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THE CRIMINAL IS POLITICAL

Real existing liberalism and the construction of the
criminal

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ABSTRACT

The familiar irony of ‘real existing socialism’ is that it never was. Socialist ideals were used to legitimise regimes that fell far short of realising those ideals – indeed, that violently repressed anyone who tried to realise them. This thesis investigates how the derogatory and depoliticizing concept of *the criminal* has historically allowed, and continues to allow, liberal ideals to operate in a worryingly similar manner. Across the political spectrum, ‘criminal’ is used as a slur. That which is criminal is assumed to be bad, and what is more, to be bad in a way that is not politically interesting. I show how this serves to prevent deep dissent from the status quo, and particularly from the existing, unjust *order of property*, from registering as dissent at all. Feminists have long argued that the exclusion of what is deemed ‘personal’ from the sphere of the political is *itself* a (conservative) political move. I propose that the construction of ‘the criminal’ as a category opposed to the political constitutes a similar barrier to emancipatory social transformation. I suggest, further, that under conditions of ‘real existing liberalism’, some kinds of conflict with the law have the potential not only to manifest but also to *forge* ‘resistant subjectivities’. I conclude that political philosophy, insofar as its purpose is emancipatory, should be more interested in the perspectives of criminals than it hitherto has been.

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INTRODUCTION

Across the political spectrum, ‘criminal’ is used as a slur. That which is criminal is assumed to be bad, and what is more, to be bad in a way that is not politically interesting. The criminal’s disobedience does not count as political dissent. Conversely, the state’s targeting of criminals does not count as political repression. The sphere of politics, as represented in liberal discourse, is that of reasonable disagreement; the criminal, in contrast, is constructed within that discourse as the perennially unreasonable – mindless, anti-social, feral. The core meaning of ‘criminal’, however, is simply ‘against the law’. Stepping outside the idealized versions of society that occupy the mainstream of liberal political philosophy,¹ we face the reality that law in ‘real existing liberalism’ has *in practice* always encoded various forms of domination.² Gender, race, class, and other oppressions coalesce around an *order of property* which prescribes vastly differential access to (among other things) the means of public speech – and, correspondingly, sanctioned forms of political participation.³ Criminalization is one way in which challenges to these hierarchical social formations are suppressed through violence and the threat of violence. Consequently, allowing the label for that which falls foul of the law – ‘criminal’ – *to imply that something is mindless and not political*, is a recipe for *depoliticizing* any deep dissent from the status quo. Feminists have long argued that the exclusion of what is deemed ‘personal’ from political consideration is itself a political move. I argue that the construction of ‘the criminal’ as a category opposed to the political constitutes a similar barrier to emancipatory social transformation. That is the first – ‘negative’ – contention of this thesis.

The second – more ‘positive’ – line of thought developed in this thesis is that there may be political insights to be had by attending to the perspectives (plural) of the criminalized

¹ The dominant mode of political philosophy, in the words of one of its critics, ‘either tacitly represents the actual as a simple deviation from the ideal, not worth theorizing in its own right, or claims that starting from the ideal is at least the best way of realizing it’. Charles W. Mills, ‘Ideal Theory as Ideology’, *Hypatia* 20, no. 3 (2005): 168.

² I take the term ‘real existing liberalism’ from Lorna Finlayson, *The Political Is Political: Conformity and the Illusion of Dissent in Contemporary Political Philosophy*, Essex Studies in Contemporary Critical Theory (London: Rowman & Littlefield, 2015), chap. 1.

³ As I will explain in Chapter 2, the term ‘order of property’ is meant to encompass norms of ‘public order’ as well as ownership in the narrower sense. An aim of Chapter 1 will be to *denaturalise* the current order of property by considering how, and in whose interests, it was historically constructed.

– specifically, those criminalized for transgressing the order of property. Under conditions of real existing liberalism, *some* kinds of conflict with the law⁴ have the potential not only to *manifest* but also to *forg*e what Howard Caygill calls ‘resistant subjectivities’.⁵ I make a case for this positive claim most explicitly in the central section of chapter 3 (‘Resistant Subjectivities’), but the argument I give for it there is not supposed to bear its full weight. Rather, the thesis as a whole, and every part of it, represents an attempt to *show* that this suggestion is worth taking seriously – by doing political philosophy in a way that does attend to perspectives forged by these kinds of conflict.

My suggestion draws on the Marxist and feminist traditions with which I will be engaging in chapters 3 and 4. For instance, some critical theorists have connected the possibility of *seeing through* ideology with experiences of contradiction and negativity which make manifest the violence of dominant categories and practices.⁶ The feminist intervention, ‘the personal is political’, also expresses an epistemological claim. The claim is that distinctive insights into the nature of gendered oppression can be gained by attending to the experiences of those at its sharp end.⁷

⁴ I explain in Chapter 2 why I will not be attempting to spell out general criteria for *which*. The reader can develop a ‘nose’ for the kinds of law-breaking I am interested in through my analysis of particular cases.

⁵ These are the subjectivities of individuals and collectives with the motivation and the capacity to challenge existing forms of oppression. Howard Caygill, *On Resistance: A Philosophy of Defiance* (London: Bloomsbury, 2013).

⁶ By ‘ideology’ is meant distorted forms of consciousness that arise out of social relations of domination and help to perpetuate them by masking their oppressive character. See Karl Marx, ‘Feuerbach: Opposition of the Materialist and the Idealist Outlooks’, in *The German Ideology: Part One with Selections from Parts Two and Three, Together with Marx’s ‘Introduction to a Critique of Political Economy’*, Second edition (London: Lawrence & Wishart, 1974). The concept is helpfully explained in Raymond Geuss, *Philosophy and Real Politics* (Princeton, NJ: Princeton University Press, 2008), 50–55. For an insightful defence of the theory of ideology against the common objection that it is ‘patronising’ towards the oppressed, see Lorna Finlayson, ‘On Mountains and Molehills: Problems, Non-Problems, and the Ideology and Ideology’, *Constellations: An International Journal of Critical and Democratic Theory* 22, no. 1 (2014): 135–46.

⁷ Catharine MacKinnon, *Toward a Feminist Theory of the State*, 2nd ed. (Cambridge, MA: Harvard University Press, 1991); Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); Miranda Fricker, *Epistemic Injustice* (Oxford: Oxford University Press, 2007). This is sometimes called ‘standpoint theory’ or ‘standpoint epistemology’. See Nancy Hartsock, *The Feminist Standpoint Revisited & Other Essays* (Boulder, CO: Westview Press, 1998). I will not be using these terms because they have become

However, while critical theorists and radical feminists seem poised to recognise ‘the criminal’ as an ideological construct, and the sharp end of the law as a vantage point from which ‘wrong society’⁸ might be revealed as such, in fact neither takes this step. Instead (and now we are back to the negative thesis), their thinking about criminals tends to reproduce the derogatory and depoliticizing contours of the liberal discourse. I illustrate this tendency through two studies. The first focuses on Max Horkheimer’s ‘Theory of the Criminal’, a hitherto neglected piece of the project that was to become the *Dialectic of Enlightenment*. The second looks at Catharine MacKinnon in the context of her ongoing debate with critics of ‘Governance Feminism’. In each case, I identify the theorist’s failure to break with the derogatory concept of the criminal as a significant misstep, through which some of the limitations of their political praxis are refracted.

This is not to say that their clinging to the concept of the criminal is unmotivated. On the contrary, Horkheimer thinks we need it to fight fascism, while MacKinnon thinks we need it to fight sexual violence. Since I agree with them about the urgency of these tasks, I need to address the worry that, to put it bluntly, *too relentless* a critique of the law in real existing liberalism will leave us unable to condemn, and more importantly to stop, Nazis and rapists. My response, in each case, will be to show how this objection overlooks the crucial role played by *the concept of the criminal* in facilitating precisely these forms of oppressive violence. Scrutinising this concept is therefore essential if we want effectively to resist them.

Chapter 1 paves the way for my analysis of contemporary liberalism by laying out a historical object of comparison. John Locke’s portrayal of the criminal as a ‘wild savage beast’ who has ‘renounced reason’ is generally treated as an unobjectionable side-note to his proto-liberal project.⁹ I propose, however, that this account of the criminal is what allows him actively to champion (and profit from) chattel slavery, colonial depredation, and draconian policies against the domestic dispossessed, all while denouncing the tyranny of any political authority not founded on consent. This is because criminalization provides a licence for

misleadingly associated with claims about the infallibility of appeals to the ‘lived experience’ of the oppressed.

⁸ I take this term from Fabian Freyenhagen’s exposition of Adorno. *Living Less Wrongly: Adorno’s Practical Philosophy* (Cambridge: Cambridge University Press, 2013).

⁹ John Locke, *Two Treatises of Government*, ed. Peter Laslett, Third Study Guide Edition, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1988), Second Treatise, §11.

excluding from the political community any person - whether absolutist prince or rebellious pauper – who challenges Locke’s favoured colonial capitalist order.

Chapter 2 begins from what I call the *legitimation gap* in contemporary liberalism. This is the gulf between:

- (a) ‘ideal’ liberal accounts of state legitimacy which depend upon the governed having a meaningful right to dissent, whose limits are cashed out in terms of respect for liberal values such as freedom and equality;¹⁰
- (b) the ‘non-ideal’ functioning of actual liberal states, in which struggles for social justice seem too often to be criminalized *not* because they fail to respect freedom and equality but because they threaten the vested interests of those with unjust social power.¹¹

In pointing to this gulf, my aim is not to reject the aspirations expressed in the ‘ideal’ accounts,¹² but to ask what would follow from taking them seriously.

On the face of it, the legitimation gap would seem to provide liberals with a reason to treat existing regimes as *illegitimate*. However, they do not tend to draw this conclusion. Investigating *why not* reveals significant tensions *within* liberalism, specifically, between the liberal state’s account of its own legitimacy and its role as enforcer of the prevailing order of property. I suggest that the derogatory and depoliticizing concept of the criminal *masks* these

¹⁰ Paradigmatically, John Rawls, *Political Liberalism*, 2nd ed. (New York: Columbia University Press, 2009). However, this commitment is not restricted to ‘political liberals’, as I will show.

¹¹ I will be drawing especially on: Tommie Shelby, ‘Justice, Deviance, and the Dark Ghetto’, *Philosophy and Public Affairs* 35, no. 2 (2007): 126–60; Juliet Hooker, ‘Black Lives Matter and the Paradoxes of US Black Politics: From Democratic Sacrifice to Democratic Repair’, *Political Theory* 44, no. 4 (2016): 448–69; Nadine El-Enany, “‘Innocence Charged with Guilt’: The Criminalisation of Protest from Peterloo to Millbank”, in *Riots, Unrest and Protest on the Global Stage*, ed. David Pritchard and Frances Pakes (London: Palgrave Macmillan, 2014), 72–97; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2011).

¹² In this I reject the equation of realism with conservatism that Lorna Finlayson identifies and criticises in the work of Matt Sleat and other prominent realists. See: Matt Sleat, ‘Coercing Non-Liberal Persons: Considerations on a More Realistic Liberalism’, *European Journal of Political Theory* 12, no. 4 (2013): 347–67; Lorna Finlayson, ‘With Radicals like These, Who Needs Conservatives? Doom, Gloom, and Realism in Political Theory’, *European Journal of Political Theory, Advance Online Publication* 0, no. 0 (2015): 1–19. I will expand on this point in chapter 2.

tensions by excluding dissenting subjects (specifically, those who dissent from the order of property) from the community of ‘reasonable’ citizens whose consent is required for legitimacy.

Chapter 3 turns from liberal to critical theory.¹³ It analyses a fragment from the Frankfurt School archives, Horkheimer’s ‘Theory of the Criminal’ (1939-1942), which I have translated into English for the first time. I focus on this text because it displays, in microcosm, how retaining the derogatory concept of the criminal undermines critical theory’s emancipatory project. I identify in this fragment a significant contradiction in Horkheimer’s account of the law and what it means to break it. On the one hand, Horkheimer understands law ‘in bourgeois society’ as an instrument of domination – ‘the will of the minority, which gives itself the form of the majority’. In his view, law’s formal universality masks its primary business of imposing, through ‘a battering violence’, the interests of capital.¹⁴ Yet while Horkheimer sees this, he *cannot see* the person who breaks the law as anything other than a brutal individualist. His criminal is ‘the crippled, retarded twin brother of the bourgeois citizen’,¹⁵ an ape-like prototype of the fascist. I argue that this construction of the criminal leaves no space for resistance which contravenes the existing order of property. This chapter therefore has two aims. Firstly, building on Horkheimer’s critique of the law (specifically his reading of social contract theory), I make a case for *some* forms of law-breaking as capable of manifesting and forging resistant subjectivities. Secondly, I address the predictable objection to this proposal: *in the face of fascism, don’t we need to defend the rule of law?*

Chapter 4 addresses the controversy around an influential approach to feminism. Its

¹³ By this, I mean the broadly Marxist tradition of emancipatory social theory of which Max Horkheimer and Theodor W. Adorno are exemplary. Of course, ‘critical theory’ is not a unified school of thought, and nor is it wholly disjoint from liberalism.

¹⁴ References are to my translation: Max Horkheimer, ‘Theory of the Criminal [Unpublished]’, trans. Koshka Duff, *University of Sussex*, 2017.

¹⁵ Horkheimer, §5.

critics call it ‘Governance Feminism’¹⁶ and ‘feminism-as-crime-control’,¹⁷ diagnosing it as a form of pernicious ‘identity politics’.¹⁸ Its advocates – most compellingly, Catharine MacKinnon – call it *taking sexual violence seriously*, by which they mean wielding the power of the state to ‘punish perpetrators’ and ‘protect women’.¹⁹ Both sides agree that this approach follows directly from MacKinnon’s radical feminist analysis of sexual violence. This chapter aims to rethink the ‘Governance Feminism’ debate by questioning this common presupposition. I ask whether taking MacKinnon’s analysis of sexual violence seriously might, in fact, *itself* give us reason to be critical of political strategies that embrace the criminalizing power of the state. This might be read as an illustration of my ‘positive’ thesis – that attending to the perspectives of the criminalized can allow significant aspects of social reality, ‘hitherto concealed beneath an overgrowth of ideology’, to come into view.²⁰ In this case, it reveals unexpected points of convergence in what has come to seem an intractable debate. Equally, the chapter might be read as pre-empting the *other* predictable objection to my critique of the derogatory concept of the criminal: *but what about the rapists?*

These chapters will not be stylistically homogenous – and this is deliberate. Each chapter engages with a different literature, and therefore with a different constellation of concepts, concerns, presuppositions, and modes of presentation. In each case, I attempt to speak from within that constellation, to offer what Bernard Williams calls ‘internal reasons’, by making use of the communicative resources of a shared language, and the insights of a

¹⁶ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, NJ: Princeton University Press, 2006); Wendy Brown et al., *Left Legalism/Left Critique* (Duke University Press, 2002); Janet Halley et al., ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism.’, *Harvard Journal of Law & Gender* 29 (2006): 336–423.

¹⁷ Elizabeth Bernstein, ‘Carceral Politics as Gender Justice? The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights’, *Theory and Society* 41, no. 3 (2012): 251.

¹⁸ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995).

¹⁹ MacKinnon, *Toward a Feminist Theory of the State*; Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987).

²⁰ Quoted phrase from Frederick Engels, ‘Karl Marx’s Funeral’, in *Marx and Engels 1874-83*, Electronic book, Marx & Engels Collected Works, Volume 24 (New York: International Publishers, 1989), 467.

shared tradition.²¹ *Partly* definitive of all the traditions I engage with, however, is the high-security wall that the concept of the criminal builds around the sphere of sanctioned political engagement – an ideological border enforced by the concrete and often violent processes of dissent-suppression it is supposed to justify. My aim is to show how this wall thwarts each tradition’s own emancipatory promise, and therefore to show liberals, critical theorists, and feminists that they all have reasons *from their own point of view* to tear it down.

My decision to proceed in this way is motivated by a wariness of ‘utopian’ or ‘ideal’ theorising shared by many of the writers I will be drawing on.²² From my commitment to realism it also follows that there is something this thesis is *not* trying to do, namely, to draw up a blueprint for how society ought to be. I am interested in how the *real existing concept of the criminal* functions in *real existing liberalism*. I will not be answering the question of whether *some* concept of *something like* the criminal might find a place in an ‘ideal’ polity. Similarly, the criticisms I make of the law, the state, the police, etc., are criticism of these *real existing* institutions. Of course, getting a handle on what is wrong with them will involve criticising as insufficient various proposals for reform. But whether an ‘ideal’ polity would have a place for any institutions to which we – or rather, people quite unlike us – would still have reason to apply the concepts of law, state, police, etc., is not a question to which I have the answer. For reasons that will emerge in the course of this thesis, it is not a question I think we should be trying to answer. What use, if any, such people might find for a concept like legitimacy (which, etymologically at least, seems to tie the notion of correct action with that of conformity to law in *some* sense) will therefore also remain unsettled.

