on the daily lives of all Mexicans. Romero offers us a way of seeing Cauduro's ghosts as something more than mere metaphor—as a way of giving visceral expression to the heartfelt experience of the people of Mexico themselves who live, not "easily" in death's presence, but all too close to it. Romero's approach enriches and develops the interpretation my chapter introduced. And by combining the intimacy of personal memoir with the rigour of political history, in a way that only he could manage, he opens new methods in law and the humanities, too.

Both Romero's essay and this response have benefited from a sustained conversation about previous drafts. As I have indicated above, we are close friends and colleagues, and we have worked together on both scholarly and creative collaborations, including in relation to the Mexican drug wars, for years. The dialogue around Luis' response to my chapter has not always been easy, and both his text and mine have changed in the process. I think Luis has come to recognize that some of what he originally read into my text was a function of his own personal and political history. But I have also had to acknowledge that colonial discourses are sometimes reproduced not simply out of innocence—always the excuse of white privilege—but out of an ignorance that we are all responsible for continually striving to remedy. In learning more about the perils of an interdisciplinary approach to cultural traditions and histories with which I was previously unfamiliar, the conversation between the two of us has, I think, raised my consciousness of the demands of that responsibility. Ultimately, that is the appeal of Levinas—a command that we pay attention to the lives of others and keep learning from their insights and perspectives.

Above all, however, the difficult and challenging conversations that lie behind the never quite final versions of the exchange you are reading here, testify to the rigours and rewards of interdisciplinary scholarship. These texts are intended to manifest our shared commitment: not simply to sacrifice either our friendship or our disagreement, but to improve the one by clarifying and distilling the other, and thereby to learn from one another, to change and grow, for the sake of a scholarship that ultimately belongs to neither of us. These texts evidence—I hope—the potential of the field to enliven a real and constructive conversation between disciplines, histories, and experiences. The current issue of *Ethics & Politics* and, indeed, the journal's whole *raison d'être,* surely stands for the necessity, now more than ever, of persevering with such conversations.

Symposium II

Oliver Marchart, *Thinking Antagonism: Political Ontology after Laclau,* Edinburgh University Press, Edinburgh 2018

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 523-532
ISSN: 1825-5167

HACER LA POLÍTICA NUEVAMENTE PENSABLE
UNA RESEÑA SOBRE *THINKING ANTAGONSM: POLITICAL ONTOLOGY AFTER LACLAU* DE OLIVER MARCHART

PAULA BIGLIERI
Facultad de Filosofía y Letras,
Universidad de Buenos Aires
paulabiglieri@hotmail.com

GLORIA PERELLÓ
Facultad de Filosofía y Letras,
Universidad de Buenos Aires
g_perello@hotmail.com

ABSTRACT
This article introduces a critical comment on Oliver Marchart's book *Thinking Antagonism. Political Ontology after Laclau.* The authors identify how Marchart, while assuming the same political aim as his mentor Ernesto Laclau – i.e. 'to make politics thinkable again' –, does so from an 'eccentric' place in regard to the philosophical field. Indeed, Marchart's main objective is to put antagonism back into its place. Why should antagonism be put back into its place? Because Laclau would have displaced it from the previous ontological status that he himself – along with Chantal Mouffe – had given to it when he later introduced the notion of dislocation.
The authors propose a psychoanalytical reading of Laclau's work arguing that psychoanalysis also allows to decipher the fundamental place that antagonism has in the theory of hegemony. From this perspective they set out to think antagonism from the theory of knots, thereby specifying the notion of contingency and the subject's place and considering how affection is at the basis of Laclau's theory.

KEYWORDS
Affection, contingency, subject's place, psychoanalysis, Laclau, Marchart.

I.

Estamos ante la publicación de un texto de lectura indispensable. No solamente para los lectores o estudiosos de la obra de Ernesto Laclau, sino también para todos aquellos que están interesados en el quehacer filosófico, o como lo propone Oliver

Marchart en un *pensar* impulsado por la ineludible implicación en lo político. Marchart es un digno discípulo de Laclau: ejerce un tratamiento riguroso sobre el texto y al mismo tiempo asume el status político de su intervención. Pensar, entonces, es un acto que sólo es posible hacer con otros, con otras, no es una empresa solipsista, en donde el pensamiento se solaza en la propia reflexión. De hecho nosotras estamos respondiendo a una invitación para hacer una lectura crítica de su texto —así como en su momento co-editó junto a Simon Critchley el *Laclau: a Critical Reader*[1]— Marchart propone un pensar con otros, con otras, que, como práctica política se trate de una actividad colectiva, un pensar implicado y situado en el campo de fuerzas de lo social atravesado por antagonismos y como práctica académica, que resulte consistente, de manera tal de trazar un camino que lleve a un punto en donde las certezas filosóficas colapsen (2019: 29).

Decimos que Marchart es un digno discípulo de Laclau, si vemos el libro *Debates y combates. Por un nuevo horizonte de la política* (2008),[2] allí Laclau recoge cuatro ensayos en los que sucesivamente discute con Slavoj Zizek, Alain Badiou, Giorgio Agamben y Michael Hardt y Antonio Negri, con notable erudición y haciendo gala de su puntillosidad académica señala divergencias y puntos de coincidencias para establecer su propia posición respecto del mapa teórico que junto a estos autores conforma y que denomina como "el reciente debate político de la izquierda" (Laclau, 2008: 11). En la introducción de dicho volumen afirmó:

> Detrás de cada una de las intervenciones de este volumen hay, de mi parte, un proyecto único: retomar la iniciativa política, lo que, desde el punto de vista teórico, significa *hacer la política nuevamente pensable*. A esta tarea ha estado destinado todo mi esfuerzo intelectual. Es para mí un motivo profundo de optimismo que después de tantos años de frustración política nuestros pueblos latinoamericanos estén en proceso de afirmar con éxito su lucha emancipatoria. Es este nuevo horizonte histórico el que ha estado en la base de mi reflexión al escribir estos ensayos. (Laclau, 2008: 12).[3]

"Hacer la política nuevamente pensable", ¿no es acaso también la empresa que Marchart se propone para su libro, con la diferencia de que ahora se trata de un 'hacer pensable la política' desde un lugar "excéntrico" (que está al mismo tiempo "por arriba" y "por abajo") respecto del campo filosófico interrogando el propio sentido del pensar? Lo que Laclau revela además a través de esta cita es su pertenencia a la tradición irreverente del pensamiento crítico latinoamericano. Es lo que Marchart capta –aunque no lo plantee en estos términos– cuando narra su inicial

[1] Critchley, Simon and Oliver Marchart (eds) (2004), *Laclau: A Critical Reader*, London and New York: Routledge.

[2] Laclau, Ernesto (2008), *Debates y combates. Por un nuevo horizonte de la política*, Buenos Aires: FCE.

[3] Laclau aquí está haciendo referencia a los procesos populistas latinoamericanos de fines del siglo XX y comienzos del XXI. El énfasis añadido es nuestro.

asombro al momento de editar el *Laclau: A Critical Reader* y encontrar que Laclau, en lugar de escoger como portada de dicho libro la fotografía que mostraba el estado desastroso en el que quedó después de un atentado su oficina de editor en jefe del periódico *Lucha Obrera,* eligió la imagen de la fachada de la Facultad de Filosofía y Letras de la Universidad de Buenos Aires.[4] Porque para Laclau "la universidad era cabalmente una arena política y, al mismo tiempo, un refugio completamente dedicado a la academia. Por lo tanto, la fachada barroca de su *alma mater* debe haberle parecido tanto un símbolo de la academia como de la militancia política" (Marchart, 2019: 216).[5] Quien haya transitado las aulas de las universidades públicas latinoamericanas sabe de su tradición crítica, que se enraíza en una concepción singular respecto de la academia y su imbricación en el campo de lo social. Para muchos académicos formados en Latinoamérica la universidad pública es el espacio para asumir el compromiso de la ética militante ya que alberga en sí el legado democrático popular aunado a la rigurosidad academicista. Así es cómo, en la medida en que Marchart comprende en toda su dimensión el pensamiento de Laclau, sostiene que "al contrario de lo que algunos críticos afirman cuando lo acusan de formalismo o excesiva abstracción, la práctica de teorizar lejos está de desconectarse de la práctica política. Por el contrario, la práctica de Laclau une el conocimiento académico con la militancia política" (2019: 28). Nuevamente: ¿acaso no es la huella de este gesto laclausiano la que atraviesa el texto de Marchart? Porque para Marchart pensar es un imperativo político (y agreguemos un implícito llamado a sus colegas) "actúa como sí pudieras activar lo que te activa" (2019: 196), esto es:

> (...) aquello que nos da vida como actores políticos, el antagonismo, debe ser traído a la vida por nuestras acciones. Debe ser provocado, a título de la política, si la naturaleza contingente y conflictiva de lo social, que de otro modo permanece escondida bajo las rutinas sociales y las instituciones, se ha de hacer evidente. *Pensar* el antagonismo, en el sentido político del pensar, es provocar el antagonismo −y, a su vez, permitirnos ser provocados por el antagonismo. He usado el término "intervención reflexiva" para la práctica −colectiva, organizada, estratégica, contenciosa y partisana− del pensar por el cual la política real se pliega en la teoría. (Marchart, 2019: 209).

Marchart llega a la conclusión respecto de este pensar porque antes dio en el clavo y pudo dilucidar que el secreto guardado de la teoría de la hegemonía que Laclau presentó junto con Chantal Mouffe en *Hegemonía y estrategia socialista.*

[4] La portada de *Laclau: A Critical Reader*, reproduce la fotografía del edificio de la calle Viamonte 430 de la ciudad de Buenos Aires en donde funcionó la Facultad de Filosofía y Letras de la Universidad de Buenos Aires y hoy aloja al Rectorado de la universidad.

[5] La traducción del texto de Marchart *Thinking Antagonism*... para todos los casos es nuestra.

Hacia una radicalización de la democracia (1985) es el antagonismo.[6] Por este motivo, el objetivo central del texto es poner al antagonismo nuevamente en su lugar y para ello se trata de desarrollar la noción de antagonismo que, según Marchart, no ha sido exhaustivamente trabajada. ¿Por qué, según Marchart, hay que poner el antagonismo nuevamente en su lugar? Porque Laclau lo habría desplazado del *status* ontológico que originalmente le otorgó en *Hegemonía...* cuando en su texto posterior *Nuevas reflexiones sobre la revolución de nuestro tiempo* (1990)[7] introdujo la noción de dislocación. Y en este derrotero argumentativo es en donde Marchart demuestra que no es solamente un discípulo de Laclau, porque es ya –sin dudas– un pensador con *status* propio que va más allá de Laclau, aunque lleve en su escritura las huellas indelebles de su maestro.

En nuestra opinión, Laclau cumplió en buena medida su propósito de "hacer la política nuevamente pensable e intervenir en las luchas populares emancipatorias", a la vez propició que avancemos hacia nuestros propios derroteros. Ya hemos mencionado -tal como lo hace el propio Marchart- que él avanza en estos derroteros ubicándose en un lugar "excéntrico" respecto de la filosofía, aunque debemos agregar que ese lugar "excéntrico" está al mismo tiempo imbuido de la tradición heideggeriana. Entonces, es desde allí que identifica un problema (la degradación del status ontológico del antagonismo que el propio Laclau habría realizado) y se propone avanzar hacia una solución (devolverle su lugar).

II.

En este punto es en donde queremos intervenir pero desde otra perspectiva, la del psicoanálisis. Las lecturas psicoanalíticas del trabajo de Laclau también permiten desentrañar el lugar fundamental que tiene el antagonismo en la teoría de la hegemonía.

Lo primero que debemos mencionar es que aquello que desde una lectura heideggeriana constituye un problema, no lo es tal desde una lectura psicoanalítica. Marchart dice que la cuestión radica en que:

> (...) él se retractó de la idea de que el antagonismo es de una primacía ontológica al introducir una noción más: la dislocación. La dislocación -un equivalente aproximado del real lacaniano como aquello que perturba las leyes de lo simbólico (del lenguaje o de la sociedad), pero, justo como el real lacaniano, sin resonancia política- debe ser supuestamente ubicada en un nivel ontológico aún más profundo. El valor ontológico

[6] Laclau, Ernesto and Mouffe, Chantal (1985), *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*, London and New York: Verso.

[7] Laclau, Ernesto (1990), *New Reflections on the Revolution of Our Time*, London and New York: Verso.

> del antagonismo quedó entonces reducido a una respuesta discursiva particular frente a una dislocación más primaria. (2019: 24).

Pero "el antagonismo está implicado en todo sistema significativo, no solamente en los discursos políticos que construyen su afuera como 'el enemigo'" (Marchart, 2019: 25). El problema con el movimiento de Laclau al introducir la dislocación como categoría primaria y, en ese sentido, como fuente del antagonismo sería que deja a este último acotado a un sentido estrecho: la construcción de un enemigo. Es decir, el antagonismo quedaría así desplazado a un segundo plano y, en consecuencia, reducido a las expresiones ónticas de formaciones políticas hegemónicamente articuladas según los diversos contextos socio-históricos. En este caso si hay antagonismos es porque la sociedad o todo orden se encuentra desde el vamos dislocado. De esta manera, el mismo Laclau estaría diluyendo su propia ontología política, que inicialmente la había presentado junto con Mouffe, y que significaba que todo orden o en palabras de Marchart que "la sociedad es instituida políticamente y ser instituido políticamente significa se instituido a través del trabajo de la negatividad, estos es, el antagonismo" (2019: 23). ¿Por qué es este un problema para Marchart? Porque si ponemos al antagonismo como la derivación de una dimensión más primordial (la dislocación), estamos también colocando a lo político en un lugar secundario y quitándole todo su carácter ontológico en la medida en que pasa a ser una consecuencia de una instancia anterior que carece de cualquier tipo de "resonancia política". En todo caso, la política surgirá si esa dislocación primordial puede ser construida como un antagonismo a través del juego de las lógicas de la equivalencia y la diferencia, que son en definitiva las que hacen a la hegemonía. La solución de Marchart es no perder de vista el incesante juego de la diferencia ontológica: el Antagonismo con mayúscula y en singular para dar cuenta de su dimensión ontológica, es decir, el plano de lo político, y los antagonismos en plural y minúscula para dar cuenta de las diversas expresiones ónticas en contextos históricamente dados, el plano de la política. En definitiva, si hay dislocación, si la sociedad está dislocada es porque está instituida antagonísticamente y no al revés.

El análisis que nosotras podemos hacer desde una perspectiva psicoanalítica, si bien coincidimos en que resultaría problemático tal como señala Marchart otorgarle primacía a la dislocación respecto del antagonismo, nos permite plantear la cuestión en términos diferentes. En realidad para ser precisas desde una lectura lacaniana de Laclau, no tenemos este problema, porque antes que pensar la introducción de la dislocación como un desplazamiento del lugar del antagonismo, que le quita su cariz ontológico político, lo que tenemos son dimensiones que se anudan.

Marchart pone en equivalencia a la dislocación con lo real lacaniano. Eso es así si sólo consideramos ubicar el real en relación con la dimensión simbólica, quedando de esta manera lo real expresado como falta, como falla en lo simbólico. Pero lo real también puede quedar expresado como exceso, en su dimensión de goce. Aunque en "lo real" no falta ni sobra nada, el hecho de habitar el lenguaje

produce esta "esquicia" en el modo de experimentar el mundo para el ser hablante. Remitiéndonos a la última enseñanza de Lacan, una expresión de esta escisión en es la trilogía imaginario, simbólico y real en la que se anuda la realidad para el *parlêtre,* (su traducción literal al castellano sería "hablante ser", en referencia al ser viviente, el viviente que habla). Ninguna de estos tres tiene una primacía sobre los demás, quedan conformados como un nudo borromeo, en el cual real, simbólico e imaginario consisten en tres cuerdas absolutamente distintas, anudadas de modo tal que al romperse una de ellas se desligan las otras dos, cualquiera sea el redondel que se corte. Nosotras hemos leído lo real en la obra de Laclau como antagonismo, dislocación y heterogeneidad social, como lo real en relación con lo imaginario, lo simbólico y lo real respectivamente.[8] Y aquí también podemos hacer esta distinción entre Antagonismo con mayúsculas y los antagonismos. El Antagonismo desde nuestra perspectiva sólo puede ser entendido como un anudamiento entre los antagonismos, la dislocación y lo heterogéneo social.

Debemos señalar además que este último término, nos resulta crucial para comprender al afecto como factor político, si queremos avanzar hacia una "teoría de la afectología" tal como lo propone Marchart (2019: 103). Aunque la heterogeneidad social no ha sido mencionada en el libro que hoy estamos comentado, Marchart no desconoce el alcance de este término. En su artículo "En el nombre del pueblo. La razón populista y el sujeto de lo político",[9] presenta lo heterogéneo social en Laclau rastreando su fuente en Bataille:

> Laclau sigue a Bataille (2000) al llamar heterogeneidad al "otro lado" del orden homogéneo de diferencias. En la definición laclauniana, lo heterogéneo es algo imposible de integrar en el juego hegemónico entre diferencia y equivalencia: no pertenece al orden homogéneo de diferencias porque entonces, obviamente, no sería heterogéneo; y tampoco pertenece al orden de equivalencia antagónica, pues entonces habría adquirido un nombre y nuevamente pertenecería al orden de significación. (2006: 53).

La heterogeneidad social es introducida por Laclau en *La razón populista* (2005)[10], texto en el que exploró la cuestión del afecto en sus dimensiones imaginarias y simbólicas en términos de identificaciones e idealizaciones (siguiendo a Freud en la constitución de agrupamientos sociales con un o una líder) y dejó abierto el camino para problematizar la cuestión del afecto en relación con lo real en términos

[8] Biglieri, Paula and Perelló, Gloria (2011),"The Names of the Real in Laclau's Theory: Antagonism, Dislocation and Heterogeneity, *Filozofski vestnik*,Volume XXXII, Number 2, pp. 47-64, Ljubljana.

[9] Marchart, Oliver (2006), "En el nombre del pueblo. La razón populista y el sujeto de lo político", *Cuadernos del CENDES*, vol. 23, núm. 62, mayo-agosto, pp. 37-58, Universidad Central de Venezuela, Caracas.

[10] Laclau, Ernesto (2005), *La razón populista*, Buenos Aires: FCE.

de *goce* (siguiendo a Lacan con la investidura radical). La heterogeneidad es concebida como unicidad fallida, y en tanto irreductible a cualquier homogeneidad:

> no está simplemente ausente, sino presente como aquello que está ausente... La forma fenoménica de esta presencia/ausencia radica en que, como hemos visto, los diversos elementos del conjunto heterogéneo van a estar *sobredeterminados o investidos diferencialmente*.[11] (Laclau, 2005: 277).

Que la heterogeneidad implique la investidura de los elementos que integran la "unicidad" de lo social, tendrá que ser leído en términos de *investidura radical*. Es decir que en las identidades populares no sólo están contenidas las dimensiones del afecto en términos de identificaciones e idealizaciones, sino que en la "materialidad" misma de ese armado está incluida la dimensión del *goce*. Si bien "no hay nada en la materialidad de las partes particulares que predetermine a una u otra a funcionar como totalidad [...] una vez que una parte ha asumido tal función, es su misma materialidad como parte la que se vuelve una fuente de goce." (Laclau, 2005: 147-148).

Laclau y Bataille coincidieron en concebir la heterogeneidad como un exceso que implica una dimensión afectiva: investidos diferencialmente, que provocan reacciones afectivas encontradas de fascinación y rechazo. Sin embargo, hay una divergencia fundamental en la concepción de estos dos autores, mientras que para Bataille la heterogeneidad es dialectizable por el campo homogéneo, para Laclau la heterogeneidad social no se puede superar dialécticamente: "la heterogeneidad es primordial e irreductible, se mostrará a sí misma, en primer lugar, como *exceso*. Este exceso, como hemos visto, no puede ser controlado con ninguna manipulación, ya se trate de una inversión dialéctica o de algo semejante." (Laclau, 2005: 277).[12]

Hay un último aspecto que quisiéramos comentar para abonar al desarrollo de una "teoría de la afectología". Volvamos a la impronta Heideggeriana de Marchart y a cómo desarrolló de manera magistral en diversos textos la noción de diferencia política[13] (la diferenciación conceptual entre lo político y la política), que permite ver que siempre estamos parados sobre fundamentos parciales porque:

> (...) nuestro mundo social no puede estar basado en un terreno firme o principio último, ni tampoco completamente carecer de terreno o principio alguno (en la medida en que no vivimos en un vacío) -más bien se basa en lo que Judith Butler llama "fundamentos contingentes" (Butler: 1992). Estos fundamentos serán plurales, siempre estarán establecidos temporariamente, pueden ser revertidos y tendrán que ser

[11] El énfasis añadido es nuestro.

[12] Desarrollamos ampliamente la lectura psicoanalítica de afecto en relación con la heterogeneidad en: Biglieri, Paula and Perelló, Gloria (2019), "Populism", Stavrakakis, Yannis, *The Routledge Handbook of Psychoanalytic Political Theory*, London/New York, Routledge, pp. 330-340.

[13] Ver por ejemplo: Marchart, Oliver (2007), *Post-Foundational Political Thought. Political Difference in Nancy, Lefort, Badiou and Laclau,* Edinburgh University Press.

> establecidos en conflicto con otros intentos fundacionales - lo que le da sentido a que a las teorías que registran la naturaleza contingente y aún necesaria de los fundamentos sociales sean descritas como posfundacionales en lugar de antifundacionales. La contingencia, como término técnico para la ausencia fundamental de un fundamento último, no implica que las sociedades puedan arreglárselas sin fundamentos, principios o normas. Sólo significa que ninguna de estas normas puede arrogarse para sí tener una validez supertemporal o trascender el mundo de las relaciones sociales. Cada norma, terreno o principio puede siempre ser desplazado, potencialmente al menos, por otras normas, terrenos y principios en conflicto. (Marchart: 2018, 14-15).

Si estamos parados sobre un constante movimiento de fundamentación y desfundamentación que sólo permite alcanzar fundamentos parciales, nos parece decisivo considerar qué hay allí en la institución de tal o cual fundamento parcial (más allá de que sean siempre precarios, pasibles de ser revertidos y siempre cuestionables). Las preguntas son, ¿por qué se impone un cierto fundamento (parcial) y no otro? ¿Qué es lo que hace que entre diversos proyectos fundacionales en pugna prevalezca uno y no otro? Que se imponga una particularidad como fundamento y no otra, no es caprichoso ni azaroso, sino contingente y está estrechamente ligada a la cuestión del afecto. Por este motivo creemos necesario complementar los argumentos de Marchart con los de Perelló (2017)[14], ya que ese juego constante entre fundamentación y desfundamentación no está gobernado ni por la accidentalidad, ni por el azar, sino por la contingencia aquí entendida como el cruce entre el azar y la intencionalidad del sujeto, en el momento de la decisión en un terreno indecidible. Se trata pues de entender la contingencia más allá de su mera definición técnica (ausencia fundamental de un fundamento último) y de diferenciarla del puro azar (impolítico) para dar lugar al sujeto.

Laclau en diversos textos (1990, 1996[15]) distinguió la contingencia del azar, de la arbitrariedad y de la accidentalidad, afirmó que la contingencia no debe ser confundida con los atributos de equivocidad y ambigüedad del significante en cuanto tal y también sostuvo que la institución de un determinado fundamento parcial (significante vacío) no es ni necesaria (no responde a ninguna determinación causal necesaria), ni caprichosa (el fundamento parcial no puede ser cualquier parcialidad o el significante vacío no puede ser cualquier significante), sino que es contingente. Además, le otorgó precisión a su noción de contingencia al introducir el concepto de dislocación y definirla como la fuente de la libertad (es ese hiato que está libre de determinaciones necesarias) y, al mismo tiempo, como el lugar del sujeto (por ser el momento de la decisión más allá de las determinaciones estructurales, una decisión contingente tomada a partir de una estructura indecidible). La contingencia

[14] Perelló, Gloria (2017), "Causa, necesidad y contingencia, algunas implicaciones políticas", *Memorias. IX Congreso Internacional de Investigación y Práctica Profesional en Psicología,* Buenos Aires, Facultad de Psicología, Universidad de Buenos Aires, *4*, 242-246.

[15] Laclau, Ernesto (1996), "¿Por qué los significantes vacíos son importantes para la política?, *Emancipación y Diferencia*, Buenos Aires, Arial, pp. 69-86.

radical que enfatiza Laclau se apoya en la crítica a la relación entre subjetividad y política entendida como relación automática, comandada por la lógica de la necesidad. La dislocación como fuente de libertad abre paso a la decisión que hace "posible el precario equilibrio de la hegemonía, pues sin ello, la contingencia de la decisión que es el sujeto, quedaría convertida en pura accidentalidad, en puro azar impolítico." (Laclau, 1997: 14)[16].

Si prestamos atención encontramos que esta misma cuestión es la que asumió Lacan al pensar la *causalidad psíquica*.[17] Una aproximación ligera a esta propuesta de Lacan podría concluir que el psicoanálisis contribuyó a reducir el escaso margen de libertad al postular determinaciones inconscientes que intervienen en la formación de síntomas y actos, en esta versión todo sería coerción de la estructura, pura repetición automática y si queda una elección posible sería siempre forzada. Sin embargo, hay otra versión que es la de lo real del acto de elegir como momento de la decisión que no está sujeto a determinaciones. Ahora bien, en lugar de determinaciones Lacan va reconducir su mirada hacia la causa, una causa no necesaria. Tomó del vocabulario de Aristóteles en torno de las causas accidentales los términos *tyché* y *automaton* para referirse a dos formas distintas de la repetición "que se traducen impropiamente por azar y fortuna." (Lacan, 1964: 60). El *automaton* (puede verse en el aspecto de la repetición-espacialidad que Marchart analizó en torno al Fort/Da de Freud, se refiere al funcionamiento automático de la cadena significante (que responde al mecanismo lingüísticos de metáfora y metonimia, como también a leyes matemáticas) sin la incidencia del sujeto, esto es, *lo que no cesa de escribirse* fallidamente (esta es, para Lacan, la definición de necesidad lógica, lo que repetitivamente se escribe fallidamente). Mientras que la *tyché,* por el contrario, no tiene lugar en la red significante, es lo inasimilable del trauma que *no cesa de no inscribirse* (es la definición de lo imposible lógico, lo que repetitivamente *insiste* en su no inscripción). Lo que queremos resaltar es que Lacan con la *tyché* introduce otro aspecto de la repetición (que va más allá de la exploración que Marchart hace del Fort/Da) en la que está en juego la dimensión pulsional, esto es, el afecto. De manera tal de que la *tyché* excede la mera repetición simbólica, sino que involucra allí mismo al sujeto como ese exceso pulsional, heterogéneo, que no entra en lo simbólico, que además insiste en no entrar y que es lo que pone en marcha el trabajo de simbolización, en definitiva, es el afecto lo que hace que se instituya un determinado fundamento parcial y no cualquier parcialidad. Por esto Lacan define a la *tyché* como un *encuentro* –siempre fallido– con lo real contingente que pone en juego la intención del sujeto. (Lacan, 1964: 62). La *tyché* no es el puro azar y como se trata de algo del orden de un *encuentro* el término más apropiado es el

[16] Laclau, Ernesto. (1997). *Hegemonía y Antagonismo; el imposible fin de lo político. (Conferencias de Ernesto Laclau en Chile).* (S. Villalobos, Ed.) Santiago de Chile: Cuarto Propio.

[17] Lacan, Jacques, (1964), *El Seminario. Los cuatro conceptos fundamentales del psicoanálisis*, Buenos Aires: Editorial Paidós, 2003.

de contingencia: es un encuentro entre el azar y la intención del sujeto –es decir, se trata en todo caso de una intención (que no es una mera intención de un sujeto que posee una identidad positiva) que involucra el aspecto pulsional, el afecto. Nosotras creemos que yace aquí la base para el encarar el desafío que propone Marchart de desarrollar una "teoría de la afectología".

Decíamos al comienzo de este escrito que el texto de Marchart es de indispensable lectura, lo volvemos a reafirmar. Nosotras apenas hemos abordado algunos pocos aspectos, por eso queremos decir que nuestro breve escrito no hace justicia a la experiencia de la lectura del libro de Marchart porque, con miras a alimentar el debate, privilegiamos los puntos en donde encontramos ciertas disidencias y nos quedaron afuera diversas cuestiones en las que coincidimos e hicieron temblar nuestra perspectiva y ampliaron nuestro modo de acercamiento, baste con mencionar ejemplo, la ética intelectual y el carácter de acto del pensar, la distinción entre Antagonismo y antagonismos, su provocativa lectura del peronismo como uno de los momentos fundacionales de la historia de los Estudios Culturales, su insistencia en cómo el populismo de Laclau encapsula la racionalidad política *tout court*, su fina dilucidación de la mínima política. Gracias Oliver Marchart por tan bello texto.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 533-542
ISSN: 1825-5167

IS ANTAGONISM A GOOD NAME FOR RADICAL NEGATIVITY? REVIEW OF OLIVER MARCHART'S *THINKING ANTAGONISM*

ALLAN DREYER HANSEN
Department of Social Sciences and Business
Roskilde University (Denmark)
adh@ruc.dk

ABSTRACT
Marchart's *Thinking Antagonism* is, systematically following one of the leads of Laclau's theory – the radical reading (or rather *thinking*) of antagonism and the Political – to their final conclusions: antagonism lies at the root of every social being – *qua being*. Despite Marchart's explicit renunciation I argue it seems more promising to follow the other. It involves accepting radical negativity defies any apprehension, that any action – including antagonizing – always already is a specific articulation. This is better grasped through the concept of dislocation and through Derridean hauntology. De-ontologizing antagonism also means de- ontologizing politics which re-introduces ethics as an 'ethics of politization'.

KEYWORDS
Radical negativity; dislocation; hauntology; ethics of politization.

Oliver Marchart's (OM) book *Thinking Antagonism* is a great achievement. As always it is a pleasure to read him, the book is well argued, clearly written, displaying insights in left Hegelian and left Heideggerian intellectual history which is simply impressive. Engaging with the broader 'ontological turn', he manages to move from the deepest ontological (un-)ground of the political to micro politics as it is enacted in our everyday lives.

The book shows OM being more Laclauian than Laclau himself. To me this is a positive thing. Pushing the logics of a theory to its final conclusions is an exercise, which no matter how we judge the actual conclusions, sheds light on it, providing the ongoing debates and interrogations with the theory a stronger basis. There can be no doubt that OM's *Thinking Antagonism* does just that.

The book starts by observing the debate after Laclau has been split between two positions. One, OM's, in which antagonism equals (radical) negativity, and another, to which there is an even 'deeper ontological layer', i.e. dislocation, of which

antagonism is but one possible way of articulating. According to OM Laclau was mostly inclined to follow the dislocation path but should have followed the antagonism path. To my reading, Laclau never made up his mind. Even though OM quotes Laclau at passages where he seems to favour dislocation, it is quite easy to find several other passages in Laclau where the opposite appears to be the case.

This is the first sense in which OM is more Laclauian than Laclau himself: he actually chooses. Antagonism it is! To OM Laclau's question – the ontological question – is *What is antagonism?* Answering this question should be the leitmotif of 'Thinking after Laclau'. Following the path of dislocation leads to passivity and is ultimately a sign of "neglect, denial, disavowal" (213). Secondly, he wants to draw the full consequences of this choice. There is be no restrictions to this ontological enterprise. The ontological status of antagonism should not be restricted to regional questions, an ontology for the political. Even if he never stated it himself, Laclau's theory entails a 'full ontology' – a universal theory of *being-qua-being*. I.e. "ontological in the sense of constituting a claim about the antagonistic nature of social being *as such*, not merely about the nature of political affairs in the narrow sense of politics as a particular sphere or form of action." (23) In this way *Thinking Antagonism* nicely follows the paths set out in OM's former *Postfoundational political thought* (2007) and can be seen as the conclusion of the issues raised there.

Apart from the obvious theoretical/ philosophical issues at stake – and OM displays an impressive overview over and insight into left Heideggerian thought – the stakes are also political. *Thinking Antagonism* is written with one clear message: our world is political, and so it can and should be changed. To OM ontology and ontological questions are not remote and ultimately futile (over)intellectual exercises but have profound and immediate effects on our thinking of and therefore also our actions in that world. Thinking – in the radical sense OM presents – is not distant contemplation, but (one dimension of) active engagement, acting in and changing our world:

> "The ontology of the political to be proposed in this book places a bet on the political nature of social being-qua-being. This will be not only an intellectual bet, but, more than that, a political one in itself. Our interrogation, therefore, must be conducted in a political mode. Rather than constituting a quest for true knowledge, untainted by the political, ontological questioning becomes a way of implicating ourselves in the field of actuality. ... thinking, more than being an 'existential' act, is a political one." (10)

Of course, there are no blueprints of how the Left can change the world. But the urge to make us see (or rather think) that the 'shivering' of everything is due to its 'innermost' political being, its *political* ontology, has a clear activist mark: the world can be changed – let's go and do it! *Thinking* antagonism, i.e. situating one within a truly political ontology "will lead to a dramatic change in perspective. The social world starts to appear in a strongly political light." (23)

As will be clear I'm not persuaded by the book. I (still) don't think antagonism can occupy the place for radical negativity, and I therefore (still) think discourse theory after Laclau should follow the path of dislocation as the fundamental ontological category. But at the same time, I agree with OM's overall political message, and I share the concern about 'post-politics'. For a moment I was not completely certain whether my critical comments should be made openly. There is far too widespread sense that we can't change anything. But we can and we should act more politically. And can we maintain a hope for political activism without believing in antagonism? Probably OM will say no. Let us look into some of the reasons why.

ONTOLOGY AND EPISTEMOLOGY

To start his ontological interrogations OM situates himself in the Hedeggerian shift "from questions regarding being-qua-*understanding* to questions regarding being-qua-*being*." According to OM this distinguishes ontology clearly from "the dominant paradigm of epistemology", based on a "disembodied position of an outer-worldly calculating mind" seeking to establish "the conditions of true knowledge" (8-9)

However, neither discarding the question of understanding, nor linking epistemology to true knowledge are obvious. Self-reflecting on granting antagonism ontological status, OM observes:

> "For someone working in an entirely different paradigm – say, a rational choice theorist – it does not make sense at all. But then again, 'rational choice' does not fare any better from the perspective of political ontology." (167)

This is no doubt true. Should a rational choice theorist come across *Thinking Antagonism* she would find it very difficult to accept the arguments and presumably even to see the relevance. Should she hold a concept of antagonism, its meaning would be entirely different. Different 'particular politico-theoretical contexts and traditions' construct their world differently: antagonism is something completely different for rational choice than it is for political ontology.

This observation is the starting point for Luhmann's systems theory (one of few regrettable omissions from OM's otherwise impressive tour through philosophical and theoretical strands of thought). Interestingly, regarding ontology, Luhmann draws the opposite conclusion (Luhmann 1990, 1994, Thyssen 2004). Ontology is an 'old European' way of thinking. Systems theory therefore is beyond ontology, and only holds an epistemology. But it does not define the conditions of truth, but rather general conditions for recognition – including science and philosophy. Luhmann's epistemology is radical constructivist, since any observation of 'the world' is made from a specific system, drawing on its own resources (its own distinctions). Whatever a system observes the environment to be, it is the system's own

construction. Making ontological claims is therefore 'substance metaphysics' apparently made from nowhere and denying the necessary 'particular' system-specific observation.

Whether we talk about systems or paradigms the conclusions are similar: it is impossible to imagine a final universal truth, concepts are always constructed within a certain horizon. I presume OM would agree. One might charge Luhmann for seeking a disembodied position – at least when it comes to moral and politics – but hardly "an outer-worldly calculating mind". Can we really answer 'Laclau's question', 'what is antagonism?' without situating ourselves within being-qua-*understanding*? Within a post-foundational position, answering the question "What *is* antagonism?" involves a specific positioning ('systemic', 'paradigmatic, 'discursive' or whatever we choose to call it).

LACLAU'S QUESTION

As we have seen, according to OM the ontological interrogations are situated around *Laclau's question*, which was posed in the following terms:

> "I am not asking myself what are the actually existing antagonisms in society, but something more fundamental: What is an antagonism? What type of relations between social forces does it presuppose?" (Laclau 2014, 102)

However, OM wants to ask a more fundamental question than 'what is *an* antagonism?'. He wants to ask, "what is *antagonism*?", an inquiry "into the ontological nature of antagonism itself" (3) Presented in these terms, OM's ontological inquiry runs some risk of being substance metaphysical. I don't think they are – because they are related to constitutive negativity – but Laclau's ontological questioning could be presented in another way, placing the weight on the *presuppositions* regarding the types of relations. In the preface to the 2. ed of *Hegemony and Socialist Strategy*, Laclau (and Mouffe) (2001) explained:

> "the strictly ontological question asks how entities have to be, so that the objectivity of a particular field is possible. ... how — to repeat our transcendental question — does a relation between entities have to be, for a hegemonic relation to become possible?" (X)

To me, this is a more precise way of posing the ontological question: not, what *is* (antagonism), but *how must the world* (the entities) *be*, in order for our theoretical category of a hegemonic relation to be possible. What characterizes the social world, if something like a hegemonic relation is possible? The answer to ontological question might of course be 'antagonism', even though Laclau and Mouffe pointed towards Derridean structural undecidability (XII). But even to pose the question in

transcendental terms 'how must it be', rather than 'what *is'* (antagonism) saves it from any charge of 'substance metaphysics'.[1]

ANTAGONISM OR DISLOCATION?

The answer to the transcendental/ ontological questioning regarding "the very condition for hegemony" was not antagonism but "structural undecidability*"* (as developed by Derrida) (xii). Elements which can be articulated in specific hegemonic formations cannot be predetermined to enter into any specific arrangement but must be marked by structural undecidability. (xii)

Regarding dislocation (or structural undecidability)[2] versus antagonism Laclau never really made up his mind but stated different things at different times. Even though the above quote points in the direction of dislocation as primary instance of negativity, it is immediately connected to the generality of politics: "to say *contingent articulation* is to enounce a central dimension of politics. This privileging of the political moment in the structuration of society is an essential aspect of our approach." (Xii).

'Privileging of the political moment' implies some kind of priority of antagonism, and it is fair to say Laclau was undecided on the matter. OM's point of departure is a critique of placing dislocation before, or at a deeper level than antagonism. OM quotes Laclau for taking that position:

> "constructing a social dislocation – an antagonism – is already a discursive response. You construct the Other who dislocates you as an enemy, *but there are alternative forms...* there is already a discursive organization in constructing somebody as an enemy which involves a whole technology of power in the mobilization of the oppressed. That is why in *New Reflections* I have insisted on the primary character of dislocation rather than antagonism." (Laclau 1999: 137 [my italics, adh])

According to this argument any discursive organization – even to construct somebody in a 'negating way' as an enemy – takes us away from the realm of radical negativity, into the positivity of social articulations. Should the dislocating element be constructed as an enemy, we are in the realm of politics, but there are other alternatives (Laclau mentions religion).

Since OM's ambition is "a post-foundational *ontology of the political* ... the science, not simply of politics, but of the political nature of social being as such" (3) he disagrees, and presents his basic argument:

[1] This is also a strong objection to Luhmann. Systems theory, like any theory, can be asked what the world must be like for its basic propositions to be possible, and therefore has an ontology.

[2] Laclau posed the problem in terms of dislocation rather than structural undecidability, but we can treat them as equivalent.

> "Dislocation, no matter where it issues from, always occurs within a prior horizon of being: the social. Examples given by Laclau for seemingly non-antagonistic social practices prove to be far from being not political. To construct, for instance, a volcanic eruption or an earthquake as an expression of our sins and the wrath of God may be different from attributing it to a political enemy, but it does involve a technology of power, the Catholic Church for instance, which is politically instituted. At no point one can experience a dislocation that is not immediately reframed via the instance of antagonism." (25)

The argument is based on an equation: *'technologies of power' = politically instituted = 'instances of antagonism'*, which leads to the conclusion: "Whatever occurs in our social world, it has to pass through the medium of antagonism." (ibid).

This is the decisive question: is power – as such – a sign of antagonism? I feel quite certain OM answer's is yes. Regarding exclusions OM quotes Laclau affirmatively:

> "[A]ntagonism and exclusion are constitutive of all identity. ... The system is what is required for the differential identities to be constituted, but the only thing – exclusion – which can constitute the system and thus makes possible those identities, is also what subverts them." (Laclau, 1996: 52–3)

Note how antagonism disappears in the quote, and only exclusions remain. Any system is based on exclusion, which at the same time constitutes and subverts it. In a post-foundational theory, exclusions are definitely ontological: if our social world is not the unfolding of a positive ground, of an absolute foundation, there will always be more than one possibility. Constructions (articulations) involves linking together moments in a contingent way, which at the same time is to exclude other possibilities that could have been but was not actualized. As Laclau has pointed out many times, this means all social relations are relations of power.

Commenting on the quote OM take one further step, simply leaves out exclusion and mentions only antagonism:

> "The term 'antagonism' denotes this double-sided moment: the moment of original *institution* as well as the moment of original *destitution* of social order." (23)

The question is, however, whether antagonism can be made equivalent to exclusion? Are all exclusions per definition also antagonistic? I find it hard to accept. Antagonism does seem to imply some form of active questioning of the exclusion. But that is exactly what cannot be taken for granted, and not be elevated to an ontological level. I believe we are inhabiting an undecidable world, the social has no absolute foundation, and so all social being are based on decisions, and therefore on exclusions (which definitely have destituting effects). But not all exclusions are antagonistic - far from it. It demands, as Laclau rightly points out, an articulation, a 'further discursive organization', of someone actively opposing the decision, the exclusion.

ANTAGONISM AND HAUNTOLOGY

In a sense OM seems to agree. He situates antagonism on a 'deeper' ontological level than the construction of friend/enemy distinctions: "on the ontological level, antagonism has little to do with a dualistic friend/enemy distinction" (194). In other words, there are many exclusions, many technologies of power which do not give rise to actual antagonizations. Rather, ontological antagonism "refers to a fundamental blockade that issues from an incommensurably negative instance." (194)

Ontological antagonism is explicitly not dependent on contingent struggles and conflicts (which are instances of 'discursive organisations') but is elevated to the level of the foundation itself. It is made equivalent to radical negativity. To mark this elevation, to note that we have left the traditional 'positive' field of ('Old European') ontology, OM occasional changes the vocabular to Derridean 'hauntology' (Derrida 1994). Ontological antagonism is "a hauntological instance, a purely negative outside of the social ... located beyond the functioning of any determinable 'logic' ... antagonism 'grounds as a-byss'." (26) Very explicitly, antagonism is equated with "the labour of the negative", as 'pure' negativity (23). Despite the denial of direct links between ontological antagonism and actual friend-enemy dichotomies, hauntology is linked to conflicts, to "the spectral presence of a ground that remains absent, but exerts an uncanny presence in moments of *conflict* and contingency ..." (171, my italics, adh)

'Hauntology' is definitely to be preferred over 'ontology'. To my reading at least, hauntology captures the radicality of negativity, i.e. the insight that it is only the blockade, the impossibilities, the dislocations which follows from negativity. How this negativity, these impossibilities will be articulated, discursively organized, is an 'ontic' question, including whether conflicts and politics will arise. Discourse theory would gain a lot from a general change of vocabular from 'ontology' to hauntology.

But Laclau did not follow that track and kept arguing in terms of ontology. Yet in his explicit engagement with hauntology (in "The time is out of Joint" (Laclau 1995) he clearly stated the differences between hauntology and ontology:

> "We find in Marx an argument about spectrality at the very heart of the constitution of the social link. Time being "out of joint," dislocation corrupting the identity with itself of any present, we have a constitutive anachronism that is at the root of any identity. .... Marx, however, attempted the critique of the hauntological from the perspective of an ontology ... [i.e.] the arrival at a time that is no longer "out of joint," the realization of a society fully reconciled with itself..., to a purely "ontological" society." (1995: 88)

Post-foundationalism makes the idea of a fully reconciled society impossible; we will forever be 'haunted' by a radical negative 'outside'. The question is whether this radical negativity is somehow linked to the political. Laclau seems to be implying it is, and I presume OM would follow him in that. Laclau states:

> "... since hauntology is inherent to politics, the transcendence of the split between being and appearance will mean the end of politics. ... If, however, as the deconstructive reading shows, "ontology" - full reconciliation - is not achievable, time is constitutively "out of joint," and the ghost is the condition of possibility of any present, politics too becomes constitutive of the social link." (ibid)

This is one step too far. That we cannot have politics without hauntology (which I accept), does not mean that wherever there is hauntology there is politics. But only in that case would politics (or 'the political' become constitutive). What we can conclude is, that there is always, 'constitutively' (in a hauntological way) a *potential* for politics. There are no social links that cannot be politicized – but this does not come about 'by itself'. Politization needs to be enacted, articulated. Politization is, to use that vocabular, an instance of 'discursive organization'; a potential, but only a potential.[3] To activate a potential is to take a decision in an undecidable structure – as we might equally as well not take it, and follow another path (acceptance, neglect, or whatever). Decisions taken in an undecidable structure bears the mark of ethics – cf. Derrida's notion of an *ethico-theoretical* decision by Husserl (Derrida 1973). As such hauntology (radical negativity) can well be articulated with an *ethics of politization* – but that is something quite different from an 'ontology of antagonism'.

AN ETHICS OF POLITIZATION

We might ask the question: if negativity is radical, is simply a blockade, something which haunts rather than founds, why call it antagonism? Why not simply call it negativity? OM situates his thinking in a specific tradition:

> "the name 'antagonism' is not just a simple 'X', an entirely emptied signifier... Selecting 'antagonism', rather than any other term, is therefore not an arbitrary choice, as it results from a naming operation rooted in a social and political context. ...the term 'antagonism' suggests itself for its historical dimension: it is within a particular tradition of left-Hegelianism and Marxism that our move assumes verisimilitude." (167)

One can agree it is not an arbitrary choice, nor a pure act of decisionism. But to choose the notion of antagonism for denoting (naming) the negative, thereby placing himself in this particular tradition (rather than e.g. rational choice) is still a decision. Naming (and especially naming the negative) is an undecidable game (otherwise it would be conceptually grasping), and we know from Derrida decisions are ethico-theoretical. They are 'ethical' because they are 'based on' something which does not follow from the system itself. There is nothing in radical negativity that determines the use of the signifier antagonism, to call it that is an ethical decision. When

[3] Especially Mouffe has argued that the potential for antagonization/ politization of all social practices in itself grants the Political an ontological primacy. I have developed the critique of that argument elsewhere (Hansen 2014).

OM chooses the signifier antagonism, it is obviously to spark a politization, to make "the social world ... appear in a strongly political light." (23)

As I started noticing, I very much identify with the ambition of politization of social relations. However, starting from radical negativity and hauntology we must come to terms with such an ambition being an *ethical* rather than itself a political choice. It does not come about by itself, it must be enacted, and there is always the possibility that our social practices are not articulated in a political way. It might (paradoxically) be the case that a belief in the ontological necessity of everything social's antagonistic character makes it easier for people to act politically – sometimes it seems it is easier to mobilize for the inevitable. But theoretically we must come to terms with the radicality of negativity, it's complete lack of *any* positive characteristics. Negativity *as such*, 'is' a 'pure' blockade, an ultimate impossibility. To link it with the signifier 'antagonism' is to try to give it a 'positive' direction, to maintain some sort of 'ontological guarantee' (for politization). But we don't have any guarantees, not even for politization; it might however, be an even stronger (ethical) injunction for political action.

BIBLIOGRAPHY

Derrida, Jacques. 1973. Speech and phenomena, and other essays on Husserl's theory of signs. Evanston: Northwestern University Press.

Derrida, Jacques. 1994. Specters of Marx : the state of the debt, the work of mourning, and the new international. New York ; London: Routledge.

Hansen, Allan Dreyer. 2014. "Laclau and Mouffe and the Ontology of Radical Negativity". Distinktion: Scandinavian Journal of Social Theory 15 (3): 283–95. https://doi.org/10.1080/1600910X.2014.973895.

Laclau, Ernesto. 1995. "The Time Is out of Joint". Diacritics 25 (2): 86–96. https://doi.org/10.2307/465146.

Laclau, Ernesto. 1996. Emancipation(s). London: Verso.

Laclau, Ernesto (and Worsham & Olson) 1999. "Hegemony and the future of democracy: Ernesto Laclau's Political Philosophy". I Race, Rhetoric and the Postcolonial, 129–64. New York: State University of New York Press.

Laclau, Ernesto. 2014. The Rhetorical Foundations of Society. London; Brooklyn, NY: Verso.

Laclau, Ernesto, og Chantal Mouffe. 2001. "Preface to the Second Edition". I Hegemony and socialist strategy: towards a radical democratic politics 2.ed, 2.:vii–xix. London: Verso.

Luhmann, Niklas. 1990. "The Cognitive Program of Constructivism and a Reality that Remains Unknown". I Selforganization : portrait of a scientific revolution. Dordrecht; London: Kluwer.

Luhmann, Niklas. 1999. "Erkendelse som konstruktion". I Fra læringens horisont, 163–82. København: Klim. (Danish translation of Erkenntnis als Konstruktion)

Marchart, Oliver. 2007. Post-foundational political thought: Political Difference in Nancy, Badiou and Laclau. Edinburgh: Edinburgh University Press.

Thyssen. 2004. "Luhmann and Epistemology". Cybernetics & Human Knowing 11 (1): 7–22.

543 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 543-554
ISSN: 1825-5167

IN THE NAME OF THE FATHER: THE WEIGHT OF INHERITANCE IN OLIVER MARCHART'S *THINKING ANTAGONISM*[*]

VASSILIOS PAIPAIS
School of International Relations
University of St Andrews
vp31@st-andrews.ac.uk

ABSTRACT
Oliver Marchart's new book stretches his political ontology to its logical implications extending and reworking some of the central insights of Ernesto Laclau's post-Marxism. At the same time, however, Marchart may perhaps be too deferent to, or possibly overly invested in, Laclau's legacy in ways that threaten to compromise the radical potential of his own reconceptualisation of antagonism. This critical review seeks to uncover in Marchart's ontology of the political the untapped potential for a radical political stasiology by building on his earlier concept of political difference.

KEYWORDS
Political ontology, antagonism, political difference, stasis.

As someone who has been persistently prodding Oliver Marchart to stretch his political ontology to its logical implications (Paipais 2017a; 2017b), I cannot but praise the publication of *Thinking Antagonism* for taking a step to that direction (Marchart, 2018).[1] From a profound reconstruction of the post-Marxist concept of antagonism to the elaboration of a systematic 'ontology of the political' (p. 3), this volume takes Ernesto Laclau's post-Marxist insights to their logical conclusion, while further unpacking some of the implications of Marchart's own political ontology. At the same time, however, it leaves one with the impression that Marchart is perhaps too deferent to, or possibly overly invested in, Laclau's legacy in ways that threaten to compromise the radical potential of his own argument. At any

[*] Parts of this essay are based on my review of Marchart's book in *Constellations*, 26(3): 504-6 republished here with Wiley's kind permission.

[1] All subsequent references to Marchart (2018) will be indicated by using page numbers in the text.

rate, as this is a book that slaughters many sacred cows in philosophy and political theory, it may equally cause outrage, astonishment, disagreement, admiration, or unconditional praise, but only great books can engender such mixed reactions thanks to the wealth of provocative ideas and creative rereadings they propose.

THE PROMISE OF AN ONTOLOGY OF THE POLITICAL

Marchart's main objective in the book is to offer a political ontology – or, rather, an 'ontology of the political', as he puts it for good reasons – that fleshes out some of the ideas already inherent, but not fully spelled out, in Laclau's post-Marxism. In this respect, the book goes beyond the Laclau (and Mouffe, 1985) of *Hegemony and Socialist Strategy* and draws on some of the breakthroughs that Laclau achieved at a later stage, following Žižek's Lacanian critique, as outlined in his *New Reflections on the Revolution of Our Time* (Laclau, 1990), his *On Populist Reason* (Laclau, 2005) and his posthumous collection of essays, *The Rhetorical Foundations of Society* (Laclau, 2014). The central intuition Marchart borrows from Laclau (but also from Lefort, Mouffe, Nancy and other post-foundationalist thinkers) is that the political is the moment of institution/de-institution of society that, in line with the post-Marxist nomenclature, he calls antagonism. Yet, in Marchart, antagonism is inflated to become the name not only for the 'ontic' battles social actors conduct in society, but primarily for the 'political nature of social being as such' (p. 3). This is a maximalist claim that Marchart defends throughout the book, initially by offering a genealogy of the idea of antagonism that harks back to the legacy of German Idealism and Marxism.

The first part of the book expands on the main difference Marchart identifies between his ontological conception of antagonism and those older renditions of Marxism or some more contemporary ontological discourses, such as those offered by Michel Foucault, Bernard Stiegler, and Nicole Loraux, which Marchart deems as ontic polemologies that do not go far enough in their theorisation of antagonism. In a nutshell, his critique amounts to claiming that, after the Heideggerian attack on metaphysical foundations, 'we' have come to recognise that antagonism does not operate solely on the ontic level of conflictuality (as 'class struggle' or ontic 'polemology'), but it rather bears an ontological quality it shares with the Hegelian notion of radical negativity. In fact, Marchart audaciously brings together Heideggerian fundamental ontology, Lacanian psychoanalysis, and the Hegelian notion of *reflective negation*[2] to defend a reformulation of antagonism as

[2] In the *Science of Logic*, Hegel (1995: 407) carefully distinguishes two senses of negativity that in many ways resemble the Heidegerrian distinction between the ontic and the ontological. On the one hand, negativity as reflective designates the purely negative process of Becoming as self-differing or moving-away-from which is independent of specific content. Negativity here becomes the condi-

the inaccessible Real of political ontology, responsible both for the grounding of the social *and* for its unravelling in situations of crisis, be it either revolution, dissent or protestation (in a sense, as constituent power always mediated through ontic, either hegemonic or counter-hegemonic, politics).

In the second part of the book, Marchart outlines the 'symbolic onto-logic' of the construction of ontic politics corresponding to his radical rethinking of antagonism. Marchart is adamant that there are certain minimal conditions that need to be in place before any action is recognised as political. Faithful to the radical democratic tradition that equates politics with collective mobilisation, he restricts politics to an act of collective will, strategically pursued, aiming to 'usurp' the universal, i.e. create a chain of equivalences that would transform a mere sectional request into a social demand, with an eye on achieving a hegemonic status (so politics, even if not numerically, at least symbolically should be majoritarian targeting people's 'hearts and minds' as an expression of universal aspirations). Marchart consciously sides here with those definitions of politics that view it necessarily as militant or oppositional activism pursuing either hegemony or counter-hegemony building. Either way, social action for Marchart is worthy of the name politics only if it generates the very negativity that the political qua antagonism seems to be the marker of on the ontological level. Consequently, not everything is political for Marchart, but even within sedimented forms of the social (institutions, bureaucracies, even regular family or personal relations), the political qua antagonism lies in hibernation or, as Marchart somewhat poetically puts it citing Nancy, 'trembles' (p. 106) inconspicuously, awaiting reactivation through protest politics.

The next logical step in Marchart's radicalisation of the concept of antagonism is to make a claim which is even more provocative, yet follows directly from his conception of antagonism-as-the-name-of-the-political. Marchart's wager is that *thinking* itself is an inescapably militant, contentious, collective, and partisan activity, elevated to its true potential only when it goes beyond mere conceptuality, namely beyond serving as the theoretical component of the various scientific disciplines that sustain the sedimented or reproductive practices of a given society. Philosophy, in other words, assumes its true dignity, so to speak, only as far as it, not only reflects, but also critically enacts or reactivates dormant possibilities within the social (according to Marchart, only when ontology becomes *prima philosophia*). Marchart's radical re-conceptualisation of antagonism thus comes full circle. Thinking, being and acting are at once penetrated by the political, perceived as the

tion of possibility for any differentiation, identity, or particularity within the ontic world. On the other hand, negativity as qualitative is a mediated negation -reflecting the Spinozian dictum that 'all determination is negation'- which describes the way negation appears within existence as the affirmation or identity of a thing as differing from its own opposite and from everything else. This parallel between Hegel's and Heidegger's discourse is premised on their agreement that pure negative activity is only visible in the world as 'qualitative determinateness'.

elusive dimension of radical negativity that does not come from the 'outside' but is generated by the very constitutive incompleteness of the social, manifested in the politico-intellectual terrain through the restless repetition or succession of ontic conflicts.

ANTAGONISM OR *POLITICAL DIFFERENCE*? DIVIDING THE DIFFERENCE

This is a tall order, indeed. Antagonism becomes the very name of the political qua radical negativity.[3] Marchart blends his sources very skilfully but also often somewhat daringly. Heidegger and Hegel are intriguingly brought together in ways that can also be disconcerting, even for those like Marchart who reject Hegel's panlogism, since the Hegelian politics of negativity (or, rather, the Hegelian-Kojevian synthesis that Marchart defends) sits uneasily with late Heidegger's politics of affirmative passivity. One does not have to be an Agambenian to see that Marchart's too quick dismissal of the politics of affirmative passivity as passively nihilistic, anti-political, or even not really politics at all, accords primacy to a very specific (Machiavellian/Gramscian/Laclauian) understanding of political action that, even if not always directly voluntarist, it is at least identified with success, effectivity, and mastery in an uneven social terrain riven by power asymmetries and inequalities. While Marchart may claim that his affirmation of concrete politics and his refusal to recognise a politics of abdication, to remember Blanchot's (1986) coinage, from a harsh or unfavourable social reality is authorised ontologically, his very own formalisation of antagonism may be the first victim of such a narrow perspective. To paraphrase Agamben, antagonism as radical negativity/nothingness can easily become the final veil of language (i.e. a well-hidden ultimate foundation),[4] obstructing access to a view of *political difference* as a productive threshold where the political and its infinite cross-cuttings with politics are still indeterminable and thus open to multiple appropriations and diverse reincarnations.

As Marchart (2007) has previously shown, the difference between politics (any particular constituted order) and the political (the exception(s), contingency or pure difference that constitute it by transgressing it) is not simply another posited,

[3] Although it is not clear why antagonism should not rather be, as I will argue shortly, the name of the very *difference* between politics and the political, which would have perhaps saved Marchart from some unnecessary criticisms.

[4] 'Nihilism experiences this very abandonment of the word by God. But it interprets the extreme revelation of language in the sense that there is nothing to reveal, that the truth of language is that it unveils the Nothing of all things. The absence of a metalanguage thus appears as the negative form of the presupposition, and the Nothing as the final veil, the final name of language' (Agamben 1999: 47).

arbitrary structural necessity. It rather constitutes a necessary *quasi-transcendental* condition of possibility for any meaningful order of historicity to arise. Quasi-transcendentality, here, stands for the paradoxical operation of the political as both belonging to the social order by authorizing the principle(s) of its constitution *and* being in a relation of constitutive exception to it. And yet, Marchart often neglects to stress, or stress enough, that this is only half of the picture of the formal logic of double negation that governs *political difference*, namely that it is only the part that corresponds to the operation of the political as constitutive exception of every particular sociopolitical order. The other crucially important dimension is the radical impotence penetrating the political itself that corresponds to the idea of the Lacanian Real as inexistent, incomplete, 'non-All'.[5] If this is so, my impression is that Marchart may have better served the radical potential of his argument had he focused more closely on Lacan's formula of sexuation in articulating what is at stake in his wonderfully productive earlier concept of *political difference*. The latter signifies a radicalised, doubly split concept of antagonism that maps nicely onto the Lacanian idea of the absence of sexual difference, as the below long quote by Žižek (2012: 760-1) suggests:

> Sexual difference is thus ultimately not the difference between sexes, but the difference which cuts across the very heart of the identity of each sex, stigmatising it with the mark of impossibility... there is no relationship, *il n'y a pas de rapport sexuel* – the two sexes are out of sync...Lacan defines the desire of the analyst not as a pure desire...but as a desire to obtain absolute difference. In order for the difference to be 'absolute', it must be a redoubled, self-reflected difference a difference of differences, and this is what the formulae of sexuation offer: the 'dynamic' antinomy of All and its exception, and the 'mathematic' antinomy of non-All without exception. In other words, there is no direct way to formulate sexual difference: sexual difference names the Real of an antagonism which can only be circumscribed through two different contradictions.

The upshot of this formula is that the masculine logic of the political as constitutive exception to politics (the still Schmittian/Hegelian/Kojevian logic of antagonism as radical negativity) is doubly split by the feminine logic of the ontological-political as constitutively '*non-All*'. This is not, anymore, obeying the logic of the transgression that sustains the law (any hegemonic normative socio-political order and its transgression in the form of anti-hegemonic politics) but of love as fulfilment of the law (the double negation or division of the division that deactivates the violence of the law). Such a logic authorises forms of politics, namely incarnations of a 'non-All' universal, that operate as embodiments of failure, incompleteness, messianic weakness, brokenness; not only as the failure to fill the absent fullness

[5] The aspect of the political as the constitutive exception to politics corresponds to the masculine side of Lacan's formula of sexuation whereas the idea of the political as inherently incomplete or 'non-All' to the feminine side, see Žižek (2012: 764-771).

of society, but as renewal and hope, as the logic of transfiguration of the political itself, of what it means to act politically.

The double formalisation of *political difference* described here is not captured by the foundational prejudices of regional ontologies, but constitutes a *formal ontology* or, else, a type of political ontology that undermines the logic of foundationalism from within without falling back to either the abstract exteriority of a 'false' transcendence or the incessant immanence of a self-enclosed agonistic totality. Transcendence, in that sense, is neither exalted nor domesticated nor dismissed. It is rather reconstrued to signify the void within immanence as the condition of possibility for historicity itself. Critique then rests on this irreducible double gap (the gap between the Real and the Symbolic for Žižek or, as Benjamin and Agamben would have it, the Pauline 'division of the division') within historical forms of social identification that both enables social reproduction and prevents its ossification by producing a remnant that deactivates and denaturalises social and political order without discarding it.[6]

Such a critical formalism is also genuinely materialist[7] in the sense that radical negativity or pure difference understood as the 'internal-external' excess/gap of signification – that is, as emerging in the intersection of the Real and the Symbolic - explains empirical differentiation and multiplicity, not as emanating from the infinity of positive historical actualities (which would make the contingency of positive worlds not necessary but contingent), but rather from an originary antagonism (a globalised civil war or *stasis* as an ontological condition and a zone of indistinction between order and disorder) that makes these actualities (im)possible in the first place (see also Agamben, 2015; Vardoulakis, 2017). Such a civil war, such a *stasis*, becomes the ontological condition of (im)possibility of the politics/political double negation. Stasis, here, does not signify any prejudice in favour of ontic mobility, upheaval, anarchy, or irregularity. As the term's ambiguity itself suggests, denoting both immobility and unrest, *stasis* operates not only as the ontological condition of possibility for the constitution/de-constitution of any particular order, but also the internal block in any constituted order that undermines its fulfillment,

[6] Such a perspective that has recently inspired the work of Critchley (2012), Žižek (2003) and Agamben (2005) is often described as Pauline *meontology* from St Paul's First Letter to the Corinthians (7: 29-32) where the life of the messianic subject is described as an existence where every aspect of this world is experienced as passing away in a process whereby every worldly activity is not nullified by its opposite but suspended ('as though not', *hōs me*) in the nothingness that constitutes its groundless ground.

[7] In a counterintuitive critique of traditional notions of dialectical materialism, Žižek proposes an alternative understanding of the term based on the idea that we conceive the 'material' not as an all-encompassing fundament, a totalising ground of reality or history, but rather as 'non-All', as the marker of the incompleteness of being (see Žižek, 2011).

completion, innocence, and self-sufficiency. In other words, it stands in for *political difference* itself as a double caesura between politics and the political.

It is also important to note here that, unlike Agamben's (1998) excessive overidentification of sovereign power with governmentality (that transforms the physical existence of individuals into a political state of exception, which is paradoxically maintained into perpetuity), this reading of *political difference* as *stasis* conceives of sovereignty, not as necessarily murderous politics or biopolitical depoliticisation, but rather as 'nothing but a name for the impossibility of self-immanence and hence the designator of the infra-structurally necessary alterity that constitutes order' (Prozorov, 2005: 88). Sovereignty, then, rather than being necessarily disastrous or oblivious of the political, is itself this zone of indistinction or indifference that Agamben (2015: 11) ascribes to the concept of *stasis*. In particular, it stands for two ontological possibilities or, rather, it signifies two ways of instantiating the political: a) as a defensive, claustrophobic, and oblivious delimitation of the boundaries of political community sustaining a clear designation of the community's internal and external enemies (sovereignty as the restrainer (*katechon*) of social chaos and disorder and the guarantor of political unity), as in Schmitt (2003, p. 60; 2008, p. 92) and Machiavelli (1996), *and/or* b) as a constant interrogation of society's principle of constitution (see Lefort, 1988; Žižek, 1999; Marchart, 2007; Stavrakakis, 2006; Honig, 2009).

The second possibility should not be envisaged simply as perpetuating the structural impossibility of achieving another type of community, designated by various poststructuralist thinkers as the 'unavowable' (Blanchot, 1988), 'inoperative' (Nancy, 1991) or 'coming' (Agamben, 1993) community, lest this structural impediment -envisaged by Lefort as the 'empty place of power'- turns into another depoliticising device that may well imagine an agonistic politics of reform and refoundation, but could never fathom the possibility of absolute renewal or transformation of the political (see Wenman 2013). The evocation of the transgressive nature of the political and the unstable fixity of every constituted order can, in other words, almost imperceptibly be turned into a pretext for new forms of depoliticisation that may perpetually defer any commitment to dangerous or so-called 'lost causes' (see Žižek 2009).

It is for this reason that it does not suffice to defend the 'impossibility of society' as the ultimate hallmark and guide of a politics of repoliticisation and resistance. One needs to be mindful, here, of the possibility that a historicist understanding of antagonism may undermine the *truth* of antagonism itself. It is mainly for this reason that Žižek took issue with what he took to be a historicist appropriation of antagonism by early Laclau and Mouffe. In a critical review of *Hegemony and Socialist Strategy*, Žižek (1990) attacked the apparently innocent question of the relationship between antagonism and the theory of subjectivation in Laclau & Mouffe's landmark book. The argument is that antagonism undercuts the text's

insufficiently radicalised vision of the subject of the political. *Hegemony* remains trapped, argued Žižek, in an Althusserian vision of the subject, one which conceives of society as discursively hegemonised by 'subject-positions' each of which brings its own 'point of view' on political matters. As Brockelman (2003, p. 190) has noted, however, such a vision of the political implicitly already *substantialises* society –suggesting a master 'viewpoint' of the social itself, a viewpoint from which all the discourses of the 'subject-positions' are exposed as limited and ideological. Antagonism, then, becomes a form of historicism that reproduces the image of society as a dynamic, yet unpunctured, totality.

In that sense, when one prefigures the content of critical discourse or predetermines the meaning of emancipation, resistance, and solidarity or apriori stipulates that 'the name of politics is populism', one refuses the practical imperative implicit in antagonism –an imperative to contest the independence and finality of any substantial identity or ontic designation- that eventually does violence to the truth of antagonism, to antagonism *as truth*. Instead, as Žižek (2000, p. 100) writes, we should appreciate how

> the impossibility at work...is *double*: not only does 'radical antagonism' mean that it is impossible adequately to represent/articulate the *fullness* of society – on an even more radical level, *it is also impossible adequately to represent/articulate this very antagonism/negativity that prevents Society from achieving its full ontological realization.*[8]

As to how to project a formal condition so radical that it refuses to be hypostatised as content *or* the form of a content, Žižek's answer -repeated throughout his prolific writings- marries the Hegelian notion of 'concrete universality' with the Lacanian notion of the 'Real'. Antagonism punctures the very rift between form and content by simultaneously appearing at both poles of the *political difference*: the political cannot appear without the ordeal of politics exposing its radical nullity, while politics are always already penetrated by the political as the exceptionality grounding its very (im)possibility. Paradoxically, truth always emerges both as a particular ontic content –the problematic site of social definition/exclusion, the defining historical moment, etc.– and as the immanent void universal form/horizon that makes possible all those particular contents. In this peculiar double lack, antagonism challenges all 'pictures' of society, both one asserting that *there is One picture of society* or one name of politics and the one asserting that *there is no picture of society* (namely that all there is are hegemonic particularities usurping the

[8] Or as Žižek puts it, how antagonism arises immanently as the very logic of difference between Laclau's difference and equivalence (differentiality): 'it is not only that the difference between the field itself and its outside has to be reflected into the field itself, preventing its closure, thwarting fullness, it is also that the differential identity of every element is simultaneously constituted and thwarted by the differential network' (2012, p. 771, n48)

universal); for it insists on re-dividing the form within the particular content that produces it.

OSTINATO RIGORE INDEED

Such a formal political ontology that is trying to capture the truth of antagonism in double negation serves the same aspiration that drives Marchart's call for 'obstinate rigour' in intellectual engagement in the conclusion of his book. The supplementary claim, however, that such a paradigm is putting forward (in the Derridean fashion of both destabilising Marchart's intellectual edifice and enabling a different, slightly displaced, outlook) is that, if Marchart is to remain faithful to his own rigorous 'ethics of intellectual engagement' (p. 210), he should be able to envisage a form of politics that undermines the ability of protest politics (with populism as its master signifier *par excellence*) to monopolise what politics is. Put differently, he should be able to also capture, and so formalise, a type of politics as affirmative passivity rendering politics open to another use by 'saving' it from the very depoliticisation that a view of populism or protest politics as the absolute incarnation of the political-qua-antagonism would risk. The stakes here are high since this means that a truly radical formalisation of an ontology of the political qua antagonism (or, rather, *political difference*) may entail keeping the realms of thought and praxis distinct (yet not separate). Otherwise, one risks compromising thought (critique) by overcommitting to a form of militant politics or a paradigm of political activation (protest politics or populism as the name or minimal condition of politics), elevated to the privileged manifestation of ontological antagonism.

Marchart, of course, stresses more than once that, due to the incomplete nature of the social, any sedimentation of the political in the form of institutionalised hegemony is fated to crumble or, as Schürmann (2003) puts it, hegemonies are destined to be broken. Yet, a possibility he does not seriously entertain is that the blind spot of every hegemonic articulation (rhetoric, or discourse) is the suppression of its own internal other, which then authorises a paradigm of political (re)activation and militancy that rests on the (often violent or oppressive) denial of its own failure. By raising this point, I am not suggesting Marchart should rather side with Agamben, Benjamin or Schürmann, as opposed to Laclau, or proclaim anarchism or messianic nihilism, rather than populism or radical democracy, as the name of politics. I am rather arguing that an 'obstinately rigorous' (p. 211) *political* articulation of antagonism, according to Marchart's own terms, should be able to accommodate *both* 'onto-logics': that of the political as constituent power or force of grounding/de-grounding the social *and* as destituent power, as a 'weak' drive, always already penetrated by the splinters of deactivation (to jointly paraphrase Benjamin and Agamben) that may open politics to a new use beyond the unending hegemony/counter-hegemony dialectic as 'a brute *factum politicum*' (p.

208). Eventually, the vision of political ontology recommended here seeks to formalise both the Bartlebian politics of detachment, civil disobedience, or passive resistance *and* the Machiavellian/Gramscian/Laclauian model of political activation as both equally nameable forms of *political* praxis without foreclosing either. It, therefore, resists an exclusionary, absolute definition of politics as a discourse of mastery, efficiency, or will-to-power without re-inscribing this resistance into an economy of determinate negation.

Despite then his promising formalisation of antagonism, the legacy of Laclau may function as more than a straight-jacket for Marchart. It runs the risk of becoming a distorting mirror that reflects Laclau's own limited or one-dimensional appropriation of the *political difference* and holds back the resources – already inherent in Marchart's project – for a truly radical political *stasiology*[9] faithful both to thought (imagination/critique) and to politics (or, rather, its unpredictability, indeterminacy, and frailty). It is a testament to the brilliance of *Thinking Antagonism* that it charts the way to such a task by stretching Laclau's legacy to its very limits. However, it falls short of taking the final step. Inheritance is indeed a heavy burden, yet often nothing serves its full assumption better than the symbolic act of 'killing the father'.

REFERENCES

Agamben, Giorgio (2015), *Stasis: Civil War as a Political Paradigm*, (Stanford: Stanford University Press).

Agamben, Giorgio (2005), *The Time That Remains: A Commentary on the Letter to the Romans*, (Stanford: Stanford University Press).

Agamben, Giorgio (1999), *Potentialities: Collected Essays in Philosophy*, (Stanford: Stanford University Press).

Agamben, Giorgio (1998), *Homo Sacer: Sovereign Power and Bare Life,* (Stanford: Stanford University Press).

Agamben, Giorgio (1993), *The Coming Community*, trans. Michael Hardt, (Minneapolis: University of Minnesota Press).

Blanchot, Maurice, (1988), *The Unavowable Community*, trans. Pierre Joris, (New York: Station Hill Press).

Blanchot, Maurice (1986), *The Writing of the Disaster*, trans. Ann Smock (Lincoln: University of Nebraska Press).

Brockelman, Thomas (2003), 'The Failure of the Radical Democratic Imaginary: Žižek versus Laclau and Mouffe on Vestigial Utopia', *Philosophy and Social Criticism,* 29(2): 183-208.

[9] The term *stasis* holding in ontological indiscernibility both immobility and partisanship could perhaps be another suitable name for the *political difference*.

Critchley, Simon (2012), The Faith of the Faithless: Experiments in Political Theology, (London and New York: Verso).

Hegel, W.F. Georg (1995), *Hegel's Science of Logic*, trans. A. V. Miller, (Atlantic Highlands NJ: Humanities Press International).

Honig, Bonnie (2009), *Emergency Politics: Paradox, Law, Democracy*, (Princeton: Princeton University Press).

Laclau, Ernesto (2014), *The Rhetorical Foundations of Society*, (London and New York: Verso).

Laclau, Ernesto (2005), *On Populist Reason*, (London: Verso).

Laclau, Ernesto (1990), *New Reflections On the Revolution of Our Time*, trans. J. Barnes, (London: Verso).

Laclau, Ernesto and Mouffe, Chantal (1985), *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, trans. W. Moore and P. Cammack, (London and New York: Verso).

Lefort, Claude (1988), *Democracy and Political Theory*, (Cambridge: Polity in association with Basil Blackwell).

Machiavelli, Nicolo (1996), *Discourses on Livy*, trans. Harvey C. Mansfield and Nathan Tarcov, Chicago: The University of Chicago Press.

Marchart, Oliver (2018), *Thinking Antagonism: Political Ontology after Laclau,* (Edinburgh, UK: Edinburgh University Press).

Marchart, Oliver (2007), Post-Foundational Political Thought: political difference in Nancy, Lefort, Badiou and Laclau, (Edinburgh: Edinburgh University Press).

Nancy, Jean-Luc (1991), *The Inoperative Community*, (Minneapolis: University of Minnesota Press).

Paipais, Vassilios (2017a). 'Towards a Formal Political Ontology' In: V. Paipais, M. Mihai and M. Thaler eds. 'Democracy, Critique and the Ontological Turn', *Contemporary Political Theory*, 16(4): 519–523.

Paipais, Vassilios (2017b). Political Ontology and International Political Thought: voiding a pluralist world (Basingstoke: Palgrave MacMillan).

Prozorov, Sergei (2005), 'X/Xs: Toward a General Theory of the Exception', *Alternatives: Global, Local, Political,* 30(1): 81-112.

Schmitt, Carl (2008), Political theology II: The myth of the closure of any political theology, (Cambridge: Polity Press).

Schmitt, Carl (2003), The Nomos of the Earth in the International Law of Jus Publicum Europaeum, (New York: Telos Press).

Schürmann, Reiner (2003), *Broken Hegemonies*, trans. Reginald Lilly, (Bloomington: Indiana University Press)

Stavrakakis, Yannis (2006), 'Negativity and Democratic Politics: radical democracy beyond reoccupation and conformism' in L. Tønder and L. Thomassen (eds.), *Radical Democracy: politics between abundance and lack*, (Manchester: Manchester University Press), pp. 185-202.

Vardoulakis, Dimitris (2017), *Stasis Before the State: Nine Theses on Agonistic Democracy*, (New York: Fordham University Press).

Wenman, Mark (2013), Agonistic Democracy: Constituent Power in the Era of Globalization, (Cambridge: Cambridge University Press).

Žižek, Slavoj (2012), Less Than Nothing: Hegel and the Shadow of Dialectical Materialism, (London and New York: Verso).

Žižek, Slavoj (2011), 'Is it Still Possible to Be a Hegelian Today?' in Levi Bryant, Nick Srnicek, Graham Harman (eds.), *The Speculative Turn: Continental Materialism and Realism*, (Melbourne: re.press).

Žižek, Slavoj (2009), *In Defence of Lost Causes*, (London and New York: Verso).

Žižek Slavoj (2003), The Puppet and the Dwarf: The Perverse Core of Christianity, (Cambridge, Mass.: MIT Press).

Žižek, Slavoj (2000), 'Class Struggle or Postmodernism?' in J. Butler, E. Laclau, S. Žižek (eds.) *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, (London and New York: Verso).

Žižek, Slavoj (1999), The Ticklish Subject: The Absent Centre of Political Ontology, (London and New York: Verso).

Žižek, Slavoj (1990), 'Beyond Discourse Analysis' in E. Laclau, *New Reflections On the Revolution of Our Time*, trans. J. Barnes, (London: Verso).

555 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 555-580
ISSN: 1825-5167

THINKING ANTAGONISM (BY WAY OF APPROPRIATION)

DAVID PAYNE
Department of Rhetoric
Södertörn University Stockholm
david.payne@sh.se

ABSTRACT
This article critically explores Oliver Marchart's recent and notable book, *Thinking Antagonism* by way of the ideas of 'the proper' and appropriation. After presenting a broad overview of the post-Marxism of Laclau and Mouffe, and the specific ways Marchart further develops their arguments, the paper goes onto explore in what ways the thinking of antagonism, as Marchart discusses it, implies a rethinking of the political significance of appropriation and 'the proper', two terms that are not without ontological implications for post-Marxist and post-foundational political thought. In order to demonstrate this, the article seeks to show three things: (i) that the novelty of Marchart's thinking, as set out in *Thinking Antagonism*, is already engaged in a series of interpretive-appropriative acts, and it is as the outcome of these appropriations that Marchart's thinking on antagonism, alongside the traditions within which his thinking operates, and the idea of antagonism itself, show themselves in their proper light; (ii) that, while remaining unthematised, 'appropriation' nonetheless operates in significant ways in the process of Marchart elucidating central features of 'being-in-the-political' (the politics of naming serves as a test-case for this) and (iii) ontologically, Marchart opens up the possibility for thinking 'generalised appropriation' on the basis of de-propriation (or, as Marchart himself puts it, 'disowning'), though this is never explicated by Marchart. The article presented here thus invites a discussion surrounding the ontological synergy between antagonism and appropriation.

KEYWORDS
Marchart, Antagonism, Appropriation-Depropriation, the Political, ontology, post-Marxism.

> 'We dwell in appropriation inasmuch as our active nature
> is given over to language.'
> (M. Heidegger)

Oliver Marchart has established himself as one of the foremost thinkers to emerge out of the intellectual tradition coalescing around the post-Marxism of Ernesto Laclau and Chantal Mouffe. Their original purpose, presented in *Hegemony and Socialist Strategy* (1985),[1] was to offer a deconstructive reading of Marxism that would be in the service of two principal and overarching aims: (i) to recast the

[1] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy,* (London: Verso, 2001).

emancipatory project for the Left, as well as to elaborate on the strategic means by which this *political* project was to be effected, and (ii) to articulate a theoretical discourse that could provide an understanding of the complexity of social and political phenomena that relinquished neither explanatory nor analytical force. While for more than three decades the so-called 'Essex School' became the institutional setting for a wider collaborative elaboration and application of Laclau and Mouffe's central ideas – generating a profusion of empirical analyses and studies on social and political phenomena as well as giving rise to innumerable texts proposing minor conceptual refinements and exegetical clarifications – Marchart's thought stands somewhat apart. Apart, though all the while remaining every bit a part of this living tradition. If permitted to begin with a statement that may confound, we can say that the precise distinctiveness of Marchart's thinking shows itself against a background with which his thought remains utterly consequent and consistent. Indeed, we can go so far as to venture that what is most distinctive about Marchart's *Thinking Antagonism* is what binds itself all the more rigorously to a common core of presuppositions and ideas surrounding the specificity, primacy, and conflictuality of political practice. This, I will contend is what defines – in texture, in style, in purpose – the 'proper' of Marchart's thinking; admittedly a 'vexing' or 'troublesome' term that I will develop later,[2] but for the time being is to be glanced from two principal aspects, namely in the two senses of (i) the proper as what makes something belong to something else (i.e. what is *proper for* Marchart's thinking to be immediately recognisable as belonging to the post-Marxist tradition) and (ii) the proper as that which 'stands out' in its singularity (i.e. what is *proper to* Marchart's line of thinking).

1. AFTER-THOUGHTS

Admittedly these are some odd remarks with which to begin, not only because (as will be discussed later), the notion of the 'proper' (and its rich stream of cognates) would appear to be at the far edges of Marchart's thinking, and for this reason would seem to function above else as a 'provocation', but owing to the fact that by

[2] Before going any further, a conceptual clarification is required. What is stake in the following set of reflections concerning Marchart's recent book, *Thinking Antagonism: Political Ontology after Laclau,* (Edinburgh: Edinburg University Press, 2018), is an understanding of the 'proper' with respect to a particular relation of 'belonging'. It does not directly touch on the question of the 'proper' with respect to the 'clean' or the 'pure' (for which ideas of the 'improper' or 'impropriety' would constitute counterpoints). Not, then, an issue of 'propriety', 'decorum', 'integrity', or other such terms that are related to 'social mores'. The discussion developed here will rather play on the following filiation of terms: 'ap-propriation', 'ex-propriation', and 'de-propriation', which lend themselves to thinking the 'proper' ontologically (and which therefore has the merit of thinking with Marchart on the same 'terrain'. In order to make the question of belonging at issue here, the German language better points out, what at root, is at stake: *eigen*, *Eigenschaft*, *Eigentum*, *An-eignung*, *Ent-eignung*, *geeignet*, *eigentlich*, *Ereignis*.

beginning in this manner we are left with a certain paradox: how can the distinctiveness of a certain thinking be indexable on the basis of what it is entirely congruent with? To set things in their correct light, let us first recall how Laclau and Mouffe themselves begin *Hegemony and Socialist Strategy* with a direct reference to Descartes' *Discourse on Method:*

> Travellers who, finding themselves lost in the forest know that they ought not to wander first to one side and then to the other, nor still less, to stop in one place, but understand that they should walk as straight as they can in one direction, not diverging for any slight reason, even though it was possibly chance alone that first determined them in their choice. By this means if they do not go exactly where they wish, they will at least arrive somewhere at the end, where probably they will be better off than in the middle of a forest.[3]

This would, phrased in other terms, be the ethical injunction of *ostinato rigore* to which Marchart will draw out at the very end of his book, *Thinking Antagonism,* as standing as the intellectual insignia (first pronounced by Leonardo, and also underlined by Ernesto Laclau and Mouffe) under which any act of thinking equal to its own possibility must submit:[4] a thinking that does not 'waver' or 'deviate' from its course 'no matter how furiously the wheel of fortune is turning', of 'not abandoning [at the first sign of the turning of the bell-weather] the very *cause* of one's actions'.[5] (The cause of thought and action will, undoubtedly, be key here , though its naming will be held in abeyance for a few moments longer.) What, at this point, needs underlining is how *ostinato rigore,* along with the Cartesian figure of the stranded and lost travellers finding their way out of obscurity, are no avatars of dogmatism. What they both point towards is the topological structure through which thinking operates: namely, that the condition for thought (the facticity of contingency) and the conditioning of thinking (in the necessity that arises therefrom) constitute a Möbius band, making the two moments ultimately indistinguishable from one another. Which is to say: as something contingent, the precipitate for thinking is not thought itself, but what comes from 'elsewhere', irrupting from outside of the cogito, triggered as a disturbance that 'touches' from without. But the contingency of this incipience (of whatever calls us *into* thinking) nonetheless issues us with a sense of necessity, the meaning of which only becomes clear once thinking is already underway; that is, once thinking, conditioned by what is outside of itself, becomes (reversibly) its own condition, and proceeding along its *hodos* unfolds its own internal logic (obstinately and rigorously) to the utmost degree, transmutating this thought back onto the real that initiated it. All this bears on what Marchart, in his *Thinking Antagonism,* identifies as thinking's implicative structure: 'of folding

[3] Descartes, cited in Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy,* pp xxii-xxiii.

[4] Oliver Marchart, *Thinking Antagonism,* p211-212.

[5] Ibid, p213.

ourselves back into the matter of our thought and of unfolding thought into an ontology of ourselves'.[6] The significance of this helps us in a provisional manner to locate the distinctive quality of Marchart's thinking, and how all the while this appears on the basis of following the common line that defines the post-Marxism of Laclau and Mouffe.

Returning to the Cartesian example, though, we may well ask the following: how far should the stranded travellers proceed without either deviation or termination? Does *a* thinking ever reach a moment of repose? Does it ever find itself in a situation where it declares 'enough!'? Not necessarily because that line of thought has reached a point of self-sufficiency where, self-satisfied, it understands itself as fulfilled, as having reached its culmination, or telos, but because it has, for one reason or another, exhausted itself; reaching a plateau or brushing against its own limit, stumbling against its blind spots, it retreats into itself, and says, exasperatedly, 'no more!'; 'no more can the saying of a particular line of thinking be expressed in a way other than as it has already been said'. Here, however, we locate Marchart's ingenuity. His wager? That those travellers (Laclau and Mouffe) and fellow travellers, who have proceeded along the sign of 'post-Marxism', have not drawn out the implications of this mode of thought to the fullest and utmost degree; they have flinched, equivocated, recoiled, or stepped back from their vertiginous insight, which first gave direction and impetus to their central political intuition. From what, then, have they turned away? From drawing out the full and far-reaching consequences of the idea of 'antagonism', the *conditio sine qua non* of social being, the *name* for the groundless ground of being, and the 'cause' of thinking. In some cases (as in Laclau himself) this stepping back is conceptually subtle, though all the more far-reaching because of it (i.e. in his essential essay, 'New Reflections on the Revolution of our Time' (1990), Laclau would end up subordinating 'antagonism' to the notion of 'dislocation' as a more basic and metaphysically neutral category in capturing the constitutive lack of both the structure and the subject, one that would not presuppose 'antagonism' or 'politics' as a necessary result of the disclosure of the lack in the structure);[7] in other cases (as in Mouffe) this stepping back is more of a

[6] Oliver Marchart, *Thinking Antagonism,* p159.

[7] Cf. Ernesto Laclau, *New Reflections on the Revolution of our Time* (London: Verso,1990). The basic question is how are we to understand the following statement from Laclau: 'To understand social reality, then, is not to understand what society is, but what *prevents it from being.*' p44. Is it to be accounted for structural dislocation or antagonism? Everything will hang on this question for Marchart. As a counterpoint, this is a discussion that has been taken up by Allan Dreyer Hansen, in his 'Laclau and Mouffe and the ontology of radical negativity', *Distinktion: Journal of Social Theory* 2014, 15:3, who while affirming the ontological principle of negativity will not make antagonism co-original with it. For what it is worth – though this will not be the opportunity to discuss this particular matter – I have certain sympathies with the adjusted position of Laclau's from 'New Reflections', and thus, by extension, with Hansen Dryberg's arguments, as set out in his article. Essentially, the risk with equating the abyssal ground, negativity, or the difference between being and beings qua difference with antagonism (or, and this boils down to the same issue, with equating the ontological difference

stepping sideways (i.e. in that while recognising the ontological primacy of antagonism she ends up (i) limiting her understanding of antagonism to a notion of conflictuality modelled on the friend-enemy distinction of Schmittian provenance, and because of this (ii) seeks to limit antagonism through sublimation by means of agonism); in other cases still, this stepping back amounts to conceptual domestication and political sanitisation (insofar that 'antagonism' is bleached of its political and ontological tonalities, becoming but an empty husk, part of a language-game that researchers like to play in offering up analysis of their chosen empirical datum in exchange for funding grants). We could go on...

And yet, we should (as Marchart does) recall the merit of a line of thinking, traceable back to the publication of *Hegemony and Socialist Strategy,* that reframed the discussion surrounding the nature of social and political struggle, bringing into the open the idea of antagonism, which, as a non-relational relation, could place in starker relief the genetic conditions from which all hitherto struggles come to play themselves out on the terrain of the social. By now, we all know where this route would lead and how it proceeds. The break with Marxism, and the concomitant constitution of Post-*Marxism*, would consist in:

(i) Exposing the subreptic fallacy of Marxism – namely its confusion of class struggle, itself but a historically conditioned appearance of political struggle, to be the a priori form through which all political conflict expresses itself; an amphibologous form of reasoning that ended up placing fundamental limits on Marxism's own visibility vis-à-vis the vicissitudes and polymorphous character of social struggle.

(ii) While exposing Marxism's limits, this meant at the same time not unmooring oneself from all transcendental riggings, simply to dive into a sea of appearances and a dispersal of heterogeneous cases – an act of thought's self-abdication that would desist any possible inquiry into general conditions for struggle as such. Instead what was required was a different way of re-posing the question surrounding those transcendental conditions making intelligible the historical appearances of struggle (of which class struggle would doubtless be one of, but not its privileged forms). This would need to be achieved not by simple decree, in elevating a historical appearance to the status of an indubitable ground and unsurpassable horizon, but by accounting for the conditions under which the objective field of the social is constituted as such, and how the subversion of that field is itself possible; genetically this would involve the very inquiry into the forming of form, into the appearing of political appearances, and into the structuration of the structure. It would refer back, to (quasi-)transcendental conditions of possibility. These operations would be articulated in terms of discursive conditions, for which an entire set of articulated

between being and beings with the politological difference between the political and politics) is the *unilateralisation* of the political, which, ends up runs the risk of obscuring the specificity of other modes of being, forms of practice and thinking. The specificity of art, poetry and literature would be three examples, that should not be reduced to political, and whose relative autonomy as modes of thought and practice should be thought on their own immanent terms.

categories were required (e.g. the field of discursivity, the relation between 'elements' and 'moments' within a discursive totality, 'nodal points', 'empty' and 'floating signifiers', the logics of 'equivalence' and 'difference', 'constitutive outside', 'antagonism', etc.). This inquiry amounted to providing an understanding of social and political life and political with, in Kantian terms (albeit radically modified), a transcendental logic, that is, a politico-logic of the social as such.

(iii) In politico-*logical* terms, this entailed a radical questioning of the basic categories that had set the basic grammar for thinking the very nature of struggle,[8] and that had historically taken one of three forms: (i) notions of logical contradiction, specifically the law of the broken middle (of Aristotelian provenance) – taking the form of either 'A' or 'non-A' – for which the fusion of opposites remained but an instance of inexplicable unreason, and must be proscribed as an illicit instance of discursive thought; (ii) the Kantian understanding of real opposition (*Realrepugnanz*), according to which oppositional forces take the form of really existing objects, as is the case with the collision of two carriages, and (iii) the Hegelian idea of dialectical contradiction that on account of positing the unity of logic and the real, took the logical category of contradiction to be in fact constitutive of reality, the merit of which was to retain both an idea of negativity (lost in Kant's idea of real opposition), and a sense of real movement inherent in contradiction (absent in the classical Aristotelian idea of logical contradiction) while nonetheless having the significant drawback of positing the dialectical unity of opposites (the identity of identity and non-identity). Breaking simultaneously from all three of these models, Laclau and Mouffe inquired into how political struggle must be re-thought in order for it to be understood as an antagonistic relation, *stricto sensu,* namely a relation of non-relation fundamentally exposed to a radical negativity, preventing each part of the antagonistic relation from constituting itself qua identity. Antagonism, while an idea that Marx himself and the Marxist tradition had nominally affirmed, they did so without having the categorial means of thinking it through adequately, resulting in a vacillation between the 'idealism' of Hegel's dialectical contradiction (e.g. Lukacs, Karl Korsch) and the naturalism of the Kantian notion of real opposition (principally in the notable work carried out by Della Volpe and Lucio Colletti).

[8] Laclau and Mouffe dedicate some notable space to discussing this in *Hegemony and Socialist Strategy*, see: pp . However, it is Ernesto Laclau's essay 'Antagonism, Subjectivity and Politics', in *The Rhetorical Foundations of Society,* (London: Verso, 2014), pp121-125 that provides the fullest and most elaborated exposition of the issues at stake. Parenthetically, it is interesting to note the significance of this particular text of Laclau's for the architecture of Marchart's own thinking, as presented in *Thinking Antagonism.* While, arguably, Laclau's essay 'The Impossibility of Society', reprinted in *New Reflections on the Revolution of our Time,* pp89-93, served as the key text in Marchart's previous and significant book *Post-Foundational Thought* (at least with respect to the final chapters that focus on Laclau and Mouffe), then in his new book it is Laclau's 'Antagonism, Subjectivity and Politics' that provides the central stimulus for the novelty and development of Marchart's arguments.

Above, we have the three principal merits of the position that Laclau and Mouffe first staked out, prising open a new terrain for thinking political antagonism, riveting antagonism to an understanding of political life. To a *certain* degree, an insight is reached in Laclau and Mouffe's thinking that, while always-already at work in the history of western thought and practice, is finally sketched out beyond any abstract and simple cosmological postulate that would simply declare that 'all is struggle'. This was achieved by setting the matter within a more analytically rigorous field of concepts and transcendental categories, which, as part of this procedure meant dislodging the outmoded categorial baggage by which an understanding of struggle had been couched.

While rigorous and in of itself exhaustive, for all that their undertaken has, according to Marchart, only unfolded the centrality of antagonism to a certain degree, and not to the fullest (which is to say, its *utmost*) degree. Here, then, we return to Marchart's wager: to think antagonism not *only* means tracing antagonism as a phenomenon, a mode of relation, or, even, as part of a transcendental argument that accounts for the appearance of antagonism as the very possibility of and for politics (i.e. what must be presupposed about the nature of political being in order to think the appearing of antagonism etc.), but to have antagonism orbit around the issue of a general and fundamental ontology, inquiring into being *qua* being. This means for Marchart re-routing the discussion of antagonism from 'political theory-building' into a strictly philosophical line of question surrounding the political nature of the being of social entities *in toto*, (that is, insofar as the interrogation into being remains distinctly and uniquely philosophy's concern).

2. WHAT COMES AFTER? PHILOSOPHY, MINOR AND MAJOR

This would thus constitute Marchart's 'move beyond', a one step further to be taken: a 'Laclau beyond Laclau' (or an 'after' Laclau), as Marchart himself pronounces.[9] This gesturing towards a 'Laclau beyond Laclau' is in no way an act of iconoclasm. It remains the most fitting way to honour his thought.[10] Here we only need to recall the way that Laclau will draw to a close the introductory remarks to his 1990 essay 'New Reflections on the Revolution of our Time', with reference to the Wittgenstein of the *Tractatus*: 'My propositions serve as elucidations in the following way: anyone who understands me eventually recognises them as non-

[9] Oliver Marchart, *Thinking Antagonism*, e.g. pp24-36, pp43-44, pp56-58, pp206-07

[10] As Heidegger reminds us, what call us into thinking (i.e. what provokes thought and gives cause for thought) is what is most problematic, what is deserving of the most severe form of questioning. And this way into thinking is what gives thanks. Martin Heidegger, *What is Called Thinking?,* tr. J. Glenn Gray (New York: Harper Collins, 2004).

sensical, when he has used them – as steps – to climb *beyond* them. (He must, so to speak, throw away the ladder after he has climbed up it.)'.[11]

As already noted, this step 'beyond' is the path into philosophy, and the affordance into fundamental ontology, with which antagonism is identified as the ungroundable ground of being. Although, we see within the pages of Marchart's inquiry that the tenor and texture of this philosophical inquiry rightly modulates. Which is to say, his appeal to philosophy is expressed both emphatically and meiotically, remaining, respectively, 'less' and 'more' than what can be presented 'non-philosophically' (e.g. 'theoretically' or 'politically').[12] Philosophy is, to put it in the medieval formula that Marchart opts for, *major et minor se ipso*.[13] This modulation of the philosophical gesture can be traced in several ways. For example, when framed in terms of a mode of questioning, the step 'beyond' appears very slight. Here, Marchart recalls that while the question Laclau posed was 'what is *an* antagonism?', the philosophical inflection placed on the same question takes the following form: 'what is antagonism?'.[14] The presence and absence of the otherwise unsuspecting indefinite article would thus appear to mark the space beyond. In shifting register from 'an antagonism' to 'antagonism' per se, one marks out a space 'beyond Laclau's' questioning that takes as its starting point not *any* actual (or possible) form of antagonism as an irruption of conflict *within* the social, but as the social's spectral (groundless) ground, pervading all relations, regions and modes of being: antagonism continues in silence, the background hum, the tremorous ground, the tremulous quality by which beings are imbibed.[15] Certainly, the nature of this beyond can be amplified, but in a way that rephrases Marchart's philosophical question into – what is equally part of philosophy's armoury – the apophantic statement, which can be expressed as *what is: antagonism*. The colon, operating as a copula, makes an identity between 'being' and 'antagonism' (they are the same). This, then, the more emphatic form of expressing 'the beyond', is consistent with a set of claims Marchart makes, occasionally veering into the language of ultimates (even if antagonism is the ultimate that vanquishes the need for all ultimates): 'the *final* law of being'[16] (the Law to end all laws), 'the *final* name of being'[17] that assumes the cover of *all*

[11] Ludwig Wittgenstein, cited in Ernesto Laclau, *New Reflections on the Revolution of our Time,* p5.

[12] Oliver Marchart, *Thinking Antagonism,* p180.

[13] Oliver Marchart, *Thinking Antagonism,* p5.

[14] Ibid, p61. Marchart never flinches from the metaphysical implications of his (or 'our') position. 'Our': not simply as so to say sympathetic readers of his text, who are committed to proceeding with him in taking 'the further step'. But, and this is a key question that would involve much discussion – 'our' in the sense that 'antagonism' is the historial name for being, in our post-metaphysical age. To what extent does history 'send' this name to 'us'?

[15] Ibid, pp100-8.

[16] Ibid, pp37-40.

[17] Ibid, Ch.7.

social being[18] and for which no thing evades its capture. Between the short shuffle and the long stride, Marchart indexes this *step beyond* in a further way, drawing the line that needs to be traversed between two different ways in which the 'being-question' is approached. Marchart will thus instructively propose a distinction between, on the one hand, 'a political ontology' (which is essentially what Laclau committed himself to developing, and that many of those who have followed him (and Mouffe) have remained faithful to), and, on the other, 'an ontology of the political' (which Marchart seeks to stake out).[19] This is, then, where the step beyond finds its stride. On the hither side, 'a political ontology', which focuses on the internal constitution of the political as it is set against and over sedimented social practices, but (as the adjectival marker indicates) constricts its purview towards being to what strictly refers to entities that have political provenance. On the other side, an 'ontology of the political', which, as the use of the double genitive indicates, is not just an ontology that pertains to a region or field we call the political (however broad and general this field is, as is certainly the case in Laclau's (and Mouffe's) work). But traverses and intersects all spheres, to the point that political ontology becomes pleonastic: 'the political' (antagonism) and 'being' (antagonism) are one and the same.

If there is an ontology that *belongs* to politics *qua* political, then the political belongs to ontology; the political act is inscribed already in the interrogation of being.[20] Being and thinking are hinged by way of the political. It is through this originary binding, that Marchart can crown politics as 'first philosophy' (the most recent coronation, after 'metaphysics', 'theology', 'ontology', 'ethics', and 'literature').[21] This way into the philosophical is precisely the route that 'post-Marxism' in its Laclauian and Mouffian iterations have not been consequent in pursuing, along with pushing

[18] Ibid, p157.

[19] Ibid, This distinction is clearly explicated by Marchart on pp24-26. There are, however, textually some instances where the distinction at stake becomes less clear cut, and blurred. The sliding between a 'political ontology' and an 'ontology of the political', which occurs from time to time, might be owing to the fact that we are not dealing with differences of kind or even differences of degree, but two constitutive parts that a post-Marxist philosophy of antagonism requires. Thus, a relation of complementarity. For this reason, at one and the same time, Marchart could reasonably shift (as he does) between these two registers. The question, though, is whether what Marchart presents as part of a philosophical discourse on being (under the locution, 'an ontology of the political') does not unsettle some of the conceptual furnishings and question some of the modes of reasoning on which the 'political ontology' a la Laclau is based?

[20] Ibid, see in particular: pp170-80.

[21] Ibid, p171. Marchart writes: 'a post-foundational ontology will thus retain the traditional status of a *metaphysica generalis* or *first philosophy*, except that its metaphysical claims with regard to an ultimate foundation are seriously weakened.' Interestingly, Marchart is a little more strident in his previous book, where he writes: 'ontology must aspire to be an ontology of all being and yet, in doing so, it can only proceed from a particular, 'ontic' region. Every *prima philosophia* is always and can only be a *philosophia secunda*, and nevertheless will have to claim the impossible status of a first philosophy. This impossible, and yet necessary, role of a post-foundational *prima philosophia* can today, as will be elaborated upon in the concluding chapter, only be claimed by the hitherto marginalized sub-discipline of *philosophia politica*.' *Post-Foundationalist Political Thought*, p83.

antagonism towards the further limits: Laclau, in subordinating 'antagonism' to the (onto)logically prior notion of 'dislocation', which, in a metaphysically more neutral way, understands 'antagonism' (and thus politics) as one possible outcome of presumably a wider set of non-antagonistic (and thereby non-political) possibilities, ends up sequestering the scope of his own theory and introducing equivocity into some of the fundamental claims he otherwise makes about the primacy of politics; and Mouffe, in understanding agonism as the ethical conduit through which antagonism is politically to be managed, turns away from examining the political and ethical injunctions issuing from antagonism itself.

3. IN ITS PROPER LIGHT: APPROPRIATION-INTERPRETATION-PROJECTION

The above has served as the backdrop against which the *distinctive* 'hallmarks' of Marchart's thinking show themselves, while remaining consistent and consequent in pushing the *common* line that has come to define the post-Marxism of Laclau (and Mouffe). It is, to use the terms I used at the beginning, what is proper to Marchart's thinking, alongside what is proper to the tradition, in whose name he takes up the task of thinking by means of his further interpretive and constructive work. What is the nature of this interpretive work, which is doubtlessly integral to (the) thinking (of) antagonism, that Marchart himself performs, and that we are enjoined to follow? It is an act of ap-propriation. Here, we are first to encounter appropriation as an interpretive-appropriative act. I will suggest here that the interpretive-appropriative act involves a *making* 'proper' in the absence of the 'Proper' (i.e. something that out of a common or shared background, reveals itself in its distinctive and peculiar light through a process of appropriation (as gathering and projection)).[22] Marchart takes up the tradition of post-Marxism, and the wider filiation of thinkers from out of which a thorough inquiry into antagonism is born (beginning with the Kantian antinomies in the 'Transcendental Dialectic' from the first *Critique*, passing through German Idealism and Hegel's idea of 'the labour of the negative', and Marx's primacy of class struggle and the antagonistic relation between the forces of production and the social relations of production).[23] In taking up both the post-Marxism of Laclau (and Mouffe) and its antecedents, Marchart does not simply reproduce an intellectual line that, as an objective datum, can simply be read off the legible face of the history of philosophy. Nor is it the case that the interpretation he offers amounts to an articulation of thoughts and ideas cobbled together, based on his own subjective whims. Neither a taking possession or making something 'one's own' – in the sense of 'a taking ownership' by a subject entirely in possession of itself – nor an idea of a tradition in possession of itself. The interpretive-

[22] Sections 6, 7, and 8 of this text will develop the point in greater detail.

[23] Oliver Marchart, *Thinking Antagonism*, pp47-54.

appropriative act, which sets Marchart's thought and the tradition it is tasked with thinking in its proper *qua* distinctive form, is a pro-jection (not an intro-jection); a projecting outwards. As projection, it projects a 'world' (as the phenomenological-hermeneutic tradition would have it),[24] allowing the 'proper' to come into itself by moving beyond itself as a result of the new discursive space into which it is brought.

Here, the 'proper' is seemingly varifocal. At one and the same time it refers to what is 'proper' to Marchart's thinking, to the immediate intellectual context (post-Marxism) within which Marchart's thinking operates, to the wider philosophical filiation (Kant-Hegel-Marx-Heidegger) that prepares the way to think antagonism as a central ontological category, to the notion of antagonism itself, and finally to antagonism *eo ipso*, 'set free to stand on its *own*';[25] as Marchart tellingly and instructively writes. These are all different ways in which the 'proper' figures. Crucially, all these ways are gatherable under the same appropriative process. They are conjoined as part of the same projection of a world, each revealing itself in its own distinctive and singular light by virtue of 'fitting' together (with respect to what is *suitable* and *appropriate*, on the one hand, and what is *articulated ,* on the other). Marchart's book is thus the site and the result of this interpretive-appropriative-projection, which, drawing on a formulation from Paul Ricouer, makes available 'new modes of being – or [...] new 'forms of life' – *giving* the subject new capacities for knowing himself'.[26] What Marchart brings to view is a mode of being that is fundamentally attuned to being qua political; 'politicality' becomes the qualia of social existence.

4. THE WORLD THAT OPENS-UP: BEING-IN-THE-POLITICAL

In *Thinking Antagonism,* the world, which, as an outcome of appropriation opens up for us, and which makes available a mode of being attuned towards the political nature of things – co-implicating us in a new mode of thinking and acting – comes together in Marchart's notion of 'being-in-the-political'.[27] While the status of this locution (vis-à-vis the Heideggerian idea of 'being-in-the-world as the existential a priori for Dasein) is admittedly equivocal (i.e. is being-in-the-political simply analogically connected to being-in-the-world, or is a structural homology being intimated, or even, as what makes possible the worlding of worlds is being-in-the-political ontologically prior?),[28] what we can say is that 'being-in-the-political' performs three functions: ontological; ethico-political, and reflective.

[24] Cf. Martin Heidegger, *Being and Time*, tr. John Macquarrie and Edward Robinson, (Oxford: Blackwell, 1980), esp. ¶ 31-32. Paul Ricouer, *Hermeneutics and the Human Sciences*, ed. & tr. John B. Thompson, (New York: Cambridge University Press, 1981), pp91-144.

[25] Oliver Marchart, *Thinking Antagonism*, p47.

[26] Paul Ricouer, 'Appropriation', *Hermeneutics and the Human Sciences*, pp154-55.

[27] Oliver Marchart, *Thinking Antagonism*, e.g. p192, p206.

[28] Two interesting passages. In the first, Marchart suggests an identity (or equivalence, (see p20) between 'being-in-the-world' and 'being-in-the-political'. Accordingly, he writes: 'Being-in-the-World,

First, *ontological*. For Heidegger in *Sein und Zeit*, the 'world' is understood as the necessary existential structure for Dasein in its everyday practical dealings and encounters, it serves as the ground and horizon against and over which other beings as well as Dasein's own being reveal themselves, and against which Dasein's own possibilities become a matter for it. As that which brings being into appearing without itself being apparent, the world is the transcendental field upon which our understanding of things and self-understanding operate.[29] When Marchart chooses to speak in terms of 'being-in-the-political', the shift from 'world' to 'the political' is not a dismissal of Heidegger's idea of 'being-in-the-world'. It builds upon it by underwriting it. It first and foremost places a different inflection on the phenomenological-existential understanding, and the play of world-ground-Dasein-freedom that opens up for an existential analytic of Dasein as being-in-the-world. As Being-in-the-world, Dasein is not a being positioned alongside other beings; not only is it correlated to the world, its being lies in its ek-sistence (in it standing out, always ahead of itself). This specific relation to the world is defined by way of not only its projection of possibilities, but its thrownness (*Geworfenheit*). The animal, the mineral, the object, may be parts of a world, but they are in fact worldless. In being thrown, Dasein shows itself to be worldly in that it is bound up with a transcending movement. Thrownness plays a double role with respect to ascertaining the precise relation between being and world: it shows up human Dasein's finitude and freedom. It is for this reason that Heidegger will, in his 1929 essay, 'On the Essence of Ground', that human Dasein shows its peculiarity by virtue of it giving ground.[30] Marchart's idea of 'being-in-the-political' becomes relevant here inasmuch that it is not, per se, Dasein's transcendence (indicated through human freedom and finitude) that accounts for the grounding operation of world; the *political* carries this mantle. The grounding operation is no longer to be thought in terms of the existential structures of human Dasein (an investigation with which the later Heidegger will in any case

as was argued from a left-Heideggerian perspective, should be understood as being-in-the-political.' (p88). In another passage the precise relation between 'being-in-the-world' and 'being-in-the-political' takes on a different inflection. On p192, Marchart argues that political thinking demands that we implicate ourselves into our being-in-the-world in terms of our 'being-in-the-political'

[29] Jan Patočka, *Body, Community, Language, World,* tr. Erazim Kohák and ed. James Dodd, (Illinois: Open Court Publishing, 1998), pp99-107.

[30] Heidegger writes: 'Freedom as transcendence, however, is not only a unique "kind" of ground, but the origin of ground in general. Freedom is freedom for ground'. The echoes between this and how Laclau understands the emergence of the subject in the disclosure of a dislocatory experience are extraordinary, according to which 'dislocation is the very form of freedom'. See: pp43-44. The significant thing here is that Marchart goes further, removing the vestiges of transcendence that cling to Laclau's understanding, and that are doubtless a theoretical-effect from privileging dislocation as an ontological category. As I understand him, Marchart's notion of 'being-in-the-political' marks an 'immanentisation' and an 'a-subjective' turn that is the direct outcome of him remaining entirely consequent with the riveting of antagonism to being.

dispense with), but to the transimmanent and 'a-subjective force of the political'.[31] While the existential analytic of Dasein draws out the condition of being-in-the-world in the laying hold (projection) of possibilities in its thrown state as already being involved with entities, with others and with situations it practically encounters, being-in-the-political accounts for the re-possibilisation of possibilities, the recasting of those meaningful structures within which possibilities are taken up in orienting us in the world. Invoking a line from Beckett's 'Westward Ho' ('say ground. No ground *but* say ground'), the political becomes the privileged operator in an interminable grounding operation. There is nothing that is not itself grounded;[32] the grounded ground, as conditioned ground, is the only available ground from which a 'world' (qua social whole)[33] is formed. The political is the name for both the de- and re-grounding of the transcendental field upon which our being-in-the-world is mounted, and for which actual possibilities become a matter for us; antagonism (and not the anxiety of Dasein) discloses the abyssal ground upon which all grounds (which, as an act of grounding) are themselves grounded. To shift idiom in order to sharpen the switch from 'being-in-the-world' to 'being-in the-political': whatever shows itself as meaningful for us (e.g. things, ideas, practices, institutions), as well as whatever understanding we have of ourselves, is set within and against 'hegemonic structures', themselves the sedimentation of the *longue durée* of historical conflict and contestation. Our dwelling in these structures, within which we orientate ourselves, are brought back to their political origin, to the act of grounding. Riveted to the world, the political becomes the frame for which the worlding of world (and concomitantly the grounding of ground) is accounted.

Second, Marchart's locution of 'Being-in-the-political', which, by means of the interminable play between de- and re-grounding, accounts for the worlding of worlds, is (by virtue of an interpretive-appropriative event) itself the projection of a world. This world effectuates something akin to an 'aspect change', a perspectival shift. In *Thinking Antagonism* we are told how there is 'instigat[ed] a fundamental *alteration of our image* of the social world [...] now forced to bring into view the contingencies and conflicts at the basis of the apparently most stable social formations.'[34] We are attuned to being in its political key, to the tremulous timbres

[31] In the clearest, though compressed, formulation of this, Marchart writes: 'From the perspective of an ontology of the political, if the latter is to explain our very being-in-the-world as a being-in-the-political, it is the real and a-subjective force of antagonism, which –in the form of an absolute restlessness of becoming –drives the unstoppable process of the constitution and destitution of the social as much as the folding of its limits into a self' p105.

[32] The ambiguity of this sentence must be left to stand. In the claim that 'there is nothing that is not itself grounded', we must hear simultaneously: (i) that only *nothing* is ungrounded, and as ungrounded, nothing is at the basis of all acts of grounding (the abyssal ground); (ii) that all grounds are the result of an act of grounding; as the effect of having been grounded, grounds are conditional, contingent, and contestable. All the while such grounds will take on the role of grounding the whole.

[33] *Kosmos*, the Greek word for 'world', meaning totality.

[34] Oliver Marchart, *Thinking Antagonism*, p89.

and restlessness pervading our social worlds. This is the *ethico-political* significance of the locution of 'being-in-the-political', which carries with it its own marching order: "there is always reason to be political" (even if, in its minimal degree, politics is not happening all the time, it nonetheless irrupts at uncertain times and in uncertain places). To 'activate' and 'amplify' the political nature of the world, of ourselves, and of thinking, for which antagonism lies always as the absent cause (even if in a state of dormancy), is the ethico-political prescription around which Marchart's book orbits.

Thirdly, since the interpretive-appropriative work of *Thinking Antagonism* projects a world touched by antagonism to its core, then this cannot but touch the thinking of Marchart. This would be the *reflective* implication that subtends the category of 'being-in-the-political', namely that he himself is placed under the condition of 'being-in-the-political' – a principal lesson of the implicative form of thinking discussed earlier: as both the object that thinking must further examine, elucidate, and to expound in terms of its ontological significance, as well as being the wellspring from out of which the act of thinking arises, antagonism is the cause and effect of his thinking (the outcome of which is an interpretive-appropriative-projection in terms of 'being-in-the-political'). Marchart is not the authorial-subject who stands above and 'gathers' and 'projects', in an act of free-standing 'appropriation'. He is as much the effect of a real process that is underway, and that appropriates us: 'antagonism sends out shock waves that *capture* every single body',[35] Marchart will write: Antagonism appropriates us, placing us under the condition of its thinking. There is thus a co-belonging between what is thought and what gives rise to thought, between thinking and being: the necessary virtuous circle.

Here, we have reached a provisional position, which will now need further explication. Thinking antagonism (and especially *Thinking Antagonism*, which lays the groundwork for such an undertaking) opens towards the issue of appropriation, and it does so necessarily. Not only because, interpretively, it is a category that makes Marchart's thinking show itself (along with the philosophical tradition of which it is a part, and the central notion of antagonism incubated therein) in their distinctive and proper light. But, because, with respect to the project of laying out of the 'ontology of the political', generally, and fundamentally in light of antagonism, appropriation (and the proper) begin to show their onto-political valences. If this point needs to be insisted upon then this is because, in contradistinction to antagonism, appropriation is left unthematised by Marchart, even though it remains at play in his thinking. In what remains, a set of further glosses will be made regarding this.

[35] Oliver Marchart, *Thinking Antagonism*, p106.

5. ON DIS-OWNING AND THE COMMON

Surrounding the ideas of the proper and appropriation, difficulties undeniably abound. So far, these obvious problems have only been skirted around. Let's begin with two of the most glaring problems: (i) appropriation (and this becomes all the more clear with the German, *Aneignung*) is rooted in what is 'own', a laying claim over, a possessing; (ii) 'appropriation' presupposes a subject (in the form of a willing-ego) behind the act, actively bringing other beings, understood as passive objects, into the power of the appropriator.[36] Based on these assumptions, we can, with good reason, suppose it is a term Marchart is mindful of. In a passage, coming right at the beginning of *Thinking Antagonism,* we read that an idea or thought is impossible to 'own'. One never owns an idea, one dis-owns it ('ideas can only be *dis-owned*', Marchart writes).[37] Those who are often a little quick to wrap their critical charges in exposing the presence of logical contradictions will wonder how this can be so when the possibility of disowning an idea must be logically predicated on it having first belonged to someone? And yet, importantly, no contradiction is necessarily implied in what Marchart pronounces. While appearing logically and causally contradictory, the prioritisation of disowning an idea over and above any originary ownership or proper belonging must ontologically hold, and is consistent with the mode of politics articulated on these ontological bases. It would be characteristic of the 'politics of protest' – the affirmative 'no' – central in Marchart's understanding of politics in action,[38] mirroring the ontological negativity within which this mode of political engagement is rooted, and also consistent with the politico-ontological claims of Ernesto Laclau, for whom the privative experience of 'injustice', 'unfreedom', 'inequality', 'disorder', etc., remains superordinate over the positivisation of ideas of 'justice', 'freedom', 'equality', 'order', in serving as a precipitate for political mobilisation.[39] Beyond these points, in claiming that one can only disown an idea, Marchart wishes to capture something further, and ultimately for our purposes, something even more significant. The dis-owning of an idea, in a more originary sense, would not simply address an idea in its privative form, something that we experience as lacking (e.g. the experience of 'inequality', 'injustice', 'unfreedom'), nor would it target an 'idea' in terms of 'denying', 'annulling', 'repudiating' it in the direct form of negation (e.g. 'no' to the 'market economy', 'no' to 'humanitarian

[36] Cf. Hegel, *Elements of the Philosophy of Right*, tr. H.B Nisbet & ed. Allen W. Wood (Cambridge: Cambridge University Press, 2000). In §44, Hegel puts the point bluntly: 'A person has the right to place his will in any thing. The thing thereby becomes mine and acquires my will as its substantial end (since it has no end within itself), its determination, and its soul –*the absolute right of appropriation which human beings have over things.*' p75. (emphasis added)

[37] Oliver Marchart, *Thinking Antagonism*, p1. A short but crucial point that deserves to be highlighted.

[38] Ibid, p107.

[39] Cf. Ernesto Laclau, 'Why do Empty Signifiers matter to Politics?', *Emancipation(s)* (London: Verso, 1996).

wars', 'no' to 'freedom of choice'). The dis- of 'dis-owning an idea' would point instead to a reversal in the very act of possessing itself, marking out a reversal by which the thinking subject and idea as object are correlated. When Marchart speaks of 'disowning' an idea, we no longer follow the movement by which an idea is drawn inwards and becomes one's own (qua appropriation), but conversely, we trace it by way of its ex-ternalisation, alienation, im-personalisation (or anonymisation) by means of an outwards movement (qua ex-propriation).[40] This, we can say, means that the result is making an idea *common,* if not a *res nullius*, which belongs to no-one in particular and for anyone in general, folded and unfolded within the common fabric of social relations. Ultimately, the disowning of an idea, as Marchart comes to speak of it, here needs to be understood with respect to a process of *de-propriation*, that is, a short circuiting of the logic of the 'proper', for which we find its classical philosophical systematisation worked out in Aristotle, as part of his discussion of the four predicables to which something is said to belong to something else. In contradistinction to definitions (which touch on common essences), the 'genus' and the 'accident', Aristotle understands the 'proper' (*idion*) as a singularising property or trait i.e. that which belongs to 'that thing and that thing alone'.[41] For something to class as proper to thing *x*, according to Aristotle, it must satisfy the rule of convertibility, explained through the following example: 'it is a property of man to be capable of learning grammar; for if a certain being is a man, he is capable of learning grammar, and if he is capable of learning grammar, he is a man'.[42] Significantly, whatever counts as 'proper' can be either an essential or accidental determination; what sets it apart from both the essence and the accident is (i) the quality of unicity (its singularity) and (ii) that it is an inalienable characteristic or property. In the superlative, the proper would be clarified by way of what is 'ownmost'. Now, clearly, by speaking of disowning qua depropriation (as Marchart rightly does), we appear far removed from the Aristotelian understanding of the proper. Dis-owning an idea or thought means putting something into *general* circulation; it means extricating ideas or thoughts from any sole possession by an *ego cogitans,* disabusing them of any unique sense (the stuff of private language games). Disowning an idea ultimately means allowing them to 'emerge from, and return to, an a-subjective,

[40] To clarify the 'ex-' of expropriation must be understood in its purely spatial sense, as an outwards movement serving as the counterpoint to the inwards movement of 'ap-propriation'. We are thus speaking less of Marx, on this occasion, and how ex-propriation is understood in the context of so-called primitive accumulation, but how ex-propriation is understood by Heidegger in *On Time and Being*, tr. Joan Stambaugh (London: Harper Collins, 1977), and later by Reiner Schürmann, cf. Introduction to *Broken Hegemonies* (Bloomington: Indiana University Press, 1990) and 'Ultimate Double Binds' in *Tomorrow the Manifold: Essays on Foucault, Anarchy, and the Singularisation to Come* (Zurich: Diaphanes, 2019) pp121-150.

[41] Aristotle, *Categories*, 1a 24-5. See also: Aristotle, *Topica*, 102a 17 and *Posterior Analytics* 73a 6

[42] Aristotle, *Topica,* Loeb edition. 102a. 19-21

collective effort that cuts across temporal and geographical barriers.'[43] If Marchart begins by underlining how the act of disowning an idea as originary then this gives ontological priority over to depropriation. But one would do well to resist surmising that de-propriation marks the end of the 'proper'. It would beg the question: what politics, thinking, mode of being could not do with some retention of the 'singular', in one form or another? Rather than its complete relinquishment, the notion of the proper is recast, no longer with respect to substance – as a unique thing, entirely monadic – but as a process by which, from the common, something *becomes* 'proper' or 'singular' qua singularisation.[44] Here, it is not in spite but because of de-propriation that 'ap-propriation' (as a making proper in the absence of the Proper) asserts itself all the more stringently as a central political category. Something we will now indicate by way of the politics of naming, an issue that takes up an important place in Marchart's ontology of the political.

6. NAMES, PROPER AND COMMON

To what register does a thinking, which is conditioned irrevocably to the political, belong with respect to being, and how does it attest to, show, indicate, this belonging? Clearly, as Marchart remarks, it does so not as anything we can know through empirical measurement or by means of observation. But at the level of intervention, decision, implication, inflection. Linguistically, political thinking is exercised not by the universal light of the Idea, and even less by the generalising rule of the concept, but by the 'name', specifically the name with respect to how proper names (*nomen proprium*) and not common nouns function. This will first appear counter-intuitive, since the taxonomy of names that furnish, at the very least, the modern political imagination ('equality', 'human emancipation', 'revolution', 'justice', 'freedom') are not principally (though they can be) names in the strict sense of 'proper names'('Mandela', 'Robespierre', 'Lenin'), but common nouns that easily drift into abstraction and indetermination.[45] This however misses the point, namely that even if politics operates on *prima facie* common nouns ('democracy', 'equality', 'emancipation', 'revolution', etc.) these common nouns come to be deployed within a given political sequence *as if* they could properly designate and belong (wholly and inalienably) to a series of articulated political actions and demands, not only serving as their *focus imaginarius* but as their common ground. It is as if, in the *hic and*

[43] Oliver Marchart, *Thinking Antagonism*, p1.

[44] Cf. Reiner Schürmann, *Tomorrow the Manifold: Essays on Foucault, Anarchy, and the Singularisation to Come* (Zurich: Diaphanes, 2019)

[45] A point that was not lost on Carl Schmitt, who, in a set of reflections on the relation between *nahme* and name, remarked precisely that modern politics (with its appeals to 'Justice', 'Humanity' and 'Virtue') had forgotten what it means to name, in that at every turn modern political thought confounds the singular by means of the common. Schmitt, *Nomos of the Earth* (New York: Telos, 2006).

nunc, the name of 'democracy', 'equality', etc., comes to singularise a concrete manifestation of politics, giving the seal of distinction and a material inscription to a specific political collectivity in formation. In *On Populist Reason*, Ernesto Laclau reminds us that 'an assemblage of heterogeneous elements kept *equivalentially together* only by a name is [...] necessarily a *singularity*.'[46] What does this amount to? In politics, we are dealing with names that function: (i) not as a descriptor of extant things, but as *performatives* that serve as the ground for what is by virtue of the name alone; (ii) not as whatever presides over common essences, but that which individuates and *singularizes*; and (iii) as a singularity, the name is what makes a specific *materialisation* and localisation of the *common* possible.

A given politics gives rise to its own nomenclature of terms that, nested within a series of discursive relations (established through stratagems and decisions, and injected with cathectic investments), become the support for the existence of a political collectivity, whose own existence is sealed through the name to which it becomes irrevocably tied. A name is not a generalising property that might indifferently be assigned to either this, that, or other similar things but a *singulare tantum,* that gathers under itself a diversity of unrelated elements *into* a unity. Immanent to a given political struggle, that is to say, from the perspective of those engaged collectively, a name is not just any name pulled indifferently from the common stock of words that circulate. It is *the* name because it *becomes* '*our* name' and, convertibly (following the rule by which Aristotle understands the proper), because it is 'our name' it can only have been that name and that name alone. 'Our name', not insofar that the 'us' antedates the name of which it takes possession but, on the contrary, because it is the name that 'grounds' the 'us', and which then retroactively belonging wholly and inalienably to the 'us', fusing it into a singularity.

It is quite instructive here to illustrate this not with respect to a particular political example, but by taking cognisance of Marchart's own thought and the internal movement by which *Thinking Antagonism* unfolds. Operating under the condition of the political, Marchart's philosophical thinking is itself an act of naming. 'Saying' being is, in its political key, a matter of 'naming' being. Being is *named* 'antagonism'.[47] This will come as no surprise. What, though, is most instructive is not the fact Being is *named* 'antagonism', it is the movement through which 'antagonism' as name passes in Marchart's thinking. On a first level, Marchart refers to antagonism as *a* name ('Antagonism is *a* name for the essentially unstable and disputed nature of the social'[48]). What is the principal effect of this use of the indefinite article? It gives antagonism a certain indetermination with respect to its fundamental relation to Being, in that as a name, 'antagonism' is one among other possible names which presumably stand at an equal distance to it, either (in the strong sense) as

[46] Ernesto Laclau, *On Populist Reason*, (London: Verso, 2005) p100.
[47] Oliver Marchart, *Thinking Antagonism*, e.g. p160, 181.
[48] Ibid, p30.

equiprimordial, or (more weakly stated) in an analogical relation. Either way, it takes its place alongside 'the clinamen', 'dislocation', 'différance', the 'differend', the 'event', the Lacanian 'real', as 'a *synonym* of incommensurability':[49] a chain of terms expressing, more or less, the same ontological insight. On a second level, Marchart substitutes the definite for the indefinite article: antagonism is not simply *a* name but *the* name for social being, '*the* name [...] for the co-originary condition of conflict and contingency'.[50] What is the function of the definite article here? It suggests that 'antagonism' is not after all just one name among others (that operate synonymously); it draws out something more. Certainly, this can be accounted for by the direct political determination that 'antagonism' harbours over and above other terms. But, in making this claim, Marchart has to acknowledge (as he indeed does) that other political names ('conflict', 'polemos', 'war', 'stasis', 'agon', 'struggle') might equally well serve to index the same ontological insights. It is in acknowledging this that Marchart makes the further claim: antagonism is 'the only true name of the 'political', 'the key word', 'the single name',[51] it is (and this is instructive) a *fitting*[52] – which is to say appropriate, proper – name for the political. How is it that a name can prove to be the best fit in this way? What is *in* a name that permits one to distinguish between different nominative possibilities? This is the critical question, for which two responses can be given. One is to draw the 'name' back into the order of conceptuality. To dig deep into the words themselves, in order to separate out *the* category that holds the true definition of 'social being' from its pretenders. Thus, from this perspective, located *in* the name is an essential kernel of meaning, an ineradicable conceptual content, to be recovered. But even were this conceptual operation possible, in order to begin such an undertaking, a few steps would already have had to been made: one would already have set oneself within the *Kampfplatz* of philosophy, already placed 'somewhere', embarking on a line of thinking where a series of conceptual connections are already established, initiating an inquiry from a tradition one has already received, only then to 'intervene ...[b]y the creation of a name'.[53] It is the re-baptising of a name that, for Marchart, has the capacity to cause a disturbance in the conceptual order, serving as a new opening, and therefore reactivating 'the sedimented order of definitions, classifications and conceptual hierarchies specific to a *given* philosophy, a philosophical paradigm, an intellectual tradition or an accepted canon of ideas.'[54] This form of intervention through naming, that operates within the ungrounding and regrounding of a determinate

[49] Ibid, p47.

[50] Ibid, p206.

[51] Ibid, p82.

[52] Ibid. Marchart writes exactly: ''Therefore at the end of a long intellectual development, the notion of antagonism emerges as a fit name for the doubly reflective determination of conflict and contingency'.

[53]Oliver Marchart, *Thinking Antagonism*, p168.

[54] Ibid.

philosophical field, convokes a 'we' that 'brings to light forgotten partisanship[s]', forging new equivalences and augmenting new frontiers and differentiations. It gives rise, then, to a final and third level by which the form of the 'name' of antagonism emerges. After having shifted from being a simple synonym ('antagonism as a synonym for the incommensurable') through a definite and privileged signifier ('*the* name for the co-originary condition of conflict and contingency'), there is the moment when the usage of impersonal article shifts into the *possessive* form. Thus, we read: antagonism is '*our* name for being.'[55] *Our* name. We find ourselves necessarily within the logic of appropriation once more. It is by virtue of this reference to an 'our' that the name is no longer simply part of a conceptual analysis; it is the site of an affective investment that injects the conceptual labour with a sense of purpose and direction. It becomes inflected with a political determination: part of a wider intellectual struggle, for which the staking out of positions, the drawing of the lines of demarcation, and the founding of alliances, are redolent. In convoking an 'us', the name designates a rallying point. In this process, 'antagonism' *does* show itself as the 'single name', 'the key word', the most fitting of names for the co-originary of conflict and contingency. The difference between 'antagonism' and its other associated names ('struggle', 'opposition', 'polemos', etc.) properly reveals itself only once one has taken it on as our name, not simply as an internal theoretical dispute. But as 'our name' it attunes us to our present, to the situation in which we find ourselves. It gives rise, in short, to an affectology.[56] Otherwise, for the disinterested, the terms simply become interchangeable, and any issue arising therefrom becomes '*just* semantic'. Yet for those attuned to 'antagonism', nothing can be further from the truth: it becomes the principal term through which, *inter alia*, modern Post-Kantian philosophy shows itself in its proper light, antagonism becomes more than a conflict between two pre-formed identities, and it is the term through which the peculiarity of our own times is brought into starker relief.[57]

If the name has within its power to singularise, then it does so by a process of *gathering*, resulting in a symbolic condensation from what, in the half-light, would remain obscure in its pre-formed heterogeneity. It is here, having grounded the relation of thinking and being in the name, we return to the question of the proper. A returning to the proper that is not accomplished through the production of proper names, *stricto sensu,* or 'new signifiers' (neologisms) that are singularly, irrevocably and inalienably attached to a unique political movement, sequence or struggle,[58] but by way of the (re)appropriation of common nouns (or concepts)

[55] Ibid, p160.

[56] Something that Marchart rightly develops. See esp.: pp103-8.

[58] This has always been the materialist's fantasy (at least in its nominalist guise), of which the later Althusser is a clear, even if, hyperbolic, example. He writes: 'Conclusive recent studies have shown that for primitive societies, there exist only singular entities, and each singularity, each particularity, is designated by a word that is equally singular. Thus, the world consists exclusively of singular, unique

already in general circulation, that, precisely, owing to a process of appropriation, are made singular once more, where, for *a specific* political struggle or philosophical inquiry, the name itself becomes the locus of new meaning and affective desire.[59] Precisely, this is the point that needs underlining: the name bestows upon a political movement a purposefulness by virtue of a sense of singularity that is induced through the act of naming. But as an act, this naming operation amounts to a taking or laying claim over a name, the power of which will always be refracted due to its common availability. It is, in this way, one could say (following Marchart) that 'naming brings conflict (to the common nouns) of concepts'.[60] But just so long as one is able to further add that these antagonisms wrought through naming are unleashed because the names that bring conflict are split between their commonality and singularity, their general availability and their punctual designation. They give rise to antagonisms because they are subject to appropriations.

7. DE-PROPRIATION-AP-PROPRIATION AND THE PROPER

What I have sought to sketch out above is how in one crucial part of Marchart's book (on the politics of naming), appropriation returns. However, in returning it dare not show itself; it lurks in the margins, unthematised. I would suggest, then, that appropriation, as the making proper or singular, is in actual fact an operative part of the architectonic surrounding 'being-in-the-political' that *Thinking Antagonism* does an immaculate and rigorous job of presenting.

Now, for sure, Marchart's disqualification of 'owning' an idea is a way of showing critical distance towards the fantasmatic horizon of intellectual property rights, 'rooted in the capitalist system of property ownership',[61] with its attendant support in 'possessive individualism', along with the hypostatisation of the willing and autonomous ego as the ground and essential locus for the arrogation of anything and everything as its own. The notion of appropriation (and its cognates: propriety, property, the proper, etc.) is to our ears overdetermined by this politico-economic sense, mired by its determinant position in discourses of property and possession.

objects, each with its own specific name and singular properties. 'Here and now', which, ultimately cannot be named, but only pointed to because words themselves are abstractions –we would have to be able to speak without words, that is, to show.' Louis Althusser, *Philosophy of the Encounter. Later Writings, 1978-1987.* ed. François Matheron and Oliver Corpet, tr. G.M Goshgarian (London: Verso, 2006) p265. This, we can say, would be the purest social expression of the 'proper'.

[59] This position comes with its own dangers, namely the entire problem surrounding homonymy (ambiguous or equivocal names). The work of Jacques Rancière risks falling into such pitfalls. Please see my: 'On Homonymy and Heterology: The Hazards of Jacques Rancière', in *Jacques Rancière and the Aesthetics of Democracy*, ed. Tora Lane and Anders Burman, Stockholm: Tankekraft, Forthcoming.

[60] Oliver Marchart, *Thinking Antagonism*, p168.

[61] Ibid p.1

It is thus, for understandable reasons, that CB MacPherson once claimed that 'the concept of man as infinite appropriator'[62] (for which the model of the possessive individual was its correlate) constituted the central axiom of a capitalist market economy, and which political thought (from Hobbes onwards) had hypostatised; and on this very basis, MacPherson sought to dislodge the preeminence of the category of appropriation in political and social thought. And yet even if we acknowledge the salience of such a critical undertaking, appropriation, as Louis Althusser once commented, abounds with mysteries;[63] a notion that cannot so easily be resolved into the frame of the liberal-capitalist order or, for that matter, reduced to matters of 'cultural appropriation'. In truth it is a term that spills over, not only (as Marx will specifically analyse) into other modes and relations of production, but (and Marx is attentive to this too) appropriation is deepened into a basic existential structure accounting for man's real practical relation to the world.[64] While it is not the time to go into the matter in any satisfactory way here, what needs to be said is that Marx (among others) assists in understanding appropriation as a generalizing feature of socio-political existence. A generalising and deepening form of appropriation that increasingly leaves no sphere of human practice or facet of social life untouched. A process without ontological limits, according to which every- and any- thing submits to its logic. No thing has a designated proper place, nothing belongs wholly and inalienably to either itself or another. It is an age of insufficient reason, and deficient being, contingent grounds and conditioned ends, for which substitutability and supplementarity are the defining operations. All of this applies not only to the side of the object (i.e. to what is appropriatable), but to the subject (i.e. the 'appropriator') who is compelled to engage in a game without end because the player is *ohne egenshaften*, to cite Robert Müsil. 'Appropriation', as Heidegger will surmise, 'is something we ourselves dwell in'; it is not we who are the first appropriators, we ourselves are the appropriated, given over to a process without end.

[62] CB Macpherson, *Democratic Theory. Essays in Retrieval*, (Oxford: Oxford University Press, 1979), p28.

[63] Louis Althusser and Étienne Balibar, *Reading Capital*, tr. Ben Brewster, (London: New Left Review, 1970) p54.

[64] Indeed, Marx, specifically, and the Marxist tradition (especially those strands infused with phenomenological, in general) was attentive to the ambivalences of the notion, a concentrated testament of which remains Marx's 1857 'Introduction' to the *Contribution to the Critique of Political Economy*. A text that critically repudiates the general abstractions (including 'production', 'appropriation', 'distribution') that furnish classical political economy, those terms of which are used to naturalise the capitalist mode of production, and instead opens up for a modulation of different forms of appropriation; on the one hand as part of a historical materialist investigation into successive social forms that exhibit variability with respect to the character and relations of appropriation that help to comprise them, and on the other, an explication of how appropriation is an invariant in modes of practice and thinking, such that in 'artistic', 'scientific', 'political' practice, the subject seizes, works-on and -over the real.

What accounts for this generalisation of appropriation? This is the crux: it is depropriation; which, despite the prefix, is not the negation of, but in fact constitutes the underside to the process of appropriation. This allows us to turn back to the idea of disowning, which earlier we indexed in Marchart's opening thoughts in *Thinking Antagonism*. Once the question of the proper as a pure singularity, as what is, in its superlative form, 'ownmost' has been liquidated, then this accelerates the process and extends the field for appropriation as the genetic form by which all things (including ideas) are commanded, *singularised*, taken possession of, inhabited. This generalising phenomenon is, for one, drawn out masterfully by Phillipe Lacoue-Labarthe in his reading of Diderot's paradox of the actor. There we read that the greater the actor, the greater his privation; 'the *more* the actor is nothing, the *more* he can be everything'.[65] Here Lacoue-Labarthe identifies a hyperbolical exchange of contraries (i.e. the more something is *x* then the more it is *y*) between depropriation and appropriation, between being nothing and becoming everything. The worldly actor, who can master all possible roles, must be equal to all, and thereby be without all assignable properties: 'precisely with the absence of any *proper* quality [...] is he able to produce in general'.[66] Any production or presentation requires a multiplication and pluralisation of appropriations. For the actor, then, 'the gift of depropriation becomes the gift for general appropriation.'[67] This insight into the paradoxical condition of the actor, Lacoue-Labarthe will not hesitate to generalise beyond its specific articulation in Diderot, surmising that we must allow it to infect 'the subject of thought, literature or art',[68] and we can add politics, also. The political inflection upon the same relation between depropriation-appropriation finds its trace, we can say, in Deleuze's reading of Nietzsche. What in *Nietzsche and Philosophy* Deleuze immediately indexes as the temerity of Nietzschean thought is how the 'history of a thing, in general, is the succession of forces which take possession of it and the co-existence of the forces which struggle for possession.'[69] There is no unique sense proper to the thing prior to its appropriation. For this reason, the 'same object, the same phenomenon, changes sense depending on the force which appropriates it';[70] the sense of things, depropriated, is but given through the accumulation of multiple and heterogeneous appropriative-interpretative practices. But equally, and this is central, the force that applies itself to the object it appropriates is no Subject that stands above the appropriated and behind the force: the act of appropriating 'can only appear[...]by first of all putting on the mask

[65] Philippe Lacoue-Labarthe, 'Diderot: Paradox and Mimesis', *Typography,* tr. Christopher Fynsk, (California, Stanford University Press, 1989), p260.

[66] Ibid, p257.

[67] Ibid, p260.

[68] Ibid, p266.

[69] Gilles Deleuze, *Nietzsche and Philosophy*, tr. Hugh Tomlinson (London: Athlone Press, 1986) p3.

[70] Ibid.

of the forces which are already in possession of the object'.[71] Appropriation emerges, first, not as the assertion or super-imposition of a self, but through, we can say, an alienation of oneself into an object already possessed by countervailing forces.

The central implication to be underlined, then, is that depropriation is both the formal and real condition of generalised appropriation; the deeper and greater the extension of the process of depropriation, the more generalized the process of appropriation. Depropriation and appropriation, disowning and enowning, are not antonymic (or for that matter, antinomic) terms; they mutually encroach and cross one another. To speak of their mutual encroachment, rather than simply about their complimentarity or dialectical unity, is to index how this is a process with friction, as well as, let us say, a space of antagonism.

What is the immediate outcome of this? In the context of our reading of Marchart, it is to bear in mind the two interconnected claims that orbit around thinking, as well as the status of his thinking: (i) that thoughts (ideas) cannot be owned (they are not sourced by a singular, unique origin); (ii) that they can only be dis-owned (that is, they are part of a common horizon, history, tradition). These two points are not to be understood as mutually exclusive. Rather than the second of these claims coming at the expense of the first, i.e. something 'belonging' as distinctly and uniquely one's own, (ii) is in fact the condition on which something like ap-propriation as a genetico-discursive process becomes possible. Depropriation, as what becomes common, does away with the idea of originary possession or singular essences. What it concomitantly involves, however, is a pluralisation of acts of possession, a process of singularisations, of re-inscriptions, re-contextualisations, and affective re-investments – not in spite of the 'common' of de-propriation, but because of it. Politics, whether minimal or major, operates interminably within this turning movement. Which is to say, only once 'ap-propriation' is brought back into the abyssal ground of depropriation, are we able to index the aporetic movement that underwrites a politics that always operates between the common and the singular.

The question here is simple, though doubtless too blunt: in a book that presents us with a thoroughgoing ontology of the political, to which the 'antagonism' is riveted as its *prima principia*, where can we locate appropriation within the comprehensive and insightful picture it projects? Thematically, beyond Marchart's opening gesture surrounding dis-owning, we see no direct reckoning (though, doubtless, the short reference to dis-owning is a precondition for such a reckoning). The question that should duly be asked is whether it is incumbent for Marchart to do so? By way of conclusion, there are three things to be said in this regard: In the short space this review article has afforded me, the aim has firstly been to show how in *Thinking Antagonism*, Marchart himself is forced back upon and folded into the logic of

[71] Ibid p4.

appropriation. On the one hand, it is what must be presupposed in order to establish how Marchart's important contribution makes it mark, how, that is, the distinctiveness and novelty of both his line of thinking alongside the tradition(s), of which his own thinking is a further development, and for which the outcome is the setting free of antagonism, are allowed to stand on their own (but doing so together). On the other hand, the purpose here has been to give an indication that internal to the philosophical elucidations of the political and politics with which Marchart provides (e.g. the ontological significance of the name and the act of naming), appropriation appears central. Second, it has been at the very least to intimate that 'appropriation', as the process of making something proper, should not be adjudged as a regress into the suppositions of bourgeois political economy or an act of abdicating one's critical faculties at the altar of the figures of 'possessive individualism' (and today's obvious displacement onto collective identities, in the form of 'possessive collectivism'); appropriation and the proper are not ultimately categories about which we should subject to a moral or normative argument. More specifically, this means in squarely political terms, not rigging the game in advance by placing the 'Right' on the side of the sanctity of property, of possession, propriation, appropriation, propriety, and the 'Left' on the side of ex-propriation, impropriety, the improper, dispossession, etc. This would be the surest way not to be equal to the intellectual maxim of *ostinato rigore* that Marchart affirms. The ontological valence of these categories needs to be accounted for from the viewpoint of their strictly political accent. This accounting, it must be said, is something that varieties of post-foundational political thought, generally, and Marchart's thinking, in particular, are in an enviable position to undertake. We only have to recall how *Thinking Antagonism* begins by giving ontological priority to dis-owning or de-propriation. What we now have to further appreciate is how de-propriation or dis-owning is not the negation or annulment of appropriation as the making proper; it is instead the *ab-grund* on which appropriation as a generalising condition plays itself out as an interminable condition of 'being-in-the-political' and as an imminent effect of antagonism. In the form of the hyperbolic exchange of contraries that Lacoue-Labarthe discusses, it could be said that 'the greater the process of depropriation, the more generalised the effects of appropriation'. To draw out the implications of this undertaking would not just be for the sake of theoretical exhaustion or completion (were ever this possible). It would, more concretely, be because our own political conjuncture is ready to show us its battle scars surrounding the issue. Today, against the backdrop of "right-wing populism" , we witness a pursuit of otherwise divisive and nationalist political agendas that, when circumstances bend in a particular direction, will soften their acerbic tones by drawing on certain motifs from the history of emancipatory struggles (and on certain ideas that guided these struggles. On the other side, there is the neo-liberal establishment, which resists this populist insurgency by presenting themselves as the heir apparent of internationalism, global justice,

freedom, equality and pluralism. Between this rock and hard place is but the shifting shores on which the Left presently finds itself: on the defensive, crying 'foul', speaking (in a variety of ways) of the negation of the sense of Ideas that they have come to understand as belonging wholly and inalienably to their living political tradition of emancipatory struggle. A sense of violation and melancholia can be indexed in the fact that, for them, political ideas, which they regard as embedded within *their* traditions, *their* histories, have been subject to illicit appropriation. Today, we find no end of claims that give expression to these, so to say, wounded attachments: from a past act of injustice ("*Solidarność* has been taken from us") , to a defiant call to resist any future possibility of ("let us not let the bigots steal feminism"); we see such grievances detailed in the exacting prose of a third-person's description ("the right stealing the left's clothes", amounting to "stealing its language" , "deftly coopting its causes, policies and rhetoric"); it is conveyed in hysteric form, where present politics is described as "a disorientating game of rhetorical appropriation, in which it is constantly unclear who stands for what and why" but also in the forensic military tone of "a blunt and effective confiscation, in which the battle-ready right relishes its ability to seize, inhabit and neutralize the arguments and vocabularies of its opponents." In one way, the entire logic of hegemony captures this adeptly: hegemony as a game of winning over consent, of the struggle between the forces of transformism and transformation proper; an attritional and intractable war of position in the (re)construction of a common sense, in the articulation of a counter-hegemonic project that can build a new world, etc. Though, arguably, this does not go far enough in showing how the process of depropriation-appropriation implies a political ontology (synergetic with, and complimentary to, what Marchart presents surrounding antagonism as the groundless ground). It is to invite the question: might (the) *Thinking* (of) *Antagonism* force us back onto (the) thinking (of) appropriation?

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 581-605
ISSN: 1825-5167

RADICALIZING RADICAL NEGATIVITY
ON OLIVER MARCHART'S *THINKING ANTAGONISM*

DIMITRIS VARDOULAKIS
Department of Philosophy
Western Sydney University
d.vardoulakis@westernsydney.edu.au

ABSTRACT
Oliver Marchart constructs an elaborate ontologization of the political that builds on theories developed by the Essex School while relying on Heideggerianism and Hegelianism. This original thought is a powerful and convincing attempt to think the ontology of the political without lapsing into a celebration of essentialist grounding or complete groundlessness, which are equally metaphysical and mutually supporting positions. Tensions arise within Marchart's own thought when the notion of instrumentality appears to be inscribed solely on the side of politics or the ontic. I suggest that a theory of practical judgment that is inchoate in Marchart's own position can resolve the tensions toward constructing a genuinely materialist ontology.

KEYWORDS
Political ontology, Instrumentality, Materialism, Agonistic Democracy.

The most distinctive contribution that Oliver Marchart has made to political philosophy is the attempt to think the ontology of the political in terms of a radical negativity. The ontologization of the political is inspired by Heidegger while radical negativity is indebted to the Hegelian conception of negation. This combination is not entirely new, but it is carried out in a unique way by Marchart, one that is informed by the "Essex School," in particular the work of Ernesto Laclau. This background enriches Marchart's project with concerns about post-Marxism and agonistic democracy, resulting in a compelling body of work.

This is amplified by the fact that Marchart is an increasingly rare kind of scholar: he is a thinker who builds a position gradually, methodically, persistently. This entails that it is hard to speak about *Thinking Antagonism*, his latest book where radical negativity is most clearly articulated, without considering his previous one, *Post-Foundational Political Thought*, which develops the post-foundationalism of his

ontology.[1] Instead of summarizing the arguments in these two monographs, I will present a series of tensions that propel Marchart's development of a systematic position. Identifying such aporias is meant as a way to think with Marchart and to contribute to the construction of his position.

1. THE POLITICAL DIFFERENCE AND DEMOCRACY

The ontologization of the political

At the center of the ontologization of the political is what Marchart calls the "political difference." At first blush, this may appear simply as the distinction of politics and the political. However, in Marchart it does a lot more work, especially in leading to a conception of democracy. The political difference mirrors Martin Heidegger's ontological difference, that is, the difference between the ontic and the ontological.[2] The ontic is the realm of particular beings that we can encounter in our lives. By contrast, the ontological refers to being that organizes experience but that can never be experienced as mere presence. The ontological difference posits a relation that is, to put in Heideggerian terms, the interplay of concealment and unconcealment.

Marchart summarizes the mirroring of the political difference and the ontological difference as follows:

> the conceptual difference between politics and the political, as *difference*, assumes the role of an indicator or symptom of society's absent ground. As *difference*, this difference presents nothing other than a paradigmatic split in the traditional idea of politics, where a new term (the political) had to be introduced in order to point at society's "ontological" dimension, the dimension of the institution of society, while politics was kept as the term for the "ontic" practices of conventional politics (the plural, particular and, eventually, unsuccessful attempts at grounding society).[3]

Politics corresponds to the ontic because it refers to "conventional politics" in the guise of institutional processes. By contrast, the political is responsible for the instituting—for the creation or construction—of the social. As such, the first obvious inference is that the political can never be reduced to all those practices that occupy the everyday activity of the various arms of government and of political parties.

Significantly, the political difference indicates a radical negativity whereby the social "is prevented from closure and from becoming identical to with itself."[4] Marchart's assertion is a paraphrase from Jacques Derrida: "what is proper to a culture

[1] Oliver Marchart, Thinking Antagonism: Political Ontology After Laclau (Edinburgh: Edinburgh U. P., 2018); and, Marchart, Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau (Edinburgh: Edinburgh U. P., 2007).

[2] Marchart, Post-Foundational Political Thought, p. 171.

[3] Marchart, Post-Foundational Political Thought, p. 5.

[4] Marchart, Post-Foundational Political Thought, p. 5.

is to not be identical to itself."[5] By affirming the priority of difference over identity, Marchart seeks to arrive at a deeper or more philosophical position. The radical negativity of the political difference pertains to political foundation. It is both the groundlessness of the social—the fact that the multiplicity and plurality of politics is thoroughly contingent—and the presence of its negative, the political, that makes a founding possible nonetheless. This radical negativity of the political is what Marchart—following Laclau and Mouffe— calls *antagonism*. I will return to the function of this negativity later.

An important caveat is needed to understand Marchart's political difference. Following the Heideggerian position about the relation of the ontic and the ontological, Marchart insists that there is no radical rupture between politics and the political. Their relation is—as Marchart puts it—quasi-transcendental in the sense that it is both possible and impossible. There is no politics without the political and vice versa, despite the fact that neither can be secured, neither can find a final ground. Their relation is thus like a "circle."[6] This is like the circle of the ontic and the ontological that Heidegger describes as unavoidable. Philosophy needs to accept such a circle, whereby the philosophical question becomes the inquiry into how to enter this circle; or, specifically in terms of the political difference, how to configure the constellation of the relation between politics and the political. The entire political project pivots around this relational difference.

Marchart theorizes this circular movement of the political difference with consistency and great insight. He pays particular attention to the points where it occurs. These are the points where any possibility of grounding dissolves. The term he uses to refer to these points is "the moment of the political." Such moments preclude the possibility that, not only the political, but even politics, can be confined to formalized institutional process: "Politics is not a matter of scale, it is a matter of kind. And, for the same reason, it is not restricted to a particular locus in the social topography (such as the political system)."[7] Politics cannot be confined within established institutions because it draws its sustenance from the moments when the political occurs, that is, those contingent occurrences of the grounding and ungrounding of collective action.

[5] Jacques Derrida, The Other Heading: Reflections on Today's Europe, trans. Pascale-Anne Brault and Michael Naas (Bloomington: Indiana U. P., 1992), p. 9. We find a similar formulation in Ernesto Laclau and Chantal Mouffe: "the presence of the 'Other' prevents me from being totally myself." Hegemony and Socialist Strategy: Towards a Radical Democratic Politics (London: Verso, 2000), p. 125.

[6] Marchart, Post-Foundational Political Thought, p. 30.

[7] Marchart, Thinking Antagonism, p. 190.

Democracy as political difference

Within this differential relation, we discover Marchart's conception of democracy. Democracy is the expression of the lack of ground characterizing political difference and the moment of the political: "democracy is to be defined as a regime that seeks, precisely, to *come to terms* with the ultimate failure of grounding rather than simply repressing or foreclosing it."[8] The last point in the determination of democracy is critical. The political difference cannot be eliminated, it occurs by necessity. Thus, groundlessness does not simply distinguish democracy from other regimes of power. Rather, democracy is the attempt to "come to terms" with the political difference as it is articulated in particular political moments.

Such moments of the political include the utilization of political institutions: "The democratic dispositive hence provides an institutional framework that guarantees the acceptance of the groundlessness of the social."[9] Marchart rejects the possibility that democracy can be confined within the purview of they operation of institutions, while also insisting that institutions matter. How they are formed and how the operate can make all the difference for the polity. If they are democratic, they need to include considerations of the groundlessness of democracy. Or, as Marchart puts it, they will "necessarily involve interrogating society's political institution."[10] We can say—although this is not Marchart's term—that the circle of political difference is democracy.

The groundlessness that characterizes the circle of political difference and democracy is then productive. It leads, according to Marchart, to a recognition and consideration of antagonism as the ontological negativity that prevents political ossification. Democracy then emerges as the dynamism of the ontological field of antagonism that guarantees such an irreducibility, whereby we can term Marchart's conception of democracy antagonistic—even if he prefers epithets such as "post-foundational" or "radical."

2. THE RISE OF THE POLITICAL

Antagonistic Democracy

We can consider *Thinking Antagonism* as the attempt to further refine and expand the notion of antagonistic democracy adumbrated in Marchart's determination of the political difference and democracy. In this sense, we can think of this book as participating in the discourse that has come to be called "agonistic democracy."

[8] Marchart, Post-Foundational Political Thought, p. 158.
[9] Marchart, Post-Foundational Political Thought, p. 104.
[10] Marchart, Post-Foundational Political Thought, p. 108.

We can immediately recognize, however, one feature that separates Marchart's antagonistic democracy from other prominent scholars in the field of agonistic democracy: He refrains from a sustained polemic with the politics of consensus characteristic of liberalism. Even though the fault line between his antagonistic approach and the politics of consensus is noted sporadically, there is nothing like the detailed engagement we see in other thinkers.[11] For instance, William Connolly first uses the term "agonistic democracy" in *Identity| Difference* in opposition to how a politics of consensus constructs identity.[12] In *The Displacement of Politics*, Bonnie Honig's first book, more than half of the space is given to the polemic with liberalism and communitarianism.[13] And when Chantal Mouffe appropriates the term "agonistic democracy" for her own project in "For an Agonistic Model of Democracy" most of the essay is devoted to a refutation of deliberative democracy.[14] Why does Marchart buck this trend with his conception of antagonism?

We can readily identify three reasons. First, there is the academic context. By the time of the publication of Marchart's first book, *Post-Foundational Political Thought*, in 2007, the critique of the politics of consensus is so well-rehearsed, it is hard to see what new can be added other than paraphrasing and recapitulating well-honed arguments. Instead of a summary repetition, Marchart positions his work as an extension of the project of the Essex school. From this perspective, there is no reason to write explicitly against the politics of consensus.

Second, the historical context is significant as well. The discourse of agonistic democracy developed in the interregnum between 1989 and 2001. Between the fall of the Belin Wall and 9/11, the dominance of the USA as the only superpower is shadowed by the myth of the "end of history," that is, the myth according to which liberal democracy is the only possible regime of power. Thus, when Connolly positions his conception of pluralism as a radical revision of liberalism and communitarianism, he is critical not only of these specific positions, but also of the dominance of a politics of consensus within political theory. By 2000, Mouffe goes even further. Her conception of the paradox of democracy calls for a reformation of the idea of liberal democracy by introducing antagonism in it as well as by aligning it with the post-Marxist position she had developed with Laclau.

Within this context, 9/11 is not a real but an imaginary date, or more accurately a date that challenges and changes the political imaginary. There is a marked shift,

[11] It is regularly acknowledged that agonistic democracy develops as a discourse in opposition to liberalism. See, e.g., Mark Wenman, Agonistic Democracy: Constituent Power in the Era of Globalization (Cambridge: Cambridge U. P., 2013).

[12] William Connolly, Identity\ Difference: Democratic Negotiations of Political Paradox (Minneapolis: U. of Minnesota P., 2002).

[13] Bonnie Honig, Political Theory and the Displacement of Politics (Ithaca: Cornell U. P., 1993).

[14] Chantal Mouffe, "For an Agonistic Model of Democracy", in The Democratic Paradox (London: Verso, 2000), pp. 80-107.

for instance, to political theology, as the kind of discourse that denotes the failure of secularism to separate the political and the theological. In a lateral register, political theology also concerns itself with what Carl Schmitt calls "the exception." Suddenly, Agamben's work on the *homo sacer* and the camp—reincarnated in Guantanamo Bay—become the focal points of intense theoretical scrutiny. The opposition to a politics of consensus seems less pressing, even inapposite in a world rife with conflict, in a historical predicament when conflict has arrived at the doorsteps of the White House and Wall Street—the symbols of the political and economic power that of the interregnum from 1989 to 2001 that the politics of consensus implicitly celebrated.

As a result—and this is the third reason for Marchart's scant engagement with liberalism and communitarianism—by 2007, a sustained engagement with the politics of consensus may appear more like an anachronistic academic exercise rather than an attempt to think on and about the historical conjecture of the moment. If in the early nineties the "enemy" of a radical political theory is the politics of consensus, a few years in the new millennium the "enemy" has changed. The "enemy" is now different conceptions of enmity, different forms in which agonism is conceptualized. My conjecture is that this is the reason Marchart avoids using the term "agonistic democracy" in his work. If the discourse of agonistic democracy defines itself in opposition to the politics of consensus, Marchart defines his discourse in opposition to different conceptions of conflict. Thus, it is more pertinent for Marchart to differentiate his position from Badiou's conception of the event than from Rawl's conception of justice, or Habermas's conception of morality—or Rainer Forst's conception of dignity, and so on.[15]

If we compare the amount of space given to the debates with the politics of consensus in the theories of agonistic democracy that pre-date Marchart and the amount of space he devotes in distinguishing his conception of antagonism from different conceptions of conflict, we could say that there is a substitution. The old problem is replaced by a new one. This is a key reason why I regard Marchart's work as so significant in the field of agonistic democracy: it marks a change of direction, a change in the distribution of volume of engagement with particular discourses—because it marks a shift in the conception of who the philosophical "enemy" is.

[15] This does not mean of course that he never addresses philosophers who have advocated various versions of the politics of consensus. See, for instance, his comments on Hebermas in Oliver Marchart, "The Political, the Ethical, the Global: Towards a Post-Foundational Theory of Cosmopolitan Democracy", in eds. Tamara Caraus, Elena Paris, Re-Grounding Cosmopolitanism: Towards a Post-Foundational Cosmopolitanism (London: Routledge, 2015), pp. 181-202.

The social and the political

The question of the enemy is the question of the antagonism of the political. But this raises the following problematic: Conflict is usually located at the social level. Does this mean that antagonism is in reality a social category? And if so, how does this affect the political? Does antagonism mean that the political is to be absorbed into the social? Marchart describes his own solution to this problematic in contradistinction to the two most notable attempts in the twentieth century to adumbrate the autonomy of the political from the social sphere: these are the attempts we find in the work of Hannah Arendt and Carl Schmitt. They were both responding to the threat of what Arendt terms "the rise of the social," the danger of subsuming the political within the social. Given that Marchart reverses their construal by attempting to subsume the social within the political, I refer to his position as "the rise of the political."

Marchart initially presents Arendt and Schmitt as occupying diametrically opposite positions. Arendt espouses an associative politics in the sense that for her the political happens through the interaction between subjects or what she calls the space "in-between." Schmitt defends a dissociative politics because the political consists in the identification of the enemy. Marchart presents the contrast as follows: "the way in which the collective is established ... is where the main difference lies: seen from an Arendtian angle, people in their plurality *freely associate* within the public realm, motivated ... by their care for the common. Seen from a Schmittian angle, though, a collectivity is established through an external antagonism vis-à-vis an enemy or constitutive outside, that is, by way of *dissociation*."[16] As a consequence, the forms of agonism that they espouse and that their followers further develop are marked by the difference between association and dissociation.

Nonetheless, both the Arendtian and the Schmittian approaches converge into the position Marchart calls the "neutralization thesis."[17] This is the familiar argument that Arendt calls "the rise of the social" and Schmitt the rise of the "total state." It consists in the expansion of the social sphere at the expense of the political sphere. Marchart notes that all "left Heideggerians"—a group he is partly aligned with given his reliance on Heidegger's ontology—also espouse the same position.[18] For instance, technophobia is a symptom of the neutralization thesis. The increased reliance on technology enters the social fabric and irremediably degrades human interaction as well as the human's relation to its environment. Understanding the political as association or as dissociation ultimately leads to the same result, namely, the incorporation of the political into the social.

[16] Marchart, Post-Foundational Political Thought, pp. 40-41

[17] Marchart, Post-Foundational Political Thought, p. 44.

[18] Marchart, Post-Foundational Political Thought, p. 47.

Marchart proposes a reversal. His own notion of antagonism is not consumed by the social but posits instead an increasing politicization that marks the autonomy of the political: "by stressing the autonomy of the political we might arrive at a point where the conditions are turned upside down, and the political itself now emerges as the *instituting* function of society: now it is the political which is the instance that grounds *and ungrounds* the social." This simultaneous grounding and ungrounding of the political combines the Aredntian and the Schmittian insights through the post-foundationalism of Marchart's political difference. He continues: "So, for instance, in the Arendtian trajectory, Claude Lefort ... will call the political the moment by which the symbolic form of society is instituted, while for Ernesto Laclau ... to some extent from within the Schmittian trajectory, the political is both the disruptive moment of the dislocation of the social and the founding moment of the social's institution vis-à-vis a radical outside."[19] The constitutive lack of foundation in the course of establishing provisional foundations—this double movement of "concealment and unconcealment," to speak with Heidegger—is inherently political, according to Marchart. In this double movement, "the political assumes primacy over the social and now indicates the very moment of institution/destitution of society."[20] This is what I call "the rise of the political" in Marchart's thought.

Polemology, or the reduction of conflict to the ontic

The rise of the political faces a danger: its radical autonomy can backfire leading to its re-absorption into the social. Marchart calls this move polemology or bellicism and examines some instances in chapter 3 of *Thinking Antagonism*. The first example of bellicism Marchart provides is Foucault's *Society Must be Defended*. This is possibly Foucault's most famous lecture-course, given that it introduces the term "biopolitics" in the last lecture. Foucault structures his lectures by inverting Clausewitz's hypothesis that war is the continuation of politics by other means. For Foucault, the reversal means that war permeates the social sphere. This is the typical move of confining antagonism to the social. The classical conception of sovereignty is substituted by this polemological conception of society. Marchart criticizes Foucault on the grounds that the way his genealogy is structured "does not go to the ontological *roots* of social conflictuality."[21] In other words, the enumeration of the various ways in which conflict is presented in Foucault's historical account unfolds as an analysis of the ontic plane, thereby failing to live up to the rise of the political.

A similar argument is employed against stasis theory as developed by Nicole Loraux—"the variant of polemology that comes ... closest to an ontology of

[19] Marchart, Post-Foundational Political Thought, p. 48.
[20] Marchart, Post-Foundational Political Thought, p. 48.
[21] Marchart, Thinking Antagonism, p. 69.

antagonism."[22] Marchart discusses how Loraux, using philosophical anthropology, analyzes the notion of agonism in ancient Greece through the figure of stasis. He discerns a strong resonance with his own ontological notion of antagonism because stasis is also two-faced, meaning both movement and immobility, both discord and a static political arrangement. However, just as in the case with Foucault, the problem here is also that stasis reverts to an analysis of the ontic: "The modern notion of antagonism goes beyond this antique notion because ... negativity ... is no longer expressed by way of the paralysing clash of *two* objectively given parties (which suggests an ultimately 'ontic' understanding of conflict), but in the very breakdown of any form of unicity."[23] Ultimately, this means that Loraux's extrapolation of stasis does not arrive at the rise of the political because conflict is still confined at the social level that corresponds to the ontic.[24]

We should recall here the argument of Laclau and Mouffe in *Hegemony and Socialist Strategy*. One of the key targets of their "post-Marxism" was the idea that social conflict can be organized into the conflict between two classes, the proletariat and the bourgeoisie. Laclau and Mouffe tirelessly deconstruct the "scientism" that arises from such as a notion of class struggle in historical materialism. Following Laclau and Mouffe, Marchart's castigation of polemology is also implicitly a rejection of the dialectics of classical Marxism. That explains why Marchart accepts Althusser's revised Marxism, especially his conception of theory, only with the qualification that Althusser is "prone to a polemological ontology."[25] The antagonism at the social field needs to remain plural. By contrast, the best that the polemological approach can do is reduce it to two competing factions.

* * *

The critique of both the neutralization thesis and the polemological move contains a hugely ambitious aim. Marchart wants to argue that the antagonism of political ontology of the rise of the political points to a *prima philosophia*. Starting from the premise that a post-foundational ontology can never be separated from the ontic but always arises in a circular relation to it, Marchart uses Jean-Luc Nancy's argument that then every "*prima philosophia* is always and can only be a *philosophia secunda*, and nevertheless will have to claim the impossible status of a first philosophy." Marchart makes a significant addition to Nancy's argument. To claim that

[22] Marchart, Thinking Antagonism, p. 77.

[23] Marchart, Thinking Antagonism, p. 83.

[24] I present a different interpretation of Loraux's argument in particular and of stasis more generally in Dimitris Vardoulakis, Stasis before the State: Nine Theses on Agonistic Democracy (New York: Fordham U. P., 2018).

[25] Marchart, Thinking Antagonism, p. 194.

political ontology is *prima philosophia* entails that this "is a political move in itself."[26] It means, in other words, that an ontology, by virtue of its circular connection to the ontic, always carries political commitments.

Marchart subverts the meaning of *prima philosophia* that, in his construal, "is not concerned with a regional aspect of beings but with the ground and horizon of all possible being."[27] Unlike the metaphysical tradition that designates as *prima philosophia* the science of investigating being as unalloyed from power, he argues that political ontology is *prima philosophia* insofar as it designates that there is no pure being as understood by metaphysics. Political ontology is *prima philosophia* because it engenders the circularity of the political difference that invalidates any notion of being as mere presence. Or, in yet another formulation, political ontology is *prima philosophia* because it is antagonistic. The rise of the political is consummated in this move thoroughly ontologizes antagonism,

3. BANISHING THE INSTRUMENTAL

The ontologization of the political proposed by Marchart—what I call "the rise of the political"—is a radicalization of Heidegger's fundamental ontology that builds on the notion of antagonism developed by Ernesto Laclau and Chantal Mouffe. As soon as we consider their work, we can see that the rise of the political touches directly on the issue of instrumentality. This raises the question about how instrumentality is placed in the ontology characteristic of the political difference in Marchart's work. In particular, if instrumentality is banished to the ontic, as is the typical move in Heidegger's ontology, then how does such a banishment affect the circularity of the ontic and the ontological?

The double antagonism

The entire matrix of what Laclau and Mouffe call "hegemonic articulation" is described by Marchart as a technic of politics, that is, the various strategies and actions of the political actors. Marchart describes this instrumental field as an "ontologic." Marchart takes a step beyond Laclau and Mouffe by extending this ontic logic to the ontological. More precisely, the "onto-logics of hegemonic politics does not strictly coincide with an ontology of the political." This "onto-logics," as developed by Laclau and Mouffe in *Hegemony and Socialist Strategy*, consists in a mechanism of instrumentality comprising "the logics of equivalence and difference, the empty signifier, the rhetorical figures of metaphor, metonymy or catachresis." But, adds Marchart, "all these technical categories ... are premised on, but not equivalent

[26] Marchart, Post-Foundational Political Thought, p. 83.
[27] Marchart, Post-Foundational Political Thought, p. 149.

to a radical moment of negativity which makes itself felt in the differential play between the ontological and the ontic, the political and politics."[28] At the ontic level, political action can take place by negating present structures of repression that have imposed the hegemonic logic sustaining a given regime of power in a particular time and place. That's the lesson of *Hegemony and Socialist Strategy*. At the ontological level, we also need to recognize that the negation of particular positions presupposes a radical negativity that organizes every particular negation.

This leads to a double meaning of antagonism: "If antagonism describes on the one hand the logic of politics, which consists of the articulation of differences into a chain of equivalence against a negating outside, it refers on the other hand to that instance of radical negativity which hinders the social to close itself into the totality of society."[29] There is the antagonism at the ontic level consisting in the strategic negations of instrumentality that promote the construction of hegemony. And there is the ontological antagonism that prevents any hegemonic articulation of becoming a solid ground for the social. We have already encountered this notion of radical negativity—the second antagonism—for instance, in the conception of the constitutive outside of the social. It is within this context of his radicalization of Laclau and Mouffe's position that Marchart extrapolates his notion of radical negativity.

Another way of phrasing the distinction between the two antagonisms is to say that Marchart's radicalization of hegemony is *mutatis mutandi* the same argument as the one he employs against polemology. Namely, just like Foucault's notion of biopolitics as the continuation of war by political means, and just like Loraux's extrapolation of Greek antagonism as a stasis that requires two specific opponents facing each other, the strategies of hegemony are also confined to the ontic. They fail to rise to the ontological proper, whence the need for the second notion of antagonism as radical negativity.

Significantly, Marchart notes that ontological antagonism can never be encountered directly. Just like Heidegger's being, the political in Marchart cannot be experienced. If the "being toward death" entails that one encounters death only ever as a futural possibility that structures one's experience, similarly the political is that which structures the experience of politics but is only ever accessible—or experienced—as at the ontic level. From this perspective, the strategies of hegemony—the entire gamut of instrumental means employed at the level of politics—pave the way to the ontological conception of antagonism as a constitutive outside. In this sense, the various techniques of hegemony are not to be dismissed as inferior to a superior ontological antagonism—no such hierarchy is permissible. To the contrary, it is only via the "technical categories" of hegemony that we can gain access to ontological antagonism.

[28] Marchart, Thinking Antagonism, p. 26.
[29] Marchart, Thinking Antagonism, p. 150.

The confinement of instrumentality to the ontic

This entails that not every instrumental action is political. Marchart constructs a notion of "minimal politics" to indicate the conditions whereby politics can happen at the ontic level. Marchart's account in presented panoramically through a discussion of Gramsci's "war of position." I cite in full this important relevant passage:

> The abyss can no more be approached directly than the ground. What is called for is the development of tools for a theory of action that do consider the ontological register of the act, but do not imagine it as if it were to be realised in a vacuum. ... For we always act on a terrain criss-crossed by antagonisms and unevenly formed by sedimented institutions. For this sort of action Gramsci found the metaphor of a "war of position." With this metaphor, he recalls the convoluted trench systems on the battlefields of the First World War. Like these, the civil societies of the developed states in the West are made up of a very complex, yet resistant structure of interlaced institutions that are being contested. By introducing this notion, Gramsci let go of the classical idea of sovereign power long before Foucault did. Gramsci saw power in the developed societies not located in a given state apparatus (such as the government), nor in any place of society: he recognised that it is distributed throughout the entire civil society. Accordingly, it is not enough to storm the Winter Palace and take over power, as in the model of the revolutionary "war of movement"; the achievement of hegemony must be preceded by a long "war of position." As in the trenches of the First World War, the shifts that are achieved along the front line are but minimal and slow. The precise location of the front line is perhaps not even always apparent.[30]

The play of groundlessness and ground, the ontological ground of the abyss that post-foundational political ontology requires, can never be approached directly. The political is not visible as such, it is not subject to direct experience. Even the "front line"—the border between politics and the political—is malleable and indiscernible. This means that the political always requires its mirroring into politics where instrumentality unfolds. This ontic level is the contingent terrain where slow, unpredictable and often incalculable moves take place. Just like trench war, politics requires strategy, organization and collective action, even if these can never guarantee a successful outcome.

This confinement of the instrumental in the ontic has a significant effect on how the political difference is understood. Specifically, the ontological is purified of all instrumentality that is now confined to the ontic level. "Political action therefore means: calculation with that which cannot be calculated—the groundless—but still never without premise, and always under the conditions of a concrete, as political scientists would put it, 'opportunity structure,' i.e. in the presence of partial

[30] Marchart, Thinking Antagonism, p. 139.

grounds."[31] The political admits of calculation only to the extent that it recognizes that it cannot calculate. The groundlessness of the ontological excludes calculation, which is now circumscribed within the ontic level, that is, the level where the "war of position" takes place and the various hegemonic strategies unfold.

Marchart takes this confinement of calculation and instrumentality to the ontic for granted. It is often repeated. For instance, in *Post-Foundational Political Thought*, Marchart writes: "What comes to block access to the 'pure' moment of the political (unmediated, that is, by the strategic movements of politics or by the sedimentations of the social) is, however, the differential nature of the political difference—implying the constant deferral of any stabilization, either on the side of politics or on the side of the political."[32] The circular relation between the ontological/political and the ontic/politics can never be stabilized. There is no purified realm of the political that is free from a "war of position." But in this relation the "strategic movement" is confined to politics. It is an entirely ontic concern.

The separation of the instrumental from the ontological is critical for the argument in *Thinking Antagonism*. For instance, we read the following: "if, on the ontological level, antagonism has little to do with a dualistic friend/enemy distinction but, instead, refers to a fundamental blockade that issues from an incommensurably negative instance, then a plethora of highly diverse concrete antagonisms will be unleashed. Conflicts will multiply, as will agents, strategies, organisations and parties."[33] The multiplicity of conflicts—the sheer contingency that characterizes the unfolding of instrumental calculations—will derail an ontology of the political. To avert this from happening it is required that antagonism on the ontological level is a pure negativity in the sense that it negates all possibility of a ground for calcuation. The possibility of ground—that is, the terrain where the first antagonism unfolds and which is vacated by the antagonism of radical negativity—is precisely the possibility of instrumental calculation.

The threat of formalism

I concur with a critique of essentialism that seeks to ground the political—moreover a critique that is mindful not to revert to metaphysics by asserting a complete groundlessness. Marchart's work is exemplary in this regard. I remain worried, however, about achieving this end by confining instrumentality to the ontic or to politics. Confining instrumentality into the ontic raises the prospect that the political difference lapses into formalism so as to sustain the relation between the ontic and the

[31] Marchart, Thinking Antagonism, p. 140.
[32] Marchart, Post-Foundational Political Thought, p. 6.
[33] Marchart, Thinking Antagonism, p. 194.

ontological. The ontological may appear only as the negative form of the content provided by the instrumentality characteristic of politics.

Such a prospect of formalism is troublesome. If on the side of politics agency and action are determined by the operation of instrumentality—such as the various strategies and organizational practices that enable hegemony—while on the side of the ontological the instrumental is banished, then one cannot help but sense a separation of the ontic and the ontological carried out via instrumentality. This seems to suggest a purely formal function for the ontological, which would consist in negating the instrumental—irrespective of content, since any content given by the instrumental antagonisms of the ontic is inadmissible in ontological antagonism.

Marchart flirts with such formalism. Symptomatic of this is his use of the passive voice to refer to action from the ontological perspective. Such a use of the passive voice is persistent throughout *Post-Foundational Political Thought* and *Thinking Antagonism*. Indicatively, here is a formulation of the political difference early on in *Post-Foundational Political Thought*:

> once *it is assumed* that the political acts as a grounding supplement to all social relations, it will not be possible to restrain its effects ... to the traditional field of politics. All dimensions of society ... will consequently *be subjected* to the constant play of grounding/ ungrounding as it is conceptually captured by the political difference.[34]

Both the assumption of the political difference and its effects are expressed in the passive voice. The post-foundational play of grounding and ungrounding is undertaken in the passive voice, that is, it is the agentless dispensation of the negation of the ontic where action and agency are confined. Similarly in *Thinking Antagonism*:

> dormant antagonism does not awake from its slumber by itself. Its awakening must *be provoked*—without any guarantee of success. Politics, by way of protestation, is about provoking antagonism. With regard to the latter, the political agent acts as *agent provocateur*. ... Thinking needs to *be activated* by antagonism, which, in turn, needs to *be activated* by thinking.[35]

So long as Marchart discusses the side of politics, he can refer to an *agent provocateur*, an actor who conducts himself instrumentally. As soon as the ontic is related back to the ontological so as to sustain the circularity of political difference, there is a lapse back to the passive voice. The danger is that this all that acting can do is merely provoke a recognition that it can never be fully successful—a point that surely does not need to be designated as the ontological as the ontic analysis itself has the capacity to reach the same conclusion.

[34] Marchart, Post-Foundational Political Thought, p. 9, emphasis added.
[35] Marchart, Thinking Antagonism, p. 197, emphasis added.

We see at this point the how close this position may appear to be to formalism. The difficulty is well-known for any ontology that refers to a constitutive outside that leads to an agentless conception of action. This is, for instance, the figure of the sovereign in Bataille—a sovereign whose actions are directed against utility and as such his most profound intervention consists in waiting rather than acting.[36] Bataille emphasizes this by calling the sovereign "NOTHING," always capitalized. Or we can see it in the celebration of the figure of Bartleby, whose "I prefer not to" most certainly dismantles any foundation of action but who also remains so devoid of content as to appear as mere form. Hardt and Negri correctly observe that "Bartleby in his pure passivity and his refusal of any particulars presents us with a figure of generic being, being as such, being and nothing more."[37] One fears that the passive voice in Marchart's text is like the shadow of Bartleby over his notion of political difference.

Astutely, Marchart avoids Heidegger's ruse to bypass this problem. Being acutely aware of the threat of formalism, Heidegger uses art or techne to fill the void of the ontological. According to Heidegger, it is great art—from the pre-Socratics to Hölderlin—that gives being an expression, or that lets being come forth. Heidegger valorizes art by accentuating the separation of being from instrumentality. Technology is ontic, only techne, as the "secret" source of technology is connected to being, as he argues in "The Question Concerning Technology." Marchart is not seduced by such a celebration of an art as settling the separation from instrumentality from the ontological. He does not take the path according to which content can be given in the guise of a book of Hölderlin's poems carried in the rucksacks of soldiers marching to war. The "uselessness" of Sophoclean tragedy is far from an adequate response to the plurality of political struggles and antagonisms facing us in any historical moment. Marchart is not tempted by Heidegger's *ruse of techne*.[38]

There are two key reasons why Marchart is prudent to avoid this solution to the problem of formalism and passive subjectivity. First, there is the ontological danger that the passive voice as an effect of the banishment of the instrumental reproduces one of the fundamental distinctions of metaphysics that Heidegger himself castigates, namely, the distinction between form and matter. The ontological, as an effect of an agentless passive voice, appears perilously close to be merely the formal observe side of the ontic. Second, this leads to pernicious political consequences.

[36] For instance, Bataille writes: "the man of action—who meant to command history—if he were attentive would see that another, who doesn't act, who waits, may in a sense be ridiculous, but takes the consequences of the event more seriously: the one who waits without acting disregards those immediate ends that never have all the importance, nor the exact importance, which action bestows on them." Georges Bataille, Sovereignty, in The Accursed Share: An Essay on General Economy, volume 3, trans. Robert Hurley (New York: Zone Books, 1993), pp. 277-78.

[37] Michael Hardt and Antonio Negri, Empire (Cambridge, Mass.: Harvard U. P., 2000), p. 203.

[38] I am alluding here to an argument that I develop in detail in Vardoulakis, The Ruse of Techne: Heidegger's Metaphysical Materialism (forthcoming).

Politics can never completely eliminate presentation, whereby it needs the "voice" both as the representatives and the represented. It is an illusion to believe that ontological formalism can dispense with representation altogether. Moreover, it is a dangerous illusion because then all sorts of mythical constructs can rush to fill the void of representation in politics, such as an imaginary people (*das Volk*) or a "charismatic" leader. Formalism does not eliminate the "active voice" in politics; rather, it prevents a critical political engagement, which is beneficial only for those who want to assume the mantle of authority.

Thus, the banishment of instrumentality from the ontological creates all sorts of metaphysical and political problems about how the differential relation between the ontic and the ontological is understood. If the typical solution is unpalatable, then how can we understand the circle of the political difference without lapsing into formalism. Maybe we need to delve deeper into the banishing of the instrumental into the ontic. Maybe we need to consider whether we need to dare to construct a notion of the ontological that *includes* instrumentality? How could such a radicalization of radical negativity be accomplished?

4. THE PERSISTENCE WITH POLITICAL JUDGMENT

I noted earlier that there is a shift in the way Marchart positions his discourse of antagonistic democracy, so that it is no longer a matter of how to distinguish agonism from consensus, but rather a matter of how to identify the correct form of antagonism. Starting with the political difference—the distinction between the political and politics—Marchart develops a post-foundational theory of the political that is, at the same time, a theory of antagonism. Simultaneously, there is a double antagonism, both ontological and ontic, both political and a dispensation of the hegemonic articulations at the ontic plane. This position faces the problem of how to deal with the banishing of instrumentality to the ontic, which suggests a separation between the ontic and the ontological, making Marchart's political ontology appear precariously close to formalism.

Heideggerianism and Hegelianism

Even though the treatment of instrumentality causes all sorts of problems, there is no direct engagement with instrumentality in Marchart's work. But this may be due to the fact that the problem that I call the banishing of the instrumentality is dealt with through other means. Specifically, one may contend that the problem of formalism is addressed by a key move that we find in the opening of *Post-Foundational Political Thought*: the distinction between post-foundationalism and anti-foundationalism. The distinction suggests that the circularity of the ontological

difference and the double sense of negation cannot be separated and examined as individual concerns.

Focusing exclusively on negation at the expense of circularity, anti-foundationalism rejects any grounding of the political tout court whereby it lapses into the very grounding it has rejected. In Marchart's formulation: "insofar as the anti-foundationalist view is premised on the negation of, or simple opposition to, the foundationalist view, it obviously shares the same horizon with foundationalism."[39] Negating the possibility of grounding as such is nothing but another form of grounding. Anti-foundationalism is the obverse side of foundationalism. This is the reason that the "post-modernist" anti-foundationalist discourses, far from negating foundationalism, actually promote it: "framing of the discussion in dualistic terms—where anti-foundationalists are merely negating or inverting foundationalist premises—is part of the strategy of foundationalists rather than being the strategy of post-foundationalists."[40] This is why foundationalist discourses thrive when faced with anti-foundationalist ones: "The negative label of 'antiness' is assigned from the standpoint of foundationalism. ... Framing the ongoing debate in terms of the divide between foundationalism and anti-foundationalism favours foundationalism and thus is upheld and deliberately instrumentalized by foundationalists."[41] Thus, for instance, if we recognize that the liberal politics of identity in the US are in fact an anti-foundationalist discourse, then it is easy to see how foundationalist discourses such as "make America great" thrive in conjunction with them.

The critical idea in the distinction between post-foundationalism and anti-foundationalism is the combination of circularity and negation. How is it possible for post-foundationalism to negate foundations without lapsing into the naïve negativity of anti-foundationalism that is unaware of the circularity of political difference This is a pivotal concern for Marchart as negation affects the circular relation between politics and the political and it thus has an impact on whether the discourse manages to escape formalism. His notion of antagonism is inscribed in this problematic and it is a—if not, *the*—major concern of *Thinking Antagonism*.

At the onset of *Thinking Antagonism*, Marchart describes his position as a combination of Heideggerianism—the circular relation of the ontological and the ontic—and Hegelianism—the emphasis on negativity.[42] Thus, Marchart introduces the term "antagonism" as follows:

[39] Marchart, Post-Foundational Political Thought, p. 12.

[40] Marchart, Post-Foundational Political Thought, p. 12.

[41] Marchart, Post-Foundational Political Thought, pp. 12-13.

[42] I should note that what Marchart calls "Hegelianism" is perhaps much more indebted to French Hegelians than to Hegel himself. Kojève is hugely important in this context. In the generation after Kojève, and thus more removed from Hegel, it is important to note the influence of Bataille's conception of negativity—a conception that has come into contact with psychoanalysis. I cannot take up all these interesting connections here.

> Antagonism is the name that was given to the phenomenon of social negativity in the tradition of German Idealism, Early Romanticism and Marxism. It was carried forward by the Heideggerian Hegelians of the first half of the twentieth century, among them Kojève, Sartre and Lacan. This concept was born from a collective inquiry that reaches back more than two hundred years, but it was in the work of Ernesto Laclau, initially in his path-breaking book *Hegemony and Socialist Strategy*, co-written with Chantal Mouffe, that "antagonism" found a contemporary systematic treatment.[43]

We are presented here with the framing of *Thinking Antagonism*. It is a combination of Heidegger and Hegel—of the circularity and negativity of ontology. The genealogy of this combination reaches back to the beginning of the nineteenth century—a genealogy Marchart presents in chapter 1, "Marx on the Beach," one of the most remarkable chapters of *Thinking Antagonism*. The combination of Hegelian negativity and Heidegger's destruction of metaphysical foundations is consummated in the work of Laclau and Mouffe who, nonetheless—as I noted earlier—do not take the final step of presenting a full ontology of the political. It is this step that Marchart takes with his own work.

What stitches together all these threads is negativity as the defining feature of the ontological. This is the *radical negativity* of a constitutive outside that is required—as Laclau recognizes, notes Marchart—for meaning to be produced:

> For differences to assume a certain degree of systematicity, they must be brought into a relation of equivalence, which can only be stabilised vis-à-vis a common outside that cannot simply be another difference (as in this case it would not constitute a true outside but would be internal to a system of differences). The outside must be of a *radically* different nature: different, that is, from all internal differences. And this it can only be as a *non*-differential instance of radical negativity—named antagonism by Laclau. ... Negating the differential nature of a given system is the very precondition for its systematicity and, thus, for meaning to arise.[44]

A discourse can be systematic without lapsing into foundationalism only by positing a constitutive outside that prevents its occlusion. At the same time, this outside enables the internal negation of the hegemonic articulations of a given social group. Radical negativity is the parallel operation of circularity and the negation of the ontic. Understood this way, radical negativity or antagonism denotes a "double-sided moment: the moment of original *institution* as well as the moment of original *destitution* of social order."[45] Thus antagonism, radical negativity or the constitutive outside—which from the present perspective are interchangeable terms—designate the ontological whose lack of foundation is presupposed by the operation of politics.

[43] Marchart, Thinking Antagonism, pp. 1-2.
[44] Marchart, Thinking Antagonism, pp. 20-21.
[45] Marchart, Thinking Antagonism, p. 23.

Interchangeable priority or qualitative difference?

We need a further step to see why the combination of Heideggerianism and Hegelianism may answer the threat of formalism. The combination of circularity and negativity entails that neither radical negation not the negation of the ontic is privileged absolutely. But this does not mean that no such privileging takes place. If the production of meaning requires the constitutive outside of radical negativity, but Marchart insists that for the circle to be sustained the privileging could also be revered. Or differently put, the privileging is a matter of perspective, whereby either radical negativity or the negation of the hegemonic can be privileged. Marchart outlines the second kind of privileging in chapter 8, titled "Being as Acting: The Primacy of Politics and the Politics of Thought":

> Politics begins with negation. From an *ontological* perspective, this would of course imply the "eventual" emergence of an antagonism; yet, from the perspective of *ontic* practices ... negation has to be brought about. Negativity, in other words, is not simply "out there" as a cosmic principle or an objective feature of the world. Negativity is to be produced by our actions. Therefore, when trying to invert the order of priority between the ontological and the ontic, one has to insist on negativity as an ontic practice—for the ontological instance of antagonism will only emerge when activated by our worldly actions. There is antagonism because politics—as much as political thinking—proceeds through negation.[46]

The fact that "politics begins with negation" is not meant as a revision of the earlier position about the priority of the political but rather as the assertion of a double perspective on negativity—just as we saw earlier a double meaning of antagonism. Negativity is both ontological and ontic. What Marchart adds here is that the ontological emerges only "when activated by our worldly actions." It is through the combination of radical negativity and circularity—which makes possible an interchangeable priority of negation from the ontic to the ontological perspective—that Marchart evades the problem of formalism.

A few pages later we find his answer to the associated problem about passive subjectivity:

> While we are not the source of our actions, we must attribute to ourselves the capacity to act unless we want to remain passive bystanders. ... I am because I negate—and I negate because my being is negated. ... [A]ntagonism as an instance of radical negativity, far from constituting something of the order of a natural force somewhere out there, detached from our practice, is always politically produced. What from an ontological perspective is the name for an insurmountable blockade of society—a mere incommensurability that *cannot* be constructed—*is* constructed, from an ontic perspective, through a particular practice: the negation of the given.[47]

[46] Marchart, Thinking Antagonism, p. 187.
[47] Marchart, Thinking Antagonism, p. 196.

The negativity at the ontic plane ensures that we do not "remain passive bystanders." In this sense, radical negativity provides an account of how action is possible. Far from celebrating passivity and lapsing into vacuous formalism that can only end up serving the interests of those in power, the combination of Hegelianism and Heideggerianism proposes a theory of action—one that "negates the given" while avoiding the dead-end of anti-foundationalism.

Does such a construal of radical negativity actually overcome the problematic banishment of instrumentality onto the ontic realm? Or is the combination of circularity and negativity a deflection whereby the banishment is merely transfigured into the positing of two perspectives, a move that changes the terms of the problem without address it as such? If circularity makes the two perspectives *interchangeable*, still this does not mean that they do not remain *incommensurable*. The fact that we can move from the ontic to the ontological, or from politics to the political, and back again, does not entail that the rift has been closed.

To the contrary, paying close attention to the passage above, we can notice that the rift is not just formulated in a different vocabulary. The antagonism of radical negativity, holds Marchart, does not constitute the political in the guise of "the order of a natural force." Naturalization makes politics and the political disappear. For politics to persist, instrumentality needs to function within the negations that are part of the hegemonic articulations. A "negation of the given" or determinate negation is required alongside the radical negation of the ontological plane.[48] The double face of negation—negation of the given and radical negativity—establishes a *system of exchange* or shifting perspective from within political and ontological difference. But this does not mean that it avoids an ontological dualism given that it persists with the *qualitative distinction* between the two perspectives.

Thereby a new gap appears, or, rather, the earlier separation is now reformulated—and, moreover, in such a way that instrumentality is still inscribed in it. This new formulation is between the naturalism of radical negativity that itself can construct nothing political, as opposed to the instrumentality that concerns exclusively the hegemonic constructions of politics. Politics institutes us through negation because its instrumentality is different from natural causality.

How are we to understand this gap between instrumentality and causality? There is a significant history on the relation of causality and instrumentality—one that, as I argue elsewhere, is central to the conception of materialism.[49] A materialist ontology

[48] There is a temptation at this point to stage the divergences between Marchart's reliance on a Hegelian notion of negativity from a Spinozan position in terms of the old debate that Pierre Macherey's classic Hegel or Spinoza, trans. Susan M. Ruddick (Minneapolis: University of Minnesota Press, 2011). But this will be a diversion that I cannot undertake here.

[49] I argue that the distinction between causality and instrumentality is indispensable for a materialist politics. See Vardoulakis, Spinoza, the Epicurean: Authority and Utility in Materialism (Edinburgh: Edinburgh U. P., 2020).

requires this distinction between causality and instrumentality so as to give an account of action. Telegraphically, a version of this history goes as follows:

Causality and instrumentality in materialism

The notion of causality can deal with matter. At the beginning of philosophy, the principle that nothing comes out of nothing, or that there is a totality outside of which nothing exists, is a commonly agreed upon ontological principle. The "Greek cosmologists," as David Furley calls them, fiercely debate this ontological principle that itself remains however beyond dispute.[50] This position is the founding principle of materialism. It effectively asserts that there is no transcendence. There is no being that is essentially different from the being that we empirically encounter in our experience. Or, to put it the other way round, there is no possibility that an entity—let's call it "god"—can intervene from the "outside" of empirical being to change that empirical being in any way, regardless of whether such interventions are understood as miracles or as acts of the free will.[51] In yet another formulation, the laws of nature are constant, which is why the chains of causes and effects, or causality, cannot account for the construction and change characteristic of the political sphere.

Alongside this natural causality, there is instrumentality that articulates as the calculation of utility and is necessary for an account of action and politics. If causality concerns being, instrumentality concerns the being of the human. The human is not capable of having a complete knowledge of the chain of causes and effect. Even the simplest act—just like the actions of my finders right now pressing the keys of the computer keyboard—is the product of a vast chain of causes and effects that I am utterly hopeless in mastering. I can master some of these causes. For instance, I can study the causality that makes it possible for my computer to work, or for this file to be saved automatically on my cloud storage. But this is far from an adequate explanation about how I have come to write what I am writing right now.

We can readily discern two distinct yet inseparable constellations of questions. There are questions about the causes that determine action. And there are questions that inquire about the means and ends of action. The material cause of a book may be the computer technology that enables the typic, saving, and sharing of the document. But this tells us nothing about why the author chose a particular topic or about the decisions to treat that topic in a particular way. These are instrumental questions whose end is always provisional and unstable. It is produced along with

[50] David Furley, The Greek Cosmologists: The Formation of Atomic Theory and its Earliest Critics (Cambridge: Cambridge University Press, 1987).

[51] The resurfacing of this materialist insight is critical for the development of natural science in modernity. SeeCatherine Wilson, Epicureanism at the Origins of Modernity (Oxford: Clarendon Press, 2008).

the actions that it produces. Causality and instrumentality give answers to different questions but they concern the same being.

The materialist tradition has always had recourse to such a distinction between causality and instrumentality. Despite the different terminology that have been employed over the ages to delineate this distinction, it is always suggests the commensurability of causality and instrumentality, because they occupy the same ontological plane. For instance, Machiavelli formulates this in terms of the distinction between fortune and virtue. His illustration of the distinction in chapter 25 of *The Prince* refers to a river that fortune (that is, natural causes) make it flood with ferocious destruction, while virtue (that is, the instrumental calculation) can prevent the destruction of the river by building dikes and dams.[52] Machiavelli is not suggesting that fate or virtue refer to different kinds of being. Nor does he refer to two interchangeable perspectives. Rather, causality and instrumentality are circumscribed within the same plane but indicate different questions that can be asked of that plane.

This has implications for the political difference. From the perspective of the ontological difference, it is impossible to confine either fate or virtue to either the ontological or the ontic. The distinction of fate and virtue—or of causality and instrumentality—overlays the ontological difference thereby preventing a gap to open up between the ontological and the ontic. Similarly, there is an overlap between the political and politics.

Practical judgment and the inscription of instrumentality in the ontological

This overlaying that inscribes instrumentality across political difference is effected through practical judgment. The earliest instance of the distinction between causality and instrumentality that I am aware of occurs in the context of Aristotle's examination of phronesis in Book 6 of the *Nicomachean Ethics*. At the very beginning, Aristotle distinguishes between two senses of the end:

> Judging determines acting (it instigates the movement of action, not its final end), and judging is determined by desire and the *logos* toward a certain specific or provisional end [*πράξεως μὲν οὖν ἀρχὴ προαίρεσις (ὅθεν ἡ κίνησις ἀλλ' οὐχ οὗ ἕνεκα), προαιρέσεως δὲ ὄρεξις καὶ λόγος ὁ ἕνεκα τινος*].[53]

[52] Niccolò Machiavelli, The Prince, ed. Quentin Skinner and Russell Price (Cambridge: Cambridge U. P., 1988), pp. 84-85.

[53] Aristotle, Nicomachean Ethics, trans. H. Rackham (Cambridge, Mass. Harvard U. P., 2003), 1139a32-33, trans modified.

Consideration of nature requires the determination of *final ends*—which accords with Aristotle's theory of the four causes.[54] By contrast, the kind of practical judgment that the Greeks call phronesis and which pertains to action is characterized by an instrumental thinking that considers *provisional ends*—that is, ends that can be otherwise as they are determined by contingent circumstances. We are all aware of the drawback of making the ends of phronesis only provisional: as Aristotle observes, this entails that phronesis never achieves certainty, which is why at the end of book of Book 6 he privileges theoretical knowledge over phronesis. Regardless of the details of Aristotle's argument and its conclusions, it is worth remembering that construction of practical judgment requires the distinction between causality and instrumentality.[55] From such a materialist perspective, causality and instrumentality are distinct but inseparable. Practical judgment is the function of the difference between causality and instrumentality that effects an overlap between the ontic and the ontological or between politics and the political. Effectively, this means that practical judgment ensures the inscription of instrumentality into the ontological as well as the ontic.

This historical background matters because of the enormous influence of Heidegger in obscuring the distinction. This takes place through a curious mistranslation of the passage from the *Nicomachean Ethics* that I cited above. In his early work on Aristotle, such as in the opening seminars of his course on the *Sophist*, which is of fundamental importance in his preparation of *Being and Time*, Heidegger misses the negative next to the final end. This leads Heidegger to conflate causality and instrumentality, or to bundle together all thinking of ends.[56] This mistake persists in the late Heidegger. For instance, in "The Question Concerning Technology," we still discern the same collapse of causality into instrumentality. The effect of this amnesia about a distinction that ancient philosophy was acutely aware of has been that the jumbled causality/instrumentality is circumscribed into the ontic. Whence the difficulty of a rift between the ontic and the ontological effected by instrumentality. And the inadequate solution of the problem through the interchangeable priority of ontic and ontological negation that still asserts a qualitative difference between the two notions of negativity.

To recognize and follow this materialist tradition about the distinction of causality and instrumentality creates a pernicious dilemma for radical negativity. The

[54] Aristotle formulates his theory of the four causes in both the Metaphysics and the Physics. See, e.g., Aristotle, Physics, Volume I: Books 1-4, trans. H. Wicksteed, F.M. Cornford (Cambridge, MA: Harvard U. P., 1957), 1013b.

[55] That this distinction is not peculiar to Aristotle is supported by the fact that we know of numerous treatises on ethics from antiquity whose title is Peri telous (On ends), culminated in Cicero's De finibus.

[56] This mistranslation and its implications are the topic of chapter 1 of Vardoulakis, The Ruse of Techne. For reasons of space, I cannot go into the details of this argument here.

dilemma arises as soon as the rift between the ontic and ontological via the confinement of instrumentality to the ontic is realized. Two equally undesirable options arise at this point: either trying to bridge the rift, thereby lapsing into a vulgar empiricism; or persisting with the rift, thereby accepting transcendence and abandoning materialism in favor of metaphysics. Let us return at this point to Marchart's text to examine how this dilemma plays out.

There are passages where Marchart appears to side with the empiricist solution. Assertions such as that "politics begins with negation" and that it is our actions that produce negativity may appear to lean this way. But a lapse into empiricism is something that Marchart himself explicitly denounces. This is, for instance, the reason of his rejection of Foucault and Loraux's polemological approaches—as we saw earlier. Moreover, if political philosophy were merely an enumeration of empirically observable instances, then a political ontology would be defunct and any attempt to determine post-foundationalism or a determinate outside purely futile.

The alternative is the hardly more palatable prospect of a re-inscription of transcendence. When Marchart writes, as we saw above, that "the outside must be of a *radically* different nature" from the ontic realm where politics unfolds, then the banishment of instrumentality into the ontic sphere asserts a qualitative difference. In the absence of an argument that shows the operative presence of instrumentality in this radical negativity of the constitutive outside, we will be entitled to say that the outside here is of a different kind of being—*qualitatively*—from the being of the political actors. Radical negativity has not cut off the rearing head of transcendence yet.

We have already seen the way out of this dilemma: the inscription of instrumentality to the ontological with recourse to a notion of practical judgment. Marchart has this solution at his disposal, even though he does not develop it—or, at least, has not develop it in his published work yet. The solution pertains to how the circular relation of the ontic and the ontological can be construed through judgment in such a way as to avoid positing a qualitatively different being at one side of the circle. In a note, Marchart observes: "Politics and the political can only emerge from each other, yet there remains that minimal difference of non-concurrence that precludes coming full circle and blocks every deductive thought." Instead of a constitutive outside that is qualitatively different from its ontic underbelly, here the relation of politics and the political is construed as an overlap. How can the political difference within the overlap be retained? Marchart continues: "Hence *the inevitability of political judgement* as the virtue that is absolutely necessary to achieve plausible articulation on both sides of the difference."[57] Exactly! If political judgment is instrumental—encompassing all the instrumental strategies of hegemonic articulation—then it is necessary to articulate the operative presence of instrumentality *on both sides* of the political and ontological difference. It is this overlap of politics and the political,

[57] Marchart, Thinking Antagonism, p. 234, emphasis added.

of the ontic and the ontological, through the inevitability of practical, instrumental judgment that breaks the hold of the dilemma "empiricism or transcendence."

Even if Marchart appears to have entrenched himself in a radical negativity whose combination of Hegelianism and Heideggerianism leads him to the confine instrumentality into the ontic, the tensions within his position push him to adopt the discourse of practical judgment—even momentarily. All that is needed to overcome the rift between the ontic and the ontological that instrumentality threatens is to inscribe instrumentality into the ontological. In other words, all that is needed is for the inclusion of practical judgment to be persisted with. Such a foregrounding will constitute the radicalization of the radical negativity.

607 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 607-621
ISSN: 1825-5167

THINKING 'THINKING ANTAGONISM'. A RESPONSE

OLIVER MARCHART
Institut für Politikwissenschaft
University of Vienna
oliver.marchart@univie.ac.at

ABSTRACT
This contribution replies to a set of articles by Paula Biglieri, Allan Dreyer Hansen, Vassilios Paipais, David Payne, Gloria Perelló and Dimitris Vardoulakis about the book 'Thinking Antagonism. Political Ontology after Laclau' (Edinburgh University Press 2018) by Oliver Marchart. The author positions his own ontology of the political, i.e. of antagonism, in relation to the work of Ernesto Laclau and within the intellectual context of the Essex School. He thereby reflects on the role of the university, the transferential relationship between academic 'master' and 'disciple', the question of what is 'proper' to a given thought, agonistic democracy, Lacanian psychoanalysis, and what 'thinking' could mean from a political perspective.

KEYWORDS
Political ontology/difference/post-foundationalism, ontological turn, antagonism, radical democracy, negativity, Laclau, Hegel, Heidegger.

I'm immensely grateful to Paula Biglieri, Allan Dreyer Hansen, Vassilios Paipais, David Payne, Gloria Perelló and Dimitris Vardoulakis for their insightful and sophisticated engagement with my book. If thinking is, as is proposed in the book, a political exercise, then it is also a collective one. And obviously, we are engaging in a collective enterprise that is not merely 'dialogical' in the liberal sense of a plurality of opinions, nor are we shouting at each other from the opposite sides of a ditch separating incompatible paradigms. Some of my interlocutors would, I suppose, clearly affiliate themselves with the Essex school, as I do, others perhaps less so, but they would still take a position sympathetic to its main tenets. So, in a sense we are all standing on the same side of the ditch; but, as it goes without saying, this does not mean that we agree on everything. Even as thinking, unconventionally understood as a mode of political acting, emerges only in and through antagonism – vis-à-vis the other side of the ditch, as it were – there would be no thinking on this side,

only sterile unanimity, without internal differences and contradictions. Our endeavor, therefore, exemplifies what *Thinking Antagonism* is all about.[1]

What I claim in the book, to recapitulate in a few lines, is that the recent 'ontological turn' in social theory is not fully accomplished as long as the intrinsically political nature of all social being is not accepted. What is needed is an ontology of the political (as differentiated from politics). By 'the political' I understand, from a post-foundational perspective, the grounding moment of the social, actualized by political practice. And I propose 'antagonism' as a name for the political. This name is taken from the work of Ernesto Laclau where, to make a long story short, antagonism constitutes the radically negative outside with respect to which the differential elements of any signifying system are brought into a 'chain of equivalence' and, thus, are given partial coherence. But while their unity is established with reference to a pure negativity, the latter, because of its threatening nature, also dislocates their unity.[2] Laclau himself remains highly ambivalent though and tends to shrink back from developing an ontology of antagonism, but for reasons developed in the book, I submit that antagonism lies at the ground of every social identity (not only of political identities or discourses). Antagonism, in Heideggerese, should be envisaged as 'the groundless ground' of the social. Such an ontology is not anymore located in the field of empirical science or even hegemony theory, nor does it fall into the realm of philosophy as an academic discipline. Rather, it is a matter of thinking, that is, of thinking antagonism. Therefore, antagonism in my approach does not have conceptual status: it is not a concept that could be distinguished from other concepts in a set of well-defined differences. It is a political presupposition that must be given a political name – a name that will direct our attention to the ineradicably conflictual and contingent nature of all social relations. This is the reason why, in order to approach antagonism, we will have to leave behind the field of conceptual differentiation and turn towards ontology, for ontology is the science of *all* being, not of a particular sector of beings. It is concerned with equivalence, rather than well-defined differences. Hence my claim that the ontological nature of antagonism must be *thought*, rather than conceptualized, provided thinking is envisaged as a collective, strategic, organized, conflictual, in short: political activity that brings together heterogeneous differences into a chain of equivalence. Given this thoroughly politicized idea of 'thinking', there can be no ontology of antagonism without thinking and vice versa. Hence, in the introduction to my book, I portray thinking and antagonism as the two foci of an ellipse; and the purpose of the book is to squeeze together the

[1] Oliver Marchart: *Thinking Antagonism. Political Ontology after Laclau*, (Edinburgh: Edinburgh University Press, 2018).

[2] Note that 'dislocation' is deliberately presented here as an *effect* of antagonism, rather than a deeper, non-political ontological source. As will become evident shortly, this is the main point of contention between my position and the position of some of my interlocutors with regard to Laclau's conception of antagonism.

two foci into a single centre, thus turning the ellipse into a circle in an effort of both 'thinking the political' and 'politicizing thought'.

No doubt, the act of squeezing requires a certain degree of force. One needs to be prepared to not only logically follow an argument which I tried to bring out in the book as clearly as possible, but also to accept the very name antagonism as a name for social being. Ultimately, the name will be granted verisimilitude only by someone within largely the same intellectual-political horizon. A rational choice theorist, for instance, will find the whole claim unacceptable – but so I find rational choice theory. One needs to position oneself in a tradition that leads from Hegel and the young Hegelians via Marx to contemporary theorizations of antagonism, particularly in Laclau and Mouffe's work, to grant verisimilitude to this choice of name. This also implies that one has to have a stake in (re-)politicizing rather than depoliticizing society. All of my interlocutors share a deeply political outlook on our social world, but not all of them would be prepared to accept my apparently boundless ontological approach to the political. And, of course, not all of them would position themselves in exactly the same line of affiliation. Here is where an initial source of irritation can be detected – a certain irritation regarding the degree to which I rely, or may not rely, on some of Ernesto Laclau's basic intuitions. It seems to be a potential matter of discomfort that the 'dogmatic status' of this book, subtitled 'Political Ontology after Laclau', remains partially undefinable. The purely temporal, and thus banal, resonance of the word 'after' does not provide the reader with any clues. Is political ontology in this book developed 'according to' or 'following' Laclau? Or is the author invested in pushing political ontology 'beyond' Laclau? Or both? Is the author perhaps deviating from Laclau's track precisely by following it?

So let me start my response by clarifying my relation to Laclau's theory, as the nature of this relation is subject to a variety of speculations. In the eyes of Hansen, I am 'more Laclauian than Laclau himself' (which Hansen takes to be a good thing, even as he disagrees) in pushing his theory to its final conclusions – onto the terrain of ontology, where Laclau himself could never make up his mind. So even while deviating from the Laclauian course (in granting ontological primacy to antagonism, which Laclau didn't), my position is even more Laclauian than Laclau's own position. It is what one is tempted to call hyper-Laclauian. Of course, this – supposed – hyper-Laclauianism not only gives reason to praise, it is as well subject to criticism. In the eyes of Paipais, I seem to be 'overly invested' in 'Laclau's legacy in ways that threaten to compromise the radical potential' of my own argument. So, while Hansen thinks that my 'over-investment' will productively radicalize the argument, Paipais thinks it would de-radicalize it. Given this choice, I obviously side with Hansen. I do think over-investment, if this should be the case, can be a much more productive intellectual strategy than pointless self-distanciation. So while I'm grateful for Paipais' many inspiring comments on my book, I do not think it would be a sign of

'ostinato rigore' to simply abandon and abdicate my theoretical position and convert, as Paipais seems to recommend, to some kind of Agambenianism, because the idea of 'radical passivity', defended by Paipais, is largely incompatible with a realistic take on politics as I see it.[3] A Gramscian stand, it is true, does associate political action 'with success, effectivity and mastery', but only to the degree to which all this flows into a concerted effort at constructing a (counter-)hegemonic formation. Therefore I cannot manage to see the danger of Laclau's Gramscian inheritance functioning 'as a straight-jacket' that would keep my book from 'taking the final step', which is supposed to be a step from Gramscianism to, say, a certain 'weak messianism' and 'radical passivism'. For theoretical as well as political reasons that I have developed elsewhere, this step would be inadvisable.[4] Let's not forget that Bartleby, the hero of 'radical passivity', starved himself to death – hardly a recommendable political strategy.[5]

Thus, I cannot agree with Paipais' claim that '(i)nheritance is indeed a heavy burden', because I am convinced that inheritance is precisely what allows us to move on. Nor do I agree with his claim that moving on should be premised on 'the symbolic act of "killing the father"'. I appreciate the provocative note on which Paipais' intervention ends, but would like to retort that I'm not too much invested in the oedipal business of 'killing the father', because it strikes me as a rather adolescent attempt at tackling the burden of inheritance. A more productive way of coping with intellectual inheritance would be to stretch it to its utmost limit, its breaking point, from where it can change its form and open new roads of inquiry. Hansen has it right that therein consists, by and large, the programmatic goal of *Thinking Antagonism*. Actually, there are three goals: (a) to push Laclau's hegemony theory to a point where an ontology of the political emerges through the re-articulation of the Hegelian tradition of radical negativity with the Heideggerian tradition of difference; (b) to develop a theory of thinking (as opposed to science and philosophy) that is reminiscent of Heidegger's notion of thinking, but would thoroughly politicize the latter; and (c) to make a claim – on the basis of the reversible relation between ontic

[3] I have presented my critique of Agamben in a chapter added to my *Die politische Differenz. Zum Denken des Politischen bei Nancy, Lefort, Badiou, Laclau und Agamben* (Berlin: Suhrkamp, 2010), pp.221-243, the significantly extended German version of Oliver Marchart: *Post-foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau,* (Edinburgh: Edinburgh University Press, 2007).

[4] Marchart: *Die politische Differenz*, pp. 317-18.

[5] Paipais thus defends a logic that he thinks could be better guaranteed by the Lacanian formula of sexuation, because 'it authorizes forms of politics, namely incarnations of a 'non-All' universal, that operate as embodiments of failure, incompleteness, messianic weakness, brokenness; not only as the failure to fill the absent fullness of society'. Given Paipais' implicit defence of a Benjaminian 'weak messianism', I should specify that I don't have any problem with political weakness, I just happen to think that it is not a virtue in itself. From a realistic perspective, to remain weak – what I describe in Chapter 6 of *Thinking Antagonism* as a deficient strategy of 'becoming minor' as opposed to a hegemonic strategy of 'becoming major' – is simply a recipe for disaster or irrelevance.

politics and the politico-ontological – for the primordiality of mundane politics as a protest practice of negating the given, a practice necessary for bringing to live antagonism.[6] It is hard, if not impossible to tell if or to what degree Laclau would have subscribed to any of these claims (for instance, he was hesitant to move onto the terrain of a generalized ontology, and with regard to Hegel, whom he had studied intensively, he once wrote: 'Forget Hegel!'). But the question is largely irrelevant. Neither was the purpose of the book to 'kill the father' nor was it to vindicate his theory. To be honest, and to disclose the genealogy of the book, its initial aim was 'to bury the father'. While the key ontological argument had been presented to different audiences over a period of at least two decades, the germ of the book traces back to a memorial section devoted to Laclau in a 2016 issue of *Contemporary Political Theory*. My contribution to this issue was based on memorial lectures at the KU Leuven and a memorial conference at Birkbeck College, organized by my friend Mark Devenney. The book, then, was conceived as a philosophical *tombeau*. In the history of literature, the *tombeau* is a Renaissance literary genre, a collection of poems or epitaphs honoring a deceived king. In a sense, the memorial section in *Contemporary Political Theory* could be seen as a modern academic variant of such a *tombeau*. But a *tombeau* can also consist of a more extensive work by a single author. In French Baroque music, a *tombeau* is a composition devoted to the memory of a colleague or teacher, whose name would be included in the title of the piece.[7] So, whatever else *Thinking Antagonism* is in relation to Laclau, it also is a philosophical *tombeau* devoted to a teacher.

An outmoded genre? Well, let us praise, for a moment, the unfashionable. Paula Biglieri and Gloria Perelló are not entirely wrong when describing my relation to Laclau as one between *maestro* and *discípulo*. I happen to appreciate the old-fashioned, if not medieval semantic – not least because, as pointed out in the Conclusion to the book, Laclau, apart from being a political militant, was a scholar of quasi-medieval stature whose style of reasoning reminded of medieval scholasticism in the good sense of the term.[8] Most of his Essex PhD students had travelled from all over the globe to study with him, reminiscent of the age-old practice of medieval students travelling across Europe to study, say, in Paris with Thomas Aquinas. This traditional idea of a cosmopolitan University (which is in actual fact the second oldest still existing occidental institution – after the Catholic Church) is incongruent to today's neo-liberalized companies that call themselves universities.[9] It is

[6] This argument is directed against the common, I think unfounded charge that political ontologists ignore ordinary politics.

[7] The famous Baroque composer Marin Marais, to give an example, wrote many *tombeaus* for viola da gamba, one 'pour Monsieur de Lully', and another one for his own teacher Sainte Colombe.

[8] see pp. 215-6 of *Thinking Antagonism.*

[9] Biglieri and Perelló point out that Laclau's style of combining political militancy with rigorous academic learning might be a peculiar feature of the Latin American variant of the university as a

incongruent, even as they pride themselves on their 'international students', because real academic learning is not about paying fees and getting in return prestige, symbolic capital and a pole position on the job market. In the traditional idea, which deserves to be defended against all odds, academic learning is based on a transferential relationship between 'disciple' and 'master', only that the master – who is not reducible to a 'supervisor' – is not someone you are accidentally bumping into at the place of higher learning closest to your parents' home, nor is she the most prestigious person in the mainstream of your discipline who can guarantee you a job. And without doubt, an academic master is the opposite of a teacher imposed on you by a disciplinary institution. An academic master is someone you were looking for (even if you encountered her through serendipity), someone you took an effort to find (even if she found you), in line with your reasons, interests and convictions (even if they were yet undeveloped). Therefore, it is your deliberate choice, and your own responsibility to study with *someone* rather than anyone.[10] From the Platonic academy onwards this has always been the idea of an academic 'school' which, in its initial stage, can only be established around the core of a personal relation of transference vis-à-vis a subject supposed to know; and it is the only form, I would assume, in which collective academic work can really thrive.[11]

From this perspective, the *subject* of academic work is not the individual scientist, theorist or philosopher; a 'thinking subject' is a collective of teachers, students, researchers, interlocutors, and so on. If the collective nature of intellectual work is taken seriously, and is given a political inflection, extreme skepticism is indicated with regard to the narcissistic academic culture of intellectual copyright claims. In the realm of thinking, understood as a common adventure, property claims are entirely misplaced. Otherwise, the realm of thought will be confused with a competitive racecourse of possessive individuals circling around university rankings, publication scores and third-party funding. This also implies that in the realm of thinking individual assertions of originality are inappropriate. Not only because the culture of possessive individualism needs to be combatted, but also because these claims are directly contradicted by the collective nature of thinking. This is the reason why

public institution: 'Quien haya transitado las aulas de las universidades públicas latinoamericanas sabe de su tradición crítica, que se enraíza en una concepción singular respecto de la academia y su imbricación en el campo de lo social. Para muchos académicos formados en Latinoamérica la universidad pública es el espacio para asumir el compromiso de la ética militante ya que alberga en sí el legado democrático popular aunado a la rigurosidad academicista'.

[10] And even if this deliberate choice issues, as Derrida would have said, from 'the other's decision in me'.

[11] As in the analogous relation between analyst and analysand there are obvious dangers involved in the transferential process of higher learning. It was for good reasons that Laclau, as a supervisor, regularly tried to frustrate transferential desire. The standard line he had for PhD students asking him 'what to do now' was: 'I'm not the subject supposed to know'. This is the other task of being a teacher: forcing students out into the cold and frightening world of autonomy.

I take questions as to the dogmatic status of my theoretical proposal to be largely irrelevant. Nevertheless, these questions can instigate some more general reflections on what is 'proper' to one's thought or what it means to 'own' a particular idea or theoretical outlook without taking possession of it. And indeed, upon further reflection, the picture may get more complicated, as it may turn out that thinking, on the other hand, is impossible without *some* kind of appropriation – an appropriation without usurpation, to be sure. David Payne, in his beautifully written and mindful text on what is 'proper' to my theoretical contribution, sets out to develop the implications of what he describes as '"generalized appropriation" on the basis of de-propriation'.[12] As they serve as Payne's jumping board, I will be allowed to quote the very first lines of *Thinking Antagonism*: 'Every thinker, as Heidegger used to say, follows the line of a single thought. What he forgot to mention was that no thought belongs to a single thinker. (...) If there is originality in intellectual work, it is originality without determinable origin. For this reason, ideas are never the property of an individual. It is impossible to "own" an idea – which is but an ideological fantasy rooted in the capitalist system of property ownership. Ideas can only be *disowned* (...) as they emerge from, and return to, an a-subjective, collective effort that cuts across temporal and geographical barriers. One of these ideas bears the name "antagonism"'.[13]

It is this idea of 'disowning' an idea that Payne, in turn, seeks to 'disown' with his reflections. As he warns us, thinking, while indeed based on a process of disowning or de-propriation, does not deprive us of what is 'proper' to our thought. He thus raises the question: 'might (the) *Thinking* (of) *Antagonism* force us back onto (the) thinking (of) appropriation?' I agree with Payne that through an intellectual process of disowning we come to develop a position of our own rather than merely repeating what has been said before or, at the other end of the scale, cutting all ties with our legacy. It would be futile to deny that thinking results in something 'proper' to a given thought; and while setting out to discuss what is 'proper' to my thought, Payne develops something 'proper' to his thought: a theory of appropriation. I thus take his reflections to imply that academic authorship, as that which is proper to the thoughts of a given author, does not simply disappear without a trace in a process of disowning. Were it otherwise, it would be impossible for me to speak about 'my

[12] Payne's thoughts on 'the proper' and on 'de-propriation' resonate in interesting ways with Mark Devenney's project of theorizing the 'improper', see Mark Devenney: *Towards an Improper Politics*, (Edinburgh: Edinburgh University Press, 2020). Payne's concerns take a different turn, though, as they do 'not directly touch on the question of the "proper" with respect to the "clean" or the "pure" (for which ideas of the "improper" or "impropriety" would constitute counterpoints)'. I am thrilled that *Thinking Antagonism* appears to invite reflections on what is 'proper', as Mark Devenney also contributed a lucid reading of *Thinking Antagonism* along these lines for a workshop on the book organized by Guido Barbi and Matthias Lievens at KU Leuven in February 2020.

[13] Marchart, *Thinking Antagonism*, p.1.

book' or use the first-person pronoun in the singular.[14] Payne is right in stressing this point. While the first lines of my book appear to give priority to *dis*-owning, Payne correctly insists that 'de-propriation or dis-owning is not the negation or annulment of appropriation as the making proper; it is instead the *ab-grund* on which appropriation as a generalizing condition plays itself out as an interminable condition of "being-in-the-political" and as an imminent effect of antagonism'. It should be noted that, at this point, Payne seeks to out-Heideggerianize me, by moving antagonism into the register of the Heideggerian *Er-eignis* of 'en-owning', thus insisting on the 'appropriative' side of antagonism. While agreeing on the importance of stressing this appropriative side,[15] I am wondering, though, whether in Payne's more deconstructive account this move does not come at the expense of radical negativity and, thus, of the political. By restricting our view to the differential play between appropriation and de-propriation we are running the danger of de-antagonizing antagonism, of placating the scandal of radical negativity. The move towards 'en-owning' may turn into a defense reaction against the scandalous nature of antagonism.

Does this explain the curious absence from Payne's text of *the* obvious reference regarding disappropriation – the Marxian call to expropriate the expropriators?[16] This call does define a 'constitutive outside': an antagonist. What the famous formula presents us with, when given a political reading, is a process of antagonization, of 'en-owning' based on 'dis-owning' the 'dis-owners'. The formula should be read as a call for political practice, understood as the negation of the given. In short, it initiates a passage through negativity. And yet, it is not a call to abolish property altogether, only *private* property as it is legally instituted in bourgeois society and results from the prior expropriation of the expropriated. It is this kind of expropriated property which, by way of a passage through negativity – through the expropriation of the expropriators –, needs to be re-appropriated *collectively*. Hence, antagonization will lead society to another form of property (I'm not Hegelian enough to say a 'higher' form) that hopefully will be appropriative without being exploitative.[17] What Payne and I are looking for in our discussion is that which is 'proper' to

[14] The well-known stylistic habit of avoiding the first-person singular in academic writing is not much more than a rhetorical cover-up for academic, if not legal insistence on one's own originality and property rights. One could suspect, in applying Payne's intuition to the case, that academic possessive individualism seems to be premised on the denial not only of any process of intellectual 'de-propriation' (hence the neurotic obsession with plagiarism) but also on the denial of anything 'proper' beyond the legal realm of property claims.

[15] In a trivial sense, to start with, the construction of a chain of equivalence is indeed premised upon the appropriation of differences which at the same time are de-propriated of their original particularity.

[16] The Marxian idea of ex-propriation is mentioned in passing and relegated to a footnote where it is merely stated that it will *not be topical* for Payne's text. My guess is that it should be.

[17] Unlike Marx, I doubt, however, that in a post-exploitative society antagonism, as an ontological condition of all society, would simply disappear.

thought, while being beyond the reach of private property. Only thinking, I submit, can give us a glimpse of a post-exploitative idea of intellectual labour. It is post-exploitative because it is collectively shared. Therefore, to come back to the book, the thinking of antagonism whose intellectual history I try to unravel in its historical chapter, is not Laclau's private property nor is it mine, but is shared, sometimes under different names, among the German idealists, the early Romantics, the young Hegelians, the Marxists and post-Marxists, and *us* as we continue this trajectory of thought. And still, to jointly move onto the field of what is 'proper' to thought is also to antagonize the political, legal and economic regime of private property.

Now, I am well aware that my stubborn insistence on antagonism can itself be antagonizing. It can bring to light internal differences and contradictions on this side of the ditch. Someone who gives prevalence to the Heideggerian or Derridean play of difference will be less inclined to cherish the productive threat of negativity; while, on the other hand, for Paipais or Vardoulakis, who approach the issue from a, say, 'stasiological' perspective, the idea of radical negativity does not seem to constitute much of a problem. Yet, there is another line of internal contention that can be discerned in some of the contributions. It concerns what in the eyes of its critics appear as the imperialist pretensions of the political vis-à-vis other aspects of life. Hence Payne's warning that 'the risk with equating the abyssal ground, negativity, or the difference between being and beings qua difference with antagonism (or, and this boils down to the same issue, with equating the ontological difference between being and beings with the politological difference between the political and politics) is the *unilateralisation* of the political, which ends up running the risk of obscuring the specificity of other modes of being, forms of practice and thinking' – such as, for instance, the 'specificity of art, poetry and literature (...) that should not be reduced to the political, and whose relative autonomy as modes of thought and practice should be thought on their own immanent terms'. On this account, Payne subscribes to Hansen's line of criticism, established first in an article for the journal *Distinktion* in 2014. In his contribution to our present exchange, Hansen remains unconvinced. While acknowledging the 'clear activist mark' of my proposal, he still believes that no ontological priority should be granted to antagonism. He thus sides with the Laclau of *New Reflections on the Revolution of Our Time*, who introduced, along the lines of the Lacanian Real, the apparently more primordial concept of dislocation (in a search not, as Heidegger would have warned against, for a 'ground of the ground', but, apparently, in search for an 'abyss of the abyss' – which I take to be equally metaphysical).[18] In my book I contest this assumption because every dislocation of apparently non-political nature – say, a pandemic – must pass, as soon as we make sense of it (and otherwise it only amounts to white noise),

[18] Ernesto Laclau: *New Reflections on the Revolution of Our Time,* (London and New York: Verso, 1990).

through discourses or institutions that *are* of political nature. 'Pure' dislocation is not available to us – and could only be subject to mystical speculation, but that would again be a form of social sense-making. Dislocation, if there is something like non-antagonistic dislocation, will always only be available in either a social (institutionalized) or political (actualized) mode of antagonism.

Except for some moments of hesitation, Laclau did not want to grant such ontological primacy to antagonism. However, in Laclau, there are other concepts that seem to be predestined for a comparable ontological role, for instance when it is held in *New Reflections* that *all* social relations are relations of 'power' or that *all* social systems are constituted by way of 'exclusion'. Hansen's point is that power and exclusion are not reducible to antagonism, hence no need to grant primacy to antagonism. But this would mean to treat power or exclusion as concepts, while I would respond that they are just alternative *names* for antagonism. My reasoning is the following: if, and therein consists Laclau's main theoretical intervention, every signifying system must constitute itself vis-à-vis a purely negative outside (i.e. antagonism), then it follows, I would assume, that any kind of exclusion achieving this very effect will be exactly equivalent to the working of antagonism. In this sense, exclusion *will be antagonism.* Of course, what is indeed imaginable is an antagonistically constructed system that happens to produce exclusions which, however, are *not* constitutive to the system. In this case, Hansen would be correct in assuming that these exclusions are not reducible to antagonism, but they are not constitutive either and therefore ontological primacy still lies with antagonism. So my main argument remains intact. The same could be said about power relations. If power is defined, pace Laclau, as that which allows repressing alternative paths available at the moment of the institution of the social, then it is antagonistic by nature: it gives coherence to a social system by repressing alternatives, and to achieve this it relegates the latter to the outside of the system. In other words, power (in Laclau's definition of the term) needs to draw an antagonistic line of demarcation. Again, hypothetically, there could be other forms of power, but they would not be constitutive in the sense defined above and, thus, do not contradict our claim as to the ontological priority of antagonism. It is unclear to me why Laclau was not prepared to draw these consequences. But given his general theory of signification, a form of exclusion or power that appertains to *all* social being (and therefore assumes ontological status) is synonymic with antagonism.