²¹ Bernard Williams, ‘Internal and External Reasons’, in *Rational Action*, ed. Ross Harrison (Cambridge: Cambridge University Press, 1979), 101–13. I am not committed to Williams’s view that internal reasons are the only kind of reasons that exist.

²² As I will explain in chapter 3, this wariness is attendant upon recognising the pervasiveness of ‘ideology’ in the sense identified by Marx.

OWNERS VERSUS OUTLAWS

Locke's gated community of the consenting

Introduction

[A] Criminal, who having renounced Reason, the common Rule and Measure God hath given to Mankind, hath [...] declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no society. (§11)¹

Every student of political philosophy can expect to encounter John Locke in emancipatory posture. Denouncing the slavery implied by absolutist monarchy, he insists that men are naturally free and equal, that ultimate legislative power must lie with ‘the People’, and political authority can only be founded on consent. While a growing literature details Locke’s complicity in North-Atlantic slavery, attacks on indigenous land claims, and championing of Draconian policies against the poor, among political philosophers at least the received picture displays a certain intransigence.² From a standard introduction we learn:

¹ The *Second Treatise of Government* is cited by section number.

² The most recent wave of scholarship includes: David Armitage, ‘John Locke, Carolina, and the Two Treatises of Government’, *Political Theory* 32, no. 5 (2004): 602–27; R Bernasconi and A Maaza Mann, ‘The Contradictions of Racism: Locke, Slavery, and the Two Treatises’, in *Race and Racism in Modern Philosophy*, ed. A Valls (New York: Cornell University Press, 2005); Robert Bernasconi, ‘Proto-Racism: Carolina in Locke’s Mind’, in *Racism and Modernity: Festschrift for Wulf D. Hund*, ed. Iris Wigger and Sabine Ritter (Zürich, Berlin: LIT, 2011); J. Farr, ‘Locke, Natural Law, and New World Slavery’, *Political Theory* 36, no. 4 (2008): 495–522; O. Ince, ‘Enclosing in God’s Name, Accumulating for Mankind: Money, Morality, and Accumulation in John Locke’s Theory of Property’, *The Review of Politics* 73 (2011): 29–54. The issue of Locke’s support for colonialism had already come to the fore in the long 1990s: C. McGuinness, ‘The Fundamental Constitutions of Carolina as a Tool for Lockean Scholarship’, *Interpretation: A Journal of Political Philosophy* 17, no. 1 (1989): 127–44; W. Glausser, ‘Three Approaches to Locke and the Slave Trade’, *Journal of the History of Ideas* 51, no. 2 (1990): 199–216; B. Parekh, ‘Liberalism and Colonialism: A Critique of Locke and Mill’, in *The Decolonization of Imagination: Culture, Knowledge, and Power*, ed. B. Parekh and P. Nederveen (London: Zed Books, 1995); J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993); Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996); U. Mehta, ‘Liberal Strategies of Exclusion: Colonial Cultures in a Bourgeois World’, in *Tensions of Empire*, ed. A. L. Stoler and F. Cooper (Berkeley and Los Angeles, CA: University of California Press, 1997). An earlier critical tradition focused (somewhat single-mindedly) on Locke’s relation to the rise of capitalist social relations in England: C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962); E. J. Hundert, ‘The Making of Homo Faber: John Locke Between Ideology and History’, *Journal of the History of Ideas* 33, no. 1 (1972): 3–22. The fact that women as a group are also barred from the Lockean ‘social contract’ is forcefully raised in C. Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988). The dynamics of that exclusion demand detailed consideration,

‘Locke assumed that human beings are naturally free, equal, and independent... Accordingly, Locke concluded that the only way of coming under another person’s authority was to give that person your consent (except in the case of justified punishment)’.³ Ian Shapiro, too, believes that Locke’s ‘inclusive view of all human beings as equally God’s property, as intrinsically rational, and as “authors” of the state was advanced for his day and, moreover, exhibited a fundamentally democratic egalitarian outlook’;⁴ Locke’s support for slavery is relegated to a footnote.⁵ Trenchantly rejecting ‘the post-colonial case against Locke’, Ann Talbot similarly emphasises that ‘Locke [...] asserted the right of resistance, opposed patriarchy and assumed that all men were equal and capable of reason’.⁶ Such readings, which are far from exceptional, regard Locke’s oppressive moments as disconnected blind-spots – symptoms of his less enlightened times, and perhaps of personal hypocrisy, but ultimately peripheral to his (proto-)liberal political philosophy.⁷

The proposal developed in this article is that attending to the figure of the criminal can help us move beyond this ‘embarrassing lapses’ narrative to investigate *theoretically* how the emancipatory potential of Locke’s ideas could have been so thwarted. I argue that recognising Locke as an advocate of forced labour, expropriation, and social control need not be incompatible with reading him as a liberal sincerely concerned with refuting Filmerian absolutism.⁸ This is because the concept of the criminal – whom Locke conceives primarily as

and are beyond the scope of this article. Women, of course, make up part of all the groups discussed here.

³ J. Wolff, *An Introduction to Political Philosophy*, Revised edition (Oxford: Oxford University Press, 2006), 35. An introductory guide is of course not expected to be at the cutting edge of scholarship but can provide a good gauge of the mainstream understanding of a topic, as well as influencing future generations of scholars.

⁴ I. Shapiro, ‘John Locke’s Democratic Theory’, in *The Real World of Democratic Theory* (Princeton, NJ: Princeton University Press, 2011), 41.

⁵ Shapiro, 47.

⁶ A. Talbot, *‘The Great Ocean of Knowledge’: The Influence of Travel Literature on the Work of John Locke* (Leiden: Brill, 2010), 302.

⁷ This view is articulated in J. A. Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, NJ: Princeton University Press, 1993), 49.

⁸ For a classic account of how Locke’s theory is shaped by opposition to Filmer, see J. Dunn, *The Political Thought of John Locke: An Historical Interpretation of the Argument of the “Two Treatises of Government”* (Cambridge: Cambridge University Press, 1969).

a violator of property – can be seen as simultaneously ‘punching up’ and ‘punching down’.⁹ While allowing Locke to defend gentlemanly resistance to a ‘criminal’ monarchy that exceeds its prerogative, it prevents this right of resistance from extending to the ‘criminal’ rabble.

My argument will proceed by contextualising the conflicting moments of Locke’s thought within the projects of acquisition, both domestic and colonial, pursued in this period by his patrons and allies. I will ask how Locke’s construction of the criminal might have served to *mask* the contradictions between, on the one hand, the particular interests advanced by these projects of acquisition, and on the other hand, the promise of universal emancipation to be found in his writings. My suggestion is that his account of the criminal as a ‘wild savage beast’ unfit for human society provides a theoretical mechanism whereby anyone who challenges his favoured order of work and property can be excluded from the body politic of reasonable citizens whose consent is required for legitimacy. What is standardly presented as an unexceptionable caveat – ‘(except in the case of justified punishment)’ – may therefore be better understood as a ‘liberal strategy of exclusion’,¹⁰ whose dynamics we should attend to if we want to salvage liberalism’s anti-oppressive resources for the present.

1. *Locke’s criminal*

A criminal, according to the *Second Treatise*, is one who violates the ‘Law of Nature’: ‘the Crime [...] consists in violating the Law, and varying from the right Rule of Reason, whereby a Man so far becomes degenerate, and declares himself to quit the Principles of Human Nature, and to be a noxious Creature’ (§9). Consequently, Locke argues, there exists a natural right, *prior even to the establishment of a state*, to punish criminals by whatever means necessary to prevent them (and others) from continuing to be criminals:

[Every man], by the Right he hath to preserve Mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil

⁹ Andrew Dilts has already made a strong case for seeing the ‘discursive fabrication of the “thief”’ as central to the argument of *The Second Treatise* – A. Dilts, ‘To Kill a Thief’, in *Punishment and Inclusion: Race, Membership, and the Limits of American Liberalism* (New York: Fordham University Press, 2014), 87–88. However, he does not connect this in any detail with Locke’s practical politics.

¹⁰ The term comes from U. Mehta, ‘Liberal Strategies of Exclusion’. To speak of a ‘strategy’ raises familiar methodological difficulties concerning the significance or otherwise of conscious authorial intention, which I cannot settle here. I am more interested in how Locke’s theory works than in how he thought it worked, while recognising that these cannot be fully disentangled. I do not seek to pronounce upon his moral culpability.

on any one, who hath transgressed that Law, as may make him repent the doing of it, and thereby deter him, and by his Example others, from doing the like mischief. And in the case, and upon this ground, *every Man hath a Right to punish the Offender, and be Executioner of the Law of Nature.* (§8)

To bolster this point, Locke brings in the concept of a ‘State of War’. A state of war exists wherever there is ‘force, or a declared design of force, upon the Person of another, where there is no common Superior on Earth to appeal to for relief’ (§19). Locke argues that ‘one may destroy a Man who makes War upon him [...] for the same Reason that he may kill a *Wolf* or a *Lion*; because such men are not under the ties of the Common Law of Reason.’ (§16)

Here and elsewhere, Locke charges the criminal with irrationality. However, on the question of whether this irrationality is a matter of *incapacity* or of errant *choice*, his presentation is crucially ambivalent. (The significance of this feature of his account will become clear later.) On the one hand, he says that ‘all Mankind’ may be taught by Reason if they ‘will but consult it’ (§6), and speaks of crime as a *renunciation* or *quitting* of the law of nature, clearly implying volition on the part of the criminal. On the other hand, the prominence he gives to rhetorical comparisons between criminals and beasts – the idea that, by transgressing the law, the criminal ‘declares himself... to be a noxious creature’ (§10, my emphasis) – generates the impression that criminality is somehow part of a person’s inherent nature, as wildness is of a lion. Locke nowhere explicitly develops the doctrine that criminals are a category of persons without *so much as the capacity* to be reasonable.¹¹ Yet if we turn from the criminal in the state of nature to her counterpart in civil society, the spectre of incorrigibility haunts Locke’s writings.

In the *Essay Concerning Human Understanding*, for instance, he addresses the problem of how wrong actions ‘may justly incur punishment’ despite being causally determined. The fact that a sinful decision is ‘judged good’ by the wrong-doer, Locke argues, shows that ‘he has imposed on himself wrong measures of good and evil; which, however false and fallacious, have the same influence on all his future conduct, as if they were true and right’ (II.xxi.56).¹² Wrong choices are seen as manifestations of a deeper tendency to be

¹¹ Indeed, that would come perilously close to blaming God for crime, implying that He had withheld the capacity to reason from criminals.

¹² J. Locke, *An Essay Concerning Human Understanding*, ed. J. Yolton, New edition, abridged (London: Everyman, 1993), 138.

motivated by ‘wrong measures of good and evil’ – which nonetheless the sinner is said to have ‘imposed on himself’ (presumably another wrong choice). On this account, punishment is just *precisely because* the criminal is the *kind of person* who cannot be trusted rationally to weigh present ease against ‘the miscarriages that follow upon it’. To call this irrationality self-imposed might seem to generate an infinite regress, but the slack is picked up by Locke’s account of socialization. Locke was alert to the power of ‘custom’ – the attitudes picked up in early childhood – to either develop or (more often) impede the capacity to reason.¹³ Indeed, as Mehta notes, ‘in [Locke’s] educational writing... we see the extent to which the self-consciousness of the mature adult and citizen is the product of careful and detailed pedagogical crafting’.¹⁴

However, not all subjects are to be crafted for citizenship in the fullest sense. Locke’s *Essay on the Poor Law* argues for the establishment of ‘working schools’ in which the children of the poor might be set to spinning ‘from sun rising to sunset only allowing them an hour for dinner, till they are 14’.¹⁵ Children will thereby ‘from infancy be inured to work, which is no small consequence to the making of them sober and industrious all their lives after’.¹⁶ As we will see, Locke regards ‘idleness’ as a criminal disposition. While noting that mismanagement on the part of the ruling classes may share the blame for the ‘relaxation of discipline and corruption of manners’ he observes among the poor,¹⁷ he does not favour leniency towards (what he sees as) the brutish products of such botched socialization.¹⁸ Another of his recommendations is that officials charged with ‘seizing beggars on the streets’ for the purposes of correctional punishment should *themselves* be subject to imprisonment or

¹³ R. Grant, ‘John Locke on Custom’s Power and Reason’s Authority’, *The Review of Politics* 74, no. 4 (2012): 607–29.

¹⁴ U. Mehta, *The Anxiety of Freedom: Imagination and Individuality in Locke’s Political Thought* (Ithaca, NY: Cornell University Press, 1992), 13.

¹⁵ J. Locke, *Political Essays*, ed. M. Goldie (Cambridge: Cambridge University Press, 1997), 192.

¹⁶ Locke, 190.

¹⁷ Locke, 184.

¹⁸ Elsewhere, Locke refers to a lack of education as ‘making men brutes’, although he worries that ‘too much’ education might equally threaten public order by ‘making men [...] proud, especially those of the lower sort’. Locke, 254.

press-ganging onto ‘His Majesty’s ships’ if they are ‘not zealous enough at enforcement’.¹⁹

Returning to Locke’s theory of crime and punishment in the state of nature, though, we might wonder about the *scope* of his claim that the criminal ‘may be destroyed as a *Lyon* or a *Tyger*’ (§11). To what extent is it tempered by his proviso that a criminal’s punishment should be ‘proportionate to his Transgression’ (§8)? A. John Simmons takes this to mean that only ‘those who kill or enslave innocents (or demonstrate the intention to do so)’ are punishable by death: ‘Lesser criminals (e.g., pickpockets or muggers) are *not* war-makers and forfeit only some of their rights by their wrongdoing’.²⁰ Buckle puts a similarly benign gloss on the Lockean right to punish. He describes it as ‘confer[ring] legitimacy on actions to protect the safety of ourselves and others’.²¹ However, to see what Locke himself might regard as proportionate, it will surely be relevant, once again, to place his comments in the context of the penal system of his day, and the attitudes he expressed towards it.

Consider, first, the political factions Locke supported in the 1680s: ‘our Great Restorer, Our present King William [of Orange]’,²² and the Whigs, part-founded by Locke’s patron, Lord Ashley, the First Earl of Shaftesbury.²³ The period inaugurated by their ascendancy saw such a sharp increase in the use of capital punishment for offences against property that Peter Linebaugh has coined the term ‘thanatocracy’ – rule by death – to characterise it. He notes that, ‘From 1688 [the year William III took the throne] to 1820, the number of crimes carrying the death penalty increased from 50 to between 200 and 250, and they were almost always crimes against property’.²⁴ The Sessions of the Old Bailey in 1715,

¹⁹ Locke, 197.

²⁰ Simmons, *On the Edge of Anarchy*, 156.

²¹ Stephen Buckle, ‘Tully, Locke and America’, *British Journal for the History of Philosophy* 9, no. 2 (2001): 267.

²² ‘The Preface’, in Locke, *Two Treatises of Government*, 137.

²³ Locke’s closeness to Shaftesbury is undisputed, even if Ashcraft overstates the case in claiming that ‘Locke was [...] steadfastly loyal to his patron, and at no time [...] did Locke once criticize the Earl for any policy, belief, or personal action whatsoever’ Richard Ashcraft, *Revolutionary Politics and Locke’s Two Treatises of Government* (Princeton, NJ: Princeton University Press, 1986), 83.

²⁴ P. Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century*, Second Edition (London: Verso, 2006), 77. For more detail see J. M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton, NJ: Princeton University Press, 1986), 141–98.

for example, record a person hanged for stealing ‘4 pewter spoons and a copper furnace’, another for taking ‘600 lbs sugar’.²⁵ Despite relying heavily on the image of the highwayman (or, in modern parlance, the mugger) in his argument for the justice of killing offenders against property, Locke seems, in practice, at least, to take its *conclusion* to apply more broadly. We know he was active in pushing for the severest punishments for property crimes which were a far cry from armed robbery, such as the practice of ‘clipping’, or removing tiny bits of precious metal from coins, which was made high treason in 1696.²⁶ So when, in the *Second Treatise*, Locke claims that it is ‘Lawful for a Man to *kill a Thief*, who has not in the least hurt him’ (§18), perhaps we should take him at his word.

Of course, caution is required in shifting between English civil society and the state of nature. However, it is an oft-noted feature of Locke’s theory that he builds a great deal of his preferred proprietary order (and the right to punish its transgressors) into his state of nature.²⁷ This is crucial to establishing a right of rebellion by property-owners against a tyrant.²⁸ Just as importantly, though, it is crucial to showing that such a right need not threaten social revolution ‘from below’ against the propertied, as we will see.

2. *The un-mixing of labour and land*

In fact, the propertied classes were, at the turn of the eighteenth century, engaging in some social revolution of their own. The British state’s increasing reliance on the gory spectacles of hanging, whipping, branding, and the removal of body parts to enforce the ‘social contract’ marked a struggle over the *meaning* of property. The rise of a new form of

²⁵ Linebaugh, *The London Hanged*, 88.