This answer does not address Payne's concern as to the 'specificity of art, poetry and literature (...) that should not be reduced to the political, and whose relative autonomy as modes of thought and practice should be thought on their own immanent terms'. Indeed, but let's be clear about what is at issue here: the question, as phrased by Payne, is one of specificity and relative autonomy. I would never deny this. To claim that, ultimately, every social identity or practice is grounded upon the political (and at the same time un-grounded by the political) is not to deny the

former specificity or 'relative autonomy'. Art, poetry and literature can indeed be thought on their immanent terms, provided we keep in mind that their immanence, i.e. their specificity and autonomy, is granted by a prior moment of the political: art and literature are social practices that are not trans-historically given, but only acquire their specific and quasi-autonomous role within a particular social formation which, ultimately, is constituted politically – in the sense of *the political*, of course, not in the sense of politics as another particular field with its own specificity and relative autonomy.[19] So the charge of ontological imperialism would only be justified if I had claimed that everything should be reducible to *politics* in the narrow sense.

Let us now turn to the contributions by Vardoulakis and Biglieri and Perelló. Vardoulakis, who has contributed an extensive and lucid reading of my book, is concerned with two aspects: with its positioning within the field of democratic theory, particularly with regard to so-called agonistic theories of democracy, and with the role of political judgement. I am grateful for him pointing out that my post-foundational conception of democracy is indeed 'antagonistic' rather than agonistic because I do retain a skeptical distance vis-à-vis the term 'agonistic democracy'. This has to do, for reasons explained more extensively elsewhere,[20] with the nature of the ideal-typical Greek *agon* as a rule-based competition among, for instance, sportsmen, whereas I do think that radical democracy, at least partially, needs to break rules rather than simply following those imposed by liberal-democratic regimes. Nor do I think the idea of 'competition', as implied by the term *agon*, really captures what is going on in politics – the fantasy of fair-play political competition remains much too close to liberal ideology to count as a realistic portrayal of actual politics in so-called liberal democracies; and Vardoulakis's previous engagement with *stasis* (as opposed to *agon*) might have been motivated by a similar intuition. In this sense,

[19] Concerning the general question of immanence (alluded to by Payne with regard to 'immanent terms' of other practices), I would like to add that the political, while being the ultimately grounding moment of all social practice (including art and literature), should not be confused with a transcendent ground; it is, to borrow Nancy's term, 'transimmanent' to all social practices. I regret, however, not having included in *Thinking Antagonism* a discussion of Roberto Esposito's important concept of 'the impolitical', which I had discussed in *Die politische Differenz.* pp. 279-82. It allows countering what could be the obvious next step of criticism: Isn't a notion of the political that appertains to *all* social relations, even when not confounded with politics, equally imperialist? If the political is immanent to the social in a 'sleeping mode', as claimed in *Thinking Antagonism*, is there then something which is not *the political*? Given the ontological nature of my argument, which makes a claim as to the being of *all* social being, it is clear that no particular social area or practice can be 'un-political'

or 'outside' the political as an immanent ground/abyss. But I would not deny that the political may have an obverse side, a side that is neither *anti*-political nor simply 'un-political' (which is but a soft version of being anti-political), and which is called by Esposito the 'impolitical'. See Roberto Esposito: *Categorie dell'impolitico* (Bologna: il Mulino, 1988). I would add that my project in *Thinking Antagonism* is also close to what Esposito presents in his recent *Politics and Negation. For an Affirmative Philosophy*, tr. Zakiya Hanafi (Cambridge: Polity 2019).

[20] See Oliver Marchart, *Conflictual Aesthetics. Artistic Activism and the Public Sphere* (Berlin: Sternberg, 2019), pp. 26-29.

my own variant of radical democracy can indeed be called antagonistic. Interestingly, democratic theory does not play any major role in *Thinking Antagonism*, where questions of ontology take center stage, which is why Vardoulakis occasionally refers to my previous book on *Post-foundational Political Thought*. However, apart from some articles, it is only in the German version of the book, published under the title *Die politische Differenz* in 2010, that I engage more elaborately with radical democratic thought.[21] Given this peculiar absence, or only fragmentary presence, I am all the more grateful for his re-, or rather, pre-construction of a democratic theory that is yet to be published in two forthcoming books: *Post-foundational Theories of Democracy* (EUP) and *Der demokratische Horizont* (Suhrkamp).

There is a systematic reason for this preliminary absence, though. The aim of *Thinking Antagonism*, from the perspective of democratic thought, is to provide the ontological groundwork for an 'antagonistic' theory of democracy. It is not by accident that, by way of ending the book (but before constructing a *tombeau* for Laclau in the Conclusion), an outlook on such democratic theory is given in the very last sub-chapter, entitled 'Thinking Democracy'. It is claimed in this sub-chapter that the task of deepening the democratic revolution 'involves the construction of a democratic will-to-democracy which, in turn, can only be founded on democratic action', while at the same time, though, one must accept that democracy, by virtue of being an 'ontic' regime, does not follow with necessity from an ontology of the political. And precisely because *no particular* politics can be pre-determined by a general ontology, a radical democratic politics needs to be 'affirmed, created, and recreated' and the 'democratic horizon has to be expanded and democratic principles rejuvenated' – as there is no prior ontological guarantee for radical democracy. The chapter ends with a plea to 'engage liberal democracy by way of *affirmative refusal'* (p. 205), i.e. by way of a radical-democratic will to 'negate the given' and democratize democracy. As Vardoulakis correctly registers, this project remains uninvested in the critique of liberal philosophy – a critique that was topical for agonistic or radical democratic theory of the 1990ies – and may thus mark 'a shift in the conception of who the philosophical "enemy" is'. Without wanting to offend any Rawlsians, for some of my second-best friends are Rawlsians, I agree with Vardoulakis that attacking Rawls today would be like flogging a dead horse. There are more urgent tasks ahead.[22] But I do think that liberalism, as a *political ideology* rather than a rationalist philosophy, needs to be politically questioned from a radical democratic perspective, because it is the liberal ideologues – often posturing against so-called 'populists' whose rise they themselves have caused with their TINA-policies

[21] See Marchart, *Post-foundational Political Thought*; Marchart: *Die politische Differenz.* pp.329-64.

[22] There is another pragmatic reason for leaving these discussions behind. The Rawlsians, as a rule, will ignore radical democratic positions anyway, so why shouldn't we ignore theirs.

– who have taken an increasingly authoritarian turn and now constitute a greater danger to democracy than many 'populists' do.

Secondly, Vardoulakis is worried about the status of instrumentality – the strategic, for that matter – in my framing of the political difference, criticizing that it is restricted to the ontic side of politics. Instrumentality must, in his view, also be located on the ontological side of the political. Such a move would obviously contradict a definition of antagonism as radical and a-subjective negativity, but the compromise solution, proposed by Vardoulakis, may point a way out (if one agreed that the model of the political difference remains ignorant as to the ontological dignity of instrumentality). It is by practical judgement, or *phronesis*, that an overlap can be effectuated between the ontic and the ontological, between politics and the political. Without having the space to engage with the intricate structure of his argument, I would concede that this is certainly one way of modelling the relation between politics and the political. And I fully subscribe to the aim of integrating a notion of practical judgement into our idea of politics as a strategic activity (as a way of politically coping with the *kairotic* event of antagonization). However, given the circular or reversible structure of the political difference, I'm not yet fully convinced that we really need *phronesis* as a mediating term effectuating an overlap between politics and the political. If the political only exists in politics, without having any independent or transcendent existence of its own, and if antagonism only comes to life through an antagonistic practice of 'negating the given', then, I would suppose, instrumentality/strategy/*phronesis* is *already* implicated in the political or antagonism *by way of politics and antagonization*, and Vardoulakis would have nothing to worry about. Only if it was possible to look at the ontological side of the political 'on its own', i.e. disconnected from politics, we would be able to detect a disconcerting absence of instrumentality. But we can only look at the political through the eyes of politics (and, vice versa, at politics under the aspect of the political), which is why the instrumental – in terms of strategic calculation or practical judgement – in actual fact *is* implicated in our notion of the political. But maybe Vardoulakis and I not that far apart here.

The position closest to my own – supposedly hyper-Laclauian – position is arguably the one formulated by Biglieri and Perelló, who, at the end of their contribution, stress their agreement with many of the points defended in *Thinking Antagonism*.[23] Rather than criticizing the book, they seek to complement or expand on the political 'affectology' whose contours, admittedly, I discuss in only a highly fragmentary fashion. This point is all the more important as such an affectology may provide answers to some of the most puzzling questions of a post-foundational theory of

[23] Such as my reading of Peronism and Laclau's theory of populism, my theory of minimal politics and the idea of an ethics of intellectual engagement, and, most importantly, my insistence on the difference between ontological antagonism and antagonisms in the plural.

politics: '¿por qué se impone un cierto fundamento (parcial) y no otro? ¿Qué es lo que hace que entre diversos proyectos fundacionales en pugna prevalezca uno y no otro?' Their answer to these questions relies on a Lacanian re-reading of Laclau, which leads them to a theory of affective investment and a re-framing of the play between grounding and un-grounding as the contingent encounter between chance and the intentionality of the subject in a moment of decision. I have no objections to their proposal on a theoretical level, but would simply like to add that Laclau himself regularly responded to questions of the above kind by pointing to what he called the 'uneveness of the social'. In a less formulaic way, I take this to mean that questions regarding the reasons why a particular hegemonic project was successful can only be answered with reference to a given historical conjuncture and the unevenness of power relations within that conjuncture. Put differently: a general affectology will only explain the general logics of affective investment, but not a particular investment in a particular collective will – which is why, and I assume Biglieri and Perelló would agree, an 'ontological' theory of affect, in order to develop its explanatory potential with regard to the above questions, needs to be combined with an 'ontic' political analysis.

I would like to end by commenting on a further Lacano-Laclauian amendment to the ontology of antagonism. As Biglieri and Perelló sustain, the Lacanian Real does not only reappear in Laclau's work in the form of antagonism, but also in the versions of dislocation and social heterogeneity. In their reading of Laclau, Antagonism (with a capital A) consists in knotting together antagonisms (in the plural), dislocation and social heterogeneity. Their reading is based on Lacan's Borromean knot between the Symbolic, the Real and the Imaginary, without being a 1:1 mapping of these registers onto the Laclauian categories. I agree that *Thinking Antagonism* does not discuss Laclau's highly interesting concept of heterogeneity, as the book remains focussed on antagonism. It is, no doubt, feasible to develop a more integral picture of Laclau's theory that would integrate these categories. Again, there is certainly no space here to enter this terrain, so I want to rather concentrate on what, according to Biglieri and Perelló, binds these categories together: the knot. Lacan, from the early 1970ies on, starts playing around, first with mathematical nodology, then with actual threads or whatever came into his hands to produce knots. In the very final phase of his teaching, the silent practice of knotting in front of his audience took over from verbal teaching in what Lacan called 'monstration'. His aim, apparently, was 'to induce every member of the audience – as well as himself – to carry out operations relating no longer to discourse but to "monstration"'.[24] Attending these seminars must have been a rather peculiar experience: 'As "monstration" took over from discourse, Lacan came to use proportionally fewer and

[24] Elisabeth Roudinesco: *Jacques Lacan*, tr. Barbara Bray, (New York: Columbia University Press, 1997), p. 363.

fewer words: he would draw rather than write, and then, when he could no longer either draw or speak, he played with rings like a child'.[25] The weirdness of some of the scenes has been attributed to cardio-vascular problems and signs of senility, yet, apart from physiological circumstances, this practice of course resulted from an intra-theoretical development: Lacan's continuous thrift toward the Real. The Real, as everyone knows, escapes symbolic representation – the realm of meaning –, but can be given the quasi-mathematical form of the matheme or of the knot. But the latter, contrary to mathemes (such as the Lacanian formulae of sexuation, proposed by Paipais as a possible option of formalizing antagonism), eventually implies a move toward physical *practice*. Lacan engages in a quasi-Wittgensteinian move of practically showing what cannot be said.

This digression into the role of Lacanian nodology is not of psychoanalytic relevance only. We are touching here, once more, at *praxis* as the silent core of post-foundational thought. Jean-Claude Milner, in his excellent book on Lacan, *L'Œvre claire*, seems to suggest that Lacan's 'monstration silencieuse des nœuds'[26] reveals precisely the abysmal nature of any Ground: 'il n'y avait pas d'Autre de l'Autre, ni de métalangage ; il n'y a pas de mathème du mathème, ni de lettre de la lettre ; il n'y a que le nœud'.[27] As is immediately evident from a left-Heideggerian perspective, the Lacanian declarations according to the scheme 'there is no X of the X' (there is no Other of the Other, etc.) are modelled upon the most important Heideggerian 'an-archic principle': 'Es gibt keinen Grund des Grundes'. And exactly because there is no ultimate foundation, the process of grounding is grounded upon nothing other than an abyss – which is Heidegger's second principle, implied by the first one: ‚Der Grund gründet als Ab-grund'. And because no foundation will be allowed to rest on a prior or ultimate foundation, the process of grounding can never stop. Yet it must not be ignored that 'grounding' is a verb and refers to a *practice*. 'There is nothing but the knot', as Milner puts it in Lacanian parlance, should thus be read as follows: if 'there is no X of the X', then there is nothing but a practice of knotting. Which reads, translated into political post-foundationalism: if there is no ground of the ground, then there is nothing but the practice of politics in a never-ending play with the political. I am grateful to my friends and colleagues for having invested their care, their intelligence and their passion in what I would like to see as a collective theoretico-political practice of knotting our thoughts together.

[25] Ibid., p. 366.
[26] Jean-Claude Milner: *L'Œvre claire. Lacan, la science, la philosophie,* (Paris: Seuil 1995), p. 165.
[27] Ibid., p. 163.

V a r i a

625 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 625-702
ISSN: 1825-5167

L'INTERIORITÀ A PROCESSO. TEORIE PENALI, FRENOLOGIA E ALIENISMO IN FRANCIA E IN ITALIA TRA XVIII E XIX SECOLO

GIANVITO BRINDISI
Dipartimento di Giurisprudenza
Università degli Studi della Campania "Luigi Vanvitelli"
gianvito.brindisi@unicampania.it

ABSTRACT
This article aims to offer a contribution to the history of the relationship between law and the humanities, analysing the birth of the articulation between legal and medical thought in the knowledge field of individuality at the turn of the 18th and 19th centuries in France and Italy. Specifically, it shows how the identification of the organic deviations of tendencies and the pathologization of the will, which had been promoted respectively by phrenology and alienism, produced an anthropological recoding of crime. It also examines the reaction of legal thought to these attempts to medicalize justice and its influence on medical thought.

KEYWORDS
Medicalization of Justice, Tendencies, Will, Phrenology, Alienism

1. INTRODUZIONE

Perché riprendere oggi il dibattito tra teorie penali, frenologia e alienismo? Quale può essere l'interesse dello studio della frenologia per la storia del pensiero giuridico e medico? Perché tornare ad affrontare il discorso frenologico quando questo, pur rappresentandosi come umanista e riformatore o forse proprio per questo, ha manifestato il suo carattere antidemocratico considerando gli individui non come uguali di fronte alla legge, ma come naturalmente differenti in ragione di capacità e anormalità cerebrali o ambientali o educative? A maggior ragione, poi, considerando che le principali forme attuali di esercizio del potere hanno carattere specificamente economico, ciò che ha generato la convinzione che il sapere antropologico della criminalità sia stato completamente eclissato dai nuovi metodi di profilazione economica e biopolitica del rischio criminale, e che il criminale come

soggetto patologico, il *criminale naturale*, sia scomparso da decenni dalle teorie scientifiche come dalla società.

Eppure, a uno sguardo più attento non sembrerebbe vi sia da esserne così certi. Il dubbio legittimo è che l'esercizio del potere non si stia in realtà de-antropologizzando, e che comunque non vi è alcuna incompatibilità, né in linea pratica né in linea teorica, tra teorie economiche e teorie comportamentali neurologiche, biologiche o genetiche. La genetica molecolare e la neuroscienza stanno infatti ridefinendo un discorso antropologico che ripropone su nuove basi scientifiche la questione del crimine naturale e per il quale la violenza e l'aggressività sarebbero iscritte nel corredo genetico o nel *broken brain* dei criminali. Ne deriva una nuova naturalizzazione del crimine e del criminale che fonda la possibilità di una nuova antropologia e di un nuovo umanismo forti dell'evidenza scientifica e di una soluzione economica per la riduzione dei costi sociali della violenza[1]. Un simile sapere, medicalizzando l'individuo, naturalizza le norme sociali vigenti e deresponsabilizza tanto gli agenti istituzionali in rapporto a queste stesse norme, quanto in generale la società in rapporto alla sociogenesi del crimine; e ancora, non si interroga sulle proprie condizioni storico-sociali di possibilità, ignora la dimensione simbolica dell'umano e produce nuove forme di soggettivazione giuridica e politica in funzione del corredo genetico o della chimica neuronale.

Per offrire una prima e minima risposta alle domande poste in apertura, potremmo dunque affermare che riprendere il discorso frenologico ha un senso nella misura in cui la frenologia ha precorso l'antropologia criminale come sapere positivo, come *concezione sanitaria della criminalità*, per usare un'espressione di Gabriel Tarde[2]. Se ancora oggi, infatti, si ritiene di poter rifondare la criminologia su basi lombrosiane, e se questi tentativi sono in grado di modificare l'esercizio effettivo della giurisdizione, allora forse la frenologia, con la sua mania classificatoria, rappresenta un impensato che ci attraversa da oltre due secoli, il nostro immaginario medico-poliziesco. Il suo studio ci permette allora di riflettere intorno al modo in cui una teoria epistemologicamente debole abbia contribuito in maniera importante, essendo dotata di una forza sociale straordinaria anche in virtù della sua trasversalità teorica e politica, alla ridefinizione delle categorie dell'esperienza giuridica, ad esempio tracciando la soglia di accettabilità per la quale si giudica legittimo essere puniti, corretti o guariti per ciò che si è in relazione allo scarto da una norma medica. Analizzare la nascita di questi saperi, il loro primo orizzonte politico ed epistemologico, il dispositivo teorico e di potere che ha costituito la loro condizione storica di possibilità, i conflitti scientifici e sociali che essi hanno generato può quindi

[1] Cfr. ad esempio A. Raine, *L'anatomia della violenza. Le radici biologiche del crimine*, trad. it. di V. Stagnaro, Mondadori, Milano 2016. Sul tema mi sia consentito di rinviare a G. Brindisi, *La ricodificazione neuro-genetica degli individui pericolosi. Problematizzazione epistemologica e analisi storico-politica del primo caso giudiziario europeo di perizia neuropsicologica e di genetica molecolare*, in «Democrazia e diritto», 1/2019, pp. 97-127.

[2] G. Tarde, *La philosophie pénale*, Lyon-Paris 1890, p. 478.

senz'altro accrescere la nostra consapevolezza nei confronti di quei saperi che oggi premono per essere considerati come delle nuove forme di difesa della società e aiutarci a denunciarne l'estensione sociale indebita, che si risolve grossomodo in una funzione di tipo poliziesco.

Una seconda risposta, ci sembra, risiede poi nella necessità di considerare più attentamente i rapporti della critica medica delle istituzioni giuridiche con quell'impostazione teorica rispetto alla quale si pensa abbia istituito una cesura storica, ossia l'utilitarismo penale oggettivista. Sebbene infatti sia riconosciuto che il processo storico che ha condotto al passaggio dalla punizione dell'individuo per il danno prodotto a una punizione fondata sulla criminalità interiore, virtuale, dell'autore del crimine in relazione al suo grado di moralità o anormalità, al passaggio cioè dal male prodotto esteriormente al male interiore – nei termini di Saleilles[3] –, è articolato e complesso, il versante iniziale di questa trasformazione storica, in cui il discorso medico frenologico ha rappresentato un interlocutore importante per il discorso giuridico, rimane ad oggi poco esplorato.

È vero, come ha mostrato Foucault, che non è stato tanto un discorso antropologico centrato sull'animalità dell'uomo quale quello frenologico o fisiologico a penetrare nella pratica giudiziaria, quanto piuttosto il discorso sulla mostruosità d'eccezione proprio dei cosiddetti crimini senza ragione. Nondimeno questa razionalità medica umanista può essere annoverata tra i principali fattori teorici tesi a ridefinire l'impianto giuridico di matrice illuminista e ad adeguare il diritto alla realtà umana come oggetto prodotto dalle scienze umane. La critica della giustizia fondata sulla natura animale dell'uomo e su un rinnovato umanismo si iscrive come un tassello fondamentale nella storia dell'oggettivazione del soggetto nella sua corporeità, e propriamente nel suo cervello, concorrendo a isolare una specifica deviazione delle tendenze. Ma la cesura netta che è spesso ipotizzata tra la critica medica dell'astrattezza del diritto e l'utilitarismo penale non rende conto di una questione centrale anche per la storia del pensiero, della cultura e delle istituzioni giuridiche e che è stata non poco trascurata, ovvero l'aggancio pratico e teorico della ridefinizione antropologica della giustizia con l'utilitarismo. Da un lato, infatti, l'utilitarismo ha costituito uno degli interlocutori primari del discorso medico, ascrivendosi tra le impostazioni teoriche che hanno presieduto alla redazione dei Codici; dall'altro, specificamente nella sua declinazione benthamiana, è stato caratterizzato da alcune ambiguità relative all'individualizzazione del giudizio e della pena sulle quali la medicalizzazione della giustizia avrebbe fatto presa, rovesciandone in parte l'impianto.

Infine, la frenologia è stata una delle prime scienze umane ad aver tentato un'oggettivazione integrale dell'individuo criminale e promosso una critica della giurisprudenza astratta, incapace di cogliere al di sotto del crimine l'individuo, la sua personalità, il suo grado di libertà morale, la sua pericolosità: questioni che, dopo

[3] R. Saleilles, *L'individualisation de la peine. Étude de criminalité sociale* (1898), Alcan, Paris 1909, p. 15.

un secolo di dibattiti medico-giuridici, saranno affrontate dalla Scuola positiva di diritto penale e dall'antropologia criminale, che hanno fondato la criminalità su una devianza biologica, considerando il crimine come un qualcosa di naturale da cui difendersi e ritenendo che il criminale voglia sì un atto, ma non la volontà che lo vuole, e che subisca piuttosto una volontà determinata da cause fisiologiche.

Premettendo che tutto quanto fin qui esposto non rappresenta che uno snodo, benché importante, nello sviluppo dei rapporti tra pensiero giuridico, sensismo, psicologia, fisiologia e Ideologia, il presente lavoro intende dunque offrire una sua prima presentazione che si spera possa valere come utile contributo alla storia del rapporto tra pensiero giuridico e scienze umane, dell'articolazione tra discorso giuridico e discorso medico nel campo di sapere dell'individualità. Ci soffermeremo in particolare sulla ricodificazione del crimine attraverso l'individuazione delle deviazioni organiche delle tendenze e la patologizzazione della sfera della volontà promosse da frenologi e alienisti e sulla critica e la ricezione dei loro tentativi di medicalizzazione della pratica penale da parte della dottrina giuridica in Francia e in Italia. L'auspicio è che l'analisi del modo in cui la dottrina ha contestato o integrato questi tentativi possa aiutare a comprendere come l'ordine di razionalità giuridico e l'ordine di razionalità delle scienze umane si siano intrecciati a partire da una critica del soggetto astratto di diritto, a illuminare quel gioco contraddittorio di scambi argomentativi tra giuristi e medici che ha modificato i principi di classificazione della soggettività e la stessa esperienza giuridica, nonché a mostrare l'influsso del pensiero medico nella ridefinizione delle categorie giuridiche e delle categorie giuridiche nella ridefinizione dei quadri psichiatrici, influsso che è alla base di quella 'necessità' delle scienze umane per la giurisprudenza che costituisce ancora il nostro orizzonte.

2. DALL'UTILITARISMO PENALE AL DISCORSO MEDICO SUL CRIMINE

Nel XVIII secolo l'utilitarismo penale *intende* costituirsi anti-teologicamente e contro la *scientia juris* tradizionale, presentandosi come una nuova modalità di conoscenza e di governo degli individui e della società fondata sull'esperienza. Tanto Beccaria quanto Bentham sono in questo debitori di Helvétius, che fissa i principî generali: l'origine delle passioni è nella sensibilità fisica, ossia nell'amore del piacere e nel timore del dolore; l'interesse o utilità, inteso come ciò che può procurare piacere o allontanare il dolore, è la misura di tutti i giudizi individuali o collettivi sulla virtuosità o la viziosità delle azioni, perché motivo spesso inconscio dei nostri comportamenti; poiché interessi diversi, legati a posizioni sociali diverse, metamorfosano gli oggetti, determinano cioè la sensibilità in gradi diversissimi da individuo

a individuo e da nazione a nazione, è dalla qualità delle leggi e dell'educazione (in senso ampio) che dipendono i vizi e le virtù degli individui e dei popoli[4].

Ne deriva che, se si vuole che l'uomo fisico, l'uomo sensibile, faccia coincidere il suo interesse con l'interesse pubblico, se si vuole insomma che l'individuo veda sé stesso nella Legge, è necessario che un legislatore illuminato riconosca e governi, trasformandoli, i suoi padroni, ossia il piacere e il dolore. In altri termini, si specchieranno nelle leggi gli individui che vedranno in esse uno strumento di soddisfazione del loro interesse e del suo esercizio in sicurezza, ma ciò potrà avvenire soltanto dopo che un dispositivo giuridico ben congegnato e imperniato sull'utilità avrà articolato interesse individuale e interesse generale intervenendo sul calcolo che presiede alla ricerca del piacere e alla fuga dal dolore.

Si imbastisce così il discorso fondativo di un dispositivo giuridico che mira a governare le passioni senza condannarle moralmente o patologicamente, ma conoscendole in rapporto a ciò che le scatena e a ciò che esse producono, tanto al fine di permettere all'individuo di padroneggiarle, quanto per padroneggiare l'individuo stesso. E il diritto penale appare come lo strumento principale di questo governo, nella prospettiva della costruzione di una soggettività e di un potere razionali modellati presuntivamente sulla natura delle passioni.

Al centro del sistema vi è un uomo, economico, la cui passione fondamentale è l'interesse, l'elemento soggettivo su cui il governo deve agire. La forza della volontà dell'individuo è infatti sempre proporzionata alla «forza della impressione sensibile, che ne è la sorgente»[5]. È per questa ragione che la pena deve avere per Beccaria una funzione psico-coattiva – come l'ha definita Tarello –, in un'ottica cioè non espiatoria ma preventiva, generale e speciale[6]. In altri termini, essa deve costituire un *motivo sensibile* atto a distogliere gli animi dalla trasgressione delle leggi, un motivo di carattere rappresentativo in grado di «controbilanciare le forti impressioni delle passioni parziali che si oppongono al bene universale»[7]. E deve essere tanto più forte quanto più forte è la spinta che ha portato al crimine. La misura per giudicare un delitto non è quindi la moralità dell'individuo, ma il comportamento oggettivamente definito, il danno recato alla nazione, per cui «errarono coloro che credettero vera misura dei delitti l'intenzione di chi gli commette»[8].

Qui non vi è ancora lo spazio per un sapere morale o naturalistico del criminale che vada a ricercare le perversità morali, i determinismi fisiologici o le alterazioni qualitative della psiche in funzione dei quali graduare la responsabilità o la colpa, perché si tratta di conoscere l'interesse che presiede al comportamento criminale

[4] Cfr. C.-A. Helvétius, *De l'esprit*, Paris 1758, pp. 155-161, 177-249, 321-325.

[5] C. Beccaria, *Dei delitti e delle pene* (1764), a cura di F. Venturi, Mondadori, Milano 1991, § XVI, p. 56.

[6] G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, il Mulino, Bologna 1976, p. 466.

[7] C. Beccaria, *op. cit.*, § I, p. 34.

[8] Ivi, p. 42.

al fine di renderlo intelligibile per un sistema giuridico che è volto a opporgli una controspinta capace di impedirne la ripetizione. Quel che importa, a quest'altezza, non è quindi la natura del criminale, ma la natura del crimine come indice, valore presuntivo della sensibilità di un dato popolo. Per questo, come è stato giustamente osservato da Philippe Audegean, il criminale in Beccaria non ha nulla a che vedere con la malvagità o la mostruosità morale, poiché anzi il suo motivo, l'interesse, è «il motore di tutte le azioni umane, sia lecite che illecite». Non «va dunque considerato un mostro, ma una persona del tutto normale, e le conoscenze richieste al legislatore nulla hanno a che fare con la teratologia sociale»[9]. Il danno, insomma, resta lo stesso quali che siano la natura e le disposizioni interiori dell'autore.

Beccaria effettivamente, muovendo dall'antica questione della giustizia divina, inaugura un motivo che sarà comune a tutto l'Illuminismo, ossia la condanna dell'arbitrio giudiziario e di una penalità espiatoria tesa a penetrare l'interno dei cuori, cosa che oltretutto «da esseri finiti non può senza rivelazione sapersi»[10]. E tuttavia il punto debole di questo motivo, volto a escludere la sfera del peccato dal regno del diritto, è che esso non offre particolari strumenti per individualizzare e graduare la pena o, come avrebbe detto Gaetano Filangieri, per superare il problema di una punizione uguale per disuguali perversità di cuore senza autorizzare alcun arbitrio giudiziario. Progressivamente, perciò, l'uguaglianza di pena per il primo come per l'ultimo cittadino, in assenza di una valutazione della sensibilità individuale per la graduazione della pena, viene riconosciuta come fonte di ingiustizie. Sempre Filangieri – premettendo che «il giudizio de' cuori è riservato alla Divinità ispettrice de' nostri pensieri» – ne fa il più grande scoglio per la perfezione del codice penale, che può realizzarsi solo nel «proporzionare la pena a' diversi gradi di malvagità, co' quali un istesso delitto può esser commesso»[11], e ne individua una soluzione legislativa nella graduazione della pena alla qualità (il patto che si viola) e al grado (colpa o dolo) del delitto. Quanto all'indagine dei movimenti reali delle diverse passioni e dei diversi appetiti individuali al fine di correggerli, questa è concepita ad esempio da Giandomenico Romagnosi come un'opera di educatori e direttori di coscienza, ma non certo di giudici e legislatori, che a suo giudizio hanno il compito di indagare non la spinta criminosa individuale, bensì quella spinta che, considerate le circostanze e la frequenza, turba l'ordine sociale in un dato popolo. Per Romagnosi la scala morale della malvagità può essere solo presuntiva, e se pure fosse possibile punire i pensieri, «penetrare entro gli abissi dell'interno di un uomo», questa sarebbe una «terribil arte di conghietturare sull'interno altrui all'incerto barlume di atti, di cenni e di andamenti; arte sol propria a spandere su tutti i

[9] Ph. Audegean, *Critica della ragion penale. Beccaria e la filosofia*, in «Diritto penale contemporaneo», 2 maggio 2016, https://archiviodpc.dirittopenaleuomo.org/upload/1461680750AUDEGEAN_2016a.pdf.

[10] C. Beccaria, *op. cit.*, § VII, p. 43.

[11] G. Filangieri, *La scienza della legislazione*, t. IV, Napoli 1789, pp. 165 e 182.

volti il pallore», che farebbe della società un «gregge tremante di schiavi» e dello Stato «un deserto funebre»[12].

Ad ogni modo, la commisurazione della punizione al danno inferto alla società, e non alla gravità individuale della colpa, è il frutto di un processo di separazione tra reato e peccato che affonda le sue radici almeno nel Seicento, come ha mostrato Paolo Prodi[13]. Ma si tratta di un processo storico fallito, almeno da due punti di vista: da quello teologico, innanzitutto, poiché il diritto penale moderno, «pur formalmente appellandosi ad una realtà secolarizzata oggettiva per giustificare la repressione degli atti socialmente nocivi, [...] in realtà impone una sua morale implicita in rapporto al potere sovrano, alle sue ideologie, alle sue istituzioni, ai suoi riti»[14]; e dal punto di vista tecnologico-politico, poiché, secondo la lezione foucaultiana ripresa dallo stesso Prodi, la razionalità punitiva di tipo utilitarista sottesa alle riforme penali, come pure la classificazione astratta dei reati nel codice penale, entrambe volte ad agire sull'elemento che ha spinto il soggetto a delinquere, portano con sé una necessità di individualizzazione della pena che aprirà la strada alla medicalizzazione della pratica penale[15].

In *Sorvegliare e punire* Foucault evidenzia come la semiotecnica punitiva degli illuministi resti in parte in sospeso per essere presto sostituita dall'oggettivazione scientifica, fisica e psicologica dell'individualità, che prende il posto della casistica[16]. È una tesi complessa, e non sempre considerata adeguatamente. In questo gioco a tre tra antica criminalistica, illuminismo e oggettivazione scientifica del criminale, il fatto che la semiotecnica punitiva sia rimasta in sospeso significa a nostro giudizio che il tentativo del liberalismo penale di sostituire la pratica penale dell'Ancien Régime si è scontrato con i suoi limiti interni, non funzionali a quella nuova economia materiale di potere che esso stesso avrebbe ereditato e rilanciato e che richiedeva un'individualizzazione della pena. Ecco perché all'individualizzazione propria dell'antica criminalistica si sostituisce progressivamente un tentativo di oggettivazione scientifica del criminale che si fa forte altresì di una rivendicazione di umanità contro una giustizia astratta e incapace di considerare l'individuo, la persona, al di sotto del crimine: in altri termini, una nuova individualizzazione ben diversa da quelle della criminalistica dei secoli precedenti, che si fondavano sull'analisi delle circostanze esterne, del *propositum*, dell'*animus*, della *voluntas* dell'autore come

[12] G. Romagnosi, *Genesi del diritto penale*, Pisa 1791, pp. 280-281.

[13] P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, il Mulino, Bologna 2000, p. 412.

[14] Ivi, p. 418.

[15] M. Foucault, *Sorvegliare e punire. Nascita della prigione*, trad. it. di A. Tarchetti, Einaudi, Torino 1995, pp. 107-110; Id., *Gli anormali. Corso al Collège de France 1974-1975* (1999), trad. it. di V. Marchetti, A. Salomoni, Feltrinelli, Milano 2004, pp. 37-124.

[16] Ivi, pp. 107-108 e 112.

funzionali a qualificare il crimine (e indirettamente il criminale)[17]. Quel che si sviluppa tra la fine del XVIII e l'inizio del XIX secolo è invece una individualizzazione volta a determinare la natura dell'individuo, come dimostra la riattivazione del dibattito sulla questione della recidiva[18], che non ruota intorno a un atto, ma a «una certa volontà che manifesta il suo carattere intrinsecamente criminale»[19], e che non a caso diverrà una delle categorie principali dell'antropologia criminale.

È a quest'altezza, vero spartiacque nella storia dell'esperienza giuridica, che nasce il conflitto (teorico) tra diritto e medicina e al contempo si pongono le basi della loro collaborazione pratica in un sistema medico-legale, un tribunale antropologico che ha di mira la responsabilizzazione degli individui in funzione delle loro disposizioni interiori, della loro natura. E il tardo utilitarismo, ad esempio quello benthamiano, presenta al riguardo evidenti ambiguità sulle quali la medicalizzazione avrebbe fatto presa e che crediamo non siano state sempre ben riconosciute.

Classicamente, Bentham passa per essere un oggettivista[20], e di certo in ampia misura lo è, ma ci sembra che il principio enunciato da Beccaria rispetto al danno e non all'intenzione come misura del delitto mostri non poche criticità nella riproposizione benthamiana. Nella sua teoria il problema dell'individualizzazione morale è presente e addirittura chiamato a costituire parte integrante del giudizio e della pena: l'accusato non è cioè riducibile a un calcolatore economico privo di interiorità o di moralità, e nonostante Bentham non fondi il sistema penale su una morale trascendente, ritiene che la moralità dell'agente giustifichi la graduazione dell'intervento penale. L'aritmetica morale dell'*homo oeconomicus* non è insomma al riparo dalla medicalizzazione, o almeno non è al riparo dalla medicalizzazione quello che al calcolo si sottrae.

Poiché l'ipotesi che intendiamo sostenere potrebbe sembrare azzardata, ci sia consentito di spendere qualche parola in più sulla questione.

Anche secondo Bentham, come per Beccaria, il cuore umano non può contenere alcuna «perversité originelle et incurable»[21], e affidare ai giudici la valutazione delle disposizioni interiori e invisibili degli individui (forza di spirito, inclinazioni, tendenze), nelle loro qualità e gradi differenti, rischia di offrire ulteriori occasioni

[17] Per una sintesi efficace delle varie posizioni della criminalistica cfr. M. Pifferi, *La criminalistica*, in *Enciclopedia Italiana di scienze, lettere ed arti*, *Il contributo italiano alla storia del pensiero. Diritto*, Istituto della Enciclopedia Italiana, Roma 2012, pp. 141-148.

[18] Nata tra il XIV e il XVI secolo, la teoria della recidiva era funzionale ad adeguare il castigo alla gravità del crimine e alla personalità del criminale, sebbene in assenza di qualsiasi dimensione educativa, rieducativa o preventiva. Cfr. al riguardo M. Sbriccoli, *«Periculum pravitatis». Juristes et juges face à l'image du criminel méchant et endurci (XIV-XVI siècles)*, in Id., *Storia del diritto penale e della giustizia: scritti editi e inediti (1972-2007)*, t. I, Giuffrè, Firenze 2009, p. 280.

[19] M. Foucault, *Sorvegliare e punire*, cit., p. 110.

[20] Cfr. L. Ferrajoli, *Beccaria e Bentham*, in «Diciottesimo Secolo», 4/2019, pp. 75-84.

[21] J. Bentham, *Traités de législation civile et pénale* (1802), in Id., *Oeuvres de Jeremy Bentham*, t. I, Paris 1840, p. 218.

all'arbitrio giudiziario[22]. Ma Bentham sostiene anche che l'adagio 'stesse pene per stessi delitti' è suscettibile di attrarre solo spiriti ingenui: il delitto va valutato infatti non solo nella sua materialità, ma partire dall'intenzione e dalla moralità dell'agente, benché non in termini assoluti ma in relazione all'atto. Inoltre la valutazione delle disposizioni può generare un arbitrio solo in assenza di segni che consentano di coglierle con un sufficiente grado di certezza. In realtà, per Bentham una pratica di governo fondata su una conoscenza empirica che ha al centro della sua azione degli individui sensibili deve riuscire a individuare al meglio le intenzioni, le disposizioni interiori e le cause di variazione della sensibilità, a fini sia legislativi sia giudiziari e penitenziari.

Da quest'ultimo punto di vista, Bentham ritiene ad esempio che a un ispettore del Panopticon, per evitare che gli individui meno depravati moralmente vengano ulteriormente pervertiti nell'arte delle scelleratezze da coloro che ne hanno una lunga esperienza, saranno sufficienti una media intelligenza e una media attenzione per distinguere i prigionieri in funzione della loro età, del grado del loro crimine, della perversità che mostrano, dei segni del loro pentimento[23].

La ragione legiferante, conformemente alle leggi della sensibilità, ha il compito di governare, e governando tramite le finzioni giuridiche e la paura della punizione, di trasformare il piacere che generalmente non si lascia calcolare in piacere calcolabile. Come ha giustamente osservato Christian Laval, «l'utilitarisme benthamien se revendique d'un fondement scientifique de type pshysiopsychologique: tout être humain, être sensible avant tout, cherche à maximiser son plaisir et à minimiser sa douleur, ce fonctionnement étant voulu par sa propre constitution nerveuse»[24]. Allorché si tratta di questioni come il piacere e il dolore, chiunque calcola, anche a sua insaputa, calcola la follia come la passione, benché il calcolo dipenda dalle disposizioni, dai moventi, dalle sensibilità individuali. Formulando le classi di azione più suscettibili di incidere sulle determinanti del calcolo, il legislatore dovrebbe supplire alle debolezze dell'interesse naturale per formare negli individui un *interesse artificiale* più sensibile e più costante là dove mancano lumi, forza d'animo e sensibilità morale[25].

Rispetto alla questione delle disposizioni interiori, entità psichiche che non sono alla portata di un'osservazione diretta[26], e dei motivi che presiedono agli atti degli individui, Bentham, consapevole della natura *patematica* del rapporto dell'uomo con il reale in quanto mediato dal linguaggio – ossia della performatività e della normatività del linguaggio, che conferisce al sentire una morale, una catena di giudizi che predeterminano le sensazioni –, propone di neutralizzare le entità fittizie

[22] Ivi, p. 31.

[23] Id., *Panoptique*, in Id., *Oeuvres de Jeremy Bentham*, cit., p. 234.

[24] Ch. Laval, *Jeremy Bentham. Le pouvoir des fictions*, Puf, Paris 1989, p. 20.

[25] J. Bentham, *Traités de législation civile et pénale*, cit., p. 38.

[26] Id., *Teoria delle finzioni* (1813-1821), a cura di R. Petrillo, Cronopio, Napoli 2000, p. 123.

della criminalistica antica e del linguaggio comune e di crearne delle nuove sulla base delle leggi naturali delle sensazioni, sufficientemente indicative della natura della cosa.

Per Bentham la perversità di un criminale può essere desunta dagli effetti dei suoi atti e dai motivi che hanno dato origine a una certa intenzione in quel caso specifico, ovvero dalle *ragioni pratiche* degli atti, che non sono quindi buone o cattive in sé stesse – e che vengono normalmente qualificate come tali solo per effetto di una «perversione strutturale diffusa più o meno in tutti i linguaggi»[27] –, ma in relazione all'azione buona o cattiva che producono. Distingue così motivi sociali o semisociali, detti anche tutelari, e motivi antisociali e personali, detti anche seduttori, funzionali rispettivamente ad attenuare o ad aggravare le pena. E aggiunge che un uomo può essere presunto più o meno perverso, sempre con riguardo agli effetti dei suoi comportamenti, a seconda del motivo da cui in certe situazioni si lascia dirigere. Ciò dirà della *disposizione* – «specie di entità fittizia, ipotizzata ai fini del discorso, per esprimere quel che si suppone permanente nella struttura mentale di un uomo»[28] –, che può qualificare la depravazione dell'intenzione e determinare un aumento di pena. Al di là dei motivi e delle disposizioni, poi, la punizione deve essere adeguata anche al carattere presuntamente pericoloso del criminale desunto a partire da alcuni indizi specifici (oppressione di un debole; destrezza aggravata; violazione del rispetto verso i superiori sociali; crudeltà gratuita; premeditazione etc.).

Quanto alle differenze della sensibilità, Bentham ritiene si debba scendere quanto più possibile nell'analisi del cuore umano e che sarebbe necessario conoscere la morale con una precisione non inferiore a quella con la quale Lyonet ha investigato l'anatomia del bruco. Prova allora ad approssimarvisi distinguendo tra circostanze primarie (temperamento, follia o disturbi mentali, salute, tendenza delle inclinazioni, fermezza etc.) e secondarie (sesso, età, rango, educazione, razza, fede, etc.) di variazione della sensibilità. Ammette che tuttavia il giudice potrà valutare direttamente solo le circostanze primarie di cui è dato provare l'esistenza o misurare esattamente il grado (disturbi mentali, forza, salute), mentre le altre saranno valutate indirettamente tramite le circostanze secondarie (resistenza, conoscenza, fermezza e stabilità di mente saranno desunte da età, sesso e rango; la tendenza delle inclinazioni dalle occupazioni abituali; la predisposizione morale dal sesso, dal rango e dall'educazione). Queste ultime infatti, a differenza delle prime, sono *evidenti* e *palpabili*, e possono *rappresentare* adeguatamente le circostanze primarie, sono

[27] Id., *Introduzione ai princìpi della morale e della legislazione* [1789], a cura di E. Lecaldano, trad. it. di S. Di Pietro, UTET, Torino 2013, p. 215.

[28] Ivi, p. 244.

insomma delle presunzioni operate dal legislatore che potranno certo generare talvolta delle ingiustizie, ma che saranno generalmente giuste[29].

A quest'altezza si apre nel discorso benthamiano un'ambiguità che rischia di ridefinirlo radicalmente. In fondo, il giudizio del giudice è chiamato ad assumere le circostanze secondarie solo perché non vi sono conoscenze sufficienti per valutare quelle primarie: le presunzioni suppliscono cioè a una carenza di sapere. Valga l'esempio della più importante causa primaria delle differenze di sensibilità, il *temperamento*, che Bentham definisce una disposizione originaria dovuta all'organizzazione fisica e alla natura dello spirito nonché il fondamento naturale di tutto il resto, ma che è difficilmente conoscibile e distinguibile in rapporto dalle ulteriori cause di influenza della sensibilità, e la cui investigazione va lasciata ai fisiologi[30].

Ma se vi fossero dei segni che rendessero conto delle circostanze primarie e delle loro relazioni? Non è proprio su alcune delle cause primarie di variazione della sensibilità che si soffermerà il discorso medico, e in particolare quello frenologico, valutando temperamento, tendenze e inclinazioni degli individui, fino ad arrivare addirittura a slegarli dall'atto? Certamente per Bentham l'individuo va punito per aver commesso il fatto previsto dalla legge come reato, la pena si fonda sugli effetti lesivi del crimine e non è giustificata la punizione di stati d'animo malvagi o pericolosi[31]. Ma non vi è anche una questione relativa alla moralità dell'autore del crimine, alla sua natura, alla sua disposizione, alla sua attitudine, che lo rende più o meno punibile, più o meno correggibile e che nulla ha a che vedere con un soggetto di diritto che viene punito per quel che fa, ma al contrario con una forma di irregolarità in rapporto a norme di carattere fisiologico o morale? Disposizione, carattere, pericolosità, possibilità di recidiva non rappresentano già in Bentham degli elementi extra-giuridici del giudizio penale su cui il discorso medico può far presa? Non è su queste basi che la psicologia può trasformarsi in fisiologia e la morale fondarsi sull'anatomia? In che modo la conoscenza empirica e sensibile che un giudice può formarsi rispetto all'individuo a partire da ciò che esso fa potrebbe competere con l'accertamento di una disposizione psichica inconscia individuata da una verità diagnostica e prognostica pronunciata dal titolare di un sapere certo?

[29] Osserva giustamente Eugenio Lecaldano: «All'interno della sua concezione generale della condotta umana Bentham, avendo dato per scontato che gli uomini sono sempre determinati da un movente, sottolinea che ciò che importa non è solo valutare la dannosità dei risultati cui si giunge, ma di disporre di quelle informazioni sull'azione che sono necessarie per decidere se chi ha agito è effettivamente responsabile del risultato» (E. Lecaldano, *Jeremy Bentham e la riforma utilitaristica delle leggi*, in J. Bentham, *Introduzione ai princìpi della morale e della legislazione*, cit., p. 52). Sbaglia però, a nostro avviso, quando sostiene subito dopo che «La concezione di libertà che tutto ciò presuppone è dunque quella dell'assenza di coercizione esterna», perché Bentham riconosce chiaramente che vi possono essere dei motivi interni di ordine fisio-psicologico che spingono al crimine, che devono essere oggetto di giudizio e meglio indagati.

[30] Cfr. su questi punti J. Bentham, *Traités de législation civile et pénale*, cit., pp. 25-32.

[31] Cfr. L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (1989), Laterza, Roma-Bari 2004, p. 466.

Bentham dovrebbe rifiutare un simile discorso, che rovescia i fondamenti della sua psicologia in relazione al calcolo del piacere e del dolore, eppure al riguardo è molto ambiguo. Il filosofo inglese era d'altronde perfettamente a conoscenza dei dibattiti frenologici dell'epoca, aventi spesso a oggetto le applicazioni pratiche di questa nuova scienza che si presenta da subito come capace di ridefinire l'arte del governo, come una scienza a forte vocazione socio-politica[32] «qui doit fournir aux législateurs, aux instituteurs, aux moralistes, de si précieuses données pour obtenir, dans la législation, l'éducation et la philosophie ces perfectionnements demandés aujourd'hui avec tant d'unanimité»[33]. Condannata da Hegel e valorizzata da Comte, nella prima metà dell'Ottocento la frenologia viene non solo riconosciuta come parte del movimento di riforma borghese della società fondato sulla valorizzazione della capacità naturali, antesignano dell'odierna meritocrazia[34], ma anche valorizzata dai progressisti, e basti pensare a Owen o addirittura a Marx[35]. Nella maggior parte dei casi, Bentham ricorre alla metafora frenologica a fini esplicativi o sarcastici, ad esempio quando prova a mostrare l'utilità del suo *Pannomion* per una qualsiasi forma di governo[36], o nelle lettere al Conte di Toreno sul codice penale proposto dal comitato di legislazione delle Cortès spagnole[37], o infine in *Rationale of Judicial Evidence*, per denunciare la perversione che le pratiche giudiziarie inglesi fanno subire al linguaggio nella loro teoria dell'affidabilità testimoniale, il cui funzionamento è illustrato da Bentham attraverso una serie di organi – dell'affidabilità (*trustworthiness*), dell'interesse (*interest*) e dell'improbità (*improbity*) – che non trovano ovviamente un corrispettivo nell'elenco di Gall (né in quello di Spurzheim)[38]. Ma

[32] Cfr. M. Renneville, *De la régénération à la dégénérescence: la science de l'homme face à 1848*, in «Revue d'histoire du XIX^{e} siècle», 15, 2/1997, p. 9.

[33] C. Broussais, *Compte-rendu des travaux de la séance annuelle*, in «Journal de la Société phrénologique de Paris», I, 1/1832, p. 82.

[34] Cfr. R. Cooter, *The cultural meaning of popular science. Phrenology and the Organisation of consent in Nineteenth-Century Britain*, Cambridge 1984, p. 86.

[35] Cfr. M. Duichin, *Marx «frenologo». Una pagina rimossa di storia delle idee*, in «Intersezioni», 2/2012, pp. 211-234.

[36] J. Bentham, *Constitutional Code for the use of all nations and all governments professing liberal opinions*, vol. I, London 1830, p. VIII.

[37] Id., *Essais sur la situation politique de l'Espagne*, in Id., *Oeuvres*, vol. III, Paris 1840^{3}, p. 163. Cfr. anche ivi, p. 175.

[38] Si tratta evidentemente di uno dei tasselli di quella «*mask of sapience in which lawyercraft and bigotry*» hanno avvolto la procedura, e che Bentham si incarica di presentare nei suoi colori originali, come premette a mo' di avvertenza al lettore che creda di trovarsi di fronte a un «sick man's dream» (J. Bentham, *Rationale of Judicial Evidence*, in Id., *The Works of Jeremy Bentham*, ed. Bowring, vol. 7, Edinburgh 1843, p. 433). Mancando di cogliere l'ironia di questo richiamo di Bentham alla frenologia, Roger Cooter e Douglas McLaren ritengono di dover attribuire proprio alla dottrina frenologica la definizione di «sick man's dream», come crediamo tuttavia non possa essere, dovendosi essa riferire all'oggetto del discorso che segue, che non è appunto costituito dalla frenologia, ma dalle pratiche giudiziarie inglesi. Cfr. R. Cooter, *op. cit.*, p. 23; A. McLaren, *Phrenology: Medium and Message*, in «The Journal of Modern History», 46, 1/1974, p. 89. Più equilibrato ci sembra il giudizio

non mancano riferimenti alla frenologia esplicitamente elogiativi, come nella lettera del 1821 a Pavel Chichagov, dove questa dottrina è presentata come la migliore filosofia sperimentale applicabile a ogni ambito della vita, sfera giuridica compresa, e dalla quale è dato attendersi numerose utilità[39], o nel suo *Auto-Icon*, dove al di là dei riferimenti ironici, Bentham parla di Gall e Spurzheim come della «goodly fellowship of phrenologists» auspicandone il sostegno per il proprio progetto[40].

Insomma, nonostante Bentham distingua chiaramente tra organizzazione fisiologica e spirito, mostrando di non concepire una dipendenza dello spirito dall'organizzazione fisiologica[41], quando auspica una conoscenza della morale fondata sulla fisiologia sta aprendo in realtà a un sistema che mina alla base la sua stessa psicologia, nonché quella di Beccaria e di Hélvetius sulla quale si fondava: un sistema in cui, tra le altre cose, la moralità dell'agente, il rapporto tra l'agente e i suoi atti, non dipende più dall'utilità o dalla malvagità di questi ultimi. Lo si è anticipato: date le premesse poste da Bentham, se vi fossero dei segni in grado di esprimere il carattere permanente della struttura psichica di un individuo, dei segni certi che significassero una determinata disposizione, allora si potrebbe andare anche al di là dei motivi e degli effetti dei comportamenti individuali. Il segno resterebbe fittizio, come ogni segno, ma la sua stabilità leggibile da un sapere esperto indirizzerebbe direttamente all'entità reale della disposizione, la natura corporea. Ed è esattamente un nuovo insieme di segni in grado di leggere le disposizioni individuali senza cancellare la libertà e la responsabilità quello che pretende di realizzare la frenologia. Un sistema semiotico[42] nel quale il cranio è una finzione che, senza fondare eziologicamente i comportamenti, rappresenta le tendenze che costituiscono la natura dell'individuo. Un sistema che, nel linguaggio di Bentham, corrisponderebbe alla percezione di un segno non patematico (il cranio), che consente di fare l'esperienza di una sostanza corporea (gli organi del cervello) e indicare l'esistenza di un'entità reale (la tendenza).

Ma non è questa la sola ambiguità del discorso benthamiano che sarà presa in carico dal pensiero frenologico. Quando discute del grado di pericolosità del criminale, Bentham sostiene che l'esistenza di delinquenti dal carattere cattivo, che fanno cioè volontariamente e consapevolmente il male, ci fa venire alla mente «toute cette classe dangereuse et malfaisante qui nous environne de pièges et trame ses

di V. Guillin, *Auguste Comte and John Stuart Mill on Sexual Equality*, Brill, Leiden-Boston 2009, p. 124, che coglie nel capitolo citato un riferimento sarcastico tanto al diritto inglese quanto alla frenologia.

[39] J. Bentham to P. Chichagov, March 12, 1821, in J. Bentham, *The Collected Works of Jeremy Bentham. The Correspondence of Jeremy Bentham, vol. 10: July 1820 to December 1821*, ed. Stephen Conway, Clarendon Press, Oxford 1994, pp. 313-314.

[40] Id., *Jeremy Bentham's Auto-Icon and Related Writings*, Bristol 2002. Le citazioni sono tratte dall'introduzione di J.E. Crimmins, https://www.utilitarian.net/bentham/about/2002----.htm.

[41] Id., *Traités de législation civile et pénale*, cit., p. 25n.

[42] Cfr. al riguardo Cfr. G. Lantéri Laura, *Histoire de la phrénologie: l'homme et son cerveau selon F. J. Gall*, PUF, Paris 1970.

conspirations en silence»[43]: singolare presenza di una classe pericolosa che tende a godere in sovrappiù in un pensatore per il quale la società e le collettività non sono oggettivabili, non essendo che un aggregato di individui differenti[44]. Con ciò, Bentham non intende ovviamente attribuire una pericolosità patologica o naturale a questa classe, che tuttavia, nei termini della descrizione, è caratterizzata da una cattiva volontà, si oppone alla classe lavoratrice e calcola sistematicamente in modo contrario all'utilità generale: insomma, non è capace di limitare razionalmente la propria volontà, radicandosi i suoi atti nell'oziosità. Non siamo poi tanto lontani dalla «race abâtardie qui est le foyer des crimes»[45] di cui parla Target, il quale pure fonda il suo ragionamento in modo utilitaristico, tranne che per questo popolo straniero all'interno della popolazione che va giudicato e punito in ragione del suo carattere perverso. E proprio sul punto di una passione non facilmente riducibile al calcolo razionale d'interesse, Charles Lucas, riformatore e fondatore della società frenologica di Parigi, ha buon gioco a far giocare Bentham contro se stesso: l'esigenza utilitaristica di rendere efficace e certa la punizione è giusta – afferma –, se non fosse che i crimini non si commettono bilanciando perdite e profitti, ma più frequentemente a causa di una passione cieca che non calcola[46], non tanto perché esiste una natura criminale, ma perché esistono degli individui *predisposti* al crimine. Non è stato peraltro Bentham, sostiene ancora Lucas, a dire che vi sono dei momenti in cui un uomo sacrificherebbe l'universo intero a una sensazione?[47]. La classe di individui *intemperanti* che si abbandona agli eccessi del godimento ha pertanto non una natura diversa dalle altre, ma una costituzione psichica e fisiologica determinata dall'appartenenza di classe, perché non ha avuto modo di sviluppare l'educazione necessaria a soddisfare i propri bisogni e a governare le proprie passioni entro i limiti della legge. Possiamo misurare quanto grande sia la distanza rispetto a Beccaria, per il quale invero pure l'ozio rappresentava un problema rilevante nell'economia dell'opera, o a Filangieri, secondo il quale gli oziosi non potevano essere puniti se non dopo che fossero state eliminate le cause sociali che avevano determinato le loro azioni. Nel sistema frenologico, diversamente, legare l'ethos all'organizzazione del cervello non vuol dire altro che condannare la minore libertà morale delle classi popolari.

Naturalmente con tutto ciò non intendiamo affatto imputare a Bentham la responsabilità della medicalizzazione della giustizia, che dipenderà da una congiuntura complessa in cui giocheranno un ruolo fondamentale la critica dei codici, la

[43] J. Bentham, *Traités de législation civile et pénale*, cit., p. 123.

[44] Cfr. ad esempio E. Halévy, *La formation du radicalisme philosophique*, vol. III, Alcan, Paris 1904, pp. 359-360.

[45] G. Target, *Observations sur le projet du Code pénal*, in *Projet de Code criminel*, Paris 1804, p. 248.

[46] Ch. Lucas, *Du système pénal et du système répressif en général, de la peine de mort en particulier*, Paris 1827, pp. 183-192.

[47] Ivi, p. 189.

riforma penitenziaria, etc. Crediamo semplicemente, piuttosto, che in Bentham esista uno spazio, per quanto ambiguo, per la pensabilità di questa medicalizzazione, in grado di ridefinire radicalmente l'impianto della sua stessa teoria, a testimonianza del fatto che affinché una scienza dell'uomo fondata sui tratti specifici della sua corporeità possa articolarsi al sistema penale non è necessario presupporre una verità a priori relativa alla morale, essendo sufficiente anche una verità sperimentale come quella utilitaristica. D'altronde, la prima critica medica dei Codici e della giurisprudenza articolerà, come vedremo, utilitarismo, fisiologia e psicologia spiritualista al di fuori di un quadro retributivo.

3. LA FRENOLOGIA DI GALL E LA QUESTIONE CRIMINALE

Franz Joseph Gall è il fondatore di una scienza umana strutturata intorno alla conoscenza del funzionamento del cervello. Come ha sintetizzato Marc Renneville, sono sei le tesi fondamentali dell'organologia o frenologia[48] galliana: 1) tendenze, qualità morali e facoltà intellettuali sono, nell'uomo come nell'animale, innate; 2) il loro esercizio dipende dall'organizzazione fisica dell'individuo; 3) il loro organo è il cervello; 4) il cervello non è un organo omogeneo, ma scomponibile negli organi che lo compongono; 5) lo sviluppo e l'azione di una facoltà sono proporzionali al volume dell'organo; 6) la forma del cranio è l'espressione esterna dello sviluppo del cervello[49]. Tale sistema ha quale suo carattere fondamentale – giustamente evidenziato da Claude-Olivier Doron – la sostituzione di una griglia analitica classica fondata sulle idee e sull'immaginazione con una griglia centrata sulla bipartizione tra ordine intellettuale e ordine affettivo, dove tale spazio affettivo ha una relativa indipendenza rispetto all'ordine intellettuale e può costituire quindi un campo positivo di sapere, consentendo altresì l'individuazione di una sfera della patologia mentale indipendente dal delirio proprio della sfera intellettuale[50].

Più estesamente, partendo dalla comparazione degli animali tra loro e dell'uomo con l'animale, Gall individua una serie di tendenze che rappresentano dei motivi interni che spingono all'azione. Queste tendenze non sono riconducibili a una qualche facoltà o funzione psicologica, ma corrispondono ad altrettanti organi del cervello e sono universali e primitive, proprie della specie, pur essendo presenti in gradi molto differenti da individuo a individuo[51]. Parti del cervello diverse

[48] La definizione di frenologia non appartiene in realtà a Gall, ma sarà introdotta solo dal suo allievo Spurzheim; cfr. *infra*, n. 88.

[49] M. Renneville, *De la régénération à la dégénérescence*, cit., p. 8. Cfr. anche Id., *Le langage des crânes: Histoire de la phrénologie*, Institut d'édition Sanofi-Synthélabo, Paris 2000.

[50] C.-O. Doron, *La formation du concept psychiatrique de perversion au XIX^e siècle en France*, in «L'information psychiatrique», 88, 1/2012, p. 41.

[51] F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux en général et du cerveau en particulier*, t. II, Paris 1812, pp. 399-401.

corrispondono a diverse facoltà, e a diverse sezioni del cervello corrispondono differenti serie di sentimenti e di idee, e pertanto dal grado di sviluppo delle sezioni e delle parti del cervello dipende la «variété infinie du caractère moral et intellectuel des hommes»[52]. Esso costituisce «la condition matérielle de possibilité de l'exercice effectif de chaque penchant dans la conduite quotidienne»[53] e le ossa del cranio sono i «témoins ostéologiques des penchants»[54], il segno esteriormente palpabile del loro sviluppo normale o anormale.

Attraverso queste disposizioni, tendenze e istinti innati che il sensismo è incapace di spiegare, Gall contesta alla base la psicologia di Helvétius: il piacere e il dolore non rappresentano più i padroni dell'uomo, perché essi stessi derivano dalle tendenze innate, né sono le facoltà a originare dalle passioni, che di quelle sono la manifestazione[55]. Comincia così l'individuazione di una sfera che porterà all'oggettivazione di quanto, all'interno dell'individuo, sfugge alla sua volontà e deve dunque essere governato. Questa nuova scienza umana ha infatti l'ambizione di presentarsi come vera e propria scienza di governo della società, iscrivendosi altresì nella verità teologica (San Paolo, San Giacomo, i Padri della Chiesa) e filosofica (da Platone a Kant) di una tendenza umana naturale al male e di una virtù come lotta contro le inclinazioni perverse. Richiamando frequentemente la concezione del peccato di San Paolo e la concupiscenza di San Giacomo[56], Gall svolge una vera e propria ricodificazione frenologica del peccato originale, della nascita del regime dell'involontarietà all'interno della volontà umana, su cui rifondare il senso della legge e delle istituzioni.

Formula così una delle prime critiche del diritto penale basate sull'osservazione antropologica, enunciando una serie di problemi e di tesi che saranno ripresi, pur su basi differenti, in tutto il dibattito medico-legale del XIX secolo. Elabora ad esempio un singolare utilitarismo fisiologico-morale che inaugura il dispositivo teorico che sarà ripreso dell'antropologia criminale, benché non si spinga a sostenere che la correzione o la difesa della società debbano soppiantare il sistema penale, non prema cioè per una politica preventiva di carattere antropologico-poliziesco che sostituisca il sistema penale, ma si limiti ad auspicare il ricorso alla frenologia ai fini del buon funzionamento del giudizio e della corretta modulazione della pena, insomma a ricodificare il crimine in generale e il diritto penale dal punto di vista medico e a fondare antropologicamente la pratica giuridica.

Proprio sui limiti dell'Illuminismo penale e di un tardo utilitarismo penale come quello benthamiano in relazione all'individualizzazione, Gall fonda un utilitarismo

[52] F.J. Gall, *Sur les fonctions du cerveau et sur celles de chacune de ses parties*, t. I, Paris 1822, p. 262.

[53] G. Lantéri Laura, *Aspects Criminologiques de l'Oeuvre de F.J. Gall*, in «Análise Psicológica», 1, XI/1993, p. 6.

[54] *Ibidem*.

[55] F.J. Gall, *Sur les fonctions du cerveau*, t. I, cit., p. 168.

[56] Cfr. ivi, pp. 256-261.

specifico, o meglio una combinazione di utilitarismo, fisiologia e tradizione teologica volta a responsabilizzare l'individuo rispetto alle sue tendenze inconsce. Sostiene infatti che alla base dei crimini sono l'ignoranza e la speranza dell'impunità e che i legislatori si comportano in modo conforme alla natura umana quando motivano le loro leggi, perché così in chi è tenuto a obbedirvi scompare il sentimento di un'imposizione arbitraria[57]. Afferma però che l'efficacia delle leggi, delle politiche penali ed educative dipende dal grado in cui esse riescono a intervenire sulle determinanti interiori e non solo su quelle esteriori dell'individuo, inteso come uomo reale, uomo naturale per come caratterizzato dalle tendenze. L'uomo, infatti, deve essere considerato sia nel suo versante animale, in quanto partecipa delle tendenze, dei sentimenti e delle facoltà intellettuali dei bruti, sia nel suo versante specificamente umano, in quanto dotato di tendenze, sentimenti e facoltà superiori che ne fanno un essere morale, e la misurazione del grado di libertà morale proprio di ogni individuo dipende dai diversi rapporti che derivano dalla sua organizzazione mista, dalla fusione dell'animalità con l'umanità[58].

Educazione, legislazione e punizione devono essere dunque funzionali a consentire all'uomo di dominare l'animale che è in lui, perché ciò che rende l'uomo governabile è la possibilità della rinuncia alla soddisfazione delle tendenze. Anche se determinato da motivi interni ed esterni, l'uomo possiede la facoltà di determinarsi a seguito dell'esame dei motivi, ed è questo che fonda la legittimità delle istituzioni sociali, che forniscono appunto all'uomo i motivi per l'azione virtuosa. La decisione della ragione che segue all'esame dei motivi interni ed esterni costituisce la volontà come differente dalla tendenza, che è invece l'effetto dell'azione degli organi. Ebbene, per Gall non si è responsabili della propria concupiscenza, delle proprie tendenze o inclinazioni, ma del consenso che diamo loro: «tant que les penchants et les désirs ne sont pas éveillés et nourris par la participation de l'individu, il ne peut en être rendu responsable; mais qu'il est de sa détermination, de son vouloir et de ses actions»[59]. Il nostro organismo decide delle inclinazioni umane e della loro intensità, su cui non si ha impero, ma anche in mezzo ai desideri più accesi altri organi, altre facoltà, intellettuali, agiscono nell'uomo e si uniscono all'educazione, alle leggi e alla religione per vincere le tendenze[60]. Resta però il fatto che l'uomo si determina a partire dal motivo più imperioso che agisce in lui, ciò che non vuol dire altro che fare l'uomo responsabile della propria involontarietà, del proprio essere, sulla base del consenso prestato ai propri motivi interni. Questi dispongono il soggetto, ma senza determinarlo del tutto: l'oggetto su cui dovrà essere portato il giudizio e su cui dovrà agire la punizione è pertanto la libertà morale di resistere alle

[57] Ivi, pp. 335-336.
[58] Ivi, p. 320.
[59] F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux*, t. II, cit., p. 106.
[60] Ivi, pp. 107 e 182.

tendenze[61]. Si rimane soggetti responsabili pur essendo fondamentalmente soggetti della tendenza, della carne, del desiderio, e questa responsabilità soggettiva varia in funzione della libertà di volere effettiva, in funzione dell'equilibrio singolare degli organi cerebrali.

Certo, né per l'utilitarismo né per la frenologia esiste una perversità o una malvagità originaria della natura umana: se nella sfera dell'utilità ogni passione è buona e ha il suo posto nell'economia del mondo, e quello che il governo può fare è indebolire le passioni troppo forti o fortificare le passioni troppo deboli per produrre una sensibilità all'interesse razionalmente inteso, per la frenologia tutte le facoltà e le tendenze umane sono buone e hanno il loro posto nell'economia della creazione, ma, come si è detto, le diverse parti e i diversi organi del cervello sono disegualmente sviluppati in ogni individuo, potendo variare infinitamente: un eccessivo sviluppo dell'organo della riproduzione degenererà in lussuria ed eccessi; quello dell'istinto carnivoro nell'insensibilità al dolore dell'altro e nel piacere della distruzione; quello del sentimento della proprietà in furto e venalità[62]. E compito del legislatore, del giudice e dell'educatore è perciò intervenire sulle tendenze che sfuggono alla stessa volontà individuale. Vero è che sia l'utilitarismo sia la frenologia intendono indirizzarsi tanto alla coscienza quanto a ciò che la determina. Ma l'inconscio dell'utilitarismo, per così dire, è legato principalmente alla sfera della sensibilità e della rappresentazione, mentre quello frenologico è legato alle tendenze inconsce degli individui in quanto materializzate dagli organi. È quest'ordine di realtà costituito dalla tendenza materializzata nel cervello, da un motivo interiore determinante la volontà, che deve costituire per i frenologi l'oggetto d'intervento della legislazione, della giurisprudenza e dell'educazione.

Una legislazione fondata sui principî della natura umana dovrebbe insomma riconoscere che la libertà morale non è egualmente ripartita proprio in forza delle differenze tra i motivi interiori esistenti nei singoli individui. Questi motivi non costituiscono di per sé una causa giustificativa o una scusante, ma la loro conoscenza fornisce i gradi della colpevolezza interiore, consentendo di comprendere quando uno stesso crimine commesso da soggetti differenti costituisca per gli uni oggetto di punizione, per gli altri oggetto di compassione.

Ma se le disposizioni differiscono da individuo a individuo e prescindono non solo dell'uguaglianza giuridica, ma anche dell'uguaglianza delle condizioni ambientali in cui si è vissuti, come può allora un soggetto di diritto, su queste basi, essere giudicato per quel che fa indipendentemente dal proprio grado di libertà morale, dai propri motivi interni?

Gall critica il Codice penale proprio perché esso determina la natura della punizione a partire dalla materialità dell'atto, senza considerazione per l'individuo che

[61] Questo punto di vista verrà ripreso pressoché integralmente da Ch. Lucas, *De la réforme des prisons, ou de la théorie de l'emprisonnement*, t. II, Paris 1838, pp. 10-11.

[62] F.J. Gall, *Sur les fonctions du cerveau*, t. I, cit., pp. 263-264.

agisce nell'atto e per l'individuo che deve espiarlo, rischiando di esporsi ai giudizi più ingiusti e punendo individui diversamente responsabili delle loro tendenze se non addirittura irresponsabili. Sebbene riconosca che la fissazione della punizione in base alla natura del crimine sia la soluzione escogitata per garantire all'esercizio della giustizia quell'imparzialità e quell'eguaglianza che gli erano state negate dall'Ancien Régime, e pur ammettendo la difficoltà di mettere in atto quella giustizia individualizzata che è al centro dei suoi auspici, Gall sostiene nondimeno che ragionare in questi termini equivale a rendersi colpevoli di un nuovo arbitrio: «Les délits et les crimes ne se commettent pus d'eux-mêmes; ils ne peuvent donc pas être considères comme des êtres abstraits [...]; ils reçoivent donc leur caractère de la nature et de la situation de ces individus»[63].

L'errore principale della legislazione e della giurisprudenza, a suo giudizio, è non aver tenuto conto della differenza tra tendenze e determinazione volontaria, e ancora meno dei «divers motifs intérieurs et extérieurs qui amènent cette détermination»[64]. Non tutti gli individui godono infatti di uno stesso grado di libertà morale, per cui «tout homme, lorsqu'il est question de culpabilité intérieure n'est pas coupable au même degré, quoique l'acte matériel et la culpabilité extérieure soient les mêmes»[65]. Punire senza sapere chi è in verità il soggetto che deve essere punito, ossia qual è la sua tendenza, il suo desiderio per come organicamente disposto, equivarrebbe insomma a cumulare un'astrazione metafisica con un'ingiustizia.

L'individualizzazione del giudizio e della pena e la valutazione della moralità dell'agente sono promosse in un quadro in cui la punizione non è concepita tanto come una retribuzione etica, ma come funzionale alla protezione della società. È giusto che il diritto positivo punisca azioni contrarie all'interesse sociale, e naturalmente si deve tener conto della moralità dell'azione, ma questa deve fondarsi sullo stato dell'agente[66], fuori da un quadro retributivo e in una prospettiva preventiva, correttiva e, volendo, securitaria, conforme alle leggi della fisiologia.

Rispetto all'esercizio della giustizia, la conclusione di Gall riprende due dei princìpî fondamentali dell'illuminismo penale beccariano ed esprime un utilitarismo specifico quando sostiene che una saggia legislazione deve da un lato rinunciare a sondare i cuori e a pretendere di esercitare la giustizia, e dall'altro darsi come scopo il bene della società attraverso la prevenzione dei delitti. Ma se la logica preventiva non sorprende, come spiegare però, nella prospettazione di una giustizia che deve considerare le tendenze interiori degli individui, l'affermazione secondo la quale solo «celui qui sonde les reins et les cœurs», solo Dio (o chi è capace di rivelazione, avrebbe detto Beccaria) può formulare un giudizio giusto sul merito e sul demerito degli uomini, per cui «quand [il s'agit] d'exercer la justice dans son acception la plus

[63] Ivi, p. 358.
[64] Ivi, p. 337.
[65] Ivi, p. 338.
[66] F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux*, t. II, cit., p. 142.

stricte il faudrait s'en remettre à Dieu seul»?[67] Gall in realtà non si sta contraddicendo, ma sta utilizzando, secondo la strategia argomentativa frenologica che ha ormai consolidato, gli stessi argomenti illuministi e utilitaristi per rovesciarli radicalmente. Il medico infatti non sostiene che non bisogna sondare l'interiorità, ma intende piuttosto che il giudizio che deve stabilire la colpevolezza interiore tenendo conto dello stato di salute, del sesso e della situazione morale dell'individuo e delle infinite circostanze accessorie che la determinano è suscettibile di non essere sempre equo, mentre solo Dio può formulare un giudizio giusto ed equo.

Stabilita questa rinuncia a esercitare la giustizia, gli obiettivi di una saggia legislazione saranno allora la *prevenzione* dei delitti, la *correzione* dei criminali e la *difesa della società* nei confronti degli incorreggibili.

Il ragionamento di Gall sulla prevenzione si fonda sulla sua dottrina dell'inneità delle tendenze. La punizione deve essere graduata sulla perversità dell'agente morale, poiché non si può infliggere la stessa pena a criminali mossi da tendenze interiori differenti. L'esemplarità della pena resta un elemento importante dell'organizzazione sociale, certo, ma la paura prodotta dalla minaccia della sanzione non deve far presa solo sul calcolo del piacere e del dolore, bensì anche sulle tendenze inconsce effettive. Per alcuni individui la prigione è peggiore della morte, come pure le torture. Quanto maggiore, dunque, è l'inclinazione al male, tanto più bisogna opporre ai criminali dei motivi in grado di controbilanciare le loro tendenze. È per questa ragione che Gall propone di aggravare e graduare la pena di morte con un ragionamento utilitaristico-morale: se si vuole che la pena abbia un'efficacia deterrente, come si può punire con la semplice morte una serie di crimini che presuppongono una perversità morale del tutto incomparabile? Il mostro morale spinto da una cupidità infernale non farà che cumulare crudeltà su crudeltà, se moltiplicando i suoi crimini non ne vede aumentata la gravità[68].

Quanto alla correzione, invece, Gall ritiene che quando il rigore delle pene non sia sufficiente a controbilanciare le tendenze, è direttamente su queste che è necessario agire. Il sapere frenologico è perciò inscindibile da una tecnica di trasformazione degli individui, ossia da un lavoro di rieducazione delle tendenze[69]. Sugli individui che non provano rimorsi naturali nei confronti delle proprie cattive tendenze bisognerà cioè agire per formare in essi una coscienza artificiale, «une idée claire et une conviction de l'immoralité de leurs actions»[70]. Tale supplenza esterna nei confronti delle mancanze interne dovrà fornire dei motivi per contrastare le cattive tendenze: non potendo trasformare questi cattivi soggetti in «êtres

[67] *Ibidem*.

[68] Ivi, pp. 153-154.

[69] G. Lantéri Laura, *Aspects Criminologiques de l'Oeuvre de F.J. Gall*, cit., p. 7.

[70] F.J. Gall, J.G. Spurzheim, *Des dispositions des innées de l'âme et de l'esprit*, Paris 1811, p. 271.

naturellement bons», la prigione si dovrà dotare di istituzioni in grado di farne degli «êtres d'habitude pour le bien»[71].

Venendo infine al problema della difesa della società dagli incorreggibili, ossia da quei criminali cui la natura ha dato il solo piacere di godere dei crimini e che, per mancanza di educazione o di sviluppo delle facoltà superiori, sono impediti a tenere a bada le proprie tendenze, Gall sostiene che simili soggetti debbano essere puniti con la pena di morte. Per il frenologo, infatti, questi individui moralmente mostruosi che non si situano al di fuori dell'umanità, bensì nel quadro di una deviazione dai caratteri della specie, sono mossi da tendenze difficilmente governabili ma vanno puniti perché conservano la libertà morale e sono in ultima analisi, come ogni altro uomo, responsabili della loro interiorità. Si prenda il caso decisivo della tendenza a uccidere, normale e innata dell'uomo, e tuttavia presente in ognuno in modo più o meno sviluppato. Vi sono, in particolare, individui predisposti congenitamente al suo sviluppo abnorme, indipendentemente dunque dall'educazione o dalle proprie abitudini, ma anch'essi conservano comunque la libertà di determinarsi secondo i doveri sociali. Difatti, tra questi individui ve ne sono alcuni che, grazie all'educazione ricevuta e allo sviluppo degli organi superiori, riescono a governare l'influenza di questa tendenza congenita sublimandola, per così dire, ossia orientandola in una direzione compatibile con la vita sociale (ad es. il piacere di torturare e sezionare gli animali che potrebbe degenerare ma viene orientato verso la chirurgia). Mentre ve ne sono altri che vengono decisi dalle loro stesse inclinazioni, non riescono a padroneggiarle e possono arrivare a portarle al più alto grado di esaltazione. Lo sviluppo della tendenza, lo ribadiamo, non è determinato da una cattiva educazione o abitudine[72], che tuttavia giocano un ruolo nella misura in cui non ne inibiscono il passaggio all'atto. Questi individui commettono così «des meurtres sans intérêt, sans vengeance, sans colère»[73], crimini rari che «nous montrent que ce penchant détestable [...] prend uniquement sa source dans un vice de l'organisation»[74]. Gli autori di questi crimini mostruosi, che conservano la libertà morale di determinarsi secondo i motivi esterni, sono mossi da tendenze – aggiunge Gall – che non sono «du nombre de ceux qui caractérisent une véritable aliénation»[75] e non devono essere giudicati come se il loro cervello difettoso potesse rappresentare una scusante. Se invece lo si volesse considerare come un'attenuante, ciò che non è nelle intenzioni del frenologo, nei loro confronti una rieducazione sarebbe impresa ardua. Questi individui vanno abbattuti come si abbatte un cane rabbioso, con una soluzione a metà tra una pena e una misura di sicurezza radicale *ante litteram*.

[71] Ivi, p. 272.

[72] F.J. Gall, *Sur les fonctions du cerveau*, t. I, cit., p. 417.

[73] Ivi, p. 422.

[74] *Ibidem*.

[75] Ivi, pp. 422-423. Cfr. anche F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux*, t. II, cit., p. 177.

Come si capirà, la posizione di Gall è alquanto singolare ed è necessario analizzarla a fondo, anche perché, lo vedremo, essa porrà non pochi problemi in relazione alla distinzione e all'equiparazione di crimine e follia.

Soffermiamoci innanzitutto sull'ultima figura richiamata nel discorso galliano, ossia gli incorreggibili. Oscillando tra una serie di contraddizioni difficilmente districabili, Gall fonda la figura di un criminale mostruoso incorreggibile caratterizzato da un'estrema colpevolezza interiore e da un grado minimo di libertà morale, che lo rende perciò massimamente pericoloso e punibile. D'altronde, per Gall i soli casi in cui non sarebbero ammissibili né una responsabilizzazione del soggetto né una graduazione della colpevolezza sono quelli in cui è possibile accertare l'assenza di libertà morale, rappresentati ad esempio dall'alienazione, totale o parziale, o dall'imbecillità. Non è dunque il caso degli incorreggibili, per i quali l'esaltazione delle tendenze perniciose cui essi sono organicamente predisposti può costituire al limite una disposizione all'alienazione[76] senza però farne degli alienati, rappresentando un assoggettamento dell'anima alla carne, all'animale nell'uomo[77]. Del resto, come la più perversa costituzione organica non costituisce alienazione, l'alienazione non è esclusa dalla migliore costituzione organica[78]. In sintesi, in Gall la disposizione congenita mostruosa non priva della libertà morale l'uomo, che resta imputabile, non è una malattia e non corrisponde a un'innocenza biologica, ma non è neanche – e il frenologo lo sottolinea con forza – una «perversité *volontaire*»[79]. La fattispecie è particolarmente spinosa per il giudice, in quanto non si distingue dallo stato di ragione e non si confonde con la follia[80]. Se non si può accusare la perversità volontaria di questi mostri, allora bisognerebbe parlare di perversità *non volontaria* o *involontaria*, che in senso stretto equivarrebbe all'alienazione, nella quale però l'individuo non partecipa della tendenza, mentre con gli incorreggibili siamo di fronte a una volontà vinta e non lesa, che ha dato assenso alla tendenza e resta responsabile: non diversamente, possiamo aggiungere, da ogni altro individuo, essendo tutti gli uomini in ultima analisi responsabili dell'assenso che danno a quello che sono, ciò che giustifica agli occhi della frenologia la sua aspirazione alla medicalizzazione del crimine in generale e non solo di quello mostruoso. Ugualmente problematico sarebbe parlare di perversità organica, poiché a rigore il movimento di tutte le tendenze è involontario e organico e diventa più o meno imperioso a seconda del grado di sviluppo delle tendenze stesse e dello stato degli altri organi, rendendo conseguentemente più o meno difficile la lotta della volontà contro di esse. È allora forse più opportuno optare per una qualificazione di *perversità congenita*, prima figura positiva della specie dei criminali nati, degli anormali, etc., la

[76] F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux*, t. II, cit., p. 337.
[77] Ivi, p. 177.
[78] Ivi, p. 337.
[79] F.J. Gall, *Sur les fonctions du cerveau*, t. I, cit., p. 424.
[80] F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux*, t. II, cit., p. 178.

cui lunghissima storia si articolerà intorno alle nozioni di degenerazione, istinto, ereditarietà, fino alla vulnerabilità genetica e all'inattività della corteccia prefrontale odierne.

Appare tuttavia complesso a questo punto distinguere tra le varie forme di mostruosità morale che è possibile isolare: gli incorreggibili congenitamente perversi di cui si è appena detto, che conservano la libertà morale e vanno abbattuti come si abbatte un cane rabbioso; coloro che meritano una pena di morte aggravata in funzione dissuasiva e che sono qualificati anch'essi da Gall come mostri sanguinari perversi; gli alienati privi di libertà morale che, come Gall riconosce, devono essere irresponsabilizzati perché suscettibili di commettere crimini mostruosi immotivati, senza collera e senza interesse, sotto la spinta di una malattia che non colpisce la sfera intellettiva ma esclusivamente la volontà.

Tolto quest'ultimo caso, che come vedremo sarà al centro del dibattito promosso da Esquirol, Georget e Marc negli anni Venti, nel secondo caso la pena svolge una funzione dissuasiva nei confronti dei criminali potenzialmente più perversi, veri e propri mostri malvagi spinti da una cupidità infernale e da desideri sanguinari insaziabili, Gall *dixit*[81], che in assenza appunto della pena di morte aggravata andrebbero compiendo scelleratezze su scelleratezze. Questi individui vanno giudicati naturalmente per i loro crimini e le loro tendenze dominanti, il loro grado di perversità. Tra i tanti, Gall porta l'esempio del brigante la cui vita non è che un tessuto di omicidi e rapine[82].

Nel primo caso si tratta invece di criminali che, Gall *iterum dixit*, pur essendo decisi dalle loro tendenze, non sono privi della libertà morale di determinarsi e non sono alienati[83]. Anche per questi individui la pena è la morte, dovendo essere abbattuti come si abbatte un cane rabbioso. Tra di essi, per restare in tema con l'esempio precedente, è il brigante che non si accontenta di tessere la sua vita di omicidi e rapine, ma tende a godere in sovrappiù, senza necessità e senza rimorso, della sofferenza delle sue vittime: il suo è un crimine senza utilità materiale (il bottino è già stato preso), senza motivo, scopo o interesse che non sia quello di godere della sofferenza provocata, un crimine che richiama da vicino quello bestiale della tradizione criminalistica, figura di estrema immoralità che sarà opposta negli anni Venti da alcuni giuristi alle patologie della volontà individuate dagli alienisti, ma che per Gall rappresenta piuttosto – come si è detto – una figura di *perversità congenita*[84].

[81] Ivi, pp. 153-154.

[82] Ivi, p. 153.

[83] Ivi, pp. 177 e 182.

[84] Cfr. F.J. Gall, *Sur les fonctions du cerveau*, t. I, cit., p. 423, nonché F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux*, t. II, cit., p. 184. Gall critica così implicitamente la dottrina giuridica che ha pensato gli autori dei cosiddetti crimini bestiali come caratterizzati da una perversità volontaria. Sebbene l'affermazione vada leggermente sfumata, ha ragione Lantéri Laura a sostenere che «à part les cas d'aliénation mentale, F. J. Gall estime donc que la phrénologie ne

C'è infine un altro punto molto importante che necessita di una precisazione, perché sarà negato degli eredi di Gall e dagli alienisti, ossia il valore della punizione degli incorreggibili. Georget contesterà a Gall che, considerata la rarità di questi soggetti caratterizzati da una *perversité native*, la pena di morte non avrebbe il minimo valore dissuasivo[85]. Ora, premessa l'impostazione particolarmente classista di Gall, nella misura in cui in ultima analisi la tendenza congenita all'omicidio condanna gli individui appartenenti alle classi popolari privi dei mezzi intellettuali per canalizzarla, nella logica del frenologo tuttavia è dato pensare che anche nei confronti di tali individui le pene possano svolgere una funzione dissuasiva, benché minima e indiretta. In mancanza di buona educazione o abitudine, la minaccia sanzionatoria rappresenta infatti l'unico motivo esterno che possa incidere sulla loro libertà morale, ed è sempre possibile che in una strenua lotta contro le loro tendenze essi riescano a vincerle prima di arrivare al punto di non ritorno – d'altronde, neanche l'educazione è talvolta sufficiente a contrastarle, come nel caso del ricco congenitamente predisposto al furto che non riesce a smettere di rubare. Inoltre, e più in generale, mantenere la pena di morte fa comunque segno verso la necessità di una sorta di screening alla nascita e di un'educazione frenologicamente intesa. Si puniscono questi individui come cani rabbiosi, ma sempre perché altri cani rabbiosi nati possano tenere a bada la loro tendenza.

In conclusione di questa sintesi della politica penale di Gall, ci sembra importante rilevare che il suo dispositivo, determinando scientificamente le tendenze delle singolarità individuali per come espresse da un segno corporeo, tendenze di cui peraltro gli individui non sono coscienti e che non padroneggiano, intende da un lato decifrare le cause interne che determinano il comportamento, e dall'altro raggiungere un livello di reale più reale della realtà del comportamento, legato alla potenza dell'individuo, alla sua verità. L'infinita concatenazione di variabili tra loro indipendenti da cui dipende una condotta, concatenazione a cui era dovuta la sottigliezza delle regole che Bentham riteneva di poter determinare scientificamente, diventa d'un tratto meno importante rispetto alla determinazione scientifica dell'interiorità individuale. Con Gall il soggetto di diritto non perde la sua libertà, ma questa viene ricodificata in termini medici e utilitari: rispetto alla conoscenza delle variabili esterne che determinano il comportamento, la conoscenza della tendenza all'omicidio risulta più certa e più utile tanto per l'individuo (che può prendere coscienza delle proprie tendenze) che per la società (che si scopre più giusta e più umana, e più efficace, in funzione della considerazione delle tendenze interiori). Ma la determinazione scientifica dell'individualità a partire da quei motivi interiori

conduit pas un instant à remplacer la liberté par le déterminisme» (G. Lantéri Laura, *Aspects Criminologiques de l'Oeuvre de F.J. Gall*, cit., p. 8). Come cercheremo di mostrare, questa posizione singolare di Gall creerà non pochi problemi allorché si porrà il problema dei crimini senza ragione nel dibattito tra alienisti e giuristi. Cfr. *infra*, nel testo.

[85] É.-J. Georget, *Examen médical des procès criminels des nommés Léger, Feldtmann, Lecouffe, Jean Pierre et Papavoine*, Paris 1825, p. 98.

rappresentati dalle tendenze materializzate consente altresì di caratterizzare un individuo in un modo o in un altro anche indipendentemente dai suoi comportamenti. Se con l'utilitarismo benthamiano si punisce per ciò che si fa e si gradua la punizione in funzione dell'essere del soggetto presunto, in mancanza di conoscenze certe, a partire dai comportamenti, con la frenologia si punisce per ciò che si è in relazione alle tendenze, e si può addirittura giungere a caratterizzare un individuo in determinati termini anche in assenza del comportamento corrispondente. In tal modo la frenologia, mediante osservazioni empiriche ricavate a posteriori diventa un sapere infallibile della soggettività che prescinde non solo dalla sua relazione con l'altro, ma anche dal suo comportamento effettivo, perché il segno rinvia direttamente a una causa organica agente.

Lantéri Laura ha affermato che il sistema semiotico frenologico, concependo il significante come un segno stabile come la pietra (il cranio, antecedente dei segni corporei che l'antropometria successiva si incaricherà di determinare), toglie incertezza alla conoscenza dell'uomo e può sganciarsi da un significante legato alla sfera del comportamento che permetterebbe una conoscenza dell'uomo non superiore alla percezione intuitiva di certi dati: «les particularité typiques du corps [...] permettent un mode d'investigation clinique dégagé des servitudes de l'analyse du comportement»[86]. Anche se incapace di fondare eziologicamente il comportamento, la consistenza semiologica della frenologia, il suo sistema di correlazione tra significante (scatola cranica) e significato (tendenze), attraverso la natura stabile del primo attesta l'esistenza del secondo, attribuendogli un livello di realtà più profondo di qualunque altro tipo di sapere, perché riguardante l'individuo come virtualità di atti in ragione della tendenza che può essere e permanere anche latente.

Tutto ciò vuol dire che quello che accade nell'uomo, al livello delle sue tendenze effettive, è molto più importante del suo comportamento e non può neanche essere da questo smentito. È già qui in azione, insomma, un dispositivo di pensiero capace di fare della tendenza e del temperamento dei concetti funzionali non solo a considerare il crimine come un fenomeno anormale o patologico, ma anche a sganciare l'agente dall'atto, la criminalità dell'agente (colpevolezza interiore) potendo sussistere anche senza la criminalità giuridica dell'atto (colpevolezza esteriore), come accadrà con la nascita dell'antropologia criminale. Si potrà essere ladri per natura senza aver mai compiuto il benché minimo furto e si potrà non essere ladri pur rubando, perché non si possiede il segno che rivela la presenza della tendenza. Si avrà una certa natura anche se l'assenza dei corrispondenti comportamenti lo esclude, perché si è abitati da qualcosa di cui non si può diventare coscienti se non attraverso la mediazione dello specialista che legge i segni ossei che testimoniano del nostro carattere.

[86] G. Lantéri Laura, *Histoire de la phrénologie*, cit., p. 225.

4. L'EREDITÀ DI GALL E LA CRITICA DEL SISTEMA PENALE IN VOISIN

I continuatori di Gall ne esaltano la linea facendo dell'istinto e dell'animalità un dato positivo della conoscenza della natura umana. In questa zona di indiscernibilità tra animalizzazione dell'uomo e umanizzazione dell'animale, la posta in gioco è la determinazione del rapporto morale esistente in ogni individuo tra tendenze istintive e facoltà intellettuali e morali, in una scala gerarchica che vede alla base i soggetti dominati da un istinto di distruzione, e alla sommità quelli capaci di dominare le loro tendenze distruttive.

Fossati non esita a dire che, dopo secoli passati a occuparsi del perfezionamento della razza dei cavalli, delle pecore e dei cani, è arrivato il momento di concentrarsi sul perfezionamento della razza umana[87]. Spurzheim, autore con Gall dei primi due volumi dell'*Anatomie et physiologie du système nerveux*[88], approfondisce la nozione di istinto inteso come «tout désir qui fait agir les animaux»[89], intendendo con ciò qualsiasi impulso interiore ad agire senza conoscenza delle cause. Proprio nel discorso sull'istinto Broussais individua la vera cifra della sua riflessione, che l'avrebbe spogliato del pensiero pronunciando la seguente sentenza: «les instincts

[87] G.A.L. Fossati, *De l'influence de la phrénologie sur les sciences, la littérature et les arts*, in Id., *Questions philosophiques, sociales et politiques traitées d'après les principes de la physiologie du cerveau*, Paris 1869, p. 75.

[88] A seguito della pubblicazione di quest'opera, Spurzheim si divide dal maestro per cause non del tutto chiare (cfr. H. Whitaker, G. Jarema, *The split between Gall and Spurzheim (1813 to 1818)*, in «Journal of the History of the Neurosciences», 26, 2/2017, pp. 216-223) e parte per l'Inghilterra, dove intraprende un'opera di divulgazione della dottrina organologica di Gall, coniando per essa il termine – che sarà inviso allo stesso Gall – di 'frenologia'. Per la tesi che vorrebbe invece questo termine 'derivato' dal medico inglese Forster si veda J. Hunt, *On the Localisation of the Functions of the Brain, with Special Reference to the Faculty of Language*, in «The Anthropological Review», 7, 25/1869, pp. 201-214, in particolare p. 202. Già nella prefazione della prima opera pubblicata a Londra, *The Physiognomical System of Drs. Gall and Spurzheim*, del 1815, Spurzheim segna il suo distacco rispetto al maestro rivendicando a sé stesso un approccio più scientifico e 'filosofico' rispetto a quello di Gall, eminentemente empirico («I am now led to think, that the objects which are still to be added to our larger work must assume a more scientific arrangement, and be considered in a more philosophical manner, than Dr. Gall has been accustomed to do in his lectures», p. VII). Ne discende una riformulazione complessiva dell'elenco delle facoltà di Gall, di cui Spurzheim modifica la nomenclatura, l'articolazione (ora in ordini e generi) e la consistenza, progressivamente ampliata fino a raggiungere il numero di 35 facoltà (dalle 27 originarie), anche con l'inserimento di facoltà che Gall dirà non fondate empiricamente (benevolenza, speranza, soprannaturalità). Le critiche di Gall alle correzioni apportate dal suo allievo non si fanno attendere: nel 1818, nel terzo volume della sua *Anatomie et physiologie*, in una lunga e animosa nota che segue la prefazione, Gall comincia con il rivolgere a Spurzheim una pesante accusa di plagio, per passare poi a contestargli di aver introdotto, con le sue pretese filosofiche, divisioni innaturali tra le facoltà; di aver misconosciuto che le facoltà intellettuali esistono indipendentemente dai cinque sensi; di aver ignorato l'esistenza del male morale , etc. (F.J. Gall, *Anatomie et physiologie du système nerveux en général et du cerveau en particulier*, t. III, Paris 1818, pp. XV-XXXIII).

[89] J.G. Spurzheim, *Essai philosophique sur la nature morale et intellectuelle de l'homme*, Paris 1820, p. 4.

ne raisonnent pas; ils poussent sans cesse à l'action»[90]. Gli stessi animali vanno distinti tra quelli che agiscono perché spinti da un impulso cieco e quelli che «montrent quelque intelligence», che «résistent souvent à leurs impulsion intérieures» e sono in grado, come il cane ad esempio, di modificare il loro agire a seconda delle circostanze esterne, avendo memoria dei castighi ricevuti[91].

Quanto alla questione penale, il Manifesto della *Société Phrénologique de Paris*, redatto da Jean Baptiste Mège e adottato a maggioranza dalla Società nella seduta del 9 novembre 1834, conferma in gran parte l'impostazione galliana, seppur modificandola in vari punti, ad esempio equiparando l'esaltazione delle tendenze perniciose cui l'individuo è organicamente predisposto all'alienazione e la criminalità alla malattia, nonché mettendo in discussione l'utilità del rigore delle pene e insistendo sul loro versante correttivo, in ogni caso sempre con riguardo alle capacità cerebrali degli individui frenologicamente determinate[92]. A non godere totalmente del loro libero arbitrio – ciò che per i frenologi equivale a non riuscire a negare la propria obbedienza all'attività dell'organo – non sono più così solo gli alienati o gli imbecilli, ma anche quei soggetti dispoticamente soggiogati nelle loro azioni «par la suprématie d'un organe supérieur à tous les autre en développement et en énergie»[93]. E tanto peggio per coloro che hanno «le malheur d'avoir une organisation cérébrale anti-sociale; s'il n'y a pas de remède à leur vice d'organisation, ils doivent, comme les aliénés, comme les animaux féroces, être mis dans l'impossibilité de nuire»[94]: il che significa, però, non più condannarli a morte, come era invece per Gall, non esistendo per i suoi continuatori il diritto naturale di uccidere gli incorreggibili (incurabili), bensì isolarli dal patto sociale rinchiudendoli a vita in prigione o inviandoli in una colonia penale[95].

È vero, come scrive Félix Voisin, che i crani dei criminali sono «comme les grandes têtes morales et intellectuelles placées par la nature en dehors de l'espèce

[90] Cfr. F.J.V. Broussais, *Considérations sur les rapports de la phrénologie avec la philosophie*, in «Journal de la Société Phrénologique de Paris», XXX/1835 (janvier), p. 4.

[91] J.G. Spurzheim, *Essai philosophique*, cit., p. 5. Il motivo dell'animale e della libertà come resistenza alle inclinazioni sarà ripreso da Charles Lucas: il cane affamato che resiste di fronte al cibo per la memoria dei colpi ricevuti offre un esempio di atto motivato e dunque libero, pur restando a un livello di libertà di primo grado, come mera resistenza a una forza, e non potendo raggiungere il secondo grado di libertà morale, ossia la resistenza in virtù di un motivo morale; mentre l'atto di libertà attraverso il quale il cane si lascia morire di fame per vegliare sulla tomba del suo padrone non dipende da un motivo morale, ma dall'organo dell'attaccamento, che nei cani è particolarmente sviluppato. Cfr. Ch. Lucas, *Du système pénal et du système répressif*, cit., pp. 156-157.

[92] Cfr. *Manifeste des principes de la Société phrénologique de Paris*, Paris 1834, pp. 25-30. Sull'equiparazione tra criminale e malato morale cfr. già A.M.Th. Bérenger, *De la justice criminelle en France*, Paris 1818, p. III.

[93] Ivi, p. 26.

[94] *Ibidem*.

[95] Ivi, p. 30. Si tratta di una posizione prossima a quella che aveva sostenuto qualche anno prima Georget, per cui cfr. *infra*, nel testo.

humaine»[96], tuttavia il frenologo è lontano dal pensare che «cette marque d'exclusion est irrémissible. La laideur ou l'infirmité physique sont liées ici [...] à la condition sociale»[97]: in linea generale, le disposizioni dell'uomo animale si manifestano nei criminali tanto in forza di un vizio congenito quanto in forza di una mancanza di educazione: «La plupart des criminels sont donc des enfants mal nés, ou s'ils n'ont point une organisation défectueuse, ils ont été horriblement mal placés dans le monde extérieur», nel senso che hanno vissuto in circostanze favorevoli al pervertimento dei loro sentimenti morali e delle loro facoltà intellettuali[98]. Insomma, un cattivo governo delle tendenze animali è spesso dovuto a una cattiva educazione o all'ambiente in cui si è vissuti.

Voisin, ritenendo che la maggior parte dei criminali siano dei malati in virtù della loro organizzazione cerebrale difettosa, e che sia possibile identificarne le tendenze e il carattere attraverso l'analisi del cranio, racconta così della sua visita al bagno penale di Toulon, finalizzata a dimostrare le virtù umanistiche della frenologia, e ricorda di essersi rivolto al commissario del bagno, M. Reynaud, in questi termini: «Si les observations des MM. Gall et Spurzheim sont exactes, lui dis-je, je dois découvrir par le simple toucher, les penchants et les sentiments des individus qui, dans cette foule de criminels ont un caractère à eux et qui ont dû nécessairement fixer votre attention, non seulement par la nature de leur délit, mais bien mieux encore, comme je viens de vous le faire entendre, par une manière d'être habituelle, qui a dû nécessiter fréquemment l'emploi de tous les moyens de répression dont vous pouvez disposer»[99]. Certamente il commissario della prigione conosceva quei criminali di cui Voisin sta parlando, i più difficili da correggere, e le sue note biografiche sui detenuti confermeranno le osservazioni del medico. Raccolta la sfida, il giorno successivo Reynaud presenta così a Voisin, su sua richiesta, circa trecento detenuti, ventidue dei quali condannati per stupro. Il medico identifica ventidue criminali il cui cranio manifesta «l'empire despotique de l'organisation»[100], ossia delle fosse occipitali inferiori molto sviluppate. Di questi, tredici sono stati condannati per stupro. Reynaud prende atto dell'alta percentuale individuata da Voisin, ma contesta che un simile sapere è piuttosto incerto se il medico ha compreso nella sua selezione ben nove individui che non sono stati condannati per stupro, mancando invece di riconoscere nove stupratori. Al contempo, però, ammette che anche i nove detenuti su cui Voisin si è sbagliato sono considerati in prigione pericolosi per i costumi e perciò sottoposti a sorveglianza speciale. Voisin rovescia allora lo scacco in vittoria, spiegando che i nove condannati per stupro che non aveva

[96] F. Voisin, *De l'organisation cérébrale défectueuse de la plupart des criminels*, in «Bulletin de l'Académie nationale de médecine», 1837, p. 911, cit. in M. Renneville, *De la régénération à la dégénérescence*, cit., pp. 10-11.

[97] M. Renneville, *De la régénération à la dégénérescence*, cit., p. 11.

[98] F. Voisin, *De l'homme animal*, Paris 1839, pp. 48-49.

[99] Ivi, pp. 94-95.

[100] Ivi, p. 97.

identificato si erano evidentemente macchiati di questo crimine per un mero incidente, ossia per aver soggiaciuto a circostanze esterne, impressioni che non sono riusciti a padroneggiare; mentre i nove criminali individuati ma non condannati per stupro erano stati puniti per un delitto non determinato dall'organo responsabile dello stupro solo perché altri tiranni predominavano nella loro testa. In un solo colpo, Voisin ottiene così il risultato di isolare la pericolosità di individui che recano in sé in potenza il delitto nei confronti dei costumi (confermata dalla sorveglianza speciale cui sono sottoposti in prigione), mostrando al contempo che la frenologia non è interamente determinista, poiché la predominanza di un organo non genera infallibilmente la necessità della sua manifestazione correlativa.

Sull'arbitrarietà e la debolezza filosofica ed epistemologica della frenologia, sul suo rinnegamento della ragione che pretende di spacciare il cranio per l'esistenza effettiva della coscienza, Hegel si esprimerà in maniera piuttosto dura. E la sua riflessione ben può rispondere alla narrazione compiaciuta di Voisin. Nella *Fenomenologia dello spirito* sostiene infatti che una rappresentazione per quanto povera dello spirito, come quella che lega i processi spirituali alle forme ossee, presenta nondimeno un'enorme quantità di determinazioni, per cui osservazioni come quelle di Voisin hanno uno statuto antiscientifico che lega la determinatezza spirituale a una forma ossea in modo non tanto diverso dalla massaia che osserva che piove ogniqualvolta si mangia l'arrosto di maiale: lo spirito, come la pioggia, è indifferente a queste circostanze, ma una legge che ci si è dati preventivamente induce comunque a interpretare come disposizione la realtà che non si manifesti al verificarsi delle circostanze, portando a dire: «mediante quest'osso si allude a qualcosa, ma anche, in eguale misura, non vi si allude»[101]. In tal modo, Hegel sostanzialmente rinnega alla radice la possibilità che il cranio sia espressione dell'interiorità effettiva del soggetto, che l'esteriorità sia indice dello spirito, che viene letteralmente cosificato dalla frenologia.

Voisin, che si ritiene un vero umanista, è convinto che l'uomo non vada separato dall'uomo[102]. Riprende così la critica galliana delle considerazioni giuridiche relative alla materialità dell'atto per soffermarsi diversamente sull'uomo agente, auspicando un raddoppiamento antropologico del sapere del crimine.

La tesi frenologica fondamentale, si è detto, vuole che «l'organisation des tous les hommes est identique, qu'ils possèdent tous les mêmes parties essentielles, que leurs différences se bornent à des nuances du même fond»[103]. Riflettere su questo fondo di «dispositions similaires et pourtant diversifiées» porta Voisin a riconoscere che l'eventualità delle circostanze, l'uso buono o cattivo delle facoltà determinano

[101] G.W.F. Hegel, *Fenomenologia dello spirito* (1807), trad. it. di V. Cicero, Bompiani, Milano 2000, p. 467.

[102] Cfr. al riguardo C.-O. Doron, *Félix Voisin and the genesis of abnormals*, in «History of Psychiatry», 26, 4/2015, pp. 387-403.

[103] F. Voisin, *Application de la physiologie du cerveau à l'étude des enfants qui nécessitent une éducation spéciale*, Paris 1830, p. 15.

uno sviluppo diseguale dell'encefalo e che l'osservazione dell'uomo nel suo stato normale o anormale è necessaria per la «solution des questions qui intéressent le plus sérieusement la société»[104].

Rispetto alla fonte delle determinazioni umane e alla conseguente modulazione (attenuata o aggravata) della colpevolezza, i giuristi – denuncia Voisin come già Gall – prendono in considerazione solo influenze esterne, secondo una pratica che va rigettata, avendo la frenologia dimostrato che esistono dei motivi interni altrettanto potenti e indipendenti dalle sollecitazioni esterne: «Pourquoi s'arrêter avec tant d'obstination à la matérialité des actes? Ne sait-on pas que l'agent seul peut leur donner un caractère ? [...] Rentrons dans les habitudes ordinaires de la jurisprudence, et satisfaisons de notre mieux aux droits de la société»[105]. Questo appello a inserire la frenologia nel suolo consuetudinario della giurisprudenza al fine di illuminarla in nome di un senso di giustizia fondato sulla perfettibilità della specie umana racchiude l'ambizione di modificarne radicalmente la forma di razionalità. Voisin accusa la giurisprudenza e tutto il sistema penale di privare i criminali «des attributs de l'espèce: on les a regardés comme d'une nature tellement inférieure, ou comme à tel point déchus de leur origine, que tout retour de leur part à l'ordre, à la raison, à la vertu, à l'intérêt personnel, au sens commun, a passé pour impossible»[106].

In modo esattamente opposto a Kant, che considerava la rieducazione una forma di trattamento dell'uomo valida come mezzo e non come fine, in quanto negazione radicale della giustizia, Voisin ritiene che non esistano uomini su cui non si possa (e 'quindi' non si debba) intervenire, potendo anche il più grande criminale pentirsi, correggersi e ritrovare la propria dignità di uomo[107]. La costituzione cerebrale deve perciò essere presa in considerazione nelle aule di giustizia, di modo che «on se livrera moins souvent devant les tribunaux à des interprétations ridicules ou quelquefois bien cruelles. L'état de l'encéphale enfin sera compté pour quelque chose; il sera pour tout le monde ce qu'il est pour nous, la traduction physiologique de l'activité de certains sentiments ou penchants dont il est impossible de trouver la source et la cause dans l'excitation du monde extérieure, dont la manifestation non motivée paraît marqué du sceau de la fatalité et dont une éducation spéciale eût pu seule comprimer la violence et régulariser l'emploi»[108].

Su queste basi, Voisin critica il sistema penale riprendendo argomenti utilitaristi e rovesciandoli: «Les lois doivent frapper un être libre, un être moral, un être intellectuel; elles doivent surtout être utiles à la fois à l'infracteur et à la société: craignons de les appliquer en pure perte, en luttant vainement contre la nature des choses».

[104] Ivi, p. 16.
[105] Ivi, p. 34.
[106] Ivi, pp. 22-23.
[107] Ivi, p. 24.
[108] Ivi, pp. 49-50.

Sembrerebbe di trovarsi di fronte a una proposizione di Bentham, per il quale punire in perdita significava punire senza che dalla punizione provenisse un profitto, dunque da un lato punire solo *realmente* (senza pubblicità), così che la punizione non potesse raggiungere la sua utilità primaria, ossia influire sul comportamento futuro degli individui, e dall'altro punire in modo inefficace, ovvero non corrispondente al grado della tentazione o della depravazione. Per Voisin, tuttavia, se certamente la punizione deve conservare un carattere di esemplarità, perché i crimini danneggiano la società, essa deve soprattutto essere graduata in funzione della colpevolezza reale, e in questa prospettiva applicare una punizione in perdita equivale a non tener conto della natura delle cose, che è la natura dell'individuo e non quella del crimine. Sganciando la criminalità reale dall'atto, portando cioè all'estremo lo spostamento galliano dal comportamento alle tendenze effettive, Voisin prova a rovesciare non solo l'ordine di importanza tra pena apparente e pena reale, ma la psicologia giuridica più in generale.

Se è inutile e ingiusto punire colui che è spinto al crimine da cause organiche non padroneggiabili, e che deve quindi essere oggetto di correzione, bisogna anche avere una giusta considerazione per quanti sono stati condannati a un crimine per il quale non sono organicamente disposti. Così, mentre per Bentham la pena poteva essere addolcita quando ad esempio la tentazione fosse un indice della benevolenza del delinquente (il padre che ruba per dare da mangiare ai propri figli), per Voisin si ha diritto alla pietà ogniqualvolta un atto sia il prodotto di una circostanza esterna piuttosto che una manifestazione realmente criminale. Con riferimento ai nove detenuti condannati per stupro ma non riconosciuti come stupratori per natura da Voisin nel bagno penale di Toulon, il frenologo qualifica il loro crimine come un incidente di cui non si dovrà temere il ripetersi. Con la conseguenza che coloro che sembrerebbero al riguardo i più punibili, perché avrebbero potuto meglio trattenersi dall'atto in mancanza di uno sviluppo anormale della relativa parte cerebrale, per il frenologo possono invece essere puniti con una pena moderata perché non hanno la natura di stupratori, ma è solo la loro grossolanità e la loro ignoranza ad averli fatti cedere al verificarsi di determinate circostanze.

La natura intimidatoria della punizione è molto meno importante per Voisin della sua corrispondenza alle tendenze reali degli individui. Qui si misura la sua distanza da Gall, che con l'invocare la morte per i perversi congeniti e una pena di morte aggravata in funzione della natura degli individui metteva il sapere antropologico a servizio del sovrano e del giudice. Ma qui si misura anche la sua distanza da Beccaria o da Bentham: secondo il frenologo la pena di morte non va criticata perché inutile e non necessaria, i supplizi non vanno criticati perché determinati da un principio di antipatia, ma l'una e gli altri vanno criticati perché così impongono la natura e la morale, perché il giudice che condanna a morte o al supplizio è determinato da una tendenza inferiore come l'istinto di distruzione, perché il popolo

allevato nella pratica del supplizio è spinto a permanere in un'animalità volgare[109]. Diversamente, un giudice che elimini un agente dannoso dalla società condannandolo alla prigione, anziché abusare della propria potenza come negli antichi supplizi, ne fa un uso nobile in grado di «concilier les intérêts généraux avec les égards que l'on doit au malheur, quand elle s'unit avec la bienveillance, l'amour de la justice et une raison supérieure»[110].

Ma anche in assenza di punizioni disumane e crudeli, Voisin critica le virtù dell'intimidazione più in generale, riconoscendo in esse, con rinvio a Montesquieu, lo strumento dei governi dispotici. Contro Guizot, secondo il quale senza il timore di un potere esterno costante, temibile ed energico non vi può essere moralità ma solo l'egoismo della passione, e che pertanto l'intimidazione generale e preventiva è il vero scopo delle leggi penali[111], Voisin sostiene che al di là della sua utilità consistente nel reprimere «la manifestation impérieuse et désordonnée des penchants inférieurs» in «têtes faibles d'intelligence et pauvres de sentiments», l'intimidazione è del tutto impotente a instillare la virtù nell'animo degli individui, neanche sotto forma di interesse ben compreso[112]. Le qualità morali non sono il prodotto dell'intimidazione, ma sono innate, e in una pratica di governo che si fondi sull'intimidazione le parti superiori del cervello non hanno modo di svilupparsi, e l'uomo animale viene lasciato solo vivere, mutilato nella possibilità di sviluppare le parti nobili del proprio essere animale, privato della possibilità di perfezionarsi[113], mentre solo l'educazione delle facoltà superiori può nobilitare le tendenze inferiori.

5. L'INDIVIDUALIZZAZIONE COME PROBLEMA TRASVERSALE

Prima di passare all'analisi dei rapporti tra frenologia, alienismo e pensiero giuridico, è opportuno fare un passo indietro rispetto alla ridefinizione della frenologia di Gall da parte dei suoi continuatori, dovuta al contesto politico in cui questi hanno elaborato le loro posizioni. Ciò al fine di mostrare come la razionalità economico-morale dell'utilitarismo penale e la razionalità antropologica della critica medica, corrispondenti in astratto all'*homo oeconomicus* e all'*homo criminalis*, non siano state affatto pensate come incompatibili dal punto di vista teorico e pratico e siano state al contrario funzionali a un'individualizzazione fisio-psicologica, utilitaristica e morale.

Nella sua celebre opera del 1898 sull'individualizzazione della pena, Saleilles rende omaggio al genio italiano che, da Beccaria a Pellegrino Rossi, ha fatto conseguire enormi progressi alla scienza penale. Per Saleilles, più precisamente, mentre

[109] Id., *De l'homme animal*, cit., p. 270.
[110] Ivi, p. 243.
[111] F. Guizot, *Mémoires pour servir à l'histoire de mon temps*, vol. III, Paris 1860, pp. 313-314.
[112] F. Voisin, *De l'homme animal*, cit., pp. 461-462.
[113] Ivi, p. 463.

Beccaria non aveva trovato altro modo di superare l'arbitrio giudiziario al di fuori di un'applicazione «générale et égalitaire» della legge, è stata la scuola neoclassica di Rossi a superare dal punto di vista teorico le false presunzioni della scuola classica relative all'identità di volontà e libertà, ovvero innanzitutto le due credenze per le quali ogni fatto voluto è un fatto libero e uno stesso atto è per ogni uomo il prodotto di una uguale libertà soggettiva[114].

Saleilles, come molti teorici prima e dopo di lui, accosta al riguardo Beccaria e Bentham senza osservare che per quest'ultimo non ogni uomo gode dello stesso grado di libertà e che vi sono comportamenti istintivi dettati dal temperamento o da stati passionali decifrabili attraverso un'individualizzazione psicofisiologica. Come si è visto, infatti, Bentham non è tra coloro che ritengono si debba giudicare la materialità del fatto senza riferimento alla responsabilità morale dell'agente, al punto che, fermo restando il principio del danno arrecato alla società come misura principale della pena, la valutazione individualizzante dei gradi dell'intenzione colpevole, delle disposizioni psichiche e dei caratteri, da affidare a giudici ed esperti, costituisce un elemento fondamentale della sua dottrina.

Contro la seconda credenza della scuola classica, secondo cui uno stesso atto libero possiede sempre il medesimo grado di libertà, Saleilles sostiene innanzitutto che la libertà, per essere qualcosa di intelligibile, non può che riconoscersi nella «force de résistance au mal. Ce ne peut être que la puissance de notre être intime qui se ressaisit lui-même, pour faire front à l'encontre des instincts et des passions qui l'entrainent»[115]. Sostiene, ancora e soprattutto, che questa forza di resistenza della volontà non può essere presente allo stesso grado in ogni individuo e che dipende non solo dall'abitudine, dal carattere e dalla personalità di ciascuno, ma anche da stati patologici che non realizzano una forma di alienazione, ossia da quelle che definisce «maladies de la volonté», «impuissances presque physiques de vouloir»[116].

Sebbene Saleilles parli in riferimento al quadro medico-legale della fine del XIX secolo, quando le tesi frenologiche sono state oramai da tempo screditate, le nozioni di libertà come resistenza alle tendenze o di malattia della volontà fuori da un quadro di alienazione non sono lontane dall'impostazione individualizzante di Gall, come vedremo a breve allorché tratteremo del rapporto tra perversità morale e alienazione in relazione ai crimini mostruosi.

Con queste brevi osservazioni intendiamo mostrare che l'individualizzazione morale, psicologica, fisiologica, etc. non è affatto estranea né al tardo utilitarismo benthamiano, né a un pensiero medico-morale come quello di Gall. Si può infatti individualizzare per via legale e giudiziaria in un sistema utilitaristico sulla base di uno specifico sapere psicofisiologico relativo alle variazioni della sensibilità, al

[114] R. Saleilles, *op. cit.*, p. 62.
[115] Ivi, p. 67.
[116] Ivi, p. 68.

temperamento etc., pur tenendo fermo il principio della pena fondata sugli effetti dell'atto (Bentham); oppure per via legale e giudiziaria in un sistema utilitaristico-morale sulla base di un sapere fisiologico-morale relativo all'uso e alle aberrazioni delle facoltà intellettive e affettive (Gall); o ancora – lo si vedrà – per via giudiziaria in senso retributivo, ma conformemente a un sapere specificamente psicologico-morale, come nella scuola cosiddetta neoclassica (Rossi). Insomma, l'individualizzazione appare come la reale posta in gioco, benché denegata, di tanti dibattiti filosofici, morali e medico-giuridici che si svolgono tra XVIII e XIX secolo, ed è per questa ragione che potremmo parlare di una sorta di lotta per l'individualizzazione tra sensismo, ideologia, utilitarismo, materialismo, organologia, spiritualismo, di una trasversalità dell'individualizzazione di cui l'unità (spesso solo pretesa) dei sistemi filosofico-giuridici e medici non riesce a rendere conto, così come non riesce a rendere conto della loro mutua sovrapponibilità.

Per quanto riguarda l'erronea equiparazione di Beccaria e Bentham, essa, lo ribadiamo, è imputabile non solo a Saleilles ma a tanti altri autori che, prima e dopo di lui, vi sono stati indotti dal fatto che l'individualizzazione era forse meno nelle teorie che nei fatti, come afferma Saleilles per giustificarli, o nelle trasformazioni materiali del dispositivo di potere moderno, come avrebbe detto Foucault contestandole[117]. Ma in realtà, più che a teorie che negavano la necessità o l'opportunità dell'individualizzazione, si era di fronte a delle vere e proprie denegazioni teoriche della dimensione psicologico-morale del soggetto, svolte in nome del soggetto di diritto e dell'oggettività del fatto come limite al potere di punire. Quasi tutti i teorici, soggiacendo all'imperativo beccariano, enunciavano a voce alta di non dovere né voler sondare le interiorità dei criminali, salvo procedere l'istante successivo ad attribuire al diritto di punire il dovere giudiziario di valutare l'elemento morale della graduazione della volontà libera, della depravazione o della perversità dell'agente[118].

A quest'altezza, la critica dei codici costituisce una posta in gioco importante. I codici penali si fondavano infatti sull'idea di una perfettibilità umana realizzabile attraverso una buona legislazione e promuovono una proporzionalità tra delitti e pene senza tuttavia realizzare gli auspici di Bentham. Il Codice del 1791, ad esempio, pur riconoscendo che il motivo delle pene può agire efficacemente solo se proporzionato alla sensibilità dell'agente e all'immoralità dell'azione, non lascia

[117] Com'è noto, i processi di individualizzazione punitiva sono infatti per Foucault un effetto, più che un principio, delle nuove tattiche penali. Cfr. ad esempio M. Foucault, *Sorvegliare e punire*, cit., p. 26.

[118] Va osservato, peraltro, come il medesimo imperativo venga enunciato dallo stesso Saleilles: «punir, c'est plus encore qu'exercer un pouvoir et une mainmise d'homme à homme, c'est vouloir pénétrer les consciences, juger de ce qui est le fond même de la personnalité et, en vertu de ce jugement porté sur la conscience, disposer de la vie et de la liberté. En ce sens l'homme n'a de juge que Dieu» (R. Saleilles, *op. cit.*, p. 38).

spazio alla graduazione della pena in ragione del timore dell'arbitrio giudiziario[119]. Al riguardo Saleilles, come a biasimarne l'inefficacia repressiva piuttosto che l'ingiustizia, osserva che la considerazione esclusiva della materialità del fatto e l'attribuzione costante del medesimo grado di responsabilità per uno stesso crimine commesso da individui diversi consentono al criminale di percepire la pena come un mero rischio: «Le Code pénal devenait, comme l'a dit von Liszt, la véritable Grande Charte des criminels: c'était leur constitution écrite. Ils savaient jusqu'où ils pouvaient aller sans rien risquer; et, lorsqu'ils se mettaient en situation de tomber sous le coup de la loi, ils savaient exactement ce qu'ils risquaient. II suffisait d'être beau joueur et de savoir perdre. Mais aussi, pour un coup de perdu, combien de gagnés!»[120]. Un passo in avanti sarà fatto dal Codice del 1810, che nelle intenzioni dei suoi redattori avrebbe dovuto prendere in considerazione i gradi della volontà per come questa può essere influenzata dell'età, dallo stato della mente, dalla perversità, dal grado della forza che ha spinto l'individuo a delinquere[121], ma che si fermerà comunque molto al di sotto delle aspettative[122].

A fronte di ciò, se è vero, come ha mostrato Saleilles, che sarà la pratica delle giurie ad anticipare nei fatti le teorie neoclassiche in direzione dell'individualizzazione[123], è vero al tempo stesso che sarà il discorso medico a determinare in gran parte il rifiuto di una giustizia astratta, disumana, ingiusta (e inefficace) che non punisce secondo i gradi di moralità dell'agente e condanna a morte individui che sono invece malati e hanno perciò bisogno di essere curati o rieducati. In questo quadro si può affermare che la medicalizzazione della giustizia appare come il modo per superare le astrattezze ingiuste e inefficaci dei codici e realizzare un'individualizzazione del giudizio e della pena senza ripiombare nell'arbitrio giudiziario dell'Ancien Régime. In fondo, se gli illuministi e gli utilitaristi avevano denunciato giudici e legislatori perché non illuminati dalla ragione ma mossi piuttosto da quello che

[119] Cfr. A. Duport, *Principes fondamentaux de la police et de la justice*, texte présenté à l'Assemblée le 22 décembre 1789, cit. in L. Guignard, *Juger la folie. La folie criminelle devant les Assises au XIXe siècle*, PUF, Paris 2010, p. 17. Cfr. anche Ch.-É. Dufriche de Valazé, *Les lois pénales*, Alençon 1784, p. 105: «Sur la méchanceté des crimes il y a beaucoup à dire, et beaucoup à supposer. Il était impossible de tout dire, et cependant il ne faut rien laisser supposer. En effet si le Juge reste le maitre d'interpréter les actions de l'homme, il y a dans les jugements l'arbitraire le plus funeste, et les despotes subalternes sont sans nombre».

[120] R. Saleilles, *op. cit.*, p. 54.

[121] Th. Riboud, *Rapport fait au Corps législatif dans la séance di 13 février 1810*, cit. in L. Guignard, *op. cit.*, p. 19.

[122] Cfr. R. Saleilles, *op. cit.*, pp. 54-55.

[123] Rispetto all'idea secondo la quale di fronte a uno stesso crimine la responsabilità e la pena non possono variare, «le jury voyait bien, en dehors même de la folie, qu'il pouvait y avoir des degrés dans la liberté et par suite des degrés dans la responsabilité. Faute de pouvoir doser en quelque sorte la responsabilité, puisque la loi ne le lui permettait pas, il acquittait purement et simplement» (ivi, p. 72).

Bentham definiva principio di antipatia, i frenologi accusano i legislatori e i giudici post-rivoluzionari di non essere illuminati dal lume delle scienze umane.

Con questo, i frenologi non intendono affatto rovesciare il sistema giudiziario. Molti sono infatti, lo si è visto, i principî illuministici e le ragioni utilitaristiche che vengono ripresi dal discorso medico, ma allo scopo di fondare una giustizia governata dal sapere che ridefinirà progressivamente l'impianto illuministico costituendo la prima vera e propria forma di individualizzazione penale imperniata su un'animalità positiva dell'uomo. Certamente, come detto in apertura, non sarà attraverso questa animalità dell'uomo che la psichiatria farà il suo ingresso nelle aule giudiziarie, e tuttavia, contestando la rigidità del codice penale e delle sue applicazioni, la frenologia inaugura uno spazio di critica della giurisprudenza a favore dell'individualizzazione che sarà costantemente ripreso durante tutto il secolo, sebbene da punti di vista differenti.

Si spiega così la sua relazione non solo con l'utilitarismo, ma con lo spiritualismo e il discorso riformatore, nonché con una psichiatria che, appena costituitasi come cura dell'alienazione mentale, intende farsi riconoscere come scienza di difesa della società rispetto ai suoi pericoli interni, e che a questo scopo raccoglie l'occasione offertale da alcuni crimini che sconvolgono il dibattito medico e giurisprudenziale del tempo e dalla teorizzazione della monomania omicida, come si vedrà. Frenologia e alienismo, benché fondati su presupposti filosofici, epistemologici e teorici differenti – su una fisiologia delle facoltà la prima, su un'eziologia delle passioni il secondo –, comunicano perciò in quegli anni, e non possono non comunicare anche con l'utilitarismo in quanto filosofia ispiratrice dei codici, e a partire dai suoi limiti.

Prima di entrare nel merito di questi rapporti, vorremmo richiamare almeno un caso significativo di compatibilità tra la razionalità economico-morale dell'utilitarismo penale e la razionalità antropologica della critica medica di cui si è detto. Al riguardo il *Code de la surété publique et particulière* elaborato nel 1807 da Scipion Bexon per il re di Baviera può ben rappresentare il tentativo di radicare la questione della moralità dell'agente in una spiegazione positiva svolta a partire da Bentham, Cabanis e soprattutto Gall[124]. Discutere l'elaborazione teorica alla base del progetto di Codice bexoniano, che fonda il diritto di punire in senso fisio-psicologico, utilitaristico e morale, e costituisce all'epoca il tentativo più avanzato di articolazione, al livello di codice, tra diritto penale e scienze umane, presenta l'ulteriore vantaggio di prefigurare l'ordine di problemi che il pensiero giuridico si troverà ad affrontare di lì a poco in relazione alle classificazioni frenologiche e psichiatriche con riguardo

[124] Non è certo un caso che due anni dopo Gall elogerà il progetto bexoniano (cfr. F.J. Gall, J.G. Spurzheim, *Anatomie et physiologie du système nerveux*, vol. II, cit., p. 150) e James Mill utilizzerà una recensione del Codice bexoniano come pretesto per esporre le idee di Bentham (cfr. S. Bucchi, *James Mill, filosofo radicale: analisi della mente e scienza politica nell'Inghilterra del primo Ottocento*, Edizioni di Storia e Letteratura, Roma 2001, pp. 69-70).

alle follie parziali, al rapporto tra ragione, interesse e moralità dell'agente, alle differenze tra deviazione delle tendenze e alienazione, etc.

Bexon si sforza di comprendere nel suo Codice tutto quanto di nuovo il sapere aveva fino ad allora elaborato con riguardo alla perfettibilità fisica e morale dell'uomo, con le sue differenti tendenze e inclinazioni e le sue determinazioni organiche, che sembrano presentarsi agli occhi di Bexon come «une impulsion directe, primitive et indépendante»[125]. Ragiona ad esempio intorno all'istinto, alle disposizioni e alle sensazioni, alle regolarità e alle alterazioni delle facoltà della mente e delle facoltà morali come dipendenti dalle disposizioni dell'organismo, o meglio dal grado di attività e di forza dei relativi organi[126], ciò che, in concorso con l'età, il sesso, il clima, etc., determina lo sviluppo diseguale degli individui e dei popoli.

Pur fondando la pena sul danno prodotto dal crimine, Bexon prevede la cattiva intenzione come un elemento costitutivo del delitto, nonché le circostanze attenuanti suscettibili di graduare la colpevolezza e la pena a partire dall'esame della moralità delle azioni vietate dalla legge. Questa è importante non tanto o non solo perché contiene le regole sociali, ma perché è «le recueil des principes de la morale et des moyens de diriger les penchants et les affections de la nature»[127].

La legge considera il bene e il male di un'azione relativamente alla società e all'intenzione dell'autore. La moralità di un atto deriva dall'intenzione, che dice della moralità dell'agente: tanto più pura quanto più disinteressata, l'azione è al contrario cattiva in sé stessa e meritevole di punizione se è prodotta dalla «volonté d'un méchant», mentre non può essere punita se ha avuto luogo in assenza di volontà o contro la volontà dell'autore: «point de délit ou de crime sans volonté, sans intention de le commettre, et sans savoir qu'on le commet»[128]. Pertanto per Bexon solo le circostanze dell'atto diranno della moralità o dell'immoralità dell'azione e permetteranno di determinare se sono immorali in se stesse o in rapporto all'intenzione dell'autore: «malheur à celui qui, ne s'attachant qu'à un fait matériel, s'exposerait sans cesse à frapper l'innocent de la même peine que le coupable, et qui ne rechercherait pas, dans les actions des hommes en elles-mêmes, et dans leur auteur, les circonstances qui peuvent les rendre innocents ou coupables, ou du moins différencier les degrés de la culpabilité, et quelquefois les faire excuser»[129]. L'intenzione non rappresenta meramente lo scopo o l'interesse dell'atto, ma la moralità dell'agente: «là où il n'y a pas de raison, par la privation ou l'aliénation des facultés morales, et où les lois ont décidé, d'après la nature, qu'elles n'étaient pas développées, il ne peut y avoir de volonté, et par conséquent de délit ni de crime. Il n'y a pas davantage de volonté, là où elle est forcée; ce n'est plus l'homme qui agit, du

[125] S. Bexon, *Application de la théorie de la législation pénale, ou code de la sûreté publique et particulière*, Paris 1807, p. XXIII.

[126] Ivi, p. XXII.

[127] Ivi, p. 6.

[128] Ivi, p. VIII.

[129] Ivi, p. IX.

moins d'une manière à pouvoir être considéré comme coupable, quand il agit par une force irrésistible»[130]. Per questa ragione all'art. 493 stabilisce che la pena deve essere proporzionale alla cattiveria del carattere del colpevole al fine di modificarne la sensibilità.

Riguardo alla graduazione delle pene, «les degrés de l'intelligence, l'éducation qu'on a reçue, l'aliénation ou l'altération de la raison, sont des rapports moraux également importants à considérer»[131], in relazione ad altri «rapports métaphysiques» come cause, intenzioni etc. e per dare loro concretezza.

Quanto all'alienazione, Bexon sostiene con Gall che lo squilibrio degli organi del cervello costituisce una disposizione all'alienazione, la quale può peraltro non essere totale: se infatti un indebolimento dell'azione degli organi produce l'imbecillità, spesso l'alienazione è solo parziale, ossia limitata a qualche facoltà, e non intacca l'attività delle altre. Non senza un po' d'incertezza, osserva infine, sempre con Gall, che «il en est de même qui n'en éprouvent aucune atteinte, ce qui se remarque souvent dans les hommes attaquées de folie ou de manie, et c'est une autre preuve de la division et d'une sorte d'indépendance des organes du cerveau entre eux»[132].

Su queste basi Bexon realizza forse il primo tentativo di regolare giuridicamente non tanto la questione della demenza (art. 424) o di tutta un'altra serie di stati di alterazione delle facoltà intellettuali e morali (eccesso passionale, ubriachezza, alterazione della ragione, etc.), ma la questione delle follie parziali (con delirio). Prevede così agli artt. 429 e 430 che sono esenti da pena i folli la cui alienazione è relativa solo ad alcuni oggetti e sempre che il crimine riguardi tali oggetti, mentre in caso contrario, quando cioè il crimine riguardi un «autre point que celui qui est l'objet de sa folie»[133], la punizione deve essere attenuata. All'art. 470, poi, stabilisce che «Dans les calculs, sur les diverses qualités et quantités qui constituent le plus ou le moins de mérite, ou de démérite des actions humaines, le juge doit aussi considérer les affection de l'âme de leur auteur, et ses dispositions morales»[134]. Così, ad esempio, il crimine prodotto da una malinconia estrema dovrà essere giudicato, in caso di *délits*, non solo scusabile, bensì, secondo un antico principio del diritto romano, già punito dallo stato in cui si trova il suo autore; punito con pena ridotta di un terzo rispetto a quella prevista in caso di *crimes*; altrimenti il giudice potrà applicare una pena moderata dopo aver valutato il carattere e il grado dell'affezione morale del suo autore (artt. 470 e 471).

In ultimo, merita di essere rilevata la distinzione operata da Bexon tra malvagità estrema e alienazione, il cui discrimine è costituito dalla presenza o meno dell'estremizzazione dell'amor proprio e dell'interesse personale. In una riflessione mediata

[130] Ivi, p. X.
[131] Ivi, p. LXXXIII.
[132] Ivi, p. XXII.
[133] Ivi, p. 40.
[134] Ivi, p. 43.

dal sensismo e dalla fisiologia, la cattiveria per Bexon è il prodotto del vizio, il quale deriva dalle tendenze, e in particolare dalla tendenza umana all'amor proprio, che è innata, com'è innata anche la tendenza al benessere dei propri cari e dei propri simili. Ma tali tendenze si trasformano in vizio o in virtù allorché di fronte a un interesse si è disposti a soddisfarlo anche a spese del prossimo o a rinunciarvi, ciò che nella logica di Gall dipende dall'organizzazione normale o anormale del cervello. Al di fuori di questo rapporto tra le tendenze innate, la disposizione organica e la logica dell'interesse, l'uomo dev'essere considerato alienato. Se un uomo è tanto più vizioso quanto più esclusiva è la sua tendenza a soddisfare il proprio interesse, un comportamento che non fosse emanazione dell'amor proprio, anche portato all'estremo, non sarebbe un vizio: «L'homme qui commettrait le crime sans aucun intérêt personnel, sans aucun amour pour soi-même, serait un fou absolu et traité comme tel»[135].

Richiamiamo queste posizioni di Bexon perché trattano esattamente di quello che diventerà il problema giuridico principale di lì a poco, ossia il problema dei crimini commessi da individui affetti da follia parziale e dei crimini senza motivo commessi da individui privi di alterazioni nelle facoltà intellettive, ciò che apre il problema del loro rapporto con la malvagità e l'alienazione.

Da quest'ultimo punto di vista, va rilevato che Bexon anticipa e fornisce una duplice soluzione, in termini di aberrazione di una tendenza naturale o di alienazione, a un problema come quello del crimine mostruoso senza interesse e senza amor di sé, che sarà al centro della ridefinizione delle nozioni di mostruosità morale e di malattia della volontà allorché si porrà la questione della monomania omicida. Sarà infatti l'esistenza di crimini mostruosi e immotivati perpetrati da soggetti che non presentano segni di delirio a istituire un nuovo rapporto tra crimine e follia e a rafforzare la ridefinizione antropologica della giustizia penale: secondo la tesi classica di Foucault, in assenza di una qualche forma di intelligibilità della ragione del crimine, e dovendo la pena essere correttiva, cioè individuale, non è dato sapere quale senso assegnare alla pena[136].

Bexon sembra offrire infatti un riconoscimento giuridico delle due dottrine che si contenderanno la titolarità del sapere relativo a quest'ordine di fenomeni, ovvero la frenologia e l'alienismo. Da un lato ritiene che la più estrema malvagità rappresenti un'aberrazione del senso morale che non costituisce malattia, quando vi sia un interesse nel commettere un crimine e nel goderne, quando cioè il comportamento testimoni di una personalità mossa da una disposizione organica al godimento del dolore altrui, dove l'interesse del soggetto risiede appunto in tale

[135] Ivi, p. XXX.

[136] È la tesi sostenuta da Foucault in Id., *Gli anormali*, cit., pp. 79-125, e Id., *L'evoluzione della nozione di "individuo pericoloso" nella psichiatria legale del XIX secolo* (1978), in Id., *Archivio Foucault. Interventi, colloqui, interviste. 3. 1978-1985. Estetica dell'esistenza, etica, politica*, a cura di A. Pandolfi, Feltrinelli, Milano 1998, pp. 43-63.

godimento. Posizione, questa, in linea con le tesi di Gall, che dovrebbe portare Bexon alla soluzione auspicata dal frenologo, se non fosse che per il giurista la pena di morte è contraria al sentimento della natura e inefficace, e nella malaugurata ipotesi che la si volesse mantenere a ogni costo dovrebbe essere applicata solo ai più perversi, mentre per quanto riguarda l'ipotesi di una pena di morte aggravata con torture, bisogna sperare che diventi presto solo un ricordo penoso[137].

Da un altro lato, però, Bexon offre anche una risposta in termini di alienazione al problema posto da quei comportamenti che, non testimoniando della razionalità o della moralità del soggetto e non essendo espressione della sua personalità, impediscono di definirne la responsabilità e la qualità della colpa e autorizzano quindi a dedurre uno stato di alienazione. Benché Bexon non vi faccia riferimento, questa risposta rinvia a una posizione differente da quella frenologica, che si sarebbe sviluppata a partire dall'ipotesi di una *mania senza delirio* o *follia ragionante*, eccesso di furore senza disordini intellettuali, formulata da Pinel nel 1800. Ipotesi che fatica a iscriversi non solo in una clinica centrata sulle facoltà intellettuali com'era quella pineliana e come lo stesso Pinel riconosce[138], ma anche in una medicina legale centrata su queste stesse facoltà com'era all'epoca quella di Johann Christoph Hoffbauer.

Il filosofo e giurista tedesco, che per altri versi, diversamente da Bexon, invoca la piena responsabilità per gli atti illegali commessi da individui affetti da follia parziale se indipendenti da questa, richiama infatti esplicitamente nel 1808, forse per primo, l'ipotesi di Pinel sostenendo che vanno irresponsabilizzati quegli individui che, pur essendo ragionevoli e in possesso di una sana facoltà di giudizio, oltre che esenti da ogni aberrazione di sentimento, sono portati da una forza irresistibile a commettere determinate azioni, come nel caso descritto da Pinel della tendenza irresistibile a uccidere propria di quell'individuo intellettualmente sano che, al presentimento di un accesso, avvertiva coloro che avrebbero potuto esserne vittime[139]. Ma Hoffbauer non si spinge oltre, perché per il resto quello che definisce *impulso*

[137] S. Bexon, *op. cit.*, p. LIX.

[138] Cfr. Ph. Pinel, *Traité médico-philosophique sur l'aliénation mentale, ou la manie*, Paris an IX (1801), pp. 149-150: «On peut avoir une juste admiration pour les écrits de Locke, et convenir cependant que les notions qu'il donne sur la manie sont très incomplètes, lorsqu'il la regarde comme inséparable du délire. Je pensais moi-même comme cet auteur, lorsque je repris à Bicêtre mes recherches sur cette maladie, et je ne fus pas peu surpris de voir plusieurs aliénés qui n'offraient à aucune époque aucune lésion de l'entendement, et qui étaient dominés par une sorte d'instinct de fureur, comme si les facultés affectives seules avaient été lésées». Gall ritiene che la mania parziale originariamente individuata da Pinel confermi la sua negazione dell'unicità organica del cervello. Se infatti questo fosse una massa omogenea e agisse interamente nella manifestazione esterna delle qualità morali e intellettuali, allora l'uomo dovrebbe inevitabilmente essere affetto da una mania generale. La mania parziale, al contrario, può corrispondere per Gall alla funzione organica alterata (F.J. Gall, *Sur les fonctions du cerveau*, cit., vol. II, p. 444).

[139] J.Ch. Hoffbauer, *Die Psychologie in ihren Hauptanwendungen auf die Rechtspflege nach den allgemeinen Gesichtspunkten der Gesetzgebung*, Halle 1808, p. 17.

cieco, ovvero il bisogno irresistibile di commettere un'azione che si disapprova moralmente, a suo giudizio resta legato all'immaginazione del malato[140], mentre l'impulso cieco di Pinel è inassegnabile a un'illusione dell'immaginazione o a un'idea dominante[141]. Riesce poi difficile comprendere come un individuo affetto da una mania parziale intorno a un oggetto possa per Hoffbauer essere punito proprio in ragione della presenza di facoltà intellettive sane, e al contrario un individuo spinto da un impulso irresistibile in assenza di qualunque tipo di disturbo intellettivo possa essere irresponsabilizzato.

Nonostante il loro carattere pioneristico, le posizioni del giurista tedesco saranno molto presto considerate contraddittorie o irragionevoli, non appena la clinica esquiroliana delle manie parziali o monomanie da un lato e dall'altro, soprattutto, la ridefinizione di questo impulso cieco in termini di *monomania senza delirio* o *istintiva* monopolizzeranno il discorso medico-legale degli anni Venti dell'Ottocento[142], quando cioè sarà già da tempo entrato in vigore l'art. 64 del Code pénal del 1810[143] e si discuterà se applicarlo o meno agli autori dei cosiddetti *crimini senza ragione*: crimini mostruosi ma difficilmente imputabili alla follia, non presentando i loro autori nessuna delle forme in cui fino ad allora la follia era stata fino qualificata in ambito medico-legale.

6. I CRIMINI MOSTRUOSI TRA PERVERSITÀ CONGENITA E MONOMANIA ISTINTIVA

La ridefinizione del concetto inizialmente isolato da Pinel come *mania senza delirio* o *mania ragionante* si ritroverà nella nozione di *monomania omicida* di Esquirol. Più precisamente, questo eccesso di furore senza disordini intellettuali assume progressivamente, tra Esquirol, Georget e Marc, la fisionomia di una vera e propria affezione della 'volontà' profonda dell'individuo.

Ciò vale, in verità, in particolar modo per Georget e Marc. Il primo distingue nettamente, su uno sfondo frenologico[144], tra una monomania che colpisce la sfera intellettuale e una monomania che colpisce la sfera della volontà o degli affetti. Quest'ultima non è infatti riconosciuta immediatamente da Esquirol, per il quale in un primo momento la monomania è una forma di follia preannunciata sempre da un qualche delirio intellettuale (incoerenze nei ragionamenti, allucinazioni, motivi

[140] Ivi, p. 359.

[141] Cfr. Ph. Pinel, *Traité médico-philosophique sur l'aliénation mentale, ou la manie*, cit., p. 155.

[142] Sul contesto politico di quegli anni e sulla politicizzazione della monomania tra la Restaurazione e la Monarchia di luglio, che si inserisce nel movimento liberale di riforma del Codice penale del 1810, cfr., tra gli altri, J. Goldstein, *Consoler et classifier. L'essor de la psychiatrie française*, trad. fr. di F. Bouillot, Institut Synthélabo, Le Plessis Robinson 1997, pp. 243-259.

[143] «Il n'y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l'action, ou lorsqu'il a été contraint par une force à laquelle il n'a pu résister».

[144] Cfr. J. Goldstein, *op. cit.*, p. 323.

immaginari, etc.), dunque un disordine di origine intellettuale e nello specifico un delirio parziale, che ruota intorno a un'idea fissa senza intaccare la gran parte delle facoltà intellettive[145]. L'isolamento da parte di Georget della monomania come relativa a una lesione specifica della volontà, come uno stato di esclusiva perversione delle tendenze, delle affezioni, delle passioni, dei sentimenti naturali[146], conduce però Esquirol a modificare la sua visione, anche se in modo ambiguo[147]. Anche Marc riconosce nella monomania istintiva una forma di follia priva di alterazioni dell'intelligenza, esente da allucinazioni o illusioni[148], che genera disordine nella sfera esclusiva dei comportamenti sotto l'effetto di una spinta incontrollabile, di un istinto cieco[149]. Il nucleo di questa nuova forma di patologia è insomma una rottura del rapporto del soggetto con sé stesso (disordine della condotta) che non ha però relazione con la rottura del rapporto del soggetto con la realtà dovuta al delirio. Solo l'occhio esperto dell'alienista è in grado di individuare un simile disordine mentale all'interno della sfera comportamentale e di sottrarre questi alienati alla colpevolezza giuridica. In altri termini, in assenza di lesioni visibili della sfera intellettiva, l'irrazionalità del comportamento, l'assenza di motivi morali e razionali, le circostanze morali che hanno accompagnato il passaggio all'atto sono l'indice dell'esistenza di una mania senza delirio[150].

Il crimine mostruoso immotivato, in sintesi, è l'indice di una forza irresistibile che si è imposta alla volontà facendo compiere agli individui degli atti aberranti, spesso nei confronti dei loro stessi cari: atti non imputabili a un'abitudine o all'ambiente, anticipati da sintomi simili a quelli del delirio (dolore al ventre o al capo, afflusso di sangue al viso etc.), atti di cui essi sentono l'immoralità e a cui cercano di resistere, di cui infine si pentono e a seguito dei quali spesso si suicidano, ciò che

[145] Si veda l'autocritica di Esquirol rispetto alle proprie precedenti posizioni in J.D.E. Esquirol, *Des maladies mentales considérées sous les rapports médical, hygiénique et médico-légal*, t. I, Bruxelles 1838, pp. 376-380.

[146] Cfr. É.-J. Georget, *Examen médical*, cit., p. 69.

[147] Cfr. J.D.E. Esquirol, *Note sur la monomanie homicide*, Paris 1827. Goldstein sottolinea opportunamente che Esquirol, pur riconoscendo il carattere della monomania istintiva in un impulso irresistibile che spinge all'atto, senza nessuna alterazione nell'ordine del giudizio, continua tuttavia a parlare della volontà lesa come di un *delirio* parziale, utilizzando una nozione all'epoca abitualmente riservata alle aberrazioni intellettive e quindi suscettibile di generare fraintendimenti nelle discussioni psichiatriche. Goldstein rileva altresì che l'ambiguità semantica della nozione di delirio relativamente alla sfera della volontà non sarà affrontata neanche da Georget e da Leuret, trascinandosi fino agli anni Cinquanta. Cfr. J. Goldstein, *op. cit.*, pp. 239-240. Sulle contraddizioni di Esquirol si appunteranno le critiche sarcastiche di É. Regnault, *Du degré de compétence des médecins dans les questions judiciaires relatives aux aliénations mentales, et des théories physiologiques sur la monomanie*, Paris 1828, pp. 68-74.

[148] C.C.H. Marc, *De la folie, considérée dans ses rapports avec les questions médico-judiciaires*, vol. II, Paris 1840, pp. 24-25.

[149] J.D.E. Esquirol, *Note sur la monomanie homicide*, cit., p. 6.

[150] Id., *Aliéné*, in «Dictionnaire des sciences médicales», vol. I, 1812, p. 326.

prova la dissomiglianza, ad esempio, tra quegli individui che si erano fino ad allora distinti per moralità o buona educazione e i loro comportamenti.

Alla luce di ciò, gli alienisti attaccano anche la medicina legale all'epoca più avanzata, come quella di Hoffbauer. Quanto alla mania senza delirio, in una nota della traduzione francese dell'opera del giurista tedesco, Esquirol rileva che il caso descritto da Pinel e richiamato da Hoffbauer – e che lo stesso Esquirol qualifica come un esempio di monomania intermittente o remittente – non è legato da Hoffbauer a «aucune des espèces d'aliénation mentale admises en Allemagne»[151]. Rispetto invece alla follia parziale, Georget, che legge in anteprima la traduzione dell'opera di Hoffbauer (definendolo ingiustamente un giureconsulto estraneo alla medicina)[152], ne contesta l'affermazione di responsabilità per gli atti illegali commessi da individui affetti da follia parziale ma non in relazione con questa. Si tratterebbe infatti di una posizione ingenua, perché l'idea dominante presente nella mente di questi individui potrebbe cambiare oggetto, perché potrebbe essere tenuta nascosta dagli stessi individui, ma soprattutto perché gli atti commessi da questi individui potrebbero derivare da un disordine morale del tutto indipendente da eventuali lesioni della facoltà di giudizio[153].

In generale, oltre a sollevare complessi problemi giuridici (difficoltà ad esempio della distinzione tra criminali bestiali e folli), la categoria della *monomania istintiva*, in quanto forma di follia che non presenta alcun segno nella sfera della ragione e che coincide semplicemente con il crimine, manifesta una rottura radicale con una pratica giurisprudenziale che, dal diritto romano e fino al Seicento, aveva elaborato una casistica estremamente differenziata dei modi in cui la follia colpiva la *ragione* e alterava la *volontà*, rendendo sempre invalido il crimine di un folle come un suo testamento, e sottraendo quindi il crimine all'universo della colpa: il giudizio giuridico, come il rapporto medico, utilizzando un linguaggio epistemologicamente univoco, non tendeva a legare crimine e follia in un rapporto interno e necessario, ma al contrario in un rapporto di esteriorità, per il quale l'uno non poteva, di diritto, essere indice dell'altro, e viceversa[154]. Ora, diversamente, a partire dalla linea frenologica e alienista, colpevolezza e alienazione potranno coesistere in vario modo, fino all'ipotesi della responsabilità parziale o della pericolosità sociale.

[151] J.Ch. Hoffbauer, *Médecine légale relative aux aliénés et aux sourds-muets, ou Les lois appliquées aux désordres de l'intelligence*, trad. fr. di A.-M. Chambeyron, avec des notes d'Esquirol et Itard, Paris 1827, p. 29n.

[152] É.-J. Georget, *Discussion médico-légal sur la folie ou aliénation mentale*, Paris 1826, p. 8.

[153] Cfr. ivi, pp. 1-15.

[154] M. Foucault, *La raison du crime* (BnF NAF 28730, boîte 70, dossier 6). Un'edizione critica di questo manoscritto e di altri testi di Foucault concernenti l'internamento e la giustizia sarà pubblicata prossimamente per i tipi di Vrin, nella collana «Foucault inédit – Philosophie du présent», a cura di G. Brindisi e O. Irrera.

Tornando ai rapporti tra frenologia e alienismo, va rilevato che nella linea inaugurata da Gall e Spurzheim[155], Georget accusa i giudici di aver condannato, in alcuni casi di crimini mostruosi, soggetti non responsabili dei loro atti. Attacca quindi tutta la tradizione medica e giurisprudenziale che aveva fatto della follia una questione di testimonianza, rilevabile da chiunque, e ritiene che l'art. 64 del Codice del 1810 – che si limitava a formalizzare i principi della partizione dicotomica tra ragione e follia individuati dalla tradizione del diritto romano e canonico e operanti nell'Ancien Règime – debba comprendere anche queste nuove patologie, pur dubitando della capacità dei giudici e dei giurati di riconoscerle[156]. La giurisprudenza, afferma, è legata infatti a una concezione classica della follia come disordine intellettuale e non considera la possibilità che i folli non presentino disturbi nelle facoltà intellettive, mancando così di cogliere che si può commettere un crimine volontariamente e con premeditazione pur essendo in uno stato di alienazione. Sostenendo che i giudici hanno il dovere di comprendere la loro necessità di «s'éclairer constamment des lumières de plusieurs hommes de l'art, lorsqu'il faut prononcer sur l'état moral des accusés»[157], Georget scardina insomma il ragionamento giuridico per doppiarlo attraverso un nuovo ordine di riflessione fondato sull'individuazione di un nuovo ordine di realtà: la volontà, l'istinto, il comportamento. Apre così la strada, come ha mostrato Foucault, alla patologizzazione del crimine e alla codificazione della follia in termini di pericolosità.

Papavoine, accusato dal pubblico ministero di possedere un istinto di ferocia, una sete di sangue, non è che un alienato per Georget, poiché non aveva alcun interesse intelligibile al suo crimine, e nel corso della sua esistenza si era distinto per non avere mai manifestato una tendenza verso la crudeltà: questa sete di sangue, «si elle existait, était *accidentelle* et *récente* [...]; une pareille *perversion morale* ne peut être que le résultat de l'aliénation mentale»[158]. Sono questi tratti a fare la differenza rispetto a quanti godono nel bagnarsi le mani del sangue dei loro simili a causa dell'abitudine al crimine, spinti dalla cupidità, oppure a quanti sono padroneggiati da tendenze originarie perverse (*perversité native*), ovvero «hommes chez qui le gout du sang, l'instinct meurtrier, l'anthropophagie, paraîtraient s'être développés naturellement avec les autres dispositions du caractère»[159].

Nel dire questo Georget rinvia alle tesi di Gall relative all'esistenza di «penchans naturels atroces qui sont la source de crimes inouïs», commessi cioè da «êtres si malheureusement nés, et qu'on ne saurait ranger au nombre des aliénés proprement dits». Nei loro confronti però, a differenza di Gall, come anticipato, Georget non ritiene debba essere applicata la pena di morte, poiché essa, considerata la

[155] J. Goldstein, *op. cit.*, p. 343.
[156] É.-J. Georget, *Examen médical*, cit., p. 99.
[157] Ivi, p. 72.
[158] É.-J. Georget, *Examen médical*, cit., p. 96.
[159] Ivi, p. 97.

rarità di questi crimini e di questi soggetti, non avrebbe il minimo valore dissuasivo: «Leur mort préviendrait-elle le crime chez ceux qui sont dans cette effroyable position?»[160]. Meglio quindi rinchiudere simili individui a vita in una casa di forza.

La nozione di monomania, tanto nella sua consistenza teorica quanto nel suo uso pratico nei tribunali, è quindi irriducibile al discorso di Gall, Spurzheim e Voisin poiché, come sostiene Georget, la monomania omicida è accidentale e contraria alle «disposizioni naturali» dei malati[161]. Benché lo stesso Georget, al pari di Marc, citi ripetutamente Gall e Spurzheim, e benché gli alienisti ragionino intorno a una partizione tra sfera affettiva e sfera intellettuale che ha un'origine frenologica, la mostruosità morale è perciò intesa diversamente dagli uni e dagli altri: per la frenologia – lo evidenzia Doron – è il prodotto di uno scarto di ordine quantitativo, legato cioè allo sviluppo eccessivo di una tendenza naturale o all'assenza di una capacità intellettuale e morale di controllo: «telle tendance aberrante n'est que l'exagération de telle tendance naturelle inscrite en l'homme et liée à son animalité première»; mentre per l'alienismo non dipende dal grado di sviluppo di un organo normale, bensì da un'alterazione della tendenza normale di tipo qualitativo[162].

Tra l'uomo normale e l'uomo anormale, insomma, non vi è per la frenologia che una differenza di grado, per sviluppo eccessivo di un organo o per degenerazione a uno stadio anteriore. Nel caso della monomania omicida, a essere in questione sarebbe l'istinto carnivoro, scoperto da Gall attraverso la comparazione dei crani degli animali carnivori ed erbivori, originariamente denominato *instinct du meurtre*[163] e riconosciuto molto frequentemente nei crani dei criminali violenti. Gall tiene a precisare che non si tratta di un istinto che spinge del tutto naturalmente all'omicidio, ma semplicemente della tendenza, propria di ogni carnivoro, a uccidere altri animali[164]. Ma la posizione di Gall è in realtà più complessa. Sin dal 1810 il frenologo riconosce e richiama i caratteri dell'alienazione parziale, ma accorda agli atti mostruosi l'ulteriore valenza di essere il prodotto di una perversità congenita punibile e suscettibile di essere accertata medicalmente.

Si è detto che il tratto specifico della frenologia galliana è quello di tendere a rendere gli individui responsabili non solo dei propri atti, ma della propria involontarietà, ossia delle proprie tendenze, attraverso il consenso che viene loro concesso. Il crimine mostruoso non fa eccezione. Anche quando la tendenza all'omicidio

[160] Ivi, p. 98.

[161] Ivi, p. 98.

[162] C.-O. Doron, *La formation du concept psychiatrique de perversion au XIX^e siècle en France*, cit., p. 42. Intorno alle differenze tra clinica delle monomanie e frenologia cfr. M. Renneville, *D'un Cesare, l'autre. Le droit de punir à l'aune de la science*, in F. Chauvaud (dir.), *Le droit de punir. Du siècle des Lumières à nos jours*, Presses universitaires de Rennes, Rennes 2012, pp. 85-97.

[163] F.J. Gall, *Anatomie et physiologie du système nerveux*, t. III, cit., pp. 199-260.

[164] Sulla normalità di questo istinto insiste molto Voisin, secondo il quale «la mort violente est une institution de la nature» (F. Voisin, *L'homme animal*, cit., p. 233). Tale istinto non va mai oltre lo scopo della sua esistenza, salvo che l'uomo sia sotto il dominio esclusivo di una o più tendenze inferiori, o a causa di una mancanza di educazione all'esercizio delle facoltà superiori (ivi, pp. 249 e 256-257).

giunge alla sua estrema esaltazione, nel godimento dell'omicidio, l'individuo conserva sempre per Gall un margine di libertà morale e dunque la facoltà di determinarsi secondo motivi sociali. Per questo, a differenza di quel che sarà per Georget, Gall ritiene che la pena di morte possa avere un valore dissuasivo anche per questi perversi congeniti. A suo giudizio d'altronde, anche quando sviluppata oltre la norma, la tendenza all'omicidio può incanalarsi in forme non dannose per la società. Gall sostiene insomma che la tendenza anche estremamente sviluppata all'omicidio può non essere né normale né patologica, non configurando una malattia o un'alienazione, ma una perversità congenita punibile[165], un'anormalità organica, un assoggettamento dell'anima alla carne[166]; e che al contrario l'alienazione non è imputabile perché il soggetto non dà assenso e non gode delle sue tendenze, alle quali è incapace di resistere.

Gall fa pendere la bilancia dal lato della perversità congenita o dal lato dell'alienazione a seconda della presenza o meno non solo dell'interesse o del senso morale, ma del godimento del soggetto nell'atto: vi è mostruosità morale punibile quando il soggetto gode del proprio atto aberrante in funzione di una tendenza spiccata verso questo genere di comportamenti; vi è alienazione allorché il soggetto non è presente nell'atto nella misura in cui l'atto avviene a sue spese, non solo senza interesse o profitto, ma senza godimento e con le caratteristiche attribuite dagli alienisti a questa forma di follia, una mostruosità disinteressata e gratuita.

In fondo, è possibile affermare che Gall dà alla questione del crimine mostruoso una risposta articolata che media tra utilitarismo, alienismo e spiritualismo: risposta utilitaristica in senso stretto, perché la punizione dei pervertiti responsabili delle loro tendenze costituisce un benché minimo fattore dissuasivo (oltre che funzionale a una sorta di screening alla nascita e all'educazione frenologica); risposta conforme all'alienismo, perché riconosce l'esistenza di perversioni di cui il soggetto non è responsabile, come nei casi di monomania istintiva – anche se la frenologia pretende di poterle individuare indipendentemente da una clinica del comportamento; risposta morale, perché il criminale mostruoso resta imputabile e responsabile e va punito conformemente al proprio grado di perversità, benché per il frenologo la perversità o depravazione sia accertabile non sulla base di un sapere psicologico-morale, ma sulla base di uno specifico sapere delle deviazioni, nel senso che, in termini più chiari, l'atto mostruoso è punibile se espressione della personalità dell'autore.

[165] F.J. Gall, G. Spurzheim, *Anatomie et physiologie du système nerveux*, vol. II, cit., p. 184. Questa posizione sarà ripresa da Voisin, che equipararerà però il furore omicida privo di interesse di alcuni idioti e alienati a quello degli esseri doppiamente eccezionali che, nati con una tendenza congenita particolarmente pronunciata, hanno avuto anche la sfortuna di crescere in circostanze esterne tali da impedire loro qualsiasi sviluppo di facoltà superiori e di sentimenti morali (F. Voisin, *L'homme animal*, cit., pp. 254 e 260-261).

[166] F.J. Gall, G. Spurzheim, *Anatomie et physiologie du système nerveux*, vol. II, cit., p. 178.

Una delle tesi fondanti la logica giuridica è la distinzione tra follia e vizio, ma l'ipotesi di una follia che colpisce esclusivamente la volontà lasciando intatta la sfera intellettiva rischia fortemente di minare questa distinzione. In un simile quadro le tesi di Gall non saranno del tutto di aiuto alla causa alienista, da un lato perché Gall, a differenza dei suoi continuatori, riconosce ampiamente la legittimità della pena di morte, anche aggravata per particolari forme di perversità, dall'altro perché i casi di monomania omicida possono essere confusi con una 'patologia' morale punibile, un'aberrazione accertabile medicalmente ma non costituente alienazione e per il quale è dunque necessaria piuttosto una graduazione della colpa. Posizione, quest'ultima, prossima alle tesi che sosterranno alcuni giuristi, fuori dai quadri del sapere medico, per contestare l'ipotesi di una monomania omicida. Era insomma difficile comprendere quando si fosse di fronte a un'immoralità volontaria, a un eccesso passionale, a una depravazione imputabile benché involontaria o a un'alienazione. E le reazioni dei giuristi non si faranno attendere.

7. LE REAZIONI DELLA DOTTRINA GIURIDICA IN FRANCIA

Sono molti i giuristi dell'epoca che discutono questo passaggio da una diagnosi centrata sull'assenza di *ragione* a quella relativa a un disturbo della *volontà* o del *comportamento*, con la conseguente difficoltà per i giudici «d'établir judiciairement la moralité d'un acte, en distinguant s'il est l'effet de la perversité, d'une passion, ou d'une lésion mentale»[167]. È pertanto di grande utilità richiamare le riflessioni giuridiche più significative al riguardo, che mostrano chiaramente l'influenza delle categorie mediche sulla razionalità giuridica, nonché il ruolo (che sarà) giocato dai problemi giuridici nella ridefinizione dei quadri patologici della psichiatria.

I problemi principali che la patologizzazione dei comportamenti avrebbe posto al pensiero giuridico sono espressi dalle tesi che Regnault e Collard de Martigny enunciano per primi nel 1828[168].

Contro l'individualizzazione del giudizio e della pena proposta da Gall, Regnault sostiene che la valutazione del grado di colpevolezza interiore sarebbe auspicabile, se non fosse che produrrebbe un nuovo arbitrio giudiziario: da un lato occorrerebbe infatti che il giudice fosse al riparo da ogni tipo di pregiudizio, capace di scrutare il fondo dei cuori degli imputati, ideale evidentemente irrealizzabile, dall'altro i medici non dovrebbero presentare sistemi tra loro contraddittori circa le cause e i

[167] C.C.H. Marc, *De la folie*, cit., pp. 83-84. Cfr. inoltre H. Legrand Du Saulle, *La folie devant les tribunaux*, Paris 1864, pp. 104-105, che pone chiaramente i termini della questione: «La perversion est à la perversité ce que la folie est au crime. L'une résulte d'une organisation défectueuse, d'un état pathologique et doit être l'objet d'un traitement médical; l'autre provient d'une immoralité indigne des égards de la loi».

[168] É. Regnault, *op. cit.*; C.P. Collard de Martigny, *Questions de jurisprudence médico-légale*, Paris 1828.

sintomi della follia. Per Regnault, agli occhi della legge non sono i sentimenti a dover essere colpevoli, ma gli atti. E sebbene non ci si debba illudere della giustizia della legge, che non è quasi mai sovranamente giusta (come è vero che su dieci omicidi colpiti con la stessa pena non se ne trovano due che siano il prodotto di un'uguale colpevolezza soggettiva), nondimeno il sistema della legge evita l'arbitrio giudiziario e quello medico. Per quanto riguarda gli alienisti, sostiene poi Regnault, questi hanno una concezione semplicistica della volontà e rischiano di alimentare un'immagine consolatoria dell'uomo che impedisce loro di comprendere la concupiscenza che alberga nel cuore umano, nonché il problema tanto discusso dell'assenza di interesse nei crimini commessi dai monomaniaci: sia perché nella monomania non è in questione una volontà lesa, ma solo una volontà di uccidere che trionfa sulla volontà di obbedire alle leggi, vale a dire ciò che accade in ogni crimine; sia perché anche in questi crimini l'interesse è presente, risiedendo semplicemente nel godimento diretto dell'atto criminale: «Dès qu'on a un désir, on a une idée de jouissance c'est donc à la jouissance que l'intérêt se rapporte. Celui qui tue pour avoir de l'argent, le fait pour satisfaire des besoins ou des passions l'argent est le moyen de ses jouissances. Celui qui tue pour le plaisir de tuer, se satisfait immédiatement par son action même; la jouissance est directe»[169].

Ognuno, sostiene infine Regnault con un'argomentazione che sarà ripresa da Collard de Martigny e da Pellegrino Rossi, porta in sé una responsabilità nei confronti dei desideri e delle idee a cui consente di maturare progressivamente nel proprio spirito, dapprima accarezzandoli e quindi restandone profondamente influenzato o addirittura dominato e ossessionato[170]. Se si ammettesse la «maladie de la volonté» come scusante, allora, sarebbe difficile tracciare una «ligne de démarcation entre les différents degrés des maladies de la volonté, depuis leur origine jusqu'à leur apogée, depuis la mauvaise humeur causée par une digestion pénible jusque l'impulsion au meurtre»[171]. Ecco perché «dès qu'il n'y a pas de délire, il y a conscience du mal; dès qu'il y a conscience, il y a faculté de choisir entre l'idée homicide qui entraîne, et celle du devoir qui retient; cette faculté de choisir n'est autre chose que la liberté»[172].

[169] É. Regnault, *op. cit.*, p. 39.

[170] Ivi, pp. 42-43.

[171] Ivi, pp. 65-66.

[172] Ivi, p. 67. Contro Regnault, cfr. Chauveau e Hélie, *Teorica del codice penale* (1837), vol. II, a cura di J.S.G. Nypels, Napoli 1853, che riconoscono pienamente la monomania istintiva e rappresentano, come ha osservato Laurence Guignard, «le point plus avancé de la période en matière de tolérance aux nouvelles théories médicales» (L. Guignard, *op. cit.*, p. 265). I due giuristi offrono infatti il miglior tributo al concetto di mania senza delirio quando ritengono oramai indiscusso «potervi essere mancanza di ragione, mancanza della cognizione del bene e del male relativamente a taluni obbietti, senza che per altri vi fosse una sensibile alterazione intellettuale» (A. Chauveau, F. Hélie, *Teorica del codice penale*, cit., p. 257).

Quanto a Collard de Martigny, questi si chiede innanzitutto perché così tanti autori trattino in quegli anni della monomania omicida, e la sua risposta è che per il suo tramite essi tentino di sostenere un ulteriore argomento contro la pena di morte. Sul punto, pur essendo contrario alla pena capitale, l'autore ritiene che la natura della pena non possa far variare il giudizio sulla colpa, per cui, se è ingiusto condannare a morte un monomaniaco omicida, dovrebbe ugualmente ritenersi ingiusto condannare un uomo affetto da una qualunque monomania alla pena prevista per il reato commesso (furto, vagabondaggio, falso, ribellione, etc.), ciò di cui però non si discute[173].

Ad ogni modo, le principali critiche opposte da Collard de Martigny alla monomania riguardano le questioni delle passioni, dell'interesse e della volontà libera.

Rispetto alla prima, non vi è alcuna differenza tra le azioni dei monomaniaci e quelle compiute per via di un eccesso passionale o dei sentimenti naturali: in entrambi i casi la volontà negativa, la ragione, ha modo di resistere con più o meno sforzi; in entrambi i casi l'individuo può rinunciare a sottrarsi al castigo e l'istinto di conservazione può soggiacere alla propensione al delitto, nonostante le precauzioni messe in atto nel perpetrare il crimine; in entrambi i casi il trasporto al delitto può essere tale da escludere la premeditazione, il calcolo dell'esecuzione e la cura della propria sicurezza. Inoltre, in entrambi i casi l'impulso al crimine può farsi irresistibile, fermo restando che il soggetto aveva comunque la facoltà di spegnere quella passione prima che questa spegnesse la sua volontà, ciò di cui dunque è responsabile[174].

In merito alla questione dell'interesse, è errato sostenere che il delitto del monomaniaco non ha come causa un qualsivoglia interesse, afferma Collard de Martigny, perché spesso crimini atroci sono commessi sotto la spinta di una passione violenta innescata da deboli interessi, ma la morale esige che la pena sia proporzionata al delitto, per cui quanto più l'interesse è debole tanto più è grande la perversità del reo. Ogni passione ha poi un interesse: la soddisfazione del desiderio[175].

La questione della volontà libera, infine, è assai semplice: sempre nell'uomo lottano una volontà negativa (la ragione) e una volontà impulsiva (la passione). Se la libertà morale è la volontà della ragione, allora si può ammettere che in caso di eccesso passionale questa è dominata e dunque non è libera. Ma da ciò deriva che la ragione contrasta il crimine e che se avesse maggiore forza non consentirebbe l'esecuzione del delitto; e ancora, che in tutti i delitti la libertà morale è in fondo dominata, ciò che priva di fondamento la distinzione tra la volontà libera e quella che non lo è: fatta eccezione per l'alienazione mentale, la giustizia deve colpire tutti coloro che hanno una volontà criminale[176].

[173] C.P. Collard de Martigny, *op. cit.*, pp. 42-43.
[174] Cfr. ivi, pp. 74-90.
[175] Cfr. ivi, pp. 91-94.
[176] Cfr. ivi, pp. 95-100.

Riguardo a queste tesi, alcune riflessioni ci sembrano importanti, e innanzitutto che accanto alla lotta tra giuristi e medici in relazione al riconoscimento della monomania come forma di alienazione si svolge una lotta insidiosa intorno alla determinazione medica o giuridica delle forme della responsabilità e della punibilità in generale. Ad esempio, le tesi di Gall sulla punibilità dei perversi congeniti pongono meno problemi al pensiero e alla pratica giuridica, almeno all'apparenza, di quelle avanzate da Georget. In fondo, Collard de Martigny ricorre a un argomento di origine frenologica contro l'alienismo quando sostiene che la monomania «n'est d'ailleurs qu'une passion particulière, dépravée, ayant comme toutes les autres sa source dans l'organisation: que, conséquemment, les jurés doivent rejeter un système qui semble vouloir couvrir tous les crimes de l'égide de la folie»[177]. Riconoscendo la sede delle passioni nello stato dell'organismo e nel temperamento, Collard de Martigny ammette, appoggiandosi a Cabanis, Bichat e Gall[178], la «responsabilité de *l'organisation* pour les actes inspirés par les passions»[179]. Fa valere insomma, contro la monomania di Georget, il problema della responsabilizzazione del soggetto nei confronti del suo organismo e delle sue tendenze, ossia la posizione frenologica: «Et si l'on décide qu'une organisation défectueuse, telle que l'organisation d'un assassin, est punissable, pourquoi une organisation lésée, celle de Léger par exemple, ne pourrait-elle pas l'être également [...]?»[180].

Certamente Collard de Martigny non intende con ciò fare del medico un giudice, ma la tesi secondo la quale in ogni crimine la libertà morale è vinta in ragione dello stato dell'organismo, senza che questo comporti un'innocentizzazione, non mette al riparo la giustizia dalla medicalizzazione. In Italia, come vedremo, Biagio Miraglia sosterrà, in linea con Gall, che nessun crimine potrebbe derivare in fondo da un uso normale della ragione, per cui il suo autore, quando pure non sia un alienato, va comunque medicalizzato per comprendere adeguatamente la natura dell'agitazione che lo ha condotto al delitto.

Diversamente da Regnault – da cui pure trae molti dei suoi argomenti – Pellegrino Rossi intende riaffermare non un pensiero della legge, ma un'individualizzazione del giudizio e della pena fondata sull'intrinseca immoralità degli atti. Rispetto alla monomania, intesa come *mania senza delirio*, sostiene che i criminalisti hanno dovuto sempre rapportarsi a crimini commessi da individui privi di cognizione del bene e del male «relativamente a taluni oggetti, senza che vi fosse per tutto il rimanente alterazione sensibile nell'esercizio delle facoltà intellettuali e morali». A questi crimini compiuti «senz'alcun motivo apparente, senza che si percepisca alcuna di quelle cagioni che le più delle volte spiegano l'azion criminosa senza punto giustificarla», che la dottrina e alcune legislazioni hanno qualificato come bestiali, veniva

[177] Ivi, p. 42.
[178] Cfr. ivi, p. 77.
[179] Ivi, p. 82.
[180] Ivi, p. 75.

riservato il massimo della pena, ciò su cui Rossi concorda, essendo simili delitti premeditati e compiuti non da alienati, ma da uomini immorali che godono del male e fanno il male per amore del male: «Ci si dirà: "L'uomo finché è dotato di ragione mai non opera senza un motivo". E sia pure. Ma bisogna forse dichiarar pazzi gli uomini che commettono un fatto isolato per un motivo che ci è ignoto, il cui impulso non è da noi risentito?». Insomma, il crimine senza ragione non è tale perché è mancato al suo autore un motivo razionale, un interesse a delinquere, un piacere o un vantaggio da trarre dal delitto, ma perché è stato commesso «senz'altro motivo che il piacere di nuocere, di veder soffrire, di far del male. Date a quest'uomo un grado di perversità di più, dategli maggior coraggio ed un pugnale, ed avrete un omicida *bestiale*»[181].

La tradizione criminalistica, continua Rossi, sa che i delitti più atroci «sono al momento della loro consumazione l'effetto di una vera monomania», «il risultamento di uno di quei pensieri funesti e strani che ponno in un tratto passare per a traverso lo spirito di ciascuno», ossia di un desiderio bestiale. Ma l'individuo morale è in grado di respingere questa tentazione passeggera, mentre l'immorale non riesce a non esservi attratto, prima indirizzandole «uno sguardo furtivo», poi accarezzandola immaginariamente e allontanandosene «per solo timore», quindi desiderandola e infine trovandosene «signoreggiato». E questo signoreggiamento del desiderio criminale sull'individualità immorale fa del soggetto un demente, che «trovavasi in preda al misfatto come uno schiavo incatenato che è preda di una belva». Però, osserva Rossi, «questo parziale soffocamento della ragione dell'uomo gli è imputabile come risultamento dell'intera sua vita, di una vita tutta di libertà e di sindacabilità morale»[182]. Ecco perché i monomaniaci vanno puniti come gli autori dei crimini mostruosi e bestiali: «La loro punizione non pure ci è parsa utile, ma più giusta che utile; ed avvisata per conto della politica essa ha piuttosto ad effetto il dare satisfacimento alla coscienza pubblica e antivenire il reato in generale che antivenire gli atti di simil genere»[183].

Si è detto che per gli alienisti non è il monomaniaco istintivo a godere del crimine, ma un altro in lui. Se questa possibilità è riconosciuta dalla frenologia, Rossi non è di questo avviso. Del piacere del crimine non può godere un altro se il soggetto ha la cognizione del bene e del male. A un tale godimento, come si è visto, si arriva però gradualmente, perché non ci si è messi in guardia «contro una cattiva tendenza», fino a perdere la ragione e ad essere padroneggiati dal desiderio criminale. In fondo, per Rossi nessun uomo può accostarsi a un atto bestiale conservando la propria ragione, e nel momento della frenesia criminale l'uomo non vede neanche il proprio interesse, come testimoniano gli errori grossolani commessi dai

[181] P. Rossi, *Trattato di diritto penale. Nuova traduzione italiana con note ed addizioni dell'avvocato Enrico Pessina*, Napoli 1853, p. 260.

[182] Ivi, p. 68.

[183] Ivi, pp. 111-112.

criminali sulla scena del crimine: i «monomaniaci non sono in una posizione diversa. Essi primariamente conoscono l'immoralità delle loro tendenze; essi hanno la coscienza di loro stessi e del male che voglion fare; essi non cadono nello stato di disordine se non allorquando il desiderio, che hanno negletto, di padroneggiare li spinge all'ultimo termine della via; essi sono sgomentati dal delitto che hanno commesso; e sanno di aver fatto il male, e ne provano i rimorsi; le quali cose tutte sono inconciliabili con la vera follia. Il monomaniaco è come l'uomo che a poco a poco ha preso vaghezza del vino»[184]. Nel caso della mania senza delirio Rossi ritiene, in continuità con la tradizione giuridica, che la giustizia possa tenere conto del fatto che l'agente «vuole» il crimine di cui «conosce la natura», che lo vuole cioè «nonostante la conoscenza del male». Non è sua intenzione, tuttavia, negare che un crimine senza ragione possa essere il prodotto della follia, ma in questa eventualità auspica che il giudice sottoponga l'imputato a «osservazioni continue e rigorose» e non dimentichi che «l'indole della follia è il disordine delle facoltà intellettive», nella convinzione – contraria a quella dei frenologi e degli alienisti – che un giudice che «per un *sentimento mal inteso di umanità*» scusasse «a titolo di follia la violenza e la bizzarria sanguinaria di taluni desiderii» attenterebbe «all'ordine morale e all'ordine politico»[185].

È dunque solo dal disordine delle facoltà intellettuali, che impedisce di comprendere la differenza tra bene e male, che possono derivare quelle perversioni della volontà in cui l'individuo «opera macchinalmente [...], mosso dagli appetiti». E se riguardo ai sintomi fisici vanno ovviamente consultati i periti, «il giudice che prende il loro avviso per una decisione viola il più sacro dei doveri; perocché sostituisce la loro coscienza alla sua, ed opera da cieco». È il giudice, non il perito, a dover prendere in considerazione la vita dell'agente – non solo i fatti che «hanno accompagnato l'azione da imputare, ma ben anche quelli che l'hanno preceduta o seguita»[186] – al fine di graduarne la responsabilità. La differenza con il discorso frenologico e alienista risiede dunque in questa specifica concezione della libertà morale e dell'individualizzazione del giudizio e della pena, che per Rossi deve dipendere non da un sapere fisiologico, bensì da uno specifico sapere giuridico-morale relativo alla moralità dell'atto in sé considerato (violazione oggettiva di un dovere) e alla moralità dell'agente[187].

Di certo gli spiritualisti non sono disinteressati quando temono le osservazioni basate sui fatti, ma nondimeno i loro avversari, afferma Rossi: «pretendono alla lor vece tutto sapere, tutto comprendere, tutto spiegare con le alterazioni del fluido nerveo, della bile, del sangue, del petto, dello stomaco, degl'intestini, della sostanza cerebrale, e simili cose. Egli torna impossibile a noi altri profani il credere o

[184] Ivi, pp. 259-261.
[185] Ivi, p. 263 (nostro il corsivo).
[186] Ivi, pp. 227-229.
[187] Ivi, p. 176.

l'accettar nulla sino a tanto che i medici ci presentano cinquanta sistemi opposti, tutti del pari fondati sull'osservazione e la pratica. Nulladimeno le quistioni giudiziarie non possono rimanere senza soluzione. [...] In mezzo a queste difficoltà i giudici debbono affidarsi al loro buon senso ed all'osservazione comune, più che alle teoriche premature de' dotti»[188].

Della figura di Pellegrino Rossi, tra le altre, Claude-Olivier Doron ha fatto una chiave di volta per la comprensione dell'origine della psichiatria in Francia. Ciò merita senz'altro alcune riflessioni, soprattutto perché a nostro avviso gli studi di questo autore, tra i più avanzati al riguardo, hanno ampliato considerevolmente la consapevolezza epistemologica e politica di quest'ordine di fenomeni, correggendo il tiro di Foucault. Secondo Doron, sintetizzando all'estremo, l'origine della psichiatria forense in Francia può essere compresa solo alla luce di una necessità specifica che il diritto di punire si è trovato in un dato momento a dover affermare per poter funzionare, ovvero la distinzione tra perversità e perversione. La trasformazione dei quadri psichiatrici ha insomma come sua condizione di possibilità l'idea che il diritto di punire si fondi sull'elemento morale, sulla perversione morale dell'agente, vale a dire sul suo rapporto morale con i suoi comportamenti e sulla perversione naturale di questi ultimi. La psichiatria ha così potuto appoggiarsi, prolungandola, sulla moralizzazione della giustizia promossa da alcuni autori liberali come Guizot, Chauveau, Hélie e appunto Rossi, che contro l'utilitarismo hanno rivendicato l'individualizzazione della pena e del giudizio sul grado di perversità morale del criminale attraverso l'analisi dei motivi che hanno spinto il soggetto ad agire[189]. Ragion per cui alla base dei crimini senza ragione non sarebbe tanto la mancanza di interesse, quanto l'assenza di motivo, ossia di moralità dell'agente. È su questo punto che gli alienisti «empiètent sur la mission qui leur est attribuée par les juridictions: ils revendiquent un savoir non simplement de la pathologie mais du 'lien moral' entre une pathologie et un acte, un savoir de la 'responsabilité morale' et de la capacité ou non du sujet à résister. Ils revendiquent un savoir qui les autorise à dire si l'élément moral est présent et si, en conséquence, le délit est constitué»[190].

Se ci discostiamo parzialmente dalla sua ricostruzione, anche al fine di approfondire ulteriormente le ricerche inaugurali di Foucault sull'argomento, è perché a nostro avviso la condizione storica di possibilità dell'oggettivazione del soggetto risieda sì nell'oggettivazione della moralità dell'agente, ma che quest'ultima si radichi in quella che abbiamo definito logica trasversale dell'individualizzazione, – che ha a sua volta come condizione di possibilità il dispositivo di potere individualizzante – e che non ha luogo a partire da Rossi, bensì già nel XVIII secolo. Lo si è visto

[188] Ivi, p. 257.

[189] Per Doron, si tratta di una strategia di contrasto alla «criminalisation de certains crimes 'politiques' et [à] la politique de répression menée au nom de la défense de la société qui s'affirme dans les années 1820» (C.-O. Doron, *La formation du concept psychiatrique de perversion au XIX^e siècle en France*, cit., p. 46).

[190] *Ibidem*.

persino con Bentham, per il quale la depravazione morale dell'agente dev'essere oggetto di giudizio ai fini della graduazione della pena, per non dire del tentativo frenologico di medicalizzazione del vizio.

L'interiorità può essere oggettivata e medicalizzata tanto in una concezione del diritto e della pena utilitarista che si preoccupa di prevenire i crimini, quanto in una concezione retributiva che si preoccupa di punire le colpe. In entrambi i casi si punisce un individuo in funzione del suo grado di perversità in relazione al suo comportamento e ai motivi che lo hanno determinato.

Vero è che talvolta Rossi contravviene alla sua consueta chiarezza argomentativa, ma in generale il problema centrale del suo discorso, a nostro giudizio, non è tanto la perversità dell'agente, quanto l'immoralità intrinseca dell'atto. E se Rossi insiste su quest'ultima è per evitare che in un sistema repressivo utilitaristico si venga puniti anche per atti che non offendono la coscienza morale. Facendo della pena un mezzo politico di difesa della società, ovvero negando la dimensione retributiva e di giustizia del diritto penale, l'utilitarismo rischia infatti di ridurre l'accusato a uno strumento di terrore nelle mani del potere, conformemente al grado di timore che il potere ha nei confronti di determinati comportamenti. Ma questo «immolare a caso una vittima all'avvenire» equivale a trasformare «la giustizia penale in un provvedimento amministrativo», poiché l'attenzione del giudice si rivolge non tanto all'immoralità intrinseca dell'atto, ma «alle cagioni impulsive che hanno determinato l'autore del malefizio»[191], per l'utilitarismo mero essere sensibile, in rapporto allo stato della società.

Quanto alla perversità dell'agente, questa non è per Rossi un elemento realmente necessario, ci sembra, del delitto. Ma il discorso è più articolato e tocca la questione dell'imputabilità e della colpevolezza o grado di reità. Secondo Rossi la moralità dell'agente consiste nella comprensione del dovere violato e unitamente nell'intenzione di violarlo, ovvero nella sua imputabilità, nella sua capacità di giudizio morale, essendo l'imputazione «la coscienza applicata agli altri»[192]. Ed è lo stesso Rossi a sostenere che le conseguenze in termini di valutazione della libertà morale di un accusato sono le medesime sia in un sistema utilitarista fondato sull'imputabilità politica, sia in un sistema morale fondato sull'imputabilità morale: nel sistema utilitarista si esige, «perché sia legittima l'applicazione della legge penale, che il legislatore possa in mercé di minacce determinare questa macchina provveduta della facoltà di sentire, che ha nome di uomo, ad astenersi dall'atto proibito. Nel sistema che noi seguitiamo, richiedesi che l'accusato abbia potuto, nei limiti delle forze dell'umanità, determinarsi a conformare le sue azioni ai precetti della legge. Egli è agevole il comprendere che i risultamenti di questi due principî sono, sino ad un dato punto, identici. E per l'uno e per l'altro la pena è inapplicabile ai fanciulli e ai

[191] P. Rossi, *op. cit.*, p. 66.
[192] Ivi, p. 135.

dementi, agli atti commessi per errore e simili»[193]. O, ancora più chiaramente: «queste divergenze [...] fra l'imputabilità morale e l'imputabilità politica non sono che apparenti. Il divario non è nella moralità dello agente, ma in quello dell'atto. In tutti i casi l'agente debbe aver la coscienza di ciò che fa; ed il suo atto debb'essere il risultamento della sua intelligenza e della sua libertà di volere»[194].

Ma, si è detto, la moralità dell'agente è suscettibile di modificazioni che influiscono sulla sua colpevolezza. Queste sono dettate dalle modalità di esecuzione del delitto o dai delitti accessori rispetto al delitto principale e dicono della cattiveria che è possibile desumere dall'atto. Non si tratta quindi della moralità assoluta dell'agente, ma solo della moralità relativa al crimine[195]. Rossi specifica sul punto che la colpevolezza speciale di tale delinquente in tale caso, ossia il suo grado di criminalità in relazione all'atto, non è una condizione essenziale del delitto e non va confusa con la perversità, che non è di competenza della giustizia umana[196].

Tornando alle posizioni dei giuristi in Francia, l'impostazione e le considerazioni di Pellegrino Rossi, insieme a quelle di Nicola Nicolini, dallo stesso Rossi influenzato, trovano una raffinata sistematizzazione in un testo di Victor Molinier[197], secondo il quale i monomaniaci sono dei criminali il cui senso morale naturale è pervertito. Assumendo la partizione tra facoltà affettive e facoltà intellettive, Molinier sostiene che le facoltà originarie sono naturalmente buone e che è a causa della loro perversione, o dei falsi calcoli dell'egoismo, che l'uomo diviene cattivo. I gradi di questa perversione sono diversi da individuo a individuo e possono raggiungere fenomeni di mostruosità sensoriale e morale anche in assenza di disturbi delle facoltà intellettuali e senza che nessun segno precedente abbia manifestato in qualche modo una simile perversità morale, oltretutto con la possibilità che gli autori dei delitti si sentano in colpa e affranti per averli commessi. I medici, afferma Molinier, hanno quindi ragione quando dicono che è un malato l'individuo che ha commesso un crimine atroce senza interesse e sotto l'impulso delle facoltà affettive, ma hanno torto nel ritenerlo irresponsabile. Da un lato, i crimini cosiddetti senza ragione hanno in fondo una ragione: dare soddisfazione alla propria cupidità, alle proprie

[193] Ivi, p. 136.

[194] Ivi, p. 137.

[195] Cfr. ivi, p. 139: «La giustizia sociale non può valutare se non gli atti speciali che cadono sotto l'imperio delle sue leggi; e solo per questo aspetto essa valuta la moralità dell'agente. Ad essa non s'avviene estimarne il merito ed il demerito assoluto. Colui che offende la morale nelle parti che la legge penale non ha punto avvalorate della sua sanzione, e colui che non rispetta la legge se non per moto d'interesse, non hanno nulla a temere dalla giustizia umana; che non ha diritto né interesse di punirli, e solo ha diritto di punire il male imputabile; ed ha diritto ed interesse a punirlo proporzionando la pena alla gravità del male ed al grado di colpabilità rivelato dall'atto particolare; ma non può né saprebbe chieder conto all'uomo di tutta la sua vita».

[196] Cfr. *ibidem*.

[197] V. Molinier, *De la monomanie envisagée sous le rapport de l'application de la loi pénale*, in «Revue de législation et de jurisprudence», 46/1853, pp. 253-276. Sul ruolo di Rossi e Molinier nel dibattito tra giuristi e alienisti in Francia cfr. L. Guignard, *op. cit.*, pp. 24-27 e 90-94.

tendenze viziose e ai propri desideri disordinati[198]. Dall'altro, l'elemento determinante la responsabilità e la punibilità non è l'esistenza di un impulso irresistibile, ma la capacità di discernere il bene dal male, che nei monomaniaci resta intatta, al punto che talvolta essi oppongono una resistenza ai propri impulsi[199]. Ne consegue che, in assenza di manifestazioni deliranti esteriori, la perversione delle facoltà affettive non può essere causa di innocentizzazione.

In aggiunta a quanto esposto, crediamo di poter sostenere che Molinier sia il solo giurista ad aver presagito la portata dirompente che l'oggettivazione delle patologie della volontà avrebbe avuto sulla razionalità e sulle categorie giuridiche. Quando denuncia che irresponsabilizzare coloro che non hanno potuto resistere a un impulso pur conoscendo la legge ed essendo coscienti della propria colpevolezza equivarrebbe a negare la libertà morale e la legittimità del diritto penale[200], Molinier sta di fatto intuendo che in tal modo si autorizzerebbe un'azione di igiene sociale che non avrebbe più da porsi il problema della responsabilità o dell'imputabilità, ma quello della pericolosità: «la liberté individuelle perdrait toute garantie si on pouvait séquestrer un citoyen en lui imputant des idées de crime qui ne se seraient manifestées par aucun signe extérieur»[201].

I criminali sono dei malati morali, dei malati punibili[202], differendo nel grado di malattia morale da cui sono affetti, ma ciò non vuol dire che l'origine della malattia sia necessariamente di ordine fisiologico, né che la determinazione del grado di malattia morale debba essere svolta medicalmente, al punto che ogni giudizio necessiti di un esperto. Il compito dei medici e degli alienisti è per Molinier quello di curare la sofferenza e fornire osservazioni sui fatti fisiologici o patologici alla scienza giuridica, mentre resta ai giudici il compito di determinare gli elementi morali del delitto e valutare le questioni relative alla libertà morale[203].

È al contrario quest'ultimo ruolo che Gall, tra le altre cose, avrebbe rivendicato ai medici in relazione al riconoscimento delle deviazioni delle tendenze al di fuori di un quadro patologico propriamente detto, piano sul quale troverà un continuatore importante in Italia, ad esempio, in Biagio Gioacchino Miraglia: oggettivare in termini fisiologici la viziosità o la perversità morale nell'uomo sano ma anormale, linea che sfugge all'alternativa di Legrand du Saulle tra perversione in quanto stato patologico risultante da un'organizzazione difettosa e perversità in quanto immoralità volontaria.

[198] Cfr. V. Molinier, *op. cit.*, p. 264. Si veda inoltre ivi, p. 268: «L'état de tous les coupables est donc le même; tous veulent donner satisfaction à des penchants vicieux, et il n'y a de différence entre eux que dans le degré de dépravation morale auquel ils sont parvenus».

[199] Cfr. ivi, p. 273.

[200] Ivi, p. 273.

[201] Ivi, p. 260.

[202] Cfr. ivi, p. 266.

[203] Ivi, p. 276.

8. LA RIDEFINIZIONE MEDICA DELLA GIURISPRUDENZA IN ITALIA TRA FERRARESE E MIRAGLIA

Molte saranno le ricezioni italiane dell'alienismo e della frenologia nella prima metà del XIX secolo[204]. Assumeremo qui quella elaborata nel Regno di Napoli da Luigi Ferrarese e Biagio Gioacchino Miraglia, che si presenta come la più avanzata soprattutto in rapporto alla critica alla giurisprudenza. Quando i due medici scrivono la dottrina delle monomanie è già stata ridefinita da Georget e il grosso del dibattito giudiziario si è già svolto. Di questo le riflessioni di Ferrarese e Miraglia portano il segno, nella misura in cui per entrambi non si tratta solo di opporre le nuove classificazioni dell'alienismo o della frenologia al mondo giuridico, ma più in generale di ridefinire medicalmente l'individualizzazione del giudizio e della pena. Entrambi, infatti, mirano a medicalizzare la perversità morale, stabilendo tra delinquenza e alienazione un rapporto che non sia di mera esteriorità.

Ferrarese innanzitutto, lo psichiatra «di gran lunga superiore a tutti i contemporanei», «molto apprezzato dai critici più competenti» e che «ebbe generalmente in Italia minor influenza di quanta ne ebbero altri, che giammai avrebbero dovuto averne alcuna»[205], afferma con forza la base organica del pensiero e di qualunque malattia mentale, che ritiene debba sempre essere rapportata alla lesione di un tessuto o di un organo specifico[206]. Aderisce alla dottrina di Gall – anche se adotta le classificazioni e le localizzazioni di George Combe[207] – ma ne contesta la negazione dell'unità del cervello, in modo simile a Georget. Discute pressoché tutti i casi al centro del dibattito medico-legale sulla monomania (Cornier, Rivière, Léger, Papavoine, etc.) e rilancia letteralmente le critiche alla giurisprudenza formulate da Gall e Georget, sostenendo che «la misura della colpabilità non dev'essere presa né nella materialità dell'atto illegale, né nella punizione determinata dalle leggi, ma soltanto nella situazione dell'individuo agente per rapporto tanto colle cose accidentali esterne, quanto collo stato interno», ovvero lo «stato interiore fisico-psicologico del malfattore», il suo «particolare organismo, temperamento, etc.»[208]. Al tempo stesso, Ferrarese è tra i medici che più hanno dialogato con i giuristi. Richiama ad esempio di frequente Hoffbauer, Mittermaier, e Chauveau e Hélie, ossia i giuristi maggiormente aperti alle nuove classificazioni dell'alienismo, e Carmignani, che

[204] Cfr. S. Baral, *Il frenologo in tribunale. Nota per una ricerca sul caso italiano*, «Criminocorpus» 1(juin) 2016: http://journals.openedition.org/criminocorpus/3283.

[205] Sono i giudizi riservati a Ferrarese da M. Leidesforf, *Trattato delle malattie mentali*, trad. it. di F. Hunger Sternberg, Torino 1878, pp. 72-74.

[206] L. Ferrarese, *Ricerche intorno alla condizione patologica nelle malattie*, Napoli 1833, p. 9.

[207] Id., *Memorie riguardanti la dottrina frenologica*, Napoli 1838, pp. 1-4. Cfr. G. Combe, *The Constitution of Man Considered in Relation to External Objects*, London 1828.

[208] L. Ferrarese, *Esame dello stato morale ed imputabile dei folli monomaniaci, ed in particolare dei monomaniaci suicidi*, Napoli 1835, pp. 16-18.

progressivamente accoglierà la nozione di mania senza delirio[209]. Fonda inoltre l'esercizio della giustizia, meno contraddittoriamente di quanto si possa pensare a prima vista, sull'utilità benthamiana e sulla coscienza morale di Rossi. E ha soprattutto a cuore la moralizzazione della giustizia proposta da Rossi, quando afferma con il «principe dei criminalisti» che il diritto di punire è subordinato all'immoralità intrinseca del fatto e alla perversità dell'agente libero e intelligente[210]. Quest'ordine di riferimento conferisce alla sua riflessione una tonalità specifica che lo conduce apparentemente ad assumere le critiche dei giuristi nei confronti della monomania, ma per meglio distaccarsene e così medicalizzare in generale la valutazione giudiziaria del crimine.

Sostiene infatti che non bisogna confondere quanti, «abituati ed incalliti nelle scelleraggini»[211], godono dei crimini e quanti, al contrario, sono spinti a commetterli da uno stato patologico, «dietro la violenza delle passioni, o dei pendii istintivi senza delirio, senza follia, od altra malattia», come nei casi di quella che Gall definiva perversità congenita, o nei casi di monomania, con o senza delirio.

Nelle *Ricerche intorno all'origine dell'istinto*, Ferrarese riconosce la necessità di commisurare la punizione al grado di libertà morale, di malizia e di malvagità del singolo individuo: ai grandi delitti, afferma, «non vi si giunge che per gradi», e per questo essi vanno giudicati non nella loro materialità e consistenza giuridica, ma in base agli antecedenti dell'atto, di modo che si punirà non tanto l'atto criminale, ma «l'azione nell'individuo per essersi esposto a perdere la detta libertà, e di cui poteva prevederne le conseguenze onde prevenirle ed evitarle»[212].

Ricorrendo alla metafora usata da Rossi per invalidare l'ipotesi di una monomania istintiva, descrive l'immoralità di quel criminale che «si è trovato come schiavo incatenato al misfatto careggiato nel suo desiderio»[213], che va punito perché ha «conosciuto la immoralità della [sua] inclinazione» e non le ha opposto «gli opportuni motivi razionali»[214]. Scrive addirittura, in omaggio a Rossi, che il «turbamento, o quella specie di *alienazione* che manifestano i più grandi scellerati, al dir di un sapiente, sono un omaggio all'umana coscienza ed accusano l'uomo che li ha risentiti, e non ne scemano la *colpabilità*»[215], a significare che la sua alienazione nel momento del crimine non potrebbe rappresentare una scusante sufficiente. Ferrarese assume insomma come «verità di fatto che non può richiamarsi in dubbio»[216] la tesi per la quale l'esistenza di idee predominanti in un delinquente è in grado di spingerlo al

[209] Cfr. *infra*, nel testo.
[210] Id., *Nuove ricerche di sublime Psicologia medico-forense*, Edinburgh 1845, p. 94.
[211] Id., *Ricerche intorno all'origine dell'istinto*, Napoli 1834, p. 72.
[212] Ivi, p. 74.
[213] Id., *Quistioni medico-legali intorno alle diverse specie di follie*, Napoli 1843, p. 53.
[214] Id., *Ricerche intorno all'origine dell'istinto*, cit., p. 73.
[215] Id., *Quistioni medico-legali intorno alle diverse specie di follie*, cit., p. 54.
[216] *Ibidem*.

delitto senza necessità di ammettere una follia intesa come malattia, in quanto essa è solo l'effetto di un'immoralità di cui l'individuo è responsabile.

Ma la sua adesione alla dottrina di Rossi è solo apparente, perché il medico distingue comunque da questi criminali tanto i monomaniaci in senso stretto quanto i perversi congeniti, concependo il «pendio a versar sangue» o come prodotto di una «disposizione fisica tutta primigenia e naturale degli organi» o come «effetto di malattia ed in particolare di monomania omicida con delirio e senza delirio»[217]. Richiamando la *Théorie du code pénal* di Chauveau e Hélie, osserva poi, contro Regnault, che certamente colui che precipita nel crimine sotto l'impero di una passione è imputabile perché poteva «combattere le prave tendenze» prima che si ingigantissero, e tuttavia «le forti passioni rendono stupido il giudizio, ma non lo distruggono: trascinano lo spirito ad estreme risoluzioni, ma non lo illudono con allucinamenti o con chimere: eccitano momentaneamente sentimenti di ferocia, ma non ingenerano quella morale perversità, o quella insensata ferocia morbosa che induce l'alienato ad immolare senza motivi l'essere a lui più caro»[218]. Auspica quindi che «la Dottrina delle monomanie [...] potrà insinuarsi anche nelle menti dei più ritrosi»[219], pur riconoscendo la difficoltà di «discernere la follia dalla passione» e con essa il pericolo di giustificare «la immoralità considerandola pari all'infortunio»[220].

Da un altro punto di vista, il riconoscimento da parte di Ferrarese dell'esistenza del criminale bestiale di Rossi come di un individuo che va punito in quanto soddisfa nel crimine le sue tendenze viziose è in realtà estremamente insidioso, per non dire 'avvelenato', perché il medico, fedele in questo alla strategia inaugurata da Gall, ritiene non solo, come visto, che il criminale bestiale vada distinto dal monomaniaco, ma che sia anch'esso da medicalizzare, anche se non malato. Ferrarese rilancia cioè la posta in gioco e prova a medicalizzare la perversità morale dell'agente ai fini della determinazione dell'imputabilità e della gradazione della pena, in modo a suo avviso 'coerente' con la letteratura giuridica del tempo. Peraltro, al di là dello scontro sulla monomania, si può concordare sul fatto che normalmente il criminale soddisfi nel crimine, direttamente o indirettamente, le proprie tendenze viziose e che la pena debba essere adeguata al suo grado di moralità. La distanza tra le due parti starebbe piuttosto nella titolarità della funzione di determinazione della libertà morale, che ciascuna parte reclama per sé.

Ferrarese non si limita quindi a stabilire la differenza tra crimine e alienazione, ma prova a individuare la loro contiguità sul piano dei processi mentali per distinguerli dai processi mentali dell'uomo normale, facendo dell'elemento più

[217] Id., *Programma di psicologia medico-forense*, Napoli 1834, p. 27.

[218] Id., *Quistioni medico-legali intorno alle diverse specie di follie*, cit., p. 56.

[219] Id., *Esame dello stato morale ed imputabile dei folli monomaniaci, ed in particolare dei monomaniaci suicidi*, Napoli 1835, p. 16.

[220] Id., *Quistioni medico-legali*, cit., p. 56.

problematico, ossia della passione, il fattore che, influendo sulle facoltà intellettuali degli individui, può determinare una disposizione tanto alla follia quanto alla delinquenza. Sin dal *Programma di psicologia medico-forense* del 1834, che sarà ripreso integralmente nelle *Nuove ricerche di sublime Psicologia medico-forense* stampate a Edimburgo nel 1845, mostra che le facoltà intellettuali del delinquente, condizionate da specifiche affezioni, tendenze e passioni non represse, hanno un andamento differente da quelle dell'uomo onesto, con l'ambizione di costituire un'«ideologia del delinquente», ossia un'analisi dei suoi processi psichici in grado di determinare l'imputabilità, la natura e il grado della punizione attraverso la considerazione del temperamento, dell'istinto, della passione, dell'età, del clima, delle abitudini etc., ma soprattutto del «rapporto che esiste tra i pendj ai delitti, e la tendenza all'alienazione mentale; le affinità che esistono tra le passioni, il delitto e la follia»[221].

Se l'Io diventa schiavo delle tendenze e delle passioni, gli eccessi di queste possono portare «alla perdita del senno» (follia), dunque all'incapacità di discernere il bene dal male e alla perdita della libertà di agire, con conseguente irresponsabilizzazione del soggetto, oppure alla «perdita dell'onestà» (crimine)[222], ossia a una forma di limitazione della libertà morale che non abolisce il discernimento del bene e del male, con conseguente responsabilizzazione del soggetto stesso in funzione del suo grado di moralità. Il loro accertamento va effettuato sulla base di un pensiero di tipo medico e non semplicemente morale, valutando «il *grado di suscettività della intelligenza* per le [...] disposizioni primigenie degli organi cerebrali»[223].

Sebbene Ferrarese attribuisca grande rilievo alle dinamiche organiche e istintive, è però soprattutto nell'azione anormale delle facoltà intellettuali (sensazione, attenzione, percezione, immaginazione) in rapporto alla loro funzione di freno rispetto alle tendenze e alla determinazione volitiva di carattere criminoso che riconosce il carattere comune al crimine e alla follia, alla perversità morale e all'alienazione, diversamente da Miraglia, che insiste invece sulla follia come pervertimento esclusivo di una funzione organica (i «sintomi dell'alienazione [...] sono pervertimenti di funzioni e non malattie proprie»)[224] e sulle cause organiche comuni a crimine e alienazione.

Miraglia adotta infatti esplicitamente la prospettiva frenologica di Gall, propone una classificazione che avrà molto credito, a partire dal Congresso di Genova degli anni Quaranta, e che sostanzialmente ricalca, con delle minime divergenze, quella

[221] Id., *Nuove ricerche di sublime psicologia medico-forense*, cit., p. 83.
[222] Id., *Quistioni medico-legali intorno alle diverse specie di follie*, cit., p. 18.
[223] Id., *Nuove ricerche di sublime psicologia medico-forense*, cit., p. 96.
[224] B.G. Miraglia, *Trattato di frenologia*, vol. II, Napoli 1854, pp. 76-77.

di Spurzheim[225], e in modo simile a Broussais[226] individua le perversioni di ogni tendenza e facoltà a partire dalle lesioni degli organi cerebrali e dal loro grado di attività.

Miraglia ritiene inconciliabili alienismo e frenologia e a più riprese nei suoi scritti prende posizione contro i discepoli di Pinel, colpevoli di restare fermi alla psicologia di Locke e di misconoscere la fisiologia del cervello[227], la dipendenza cioè del grado di attività di ogni facoltà mentale dal grado di azione del corrispondente organo cerebrale. Richiama quindi non solo i giuristi, ma anche i medici a riconoscere che le perversioni di ogni singola facoltà rientrano nella differenza specifica tra le follie della sfera affettiva, che si «manifestano in impulsioni ed emozioni irresistibili ed incorrigibili», e le follie della sfera percettiva e riflessiva, che «si presentano con incoerenza d'idee, allucinazioni, sragionamenti»[228].

Quanto alla monomania, la sua riflessione rinvia pressoché esclusivamente alla «fisiologia del cervello»[229]. Fonda la nozione di «alienazione delle tendenze»[230], intesa come una specifica patologia della volontà per la cui determinazione la presenza o meno della coscienza di delinquere non è sufficiente. Sulla scia di Gall, ritiene che «vi sono tante monomanie per quante sono le tendenze e tutte le sue innumerevoli modificazioni», benché molto rara sia «la lesione semplicemente limitata ad una sola facoltà senza che alcune altre non vi sieno per influenza trascinate»[231]. La monomania omicida può avere così due tipi di cause organiche, ossia un'esaltazione originaria dell'istinto della distruzione o un'attività anormale di questo istinto, sottoposto all'influenza di «altro istinto del pari impetuoso e sottratto all'impero della volontà»[232].

Miraglia ritiene inoltre che la maggior parte delle monomanie presenti delle manifestazioni osteologiche e pertanto si fa promotore delle perizie frenologiche nei tribunali[233]. E in modo analogo a Ferrarese, anche la sua lotta per conquistare alla frenologia lo spazio della giurisdizione si pone come obiettivo non solo l'irresponsabilizzazione degli alienati, ma anche la valutazione della premeditazione, della colpevolezza soggettiva dei criminali e della loro libertà morale. Da un lato formula la solita accusa

[225] Si vedano, in particolare, J.G. Spurzheim, *Phrenology, or the Doctrine of the Mental Phenomena*, Boston 1834, e B.G. Miraglia, *Cenno su una nuova classificazione e di una nuova statistica delle alienazioni mentali*, Aversa 1847, dove pure Spurzheim non è citato esplicitamente, a differenza del *Trattato di frenologia*, Napoli 1854, in cui è richiamato ripetutamente.

[226] Cfr. F.J.V. Broussais, *Cours de pathologie et de thérapeutique générales*, t. III, Paris 1834, pp. 407-423.

[227] B.G. Miraglia, *Trattato di frenologia*, vol. II, cit., p. 129: «Troppo direi se esporre qui volessi le divisioni della follia finora immaginate dagli alienisti; le quali divisioni fatte su le moltiplici varietà dei sintomi ritenuti come caratteri specifici dell'alienazione mentale, non formando la base di alcuna utilità pratica, faran sempre ritardare il progresso della scienza».

[228] Ivi, p. 131.

[229] Id., *La legge e la follia ragionante*, cit., p. 47.

[230] Ivi, p. 54.

[231] Id., *Trattato di frenologia*, vol. II, cit., p. 137.

[232] Ivi, p. 156.

[233] Cfr. ivi, p. 127 e Id., *La legge e la follia ragionante*, cit., p. 47.

ai giudici di confondere «col malvagio lo sventurato»[234] per incapacità di riconoscere una follia priva di disturbi intellettivi, dall'altro attacca frontalmente il principio dell'intimo convincimento per affermare la necessità che la giustizia si fondi sulle scienze umane: «con la convinzione morale nell'amministrazione della giustizia il magistrato non giungerà mai a quella conoscenza delle scienze mediche e naturali che il solo perito può svolgere e porre sotto il vero punto di vista onde chiarire i fatti e rendere giusta l'applicazione della legge»[235]. Il giudizio, senza le nozioni delle scienze umane, sarebbe insomma meramente emotivo: «il giudice che giudica con la semplice emozione non intenderà la premeditazione, né i gradi di colpabilità e di penalità, e molto meno le cause produttrici i perturbamenti mentali»[236].

I gradi di colpevolezza possono essere individuati per Miraglia solo al di là dei casi di alienazione, che, parziale o totale, con o senza delirio, deve generare sempre una totale irresponsabilizzazione: «I gradi di colpabilità adunque se sono da stabilirsi nello stato di abuso o vizio delle facoltà, considerando *l'uomo sano che delinque più o meno agitato*, non mai sono da ritenersi nella pazzia sì generale che parziale»[237]. Il frenologo accoglie così la partizione di Legrand du Saulle, per il quale la perversione è uno stato patologico dipendente da un'organizzazione (cerebrale) difettosa che dev'essere oggetto di trattamento medico, mentre la perversità coincide con l'immoralità e dev'essere punita[238]. Ma al tempo stesso intende spingersi oltre e medicalizzare la perversità, auspicando un sapere capace di determinare non solo l'imputabilità, ma la stessa colpevolezza soggettiva. Impresa complessa, tanto più perché la tesi con la quale Miraglia ritiene di poter fondare una giurisprudenza medica e *distinguere* la follia dalla delinquenza è la stessa che usa per equiparare crimine e disturbo mentale: ossia che le manifestazioni dello spirito, nello stato fisiologico come in quello patologico, dipendono dagli organi del cervello[239], per cui ogni disordine degli istinti (alimentività, distruttività, etc.), delle facoltà intellettive (percezione, memoria, immaginazione, giudizio) o delle facoltà morali (sentimenti come coscienziosità, circospezione, etc.) rappresenta un sintomo di follia che va sempre ricondotto al pervertimento di un organo cerebrale ed è proporzionato alle sue

[234] Id., *Trattato di frenologia*, vol. II, cit., p. 156.

[235] Id., *Sulla procedura nei giudizi criminali e civili per riconoscere l'alienazione mentale*, Napoli 1870, p. 4.

[236] Id., *Questioni filosofiche, sociali, mediche e medico-forensi trattate coi principi della fisiologia del cervello*, Napoli 1882, p. 83. Sul tema cfr. G.S. Bonacossa, *Dell'importanza della perizia medica nel giudicare sullo stato mentale dell'uomo*, in «Atti della Società medico-chirurgica di Torino», 1/1844, pp. 347-383, testo molto rappresentativo delle poste in gioco teoriche e pratiche della lotta tra giuristi e medici intorno alla perizia nei tribunali, nel quale Bonacossa, appoggiandosi all'autorità di Carmignani e opponendosi a Kant, Regnault, Rossi e Nicolini, sostiene che: «diritto e privilegio debb'essere della medicina il potere assoluto ed ultimo giudizio sulle diverse condizioni della mente dell'uomo in cui può essersi alterata e smarrita la sua morale libertà» (ivi, p. 359).

[237] Ivi, pp. 74-75 (nostro il corsivo).

[238] L. Du Saulle, *La folie devant les tribunaux*, Paris 1864, pp. 104-105.

[239] B.G. Miraglia, *Trattato di frenologia*, vol. II, cit., p. 110.

lesioni, le quali possono essere congenite, accidentali, meccaniche, etc., o derivare da altre alterazioni dell'organismo.

A fondamento di tale equiparazione Miraglia pone non tanto l'immoralità volontaria dei giuristi, quanto un'involontarietà subita, un'agitazione non voluta comunque punibile. Il crimine e la colpa, sostiene, istituendo un legame interno tra crimine e follia, non possono essere «che prodotto d'individuo agitato»[240], che «per quanto è prossimo al più alto grado di colpabilità, è egualmente vicino alla demenza»[241].

Escludendo le patologiche tendenze interiori a delinquere, che non vanno responsabilizzate, «quanto più lieve è il motivo provocatore tanto più cresce la malvagità della colpa. Al contrario, è l'individuo meno capace d'imputazione per quanto l'interno impulso ha trascinato la volontà inchinevole al misfare». In tal modo Miraglia estende a dismisura il ruolo delle scienze umane nel processo, fino a ricodificare integralmente il sapere giuridico-morale. Senza cancellarlo, lo ridetermina e lo fa funzionare secondo categorie mediche.

Un'occasione per sostenere queste posizioni gli è offerta dalla discussione intorno alla formulazione dell'art. 372 del Progetto di Codice penale del Regno d'Italia avente a oggetto la premeditazione e volto a definire l'esecuzione di un atto il cui disegno è stato precedentemente, freddamente (emendamento De Falco) o deliberatamente (emendamento Canonico), formato. Invitato dalla Commissione istituita dal Guardasilli Pasquale Stanislao Mancini a formulare le proprie osservazioni sul Progetto di Codice penale, in una lettera del 1877 indirizzata al ministro Miraglia affronta il tema della premeditazione ridefinendo integralmente la questione: se con premeditazione – sostiene – possiamo intendere una determinazione libera e fredda della ragione, la frenologia mostra al contrario come ogni determinazione e spinta criminosa presupponga l'assenza di una volontà diretta dalla ragione. Se un atto premeditato è una «conseguenza della consultazione di sé stesso, di un calcolo della ragione, della riflessione», allora nessun atto criminale può dirsi davvero tale. Chi, infatti, se non colui che abbia un animo agitato da una qualche tendenza perversa, potrebbe mai trascinare la riflessività verso una determinazione a delinquere? Può «in vero considerarsi non agitato un animo che si determina a misfare?»[242].

Miraglia ritiene che solo un sapere antropologico sia in grado di determinare «il concetto vero della premeditazione», e nel sostenere che «la colpabilità dell'atto aumenta per quanto è minore la tendenza impulsiva brutale, e viceversa»[243], non contesta del tutto la razionalità giuridica intorno alla premeditazione, ma la

[240] Id., *Questioni filosofiche*, cit., pp. 5-6. Cfr. anche Id., *Trattato di frenologia*, vol. I, cit., pp. 29-31.

[241] Id., *Trattato di frenologia*, vol. I, cit., p. 33.

[242] Id., *Questioni filosofiche*, cit., p. 79.

[243] Ivi, p. 78.

ricodifica in senso medico[244]. Le conseguenze di questa riflessione non sono trascurabili, perché Miraglia, per il quale ogni premeditazione non è che il disegno di una mente mossa da una specifica tendenza, da un'agitazione, trasforma in una macchina individualizzatrice quella che dovrebbe essere una semplice minaccia sanzionatoria funzionale a distogliere chi medita cattive azioni dal commetterle. Ed ecco servito il *coup de théâtre*: utilizzando argomenti giuridico-morali di valutazione della libertà morale si ottiene che non è più un giudice, ma un medico a giudicare, con la conseguenza che la pena non avrà funzione retributiva ed espiatoria, come in Rossi, ma esclusivamente correttiva.

Nonostante il momento storico avesse delle poste in gioco decisive, e innanzitutto l'iscrizione al livello del codice penale della pratica effettiva dei tribunali sotto la pressione delle scienze umane, Miraglia si limita ad auspicare una maggiore aderenza della legge al discorso medico. Resta comunque la tensione di una forma di razionalità antropologica che intendeva costituire una giurisprudenza medica avente giurisdizione non solo sull'alienazione, ma sulle cosiddette agitazioni dell'uomo sano, considerando il delinquente un malato morale punibile ma medicalmente accertabile in funzione di un'agitazione da ricondurre alle sue cause organiche.

Ci troviamo, con queste posizioni, nella situazione di considerare ogni delitto come il prodotto di una volontà agitata, e pertanto bisognoso di un giudizio medico relativo alle variazioni cui va soggetta la volontà. Poiché ogni determinazione volontaria al crimine presuppone un'agitazione, un'involontarietà, scaturendo ogni crimine da un vizio e ogni vizio da un difetto di organizzazione, congenito o derivato, il frenologo dovrebbe infatti essere consultato anche nel caso del più piccolo dei crimini. In tal modo il crimine diventerebbe un oggetto medico anche senza essere il prodotto di un malato, di un folle, e qualsiasi condotta non patologica ma disfunzionale rispetto a un qualsiasi ordine istituito potrebbe essere rinviata a una dinamica cerebrale che ne sanzioni la viziosità morale in termini fisiologici.

9. LE REAZIONI DELLA DOTTRINA GIURIDICA IN ITALIA

La dottrina giuridica italiana discuterà presto le nuove classificazioni frenologiche e psichiatriche attestandosi su posizioni assai differenziate, tra le quali prenderemo in esame quelle contrarie di Nicola Nicolini e Francesco Carrara, quelle di Carl Mittermaier (per la forte presenza e influenza in Italia) e di Giovanni Carmignani, che hanno invece riconosciuto valore alla nozione di monomania istintiva e contribuito alla valorizzazione delle perizie psichiatriche nei tribunali, nonché la posizione mediana di Enrico Pessina. Non senza avere però osservato preliminarmente

[244] Sulla scia di Gall, già Charles Lucas aveva da tempo sostenuto che si può uccidere in un momento di collera ed essere privi dell'organo della distruzione, ma se un delitto è a lungo meditato e progettato allora è certo che l'ideatore ne possiede l'organo (*Du système pénal et du système répressif en général, de la peine de mort en particulière*, Paris 1827, p. 254).

che in Italia, come in Francia peraltro, i giuristi risentono nelle loro classificazioni delle ambiguità della nozione di monomania in seno all'alienismo, per non dire dei suoi rapporti con la frenologia, che è meno richiamata in ragione del suo minore impatto giudiziario, ma nondimeno presente nelle elaborazioni dottrinali.

Ad ogni modo, nel Regno di Napoli a porsi sulla scia di Pellegrino Rossi è Nicola Nicolini, il Vico dei giuristi italiani del XIX secolo, durissimo nei confronti dei periti: «i tribunali napolitani tenner sempre per massima, che il giudizio dei periti non lega il giudice, né si sottoposero al potere che si attentavano di arrogarsi costoro, quasi che il loro giudizio dovesse valere nelle cause come un'autorità di cosa giudicata»[245]. Nicolini adotta la classificazione della follia di Thomasius, distinguendo, secondo un livello crescente di gravità, la «follia morale» – un principio di *stultitia* che ha origine nell'imperfezione congenita della natura umana, diffusa al punto che è assai difficile trovare un uomo che possa dirsi al riparo da essa –, la «follia giuridica e politica» – che deriva dalla precedente, ma è diretta contro gli altri – e la «follia fisica», vera e propria infermità fisica e mentale che reca tracce evidenti nel cervello e nel cuore, oltre che nelle azioni, del soggetto che ne è afflitto[246]. E a quest'ultimo genere riconduce la monomania, citando «il nostro Ferrarese»[247] e sostenendo che l'esistenza «di tale infermità non è rara [...]; e quando ve n'è la pruova, la presunzione di sanità cede al fatto del disordine fisico e mentale che si è sofferto o si soffre»[248].

Per quanto all'apparenza Nicolini accetti le classificazioni dei frenologi e degli alienisti, in realtà però se ne allontana esattamente in relazione alla monomania istintiva. Innanzitutto, a suo giudizio le manie parziali sono generalmente più da commedia che da tragedia: «Orazio narra che un nobile Argivo si era fiso in mente di udir di continuo tragedie maravigliose, si che spesso in vòto immaginario teatro ci sedea solo, intento alla rappresentazione, spettator lieto e plaudente: nel resto osservatore retto de' doveri della vita, buon vicino, ospite cortese, consorte affidabile, padrone indulgente»[249]. Ma vi sono manie parziali molto pericolose, come quella di «Orlando quando ancor pensava ad Angelica»[250]. Nicolini ha dunque ben presente la distinzione tra mania con e senza delirio e tuttavia non riconosce la seconda categoria, convinto com'è che la monomania necessiti dei segni esteriori attribuiti classicamente alla follia, o anche dei segni individuati dai suoi contemporanei (tra i quali richiama Pinel, Foderé e Ferrarese), avendo sempre e comunque

[245] N. Nicolini, *Le quistioni di dritto* (1835), vol. I, Napoli 1870², p. 209.

[246] Cfr. ivi, pp. 227-228. Il riferimento è a Ch. Thomasius, *De praesumptione furoris atque dementiae*, 1719, § IV, V, VI, XI.

[247] N. Nicolini, *Le quistioni di dritto*, cit., p. 228.

[248] *Ibidem*.

[249] Ivi, p. 232. L'argomento era già usato in relazione alla questione degli intervalli di lucidità nel furore. Cfr. ad esempio H.F. D'Aguesseau, *Œuvres complètes*, nouvelle édition, t. III, Paris 1819, p. 505.

[250] N. Nicolini, *Le quistioni di dritto*, cit., p. 232.

riguardo a una follia che colpisce la sfera intellettuale. L'art. 61 delle Leggi penali del Regno delle due Sicilie – afferma – non riguarda la stoltezza e l'insania morale, che vanno punite, ma solo la follia fisica. La follia «di cui parla la legge [...] è quella finalmente che o toglie all'uomo del tutto la coscienza di conoscere e sentire e di esser quell'istesso che è stato sempre e non altro, o se fa rimanere di questa coscienza alcun raggio, scioglie e sconnette a tal segno il legame fra le idee, ch'egli non intende più se medesimo, né si riconosce»[251].

Nicolini, pertanto, nega del tutto che le monomanie possano «sconvolgere ogni sistema di morale»: «Di tale monomania si parla ormai tanto e se ne ragiona e sragiona da' giornali e dagli autori di medicina legale, ch'ella è diventata nei giudizii penali l'eccezion di moda. Ma se questa specie di pazzi, che sanno quel che fanno, e lo fanno volendo, fossero da compassionarsi e da esserne piuttosto serrati in un ospizio d'infermi, che messi sotto la scure di Astrea, chi è fra i più odiosi scellerati che temer potrebbe la pena?»[252].

Il giurista sostiene poi, in modo molto raffinato, che sia impossibile accostare crimine e follia. Nei processi in cui si dibatte di crimini atroci, ad esempio, e contrariamente a quanto ritenevano gli alienisti, l'atrocità del crimine non può costituire un segno dell'assenza di ragione nell'accusato. E neanche nei processi per crimini più lievi, al fine di irresponsabilizzarne l'autore, può essere invocato l'argomento secondo cui l'atto era contrario alla ragione. Ciò perché chiunque allora violasse sia il diritto naturale sia il diritto positivo dovrebbe necessariamente essere folle, «necessariamente in uno stato di opposizione alla retta ragione». Ma «la legge impone la punizione de' malvagi», e la stessa legge «dichiara non imputabili le azioni de' folli», per cui, se «ogni malvagio è folle, potremmo punire ed assolvere ogni reo nel tempo medesimo. Solita contraddizione nata dall'uso di dare spesso a due idee differenti, ma che hanno qualche lato di rassomiglianza fra di loro, il nome medesimo, o alla stessa cosa due nomi di significazione affine»[253].

Per il resto, la sua posizione ricalca quella di Rossi, e medesimi sono gli argomenti: Nicolini accosta gli atti compiuti dai monomaniaci ai crimini commessi «per solo istinto di malvagità, senza l'impulso di alcuna altra causa»; rileva la presenza nei loro autori della consapevolezza del bene e del male e dell'immoralità dei loro gesti, di cui testimonia l'emergenza del rimorso; ritiene che essi si siano

[251] Ivi, p. 230.

[252] Ivi, p. 234. Cfr. anche ivi, p. 235: «Altri poi fanno il male solo per amor del male. E quanti maledicono e calunniano senza essere stati offesi, senza interesse personale, senz'altro motivo che il piacere di veder soffrire e di nuocere? Date ad un di costoro un grado di perversità di più, più coraggio ed un pugnale, e avrete la matta *bestialità* di cui parla Dante, ed un omicida il quale non è certo più degno di pietà di quel calunniatore o maledico». La pena, ricorda Nicolini nella sua risposta a Ortolan, «è nell'affetto ansioso e pauroso dell'animo, comeché l'arte possa renderne più sensitiva la coscienza, e meglio calcolatrice e più previdente la ragione, e più imperiosa l'ansietà» (*Delle opere legali e della vita di Niccola Nicolini. Esame fatto dal sig. Ortolan*, Napoli 1840, p. 73).

[253] Ivi, p. 227.

progressivamente lasciati sopraffare da un desiderio inizialmente accarezzato, e che per tutte queste ragioni debbano essere puniti, altrimenti, «quanto più atroce è il misfatto, tanto più perdonabile ne sarebbe il reo, e la morale e la giustizia non sarebbero che nomi»[254]. Di conseguenza, non ammette la monomania istintiva, perché se l'autore dell'atto «ha coscienza di quel che fa, e lo fa con azione determinata dalla sua volontà, egli non può scusarsi per l'organo dell'omicidio o per l'organo del furto che Gall dicesse aver discoperto nel suo cranio, né per le inclinazioni monomane che qualche altro dottore volesse giudicare»[255].

Rispetto alla monomania, l'influenza di Pellegrino Rossi è avvertibile anche nella riflessione di Francesco Carrara, per il quale i monomaniaci devono essere responsabilizzati e puniti secondo il loro grado di perversità morale. Carrara riconosce come vera alienazione la sola mania intellettuale o con delirio, nelle forme dell'imbecillità, della demenza e del furore, e la definisce giuridicamente come «*un abito morboso che togliendo all'uomo la facoltà di conoscere i veri rapporti delle sue azioni con la legge, lo ha portato a violarla senza coscienza di violarla*»[256]. A suo giudizio la mania intellettuale esclude l'imputabilità quando è totale, mentre se parziale la esclude «soltanto se fu *efficace*: cioè se *influì* sulla determinazione ad agire», afferma rinviando a Mittermaier. Ma in tal modo il giurista non contempla la possibilità che la mania senza delirio, o *mania morale*, costituisca una causa esimente l'imputabilità. «Moralmente e politicamente guardata», la mania senza delirio non diminuisce la responsabilità dell'agente, a meno che non alteri «la potenza intellettiva» e «la libertà di eleggere»: «La forza che una mala tendenza eserciti sulla determinazione del maniaco morale aumenta la ragione che la società ha di temerne, senza diminuire la sua responsabilità»[257]. A Carrara riesce difficile concepire una patologia esclusiva della volontà compatibile con la presenza intatta delle funzioni intellettuali, tanto che, riguardo alla responsabilizzazione dei maniaci morali, richiama il dissenso della «scuola medica», attribuendole la tesi secondo cui «nell'uomo la volontà non possa essere ammalata senza essere ammalato lo intelletto»[258], mentre è esattamente il contrario che le nozioni di monomania istintiva di Marc e Georget intendono oggettivare. Il problema è che, nel trattare della monomania istintiva, Carrara attinge ai testi degli psichiatri che criticheranno esattamente la realtà di questa nozione[259]. Ad ogni modo, il giurista sostiene che non saprebbe adattarsi «ad esonerare da ogni responsabilità certi uomini che godono in società la

[254] Ivi, p. 236.