²⁶ J. Locke, *Some Considerations of the Consequences of the Lowering of Interest, and Raising the Value of Money. In a Letter to a Member of Parliament*. (London: Awnsham and John Churchill, at the Black-Swan in Pater-Noster-Row, 1692), 3. To be sure, Locke’s concern is not *only* with penal responses but also with broader monetary policy. For analysis see: C. G. Caffentzis, *Clipped Coins, Abused Words, and Civil Government: John Locke’s Philosophy of Money* (New York: Autonomedia, 1989), 21; Linebaugh, *The London Hanged*, 51.

²⁷ He is clear that ‘Every Offence, that can be committed in the State of Nature, may in the State of Nature be also punished equally, and as far forth as it may, in a Common-wealth’ (§12). The role of governments in determining what counts as an offence will be discussed later.

²⁸ This point is noted in Glausser, ‘Three Approaches to Locke and the Slave Trade’, 214.

private property was destroying older ‘customary usages’.²⁹ Workers’ commonly understood entitlements to work-place materials such as wood-chippings or scrap metal for their own use, as well as rural ‘commoning rights’ to the resources of forests or meadows, were *redefined* as theft, as crimes against property. Between 1662 and 1740 seven separate statutes were passed forbidding customary forms of (often non-monetary) income.³⁰ This ‘enclosure of the commons’ entailed the forcible severance of people from their means of subsistence, thereby creating a stratum of people who had no choice but to work for wages. This was a result aimed at by many political economists and statesmen of the period, who ‘called for measures to force those who engaged in self-provisioning to integrate themselves into the cash nexus’.³¹ The ‘philanthropist’ John Bellers summarises this widely recognised connection between expropriation from the land and the imperative to labour: ‘Our Forests and great Commons (make the Poor that are upon them too much like the Indians) being a hindrance to Industry, and are Nurseries of Idleness and Insolence’.³²

It is in this context that we should understand Locke’s own interventions, particularly his *Essay on the Poor Law*.³³ As well as the ‘working schools’ already discussed, Locke recommends a host of punitive measures directed against those ‘begging drones’³⁴ of all ages who, he complains, are to be found ‘swarming in the streets’.³⁵ Their very multitude, he argues, shows that not enough of these ‘visible trespassers have been taken up and brought to punishment’—since he regards the claim not to be able to find work a mere ‘pretence’.³⁶ He therefore proposes that ‘whosoever shall counterfeit a [begging] pass shall lose his ears for the forgery the first time that he is found guilty thereof, and the second time, that he shall be

²⁹ See Beattie, *Crime and the Courts in England 1660-1800*, 450–92; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Acts* (London: Penguin, 1975); Linebaugh, *The London Hanged*; R. Nichols, ‘Disaggregating Primitive Accumulation’, *Radical Philosophy* 194 (2015): 18–28; J. Goldstein, ‘Terra Economica: Waste and the Production of Enclosed Nature’, *Antipode* 45, no. 2 (2013): 357–75.

³⁰ Linebaugh, *The London Hanged*, 239.

³¹ M. Perelman, *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation* (Durham, NC: Duke University Press, 2000), 124.

³² Perelman, 46.

³³ For detailed discussion, see Hundert, ‘The Making of Homo Faber’.

³⁴ Locke, *Political Essays*, 183.

³⁵ Locke, 190.

³⁶ Locke, 189–90.

transported to the plantations'.³⁷ Begging without a pass should result in several years' hard labour in a house of correction, or impressment into service on His Majesty's ships.³⁸ Children caught begging should be 'soundly whipped' or 'sent to the next house of correction, there to remain at work six weeks',³⁹ and so forth.

It is sometimes thought that the attitude towards the poor which Locke expresses here is counterbalanced by his support for charity.⁴⁰ However, as Locke's friend Lady Masham recalls, 'his charity was always directed to encourage working, laborious, industrious people, and not to relieve idle beggars, to whom he never gave anything, or would suffer his friends to do so before him'.⁴¹ In a 1679 musing he even envisages punishments for anyone giving to a beggar without reporting them to the authorities.⁴² This provides support for my claim that a function of criminalization in Locke is to repress dissent 'from below'. The significant point is that the brutal measures were reserved for those who *challenged* Locke's favoured regime of work and property - although, clearly, many were in circumstances such that their few available means of survival posed such a challenge. Lee Ward's observation that, 'For the poor, *as opposed to* vagrants and beggars, Locke argues, relief "consists in finding work for them"', equally shows the importance of the distinction between the obedient and the criminalized, and of the imperative to labour which underlies it, whether or not we agree with Ward that this constitutes a 'truly enlightened and progressive aspect of Locke's proposal'.⁴³

3. Colonial slavery and Locke's 'just war' on crime

Nobody would make that claim for the forced labour economy Locke was involved in

³⁷ Locke, 194.

³⁸ Locke, 185–86.

³⁹ Locke, 187.

⁴⁰ See J. Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980), 132. Tully's later work on the Lockean 'penalized self' is more critical on this point, however. See 'Governing Conduct' in *Locke in Contexts*, 179–241.

⁴¹ Cited in G. Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford: Oxford University Press, 1995), 45.

⁴² These musings, which appear in Locke's journal under the heading 'Atlantis', were not merely idle. As David Armitage notes, they 'referred explicitly or implicitly to [the colony of] Carolina' (Armitage, 'John Locke, Carolina, and the Two Treatises of Government', 610.)

⁴³ L. Ward, *John Locke and Modern Life* (Cambridge: Cambridge University Press, 2010), 204. My emphasis.

instituting in the American colonies. Although his writings were to figure significantly in later abolitionist campaigns,⁴⁴ his complicity in the development of chattel slavery is well-documented.⁴⁵ For instance, he invested in The Company of Royal Adventurers in England Trading into Africa, a substantial portion of whose trade consisted in enslaved Africans, and was a primary subscriber to the Royal Africa Company which succeeded it, among other slaving ventures. He also sat on various boards concerned with the slave-holding plantations. As Secretary to the Lords Proprietors of Carolina and aide to the Earl of Shaftesbury (a key figure in the history of English colonialism), he contributed to the *Fundamental Constitutions of Carolina*,⁴⁶ a blue-print for the administration of the colony, and was minutely involved in its running for nearly a decade.⁴⁷ David Armitage demonstrates in meticulous detail how Locke was active in revising the *Constitutions* at the same time as he was composing the *Second Treatise* (early 1680s), in particular the key chapter ‘Of Property’.⁴⁸ Although not the sole author of the *Constitutions*,⁴⁹ his contributions are thought, notoriously, to include altering a passage that read, ‘Every freeman of Carolina shall have absolute Authority over his Negro Slaves, of whatever opinion or Religion so ever’, strengthening this to ‘absolute power and Authority over his Negro Slaves’⁵⁰ – meaning the power of life and death.

Those operating with the traditional view of Locke have encountered great difficulties trying to integrate this material into his broader – presumed emancipatory – project. Farr, for instance, asks: ‘How could Locke - a philosopher of such judgment and criticism and reflection - live with such contradiction...? But he did. *A kink in his head*, he partook of the madness of American slavery’.⁵¹ This leaves Locke-the-flawed-individual mired in the

⁴⁴ Farr, ‘Locke, Natural Law, and New World Slavery’, 511.

⁴⁵ See Glausser, ‘Three Approaches to Locke and the Slave Trade’; Armitage, ‘John Locke, Carolina, and the Two Treatises of Government’; Bernasconi and Maaza Mann, ‘The Contradictions of Racism’; Farr, ‘Locke, Natural Law, and New World Slavery’.

⁴⁶ Locke, *Political Essays*, 160–81.

⁴⁷ At one point, he was in line to become a Proprietor of the territory himself, and ‘Locke Island’ was named for him with plans for a plantation (Farr, ‘Locke, Natural Law, and New World Slavery’, 500.).

⁴⁸ Armitage, ‘John Locke, Carolina, and the Two Treatises of Government’. See especially 615–16.

⁴⁹ Evidence concerning his precise role is laid out in Armitage.

⁵⁰ Armitage, 609. Locke, *Political Essays*, 180.

⁵¹ Farr, ‘Locke, Natural Law, and New World Slavery’, 516. Emphasis added. Shapiro echoes this conclusion: ‘Farr makes a convincing case that the two really cannot be reconciled’ (Shapiro, ‘John Locke’s Democratic

insanity of his day in order to extract Locke-the-liberal-theorist unscathed, apparently fully at odds with his other self. In contrast with such ‘deviance’ readings,⁵² when Domenico Losurdo’s contends that ‘liberalism and racial chattel slavery emerged together as a twin birth’,⁵³ he is referring not merely to the (undeniable) fact of chronological concurrence, but to the role of liberals and liberal ideas in championing the rights of slave owners over their human property. The complex entanglements of liberalism with Empire in later centuries are, of course, the subject of a significant literature.⁵⁴ In light of such critical histories, it is hard to disagree with Robert Bernasconi and Anika Maaza Mann that the hitherto dominant assumption that Locke’s practice and his preaching are *simply* disjoint on the issue of slavery bears re-examination.⁵⁵

The defence of slavery Locke offers in the *Second Treatise* pertains to ‘Captives taken in a just War’, who ‘are by the Right of Nature subjected to the Absolute Dominion and Arbitrary Power of their Masters’ (§85). Locke’s insistence on the slave-master’s *absolute* power is consonant with the position of the *Fundamental Constitutions*, as against Tyrrell’s position in *Patriarcha non Monarcha* (with which Locke was well acquainted), which denied owners the right to kill their slaves.⁵⁶ However, as has often been noted, slaving expeditions to the West Coast of Africa do not seem to be archetypical instances of ‘just war’; nor do wars waged between African principalities for the purpose of acquiring captives for sale. Even if they could be so construed, Locke’s theory would not appear to make room for the hereditary slavery that was becoming an increasingly stable feature of English colonial practice after the Virginia Act XII of 1662.⁵⁷ Most commentators therefore take it that Locke’s ‘description of

Theory’, 47.). This is not a new theme in the literature. Dunn, for instance, describes Locke as ‘sheepishly avert[ing] his eyes [from the slave trade] when he came to elaborate a coherent morality’ (Dunn, *The Political Thought of John Locke*, 255.).

⁵² Cf. Glausser, ‘Three Approaches to Locke and the Slave Trade’, 205.

⁵³ Domenico Losurdo, *Liberalism: A Counter-History*, trans. Gregory Elliot (London: Verso, 2014), 302.

⁵⁴ A recent contribution to this literature is Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton, NJ: Princeton University Press, 2016).

⁵⁵ Bernasconi and Maaza Mann, ‘The Contradictions of Racism’; Bernasconi, ‘Proto-Racism: Carolina in Locke’s Mind’. To say that they are not *simply* disjoint is not, of course, to say that they are fully coherent.

⁵⁶ J. Tyrrell, ‘Patriarcha Non Monarcha’ 1681, 103–5. For comparison of Locke and Tyrrell, see Bernasconi, ‘Proto-Racism: Carolina in Locke’s Mind’, 75–76.

⁵⁷ There is no record of Locke opposing hereditary slavery, although he would have been in a position at least to

slavery [in the *Second Treatise*] has almost no resemblance to the institution of slavery then established',⁵⁸ drawing the conclusion that his theoretical defence of slavery was not supposed to be a defence of the actually existing institution of slavery.

This view is strongly contested by Bernasconi and Maaza Mann. They document the regularity with which 'just war' theories *were* invoked in the period to defend colonial slavery, presenting this as strong contextual evidence that Locke did regard it as falling within the remit of his *Second Treatise* account.⁵⁹ An inaccurate description may, after all, be more successful than an accurate one in legitimising a bad institution. However, I do not propose here to settle the question of whether Locke made a coherent effort in the *Second Treatise* to justify Carolina-style slavery. Whether he did or not, we are still entitled to enquire how he might have side-stepped the apparently glaring incompatibility of his 'just war' account with the realities of colonial practice.

The standard story is that Locke was a 'child of his time', who could afford complacency because his position 'simply reflect[ed] the position that most of Britain held'.⁶⁰ As Bernasconi and Maaza Mann argue, however, this fails to reckon with the fact that Locke 'belonged to the circle that helped to shape the specific form in which the institution of chattel slavery took root in North America'. It therefore does not make sense to present him as merely inheriting a prejudice in favour of an accepted practice.⁶¹ 'Child of his time' explanations draw sustenance from a familiar narrative according to which slavery was universally accepted until some way into the eighteenth century when abolitionist movements gained respectability. Of course, support for slavery could never be perceived as universal if one were to count the opinions of enslaved people themselves, who regularly signalled their dissent by running away and/or rebelling.⁶² Even leaving that aside, though, the forms of

register an objection, not only as secretary to the Carolina Proprietors (which, as Armitage emphasises, 'was an executive as well as administrative position' (Armitage, 'John Locke, Carolina, and the Two Treatises of Government', 607.), but several decades later, as secretary to the Board of Trade (Armitage, 603.).

⁵⁸ McGuinness, 'The Fundamental Constitutions of Carolina as a Tool for Lockean Scholarship', 140.

⁵⁹ Bernasconi and Maaza Mann, 'The Contradictions of Racism'.

⁶⁰ McGuinness, 'The Fundamental Constitutions of Carolina as a Tool for Lockean Scholarship', 142.

⁶¹ Bernasconi and Maaza Mann, 'The Contradictions of Racism', 102.

⁶² For late seventeenth century rebellions by plantation workers, see P. Linebaugh and M. Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston, MA:

chattel slavery being developed in the American colonies were vigorously contested in England during the seventeenth century. Texts such as ‘The Complaints of the Negro-Slaves against the hard Usages and barbarous Cruelties inflicted upon them’, presented in the voice of an enslaved person by the popular author Thomas Tryon,⁶³ show that arguments against the institution were current.

There is a broader methodological point here. In times of struggle and contestation, pointing to the times cannot explain why an individual took one side rather than another. Noting an individual’s social position and economic interests can have significant explanatory value but to avoid crude determinism we must, surely, try to understand how the ideas, attitudes, and commitments which comprised that individual’s world view could (at least) have *seemed* to hang together. In the case of Locke’s world view, my suggestion is that the figure of the criminal is apt for creating just such a *seeming* consistency.

Let me sketch a reconstruction of how one could get *from* the position articulated in the *Second Treatise* – via the criminal – to a view of colonial slavery as at least approximating a just institution. As more than one commentator has noted, albeit only in passing,⁶⁴ Locke could have imagined that slaving raids and colonial aggression were ‘just wars’ so long as those against whom they were directed could be cast *en masse* as criminals. This is because to be a criminal, even if peaceful and unarmed, is to put oneself in a ‘state of war’ with civilized society, thereby exposing oneself to rightful extermination ‘as a *Wolf* or a *Lyon*’ (§16), or to an enslavement that – as Locke takes pains to emphasise – is absolute. I suggest this point deserves closer attention.

The chapter ‘Of Slavery’ supports the view that Locke saw crime as a path to deserved enslavement. There he argues that that a man [sic] may part with his ‘freedom from absolute, arbitrary power’ by committing ‘some Act that deserves Death’ and ‘by his fault forfeit[ing] his own Life’ (§23). Locke would not have been alone in believing this. Even the slave

Beacon Press, 2000), 137. For discussion of Locke’s awareness of these, see Neocleous, ‘War on Waste’, 18. To point out that Locke would not have respected the opinions of rebel slaves begs the question as to *why* he did not respect them.

⁶³ T. Tryon, ‘Friendly Advice to the Gentlemen-Planters of the East and West Indies’ 1684.

⁶⁴ Glausser, ‘Three Approaches to Locke and the Slave Trade’, 214; Bernasconi, ‘Proto-Racism: Carolina in Locke’s Mind’, 77.

narrator of Tryon's 'The Complaints of the Negro-Slaves' concedes that 'We had never been snatcht from the Lands of our Nativity [...] if we had not first forsaken and violated that Law of our Creator'.⁶⁵ That an anti-slavery author found it dialectically wisest to grant this point is testament to its status as a commonplace of pro-slavery rhetoric. Furthermore, travel writings with which Locke was familiar emphasised (with varying degrees of approval) the use by authorities in West Africa of enslavement as a punishment for theft and other crimes against property, as well as for religious offences such as practising 'wizardry', which were framed as threats to public order.⁶⁶ Certainly, portraying enslaved Africans as criminals was to become an increasingly prominent anti-abolitionist tactic in the century after Locke's death.⁶⁷

However, a puzzle remains as to how this could have been taken to excuse an institution of *hereditary* slavery. To be sure, there is precedent in natural law theory for expanding the war on crime to justify enslavement not only of individuals but of populations. Grotius, for instance, declares that: 'a whole People may be brought into Subjection for a publick Crime'.⁶⁸ Yet Locke's claim that the families of defeated combatants should not be enslaved seems to push against this (§182). Another question, which I will take up later, is why *absolute* slavery is reserved for 'Negroes', on Locke's scheme, rather than for criminals of European origin (although the latter may be subjected to forced labour of various kinds).

⁶⁵ Tryon, 'Friendly Advice to the Gentlemen-Planters', 80–81.

⁶⁶ For instance, J. Merolla da Sorrento, 'A Voyage to Congo and Several Other Countries in the Southern Africk', in *A Collection of Voyages and Travels*, ed. A. Churchill and J. Churchill, vol. 1 (London: Printed for Awnsham and John Churchill, 1704), 669, 676–78. [Rare] L34 Chu (fol.), Senate House Library, University of London. Locke was closely involved with this publication. He discussed the selection of texts at length with his friend and publisher Awnsham Churchill, and was sent proofs as well as complimentary copies of the 1704 published volumes. Material in the *Collection* connects closely with Locke's citation of travel literature in the *Essay Concerning Human Understanding*. I am grateful to Mark Goldie for these details, which will be published in his forthcoming intellectual biography of late Locke. For an account of Locke's relationship with Churchill see M. Knights, 'Churchill, Awnsham (1658-1728)', in *The History of Parliament: The House of Commons 1690-1715*, ed. S. Handley, D. Hayton, and E. Cruickshanks (Cambridge: Boydell & Brewer, 2006).

⁶⁷ E. Christopher, "'The Slave Trade Is Merciful Compared to [This]': Slave Traders, Convict Transportation, and the Abolitionists", in *Many Middle Passages: Forced Migration and the Making of the Modern World*, ed. E. Christopher, M. Rediker, and C. Pybus (Berkeley and Los Angeles, CA: University of California Press, 2007), 112–15.

⁶⁸ Cited in Neocleous, 'War on Waste', 22.

These questions both relate to the fact that colonial slavery was a *racialized* institution.⁶⁹ While racism as an explicitly formulated biological-essentialist ideology was a product of later centuries,⁷⁰ Bernasconi suggests that the system Locke supported can helpfully be described as (at least) ‘proto-racist’. This is to say, it already operated *practically* in such a way that the invention of a fully-fledged racial ideology would subsequently be required to legitimise it – *post hoc*, as it were.⁷¹

Without proposing to offer anything like a complete explanation of the contours of this system, I suggest that one feature of Locke’s story about criminality might *lend itself* to a racialized understanding of who is deserving of enslavement. This is the ambivalence, identified earlier, between *essentialism* and *voluntarism* in his account of the criminal. As we have seen, Locke repeatedly portrays the criminal as a different *species* from the rational man [sic]. Such imagery might make a racialized form of hereditary slavery seem less troubling; after all, ‘Beasts of Prey’ (§16) are unlikely to give birth to human beings. Conversely, Locke’s insistence that the criminal *chooses* to deviate from the law of nature ensures that the enslaved person, like the ‘begging drone’, remains responsible for their fate. To be sure, the rhetoric of bestiality and the rhetoric of blame as applied to a criminalized group are on some level in tension with one another. Oscillating between them, however, seems to be a potent formula for legitimising ill-treatment, as the ‘law and order’ politicians of our own day have recognised.

In the case of those subjected to chattel slavery, though, the question remains: what is the crime they are supposed to have committed? While it cannot be assumed that Locke had a well worked-out answer to this, it is still worth asking what answer(s), if any, might have seemed plausible from his theoretical perspective. A clue can be found, I suggest, in the ‘Introductory Discourse’ to the collection of travel writings mentioned earlier:

The Natives [of Africa] are for the most part black, or else inclined to it. All the

⁶⁹ An institution of hereditary slavery would not *have* to be racialized, but in the case in question these features are plausibly connected.

⁷⁰ For the role of another ‘father of liberalism’ in its development, see E. Eze, ‘The Colour of Reason: The Idea of “Race” in Kant’s Anthropology’, in *Postcolonial African Philosophy: A Critical Reader*, ed. E. Eze (Oxford: Blackwell, 1997); P. Parks, *Africa, Asia, and the History of Philosophy: Racism in the Formation of the Philosophical Canon, 1789 - 1830* (Albany, NY: SUNY Press, 2013).

⁷¹ Bernasconi, ‘Proto-Racism: Carolina in Locke’s Mind’, 72.

Commodities that are brought from thence are Gold-Dust, Ivory and Slaves; those black people selling one another, which is a very considerable Trade, and has been a great support to all the American Plantations. This is all that mighty Continent affords for Exportation, the greatest part of it being scorched under the Torrid Zone, and the Natives almost naked, *no where industrious*, and for the most part scarce civiliz'd.⁷²

Attributions of this preliminary essay to Locke himself are unsubstantiated.⁷³ Yet the acceptance within his close circle of a view of Africans as 'no where industrious'⁷⁴ is still significant. Might it provide a missing link between (a) Locke's apparently abstract defence of slavery in the *Second Treatise* and (b) his practical stance towards the 'absolute power and authority' of the Carolina slave master 'over his Negro Slaves'?⁷⁵ To be clear, this reconstruction would not be in competition with explanations of Locke's attitude to colonial slavery in term of racist or 'proto-racist' beliefs,⁷⁶ but might contribute to our understanding of what these amounted to.

My suggestion, in broad brush strokes, is this: the (perceived) persistence of Africans in a way of life that does not 'profit mankind' by industriously contributing to economic expansion ('civilization') renders them liable to criminalization through Locke's theoretical lens.⁷⁷ To see how this works in more detail, however, we need to examine Locke's account

⁷² 'The Whole History of Navigation from Its Original to This Time', in *Collection of Voyages and Travels*, ed. A. Churchill and J. Churchill, vol. 1 (London: Printed for Awnsham and John Churchill, 1704), xxxiii.

⁷³ The Preface to the third edition boasts of the 'Introductory Discourse' that it was 'supposed to be written by the Celebrated Mr. LOCKE'. A. Churchill and J. Churchill, eds., *A Collection of Voyages and Travels*, The Third Edition, vol. 1 (London: Printed by assignment from Messrs. Churchill, for Henry Lintot; and John Osborn, 1744), ii. *Historical Texts* online archive.

⁷⁴ Another author in the *Collection* remarks of enslaved African workers at a Portuguese sugar works in Brazil: 'It is wonderful to see the Blacks, who are naturally lazy, labour so hard'. Merolla da Sorrento, 'A Voyage to Congo', 617.

⁷⁵ Locke, *Political Essays*, 180. To speak of a 'missing link' is not to claim that the former must have been intentionally geared towards justifying the latter, but that the two may be more compatible than scholars tend to believe.

⁷⁶ Bernasconi and Maaza Mann, 'The Contradictions of Racism'; Bernasconi, 'Proto-Racism: Carolina in Locke's Mind'.

⁷⁷ This could combine profitably (from a coloniser's perspective) with the notion that those Africans sold as slaves to Europeans had likely committed further crimes within their native jurisdictions. My account is not intended to be exhaustive.

of what the criminal offends *against*, namely, his theory of property.

4. *Making (and) money*

Locke is committed to property as a kind of *Ur*-value or axiom. He derives the rationality of preserving oneself and others from the fact that ‘all mankind’ are ‘his Property, whose Workmanship they are, made to last during his, not one another’s Pleasure’ (§6); in other words, failing to ‘preserve Mankind’ is wrong because it is an offence against God’s property.⁷⁸ While *earthly* property rights clearly do not precede the duty to collective self-preservation, Locke does think they are prior – probably temporally but certainly in principle – to any state or ‘political society’. The need for a state itself arises from a pre-existing but precarious institution of property.⁷⁹ However, as we have seen, the forms of property which Locke in fact wanted the state to enforce were at least as new and controversial as his ideas about the limitation of monarchical power. As an ally of the forces of enclosure, Locke was engaged in a process of redefining ‘what counts as the *proper* use of nature and thus nature as *property*, what counts as the *proper* use of one’s own person (labour) and time and thus *propriety*, and thus what counts as a *proper order*’.⁸⁰ The question to be addressed here is whether and how his account of property as laid out in the *Second Treatise* contributes to this project.

Locke’s theory of property has two distinct stages. In the first, he claims that property is acquired through mixing one’s labour with the fruits of nature (§27). On this story, if I pick an apple from an unowned tree, that apple becomes mine. Furthermore, Locke claims that there is a natural limit to how much property of this kind I can acquire, since there are only so many apples I can make use of. If I try to stockpile more and more apples they will go to waste. Waste, he says, is irrational; it is a crime against ‘the common Law of Nature’ (§37). That which is wasted does not count as property, and ‘might be the Possession of any other’ (§38). However, Locke ultimately does not want everything to belong to the person who ‘mixed their labour’ with it. This is immediately revealed in the examples he gives: ‘Thus the

⁷⁸ For discussion of the ‘workmanship model’ of God’s authority, see Tully, *A Discourse on Property*, 35–50. It is striking how often Locke uses analogies with human property to make his case.

⁷⁹ For helpful exposition of this point see Caffentzis, *Clipped Coins, Abused Words, and Civil Government*, 45–76.

⁸⁰ Neocleous, ‘War on Waste’, 68.

Grass my Horse has bit; the Turfs my Servant has cut... become my *Property*, without the assignation or consent of any body' (§28). Suppose for a moment that I am Locke's servant. Since it is *my* labour that is mixed with the turfs, why does he take for granted that they belong to him rather than to me? Indeed, if all are equal in a state of nature, why do I have a master at all? Another *prima facie* puzzle is why, given Locke's assertion of the 'spoilage limitation', he did not seem so keen in practice to limit how much property gentlemen could acquire.

The answer, familiar from C. B. Macpherson's classic reading, can be found in stage two of Locke's theory: the invention of money. Locke takes money to have been established 'by consent', the evidence for this being that it exists and therefore must have been consented to (§50).⁸¹ Money takes the form of non-perishable tokens such as gold. Since these do not rot, a man [sic] can accumulate as much as he wants without creating a noxious midden (§46-7). Indeed, if he is 'Industrious and Rational' (§34), he will invest his money in further production – *put it to work as his servant* – and then reap the fruits of its labour: more money.⁸² Locke calls this 'improvement' – a concept we will explore later. For the moment, we need simply note that Locke's strictures against hoarding⁸³ apply only to money lying idle and wasted. They do not apply to money as capital.⁸⁴

Locke is fully conscious that this sort of wealth accumulation will lead to extremes of inequality and poverty. It is precisely for this reason, on his scheme, that a state is required to uphold the property of the wealthy in the face of the social unrest into which a society characterised by such heightened antagonism of interests must inevitably fall. As Caffentzis puts it, 'the increasing disproportion of possessions ignites a chronic state of war that necessitates a compact among those who find it in their interest to protect and preserve their property'.⁸⁵ Furthermore, Macpherson argues, such inequality is a prerequisite for the master-

⁸¹ For illuminating analysis of Locke's theory of money, and the ambiguous roles of both consent and natural law in its establishment, see Ince, 'Enclosing in God's Name'.

⁸² See D. McNally, 'Locke, Levellers and Liberty: Property and Democracy in the Thought of the First Whigs', in *Locke's Moral, Political, and Legal Philosophy*, ed. J. R. Milton, Reprinted 1999 (Aldershot: Ashgate, 1989), 30.

⁸³ Discussed in Tully, *A Discourse on Property*, 102.

⁸⁴ For explanation of this point see Ince, 'Enclosing in God's Name'.

⁸⁵ Caffentzis, *Clipped Coins, Abused Words, and Civil Government*, 163.

servant relation Locke takes for granted in his example of the turfs. It is because they lack the resources to live independently that the propertyless must become servants of the propertied. This interpretation can make sense of the way that Locke, somewhat implausibly, writes into his state of nature the complex institutions of money and wage labour – and, consequently, ‘the supersession of the initial spoilage limit on the amount of land a man can rightfully possess’.⁸⁶ His aim, according to Macpherson, is to naturalise a system of capitalist accumulation through the exploitation of the dispossessed.

James Tully, however, contests Macpherson’s characterisation of Locke as an early ideologist of capital. He points to the fact that, although the *spoilage* condition may be overcome with the institution of money, Lockean property rights continue to depend upon another condition: that they promote the common good (§27).⁸⁷ Indeed, Tully argues that property limited by the need to serve this ‘social function’ is not properly called *private* at all.⁸⁸ However, while he is correct in noting Locke’s frequent invocations of the good of mankind, in taking them as inimical to the institution (and accumulation) of private property, Tully misconstrues their role. As Onur Ince notes,⁸⁹ Locke repeatedly asserts that the common good *is* served by his favoured form of property – namely, the ‘improvement’ of land by the ‘Industrious and Rational’ (or rather, though this is more often assumed in the *Second Treatise* than stated, by their servants and slaves⁹⁰). It is more efficient, he proclaims, so it ‘increase[s] the common stock of Mankind’ (§37, see also §43).⁹¹ As with ‘trickle-down’ economics today, the idea of the ‘common good’ seems to be operating primarily as a *justification* for accumulation, not as a limit on it.

This makes sense if we consider that Locke, in line with other early political economists, understood ‘common good’ as roughly equivalent to economic expansion. At the

⁸⁶ Macpherson, *The Political Theory of Possessive Individualism*, 209.

⁸⁷ Tully, *A Discourse on Property*, 99.

⁸⁸ Tully, *Locke in Contexts*, 96, 117, 120.

⁸⁹ Ince, ‘Enclosing in God’s Name’, 46.

⁹⁰ Tully’s insistence that ‘the demand that property in land be conditional on use’ is inherently egalitarian (*Locke in Contexts*, 129.) overlooks this fact.

⁹¹ Speaking of *Some Considerations of the Lowering of Interest, and Raising the Value of Money*, McNally observes that ‘Locke’s whole argument was organised around the view that the public interest is inseparably linked with the economic interests of the landed gentleman’ (‘Locke, Levellers and Liberty’, 32.).

time, this was *nationally* organised; furthermore, it was recognised as requiring a strong work- and property-enforcing state, empowered to place restrictions on individual accumulators to secure the conditions for further accumulation.⁹² Macpherson's thesis (that Locke's theory of property is designed to justify boundless accumulation by the elites with whom he associated) is therefore defensible so long as we bear in mind that it applies to those elites *as a collective body or class*. As individuals, Locke is clear, their private accumulation may be held in check in the interests of this collective goal.⁹³

A short-coming of Macpherson's account, however, is its equation of Locke's master-servant relation with the exchange of money for labour-power. This overlooks Locke's support for practices – of forced convict labour, impressment, indentured servitude, and workhouses – which straddle the border between wage-labour and chattel slavery. Macpherson fails to recognise the importance of these interrelated processes of criminalization and colonisation, in the enterprising vision of seventeenth-century 'improvers', for generating the exploited labour on which economic expansion would be predicated.⁹⁴

5. *Common criminals*

But if Locke does not want to set a ceiling on the unequal accumulation of private property, why does he spend so much time asserting its natural limit in stage one of his theory? One reason suggested in the literature is that the concept of *waste* is instrumental to delegitimising those uses of nature he finds undesirable, and criminalizing the people engaged in them. Locke talks of waste in (at least) two senses. Both, on his view, are crimes against natural law. The first is the one already described: 'the Fruits rotted, or the Venison putrified,

⁹² This is a central theme of Perelman, *The Invention of Capitalism*. It undermines a key presumption of the Macpherson-Tully debate, namely that 'the mercantilist commonplace that political power regulates and preserves property [...] for the "Publick Good" [...] is incompatible with capitalism' (Tully, *Locke in Contexts*, 131.).

⁹³ See Ince, 'Enclosing in God's Name', 46; For examples from the administration of the colonies, see Arneil, *John Locke and America*, 158–62.

⁹⁴ The centrality of these practices to the development of capitalism has led some theorists to question the orthodoxy which sees 'doubly free' waged labour as *the* capitalist relation. See H. Gerstenberger, 'The Political Economy of Capitalist Labour', *Viewpoint Magazine*, 2014.

before he could spend it' (§37). This is where a person gathers an excess of perishable property, so vitiating his property claim. The second sort of thing that Locke calls 'waste', on the other hand, involves the *failure* to appropriate something as private property, leaving it 'lyeing wast in common' (§37). This connection between waste and the *communal* use of natural resources is a recurring trope. He laments the fact that, 'there are still *great Tracts of Ground* to be found, which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent of the Use of their common Money) *lie waste*, and are more than the People who dwell on it do, or can make use of, and so still lie in common' (§45).

Locke was far from a lone figure in drawing on this image. There was a burgeoning discourse in the period equating commons with disorder and 'idleness' – which figured as another kind of 'waste': the waste of capacity to labour.⁹⁵ This discourse set itself against the claims of those like the Diggers – or, as they called themselves, True Levellers – who, back in the revolutionary 1640s, had asserted the 'Community of Land', realising that formal equality before the law would mean little without access to independent means of subsistence.⁹⁶ In protests intended to prefigure the kind of society they wanted to build, groups of Diggers occupied public lands that had been privatised and cultivated them in common. By Locke's time, the Diggers had been thoroughly suppressed as a political force, their protest encampments razed by landowners' militias. Nevertheless, the continued currency of such ideas is shown in the fact that Locke finds it necessary to respond to them:⁹⁷

Nor is it so strange, as perhaps before consideration it may appear, that the *Property of labour* should be able to over-balance the Community of Land. For 'tis *Labour* indeed that *puts the difference of value* on every thing. (§40)

As we have seen, though, if another person already owns that which the labourer labours upon, the value accrues to them, not to the labourer.