[255] Ivi, p. 235.

[256] F. Carrara, *Programma del corso di diritto criminale*, vol. I, Lucca 1877[5], p. 199.

[257] Ivi, p. 200.

[258] Ivi, p. 201.

[259] Carrara rinvia infatti a J.A. Mandon, *Histoire critique de la folie instantanée, temporaire, instinctive*, Paris 1862, che contesta la monomania istintiva di Esquirol sostenendo che la sfera della volontà è sempre il prodotto delle sensazioni, delle idee e dei sentimenti, e che quindi ogni lesione esclusiva della facoltà di volere deve riguardare anche le facoltà intellettive.

pienezza dei loro diritti quantunque affetti da una mania o da una allucinazione parziale, appunto perché in tutto il rimanente dando non dubbi segni di acuta e completa intelligenza sarebbe ingiusto chiuderli in un manicomio o trattarli eccezionalmente come insensati. Se dunque costoro malgrado la loro parziale mania hanno ragione di essere mantenuti nel godimento dei diritti di cittadino, bisogna che sopportino la responsabilità»[260]. Fermo sulla distinzione tra passione e follia, Carrara ritiene ad esempio, parlando della cleptomania, che la soluzione del problema risieda nello stabilire se la mania morale possa «avvenire senza una alterazione organica». In caso contrario, ogni crimine deriverebbe da una «causa fisica» e «sicuramente bisognerebbe provvedere alla tutela giuridica con altri mezzi»: «Ma se invece la monomania deriva soltanto da un pervertimento morale, l'uomo ne è sempre più o meno responsabile, e lo si deve imputare»[261].

Veniamo ora a Carl Mittermaier, la cui *Disquisitio de alienationibus mentis quatenus ad jus criminale spectant*, pubblicata nel 1825, costituirà un imprescindibile testo di riferimento per tutti i giuristi aperti all'accettazione delle categorie frenologiche e psichiatriche, nonché per gli stessi medici, che ne loderanno l'opera illuminata[262].

Membro associato straniero della *Société médico-psychologique*, noto per la sua profonda conoscenza della situazione europea delle carceri e dei manicomi, è tra i giuristi che più avevano discusso e riconosciuto gli alienisti francesi, dai quali è molto apprezzato. Brière de Boismont gli dedica un articolo estremamente elogiativo negli *Annales médico-psychologiques*: a suo dire, più di Hélie, più di Ortolan, Mittermaier è il giurista che ha «vérifié les doctrines des aliénistes par la connaissance approfondie de leurs ouvrages et l'examen clinique des malades»[263].

Mittermaier giudica infatti insufficienti le conoscenze psicologiche per giudicare la follia, che presuppone sempre legata a dei disordini fisici in ragione dei quali solo gli alienisti possono ricoprire il ruolo di periti in tribunale. Ciò non significa, però, che il giurista abdichi all'alienismo e che intenda sostituire il giudizio degli alienisti a quello del giudice. Nel 1854 afferma anzi esplicitamente che i periti vanno equiparati ai testimoni, in quanto incaricati di fornire gli elementi la cui conoscenza

[260] F. Carrara, *Programma del corso di diritto criminale*, vol. I, cit., p. 202.

[261] Id., *Programma del corso di diritto criminale*, vol. IV, Lucca 1869, p. 330.

[262] A Mittermaier, oltre che a Nicolini e Carmignani, Ferrarese dedicò le sue *Quistioni medico-legali intorno alle diverse specie di follie*, in segno di ringraziamento per il riconoscimento tributatogli dal giurista tedesco nell'edizione da lui curata e aggiornata di P.J.A.R. von Feuerbach, *Lehrbuch Des Gemeinen in Deutschland Gültigen Peinlichen Rechts*, Giessen 1840[13], nonché in C.J.A. Mittermaier, *Intorno ai progressi della letteratura giuridica, e sullo stato dello studio del diritto in Italia*, in «Annali Universali di statistica, economia pubblica, storia, viaggi e commercio», 71/1842, p. 154. Il giurista tedesco aveva inoltre visitato il Manicomio di Aversa sotto la direzione di Miraglia, per cui cfr. Id., *Delle condizioni d'Italia*, Lipsia-Milano-Vienna 1845, pp. 144-149, e B.G. Miraglia, *Sulla procedura nei giudizi criminali e civili per riconoscere l'alienazione mentale*, Napoli 1870, pp. 7-8.

[263] A.J.F. Brierre de Bismont, *Mittermaier. La peine de mort – Les aliénés dans les prisons et devant les tribunaux*, in «Annales médico-psychologiques», 26/1868, p. 374.

rende possibile l'intimo e libero convincimento del giudice. Quanto alla monomania, è convinto che le maggiori difficoltà riguardino proprio «l'esatto giudizio della *mania*, quando essa si manifesta sotto una forma, che spinge irresistibilmente a certi atti, senza alterare la vita psichica, e senza togliere la coscienza»[264]. Mittermaier distingue così la monomania istintiva dalla malvagia inclinazione, la cui «irresistibilità non appare che qual conseguenza d'una colpa»[265], ed è tra i primi a tentare una sistematizzazione giuridica di questa patologia attraverso l'enunciazione di alcuni principî: 1) la mania dipende dalle disposizioni del sistema nervoso; 2) la monomania è uno stato che non mostra «sconcerto apparente nelle facoltà mentali» e al contrario «lucidezza della coscienza»; 3) il carattere principale della monomania è «la mancanza di libera spontaneità»; 4) le definizioni di *moral insanity* e di *monomanie homicide* sono passibili di fraintendimento e devono essere abbandonate; 5) la monomania esclude l'imputabilità se «è dimostrata la mancanza di un qualunque motivo egoistico»; 6) il principio legislativo più importante riguardo all'imputazione è quello di adottare «espressioni le più late» per non impedire ai giudici e ai periti di «vantaggiarsi de' progressi della scienza e della esperienza»[266].

Una posizione affine a quella di Mittermaier è sostenuta in Italia dal giurista pisano Giovanni Carmignani, le cui riflessioni subiscono tuttavia nel tempo un'importante evoluzione. Nei suoi *Elementa juris criminalis* l'intenzione di delinquere è presentata come suscettibile di avere carattere morale e politico, ciò che rende necessaria la sua valutazione in rapporto sia alla moralità dell'atto e al grado di libertà morale dell'agente, sia al danno sociale prodotto. Quanto all'alienazione, Carmignani la comprende nel quadro delle *cause fisiche e intrinseche* che diminuiscono l'imputabilità dell'agente in relazione alle facoltà intellettive: sulla scorta di Cabanis[267] non distingue tra il fisico e il morale e non riconosce all'alienazione lo statuto di affezione della volontà, caratterizzandola come una «*preternaturale* alterazione delle fibre del cervello» che produce un proporzionale alterazione nella sfera intellettiva, per cui «chi ne è affetto, ignora totalmente la connessione delle cose»[268]. Solo la medicina e la fisiologia possono determinare l'influenza delle diverse specie di alienazione sulla moralità dell'azione.

Con riguardo alle cause che diminuiscono la libertà del volere ma non l'imputabilità, ossia le cattive abitudini che pervertono l'animo e generano l'attrazione per il

[264] C.J.A. Mittermaier, *Sulla condizione ed efficacia dei periti nel procedimento penale*, in «L'eco dei tribunali», 411/1854, p. 59.

[265] Ivi, p. 35.

[266] Ivi, pp. 35-37. Ne segue l'esempio in Italia L.G.A. Cibrario, *Opuscoli*, Torino, 1841, pp. 136-139.

[267] P.J.G. Cabanis, *Rapports sur le physique et le moral de l'homme*, Paris 1802, p. 142. Carmignani richiama anche Ph. Pinel, *Observations sur les aliénés et leur division en espèces distinctes*, in «Mémoires de la Société médicale d'émulation», t. III, 1799, p. 1ss.

[268] G. Carmignani, *Elementi del diritto criminale* (1808), prima versione italiana a cura di G. Dingli, Napoli 1854, pp. 53 e 57-58.

male, Carmignani richiama invece Gall e Voisin, ma a titolo meramente informativo e con una prudenza che non lascia intendere una sua adesione[269]. Si chiede infatti se le cause della delinquenza possano essere ravvisate in una predisposizione degli organi del cervello, e sembra disposto ad accettare che l'abitudine a delinquere possa avere alla base una disposizione fisiologica che spiegherebbe la turpitudine dell'agente, senza tuttavia mai esprimersi in modo esplicito sull'argomento.

Nella *Teoria delle leggi della sicurezza sociale* il giurista rivede però la propria posizione. Ferma restando la difficoltà del giudizio, prende atto della possibilità che le «contradizioni della natura» giungano «al segno di presentare nello stesso individuo, e nell'azione medesima la ragione, e la fatuità: la calma dell'animo, ed il furore del corpo: l'impero dell'intelletto, e l'insubordinato carattere delle facoltà *affettive* dell'uomo»[270]. E dopo aver richiamato i lavori di Ferrarese, nonché il caso Léger, discusso da Georget, sostiene che nella distinzione tra sfera intellettiva e sfera affettiva risieda il criterio in base a cui giudicare i casi di mania senza delirio, ai quali applica la definizione di *mania sine delirio* offerta da Mittermaier nella sua *Disquisitio*[271]. È ad ogni modo sua opinione che la medicina legale rappresenti un ausilio necessario tanto al giudizio della polizia che a quello della giurisprudenza penale, e che spetti al giudizio medico chiarire gli oggetti che «debbon passare al giudizio del dritto»[272].

Un'ultima figura sulla quale riteniamo importante soffermarci è quella di Enrico Pessina, autore di opere giuridiche di grande respiro filosofico, e tra queste della raffinata seconda traduzione italiana del *Trattato* di Rossi, che cura con interessanti note. Il giurista, non proprio correttamente, attribuisce la paternità della frenologia alla negazione della libertà del volere[273], e invoca un'alleanza non cedevole con il naturalismo, rivendicando di non riconoscere validità al «tribunale materialistico» e di volerlo sul campo giuridico come alleato e non conquistatore[274].

Ciò nondimeno, una relativa apertura della giurisprudenza alle scienze umane si ritrova nella sua interpretazione dell'art. 61 delle Leggi penali del Regno delle due Sicilie, che, fatta eccezione per il rinvio al furore, era ricalcato sull'art. 64 del Code

[269] Cfr. ivi, p. 67: «Non è guari si è esaminato se le cause di delinquere possano essere attribuite a qualche predisposizione di organi nel cervello; ciò che i seguaci di Gall han preteso di poter pienamente accertare per via della ispezione del cranio, detta *Cranoscopia*, *Cranologica*, o *Frenologia*; e la cosa si è tant'oltre spinte che Voisin tentò a quest'oggetto più sperimenti nei condannati ai pubblici lavori. Vi ha poi chi reputa la dottrina di Gall aneddotica che fisiologica».

[270] Id., *Teoria delle leggi della sicurezza sociale*, t. II, Pisa 1831, p. 138.

[271] Ivi, p. 188, dove Carmignani scrive anche di essere stato consultato sulla questione della mania senza delirio proprio dal giurista tedesco. Carmignani discute della mania senza delirio, rifacendosi stavolta a Pinel, anche in Id., *Cause celebri*, vol. I, Pisa 1843, pp. 428-430.

[272] Id., *Teoria delle leggi della sicurezza sociale*, t. I, Pisa 1831, p. 307.

[273] E. Pessina, *Il libero volere. Prolusione al corso di diritto penale*, letta nella Regia Università di Napoli il 20 dicembre 1875, Napoli 1876, p. 7.

[274] Id., *Il naturalismo e le scienze giuridiche: discorso inaugurale*, letto nella Regia Università di Napoli il 17 dicembre 1878, Napoli 1879, p. 6.

pénale del 1810, recitando: «Non vi è reato quando colui che l'ha commesso era nello stato di demenza o furore nel tempo in cui l'azione fu eseguita». Rispetto a questo articolo, dunque, Pessina riesce a introdurre tra le cause di imputabilità anche le nuove forme di follia individuate dall'alienismo, sostenendo che con le nozioni di demenza e furore il legislatore non ha inteso esprimere *a priori* «i soli casi della demenza nello stretto significato di mania e del furore o mania violenta»[275]. Sette anni più tardi, negli *Elementi*, il giurista esprime però una diversa valutazione, scrivendo che se il codice francese offriva l'esempio di come un legislatore dovesse limitarsi a fissare un principio generale, consentendo così di intendere «per demenza qualsiasi condizione che ingeneri privazione di mente»[276], il codice napoletano, pur riproducendo il principio di quello francese, «ne alterò il rigore logico per avere aggiunto alla formola generale della demenza il caso speciale del furore»[277].

Per quanto riguarda invece la classificazione della follia, per Pessina «l'antropologia psichica» contempla tre forme generali dello stato di anormalità patologica dell'intelletto caratterizzate dall'incapacità per il soggetto di essere causa morale delle proprie azioni: l'imbecillità, la mania o demenza e il furore. Per questa ragione è opportuno «porre come principio la presunzione giuridica che queste tre infermità dello spirito rendono incolpabile l'uomo, lasciando al giudice di fatto il verificare per mezzo di uomini periti di tale branca di cognizione e specialmente mercé l'avviso di coloro che coltivano la scienza frenologica il disaminare se sussista o meno la demenza»[278]. Pur tuttavia, il giurista apre alla nozione di monomania, riconoscendo comunque che è di difficile accertamento, essendo l'individuo in pieno possesso delle proprie facoltà intellettive. L'essenza della monomania, afferma, «consiste in ciò per appunto che si riferisca ad un obbietto ideale determinato il quale occupa di tanto lo spirito da fargli perdere la signoria di se stesso, da farlo operare come macchina pura»[279], con riferimento evidentemente alla mania parziale con delirio, mentre sembra riferirsi alla monomania istintiva quando osserva che nello stato monomaniaco gli atti «sono eseguiti senza coscienza di ciò che si opera a guisa di un bruto che istintivamente tende a quello cui è dirizzata la sua natura senza rendersi conto de' suoi propri movimenti»[280].

Pessina non arriva però al punto di convalidare l'esito della progressiva autonomizzazione della sfera delle deviazioni delle tendenze e delle patologie della volontà, ossia la negazione della libertà del volere, e sarà anzi un oppositore, insieme

[275] Id., *Trattati elementari sul diritto penale delle due Sicilie*, vol. 2, Napoli 1858, p. 86.

[276] Id., *Elementi di diritto penale* (1865), Napoli 1871², vol. I, p. 199. Si tratta di un principio piuttosto riconosciuto in Francia fin dai primi dell'Ottocento, tanto dagli alienisti quanto da molti giuristi (cfr. L. Guignard, *op. cit.*, pp. 67-96). La tesi di Pessina è in particolar modo prossima a quella sostenuta da A. Chauveau, F. Hélie, *op. cit.*, p. 239.

[277] E. Pessina, *Elementi di diritto penale*, cit., p. 199.

[278] Id., *Trattati elementari sul diritto penale delle due Sicilie*, cit., p. 76.

[279] Ivi, p. 77.

[280] Ivi, p. 78.

a Carrara, di Lombroso. Ciò nella convinzione che il crimine non possa essere considerato come un qualcosa di naturale e necessario in alcuni individui, come una fatalità che negherebbe con la sua sola esistenza la legittimità del diritto penale (non potendosi punire un atto necessitato)[281] e dalla quale quindi la società avrebbe solo il compito di difendersi preventivamente.

10. CONCLUSIONI

Come si è detto, tra il XVIII e il XIX secolo il motivo beccariano del divieto dell'indagine dell'interiorità dei cuori è enunciato pressoché da tutti (Bentham, Gall, Rossi, etc.), eppure tutti al tempo stesso non rinunciano ad individualizzare. Se questa enunciazione rappresenta la denegazione del soggetto psico-fisiologico-morale punito per ciò che è al di sotto del soggetto di diritto punito per ciò che fa, è perché tra il XVIII e il XIX secolo la conoscenza dell'interiorità del soggetto a partire dalla questione dell'imputabilità e della graduazione della pena diventa una questione trasversale a vari quadri teorici relativamente sovrapponibili. Il criminale appare così non solo come un trasgressore della legge, ma anche come un soggetto caratterizzato da una forma di deviazione psicologico-morale o fisiologica.

Si è visto che per molti giuristi la perversione delle facoltà affettive, le malattie della volontà in assenza di delirio erano equiparabili a una mera perversità morale volontaria. Contestualmente i frenologi, attraverso una strategia tendente a distinguere delinquenza e alienazione, provano anche a medicalizzare questa perversità, pur responsabilizzandola sulla base delle modulazioni fisiologiche della libertà di volere, ciò che non sarà del tutto d'aiuto alla causa alienista. Tale linea, che fa perno su quelle che Miraglia definiva agitazioni dell'uomo sano, conduce a un certo punto a una sorta di sovrapposizione tra argomenti medici e argomenti giuridici, almeno per quei medici, come Ferrarese, che equiparano i processi psicologici e organici di crimine e follia, coerentemente, a loro avviso, al tentativo di tanti giuristi, sia utilitaristi che spiritualisti, di fondare il giudizio penale sulla moralità dell'agente – giuristi che avrebbero però dovuto fondare la loro pratica sulle determinazioni delle scienze umane, o meglio, legittimare il potere d'intervento medico sulla scena giudiziaria.

Ma tale linea non si affermerà, e medici come Ferrarese e Miraglia si rivelano ancora troppo legati alle posizioni di Gall, Esquirol e Georget per ampliare l'orizzonte dell'impresa psichiatrica, la quale tuttavia supererà presto questa fase di compromesso medico-legale proprio grazie alle problematiche evidenziate dai giuristi.

Abbiamo ricordato come a partire dalle critiche rivolte alla giurisprudenza dalla frenologia e dall'alienismo i giuristi abbiano in parte aperto a un'antropologizzazione del giuridico, e al contempo variamente contestato l'ipotesi delle patologie

[281] Cfr. Id., *Il libero volere*, cit., pp. 10-12.

della volontà. Ebbene, come ha mostrato Foucault, tali contestazioni saranno prese in considerazione proprio da quella psichiatria che criticherà l'alienismo per rifondarsi, disalienizzandosi[282], e per estendere il dominio del patologico alla sfera dell'anormalità. L'analisi di Doron è al riguardo esemplare: le critiche di Jean-Pierre Falret e di Bénédict Augustin Morel si appoggiano a quelle dei giuristi, ma non allo scopo di riconoscere alla sfera giuridica l'ambito delle perversioni morali o di negare la follia dei comportamenti, quanto piuttosto per meglio fondare la pratica psichiatrica e passare da un'analisi degli atti aberranti al riconoscimento di una perversione delle tendenze soggiacente come tratto costitutivo del soggetto[283].

Quando Falret nega la validità alla monomania, sostiene espressamente che questa categoria «rend impossible toute ligne de démarcation rigoureuse entre la passion et la folie»[284] e che è proprio la difficoltà dei giudici ad ammettere una lesione «aussi restreinte de l'esprit humain» a fare sì che essi condannino «le plus souvent le malheureux aliéné que les médecins lui dépeignent comme un monomane». Il medico deve individuare il disturbo «en dehors de l'acte incriminé», sull'insieme «des symptômes et sur la marche de la maladie»[285]. Appoggiandosi a Falret, Morel afferma che è impossibile separare gli atti degli alienati da uno stato di delirio, che la stessa nozione di follia senza delirio è infelice e che ad essa va sostituita la nozione di «manie istinctive», forma di follia delirante *tout court*: il disturbo insomma, diversamente da quanto ritenevano gli alienisti, fa segno verso una malattia che non è slegata dalla personalità. Il problema di Morel è infatti proprio quello di ridefinire il delirio, e la sua soluzione è di farlo sulla base della degenerazione[286]. Le lesioni della volontà, degli istinti, dei sentimenti sono contestabili se considerate astrattamente dalla «synergie de la puissance intellectuelle»[287]. Definire il delirio come ciò che impedisce la normale associazione delle idee porta a escludere che i monomaniaci delirino, a meno che non si comprendano nello stato normale dell'intelligenza e dei sentimenti anche l'impossibilità di tendere verso uno scopo normale di attività, la tendenza irresistibile a fare il male, la perversione precoce che non si lascia influenzare da alcun elemento di ordine intellettuale. L'alienazione dei «monomaniaci istintivi», formula di compromesso impiegata da Morel, si può dunque riconoscere attraverso l'ereditarietà, «dans les fibres le plus intimes de leur organisation

[282] M. Foucault, *Gli anormali. Corso al Collège de France (1974-1975)*, cit., pp. 127-150.

[283] C.-O. Doron, *La formation du concept psychiatrique de perversion au XIX^e siècle en France*, cit., p. 48.

[284] J.P. Falret, *De la non-existence de la monomanie* (1854), in Id., *Des maladies mentales et des asiles d'aliénés*, Paris 1864, p. 446. Falret aggiunge che la dottrina di Esquirol e Marc costringe il medico a uscire dal suo ruolo e a indossare i panni dell'avvocato, deducendo la follia da considerazioni relative al comportamento che si rivelano insufficienti al fine di distinguere tra la passione e la follia. Cfr. ivi, p. 447.

[285] Ivi, pp. 447-448.

[286] Cfr. B.A. Morel, *Considérations médico-légales sur un imbécile érotique convaincu de profanation de cadavres. Lettres à M. le Docteur Bédor*, Paris 1857, p. 35.

[287] Ivi, p. 34.

physique»[288]. Il rinvio – beninteso – non è alla frenologia, cui già da anni Jules Gabriel François Baillarger[289] aveva contestato quella partizione tra sfera intellettiva e sfera affettiva incorporata dall'alienismo stesso, affermando l'unitarietà del sistema nervoso. A quest'altezza, peraltro, la cranioscopia risulta già totalmente screditata, colpita da critiche che denunciavano l'assenza di una corrispondenza sistematica tra la forma del cranio e quella del cervello[290], così che per Morel la cattiva conformazione del cranio non costituisce che uno dei tanti indici di degenerazione (rachitismo, deviazioni della sensibilità, cachessia, irascibilità, etc.). Anche i casi che Gall addebitava a una perversità congenita punibile iscritta nella corporeità vengono ora deresponsabilizzati per essere rubricati nel quadro della patologia. Quanto all'assenza dei motivi d'interesse, delle ragioni di delinquere, Morel sostiene che essa non è sempre la prova di un'alienazione, ma solo un indizio di aberrazione delle facoltà intellettuali o di perversione morale[291], e che le teorie della monomania in precedenza elaborate non sono in grado di «apporter dans l'esprit des magistrats des preuves suffisantes de non-responsabilité dans les actes»: «Ce n'est pas, en effet, la nature de l'acte qui doit déterminer la variété maladive à laquelle appartient l'individu inculpé; mais c'est dans la nature même de la maladie, et dans l'examen de l'action que cette maladie exerce sur la libre manifestation de l'intelligence et des sentiments, que le médecin doit chercher les motifs qui lui font supposer que le prévenu est ou un aliéné ou un coupable»[292]. Lo psichiatra è pertanto chiamato a stabilire l'alienazione valutando l'attualità dello stato morboso dell'individuo, i fenomeni di ordine morale e intellettuale generati dall'eredità, nonché l'elemento storico, che può insegnare in quali circostanze della storia umana si sono prodotti fatti simili[293]. Morel compie insomma un passaggio dalla patologizzazione di un atto criminale ricondotto a una tendenza irresistibile all'individuazione di una malattia al di fuori dell'atto incriminato, rintracciabile però non tanto nel cervello o nel cranio, ma nell'intera storia biologica dell'alienato: una follia di tipo ereditario, una cattiva volontà profonda e biologicamente trasmissibile. È una tesi ormai classica di Foucault: la psichiatria, nata per sottrarre il folle alla giustizia, giunge così, riscrivendosi a partire dalle nozioni di *istinto*, *degenerazione*, *ereditarietà* – che diventano progressivamente il campo di riferimento comune di tutte le condotte (dall'autoerotismo infantile all'omicidio) – a diagnosticare non più solo i crimini mostruosi, bensì

[288] Ivi, p. 38.

[289] J.G.F.B. Baillarger, *Recherches sur l'anatomie, la physiologie et la pathologie du systéme nerveux* (1847), Paris 1872, p. 385. Cfr. al riguardo M. Foucault, *Gli anormali*, cit., pp. 144-145.

[290] Cfr. M. Renneville, *Crime et folie*, cit., pp. 83-84.

[291] Cfr. B.A. Morel, *op. cit.*, p. 43.

[292] Ivi, pp. 44-45.

[293] Cfr. ivi, p. 46.

tutto il campo dell'anormalità[294]. Si apre in tal modo una nuova strada per iscrivere il crimine nel desiderio del soggetto: la società diventa il laboratorio dell'alienista[295].

In Italia, ad esempio, è Carlo Livi a far proprie le obiezioni giuridiche alla monomania istintiva, accusando gli alienisti di aver abusato della scienza medica con i loro ragionamenti intorno agli atti senza motivo[296]. Livi continua, è vero, a definire la monomania istintiva come una «lesione», un «pervertimento» o una «malattia della volontà»[297], ma la desume dall'ereditarietà e non più dall'atto senza ragione, né dal cervello; d'altro canto riconosce alla cranioscopia un grado di scientificità appena superiore a quello della chiromanzia e assegna alla misurazione delle anomalie craniche in sede processuale un ruolo esclusivamente di appoggio rispetto ai più 'affidabili' strumenti diagnostici fondati sulla patologia[298].

In sintesi, l'alternativa tra il crimine e la follia, tra la colpa e la patologia non si pone più, poiché ogni cattivo comportamento è suscettibile di richiedere l'intervento medico. Con l'alienismo, le anomalie del comportamento caratterizzanti la biografia del soggetto non valevano di per sé e dovevano necessariamente fare segno verso la follia o verso la cattiveria colpevole. Con la frenologia, la cui specificità era tuttavia quella di essere autonoma rispetto a una clinica del comportamento, potevano comunque in aggiunta far segno verso l'agitazione organica non costituente malattia e punibile, di modo che la cattiveria potesse sempre essere medicalizzabile anche al di fuori di un quadro patologico. Con la teoria della degenerazione le anomalie comportamentali possono invece essere prese in esame dalla psichiatria in quanto tali, senza necessariamente far segno verso il crimine (piacere di fare il male) o la follia (con o senza delirio), perché sono di per sé stesse sintomo di uno stato patologico[299].

Tornando alla frenologia, si può certamente affermare che le tesi di Gall, Spurzheim, Ferrarese o Miraglia, distinguendo i gradi di colpevolezza interiore rispetto a un'identità di colpevolezza giuridica per un dato crimine, inaugurano un dispositivo di pensiero in grado non solo di considerare il crimine come un fenomeno leggibile attraverso la fisiologia del cervello, ma altresì di sganciare l'agente dall'atto, riconoscendo la criminalità dell'agente (colpevolezza interiore) anche in assenza della criminalità giuridica dell'atto (colpevolezza esteriore), analogamente a quanto sarà sostenuto dalla criminologia. Certamente la frenologia è la prima teoria a offrire una spiegazione della criminalità sotto un profilo biologico, nella misura in cui mira a

[294] Cfr. M. Foucault, *Gli anormali*, cit., pp. 260-284.

[295] M. Renneville, *Crime et folie*, cit., p. 152.

[296] C. Livi, *Frenologia Forense ovvero delle frenopatie considerate relativamente alla medicina legale*, Milano 1863-1868, pp. 45-55.

[297] Cfr. ivi, p. 36, nonché Id., *Della monomania in relazione col foro criminale*, Reggio Emilia 1877, p. 18.

[298] Cfr. Id., *Frenologia Forense*, pp. 143-144 e 279-280. Al riguardo cfr. M. Starnini, *L'uomo tutto intero. Biografia di Carlo Livi, psichiatra dell'Ottocento*, Firenze University Press, Firenze 2018.

[299] Cfr. M. Foucault, *Gli anormali*, cit., p. 136.

individuare le disposizioni della mente criminale attraverso le stigmate corporee, e in tal senso essa anticipa l'antropologia criminale con la sua nozione di temibilità o pericolosità, le teorie scientifiche delle razze e della difesa della società. Fermo restando, però, che Gall invoca nella maggior parte dei casi una specifica responsabilizzazione e punibilità del soggetto per le involontarietà che lo agitano, e che non riconosce nello sviluppo eccessivo di un organo o nella sua degenerazione a uno stadio anteriore una testimonianza della sopravvivenza nella specie di istinti primitivi, come sarà per Lombroso[300], né propone infine lo smantellamento del sistema penale, auspicando piuttosto la sua medicalizzazione.

Con questa riflessione, speriamo di aver evidenziato, anche solo in minima parte, l'interesse teorico del dibattito tra frenologi, alienisti e giuristi per una riflessione sulla nascita del rapporto tra diritto e scienze umane, e più in generale sul nostro sistema medico-legale. E proprio quest'ultimo – ci sembra – richiede un'ultima considerazione.

Si è detto che Miraglia riteneva che senza le perizie mediche il giudizio del magistrato sarebbe stato mosso dalla mera emozione, modo elegante per fare del magistrato un medico e, nel caso rifiutasse di utilizzarle, per considerarlo alla stregua di un ignorante (nei casi di crimini lievi) o di un boia (nei casi di crimini gravi). Sul fronte opposto, qualche anno prima Rossi scriveva che, fin quando i medici avessero proposto risultati tutti diversi e tutti egualmente fondati sull'osservazione, la perizia sarebbe rimasta uno strumento incerto e precario, ciò che consigliava di rimettersi al giudice e al senso comune. Forse, però, il problema non è esattamente quello posto dalle alternative di Miraglia e Rossi. Innanzitutto perché, al livello di principio, anche Rossi accettava implicitamente che, qualora i risultati fossero stati omogenei – eventualità peraltro impossibile scientificamente – l'antropologia potesse sostituirsi al giuridico. E in secondo luogo perché le scienze umane, nonostante la loro incertezza scientifica, hanno avuto comunque l'effetto di trasformare la razionalità giuridica in una razionalità medico-legale epistemologicamente antinomica, in un groviglio difficile da contestare che fa del criminale contemporaneamente un trasgressore della legge, un malato da curare, un individuo da correggere, etc., ma tuttavia funzionante in un dispositivo pratico che ha modificato il senso comune e l'esperienza giuridica.

Sicuramente le prospettive frenologiche e antropologiche hanno normalizzato (o naturalizzato), attraverso il discorso scientifico, le categorie normative costruite dal diritto, nonché la devianza, facendola ricadere sempre sulle stesse categorie sociali[301]. Ma si può anche rilevare che il discorso delle scienze umane ha utilizzato il

[300] Cfr. C. Lombroso, *L'uomo delinquente studiato in rapporto all'antropologia, alla medicina legale ed alle discipline carcerarie*, Hoepli, Milano 1876.

[301] Cfr. M. Renneville, *Les théories biologiques de la criminalité*, in «Histoire de la médecine et des sciences», 11/1995, p. 1723.

processo come luogo a un tempo simbolico ed effettivo per naturalizzare le proprie classificazioni e, conseguentemente, l'ordine normativo prodotto dai dispositivi di potere che costituiscono la loro condizione storica di possibilità.

La dottrina giuridica non ha sempre messo a fuoco con chiarezza questi problemi, molto prossimi peraltro a quelli posti oggi dalle neuroscienze o dalla genetica molecolare, nella misura in cui la localizzazione delle aree cerebrali e l'illusione di poter determinare l'anormalità o il disfunzionamento a partire dallo sviluppo abnorme degli organi o dalle loro lesioni trovano un corrispettivo nell'anatomia cerebrale attraverso le tecniche di *neuroimaging*.

Tornare ad affrontare lo studio della frenologia e dell'antropologizzazione della giustizia, però, non sottende affatto la convinzione che il rapporto istituito dai frenologi tra cervello e cranio sia alla base delle ricerche neuroscientifiche attuali – benché non manchino neuroscienziati che rivendicano una neofrenologia – ma è semplicemente funzionale a comprendere, mediante l'analisi delle loro differenze, lo spazio epistemologico e politico in cui viviamo. E non si tratta neanche di contestare il determinismo, perché tanto la frenologia, quanto le odierne neuroscienze o la genetica comportamentale non si pensano come deterministiche, bensì piuttosto come probabilistiche – salvo poi effettuare, nelle loro applicazioni giudiziarie, diagnosi di malattia mentale e attribuire il comportamento ai geni e all'educazione. Non si darebbe ragione di quello che hanno pensato i frenologi se si dicesse che erano dei deterministi incalliti. Sebbene riconoscessero delle forme di incorreggibilità, essi credevano infatti nella libertà morale fisiologicamente intesa e nello sforzo di perfezionamento dell'animale umano. Al di là dei casi di lesione originaria degli organi cerebrali, interpretavano l'anormalità del cervello e del cranio come indice di una cattiva educazione o di un cattivo ambiente, nella convinzione, da un lato, che il difetto organico rendesse l'individuo vulnerabile rispetto alle circostanze esterne, e dall'altro che l'ambiente e l'educazione influissero sullo sviluppo e sul funzionamento del cervello. E pur a partire da un orizzonte epistemologico completamente diverso, i termini del problema odierno sono prossimi a questi, come è vero che l'individuazione del gene difettoso o del cervello guasto fa oggi segno verso l'anormalità ambientale e culturale.

Tanto la frenologia quanto la neuroscienza e la genetica comportamentale vanno allora certamente prese sul serio – come si dice spesso di maniera, salvo poi non farlo o allontanarsene – per analizzarne le forme di classificazione e le condizioni storiche e politiche di possibilità, il modo in cui ridefiniscono la soggettività e intendono agire su di essa e il modo in cui sono funzionali a una certa organizzazione della società. Ma vanno prese sul serio anche quando svolgono discorsi palesemente ridicoli ed epistemologicamente fragili. Non è uno scandalo affermare che anche la neuroscienza e la genetica molecolare, concependo la violenza come un problema di ordine medico, in linea con una medicina che valorizza l'adattamento

all'ambiente e che pensa sé stessa in termini di governo della popolazione[302], si pongono e si autolegittimano come agenzie autonome di governo o come consulenti di governo ai fini della protezione della società.

Con buona pace di Hegel la frenologia, benché screditata, rientra tra le forze sociali ed epistemologiche che hanno ridefinito la nostra morale effettiva. Oggi le scansioni delle aree del cervello o i geni, come le ossa, continuano a non avere la parola, ma nondimeno la loro popolarizzazione determinata dall'alto induce una ridefinizione del senso comune funzionale alla naturalizzazione e alla medicalizzazione del crimine e di tutti i comportamenti non criminali devianti. Il sogno frenologico è ancora vivo nell'immaginario psichiatrico odierno, che non si interroga sul fatto che la norma cui parametrare i comportamenti cattivi dovuti a un certo corredo genetico o a un *broken brain* è in ultima analisi sempre storico-sociale, politica in senso ampio. D'altronde, il passaggio all'atto confermerà sempre, *a posteriori*, la reclusione o la correzione e la prevenzione farmacologica.

[302] Il citato lavoro di Raine (cfr. *supra*, n. 1) si legittima anche sulla base di uno studio dell'OMS in cui si sostiene l'esistenza di un'epidemia di violenza a livello globale. Cfr. L.L. Dahlberg - E.G. Krug, *Violence: A global public health problem*, in AA.VV. (eds.), *World report on violence and health*, World Health Organization, Geneva, 2002, pp. 3-21.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 703-727
ISSN: 1825-5167

A NEO-REPUBLICAN CRITIQUE OF HARD LIBERTARIANISM

ROBERT DONOGHUE
Department of Social and Policy Sciences
University of Bath
r.donoghue@bath.ac.uk

ABSTRACT
This paper argues that hard libertarianism is not a social philosophy guided by the 'presumption of liberty'. Instead, hard libertarianism is more appropriately conceived of as a 'property-rights-based theory of justice'. Moreover, libertarians maintain that institutionalizing their avowed theory of justice will sufficiently secure individual liberty. This too is inaccurate: for it will be shown that libertarian theory overlooks relevant social threats to the freedom of persons. The classical understanding of liberty holds that one's freedom is compromised when their will is subordinated to the will of an arbitrary power. As we will see, libertarianism shows concern for only one mechanism by which arbitrary powers can subordinate the will of others to their own: aggression. However, I will show that there exist other significant mechanisms beyond aggression by which people can see their will subordinated to an arbitrary power. In what follows, I offer the mechanism of 'dependency exploitation' as one such example. Thus, a theory of justice focused exclusively on preventing aggression – as libertarianism does – fails to adequately address other meaningful mechanisms of will-subordination. Alternative political theories committed to the presumption of liberty – such as neo-republicanism – takes seriously the problem of dependency exploitation (in addition to aggression), and therefore offer a more compelling social philosophy for freedom lovers.

KEYWORDS
Libertarianism, Republicanism, Non-Aggression, Non-Domination, Nozick, Pettit

Libertarianism is often presented by its advocates as a social philosophy defined by the 'presumption of liberty'.[1] In the words of libertarian theorist Eric Mack, "Libertarianism is advocacy of individual liberty as the fundamental political norm."[2] In what follows, I will argue that this proposition constitutes an unwarranted description of libertarian social philosophy by showing that libertarians are not interested in the primacy

[1] David Boaz, *The Libertarian Mind: A Manifesto for Freedom* (New York: Simon and Schuster, 2015).

[2] Eric Mack, *Libertarianism* (Cambridge: Polity, 2018).

of freedom as such. Instead, their most salient concern is the preservation of a particular rights-based view of justice – and contrary to their assertions, a pursuit of justice with harmful consequences for individual liberty.[3] However, before the central thesis of this paper can be directly advanced, a key admission is worth stating: libertarianism is not a monolithic tradition by any means. Like all social philosophies it boasts a large family comprised of related but markedly different members. Unfortunately, it is not feasible within this limited space to consider the specific arguments associated with all of the philosophical branches that diverge from the 'essential commitments' of libertarianism.

Thus, as a matter of fairness, we must be clear as to which specific expression of libertarianism the central argument is responding. Libertarian philosopher Jason Brennan offers a typology that sorts the libertarian family into three, generally distinct groupings: 'classical liberals', 'hard libertarians', and the 'neoclassical liberals' (Brennan personally identifies with the last group).[4] Due to concerns of space, we cannot explore their significant and important differences here. Rather, the purpose is simply to note that this article focuses on only one of these groupings, namely, hard libertarianism: a strand often demarcated by its affinity for inviolable natural rights and attributed to thinkers like Robert Nozick, Murray Rothbard, Ayn Rand, among others.

1. HARD LIBERTARIANISM: FREEDOM AS NON-AGGRESSION

'Hard libertarianism' isolates what may fairly be called the deontologically-oriented approach within the libertarian tradition. Unlike classical liberalism – or what Norman Barry calls 'consequential libertarianism' – hard libertarianism is anchored by the central thesis that individuals have fundamental rights (and correlative duties) irrespective of what consequences may result from strict adherence to them; and unlike neoclassical liberalism, this strand denies the moral necessity of any communal commitment such as the promotion of 'social justice' (understood in Rawlsian terms).[5] Thus, the core proposition of hard libertarianism is perhaps best expressed in the preface of Robert Nozick's *Anarchy, State, and Utopia*: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."[6]

[3] Gerald Gauss, "The Diversity of Comprehensive Liberalisms," in *Handbook of Political Theory*, ed. Gerald Gauss and Chandran Kukathas (London: Sage Publications, 2004). See pp. 109.

[4] Jason Brennan, *Libertarianism: What Everyone Needs to Know* (Oxford: Oxford University Press, 2012).

[5] Norman P. Barry, "The New Liberalism," *British Journal of Political Science* 13, no. 1 (1983): 93–123; Michael F. Reber, "Distributive Justice and Free Market Economics: A Eudaimonistic Perspective," *Libertarian Papers* 2, no. 1 (2010).

[6] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 2013).

Whilst hard libertarians generally share in a subscription to the central thesis that individuals have inviolable natural (pre-social) rights, there are a number of different ways in which this core assertion is defended. Perhaps the strongest argument(s) for inviolable natural rights comes in the work of Robert Nozick. Nozick sketches out a compelling, albeit incomplete, case for such rights – and the thesis of self-ownership more generally – by appealing to the Kantian notion of human dignity. In so doing, he diverges with the precedent set by John Locke of upholding natural law as the foundation for individual rights – a practice continued by Murray Rothbard, another leading light of hard libertarianism.[7]

In taking up the Kantian line, Nozick argues that, in our interactions with others, we must not overlook that each person constitutes, "a being able to formulate long-term plans for its life, able to consider and decide on the basis of abstract principles or considerations it formulates to itself."[8] Apparently, unlike other organisms in the universe, human beings possess the (unique) capacity to modulate their behavior, "...in accordance with some principles or picture [she] has of what an appropriate life is for [herself] and others, and so on."[9] This capacity for people to live a 'self-shaping life' – or what others have dubbed our capacity to execute a 'rational life plan' – is the source of our inherent dignity that ought to be respected by others.[10] In short, because each person is able to organize their choices, actions, and beliefs according to a worldview of their own construction, to interfere in the 'self-shaping' process of others is to treat them as a means and violate their status as ends-in-themselves. Nozick therefore concludes that, "if individuals are inviolable ends-in-themselves" and we are to respect that fact about others, "it follows... that they have certain *rights*, in particular rights to their lives, liberty, and the fruits of their labor."[11]

The 'central thesis' of hard libertarianism, that individuals have inviolable natural rights, ultimately entails that individual freedom is a condition demarcated by the absence of force (i.e. physical violence). For Nozick specifically, the elimination of aggression as *the* imperative for securing individual liberty starts with his claim that a person's rights ought to function as 'side constraints' on the actions of others (in relation to the rights-bearer). Nozick clarifies that there are two possible ways of thinking about how rights could regulate social interaction. On the one hand, rights may be valuable

[7] Murray N. Rothbard, *The Ethics of Liberty* (New York: NYU Press, 2015).

[8] Nozick, *Anarchy, State, and Utopia*, 49.

[9] Nozick, *Anarchy, State, and Utopia*, 49.

[10] Leslie P Francis and John G Francis, "Nozick's Theory of Rights: A Critical Assessment," *Western Political Quarterly* 29, no. 4 (December 1, 1976): 634–44 ; See chapter two: Jonathan Wolff, *Robert Nozick: Property, Justice, and the Minimal State* (Cambridge: Polity Press, 1991).

[11] Edward Feser, "Nozick, Robert," in *Internet Encyclopedia of Philosophy*, accessed April 30, 2019, https://www.iep.utm.edu/nozick/#H2.

because they bring about some greater goal or 'end state' *G*. For instance, the right against being murdered could be justified on the utilitarian grounds that it would raise aggregate (or average) happiness, as no one would need to constantly worry about the possibility of being murdered. But, Nozick points out, this kind of justification for rights could lead to a 'utilitarianism of rights', where a situation might arise that, "would require us to violate someone's rights [because] doing so minimizes the total amount of the violation of rights in society."[12]

An alternative view, and the one advocated for by Nozick, holds that the rights of another cannot be violated, under any circumstances, even if it would yield less rights violations in the future. Recall that the first approach to rights, "tries to build the side constraints *C* into goal *G*" – that is, the right not to be murdered (*C*) is a function of wanting to increase aggregate happiness (*G*).[13] This second approach instead conceptualizes "a right [as] an agent-relative side constraint on action and not a goal to be promoted."[14] Richard Arneson explicates the side-constraint paradigm in the following way: "a side constraint is to be interpreted as follows: in deciding which of the available options for action one should pursue at any given time, one should eliminate from consideration those options that would involve one's violating any individual's moral rights."[15] In short, rights understood as side-constraints honors the fundamental duties we have to other persons – they are not valuable because they help to realize some 'moral goal'.

Nozick then asks the obvious follow-up question: "Isn't it irrational to accept a side constraint C, rather than a view that directs minimizing the violations of C? If nonviolation of C is so important, shouldn't that be the goal?"[16] Nozick responds to this possible objection by noting that a side constraint view of rights is meant to "reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are *inviolable*" (my emphasis).[17] Again, the second formulation of the categorical imperative holds that one not be treated *merely as a means* as doing so overlooks the autonomy of each person to live according to a rational life plan. To use Nozick's example, murdering an innocent person to satiate a mob, despite the potentially beneficial consequences, would clearly involve overlooking the innocent person's self-shaping

[12] Nozick, *Anarchy, State, and Utopia*, 28.

[13] Nozick, *Anarchy, State, and Utopia*, 29.

[14] Richard J Arneson, "Side Constraints, Lockean Individual Rights, and the Moral Basis of Libertarianism," in *The Cambridge Companion to Nozick's Anarchy, State, and Utopia*, ed. Ralf M Bader and John Meadowcroft (Cambridge: Cambridge University Press, 2011), 17.

[15] Arneson, *Side constraints,* 17.

[16] Nozick, *Anarchy, State, and Utopia*, 30.

[17] Nozick, *Anarchy, State, and Utopia*, 30-31.

status – and thus doing so entails treating him merely a means and thereby violating the inviolability of their status as an end-in-themselves.

We can now connect Nozick's underlying moral framework and his assertation that freedom is secured though the minimization of force *as such*. As we have seen, Nozick argues the following: (1) individual persons are ends-in-themselves because they are capable of living according to a rational life plan, (2) as inviolable ends-in-themselves, persons have 'libertarian rights' (i.e. to life, liberty, property) against certain forms of treatment, (3) rights are to be understood in the strict sense of 'side constraints' (i.e. they are inviolable). Nozick further elucidates that the existence of moral side constraints in our interactions with others entails the moral existence of 'libertarian constraints' that ought to govern all social, political, and economic integration. In his words,

> This root idea, namely, that there are different individuals with separate lives to lead and so no one may be sacrificed for others, underlies the existence of moral side constraints, but it also, I believe, leads to a libertarian side constraint that prohibits aggression against another.[18]

2. THE PROBLEM WITH FREEDOM AS NON-AGGRESSION

We have seen that hard libertarianism – Nozick being our archetypal representative – presents liberty (or the 'free society') in the narrow terms of 'the absence of aggression'. More precisely, for hard libertarians it is the presence/absence of *aggression as such* (i.e. physical violence against a person or their justly held property) that determines whether a person is free or not. We now turn to explore the reasons why this claim, that an individual's liberty is compromised by aggression *simpliciter* against their person or property, is flawed. In short, we can imagine instances where physical violence does not impact personal liberty, or conversely, where personal liberty is compromised even amidst the absence of physical violence. Should this be possible, it calls into question the central thesis of hard libertarianism that freedom is exclusively mediated by the presence or absence of aggression. Consider the following 'hypothetical' scenarios:

> Scenario #1: (Y), thinking they are being funny, snaps (X) on the arm with a rubber band leaving (X) with a momentary stinging sensation. No permanent injury results and the discomfort lasts for only a few seconds.

[18] Nozick, *Anarchy, State, and Utopia*, 34.

> Scenario #2: (X) is a multi-billionaire that owns dozens of multi-million-dollar estates across the world and moves from one residence to the next, staying at each for only a short time. The boundary edge of one such estate is lined with rows of Apple trees. (Y) is out walking around their neighborhood and passes along the edge of one of (X)'s currently vacated properties. (Y) notices a large number of unpicked apples laying on the ground. She picks up a couple apples to take home to eat later.

> Scenario #3: Imagine two sets of slaves with different masters. The master of the first group prefers to use incentives to encourage compliance, and resorts to the whip as a last resort. Generally speaking, his slaves are rarely compelled to action by the initiation of force. The second master prefers to use exclusively the whip, or the threat of it, to motivate his slaves. In fact, he sometimes needlessly uses the whip just to remind his servants that he will use force to maintain compliance.

> Scenario #4: A commercial passenger plane, whilst flying over the ocean, malfunctions and crashes on a private island owned by a single (sociopathic) billionaire. All of the passengers survive with minimal injuries. The island is very remote with no cellular service and the plane communications system broke in the crash landing. The billionaire, who happens to be on the island at the time, is irritated with the presence of the crash survivors. He orders the passengers to get off his island. The passengers have no independent means of calling for an emergency evacuation.

The first two scenarios are meant to suggest that aggression *as such* does not, in fact, necessarily compromise a person's individual liberty. In scenario number one, (X) certainly experienced something he wishes had not occurred – there is no denying that. Moreover, (Y) committed an act that he shouldn't have because (X) has a claim-right against such treatment. Even with these facts in mind, however, it is hard to see how this event, being snapped with a rubber band, has limited the liberty of (X). We have admitted that being snapped by a rubber band is undoubtedly an annoyance and that it violates (X)'s rights, but is it really freedom-endangering? According to the hard libertarians, it would be accurate to say that (Y)'s poor and annoying attempt at humor has limited the freedom of (X). But on what causal grounds, exactly, does this proclamation actually make sense? Can the libertarian point to a meaningful obstruction in (X)'s capacity to be a 'self-owner' or live according to a rational life plan that is the result of this event?

Similarly in the second case, it may be true that (Y) has done something objectionable by taking apples that weren't her own, but we can probably make the following assumptions: (1) the billionaire will almost certainly never even know that the apples were taken, (2) the relative importance of the apples to the billionaire's life is so minute that the material impact of losing them will be negligible, and (3) the apples might have spoiled and gone to waste. How, then, could it be that an action which would have approximately zero material or psychological impact on (X) compromise (X)'s liberty? Again, what meaningful obstruction to (X)'s self-ownership status or ability to live according to a rational life plan has resulted from (Y)'s behavior?

The latter two scenarios are meant to show the reverse: that a person's liberty could be compromised without the presence of aggression as such. Scenario number three is classically employed in the writings of neo-republican theorists to immediately depict that aggression is not the fundamental antithesis of freedom. If a person's freedom has a direct relationship with aggression, as the hard libertarian maintains, then slaves of a less forcefully interfering master – say a master who uses incentives as opposed to sanctions to enforce his ends – would be freer as a result of being subject to a lower volume of coercion (as physical violence). But as Frank Lovett explains, "Some find this conclusion deeply counterintuitive: if there is anything to the idea of political liberty, one might think, surely it cannot be found in the condition of slavery!"[19] We will further consider the significance of this scenario in later sections.

Scenario four is predicated on a hypothetical found in Henry George's *Progress and Poverty*. In trying to make the point that 'ownership of land' can eventually transform into 'ownership of man' he offers the following thought experiment: "Place one hundred men on an island from which there is no escape, and whether you make one of these men the absolute owner of the other ninety-nine, or the absolute owner of the soil of the land, will make no difference to either him or to them."[20] Herbert Spencer made a same point in his *Social Statistics*:

> [I]f one portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then other portions of the earth's surface may be so held; and eventually the whole of the earth's surface may be so held; and our planet may thus lapse altogether into private hands. Observe now the dilemma to which this leads. Supposing the entire habitable globe to be so enclosed, it follows that if the landowners have a valid right to its surface, all who are not landowners, have no right at all to its surface. Hence, such can exist on the earth by sufferance only. They are all trespassers. Save by the permission of the lords of the soil, they can have no room for the soles of their feet. Nay, should the others think

[19] Frank Lovett, "Republicanism," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2017, https://plato.stanford.edu/archives/spr2017/entries/republicanism/.

[20] Henry George, *Progress and Poverty* (New York: Cosmo Classics, 2005), 246.

> fit to deny them a resting-place, these landless men might equitably be expelled from the earth altogether.[21]

In other words, certain distributions of ownership over the Earth's resources could entail a social context where the mass of humanity is at the total mercy of a resource monopolist. It is hard to see the masses in such a condition as anything but free, even if the resource monopolist doesn't physically aggress against said masses. As George puts it, in the latter situation where one man is made owner of all the soil (as opposed to owner of the other ninety-nine), "[he] will be the absolute master of the other ninety-nine – his power extending even to life and death, for simply to refuse them permission to live upon the island would be to force them into the sea."[22] Now, Rothbard, for instance, is very clear that the 'refusal of permission' is in no way an instance of aggression. In fact, he accuses Friedrich Hayek of 'confusion' and 'self-contradiction' because, Hayek uses coercion, "as a portmanteau term to include, not only physical violence but also voluntary, nonviolent, and non-invasive actions... [such as] peaceful, voluntary refusal to make exchanges."[23] And here is where the 'rubber meets the road': can we apply the word 'freedom' to a social context where the granting or refusal of permission by an arbitrary power determines the continued existence of others? In a range of plausible circumstances, the libertarian is forced to answer in the affirmative – a position that is seriously objectionable as Henry George's thought experiment so powerfully shows.

As a brief aside, we recognize that the citation of Henry George's work to exemplify the limits of non-aggression as a principle of freedom is a curious maneuver. On the one hand, as a natural law economist, George very much embodies the hard libertarian (and Nozickean) worldview. By upholding natural rights as the fundamental grounds for the regulation of social life, he largely associates liberty (and justice) with the absence of rights-violations. In *Social Problems*, he explains that,

> There are those who, when it suits their purpose, say that there are no natural rights, but that all rights spring from the grant of the sovereign political power. It were [sic] waste of time to argue with such persons... there are rights as between man and man which existed before the formation of government ... *These natural rights, this higher law, form the only true and sure basis for social organization.*[24] (emphasis added)

[21] John Offer, *Herbert Spencer*, Critical Assessments of Leading Sociologists 4 (London: Routledge, 2000), 209.

[22] Henry George, *The Essence of Progress and Poverty* (Mineola: Courier Dover Publications, 2020), 32.

[23] Rothbard, *Ethics of Liberty*, 220.

[24] Francis K. Peddle and William S. Peirce, *The Annotated Works of Henry George: Social Problems and The Condition of Labor* (New York: Rowman & Littlefield, 2018), 123.

George later clarifies that, "These natural rights of man are thus set forth in the American Declaration of Independence as the basis upon which alone legitimate government can rest."[25] He subsequently indicates that these 'natural rights of man' set out in the Declaration of Independence imply very strong property rights, and he bemoans the failure of existing institutions to sufficiently protect people's rightful holdings:

> The equal, natural and unalienable right to life, liberty and the pursuit of happiness... require that each shall be free to make, to save and to enjoy what wealth he may, without interference with the equal rights of others; that no one shall be compelled to give forced labor to another, or to yield up his earnings to another; that no one shall be permitted to extort from another labor or earnings... Any recognition of the equal right to life and liberty which would deny the right to property — the right of a man to his labor and to the full fruits of his labor — would be mockery. But that is just what we do.[26]

We can see that George subscribes to a theory of entitlement and natural rights that is quite similar to Nozick's.[27] Both theorists suggest that individuals have inviolable rights in their person and inviolable *rights to property*. They significantly diverge, however, on whether a rightful property claim to land (i.e. natural resources) is possible. The 'original acquisition' of unowned property has long been a thorn in the side of libertarian theory. John Locke, often regarded as a key inspirer of (hard) libertarianism, attempted to set out conditions that, if satisfied, allow for individuals to appropriate unowned resources. Thus, Locke's account "has become the starting point for almost any discussion of the appropriation-based justification of property rights."[28]

Central to Locke's theory of initial acquisition is the notion of 'labour-based appropriation', which suggests that, "The first person to mix his or her labor with land needs no one else's consent to appropriate it."[29] Additionally, Locke ostensibly places limitations on the acquisition of unowned property, including: "(A) the no-waste proviso or spoliation limitation, (B) the charity or subsistence proviso, and (C) the enough-and-as-good proviso or the sufficiency limitation."[30] As Widerquist points out, Locke's original theory is something of a 'Rorschach test', with wide-ranging views on what he actually meant. In the case of Nozick, he onboards the labour-based theory of appropriation and views (C) as '*the* Lockean proviso' to be satisfied – however, "Nozick re-interprets the proviso [(C)] to mean that if the initial acquisition fails to make anyone worse off

[25] Peddle and Pierce, *The Annotated Works of Henry George,* 124.

[26] Peddle and Pierce, *The Annotated Works of Henry George,* 126.

[27] John Laurent, *Henry George's Legacy in Economic Thought* (Cheltenham: Edward Elgar Publishing, 2005), 196.

[28] Karl Widerquist, "Lockean Theories of Property: Justifications for Unilateral Appropriation," *Public Reason* 2, no. 1 (2010): 4.

[29] Widerquist, *Lockean Theories of Property*, 6.

[30] Widerquist, *Lockean Theories of Property*, 7.

who was using the resource before, then it is justly acquired."[31] Thus, Nozick's principle of just acquisition holds that,

> An individual A acquires at time t a full property right in an object O which has not previously been the property of any individual if and only if: (i) A mixes his labour with o at time t; and (ii) as a result of O becoming A's private property, no one else is made any worse off than he or she would have been, O having being left unappropriated by anyone and had everyone in consequence been free to use O without appropriating it.[32]

Ultimately, then, Nozick holds that inviolable and *unlimited* rights to property, including land, is permissible if one mixes their labour with it and its appropriation does not make people worse off. George, on the other hand, deviates from Nozick's account in two significant ways. First, George believes the right of ownership can only be conferred to the products of labour itself. In his words,

> ... that which man makes or produces is his own... no one else can rightfully claim it, and his exclusive right to it involves no wrong to anyone else... If production give to the producer the right to exclusive possession and enjoyment, there can rightfully be no exclusive possession and enjoyment of anything not the production of labor, and the recognition of private property in land is a wrong.[33]

In short, George, in contradistinction to Nozick, believes that Locke's labour-based appropriation argument, "justifies ownership of only the value added by the appropriator, not the full resource value of an asset."[34] A farmer is entitled to the corn he grows because it is a product of his labour, but not the soil he planted it in (because it is not something he created). Second, it could be argued that George takes a 'stronger' view of the Lockean proviso than Nozick. Whereas Nozick takes a 'weaker view of (C) – i.e. "One can appropriate resources as long as everyone else is as well off as they would be if no one had appropriated any property and society remained in a state of nature," – George believes that, "resources can be appropriated as long as an equal share of the value of unimproved natural resources is available to everyone."[35] John Laurent therefore summarizes their differences in the following way:

> While Henry George effectively accepted an approach to economic justice in the same terms as Nozick... George was basically asserting that the 'Lockean proviso' could never be satisfied in the real world... [therefore] justice could only be assured by requiring those

[31] Edward Feser, "Nozick, Robert," in *Internet Encyclopedia of Philosophy*, accessed April 30, 2019, https://www.iep.utm.edu/nozick/#H2.

[32] Conway, David. "Nozick's Entitlement Theory of Justice: Three Critics Answered." *Philosophical Notes* 15 (1990): 1-7.

[33] George, *Progress and Poverty*, 237.

[34] Widerquist, *Lockean Theories of Property*, 7.

[35] Widerquist, *Lockean Theories of Property*, 7.

> using such coveted resources to compensate their fellow human beings for their equal rights by paying full-market rent into a common fund.[36]

We can now see how George's work, even though it is often in alignment with Nozick, can be marshalled to highlight the potential absurdities that result from the hard libertarianism's tolerance for inviolable and unlimited rights in all forms of property. George makes a compelling case for a stronger interpretation for the 'the enough-and-as-good proviso' and thereby underscores the moral dangers of private land ownership. He therefore calls for a 100% land value tax to keep the value of natural resources in common ownership so as to guard against the nightmarish vision outlined by Spencer and alluded to in scenario four – a public policy Nozick explicitly condemns as a violation of liberty, as we explore below.[37]

Thus, to conclude this section, we have seen that for the hard libertarian, whether a person is free or not hinges on the inviolability of their (property) rights. But as our four scenarios suggest, anchoring freedom to undisturbed property leads to all kinds of absurdities. Certain ownership distributions of resources can de facto result in ownership of people without any actual rights-violations occurring. Or, alternatively, rights-violations without any measurable effect on others are supposedly freedom-endangering. It is on the grounds of *reductio ad absurdum* that we reach one our overarching conclusions in this paper: hard libertarianism is not defined by the presumption of liberty, instead it is principally a property-rights-based theory of justice. That is, the moral underpinning of libertarian theory prioritizes the absence of rights-violations above all else – even if it means tolerating a social context where the ownership of land translates into *de facto* ownership of people, a situation that must be regarded as one of widespread unfreedom. In the next section, we begin to elucidate how our second conclusion is reached: namely, that libertarianism, as a property-rights-based theory of justice, fails to promote individual freedom, especially when compared to competing social philosophies.

[36] Laurent, *Henry George's Legacy in Economic Thought*, 197.

[37] We should note that Nozick does propose that the suspension of property rights might be morally just in extreme circumstances, and therefore he may agree that in scenario four the island owner has no right to order the passengers into the sea. First, we note that not all hard libertarians agree with Nozick on this. Second, the larger point to be made is that Nozick's theory, even with a caveat for emergency situations, tolerates resource monopolization that arises through the principles of his entitlement theory – and our point is that resource monopolization, whether it arises from a catastrophe or through market transactions, endangers individual liberty.

3. NEO-REPUBLICANISM: FREEDOM AS THE ABSENCE OF WILL-SUBORDINATION

If, as we have begun to suspect, that aggression (or subjection to rights-violating behavior) is not what truly makes a person unfree, then what does? Here we look to the theory of liberty dominant in antiquity and reproduced in the 'republican revival' – a project spearheaded by the likes of Philip Pettit and Quentin Skinner. In so doing, we cannot help but immediately notice the relative infancy of the liberal/libertarian theory of freedom as non-aggression in the history of political and social thought. Indeed, prior to the rise of liberalism as the dominant governing philosophy in Europe and North America, the prevailing ideal of (republican) liberty did not share "the key assumption of classical liberalism to the effect that force or the coercive threat of it constitute the only forms of constraint that interfere with individual liberty."[38] Ironically, Friedrich Hayek, a classical liberal, commences his magnum opus *The Constitution of Liberty* by stressing this point. According to Hayek, the free person is one who "is not subject to coercion by the arbitrary will of another" and, he further elaborates that,

> ... [this] seems to be the original meaning of the word. Man... enters history divided into free and unfree; and this distinction had a very definite meaning. The freedom of the free have differed widely, but only in the degree of an independence which the slave did not possess at all. It meant always the possibility of a person's acting according to his own decision and plans, in contrast to the position of one who was irrevocably subject to the will of another, who by arbitrary decision could coerce him to act or not act in specific ways.

As Hayek correctly suggests, the 'original' conception of freedom – at least, the one that prevailed in the republic of Ancient Rome – derives from a careful analysis of the master-slave relationship. It is, of course, unsurprising that in a slave society philosophers came to define liberty as something to be contrasted with the plight of the slave.[39] In Pettit's words, "...the Romans, who were familiar with the institution whereby a master of *dominus* held power of his slave... argued that to live *in postetate domini*, in the power of a master, was enough in itself to make you unfree."[40] Importantly, whilst the liberal definition of freedom eventually 'eclipsed' the older republican understanding, both are fundamentally 'negative' conceptualizations of liberty. As, Christian Rostbøll

[38] Philip Pettit, "Keeping Republican Freedom Simple: On a Difference with Quentin Skinner," *Political Theory* 30, no. 3 (June 2002): 341.

[39] Pettit, Republicanism, 31.

[40] Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (London: W. W. Norton & Company, 2014), 3.

incisively points out, "The idea that freedom must be understood in relation to its opposite is prominent in the republican tradition of political thought."[41]

A principal aim of the contemporary neo-republican project is to clarify what exactly it means to live *in postetate domini* (or a slavish existence), and conversely, what is required to escape such a condition and live as a free person (*liber*). Pettit, for instance, has argued for a theory of freedom as *non-domination*, "a conception of liberty in which the antonym is not interference as such but rather *dominatio* or domination."[42] One is dominated, according to Pettit, if they are subject, "to an arbitrary power of interference on the part of another—a dominus or master—even another who chooses not actually to exercise that power." Quentin Skinner, on the other hand, advances a slightly different model that associates freedom with an absence of dependency (on the good will of another).[43] Both of these accounts critically stress that the classical republican – and the more recent neo-republican – tradition views individual liberty as compromised or endangered by 'dependence on an arbitrary power'.

It plainly evident how the slave perfectly embodies the unfreedom that arises from living in a state of total dependence on an arbitrary power. Firstly, "the details of the slave's existence are wholly dependent upon the dictates of her master. For every question that could be asked about her present and future condition—will she be fed, how will she spend her time, what work will be assigned to her, etc.—the answer will always be, 'it *depends* on what her master decides'".[44] And secondly, "the master's power can be exercised in an arbitrary manner. That is, the master's private whims (can) inform his answers to all of those questions that shape the slave's existence." In short, it is the conjunctive presence of these elements in a social relationship, *dependence* and *arbitrary power,* that result in a situation of unparalleled unfreedom (or domination) for the dependent party. Simply put, if (X) is dependent on (Y), and (Y) can operate on an arbitrary basis, then (X) is, relative to the degree of their dependency, at the mercy of the private whims of (Y).

Ultimately, then, what the (neo-)republican theory of freedom makes clear, and its leading advocates emphatically stress, is that the slave's uniquely profound unfreedom does not, as the libertarian suggests, flow from the fact that (s)he may be subjected to aggression by a master – although, this is certainly a key part of the domination she experiences. Instead, the slave's unfreedom is the result of a deeper and more

[41] Christian Dahl and Tue Andersen Nexö, eds., *To Be Unfree: Republicanism and Unfreedom in History, Literature, and Philosophy* (Bielefeld: Transcript Verlag, 2014), 19.

[42] Philip Pettit, "Keeping Republican Freedom Simple: On a Difference with Quentin Skinner," *Political Theory* 30, no. 3 (June 2002): 339–56. See pp. 341.

[43] Pettit, *Keeping Republican Freedom Simple*, 341.

[44] Robert Donoghue, "'Emancipationism': An Attempt to Synthesize Neo-Republican and Socialist Thought," *Ethics, Politics, & Society* 3, no. 1 (2020): 80.

encompassing reality: namely, the slave is (a) invariably at risk of (b) having her *will subordinated to the arbitrary will of a master*. That is, to be a slave is to occupy a social position, or a *status*, where one's will *is not sovereign*. Instead, the will of the slave is subordinated to the total(itarian), arbitrary will of a master. Clearly, in such a state, the slave is denied the possibility of fully projecting herself into the world as her attempted projections are always at risk of being frustrated and overwritten by an alien power. Thus, the *liber* (the free person) is one who orders and exercises their preferences *sui juris* (on their own terms). Insofar as a person (*servus)* must (a) order their preferences according to the preferences of another (*dominus*), or (b) forgo exercising their preferences and execute the preferences of another, they are decidedly unfree. Thus, in social and political life the archetypal nemesis of freedom, is, in the words of Jeremy Bentham, any agent, "who will make everything bend to [its] will."[45]

4. MECHANISMS OF (UN)FREEDOM: FORCE AND DEPENDENCY

The previous section's exposition of neo-republican liberty – i.e. the absence of will-subordination – elucidates why the libertarian view of freedom as non-aggression appears problematic with respect to the four hypothetical scenarios considered earlier. In short, the libertarian's moral framework ultimately mistakes a *mechanism* of unfreedom, namely aggression, for the *condition* of unfreedom itself. In other words, aggression is a mechanism that can compromise liberty because it can function as tool by which arbitrary powers subordinate the will of others to their own – but the presence or absence of this mechanism does not, in itself, necessarily result in a loss of liberty. Recall that scenarios one and two suggested that ostensibly aggressive acts, like rubber band snapping or apple appropriation, do not intrinsically minimize a person's liberty. These acts of aggression did not achieve will-subordination, and this explains our intuition regarding why the person snapped with a rubber band and the billionaire do not suffer a loss of freedom. Conversely, we noted the existence of non-aggressive contexts, like the existence of a benign master and a resource monopolist, that are indeed freedom-compromising. In these scenarios, the benign master and the monopolist are able to subordinate the will of the slaves and plane crash survivors to their own (without aggression), and this accounts for our intuition about the unfreedom of the latter pair. It is now evident how the republican association of unfreedom with will-subordination accounts for the misalignment plaguing the libertarian theory of liberty.

Moreover, not only does the libertarian theory of freedom as non-aggression result in conceptual absurdities – such as proclaiming that a billionaire suffers a loss of

[45] Jeremy Bentham, *The Works of Jeremy Bentham*, vol. 8 (Edinburgh: William Tait, 1839), 533.

freedom if an apple is taken from his vacant property – it's greatest limitation is a blindness to other *mechanisms* beyond (the threat of) force that endanger personal liberty. That is, in exclusively aligning unfreedom with the initiation of aggression, the libertarian errs in thinking that (the threat of) force is the only means by which persons can experience a diminishment in their liberty – an oversight that does not arise when unfreedom is equated with subordination to the will of an arbitrary power. For instance, the libertarian either ignores or rejects the key republican insight that for persons in a relationship of dependency with an arbitrary power, the mere presence of *dependency* can, in and of itself, minimize the liberty of the dependent person.

Let us make this point with yet another example. In Libertopia (a society where all institutions adhere to the side-constraints flowing from a libertarian moral framework), (X) cannot afford health insurance in the private market for her son with a critical, life-threatening illness. However, she has managed to land a job with a large employer who offers, as a standard benefit for all employees, medical insurance that will provide sufficient coverage for her son's medical needs. Moreover, in keeping with the moral commitments of libertarianism, Libertopia has no welfare state nor regulations prohibiting fire-at-will employment. Given these conditions, (X) and her son, are entirely dependent on (X)'s employer – specifically that the employer continues to show a preference for (X)'s employment. What does this mean for a situation where (X)'s will might conflict with her employer's will? Perhaps (X) wants to take the day off on 25 December to celebrate Christmas with her family. Can we say, unequivocally, that (X) is free to stay home on Christmas day?

We can imagine three overarching, but possibly more, outcomes that might result. First, she may choose not to even ask her employer out of fear that, in so doing, she upsets him, and he retaliates against her for being a nuisance. One might think this a ridiculous notion, but people are sanctioned, penalized, or fired under strangely objectionable conditions all the time.[46] Perhaps she senses that her employer doesn't like being put in the position of having to deny people's requests and that he might want to make an example out of (X), and prevent such requests coming forth in the future. Thus, when the dependent surmises that a collision between her will and the will of the 'dependee' (i.e. the person on which the dependent depends) are inevitable, the dependent might engage in an act of self-censorship and reconstitute her will to avoid the oncoming collision of wills fearing the consequences of such a possibility (given the power the dependee has in this relationship).

[46] Salvador Rodriguez, "Facebook Employee Says He Was Fired for Speaking out about His Colleague's Suicide," *CNBC*, October 15, 2019, https://www.cnbc.com/2019/10/15/facebook-employee-i-was-fired-for-talking-about-colleagues-suicide.html.

What is revealed by this first possibility is that, within a relationship of dependency, the dependent may actually propagate their own unfreedom by means of self-censorship. It is conceivable that because (X) anticipates a potential collision of her will with her employer's, she actually proactively subordinates her will to what she perceives to be the employer's will. This underscores a crucial distinction between the libertarian (non-aggression) and republican (non-will-subordination) theories of freedom: whereas the former values only objective indicators to evaluate whether a person is free, the latter is additionally sensitive to subjective indicators. This discrepancy is critical for revealing why, in the aforementioned scenario number three, the slaves with a benign master cannot be said to be freer than the slaves with a cruel master. The slaves of a benign master may be subject to less physical harm, but it might be because they are so well practiced at self-censoring their behavior such that their action predominantly aligns with the will of the master.

And herein lies the rub: from an objective, third-person point of view, it may look as though the slave (or the worker) of a benign master (or employer) has 'free reign' – and on the libertarian account of freedom, they do! But this is all just an appearance that belies the phenomenological reality: namely, that the slave (worker) is subordinating her own will out of a concern for avoiding the wrath of a *dominus* (employer). Furthermore, in relationships of dependency, even if the superior truly does grant 'free reign', and the dependent may never feel the need to truly subordinate their will on a proactive basis, it will always remain the case that the dependent's 'free reign' could be *reined in* at any moment. Pettit actually uses horse riding to make this analogy in quite plan terms.[47] A rider in the saddle may from time to time forfeit their 'operative control' by dropping the reigns and giving the horse their head. But by remaining in the saddle, the rider nevertheless retains 'reserve control' because they can grab the reigns whenever it suits them. The same principle applies in human relationships of dependency: the more powerful party always has some form of reserve control, and the dependent, aware of this fact, will always have an experience of liberty shadowed by that omnipresent threat.

A second outcome may be that (X) asks her employer for the day off, but he outright denies the request. Again, this is not an inconceivable outcome, regardless of how mean-spirited it might seem. Depending on the industry (X) works in, it might make sense that her employer wants her to work that day. In fact, millions of Americans still go to work on Christmas day.[48] In these circumstances, when a collision between the

[47] Pettit, *Just Freedom*, 1-2.

[48] Hadley Malcolm, "Quarter of Americans Will Work over Holidays," *USA Today*, November 25, 2014, https://www.usatoday.com/story/money/business/2014/11/25/employees-that-work-holidays/19487341/.

wills of the dependent and the dependee does actually materialize, the dependee can leverage the power afforded to him by the dependence of the dependent – and thus ultimately assert his own will and subordinate the dependent's will to his own. The mechanics of this possibility are rather obvious: (X)'s employer denies her request to stay home on the 25th of December and informs her that doing so would result in immediate termination. Further, as we have already specified, this job provides access to medical care her seriously ill son desperately needs. In such a circumstance, the daylight between the libertarian and republican ideals of freedom is most visibly revealed. Should this particular situation unfold, the libertarian would say (X) is still 'free' to take time off for Christmas so long as the employer does not use force to keep her in work on Christmas day.

Whilst it's true that in Libertopia she need not fear violence from her employer, the assertion that she is still 'free' to not attend work is perhaps best described by Adam Swift as a 'cruel joke'.[49] It is not at all clear that she is in fact 'free' to take the day off given that it could lead to termination from the job responsible for keeping her son alive. This potential scenario suggests that dependency and force become nearly indistinguishable as threats to freedom in profoundly precarious conditions. In other words, extreme dependency, and the exploitation of it, begins to look hardly any different than physical violence itself when assessed from the respective outcomes: (a) I force you to work by pointing a gun at your son, or (b) if you don't work I will sign off on your son's death by revoking an employment contract. At what point does the act of depriving that which maintains life become morally equivalent to the act that takes life? We have one single event, with two starkly different interpretations of what is happening – and it seems there is no way to bridge the gap between them. Either, you believe that exploiting someone's dependency is a threat to the dependent's freedom, or you don't.

Simply put, if an agent can arbitrarily subordinate the will of others to his own, the mechanism employed to achieve this feat ought to be regarded as a weapon that may target personal liberty. Surely, the republican is likely to admit that physical violence is perhaps *the* most powerful weapon one could use to achieve will-subordination. But here we have attempted to show that *dependency exploitation* can achieve the same end of will-subordination without actually engaging in forceful aggression. Moreover, it should be noted that the concern over relations of dependency is no mere theoretical speculation, especially with respect to something as fundamental as access to health care. Robust empirical data shows that Americans, who rely on employer-sponsored health insurance, suffer the shackling experience of 'job lock' at much higher levels

[49] Adam Swift, *Political Philosophy: A Beginner's Guide for Students and Politicians* (Polity, 2006), 55.

than their European counterparts who enjoy universal healthcare.[50] The practice of employer-sponsored health insurance has detrimental effects on job mobility and entrepreneurship, and it forces people to work longer than they otherwise would.[51,52] According to Sterret et al.: "A system that provides universal access to health coverage, on the other hand, is 'far more likely to promote entrepreneurship than one in which would-be innovators remain tied to corporate cubicles for fear of losing their family's access to affordable healthcare.'"[53]

Both empirical findings and theoretical considerations therefore demonstrate that a person's will can be and often is exposed to manipulation via the dependency embedded in a particular relationship. In other words, nested within relations of dependency is the omnipresent possibility that when the dependent's will runs contrary to the will of the power on which they depend, the latter could leverage such dependence to superimpose their own arbitrary will upon the will of the dependent. In this sense, the act of arbitrary termination is a tool that can be used for exploiting dependency, and dependency exploitation is thus a *mechanism* that can bring about will-subordination (and unfreedom for dependents).

This section has sought to illustrate that the libertarian is unwilling to concede that exploiting someone's dependency is an infringement on their liberty because they are interested not in the promotion of liberty *qua liberty*, but in the promotion of justice (understood as conforming to duties associated with property rights). Interestingly, thinkers like Eric Mack can be found claiming that, "each individual has a natural right to pursue her own good in her own chosen way; each individual has an original (baseline) right not to be subordinated to the ends of others."[54] Yet, Mack, and fellow libertarians, fail to apply this ideal consistently across all social possibilities. That is, if we understand liberty to be the condition of having one's will subordinated to the will of another, then, it is hard to see how (X) is free to not work on Christmas, even though the mechanism utilized to subordinate her will is exploitation of her dependency (not force). Therefore, a philosophy truly dedicated to the preservation of individual liberty – as libertarianism claims to be – would show concern not only for the mechanism of

[50] David Sterret, Ashley Bender, and David Palmer, "A Business Case for Universal Healthcare: Improving Economic Growth and Reducing Unemployment by Providing Access for All," *Health Law and Policy Brief* 8, no. 2 (2014): 41–55.

[51] Scott J. Adams, "Employer-provided Health Insurance and Job Change," *Contemporary Economic Policy* 22, no. 3 (July 2004): 357–69.

[52] Jeannette Rogowski and Lynn Karoly, "Health Insurance and Retirement Behavior: Evidence from the Health and Retirement Survey," *Journal of Health Economics* 19, no. 4 (July 2000): 529–39.

[53] Sterret et al., *A Business Case for Universal Healthcare*, 45.

[54] Eric Mack, "Natural Rights," in *Arguments for Liberty*, ed. Aaron Ross Powell and Grant Babcock (Washington, DC: Cato Institute, 2016), 79.

violence as a will-subordinator, but also for dependency as another meaningful tool for an arbitrary power to overlay their will on others. But of course, libertarianism does in fact only show concern for the employment of violence and shows no concern (from a liberty-maximization perspective) for dependency as a tool for will-subordination.

We might note that some libertarians try to invoke a thinly conceived notion of 'voluntariness' as a potential response to the problem of dependency. For instance, Gerard Casey summarizes libertarian thought as a "deep-rooted resistance to having your life and actions ordered by others to whom you have not voluntarily subordinated yourself."[55] In other words, if subordination arises by a series of voluntary agreements and exchanges, then no injury to a person's freedom has transpired. We have already seen the problem with this position: namely, that it suffers from a collapse into absurdity under certain conditions. Casey, like most hard libertarians, maintains that unlimited 'private ownership of natural resources, capital... [or] property' is a 'key element to the realization of our freedom in the world'.[56] But recall Henry George's astute observation that, under certain circumstances, ownership of resources translates into ownership of people (a fact recognized even by Nozick).[57]

What would Casey make of the aforementioned scenario four? The surviving passengers of the plane crash find themselves in an arrangement not of their own choosing. They did not intentionally put themselves on this small plot of privately-owned land in the middle of the sea. Yet, they are completely at the mercy of the island owner. So here we have a circumstance where people are subordinated to a power that they did not consent to, and a power that can arbitrarily order them to their death. But let us now imagine that the island owner sees an opportunity and offers the passengers the right to stay on the island if they sign a contract forfeiting 80% of all income, they earn for the next ten years. Thus, the options are (a) walk into the ocean, or (b) sign the contract. I think it is fair to assume that all passengers would sign the contract, and in so doing, subordinate themselves to the island owner. The crucial question is: did the passengers choose that subordination on a voluntary basis? If Casey alleges that they did, then we have reached the point of absurdity, wondering yet again what distinction there is between being forced to sign a contract at the point of a gun or forced into the ocean by revoking permission to be on land. On the other hand, if Casey alleges that their signing of the contact wasn't voluntary, he would be admitting there are indeed circumstances of non-voluntary subordination that are not a product of immoral use of force but dependency. This would lend credence to our central argument that dependency should be regarded as a potential mechanism of unfreedom in addition to force.

[55] Gerard Casey, *Libertarian Anarchy: Against the State* (London: Bloomsbury Academic, 2012), 60.
[56] Casey, *Libertarian Anarchy*, 60.
[57] Lacey, Alan. *Robert Nozick*. (United Kingdom: Taylor & Francis, 2014), 21.

5. QUALIFYING THE LIMITS OF WILL-SUBORDINATION

Which brings us to the final element in need of addressing. The libertarian might object at this point with the well-reasoned observation that the institutions required to eliminate dependency exploitation and promote neo-republican liberty might end up making us less free because it would require such large-scale (and forceful) interference in our lives – a concern that we saw was prominent for Nozick. Naturally, the institutions that might be implemented to minimize social relations of dependency – such as decommodifying universal programs in healthcare, education, retirement pensions, housing, etc. – would require significant redistribution of resources amongst members of a society. Which raises an important concern (especially for the libertarian): isn't redistribution subordinating the will of the taxpayer to the will of the state? Further to that end, how far should we go to eliminate dependency as such? Is it not conceivable that, at the extremes, extensive 'physical violence' used to eliminate all dependency could be a greater threat to freedom than the resulting diminishment of dependency achieved by such policies? These queries certainly embody worthwhile concerns that must be addressed by those advocating for the minimization of will-subordination via social policy. Unfortunately, a sufficient reply is beyond the scope of the present work. Nevertheless, I will briefly introduce the standard neo-republican response that merits further discussion elsewhere.

Recall Nozick's assertion that the existence of side constraints protecting individual persons entails a general libertarian constraint prohibiting aggression by any social actor. On these grounds, Nozick claims that when the state enacts a policy to promote a moral goal like the 'eradication of poverty' or 'reduced inequality' – what Nozick calls 'end-state' or 'patterned principles' – the state disobeys its libertarian constraints by forcefully interfering with unwilling taxpayers. Simply, enforcing a chosen patterned distribution requires, "continuous interference with people's lives" and deprives people of the freedom to live according to their rational life plan. Thus, redistributive policies deny the core libertarian thesis that individuals are ends-in-themselves and have natural rights against being used merely as a means to the benefit of others. Nozick even goes so far as to define compulsory tax-financed redistribution as enslavement, because the taxed individual is physically forced to surrender the 'produce of their labour' to a non-entitled state. In his words, "Taxation of earnings from labor is on par with forced labor... taking the earnings of n hours labor is like taking n hours from the person; it is like forcing the person to work for n hours for another's person..."[58] Thus, Nozick declares, "liberty upsets patterns" – that is, the polity cannot use the state to realize a desired wealth distribution if it cares about securing individual liberty.

[58] Nozick, *Anarchy, State, and Utopia*, 169.

Given that neo-republican freedom is based on an opposition to the master-slave relationship, this appears to be a damning objection to the neo-republican claim that dependency-minimizing policies – which require continuous interference in people's lives – promote individual liberty. Is it not the case that, as Nozick argues, dependency-minimizing institutions functionally subordinate the will of one group to another, such as the will of the taxpayer to the will of the state and thereby render the taxpayer unfree? The neo-republican response to Nozick's claim is complicated, because whether will-subordination is the result of redistributive taxation ultimately *depends* on the social context in which it occurs. Indeed, neo-republican theorists take this problem seriously, noting that if the minimization of dependency in society,

> ...requires a coercive state, then the specter of public power looms large. For the coercive state is essentially an interfering state: it intrudes in the lives of its citizens by enacting laws, levying taxes, and imposing penalties. The core idea in the republican response to the challenge posed by such power is that nevertheless this interference by the state need not be a threat to people's freedom.[59]

Recall the full republican formula of freedom: a person (or group) is free so long as they are not subordinated to the will of (or dependent upon) an *arbitrary* power. If the state exercises power in an arbitrary manner, then it may very well be the case that the taxpayer suffers from an encroachment on their liberty. But, if state interference does *not* constitute an exercise of arbitrary power, then, according to neo-republican thinking, taxation does not necessarily amount to a freedom comprising intrusion.

Within the republican literature, three standards prevail for determining whether power is arbitrary. As John Harris and Samuel Arnold explain, "According to the first, championed recently by Frank Lovett, power is arbitrary insofar as it is unconstrained. According to the second, advanced most prominently by Philip Pettit in his recent work, power is arbitrary insofar as it is uncontrolled by those subject to it. According to the third, found in Pettit's early work, power is arbitrary insofar as it is not forced to track the interests of those subject to it."[60] There is considerable debate over which of these standards constitutes the 'necessary and sufficient conditions for rending power non-arbitrary'.[61] No argument for one over the other will be levied here. Instead, the point is to stress that interference becomes will-subordinating only if it is unconstrained, or uncontrolled by those subject to it, or not forced to track the interests of those interfered with. Let us, once again, draw on an example to further clarify this distinction. In

[59] Pettit, Just Freedom, 111.

[60] Arnold, Samuel and Harris, John R. "What Is Arbitrary Power?" *Journal of Political Power*. 10:1 (2017), 55-70. 55.

[61] Frank Lovett, "What Counts as Arbitrary Power?," *Journal of Political Power* 5, no. 1 (April 1, 2012): 137.

delineating between arbitrary and non-arbitrary power, Samuel Arnold offers the following illustration:

> My university's library can fine me: this is a form of interference power. So too, it can deny me access to materials: this is another form of interference power. And because it can interfere with me in these ways, it can get me to do things I would not otherwise prefer to do, such as return library materials on time. Yet there's nothing morally amiss with this relationship; in having these forms of power over me, the library does not dominate me. But why not? The basic answer is that the library's power is constrained to track my interests, and is therefore not arbitrary. It can't fine me without reason; nor can it deny me access to its collections on a whim. It must operate in accordance with public rules. And indeed, not only is the library's power constrained; it is constrained in ways that force it to track the interests of its patrons.[62]

Arnold, in this example, makes clear the crucial point: interference as such cannot be deemed a threat to individual liberty. It is the contextual social details surrounding an instance of interference that establishes the moral legitimacy of that interference and whether it reaches the threshold of will-subordination. If, for instance, the state's taxing powers are controlled by those who are subject to it, as would be the case in a democratic society, then state activity – including redistribution – does not constitute 'an alien and arbitrary will' in relation to the citizenry, including the tax-paying citizens. As Pettit explains, "The reason why a state that meets the republican specifications is legitimate in this sense is that it does not take from the freedom of citizens; it operates on terms they impose."[63] We saw above that the horror of the slave's unfreedom stems from her being entirely hostage to the master's private, unaccountable whims. The relationship between the democratic state and a citizen is not the same: those who are subject to the State's interference power have control over it, whereas a slave has no control over the power wielded by the master. In sum, enslavement occurs when one is forced to execute commands over which they have no control, i.e. from an arbitrary power – and taxpayers of a republican (and democratic) state do not fit that description.

Naturally, the mere presence of a 'voting citizenry' does not intrinsically imply that a state operates on 'terms imposed by the citizenry'. How state interference comes to embody a mandate of the people is a difficult subject that cannot be explored here, but other thinkers have put forward detailed accounts of the republican view on how this is achieved.[64] The point at hand is that Nozick's view of taxation is undermined by the reality that state imposed taxation, if exercised on a non-arbitrary basis, does not mirror

[62] Samuel Arnold, "Capitalism, Class Conflict, and Domination," *Socialism and Democracy* 31, no. 1 (January 2, 2017): 109-110.

[63] Pettit, Just Freedom, 145.

[64] See chapter six and seven for a detailed consideration of what is required to make states non-dominating: Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP Oxford, 1997).

the master-slave relationship, and therefore taxation need not amount to some kind of enslavement. To be sure, the interference of taxation could annihilate individual freedom if it that power is wielded in an arbitrary manner. Monarchs, dictators, or even fascist democracies could levy taxes in a way that is uncontrolled by those subject to it. But it isn't accurate to say that state imposed taxation *as such* is arbitrary and will-subordinating, because, "State interference will not be dominating... so long as it can be subjected to the effective, equally shared control of the people."[65] Thus, as with many republican prescriptions, the contextual details and mechanics of social policies matter in deciphering whether a given government-led initiative endangers or engenders freedom – a clear distinction from the libertarian 'non-aggression principle' which can deduce all politically relevant questions from *a priori* abstraction in the armchair.

Not let us turn to the second objection that seeking to eliminate all iterations of dependency would be a greater threat to freedom than the resulting diminishment of dependency achieved by such efforts. In *Just Freedom*, Pettit addresses this very problem by breaking up his detailed account of the neo-republican theory of freedom into two chapters entitled 'freedom with depth' and 'freedom with breadth'. The first of the two chapters deals with what has been discussed thus far: namely, explaining that the free person is one who doesn't experience will-subordination (or domination as Pettit would say). It is under such circumstances that they can be said to enjoy liberty with depth. The second chapter takes up the problem of how far our institutions should go about eradicating will-subordination in the name of freedom. Pettit summarizes the predicament as follows:

> How, then, should we determine the range of choices in which you must enjoy freedom [non-will-subordination] to count, intuitively, as a free person? We know that the freedom you enjoy must have the depth described in the last chapter; it must involve the resources and protections associated with freedom as non-domination. We now have to settle on the breadth of choice – the range of decision which such freedom should be available.[66]

Pettit resolves this problem by arguing for the minimization of dependency along a range of critical choices people confront in their daily lives. In other words, republican theorists have traditionally argued for the existence of a set of *basic liberties* that individuals must be able to exercise in order to be deemed a *liber* (free person) who can live *sui juris* (on their own terms). Thus, the totality of republicanism is to argue for an institutional framework that ensures individuals are not dependent on an arbitrary power to execute such basic liberties. Pettit offers a few examples of what might reasonably be considered basic liberties: freedom of speech, freedom to practice one's

[65] Pettit, *Just Freedom*, 111.
[66] Pettit, *Just Freedom*, 56

religion, freedom to change employment and occupation, etc.[67] Imagine that a polity decides that the ability to practice one's religion is in fact a basic liberty – it is a fundamental choice people need to be able to make in order to live on their own terms. Should that be the case, then, a law banning arbitrary employment termination based on a person's religious affiliation would be regarded as freedom-engendering: such a law ensures that an employee's capacity to practice their religion does not depend on their employer tolerating it. The critical point is that once the polity fleshes out some sort of consensus as to what the basic liberties are, the parameters for how far state interference should go to minimize dependency come into view. For instance, a polity would likely reject that playing Nintendo is a basic liberty and therefore the state would have no business in empowering individuals (likely children) whose access to a Nintendo console is dependent on an arbitrary power (their parents). Limiting the function of governmental institutions to promoting each person's capacity to independently exercise their basic liberties constitutes a natural barrier against totalitarian overreach.

In dealing with this second objection, we have invoked the 'authority of the polity' to determine what comprises the basic liberties, and then tasked it to design political institutions – imbued with the power to employ force – to ensure that citizens can exercise those liberties with sufficient independence from arbitrary powers. Naturally, the liberal tradition – and particularly the libertarians we have been considering in this paper – maintain(s) a skeptical stance towards democratic governance. Perhaps the liberal concerns surrounding democracy were best stated in Mill's *On Liberty* where he raises the most salient fear associated with democratic rule: a 'tyranny of the majority'.[68] With respect to our current discussion, the libertarian might argue that if the polity seeks to declare certain things a basic liberty, a dissenting minority who object to participating in the process of securing those liberties for all might feel like victims of persistent will-subordination. Do not the mere preferences of a majority, backed by the power of the state, constitute interference by an arbitrary power in the lives of the minority constituency? The republican tradition shows a profound awareness of this problem, namely, that states can also becoming dominating powers, even when acting on a democratic mandate. It is for this reason that republican writers have spoken of the *two* great evils of *dominium* (private power) and *imperium* (public power).[69] Thus, a key aim of the republican tradition is to develop a theory of government which ensures state activity does not transform into the imposition of an alien will upon dissenting citizens. Whilst

[67] Pettit, *Just Freedom*, 72

[68] Mill, John Stuart. On Liberty. (United States: Barnes & Noble Books, 2004), 4.

[69] Pettit, *Just Freedom*, 6

exploring such a theory is beyond our scope here, I again point to the work of republican theorists who address this very problem.[70]

6. CONCLUSION

The principal finding of this article is as follows: hard libertarianism confuses a mechanism of unfreedom with the condition of unfreedom. Mere subjection to aggression is itself not what makes people unfree as the hard libertarians suggest. Instead, as we have seen, a loss of liberty occurs when one's will is subordinated to an arbitrary power – and force is simply a reliable and powerful mechanism that can bring about will-subordination. The fallacious alignment of freedom with non-aggression underscores that hard libertarians are primarily (and exclusively) committed to a system of deontological justice predicated on (natural) property rights. Moreover, the further libertarian claim that a deontological property rights theory of justice is freedom-engendering has also been shown to be seriously problematic because it fails to account for other challenges to individual liberty, namely, dependency exploitation. We explored above how certain social contexts, particularly resource monopolization, can result in undeniable and profound unfreedom for persons even when no aggression has transpired. Thus, a theory of justice truly committed to liberty (as non-will-subordination) would take seriously the constraints of violence *and dependency exploitation*, as a neo-republican approach does. What the libertarian is guilty of, then, is mistaking a mechanism of unfreedom for unfreedom itself.

[70] See: Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP Oxford, 1997); Frank Lovett, *A General Theory of Domination and Justice* (OUP Oxford, 2010).

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 729-750
ISSN: 1825-5167

SOVRANITÀ COSMOPOLITICA

EDOARDO GREBLO
Università di Trieste
Dipartimento di Studi Umanistici
edgreblo@gmail.com

ABSTRACT
According to several contemporary theorists of cosmopolitanism, the concept of sovereignty – enabling the political authority to be core and head of society – should be overcome. Therefore, juridical and political institutions are to be considered as mere instruments serving goods that count as desirable in specific collectives. The thesis of the paper is that liberty is always "social liberty": the institutions enabling it are not to be added to a prepolitical liberty dimension, on the contrary they are what enables its realization. Such thesis is advanced to endorse the so-called "domestic analogy" in order to overcome anti-statist cosmopolitism objections to the idea that recognizing the equal supremacy of states is part and parcel of everyone rights to freedom respect.

KEYWORDS
Cosmopolitism, supremacy, justice, liberty, domestic analogy.

Non sono pochi i teorici contemporanei del cosmopolitismo per i quali il progetto di un ordine globale basato sul diritto internazionale risulta incompatibile con la sovranità di Stati nazionali che non intendono rinunciare alla capacità di regolare in piena autonomia i propri affari interni ed esterni.[1] Charles Beitz, Onora O'Neill e Thomas Pogge, per esempio, affrontano il problema dell'agire nel contesto internazionale in una prospettiva che mira a porre in discussione il ruolo degli Stati e a difendere l'esigenza di affidare ad altri attori – come organizzazioni non governative, regionali o transnazionali dotate di reali capacità di intervento – i problemi di giustizia a livello globale. In realtà, non tutti gli autori cosmopoliti considerano superato il concetto di sovranità, che mette l'autorità politica in condizioni di essere centro e vertice della società. Ma un settore influente del cosmopolitismo contemporaneo, quello che si potrebbe definire antistatista,[2] tende a

[1] C. Beitz, *Cosmopolitan Liberalism and the States System*, in *Political Restructuring in Europe*, a cura di C. Brown, Routledge, London 1994, pp. 124-126; O. O'Neill, *Bounds of Justice*, Cambridge University Press, Cambridge 2000, pp. 181-185; T. Pogge, *World Poverty and Human Rights*, Polity Press, Cambridge 2002, pp. 186-195.

[2] Il termine viene usato in analogia con il cosmopolitismo statista difeso da Lea Ypi, *Stato e avanguardie cosmopolitiche*, Laterza, Roma-Bari 2016.

considerare questo concetto come un costrutto politico il cui valore è puramente residuale, di mero strumento a difesa dei valori umani minacciati. Il dibattito sembra così polarizzarsi su due unilateralità contrapposte: da un lato i cosmopoliti antistatisti, per i quali gli Stati, così come le relazioni politiche di tipo associativo su cui essi si fondano, vanno considerati pressoché irrilevanti da un punto di vista normativo; dall'altro molti statisti, i quali ritengono invece che l'importanza degli Stati sia tale da giustificare la rinuncia a ogni progetto capace di garantire l'eguaglianza redistributiva a livello globale.

Esiste però un rapporto diretto tra la libertà dell'individuo e la sovranità dello Stato che porta a mettere in discussione il cosmopolitismo antistatista: è possibile sostenere, in linea con la filosofia del diritto di Kant, che la sovranità dello Stato non soltanto sia compatibile con la libertà soggettiva dei suoi cittadini, ma, anzi, che essa sia essenziale per abilitarli all'esercizio di una libertà socialmente costituita. La possibilità che gli individui intreccino relazioni e strutturino forme di vita senza essere sottoposti a forme di pressione arbitraria dipende dall'esistenza di una infrastruttura normativa plasmata nelle forme del diritto e garantita dalle istituzioni coercitive dello Stato. La tutela dei diritti delle persone non esclude, ma anzi prevede, "il diritto degli uomini a vivere *sotto pubbliche leggi coattive*, attraverso cui il 'proprio' di ognuno possa essere determinato, e assicurato contro ogni attentato altrui".[3] Le aspirazioni normative alla libertà nel senso dell'autonomia degli individui possono organizzarsi politicamente soltanto sotto la tutela di un'autorità politica sovrana.

Ora, il valore che l'idea di autonomia ha acquisito nella modernità si spiega con la sua capacità di istituire un collegamento sistematico tra il soggetto individuale e l'ordine sociale, nel senso che ciò che è bene per l'individuo contiene anche delle indicazioni per istituire un ordine sociale legittimo. Le possibilità di autodeterminazione individuale non possono essere separate dalle riflessioni sul modo in cui la società debba essere organizzata per rispondere agli interessi e ai bisogni degli individui, e cioè da una certa concezione della giustizia sociale.[4] La libertà non è separabile dalla giustizia, e quindi dalla sovranità dello Stato incaricato di esercitarla, perché la giustizia, nel mondo moderno, equivale a garanzia di autodeterminazione. È a questa prospettiva che ci si può ispirare per mettere in discussione il modo con cui il cosmopolitismo antistatista propone la sua concezione di giustizia, intesa come tutela delle libertà prepolitiche del singolo rispetto alle quali la volontà sovrana del legislatore deve obbedire a regole di astensione preventiva. La tendenza a riconoscere alla sovranità una mera funzione strumentale può infatti essere considerata come una diretta conseguenza di una ben precisa concezione dei

[3] I. Kant, *Sul detto comune etc.* (1793), in Id., *Scritti di storia, politica e diritto*, a cura di F. Gonnelli, Laterza, Roma-Bari 1995, pp. 136-137.

[4] A. Honneth, *Il diritto della libertà. Lineamenti per un'eticità democratica* (2015), Codice edizioni, Torino 2015, p. 6.

diritti: qui i diritti soggettivi sono diritti negativi, che proteggono margini d'azione individuali contro interventi illegittimi in materia di libertà, vita e proprietà. La giustizia è concepita nella prospettiva del diritto privato, come un sistema di diritti negativi e procedurali che tutelano la libertà e l'autodeterminazione e dove gli individui godono della protezione dello Stato nella misura in cui perseguono interessi privati all'interno di limiti fissati per legge. A questo orientamento è possibile però opporre una visione alternativa, quella di una concezione della giustizia intesa come regno di una libertà sociale che necessita di "istituzioni della libertà", per cui l'esistenza di un'autorità sovrana è una componente intrinseca della libertà individuale.

La tesi che suggerisce l'esistenza di una connessione interna tra la libertà individuale e la sovranità dello Stato si basa sull'idea che solo in una situazione di autogoverno e nello stesso tempo di soggezione al diritto gli individui possono interagire gli uni con gli altri in termini di pari libertà. La ragione fondamentale per cui le istituzioni pubbliche dotate di potere coercitivo sono necessarie non ha tanto a che fare con le "circostanze di giustizia" di Hume o di Rawls, ovvero, rispettivamente, con la "benevolenza limitata"[5] o la "scarsità moderata",[6] quanto con la necessità di offrire soluzioni a problemi di coordinazione delle azioni.[7] Le istituzioni non sono cioè una sorta di "male necessario", ma sono sistemi di norme che comprendono valori, principi e regole che "costituiscono" un agire che i soggetti coinvolti possono realizzare solo cooperativamente. Anche l'adeguata realizzazione dell'autodeterminazione individuale dipende da questi sistemi di norme, poiché va considerato "giusto" ciò che garantisce la tutela, la promozione o la realizzazione dell'autonomia di tutti i membri della società. "La giustizia e l'autodeterminazione individuale rinviano circolarmente l'una all'altra",[8] poiché un sistema di cooperazione non può sempre dipendere dall'intesa informale fra le parti interessate. Infatti, in assenza di istituzioni pubbliche coercitive, il presentarsi di situazioni problematiche o conflittuali può dare vita a situazioni in cui strutture asimmetriche di potere o di risorse pregiudichino l'esito delle interazioni. È per questo che il diritto di ogni persona a un'autonomia garantita giuridicamente richiede l'esistenza di norme tutelate dalla minaccia di sanzione, anche nel caso in cui le risorse a disposizione degli individui non siano a rischio di scarsità o le loro relazioni siano improntate alla benevolenza reciproca.

Diretta conseguenza di questa prospettiva è la tesi che considera la sovranità come la controparte, a livello sovranazionale, della libertà in ambito nazionale. Si tratta della cosiddetta *domestic analogy*, secondo la quale gli Stati possiedono il diritto alla propria integrità territoriale nello stesso modo in cui gli individui hanno

[5] D. Hume, *Trattato sulla natura umana* (1739-1749) , Laterza, Roma-Bari 1982, vol. II, pp. 636-640.

[6] J. Rawls, *Una teoria della giustizia* (1971), Feltrinelli, Milano 1982, pp. 118 sgg.

[7] T. C. Schelling, *La strategia del conflitto* (1960), Bruno Mondadori, Milano 2006.

[8] A. Honneth, *Il diritto della libertà*, cit., p. 9.

diritto alla propria integrità fisica. Tale analogia è stata spesso criticata, o per avere sottovalutato le rilevanti differenze che intercorrono tra gli Stati e gli individui o per avere attribuito un eccessivo rilievo all'integrità del corpo collettivo. Non ogni difesa della *domestic analogy* deve però necessariamente cadere sotto il peso di queste critiche. Non è infatti necessario attribuire agli Stati caratteristiche morali assimilabili a quelle degli individui né riconoscere al collettivo un qualche valore morale intrinseco. È sufficiente considerare gli Stati come le strutture istituzionali cui spetta il compito di garantire a ogni soggetto uno spazio individuale all'interno del quale egli possa decidere a sua discrezione degli scopi della propria vita senza subire interferenze esterne. La sovranità statale è essenziale per la volontà di fare in modo gli individui rappresentino realmente, e non solo nominalmente, la misura dei diritti morali e giuridici. Questa tesi si pone in diretto contrasto con la concezione della giustizia distributiva che sta alla base di molte delle proposte cosmopolitiche di riforma dell'ordine internazionale, per le quali il rispetto dei diritti umani fondamentali è l'unico criterio valido di legittimità politica. Una concezione alternativa della giustizia di tipo relazionale può invece spiegare perché esista una connessione interna tra i diritti degli individui e i diritti degli Stati.

1. COSMOPOLITISMO MORALE E COSMOPOLITISMO POLITICO

Il cosmopolitismo è, in ultima analisi, una teoria che si propone di sfruttare il potenziale euristico contenuto nell'idea che vede in ogni essere umano la misura ultima del valore morale. Naturalmente, il cosmopolitismo contemporaneo presenta numerose varianti,[9] ma il problema di come trasformare i principi morali in obblighi politici validi universalmente ha dato vita a una distinzione fondamentale: da una parte il cosmopolitismo *morale*, che invita a non anteporre gli interessi della propria comunità agli interessi di coloro di cui non condividiamo né la discendenza, né la genealogia né la storia e che tende a concepire il cittadino del mondo in senso prepolitico e pregiuridico; dall'altra il cosmopolitismo *politico-giuridico*, che si propone di intraprendere trasformazioni politiche di portata globale in corpi collettivi non necessariamente coincidenti con gli Stati, anche coinvolgendo cittadini di nazioni diverse.[10]

Non tutti i teorici cosmopoliti ritengono che tra i due orientamenti vi sia un'incompatibilità di principio. Ma per alcuni influenti sostenitori del cosmopolitismo morale è necessario prendere le distanze dalla prospettiva di un ordine internazionale costituito da una comunità di Stati che si garantiscono reciprocamente la loro "sovrana eguaglianza" (come recita l'art. 2, par. 1, della Carta delle Na-

[9] Cfr. A. Taraborelli, *Il cosmopolitismo contemporaneo*, Laterza, Roma-Bari 2011.

[10] Questa distinzione, ormai classica, risale a C. Beitz, *Cosmopolitan Liberalism and the States System*, in C. Brown (a cura di), *Political Restructuring in Europe*, Routledge, London e New York 1994, pp. 123-136.

zioni Unite), e muoversi nella direzione di un ordine cosmopolitico in cui la comunità dei popoli adotta la tutela della pace e dei diritti umani quale criterio esclusivo per valutare la legittimità delle istituzioni politiche e giuridiche. Questa concezione si basa sull'idea che i confini di Stato siano privi di valore normativo o che ci debba essere congruenza tra i principi di giustizia nazionali e i principi di giustizia internazionali o globali.[11] Si tratta cioè di trasporre la positivizzazione dei diritti civili e di quelli umani dal piano nazionale a quello internazionale o globale. E poiché il cosmopolitismo antistatista concepisce la giustizia in termini di diritti umani, "il nucleo della giustizia, la protezione dei diritti umani, dovrebbe essere l'obiettivo primario del sistema giuridico internazionale".[12] La protezione dei diritti umani rappresenta lo standard con cui valutare gli ordinamenti politici nazionali. La sovranità statale è quindi ridotta a un valore strumentale la cui importanza dipende dalla sua efficacia nella promozione e nella tutela dei diritti umani fondamentali. Sono gli individui, non gli Stati, che vanno riconosciuti come i soggetti ultimi del diritto internazionale, mentre la posizione internazionale degli Stati dovrebbe essere valutata alla luce della legittimità dei loro ordinamenti nazionali.

Una importante implicazione di queste tesi riguarda la questione della cosiddetta "ingerenza umanitaria": nel momento in cui agli individui viene riconosciuto un valore normativo assoluto e non negoziabile, le violazioni dei diritti umani possono rendere giustificabili forme di intervento militare nei paesi che se ne sono resi colpevoli. È come se questi interventi fossero una "anticipazione" di un effettivo diritto cosmopolitico, una sorta di avvicinamento a quella "condizione cosmopolitica" capace di offrire protezione legale anche contro i crimini del proprio governo, quasi che si trattasse della trasformazione dello *jus in bello* in un diritto di intervento assimilabile ai diritti di polizia interni agli Stati. Non si tratta più soltanto di far valere i doveri negativi di una morale di giustizia universalistica, ma, in certi casi, di porre in atto il dovere "positivo" di reagire attivamente a favore delle vittime in tutti i casi in cui si verificano sistematiche violazioni dei loro diritti umani.[13] Questo non significa che la violazione dei diritti umani sia di per sé sufficiente a giustificare interventi diretti negli affari interni di altri Stati, poiché lo *jus ad bellum*, che costituisce il nucleo del diritto internazionale classico, rimane valido anche nel caso di "guerre giuste", per cui l'uso della forza deve avere una ragionevole prospettiva di successo, essere una risorsa da impiegare in ultima istanza, deri-

[11] Cfr. C. Beitz, ivi, p. 125; Id., *Justice Beyond Borders. A Global Political Theory,* Oxford University Press, Oxford 2005, p. 5; F. Tesón, *The Liberal Case for Humanitarian Intervention*, in J.L. Holzgrefe e R.O. Keohane (a cura di) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Cambridge University Press, Cambridge 2003, pp. 93-129 (p. 103).

[12] Cfr. per esempio, C. Beitz, *Political Theory and International Relations,* Princeton University Press, Princeton, NJ 1999, pp. 69 e 83; F. Tesón, *A Philosophy of International Law,* Westview Press, Boulder, CO, 1997, p. 40.

[13] S. Caney, *Justice Beyond Borders. A Global Political Theory*, Oxford University Press, Oxford 2005, p. 235; D. Moellendorf, *Cosmopolitan Justice*, Westview Press, Boulder, CO, 2002, p. 123; F. Tesón, *The Liberal Case*, cit., p. 103.

vare dall'applicazione di procedure stabilite giuridicamente da un'organizzazione mondiale inclusiva eccetera. Queste clausole limitano le circostanze che giustificano gli interventi di "ingerenza umanitaria", ma non le esclude preventivamente dal campo delle norme che regolano le relazioni internazionali. Come afferma Beitz, anche se "esiste un diritto che si oppone all'intervento, esso [...] non si applica con la medesima forza a tutti gli Stati".[14] La sovranità va subordinata a una politica di affermazione e protezione su scala mondiale dei diritti umani e delle libertà fondamentali per tutti.

In modo analogo, anche le pretese di autodeterminazione rivendicate dai paesi che mirano a emanciparsi da ogni forma di dominio neocoloniale andrebbero valutate più alla luce di princìpi di giustizia che avendo riguardo all'autodeterminazione di popoli che intendano organizzarsi in Stati nazionali.[15] L'autodeterminazione, così come il principio che impone di astenersi da ogni ingerenza negli affari interni di un altro paese, è soltanto "un mezzo per raggiungere il fine della giustizia sociale", [16] e può essere garantita solo quando vi sia ragione di credere che la 'decolonizzazione' possa avere come sbocco una società meno ingiusta. Non è perciò fuori luogo ritenere che il cosmopolitismo antistatista rientri nella tradizione dell'"anti-pluralismo liberale", caratterizzata dalla "mancanza di tolleranza per i regimi non liberali".[17] Persino Rawls, per il quale gli Stati costituzionali democratici devono rigidamente attenersi ai principi di giustizia, ha ritenuto che questi principi possano essere ridimensionati per i rapporti con Stati autoritari.[18] Trasformare la sovranità in una funzione subordinata alla capacità degli Stati di garantire ai loro cittadini un ordinamento rispettoso dei diritti umani equivale però a discriminare tra gli Stati sulla base delle loro caratteristiche nazionali e avviarsi pericolosamente sulla strada che porta a guerre punitive arbitrarie e selettive. Questa tendenza è "normativamente difettosa e politicamente pericolosa",[19] perché rischia di trasformare il cosmopolitismo antistatista in un'ideologia che può facilmente prestarsi a giustificare il "diritto egemonico di una potenza imperiale che si ritira dal diritto internazionale soltanto per finire con l'assimilarlo al proprio

[14] C. Beitz, *Political Theory,* cit., p. 191.

[15] Ivi, p. 69: "Interventismo, colonialismo, imperialismo e dipendenza non sono moralmente discutibili perché offendono un diritto di autonomia, ma, piuttosto, perché sono ingiusti. [...] Questo non significa affermare in cui un diritto di autonomia statale dovrebbe essere rispettato, ma piuttosto che tale diritto, quando esiste, è una derivazione di più fondamentali principi di giustizia".

[16] Ivi, p. 104.

[17] G. Simpson, "Two Liberalisms", *European Journal of International Law*, 3, 2001, p. 539.

[18] J. Rawls, *Il diritto dei popoli*, Edizioni di Comunità, Torino 2001, p. 48: "Naturalmente, un principio come [...] quello del non intervento dovrà essere modificato nel caso generale degli stati fuorilegge e di gravi violazioni dei diritti umani; pur attagliandosi bene a una società di popoli bene ordinati, questo principio non funziona per una società di popoli non ordinati dove guerre e gravi violazioni dei diritti umani hanno carattere endemico".

[19] J. Cohen, "Sovereign Equality vs. Imperial Right: The Battle over the 'New World Order'", *Constellations*, 4, 2006, p. 486.

diritto pubblico nazionale e incorporarlo".[20] Per evitare una variante imperiale della teoria della guerra giusta, che nasce da tradizioni teologiche e giusnaturalistiche e che si ripresenta *nel* diritto internazionale con un volto 'umanitario', occorre perciò concepire libertà individuale e sovranità statale come aspetti che si presuppongono e si richiamano a vicenda: come la prima sarebbe irrealistica senza l'altra, così la seconda sarebbe incompleta senza la prima.