In a telling passage, Locke comments: '[God] gave [the world] to the use of the Industrious and Rational [...] not to the Fancy or Covetousness of the Quarrelsome and Contentious' (§34). A lack of industriousness implicitly places one in the latter – irrational,

⁹⁵ Goldstein, 'Terra Economica'; Neocleous, 'War on Waste'.

⁹⁶ Linebaugh and Rediker, *The Many-Headed Hydra*, 85.

⁹⁷ As McNally explains ('Locke, Levellers and Liberty', 27.). This is not inconsistent with Tully's point that Locke needed to postulate an original community of land to defeat Filmer (*Locke in Contexts*, 110.). It explains the urgency, for Locke, of foreclosing some of the socially radical implications of this idea.

quarrelsome and contentious, i.e. potentially rebellious – category. This takes us back to the criminal. Even if it is too strong to claim, as Macpherson does, that Locke ‘viewed the working class as a whole from the standpoint of a defective rationality’,⁹⁸ for my argument it is sufficient to note that *dissenting* from exploitation seems to mean committing the crime of idleness (making human waste of oneself), thereby proving one’s irrationality, even before one ‘violates’ any property in the usual sense. If so, then the criminalization mechanism built into Locke’s theory will license whip and workhouse (or worse).

Yet Locke does not *always and everywhere* equate commons with criminals. For instance, he defends ‘*Land that is common in England, or any other Country, where there is Plenty of People under Government, who have Money and Commerce*’, stating that ‘no one can inclose or appropriate any part, without the consent of all his Fellow-Commoners’ (§35). However, this can be made sense of through a more nuanced understanding of the imperatives of the enclosures movement. Firstly, Perelman argues, workers could survive on lower wages (meaning higher profits) if they could supplement these with some (limited) home- or commons-grown produce.⁹⁹ Secondly, at the turn of the eighteenth century, profit-making enterprises were not in a position to exploit an entirely dispossessed population; the total destruction of commoning would be a recipe for social disorder which no achievable level of penal brutality could keep in check.

Equally, we should attend to Locke’s own rationale: ‘this is left common by Compact, *i.e.* by the Law of the Land, which is not to be violated.’ Respect for law was crucial to the constitutionalist project of ‘placing [royal absolutism] behind a high hedge of law’,¹⁰⁰ as much as to the control of the thieving and wasteful poor. Locke’s vision might point towards the replacement of common by private property, but he had to contend with the fact that many customary usages were written into the English common-law, as were the perks of the wealthy. Like a great siege-machine, preparatory work would be required to bring the Law of the Land into a new attacking position. Not so in the colonies, and it is here that Locke’s crusade against waste and wastrels proceeds in untrammelled form.

⁹⁸ Macpherson, *The Political Theory of Possessive Individualism*, 234.

⁹⁹ Perelman, *The Invention of Capitalism*, 107.

¹⁰⁰ Thompson, *Whigs and Hunters*, 263.

6. Owner-occupiers

Of ‘the wild woods and uncultivated wast of America’ (§37), Locke exclaims bitterly, ‘we shall find the benefit of it amount to little more than nothing’ (§42). It is increasingly recognised that Locke’s theory of property is fundamentally shaped by the needs of the English colonial project.¹⁰¹ Barbara Arneil documents how ‘John Locke’s *Two Treatises* were used in the early years of the history of the United States to justify Americans [i.e. colonists] taking over land claimed by the aboriginal peoples’.¹⁰² Furthermore, she emphasises that ‘Locke’s involvement in the development of colonial policy occurred at a time when the majority of opinion in England was firmly opposed’.¹⁰³

Arneil shows how Locke’s account of the acquisition of land through cultivation – and his equation of cultivation with enclosure – is directed against Native Americans, as well as against colonial competitors (such as the Spanish) who claimed land by right of conquest.¹⁰⁴ Although precolonial American societies had developed successful farming methods, Locke’s insistence that ‘it is the act of enclosure, along with that of cultivation, which brings value to the land’ serves to delegitimise the land claims of Native Americans, who, as well as hunting and gathering, ‘engaged in agricultural activities as a collective unit rather than as individuals

¹⁰¹ The case for this is most thoroughly made by Barbara Arneil (*John Locke and America.*), building on Tully’s ‘Rediscovering America’ in *Locke in Contexts*, 137–78. It is developed in Ince, ‘Enclosing in God’s Name’; Neocleous, ‘War on Waste’; Goldstein, ‘Terra Economica’. Its essentials were grasped much earlier by Seliger in ‘Locke, Liberalism, and Nationalism’, in *John Locke: Problems and Perspectives*, ed. J. Yolton (Cambridge: Cambridge University Press, 1969), 28. Buckle points to flaws in Tully’s exposition, criticising his reliance on a vague concept of ‘Eurocentrism’ (‘Tully, Locke and America’.), but ignores Arneil’s articulation of the argument, which does not depend on this concept. Buckle’s claim that ‘the period of Locke’s close involvement with Carolina [...] precedes the composition of the *Two Treatises*’ (Buckle, 264.) has subsequently been refuted by Armitage (‘John Locke, Carolina, and the Two Treatises of Government’.). Nonetheless, he is right to insist that Locke’s thought did not simply ‘mirror existing European political realities’ (Buckle, ‘Tully, Locke and America’, 255.); Locke was in many ways an innovator. My point is that forward-looking does not necessarily equal anti-oppressive, in a context where innovative methods of exploitation and social control are being developed.

¹⁰² Arneil, *John Locke and America*, 169.

¹⁰³ Arneil, 90, 88–118.

¹⁰⁴ Arneil, 19, 163–65.

within enclosed ground'.¹⁰⁵ Land thus cultivated still counts as waste, on Locke's scheme.¹⁰⁶ Here we see Locke's slippery notion of the 'common good' in action, as he 'claims that it is the lack of enclosure by Amerindians which allows the Englishman to claim, by virtue of a higher yield of goods to humanity, their land for cultivation'.¹⁰⁷ In fact, even enclosure is not enough, as Locke cites a failure to integrate into a money economy and engage in 'Commerce with other Parts of the World' as indicating that one has not adequately overcome the spoilage condition.¹⁰⁸

Focusing purely on Locke's attitude to Native Americans, however, Arneil largely ignores the role of institutions of forced labour in colonial economic development. This generates the false impression that Locke wanted planters to be restricted in their land acquisition by what they *themselves* were able to cultivate,¹⁰⁹ forgetting that significant plantation owners would of course be relying on the labour of their servants and slaves. In fact, the Lords Proprietors of Carolina had a policy of parcelling out land to planters in proportion to the number of labourers they controlled.¹¹⁰ This oversight contributes to a lack of clarity over the extent to which English propaganda denouncing violent conquest in favour of 'peaceable industry and the purchase of land'¹¹¹ reflected reality. Open hostilities with indigenous communities were a not infrequent feature of the early history of English Carolina.¹¹² Peaceable methods of dispossession might be preferred, but only so long as they were acquiesced in. Mark Neocleous observes that '[a]n implication of Locke's argument concerning waste [...] is that any resistance to the taking of waste land turns the natives into

¹⁰⁵ Arneil, 141.

¹⁰⁶ For other liberal thinkers arguing that indigenous people were 'wasting' land, see Losurdo, *Liberalism: A Counter-History*, 231.

¹⁰⁷ Arneil, 62.

¹⁰⁸ Arneil, 146; Glausser, 'Three Approaches to Locke and the Slave Trade', 214–15; Ince, 'Enclosing in God's Name', 41–43.

¹⁰⁹ Arneil, *John Locke and America*, 175.

¹¹⁰ E. Fenn and P. Wood, 'Natives and Newcomers: North Carolina before 1770', in *The Way We Lived in North Carolina*, ed. J. Mobley (Chapel Hill, NC: University of North Carolina Press, 2003), 37.

¹¹¹ Arneil, *John Locke and America*, 122.

¹¹² Fenn and Wood, 'Natives and Newcomers', 50–60. Locke's confident assertion, in the *First Treatise*, that 'A Planter in the *West Indies* [...] might, if he pleased (who doubts) Muster [a personal army...] against the *Indians*, to seek Reparation upon any Injury received from them' (§130), should be understood in this context.

the aggressors, which reinforces the belief that the European project is a ‘just war’.¹¹³

Yet Locke made efforts to curb the widespread practice of enslaving Native Americans in Carolina.¹¹⁴ This might seem at odds with my reconstruction, according to which the criminalized may justly be enslaved. This puzzle could be added to the one raised earlier as to why criminals of European origin should be spared *absolute* servitude despite seeming fit candidates for it, having put themselves in a ‘State of War’ with the community of the reasonable. The general form of the problem is this: various groups seem to be equally liable to criminalization using the resources of Locke’s theory, yet he does not treat them equally. How can I explain this?

To begin with, strong pragmatic reasons can be found for Locke’s opposition to the practice of enslaving Native Americans. The success of the colony under his administration was still on a knife edge. A previous colonisation attempt in the area had folded, in part due to escalating hostilities with the indigenous people of the area.¹¹⁵ Furthermore, Arneil emphasises the propaganda value, both to entice new colonists and to use against the Spanish, of English claims that theirs was a ‘peaceful’ occupation.¹¹⁶ Similarly, Linebaugh and Rediker argue that well-founded fears of united rebellion by (those increasingly defined as) ‘white’ servants – including indentured labourers, convicts, and the colonised Irish – and (those increasingly defined as) ‘Negro Slaves’ necessitated a divide and conquer strategy on the part of the colonial elite.¹¹⁷

These nods to *Realpolitik* are of course not intended to be exhaustive. They do not preclude analysis of further ways racial categorisations might have been built into Locke’s worldview. For instance, it is worth investigating further to what extent Locke’s attitudes reflect ideas found in contemporary travel literature about the relative ‘rational capacities’ of

¹¹³ Neocleous, ‘War on Waste’, 79; this point is also made in Glausser, ‘Three Approaches to Locke and the Slave Trade’, 208–9.

¹¹⁴ Armitage, ‘John Locke, Carolina, and the Two Treatises of Government’, 609. Arneil, *John Locke and America*, 126. For discussion of how prevalent the practice was, see Fenn and Wood, ‘Natives and Newcomers’, 36–50.

¹¹⁵ Fenn and Wood, ‘Natives and Newcomers’, 38.

¹¹⁶ Arneil, *John Locke and America*, 165.

¹¹⁷ Linebaugh and Rediker, *The Many-Headed Hydra*, 127.

Africans and Native Americans, the myth of the ‘Noble Savage’ as childlike rather than incorrigible, and so on.¹¹⁸ What I want to make clear, though, is that Locke’s concept of the criminal is not, on my account, some kind of *deus ex machina*, determining the contours of his policy interventions. I have suggested, rather, that this concept is *apt* for making a range of oppressive measures, pursued for a variety of reasons, seem less troubling from a Lockean point of view.

In fact – and here is my final proposal – the structure of Locke’s theory itself seems to facilitate this kind of pragmatism. Attacking Macpherson’s claim that Locke intends to naturalise capitalist property relations, Tully points out that, with the coming of *government*, natural property rights lose their sway, since ‘whatever property men have in political society is conventional’.¹¹⁹ Governments are empowered to determine what regulation of property is in the interests of national economic expansion – or, in Locke’s phraseology, the ‘common good’. Yet natural property rights cannot be completely jettisoned with the institution of political authority. This is not only because Locke’s anti-absolutist argument depends upon property owners maintaining the right to rebel against a sovereign who does not protect their (natural right to) property. It is also because, as Tully points out, ‘it is only with a natural standard of property to appeal to, that a radical can criticise and justify opposition to prevailing forms of property’¹²⁰ – and there certainly were some ‘prevailing forms’, such as the unprofitable and disorderly commons, or the outrage of an idle continent, which Locke and his fellow ‘radicals’ were determined to sweep away. What applies to property applies equally to the criminal, defined by their violation of property. The details of their treatment can be determined, to some extent, by statesmanly pragmatism. When it is expedient, however, Locke can appeal to the sanction found in the laws of reason and nature for some arrangements over others.

Conclusion

No more slavery! She had to laugh! “These new ones have Letter of the Law. Same thing. They got magistrate. They got fine. They got jail house and chain gang... New ones worse than old

¹¹⁸ Relevant material is discussed in Talbot, *The Great Ocean of Knowledge*.

¹¹⁹ Tully, *A Discourse on Property*, 99.

¹²⁰ Tully, 89.

ones – more cunning, that’s all.”¹²¹

Locke’s claim that we ‘tacitly consent’ to government if we own property or use public roads has often been found implausible. It is pointed out that, as individuals at least, we seem to lack meaningful opportunities to opt out of the existing regime, so our acquiescence in continuing to live within it cannot be read as indicating uncoerced approval. My argument has pressed on this point by asking, conversely, what happens when we do *not* acquiesce. Do we then fall automatically into the category of the ‘wild savage beast’, liable to extermination or enslavement, and governable only by violence? Would it be right to say that, *while political society is supposed to be based on consent, as soon as you show that you do not consent, your consent does not matter anymore?*

Not quite. It is imperative for Locke that ‘the People’ (suitably defined) *do* under certain circumstances have the option of withdrawing their consent. There-in lies his opposition to absolutism. However, to prevent this right of resistance from spreading to those whose subjection he finds profitable, Locke takes care to separate – at least, whenever it is convenient to do so – the *political* question of state legitimacy from the (on his account) *prior* question of the legitimacy of a set of property relations into which the imperatives of colonial accumulation are already coded, and whose transgressors he labels punishable by natural right.¹²² As Glausser puts it, ‘[Locke] creates a zone outside of social agreements which acts both as the repository of natural rights and as a kind of detention area for unnatural criminals’.¹²³ Thus, he can defend coups by the well-heeled as ‘just resistance’, while dissent from the emerging capitalist order is excluded from the sphere of the political.

This reading challenges the assumption that Locke’s liberal vision – of a political community of individual property/rights holders under an authority established by consent – can simply be detached from his unfortunate associations with slavery, colonial depredation, and attacks on the domestic dispossessed. I have argued that the ties between these elements are more complex and difficult to sever than it might appear. This is because a mechanism for reproducing exclusions from the community of rights-holders can be found in the *caveat*

¹²¹ J. Rhys, *Wide Sargasso Sea*, Reprinted 1997 (London: Penguin, 1966), 11.

¹²² Of course, *who* punishes the offender (individual or state) is down to the consent of others, who (in theory at least) may or may not transfer their private right to punish.

¹²³ Glausser, ‘Three Approaches to Locke and the Slave Trade’, 214.

Locke's theory of the criminal-against-property places on the 'consent of the governed' requirement – '(except in the case of justified punishment)'.¹²⁴ The worry is that, while this caveat remains in force, removing *explicit* restrictions on membership of the political community may be insufficient. This is not to deny that liberalism contains powerful resources for the denunciation of unfreedom – some of which may rightly be credited to Locke himself. It is rather to pin-point one way, too often overlooked, in which this emancipatory potential can be thwarted.

¹²⁴ Wolff, *An Introduction to Political Philosophy*, 35.

THE CRIMINAL IS POLITICAL

Policing politics in real existing liberalism

Introduction

It is criminality pure and simple [...] The young people stealing flat screen televisions and burning shops that was not about politics or protest, it was about theft.¹

The struggle for black life and black freedom often requires acting outside the strictly legal, beginning with those fugitive slaves who gained their freedom by committing the crime of “stealing” themselves.²

‘Criminality pure and simple’ is widely assumed to be a bad thing. Furthermore, insofar as a person is deemed ‘criminal’, they are assumed to lack political consciousness and political motivation for their actions. These two inferences – (a) from ‘X is criminal’ to ‘X is (probably) bad’, and (b) from ‘X is criminal’ to ‘X is (probably) not political’ – are so taken for granted in contemporary liberal discourse that we can see them as contained in the *concept* of ‘the criminal’. Many liberals will disagree with David Cameron about where to draw the line between ‘criminality’ and ‘politics’. Implicitly it tends to be accepted, though, that these are two very different kinds of things: *if* the riots are ‘about theft’ *then* they are not ‘about politics or protest’. Conversely, arguing that something *is* political usually means showing that it is not ‘really’ criminal, even if it breaks the law. The person engaged in civil disobedience, whose law-breaking is recognized as politically conscious, is defined *against* the so-called ‘common’ criminal.

Politics, I will take it, concerns all forms of social power insofar as they are far-reaching and systemic. It concerns the distribution of benefits and burdens in society, how decisions are made regarding the organisation of social life, and who has the power to do what to whom – and it concerns struggle over these things. Crime is recognized as political in *some* sense when it is treated as a symptom of social ills, requiring political solutions. However, to be seen as a problematic *symptom* to be managed by those in power is precisely not to be recognized as a politically conscious agent. Indeed, this image of criminals – manifested in frequent use of the prefix ‘mindless’ (‘mindless criminals’, ‘mindless rioters’, ‘mindless looting’, etc.) – goes along with the notion that they lack the kind of rationality

¹ David Cameron, ‘Riots: David Cameron’s Commons Statement in Full’, BBC News, 11 August 2011, <http://www.bbc.co.uk/news/uk-politics-14492789>.

² Hooker, ‘Black Lives Matter and the Paradoxes of US Black Politics’, 451.

required to participate in political processes of collective self-determination.³

It is this (a) *derogatory* and (b) *depoliticizing* concept of the criminal that I worry may be operating to perpetuate unjust forms of social power. The aim of this chapter is to trace one way it might do so, namely, by systematically excluding *deep* dissent from the sphere of the political. By ‘deep dissent’ I mean dissent that seriously or fundamentally challenges the existing apportionment of wealth and power in society.⁴ Of course, not all deep dissent is progressive (consider the Stalinist who thinks all resources should be controlled by Party apparatchiks). But so long as *some* of it is progressive – as I will argue it is – we have reason to be concerned about its erasure, and to enquire into the mechanisms by which this erasure is achieved. I suggest that the concept of the criminal is one such mechanism.

My argument proceeds from the following observations: 1) a primary meaning of ‘criminal’ is ‘against the law’; therefore, 2) using ‘criminal’ as a term of approbation seems to presuppose that what falls foul of, or resists, the prevailing order must involve (or most likely involves) wrong-doing;⁵ however, 3) such a presupposition would be warranted only if that order were legitimate.⁶ While the mainstream of political philosophy has tended to assume that this condition obtains (i.e. to assume the legitimacy of existing liberal states), this view is increasingly being challenged. Tommie Shelby, for instance, has argued that systemic racism undermines the legitimacy of the US state by denying ghettoised black Americans the benefits of equal citizenship.⁷ Under these circumstances, he contends, various forms of criminality should be seen not only as necessary survival tactics for ghetto residents, but as ‘just resistance’ to oppression. Shelby includes ‘openly transgressing conventional norms, expressing contempt for authority, desecrating revered symbols, pilfering from employers or

³ Of course, insofar as they are deemed morally culpable, criminals are treated as rational in a minimal sense.

⁴ The distinction between ‘deep’ and ‘shallow’ dissent is best conceived as a spectrum. See Finlayson, *The Political Is Political*.

⁵ It might be objected that the term ‘criminal’ can be used to capture wrong-doing in general, not just transgressions against a positive legal order. However, the ease with which these meanings are slipped between rather illustrates my point.

⁶ Or if it criminalized only bad things. While these conditions can come apart on some accounts of legitimacy, this will not affect my argument since the failures of legitimacy I am interested in are generated by states *criminalizing things that are not bad* (namely, struggles for social justice).

⁷ Shelby, ‘Justice, Deviance, and the Dark Ghetto’.

state institutions, vandalizing public and private property, or disrupting public events’,⁸ as well as (what are arguably) victimless crimes against property, such as shoplifting from large corporations. Shatema Threadcraft has extended this analysis of criminality-as-just-resistance to include practices of non-compliance with ‘social services’ that perpetrate racist and sexist social control in intimate matters such as reproduction.⁹ I am concerned with the same kinds of ‘upward punching’ crimes as Shelby and Threadcraft – crimes against the property of the powerful, against figures of unjust authority (such as institutionally racist police forces), and against ‘public order’ when that order demands the silence of the oppressed.¹⁰

My argument will be structured as follows. **Section 1** (‘The Liberal State: An offer you can’t refuse’) poses a problem for the attempt to use standard liberal accounts of legitimacy to vindicate existing regimes. Since the term ‘legitimacy’ can be used in a variety of senses, it is important to clarify at the outset how I will be using it. For our purposes, the relevant notion of legitimacy is tied to the generation of *political obligation*: an order is legitimate in this sense *if and only if* those subject to it stand under a *pro tanto* moral obligation to obey.¹¹ Legitimacy in other senses – such as ‘having the appropriate standing to exercise power’¹² – is relevant only insofar as it is supposed to generate such an obligation. My reason for homing in on this notion of legitimacy is simple. If a state lacks legitimacy of the political-obligation-generating kind, the justification for regarding a criminal *qua criminal* as acting wrongly is undermined (although we might still hold their actions to be wrong for other reasons).

Political philosophers have offered various accounts of how such obligation can be generated. I propose (relatively non-controversially) that it is characteristic of liberal – as

⁸ Shelby, 156.

⁹ Shatema Threadcraft, ‘Intimate Injustice, Political Obligation, and the Dark Ghetto’, *Signs* 39, no. 3 (2014): 735–60.

¹⁰ Shelby’s position, particularly as articulated in his most recent work, differs in various ways from the one defended here. Exploring these differences would take me too far from my main argument. See Tommie Shelby, ‘Punishment’, in *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, MA: Harvard University Press, 2016).

¹¹ The distinction sometimes drawn between obligations and duties is not significant here.

¹² Amanda Greene, ‘Consent and Political Legitimacy’, in *Oxford Studies in Political Philosophy*, ed. David Sobel, Peter Vallentyne, and Steven Wall, vol. 2 (Oxford: Oxford University Press, 2016).

opposed to Hobbesian – accounts of state legitimacy that they establish only the *counterfactual* conclusion that a state *would be* legitimate *if* it fulfilled certain criteria. Not just any state will do.¹³ A problem arises, however, when we notice that existing regimes do not fulfil the criteria liberals standardly propose. In fact, there appears to be a substantial gulf between:

- (c) ‘Ideal’ liberal accounts of state legitimacy that depend upon the governed having a meaningful right to dissent, whose limits are cashed out in terms of respect for liberal values such as freedom and equality.¹⁴
- (d) The ‘non-ideal’ functioning of actual liberal states, in which struggles for social justice seem too often to be criminalized *not* because they fail to respect freedom and equality but because they threaten the vested interests of those with unjust social power.

I dub this the ‘legitimation gap’. The existence of such a gap would appear to provide anyone committed to the principle of government by consent, as articulated in familiar liberal arguments for political obligation, with a *prima facie* reason to treat existing regimes as *illegitimate*. This in turn would undermine the justification for using ‘criminal’ as a derogatory term.

Yet liberals tend to resist drawing this conclusion. More often, they urge obedience to existing regimes on the grounds that this is, supposedly, the best way (gradually) to close the legitimation gap. In other words, they adopt what I call the ‘presumption of quasi-legitimacy’. The only morally permissible and politically interesting kind of law-breaking countenanced on this view is civil disobedience, which is defined against criminality by its overall respect for the system.¹⁵ The belief that we should broadly comply with existing institutions is so

¹³ In contrast, the classic Hobbesian argument for political obligation runs: any state is better than no state, so whoever is in power should be obeyed. From a liberal point of view, this proves too much.

¹⁴ As I argue in section 1, many liberals appear committed to some version of this as a necessary (though not sufficient) condition of legitimacy.

¹⁵ John Rawls, *A Theory of Justice*, ed. Samuel Richard Freeman, Revised Edition (Cambridge, MA: Harvard University Press, 1999), 319–46; Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012); David Lefkowitz, ‘On a Moral Right to Civil Disobedience’, *Ethics* 117, no. 2 (2007): 202–33; David Lyons, ‘Moral Judgement, Historical Reality, and Civil Disobedience’, *Philosophy and Public Affairs* 27, no. 1 (1998): 31–49.

dominant that it is rarely explicitly defended, but when it is, it is usually by appeal to ‘realism’. As Lorna Finlayson points out, the debate between ‘realists’ and ‘ideal theorists’ in the methodology of political philosophy often goes so far as to equate being more realist with being more accepting of existing institutions.¹⁶

However, in **Section 2** (‘Property Wrongs – And why we can’t just be civil about them’) I consider a realist objection to the presumption of quasi-legitimacy. The worry is that the legitimization gap, rather than being a contingent and reparable feature of liberal regimes, may be a necessary consequence of their role as enforcers of the prevailing order of property. So long as they are committed to enforcing this order, it seems liberal states *cannot* tolerate its being seriously contested. This generates a conflict with any principle of legitimacy that requires a right to reasonable dissent on the part of the governed. This is because ‘reasonableness’, for liberals, will usually be cashed out in terms of respect for the freedom and equality of all citizens; yet the desirability of the existing order of property, as I will argue, is the kind of thing that people can dissent from *not because they reject the values of freedom and equality, but precisely because they care about them*.

Motivating this thought is the observation that unequal economic power is a linchpin of many forms of oppression – gender, race, class, and so on – that progressives are committed to dismantling. This observation may explain why struggles for social justice so often come up against the (historically and currently unjust) order of property. The upshot, though, is that it is difficult to see how the legitimization gap could ever be closed within the framework of presumed quasi-legitimacy, which – even in its account of civil disobedience – retains an overarching presumption in favour of obedience to the property-enforcing state. In short, the liberal commitment to government by consent, which requires a right to dissent if it is to be meaningful, seems to be fundamentally in tension with the liberal commitment to enforcing the prevailing order of property *even when* that order encodes unjust social hierarchies. This, I propose, is a tension at the heart of liberalism.

In **Section 3** (‘Policing the Political’) I show how the concept of the criminal might *itself* work to disguise this tension – by wrongly excluding challenges to the prevailing order of property from the sphere of politics. My suggestion is that use ‘criminal’ as a slur term can

¹⁶ Finlayson, ‘With Radicals like These, Who Needs Conservatives? Doom, Gloom, and Realism in Political Theory’.

conceal the extent of the legitimization gap by making it look like liberal regimes are not repressing *political* dissent when they crack down on challenges to unjust property relations. Perhaps, indeed, it is only through this conceptual sleight of hand that the framework of presumed quasi-legitimacy – which insists that the legitimization gap can be closed by some combination of lawful dissent plus civil disobedience – can present itself as the ‘realistic’ option.

Before I proceed, though, let me offer a disclaimer. I am not saying that *all* crime constitutes just resistance to oppression. As Louk Hulsman observes, ‘Within the concept of criminality a broad range of situations are linked together. Most of these, however, have separate properties and no common denominator’.¹⁷ Unlike the person who uses ‘criminal’ as a derogatory term, I do not posit an archetypal law-breaker to be either condemned or valorised. Clearly, many illegal acts do not challenge oppression but perpetuate it, or are objectionable for other reasons.

We might wonder whether such a disclaimer should strictly be necessary, though, when we notice that the same is true of legal acts, especially the ‘normal’ operations of the economy. In the category of acts that cause harm and yet are legal we might include: buy-to-let landlords evicting families so they can charge higher rents; private health-care providers denying people treatment because they cannot afford to pay for it; governments deporting people with marginalised sexualities to life-threatening situations because they do not have the requisite paperwork; large corporations moving into neighbourhoods and destroying the livelihoods of small business owners; oil companies destroying nature reserves and displacing indigenous communities; and police officers killing black people, which in practice is almost always declared lawful. Feminists have pointed out, too, that sexual and gendered violence is often *de facto* legal, especially when committed by the socially powerful.¹⁸ Yet those advocating political strategies that collaborate with existing regimes are rarely asked to justify or distance themselves from all these law-abiding (or law-enforcing) wrongs. We might, therefore, detect some double standards when it is demanded of anyone who wants to discuss illegal forms of dissent that she justify or distance herself from every morally problematic

¹⁷ Louk H. C. Hulsman, ‘Critical Criminology and the Concept of Crime’, *Contemporary Crises* 10 (1986): 65.

¹⁸ MacKinnon, *Toward a Feminist Theory of the State*.

criminal act.

Whether such double standards can be justified will depend upon whether a convincing liberal argument¹⁹ can be provided for the claim that we have a moral duty to obey *under conditions of real existing liberalism*. In the following section, I suggest that standard liberal accounts of legitimacy seem rather to imply the opposite.

1. The Liberal State - An offer you can't refuse?

The argument I want to put forward in this section can be summarised as follows:

1. *If* a state, S, is legitimate *then* it fulfils the following criterion: S represses dissent (a) *only* in order to respect or promote universal values such as freedom and equality, and correspondingly (b) *not* in order to serve the vested interests of those with unjust social power. (Liberal Premise)
2. Existing liberal states do not fulfil this criterion. (Realist Premise)

Therefore:

3. Existing liberal states are not legitimate.

Let me break this down.

1.1. The Liberal Premise

There are notoriously many – sometimes conflicting – liberal accounts of state legitimacy, and it would be far beyond the scope of this chapter to investigate all of them. My aim here is more modest, namely, to motivate the thought that a lot of what liberals of both ‘political’ and ‘perfectionist’ varieties have to say on the question of *why state coercion is justified* suggests a commitment to what I am calling ‘the Liberal Premise’. To make a case for this, I will explain how the premise articulates a widespread commitment to government by consent as a necessary (albeit not a sufficient) condition of legitimacy.²⁰ Whether an account of legitimacy could still be recognizably liberal if it abandoned this premise is not a

¹⁹ As already noted, we need a distinctively *liberal* argument because a Hobbesian argument for political obligation (if successful) would generate the unwelcome conclusion that there are very limited rights to just resistance even under deeply authoritarian regimes.

²⁰ Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility*, trans. David Ames Curtis, First published in French, 1997 (Cambridge: Cambridge University Press, 2002), 14.

question I attempt to settle. It is worth noticing, though, that an amended version of my argument might still be run no matter what one's chosen criteria of legitimacy – so long as those criteria were not met by existing states.

Here, in broad brush strokes, is why I think many liberals commit themselves to something like premise 1. Liberalism is supposed to have an advantage over all other modes of government because, so the familiar story goes, a liberal state can tolerate – indeed, can facilitate, meaningfully engage with, even thrive upon – *political disagreement*. A liberal society is often characterised as one in which people can freely express and act upon their differing convictions so long as they allow the same freedom to others. Intuitively, indeed, this seems a prerequisite for realising the fundamental liberal value of government by consent: *for consent to be meaningful, there must be the possibility of dissent*. By engaging with, rather than simply repressing, those who disagree, liberal political institutions are supposed to maintain a culture of *public deliberation* in which everyone can participate if they choose, and through which progress against residual injustices can be achieved. Of course, there are some caveats. Nobody thinks that *all* dissent can or should be tolerated. However, the point of the Liberal Premise is that these caveats must – and this is point (a) of the premise – appeal to *universal* values (like freedom and equality *for all*), rather than – and this is point (b) – *particular* interests (like those of the wealthy and powerful). Otherwise, an important plank of liberalism's claim to superiority over other modes of government is lost.

For simplicity of presentation, I am treating freedom and equality as the paradigmatic liberal values, in terms of which state coercion must be justified. However, one could substitute autonomy, capabilities necessary for flourishing, or similar, into premise 1 without substantially affecting my argument. To be sure, liberals can also care about such desirable things as stability, security, utility, and the like. To avoid lapsing into Hobbesianism, though, a liberal must be wary of allowing these values to be invoked to justify the suppression of dissent *except insofar as* they can be connected in an appropriate way with core liberal values like freedom and equality. That explains why, for instance, stability is to be prized only insofar as it is 'for the right reasons', security to be valued *instrumentally* only insofar as it supports rather than undermines the realisation of greater freedom and equality, utility-promotion to be understood as non-contingently connected with the promotion of individual liberty, or as subject to distributive constraints that arise from conceiving all citizens as free and equal, and so on. The details of accounts will differ, but these are familiar themes, and they all point towards my Liberal Premise.

A commitment to this premise is easiest to observe in the case of political liberals, who hold that the state should not impose any ‘comprehensive’ vision of the good life on citizens. They endorse a ‘liberal principle of legitimacy’ requiring that ‘political power should be exercised... in ways that all citizens can publicly endorse in the light of their own reason’.²¹ A legitimate state will tolerate dissenters so long as they are ‘reasonable’ in the Rawlsian sense of being willing to propose (and stick to) principles of fair social cooperation with fellow-citizens conceived as free and equal.²² It is disputed whether Rawls’s notion of ‘reasonableness’ can be explicated without circularity, since the meaning of terms like ‘free’, ‘equal’, and ‘fair’ are themselves politically contested.²³ Nonetheless, it is clear enough that the ‘liberal principle of legitimacy’ would be violated by a state that coercively repressed dissent just because it challenged the interests of dominant groups (point (b) in the Liberal Premise). To put this point intuitively: legitimate political institutions must embody, fundamentally, if perhaps imperfectly, a kind of *public reason* – a procedure for decision making which is the express opposite of being in thrall to existing social power.

Perfectionist liberals reject the ‘liberal principle of legitimacy’ in its Rawlsian formulation, arguing that a legitimate state *should* impose certain ‘comprehensive’ liberal values on the governed.²⁴ However, it would be too hasty to conclude that they therefore reject the Liberal Premise. On the contrary, the values comprehensive liberals believe states can legitimately impose still tend to be universal ones (fulfilling point (a)). For example, they might think the state can act to promote autonomy *for everyone*, or for a disadvantaged group, so as to bring their autonomy up to the level enjoyed by others. Or they might think cultural practices can (under certain circumstances) be prohibited if they fail to respect the equality *of all*. However, it is hard to see how promoting the autonomy of an elite group – members of Oxford’s exclusive all-male Bullingdon Club, for example – could count as an acceptable policy objective, on any comprehensive liberal view. This is point (b) in my formulation. What the perfectionist liberal cannot allow, any more than the political liberal can, is that a liberal state would be in the business of serving *particular* interests, that is, of repressing

²¹ John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 90–91.