2. GIUSTIZIA E ISTITUZIONI POLITICHE

Per conciliare i principi normativi del cosmopolitismo politico con il riconoscimento dei principi di autodeterminazione e non intervento riconosciuti dal diritto internazionale è necessario prendere in esame la concezione distributiva della giustizia implicita nel cosmopolitismo antistatista. In generale, lo scopo primario di ogni teoria della giustizia distributiva è quello di definire in termini di equità l'assegnazione di determinati esiti. Come ha scritto Rawls, "l'oggetto principale della giustizia è la struttura fondamentale della società, o più esattamente il modo in cui le maggiori istituzioni sociali distribuiscono i doveri e i diritti fondamentali e determinano la suddivisione dei benefici della cooperazione sociale".[21] Quale sia il *distribuendum*, cioè l'oggetto che la teoria della giustizia intende distribuire – ad esempio, l'utilità generale, il rispetto di alcuni principi fondamentali, il godimento di alcuni beni primari, le risorse materiali e le opportunità eccetera – e poi il modo, che dovrebbe essere giusto, con cui esso viene distribuito, rimangono naturalmente controversi. Per i cosmopoliti antistatisti, il *distribuendum* da assegnare consiste fondamentalmente nei diritti umani sovrapositivi che costituiscono il nucleo centrale delle Dichiarazioni dei diritti umani. Il termine "giustizia" fa così diretto riferimento sia ai diritti che giustificano le legittime pretese di essere protetti da indebite interferenze nella libertà, nella vita e nella proprietà, sia ai diritti individualmente rivendicabili alla libertà di fede, di parola e di opinione, che fino a oggi costituiscono nel loro insieme la componente fondamentale del sistema giuridico liberale, sia i diritti come pretese di prestazioni necessarie alla realizzazione dei progetti esistenziali delle persone. In effetti, riguardo a questo ultimo aspetto la posizione dei cosmopoliti antistatisti non è sempre concorde; univoca è invece la convinzione che i diritti umani – per quanto diversamente specificati – soddisfano il criterio della validità universalistica che giustifica iniziative politiche provviste di un adeguato orientamento normativo.

Questo modo di concettualizzare la giustizia incide direttamente sul ruolo da attribuire al diritto e alle istituzioni politiche, nel senso che non si tratta di affrontare

[20] J. Habermas, *L'Occidente diviso*, cit., p. 146.

[21] J. Rawls, *Una teoria della giustizia*, cit., p. 24.

la questione di una distribuzione giusta in generale, ma solo quella che dipende da un determinato sistema istituzionale. Le istituzioni diventano allora soltanto lo strumento più o meno funzionale a cui si delega l'applicazione dei requisiti di giustizia. Ciò non significa che l'adesione a una concezione distributiva della giustizia le renda irrilevanti per la concretizzazione e la realizzazione dei valori socialmente legittimati. Il punto è, piuttosto, che vincolare la giustizia fin dall'inizio a un sostrato prepolitico – per cui la priorità dei diritti umani, che tutelano le libertà prepolitiche del singolo, serve fondamentalmente a porre dei limiti alla volontà sovrana del legislatore – impedisce di caratterizzare in senso *positivo* l'esistenza delle istituzioni. Le istituzioni non sono il *medium*, l'intermediario necessario che rende possibile formulare un'idea di libertà in grado di incorporare la dimensione relazionale, intersoggettiva e quindi sociale, ma poco più che un "male necessario", per così dire. Questa concezione delle istituzioni si ritrova in tutti i cosmopoliti antistatisti, per i quali la sovranità dello Stato ha un valore puramente strumentale, la cui prestazione di efficacia dipende dalla capacità di promuovere e tutelare i diritti umani.[22]

Il modello di tipo distributivo di pensare la giustizia riproposto dal cosmopolitismo antistatista non è però immune da possibili critiche. Anzitutto, induce a perdere di vista il fatto che la giustizia è una nozione che si applica unicamente alle relazioni interpersonali. Quali che siano le esigenze che ne sono all'origine, il concetto di giustizia non può essere inteso indipendentemente dai valori sociali generali, poiché dipende di volta in volta dal significato conferito a pratiche d'azione già stabilite, altrimenti quelle esigenze finirebbero per avere le caratteristiche della pura autoreferenzialità. In secondo luogo, la decisione di considerare in termini "distributivi" la costituzione giuridica della libertà porta ad assimilare la libertà a un'eguale distribuzione di beni acquisiti o corrisposti. Iris Marion Young ha criticato questo errore con molta chiarezza: "Che cosa significa 'distribuire' un diritto? Si può sempre affermare di aver diritto a una certa porzione di cose materiali, risorse od entrate. Ma in questi casi ciò che viene distribuito è il bene, non il diritto [...] Concepire i diritti come se fossero delle proprietà si rivela dannoso. I diritti sono relazioni, non cose; sono regole che, istituzionalmente definite, specificano che cosa una persona può fare rispetto a un'altra persona. I diritti si riferiscono piuttosto al fare che non all'avere, cioè a relazioni sociali autorizzanti, o invalidanti, l'azione".[23] L'ingiustizia può manifestarsi da un punto di vista a partire dal quale la libertà e la dignità di tutti coloro che ne sono colpiti subiscono restrizioni così

[22] Cfr. B. Barry, "Statism and Nationalism: A Cosmopolitan Critique", in I. Shapiro e L. Brilmayer (a cura di), *Global Justice* New York University Press, New York e London, 1999, p. 37: "il valore di qualsiasi struttura politica [...] è interamente derivato dal modo in essa contribuisce al progresso dei diritti umani, del benessere ecc.". Cfr. anche A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International, Law*, Oxford University Press, Oxford 2004, pp. 74 sgg.

[23] I.M. Young, *Justice and the Politics of Difference*, Princeton University Press, Princeton NJ, 1990, p. 25.

invalidanti da far considerare ingiustificata ogni regolazione istituzionale data.[24] Concettualizzare la giustizia in termini di equa distribuzione degli esiti della cooperazione sociale equivale perciò a snaturarne la caratteristica relazionale e istituzionale. Se la giustizia viene concepita come la sfera che riguarda la corretta assegnazione di beni e diritti, ogni rivendicazione finisce per essere progressivamente riformulata sotto forma di pura e semplice rivendicazione giuridica, per cui di ogni soggettività rimane soltanto l'involucro della persona giuridica, un fantasma che diventa di ostacolo alla costruzione della libertà sociale. È solo in seconda battuta, dopo che è stato chiarito quali siano gli esiti che l'individuo può legittimamente rivendicare, che possono essere prese in considerazione le controparti rispetto alle quali rivendicare a sé dei diritti in maniera antagonistica.

Inoltre, questo modo di vedere la giustizia tende a lasciare in ombra alcune distinzioni essenziali per cogliere il legame tra le rivendicazioni di giustizia e l'ingiustizia in senso proprio. Se l'attenzione si focalizza unicamente sulla corretta assegnazione di beni e diritti, riesce difficile distinguere tra le situazioni in cui le persone soffrono, per esempio, a causa di calamità naturali e le circostanze in cui soffrono per effetto di comportamenti altrui che risultano lesivi per la loro dignità e i loro diritti. Ma diventa anche difficile distinguere tra una violazione dei diritti riconducibile a comportamenti attuati da terzi e una violazione imputabile a scelte compiute in prima persona. Questo non significa che l'adesione a una concezione distributiva della giustizia precluda il riconoscimento di queste distinzioni o la possibilità di valutare le situazioni in modo diverso. Tuttavia, dal momento che la giustizia viene identificata con il processo distributivo della corretta assegnazione di beni e diritti, l'esigenza di adempiere ai doveri di giustizia impone di porre *comunque* rimedio a situazioni di sofferenza evitabile. E ciò non aiuta a distinguere tra ciò che si deve agli altri per ragioni di solidarietà umana e ciò che si deve agli altri per ragioni di giustizia. Prestare aiuto o soccorso in nome di un moto spontaneo di empatia o solidarietà è cosa ben diversa dall'intervenire per raddrizzare un torto o correggere un'ingiustizia. È però a questo tipo di mancate distinzioni che si deve la propensione a sollecitare interventi di "ingerenza umanitaria" indifferente alla sovranità che si ritrova in molti esponenti del cosmopolitismo antistatista.

Oltre a tutto ciò, la concezione distributiva della giustizia adottata dal cosmopolitismo antistatista lascia in sospeso il problema di quali siano le figure cui spetta il compito di trasporre nella realtà gli obblighi normativi pertinenti. Si potrebbe descrivere questa concezione come un approccio che "si dedica prima di tutto a completare il lavoro sull'etica, raggiungendo una teoria ideale su come dovremmo

[24] Ivi, p. 39: "La giustizia dovrebbe riferirsi non solo alla distribuzione, ma anche alle condizioni istituzionali indispensabili a esercitare, e sviluppare, le capacità individuali e la cooperazione collettiva. In questa visione della giustizia l'ingiustizia concerne anzitutto oppressione e dominio quali forme di restrizioni invalidanti. Sono restrizioni che non riguardano solo modelli di distribuzione, ma abbracciano anche materie non immediatamente assimilabili a logiche distributive: per esempio procedure decisionali e divisione tra lavoro e cultura".

agire, e dopo, in un secondo passo [...] applica la teoria ideale all'azione degli agenti politici".[25] Ciò che conta è definire i principi di giustizia appropriati e fare in modo che sia fatta giustizia. Domande del tipo: "A chi spetta decidere quali sono le rivendicazioni giustificate?", oppure, "Chi ha titolo a decidere che giustizia è stata fatta?", o non vengono affrontate oppure vengono risolte demandando la risposta ai criteri presuntivamente oggettivi che la teoria ideale mette a disposizione di chi dovrebbe implementarli nel mondo reale. Si tratta di una soluzione che risulta particolarmente insoddisfacente quando alla domanda di giustizia viene data una risposta improntata all'"umanesimo militare", per usare l'espressione di Chomsky. Se ci si colloca nell'orizzonte del cosmopolitismo antistatista risulta difficile isolare una differenza, che sia significativa dal punto di vista normativo, tra le misure coercitive assunte da un'autorità politica nazionale e le misure assunte da una autorità politica straniera.[26] L'universalismo normativo va applicato tenendo conto del particolarismo politico ed evitando di ritrovarsi disconnesso dalle pratiche e dai significati che si sviluppano a livello locale. Altrimenti nulla esclude che possa degenerare in una forma di elitismo politico che si presenta come una sorta di curatore fiduciario dei diritti umani.

3. KANT, I BENI E I VINCOLI

Un'impostazione alternativa alla giustizia distributiva, in grado di conservare il rapporto di complementarità tra libertà individuale e sovranità dello Stato, può essere ritrovata nella filosofia kantiana del diritto. Kant definisce la giustizia nella prospettiva di un innato "diritto alla libertà", inteso come "indipendenza dall'arbitrio costrittivo altrui, in quanto può coesistere con la libertà di ogni altro secondo una legge universale".[27] Questa definizione di libertà non è di per sé incompatibile con i principi del cosmopolitismo morale: è individualistica, nel senso che riconosce i singoli esseri umani come unità di interesse morale; è universalistica, nel senso che la corretta assegnazione di beni e diritti riguarda allo stesso modo ogni essere umano; è generale, nel senso che ciascuno costituisce l'unità ultima di interesse morale per chiunque altro. Non a caso, Kant afferma che il diritto alla libertà può consistere "nella possibilità dell'accordo della coazione generale e reciproca con la libertà di ognuno".[28] Si tratta della definizione che esprime l'idea familiare di "sfere" di libertà, di ambiti d'azione protetti da interferenze arbitrarie altrui ed entro i quali ciascuno decide a sua discrezione come condurre la propria vita.

[25] R. Geuss, *Philosophy and Real Politics*, Princeton University Press, Princeton e Oxford, 2008, p. 8.
[26] C. Beitz, *Political Theory*, cit., pp. 80 e p. 87.
[27] [27] I. Kant, *La metafisica dei costumi* (1797), Laterza, Roma-Bari, 1970, p. 44.
[28] Ivi, p. 36.

La concettualizzazione kantiana della giustizia in termini di diritto alla libertà è sensibilmente diversa dalle concezioni distributive che articolano la giustizia in termini di diritti umani posti a tutela degli interessi umani fondamentali. Anzitutto, l'idea di uguale libertà non reca traccia di interessi umani fondamentali da rivendicare. Sebbene la capacità di agire razionale costituisca il presupposto fondamentale delle rivendicazioni di giustizia, il diritto alla libertà non consiste nella protezione degli interessi fondamentali delle persone considerate *uti singuli*. Inoltre, "in questa reciproca relazione di arbìtri non si prende affatto in considerazione la *materia* dell'arbitrio", "ma ciò che è in questione è soltanto la *forma* nella relazione dei due arbìtri, in quanto questi sono considerati assolutamente *liberi*, e occorre cercare unicamente se l'azione di *uno* dei due possa accordarsi con la libertà dell'*altro* secondo una legge generale".[29] La libertà come autonomia non consiste nella possibilità di godere di una giusta assegnazione di beni e diritti concessa a un "sé" dato a priori, a prescindere da relazioni e appartenenze, ma è la libertà di respingere pretese o condizioni che non superano il test dell'universalizzabilità sociale. Non è un bene meritevole di sostegno, ma un vincolo alla condotta degli altri. Agli occhi di Kant vi è quindi un nesso interno tra coercizione e libertà. "Il diritto è legato fin dall'inizio a un potere coercitivo".[30] La coercizione però si giustifica soltanto "in quanto *impedisce* un *ostacolo fatto alla libertà*",[31] ossia in quanto si oppone alla violazione della libertà di ciascuno. La pretesa di validità del diritto esprime appunto la convergenza "della coazione generale e reciproca con la libertà di ognuno".[32] Le regole giuridiche stabiliscono le condizioni coercitive "per mezzo delle quali l'arbitrio dell'uno può accordarsi con l'arbitrio di un altro secondo una legge universale della libertà".[33] Servono cioè a garantire la compatibilità tra la libertà di ciascuno e l'eguale libertà di tutti.

In secondo luogo, l'attenzione rivolta alle relazioni interpersonali preclude l'eventualità di concepire il diritto alla libertà come un'idea distributiva. A essere in discussione non è più il problema di un'equa distribuzione di eguali diritti definiti in senso prepolitico oppure di una stessa gamma di possibilità tra loro equivalenti. E neppure un'idea di libertà concepita come un bene da distribuire in modo equo e imparziale, anche se in prevedibile conflitto con altri beni concorrenti. Le strutture portanti della libertà possiedono in gran parte il carattere di pratiche, costumi e ruoli sociali, più che quello di dati di fatto prepolitici, poiché riguardano la posizione di un soggetto in relazione con la posizione di altri soggetti – posizioni che dovrebbero essere tali per cui la libertà dell'uno possa accordarsi con la libertà un altro "secondo una legge universale della libertà". Ognuno dovrebbe essere libero di decidere in modo autonomo circa le sue scelte di vita e nessuno dovrebbe

[29] Ivi, p. 34.
[30] J. Habermas, *Fatti e norme* (1992), Laterza, Roma-Bari 2013, p. 38.
[31] I. Kant, *La metafisica dei costumi*, cit., p. 36.
[32] *Ibid.*
[33] Ivi, pp. 34-35.

essere in grado di imporre agli altri i propri fini scelti arbitrariamente. Non esiste perciò una qualche norma predeterminata in grado di legittimare forme di intervento "umanitario" a favore delle persone i cui interessi fondamentali siano messi in pericolo. Nella misura in cui le questioni di giustizia non riguardano, se non in seconda battuta, i fini da perseguire, ma i problemi su chi ha titolo a decidere i fini da perseguire, il problema investe anzitutto la definizione di regole giudizialmente applicabili che stabiliscano in via generale se e in quali circostanze sussistano le condizioni per giustificare una disposizione interventistica negli affari interni di altri Stati. Nella teoria kantiana, tuttavia, non si trova alcun sostegno a favore di un diritto all'ingerenza negli affari interni di uno Stato che possa essere giustificato da un "dovere naturale di giustizia"[34] capace di presentarsi come una sorta di "anticipazione" di un effettivo diritto cosmopolitico.

Ora, se si guarda al problema della connessione interna tra libertà individuale e sovranità statale alla luce di queste considerazioni, se ne ricava l'idea che il diritto alla libertà sia una categoria normativa adatta a valutare sotto un profilo morale la qualità delle istituzioni sociali e politiche esistenti solo a condizione di prevedere l'esistenza di un'autorità sovrana. La libertà, intesa come un sistema di vincoli reciproci e non arbitrari, può essere esercitata solo attraverso le istituzioni statali del potere legislativo, esecutivo e giudiziario. Se si pensa alla giustizia in termini di diritto alla libertà, risulta poco plausibile considerare le istituzioni giuridiche e politiche quali semplici strumenti al servizio dei beni che in determinati collettivi valgono come desiderabili. Le istituzioni dovrebbero piuttosto essere considerate costitutive della giustizia per cui, e per la stessa ragione, anche la sovranità dello Stato non può essere limitata al suo solo valore strumentale. Se lo Stato rappresenta una condizione necessaria per l'osservanza reciproca da parte di tutti dell'autonomia di ciascuno, allora riconoscere l'eguale sovranità degli Stati è parte integrante del rispetto del diritto alla libertà di ogni persona.

4. SOVRANITÀ STATALE E LIBERTÀ INDIVIDUALE

A sostegno della tesi che vede nello Stato un presupposto necessario per le forze costitutive della libertà sociale può essere utile richiamare la finzione controfattuale di quell'immaginario stato di natura del quale non mancano certo i riscontri nella storia del pensiero politico. Il senso del discorso è che, in assenza di processi consultivi e decisionali giuridicamente istituzionalizzati nello Stato, non vi è alcuna garanzia che i processi sociali attraverso cui s'intrecciano interazioni e si strutturano forme di vita si sviluppino in modo da garantire a tutti pari libertà individuali d'azione. Come scrive Kant, "non è detto che lo stato di natura fosse, solo in quanto tale, uno stato d'*ingiustizia* (*iniustus*) [...]; ma era comunque uno stato *pri-*

[34] A. Buchanan, *Justice, Legitimacy, and Self-Determination*, cit., pp. 85 sgg.; cfr. anche S. Caney, *Justice Beyond Borders*, cit., pp. 111 sgg.

vo di diritti (*status iustitia vacuus*), in cui, quando riguardo al diritto nasceva *controversia* (*ius controversum*), non si trovava nessun giudice competente che potesse con forza di legge pronunciare una sentenza in virtù della quale ognuno potesse con la forza spingere l'altro a uscire da tale stato per entrare in uno stato giuridico".[35] Il solo modo per evitare che strutture asimmetriche di potere possano cristallizzarsi in una volontà arbitraria a disposizione unilaterale di una sola delle controparti è quello che consiste nella creazione di un'autorità statale capace di tutelare lo status giuridico dei cittadini. In assenza di organi istituzionali pubblici non vi è alcuna autorità che possa addossarsi l'onere di impedire che gli spazi di libertà a disposizione di ciascuno subiscano interferenze ingiustificate da parte di altri. Le norme giuridiche producono nello stesso tempo sia costrizione sia libertà. Infatti, ciascuno può vedersi garantite delle sfere di libero arbitrio a condizione che, sotto la minaccia di sanzioni statali, si impegni a rispettare anche nelle controparti sociali le stesse libertà che rivendica a sé in prima persona. Tuttavia, anche se lo Stato può essere considerato come il presupposto costitutivo di ogni forma duratura di mutua realizzazione dei fini individuali, questo non significa che i diritti umani debbano trovarsi in un rapporto di oppositività con la sovranità statale o che la sovranità debba avere un valore tutt'al più solo strumentale.

La libertà è sempre libertà "sociale": le istituzioni che la rendono possibile non sono qualcosa che si tratta di aggiungere a una dimensione prepolitica di libertà, ma sono ciò che ne rende possibile la realizzazione. L'intreccio tra il diritto e il potere politico non ha bisogno di collegarsi ad alcun sostrato prepolitico: piuttosto che dipendere da qualcosa di preesistente, ovvero da qualcosa di radicato in un immaginario stato di natura, il diritto alla libertà rappresenta un vincolo a ciò che può essere riconosciuto come un ordine legale e politico legittimo. È un criterio normativo astratto che esclude norme e assetti istituzionali che siano tali da rendere possibili situazioni in cui si cristallizzino rapporti asimmetrici di dipendenza o di subordinazione. In che modo questo criterio debba essere implementato nei programmi e nelle procedure legislative è un problema che può essere affrontato solo alla luce dei valori e delle forme di vita nazionali. In altre parole, non vi sono, datità morali preordinate al diritto statuale rispetto alle quali la sovranità potrebbe essere intesa come un valore strumentale. È per questo che la sovranità dello Stato è una componente intrinseca della libertà individuale, in quanto è l'istituzionalizzazione di procedure giuridiche a rendere possibile l'esercizio effettivo dell'autodeterminazione e a conferire concretezza e forza vincolante all'idea astratta della reciproca indipendenza.

Prendere atto che è lo Stato a offrire il quadro istituzionale che rende possibile l'esercizio legittimo della libertà individuale significa escludere preventivamente ogni diritto a forme di "ingerenza umanitaria". "A dispetto dei pericoli di disuguaglianza e di guerra, la sovranità nazionale è un modo di proteggere culture storiche

[35] I. Kant, *La metafisica dei costumi*, cit., p. 141.

distinte, di carattere a volte nazionale e a volte etnico o religioso. [...] La sovranità è un mezzo di autodifesa, ed è molto pericoloso esserne privati".[36] Una difesa dei diritti umani che si faccia valere nelle dimensioni dell'intervento militare equivale a destabilizzare quel regime del diritto internazionale che rappresenta pur sempre un primo passo nella direzione di un assetto cosmopolitico. Naturalmente, l'idea che lo Stato è la struttura che serve a garantire la compatibilità della libertà di ciascuno con l'eguale libertà di tutti può sempre ricevere brucianti smentite. Gli esempi di poteri arbitrari che rovesciano in caricatura le istituzioni che dovrebbero regolare conflitti e aspettative in modo equo e imparziale non mancano. Ma la libertà non è un valore sospeso nel vuoto, bensì acquista carattere vincolante solo nelle pratiche e nelle forme culturali di vita che trovano espressione negli ordinamenti normativi di Stati sovrani. Gli Stati non sono solo, ma sono anche, collettività politiche di "popoli" che si distinguono fra loro per lingua, religione e modo di vita. Con un intervento militare esterno i popoli perderebbero, insieme alla sovranità dei loro Stati, un'indipendenza nazionale già acquisita e ciò metterebbe a rischio l'autonomia delle loro forme collettive di vita.

5. L'ANALOGIA DOMESTICA RIVISITATA

Questi argomenti possono essere addotti a sostegno della cosiddetta "analogia domestica", così da superare le obiezioni del cosmopolitismo antistatista all'idea, propria del cosmopolitismo politico, che riconoscere l'eguale sovranità degli Stati sia parte integrante del rispetto del diritto alla libertà di ogni persona. Stando a questa analogia, la sovranità può essere intesa come una controparte internazionale della libertà individuale in ambito domestico. Come gli individui hanno diritto alla propria integrità corporea, così gli Stati hanno il diritto alla propria integrità territoriale. In entrambi i casi, l'integrità è una condizione esterna necessaria all'esercizio di scelte autonome, per quanto il diritto all'integrità non sia subordinato a tali scelte. Il diritto all'integrità è un aspetto essenziale del diritto alla libertà e comprende il diritto di compiere errori, sia da parte degli individui sia da parte degli Stati. Come non possiamo fare pressioni esterne sugli individui e capovolgere l'esercizio della libertà in supervisione paternalistica, così neppure l'unilateralismo di un egemone per quanto bene intenzionato può sostituirsi alle scelte autonome di uno Stato. In altre parole, non vi è alcuna diretta correlazione tra le caratteristiche interne di uno Stato e la sua posizione internazionale.[37] È certo possibile che uno Stato manchi della volontà o della capacità di garantire ai suoi cittadini un ordinamento democratico e costituzionale, ma ciò non giustifica una limitazione della sua sovranità imposta con la forza e la sua esclusione dalla "co-

[36] M. Walzer, *Sulla guerra*, Laterza, Roma-Bari, 2004, p. 174.

[37] Cfr. M. Walzer, "The Moral Standing of States: A Response to Four Critics", *Philosophy & Public Affairs*, 3, 1980, p. 212 e p. 214.

munità internazionale". L'analogia domestica implica perciò l'uguaglianza di tutti gli Stati. In contrasto con il punto di vista asimmetrico difeso dai cosmopoliti antistatisti, difendere l'analogia significa difendere i principi di non intervento e di autodeterminazione sanciti dalle norme del diritto internazionale e validi anche per gli Stati che Rawls definiva "fuorilegge". L'analogia tra relazioni interpersonali e relazioni internazionali incontra l'ostilità dei cosmopoliti antistatisti per almeno due ragioni. Anzitutto perché lascia passare sotto silenzio le rilevanti differenze che intercorrono tra gli individui e gli Stati, e, in secondo luogo, perché attribuisce all'autonomia collettiva un valore che finisce per limitare in modo ingiustificato i diritti individuali.

Ora, una prima linea di difesa dell'analogia domestica nasce dalla preoccupazione di difendere l'integrità territoriale e l'indipendenza politica e decisionale di ogni Stato da ogni interferenza esterna. Il principio alla base di questo argomento è piuttosto semplice e si basa sul presupposto che le relazioni interstatali e le relazioni interpersonali siano simili per un aspetto decisivo. In entrambi i casi i partner dell'interazione partecipano a un gioco strategico in cui godono dell'indipendenza di fatto nella misura che consente loro di decidere secondo le loro preferenze e di agire autonomamente. Per esempio, gli individui secondo i loro interessi personali, gli Stati secondo l'"interesse nazionale". Come gli individui, così gli Stati sono attori che partecipano a un gioco strategico in cui la distribuzione dei ruoli obbedisce, almeno in linea generale, al principio di una stretta eguaglianza. Gli uni e gli altri hanno così il diritto di perseguire i propri fini – per esempio le preferenze di cittadini privatamente autonomi e la sicurezza e il controllo del territorio nazionale – senza vedersi imporre decisioni altrui. Di conseguenza, a ogni Stato andrebbe riconosciuto l'esclusivo diritto di giurisdizione su uno specifico popolo e territorio per cui, nella sfera dei rapporti tra Stati, il principio dell'eguaglianza sovrana dovrebbe regolare la condotta formale degli Stati nei loro rapporti, a prescindere dal fatto che i loro regimi siano rappresentativi o meno.

I cosmopoliti antistatisti tendono a respingere questa tesi poiché ritengono che essa trascuri le differenze profonde che intercorrono tra il riconoscimento internazionale degli Stati come soggetti che, in linea di principio, sono eguali di fronte alla legge e godono del medesimo status formale, e il principio che prescrive l'eguale rispetto per ogni persona. È irrealistico pensare che i cittadini, unendosi in un solo corpo, non siano più soltanto dei privati meramente soggetti alle leggi ma si fondano gli uni negli altri dando vita a un macrosoggetto, un corpo collettivo capace di dirigere l'intera società con volontà e coscienza. Come afferma Beitz, "gli Stati in quanto Stati non pensano, non vogliono o non agiscono in vista di determinati fini; solo le persone [...] fanno queste cose".[38] A meno di non pensare a un collettivo organizzato in Stato come a un quasi-soggetto capace di agire teleolo-

[38] C. Beitz, *Political Theory*, cit., p. 76; cfr. anche S. Caney, *Justice Beyond Borders*, cit., p. 236.

gicamente, non sembra quindi che ci siano motivi convincenti per riconoscere agli Stati gli stessi diritti di cui godono le persone di perseguire autonomamente i propri interessi in maniere razionali rispetto-allo-scopo – "compatibilmente con un simile sistema di libertà per tutti". L'analogia non regge, in altre parole, perché gli Stati non dispongono, per giustificare la loro integrità territoriale, delle proprietà morali che servono invece a giustificare l'integrità personale.

Una seconda linea di difesa si ispira all'argomento di taglio comunitarista proposto da Michael Walzer difesa. Si tratta di una prospettiva che non attribuisce il diritto morale di scegliere a proprio arbitrio direttamente agli Stati. Gli Stati non sono agenti morali paragonabili alle persone e ai quali siano perciò ascrivibili gli stessi diritti riconosciuti alle persone. L'idea, piuttosto, è che gli Stati siano l'espressione politica di forme di vita intersoggettivamente condivise. È la comunità che si nutre dell'appropriazione ermeneutica di tradizioni condivise a godere del diritto inalienabile all'autonomia. Un eventuale intervento esterno è perciò meno un'offesa allo Stato che un'offesa alla comunità rappresentata dallo Stato. Pertanto, il fondamento morale più profondo della comunità è una sorta di contratto di tipo burkeano tra "i vivi, i morti e coloro che devono ancora nascere", mentre "l'idea di integrità comunitaria deriva la sua forza morale e politica dai diritti degli uomini e delle donne contemporanei di vivere come membri di una comunità storica e di esprimere la cultura ereditata attraverso forme politiche elaborate da loro stessi".[39] E a tali comunità storiche che gli stranieri devono rispetto, che va associato peraltro a "un presupposto moralmente necessario: che esista un certo 'adattamento' tra la comunità e il suo governo e che lo Stato sia 'legittimo'".[40]

Secondo Walzer, anche se i governi nazionali possono a volte compiere scelte politiche lesive dei più fondamentali diritti dei propri cittadini, i governi stranieri non dispongono di sufficienti conoscenze storiche né di sufficienti esperienze dirette per formulare giudizi adeguati sulla effettiva legittimità dei governi che si prefiggono di rovesciare. Non sono cioè in grado di giudicare se l'autorità politica impiega l'apparato coercitivo a sua disposizione per tutelare una élite autoreferenziale o invece per assicurare la continuità delle pratiche e delle tradizioni che sono costitutive per l'identità comunitaria. "La protezione dell'integrità del modo di vita e dell'ethos tradizionale di una comunità statalmente organizzata deve godere, fin quando non si arrivi a genocidi e a crimini contro l'umanità, di precedenza sull'applicazione globale di astratti princìpi di giustizia".[41] È questa carenza strutturale di comprensione del contesto locale, associata al diritto di autodeterminazione di ogni comunità, che motiva la sfiducia di Walzer per le procedure e le organizzazioni sovranazionali e che lo porta a escludere eventuali interventi negli affari domestici di un paese a prescindere sua costituzione interna – tranne in circostan-

[39] M. Walzer, "The Moral Standing of States", cit., p. 211.
[40] Ivi, p. 212.
[41] J. Habermas, *L'Occidente diviso*, cit., p. 92.

ze eccezionali. Il mancato rispetto di questo principio sarebbe di fatto equivalente a una violazione dei diritti dei cittadini degli altri Stati. Per questo, conclude Walzer, "gli Stati possono essere legittimi, in linea di principio, dal punto di vista della società internazionale, e illegittimi, in linea di fatto, dal punto di vista domestico".[42]

La critica antistatista della versione comunitarista dell'analogia domestica mette in genere in discussione la connessione tra il rispetto per l'integrità comunitaria e l'"adattamento" tra la comunità e il proprio governo. Anzitutto, l'idea che un osservatore esterno non disponga di fonti sufficienti per esprimere giudizi fondati è a dir poco irrealistica. Le informazioni a sua disposizione possono essere carenti o lacunose nei dettagli, ma ciò non esclude affatto la possibilità che se ne possa servire per esprimere valutazioni generali. Inoltre, l'eventualità di una univoca corrispondenza tra Stato e comunità rientra nel novero delle eccezioni piuttosto che della regola. Nel mondo reale si contano sulle dita di una mano gli Stati che ospitano al proprio interno una e una comunità soltanto di individui che si identificano in una forma di vita che condividono in via esclusiva, come se costituissero una totalità ermetica e sigillata. E anche se avesse senso ipotizzare uno Stato che sia espressione di una "cultura" che permea ogni aspetto della vita sociale e delle istituzioni, il pluralismo interpretativo con cui vengono vissute tradizioni di per sé ambivalenti offre sempre a ogni comunità nuove occasioni di revisione e critica. Non è perciò chiaro, alla luce del pluralismo che caratterizza sia la "comunità" organizzata in Stato sia l'appropriazione critica di ogni tradizione, se il principio di non intervento rappresenti il modo migliore di proteggere l'integrità comunitaria. La decisione di astenersi dall'interferire in un conflitto interno a uno Stato potrebbe infatti essere interpretata come una forma di partigianeria a favore della parte dominante.[43] In altre parole, dal momento che l'argomento di Walzer non spiega perché il principio di non intervento possa essere addotto a sostegno della sovranità degli Stati, non riesce neppure a suffragare la tesi dell'analogia domestica.

Il fatto di riportare le obiezioni sollevate dal cosmopolitismo antistatista nei confronti dell'analogia domestica non significa però condividerle. Per riaffermare la validità dell'analogia non è né necessario che gli attori collettivi possiedano caratteristiche morali assimilabili a quelle riconosciute agli attori individuali, né che l'integrità comunitaria abbia titolo a vedersi riconosciuto un valore morale indipendente, né che sia indispensabile postulare una qualche forma di corrispondenza tra la comunità e lo Stato. È sufficiente concepire lo Stato come l'istituzione che assicura la possibilità di una convivenza giuridicamente organizzata, dal momento che i diritti hanno bisogno di essere attuati anche con la forza mediante un apparato giurisdizionale che va tutelato da ogni interferenza esterna. La sovranità *de jure*

[42] M. Walzer, "The Moral Standing of States", cit. p. 214.

[43] C. Beitz, *Political Theory*, cit., p. 195; J. Buchanan, *Justice, Legitimacy, and Self-Determination*, cit., pp. 178 sgg.

in ambito internazionale non è che il logico completamento del potere reale che la sovranità conferisce a uno Stato sul piano dei suoi affari interni. Il ricorso allo *jus ad bellum*, che limita la sovranità dei singoli Stati in funzione di un'applicazione globale di astratti princìpi di giustizia, mette a rischio la capacità dello Stato di fornire il quadro istituzionale e organizzativo che assicura il diritto alle pari libertà soggettive che si concretizzano in diritti fondamentali. Proprio come gli agenti individuali devono poter agire in modo da essere indipendenti gli uni rispetto agli altri all'interno della propria comunità nazionale, così gli Stati devono poter esercitare le proprie facoltà potestative in base al principio della "eguale sovranità" all'interno della comunità internazionale. Sopprimere la sovranità dei Leviatani nazionali equivale a rimuovere le condizioni esteriori della libertà sociale.

Ora, se si volesse far compiere all'analogia un passo ulteriore, si potrebbe essere indotti a mettere in discussione proprio il principio della "eguale sovranità" tra Stati. Infatti, "questa 'sovrana eguaglianza' viene pagata col riconoscimento della guerra come meccanismo di regolazione dei conflitti, dunque con la libertà data all'uso della forza militare."[44] Anche senza richiamare i funesti esempi della lotta per "un posto al sole" o per lo "spazio vitale", le relazioni tra gli Stati sono improntate all'esigenza di porre i rispettivi interessi nazionali al di sopra di tutti gli altri, e ciò sembra suggerire l'esigenza di creare un ente superiore di coordinamento in grado di mediare e risolvere le controversie, una sorta di autorità sovranazionale di "secondo livello" analoga alle autorità nazionali di "primo livello". Tuttavia, se gli Stati fossero soggetti a istanze sovraordinate per l'affermazione e l'applicazione imparziale del diritto, la loro sovranità ne uscirebbe profondamente ridimensionata. Si ridurrebbero tutt'al più a unità di rango inferiore e relativamente autonome di uno Stato federale globale dotato di poteri coercitivi nei loro confronti.

Questa apparente complicazione deriva dal paragone tra la situazione di anarchia che vige tra gli Stati e quello "stato di natura" nel quale gli individui si sarebbero trovati prima di qualunque socializzazione. Come il patto sociale indica nella convivenza di cittadini organizzati la risposta a una situazione di permanente insicurezza così, ritiene Kant, anche gli Stati devono a loro volta trovare un'analoga via d'uscita da uno stato di natura altrettanto insostenibile. "Come un tempo gli individui si sono uniti, sacrificando la loro libertà naturale, in una comunità organizzata in Stato sotto leggi coattive, così anche gli Stati debbono unirsi, sacrificando la loro sovranità, in una 'comunità cosmopolitica sotto un unico sovrano'. Come là si trovò la soluzione nello Stato, così qui la soluzione la porterà uno Stato di Stati – lo Stato dei popoli".[45] Nel sistema delle relazioni internazionali gli accordi giuridici si limitano a riflettere transitorie e mutevoli costellazioni di interessi tra le potenze. Di conseguenza, un sistema internazionale basato sull'equilibrio del pote-

[44] J. Habermas, *L'Occidente diviso*, cit., p. 112.
[45] Ivi, p. 123.

re è uno "*stato di guerra* (il diritto del più forte)", che "è in sé estremamente ingiusto",[46] e le nazioni che non possono evitare le relazioni con le altre nazioni sono obbligate a porre fine a tale sistema unendosi in un'associazione di Stati "che decida le controversie dei popoli in modo civile, per così dire mediante un processo, e non già in modo barbaro (al modo dei selvaggi, vale a dire per mezzo della guerra".[47] Alcuni interpreti hanno ritenuto che lo sbocco coerente di questa analogia sia rappresentato da uno Stato di nazioni o uno Stato internazionale in grado di inglobare tutti i popoli.[48] Kant invece, com'è noto si schiera decisamente a favore del confederalismo negli affari internazionali, propone una *lega* dei popoli come surrogato dello *Stato* dei popoli, e fonda la sua speranza su un'associazione "volontaria e in ogni tempo *revocabile* dei diversi Stati"[49] intenzionati a cooperare pacificamente ma sempre sovrani.

Ma se un tempo gli individui hanno trovato nello Stato, cioè nell'esercizio del potere politico attraverso l'amministrazione del diritto coattivo, una risposta ai pericoli e all'insicurezza dello stato di natura, perché escludere un potere sovranazionale che risponda al problema dello stato di natura tra gli Stati rivali e che sia dotato delle possibilità di sanzione e delle capacità di azione indispensabili per imporre le proprie regole? Perché escludere un potere sovranazionale di imposizione e limitarsi alla forma debole di un'associazione volontaria di repubbliche amanti della pace, una "specie di *alleanza* di alcuni *Stati"*, che Kant definisce come "un *permanente congresso di Stati*, l'associarsi al quale non è precluso ad alcuno Stato vicino"?[50] La risposta di Kant è ben nota: perché un potere del genere potrebbe essere affermato solo a prezzo di un "dispotismo senz'anima", tale da imporre una pacificazione giuridica della società mondiale con i mezzi repressivi a disposizione di un unico monopolista della forza. Un'altra risposta potrebbe partire dal riconoscere che l'analogia dello stato di natura suggerisca un parallelismo che non andrebbe inteso in senso troppo letterale. Infatti, a differenza degli individui, gli Stati non dispongono della possibilità di fissare arbitrariamente i propri obiettivi. Dal momento che sono corpi collettivi, possono perseguire un solo obiettivo fondamentale: creare le condizioni necessarie a tutelare l'autonomia delle rispettive forme individuali e collettive di vita. Il diritto sovrano degli Stati di operare in modo indipendente dagli altri Stati si riferisce alla possibilità di perseguire questo obiettivo senza dover sottostare a vincoli esterni. Entro questi limiti, gli Stati sono liberi di organizzare la convivenza dei propri cittadini senza vedersi costretti a sacrificare la loro sovranità, in una "comunità cosmopolitica sotto un unico sovrano", una "monarchia universale" monopolista della forza.

[46] I. Kant, *La metafisica dei costumi*, cit., p. 180.

[47] Ivi, p. 488.

[48] O. Höffe, *Kant's Cosmopolitan Theory of Law and Peace*, Cambridge University Press, New York 2006, p. 193.

[49] I. Kant, *La metafisica dei costumi*, cit., p. 188.

[50] *Ibid.*

Ciò suggerisce due conclusioni. La prima è che gli Stati sono autorizzati a combattere soltanto le guerre difensive necessarie alla loro autoconservazione. La seconda è che il territorio non è una sorta di bene esterno a disposizione dell'autorità sovrana, ma la sua manifestazione spaziale. Il territorio è uno spazio che è qualificato solo in quanto politico, e il suo compito è quello di rappresentare la sovranità inserita in una spazialità dotata di senso creata proprio per respingere all'esterno la guerra, per delimitare uno spazio interno pacificato. Diversamente dalla proprietà privata, che è uno strumento a disposizione di individui interessati unicamente a perseguire liberamente i propri fini, il territorio è reso significativo dalla presenza dello Stato, "che determina lo spazio politico perché, ovviamente, ha bisogno di uno spazio per manifestarsi. [...] La sovranità non può non essere il comando universale che vale nello spazio particolare".[51] Per questo il territorio è l'incarnazione, per così dire, dello Stato ed è costitutivo della sua personalità giuridica internazionale.

È importante distinguere la proprietà dei beni esteriori dalla 'proprietà' del territorio perché nello stato di natura i problemi si riferiscono alla ripartizione di una certa porzione di cose materiali, risorse o entrate. Si tratta di questioni di giustizia distributiva. In questi casi ciò che viene distribuito è un bene, non un diritto. Dal momento però che il territorio non è un bene esterno, ma l'equivalente del corpo di una persona trasposto sul piano delle relazioni internazionali, la richiesta che gli Stati rispettino l'integrità territoriale degli altri non equivale all'imposizione unilaterale di un vincolo. È certamente vero che "nel mondo reale dipende sempre dalla casualità storica e dalla fattualità degli eventi stabilire a chi tocca il potere di tracciare i confini della comunità politica [e che] in linea di massima ciò dipende dall'esito naturalistico di conflitti violenti, di guerre esterne e di guerre civili".[52] Quando però uno Stato esercita il proprio diritto di legittima difesa la sua reazione non può essere considerata come un atto unilaterale di tutela dei propri diritti di proprietà, ma come un'azione finalizzata a conservare l'integrità delle istituzioni create a tutela della coesistenza giuridicamente equiparata tra i cittadini.

Allo stesso tempo, per evitare che questa "sovrana eguaglianza" venga pagata col riconoscimento della guerra come meccanismo di regolazione dei conflitti, diventa necessario promuovere la creazione di un'autorità sovranazionale che non vada però al di là di un semplice coordinamento di attività di singoli Stati. Ciò può spiegare la scelta di Kant a favore di un *foedus gentium*, di un *Völkerbund*, e non della *civitas maxima*, della *Weltrepublik*, del *Völkerstaat.* Al progetto della lega di popoli è legata l'idea di una federazione di repubbliche che desistono dalle guerre di aggressione e accettano di risolvere le loro controversie affidandosi a un arbitrato internazionale. In altre parole, la lega provvede a istituire le procedure di pacifi-

[51] C. Galli, *Spazi politici*, Il Mulino, Bologna, 2001, p. 63.

[52] J. Habermas, "Lo stato-nazione europeo. Passato e futuro della sovranità e della cittadinanza", in Id., *L'inclusione dell'altro* (1996), Feltrinelli, Milano, 1998, p. 129.

ca composizione dei conflitti. Ciò significa, allora, che la difesa dell'analogia domestica è compatibile con il riconoscimento della "sovrana eguaglianza" tra gli Stati. Diventare membri della lega dei popoli significa cioè assumere lo status di soggetti compartecipi del diritto internazionale ma senza, con ciò, diventare semplici parti di un più ampio ordinamento gerarchico.

6. OSSERVAZIONI CONCLUSIVE

Nelle pagine precedenti si è affermato che la sovranità di uno Stato si fonda sul riconoscimento internazionale e che tale riconoscimento non dipende dalla sua capacità di entrare in risonanza con gli ideali della democrazia e del liberalismo. Ciò equivale a sostenere che la razionalizzazione del dominio all'interno di uno Stato può contravvenire a criteri di corretta efficienza della organizzazione giuridica e fiscale e che, però, la sua condotta va considerata moralmente indifferente. Mancano perciò i presupposti per una trasformazione dello *jus in bello* in un diritto di intervento anche solo vagamente simile ai diritti di polizia interni agli Stati. Nella prospettiva del cosmopolitismo statista, una conclusione come questa non può che suonare deludente e rinunciataria, poiché sembra precludere ogni intervento sanzionatorio nei confronti di governi che si macchiano di crimini atroci. Eppure, non è detto che di fronte a guerre aggressive e a violazioni dei diritti umani causate governi criminali non resti che la neutralità ipocrita o l'inerzia dello spettatore moralmente indignato.

Per provare a immaginare come la difesa del principio di non intervento possa essere compatibile con l'applicazione di sanzioni per la violazione delle norme, all'occorrenza anche l'intervento militare con funzioni di polizia, può essere utile ricordare un'ovvietà: imporre a una popolazione la forma organizzativa di tipo statuale non equivale a disporre del monopolio dei mezzi per l'impiego legittimo della forza che al moderno Stato di diritto serve da copertura per la sovranità interna ed esterna. Uno Stato deve anche basarsi su un ordinamento istituzionale le cui procedure di giurisdizione e imposizione giuridica sono precedenti e sovraordinate alle parti in conflitto. Queste procedure possono essere imprecise o disfunzionali, la loro applicazione solo parziale o clientelare, i loro esiti inadeguati o insoddisfacenti. Non è detto che la legittimità di uno Stato dipenda sempre o ovunque dalla sua capacità di soddisfare alcuni standard ideali di giustizia: può anche poggiare su fattori come forza delle circostanze, costumi o semplice convenzione. È sufficiente che la funzione pacificatrice del diritto possa intrecciarsi con la garanzia di libertà offerta da una condizione giuridica che i cittadini possano essere disponibili a riconoscere come legittima.

I regimi autoritari e talvolta perfino dispotici e criminali che praticano forme di terrorismo di Stato anche contro la loro popolazione sono qualcosa d'altro e di diverso da regimi 'semplicemente' corrotti o inefficienti. Questi regimi hanno per-

so la presunzione d'innocenza loro garantita dal diritto internazionale. Permettere un'interferenza esterna anche nelle dimensioni dell'intervento militare non è un'opzione in contrasto con la difesa della eguale sovranità degli Stati e del principio di non intervento. In circostanze come queste non si tratta di destituire un governo che serve a garantire la compatibilità della libertà di ciascuno con l'eguale libertà di tutti, ma di impedire la criminalità governativa degli Stati che fanno guerra ai loro popoli con pulizie etniche e genocidi. Il pronto intervento in caso di imminente genocidio fa non a caso parte integrante del diritto internazionale consuetudinario. Si tratta però di eccezioni, alle quali il cosmopolitismo antistatista può prestare – certo involontariamente – un'aura di legittimazione e può servire da riserva di copertura a interventi unilaterali ispirati a una pura politica di potenza.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 751-768
ISSN: 1825-5167

THE INTRINSIC JUSTIFIABILITY OF GRANDFATHERING IN CLIMATE POLITICS

MENNO R. KAMMINGA
Faculty of Arts
University of Groningen (The Netherlands)
m.r.kamminga@rug.nl

ABSTRACT
Climate philosophers conceptualize 'grandfathering' as 'emissions grandfathering': past emission levels entitle to future emissions. With the notable but controversial exception of libertarian Luc Bovens (2011), they regard grandfathering as intrinsically, even if not instrumentally, unjust. Questioning both the standard dismissal and Bovens's Lockean pro-argument, this article defends the intrinsic (albeit limited) fairness of grandfathering conceptualized as 'resources grandfathering': fossil resource creation entitles to future resources use. A threefold 'social constructivist' ethical argument for this position is developed. First, philosophers' basic aversion to grandfathering, while consistent with their emissions-based understanding, rests on an undefended, shallow 'cosmopolitan materialism'. Second, Bovens's Lockean defense of the intrinsic fairness of grandfathering emission rights falls short for assuming a dubious 'first-come first-served' within a retained cosmopolitan materialism, although it sensibly suggests to include respect for investments in our understanding of grandfathering. Third, a 'communitarian idealist' defense of grandfathering, which stresses that 'natural resources' are cultural-historical creations, succeeds by undermining cosmopolitan materialism and eliminating first-come first-served. Thus, grandfathering supports Western countries and opposes (possibly) non-Western small rich or rapidly industrializing ones, and implies a critique of the view that the West owes a massive climate debt to developing countries. Yet, grandfathering, as distributional starting-point within a pluralist framework, should arguably be complemented by 'no-harm' and 'ability to pay'.

KEYWORDS
Climate justice; communitarianism; grandfathering; idealism; materialism; social constructivism

INTRODUCTION

The politically most practiced but philosophically most opposed principle for allocating emissions space is arguably 'grandfathering'. Climate philosophers generally understand this principle as one that distributes emission permits among states according to their current emission levels, so that the more a state emits in the start year, the more permits it receives for the future (Mi et al. 2019: 312;

Moellendorf 2015: 177; Page 2013: 233). As such, grandfathering is highly controversial: it benefits developed, rich countries, whereas poor, developing countries would benefit by a seemingly more just principle that accounts for 'historical responsibility' for climate change (Mi et al. 2019: 317). During two decades of international climate negotiations, developing countries have basically defended an 'equal per capita emissions' standard and rejected grandfathering - or 'equal percentage emissions reductions' - as proposed by developed countries as wholly unfair (Damon et al. 2019: 34-37; cf. Torpman 2019: 6). In this, developing countries have received support, even if qualifiedly so, from climate activists and philosophers: since past emissions have caused climate change, it would be counterintuitive, if not perverse, to reward polluters who should actually pay (Damon et al. 2019: 29). Thus, Darrel Moellendorf holds that grandfathering troublingly '[entrenches] an entitlement to high emissions to historically high emitters simply because they are historically high emitters' (2015: 177); and Simon Caney concludes that '[n]o moral and political philosopher (to my knowledge) defends grandfathering, presumably assuming that it is unjust' (2009: 128; cf. Breakly 2015: 158). Indeed, seen from an often (roughly) accepted 'equal per-capita share' perspective (cf. Torpman 2019: 2), one would expect the US and other Western states to accept a status as 'debtors' and transfer many trillions of dollars of climate reparation payments to developing countries as 'creditors' (Matthews 2016).

Yet several ethical defenses of 'emissions grandfathering' have emerged. Probably the best known is the Lockean libertarian account of Luc Bovens (2011). According to Bovens, states have a future use right in their historically productive use of the atmospheric absorptive capacity as a good initially unproductively owned by all humanity. Largely in response to Bovens's attempt to defend grandfathering on such intrinsic grounds, Carl Knight (2013, 2014) and Rudolf Schuessler (2017) have argued that grandfathering can be defensible but on instrumental grounds only, that is, if derived from basic ethical theories such as utilitarianism, egalitarianism, and luck-based ethics. In being 'moderate', a defensible grandfathering (Knight 2013: 411-412) does *not* reward the polluters (cf. Caney 2009: 127). As Knight puts it, 'that pumping out carbon should, intrinsically and regardless of its effects, *increase* entitlements would be a *reductio* of [libertarianism]. Emissions just do not seem intrinsically entitlement-granting' (2013: 416, emphases in original; cf. Moellendorf 2015: 177). If, then, Knight and Schuessler are right in rejecting Bovens's view, we would still lack reason for thinking that grandfathering could be *intrinsically* legitimate and so should *basically* maintain Caney's dismissal.

This article criticizes the usual rejection of grandfathering as intrinsically unjust while attempting to improve upon Bovens's Lockean pro-argument. Thus, I defend the intrinsic (even if limited) fairness of grandfathering conceptualized as (for lack of a better term) 'resources grandfathering': fossil resource creation entitles to future resources use. I will develop a threefold 'social constructivist' ethical argu-

ment for my position. First, philosophers' basic aversion to grandfathering, while in line with their emissions-based understanding, rests on an undefended, shallow 'cosmopolitan materialism', according to which atmospheric absorptive capacity and fossil resources are 'ecosystem services' to be treated as common global goods (cf. Torpman 2019: 1). Second, Bovens's defense of the intrinsic fairness of grandfathering emission rights falls short for assuming a dubious 'first-come first-served' (cf. Shue 2015: 19; Damon et al. 2019: 23) within a retained cosmopolitan materialism, although it sensibly suggests to include respect for investments in our conception of grandfathering. Third, a 'communitarian idealist' defense of grandfathering, which highlights that 'natural resources' are cultural-historical creations, succeeds by undermining cosmopolitan materialism and making first-come first-served non-existent. Thus, grandfathering supports Western countries and opposes (possibly) non-Western small rich or rapidly industrializing ones, and implies a critique of the view that the West owes a huge climate debt (e.g., Matthews 2016) to poor countries. Yet, grandfathering, as distributional starting-point within a pluralist climate ethical framework, should arguably be complemented by principles of 'no-harm' and 'ability to pay'.[1]

Before developing my arguments, I should clarify the difference between (the already mentioned terms of) 'materialism' and 'idealism' as ontological positions regarding 'society' (Wendt 1999). As Alexander Wendt (1999: 23) explains, 'materialism' holds that the key social fact is the impact of material forces; often, human nature, natural resources, geography, forces of production, and forces of destruction are seen as belonging to this category. By contrast, 'idealism' holds that the key social fact is the impact of social consciousness, that is, the constitutive effects of ideas or knowledge (Wendt 1999: 24). I shall, then, in line with Wendt's 'social constructivism' (albeit against his materialist view in this respect; Wendt 1999: 23, 111), defend an idealist view of 'natural resources' as especially 'ideational' and only 'material' in a minimal sense. Thus, I will make a communitarian-idealist ethical case for grandfathering based on the 'cultural history' behind fossil fuels and atmospheric absorptive capacity.

A CRITIQUE OF THE STANDARD PHILOSOPHICAL REJECTION

My first argument is that philosophers' basic dislike of grandfathering, while that fits their emissions-based conception, presupposes a narrow, questionable 'cosmopolitan materialism'. I shall focus on directly relevant arguments of Edward Page, Caney, Knight, and Schuessler.

[1] Seeking a moral foundation for grandfathering in the context of climate justice, I will not cover possible practical implications such as the advantage of bringing stakeholders together or the disadvantage of undermining incentives to invest in abatement or new technology (Damon et al. 2019; cf. Caney 2009: 128-130).

According to Page, emissions grandfathering is clearly unfair. As he writes:

> [T]he obvious problem with emissions grandfathering...is that it assigns an implausible weight to the normative relevance of historic usage of the capacity of the atmosphere to assimilate greenhouse gas. [Thus,] anchoring the emissions entitlements of states to their past emissions profiles would be unfair to states responsible for modest accumulations of atmospheric greenhouse gas since 1750 (Page 2013: 233).

One undesirable consequence, Page fears, is that 'the per capita emissions of the developed world' will continue 'to exceed those of the developing world for many decades' (2013: 233).

However, in reaction to Page, while *emissions* in dangerously high levels do form an 'obvious problem', we need not conclude that *grandfathering* as a principle is obviously problematic. Indeed, Page's negative judgement tacitly presupposes that emissions and atmospheric absorptive capacity are simply material and should be globally shared so as to halt the historically unequal distribution of per capita emissions. Remarkably, Page thus also assumes the positive, wealth-related quality of 'emissions' as such. But this begs the question of what has made such beneficial emitting actually possible.

Caney (2009) finds grandfathering - 'that the fair share of emissions for any actor should be a function of its past share of emissions' (127) - perverse. He raises two objections:

> First, it is insensitive to people's needs and would lock members of developing countries into a permanent state of poverty and underdevelopment...And...eradicating great poverty is an ethical concern of paramount importance....Grandfathering would entail that both China and India receive radically fewer emission rights per capita than North American, Japanese and European citizens, and as such would thwart the former's legitimate interests in development and the realization of fundamental human rights to meet basic needs. Second, grandfathering runs contrary to another deeply held principle of justice - namely,...historical responsibility. It is widely held that those responsible for creating an environmental problem should bear a commensurate cost...Grandfathering, however,...remunerates people for behavior that has caused the problem (Caney 2009: 128).

Now, Caney's 'strong' (Knight 2013; cf. Damon et al. 2019: 26) verdict, notably his second objection of historical responsibility, is conceivable as regards 'emissions grandfathering', but it is also silently dependent on assumptions entailing the essential materiality and global-ness of emissions and atmospheric absorptive capacity: these provide his benchmarks for why polluters as causers of this 'environmental problem' should pay. Note also that Caney, like Page, tacitly concedes the inherently positive, development-creating potential of fossil fuel-based 'emissions' by itself; he even claims that developing countries are entitled to a particular share due to their legitimate anti-poverty development needs (his first objection).

But again, we are not told how the very possibility to emit so valuably has come into being in the first place. Finally, as Caney's first objection of the global poor's needs merely points to emission *limits* for the rich, it might be combined with *pro tanto* grandfathering and a plea for pluralism into a 'moderate' position - to be discussed now.

Knight (2013, 2014), who argues that a 'moderate' grandfathering may be morally legitimate, maintains that grandfathering cannot be *intrinsically* fair. 'Emissions grandfathering maintains that prior emissions increase future entitlements', Knight (2013: 410) accepts. What he defends, then, is a grandfathering that (i) holds that one's past emissions provide a *pro tanto* entitlement to one's future emissions and so allows other considerations (e.g., basic needs, ability to pay) to influence emission entitlements, and (ii) is justified on *instrumental* grounds. Knight's primary justification is utilitarian: in terms of welfare, since high emitters would probably benefit more than low emitters from each extra available unit of emission entitlements, they receive more entitlements. Grandfathering so construed is probably temporary but not necessarily so depending on the factual balance of positive and negative outcomes (Knight 2013). Knight (2014) adds that members of countries with higher past emissions will face higher costs when transitioning to some lower emissions level; he then argues extensively that, from the perspectives of utilitarianism, egalitarianism, prioritarianism, and sufficientarianism, they are therefore instrumentally entitled to greater emission entitlements than those with lower emissions. Knight (2014: 572-573) explicitly acknowledges that he, like most climate philosophers, assumes a broadly cosmopolitan account, treating the allocation of emission entitlements as a matter of distributive justice which ultimately derives from individuals' equal moral standing.

Now, Knight's claim that an agent's earlier emissions offer a *pro tanto* reason for future emissions and so enable other important moral considerations to influence emission entitlements is well-taken. Indeed, a moderate defense of grandfathering need not depend on it trumping all other concerns, but may well be at home within some pluralist framework. Yet, his instrumental justification (the success of which I need not examine) notwithstanding, Knight tacitly assumes the basically material character of all emissions and does not bother to defend the cosmopolitanism according to which, he thinks, entitlements should be fairly distributed. Again, the question is why, if at all, these beliefs should be accepted.

Schuessler (2017) offers a non-intrinsic, 'luck-based' argument for grandfathering: the undeserved adverse shocks agents are subjected to should be communally 'buffered'. Since agents should have time to adapt to a situation that might otherwise cause severe suffering and unsettle their lives, the non-permanent grandfathering he defends permits people in industrial countries to reduce emissions gradually. As Schuessler explains:

> Awareness of anthropogenic global warming [around 1990] entailed a responsibility to reduce GHG output considerably, and given the potential or even expectable negative welfare effects of such reductions, learning about global warming at a time when advanced economies already heavily depended on fossil fuel is to be regarded as a stroke of brute bad luck (Schuessler 2017: 151).

Schuessler, then, defends 'buffering' as a luck-based transitory principle of justice, although he does assume global sufficientarianism about entitlement to basic resources and opportunities. He thus offers a principle of gradual adjustment in support of grandfathering, one that provides an appropriate amount of time to adapt to greener lifestyles and avoid severe unwarranted losses, without requiring the economy and habits to change abruptly yet expecting the need for buffering to become lesser over time (Schuessler 2017: 152, 158, 162).

Like Knight, Schuessler appears plausibly committed to a bounded defense of grandfathering (of which, again, I need not discuss its non-intrinsic success) within a pluralist (here sufficientarianism-including) setting. Yet, again, we encounter an undefended basic commitment to cosmopolitanism and an account of emissions as self-evidently material, without any investigation of the origins of fossil fuel-based emission as a phenomenon.

In sum, philosophical critics and instrumentalist defenders of (moderate) 'emissions grandfathering' wish to avoid the suggestion that grandfathering could have intrinsic legitimacy as a principle of climate justice. However, it is their mostly implicit, superficially cosmopolitan-materialist perspective that could make it too easy for them to reject grandfathering *basically*. For all their differences, the above critics of 'intrinsic' grandfathering *uncritically* share a framework of materialism and cosmopolitanism, and a maximal or minimal, weak or strong, egalitarianism.[2] Accordingly, their view of natural resources is rather static, which will make 'intrinsic' grandfathering quickly appear an unfair legitimization of a first-come first-served use of natural resources such as fossil fuels and atmospheric absorptive capacity. Given the silent acceptance of 'cosmopolitan materialism', this framework might be vulnerable to non-egalitarian attacks that (successfully) defend 'idealism' and 'communitarianism'. But perhaps an intrinsic defense of grandfathering on cosmopolitan materialist terms, to be examined in the next section, could also succeed (though I will argue otherwise).

[2] My criticism applies to not only 'isolationists' but also 'integrationists'. The former see emissions egalitarianism as a fair principle for one specific climate issue (the distribution of the available carbon budget); the latter (notably Caney) treat egalitarianism as comprehensively including emissions, other burdens of climate change, and other justice concerns (Torpman 2019: 3). Yet both camps tend to uncritically accept cosmopolitan materialism.

BOVENS'S LOCKEAN DEFENSE AND ITS SHORTCOMINGS

Second, I argue that Bovens's defense of the intrinsic fairness of grandfathering emission rights falls short for assuming a dubious first-come first-served within a retained cosmopolitan materialism, even though it sensibly suggests to include respect for investments in our understanding of grandfathering. Bovens aims to offer 'a sustained, yet qualified, moral argument in support of grandfathering emission rights on Lockean grounds' (2011: 126), which entails that none of the empirical differences between the atmosphere and the pastures precludes transposing grandfathering from the latter to the former (Godard 2017: 139).

John Locke examined the legitimate appropriation of natural resources, notably land, in a pre-political state of nature. Like today's cosmopolitans, he postulated initial common ownership of resources subsequently exposed to private appropriation. In this state of nature, persons are free and equal, all possessing rights and duties regarding life, freedom, and ownership. Now, for Locke, (land) appropriation is legitimate if human labor changes the resource from common good to private good, no waste results, and 'enough-and-as-good' remains for the others (Godard 2017: 140-142). Bovens (2011: 128), then, postulates an unmanaged and unproductive commons and extends Locke's argument for land allocation to allocation of atmospheric absorptive capacity.

According to Bovens, before industrialization, until 1800, the atmosphere was a rather unproductive commons, although it allowed breathing. It could absorb a certain amount of GHGs without problems, but there was no technology emitting worrisome amounts of 'GHGs as by-products' (Bovens 2011: 129). Then, due to technological progress, entrepreneurs started using portions of this atmospheric absorptive capacity. Initially, this happened without violating the enough-and-as-good and no-waste conditions: many benefited, nobody was disadvantaged and all use was productive. Once the atmospheric absorption capacity, say, around 1960, appeared to be running out and overuse threatened to violate the enough-and-as-good condition and initiate dangerous climate change, we closed the commons. Just as farming created claim rights over land, use of atmospheric absorption capacity created claim rights over atmospheric absorption capacity. Past use establishes differential claim rights to upcoming use of the atmospheric absorption capacity by emitting GHGs, according to Bovens (2011: 129, 140-141). His question now is: with atmospheric absorptive capacity appropriations having exceeded 'enough-and-as-good', why would people having unequal emission rights based on their various use levels be unfair if we had accepted an allocation procedure that yielded unequal rights (Bovens 2011: 129)? His main answer is as follows:

> Developed countries should be able to demand that, in deliberations, some respect be paid to their appropriations of the atmospheric absorption capacity that predate the cutoff point at which the enough-and-as-good condition was first violated. When violations have been ongoing, this is not the sole principle, since we also need to

> impose rectification on illicit appropriations past this cutoff point. And granted, these are for a large part due to growth in developed countries (but also to the GHG-intensive development of emerging economies). That *some* respect be paid to differential investments made during the time when there were no violations of the enough-and-as-good condition is common in such policy decisions. This, I take it, is the moral ground for grandfathering...emission rights (Bovens 2011: 134, emphasis in original).

A radical, investment-disrespectful egalitarian reform of emissions rights, based on a sudden 'equal rights' idea, is as problematic as egalitarian land reforms without respect for historically established rights, Bovens (2011: 135-136) insists. Bovens does soften his claim in view of existing great differences in emissions per capita. Humanitarian concerns such as a minimally decent standard of living should also count, although Lockean concerns or historical emission patterns should carry *some* weight (Bovens 2011: 136). Bovens foresees that '[m]y approach to GHG emission rights leads to a distribution of emission rights that will gradually become more and more egalitarian', also by balancing 'a concern for respecting differential investments' with 'a concern for rectification on grounds of the *polluter-pays* principle' and with 'egalitarian concerns and a concern to raise developing countries above the subsistence level' (2011: 143, emphasis in original). Thus, Bovens, too, eventually defends a broadly pluralist overall view that, as such, could have more plausibility.

Now, Knight (2013: 415) thinks that Bovens's libertarian justification fails essentially. Although Bovens narrows the impact of the initial acquisition of emissions rights, he does make it the starting-point. But, Knight insists, such rights become untenable once we consider later generations, who, with nothing left to acquire, are disenfranchised. Without a redistribution mechanism that could undo the initial acquisition effects, the end result will be that later people do not receive the same rights as those permitted to make the 'first moves'. Hence Bovens's libertarian approach ends up unattractive. Because, Knight adds, greenhouse gas emissions lack all moral appeal, Bovens's extension of the libertarian justification to carbon emissions should make us question libertarianism: we cannot accept a view that entails that emissions, or 'pumping out carbon', should intrinsically increase entitlements.

Knight, I believe, overemphasizes 'emissions' in, and even makes a caricature of, Bovens's position, which clearly does more than just defending 'pumping out carbon'. Indeed, Bovens relates emissions rights, and thus grandfathering, to *productive* natural resources use - notably of 'atmospheric absorptive capacity' as analogous to 'land' - rather than 'emissions' as actually 'worrisome by-products' (Bovens 2011: 129). What Bovens stresses is that we should pay 'some respect to (differential) investments' made. Yet, Knight's 'first moves' concerns directly, and rightly, target Bovens's effectively proposed 'first-come first-served' starting-rule for distributing scarce material resources as troubling from the latter's own sensitivity

to existing great differences in per capita emissions and fundamentally conflicting with the egalitarianism he also appears to endorse. Indeed, since Bovens (2011: 142) accepts not only a Lockean cosmopolitanism but, surprisingly, also the rival egalitarian one, his attempt to reject the cosmopolitan critique of grandfathering looks quite questionable.

Next, Schuessler (2017: 147-150) argues against Bovens that industrial countries have not legitimately appropriated a larger share of the atmosphere's absorptive capacity and cannot justifiably claim more extensive (Lockean) emission rights than others on a per capita basis, especially not by referring to the emission totals of 1990: the usual yet unstable reference point. As he further explains:

> The absorptive capacity for GHG is practically a non-renewable resource...Hence, the consumption of absorptive capacity is more or less analogues to the eating of a cake. Having eaten a fair share of the cake while others have just started nibbling at it does not entitle a fast eater to a larger piece of the cake, or to continued consumption at an established proportional speed relative to others (Schuessler 2017: 149).

Moreover, Schuessler argues, '[i]f countries are deprived of the opportunity to achieve economic growth, which under the prevailing technologies is coupled to greenhouse gas emissions', it will be virtually impossible for them to engender welfare for their citizens; and this does not just 'mitigate Lockean grandfathering' but 'strikes at its roots' (2017: 149). Like Knight, then, Schuessler finds that 'there is no reason to grant industrial countries higher emission rights...simply because they have a history of high emissions' (2017: 150).

Now, Schuessler, too, overstresses 'emissions' and neglects the role of 'investments' in Bovens's account. Again, Bovens's defense of grandfathering in favor of industrial countries entails more than 'simply because they have a history of high emissions' (Schuessler). Nevertheless, Schuessler's 'fast eater' objection entails an appropriate critique of Bovens's effectively proposed 'first-come first-served' starting rule for atmospheric absorptive capacity distribution. After all, Bovens accepts egalitarianism in addition to his Lockean respect for investments and treats atmospheric absorptive capacity as ultimately materialist, and so indeed as 'more or less analogous to the eating of a cake' (Schuessler).

In sum, Bovens's intrinsic, (moderately) Lockean account, although not wholly implausible, cannot be decisive. Sharing the standard cosmopolitan materialist view of atmospheric absorptive capacity and even conceding the final force of egalitarianism, he ends up advocating an unsatisfactory 'first-come first-served'. Thus, eventually weakening his Lockeanism for the sake of his critics' other-regarding concerns, Bovens fails to refute philosophers' tendency towards a more or less egalitarian distribution of resources and emissions. We should now either reject 'intrinsic' grandfathering or, as I propose, seek a defense that transcends cosmopolitan materialism and egalitarianism; a defense that enforces Bovens's move towards natural resources and investments - as still a *partially* satisfactory answer to

the question of where the very possibility to beneficially emit comes from - but also nullifies problems such as the 'cake eating' one.

A COMMUNITARIAN IDEALIST ETHICAL CASE: FROM COMMONS TO CULTURAL HISTORY

My third argument is that a 'communitarian idealist' defense of grandfathering succeeds by undermining cosmopolitan materialism and making the problem of 'first-come first-served' non-existent. We should move beyond Bovens's Lockean view towards a communitarian one that stresses 'natural resources' being the result of idealist inventiveness and so cancels out 'first-come first-served' at this basic level. We should not think of resource use in terms of appropriation of a commonly owned and practically non-renewable resource and adopt Schuessler's 'cake eating' analogy. As we shall see, there were no such resources before the Industrial Revolution as a unique socio-historical process, so that discovery and use come first, distribution only second. According to Knight, grandfathering means that past emissions enlarge rights to future emissions; yet, to suggest that there is no reason to grant industrial countries higher emission rights permanently simply because they have a history of high emissions, while correct as such, is to misstate the issue. As will become clearer, not all emissions should count equally. Moving to communitarian idealism, then, will enable an effective defense of the intrinsic force of grandfathering. I use work of economic theologian Michael Novak and social scientist Olivier Godard in order to show the social construction of fossil fuels (Novak) and the atmosphere (Godard) as initially non-scarce resources.[3]

My broadly anti-egalitarian, communitarian argument for grandfathering I take from Novak: modern (fossil) resources, without mass welfare just could not have been possible, are rooted in Western, notably Anglo-Saxon, cultural history. Novak ([1982] 1991: 305) first notes that no people, no matter how exploitative or imperialist, had been able to achieve a tenable economic development until the steam machine and Industrial Revolution were invented. Next, he explains how, through science, technology, and economic organization, England managed to do this in the first half of the nineteenth century:

> In 1850, Great Britain was just completing seventy straight years during which, with a dynamism never before matched in history, its gross national product grew every year by an average of nearly 2 percent a year. This seemingly miraculous achieve-

[3] The discussion to follow draws on and builds on Kamminga (2019: 8-13, 36). Its argument nullifies the debate about the extent to which the Lockean enough-and-as-good and no-waste conditions (could) have been satisfied in the case of atmospheric absorptive capacity use since the Industrial Revolution (Bovens 2011; Moellendorf 2011; Godard 2017: 143-145). After all, the point here is that, by invoking communitarian idealism as a more fundamental perspective, we need not be concerned with such conditions.

> ment introduced into the world the reality of economic development...The law of patents had greatly stimulated invention, as had the Royal Society. In every decade and in almost every year, new technologies excited the populace (Novak [1982] 1991: 301).

Regarding America, Novak explains how much the fact that the US population uses much more energy that the world average proportionally has been interpreted wrongly:

> [It has been stated that] 40 percent of the world's energy is used by 6 percent of the world's population residing in the United States. This way of putting the facts [exemplifies a] cultivation of guilt...What the entire human race meant by energy until the discovery of the United States and the inventions promoted by its political economy were the natural forces of sun, wind, moving water, animals, and human muscle...In 1809 an American outside Philadelphia figured out how to ignite anthracite coal. The ability to use anthracite...made practical the seagoing steamship and the locomotive. In 1859 the first oil well was dug outside of Titusville, Pennsylvania...Arabia would have been as rich then as now, if anybody had known what to do with the black stuff. The invention of the piston engine and the discovery of how to drill for oil were also achieved in the United States. The first electric light bulb was illuminated in 1879 in Edison, New Jersey. After World War II the U.S. government dragooned the utilities into experimenting with nuclear energy...[promoting] the peaceful uses of the atom. Thus 100 percent of what the modern world means by energy was invented by 6 percent of the world's population. More than 60 percent of that energy had been distributed to the rest of the world. Though the United States can, of course, do better than that, we need not feel guilty for inventing forms of energy [so] useful to the human race (Novak [1981] 1995: 777; cf. [1982] 1991: 300; 2008; 2014).

Now Novak tends to exaggerate the US contribution in comparison with the European one. Yet it is clear that about 100 percent of modern energy is of Western, largely American, origin.[4] Novak, then, offers no cosmopolitan or (purely) libertarian view but a communitarian one: by nature, humans are social beings, or 'communitarian individuals' (Novak [1982] 1991: 143-155), who can be inventors only within a social-cultural and institutional context of inventiveness and industriousness. Thus, beneath Bovens's materialism we find more than resource-based 'investments'. The ideational factor of cultural historical achievement, without which fossil resources would not have come into existence, is what makes the difference.

[4] Novak enumerates: 'electricity, the Franklin stove, the steam engine, the piston engine propelled by gasoline (and now by electric and/or hydrogen batteries), the processing of crude oil into gasoline, nuclear energy, the jet engine, the development of ethanol and other fuels derived from plants, and other devices - all of these except one [the British-invented steam engine] were invented by the people of the United States, as their gift to the world' (2008). Yet, although the US have constantly made technological and commercial-optimizing contributions, underlying these are often also originally European inventions (engines, batteries, nuclear energy).

Accordingly, Novak plausibly argues that, since for resources 'culture' is the key factor, 'equality' is irrelevant (cf. Kamminga 2008: 679). He quotes Brazilian Roman-Catholic archbishop Dom Helder Camara, who stated in 1970: 'It is a sad fact that 80 percent of the world's resources are at the disposal of 20 percent of the world's inhabitants' (Novak [1982] 1991: 299; cf. 2008). This, Novak holds, illustrates a false use of the term 'resources'. Such a 'sad fact' is only so from a particular ideological-moral perspective; but behind this (partially true[5]) fact lie 'quite diverse cultural histories' (Novak [1982] 1991: 299). Novak recalls only how short ago entire humanity had no clue of the potential of oil. Most 'materials' we now call 'resources' were not regarded as such before the development of a democratic capitalist political economy, but remained 'dumb', 'inert'. The meaning of 'resources' includes the ideational factor of culture, as expressed by discovery and invention; the 'Protestant European culture' of 'proliferation with talents' has been particularly fertile in this respect. Thus, archbishop Camara could have noted: 'It is a marvelous fact that [80-90] percent...of the world's resources have been discovered and put to use during the past century by one of the smaller cultures...The benefits of such discoveries have been carried to every continent' (Novak [1982] 1991: 300). In so openly deploring inegalitarianism, Camara ignored that some cultures have arranged their political economy for the goal of discovering resources and inventing useful technologies, while others have not. His own Brazil could itself have created technologies for utilizing (its) resources, Novak ([1982] 1991: 300) states.

This unique, anti-equality view of the 'conservative' Novak, while ignored by cosmopolitans (Godard 2017: 74-78; cf. Knight 2014: 589) in particular, finds support in the work of familiar, 'progressive' yet (roughly) communitarian, philosophers. Thus, David Miller (1999) stresses that the value of a resource depends on the talents, knowledge, and technological skills needed for using it fruitfully. Until recently, uranium-rich rock was useless instead of the valuable resource it has become today; no one knew how to extract and exploit it. A low-developed country with uranium depots does not simply own a valuable resource if it does not also possess the technology for mining and using uranium. It will need an outside (Western) mining company to extract the uranium, and without extraction the value of the resource stays undetermined. Whether, then, the citizens of this (or any other) country possess something like their 'equal share' cannot be established, Miller (1999: 193) concludes. John Rawls, philosophical defender of egalitarianism within liberal societies, holds that 'the causes of the wealth of a people...lie in their political culture and [their] religious, philosophical, and moral tra-

[5] Fossil energy exporting countries are mostly non-Western rather than Western. Thus, the OPEC countries are the ones who possess most of the oil and control the supply and price thereof. Indeed, the West is often a net-payer itself, without having full command of the benefits of its own inventiveness in this regard.

ditions..., as well as in [their] industriousness...cooperative talents...and...capacity for innovation' (1999: 108). This, Rawls (1999: 117) argues, makes discussions about a more or less equal transnational distribution of natural resources otiose.

All this being so, the dominant cosmopolitan, (roughly) egalitarian view overlooks the 'cultural' point by frequently, but mistakenly, presupposing that '[r]esources are found "out there,"...under one's feet'; it thus misleadingly infers that 'the natural distribution of resources is a [relatively pure] case of something being "arbitrary from a moral point of view"', and that 'each person has an equal prima facie claim to a share of the total available resources' (to quote Beitz [1979] 1999: 139-141). I disagree, then, with Megan Blomfield (2019), who assumes, in cosmopolitan materialist vein, that natural resources, which are of fundamental value to everybody, exist independently of human beings, and who argues that natural resources are appropriate objects of egalitarian justice: all human beings have an equal original claim to them (even if not a right to an equal share), she insists. But (modern) 'natural resources' are *not* human-independent; and people's rights to basic needs fulfillment (Blomfield 2019) should be treated as a separate issue (involving, e.g., foreign aid or population restriction) and not as simply linked to natural resources entitlement.

Still, one could object that, historically, more has happened than 'Western inventing'. The Islamic world influenced medieval European culture in many ways: philosophically, scientifically, mathematically, and technologically. Various features of modern technology are the product of various cultures in mutual interaction. Oil was already in use in the Middle East, before Western entrepreneurs recreated and utilized it for modern purposes. However, first, all of this does not affect the decisiveness of the Western-cultural contribution of constructing resources for industrial welfare development. Oil was actually used in earlier (biblical) times for products such as perfume and ink (Novak [1981] 1995: 777), or as lubricant, for instance. Yet it were the inventions of the combustion engine and oil drilling technology that could unlock oil's full potential and turn it into the important modern - and subsequently widely desired - energy source with which the West, in line with the English-European Industrial Revolution, lay the foundation for the creation of society-wide prosperity.[6] And second, in conceding the role of 'culture', such an objection could only - but again, not really - compel us to draw the circle somewhat wider. In the absence of sustained intercultural influencing globally, it could also not entail a convincing defense of an equal per capita (or some other cosmopolitan) emission norm.

[6] In the Middle East, the first oil strike took place only in 1908, with Western companies providing the technology and knowledge Middle Eastern countries themselves lacked. See the clear oil history timeline in BBC, 'Black gold: how did oil come to run our world?', https://www.bbc.com/timelines/zqgxtfr, last accessed 27 September 2019.

Next, as regards atmospheric absorptive capacity, the creation of this as a 'resource' has resulted from the creation of welfare and elimination of mass poverty through fossil fuels and technology as a Western-cultural invention actively based on resources as ideational constructions rather than passively as matter. As Godard (2017: 107-108, 127, 140) explains, the atmosphere in 1990 was not a new manna to be shared among all world citizens without taking account of legitimate past uses and rights. There was no prior collective ownership. The West had not been using something that clearly belonged to everyone or anyone; rather, it actively, albeit unintentionally, created something that did not yet exist in a meaningful way (against Torpman 2019: 5-6). To quote Godard's non-generic, historical account:

> [It would be] a historical misinterpretation [to assume] that in moral terms the ability of the atmosphere to absorb GHGs has been a resource common to all humankind since the beginning of historical time...[T]his function of the atmosphere emerged only when human technology and economic activity transformed a natural condition into a useful resource. Moreover, it was [only] at the end of the twentieth century that it became a scarce resource due to the feared impacts of climate change. [Thus], considering that the absorption of GHGs was a common resource in 1850 is the result of a retrospective illusion. It is blind to the contingency of the historical conditions for the emergence of the climate threat: the recent evolution of GHG emissions since 1988...did not constitute a fatality or a fate that people in 1920, for example, could and should reasonably have anticipated. Not only did people at that time have no knowledge of the phenomenon, but the phenomenon itself had not been historically shaped. It was still possible that future energy systems would be based on diversified sources of energy, and that human demography would not take [such a] galloping pace...: in 1920, the world population stood at just 1.8 billion people. Futures without climate change were still possible...Historical conditions have made the absorption of GHGs the scarce resource that it was not initially (Godard 2017: 107-108).

Regarding the atmosphere, Godard's argument cuts deeper than a Lockean one, and has more force against cosmopolitan egalitarianism. In contrast to land, for the atmosphere the - less material but more ideational - point of departure is not an initial common ownership of terrestrial resources, but a socio-historical process of the construction of something new: 'atmospheric absorptive capacity'. Whereas a Lockean starting-point - a commons unmanaged and unproductive (Bovens 2011: 128) - may have applied to land, the atmosphere, by contrast, was no commons apart from breathing as its core material element. Rivalry and non-excludability as features of common pool resources (Bovens 2011: 130) became later and unforeseen concerns only. The atmosphere was owned by no one initially, in contrast to land usually (like American land being firstly owned by Indians). While people have usually wanted land for more direct reasons, atmospheric absorptive capacity is at best wanted more indirectly, insofar as cultures have created - industrial-economic - reasons for needing it. That industrialized countries had

the benefit of early entrance (Bovens 2011: 141) is irrelevant: atmospheric absorptive capacity did not really exist until the West generated industrialization. Thus, the current cosmopolitan belief that the atmosphere is humanity's common property to which everyone has the same indisputable right wrongly suggests that whoever invented atmospheric use is morally random. But the atmosphere is now being *framed* as the 'common property of humankind' to which all humans should have the same right, whether they belong to past, present or future generations. Thus, the idea - based on some norm of equal per capita distribution supposedly valid since the beginning of history - that some countries have made excessive historical use of the atmosphere is false, even if the issue of possible damage caused to the environment of other countries by GHG emissions from a given country remains valid (Godard 2017: 80; Bovens 2011: 134, 143). Without the Western finding of fossil fuels, non-Western countries could never have had any reason for claiming something like the 'atmospheric absorptive capacity' to be equally divided globally.[7]

In sum, cosmopolitan materialism should give way to (what could be called) 'resources grandfathering'. The West invented the Industrial Revolution and worked hard to generate fossil (and nuclear) energy, so that its millennia-long state of hunger and misery could eventually be replaced by mass welfare. As Schuessler admits, 'the riches of industrialization did not come about as mere windfall profits or simply as a result of fossil fuel burning. It took much thought and effort to create the wealth of nations' (2017: 151 n. 16). It is, then, too simple to insist that countries and persons all have an obvious moral right to fossil fuel-based economic growth to the same extent as industrialized countries, and to assistance provision by those latter countries insofar as is needed for this purpose. From a communitarian perspective, not all countries' emissions should count equally as causes of 'pollution'; those done by inventor countries should weigh less and entitle more to grandfathering. Resources are not just material and for the picking-up; without Western Europe, particularly England (thus not India or China) with its Industrial Revolution as path towards sustained welfare (see Landes 1998), and the US, which with its talent, effort, and creativity as ultimate source of their later welfare transformed rough materials into 'resources', we might never have come to know

[7] My 'second-line' communitarian idealist argument would be that the extra emissions from the West are broadly compensated by what it has thereby produced specifically as life-enhancing goods to the benefit of non-Westerners also (cf. Bovens 2011: 132). Consider industrialization and economic production, but also progress regarding science, technology, literature, communication, music and instruments, medicine, health care, and food production. Admittedly, developing countries have often paid for benefits acquired from Western inventions. Yet these are often positive externalities for which Westerners have not been fully compensated (Posner and Sunstein 2008: 1594); and the value of the original creativity behind these findings as *sine qua non* cannot be morally wiped out - wholly reduced to commodities - by plain payment acts. It is, then, not unfair that the West has benefited first and most from a fossil fuel-based and atmosphere-utilizing economic process it has invented and developed itself.

their usefulness. Hence, while a 'first-come first-served' basis for distribution would be unfair, the popular idea that the West was 'only the first' is simply false.

CONCLUSION

I have argued that grandfathering, construed in terms of 'resources' rather than simply 'emissions', possesses intrinsic fairness for the purpose of combating climate change. Thus, grandfathering may play a major, lasting role in climate politics, namely by working selectively in favor of the West. Insofar as political climate practice has benefited the West, there is nothing particularly unjust about this, that is, as a starting-point. The real distributional problem does not lie with the US or Europe, despite them being large resource users and emitting entities, and having already used much atmospheric space in the past. As a baseline, they are entitled to grandfathering and thus to maintaining relatively (but not absolutely) high annual permits for future emissions. Accordingly, not entitled to grandfathering are high-emitting non-Western countries such as China, India, and other industrializing countries, and high-emitting small rich countries such as Qatar, Curacao, Latvia, Bahrein, and United Arab Emirates. Note that, with distributive justice not being the whole of morality, there is one escape from this conclusion, albeit an unattractive one: to argue that the Industrial Revolution was a wrong turn in human history - with sustained and widespread global poverty as the price to pay. Thus, the moral choice is either to accept grandfathering or to reject Industrial Revolution-based economic development and so the very right to emit altogether.[8]

If we do accept the (relative) intrinsic moral justifiability of grandfathering as defended in this article, we should *not* exempt Western countries from making very serious efforts in the fight against climate change. First: Bovens is right to reject 'a regime in which...developed countries...are branded as scoundrels for every inch that they deviate from equal emission rights per capita, and in which they [owe]...developing countries...Versailles-style wartime reparations' (2011: 144). Yet some climate debt does exist insofar as the West - like the non-Western countries mentioned above - has violated its community-transcending negative duty (as ethically more basic than positive duties to assist the needy) by, through its high emissions, having done excessive harm to those who suffer the most from climate change and have hardly contributed to the problem (Duus-Otterström and Jagers 2012; cf. Pogge 2004: 278-279; Shue 2015: 17-18; Blomfield 2019: 225). This 'residual debt' would have to be paid off, that is, insofar as communities harmed will maintain a climate-friendly behavior by abstaining from fossil fuel use. Second, as

[8] For principal-ecological reasons, one could dismiss industrial welfare as means to combat poverty and thereby consistently blame the 'Western community' as the key climate spoiler. However, the moral consequence of such a dismissal would also be to refrain from fossil fuel employment oneself as means for achieving welfare - for poor countries a position difficult to maintain.

with power comes responsibility, the 'good grandfather' should accept climate responsibility as based on the positive duty of 'ability to pay' (Knight 2013), notably for funding the energy transition and climate adaptation worldwide. This way, then, we have arrived at a specific pluralist framework of climate justice: one that includes 'no-harm' and 'ability to pay' besides 'grandfathering'. Thus, while something like 'equal percentage emissions reductions' by all emitting states as (technically) accepted by developed countries (as noted in the introduction) has moral force and is really urgent now, this pluralist framework also entails the special responsibility of rich, powerful countries to help make the 2015 Paris Climate Agreement a success by ensuring finance.

BIBLIOGRAPHY

Beitz, C.R. ([1979] 1999) *Political Theory and International Relations*. Princeton, N.J.: Princeton University Press.

Blomfield, M. (2019) *Global Justice, Natural Resources, and Climate Change.* Oxford: Oxford University Press.

Bovens, L. (2011) 'A Lockean Defense of Grandfathering Emission Rights', in D. Arnold (ed.) *The Ethics of Global Climate Change.* Cambridge: Cambridge University Press, pp.124-144.

Breakey, H. (2015) 'COP20's ethical fallout: the perils of principles without dialogue', *Ethics, Policy & Environment* 18(2): 155-168.

Caney, S. (2009) 'Justice and the distribution of greenhouse gas emissions', *Journal of Global Ethics* 5(2): 125-146.

Damon, M., D.H. Cole, E. Ostrom, and T. Sterner (2019) 'Grandfathering: environmental uses and impacts', *Review of Environmental Economics and Policy* 13(1): 23-42.

Duus-Otterström, G. and S.C. Jagers (2012) 'Identifying burdens of coping with climate change: a typology of the duties of climate justice', *Global Environmental Change* 22(3): 746-753.

Godard, O. (2017) *Global Climate Justice*. Cheltenham: Edward Elgar.

Kamminga, M.R. (2008) 'The ethics of climate politics: four modes of moral discourse', *Environmental Politics* 17(4): 673-692.

Kamminga, M.R. (2019) 'Westerse klimaatschuld? Een ethische kritiek', 'Van klimaatschuld naar klimaatspoed: een reactie op de vier commentatoren', *Filosofie & Praktijk* 40(2): 4-20, 33-36.

Knight, C. (2013) 'What is grandfathering?' *Environmental Politics* 22(3): 410-427.

Knight, C. (2014) 'Moderate emissions grandfathering', *Environmental Values* 23(5): 571-592.

Landes, D.S. (1998) *The Wealth and Poverty of Nations.* New York: W.W. Norton.

Matthews, H.D. (2016) 'Quantifying historical carbon and climate debts among nations', *Nature Climate Change* 6(1): 60-64.

Mi, Z., H. Liao, D.M. Coffman, and Y.M. Wei (2019) 'Assessment of equity principles for international climate policy based on an integrated assessment model', *Natural Hazards* 95(1-2): 309-323.

Miller, D. (1999) 'Justice and Global Equality', in A. Hurrell and N. Woods (eds.) *Inequality, Globalization, and World Politics*. Oxford: Oxford University Press, pp.187-210.

Moellendorf, D. (2011) 'Common Atmospheric Ownership and Equal Emission Entitlements', in D. Arnold (ed.) *The Ethics of Global Climate Change.* Cambridge: Cambridge University Press, pp.104-123.

Moellendorf, D. (2015) 'Climate change justice', *Philosophy Compass* 10(3): 173-186.

Novak, M. ([1982] 1991) *The Spirit of Democratic Capitalism.* London: The IEA Health and Welfare Unit.

Novak, M. ([1981] 1995) 'Toward a Theology of the Corporation', in M.L. Stackhouse, D.P. McCann, and S.J. Roelfs (eds.) *On Moral Business.* Grand Rapids, Mich.: W.B. Eerdmans, pp.775-785.

Novak, M. (2008) 'American energy and invention', *National Review Online*, 23 May.

Novak, M. (2014) 'Three cardinal virtues of business', lecture in Vilnius, 27 November, text version by Holger Lahayne, 3 December.

Page, E.A. (2013) 'Climate Change Justice', in R. Falkner (ed.) *The Handbook of Global Climate and Environment Policy*. Chichester: Wiley-Blackwell, pp.231-247.

Pogge, T.W. (2004) '"Assisting' the Global Poor', in D.K. Chatterjee (ed.) *The Ethics of Assistance*. Cambridge: Cambridge University Press, pp.260-88.

Posner, E.A. and C.R. Sunstein (2008) 'Climate change justice', *Georgetown Law Journal* 96(5): 1565-1612.

Rawls, J. (1999) *The Law of Peoples*. Cambridge, Mass.: Harvard University Press.

Schuessler, R. (2017) 'A Luck-Based Moral Defense of Grandfathering', in L.H. Meyer and P. Sanklecha (eds.) *Climate Justice and Historical Emissions.* Cambridge: Cambridge University Press, pp.141-164.

Shue, H. (2015) 'Historical responsibility, harm prohibition, and preservation requirement: core practical convergence on climate change', *Moral Philosophy and Politics* 2(1): 7-31.

Torpman, O. (2019) 'The case for emissions egalitarianism', *Ethical Theory and Moral Practice*, 23 July: 1-14.

Wendt, A. (1999) *Social Theory of International Politics*. Cambridge: Cambridge University Press.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 769-782
ISSN: 1825-5167

"UN MENO CHE TOCCO": LA FILOSOFIA DEL TOCCO DI JEAN-LUC NANCY

MIRT KOMEL
Department of Cultural Studies
University of Ljubljana (Slovenia)
mirt.komel@fdv.uni-lj.si

ABSTRACT
The article deals with the philosophy of touch by Jean-Luc Nancy, defined by Derrida as "the greatest philosopher of touch" in his book *On touching: Jean-Luc Nancy.* Nancy is known as a philosopher who dealt with a series of different phenomena, but if there is a *fil rouge* in his work, from the very first writings to the more recent works, then it is precisely the issue of touch. The paper focuses on the concept of touch as developed by Nancy from *Corpus* to *Noli me tangere*, from a conception of the body up to an attempt of grasping touch, which eventually paved the way to the emerging field of "haptic studies".

KEYWORDS
Nancy; Derrida; *corpus*; touch; haptic studies; phenomenology; (post-)structuralism.

UN PO' DI CONTESTO

I tempi eroici dello strutturalismo francese si collocano indietro nel tempo, a partire dal loro nascere dalla linguistica negli anni Cinquanta alla loro esplosione nei rivoluzionari anni sessanta, dalla loro disseminazione nei settanta alla consolidazione europea negli ottanta e alla americanizzazione nei novanta, fase, quest'ultima, che è stata ribattezzata con il nome di post-strutturalismo. Qualunque cosa si pensi del (post-)strutturalismo – affermativa o negativa che sia – non si può negare che questo movimento è stato uno dei periodi intellettualmente più stimolanti del contesto filosofico del Novecento, che si è sviluppato, come talora avviene, a ondate di varia portata. Giusto per fare alcuni nomi: i *founding fathers* dello strutturalismo sono in primo luogo quei linguisti che hanno seguito Ferdinand de Saussure lungo la via di quella nuova scienza umanistica che va sotto il nome di linguistica (senza trascurare le declinazioni della semiotica, della semiologia ecc.), come Roman Jakobson, Emile Benveniste, Roland Barthes, per giungere sino a Jacques Derrida, senza tuttavia trascurare Claude Lévi-Strauss, con il suo nuovo approccio in antropologia basato sulla linguistica, che probabilmente segna la nascita vera e propria

dello strutturalismo francese, accanto a una nuova lettura di Freud da parte di Jacques Lacan e i suoi discepoli, a una nuova lettura di Marx fatta da Louis Althusser e il suo gruppo di studio e a una nuova teoria della storia, del sapere e del potere innescata da Foucault.[1]

In mancanza di un termine migliore, l'etichetta di "strutturalismo" ha compreso tutti gli svariati protagonisti che gli hanno dato vita, raggruppati da un termine nato dall'interno ma che è stato attribuito dall'esterno, da una prospettiva anglosassone volta soprattutto a discriminare – intellettualmente, teoreticamente, accademicamente e politicamente – questo nuovo paradigma di pensiero.[2] Nonostante nessuno degli studiosi appena menzionati abbia mai voluto essere definito "strutturalista" – e tanto meno "post-strutturalista" – il termine è rimasto comunque in voga, insieme ad altre etichette come "French Theory" e, relativamente a contesti assai più ampi, "Continental Philosophy". Comunque sia, la "scuola francese di filosofia" (altra etichetta, ma forse la meno problematica di tutte), con la sua dozzina di nomi, ha avuto parecchi discendenti: dal campo di Althusser arrivano Étienne Balibar, Jacques Rancière, Alain Badiou; da quello lacaniano Jacques-Alain Miller e Jean-Claude Milner (e altri da altri paesi come gli sloveni Slavoj Žižek e Mladen Dolar); infine, dalla scuola di Derrida, Jean-Luc Nancy, l'autore al centro delle riflessioni che seguono. Come possiamo vedere, ognuno ha il proprio *maître* (Marx-Althusser-Balibar, Badiou, Rancière; Freud-Lacan-Miller, Milner), un "maestro" e "padrone" allo stesso tempo, necessario per una attività che passa per la più liberale di tutte, a sottolineare quello che è forse uno dei più vistosi paradossi della filosofia: la libertà di pensiero importa un vincolo a un maestro, quasi ad affermare che non c'è pratica di libertà teorica e concettuale senza assoggettamento a un insegnamento, a un *maître* che, inevitabilmente, non può svolgere la funzione di "insegnante" senza quella di "padrone", allo stesso tempo e forse senza la possibilità, da ultimo, di distinguere le due "azioni".

SU JEAN-LUC NANCY

Jean-Luc Nancy ha subito un trapianto di cuore ed è sopravvissuto a una diagnosi di cancro, è dunque uno dei *last man standing* del (post-)strutturalismo franceseed è, come vedremo, certamente uno di quegli autori che facilitano il pensiero, uno di

[1] Relativamente a tale contesto, cfr. Gilles Deleuze, "Da che cosa si riconosce lo strutturalismo?" (1972), in Id., *L'isola deserta e altri scritti* (2002), a cura di Deborah Borca, Einaudi, Torino 2007, pp. 214-243.

[2] In Simon Blackburn, *Oxford Dictionary of Philosophy*, Oxford University Press, Oxford 2008, p. 353, troviamo questa definizione che è problematica già dalla prima parola poiché dice che lo strutturalismo è "una convinzione (*belief*)" che "il fenomeno dell'umano vivente (*human life*) non è concepibile che tramite le loro interrelazioni", e che queste interrelazioni "costituiscono una struttura", che governa i fenomeni "con leggi costanti di una struttura astratta.".

quei filosofi che amano pensare *con* – e non *contro* – gli altri: una figura di incroci e connessioni che senz'altro merita il titolo di *maître* che ha reso possibile, tra altri e in uno di questi incroci, anche la nascita dei cosiddetti *haptic studies* o "studi del tocco". Nancy si è diplomato in filosofia nel 1962 e, dopo aver insegnato a Colmar, è diventato assistente all'Istituto di Filosofia di Strasbourg nel 1968. Nel 1973 ha ottenuto il dottorato con una dissertazione su Immanuel Kant e l'idealismo tedesco sotto la supervisione di Paul Ricoeur, dopo di che è stato promosso a *Maître de conferences* all'Università di Scienze Umanistiche di Strasbourg. Nei anni settanta e ottanta è stato *visiting professor* in molte prestigiose università europee e americane. Nel 1980 Nancy e Philippe Lacoue-Labarthe organizzano un convegno dedicato a Derrida e la politica al Centro Culturale Internazionale di Cerisy-la-Salle intitolato *Les fins de l'homme* (*I fini dell'uomo*), una collaborazione dalla quale nasce il *Centre de Recherches Philosophiques sur la Politique*.[3] Nel 1987 riceve il *Docteur d'état* dalla Università di Toulouse-Le-Mirail sotto la supervisione di Gérard Granel e sotto la tutela di Jean-François Lyotard e Jacques Derrida, con una tesi pubblicata nel 1988 con il titolo *L'expérience de la liberté* (*L'esperienza della liberta*).[4] La sua personale "esperienza della libertà" è stata troncata per via dei seri problemi medici accennati poco fa che gli hanno impedito di insegnare regolarmente, ma certamente non di pensare; di fatto, i suoi scritti più famosi si collocano in questo periodo, compreso *L'intrus*, una riflessione filosofica della sua personale esperienza del trapianto di cuore.[5]

I primi due libri di Nancy – entrambi usciti nel 1973: *Le remarque spéculative* (*Il termine speculativo*),[6] e *Le titre de la lettre* (*Il titolo della lettera*),[7] quest'ultimo in collaborazione con Lacoue-Labarthe – trattano di Hegel e Lacan. Da essi emerge quel tratto accennato in precedenza che fa di Nancy un filosofo che pensa *con* – e non semplicemente *contro* – gli altri. Il primo testo è una riflessione critica sul "concetto speculativo" di *Aufhebung* in Hegel, su cui si è formata una intera generazione di filosofi francesi tramite le famose lezioni di Alexandre Kojève;[8] il secondo è uno

[3] Il Centro per la ricerca filosofica sulla politica è stato dedicato a una analisi filosofica della politica, che si distanzia dalla ricerca empirica con l'asserzione principale che la filosofia stessa – perfino se puramente ontologica – *è* già marcata dalla politica. Il centro ha ospitato nomi importanti, come Claude Lefort e Jean-François Lyotard, ma nel 1984 ha comunque dovuto chiudere per ragioni di cui i due fondatori hanno parlato pubblicamente in *Cari amici: una lettera sulla chiusura del Politico*; cfr. Philippe Lacoue-Labarthe & Jean-Luc Nancy, "*Chers Amis* A letter on the Closure of the Political," *Retreating the Political*, Routledge, London & New York 1997, pp. 143-7.

[4] Cfr. Jean-Luc Nancy, *L'esperienza della libertà* (1988), trad. di Davide Tarizzo, Einaudi, Torino 2000.

[5] Cfr. Id., *L'intruso* (2000), a cura di Valeria Piazza, Cronopio, Napoli 2006.

[6] Cfr. Id., *Le remarque speculatif: Un bon mot de Hegel*, Gallimard, Paris 1973.

[7] Cfr. Id., *Il titolo della lettera* (1973), trad. di Sergio Benvenuto, Astrolabio, Roma 1981.

[8] La lista dei nomi che hanno seguito le lezioni di Kojève, pubblicate sotto il titolo di *Introduzione alla lettura di Hegel* (1947), a cura di Gian Franco Frigo, Adelphi, Milano 1996, è degna di nota di per sé: André Breton, Brice Parain, Eric Weil, Georges Bataille, Henry Corbin, Jacques Lacan, Jean

dei primi e più approfonditi studi del concetto di significante in Lacan, inteso metalinguisticamente come *la lettre* e che ancora oggi rappresenta uno dei tratti distintivi dell'approccio "iper-strutturalista".[9] In entrambi i casi la posizione di Nancy si caratterizza come una lettura *con*, una lettura critica e inerente al concetto in questione che tuttavia cerca di sospingere il pensiero dell'autore oltre sé stesso. Si tratta di una spinta al limite del paradigma dato, del pensare stesso: un piccolo eccesso di pensiero, un quasi impalpabile promemoria che riconduce il pensare a qualcosa di non dato per scontato o di definito una volta per tutte, ma a un interrogare che si articola anzitutto *con* e non *contro*.

Per esempio, *Aufhebung*, "il concetto speculativo per eccellenza", denota il centro del sistema filosofico di Hegel, inteso come un mastodontico autosviluppo dello spirito in natura, religione, arte e filosofia, dove ognuno dei momenti abolisce il precedente in modo da incorporarlo nel proprio tessuto, e dove alla fine arriviamo al compimento dello spirito assoluto, che a sua volta incorpora tutti i momenti precedenti, i loro concetti e le loro contradizioni. Tutti tranne uno, ossia il controverso concetto di *Aufhebung*, in modo tale che il movimento procede come se potesse essere dialetticamente *aufgehoben*, tranne però il processo di *Aufhebung*: "*Aufheben* non cattura sé stesso, non si chiude su sé stesso, evitando così la propria identificazione; *aufheben* insiste, persiste, si muove oltre se stesso, scivola nel testo, intoccabile, per cosi dire, non conservato e nemmeno eliminato."[10] Ed è così che *Aufhebung* funziona come sinonimo della dialettica di Hegel e allo stesso tempo come il nome dell'errore di Hegel che mostra una possibile via di uscita dal suo sistema filosofico – un'apertura al punto stesso della chiusura del pensiero, una carica di esplosivo nel cuore di cemento che tiene insieme il sistema, e il confine esterno della concettualità stessa che non può essere concettualizzato dall'interno.[11]

Hyppolite, Jean-Paul Sartre, Jean Wahl, Maurice Merleau-Ponty, Michel Leiris, Patrick Waldberg, Pierre Klossowski, Raymond Aron, Raymond Queneau, Robert Mariolin, Roger Caillois, Taro Okamoto, Günther Anderson, Hannah Arendt.

[9] Jean-Claude Milner nota due ragioni, una "pubblica" e l'altra più pertinente in quanto questione paradigmatica: Lacan "iper-strutturalista" per via dei suoi infami *Séminaiers* che erano vere e proprie lezioni-performances pubbliche, ma anche e molto più importante per via della sua appropriazione della linguistica, dove il concetto di "significante" prende il sopravvento sull'assioma del "segno" saussuriano. Cfr. Jean-Claude Milner, *Il periplo strutturale: figure e paradigma* (2002), a cura di Barbara Chitussi, Mimesis, Milano-Udine 2009.

[10] J.-L Nancy, *Le remarque speculatif*, cit., p. 58.

[11] Seguendo Marx, che e stato indubbiamente il primo a fare una critica della *Aufhebung* di Hegel in maniera appropriativa – come per esempio nel *Manifesto Comunista* dove parla dell'«abolizione della proprietà privata» (*Aufhebung des Privateigentums*) e della rivoluzione comunista come «vera riconciliazione» che contrasta quella supposta «falsa» di Hegel (cfr. Karl Marx, *Il manifesto comunista*, Marxist Internet Archive 1848) – Lenin mette in risalto il paradosso interno al termine di *Aufhebung*, che non può essere sottoposto al suo stesso processo di «abolizione» tramite la questione della traduzione del termine in russo (cfr. Lenin, *Philosophical Notebooks* vol. 38, Progress Publishers, Mosca 1969).

E questa lotta per "uscire" – una ossessione quasi nevrotica nel tentativo di trovare una via di fuga dalla "caverna filosofica" platonica in generale e dal sistema di Hegel in particolare, che coincide con il cercare un'uscita dall'ideologia capitalistica del dopoguerra europeo – è uno dei segni distintivi dello strutturalismo francese. In questa lotta, ognuno degli autori ha proposto la propria soluzione – o almeno un concetto di soluzione – al problema (*révolution*, *événement*, *déconstruction, inconscient*, etc.).[12] Incluso lo stesso Nancy, che a un certo punto dello sviluppo del proprio pensiero filosofico ha giocato il tutto per tutto con il concetto di *corpus*, inteso non semplicemente come un corpo fisico o biologico, opposto all'anima o al pensiero, ma come un punto di partenza che permette di pensare il concetto in contatto con la corporeità stessa – la "corporealtà" del concetto stesso – dove il concetto diventa corporeo e dove non ci può essere corpo senza un discorso del corpo, senza una concettualizzazione del corpo, e come la lunga tradizione europea dimostra già di per sé stessa, a partire dalla cultura del piacere dei Greci e dei Romani, cancellata dalla repressione della sessualità sotto il Cristianesimo, rinata durante il Rinascimento e la estetizzatone artistica del corpo... fino al ventesimo secolo, a partire dalla controversa rivoluzione sessuale, che ha connesso vari fenomeni, dalla linguistica alla psicoanalisi, dalla rivoluzione alla emancipazione.

IL CORPO, DUNQUE

Il corpo, o meglio, il concetto del "corpo" e stato sicuramente uno dei termini principali nella tradizione francese strutturalista – che si è appoggiata alla fenomenologia tedesca dall'altra parte del Reno per opporsi alla filosofia anglosassone dall'altra parte della Manica – dove troviamo una serie di autori che "riscoprono" il corpo come questione filosofica centrale per un pensiero attuale.

Nello stesso periodo in cui nascono la psicoanalisi di Freud e la linguistica di Saussure, Husserl fonda la fenomenologia come "ritorno alle cose stesse" tramite il metodo della "riduzione trascendentale" operando sulla tradizionale distinzione cartesiana di "anima" e "corpo", riconcettualizzandoli in "ego trascendentale" ed "ego corporeo".[13] Sulla stessa linea, Heidegger ha sviluppato il concetto di *Dasein* ("esserci") in relazione alla "domanda dimenticata dell'essere" che ha permesso, tra l'altro, di riporre la relazione tra l'uomo, il proprio corpo e gli oggetti corporei come questione di un possibile "incontro autentico con il mondo".[14] E così come è stato soprattutto Jean-Paul Sartre a introdurre la fenomenologia tedesca nella filosofia

[12] Cfr. J.-C. Milner, *Il periplo strutturale*, cit.

[13] Cfr. Edmund Husserl, *Idee per una fenomenologia pura e per una filosofia fenomenologica* (1913), a cura di Vincenzo Costa, Einaudi, Torino 2002.

[14] Cfr. Martin Heidegger, *Essere e tempo* (1927), a cura di Alfredo Marini, Mondadori, Milano 1996.

francese, insistendo sulla "precedenza dell'esistenza rispetto all'essenza" (da cui il nome di "esistenzialismo"),[15] Maurice Merleau-Ponty è stato colui il quale ha definitivamente messo in primo piano la questione del corpo e dei sensi tramite la sua "fenomenologia della percezione",[16] e in particolare tramite il successivo concetto di "carne del mondo".[17] Un ultimo autore che va necessariamente menzionato per tracciare la via che conduce al pensiero di Nancy, è Emmanuel Levinas con il concetto di "Altro", con il quale – "altro" o "Altro" che sia – il soggetto può entrare autenticamente in contatto – un contatto che è sempre "etica" –solo tramite "una carezza", ossia una "sensibilità" che, nel contatto, "trascende il sensibile".[18] Ecco dunque, in estrema sintesi, il percorso filosofico che conduce alla filosofia del corpo di Nancy e, di conseguenza, come mostreremo tra breve, anche alla questione del tocco.

Corpus è un esperimento filosofico e linguistico volto a pensare il corpo; qui, da principio, Nancy evoca una pluralità di significati: *corpus* come corpo, come corpo al singolare e come corpi al plurale, come qualunque corpo, ma anche questo corpo qua, e da ultimo infinitamente più e infinitamente meno che un corpo qualunque, come per esempio i corpi degli atomi (*corpora*), un *corpus* di testi o opere artistiche, un *corpus* militare ecc.: "Il *corpo*: ecco come l'abbiamo inventato. Chi altri al mondo lo conosce?"[19] Il corpo è qualcosa che "noi", gli occidentali, abbiamo inventato così come abbiamo inventato "l'anima", lo "spirito" ecc., o affermando il primo contro l'ultimo (come Platone ha fatto con la distinzione tra l'anima e il corpo), oppure riaffermando il secondo contro il primo (come Nietzsche ha fatto rovesciando il rapporto tra il corpo e l'anima). In ogni caso manchiamo il punto essenziale se semplicemente affermiamo o l'uno o l'altra, il corpo o l'anima l'uno contro l'altra, così come rischiamo di mancarlo se affermiamo una pluralità di significati del corpo contro una concezione unica e unificante, o addirittura se, al contrario, affermiamo un corpo unico, per esempio evocando il *corpus Christi* e il *hoc est enim corpus meum* con il quale Nancy comincia il suo saggio sul corpo.

La saturazione linguistica del corpo fenomenologico ha uno scopo ben preciso: destituire l'immediatezza del corpo, mostrare come il corpo *pesa* sì, ma come cosa che *pensa* – per evocare un gioco di parole che Nancy ama e che funziona anche in italiano tra il *peser* e il *penser* francese, il "pesare" e il "pensare" – e non semplicemente come qualcosa di biologico o fisico e dunque di opposto allo spirito o al

[15] Jean-Paul Sartre, *L'Essere e il Nulla* (1943), traduzione di Giuseppe Del Bo, a cura di F. Fergnani e M. Lazzari, Il Saggiatore, Milano 2014.

[16] Maurice Merleau-Ponty, *La fenomenologia della percezione* (1945), trad. Andrea Bonomi, Bompiani, Milano 2003.

[17] Maurice Merleau-Ponty, *Il visibile e l'invisibile,* (1964), trad. Andrea Bonomi, Bompiani, Milano 1993.

[18] Emmanuel Levinas, *Totalità e Infinito. Saggio sul esteriorità* (1961), traduzione di Adriano del Asta, Jaca Book, Milano 1980

[19] J-L. Nancy, *Corpus* (1992), a cura di Antonella Moscati, Cronopio, Napoli 1995, p. 8.

pensiero: "Il corpo è la certezza sconvolta, messa in frantumi. Niente di più proprio, niente di più estraneo al nostro vecchio mondo."[20] Un corpo proprio, un corpo straniero, *étrange corps étrangers* o *strani corpi stranieri*, nel pensiero di Nancy significa che il corpo non è qualcosa di dato, di chiaro, di familiare, ma piuttosto qualcosa di strano e di estraneo, "'il corpo' è la nostra angoscia messa a nudo!"[21] Il nostro corpo è la nostra angoscia denudata – "Come siamo nudi!" grida a un certo punto del testo – proprio quando vogliamo affermare il corpo contro il significato, l'ideologia, la religione; per esempio mettendoci a nudo, mostrando il nostro corpo fino al punto in cui l'esibizionismo combacia con il voyerismo, e tutt'e due con la "pornoscopia". Serve davvero menzionare a questo riguardo, e per fornire esempi per così dire "plastici", *Facebook*, *Instagram*, *Tweeter, Tik-Tok, Tinder* e gli altri social media pornoscopici della nostra "angoscia denudata"?