²² Rawls, 6–7.

²³ Finlayson, *The Political Is Political*, 37–64.

²⁴ Ben Colburn, *Autonomy and Liberalism* (London: Routledge, 2013); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988).

dissent because it threatens the domination of some sections of society over others.

1.2. The Realist Premise

Regardless of whether we think they should be, however, liberal states too often do seem to be in this business. From the suffrage campaigns of the 19th and early 20th centuries, to the civil rights movement of the 1950s and 60s, to the Black Lives Matter, Occupy, Standing Rock, anti-austerity, climate justice, anti-fracking, anti-fascist, and anti-Trump protests of our own day, those struggling for social justice have routinely fallen foul of the law in liberal states.²⁵ Time and again, we have seen the police and criminal justice systems used to suppress challenges to powerful vested interests (those of oil companies, arms manufacturers, banks, groups enjoying unjust racial privilege, and so on), quite contrary to the standards of legitimate coercion formulated by liberal political philosophers. Furthermore, on a worrying number of occasions, we have seen the label ‘criminal’ used (often effectively) to undermine sympathy among the public at large for the targets of state repression. These are broad empirical propositions, of course, and I do not claim to establish them here. I anticipate, however, that they will be found plausible by liberals who take past and present injustices seriously – and it is to them that my argument is addressed.²⁶

The following case study, drawn from Nadine El-Enany’s genealogy of British public order law, should illustrate the kind of real-world behaviour on the part of liberal states that I am interested in. The public order legislation currently in force in the United Kingdom El-Enany traces to the aftermath of the Peterloo massacre. In 1819, a peaceful gathering at St Peter’s Field in Manchester calling for parliamentary reforms and the extension of the franchise was set upon by sabre-wielding cavalry officers, killing at least 11 and injuring over 500. As El-Enany explains, the charge of ‘unlawful assembly’ was subsequently concocted by

²⁵ Alexander, *The New Jim Crow*; Losurdo, *Liberalism: A Counter-History*; Hooker, ‘Black Lives Matter and the Paradoxes of US Black Politics’; El-Enany, “‘Innocence Charged with Guilt’: The Criminalisation of Protest from Peterloo to Millbank’. Turning our attention to the activities of liberal states beyond their own borders would reveal an even more unmistakable pattern of repression directed against threats to powerful interests. See, for instance, Noam Chomsky, *Year 501: The Conquest Continues* (London: Pluto Press, 2015). I focus on the repression of domestic dissent because this is where the concept of the criminal seems to play the greatest role. The line is blurred when it comes to the treatment of non-citizens labelled ‘illegals’, who are notable targets of many current administrations.

²⁶ I will return to this caveat in my conclusion.

the British authorities, who needed a way to justify the massacre, and the targeting of survivors for further repression, to an increasingly rights-conscious public. By proclaiming large political gatherings inherently violent, as the new law did, the aim was to *depoliticize* them, ‘presenting [them] in terms of individual wrongdoing and disorder rather than as political contestation’²⁷. This allowed the state to crack down on ‘disorder’ while maintaining the charade that political dissent was tolerated and public discourse thriving.

With the benefit of hindsight, the charade is obvious. However, while the term ‘unlawful assembly’ itself came to sound *too political* for the state’s purposes and was dropped, its rationale has been preserved in various sections of the Public Order Act 1986. These offences, particularly the charge of ‘violent disorder’ (which carries up to a 5 year prison sentence), ‘are used to target political activity and expression in very much the same way today’.²⁸ The state’s response to the 2010 student protests for free education, for instance, reveals a ‘pattern of prosecutions, convictions, and harsh and exemplary sentences’ which ‘points towards a policy of criminalizing dissent’.²⁹ Furthermore, just like after Peterloo, prosecutions under the Public Order Act have been used post-2010 to give a sheen of legitimacy to the state’s use of extrajudicial violence, which has included ‘kettling’ crowds of protesters and charging them with horses, indiscriminate strikes with truncheons, fists, and riot shields, and aggressive surveillance.³⁰ Scrutiny has been averted from these anti-dissent tactics by portraying those against whom they are directed as ‘criminals’, therefore by implication ‘mindless’ and unresponsive to reasons, governable only by force.

To recapitulate the argument so far, the problem I have identified with real existing liberal states is that they can be observed repressing dissent not *only* when that dissent fails to respect the freedom and equality of all, but when it disrupts a social order that systematically refuses to do so. If this is the case, it poses a serious problem for the legitimacy of these regimes, which in turn would undermine the rationale for using ‘criminal’ as a derogatory

²⁷ El-Enany, “‘Innocence Charged with Guilt’: The Criminalisation of Protest from Peterloo to Millbank”, 73.

²⁸ El-Enany, 73.

²⁹ El-Enany, 84.

³⁰ For first-hand accounts, see Matt Myers, *Student Revolt: Voices of the Austerity Generation* (London: Pluto Press, 2017), 89–105.. For details of surveillance methods, see Val Swain, ‘Disruption Policing: Surveillance and the Right to Protest’, News, *Open Democracy* (blog), 8 August 2013, <https://www.opendemocracy.net/opensecurity/val-swain/disruption-policing-surveillance-and-right-to-protest..>

term in the here and now.

1.3. The presumption of quasi-legitimacy

However, there is a familiar way of trying to avoid, or mitigate the consequences of, this conclusion. It goes something like this: while existing states might *strictly speaking* fall short of liberal criteria of legitimacy, the best way to arrive at just, legitimate institutions is, for the most part, to obey the unjust, illegitimate ones, and work within their ‘official channels’ for social change. The equally familiar response from progressives is to point out that part of what *constitutes* the existing ‘non-ideal’ set-up is that it contains mechanisms to forestall or ignore attempts by the oppressed collectively to improve their circumstances by legally permitted means.³¹ Structural racism in the USA, for instance, means differential access to educational opportunities, positions of influence, even the ballot – as criminalization often brings with it disenfranchisement, and black and Hispanic people are disproportionately criminalized³². Most liberals agree, therefore, that *some* notion of progressive law-breaking is required, this recognition being enshrined in the concept of civil disobedience. Precisely how the concept should be delineated is contested, but this much is uncontroversial:

- (a) the civil disobedient is to be differentiated from the (‘common’) criminal;
- (b) respect for the law in general is a necessary condition of civil disobedience (as opposed to crime).

The standard formula for closing the legitimation gap, then, is this: work within the ‘official channels’ of liberal regimes; plus, in exceptional circumstances, engage in civil disobedience.³³

³¹ See Iris Marion Young, ‘Activist Challenges to Deliberative Democracy’, *Political Theory* 29, no. 5 (2001): 670–90. The term ‘collectively’ is important, since even when opportunities exist for individual ‘social mobility’, leaving behind one’s fellow-oppressed or even profiting at their expense may not be the more politically conscious decision. See Shelby, ‘Justice, Deviance, and the Dark Ghetto’.

³² Alexander, *The New Jim Crow*; Shelby, ‘Justice, Deviance, and the Dark Ghetto’.

³³ Lefkowitz argues explicitly that there must not be too much civil disobedience. See Lefkowitz, ‘On a Moral Right to Civil Disobedience’. Anyone who endorses (b), though, must hold that law-breaking should be exceptional rather than routine, otherwise respect for the law in general would not be displayed. There are, to be sure, other concepts available to describe progressive political lawbreaking, such as ‘direct action’ and ‘militant protest’. Insofar as these do not require respect for the law in general, they move beyond the framework of

Because it proposes we treat existing regimes broadly *as though they were* legitimate, while recognizing that strictly speaking they are not, I dub this standard formula ‘the presumption of quasi-legitimacy’. It tends to be defended (when it is defended at all, and not simply adopted without argument) by appeal to *realism*. No ‘sensible person’, we are told, will deny that existing coercive institutions are ‘necessary’; therefore, we should be ‘realistic’ and accept that complying with them is a prerequisite for progress.³⁴ As Finlayson points out, however, whether a proposed course of action should be regarded as realistic depends not only on whether it is *modest*, but on whether it is *effective*. She illustrates this point with the following analogy:

If I recommend that you continue to smoke and drink heavily, to overeat and to take no exercise, and also be healthier, while someone else suggests an alternative programme involving various tedious and demanding lifestyle changes that you have no intention of making, then in one sense I have given you the more feasible plan. But pretty clearly, I am peddling comforting delusions and should not be listened to.³⁵

This raises the question: might the framework of presumed quasi-legitimacy be unrealistic in precisely the manner of Finlayson’s fraudulent guru? It would be impossible to settle this question definitively here. However, in the next section, I lay out a problem that any attempt to answer it in the negative will have to overcome. There is, I suggest, a serious obstacle to achieving our desired end (closing the legitimization gap) *solely* through the modest forms of dissent countenanced within the framework of presumed quasi-legitimacy (official channels plus civil disobedience). That obstacle is the existing order of property, and the liberal state’s commitment to enforcing it.

presumed quasi-legitimacy, which it is my concern to assess here.

³⁴ Sleat, ‘Coercing Non-Liberal Persons: Considerations on a More Realistic Liberalism’. While Sleat himself is not always clear about this, I suggest that the promise of progress-through-compliance is essential to this argument, at least on a charitable reading. Without that promise, we are left simply with the claim that: (1) coercion (beyond what is justified according to the Liberal Premise) is necessary for the perpetuation of the existing social order; and perhaps also that (2) coercion (beyond what is justified according to the Liberal Premise) is necessary for social order *tout court*. The former seems to beg the question regarding political obligation (leaving us with no reason to disparage the criminal), and the latter to revert to a Hobbesian argument (proving too much). The precise relations between these two claims and the presumption of quasi-legitimacy, however, cannot be settled here.

³⁵ Finlayson, *The Political Is Political*, 24.

2. *Property Wrongs – And why we can't just be civil about them.*

I have argued that liberal states must stop criminalizing struggles for social justice if they are to fulfil – or even come close to fulfilling – their own criteria of legitimacy. Suppose, however, that the tendency of liberal states to criminalize challenges to the existing (unjust) apportionment of wealth and power in society were not best understood as merely a *failure to be liberal enough* on the part of those states, but rather as a manifestation of a tension *within* liberalism. This suggestion acquires some plausibility when we consider the following:

- 1) On the one hand, liberals believe in universal values like freedom, equality, and government by consent. These values are foregrounded in liberal accounts of state legitimacy. Insofar as the entrenched social power of dominant groups implies vastly differential access to political participation, safety from violence, educational opportunities, and other prerequisites for human flourishing, most contemporary liberals are therefore committed, at least in principle, to challenging it.
- 2) On the other hand, liberals tend to assume that a basic function of the state is to uphold what might be called the 'order of property'. I use this term to encompass *both* (and to capture the connections between): (a) laws against property damage, theft, trespassing, and so on, that enforce the existing distribution and forms of property; (b) laws that uphold 'public order' by preventing the disruption of business as usual.

Let me bring out the tension between these commitments. Enforcing the order of property will tend to mean siding with the propertied, which (not always but often) means siding with the economically powerful, *even when* that power is unjust. To put this point in its starkest form: since dominant groups tend to wield economic power over those they subordinate, the state's enforcement of 'property rights' through violence and the threat of violence must be partly *constitutive* of the power of dominant groups. Property *in its current forms and distribution* is a linchpin of multiple forms of oppression. The flip-side of this is that challenging oppression will tend to involve some clash with the existing order of property. Transgressing that order, however, makes you a criminal.

The problem this generates can be simply stated. Just as a theocratic state demands worship of the One True God, a liberal state demands respect for prevailing property relations. However, the desirability of this system is precisely the kind of thing that people can disagree about politically *even if* they respect (1). Therefore, according to (1), dissent from the order of property (so long as it respects freedom, equality, etc.) must be tolerated and engaged with if the right to dissent is to become meaningful and the legitimization gap closed.

However, according to (2), this kind of deep disagreement *cannot* be tolerated by liberal states without undermining their own *raison d'être* as enforcers of property. Therein lies the contradiction.

It will probably be objected that I am equivocating on the meaning of ‘prevailing order of property’ and therefore mistaking the sense in which liberal states are committed to upholding it. Most liberals, as I have said, will agree that the existing *distribution* of property is unjust.³⁶ Many will even contest (or allow that one reasonably could contest) the desirability of dominant *forms* of property. They may, for instance, object to forms of land ownership that neglect environmental concerns, or to the commodification of basic building blocks of human flourishing such as healthcare and education. However, the objection continues, one can challenge the prevailing forms and distribution of property without violating the property rights of existing proprietors. Let us leave aside for the moment the question whether we have any moral obligation to refrain from doing so. Whether there could (hypothetically) be a just order of property, and if so what it might look like, is also not what is at issue here. The state criminalizes transgressions of the *existing* order, not of some hypothetical just order. For instance, it does not stop to inquire into the justice of Walmart’s profits before it prosecutes a shoplifter. To remove the conflict between (1) and (2), therefore, it must be that those wronged by the existing order of property (and their allies) *can* effectively speak out against that order without transgressing it.

What this proposal founders against is, quite simply, real existing liberalism. In our ‘non-ideal’ reality, the order of property defines the permissible uses of space. It has often been observed that the enormous inequalities in property ownership that currently exist tend to translate into inequalities in access to public speech, hence to sanctioned forms of political participation.³⁷ For instance, if I have money (and the status and connections that come with

³⁶ Right-wing liberals attempt to block the inference from inequality to injustice by arguing that rampant inequality *could hypothetically* come about through (what they regard as) ‘just transactions’. See, for instance, Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974). However, even if successful, these arguments could not vindicate *actual* inequalities of wealth and power, which came about through historical ‘transactions’ including colonial pillage and enslavement.

³⁷ Young, ‘Activist Challenges to Deliberative Democracy’. This point could be further strengthened by attending to the phenomena of ‘epistemic injustice’, where oppression generates differential access to credibility and skews the hermeneutical resources available for making sense of social experience. See Fricker, *Epistemic*

it), I can plaster my message on billboards and across high-distribution media outlets, or donate to a political party to carry my agenda forward. If, on the other hand, I don't have money, writing my message on a billboard is criminal damage, handing out leaflets on corporate or state property is aggravated trespass, talking through a megaphone is antisocial behaviour, holding a banner across the road is obstructing a highway, and waving a placard outwith the police designated 'protest pen' is a breach of public order.³⁸ In broad brush strokes, we can say: since business as usual means the oppressed not having their voices heard, speaking out against power usually requires some *disruption* of business as usual, i.e. using spaces in ways which are not sanctioned by those who own those spaces. But that is exactly what the system of laws protecting property rights and public order – what conjoined I am calling the order of property – are designed to criminalize.

At this point, the concept of *civil disobedience* is supposed to step in. Its point is to protect whatever progressive law-breaking is required to overcome the legitimization gap from the taint of the term 'criminal'. However, as David Lyons has argued, there is reason to doubt that the notion of civil disobedience, as standardly theorised, will be adequate to this task – and for a very simple reason: it can only rescue *shallow* dissent. The civil disobedient is defined *against* the criminal by (among other things) her overarching respect for the law. As Lyons notes, standard accounts 'assume that civil disobedients consider the prevailing system as "reasonably just" and accordingly seek limited reform, not radical change'.³⁹ The perverse upshot of defining civil disobedience in this way is that, while those subject to minor and easily correctable injustices may rightfully challenge them, those subjected to more pervasive and systematic injustices, or their allies, will count as criminals if they try. Having a *deep* political disagreement with the way things are prevents you from qualifying as having a political disagreement at all.

Indeed, Lyons points out that the 'respect for law' criterion would exclude even Martin Luther King Jr from the category of civil disobedient, since he cannot plausibly be said to have accepted a 'moral presumption of obedience' to the law in Jim Crow America,⁴⁰

Injustice.

³⁸ In the UK, this would constitute breach of section 14 of the Public Order Act 1986.

³⁹ Lyons, 'Moral Judgement, Historical Reality, and Civil Disobedience', 32.

⁴⁰ Lyons, 'Moral Judgement, Historical Reality, and Civil Disobedience'.

a fact suppressed by romanticised histories of the civil rights movement.⁴¹ Another way of putting this is to say that, insofar as they insist that dissenters must broadly endorse and succeed in conforming to the rules of dominant society in order to be recognized as conscientiously contesting the injustices of that society, standard accounts of civil disobedience enforce a ‘politics of respectability’ that tends to rule out of bounds dissent by (or with) the least well-off.⁴²

These criticisms of the concept of civil disobedience are not new. However, I suggest we can make the diagnosis more precise by relating it to the problem of property. To qualify for the respectable category of ‘civil disobedient’ rather than the denigrated category ‘criminal’, you must locate the injustice to which you are responding in some separable, peripheral laws, or misguided but short-lived policies, which can be challenged while keeping the system mostly intact. The laws that uphold the prevailing order of property, however, cannot be described as either peripheral or short-lived. Enforcing existing property-titles is widely accepted to be a core function of liberal states. Consequently, dissent that transgresses the order of property will struggle to qualify as civil disobedience, because it will (often rightly) be regarded as failing to exhibit an overarching respect for the law.