Dunque, se non possiamo arrivare al corpo mediante semplici opposizioni che coinvolgono l'anima o lo spirito o il pensiero (come Descartes e come molti altri, seguendolo, hanno fatto, allora come possiamo arrivare a toccare quel che è corporeo nel corpo stesso? Ed ecco la proposta di Nancy: il corpo non e mai stato identico a se stesso, perché è sempre stato fuori di sé, e l'anima o lo spirito o il pensiero sono solo modi nei quali il corpo sta o va fuori di sé stesso; lo spirito, dunque, è questo fuori-di-sé del corpo stesso, ma non semplicemente come qualcosa di esterno, semplicemente come qualcosa di strano o estraneo, ma come un qualcosa di inerente al corpo stesso. E il punto principale dell'argomento è che si può ritornare a sé stessi, che si può ritrovare sé stessi solo tramite questa esperienza di un altro corpo che passa da una simile esteriorizzazione. Ed è qua che non possiamo non pensare a *L'intruso*, in cui Nancy descrive l'esperienza del trapianto di cuore come una simile esteriorizzazione del corpo: "Di chi è questo cuore che mi batte in petto?"

Questa realizzazione del corpo tramite l'altro, tramite un altro corpo, tramite il corpo dell'altro – e tramite la sua propria alterità– non ha modo di abolire l'esteriorità della propria esperienza: non c'è nessuna *Aufhebung* possibile del corpo nel concetto ed è proprio per questo motivo che il corpo, in ultima analisi e per dirla in termini strutturali, è lo stesso che il processo di *Aufhebung*: il corpo come personificazione della *Aufhebung*.

INTERMEZZO

Se diciamo che il corpo incontra un altro corpo, o più precisamente che il corpo incontra il proprio altro come sé stesso, diciamo immediatamente "sessualità", di-

[20] Ivi, p. 9.
[21] Ivi, p. 10.

ciamo che il corpo è marcato dalla "differenza sessuale" tramite l'incisione del "significante", che è proprio l'oggetto del saggio di Nancy su Lacan, rivisitato qualche anno dopo, in occasione del centenario della nascita di Lacan, nel 2001, con il titolo *L'"il y a' du rapport sexuel* (*Il 'c'è' del rapporto sessuale*).[22]

In questo testo l'accento viene messo sulla questione dell'"il y a', il 'c'è' del rapporto sessuale stesso: "La differenza dei sessi non è la differenza tra due o più cose, di cui ciascuna sussisterebbe di per sé in quanto 'una' (*un* sesso): non è né come una differenza di specie, né come una differenza di individui, né come una differenza di natura, né come una differenza di grado. È la differenza *del* sesso, in quanto questo differisce da sé. Il sesso è, per ogni vivente sessuato e sotto ogni aspetto, l'ente che differisce da sé (*différant de soi*): differisce in quanto si differenzia secondo i gradienti molteplici e le fasi intricate denotate con 'maschile/femminile', 'omo/etero', 'attivo/passivo ecc., e differisce in quanto la specie vi demoltiplica indefinitamente le singolarità dei suoi 'rappresentanti'."[23] Il *différer* di Nancy fa eco alla logica della *différance* di Derrida: il sesso è, allo stesso tempo, ciò che è differenziato e ciò che attua la differenziazione, una differenza che anticipa le proprie differenziazioni, il principio di differenziazione, la differenziazione stessa ancora prima di arrivare ai suoi elementi differenziali. Il problema è – e ed è qui che Nancy segue più Lacan che Derrida – che il principio di differenziazione è già da sempre marcato con la differenza sessuale, "sessualizzato" per così dire, in quanto la "sessualità" è precisamente il nome della differenza per eccellenza: "Il sessuale non è una specie del genere rapporto, piuttosto il rapporto ha nel sessuale la sua estensione o la sua esposizione integrale. Potrei dire: il sessuale rapporta quel che ne è del rapporto, ma il suo rapporto – il suo bilancio e il suo racconto – non si totalizza né si conclude."[24] Ancora una volta possiamo vedere che c'è una equivalenza strutturale tra il corpo, che funziona da personificazione dell'impossibilità di una *Aufhebung* concettuale, e la sessualità che marca il corpo con questa impossibilità, essa stessa, in ultima analisi, la ragione per cui l'*'il y a du...'* deve essere supplemento e pensato tramite la sua controparte molto più scandalosa della tesi di Lacan: "il n'y a pas du rapport sexuel" ("non c'è rapporto sessuale").

Come possiamo, dunque, parlare o scrivere di questo corpo sessualizzato che non può essere *aufgehoben* in un concetto? Questo è precisamente quello che *Corpus*, come esperimento linguistico e filosofico di pensare il corpo, cerca di fare; o meglio, come spiega lo stesso Nancy: "Scrivere non *del* corpo, ma il corpo stesso [*Soit à écrire, non pas* du *corps, mais le corps même*]. Non la corporeità, ma il corpo. [*Non pas la corporéité, mais le corps*]. Non i segni, le immagini, le cifre del corpo, ma ancora il corpo [*Non pas les signes, les images, les chiffres du corps, mais*

[22] Cfr. Id., *Il "c'è" del rapporto sessuale* (2000), trad. di Graziella Berto, SE, Milano 2002.
[23] Ivi, pp. 31-32.
[24] Ivi, p. 28.

encore le corps]."[25] Tutto questo scrivere *del* corpo era, per Nancy, il "programma del modernismo", ma oggi "non abbiamo più un programma", solo programmi televisivi, nei quali uno guarda una moltitudine di corpi – vivi e morti che siano – e da dove emerge "una necessità, una urgenza", che domanda lo "scrivere del corpo": "In questo modo, di nuovo, il corpo è sul limite, all'estremità: viene da più lontano, l'orizzonte è la sua moltitudine che viene."[26] E così come "il corpo è sul limite, all'estremità", anche lo "scrivere il corpo" deve essere estremo: "Scrivere: toccare l'estremità" [*Écrire: toucher à l'extrémité*]"; e la questione di Nancy in questo senso riguarda proprio il tocco: "Come dunque giungere a toccare il corpo, invece di significarlo o di farlo significare [*Comment donc toucher au corps, au lieu de le signifier ou de le faire signifier*]?"[27] Come, dunque, "toccare il corpo" senza il significante, l'elemento cardine dello strutturalismo, della linguistica, della psicoanalisi?

La questione è chiara, critica, puntuale – la risposta un po' meno, almeno da principio, quando Nancy ci offre una semplice opposizione tra "la lettera" (*la lettre*) di Lacan e "la scrittura" (*l'écriture*), che in verità occupano la stessa posizione strutturale: "Scrivere non è significare. La domanda era: come giungere a toccare il corpo [*comment toucher au corps*]?"[28] E certamente non si può rispondere a questa domanda come a una "domanda tecnica", ma si deve precisare che quello che "continuamente accade nella scrittura" è proprio questo "giungere al corpo, toccare il corpo, *toccare* insomma" [*toucher au corps, toucher le corps,* toucher *enfin*]."[29] Ora, se la scrittura ha "il suo posto sul limite", allora a essa "accade solo di *toccare*. Le accade di toccare del corpo (o meglio questo o quel corpo singolo) *con l'incorporeo* del 'senso' [toucher le corps ... *avec l'incorporel du 'sens'*]"; e di conseguenza rendere "*l'incorporeo toccante*, e il *senso* un tocco [rendre *l'incorporel touchant*, ou de faire du *sens* une touche]."[30] Dire in questo contesto che "scrivere" non è "significare" significa semplicemente dire che "Derrida non è Lacan", anche se entrambi, nelle proprie teorie sulla scrittura e sul significante, hanno messo in risalto proprio il momento del "toccare" (lo scrivere che tocca il significato nel primo e il significante che ha effetti materiali sul corpo nel secondo), così come viene ripreso da Nancy intorno alla questione del "toccare il limite": "Forse non succede proprio *nella* scrittura", ma "sul confine, sul limite, sul bordo, sul punto estremo della scrittura non succede che questo"; e se "la scrittura ha il suo luogo sul limite" allora alla scrittura stessa "non succede niente se non il *tocco*", chiudendo con il doppio nodo del tocco che rende "l'incorporeo del senso" tangibile – insomma: un tocco.

[25] Id., *Corpus*, cit., p. 12.
[26] *Ibidem.*
[27] *Ibidem.*
[28] *Ibidem.*
[29] *Ibidem.*
[30] Ivi, p. 13.

Il tocco, come possiamo vedere, è la risposta implicita di Nancy sia a Derrida che a Lacan, almeno per quanto riguarda la relazione del linguaggio con il corpo, ed è forse proprio per questo che ritorna su questa questione anche nelle altre sue opere, dove gioca sul doppio significato della parola francese *sens*, che funziona anche in italiano: il *senso* e, allo stesso tempo, il "senso" come qualcosa che appartiene al corpo sensibile, e dall'altra significa il significato stesso, e dove proprio il tocco tocca tutt'e due i significati e li fa combaciare.

TOCCARE

Nell'anno 2000, al giro del secolo e del millennio, Derrida pubblica il suo saggio intitolato *Le toucher: Jean-Luc Nancy* (*Toccare: Jean-Luc Nancy*), dedicato proprio alla filosofia del tocco di Nancy che Derrida giustamente, a mio giudizio, definisce "il più grande filosofo del tocco".

È per una felice coincidenza storica che la traduzione inglese del libro di Derrida *On Touching* (*Sul Toccare*) è uscita nello stesso anno del volume intitolato *The Book of Touch* (*Il libro del tocco*) di Constance Classen, cioè nel 2005, un anno che può marcare la nascita degli *haptic studies* (*studi aptici*), una disciplina emergente che tratta il tocco da un punto di vista interdisciplinare combinando antropologia, sociologia, culturologia... ma in primo luogo la filosofia e la sua lunga storia nel pensare i sensi, dove però il tocco è stato quasi sempre sottomesso ai sensi "più teoretici" (Hegel) della vista e dell'udito, come dimostrano, tra l'altro, i termini di *theoria* greca o la *vox* della coscienza cristiana.

Quanto riguarda la seconda linea: molti degli autori del *Book of Touch* si sono specializzati nella questione del tocco sia tramite articoli che monografie (come per esempio Mark Paterson con il suo *The Senses of Touch* (*I sensi del tocco*)), sia edizioni speciali di riviste accademiche (come David Howes con il numero speciale della *The Senses and Society* (*I sensi e la società*) intitolato *Re-mediating Touch* (*Re-mediazione del tocco*)). È importante osservare che quasi tutti gli autori contemporanei degli "studi sul tocco" tendono a usare una prospettiva fenomenologica che mette in secondo piano quella linguistica, pur senza trascurarla del tutto. In particolare, dal *Book of Touch* di Classen fino a *The Senses of Touch* di Paterson, la questione della lingua non è assente e tutti i contributi stabiliscono determinate connessioni significative tra "il toccare e il parlare" (con temi come: il toccare corporeo quale forma di comunicazione, le differenze linguistiche del verbo "toccare" in varie culture, etc.);[31] quello che però manca è un dialogo epistemologico tra lo strutturalismo linguistico francese e gli *haptic studies* angloamericani che metta in risalto la speciale connessione tra gli studi del tocco e gli studi del linguaggio, una

[31] Cfr. Constance Classen, *The Book of Touch,* Berg, Oxford 2005; Mark Paterson, *The Senses of Touch,* Berg, New York & London 2007.

questione che non può essere risolta, almeno a mio avviso, se non tramite una mediazione filosofica.[32]

Cercheremo qui di seguire e approfondire la prima di queste due linee, precisandone i contenuti a partire da Derrida, che ha pubblicato *Le toucher* nel 2000 quale rielaborazione di un testo pubblicato negli anni novanta con il titolo inglese di *On the Work of Jean-Luc Nancy* (*Sull'opera di Jean-Luc Nancy*), posto a introduzione di un numero speciale del *Journal of Modern Critical Theory* dedicato proprio a Nancy. Né è privo di interesse il fatto che l'interpretazione derridiana dell'opera di Nancy in quanto prima vera e propria filosofia del tocco sia uscita ancora prima che lo stesso Nancy abbia esplicitamente formulato una filosofia del tocco, che trapelava bensì dai suoi lavori precedenti, ma solo in maniera implicita, ed è stata messo in risalto solo successivamente, a cominciare dal 2003, con la pubblicazione di *Noli me tangere*,[33] che va inteso anche come risposta filosofica a Derrida.

Così come *Corpus* comincia con il *hoc est enim corpus meum* cristiano, *Noli me tangere* comincia con il corpo di Gesù Cristo dopo la resurrezione, come è narrato nel *Nuovo testamento*, molto più precisamente nella scena descritta in "L'apparizione a Maria di Magdala" del Vangelo di Giovanni (Giovanni 20:1–18):

> Nel giorno dopo il sabato, Maria di Màgdala si recò al sepolcro di buon mattino,
> quand'era ancora buio, e vide che la pietra era stata ribaltata dal sepolcro. [2] Corse
> allora e andò da Simon Pietro e dall'altro discepolo, quello che Gesù amava, e disse
> loro: "Hanno portato via il Signore dal sepolcro e non sappiamo dove l'hanno po-
> sto!" [3] Uscì allora Simon Pietro insieme all'altro discepolo, e si recarono al sepol-
> cro. [4] Correvano insieme tutti e due, ma l'altro discepolo corse più veloce di Pietro e
> giunse per primo al sepolcro. [5] Chinatosi, vide le bende per terra, ma non en-
> trò. [6] Giunse intanto anche Simon Pietro che lo seguiva ed entrò nel sepolcro e vide
> le bende per terra, [7] e il sudario, che gli era stato posto sul capo, non per terra con le
> bende, ma piegato in un luogo a parte.[8] Allora entrò anche l'altro discepolo, che era
> giunto per primo al sepolcro, e vide e credette. [9] Non avevano infatti ancora com-
> preso la Scrittura, che egli cioè doveva risuscitare dai morti. [10] I discepoli intanto se
> ne tornarono di nuovo a casa.[11] Maria invece stava all'esterno vicino al sepolcro e pian-
> geva. Mentre piangeva, si chinò verso il sepolcro [12] e vide due angeli in bianche vesti,
> seduti l'uno dalla parte del capo e l'altro dei piedi, dove era stato posto il corpo di
> Gesù. [13] Ed essi le dissero: "Donna, perché piangi?" Rispose loro: "Hanno portato
> via il mio Signore e non so dove lo hanno posto." [14] Detto questo, si voltò indietro e

[32] All'interno di del progetto intitolato *Jezik dotika: lingvistične perspektive v haptičnih študijah* (*Il linguaggio del tocco: perspettive linguistiche negli studi del tocco*), finanziato dal *European Research Council* e dalla *Agenzia nazionale di ricerca della repubblica di Slovenia*, abbiamo cercato di sormontare questo divario; i risultati della nostra ricerca sono stati pubblicati in *Language of Touch: Philosophical Examination in Linguistics and Haptic Studies* (*Il linguaggio del tocco: esaminazioni filosofice della linguistica e degli studi sul tocco*), curato da Mirt Komel, Bloomsberry press, London 2019.

[33] Cfr. Id., *Noli me tangere: Saggio sul levarsi del corpo* (2003), trad. di Franco Brioschi, Bollati Boringhieri, Torino 2005.

> vide Gesù che stava lì in piedi; ma non sapeva che era Gesù. [15] Le disse Gesù: "Donna, perché piangi? Chi cerchi?" Essa, pensando che fosse il custode del giardino, gli disse: "Signore, se l'hai portato via tu, dimmi dove lo hai posto e io andrò a prenderlo."[16] Gesù le disse: "Maria!" Essa allora, voltatasi verso di lui, gli disse in ebraico: "Rabbunì!", che significa: "Maestro!" [17] Gesù le disse: "Non mi trattenere, perché non sono ancora salito al Padre; ma va' dai miei fratelli e dì loro: Io salgo al Padre mio e Padre vostro, Dio mio e Dio vostro."[18]

È importantissimo notare già dal principio che questa scena ha ricevuto un nome proprio – *Noli me tangere* – il cui uso storico e contemporaneo nelle arti e nella dottrina cristiana può essere considerato alla pari delle sue controparti più famose come *L'ultima cena* o *La crocefissione.* Ma Nancy ne fa un uso diverso: la sua analisi filosofica del *Noli me tangere* fa parte del progetto derridiano più ampio della "decostruzione del cristianesimo", un movimento "di analisi" e allo stesso tempo "di trasposizione, accompagnata da una trasformazione" del problema teologico del corpo di Cristo che si rivolge al tocco per operare una certa "secolarizzazione" di tale questione.[34]

Una riappropriazione che si può operare partendo, come Nancy ha fatto, da un trattamento dello stesso motivo già da prima che la religione cristiana abbia avuto avvento, come per esempio nell'*Edipo a Colono* di Sofocle, dove un momento prima della apoteosi del vecchio e ormai cieco re Edipo, il tragico eroe parla così alle sue figlie Antigone e Ismene: "O figlie, seguitemi; incredibile guida sono a mia volta per voi, come voi foste al padre. Venite, e non toccatemi."[35] Ma c'è una differenza importante tra il testo di Sofocle e quello di Giovanni che Nancy non manca di sottolineare: nella frase in greco di Gesù, μή μου ἅπτου, troviamo il verbo ἅπτειν, che significa allo stesso tempo sia "toccare" che "trattenere", mentre nell'appello di Edipo è usato il verbo ψαύω, che significa "toccare" nel senso di "sfregiare" o persino "danneggiare". Il problema maggiore della traduzione latina della Bibbia, che è stata difatti il riferimento principale per la circolazione del motivo del *Noli me tangere*, è che trasforma il μή μου ἅπτου greco nel *noli me tangere*, nel senso unilaterale del verbo *tango*, che oramai significa solo "toccare" nel senso fisico del termine.

Ed è qui che Nancy capovolge il rapporto: non è la dottrina Cristiana a delimitare il concetto del tocco, ma è invece il tocco stesso a estendere la questione cristiana del (non-)toccare – un punto che è reso evidente da una serie di esempi secolari che portano il nome di *Noli me tangere*: oltre a una moltitudine di esempi di pittura classica dal medioevo al rinascimento (da Tintoretto a Caravaggio) vanno menzionati un poema di Wyatt dedicato ad Anna Boleyn, un pezzo teatrale di Phillippin Jose Rizal, reso anche in forma di musical, varie installazioni artistiche (Arman,

[34] Ivi, p. 10 nota.

[35] Sofocle, *Edipo a Colono*, in *Tragici greci*, a cura di Raffaele Cantarella, Mondadori, Milano 1992, p. 275.

Seyed Alavi, Sam Taylor Wood ecc.), un libro sugli abusi sessuali scritto sotto lo pseudonimo di Marie L., un film di Jacques Rivette intitolato *Out 1: Noli me tangere*, ma anche una forma di tumore che non deve essere toccato se non è impossibile operarlo, una specie di *impatiens* che perde i semi se la si tocca, una specie di gatti che preferiscono non essere toccati e così via.

Tutti questi esempi, che portano il nome di *Noli me tangere,* certamente mostrano la questione del tocco come un problema la cui soluzione principale si mostra come una proibizione del toccare, come un non-toccare. Ma un altro esempio potrebbe funzionare come una sorta di negativo perfetto di quello trattato da Nancy, cioè la scena dello stesso Vangelo di Giovanni immediatamente successiva, dove troviamo Gesù alle prese con Tommaso (Giovanni 20:24-29):

> Tommaso, uno dei Dodici, chiamato Dìdimo, non era con loro quando venne Gesù. [25] Gli dissero allora gli altri discepoli: "Abbiamo visto il Signore!". Ma egli disse loro: "Se non vedo nelle sue mani il segno dei chiodi e non metto il dito nel posto dei chiodi e non metto la mia mano nel suo costato, non crederò". [26] Otto giorni dopo i discepoli erano di nuovo in casa e c'era con loro anche Tommaso. Venne Gesù, a porte chiuse, si fermò in mezzo a loro e disse: "Pace a voi!". [27] Poi disse a Tommaso: "Metti qua il tuo dito e guarda le mie mani; stendi la tua mano, e mettila nel mio costato; e non essere più incredulo ma credente!" [28] Rispose Tommaso: "Mio Signore e mio Dio!" [29] Gesù gli disse: "Perché mi hai veduto, hai creduto: beati quelli che pur non avendo visto crederanno!"

Se contrapponiamo la scena della "Maddalena" a questa con "l'Incredulo", vediamo che in esse si esprimono due tendenze opposte riguardo alla questione del tocco. Nella prima con Maria di Magdala, un desiderio di dissolvere il dubbio sensoriale tramite un tocco che figura come un gesto e una frase, che sono esse stesse "toccanti", nel senso che il "Non toccarmi!" opera una sostituzione del tocco fisico con quello linguistico, che dà garanzia alla fede (come per dire: "Non toccarmi, ma credimi!"). Nella seconda, con Tommaso, succede proprio il contrario, sicché il vuoto del dubbio di Tommaso è articolato linguisticamente, e in questa situazione è proprio il desiderio di Cristo a guidare il dito dell'incredulo nel vuoto del proprio costato, cosicché la fede è data dal muto silenzio del tocco (come per dire: "Toccare per credere!"). Non è un caso che entrambe le scene compaiono nella iconografia religiosa, nella pittura del Rinascimento, in pezzi teatrali, film e così via, perché non solo fungono da rappresentanti emblematici della fede e del dubbio, che si scontrano sul terreno dei sensi e del sensibile, ma perché funzionano anche come allegorie di una certa fragilità della certezza dei sensi in rapporto col linguaggio: nella scena con la "Maddalena" il tocco è fermato come provocatore di dubbio, mentre il linguaggio, qui identico con la frase *Noli me tangere*, opera come garante di certezza – mentre nella scena con "L'incredulo" è proprio il tocco a funzionare da supplemento al dubbio articolato tramite il linguaggio.

Ed è proprio per questo speciale rapporto tra il toccare e il linguaggio che Nancy può dire che la frase (la massima? l'imperativo?) "Non toccarmi!" – in qualunque

linguaggio la articoliamo, dall'originale greco del μή μου ἅπτου al latino *Noli me tangere* e fino al francese "Ne me touche pas!" o all'inglese "Do not touch me!" – tocca il punto sensibile del tocco stesso: "Per dirla in una parola e con un gioco di parole – difficile da evitare – 'non toccarmi' è una frase che tocca, che non può non toccare [*ne me touche pas' est une phrase qui touche, qui ne peut pas ne pas toucher*], anche quando si trovi isolata da ogni contesto" (e il contesto in questo caso è, giustamente, religioso); ancor di più, la frase "enuncia qualcosa intorno al toccare in generale, o tocca il punto sensibile del toccare [*énonce quelque chose du toucher en général ou elle touche au point sensible du toucher*]: quel punto sensibile che il toccare costituisce per eccellenza (è 'il' punto, insomma, del sensibile) e che forma in esso il suo punto sensibile"; ed è precisamente qui, su questo punto, che "il toccare non tocca, non deve toccare per esercitare il suo tocco (la sua arte, il suo tatto, la sua grazia) [*Or ce point est précisément le point où le toucher ne touche pas, ne doit pas toucher pour exercer sa touche*]", il punto dove "lo spazio privo di dimensione che separa ciò che il toccare accosta, la linea che divide il toccare dal toccato e dunque il tocco da se stesso [*le point ou l'espace sans dimension qui sépare ce que le toucher rassemble, la ligne qui écarte le toucher du touché et donc la touche d'elle-même*]."[36] Questo punto, dove il tocco non deve toccare se vuole esercitare il proprio potere (o meglio: la sua "arte, tatto, grazia"), e allo stesso tempo il punto dove il soggetto attivo del toccare si distingue dall'oggetto toccato, è dunque, come conclude Nancy, dove il tocco si divide "da se stesso" – o per dirla altrimenti: il tocco, che si divide "da se stesso", è un tocco che delimita il soggetto dall'oggetto ma, ancor di più, è la stessa linea che separa, per così dire, il toccabile dall'intoccabile. Ed è proprio perciò che il tocco, quale punto sensibile della sensibilità stessa, fa senso e rende il senso – di per sé intoccabile, cosi come tra l'altro la verità – palpabile, tangibile.

La tecnologia odierna, inclusi i cosiddetti *social*, promette maggiore vicinanza e maggiore contatto ("con-tatto") – pensiamo alla *touch-technology* dei telefonini, dei laptop, dei tablet... in combinazione con appunto i "social" – mentre ciò che produce in realtà è sempre più alienazione, più distanza, più distacco (e così i *social* si rivelano, in verità, veri e propri "anti-*social*"). Più si procede alla smaterializzazione del mondo e alla riduzione delle distanze, più distanza in realtà si crea e più viene meno quel contatto che solo il tocco può darci. Insistere sull'esperienza del tocco – come esperienza dell'intoccabile senso del tocco che è allo stesso tempo il tangibile senso del senso – può, adesso più che mai, mostrarci una via d'uscita dalla progressiva digitalizzazione e virtualizzazione, che si rivelano essere altrettante mortificazioni del senso del tatto. Può, insomma, continuare a "fare senso" in un mondo che sembra destinato all'insensato e all'insensibile. Ed è proprio questa la ragione ultima del senso del tatto in ambedue i significati della parola "senso".

[36] J.-L. Nancy, *Noli me tangere*, cit., p. 24.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 783-792
ISSN: 1825-5167

AL DI LÀ DEL PIACERE? SULLA FONDAZIONE DEL 'PRINCIPIO DI UTILITÀ' IN JEREMY BENTHAM

DAMIANO SIMONCELLI
Dipartimento di Antichità, Filosofia e Storia
Università di Genova-Consorzio FINO
damiano.simoncelli@gmail.com

ABSTRACT
The Principle of Utility can be regarded as the keystone of the Benthamite ethical and political thought. In fact, it is at the core of Bentham's two major works *Introduction to the Principles of Morals and Legislation* and *Deontology*. At the same time, the question has been raised about its foundation. This paper is aimed at showing that this foundation can be found in the elenctic defense he proposes at the beginning of his *Introduction to the Principles of Morals and Legislation*.

KEYWORDS
Bentham, Utilitarianism, Principle of Utility

Il 'Principio di Utilità'[1] costituisce la chiave di volta della riflessione etico-politica benthamiana: a partire da esso il filosofo di Londra sviluppa le sue due opere maggiori, l'*Introduzione ai principi della morale e della legislazione* e la *Deontologia*; contro di esso, la critica ha sollevato l'obiezione di mancata fondazione. Il presente elaborato intende mostrare che questa preoccupazione fondativa può essere ritrovata nel tentativo di difesa elenctica, che Jeremy Bentham propone nei capitoli iniziali dell'*Introduzione ai principi della morale e della legislazione*.

0. PREMESSA ANTROPOLOGICA

In apertura della sua *Introduzione ai principi della morale e della legislazione*, Bentham illustra un importante assunto antropologico, che servirà da base all'elaborazione del PdU:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to

[1] D'ora in poi si indicherà tale principio con la sigla PdU.

> determine what we shall do. On the one hand, the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort of we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while[2].

Considerando questo luogo, è possibile anzitutto notare che la tesi fatta propria da Bentham è accettata come vera senza essere provata – si tratta, come detto sopra, di un assunto. Essa intende mettere a tema la natura umana; pertanto, può essere a ragione definita "antropologica". Inoltre, essa ha la pretesa di dire, riguardo alla natura umana, non un qualsivoglia aspetto accidentale, bensì "il" tratto proprio, ovverosia l'elemento strutturale proprio dell'uomo in quanto uomo; dunque si può affermare che si tratta di una tesi "antropologico-trascendentale"[3]. Precisare la tesi come "antropologico-trascendentale" offre un'ulteriore felice sintesi di quanto Bentham ha appena affermato: "trascendentale", infatti, porta in sé il significato di "intrascendibile", ovverosia "inoltrepassabile". Come si è visto, ciò che il filosofo di Londra intende sostenere è che nessun aspetto dell'agire umano sfugge alla signoria di piacere e dolore: questa, infatti, si pone all'origine dell'agire dell'uomo e, al contempo, ne è principio regolatore[4]. A riprova di ciò, Bentham afferma che qualora si tentasse di sottrarsi a questa signoria, se ne testimonierebbe nuovamente il dominio: si tratta della situazione in cui, secondo la tradizione aristotelica, si trova il negatore dei primi principi[5]. Secondo il filosofo di Londra, il tentativo di emancipazione può avvenire soltanto sul piano verbale e mai su quello dell'agire, con la conseguenza che chi tenta l'emancipazione sembrerebbe incorrere in quella che, in termini contemporanei, viene chiamata "contraddizione performativa"[6].

[2] J. Bentham, *Introduction to the Principles of Morals and Legislation* (d'ora in poi *IPML*), in: Id., *Selected Writings on Utilitarianism*, Wordsworth, Ware 2001, Chap. I, § 1. Per un quadro introduttivo sulla vita e sul pensiero di Bentham cfr. P. Schofield, *Bentham. A Guide for the Perplexed*, Continuum, London 2009.

[3] "Trascendentale" qui vuol indicare "l'identità comune a tutte le differenze". Si tratta del significato originario del termine, che si ritrova sia nella sua declinazione "ontologica" (cfr. pensiero antico e medioevale) sia nella sua declinazione "metodologica" (cfr. pensiero moderno, in special modo Kant). Sul trascendentale cfr. P. Bettineschi, *Sul trascendentale*, pro manuscripto, Venezia 2014; C. Vigna, *Etica del desiderio come etica del riconoscimento*, Orthotes, Napoli-Salerno 2015; Id., *Il frammento e l'intero. Indagini sul senso dell'essere e sulla stabilità del sapere*, Vita e Pensiero, Milano 2000.

[4] Osserva opportunamente Piero Tarantino che, secondo Bentham, «*the human mind is by nature oriented to the pursuit of pleasure and to the avoidance of pain. This orientation is constitutive of human agency: it is not matter of choice, because it intimately structures rationality*» (*Philosophy, Obligation and the Law. Bentham's Ontology of Normativity*, Routledge, London and New York 2018, p. 137).

[5] Per un approfondimento si veda la seguente edizione commentata del IV libro della *Metafisica* di Aristotele: Aristotele, *Il principio di non contraddizione*, traduzione introduzione e commento di E. Severino, La Scuola, Brescia 1959.

[6] Ovverosia una contraddizione che accade tra il locutorio (il contenuto proposizionale) e l'illocutorio (l'atto eseguito nel proferire il contenuto proposizionale). Ad esempio, se *x* dice: "*x* non è capace

Per concludere l'analisi di questo denso luogo benthamiano, resta da interrogarsi riguardo a che cosa l'Autore intenda con "piacere" e "dolore". Rimanendo all'interno dell'*Introduzione*, è possibile trovare risposta nel § 3, laddove Bentham propone due serie di sinonimie: egli, riguardo al piacere, afferma che si tratta di ciò che si può diversamente chiamare «*benefit, advantage,* [...] *good or happiness*»; riguardo al dolore, si intende quella stessa realtà denotata da termini quali «*mischief,* [...] *evil or unhappiness*»[7].

1. LA CONCEZIONE BENTHAMIANA DEL PDU

All'assunto antropologico appena presentato si riferisce[8] il PdU[9].

Sul PdU Bentham intende fondare il proprio sistema, che si presenta come «*the fabric of felicity by the hands of reason and of law*»[10]. Scrive il filosofo di Londra:

di parlare". Sul concetto di contraddizione performativa, cfr. J. Habermas, *Etica del discorso,* trad. it. di E. Agazzi, Laterza, Roma-Bari 1989[1], pp. 89-91; P. Pagani, *Contraddizione performativa e ontologia*, FrancoAngeli, Milano 1999.

[7] *IPML*, Chap. I, § 3. Nella *Deontologia*, invece, è mantenuta soltanto la sinonimia tra piacere e bene (cfr., J. Bentham, *Deontology* [d'ora in poi *DL*], in: Id., *Deontology together with A Table of the Springs of Action and the Article on Utilitarianism*, ed. by A. Goldworth, Clarendon Press, Oxford-New York 2002, P. I, I.6), mentre il rapporto piacere-benessere viene precisato indicando con il secondo termine la somma dei piaceri al netto dei dolori (cfr. *ivi*, P. I, I.3). La relazione tra benessere e felicità subisce addirittura una più significativa divaricazione, costituendosi la seconda come superlativa esperienza di piacere senza la minima presenza di dolore (cfr. *ibidem*). Non manchi di essere notata l'ascendenza hobbesiana di una siffatta equazione (cfr. Th. Hobbes, *De homine*, cap. XI, [vol. II di Thomae Hobbes Malmesburiensis *Opera Philosophica quae latine scripsit omnia, in unum corpus nunc primum collecta*, Londini 1839-1845]).

[8] Si preferisce parlare di riferimento del 'Principio di Utilità' a un assunto antropologico, anziché di fondazione del "Principio di Utilità' su un assunto antropologico per evitare ambiguità rispetto al dibattito in merito alla presenza del passaggio *is-ought* nei rapporti tra l'antropologia e l'etica benthamiane. Visti i debiti di Bentham nei confronti del pensiero humeano, sembra ragionevole optare per l'esclusione, interpretando il ruolo "fondativo" dell'antropologia rispetto all'etica come sottolineatura dell'importanza dei «referti della scienza della natura umana». Essa, come prosegue Giacomo Samek Lodovici, «dev'essere la base scientifica [...] della nuova scienza della morale: l'edonismo psicologico è un fatto di cui non si può non tener conto, se non si vuole elaborare una morale astratta e avulsa dalla natura umana, ma non è la giustificazione del principio di utilità» (*L'utilità del bene. Jeremy Bentham, l'utilitarismo e il consequenzialismo*, Vita e Pensiero, Milano 2004, p. 17). Sui debiti di Bentham nei confronti del pensiero humeano si veda il documentato saggio di Frederick Rosen (*Classical Utilitarianism from Hume to Mill*, Routledge, London-New York 2003, cap. 3). Cfr. anche *Stanford Encyclopedia of Philosophy*, s.v. The *History of Utilitarianism*.

[9] D'ora in poi indicato con la sigla PdU. Va tuttavia sottolineato che, in una nota del 1822 al primo capitolo dell'*Introduzione*, l'Autore sostiene di preferire alla denominazione "Principio di utilità" quella di «greatest happiness *or* greatest felicity *principle*» (*IPML*, Chap. I, § 1, nota).

[10] *Ivi,* Chap. I, § 1.

> By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness[11].

Anzitutto è bene notare che, al pari della signoria di piacere e dolore, anche questo principio – che quella ha come riferimento – ha una pretesa totalizzante («*every action whatsoever*»): esso, infatti, vuol regolare l'agire umano tanto nella sua dimensione individuale, quanto in quella sociale. Per quanto riguarda, invece, la denominazione del principio, ovverosia l'utilità (*utility*), nel paragrafo successivo Bentham la definisce come ciò che tende ad accrescere il piacere (o la felicità) e a diminuire il dolore (o infelicità) della parte (*party*) di cui si considera l'interesse, sia essa un individuo o la società: nel primo caso è in questione la felicità[12] individuale, nel secondo quella comunitaria[13]. Nella definizione di utilità, inoltre, il filosofo di Londra introduce il concetto di "interesse" (*interest*), che declina anche in questo caso sia socialmente che individualmente. Che cos'è, quindi, per Bentham l'interesse? Nonostante l'ordine dell'esposizione, è necessario partire dalla sua declinazione individuale[14] (*the interest of the individual*): esso si può definire come la somma totale dei piaceri di un individuo in quanto passibile di conoscere un incremento[15]. Considerata la declinazione individuale, è possibile concentrarsi su quella sociale: la ragione di ciò risiede nella concezione benthamiana di una società quale corpo fittizio (*fictitious body*), di cui gli individui sono considerati le membra[16]; in quest'ottica, pertanto, l'interesse sociale (*the interest of the community*) non è altro che la somma degli interessi degli individui particolari che compongono la compagine sociale.

Prima di proseguire, sembra utile soffermarsi sul rapporto tra utilità e interesse: la prima appare riconducibile all'ordine dei mezzi, mentre la seconda a quello dei

[11] *Ivi*, Chap. I, § 2.

[12] Sulla felicità come oggetto dell'utilità cfr. D. Lyons, *In the Interest of the Governed. A Study in Bentham's Philosophy of Utility and Law*, Clarendon Press, Oxford 2003, p. 27; G. J. Postema, *Utility, Publicity, and Law. Essays on Bentham's Moral and Legal Philosophy*, Clarendon Press, Oxford 2019, p. 57.

[13] Cfr. *ivi*, Chap. I, § 3. Il cambio di denominazione prospettato nella nota del 1822, si può quindi interpretare anche come volontà dare maggior risalto al fine, piuttosto che ai mezzi. Cfr. Id., *Article on Utilitarianism*, in: Id., *Deontology together with A Table of the Springs of Action and the Article on Utilitarianism*, cit., §§ 18-20. Sulle difficoltà interpretative che la duplice menzione dell'individuo e della società fa sorgere, cfr. D. Lyons, *In the Interest of the Governed. A Study in Bentham's Philosophy of Utility and Law*, cit., pp. 28-29.

[14] Così l'indicazione di Bentham stesso nel § 4.

[15] La definizione appena presentata non si trova riportata in questa forma nel dettato del filosofo londinese: infatti, essa, è stata ricavata dal seguente luogo: «*A thing is said to promote the interest, or to be* for *the interest of an individual, when it tends to add to the sum total of his pleasure: or, what comes to the same thing, to diminish the sum total of his pains*» (*Ivi*, Chap. I, § 5). Sembra

[16] Non sfugge l'ascendenza hobbesiana della "ontologia sociale" di Bentham. Cfr. Th. Hobbes, *Leviathan*, ed. by J. C. A. Gaskin, Oxford University Press, Oxford 2008, Part II, Chap. XVII.

fini. Infatti, come visto poc'anzi, l'utilità si presenta come quella proprietà per cui un oggetto è apportatore di piacere, benessere, bene e felicità (o, dal lato negativo, per cui contribuisce a diminuire i fattori di malessere e di dolore). In altre parole: è quella proprietà che fa sì che l'oggetto in questione possa essere inquadrato in una logica strumentale e teleologica. In quanto avente questa proprietà, l'oggetto considerato è a ragione detto "promotore dell'interesse di qualcuno" o "per l'interesse di qualcuno". Con ciò, appare al contempo chiara la natura di fine propria dell'interesse[17].

Tornando al passo citato in apertura di paragrafo, si è visto che il PdU è regola per l'agire, sia individuale che politico. Qualora un'azione (o – su scala sociale – un provvedimento di governo) contribuisca alla felicità della comunità, sarà detta conforme al (principio di) utilità[18]. Andando oltre la lettera del dettato benthamiano e tenendo conto delle distinzioni sopra esposte, tale azione (o provvedimento) potrà essere detta "utile"[19]. Va, inoltre, notato che, a questo punto, Bentham provvede ad unificare ciò che nei paragrafi immediatamente precedenti aveva considerato partitamente, ovverosia felicità individuale e felicità comunitaria: la prima deve essere sempre considerata nell'economia di quel "corpo fittizio" che è la seconda[20].

Un'azione *x* – sia essa un atto del singolo o un provvedimento di governo – che sia stata giudicata conforme al PdU, può essere pensata, secondo Bentham, come obbediente a una specie di legge (*law*) o di precetto (*dictate*) che valuta conforme al PdU quella classe di azioni cui *x* appartiene. Questa specie di legge viene denominata dal filosofo di Londra "legge o precetto di utilità" (*law or dictate of utility*): essa sembra avere il ruolo di mediare tra l'universalità del PdU e la particolarità delle singole azioni[21].

Da ultimo, va considerato che la conformità dell'azione al PdU si dà in due differenti gradi, il primo dei quali testimonia un legame più forte: l'azione, quindi, deve

[17] È altrettanto interessante mettere in relazione i termini cui Bentham assegna natura di fine, ovverosia "interesse", "benessere" e "felicità". Per fare ciò, è vitale il riferimento alla trattazione della *Deontologia*. Considerata la quale, si potrebbe schematizzare nella seguente maniera: (a) interesse: somma totale dei piaceri di un individuo, considerata nel suo aspetto dinamico, ovverosia passibile di conoscere un incremento; (b) benessere: somma totale dei piaceri di un individuo vista nel suo essersi realizzata (o nel potersi realizzare), al netto definitivo dei dolori; (c) felicità: situazione di piacere al massimo grado, senza la possibilità di essere intaccata dai dolori.

[18] «*An action then may be said to be conformable to the principle of utility, or for shortness sake, to utility (meaning with respect to the community at large), when the tendency it has to augment the happiness of the community is greater than any it has to diminish it. A measure of government (which is but a particular kind of action, performed by a particular person or persons) may be said to be conformable to the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it*» (*IPML*, Chap. I, §§ 6-7).

[19] Se "utilità" è la 'proprietà' di una cosa per cui quest'ultima è apportatrice di felicità.

[20] Cfr. M. Reichlin, *L'utilitarismo*, Il Mulino, Bologna 2013, pp. 32-33.

[21] Cfr. *IPML*, Chap. I, §§ 8-9. La *law or dictate of utility* sembra rivestire un ruolo analogo a quello che nella morale kantiana hanno le leggi pratiche, ovverosia le massime conformi all'imperativo (cfr. I. Kant, *Critica della ragion pratica*, trad. it. di F. Capra, Laterza, Roma-Bari 1997, P. I, L. I, cap. I)

essere compiuta (*one* [scil. *action*] *that ought to be done*); mentre nel secondo il legame si manifesta più debole: l'azione, in questo caso, non deve non essere compiuta (*not one* [scil. *action*] *that ought not to be done*). In altri termini, restando al dettato benthamiano, nel primo caso si parlerà di "azione giusta" (*right action*), nel secondo, invece, di "azione non ingiusta" (*not a wrong action*)[22]. Ci si potrebbe chiedere da che cosa dipende l'intensità del legame, ovverosia che un'azione si dica "giusta" e un'altra "non ingiusta". Rimandando il PdU stesso alla felicità (esso, infatti, discrimina le differenti azioni sulla base della loro capacità di apportare felicità alla parte in questione), è possibile rispondere che il criterio è dato dalla maggiore o minore capacità felicifica dell'azione considerata.

2. IL TENTATIVO DI DIFESA ELENCTICA

Come l'assunto antropologico che sta alla sua base, così anche il PdU si presenta con i tratti dell'inevadibilità. Nei primi due capitoli dell'*Introduzione*, Bentham intende dare fondamento a quelli che finora ha presentato come semplici assunzioni. Il filosofo di Londra, ben consapevole (a) di muoversi sul terreno della principialità e (b) di non poter, quindi, dare dimostrazione[23], presenta due argomenti volti a mostrare l'inaggirabilità del PdU: ogniqualvolta, infatti, si tentasse di emanciparsi dal PdU, ricorrendo a principi differenti, si ricorrerebbe inevitabilmente al PdU stesso[24]. Si tratta di una mossa di spirito aristotelico: il modello classico di un tale procedere è infatti l'*èlenchos*, la difesa del principio di non contraddizione che lo Stagirita esegue nel IV libro della *Metafisica*.

Primo argomento

Nonostante, secondo Bentham il PdU sia inconfutabile tramite argomenti, è possibile che, a causa di visuali distorte, parziali o confuse, qualcuno possa non apprezzarlo. Nel caso questi accetti di mettersi in discussione, il filosofo di Londra propone un itinerario di pensiero in dieci tappe che (a) dimostrerebbe l'inevitabilità di riferirsi al PdU, essendo le diverse alternative impercorribili o insufficienti e (b) la successiva possibilità, per il negatore, di riconciliarsi con se stesso. L'intricato percorso benthamiano si può riassumere come di seguito. Al negatore si prospettano queste quattro alternative:

[22] Cfr. *IPML*, Chap. I, § 9.

[23] Essa, infatti, presuppone il riferimento a dei principi. Scrive Bentham: «*It* [scil. *The principle of utility*] *is susceptible of any direct proof? It should seem not: for that which is used to prove everything else, cannot itself be proved: a chain of proofs must have their commencement somewhere*» (*ivi*, Chap. I, § 11).

[24] «*When a man attempts to combat the principle of utility, it is with reasons drawn, without his being aware of it, from that very principle itself*» (*ivi*, Chap. I, § 13).

i. Non si dà nessun principio con cui valutare le azioni e agire;

ii. Si dà un principio con cui valutare le azioni e agire: si ammette che esso non sia altro che l'espressione individuale di preferenze sentimentali individuali[25];

iii. Si dà un principio con cui valutare le azioni e agire: esso è creduto essere l'espressione a livello individuale delle preferenze sentimentali dell'uomo in quanto tale[26];

iv. Si dà un principio con cui valutare le azioni e agire: esso non coincide con l'espressione a livello individuale delle preferenze sentimentali dell'uomo come tale, ma è una regola razionale e oggettiva.

Di queste quattro alternative, Bentham prende realmente in considerazione la II e la III. Al negatore convinto di II, il filosofo di Londra fa notare che ne seguirebbe una situazione babelica, in cui ogni discorso si ridurrebbe al "a me piace questo" ed al "a me non piace questo". Se l'opzione invece fosse per III, ci sarebbe spazio per un'ulteriore domanda: si è sicuri che quelle che si considerano espressioni a livello individuale delle preferenze sentimentali dell'uomo in quanto tale, lo siano veramente? Forse che non potrebbero essere percepite da altri come oppressive o addirittura dannose? Bentham evita di esaminare la risposta affermativa a questa domanda. Nondimeno, se la domanda è intesa come domanda retorica, appare chiaro quali sarebbero le conseguenze: un tentativo di sopraffazione. Nel caso invece, si rispondesse negativamente, motivandone l'universalità con l'aver sottoposto la propria preferenza sentimentale a mediazione, allora può essere sollevata la domanda sui criteri di tale mediazione. Il filosofo di Londra ritiene che, in ultima battuta, questo non possa essere altro che il PdU; nel qual caso, il negatore, sosterrebbe il proprio principio grazie all'ausilio del principio da cui intende prendere le distanze[27].

Secondo argomento

Se il primo argomento, come si è visto, si è impegnato a mostrare le difficoltà in cui si incorre prendendo a riferimento principi diversi dal PdU – si tratti di situazioni di vera e propria *impasse*, di sopraffazione o di insufficienza normativa –, il secondo si assume un compito ancor più impegnativo: mostrare che il PdU è riaffermato persino dai principi che intendono negarlo. Si tratta di un procedimento simile a quello che la tradizione aristotelica ha sviluppato per la difesa dei primi principi, ovverosia l'*èlenchos*.

[25] Nel seguito ci si riferirà alla prospettiva fondata su questo principio con l'espressione "sentimentalismo soggettivo".

[26] Nel seguito si sceglie di indicare la prospettiva fondata su questo principio con la denominazione di "sentimentalismo oggettivo".

[27] Cfr. *IPML*, Chap. I, § 14.

Secondo il filosofo di Londra, i principi avversi al PdU possono essere ricondotti a due generi sommi, che si costituiscono attorno a due principi: (a) principio 'dell'ascetismo', nel caso in cui l'opposizione all'utilità sia costante e (b) principio 'della simpatia e dell'antipatia', qualora l'opposizione talvolta si dia e talvolta non si dia[28].

L'analisi benthamiana prende in considerazione, anzitutto, il principio dell'ascetismo, che si rivela essere null'altro che l'esatto opposto del PdU: infatti, quello approva ciò che questo riprova, elogiando le azioni che diminuiscono la felicità e condannando quelle che la accrescono[29]. Il principio dell'ascetismo, secondo Bentham, si realizzerebbe a sua volta due fondamentali declinazioni, ovverosia il moralismo filosofico (*moralism*) e il fanatismo religioso (*religionism*)[30]. Il primo sarebbe stato seguito soprattutto da persone istruite, mentre il secondo avrebbe attecchito perlopiù tra gli strati incolti e popolari. Fra i due, il fanatismo religioso sarebbe maggiormente radicale nella sua opposizione, dal momento che giungerebbe a fare della ricerca del dolore una questione di merito e finanche di dovere. D'altra parte, il moralismo filosofico, si limiterebbe a considerare la ricerca del dolore materia moralmente indifferente[31].

In verità, i seguaci del principio dell'ascetismo, in ambedue le sue declinazioni, non seguirebbero altro che una versione distorta del PdU. Secondo Bentham, ciò può essere messo in luce considerando la genesi del principio ascetico e le motivazioni sottese all'agire dei suoi seguaci. Infatti, all'origine di un siffatto principio vi sarebbe un fraintendimento circa l'applicazione del PdU: si sarebbe osservato che l'assecondare certi piaceri a lungo andare porta più dolori che piaceri; pertanto, la reazione sarebbe stata quella di contrastare tutto ciò che si fosse presentato come piacevole. Nondimeno, se nell'immediato la fuga dai piaceri era il frutto di una reazione, nel lungo termine si sarebbe commesso l'errore di scambiare ciò che era un ripiego con ciò che effettivamente merita di essere cercato[32]. Riguardo alle motivazioni, il filosofo di Londra mostra che sia i fanatici religiosi sia i moralisti filosofici inquadrerebbero il loro agire nell'orizzonte del piacere: i primi nella speranza di godere di premi e di evitare futuri castighi divini[33], i secondi rivestendo il piacere di raffinate spoglie (ciò che è degno di onore, di gloria e di fama[34]) e tutti protesi all'acquisto di fama terrena[35].

Il secondo riferimento alternativo al PdU è chiamato da Bentham 'Principio della simpatia e dell'antipatia' (*principle of sympathy and antipathy)*, alla cui sequela

[28] Cfr. *ivi*, Chap. II, § 2.
[29] Cfr. *ibidem*.
[30] Cfr. *ivi*, Chap. II, § 5.
[31] Cfr. *ivi*, Chap. II, § 6.
[32] Cfr. *ivi*, Chap. II, § 9.
[33] Cfr. *ivi*, Chap. II, § 5.
[34] Cfr. *ivi*, Chap. II, § 6.
[35] Cfr. *ivi*, Chap. II, § 5.

il filosofo di Londra riconduce posizioni etiche molto diverse tra loro: *moral sense*, *common sense*, intuizionismo (*understanding*), etiche della legge di Natura, di Ragione o dell'ordine ontologico e morale dell'elezione divina[36]. I seguaci di queste differenti declinazioni del principio della simpatia e dell'antipatia si propongono di valutare le azioni in base alla loro soggettiva disposizione ad approvarle o a respingerle; in campo legislativo, inoltre, essi prenderebbero il loro grado di disapprovazione di un atto come criterio per stabilire l'intensità della pena da comminarsi a chi ha commesso quell'atto: quanto più un atto è disapprovato, tanto più severamente sarà punito chi lo commette[37].

L'ostilità benthamiana verso questo principio non è celata, in quanto esso è ritenuto essere, piuttosto che un principio, la negazione di qualsiasi possibile principio: verrebbe meno la funzione fondamentale del principio etico, ovverosia quella di avere un metro oggettivo con cui guidare i propri sentimenti di approvazione e antipatia; dunque sotto una semplice etichetta non rimarrebbero altro che sentimenti, assurti alla dignità di regola a se stessi[38]. Nondimeno, l'avversione benthamiana a tale principio non è essa stessa frutto di un rifiuto sentimentale. I già citati rischi cui conduce quello che sopra è stato chiamato sentimentalismo (sia nella sua variante oggettiva sia in quella soggettiva), sono riproposti in queste pagine: sopraffazione nei confronti di chi si fa voce di un diverso sentire (soprattutto nel caso del sentimentalismo oggettivo)[39], discordia e sospetto (soprattutto nel caso del sentimentalismo soggettivo)[40].

Al di là della motivata ostilità nei confronti di questo principio, Bentham osserva che anch'esso si costituisce come una variante distorta del PdU: non di rado, infatti, nelle sue indicazioni traspaiono precetti di utilità, quantunque ciò avvenga in forma inconsapevole[41]; anche in questo caso, pertanto, chi tentasse di rifarsi a un paradigma diverso da quello dell'utilità ricorrerebbe – seppur a intermittenza – all'utilità stessa.

CONCLUSIONE

A conclusione di questa breve indagine possono essere raccolte tre osservazioni. Anzitutto, non sembra possibile concordare con l'interpretazione di Massimo Reichlin, secondo la quale «Bentham non offre alcuna prova del suo principio, sia perché pensa che non possa essere provato da nulla di più fondamentale, sia perché

[36] Cfr. *ivi*, Chap. II, § 14.
[37] Cfr. *ivi*, Chap. II, § 11.
[38] Cfr. *ivi*, Chap. II, § 12.
[39] Cfr. *ivi*, Chap. II, § 14, n.
[40] Cfr. *ivi*, Chap. II, § 16.
[41] Cfr. *ivi*, Chap. II, § 15.

darne prova è inutile, dato che tutti lo abbracciano»[42]. Certamente, come si è visto, non è possibile "provare" il PdU nel senso di darne formale dimostrazione; nondimeno, non è altrettanto possibile affermare che esso sia introdotto senza alcuna prova: i due tentativi di difesa elenctica del PdU ne sono testimonianza[43].

Si è evidenziato, inoltre, come il PdU sia in qualche modo espressione di una determinata antropologia, che l'apertura dell'*Introduzione* compendia nell'assunto che la «*nature has placed mankind under the governance of two sovereign masters*, pain *and* pleasure». Avendo considerato l'itinerario di difesa del PdU, si potrebbe dire che, al termine di esso, Bentham ha al contempo fornito una difesa del proprio assunto antropologico: mostrando infatti che l'uomo si orienta sempre sulla base dell'utilità – cioè sulla base di ciò che tende ad apportargli piacere –, il filosofo di Londra conferma al contempo la signoria del piacere sull'intero campo dell'agire umano.

Infine, si può notare che il piacere, in quanto dimensione strutturale e intrascendibile della prassi umana, sembra occupare, nel pensiero di Bentham, il posto che la riflessione classica (almeno da Agostino in poi) aveva assegnato al bene come tale: se questa affermava che non si può dare attività umana al di là del riferimento all'infinito orizzonte del bene, il filosofo di Londra sostiene invece che questo orizzonte cui l'uomo, agendo, non può fare a meno di riferirsi, è la finita radura del piacere. Risulta chiaro che una siffatta riconfigurazione dell'orizzonte primo e ultimo della prassi umana non può non sollevare questioni in merito all'adeguatezza di una tale riconfigurazione: lasciando ad altra sede il compito di istruire in maniera debita l'indagine, sembra tuttavia possibile concludere che, siccome l'orizzonte del piacere – a motivo della sua costitutiva finitudine – non può rivestire il ruolo che Bentham ad esso assegna, un tale orizzonte si rivela essere un succedaneo inadeguato dell'infinità del bene.

[42] M. Reichlin, *L'utilitarismo*, cit., p. 33. Di avviso simile è anche il già citato G. J. Postema, per il quale la difesa elenctica presentata a principio di *IPML* è un «*dismissive gesture*» il cui scopo è quello di «*wave away all competitor principles to his principle of utility*» (*Utility, Publicity, and Law. Essays on Bentham's Moral and Legal Philosophy*, cit., p. 63). Al contrario, Giacomo Samek Lodovici conviene sulla lettura proposta in questo saggio: «Si è visto che il principio di utilità non può essere dimostrato, bensì difeso mediante una confutazione, la quale mostra che il negatore del principio, in realtà, ricorre ad esso continuamente e gli si conforma anche quando pretende di negarlo: insomma l'adesione ad esso è universale e unanime, e, pertanto, la sua difesa mostra che il negatore del principio si contraddice» (G. Samek Lodovici, *L'utilità del bene*, cit., p. 217). Sulla stessa linea sembra porsi anche R. Harrison (*Bentham*, Routledge, London and New York 1983, pp. 183-184).

[43] Diverso è interrogarsi in merito all'effettivo successo di tale difesa. Sembra infatti che il filosofo di Londra conceda troppo all'approssimazione, sia per quanto riguarda l'identificazione delle prospettive avversarie, sia per quanto riguarda l'analisi delle stesse.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 793-816
ISSN: 1825-5167

METAMORFOSI DEL BENE. TRACCE MEDIEVALI NEL *LEVIATANO* DI HOBBES

GIAN PIETRO SOLIANI
Dipartimento di Studi umanistici (DISTUM),
Università di Urbino
gian.soliani@uniurb.it

ABSTRACT
Scholars have often underlined the influence of medieval theological voluntarism in Thomas Hobbes' thought. The article aims to identify the similarities with some theses of medieval ethical voluntarism in Thomas Hobbes' *Leviathan*. The evolution of the concept of good is considered starting with the ethical thought of John Duns Scotus and William of Ockham. The concept of good understood as individual advantage and self-preservation comes to Hobbes probably through Scotus' influence in Francisco Suárez. In addition, the approaches to moral obligation and to good and evil seem to be the Ockham's legacy to the Hobbesian moral and political thought.

KEYWORDS
Hobbes, Scotus, Ockham, voluntarism, Leviathan.

1. RILEVANZA E DETERMINAZIONE DELLA QUESTIONE

In uno dei suoi scritti su Hobbes, Yves Charles Zarka scrive che «gli elementi del sistema di Hobbes – la concezione materialista del mondo, la teoria del diritto naturale e individuale, l'idea di stato come risultato di un contratto sociale – appartengono tutti alla tradizione del volontarismo teologico che affonda le sue radici nel tardo Medioevo».[1] Con questa affermazione lo studioso francese ha inteso indicare dei generici antecedenti del pensiero di Hobbes, mediati probabilmente anche attraverso motivi emergenti nell'ambiente calvinista e luterano, oltre che nell'alveo culturale e filosofico anglosassone. A questo proposito, ci si riferisce spesso a Hobbes come a un seguace del volontarismo teologico e del nominalismo.[2]

[1] Cfr. YVES CHARLES ZARKA, *First philosophy and the foundation of knowledge*, in Tom Sorrell, *The Cambridge Companion to Thomas Hobbes*, Cambridge University Press, Cambridge 1996, p. 80.

[2] Per volontarismo teologico si intende la corrente medievale che ha posto una certa enfasi sull'insindacabile volontà e onnipotenza divine. Sul volontarismo teologico di Hobbes, si veda e.g. *ivi*, pp.

Quanto all'influenza della Scolastica, in senso lato, sul pensiero di Hobbes, in tempi ben più recenti rispetto all'articolo di Zarka, Raffaella Santi si è soffermata sul possibile influsso del gesuita Francisco Suárez (1548-1617) riguardo ai temi della *translatio potestatis* e della teoria dell'autorizzazione nel *Leviatano*. La studiosa ha rilevato che i concetti hobbesiani di conservazione della vita e di benessere, così come quelli di contratto e di trasferimento della forza e del potere verso colui che diviene sovrano, tradirebbero una qualche analogia con il pensiero politico suareziano. In particolare, uno degli indizi di questa tesi ruoterebbe intorno al concetto di *commoditas*.[3]

Come scrive Hobbes nella versione latina del *Leviatano*, gli uomini amano per natura la libertà e il potere, ma quando decidono di uscire da quella situazione di guerra permanente che è lo stato di natura, devono accettare delle restrizioni alla loro libertà, affinché sia possibile la realizzazione del loro desiderio originario che consiste nella conservazione della vita e nel raggiungimento di un'esistenza più vantaggiosa (*conservatio suae vitaeque commodioris*).[4] Tommaso d'Aquino e molti dei suoi commentatori moderni preferivano parlare di *bonum*, inteso, da un lato, come fine della società civile – nella forma del bene comune – e, dall'altro lato, come fine del desiderio umano, nella forma del bene inteso come proprietà trascendentale dell'essere (*ens*) che si realizza concretamente nel Sommo bene. In questo senso, originariamente medievale, utilizzeremo nel prosieguo l'espressione "bene trascendentale", intendendo il referente formale e infinito del desiderio umano.

La stessa Santi osserva che la sostituzione del *bonum* con la *commoditas* avviene nel *De legibus ac Deo legislatore* di Suárez, dove il fine del potere civile è indicato nella felicità naturale della comunità umana, per mezzo della cura dei suoi

79; MARTINE PÉCHARMAN, *La puissance absolue de Dieu selon Hobbes*, in G. Canziani – M.A. Granada – Y.C. Zarka (eds.), *Potentia Dei. L'onnipotenza divina nel pensiero dei secoli XVI e XVII*, Franco Angeli, Milano 2000, pp. 269-293; LUC FOISNEAU, *Le Dieu tout-puissant de Hobbes est-il un tyran?*, in G. Canziani – M.A. Granada – Y.C. Zarka (eds.), *Potentia Dei*, cit., pp. 295-315. Essendo il dibattito sul nominalismo di Hobbes piuttosto ampio ci limitiamo al confronto tra Ockham e Hobbes: KATARZYNA DOLIWA, *William of Ockham and Thomas Hobbes on the Nature of General Concepts*, «Studies in Logic, Grammar and Rhetoric» VIII (2005), pp. 101-110. Noi ci occuperemo soprattutto del volontarismo etico, ossia sulla linea di pensiero connessa al volontarismo teologico che ha sottolineato la libertà e autonomia della volontà rispetto all'intelletto umano.

[3] Cfr. RAFFAELLA SANTI, *Hobbes vs Suárez*, in CINTIA FARACO – SIMONA LANGELLA (a cura di), *Francisco Suárez (1548-1617). Atti del convegno in occasione del IV centenario della morte*, Quaderni di Heliopolis, I, Artetetra edizioni, Capua 2019, pp. 276-277. Sul fine del governo civile in Suárez si veda anche LUIS-CARLOS AMEZÚA AMEZÚA, *Francisco Suárez y la posibilidad de intervención pública en asuntos sociales*, in Robert Aleksander Maryks - Juan Antonio Senent de Frutos (eds.), *Francisco Suárez (1548–1617): Jesuits and the Complexities of Modernity*, in particolare, pp. 206-209.

[4] THOMAS HOBBES, *Leviathan latinus*, XVII, 1, in *Opera philosophica*, vol. III, ed. W. Molesworth, Apud Joannem Bohn, Londini 1841, p. 127. Si farà riferimento alle due edizioni – inglese e latina – dell'opera. Quando necessario, segnaleremo eventuali discrepanze tra i due testi. Per la traduzione italiana della versione inglese faremo riferimento a THOMAS HOBBES, *Leviatano*; trad. it. C. Galli, BUR, Milano 2020[7].

componenti, di modo che sia preservata la pace e la giustizia, così che i cittadini vivano con una quantità di beni sufficienti a garantire la conservazione della vita corporea e un'esistenza vantaggiosa (*ad vitae corporalis conservationem et commoditatem*).[5] In questo modo Suárez risulterebbe essere una probabile fonte di Hobbes, sebbene non dichiarata.[6] Occorre anche notare, al di là di questi rilievi assai pertinenti, che la conservazione del proprio essere e l'inclinazione umana verso il proprio vantaggio erano stati ottenuti da Suárez mediante un procedimento di deduzione a priori dall'essenza di uomo, senza l'ausilio dell'esperienza, e proprio nel *De legibus*, tenendo come riferimento Tommaso d'Aquino.[7]

Per tentare di comprendere meglio la decisione di ridurre il *bonum*, inteso come fine del governo civile, alla *commoditas*, può essere utile rilevare che, secondo Suárez, l'oggetto della volontà umana è meno esteso rispetto all'oggetto dell'intelletto. Infatti, quest'ultimo è l'*ens* considerato in tutta la sua ampiezza a ricomprendere tutto l'ambito di ciò che esiste, in forza della propria semplice incontraddittorietà, e che eventualmente potrebbe esistere attualmente. Invece, l'oggetto della volontà è ristretto all'ambito di ciò che è attualmente esistente o che, per lo meno, esisterà attualmente. Quindi: l'oggetto dell'intelletto è propriamente trascendentale e, dunque, intrascendibile, mentre l'oggetto della volontà è certamente transcategoriale, ma non intrascendibile.[8] Questa tesi è, in primo luogo, divergente rispetto al pensiero di Tommaso d'Aquino e, una volta trasposta in ambito politico, conduce a pensare il desiderio dell'uomo in quanto cittadino secondo un orizzonte ridotto e non più trascendentale. Da qui, l'impossibilità di concepire la comunità civile come composta da individui umani accomunati dalla medesima destinalità. La ricerca del proprio vantaggio diventa, quindi, in qualche modo inevitabile, sebbene all'interno di una cornice teologica nella quale il fine ultimo della vita umana rimane ancora il Sommo bene.

In questo articolo ci concentreremo su alcuni snodi cruciali del passaggio, avvenuto nella corrente volontarista medievale, da una concezione del desiderio umano come apertura naturale verso il bene trascendentale al desiderio come inclinazione naturale verso la conservazione della propria vita e verso una vita vantaggiosa dalla quale non è escluso un qualche piacere soggettivo. L'esaurimento e il consolidamento di questo percorso nella filosofia moderna possono essere apprezzati in

[5] FRANCISCO SUÁREZ S.J., *Tractatus de legibus ac Deo legislatore in decem libros distributus*, III, 11, 7, in *Opera omnia*, vol. V, ed. C. Berton, Vivés, Parisiis 1856, p. 213b. La prima edizione dell'opera è quella pubblicata a Coimbra nel 1612.

[6] È nota l'avversione di Hobbes per la Scolastica e, in particolare, per Suárez.

[7] FRANCISCO SUÁREZ S.J., *Tractatus de legibus ac Deo legislatore in decem libros distributus*, II, 8, 4, p. 117a. Occorre precisare che l'applicazione di questo metodo deduttivo a priori alle inclinazioni naturali è estraneo al pensiero di Tommaso.

[8] FRANCISCO SUÁREZ, *De anima*, IV, 9, 2, in *Opera omnia*, vol. III, ed. C. Breton, Vivés, Parisiis 1861, p. 774a. Su questo punto si veda, DAMIANO SIMONCELLI, *Note sulla coscienza invincibilmente erronea in Francisco Suárez*, in CINTIA FARACO – SIMONA LANGELLA (a cura di), *Francisco Suárez (1548-1617). Atti del convegno in occasione del IV centenario della morte*, cit., p. 211.

alcuni celebri testi di Hobbes e, in particolare, nel *Leviatano*, come si è già iniziato a vedere. In fondo, si tratta di una divaricazione tra la dimensione oggettiva e soggettiva del bene. Infatti, mentre il bene trascendentale, in virtù della sua assoluta terzietà, è disponibile a tutti e costituisce quell'infinito che fa da referente intenzionale, per lo meno ideale, di ogni desiderio razionale,[9] nel Tardo medioevo comincia ad annunciarsi quella che potremmo definire come una riduzione dell'orizzonte del desiderio al proprio bene soggettivo e individuale a cui corrisponde specularmente un'accentuazione della libertà del volere. Ciò a cui ciascuno naturalmente aspira risulta soggettivamente connotato come *proprio* vantaggio, come conservazione della *propria* vita e come esercizio della *propria* libertà, senza che tutto questo sia inscritto nel più ampio orizzonte di un bene ideale che è a tutti comune e che non può essere oltrepassato. Naturalmente, stiamo parlando di una tendenza che ammette senz'altro eccezioni, ma che pure attraversa la Modernità e giunge fino al contemporaneo.

Quella secondo cui l'approdo ultimo del desiderio consiste nell'unione con il Sommo bene e nella visione beatifica appare certamente come una dottrina consolidata, all'interno della tradizione scolastica del XIII e del XIV secolo, ma questa affermazione andrebbe meglio precisata, perché non è sorprendente incontrare pensatori che vedono, nella libertà, il potere di rifiutare Dio o di peccare *in patria*. In questo modo, tali pensatori intendono esaltare la libertà del volere come sommo bene, a scapito della felicità intesa come visione beatifica.[10]

Da questo punto di vista, Hobbes esprime una posizione radicale, quando scrive che:

> Un continuo successo nell'ottenere quelle cose che volta a volta si desiderano, vale a dire, una continua prosperità, è ciò che gli uomini chiamano felicità, voglio dire la felicità di questa vita. Infatti, finché viviamo qui, non c'è una cosa come la perpetua tranquillità della mente, poiché la vita in sé non è che movimento, e non può essere mai senza desiderio, né senza timore, non più di quanto possa essere senza senso. Quale genere di felicità Dio abbia ordinato per chi lo onora devotamente non lo si conoscerà prima di gioirne, dato che quelle gioie ora sono tanto incomprensibili quanto è inintelligibile l'espressione scolastica *visione beatifica*.[11]

In questo testo giocano anche motivi che eccedono il dibattito scolastico, ma non si può certamente affermare che siano del tutto estranei ad esso. In ogni caso, è

[9] L'infinità formale del desiderio è riscontrabile a partire dall'esperienza, considerando che non vi è alcunché di finito che possa saturarne l'ampiezza acquietandolo.

[10] Ci permettiamo di rimandare a GIAN PIETRO SOLIANI, *Libertà inquieta. Ricerche su male e volontà tra XIV e XVI secolo*, Orthotes, Napoli 2020.

[11] THOMAS HOBBES, *Leviatano*, VI, cit., p. 64. Il passaggio non è presente nella versione latina. Cfr. ID., *Leviathan latinus*, cit., p. 50. Si veda anche THOMAS HOBBES, *Leviatano*, XI, cit., p. 100; ID., *Leviathan latinus*, XI, cit., p. 77, dove Hobbes sostiene che la felicità in questa vita non è il fine ultimo e nemmeno il Sommo bene degli antichi filosofi morali, ma soltanto il movimento progressivo del desiderio da un oggetto all'altro senza tregua.

noto che al momento di affrontare il tema della condizione naturale dell'uomo quanto alla sua felicità e alla sua miseria, Hobbes nota che gli uomini sono uguali per quanto riguarda il possesso di una mente e di un corpo, sebbene possano distinguersi per le loro capacità cognitive. Tuttavia, nessun uomo è in grado di conoscere fino a che punto i suoi simili siano dotati di saggezza e di intelligenza. Per questo, tutti gli uomini possono essere considerati uguali tra loro in quanto sono generalmente convinti di essere superati in saggezza soltanto da pochi e, dunque, condividono con gli altri il fatto di accontentarsi della loro condizione.[12] Da questa uguaglianza di abilità, ma sarebbe meglio dire da questa persuasione di uguaglianza, nasce nell'uomo la speranza di conseguire i propri fini. Tra questi, Hobbes segnala che il fine principale della natura umana è la propria autoconservazione o il semplice diletto. Il fatto, poi, che due uomini desiderino lo stesso fine, ma non possano goderlo insieme, è ciò che dà luogo a quello stato di *bellum omnium contra omnes* per il quale Hobbes è divenuto così celebre e che viene posto a fondamento della teoria sociale e politica dell'autore inglese.[13]

Infatti, lo stesso desiderio di autoconservazione e di diletto è anche ciò che, secondo Hobbes, mette fine alla guerra e conduce gli uomini a riconoscere la necessità del patto sociale, con la conseguente uscita dallo stato di natura. Hobbes sembra ridurre l'emergenza di un tale desiderio originario a una serie di passioni quali il timore della morte, la tendenza ad acquisire ciò che è necessario a vivere bene (*ad bene vivendum*) e anche la speranza di ottenerlo mediante la propria attività nel mondo. A queste passioni, il filosofo inglese dà il nome di «leggi di natura» (*leges naturales*).[14] Nelle pagine che seguono, ci soffermeremo su alcuni tratti del pensiero etico e antropologico di Duns Scoto e di Guglielmo di Ockham, cercando di mostrarne l'affioramento e, in alcuni casi, la radicalizzazione che, come stiamo per vedere, essi hanno subito nel pensiero di Hobbes.

2. IL *DE CASU DIABOLI* NELL'INTERPRETAZIONE DI DUNS SCOTO

In un celebre passo del dialogo di Anselmo d'Aosta, intitolato *De casu diaboli*, il maestro medievale affronta la questione del peccato di Lucifero e ne indica la ragione affermando che gli angeli ribelli rifiutarono Dio perché bramarono un vantaggio (*commodum*) in modo ingiusto, rifiutando, invece, la giustizia e, quindi, meritando la rovina. Anselmo apre alla possibilità che la libertà creata possa rifiutare Dio e la sua giustizia per rivolgersi altrove, al fine di aumentare la propria grandezza, ma compiendo così il male.[15] La volontà angelica, ma questo vale per ogni volontà

[12] THOMAS HOBBES, *Leviatano*, XIII, cit., pp. 127-128.

[13] THOMAS HOBBES, *Leviatano*, XIII, cit., p. 128; ID., *Leviatanus latinus*, XIII, cit., p. 98.

[14] THOMAS HOBBES, *Leviatano*, XIII, cit., p. 133; ID., *Leviatanus latinus*, XIII, cit., p. 102.

[15] ANSELMUS CANTUARIENSIS, *De casu diaboli*, VI, in *Opera omnia*, vol. I, ed. F.S. Schmitt, Apud Thomam Nelson et filios. Edimburgi 1946, pp. 243-244.

creata, si muoverebbe tra due polarità: il proprio vantaggio (*commodum*), da un lato, e la giustizia (*iustitia*), dall'altro lato. Secondo Anselmo, la libertà degli angeli è «creata nella giustizia», ma se ne può liberamente allontanare condannando sé stessa all'infelicità. Vi è, quindi, una rettitudine originaria (*originaria rectitudo*) che Dio attribuisce alla natura razionale, ma che può essere perduta col peccato,[16] quando la creatura, preferisce il proprio vantaggio alla giustizia.

Il testo di Anselmo appena ricostruito è di fondamentale importanza per i dibattiti scolastici successivi intorno al tema del peccato e della libertà. In particolare, Giovanni Duns Scoto (1265-1308) ne fornirà un'interpretazione originale che rappresenta una svolta in campo antropologico e morale. Egli sosterrà che la volontà possiede un duplice appetito: naturale e libero, passivo e attivo, che egli chiama rispettivamente *affectio commodi* (affezione per il vantaggioso) e *affectio iustitiae* (affezione per la giustizia). Il primo tipo di affezione è naturale ed è la tendenza che la volontà possiede verso il proprio perfezionamento. Si tratta della radice dell'amore di concupiscenza (*amor concupiscentiae*) ed esisterebbe anche se la volontà non fosse libera. L'affezione per la giustizia, invece, è la radice dell'amore di amicizia (*amor amicitiae*) e del carattere libero del volere. Duns Scoto ne parla come dell'affezione più nobile, poiché è regolatrice di sé (*regulatrix eius*) e moderatrice (*moderatrix*).[17] La differenza tra i due amori è assai marcata. «L'atto di amicizia – scrive Duns Scoto – tende nell'oggetto in quanto è buono in sé, l'atto di concupiscenza tende in quello in quanto è buono per me (*mihi est bonum*)».[18] L'amore di amicizia è, quindi, libero e tende al bene oggettivo. Si tratta di una uscita della volontà da se stessa verso ciò che è di per sé bene. L'amore di concupiscenza, invece, non è libero e tende verso un bene soltanto soggettivo.[19]

[16] *Ibidem*. Anche *ivi*, IX, pp. 246-247.

[17] Fondamentale è il seguente testo. IOANNES DUNS SCOTUS, *Ordinatio*, IV, d. 49, q. 10, *Opera omnia*, vol. XIV, edd. B. Hechich *et al.*, Typis Vaticanis, Civitas Vaticana 2013, nn. 282-284, pp. 360-361: «[...] sicut vult Anselmus, *De casu diaboli* cap. 6, ubi vult quod aliquid appetebant quod habuissent si stetissent; nihil autem prius vel magis appetebant quam beatitudinem, quia ad illam primo et summe inclinai affectio commodi. Actus autem amicitiae respectu Dei ex ratione sui et obiecti est bonus, saltem quod non potest esse immoderatus excedendo, sed forte deficiendo. Tum quia actus concupiscentiae non est nec potest esse primus actus voluntatis respectu finis, quia omne 'concupiscere' est in virtute alicuius actus amicitiae: ideo enim concupisco huic bonum, quia amo hunc cui concupisco. Tum quia actus amicitiae inest voluntati secundum quod habet affectionem iustitiae, quia si solam affectionem commodi haberet, non posset nisi summe commoda velie, secundum Anselmum 14 *De casu diaboli*. Actus autem concupiscentiae inest voluntati secundum quod habet affectionem commodi, quia necessario inest secundum illam, etiamsi sola illa esset; nobilior autem secundum rationem est affectio iustitiae affectione commodi, quia regulatrix eius et moderatrix secundum Anselmum, et propria voluntati, in quantum libera est, cum affectio commodi esset eius etiamsi voluntas libera non esset».

[18] IOANNES DUNS SCOTUS O.F.M., *Ordinatio*, IV, d. 49, q. 10, cit., n. 285, p. 361: «[...] actus amicitiae tendit in obiectum ut est in se bonum, actus autem concupiscentiae tendit in illud ut mihi est bonum».

[19] Bonnie Kent ha messo in luce una torsione dal teologico all'ontologico, nell'ermeneutica scotiana del testo di Anselmo. L'affezione della giustizia che Anselmo riteneva essere dono gratuito di

Le due inclinazioni, naturale e libera, non costituiscono due volontà diverse, tanto che la volontà naturale non è volontà in senso proprio, ma soltanto una relazione che consegue dal fatto che la volontà è per sua natura rivolta alla propria perfezione. Al contrario, la volontà in senso proprio è tale solo se libera.[20] «La volontà vuole il bene naturalmente, [ma] quel volere non è un atto elicito. Quindi nessun moto vi è nel bene, ma soltanto una inclinazione naturale, la quale è l'atto primo o per lo meno non elicito, sebbene provenga dalla volontà, in quanto è soltanto un appetito».[21] Il testo, forse più chiaro in questo senso è il seguente:

> Quando si dice che la volontà libera e [la volontà] naturale sono due volontà, dico che la volontà naturale – in quanto tale e in quanto naturale – non è volontà in quanto potenza, ma implica soltanto una inclinazione della potenza a ricevere la propria perfezione, non ad agire in quanto tale; e quindi è imperfetta a meno che non sia sotto quella perfezione alla quale quella tendenza inclina quella potenza. Quindi, la potenza naturale non tende, ma è quella tendenza per la quale la volontà assoluta tende – e questo in modo passivo – a ricevere. Ma vi è un'altra tendenza, nella stessa potenza, affinché tenda liberamente e attivamente determinandosi all'atto, così che [vi è] una duplice tendenza (attiva e passiva). Allora all'argomento dico che la volontà naturale non è potenza o volontà, ma un'inclinazione della volontà e una tendenza per la quale tende nel ricevere la perfezione in modo passivo.[22]

Dio, revocabile a causa del peccato, in Scoto entra a far parte della struttura stessa della volontà, indipendentemente dalla grazia, confondendosi con la libertà del volere. B. KENT, *Virtues of the Will. The Transformation of Ethics in the Late Thirteenth Century*, cit., p. 196.

[20] IOANNES DUNS SCOTUS O.F.M., *Ordinatio*, III, d. 17, q. un., *Opera omnia*, vol. IX, ed. B. Hechich *et al.*, Typis Vaticanis, Civitas Vaticana 2006, n. 13, pp. 566-568: «Dico quod 'appetitus naturalis', in qualibet re, generali nomine accipitur pro inclinatione naturali rei ad suam propriam perfectionem - sicut lapis inclinatur naturaliter ad centrum; et si in lapide sit inclinatio illa aliud absolutum a gravitate, tunc consequenter credo quod similiter inclinatio naturalis hominis 'secundum quod homo' ad propriam perfectionem, est aliud a voluntate libera. [...] Tunc dico, quod sic est de voluntate, quia voluntas naturalis non est voluntas, nec velle naturale est velle: sed ly 'naturalis' distrahit ab utroque et nihil est nisi relatio consequens potentiam respectu propriae perfectionis unde eadem potentia dicitur 'naturalis voluntas' cum respectu tali necessario consequente ipsam ad perfectionem, et dicitur 'libera' secundum rationem propriam et intrinsecam, quae est voluntas specifice». Per una trattazione esauriente di queste questioni, cfr. C. GONZÁLEZ-AYESTA, *Duns Scotus on the Natural Will*, «Vivarium» L (2012) pp. 33-52.

[21] IOANNES DUNS SCOTUS O.F.M., *Reportatata Parisiensiensia*, II, d. 39, q. 2, cit., n. 8, p. 206b: «Dico, quod voluntatem velle bonum naturaliter, non est illud velle aliquis actus elicitus. Unde nullus motus est in bonum, sed tantum inclinatio naturalis, quae est actus primus vel saltem non elicitus, cum sit a voluntate, inquantum appetitus tantum».

[22] IOANNES DUNS SCOTUS O.F.M., *Ordinatio*, III, d. 17, q. un., cit., vol. IX, n. 18, pp. 570-571: «Ad secundum, cum dicitur quod voluntas libera et naturalis sunt duae voluntates, dico quod voluntas naturalis - ut sic et ut naturalis - non est voluntas ut potentia, sed tantum importat inclinationem potentiae ad recipiendum perfectionem suam, non ad agendum ut sic; et ideo est imperfecta nisi sit sub illa perfectione ad quam illa tendentia inclinat illam potentiam; unde naturalis potentia non tendit, sed est tendentia illa qua voluntas absoluta tendit – et hoc passive – ad recipiendum. Sed est alia tendentia, in potentia eadem, ut libere et active tendat eliciendo actum, ita quod una potentia et

Il testo sembra distinguere due modi di intendere la volontà, ma di cui solo uno è adeguato ed è quello per cui la volontà è attiva, cioè libera di determinarsi o non determinarsi all'atto. L'altro modo, improprio, è quello della volontà passiva, in grado soltanto di ricevere il proprio oggetto. In questo caso non si tratta di una vera potenza, ma di una tendenza la cui inclinazione è sempre verso il bene inteso come vantaggio individuale.[23]

Da questo punto di vista, Duns Scoto prende le distanze dalla *voluntas ut natura* per come era stata intesa da Tommaso d'Aquino. Quest'ultima consisteva nell'apertura ontologica della volontà verso il bene trascendentale, sulla quale si fondava la possibilità per la libertà di orientarsi verso i diversi beni finiti, nella forma della *voluntas ut deliberata*.[24] Al contrario, per Duns Scoto, la volontà naturale è soltanto un'inclinazione passiva, deterministicamente orientata e dominata dalla concupiscenza verso un bene individuale che non coincide di per sé con la giustizia. Duns Scoto comincia ad assolutizzare l'agire libero della volontà, sganciandolo in qualche modo dall'orizzonte intrascendibile del bene in quanto tale. Quest'ultimo sembra essere ridotto a concetto universale che l'intelletto può anche non tenere in considerazione, nel momento in cui subisca l'influenza della volontà. Lo si comprende piuttosto esplicitamente nel confronto che egli istituisce con Tommaso ed Enrico di Gand nella questione 16 delle sue *Quaestiones quodlibetales*. Qui, Scoto intende respingere le ragioni dei due maestri e, in particolare, la tesi di Tommaso, presente in *Summa theologiae*, I[a]-II[ae], q. 10, a. 2, secondo la quale la volontà non può rifiutare quell'oggetto che è il bene senza difetti, ossia il fine ultimo; quindi necessariamente tende in quell'oggetto.[25]

duplex tendentia (activa et passiva). Tunc ad formam dico quod voluntas naturalis [...] non est potentia vel voluntas, sed inclinatio voluntatis et tendentia qua tendit in perfectionem passive recipiendam».

[23] *Ivi*, n. 15, p. 568: «[...] tertio modo accipitur 'voluntas naturalis' ut elicit actum conformem inclinationi naturali, quae semper est ad commodum».

[24] THOMAS DE AQUINO O.P., *Scriptum super libros Sententiarum*, II, d. 39, q. 2, a. 2, ad 2um, in *Opera omnia*, ed. R.P. Mandonnet, P. Lethielleux, Parisiis 1929, II, p. 994: «Voluntas ut deliberata, et ut natura, non differunt secundum essentiam potentiae: quia naturale et deliberatorium non sunt differentiae voluntatis secundum se, sed secundum quod sequitur judicium rationis: quia in ratione est aliquid naturaliter cognitum quasi principium indemonstrabile in operabilibus, quod se habet per modum finis, 'quia in operabilibus finis habet locum principii', ut in 6 ethic. dicitur. Unde illud quod finis est hominis, est naturaliter in ratione cognitum esse bonum et appetendum, et voluntas consequens istam cognitionem dicitur voluntas ut natura. Aliquid vero est cognitum in ratione per inquisitionem ita in operativis sicut in speculativis; et utrobique [...] contingit inquirentem rationem errare; unde voluntas quae talem cognitionem rationis sequitur, deliberata dicitur, et in bonum et malum tendere potest, sed non ab eodem inclinante». Su questo tema si veda P. PAGANI, *Libertas differentiae*, in ID., *Studi di filosofia morale*, Aracne, Roma 2008, pp. 80-81.

[25] IOANNES DUNS SCOTUS O.F.M., *Quodlibetum*, q. 16, edizione critica a cura di T. Noone e H. Francie Roberts, in C. SCHABEL (ed.), *Theological Quodlibeta in the Middle Ages. The Fourteenth Century*, Brill, Leiden 2007, n. 9, p. 164: «Prima est ista: voluntas non potest resilire a proprio obiecto quod est bonum vel ab illo in quo est tota perfectio sui obiecti; ergo necessario tendit in illud obiectum in quo nec est aliqua malitia nec aliquis defectus boni; huiusmodi est finis ultimus».

Per Scoto è indifferente che si parli del fine ultimo in universale o del fine ultimo in concreto, cioè di Dio. Egli parte dal principio per il quale, se vi sono due nature assolute ed essenzialmente ordinate, la prima nell'ordine sembra poter stare senza la seconda e senza che ciò comporti contraddizione. Nel caso della volontà siamo di fronte a tre elementi che concorrono all'atto volontario: l'oggetto amabile, l'apprensione (o visione) dell'oggetto nell'intelletto creato e la volontà creata. Ciascuno di questi elementi precede l'atto di amore verso l'oggetto, quindi i primi tre elementi possono stare senza quest'ultimo non dando luogo a contraddizione. Dunque: il legame tra l'atto di volontà e quell'oggetto amabile che è il bene senza difetti non è necessario, perché può essere negato senza contraddizione.[26]

A sostegno della inessenzialità del legame tra la volontà e il fine ultimo, Scoto aggiunge che la potenza che agisce in modo necessario riguardo all'oggetto, deve continuare necessariamente quell'atto, finché le è possibile. Invece, la volontà dell'uomo *in via* non continua l'atto rivolto verso il fine ultimo appreso in universale, né necessariamente né per quanto le è possibile.[27]

Si comprende che il riferirsi della volontà verso il fine ultimo in universale, ossia verso il bene trascendentale, è inteso in senso psicologico e non ontologico. La volontà è una potenza capace di considerare il fine ultimo, ma anche di rivolgersi altrove, secondo una dottrina che è altra rispetto al piano sul quale Tommaso aveva sviluppato il proprio discorso.[28] La volontà dell'uomo *in via*, spiega Duns Scoto, potrebbe dar seguito all'atto dell'intelletto per mezzo del quale essa considera il fine ultimo, ma non vi è sempre una tale prosecuzione. Di frequente, infatti, la volontà indirizza l'intelligenza verso la considerazione di un altro atto oppure, per lo meno, non impedisce a un altro oggetto di ostacolare la considerazione del fine ultimo. Questa considerazione da parte dell'intelletto è condizione necessaria affinché la volontà possa a sua volta considerarlo; ma, cessando la prima considerazione, termina anche la seconda.[29]

[26] *Ivi*, n. 13, pp. 166-167: «Quia quando sunt duae naturae absolutae et essentialiter ordinatae, prior sine contradictione videtur posse esse sine posteriori. Nunc autem, istorum trium quae sunt: obiectum diligibile, et ipsa apprehensio vel visio illius obiecti in intellectu creato, et etiam ipsa voluntas creata, quodcumque est absolutum et prius naturaliter actu diligendi illud obiectum, et hoc loquendo de dilectione in voluntate creata. Ergo quod quodcumque istorum possit esse—immo quod omnia possint esse—sine illo actu dilectionis, non includit contradictionem; nec per consequens oppositum est simpliciter necessarium. Quomodo illud dicitur necessarium cuius oppositum non includit contradictionem?».

[27] *Ivi*, n. 16, p. 168: «Praeterea, potentia quae necessario agit circa obiectum, necessario continuat actum illum, quantum potest; voluntas, saltem viatoris, non necessario continuat actum circa finem in universali apprehensum, quantum posset continuare; ergo non necessario agit circa illum».

[28] Si veda BERNARDINO BONANSEA, *L'uomo e Dio nel pensiero di Duns Scoto*, trad. it. a cura di Merina Ferrero, Jaca Book, Milano 1991, pp. 68-71.

[29] IOANNES DUNS SCOTUS O.F.M., *Quodlibetum*, q. 16, cit., n. 18, p. 168: «Quia voluntas viatoris posset quandoque continuare actum intellectus quo considerat finem, quem non continuat, sed vel convertit intelligentiam ad considerationem alterius actus, vel saltem non impedit quin obiectum aliud

Come è noto, Scoto ha inteso mostrare che, sebbene la volontà possa fruire ordinatamente e, quindi, secondo giustizia, soltanto del Sommo bene; tuttavia è possibile anche che essa fruisca disordinatamente di qualcosa d'altro, in ragione del fatto che essa è libera e autonoma rispetto all'intelletto. Può, quindi, desiderare il vero bene o un bene soltanto apparente, ma anche ciò che essa stessa ha inteso costituire come bene per sé, in virtù della propria piena libertà.[30]

Con Scoto si delinea un'iniziale divaricazione tra una dimensione della volontà che è *naturale*, soggettiva e legata alla concupiscenza, di contro alla dimensione volontaria propriamente detta, perché libera e autonoma, in quanto razionale in senso stretto.[31] Da un lato, vi è una tendenza naturale e non libera verso ciò che è vantaggioso (*commodum*), mentre dall'altro lato vi è la volontà libera, capace, se vuole, di giustizia. Il concetto di *commoditas* che Suárez sembra aver veicolato nei confronti di Hobbes, è probabilmente originato dall'influenza costante di Duns Scoto sul gesuita granadino, sullo sfondo di un più generale mutamento nel modo di concepire la volontà avvenuto nel passaggio tra XIII e XIV secolo.

3. BENE SOGGETTIVO E BENE MORALE IN GUGLIELMO DI OCKHAM

Ockham radicalizza in parte le posizioni di Scoto, mentre ne introduce di nuove. Il ruolo fondamentale nella morale ockhamiana è giocato dal concetto di *libertas indifferentiae*, elevato ad analogato principale della libertà. A questo si deve aggiungere un'idea di moralità che viene fatta dipendere in gran parte dall'obbligazione della volontà creata nei confronti dell'ordine morale contingente voluto da Dio.[32]

occurrens impediat illam considerationem; illa autem consideratione non continuata, non continuatur actus voluntatis circa illud obiectum, et continuata illa, continuaretur ista».

[30] IOANNES DUNS SCOTUS O.F.M., *Ordinatio*, I, d. 1., p. 1, q. 1, in *Opera omnia*, vol. II, edd. C. Balić *et al.*, Typis Vaticanis, Civitas Vaticana 1950, n. 15, p. 9: «Ideo teneo quantum ad istum articulum hanc conclusionem, quod videlicet fruitio ordinata habet tantum ultimum finem pro obiecto, quia sicut tantum est assentiendum per intellectum primo vero propter se ita tantum est assentiendum per voluntatem primo bono propter se».

[30] *Ivi*, n. 16, p. 9: dico quod obiectum fruitionis in communi, ut abstrahit ab ordinato et inordinato fine, est finis ultimus: vel verus finis, qui scilicet est finis ultimus ex natura rei, vel finis apparens, finis ultimus qui scilicet ostenditur a ratione errante tamquam finis ultimus, vel finis praestitutus, quem scilicet voluntas ex libertate sua vult tamquam finem ultimum». Su questo si veda G. ALLINEY, *"Velle malum sub ratione mali": Duns Scoto e la banalità del male*, in "Etica & Politica", IV (2002), fasc. 2 (http://www2.units.it/etica/2002_2/indexalliney.html). Ci permettiamo anche di rinviare G.P. SOLIANI, *Libertà inquieta*, cap. II, cit..

[31] Sulla volontà come unica potenza veramente razionale, si veda IOANNES DUNS SCOTUS O.F.M., *Quaestiones super libros Metaphysicorum Aristotelis*, lib. IX, q. 15, in *Opera philosophica*, The Franciscan Institute - St. Bonaventure University, St. Bonaventure - N.Y. 1997, nn. 21-44, pp. 680-688.

[32] Riguardo alla filosofia morale di Ockham segnaliamo i seguenti testi: L. FREPPERT, *The Basis of Morality according to William Ockham*, Franciscan Herald Press, Chicago 1988; A. MAURER,

La libertà di indifferenza è definita da Ockham come «il potere per il quale posso porre oggetti diversi indifferentemente e in modo contingente, così che posso causare e non causare lo stesso effetto, non esistendo alcuna opposizione [all'atto della facoltà] altrove, fuori da quella facoltà».[33] La libertà è, quindi, originariamente pura «indifferenza e contingenza» verso qualunque effetto. Qualunque oggetto può essere scelto dalla volontà senza che nulla di estrinseco possa opporvisi o inclinare l'atto di quest'ultima.[34]

Secondo alcune affermazioni di Ockham, l'orizzonte della volontà umana e, quindi, l'ambito di azione della libertà può estendersi indifferentemente al bene e al male, anche considerato in quanto tale e non semplicemente sotto l'aspetto del bene (*sub ratione boni*). Nelle *Quaestiones variae* contenute nell'edizione critica dell'*Opera theologica* di Ockham, il francescano inglese si chiede se la volontà possa compiere un atto virtuoso rispetto a un oggetto che l'intelletto ha giudicato in modo erroneo.[35] Al termine della propria risposta, Ockham inserisce alcuni *dubia*. Uno di questi sostiene che la volontà sia frenata nel volere ciò che la ragione invincibilmente erronea detta, poiché il contenuto di quel comando razionale, ma erroneo, è un male e la volontà non può volere ciò che è male in quanto male. Ciò che, invece, può essere voluto (*volibile*) oppure è attualmente voluto (*volitum*) è soltanto il bene effettivamente esistente o per lo meno apparente.[36] Il *dubium* presuppone

The Philosophy of William of Ockham in the Light of its Principles, PIMS, Torono 1999, pp. 510-539. Altri riferimenti bibliografici verranno indicati nel prosieguo.

[33] GUILLELMUS DE OCKHAM O.F.M., *Quodlibeta septem*, I, q. 16, *Opera theologica*, vol IX, ed. J. C. Wey, St. Bonaventure University, N.Y. 1980, p. 87: «Voco libertatem potestatem qua possum indifferenter et contingenter diversa ponere, ita quod possum eumdem effectum causare et non causare, nulla diversitate existente alibi extra illam potentiam». Si veda anche GUILLELMUS DE OCKHAM O.F.M., *Ordinatio*, I, d. 1, q. 6, cit., p. 501: «[Libertas] opponitur necessitati secundum quod necessitas opponitur contingenti secundo modo dicto in priori distinctione. Et sic libertas est quaedam indifferentia et contingentia, et distinguitur contra principium activum naturale». Il testo dei *Quodlibeta* di Guglielmo di Ockham è frutto di dispute tenute tra l'Inghilterra e Avignone negli anni '20 del XIV secolo. Cfr. R. KEELE, *Oxford Quodlibeta from Ockham to Holcot*, in C. Schabel (ed.), *Theological Quodlibeta in the Middle Ages. The Fourteenth Century*, Brill, Leiden 2007, in particolare, pp. 655-659.

[34] GUILLELMUS DE OCKHAM O.F.M., *Ordinatio*, I, d. 1, q. 6, cit., p. 501: «Pro illo quod producit aliquem effectum, et nullo variatio ex parte sua nec ex parte cuiuscumque alterius habet in potestate sua ita non producere sicut producere, ita quod ex natura sua ad neutrum determinatur».

[35] Il testo è frequentemente citato nella Scolastica successiva e costituiva la tredicesima questione del Libro III del *Commento alle Sentenze* nell'edizione pubblicata a Lione nel 1495. Cfr. GUILLELMUS DE OCKHAM O.F.M., *Super quattuor libros Sententiarum*, III, q. 13, Johann Treschel, Lugduni 1495, fo. p5va-q2rb.

[36] GUILLELMUS DE OCKHAM O.F.M., *Quaestiones variae*, q. 8, in *Opera theologica*, edd. G.I. Etzkorn *et alii*, St. Bonaventure University, St. Bonaventure (N.Y.) 1984, p. 433: «Tertium dubium est de hoc quod dicitur quod voluntas velle dictatum a ratione erronea errore invincibili esse volendum, quia tale dictatum est malum. Ponamus quod ita sit. Nunc autem malum sub ratione mali non est volitum nec volibile. Quia sicut omne volitum vel volibile est solum bonum exsistens vel apparens, ita omne nolitum vel nolibile est malum exsistens vel apparens, et per consequens nullum bonum est nolitum nec esse potest, nec aliquo malum est volitum nec esse potest. ».

che la volontà possa muoversi autonomamente rispetto al dettame della ragione, ma rimane fedele alla posizione aristotelica e largamente accettata nella Scolastica secondo la quale la volontà può volere soltanto il bene vero o il bene apparente, ma mai il male in quanto male.[37]

Ockham risponde semantizzando il termine *bonum* secondo una duplice accezione. In un primo significato, si intende ciò che Aristotele nell'*Etica Nicomachea* ha distinto in bene morale (*honestum*), utile e piacevole (*delectabile*); mentre in un secondo significato, "bene" è sinonimo di voluto o di ciò che può essere voluto (*volibile*). Allo stesso modo, anche il male andrà incontro a una duplice possibilità semantica.[38]

Se il termine *bonum* viene preso nel primo significato, allora, secondo Ockham, è possibile volere il male in quanto male e, quindi, trascendere l'orizzonte del bene (sia esso reale[39] o soltanto apparente). Analogamente, è possibile rifiutare un bene, quindi non soltanto un male reale o un male apparente.[40] Se così non fosse, infatti, non sarebbe possibile meritare e demeritare. Il presupposto di questa svolta è quella radicale autonomia della volontà rispetto all'intelletto, già teorizzata da Duns Scoto, che il francescano inglese sembra volere sottolineare in modo ancora più accentuato.[41]

Per rafforzare la propria tesi, Ockham propone un esempio che riguarda il peccato mortale di idolatria. Ammettiamo che l'intelletto – qui identificato con la retta ragione (*recta ratio*) – comandi che l'idolatria sia un male. Se l'intelletto, senza errare, giudica che l'idolatria sia un male, siamo di fronte a un male, non soltanto apparente, ma anche reale. Quando, invece, qualcosa è giudicato erroneamente come bene o come male, allora siamo di fronte rispettivamente a un bene o a un male apparenti.[42] Ciò premesso, occorre chiedersi se la volontà possa volere

[37] Di questo ho trattato in G.P. SOLIANI, *Libertà inquieta*, cap. II, cit.

[38] GUILLELMUS DE OCKHAM O.F.M., *Quaestiones variae*, q. 8, cit., p. 442: «Ad tertium dubium, dico quod 'bonum' accipitur dupliciter. Uno modo pro bono ut dividitur in bonum honestum, utile et delectabile. Alio modo bonum est idem quod volitum, vel accipitur pro omni eo quod est volibile. Et eodem modo 'malum' accipitur dupliciter: vel ut opponitur bono primo modo dicto, vel ut accipitur pro aliquo quod est nolibile vel nolitum». Su questa tripartizione, cfr. ARISTOTELES, *Ethica nichomachea*, VIII, 2, 1155b19.

[39] Il termine *reale* per Ockham significa l'attualmente esistente nella sua individualità e si oppone a ciò che è meramente possibile.

[40] GUILLELMUS DE OCKHAM O.F.M., *Quaestiones variae*, q. 8, cit., p. 443: «Accipiendo bonum primo modo et malum etiam prout opponitur bono primo modo, sic dico quod voluntas potest velle malum quod nec est bonum realiter nec apparenter; et potest nolle bonum quod nec est malum realiter nec apparenter».

[41] D.W. CLARCK, *The Structure of Ockham's Moral Doctrine* (Tesi di dottorato, Loyola University, Chicago 1973), p. 52.

[42] GUILLELMUS DE OCKHAM O.F.M., *Quaestiones variae*, q. 8, cit., p. 443: «Prima pars istius conclusionis patet, quia aliter sequeretur quod nec posset mereri nec demereri committendo circa quodcumque obiectum malum realiter et dictatum a ratione recta esse tale. Quod probo: quia accipio aliquod tale obiectum, gratia exempli quod obiectum peccati mortalis, puta colere deos alienos

comunque l'idolatria, sebbene questo oggetto d'azione sia dettato come male dall'intelletto. Se ciò è possibile, allora è chiaro che la volontà può volere il male in quanto male, sia esso reale o apparente. Se, invece, ciò non è possibile, allora l'uomo non potrebbe mai peccare per un peccato di commissione. Infatti, potrebbe peccare in un modo simile soltanto se la volontà potesse volere l'opposto di ciò che detta la retta ragione riguardo all'idolatria. Al contrario, volendo ciò che la retta ragione detta come da volere, la volontà non pecca, ma anzi merita. In conclusione, la volontà può peccare per un peccato di commissione, volendo l'idolatria, in conflitto con il dettato della retta ragione che indica quell'atto come peccato.[43]

Se l'intelletto detta che qualcosa è male, senza errare, allora la volontà che scelga di opporsi all'intelletto vuole il male in quanto male, ossia il male in quanto saputo come tale dall'intelletto, ossia dalla retta ragione, e scelto come tale dalla volontà.[44] Tuttavia, il quadro fin qui delineato non sarebbe completo se non si facesse riferimento alla questione del merito e del demerito. Infatti, come Ockham sottolinea, sono le leggi di Dio ad aver previsto che l'uomo *in via* debba essere liberamente in grado di commettere l'opposto di un atto meritorio. Se, quindi, la volontà non potesse volere anche l'opposto del bene, non potrebbe meritare nel momento in cui scegliesse il bene rifiutando il male.[45] Il francescano inglese sembra qui costruire,

malum est. Ponamus igitur quod intellectus dictet hoc esse malum, quia tunc est malum realiter et apparenter. Quia hoc solum voco realiter vel apparenter bonum vel malum quod iudicatur ab intellectu bonum vel malum. Et si iudicetur ab intellectu recto non errante esse tale, tunc non solum est apparenter bonum vel malum sed realiter, quia tunc intellectus dictat sicut est in re. Si autem iudicetur ab intellectu errante, tunc est solum bonum vel malum apparenter et non realiter».

[43] *Ivi*, pp. 443-444: «Hoc suppostio, quaero tunc utrum voluntas possit velle hoc malum 'colere deos alienos' dictatum tale ab intellectu vel non. Si sic, habetur propositum quod voluntas potest velle malum quod est malum realiter et apparenter et nullo modo bonum primo modo acceptum. Si non potest velle hoc malum sic dictatum, igitur voluntas numquam potest peccare circa istud obiectum peccato commissionis, quia non peccaret tali peccato nisi volendo oppositum illius quod dictat recta ratio circa praedictum obiectum. Quia in volendo illud quod est dictatum a recta ratione esse volendum non peccat, immo magis meretur. Igitur si voluntas potest peccare peccato commissionis circa illud obiectum, hoc erit volendo illud quod est dictatum a recta ratione malum. Ergo non potest velle tale malum sic dictatum, non potest peccare peccato commissionis».

[44] Come ormai diversi studiosi hanno messo in luce, Ockham non dà una definizione univoca di *recta ratio*. Cfr. D.W. CLARK, *William of Ockham on Right Reason*, «Speculum», XLVIII (1973), pp. 13-36; S. MÜLLER, *Handeln in einer kontingenten Welt: zu Begriff und Bedeutung der rechten Vernunft (recta ratio) bei Wilhelm von Ockham*, Francke, Tübingen 2000. L'espressione latina deriva dal greco *orthos logos* che troviamo in Aristotele. A seconda dei casi, Aristotele considera la "retta ragione" come una componente della definizione di virtù (ARISTOTELES, *Ethica Nichomachea*, II, 6, 1106b35-1107a3); come ciò che è medio tra l'eccesso e il difetto (*ivi*, VI, 1, 1138b17-20); come identica alla *phronesis* (*ivi*, VI, 13, 1144b20-22); e, infine, come una vera e propria virtù (*ivi*, VI, 5, 1140b20-35). Per uno studio aggiornato sul tema, si veda J. TIAN, *The Orthos Logos in Aristotle's Ethics* (Tesi di dottorato, Humboldt-Universität, Berlino 2014).

[45] GUILLELMUS DE OCKHAM O.F.M., *Quaestiones variae*, q. 8, cit., vol. VIII, p. 433: «Nunc apparet verum, secundum leges Dei communiter ordinatas, quod voluntas viatoris non potest mereri circa aliquid nisi circa illud posset demereri committendo. [...] Si igitur voluntas non potest velle

paradossalmente, la propria teoria morale a partire dal negativo, ossia dal male. Il bene morale, liberamente voluto, e quindi meritorio, acquista consistenza solo grazie alla possibilità sempre aperta per la volontà umana del male morale.

A monte di una tale dottrina sta il principio per il quale la volontà può determinarsi all'atto riguardo a un qualunque oggetto d'azione buono, ma può anche demeritare determinandosi all'atto opposto. Quindi: la volontà è trascendentalmente aperta al bene e al male come due poli tra i quali scegliere, con la conseguenza di poter sempre meritare, ma a patto di poter anche demeritare, secondo ciò che Dio ha disposto.[46]

Se, invece, si intende con il termine *bonum* ciò che può essere voluto o ciò che è attualmente voluto, allora la volontà non potrà mai volere il male, perché vorrà sempre qualcosa di buono, sia esso reale o apparente. Tutto ciò a cui la volontà si opporrà sarà sempre qualcosa che ripugna alla volontà, in quanto indesiderabile o indesiderato.[47] Si è fatto notare che il modo in cui Ockham presenta il bene nel senso del *volitum* o *volibile* trasforma la proposizione "la volontà desidera ciò che è buono", in una proposizione del tutto «innocua» come la seguente: "la volontà vuole ciò che è voluto o che può essere voluto".[48] A nostro avviso, di fronte a questa tesi sono possibili due interpretazioni tra loro inconciliabili. Da un lato, infatti, Ockham intende rimanere nell'alveo delle *auctoritates* e dei *dicta doctorum*; ma, dall'altro lato, sembra voler dire qualcosa di diverso. Rimanere fedele alle autorità significherebbe intendere il bene, in quanto *volitum* o *volibile*, come trascendentale dell'essere e, quindi, in senso metafisico. La desiderabilità, dunque, dovrebbe fondarsi sull'essere stesso dell'ente e non sull'atto di volere soggettivo, sia esso attuale o soltanto possibile. Al contrario, introdurre una posizione diversa da quella delle autorità consolidate significherebbe affermare la tesi per la quale tutto ciò che è buono è tale in quanto voluto, attualmente o potenzialmente, da una volontà. In questo ultimo caso, verrebbe introdotta una qualche soggettivizzazione del bene, per la quale l'ente si dice buono in quanto è voluto. Questi due modi di intendere

praedictum obiectum, non potest demereri nec per consequens mereri in nolendo illud malum sic dictatum».

[46] *Ivi*, p. 445: «voluntas potest nolle bonum primo modo acceptum quod non habet rationem mali realiter nec apparenter, puta quia realiter est [bonum] et sic dictatur ab intellectu. Et [hoc] est [illud] medium: quia voluntas circa quodcumque obiectum potest mereri eliciendo actum, potest demereri committendo. Et per consequens si potest mereri eliciendo actum volendi circa tale bonum, potest demereri eliciendo actum nolendi circa idem obiectum».

[47] *Ivi*, p. 446: «Accipiendo bonum et malum secundo modo sic voluntas non potest velle aliquid nisi bonum nec nolle aliquid nisi malum vel sub ratione mali. Hoc patet quia sic accipiendo bonum, bonum idem est quod volitum sive volibile, et malum idem est quod nolitum sive nolibile. Nunc autem videtur contradictionem includere quod voluntas velit aliquid nisi hoc sit volibile et volitum, et similter quod nolit aliquid nisi hoc sit nolitum vel nolibile, igitur, etc. Et sic possunt glossari auctoritates et dicta doctorum qui dicunt quod voluntas non potest velle aliquid nisi sit bonum realiter vel sub ratione boni sive apparenter. Similiter non potest nolle alquid nisi sit malum vel sub ratione mali».

[48] D.W. CLARCK, *The Structure of Ockham's Moral Doctrine*, cit., pp. 51-52.

il bene sembrano ricalcare la distinzione scotiana tra *amor amicitia* e *amor concupiscentiae*. Nel primo caso, il bene è oggettivo, perché fondato sul ciò che è e non sulla tendenza affettiva del soggetto verso il vantaggioso che caratterizza la natura umana dopo il peccato originale. Nel secondo caso, invece, il bene è soggettivo. Nel momento in cui il bene trascendentale venisse privato della propria portata metafisica, verrebbe a mancare il piano dell'oggettività, lasciando tutto il campo alla volontà del soggetto, a meno che – ed è ciò che Ockham teorizza – la volontà soggettiva creata non trovi davanti a sé la libertà sovrana del Creatore che ordina, secondo la propria insindacabile volontà, dei precetti contingenti verso i quali la libertà creata è moralmente obbligata. Nel pensiero di Ockham, la connotazione ontologica del bene trascendentale come referente intenzionale della volontà sembra venire meno, come già ravvisato dagli studiosi.[49] Solo nella prima accezione di *bonum* è aperto lo spazio della libertà (di indifferenza), anche di compiere il male. Nel secondo caso, invece, la volontà è necessariamente orientata al bene, ma in quanto costituito soggettivamente dall'individuo.

Ockham muta, in qualche modo, i criteri per distinguere moralità e immoralità dell'atto di volontà umano. La moralità dell'atto volontario consiste nel dare seguito al dettato della retta ragione, ossia a ciò che l'intelletto indica – senza errare – come bene; mentre l'immoralità consiste nell'opporsi della volontà al dettato della retta ragione. Egli ritiene che non sia vero che volontà e intelletto non possano discordare e, quindi, nega che vi sia una stretta connessione tra le due potenze, altrimenti – come si è visto – non sarebbe possibile peccare.[50] La volontà, quindi, è talmente libera, sia rispetto al giudizio dell'intelletto sia rispetto a Dio stesso, da poter agire in opposizione a quel giudizio oppure da possedere un abito (*habitus*) che la inclini, senza necessitarla, ad amare Dio o addirittura ad odiarlo.[51] Se non che, nemmeno l'abito può necessitare la volontà, perché la libertà di quest'ultima ha sempre la possibilità di volere altrimenti, potendo opporsi a qualunque inclinazione, virtuosa o viziosa, che pure è possibile sperimentare in noi dopo aver compiuto una serie di atti dello stesso tipo.[52]

[49] Oltre a David W. Clarck si faccia riferimento anche a H.S. MATSEN, *Alessandro Achillini (1463-1512) and His Doctrine of 'universals' and 'Transcendentals'. A Study in Renaissance Ockhamism*, Bucknell University Press, Cranbury 1974, p. 157.

[50] GUILLELMUS DE OCKHAM O.F.M., *Reportatio*, III, q. 11, in *Opera theologica*, vol. VI, edd. F.E. Kelley - G.I. Etzkorn, St. Bonaventure University, St. Bonaventure (N.Y.) 1982, p. 355: «Non est talis connexio inter intellectum et voluntatem quin voluntas possit in oppositum iudicati ab intellectu; aliter non potest peccare».

[51] *Ivi*, p. 356: «Voluntas est ita libera respectu Dei sicut respectu cuiuscumque alterius. Sed respectu Dei potest habere habitum inclinantem ad diligendum Deum et odiendum eum».

[52] *Ivi*, p. 357: «In potentia autem libera non potest poni habitus propter istam causam, quia quantumcumque inclinetur in aliquod obiectum, potest tamen de se propter suam liberatatem in actum oppositum. Ideo potest poni habitus, quia quilibet experitur in seipso quod post multos actus elicitos in voluntate circa aliquod obiectum, facilius et intensius inclinatur ad eliciendum actus consimiles modo post multos tales actus quam prius».

In ogni caso, la prosecuzione o l'opposizione della volontà nei confronti del giudizio della retta ragione non sono il criterio ultimo per definire la qualità morale dell'atto. Occorre, infatti, tener conto dell'obbligazione rispetto ai decreti della volontà di Dio. In *Reportatio*, II, qq. 3-4, Ockham sostiene che il male morale «non è nient'altro che il compiere qualcosa rispetto al quale qualcuno sarebbe obbligato a fare l'opposto».[53] Le fonti dell'obbligazione morale sono Dio e la retta ragione, ma in tanto in quanto il dettato di quest'ultima è in sintonia con il volere divino. In questo modo, quelle che appaiono a prima vista come due polarità distinte della morale ockhamiana, vengono messe in relazione strettissima. Da un lato, infatti, considerato l'ordine delle cose vigente voluto da Dio, l'atto virtuoso è tale soltanto se la volontà si è determinata ad esso in conformità con la retta ragione;[54] mentre, dall'altro lato, la retta ragione deve dettare come da volere ciò che la volontà divina vuole.[55] In generale, però, Ockham non sa dare un motivo per seguire il dettato della retta ragione e il precetto divino. Egli scrive solo che «questo significa determinarsi in modo conforme alla retta ragione: volere ciò che è dettato dalla retta ragione a causa del fatto che è dettato».[56]

Riassumendo le linee fondamentali di ciò che si detto, in primo luogo, la volontà creata non è più legata da una necessità naturale all'orizzonte ontologico del bene in quanto tale. In questo senso, essa può volere il male in quanto male, essendo completamente autonoma rispetto al giudizio dell'intelletto (la retta ragione) e potendo scegliere scientemente di disporsi in modo opposto rispetto all'obbligazione posta dalla legge divina. In secondo luogo, Dio sembra essere posto al di là di ciò che per la volontà creata sono il bene e il male. Se, infatti, il bene morale connota l'adesione della volontà creata al precetto divino e il male morale connota l'avversione al precetto divino, Dio sarà al di là di un bene e di un male così semantizzati. La conferma di questo aspetto ci è data dal modo in cui Ockham spiega il peccato di commissione, distinguendolo dal peccato di omissione. A differenza del peccato di commissione, il peccato di omissione ha soltanto una causa difettiva (*causa defectiva*) che consiste nella volontà in quanto questa non si determina verso ciò che è moralmente dovuto. Quindi, un tale peccato non si fonda su alcunché di positivo, ma sul niente del mancato atto di volontà. Nel peccato di commissione, invece, le cause dell'atto di volere sono la volontà e insieme Dio stesso, essendo Egli la causa immediata di tutti gli atti e di tutte le cause seconde. In questo modo, Dio risulta

[53] GUILLELMUS DE OCKHAM O.F.M., *Reportatio*, II, qq. 3-4, in *Opera theologica*, vol. V, edd. G. Gál – R. Wood, St. Bonaventure University, St. Bonaventure (N.Y.) 1981, p. 59: «Malum nihil aliud est quam facere aliquid ad cuius oppositum faciendum aliquis obligatur».

[54] GUILLELMUS DE OCKHAM O.F.M., *Quaestiones variae*, q. 7, cit., p. 394: «Stante ordinatione quae nunc est, nullus actus est perfecte virtuosus, nisi conformiter eliciatur rationi rectae».

[55] GUILLELMUS DE OCKHAM O.F.M., *Ordinatio*, I, d. 41, q. unica, cit., p. 610: «Eo ipso quod voluntas divina hoc vult, ratio recta dictat quod est volendum».

[56] GUILLELMUS DE OCKHAM O.F.M., *Quaestiones variae*, q. 7, cit., p. 395: «Hoc est elicere conformiter rectae rationi: velle dictatum a ratione propter hoc quod est dictatum».

essere, per Ockham, anche la concausa della deformità (il peccato) e della sostanza dell'atto. Ora, la deformità dell'atto di commissione non è altro che il medesimo atto elicito di volontà contrario al precetto divino, quindi il termine "deformità", spiega il francescano, significa soltanto l'atto elicito e insieme connota o dà ad intendere lo stesso fatto di essere posto contro il precetto divino.[57]

Da questa dottrina consegue che Dio sia concausa del peccato di commissione; ma, per Ockham, non ne consegue che Dio partecipando, come causa, al peccato dell'uomo, sia Egli stesso peccatore. Infatti, Dio non è debitore, cioè non è tenuto né a causare l'atto peccaminoso né a causare l'atto opposto dell'uomo, ma nemmeno a causare o non causare alcun atto. Essendo sottratto ai precetti e, quindi, alle obbligazioni poste da una eventuale, ma inesistente volontà superiore, a Lui sovrana, Egli decreta ciò che vuole senza essere limitato da alcun divieto. Per questo viene meno la possibilità che egli pecchi. Causando l'atto peccaminoso della volontà creata, Dio non pecca, poiché non è chiamato a rendere conto ad alcuno del proprio operato. Solo la volontà creata pecca, nel momento in cui trasgredisce all'obbligazione verso i precetti divini.[58]

L'architettura della morale ockhamiana che abbiamo delineato in queste pagine presenta delle analogie con ciò che Hobbes scrive in alcuni passaggi del *Leviatano*, quando egli scrive che

> la filosofia morale infatti non è altro che la scienza di ciò che è bene e di ciò che è male nella conversazione e nella società degli uomini. Bene e male sono nomi che significano i nostri appetiti e le nostre avversioni che sono differenti nei differenti temperamenti, costumi e dottrine degli uomini. [...] Perciò, finché un uomo è nella condizione di mera natura (che è una condizione di guerra) il suo appetito personale è la misura del bene e del male.[59]

[57] *Ivi*, p. 389: «Peccati omissionis nulla est causa positiva, quia ipsum nihil est positivum, sed tantum habet causam defectivam; et illa est voluntas quae tenetur actum oppositum illi carentiae elicere, et no elicit. Si autem loquamur de peccato commissionis, sic non tantum voluntas creata est causa efficiens illius actus, sed ipse Deus, qui omnem actum immediate causat, sicut quaecumque causa secunda; et ita est causa positiva deformitatis in tali actu sicut ipsius substantiae actus, quia [...] deformitas in actu commissionis non est nisi ipsemet actus elicitus contra praeceptum divinum, ita quod iste conceptus vel vox 'deformitas' significat ipsum actum et connotat sive dat intelligere ipsum esse causatum contra praeceptum divinum, et nihil penitus aliud dicit».

[58] *Ivi*, pp. 389-390: «Et si dicis quod tunc Deus peccaret causando talem actum deformem, sicut voluntas creata peccat quia causat talem actum: respondeo: Deus nullius est debitor, et ideo nec tenetur illum actum causare nec oppositum actum, nec illum actum non causare, et ideo non peccat quantumcunque illum actum causet. Voluntas autem creata tenetur per praeceptum divinum illum actum non causare, et per consequens in causando illum actum peccat, quia facit quod non debet facere. Unde si voluntas creata non obligaretur ad non causandum illum actum vel oppositum, quantumcunque causaret illum, numquam peccaret sicut nec Deus». Su Dio come concausa dell'atto peccaminoso, cfr. anche GUILLELMUS DE OCKHAM O.F.M., *Reportatio*, IV, q. 16, in *Opera theologica*, vol. VII, edd. R. Wood - G. Gàl - R. Green, St. Bonaventure University (N.Y.) 1984, p. 355.

[59] THOMAS HOBBES, *Leviatano*, XV, cit., pp. 165-166; ID., *Leviathanus latinus*, VI, cit., p. 122.

In questo modo, Hobbes non fa altro che esplicitare una dottrina che era già presente in Ockham e che alludeva alla volontà come misura di ciò che è bene e di ciò che è male, per lo meno stando alla accezione del termine "bene" inteso come ciò che è voluto attualmente o potenzialmente da una volontà. Le affinità con Ockham, però, non sono terminate, perché Hobbes aggiunge che, poiché nessuno desidera la guerra, occorre constatare che tutti gli uomini si accordano sul fatto che la pace è un bene e sono un bene anche tutti i mezzi necessari a conseguirla, secondo ciò che le leggi di natura enunciano. Queste sono innanzitutto dettami della ragione, e il termine legge – precisa Hobbes – sarebbe, invece, improprio.[60] Si tratta, infatti, di «conclusioni o teoremi» che indicano le modalità in cui l'uomo può realizzare la propria autoconservazione, ossia quello che abbiamo già iniziato a chiamare desiderio originario. Nella versione inglese del *Leviatano*, troviamo scritto che la legge, invece, «è la parola di chi, per diritto, comanda sugli altri. Ma se consideriamo i medesimi teoremi, come manifestati nella parola di Dio, che, per diritto, comanda su tutte le cose, allora sono chiamati propriamente leggi».[61]

Troviamo racchiusi, in un unico plesso tematico, la soggettivizzazione del bene e del male, il riferimento a un desiderio di autoconservazione che accomuna tutti gli uomini e, infine, la posizione del legame di equivalenza tra ciò che è dettame della ragione e ciò che è posto come legge di natura dalla volontà sovrana di Dio e, per questo, è moralmente obbligante.

3.1 Nota sul bene trascendentale in Guglielmo di Ockham

È pur vero che anche Ockham affronta la dottrina dei trascendentali dell'essere, trattandoli, tuttavia, o come termini connotativi o attraverso il dispositivo logico della *suppositio*, quindi secondo un intento semantizzante che tende a sradicare il bene dal suo fondamento ontologico. Sebbene Ockham parli soprattutto del rapporto tra i termini trascendentali *unum* ed *ens*,[62] le sue conclusioni valgono anche riguardo al *bonum*. A questo proposito, quando si dice che "l'essere è bene", i termini "bene" ed "essere" suppongono in modo semplice, cioè stanno, rispettivamente, per il concetto di "essere" o per il concetto di "bene", rimanendo quindi diversi. Invece, dal punto di vista della supposizione *personale*, "essere" e "bene"

[60] THOMAS HOBBES, *Leviatano*, XV, cit., p. 166; ID., *Leviathanus latinus*, VI, cit., p. 122.

[61] THOMAS HOBBES, *Leviatano*, XV, cit., pp. 167-168. Nella versione latina il testo non è più presente.

[62] Cfr. e.g. GUILLELMUS DE OCKHAM O.F.M., *Summa logicae*, I, cap. 10; *ivi*, I, capp. 38-39; ID., *Ordinatio*, I, d. 24, q. 1. Riguardo al tema delle proprietà trascendentali dell'essere in Ockham, si veda J. E. PELLETIER, *William Ockham on Metaphysics. The Science of Being and God*, Brill, Leiden 2012, pp. 104-106; D. PERLER, *Ockhams Transformation der Transzendentalien*, in *Die Logik des Transzendentalen Festschrift für Jan A. Aertsen*, MARTIN Pickavé (hrsg.), Walter de Gruyter, Berlin 2003, pp. 361-382; JAN AERTSEN, *Medieval Philosophy as Transcendental Thought*, cit., pp. 515-537.

suppongono per la stessa cosa, perché significano ciascun ente singolare, il quale ha in sé essere e bontà. Da questo punto di vista, essere e bene sono identici.[63]

Il bene e l'essere si convertono, ma mentre "essere" è un termine assoluto, "bene" è un termine connotativo, cioè «connota qualcosa che può essere voluto (*volibile*) o amato (*diligibile*) secondo la retta ragione».[64] Se non che, Dio sembra trovarsi oltre questo orizzonte. Della sua bontà si può parlare nella misura in cui quel termine connotativo di bene può essere esteso per astrazione al Creatore e alla creatura e predicato *in quid*, come un concetto quidditativo, ossia predicabile essenzialmente di entrambi.[65] In altri termini, anche di Dio si può dire che è buono in tanto in quanto è desiderabile e amabile da una volontà creata che segua la retta ragione e – occorre aggiungere subito – l'obbligazione divina. Tuttavia, Dio e la creatura non sono in alcun modo sottomessi a un bene in quanto tale e alle sue esigenze, semplicemente perché quest'ultimo risulta in qualche modo privato della sua consistenza ontologica. In termini più espliciti, la radice della desiderabilità sembra spostarsi dall'essere e dalla realtà alla volontà, sia essa divina o umana. Ciò che la volontà divina vuole è bene e ciò che la volontà creata vuole è desiderabile realmente o apparentemente nella misura in cui rispetti o meno i decreti divini, i quali sono, come è noto, del tutto contingenti. È pur vero che anche Tommaso d'Aquino e, prima di lui, Aristotele trattano il bene sempre in riferimento a una volontà, ma invertendo l'ordine tra bontà e desiderabilità: qualcosa è buono, non perché

[63] GUILLELMUS DE OCKHAM O.F.M., *Ordinatio*, I, d. 24, q. 1, cit., vol. IV, p. 85: «Dico ista 'unum differet ab ente' vel 'unum et ens differunt', potest distingui eo quod termini possunt supponere simpliciter vel personaliter, vel unum terminus simpliciter et aliud personaliter. Primo modo dico quod simplicieter differunt, nec sunt idem. Quia tunc isti termini supponunt supponunt pro conceptibus, et isti conceptus – sive sint tantum obiective in mente sive subiective – non sunt idem conceptus. Secundo modo dico quod unum non differt ab ente, nec simpliciter nec secundum quid nec formaliter nec quocumque modo, non plus quam ens differt ab ente»; *ivi*, I, d. 2, q. 1, in *Opera theologica*, vol. II, edd. S. Brown *et alii*, St. Bonaventure University, St. Bonaventure (N.Y.) 1970, pp. 23-24: «Unde si isti termini supponant personaliter nihil potest vere affirmari de ente et negari ab uno; et ideo sic accipiendo terminos haec est falsa 'ens est subiectum metaphysicae', et haec similiter 'unum est passio', vel 'unum est posterius ente', et sic de aliis». Come è noto, nel caso della supposizione semplice il termine suppone per un concetto, mentre nel caso della supposizione personale il termine suppone per un ente singolare.

[64] Cito qui il testo in modo più ampio. GUILLELMUS DE OCKHAM O.F.M., *Summa logicae*, I, cap. 10, *Opera philosophica*, vol. I, edd. P. Boenher *et alii*, St. Bonaventure University, St. Bonaventure (N.Y.) 1974, p. 38: «Sub istits etiam nominibus [connotativis] comprehenduntur omnia talia 'verum', 'bonum', 'unum' [...]. Et eodem modo dicendum est de 'vero' et 'bono', quia 'verum', quod ponitur convertibile cum 'ente', significat idem quod 'intelligibile'. 'Bonum' etiam, quod est convertibile cum 'ente', significat idem quod haec oratio 'aliquid secundum rectam rationem volibile vel diligibile'».

[65] GUILLELMUS DE OCKHAM O.F.M., *Ordinatio*, I, d. 3, q. 3, cit., vol. II, p. 425: «Bonum dupliciter accipitur. Uno modo secundum quod est connotativum; alio modo secundum quod est perfectio secunda vela liqua res specialis distincta contra sapientia, et isto modo non est conceptus quidditativus Dei; primo modo potest esse conceptus quidditativus. Ita est de sapientia et dilectione quod a sapientia creata et a deitate potest abstrahi conceptus unus praedicabilis in quid de utraque et erit conceptus quidditativus. Similiter, a dilectione creata et a deitate potest abstrahi unus alius conceptus et erit praedicabilis in quid de utraque».

desiderabile o desiderato, ma è desiderabile o desiderato in quanto è buono. In Ockham, invece, sebbene con qualche oscillazione, sembra valere la prima implicazione, piuttosto che la seconda.

4. BENE E MALE NEL *LEVIATANO*

Riproponendo in modo più esplicito le indicazioni di Ockham, Hobbes scrive nel *Leviatano* che

> qualunque esso sia, l'oggetto dell'appetito o desiderio di un uomo, è ciò che egli, per parte sua, chiama *buono*; l'oggetto del suo odio e della sua avversione, *cattivo* e quello del suo dispregio *vile* e *trascurabile*. Infatti, queste parole, buono, cattivo e spregevole, sono usate in relazione alla persona che le usa, dato che non c'è nulla che sia tale semplicemente e assolutamente, e non c'è alcuna regola comune di ciò che è buono o cattivo che sia derivato dalla natura degli oggetti stessi; essa deriva invece dalla persona (dove non c'è lo stato) o (in uno stato) dalla persona che lo rappresenta, oppure da un arbitro o un giudice, che gli uomini in disaccordo istituiranno per comune consenso e della cui sentenza faranno la regola.[66]

In questo passaggio celebre, ritroviamo una considerazione del tutto soggettiva del bene e del male, per lo meno nella situazione in cui l'uomo si trovi a vivere nello stato di natura, ossia fuori da un'organizzazione statuale nella quale la volontà del sovrano sia il criterio di ciò che è bene e di ciò che è male. Diversamente, bene e male saranno decretati, appunto, da una figura terza che rivesta il ruolo di arbitro, una volta che il consenso popolare lo abbia indicato come legittimato a governare.

Ciò che ora ci interessa è sottolineare che l'impianto di fondo del pensiero hobbesiano, quanto ai temi in esame, non è poi molto diverso da quello di Ockham. È la volontà, umana o divina, del singolo o del sovrano, ad essere l'unica misura di ciò che si dice bene e male. Tuttavia, Hobbes mostra una posizione più radicale di Ockham. Poco dopo il passo citato, egli riprende in parte la triplice declinazione aristotelica del bene, ma nella quale il *bonum honestum* viene di fatto sostituito dal meno impegnativo *bonum pulchrum*, sebbene, nella versione latina del *Leviatano*, il *bonum honestum* venga considerato come specie del genere *bonum pulchrum*.[67] La differenza tra *honestum* e *pulchrum* è assai rilevante. *Honestum*, infatti, non indica soltanto la bellezza esteriore del bene, ma allude soprattutto a un bene propriamente umano, ossia adeguato all'uomo in quanto tale, *simpliciter sumptum*. Non si tratta, quindi e soltanto, del bene per l'uomo secondo un certo "in quanto", ma per l'uomo in quanto uomo.[68] Ora, secondo Hobbes, un tale bene, visto come perfezionamento proprio della natura umana, non si dà. Al suo posto, il pensatore

[66] THOMAS HOBBES, *Leviatano*, VI, cit., pp. 53-54;

[67] THOMAS HOBBES, *Leviatano*, VI, cit., p. 54; ID., *Leviathan latinus*, VI, cit., p. 42.

[68] Piuttosto esplicito a questo proposito è Tommaso d'Aquino. Cfr. THOMAS DE AQUINO O.P., *Summa theologiae*, I^{a}-II^{ae}, q. 18, a. 1.

inglese introduce il *bonum pulchrum*, ossia l'aspetto promettente, quanto al vantaggio, che qualcosa può esprimere in relazione alla volontà di ciascuno, secondo circostanze diverse. A questo tipo di bene, si aggiungono il bene piacevole – come riverbero soggettivo del bene ottenuto – e il bene utile.[69]

4.1. Appetito, volontà, deliberazione

Giunti a questo punto occorre precisare meglio che cosa intenda Hobbes con i termini appetito, volontà, desiderio e deliberazione. Ad essi, sono dedicate alcune celebri pagine del capitolo VI del *Leviatano*. Come si è visto, Hobbes ha indicato nel bene l'oggetto proprio dell'appetito che egli intende anche come sinonimo di desiderio. Nel particolare "materialismo", proprio del filosofo inglese, l'appetito è un movimento corporeo incipiente paragonabile a uno sforzo (*endeavour* o *conatus*). La polemica di Hobbes si dirige immediatamente verso la Scolastica, a causa del fatto che l'appetito sarebbe solitamente considerato, in quel contesto, come movimento in senso metaforico. Secondo, Hobbes, invece, si tratterebbe di un vero e proprio movimento fisico, sebbene incipiente. Ovviamente, è previsto anche il contrario dell'appetito che Hobbes chiama avversione.[70]

Ora, nel corpo umano si susseguono una serie di appetiti e di avversioni che precedono sempre il momento della deliberazione rispetto a due possibili alternative. La radice di tali appetiti e avversioni è situata nel senso e nell'immaginazione, ma non nella ragione. Finalmente, l'atto del deliberare termina alla libertà di fare o non fare, ed è preceduto da un ultimo appetito che è l'atto di volontà. Quanto alla volontà come facoltà, invece, Hobbes si rifiuta di definirla scolasticamente appetito razionale. Se, infatti, la volontà fosse razionale, allora il suo atto non potrebbe mai essere contrario alla ragione.[71]

Una tale motivazione mostra che Hobbes risente in qualche modo della tendenza volontaristica tardomedievale. Lo stesso dicasi per la tesi secondo la quale l'atto volontario scaturisce soltanto dalla volontà e non da altro. Tuttavia, il pensatore inglese difende entrambe le posizioni a partire dall'idea che l'atto volontario non sia altro che l'ultimo di una serie di movimenti fisici che si avvicendano continuamente nel corpo umano, secondo una prospettiva rigidamente materialistica. Ciò che lo differenzia dagli altri appetiti è soltanto il fatto di essere l'«ultimo appetito nel deliberare».[72]

A questo proposito, Martin Rhonheimer ha fatto notare che Hobbes non riesce davvero a mantenersi coerente con le sue affermazioni, facendo agire

[69] THOMAS HOBBES, *Leviatano*, VI, cit., p. 54; ID., *Leviathan latinus*, VI, cit., p. 42.
[70] THOMAS HOBBES, *Leviatano*, VI, cit., p. 52; ID., *Leviathan latinus*, VI, cit., p. 41.
[71] THOMAS HOBBES, *Leviatano*, VI, cit., p. 61; ID., *Leviathan latinus*, VI, cit., p. 48.
[72] THOMAS HOBBES, *Leviatano*, VI, cit., pp. 60-62; ID., *Leviathan latinus*, VI, cit., pp. 48-49.

surrettiziamente un «concetto analogo di volontà».[73] Hobbes teorizza una volontà non informata dalla razionalità – tanto da essere comune all'uomo e agli animali –, ma è costretto a riconoscere che la deliberazione segue il criterio della apparenza di bene o di male da cui sorgono gli appetiti e le avversioni. In altri termini, l'atto deliberativo avviene tenendo conto il più possibile della catena di conseguenze che la realizzazione di un appetito potrebbe portare con sé. Se non che, una tale concatenazione può essere vista soltanto dalla ragione.[74] «Cosicché – conclude Hobbes – colui che ha per esperienza o per ragionamento il maggiore e più sicuro prospetto delle conseguenze, delibera meglio per sé ed è in grado, quando vuole, di dare i migliori consigli agli altri».[75] In questo modo, l'ultimo appetito, detto volontà, che dovrebbe precedere la deliberazione sarebbe, in realtà, accompagnato da un ragionamento o, per lo meno, da una qualche consapevolezza razionale delle esperienze passate. In ogni caso, ciò che il soggetto ha sempre in vista nel deliberare è quel desiderio originario di autoconservazione che costituisce la prima e imprescindibile inclinazione verso il proprio vantaggio.

Se ancora Ockham manteneva un qualche flebile riferimento all'orizzonte del bene trascendentale, Hobbes è esplicito nel sostituirlo con ciò che è autoconservazione e vantaggio personale in questa vita, secondo la definizione di felicità che abbiamo segnalato in precedenza. Questa decisione teorica è del tutto coerente con il nominalismo hobbesiano, in una prospettiva che elimina il radicamento ontologico del bene umano per riferirlo esclusivamente a ciò che pertiene alla vita individuale, soprattutto nella sua dimensione fisica.

4.2. Considerazioni su libertà e necessità

Come è noto, nel *Leviatano*, Hobbes considera la libertà come semplice assenza di impedimento fisico al movimento di un qualunque corpo. Infatti, parlare di libertà senza applicarla ai corpi sarebbe un modo di parlare abusivo.[76] Presa secondo questa accezione, coerente con il materialismo del filosofo inglese, la libertà diviene compatibile con la necessità delle serie causali che presiedono al movimento della realtà fisica e di cui Dio è la prima e unica causa. L'acqua che non trova ostacoli nello scorrere lungo il letto di un fiume è libera e insieme necessitata senza contraddizione, in virtù di quella riduzione del significato di libertà di cui si è appena detto. Analogamente, vale il medesimo discorso per la libertà umana. Infatti, ogni azione

[73] MARTIN RHONHEIMER, *La filosofia politica di Thomas Hobbes. Coerenza e contraddizioni di un paradigma*, Armando editore, Roma 1997, p. 84.

[74] La deliberazione parla lo stesso linguaggio del ragionamento (*non differt a sermone ratiocinandi*), ma mentre questo si rivolge a ciò che è universale, quella si rivolge al particolare. Cfr. THOMAS HOBBES, *Leviatano*, VI, cit., p. 62; ID., *Leviathanus latinus*, VI, cit., p. 49.

[75] THOMAS HOBBES, *Leviatano*, VI, cit., pp. 63-64; ID., *Leviathanus latinus*, VI, cit., p. 50.

[76] THOMAS HOBBES, *Leviatano*, XXI, cit., pp. 222-223; ID., *Leviathanus latinus*, VI, cit., pp. 159-160.

volontaria dell'uomo procede dalla sua libertà, in quanto proviene dalla volontà. Se non che, ogni desiderio, inclinazione o atto volontario ha una causa, la quale, a sua volta, è il risultato di una serie causale che mette capo a Dio.[77]

Troviamo nello svolgimento di questa dottrina sulla compatibilità di libertà e necessità un'analogia con la tesi di Ockham, secondo la quale Dio sarebbe a suo modo la causa dell'azione peccaminosa e, in generale, di ogni azione umana. Ma insieme all'analogia è presente anche una rottura radicale con la corrente volontarista, per lo meno in ambito morale. Scrive Hobbes:

> Dio, quindi, che vede e dispone tutte le cose, vede la necessità di tutte le azioni che provengono dalla sua volontà. Gli uomini, infatti, sebbene facciano molte cose contro le leggi divine, cioè molte cose di cui Dio non è autore, non hanno alcuna passione, volontà o appetito di cui la causa prima e piena non venga dalla volontà di Dio. Se, infatti, la volontà di Dio non imponesse la necessità alla volontà umana e per conseguenza a tutte le azioni che da essa dipendono, la libertà della volontà umana toglierebbe l'onnipotenza, l'onniscienza e la libertà di Dio. E queste cose, quanto al presente proposito riguardante la libertà naturale e propriamente detta, sono discusse a sufficienza.[78]

Il testo deve essere ricondotto entro le coordinate tratteggiate sopra. La libertà dell'uomo nel fare ciò che vuole è l'assenza di impedimento nel perseguire l'ultimo appetito che precede la deliberazione. Non trovando ostacoli, l'uomo è libero. Tuttavia, la causa ultima di ogni movimento e, quindi, anche di ogni atto volontario è Dio stesso, in quanto causa prima di quella serie causale nella quale ciascuno è inserito. Da questo punto di vista, ogni atto volontario, anche quelli contrari al comando divino, hanno come prima causa Dio stesso, sebbene quest'ultimo non sia autore dell'azione peccaminosa e, quindi, dell'atto deliberativo. Ciò comunque è sufficiente per sostenere che, secondo Hobbes, l'azione causale di Dio è implicata nell'agire libero, anche in quello contrario alla sua volontà.

5. CONCLUSIONI

Si è cercato di mostrare in che modo alcune sollecitazioni medievali intorno al bene e al desiderio umano riaffiorino in una delle opere più note della modernità filosofica, come in una sorta di metamorfosi del concetto di bene a cui si

[77] THOMAS HOBBES, *Leviatano*, VI, cit., p. 224; ID., *Leviathanus latinus*, VI, cit., p. 160.

[78] THOMAS HOBBES, *Leviatano*, VI, cit., p. 224; ID., *Leviathanus latinus*, VI, cit., p. 160: «Deus ergo, qui videt et disponit omnia, necessitatem videt omnium actionum a sua ipsius voluntate proficiscentium. Homines enim, quanquam multa faciant contra leges divinas, id est, multa quorum Deum non est author, nullam tamen passionem, voluntate, aut appetitum habent, cujus causa prima et plena non sit a voluntate Dei. Nisi enim voluntas Dei necessitatem voluntati humanae imponeret, et per consequens actionibus omnibus ab ea dependentibus; libertas voluntatis humanae omnipotentiam et omniscentiam et libertatem Dei tolleret. Atque haec, quatenus ad institutum praesens, de naturali et proprie dicta libertate disputata sufficiant».

accompagna un ripensamento della felicità individuale e politica. Certo, Hobbes radicalizza in senso spesso unilaterale, alcune tesi del volontarismo etico medievale, ma la cornice all'interno della quale si situa è largamente debitrice di quella tendenza. Come del resto, lo stesso vale, ma è stato già mostrato in altri studi, per il volontarismo teologico.

 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 817-832
ISSN: 1825-5167

INTENTIONS, COLLATERAL DAMAGE AND INDIFFERENCE TO HUMAN LIFE

MATEJ SUŠNIK
Institute of Philosophy
University of Zagreb (Croatia)
matej@ifzg.hr

ABSTRACT
In this paper, I discuss a possible moral difference between terrorism and war. The standard approach to this question relies on the doctrine of double effect (DDE). The DDE advocates believe that it matters morally whether certain harm is intentionally caused or whether it merely occurs as a foreseen but unintended side effect. I suggest that the DDE does not answer the question and that the moral difference between terrorism and war cannot be adequately captured as long as one focuses on moral justification or permissibility. The critical difference, it is claimed, is not that war is sometimes morally right or permissible, but that terrorism and war do not display the same attitude toward innocent people. The distinction between permissibility and blameworthiness also enables us to see why some wars, such as those covered by the name "war on terror", should be morally distinguished from terrorism.

KEYWORDS
Blameworthiness, intention, negligence, permissibility, recklessness, terrorism, war.

1. INTRODUCTION

Terrorism and war appear morally different, but it is sometimes argued that this appearance is deceiving. Once it is acknowledged that the loss of innocent lives is an indispensable part of every war and that the harm done to civilians in military conflict often far exceeds the harm caused by terrorist attacks, it is no longer obvious how to account for the difference between terrorism and war. Stephen Nathanson nicely summarizes the problem:

> [M]ost people who condemn terrorist acts believe that war is often morally justifiable even though wars generally result in many more deaths of innocent people than terrorist attacks. But how can this be? How can terrorism be wrong because it kills innocent people while war, which generally kills more innocent people, may sometimes be right? (Nathanson 2010: 4)

Since the most common way to tackle this problem is to appeal to the doctrine of double effect (DDE), I briefly examine this doctrine in section 2 and consider an important objection often raised against it. I discuss how the advocates of the DDE respond to that objection, but I ultimately conclude that their response fails and that the DDE does not capture the moral difference between terrorism and war. In section 3, it is suggested that the moral distinction between terrorism and war cannot be drawn as long as one focuses only on moral justification or permissibility. The key difference, I argue, is not that war is sometimes right and terrorism always wrong, but that terrorism and war do not display the same attitude toward innocent people. In section 4, I further develop this proposal. More specifically, I appeal to the distinction between permissibility and blameworthiness (culpability) to undermine the suggestion, advocated by some authors, that there is no relevant moral difference between "war on terrorism" and terrorism. In section 5, I briefly outline the key points defended in the paper and give some concluding remarks.

2. RECKLESSNESS, NEGLIGENCE AND THE DDE

While it is undeniable that war "generally kills more innocent people" than terrorism, that still does not establish that war is morally worse than terrorism. The crucial moral difference, it is usually claimed, is that terrorists kill innocent people intentionally.[1] But when innocent people are killed in war, they are usually killed unintentionally as a side effect of legitimate military action. Hence, the claim is that in certain cases it could be morally permissible to perform an action that will have a harmful effect provided one does not intend to bring about that harm, but only foresees its unfortunate occurrence. Combatants usually intend to achieve a legitimate military aim or gain some military advantage, and the death of civilians, if it occurs, is an unfortunate event or 'collateral damage'.

But this is not the whole story. Those who emphasize that terrorism and war cannot be morally distinguished without appealing to intentions do not say that one can justify killing innocent people merely by not intending to kill them. This is why the absence of a bad intention is only necessary, and not a sufficient condition for moral permissibility. Although intentions play a significant role in the process of justification, causing collateral damage, according to this view, is not morally permissible unless certain other conditions are met as well.

To justify collateral damage, one often invokes the doctrine of double effect (DDE).[2] The DDE says that in some instances it is morally permissible to perform an action that will have a harmful effect provided (1) the action itself is not wrong; (2) one does not intend to bring about that harm either as an end or as a means;

[1] In this paper, I assume the distinction between combatants and noncombatants.

[2] For example, see Frowe (2016: 147).

and (3) that the harm caused is not out of proportion to the positive value that the action brings about (cf. Timmons 2013: 83). It is only if all these conditions are fulfilled that performing that action becomes morally permissible.

However, the DDE faces difficulties. It is often argued that intentions as mental states cannot affect moral permissibility and that the doctrine involving such claim leads to some absurd results.[3] Similarly, it is sometimes pointed out that—due to its inability to accurately differentiate between intention and foresight—the DDE can justify conduct that most people would find impermissible. Since there are many serious attempts in the literature to meet these difficulties[4], it is still an open question whether they have any real force and to what extent (if any) they succeed in undermining this ethical theory.

For the purposes of my discussion, however, it is worth examining in more detail a somewhat different problem that the advocates of the DDE confront. The problem arises because it seems that in the circumstances of war satisfying DDE requirements is not sufficient to render a conduct morally permissible.

By way of illustration, let us consider how things usually stand when we consider 'normal' circumstances—those that do not arise in the context of war. In those circumstances we often try to minimize the damage that occurs as a side effect of our actions. For example, a dentist who is about to perform surgery will most likely give anesthesia to his patient to relieve him of pain. Assuming that the operation itself is not wrong, that the dentist does not have a bad intention, and that the surgery's expected outcome outweighs its negative aspects, one would still expect that the dentist will make sure that his patient is not in great pain. But suppose that it never occurs to the dentist that his patient should be given anesthesia, or perhaps it does occur to him, but he just does not care, so he decides to perform a surgery without anesthesia. If so, then although it might be true that the dentist is complying with the DDE, his behavior should nonetheless be considered negligent or reckless.

It might be replied that the dentist would in fact *not be* complying with the DDE. Performing surgery without anesthesia is permissible only if it cannot be performed in a less harmful way (for example, if anesthesia is not available in the given circumstances). This is why some authors (e.g, Kamm 2007: 93) note that the DDE should be supplemented with the following (necessity) condition:

(4) There is no less harmful way to bring about a good end.

However, the initial difficulty remains even if the DDE is supplemented in this way. David Rodin thinks of a case in which "a motorist ... drives across a crowded school yard to deliver a sick person to a hospital" (Rodin 2004: 764). Even if there is no other way to reach the hospital on time and the three previously mentioned requirements of the DDE are fulfilled, Rodin observes, "...if [the motorist] strikes

[3] See Thomson (1991).

[4] For instance, see Quinn (1989); FitzPatrick (2006); Nelkin and Rickless (2015).

and kills a child he will be held liable, in law and in morality, for manslaughter because of the *recklessness* of his actions" (Rodin 2004: 764 – italics added).

Rodin uses this example to show that acting in accordance with the DDE does not rule out culpable behavior. Satisfying the four conditions set by the DDE is still not sufficient to avoid the charge of recklessness. To avoid the recklessness charge, particularly in the circumstances in which harm is highly likely to occur (such as war, for example), one should demonstrate a sufficient level of care in one's conduct. And this cannot be merely accomplished by satisfying the above mentioned conditions. Although the motorist cannot take any other route to the hospital and does not intend to strike a child, he certainly knows that the chances of that happening are very high. This is why he will not be absolved from culpability if his action results in harm.

Applying this to the context of war, since the DDE does not require an agent to take measures to reduce harm in given circumstances, the result is that combatants are granted moral permission to act recklessly and negligently, and in this way the number of civilian casualties in military conflict can become so large that—when considering things from that perspective—it is difficult to see how terrorism could be morally worse than war.

This insight leads Rodin to argue that, under the given circumstances, the term 'terrorism' should be equally applied to intentional, reckless and negligent harm to civilians (see Rodin 2004: 755). But many other philosophers and public intellectuals have raised similar concerns regarding the notion of collateral damage and, in one form or another, endorsed the view that terrorism and war are often morally indistinguishable.[5]

Perhaps the charge that the DDE allows reckless and negligent behavior could be avoided by expanding the doctrine with yet another condition. Thus, one may adopt Michael Walzer's proposal that the DDE also requires an agent to:

> (5) "seek to minimize [collateral damage], accepting costs to himself" (Walzer 1977: 155).

As Walzer says, an agent needs to have a "double intention"—not only to achieve a good end, but also to minimize the harmful side-effects as much as possible. It is only if this last condition is also met that action becomes justified and hence morally permissible.

While it may be questioned what exactly is involved in minimizing the harmful side-effects, we may set this worry aside and examine whether Walzer's suggestion avoids the problem that the advocates of the DDE confront. For the sake of argument, let us assume that there is only one way, namely *F*, in which a legitimate

[5] See, e.g. Held (2003: 61-2); McPherson (2007: 534-39); Honderich (2002: 98-9); Fisk (2008: 355-57); Lichtenberg (1994: 363); Zinn (2001). Most of these people, Rodin included, discuss the notion of collateral damage in the context of "war on terrorism".

military goal *M* can be achieved, and that *F* involves risking the lives of five innocent people as a side-effect. Assume further that all the previously mentioned conditions prescribed by the DDE are fulfilled and that an army pilot *S* is indeed seeking to minimize the risk to these five people while intending to achieve *M*. According to Walzer's version of the DDE, therefore, it is permissible for *S* to do *F*.

But it is difficult to understand how *S*'s attempt to minimize the risk of harm to the five innocent people affects the moral permissibility of *F*. Simply put, if *F* is the *only way* to achieve *M*, then *S* cannot achieve *M* in a way that would be less risky to the five people. It seems then that *S*'s attempt to reduce the risk of harm is not necessary to make *F* morally permissible, but instead that doing *F* is morally permissible (if it is permissible at all) irrespective of *S*'s search for another option.[6] This establishes that Walzer's amendment to the DDE is not doing any work and should at best be considered redundant.[7]

Perhaps the proponents of the DDE can easily avoid this worry. But even they can, it seems to me, we should still be careful not to overestimate DDE's significance for our initial problem—namely the problem of moral difference between terrorism and war.

First, even if collateral damage can be justified by invoking the DDE, one could say, that would not establish that war and terrorism are morally different, but only that *just* war and terrorism are morally different.[8] Following Jeff McMahan (2005), it could be pointed out that unjust combatants cannot appeal to the DDE because they cannot meet the proportionality condition that requires that its good effects outweigh bad side-effects of one's action. Those combatants who fight on the unjust side in war, McMahan says, cannot meet this requirement because their actions lack a just cause and hence cannot have good effects in the first place (McMahan 2005: 6). If correct, this view shows that invoking the DDE could only be a partial solution and that it still remains to be answered whether there are any moral differences between unjust war and terrorism.[9]

Second, invoking the DDE cannot be the whole story even if one rejects McMahan's argument about unjust combatants not being able to satisfy the proportionality requirement. The problem is that even if causing collateral damage is sometimes morally justified, it could be argued that terrorism is also sometimes

[6] For a similar argument, see Zohar (2007).

[7] This is not to say that *S*s effort to find *G* does not count morally. While it does not affect moral permissibility, it does affect moral culpability or blameworthiness. Or so I will argue.

[8] Thus, Jeff McMahan argues that "[t]he most important intuitions that the relevance of intention to permissibility has traditionally been invoked to defend are ... those concerned with the difference between *just* war and terrorism" (McMahan 2009a: 359 – italics added).

[9] It should be mentioned that McMahan agrees that unjust war and terrorism are morally different. He discusses this issue in 2009b. Although his discussion contains important insights, my aim is to examine whether it is possible to provide a single and unique account of the moral difference between war and terrorism, namely an account that applies both to just and unjust wars.

morally justified. Granted, it may be highly controversial to take the latter view. Still, some argue that it is equally controversial to take the view according to which terrorism could never be morally justified. As Uwe Steinhoff (2004) remarks, while the burden of proof is carried by those who argue that some countervailing reasons could sometimes outweigh the protection of civilians, the burden of proof is also carried by those who are absolutists with regards to the rights of the innocents (Steinhoff 2004: 106).[10]

3. PERMISSIBILITY AND BLAMEWORTHINESS

If the above remarks are on the right track, it yet remains to be explained how one's intention to reduce the risk of collateral damage affects moral permissibility. In the absence of such an explanation, it is not clear why the DDE would require that an agent forms such an intention in the first place. Furthermore, as mentioned above, even if it turns out that intentions are relevant for moral permissibility, it is still open to doubt whether that would establish a moral distinction between terrorism and war.

Nevertheless, to say that one's intention to minimize the risk of collateral damage does not affect permissibility is not to say that it is morally irrelevant whether one has that intention. There is a sense in which an army pilot who does *F* in a way that he believes would minimize the risk of collateral damage still performs a morally different action than a pilot who does *F* without showing any concern for civilian casualties. In other words, it seems that one's intention to minimize civilian casualties has a certain moral weight. While it may not affect permissibility, the presence of such an intention may be relevant for determining the extent to which one's action is morally culpable or blameworthy.

We indeed tend to blame those who fail to take necessary precautions if they engage in conduct that exposes others to the risk of harm. But our ascription of blame is sometimes independent of the question of whether such conduct is permissible. Not everyone seems to recognize this. According to Colm McKeogh, for example,

> for there to be a difference in moral culpability between the collateral killing of civilians and the direct killing of civilians, there must be a difference in the probability and magnitude of civilian deaths between the two cases. If the same number of

[10] Fortunately, we do not need to resolve this issue here. And that is because, as we will see soon, the question whether terrorism and war should be equally *condemned* can be examined independently of the question whether terrorism is always *wrong* and war sometimes *right*.

> civilians is just as likely to die in both cases, then the wrongness of the acts is the same. (McKeogh 2002: 170)[11]

But even if "the *wrongness* of the acts is the same", that does not mean that there could be no difference in moral culpability. An act is either right or wrong, permissible or impermissible, but moral culpability comes in degrees. Even if two people perform the same (morally wrong) act, their acts might still not be equally blameworthy. An action could be blameworthy not because it is morally impermissible (or wrong), but because it is performed with a culpable state of mind. In that regard, malicious, reckless and negligent behavior can be subject to blame because it signals a morally unacceptable attitude toward others' well-being.[12]

The claim that moral permissibility and blameworthiness may sometimes diverge can be supported with an example. Let us assume that one mistakenly takes another person's umbrella when leaving a restaurant. In that case, it could be argued that one's action is impermissible, but that it is not blameworthy, or at least that it is not blameworthy to the extent it would have been had one taken another person's umbrella intentionally (see Graham 2010: 94; Ferzan 2005: 713-14). The crucial point is that we sometimes do not condemn people even if their actions are impermissible. This is because it is sometimes much more important whether an agent has acted with a "guilty mind".[13]

Maybe all this suggests that the question of moral difference between terrorism and war should be approached somewhat differently. Perhaps we should set aside the question of whether collateral damage is sometimes morally justified and instead focus on the issue of blameworthiness. Maybe the difference between terrorism and war needs to be captured in terms of culpability or blameworthiness, not permissibility. It could be that our condemnation of terrorism is not grounded in the issue of justification at all, but rather in the attitude that terrorist actions display. It could be that the reason why we usually condemn terrorist acts is that there is something in the very nature of those acts that makes them morally repugnant, and it may turn out that this feature of terrorism cannot be fully captured if one focuses only on the notion of permissibility. Maybe the point is *not* that war—unlike terrorism—is sometimes right, but that acts of war and terrorist acts do not signal the same attitude towards innocent people and are thus not equally blameworthy. It is this suggestion that I would like to explore.

[11] See also Lichtenberg (1994).

[12] Cf. Scanlon (2008: 123-28); Rosen (2002: 73).

[13] Perhaps more controversially, one may also claim that an agent can be held culpable despite acting permissibly. To modify slightly an example by Judith Thomson (1991: 293-94), suppose A intends to kill B by poisoning B's drink. However, A is not aware that the stuff he possesses is not a poison but medicine that can cure B's illness. Thus, if A puts this stuff in B's drink, the argument might go, A can be held culpable even though his action is permissible. For criticism of this example, see McMahan (2009a: 352-54).

Perhaps one could reply that separating permissibility and blameworthiness in this way cannot help us to make any significant progress concerning the distinction between terrorism and war. It might be argued, for example, that some terrorists may even take steps to ensure that the harm they plan to cause is not excessive in relation to the end they intend to achieve. Thus, Helen Frowe thinks of a terrorist who "chooses to attack at night in order to avoid killing any more people than necessary to achieve his goal of terrorising the munitions works" (Frowe 2016: 150). Why not say that such a terrorist also expresses concern for innocent lives?

While it should be conceded that the possibility of there being such a terrorist cannot be entirely ruled out, Frowe's scenario is not plausible. Briefly, that is not a behavior that we have reason to expect from terrorists. Although defining terrorism is not an easy task, as McMahan points out, "virtually everyone agrees that [it] involves intended harm to innocents" (McMahan 2009: 360). In light of that, to argue that even a terrorist may be willing to carry out his mission with the attempt to reduce the number of civilian casualties is to assume that the terrorist acts in a way that goes against the very logic of terrorism. It just does not make much sense to assume that people who kill innocents in order to spread as much fear as possible would decide to be restrained in their killing of innocents.

But why would one think that the morally unacceptable attitude toward the well-being of others is displayed only by terrorist acts and not by some acts of war? As Rodin argues, reckless and negligent killings in war are "*morally culpable to the same degree* and for the same reasons that typical acts of terrorism are culpable" (Rodin 2004: 769 – italics added). Hence, people who share Rodin's view might point to some specific acts of war—such as those performed within the so-called "war on terror"—and say that insensitivity toward innocent people displayed by such acts is no different than the one displayed by terrorist attacks.

In the following section, I will argue against that view. As I will suggest, those who claim that some acts of war (i.e., those that were carried out within the "war on terror") belong in the same moral category as terrorist acts do not provide compelling reasons in favor of such moral assessment. More precisely, I will not argue that those acts of war do not exhibit a morally unacceptable attitude toward the lives of innocent people, but only that the reasons which allegedly support that view are much weaker than they appear to be.

4. THE ATTITUDE OF INDIFFERENCE

The following argument summarizes our discussion:

(1) Recklessly and negligently harming innocent people is part of every war.

(2) Recklessly and negligently harming innocent people in war is morally on a par with terrorism.

(3) Therefore, every war consists of actions that are morally on a par with terrorism.

Let us first examine (1). Recklessness and negligence are common phenomena, present in everyday life, so it is difficult to believe that reckless and negligent harm does not exist in warfare. Nevertheless, it is important to specify conditions under which military conduct should be considered reckless or negligent. If innocent people die as a result of some military operation, is that a reason to think that such operation was recklessly or negligently performed? Should we be inclined to think that a military operation is culpably performed if it harms innocent people?

Those who argue that some military operations are reckless or negligent and hence no different than terrorism sometimes seem to support this assessment by pointing to the bad outcomes those actions bring about. This can be seen in the following assertion by Rodin: "[W]hen noncombatant fatalities are caused as the unintended but foreseen side effect of bombardment, this must raise serious questions of culpable negligence or recklessness" (Rodin 2004: 766). It is important to notice that Rodin says only that unintended civilian casualties "*raise serious questions* of culpable negligence and recklessness", not that noncombatant fatalities demonstrate that the conduct in question was in fact reckless or negligent. However, some parts of his discussion suggest that he is inclined to accept the latter view in some instances. For example, he often appeals to the number of civilians killed in military operations carried out by such powers as the United States, NATO and Israel (cf 2004: 752, 762, 771) and then writes that "[o]ne will be inclined to view many of the noncombatant casualties caused in the course of military operations (including those of Western nations) *to be* culpably reckless or negligent" (Rodin 2004: 767 – italics added). But why does Rodin think that one will have this inclination?

He would presumably answer that civilian death tolls indicate that some of these operations have been conducted with insufficient care for civilian lives. And exposing noncombatants to a high risk of harm, he would add, is not justifiable unless they have freely and autonomously decided to bear it, or unless they have made themselves susceptible to such harm through their actions. To expose noncombatants to a high risk of harm is to violate their rights. For this reason, Rodin would say, civilian casualties can sometimes be a sure sign of reckless or negligent behavior (see Rodin 2004: 764-769).

To evaluate Rodin's argument, let us focus on the concept of recklessness as the American Model Penal Code defines it. To say that one is reckless is to say that one "consciously disregards a substantial and unjustifiable risk" that one's conduct may bring about the bad result.[14] However, as Nathanson (2010) correctly points out, there are two different ways in which the phrase "consciously disregards" can

[14] American Law Institute, *Model Penal Code*, sec. 2.02(2)(c).

be understood: if what counts is *the mere performance* of the action that is likely to cause harm, then it trivially follows that the one who performs the action in question consciously disregards the risk. But things may change if we consider the broader context. For example, if one makes a serious *effort to reduce the risk of harm* prior to the action taken, it is no longer clear that one consciously disregards the risk (Nathanson 2010: 270). Relying on Nathanson's observation, it is possible to argue that the reasons Rodin invokes to establish that certain military actions are performed recklessly do not support such assessment at all.

Let us return to the previously mentioned example of an army pilot *S* who performs the action *F* and thus risks the lives of five innocent people. We may set aside whether *F* is morally right or wrong and focus on whether *S* acts recklessly. Consider two different ways in which *S* performs *F*:

> (a) *S* performs *F* without even trying to minimize the risk of causing harm to the five innocent people.
>
> (b) *S* performs *F* after making a considerable effort to reduce the risk of harm to the five innocent people.

Now, *S* either acts recklessly in both (a) and (b), or he acts recklessly only in (a). But it should be emphasized that, contrary to what Rodin seems to be suggesting, neither account entails that the actual outcome of the action determines reckless behavior. Namely, if what counts is the mere performance of the action (say, dropping the bomb), *S* in both cases acts recklessly irrespective of whether the harm actually occurs (i.e., regardless of whether the bomb actually kills the five). If conduct is reckless, it is reckless even if by sheer luck things do not turn out badly. Similarly, if we say that *S* in (b) does not act recklessly because he takes the necessary precautions prior to the action, we will not withdraw that judgment if the harm actually does occur. The occurrence of a bad outcome, therefore, is not sufficient evidence that *S* consciously disregarded the risk and behaved recklessly.[15] As already noted, since recklessness and negligence are common phenomena, there are good reasons to think that reckless and negligent harm of innocent people occurs in every war. But to firmly establish that a military operation has been recklessly or negligently conducted, it is not enough to point out that it has resulted in the high number of noncombatant casualties.[16]

[15] The same applies to negligence. A negligent person acts without being aware that his conduct is (potentially) harmful. The reason why negligence is considered culpable is that a person should be aware of the harm his conduct may cause. But again, if the harm actually occurs as a result of his conduct, that is not yet evidence that this person acted negligently. For the argument that negligence is in fact *not* culpable, see L. Alexander and K. Ferzan (2009: 69-85).

[16] Here I side with those authors who argue that the results of our actions do not affect blameworthiness at all. For example, see L. Alexander and K. Ferzan (2009: 171-196).

Furthermore, even if it is true that some military operations (such as those carried out by Western nations) *unjustifiably* exposed noncombatants to the risk of harm, that does not yet mean that they were performed recklessly. Exposing others to "unjustifiable" risk is only a necessary but not a sufficient condition for recklessness. What remains open is whether those who engaged in such military actions "consciously disregarded" the risk they imposed upon noncombatants. Namely, does one act recklessly if one exposes others to unjustifiable risk of harm but makes a considerable effort to reduce that risk? Consider a hypothetical case in which one reasonably, but falsely, believes that the risk imposed by one's conduct is justifiable. And if one also makes a significant effort to minimize that risk, should we say that one acts recklessly? It is far from evident that we should say that.

Returning to the distinction between permissibility and blameworthiness (culpability) introduced in the previous section, it may as well turn out that it is not *morally permissible* to expose noncombatants to a high risk of harm. To that extent, Rodin is right to point out that noncombatants have rights not to be harmed and that it is difficult to justify the risks military operations impose on them. Whether such imposition of risk is morally permissible, it seems to me, ultimately depends on which account of the moral permissibility is correct. But even if it is not morally permissible to expose noncombatants to a high risk of harm, that does not mean that such imposition cannot be performed in a nonculpable way.[17] As long as we are careful to distinguish between permissibility and blameworthiness (culpability), such possibility cannot be ruled out.

Another way in which one may respond to the above argument is to cast doubt on (2). If some acts of war are reckless or negligent, does that mean that they should also be described as acts of terrorism?

One could support an affirmative answer by appealing to what seems to be an analogous case in law. Since terrorism, as it is usually conceived, involves intentional killings of innocent people[18], it is not surprising that it is often compared to murder. While law commonly distinguishes between murder, manslaughter and negligent homicide—and this classification essentially depends on the culpable state with which a criminal act is performed—it is important to notice that one does not need to intentionally cause death in order to be liable for murder. Although the degree

[17] Now, just as it seems possible to act nonculpably while imposing an unjustifiable risk to others, it also seems possible to act culpably while imposing a justifiable risk to others. Consider the following example. Suppose that some military operation justifiably imposes a high risk of harm on two innocent people in the course of preventing a massive terrorist attack. But suppose further that a combatant *S*, who acts as a member of the team preventing the attack, somehow ensured not to have the option of preventing a terrorist attack without risking collateral damage (e.g., *S* deliberately destroyed the weapon that enables one to accurately discriminate between terrorists and civilians). Although the risk imposed on the civilians is justifiable, it might be argued, the military operation is still carried out in a culpable way.

[18] Cf. McMahan (2009: 360).

of culpability usually varies depending on whether death is caused intentionally, recklessly or negligently, there are circumstances where this is not the case. Sometimes the legal and moral culpability for reckless and intentional killings is the same.

These circumstances are also mentioned in the American Model Penal Code, which states that homicide can qualify as murder if it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life".[19] Needless to say, it will sometimes be a matter of dispute whether one's behavior manifests such indifference, but that does not mean that there are no cases for which it is more than clear that they fall under that description. For example, a person who starts shooting into a room full of people may not intend to harm anyone, but since the chances of someone getting harmed in such circumstances are extremely high, it seems safe to say that the value of human life is of no great concern to this individual (cf. Husak 1994: 65).

The circumstances of war, however, are such that many military operations are like shooting into a room full of people. And if so, then being reckless in war is not much different from being extremely indifferent to the value of human life. If terrorism is like murder, and if one can sometimes be liable for murder even when death occurs as a result of mere recklessness, then it is plausible to think that reckless harm in the circumstances of war can also qualify as terrorism.[20]

To respond to this argument, it should be noted that there are two ways in which we may think about culpable mental states in the context of war. We may either attribute such mental states to (a) an individual combatant, or (b) to a collective of which an individual combatant is part. As mentioned before, there are no good reasons to believe that states such as recklessness and negligence do not exist in warfare, especially at the individual level. It would be unreasonable to deny that the acts of some individual combatants can indeed display indifference to the value of human life. But whether such indifference can be attributed to a military as a whole seems to be an entirely different matter.

[19] American Law Institute, *Model Penal Code*, sec. 210.2(1)(b).

[20] Noam Chomsky is an excellent example of someone who believes that some allegedly reckless or negligent acts of war clearly display the attitude of extreme indifference to the value of human life and that such acts are often even more repulsive than murder. For example, his view on Clinton's decision to bomb a pharmaceutical plant in Sudan in 1998 is clearly expressed in his discussion with Sam Harris. Chomsky writes: "[I]t just didn't matter if lots of people are killed in a poor African country, just as we don't care if we kill ants when we walk down the street. On moral grounds, that is arguably even worse than murder, which at least recognizes that the victim is human. [...] There was clear negligence – the fate of probably tens of thousands of African victims did not matter" (https://samharris.org/the-limits-of-discourse/). It remains unclear, however, why Chomsky is so sure that the fate of these people "did not matter". If his assessment is exclusively based on the number of civilian casualties, then, as suggested above, there is a reason to take it with a grain of salt.

The obvious problem here is that a collective cannot have mental states, so thinking of a military as being indifferent to the lives of others, it might be pointed out, does not make much sense. And taking into account the suggestion that our practice of blame is essentially dependent on the attitudes manifested by one's behavior, this further raises a question of whether blaming the military as a whole could ever be appropriate. But this would be too quick. As Thomas Scanlon argues, a collective can be the object of blame if it is organized in a way that makes it "responsive to reasons", and a collective is responsive to reasons only if there are procedures that determine its conduct (Scanlon 2008: 162-65).

This surely applies to military forces. Military forces can be the object of blame because of their internal structure: since their actions are guided by formal rules, it seems that such collectives can indeed be responsive to different kinds of considerations. And blame becomes appropriate when some of these considerations—such as well-being of innocent people—are not sufficiently taken into account.

Arguably, whether one takes such considerations into account is typically manifested by what one does, but some actions cannot properly be understood unless they are placed in a wider context. For example, actions performed on the battlefield are the final product of various human interactions that take place on many different levels. Zohar strongly emphasizes this point when he observes that it is a mistake to think of combatants as "individual agent[s]" because their "individual contributions can only be understood in the context of collective action" (Zohar 2007: 737-40). And it is only in the context of collective action, he argues, that the search for the differences between terrorism and war makes sense (Zohar 2007: 741).

Following up on Zohar's proposal, we indeed find that the well-being of civilians plays a key role in determining the conduct of the military as a whole. Military conduct is subject to various rules and constraints specifically established to reduce harm to the civilian population. Since the risk of harm to which innocent people are exposed in the circumstances of war is extremely high, the existence of such rules and constraints shows that the military as a whole is sensitive to the value of human life.

It is for this reason that we may question the second premise of the above argument. Even if, due to recklessness or negligence, a military action causes harm to innocent civilians, it is wrong to think of such conduct as being morally on a par with terrorism. Namely, such reckless and negligent conduct still takes place within the collective that imposes all sorts of measures to protect civilian lives. Of course, that does not mean that reckless or negligent conduct, when it does occur, should be exempt from moral criticism, but it does mean that it is not appropriate to put it in the same moral category with terrorism. While these measures, embodied in the Laws of Armed Conflict, are not imposed to prevent actions under highly risky

circumstances, they are imposed to reduce the risk of collateral damage as much as possible. The conduct of terrorist organizations, obviously, is not constrained by similar measures. Hence, once this broader view is taken, one realizes that we should not equally condemn harmful conduct that occurs within a collective aiming to minimize harm to innocent people and harmful conduct that occurs within a collective gathered around the plan to inflict harm on innocent people.

5. FINAL REMARKS

I have suggested that the best way to approach the question of moral difference between terrorism and war is to avoid moral justification altogether and focus instead on the attitude that terrorist actions display. Our condemnation of terrorism is not grounded in the thought that terrorism, unlike war, is never morally justified, but in the morally repugnant attitude that terrorist actions manifest toward human lives. Even if acts of war cause more civilian casualties than terrorist attacks, I have claimed, that is not sufficient evidence that they are performed recklessly or negligently. Furthermore, the claim that such acts manifest indifference to the value of human life becomes less plausible when one considers them through the lens of collective agency. In the second part of the paper, I have applied this approach to evaluate the view, shared by some contemporary authors, that certain military actions carried out within the so-called "war on terror" are morally on a par with terrorism. I have claimed that the arguments invoked in defense of that view are not as strong as they may appear. My aim in this part of the discussion was modest: I did not argue in favor of the strong claim that those actions *are not* morally on a par with terrorist actions, but rather that the view that they *are* morally on a par with terrorist actions is not adequately supported.

All that being said, one may reasonably wonder whether the moral difference between terrorism and war can properly be accounted for even if one takes the above approach and sets aside the problem of moral justification. Namely, it could be assumed, following Walzer, that "[i]n rare and narrowly circumscribed cases, it may be possible, not to justify, but to find excuses for terrorism" (Walzer 2006: 7). Although Walzer does not elaborate further on the distinction between "justification" and "excuse", he probably has in mind something like this: to say that terrorism can sometimes be excused but not justified is to say that there are circumstances under which terrorism can cease to be blameworthy but that there are no circumstances under which it can cease to be wrong.

But then, does that mean that there are circumstances in which terrorist acts do not manifest indifference to the value of human life? And if so, does that further mean that terrorism and war are morally close to each other after all? One way to approach these questions is to think about what kind of circumstances could those possibly be. In an earlier work he describes such circumstances as those in which

"a threat to human values [is] so radical that its imminence would surely constitute a supreme emergency" (Walzer 1977: 253). He also believes that the Nazis in fact posed such threat at the beginning of World War II and that the terror bombing of German cities that took place may indeed have been the only available response (see Walzer 1977: 255-263).[21]

However, the reason why it is reasonable to say that terrorism in such circumstances can be excused (and hence not subject to blame) is that the options one faces are limited. In such circumstances, it might be argued, the attitude of indifference can be attributed to one's conduct *no matter what one does*. In other words, should we not say that one is indifferent to the value of human life not only if one deliberately harms innocent people but also if one allows mass atrocities to take place when one could have easily prevented them? But these are the circumstances that terrorists, in the usual sense of that term, never face. Their actions are not forced by the unfortunate circumstances. On the contrary, they choose to be indifferent.[22]

ACKNOWLEDGMENTS

I would like to thank Neven Sesardić for helpful comments. I am also grateful to the two anonymous reviewers of *Etica & Politica* for their valuable and insightful suggestions. This work was supported by the Croatian Science Foundation under grant HRZZ-UIP-2017-05-4308.

REFERENCES

Alexander, L. and Ferzan, K. K., with Morse, S. 2009. *Crime and Culpability: A Theory of Criminal Law*. Cambridge: Cambridge University Press.

American Law Institute. 1962. *Model Penal Code*. Philadelphia: American Law Institute.

Coady, C. A. J. 2004. "Terrorism, Morality, and Supreme Emergency" In I. Primoratz (Ed.), *Terrorism: The Philosophical Issues*. Houndsmills: Palgrave Macmillan, 80-96.

Ferzan, K. K. 2005. "Justifying Self-Defense", *Law and Philosophy* 24, 711-749.

Fisk, R. 2008. *The Age of the Warrior*. Fourth Estate: New York.

FitzPatrick, W. J. 2006. "The Intend/Foresee Distinction and the Problem of 'Closeness'", *Philosophical Studies* 128, 585-617.

[21] Walzer's "supreme emergency" argument is criticized by Coady 2004.

[22] Compare the following statement by Walzer: "Terror is a strategy that has to be chosen from a fairly wide range of possible strategies. It is always a choice" (Walzer 2006: 7).

Frowe, H. 2016. *The Ethics of War and Peace: An Introduction*. London: Routledge.

Graham, P. A. 2010. "In Defense of Objectivism about Moral Obligation", *Ethics* 121, 88-115.

Harris, S. 2015. "The Limits of Discourse: As Demonstrated by Sam Harris and Noam Chomsky", Blog. https://samharris.org/the-limits-of-discourse/.

Held, V. 2004. "Terrorism and War", *The Journal of Ethics* 8, 59-75.

Honderich, T. 2002. *After the terror*. Edinburgh: Edinburgh University Press.

Husak, D. N. 1994. "Is Drunk Driving a Serious Offense?", *Philosophy & Public Affairs* 23(1), 52-73.

Kamm, F. 2007. "The Doctrines of Double and Triple Effect and Why a Rational Agent Need Not Intend the Means to His End" in *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*. Oxford: Oxford University Press, 48-77.

Lichtenberg, J. 1994. "War, Innocence, and the Doctrine of Double Effect", *Philosophical Studies* 74, 347-368.

McKeogh, C. 2002. *Innocent Civilians: The Morality of Killing in War*. New York: Palgrave.

McMahan, J. 2005. "Just Cause for War", *Ethics and International Affairs* 19, 1-21.

McMahan, J. 2009a. "Intention, Permissibility, Terrorism, and War", *Philosophical Perspectives* 23, 345-372.

McMahan, J. 2009b. "War, terrorism and the 'war on terror,'" In C. Miller (Ed.), *War on terror*. Manchester and New York: Manchester University Press, 159-184.

McPherson, L. K. 2007. "Is Terrorism Distinctively Wrong?", *Ethics* 117(3), 524-546.

Nathanson, S. 2010. *Terrorism and the Ethics of War*. Cambridge: Cambridge University Press.

Nelkin, D. K and Rickless, S. C. 2015. "So Close, Yet So Far: Why Solutions to the Closeness Problem for the Doctrine of Double Effect Fall Short", *Noûs* 49, 376-409.

Quinn, W. S. 1989. "Actions, Intentions, and Consequences: The Doctrine of Double Effect", *Philosophy and Public Affairs* 18, 334-51.

Rodin, D. 2004. "Terrorism without Intention", *Ethics* 114(4), 752-771.

Rosen, G. 2002. "Culpability and Ignorance", *Proceedings of the Aristotelian Society* 103, 61-84.

Scanlon, T. 2008. *Moral Dimensions: Permissibility, Meaning, Blame*. Cambridge, MA: Harvard University Press.

Steinhoff, U. 2004. "How Can Terrorism Be Justified?" In I. Primoratz (Ed.), *Terrorism: The Philosophical Issues*. Houndsmills: Palgrave Macmillan, 97-109.

Thomson, J. J. 1991. "Self-Defense", *Philosophy and Public Affairs* 20, 283-310.

Timmons, M. 2013. *Moral Theory: An Introduction*. Lanham, MD: Rowman & Littlefield.

Walzer, M. 1977. *Just and Unjust Wars*. New York: Basic Books.

Walzer, M. 2006. "Terrorism and Just War", *Philosophia* 34, 3-12.

Zinn, H. 2001. "A Just Cause, Not a Just War", *The Progressive*. https://progressive.org/magazine/just-cause-just-war-Zinn/.

Zohar, N. J. 2007. "Double Effect and Double Intention: A Collectivist Perspective", *Israel Law Review* 40(3), 730-742.

833 *Etica & Politica / Ethics & Politics*, XXII, 2020, 3, pp. 833-848
ISSN: 1825-5167

POSTCOLONIAL THINKING AND MODES OF BEING-WITH OTHERS

MINKA WOERMANN
Department of Philosophy
Stellenbosch University (South Africa)
minka@sun.ac.za

ABSTRACT
This paper seeks to interrogate the mode of relationality – or Being-with Others – that supports a responsible postcolonial thinking. The paper draws from both the Western and African philosophical traditions. Three modes of Being-with Others are identified at the hand of Martin Heidegger's and Jean-Luc Nancy's work, namely the exterior mode, in which we simply exist alongside one another; the interior mode, wherein our identities are assimilated by a historically-constituted community; and, the non-essentialised mode, wherein our identities are open to Others. The paper critically explores African Humanism and African Communitarian in order to demonstrate how – in practice – these views often lend support to the exterior mode and the interior mode respectively. As an alternative to these views, a reading of African philosophy that foregrounds the Political as first philosophy is given. It is demonstrated how this reading not only demands a non-essentialised mode of Being-with Others (which will be motivated as the preferred relational mode), but also leads to a view of postcoloniality that is premised on the inherent openness of being and community.

KEYWORDS
Postcoloniality, Ubuntu, Being-with, the Other, African Humanism/Communitarianism, the Political, Heidegger, Nancy.

INTRODUCTION

Postcolonial thinking is increasingly becoming an important avenue of research and debate. In a nutshell, postcolonial thinking challenges the hegemony of the Western perspective, which has long been assumed to be objective, neutral and universal. Other knowledge systems (such as for example African Philosophy) have, in turn, long been depicted as minor discourses that stand inferior to Western Philosophy. In short, Western Philosophy has developed as a closed system of knowledge. In challenging this standard picture, postcolonial thinking involves not only a critical interrogation of the substantive issues addressed in philosophy, but also of the status of philosophy as such.

In his essay, titled 'The right to philosophy from a cosmopolitan point of view', the post-structural philosopher, Jacques Derrida, argues that responsible thinking demands that we escape the dialectic of Eurocentricism and anti-Eurocentricism in contemplating the future of philosophy. Derrida (2002, p. 337) writes that '[t]here are other ways [*voies*] of philosophy than those of appropriation as expropriation ... Not only are there other ways of philosophy, but philosophy, if there is a such a thing, is the other way [*l'autre voie*].' Following from this, it stands to reason that responsible postcolonial thinking should neither entail a simple rejection of Western philosophy nor an uncritical assimilation of African philosophy, but should seek to overcome the dialectic between these two traditions, by reflecting on, and interrogating, 'the concrete conditions for respect and the extension of the right to philosophy' (p. 337).

This latter imperative constitutes the focus of this paper, and the subject matter that informs the investigation concerns different constitutions of subjectivity. Specifically, I am interested in how different conceptual modes of Being-with Others lead to different representations of subjectivity. Although the theoretical points explored hold implications for all forms of subjectivity, I use the current South African sociopolitical landscape as a frame for contextualising the theoretical discussion. My aim is to argue for a conception of (black) subjectivity that supports an interpretation of postcolonial thinking that affirms the openness of philosophy, as identified by Derrida.

The literature that will be covered in this paper draws from both the Western and African traditions. A hallmark of African (moral) philosophy is the recognition of Others in the constitution of a subject's identity. This is demonstrated in the popular Ubuntu aphorism, 'I am because we are, since we are therefore I am' (Ramose, 2002a, p. 230). A common interpretation of this aphorism is that of African Humanism, wherein our interrelatedness with Others informs the imperative to create harmonious relationships, characterised by goodwill, solidarity, friendship and love (Shutte, 2001; Metz, 2007). A second popular reading of the above aphorism is that of African Communitarianism, which supports the view that the '[t]he community ... makes[s], create[s], or produce[s] the individual' (Mbiti, 1969, p. 108), as well as provides the grounding for (moral) personhood (Menkiti, 2004).

The influential African philosopher, Thaddeus Metz (2018, p. 209), argues that – regardless of the interpretation followed – a distinct ontological difference between African philosophy and Western philosophy is that Western philosophers view the essence of a natural object as 'constituted by its intrinsic properties', whereas African philosophers 'account for a thing's essence by appeal to its relational properties.' Metz is an analytic philosopher, and thus largely equates Western philosophy with Anglo-American philosophy. However, and starting with Martin Heidegger, those working in continental philosophy have sought to resuscitate the original Greek reading of relationality as being-toward (another) (Gasché, 1999).

As a starting point to the analysis, I turn to Heidegger, as well as Jean-Luc Nancy's critical re-reading of Heidegger, to forward three accounts of being-with Others. I explore the implications of these accounts theoretically, before demonstrating these implications at the hand of critical readings of African Humanism and Communitarianism within the South African socio-political context. In conclusion, I motivate the preferred account of being-with Others (the Nancean account) at the hand of the (ethical) implications that this account holds. I do so with specific reference to post-colonial thinking, and the Derridean imperative of positioning philosophy differently.

THREE READINGS OF BEING-WITH OTHERS

Before exploring Heidegger's views on being-with Others, it is firstly necessary to contextualise his project briefly. The significance of his philosophy (with particular reference to *Being and Time*) is that he is the first contemporary philosopher in the Western tradition to accord ontological priority to the question of Being. Indeed, Heidegger criticises René Descartes' view that the cogito sum 'put[s] philosophy on a new and firm footing', since what Descartes leaves unexplored is an interrogation of 'the kind of Being which belongs to the res cogitans, or – more precisely – the *meaning of the Being of the* "*sum*"' (BT, 24, 46). Heidegger argues that Kant took over Descartes' ontological position in his transcendental logic, thereby further entrenching the West's neglect of the question of being.

Heidegger is of the opinion that humanism, as locked in by Cartesian subjectivism, 'underestimates man's unique position in the clearing of being' (Krell in BW, 1993, p. 215). Heidegger poses an ontic-ontological distinction between being (defined in terms of the facticity of existence) and Being (which constitutes the proper mode of being). He states that '[t]his entity which each of us is himself and which includes inquiring as one of the possibilities of its Being, we shall denote by the term "*Dasein*"' (BT, 7, 27).

Heidegger, moreover, defines *Dasein* as Being-in-the-world, which 'stands for a unitary phenomenon' (BT, 53, 78). Heidegger goes on to explain that 'Being-in is not a "property" which Dasein sometimes has and sometimes does not have, and *without* which it could *be* just as well as it could be with.' This means that we should not understand Being-in as a spatial relation, but as an ontological relation with world. Heidegger uses the term "dwelling" to capture the distinctive manner in which *Dasein* is in the world. Michael Wheeler (SEP, 2018) explains as follows: 'To dwell in a house is not merely to be inside it spatially ... Rather, it is to belong there, to have a familiar place there.' The world in which we dwell is familiar to us in that it presents itself as 'the structural whole of significant relationships that Dasein experiences – with tools, things of nature, and other human beings – as being-in-the-world' (Krell in BW, 2008, p. 141). Heidegger characterises our relation with

world as "ready-to-hand", which he contrasts with "present-at-hand". Ready-to-hand is our primordial mode of engaging with the things (equipment) that constitute our practical realities, whereas present-at-hand signifies the privative, Cartesian mode whereby 'the corporeal Thing' is primarily characterized as *res extensa* or world-stuff (BT, 97, 130). Thus, just as the sparrow knows itself pre-theoretically as a being who builds and dwells in nests, so too *Dasein* a priori knows itself through world.

However, and as mentioned in the Krell citation above, the world not only consists of equipment and things in nature, but also of other human beings. Moreover, the bridge between ready-to-hand equipment and Others is that we often recognise specific equipment as concerning the lives and life projects of Others, who, through their everyday activities, are beings like us in that they engage with the world as we do. In this regard, Heidegger writes that:

> The boat anchored at the shore is assigned in its Being-in-itself to an acquaintance who undertakes voyages with it; but even if it is a "boat which is strange to us", it still is indicative of Others. The Others who are thus "encountered" in a ready-to-hand, environmental context of equipment, are not somehow added on in thought to some Thing which is proximally just present-at-hand; such "Things" are encountered from out of the world in which they are ready-to-hand for Others – a world which is always mine too in advance (BT, 118, 154).

For Heidegger, the world which we share with Others is constituted by our historically-conditioned cultures (those with whom we share equipment, work, affairs, undertakings, and mishaps). Heidegger thus states that '[i]n so far as Dasein exists factically, it already encounters that which has been discovered within-the-world ... [that which has] *in every case, been incorporated into the history of the world*' (BT, 388, 440). Yet, Heidegger argues that this 'historiological disclosure of history' as facticity (BT, 392, 444; italicised in the original) constitutes an inauthentic mode of existence, insofar as the historicality of *Dasein* is not properly conceptualised. Heidegger uses the example of death to explain the difference between these two notions of history.

On the one hand, death is a simple fact that is constantly occurring in our publically-shared world. Moreover, Heidegger argues that the interpretation given to death in its everydayness is one in which 'death is understood as an indefinite something which, above all, must duly arrive from somewhere or other, but which is proximally *not yet present-at-hand* for oneself, and is therefore no threat' (BT, 253, 297). This notion is captured in the expression, "One dies". The "one" is therefore not a determinate Other, but a nobody, an anyone. This view constitutes the improper mode of being-towards-death, in that death remains an exterior experience, in which nothing is shared with the Other (Woermann, 2016). Nancy (2008, p. 9) explains as follows: 'each one remains either at the mercy of or opened to its singular fate: a unique fate insofar as it is one's own death, but a banal fate insofar as it is the common cessation of life.'

On the other hand, death becomes shared through the historicity and fate of a people. This constitutes the proper mode of being-towards-death, because the authentic *Dasein* '*hands* itself *down* to itself, free for death, in a possibility which it has inherited and yet has chosen' (BT, 384, 435). Heidegger goes on to explain as follows:

> But if fateful Dasein, as Being-in-the-world, exists essentially in Being-with Others, its historizing is a co-historizing and is determinative for its *destiny* [*Geschick*]. This is how we designate the historizing of the community, of the people. Destiny is not something that puts itself together out of individual fates, any more than Being-with-one-another can be conceived as the occurring together of several Subjects. Our fates have already been guided in advance, in our Being with one another in the same world and in our resoluteness for definite possibilities. Only in communication and in struggling does the power of destiny become free. Dasein's fateful destiny in and with its "generation" goes to make up the full authentic historicizing of Dasein (BT, 384-385, 436).

Nancy (2008 in Woermann, 2016, p. 143) further explains that the proper mode of death, that is the death of the People, is characterised by its non-everydayness, in that the People have been elevated to the level and the intensity of a destiny: being-towards-death no longer concerns a sole existent's ultimate possibility, but is that through which *history* happens. The people thus present the proper mode of dying, since death is the '*common* of a *community*' (Nancy, 2008, p. 9).

Nancy's own philosophical project – as explained in Woermann (2016, pp. 142-145) and summarised here – revolves around the question of being-with Others, and in this regard, he readily acknowledges his debt to Heidegger in writing that 'no other thinking has penetrated more deeply into the enigma of *Being-with*'. Yet, crucially, he adds that 'no object of thought remains more unthought than this enigma' (p. 9). This may seem like a strange qualification, given that Heidegger explicitly declares that '[o]nly so far as one's own Dasein has the essential structure of Being-with, is it Dasein-with as encounterable for Others.' (BT, 121, 157). *Mitsein* (being-with) and *Mitdasein* (being-there-with) are thus co-essential to *Dasein.* This is because '[t]he "there" (*da*) makes of me at the same time a "with" (*mit*). Or more exactly: the "there" is always already a "with"' (Devisch, 2000, p. 242). And yet, what is striking is that Heidegger's discussion of the *mit* is only introduced in section 26 of Being and Time (at the hand of a discussion of "taking care of" as the proper relational mode of the "with"). This is long after Heidegger's extensive discussion on the originality of *Dasein,* which begs the question of whether these two categories are really coessential; or – otherwise put – whether the Other truly impacts on the ontology of *Dasein.*

Nancy (2008) demonstrates the problem with Heidegger's conception of Being-with at the hand of his treatment of death. He argues that, in Heidegger's analysis death disappears twice: 'once as a common demise which remains external to the Being-delivered-over to the ultimate possibility of existing, and again according to

the sublimation that the *common destiny* operates on individual death' (p. 10). On both counts, the "with" is also effaced. In the improper mode, the dying of the anyone, 'the essentiality of the *with* is dissolved' (p. 10). Beings are related contiguously in space (in the crowd); but in their being, theyremain absolutely exterior to one another. Death thus becomes nothing more than 'the corpse ... return[ing] to the sheer material juxtaposition of things' (p. 8). In the proper mode, the essentiality of the "with" becomes 'hyperpossible' (p. 10), in that it is 'sublimated, sublated, or heroicized' (p. 11) in destiny. Beings are thus robbed of a shared death because Being-with is sacrificed to the "We", that is, to the common subject of history.

Nancy thus argues that it was against his own intentions that Heidegger managed to either erase or dialecticise being-with Others. Nancy attributes the reason for this to the fact that '*Dasein's* "being-towards-death" was never radically implicated in its being-with – in *Mitsein*' (Nancy, 1991, p. 14). Nancy further states that 'it is this implication that remains to be thought' (p. 14). It is exactly this task that he takes upon himself in opening a space for a "with" that is 'neither in exteriority, nor in interiority. Neither a herd, nor a subject. Neither anonymous, nor "mine". Neither improper, nor proper' (Nancy, 2008, p. 11).

Between the anyone and the People, being-there-with implies 'the common as the sharing of properties (relations, intersections, mixtures)' (p. 4). The "with" is thus 'the proximity (contiguity and distinction) of multiple *theres*' (p. 10). This means that the exclusive "there" must already contain the multiplicity of other "theres" within itself, and similarly Being-with (that is, the relation with Others) cannot be thought of as 'secondary in the constitution of existence, but truly and essentially equiprimordial in the existent' (p. 11). This is why Nancy refers to existents as singular-plural; we are not beings who stand in relation with one another, we are beings who are ontologically defined *as* relation. As such, Others cannot be reduced to mere bodies, or to the immanent community of the People. Community (in Nancy's understanding) is not premised on assimilation, but co-exposition, wherein existents ontologically expose themselves to nothing other than one another, and wherein death implies a sharing 'between all existents, between us, the eternity of each existence' (p. 13). Ignaas Devisch (2000, pp. 244; 245) summarises the implications of Nancy's understanding of the *with* as follows:

> For Nancy, being is "with". The primordial ontological conditions of our community are not conceived as the One, the Other or the We, but as the "with", "relationality", and the "between". The question of being (*Seinsfrage*) is therefore the question of being-with (*Mitseinsfrage*) ... The way Nancy tries to articulate our single being in the world transforms [Descartes'] *ego sum* into an *ego sum expositus* [I am exposed] or (what is the same thing) a *nos sumus* [we are].

In summary, the three views on being-with Others that come to the fore in this discussion are the *exterior view,* in which we simply exist alongside other beings; the *interior view,* wherein our identities are assimilated by a historically-constituted

community; and, the *non-essentialised view,* wherein our identities are open to Others. In what follows, I shall offer critical readings of both the communitarian and the humanist accounts of African moral philosophy (Ubuntu), with the aim of demonstrating that these views are in danger of respectively fostering an interior and exterior account of being-with Others. I illustrate this danger at the hand of examples stemming from the South African context.

BEING-WITH IN AFRICAN HUMANISM

One of the early propagators of the humanist interpretation of Ubuntu was Augustine Shutte. In the chapter titled, 'An ethic for a New South Africa', Shutte (2001, p. 66) offers the following description of Ubuntu:

> UBUNTU ... is essentially a knowledge and affirmation of the humanity we all share – and so it is properly translated *humanity.* It is the power that produces personal growth in individuals and at the same time creates personal community between them. This is the twofold goal of the ethic of UBUNTU.

More recently, Thaddeus Metz (2007) has sought to circumscribe this humanist interpretation of Ubuntu into a principle of right action. This principle is based on two features of Ubuntu that create personal community or what Metz calls harmony, understood as love or friendship. These features are a shared identity and good will, which when brought together, form the following principle:

> An act is right if it prizes other persons in virtue of their natural capacity to relate harmoniously; otherwise, an act is wrong, and especially insofar as it prizes discordance (Metz, 2016, p. 178).

In South Africa's socio-political sphere, Archbishop Desmond Tutu tirelessly advocates the humanist interpretation of Ubuntu. He argues that '[h]armony, friendliness, community are great goods. Social harmony is for us the *summum bonum* – the greatest good' (Tutu, 1999, p. 35). As is well-known, Tutu also served as the Chair of the *Truth and Reconciliation Commission* (TRC). The TRC was created and mandated as a court-like body in 1995, with the aim of hearing the testimony of the victims and perpetrators of the apartheid state. Unlike legal courts, the TRC was based on a reconciliatory, rather than a retributive, view of justice and perpetrators could thus request amnesty. In reflecting on the hearings, Tutu notes that he drew on both his Christian and cultural values. Specifically, 'he constantly referred to the notion of Ubuntu when ... guiding and advising witnesses, victims and perpetrators during the Commission hearings' (Murithi, 2006, p. 28).

David McDonald (2010, p. 142) further notes how Ubuntu was employed 'by a host of traditional leaders, churches, community organisations, NGOs and politicians since the end of apartheid to push for a "moral regeneration" of South Africa.' Following apartheid, South Africa quickly became known locally and globally as

"The Rainbow Nation" (a term coined by Tutu, and further enlivened by then President Nelson Mandela). The Rainbow Nation refers to a country that demonstrates unity in diversity. This notion of unity is premised on the understanding that 'my humanity is caught up, is inextricably bound up, in [your humanity]' (Tutu, 1999, p. 5).

Business and politics were quick to follow in the wake of the successful uptake of Ubuntu. Yet, what was missing in their appeals to Ubuntu was the commitment with which men such as Mandela and Tutu lived Ubuntu. Indeed, in an article titled '*Ubuntu* bashing: the marketization of "African values" in South Africa', McDonald (2010) explores the uptake and appropriation of the language of Ubuntu by market ideologies in post-apartheid South Africa. McDonald argues that 'the entire market-orientated *ubuntu* project of the last two decades [now almost three] rings hollow' (p. 147), because, for the most part, business continues as usual. Another influential African philosopher, Leonhard Praeg (2017, p. 298), phrases this criticism more strongly in writing that:

> [w]e only "rented" African subjectivity in the form of Ubuntu in order to get through the transition from one Western political form (apartheid) to another (liberal democracy). Once we got to the other side, we discarded every recognition of "shared humanity" from talk about "shared resources" ... It may perhaps not be an exaggeration to say that on every front – macro-economic, legal, political – the African conception of personhood *that founded our politico-juridical order* has been systematically instituted against since 1994 ....

This type of critique has also been levelled against the concept of "Rainbowism", which is increasingly viewed by a generation of disgruntled South Africans as a convenient way of covering over the country's socio-economic disparities. The force of Rainbowism, like the appeal to Ubuntu in a post-national context, largely degenerated into a rhetorical exercise that stands in the way of meaningful structural change, including institutional change (Gachago and Ngoasheng, 2016). Perhaps a reason for this can be found in humanism's treatment of violence. Praeg (2017, p. 295) argues that the question of violence remains anathema to the humanist interpretation of Ubuntu, which is premised on 'a whole rainbow of good news – "harmony", "friendliness", "love", "shared humanity", "forgiveness", "reconciliation" ...'. It is arguably this myopic view of current realities that has led to such a vacuous appeal to Ubuntu humanism.

It is when African humanism becomes no more than empty rhetoric that we are in danger of fostering an exterior view of being-with Others (akin to Heidegger's view of the improper mode of being). In this view, Others have no real impact upon my life or my humanity. One good current example of this is the new South African Facebook page, called #ImStaying,[1] which was founded in September 2019, and

[1] https://www.facebook.com/groups/hashtagimstaying

which – by September 2020 – was 1.2 million members strong. #ImStaying is described as a group that 'is dedicated to the South African women and men of all races, cultures, religions and creeds that choose to grow and improve South Africa'.

Whilst #ImStaying arguably presents an import pushback to the divisive politics propagated in the media, a concern is that this group will largely end up as an exercise in lip service. Indeed, and again referring to an exterior view of being-with Others, a significant number of posts deal with such trivia as which province members are from, favourite foods and rugby players, and favourite South African expressions. All of this is innocuous, but therein lies the problem. One's sense of identity in community is reduced to the banal being alongside Others. This is a far cry from viewing our lives as explicitly bound up in the lives of Others (as described by Tutu). Whilst the humanist account initially looked promising as a way of operationalising the non-essentialised Nancean view of being-with Others, the consequences that this view holds in practice prove that African humanism can easily backslide into an exterior account of being with-Others.

BEING-WITH IN AFRICAN COMMUNITARIANISM

A critical reading of African communitarianism reveals that this interpretation fairs no better in thinking the "with" of Being-with productively. The reason, however, is the opposite of the problem encountered with humanism. Contrary to humanism, communitarianism runs the risk of fostering an interior view of identity, one which essentialises the "with" in terms of a People. In order to motivate this claim I will consider two interrelated criticisms, which are levelled against Ubuntu's traditionalism and exclusivity (Louw, 2001).

As a traditional ethic, Ubuntu refers to the different sets of cultural practices defining traditional African cultures. Indeed, these practices are so far removed from contemporary understandings of Ubuntu that Praeg (2017) draws a distinction between Ubuntu as praxis and Ubuntu as abstract philosophical construct. As a traditional ethic, Ubuntu is understood as a praxis, which – as with all traditional cultural norms – should be subjected to ethical scrutiny.

Such scrutiny reveals the danger of an extreme form of violence latent in Communitarianism. Praeg (2017) argues that this violence hinges on understanding the good of the community as outstripping the rights of the individual. When individuals act against community interests, violence is implicitly sanctioned in order to bring individuals back into line. One example that demonstrate the primacy of the community (and the violence inherent in this conception) in Ubuntu praxis concerns initiation rites, specifically circumcision and clitoridectomy. John Mbiti (cited in Ramose 2002b, p. 71) writes of this practice that the blood that is spilled on the soil indicates that the initiated youth 'wishes to be tied to the community and people, among whom he or she has been born as a child [and that] until the individual has

gone through the operation, he [or she] is still an outsider.' The traditional ethic of Ubuntu thus – in at least some instances – also incorporates an exclusionary ethic.

Generally speaking, when Ubuntu is interpreted in terms of an exclusionary ethic, one runs the risk of forwarding a narrow and closed conception of community. Dirk Louw (2001) argues that this derailed view of Ubuntu 'represents the fortification and preservation of a specific group identity through limitation and segregation' (p. 121).

In terms of contemporary society, a narrow, communitarian reading of Ubuntu offers justification for putting the interests of a specific group ahead of the interests of the broader public. In a heterogeneous and politically-fraught society such as South Africa's examples abound. Praeg (2017, p. 296) references examples of past violations of law (and even of the Constitution) by the ruling African National Congress (ANC), which were justified by appealing to the unity of the party. In these examples, the unity of the party is seen as more important than the Constitution and the unity of the citizens of South Africa. Implicit in the ANC's appeal is a conception of unity premised on the collective political identity of a people, as opposed to a traditionally-shared way of life.

In order to understand this statement, it is important to acknowledge how the concept of black subjectivity came into being. Praeg (2017) argues that the Political is first philosophy within African philosophy, which means that 'it is the very nature of the subject at hand (African subjectivity) that the historicity and therefore the political history of the African subject should be foregrounded as point of departure' (pp. 293-294). The Political as first philosophy thus constitutes an investigation of the divided and ambivalent ground from which (black) subjectivity springs forth and develops. Praeg (2019a, pp. 101-102) identifies four constituent moments characterising the development of the modern black subject. The first moment created the perception of "blackness" as a function of the experience of the black, modern subject viewing itself through the racialised, and racialising, gaze of the white coloniser. The second moment is characterised by the emergence of a counter-hegemonic black subject: "we, the community of oppressed black people subjected to slavery and colonialism". The third moment represents a conscious effort by black intellectuals, artists, and politicians to counter the negative stigmas associated with "blackness" in colonialist discourse by giving positive attributes to "blackness", and hence to black subjects. The last moment is the moment in which black knowledge and knowledge systems are viewed as conditions for a new emancipatory humanity in postcolonial Africa and beyond.

In modern politics, an appeal to unity thus more often than not constitutes an appeal to a shared politically-informed constitution of black subjectivity, rather than a culturally-shared way of life. One of the clearest examples hereof is the pan-Africanist socialist political party in South Africa, called Black First Land First (BLF), whose "Revolutionary Call", released on 13 August 2015, reads as follows:

> Without land there is no freedom or dignity. We want Land First because it is the basis of our freedom, our identity, or spiritual well-being, our economic development and culture ... We are the people crying for our stolen land! Now we have decided to get it back by any means necessary.[2]

The "Revolutionary Call" evokes a derailed interpretation of the second moment typifying the constitution of black subjectivity, wherein the community of oppressed black people actively resists slavery and colonialism (depicted as stolen land in the above Call). Whilst the importance of counter-hegemonic discourses in exposing and usurping ill-begotten power and resources should be encouraged, the mandate of BLF is clearly exclusionary. In viewpoints like these, community becomes the vehicle for promoting racism, xenophobia and cultural, class or ethnic purity (Louw, 2001). Indeed, BLF has been embroiled in a number of controversies concerning these types of issues, the most serious being hate speech towards white people, which was justified by the party as a defense of black people, and their interests.[3]

The dangers of a communitarian reading premised on an exclusionary ethic are not limited to the politics practiced on the southern tip of Africa. Indeed, Heidegger's own reading of the destinal unity of the community of the People arguably betrays the seeds of his Nazism. Both Nancy and Emmanuel Levinas, for example, identify a totalitarian impulse in Heidegger's work. Nancy, however, goes further in arguing that the desire for a common identity underscores not only Heidegger's work, but the whole of Western culture. This is true to the extent that there remains a longing 'for a lost age in which community was woven of tight, harmonious, and infrangible bonds and which above all it played back to itself, through its institutions, its rituals, and its symbols' (Nancy, 1991, p. 9). Indeed, one could argue that current nationalist political regimes – such as Trump's America, which is defined by the slogan "Make America Great *Again*" (my italics) – are premised on this exact logic.

An uncritical uptake of African Communitarianism thus suffers from the same implications as Heidegger's conception of the proper mode of Being-with Others in community. In both cases, the individual is viewed as secondary to the community. This is achieved by either sublimating individual death into the common destiny (Heidegger), or by sublimating the individual into either a traditionally-sanctioned way of life or a community of politically-constituted subjects (African Communitarianism).

[2] http://en.wikipedia.org/wiki/Black_First_Land_First

[3] http://en.wikipedia.org/wiki/Black_First_Land_First

POSTCOLONIALITY AND THE NON-ESSENTIALISED BEING-WITH

Having argued that neither Heidegger's philosophy nor a Communitarian or Humanist understanding of African philosophy provide the resources for developing a conception of the with-Others as truly co-essential to subjectivity, I now turn (re)turn to Praeg's statement that within African philosophy the Political is first philosophy. I shall argue that grounding African philosophy in the Political offers us an avenue for developing a non-essentialised account of Being-with that resonates with Nancy's view of Being *as* relation. Moreover, I shall argue that this account also provides an opening for a responsible postcolonial thinking, which would – in principle – be capable of positioning philosophy beyond the dialectic of Eurocentricism and anti-Eurocentricisim.

To begin, we need to distinguish between politics and the Political. Many of the examples appealed to in the foregoing analysis concern politics, that is, 'the activities of the government, members of law-making organizations, or people who try to influence the way a country is governed'[4]. As also demonstrated in the above analysis, politics can be subjected to critical scrutiny. In contrast to politics, "the Political" (the conversion of the adjective into the noun), emerged in the English language during the 1980s/1990s with the translation of Carl Schmitt's *The Concept of the Political* (1996) and Claude Lefort's *Political Forms of Modern Society* (1986) (Valentine, 2017). Broadly-speaking, the Political refers either to 'the basis of a method or criteria which could determine the specificity of politics' or 'as something like the conditions of politics in a constitutive rather than transcendental sense' (p. 197). The concept of the Political, specifically the second interpretation thereof, also features strongly in the work of Nancy.

Briefly, Nancy defines the essence of the Political as informed by conditions that are necessarily connected to community and freedom. The emphasis on community and freedom has a twofold aim, namely to restore the priority of the ethical within the Political so as to usurp the focus on power and domination, and to demonstrate that any global attempt at prescription or regulation must necessarily fail (Ingram, 1988). The reason for the latter concerns Nancy's understanding of freedom and community. Ingram notes that, as with Levinas, Nancy distinguishes between morality (the codes operating in the socio-political order) and ethics (the passivity and openness to the inassimilable Other). Whereas morality 'involves prescribing actions within a view of global consequences; [ethics] imposes a prior obligation to remain open to questioning as such' (p. 106). This questioning implies a freedom that opens up politics, because, as Derrida (1978, p. 80) argues, '[t]here is no stated law, no commandment, that is not addressed to a freedom of speech.'

Such a radical questioning also 'implies a fundamental openness towards possibilities of judgment, of disclosing anew the meaningful "identity" (being) of self and

[4] https://dictionary.cambridge.org/dictionary/english/politics

world' (Ingram, 1988, p. 106). Furthermore, if the Other is co-essential to my identity, and if community is the constant co-exposition of beings to one another, then it stands to reason that finite community is also defined by this freedom and openness. To convey this idea, Nancy writes that community

> necessarily occurs in what Blanchot has called *désouevrement* (undoing, omission, or suspension of the work): before or beyond the work, that which withdraws (retires or retreats) from the work, that which no longer has anything to do with either production of completion, but which encounters interruption, fragmentation, [and the] suspens[ion of] ... singular beings ... at/on the limit' (Nancy, 1986, pp. 78-79; trans. Ingram, 1988).

On the basis of this understanding of freedom and community, Nancy (p. 100) defines the Political as 'inscrib[ing] the partitioning and sharing of community'. Moreover, it is this recursive partitioning and sharing that should inform the concrete politics and codes of a community.

The implications that this understanding of the Political holds for postcoloniality neither endorse a thinking that pays lip-service to being-with in community, nor a thinking that retains the oppositional binary between the West and Africa. Rather, and as argued by Praeg (2014, p. 171), postcoloniality is better understood as 'a condition in which the passage from bare life to the Political, from a multiplicity of form to the subject(ivity) of, say, the liberal democratic nation states, remains forever visible *as a passage*'. In terms of post-colonial thinking, and particularly the Political constitution of black subjectivity, keeping this passage visible means reckoning with the partitioning and sharing of community. Every being is both singular and plural, and subjectivity is thus cast in terms of both differentiation and relation. On the one hand, foregoing the socio-cultural and historical grounds of differentiation (including how (black) subjectivity is represented in light of, and as a response, to the (white) Other), leads to a banal politics or a happy humanism. On the other hand, foregoing the relational aspect of identity, that is, how being-with Others constitutes our very ontology, leads to a closed politics (a totalitarian communalism).

In terms of black subjectivity, the implications of this double-thinking are that, on the one hand, '[t]he black subject does not get to leave the originary moment of differentiation from the rest of humanity behind – not in historical terms ... or in the "foundational terms" of a juridico-political order' (Praeg, 2017, p. 9). In other words, confronting the Political necessarily means dealing with the arche-cut that runs through philosophy as Subject, but that also cuts subjectivities. On the other hand, this thinking also means that the project of construing the "totality of black consciousness" necessarily fails for the reason that every definition of black subjectivity 'always constitutively exceeds itself because the boundary concept that makes black subjectivity possible and thinkable as a unified whole or a totality is a double concept, *a site whose activity is inside/outside differentiation*' (Praeg, 2019a, p. 104).

This double-thinking necessitates that we take seriously the Nancean imperative of thinking community as the suspension of singular beings at/on the limit. In the place of consensus and ideology, the Political demands a questioning informed by contingency and complexity. To responsibly engage in postcolonial discourse is therefore to confront the contestations, ambiguities, violence, and politics of what it means to write (African) philosophy differently, and to recognise that this site of activity does not eventually give itself over to a unified whole or totality. Rather, we remain at the limit or on the border. In reflecting on the title of his edited volume, *Philosophy on the Border: Decoloniality and the Shudder of the Origin,* Praeg (2019b, p. 1) expresses the above argument as follows,

> [b]eing 'on' the border ... means standing on the line of differentiation: neither on this side nor the other side ... [B]eing 'on' the border suggests less of a differentiation between this and that and more a dedifferentiation of this *and* that, of being *in* difference.

In conclusion, confronting the Political in postcolonial thinking does not allow for a comfortable politics, but it does pave the way towards a more *responsible* politics – one that is first and foremost informed by the ethical, defined in terms of a ceaseless and free questioning. Furthermore, in grappling with the difficult conceptual and practical implications of what it means to be constituted in community, postcolonial theorists may be able to offer a positive reflection in response to Derrida's appeal to think 'the concrete conditions for respect and the extension of the right to philosophy'.

BIBLIOGRAPHY

Derrida, J. (2002). The right to philosophy from a cosmopolitical point of view: the example of an international Institution. In P.P. Trifonas (Ed. and trans.). *Ethics, institutions, and the right to philosophy* (pp. 1-18). Maryland: Rowman and Littlefield Publishers.

Derrida, J. (1978). Violence and metaphysics: An essay on the thought of Emmanuel Levinas. In *Writing and difference* (trans. A. Bass, pp. 79-153). Chicago: University of Chicago Press.

Devisch, I. (2000). A trembling voice in the desert: Jean-Luc Nancy's rethinking of the space of the political. *Cultural Values*, 4(2), 239-256.

Gachago, D. and Ngoasheng, A. (2016). South Africa's "Rainbow Nation" is a myth that students need to unlearn. *The Conversation.* Retrieved from https://theconversation.com/south-africas-rainbow-nation-is-a-myth-that-students-need-to-unlearn-66872

Gasché, R. (1991). *Of minimal things: studies on the notion of relation.* Stanford: Stanford University Press.

Heidegger, M. (1993). *Basic writings* (Ed. D.F. Krell). New York: HarperCollins.

Heidegger, M. (1962). *Being and time* (trans. J. Macquarrie and E. Robinson). New York: Harper and Row.

Ingram, D. (1988). The retreat of the political in the modern age: Jean-Luc Nancy on totalitarianism and community. *Research in Phenomenology,* 18, 93-124.

Louw, D.J. (2010). Rethinking Ubuntu. In J. Ogude (Ed.). *Ubuntu and the reconstitution of community* (pp. 114-130). Indiana: Indiana University Press.

Mbiti, J. (1969). *African religions and philosophy.* London: Heinemann.

McDonald, D. (2010). *Ubuntu* bashing: the marketization of "African values" in South Africa. *Review of African Political Economy,* 37(124), 139-152.

Menkiti, A.I. (2004). On the normative conception of a person. In K. Wiredu (Ed.). *A companion to African philosophy* (pp. 324-331). Oxford: Blackwell Publishing.

Metz, T. (2018). What is the essence of an essence? Comparing Afro-relational and Western-individualist ontologies. *Philosophical Papers,* 65(1), 209-224.

Metz, T. (2007).Towards an African Moral Theory. *The Journal of Political Philosophy,* 15(3), 321-341.

Murithi, T. (2006). Practical peacemaking. Wisdom from Africa: reflections on Ubuntu. *The Journal of Pan African Studies,* 1(4), 25-34.

Nancy, J.-L. (2008). The being-with of being-there (trans. M.E. Morin). *Continental Philosophy Review,* 41, 1-15.

Nancy, J.-L. (1991). *The inoperative community* (Ed. P. Connor; trans. P. Connor, L. Garbus, M. Holland and S. Sawhney). Minneapolis: Minneapolis University Press.

Nancy, J-L. (1986). *La communauté désoeuvrée.* Paris: Christian Bourgeois.

Praeg, L. (2019a). Philosophy of the border. In L. Praeg (Ed.). *Philosophy on the border: decoloniality and the shudder of the origin* (pp. 1-32). Pietermaritzburg: University of KwaZulu-Natal Press.

Praeg, L. (2019b). Totality by analogy; or: the limits of law and black subjectivity. In L. Praeg (Ed.). *Philosophy on the border: Decoloniality and the shudder of the origin* (pp. 95-111). Pietermaritzburg: University of KwaZulu-Natal Press.

Praeg, L. (2017). Essential building blocks of the Ubuntu debate; or: I write what I must. *South African Journal of Philosophy,* 36:2, 292-304.

Praeg, L. (2014). Postcards from the postcolony. In G. Farred, K. Kavwahirehi and L. Praeg (Eds.). *Violence in/and The Great Lakes; the thoughts of V.Y. Mudimbe and beyond* (pp. 161-187). Pietermaritzburg: University of KwaZulu-Natal Press.

Ramose, M.B. (2002a). The philosophy of *Ubuntu* and *Ubuntu* as a philosophy. In P.H. Coetzee and A.P.J. Roux (Eds.). *Philosophy for Africa* (pp. 230-238). Oxford University Press: Cape Town.

Ramose, M.B. (2002b). *African philosophy through Ubuntu* (rev.). Harare: Mond.

Shutte, A. (2001). *Ubuntu: an ethics for a New South Africa.* Cluster Publications: Pietermaritzburg.

Tutu, D. (1999). *No future without forgiveness.* New York: Random House.

Valentine, J. (2017). Review: Politics and the concepts of the political: The political imagination by James Wiley. *Contemporary Political Theory,* 17(S4), 197-200.

Wheeler, M. (2018). Martin Heidegger. In E.N. Zalta (Ed.). *The Stanford Encyclopaedia of Philosophy* (Winter 2018 Edition). Retrieved from https://plato.stanford.edu/archives/win2018/entries/heidegger/

Woermann, M. (2016). *Bridging complexity and post-structuralism.* Switzerland: Springer International.

INFORMATION ON THE JOURNAL

Etica & Politica/Ethics & Politics is an open access philosophical journal, being published only in an electronic format.

The journal aims at promoting research and reflection, both historically and theoretically, in the fields of moral, political and legal philosophy, with no preclusion or adhesion to any cultural current or philosophical tradition.

Contributions should be submitted in one of these languages: Italian, English, French, German, Portuguese, Spanish.

All essays should include an English abstract of max. 200 words.

The editorial staff especially welcomes interdisciplinary contributions with special attention to the main trends of the world of practice.

The journal has an anonymous double peer review referee system.

Three issues per year are expected.

ETICA & POLITICA/ETHICS & POLITICS POSITION ON PUBLISHING ETHICS.

The Editors of Etica & Politica/Ethics & Politics have taken every possible measure to ensure the quality of the material here published and, in particular, they guarantee that peer review at their journal is fair, unbiased and timely, and that all papers have been reviewed by unprejudiced and qualified reviewers. The publication of an article through a peer-review process is intended as an essential feature of any serious scientific community. The decision to accept or reject a paper for publication is based on the paper's relevance, originality and clarity, the study's validity and its relevance to the mission of the journal. In order to guarantee the quality of the published papers, the Editors encourage reviewers to provide detailed comments to motivate their decisions. The comments will help the Editorial Board to decide the outcome of the paper, and will help to justify this decision to the author. If the paper is accepted with the request of revision, the comments should guide the author in making the

revisions for the final manuscript. All material submitted to the journal remains confidential while under review.

Once the author receives a positive answer, he/she should send the final version of the article since proofs will not be sent to him/her. Etica & Politica/Ethics & Politics will publish the paper within twelve months from the moment of the acceptance, and the author will be informed of the publication.

The journal is committed to such standards as originality in research papers, precise references in discussing other scholars' positions, avoiding plagiarism. E&P takes these standards extremely seriously, because we think that they embody scientific method and are the mark of real scholarly communication.

Since Etica & Politica/ Ethics & Politics is devoted solely to scientific and academic quality, the journal neither has any submission charges nor any article processing charges.

The following guidelines are based on existing Elsevier policies and COPE's Best Practice Guidelines for Journal Editors

1. PUBLICATION AND AUTHORSHIP

EUT (Edizioni Università di Trieste), is the publisher of the peer reviewed international journal Etica & Politica/ Ethics & Politics.

The publication of an article in a peer-reviewed journal is an essential step of a coherent and respected network of knowledge. It is a direct reflection of the quality of the work of the authors and the institutions that support them. Peer-reviewed articles support and embody the scientific method. It is therefore important to agree upon standards of expected ethical behaviour for all parties involved in the act of publishing: the author, the journal editor, the peer reviewer, the publisher.

Authors need to ensure that the submitted article is the work of the submitting author(s) and is not plagiarized, wholly or in part. They must also make sure that the submitted article is original, is not wholly or in part a re-publication of the author's earlier work, and contains no fraudulent data.

It is also their responsibility to check that all copyrighted material within the article has permission for publication and that material for which the author does not personally hold copyright is not reproduced without permission.

Finally, authors should ensure that the manuscript submitted is not currently being considered for publication elsewhere.

2. AUTHOR'S RESPONSIBILITIES

Etica & Politica/Ethics & Politics is a peer-reviewed journal, and Authors are obliged to participate in our double blind peer review process.

Authors must make sure that all and only the contributors to the article are listed as authors. Authors should also ensure that all authors provide retractions or corrections of mistakes.

3. PEER REVIEW AND REVIEWERS' RESPONSIBILITIES

Both the Referee and the Author remain anonymous throughout the "double blind" review process. Referees are selected according to their expertise in their particular fields.

Referees have a responsibility to be objective in their judgments; to have no conflict of interest with respect to the research, with respect to the authors and/or with respect to the research funders; to point out relevant published work which is not yet cited by the author(s); and to treat the reviewed articles confidentially.

4. EDITORIAL RESPONSIBILITIES

Editors hold full authority to reject/accept an article; to accept a paper only when reasonably certain; to promote publication of corrections or retractions when errors are found; to preserve anonymity of reviewers; and to have no conflict of interest with respect to articles they reject/accept. If an Editor feels that there is likely to be a perception of a conflict of interest in relation to their handling of a submission, they will declare it to the other Editors. The other Editors will select referees and make all decisions on the paper.

5. PUBLISHING ETHICS ISSUES

Members of the Editorial Board ensure the monitoring and safeguarding of the publishing ethics. This comprises the strict policy on plagiarism and fraudulent data, the strong commitment to publish corrections, clarifications, retractions and apologies when needed, and the strict preclusion of business needs from compromising intellectual and ethical standards.

Whenever it is recognized that a published paper contains a significant inaccuracy, misleading statement or distorted report, it will be corrected promptly. If, after an appropriate investigation, an item proves to be fraudulent,

it will be retracted. The retraction will be clearly identifiable to readers and indexing systems.

6. POLICY ON EDITORIAL NORMS AND STYLE

In accordance with the pluralist principle and the breadth of interests that characterize the editorial line of Etica & Politica/Ethics & Politics, the review leaves the contributors free to choose which style of quotation to adopt in the composition of their article. Of course, this style must conform to one of the two internationally recognized models in the area of scientific publications in the humanities, namely the Chicago A (equivalent to APA) or the Chicago B, both defined by The Chicago Manual of Style, 17th edition. Moreover, the reference to the complete source must contain all the information required by the ISO
690 standard, both if it is provided only in the final bibliography (Chicago A)
and if it is provided in a note (Chicago B).

7. PAST ISSUES AND STATISTICS

Past issues with download and visitors statistics for each article are provided by EUT publisher through its official repository.:
http://www.openstarts.units.it/dspace/handle/10077/4673

LISTA REFEREE 2020 / LIST OF REVIEWERS 2020

Bruno Accarino (Università di Firenze), Julio Andrade (Stellenbosch University, South Africa), Alberto Andronico (Università di Catania), Antonella Argenio (Università della Campania), Daniel Attas (University of Gerusalem), Federigo Bambi (Università di Firenze), Alessandro Bertinetto (Università di Torino), Giovanni Blando (Università di Napoli Federico II), Patricia Branco (Ces – Universidade de Coimbra), Gianvito Brindisi (Università della Campania), Matthew Calarco (California State University), Paolo Cappellini (Università di Firenze), Gaetano Carlizzi (Università di Napoli Suor Orsola Benincasa), Pierpaolo Cesaroni (Università di Padova), Sandro Chignola (Università di Padova), Fabio Ciaramelli (Università di Napoli) , Gianpiero Coletta (Università della Campania), Raffaella Colombo (Università di Milano), Fausto Corvino (Università di Pisa), Carlo Crosato (Università di Venezia Ca' Foscari), Salvatore D'Acunto (Università della Campania), Jacopo d'Alonzo (Université Paris 3 Sorbonne Nouvelle), Filomena D'Alto (Università della Campania), Lucia Dell'Aia (Università di Bari), Carmine Di Martino (Università di Milano), Luigi Di Santo (Università di Cassino), André Duarte (University of Paraná, Brasil), Roberto Evangelista (Centro Nazionale delle Ricerche CNR), Ubaldo Fadini (Università di Firenze), Gianluca Famiglietti (Università di Pisa), Franco Ferrari (Università di Salerno), Maria Ferretti (Goethe-Universität Frankfurt a.M.), Antonino Firenze (Universidad de Barcelona, Pompeu Fabra), Luca Fonnesu (Università di Pavia), Sotera Fornaro (Università di Sassari), Gabrio Forti (Università di Milano Sacro Cuore), Tommaso Gazzolo (Università di Sassari), Paola Giordano (Università di Napoli Suor Orsola Benincasa), Tommaso Greco (Università di Pisa), Matthew Hanser (University of California, Santa Barbara), Juan Carlos Herrera Ruiz (Universidad de Medellín), Maria Pia Iadicicco (Università della Campania), Carlo Iannello (Università della Campania), Manlio Iofrida (Università di Bologna), Dario Ippolito (Università Roma Tre), Giulia M. Labriola (Università di Napoli Suor Orsola Benincasa), Daniel Layman (Davidson College, USA), Giovanni Leghissa (Università di Torino), Mauro Lenci (Università di Pisa), Michael Lewis (Newcastle University, UK), Federica Liveriero (Università della Campania), Antonio Lucci (Homboldt Universität Berlin), Pietro Maffettone (Università di Napoli Federico II), Luca Mandara (Università di Napoli Federico II), Ottavia Marzocca (Università di Bari), Colm McKeogh (University of Wikato, New Zealand), Rodrigo Miguez Nuñoz (Università del Piemonte Orientale), Gianfranco Mormino (Università di Milano), Bruno Moroncini (Università di Salerno), Giovanni Morrone (Università della Campania), Valerio Nitrato Izzo (Università di Napoli Federico II), Mauro Nobile (Università di Trento), Vincenzo Omaggio (Università di Napoli Suor Orsola Benincasa), Paolo Pagani (Università di Venezia Ca' Foscari), Massimo Palma (Università di Napoli Suor Orsola Benincasa), Andrea Parravicini (Università di Milano), Antonio Petagine (Università Roma Tre), Julia Pfefferkorn (Universität Tübingen), Massimo Palma (Università di Napoli Suor Orsola Benincasa), Saulle Panizza (Università di Pisa), Gabriella Paolucci (Università di Firenze), Felice Ciro Papparo (Università di Napoli Federico II), Lorenzo Petrachi (Università di Bologna), Benedetta Piazzesi (Scuola Normale Superiore di Pisa), Ulderico Pomarici (Università della Campania), Andrea Porciello (Università di Catanzaro), Roberto Redaelli (Universität Nürnberg-Erlangen, Germany), Francesco Riccobono (Università di Napoli Federico II), Giorgio Ridolfi (Università di Pisa), Filippo Ruschi (Università di Firenze), Pierfrancesco Savona (Università di Napoli Federico II), Ernesto Sferrazza Papa (Pontificia Universidad Católica de Chile), Giovanni Sgro' (Università E-Campus), Gian Pietro Soliani

(Università di Urbino), Dorotea Sotgiu (Bergische Universität Wuppertal, Germany), Salvatore Spina (Università di Messina/ Albert-Ludwigs Universität Freiburg i.B.), Jan Swianiewicz (University of Warsaw), Angela Taraborrelli (Università di Cagliari), Antonio Tucci (Università di Salerno), Maria Silvia Vaccarezza (Università di Genova), Johan van der Walt (Université du Luxembourg), Serena Vantin (Università Modena-Reggio Emilia), Miguel Vatter (Flinders University, Australia), Mario Vergani (Univesità di Milano Bicocca), Paolo Vignola (Universidad de las Artes del Ecuador), Minka Woermann (Stellenbosch University, South Africa), Thanos Zartaloudis (University of Kent), Giovanni Ziccardi (Università di Milano), Francesco Zini (Università di Siena).