In the face of this, it might be thought that what is needed is just a broader concept of civil disobedience, which discards the ‘respect for law’ criterion and its ties to respectability politics.⁴³ The merits of this strategy are likely to be context dependent and cannot be

⁴¹ Charles Mills, ‘White Ignorance’, in *Race and Epistemologies of Ignorance*, ed. Shannon Sullivan and Nancy Tuana (New York: SUNY Press, 2007), 11–38; Hooker, ‘Black Lives Matter and the Paradoxes of US Black Politics’. Shelby makes the further point that *demanding* compliant behaviour from the most oppressed ‘fails to appreciate that acquiescing to injustice is simply incompatible with the maintenance of self-respect’. See Shelby, ‘Justice, Deviance, and the Dark Ghetto’, 156. We might add (although he does not) that it seems to place an unfair burden on those at the sharp end of oppression if their more privileged allies refuse to incur any of the risks of extra-legal resistance. Indeed, to argue that those who draw relatively greater benefits from existing regimes have *for that reason* a moral obligation to comply with them seems to postulate, somewhat perversely, a moral duty to collude in oppression from which one benefits. This point deserves further investigation, but cannot be pursued here.

⁴² Alexander, *The New Jim Crow*, 212.

⁴³ Other criteria standardly proposed to delineate civil disobedience – publicity, accepting punishment, ‘non-violence’, and the like – might also tie that concept to a politics of respectability, and indeed are often recommended on the grounds that they demonstrate respect for the law. See Rawls, *A Theory of Justice*, 319–46.

assessed here, but insofar as it marks a departure from the presumption of quasi-legitimacy it removes the justification for taking ‘criminal’ as the disparaged and depoliticized contrast class. That it just the conclusion I am seeking to establish. The problem I have identified with the concept of civil disobedience is *not* that it draws a distinction between progressive and non-progressive lawbreaking, or between good and bad law-breaking, or between law-breaking which is politically conscious and that which is not.⁴⁴ The problem is that it figures these differences in terms of an overarching ‘respect for the law’ and therefore tends to validate only shallow dissent by the relatively privileged.

To summarise the argument of this section: the liberal state’s commitment to enforcing the prevailing (unjust) order of property poses a problem for the framework of presumed quasi-legitimacy, according to which law-abiding dissent plus ‘civil disobedience’ – as that term is currently understood – is supposed to effect a (miraculous) closing of the legitimization gap. Crucially, however, *it was only the hope that the gap could be closed within the framework of presumed quasi-legitimacy that justified us remaining within that framework in the first place*. Realism therefore seems to demand that we look beyond it.

3. *Policing the Political*

So far, I have presented a relatively straightforward argument for the conclusion that, under real existing liberalism, the moral presumption in favour of obedience to law – and hence the derogatory use of the term ‘criminal’ – may be misplaced. This argument has nothing to do with ‘philosophical anarchism’.⁴⁵ Rather, it follows from taking seriously the standard liberal story about legitimacy. Furthermore, the empirical premises I have appealed to are readily acknowledged by many progressive liberals. Why, then, is the conclusion not already obvious? To put this another way, I have identified what appear to be glaring contradictions:

- (a) between liberal ideals and the reality they are invoked to uphold (the legitimization gap);

⁴⁴ These can come apart. The concept of civil disobedience is primarily supposed to capture a kind of law-breaking which is political *and* progressive *and* morally acceptable. I too am concerned with actions that tick these boxes – and showing why the label ‘criminal’ can so easily and effectively be used to erase them from the record of dissent.

⁴⁵ R. P. Wolff, *In Defence of Anarchism* (New York: Harper Torchbooks, 1970).

(b) between these liberal ideals themselves (government by consent vs. government to enforce the order of property).

But if the contradictions are so glaring, how can I account for the fact that so few liberals have recognized them as such? In this section – the final one before my conclusion – I propose a partial explanation for this widespread oversight. The culprit I identify is the derogatory and depoliticizing concept of the criminal itself.

Could it be that the construction of the criminal within liberal discourse as ‘mindless’ and non-political is *masking the legitimization gap* by making it look like the authorities are not repressing *political* dissent when they criminalize the disruption of business as usual? The analysis I have presented should make us, at the very least, take this suggestion seriously. To begin with, I have pointed to a sense in which the disrupters of business as usual are *rightly* called criminals. This is because they are transgressing the order of property, the enforcement of which is a core function of the law in liberal states. But now, if we allow the inference from ‘X is criminal’ to ‘X is (most likely) not political’, we seem to have a recipe for excluding challenges to the prevailing order of property from the sphere of politics.

This move has the potential, furthermore, to paper over whatever tensions exist between the liberal ideal of government by consent, on the one hand, and the liberal commitment to enforcing the existing order of property, on the other. It makes it much easier to imagine that the order of property is broadly uncontested if anyone who *does* contest it gets labelled a criminal, and *therefore* does not count as ‘contesting’ anything in the first place. My concern is that this circular reasoning – enabled by the derogatory and depoliticizing concept of the criminal – may be lending an unwarranted sheen of realism to the framework of presumed quasi-legitimacy.

An analogy between my contention that *the criminal is political* and the feminist slogan *the personal is political* may help to clarify this point.⁴⁶ Like the splitting of the personal from the political – i.e. the conceptualisation of these as *dichotomous* categories – I am suggesting that the splitting of the criminal from the political has the potential to *naturalize* oppressions (in this case, those coded into the existing coercively-enforced order of

⁴⁶ Carol Hanisch, ‘The Personal Is Political’, in *Notes from the Second Year: Women’s Liberation*, ed. Shulamith Firestone and Anne Koedt (New York: Radical Feminism, 1970).

property) by placing them outside the arena of collective contestation, and to *misrepresent* systematic injustices as matters of individual inadequacy (or, in this case, delinquency). The analogy goes further. Feminists have noted that, while politics is understood as a sphere of rational deliberation and agency, those tainted by association with the ‘private sphere’ are denied rationality, cast as creatures of whim, instinct, and emotion.⁴⁷ Arguably, the same is true of the criminalized, who are often compared to ‘dumb’ or ‘feral’ animals by writers across the political spectrum.⁴⁸ In both cases, the charge of irrationality is taken to justify the exclusion of members of the maligned group from the body politic of reasonable citizens whose consent is required for legitimacy.

To be clear, the feminist insight is that the *dichotomy* between the personal and the political *is itself political*. This does not mean that every single personal matter is therefore, automatically and without further ado, of great (or indeed any) political significance. Analogously, it would be wrong to claim that every crime is political, even under an illegitimate regime. It would equally be wrong to claim that all political crimes are good. But then, it might be asked, why do I not propose some criterion for delineating those crimes that do constitute just resistance from those that do not? The answer is that, once we leave behind the framework for presumed quasi-legitimacy, with its double-standards for assessing the obedient and the disobedient,⁴⁹ it is unclear why we should expect a simple rule for distinguishing good law-breaking from bad – any more than we would expect ethics *tout court* to be reducible to a simple rule. Dissecting the derogatory label ‘criminal’ is not the end of nuanced political discussion, but the beginning.

Conclusion

I have argued that, if we are committed to a liberal justification of the state, we need to take seriously the possibility that existing liberal regimes, while they persist in criminalizing struggles for social justice, may be unworthy of our obedience. Yet a presumption of *quasi-*

⁴⁷ Brown, *States of Injury*.

⁴⁸ David Harvey, ‘Feral Capitalism Hits the Street’, Reading Marx’s Capital with David Harvey, 11 August 2011, <http://davidharvey.org/2011/08/feral-capitalism-hits-the-streets/>; Graeme Wilson, “‘Feral Underclass’ to Blame for Riots’, News, The Sun, 5 September 2011, <https://www.thesun.co.uk/archives/news/762539/feral-underclass-to-blame-for-riots/>.

⁴⁹ Illegality being treated as a *wrong-making* property, and acts of non-compliance as standing in need of far more strenuous justification than acts of compliance.

legitimacy has the status of common sense – if not self-evident truth – within the dominant liberal discourse. I have argued, though, that this presumption would be justified *only if* the existing system could be regarded as ‘self-correcting’. There would have to be a realistic prospect of transforming the system into one that meets liberal criteria of legitimacy *by means solely of actions that treat it as though it were already broadly legitimate* (namely, legally sanctioned dissent plus ‘civil disobedience’ as it is usually understood). A serious and deep-rooted obstacle to this, however, is the liberal state’s commitment to enforcing the existing order of property, an order which not only reflects and perpetuates but in part *constitutes* the domination of some sections of society over others. Finally, I have raised the worry that the derogatory and depoliticizing concept of the criminal may serve to naturalize this unjust order by excluding those who contest it from the sphere of politics – a kind of border policing on the level of ideology.

Having said all this, though, there remains an obvious way to resist my conclusions: just deny the legitimization gap, or deny that the current order of property stands in the way of closing it. Interpret ‘freedom’ to mean not having your property interfered with except by the whims of the market, ‘equality’ to mean no more than that rich and poor alike are forbidden to sleep under the bridges of Paris, and so on. There certainly are liberals who would take this path; perhaps dominant strands in liberalism have always done so.⁵⁰ However, for liberals committed to fighting injustice, it will not be attractive. For feminists, anti-racists, and other progressives, it only makes sense to operate within the theoretical framework of liberalism insofar as it can provide the resources for criticising existing forms of oppression. Gutting liberal values of their critical content might allow you to maintain your allegiance to the chequered regimes of real existing liberalism – but then you might wonder what the point is in being a liberal at all.

⁵⁰ As Losurdo argues in *Liberalism: A Counter-History*.

THEORY OF THE CRIMINAL (1939-1942)

Max Horkheimer

Archival sources & notes on the text

1944 typescript: ‘Theorie des Verbrechers’ [Theory of the Criminal] (pp. 349-362), and ‘Zur Rechtsphilosophie’ [On the Philosophy of Law] (pp. 342-44), in Max Horkheimer, ‘Konzepte Als Zugabe Zur Festschrift Für Friedrich Pollock [Sammlung B]’, Available online in the Max Horkheimer archive in the Universitätsbibliothek, Goethe Universität, Frankfurt am Main, 1944, <http://sammlungen.ub.uni-frankfurt.de/horkheimer/content/thumbview/7317058>.

New York typescript: ‘Theorie des Verbrechers’ [Theory of the Criminal] (pp. 88-104) and ‘Straftheorie. Zur Rechtsphilosophie (1942)’ [Theory of Punishment: On the Philosophy of Law] (several versions, pp. 73-84), in Max Horkheimer, ‘New Yorker Notizen 1939-42 [Sammlung C]’, Available online in the Max Horkheimer archive in the Universitätsbibliothek, Goethe Universität, Frankfurt am Main, 1942, <http://sammlungen.ub.uni-frankfurt.de/horkheimer/content/thumbview/7316809>.

This translation is based primarily on the 1944 typescript.¹ The earlier New York typescript contains numerous changes in Horkheimer’s hand. I note these in the footnotes only where they seem significant. Notes prefaced by [KD] are my additions. All other footnotes are Horkheimer’s. Several substantial sections scored out in the New York typescript, and omitted from later versions, are not included in my translation. However, since they do not appear in any German edition, and occasionally shed light on surrounding sections, I append them in German as endnotes.

The latter part of the text is published in the *Notes and Sketches* at the end of the *Dialectic of Enlightenment*, under the heading ‘From a theory of the criminal’.² This includes several paragraphs from ‘Zur Rechtsphilosophie’ [On the Philosophy of Law], to be found in the 1944 typescript under the handwritten section heading ‘Strafgefangene’ [Prisoners] (p. 344). Several earlier versions of ‘Strafgefangene’ [Prisoners] appear in the New York Typescript, sometimes under the heading ‘Straftheorie. Zur Rechtsphilosophie’ [Theory of Punishment: On the Philosophy of Law], sometimes simply ‘Straftheorie’ (pp. 73-84). I have

¹ Published in German as ‘Theorie des Verbrechers’, in Max Horkheimer, *Gesammelte Schriften Band 12: Nachgelassene Schriften 1931-1949*, ed. Alfred Schmidt (Frankfurt am Main: S. Fischer Verlag, 1985), 266–76.

² Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments*, ed. Gunzelin Schmid Noerr, trans. Edmund Jephcott (Stanford, CA: Stanford University Press, 2002), 187–90.

reproduced the published version at the end of my translation so the reader can appreciate 'Theory of the Criminal' in its fullest form.

[§1] The more the command was fragmented, the more mediated was the domination. The individual property-holders [Besitzenden] suppressed those poorer than they, not, as the feudal lord and oriental despot, with satraps and Horse Guards, the simple perpetuation of barbaric-physical force; their will had to objectify itself into law [Recht], and thereby constrain the totality of the power, which that law represented. Law [Gesetz] as a means of domination develops a logic of its own, whose contradiction to domination the silken thread it carries over cannot overcome.¹ The offender in bourgeois society is no longer taboo like the heretic against primitive solidarity, no more the rebelling slave and serf. He stands not merely outside of society, but is rather the representative [der Exponent] of a conflict that is necessarily inherent in it. The social principle thanks to which the law exists reproduces itself in the criminal. Even through the hymns to the worldly executioner's sword intoned by Protestantism shines the human-inhuman origin of the law, the will of the minority, which gives itself the form of the majority. The many lords who, while in rivalry with each other, wanted to control the leadership, had besides their own economic power to grant a kind of independence to the safeguard against competing, executive power,² against the organs of terror, so they attended to the law. The penal law protects the bourgeois citizen not merely from the criminal act, but equally from the state that would avenge it. Yet the perpetrator, the outsider, as an individual is still integrated into this thinking. Bourgeois penal law harks back more to the civil law of the primitives, insofar as one can be spoken of, than to the measures

¹ [KD] There seem to be no significant differences between 'Recht' and Gesetz' in this text. Both are translated as 'law' throughout.

² [KD] The German reads, 'Die vielen Herren, die, wenngleich im Wettstreit miteinander, die Obrigkeit kontrollieren wollten, mußten neben der eigenen ökonomischen Gewalt dem Schutz vor der konkurrierenden, ausführenden, vor den Organen des Terrors eine Art Selbständigkeit gewähren, deshalb nahmen sie sich des Gesetzes an'. I have translated 'Gewalt' as power, rather than force, because the English terms 'economic power' and 'executive power' are so standard. The 'Gewalt' before which the lords are protected is singular, and 'competing' was added by hand in the New York typescript. This implies that Horkheimer had in mind the power of the state. This fits with the sentence that follows. A natural translation would be 'against the competing, executive power'. On the other hand, Horkheimer is also making the point that the private executive powers – plural – of the competing lords are constrained by law. To allow for this reading, I have removed the definite article.

their society took against heretics. Positive law, ‘governing all phases of tribal life’, says Malinowski, ‘consists... of a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society... Their stringency is ensured through the rational appreciation of cause and effect by the natives, combined with a number of social and personal sentiments...’³ The formulation of principles and laws belongs to exchange. It is tied up with the stabilisation of private property,⁴ which ultimately makes humans into subjects. The market yields honesty along with its opposite; as it demands money, so it demands law. Between these two mediations of the economy there exists an affinity. They are universal in form: one does not inspect the law to find out whom it will hit, and one does not inspect money to find where it was taken from, even though in reality the former is drawn to the poor and the latter to the rich. Indeed, the neutrality of the mediations, their formal universality [Allgemeinheit], determines the member of the bourgeois world as a subject, in each case the same [das in allen dasselbe ist]. This neutrality first creates the concept of the human. Personhood presupposes at least rudimentary legal relations, a universal [ein Allgemeines]. The criminal builds on such universality. So far as his *ratio* extends, he adheres to the opportunities that flow from the anonymity of that instrument become independent, which also makes him into an equal [zum Gleichen]. Of the damnable profligate, the poor sinner who injured Gods and men, has become the trespasser of the paragraph, the criminal: a product of humanity.

[§2] The illusion that in the bourgeois world [unter Bürgern] there are any criminals other than those against property is ideology in the true sense: false appearance to which individuals are necessarily subject due to their role in the social process. To be sure, murder is no longer punished less than theft, as in periods of scarcity and lack of work.⁵ Since the Lord

³ Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: K. Paul, Tranch, Trubner & co., ltd., 1926), 58.

⁴ Cf. Robert Briffault, *The Mothers*, vol. 2 (New York: Macmillan, 1927), 357.

⁵ [KD] This is a reference to Georg Rusche’s theory about the historical correlation between penal systems and the state of class struggle. There seems to be some confusion, however, over whether it is ‘lack of work’ (Arbeitsmangel), or ‘lack of workers’ (Arbeitermangel) that is relevant. In both the New York typescript and the 1944 typescript, Horkheimer writes ‘lack of work’, but the 1944 version contains a handwritten correction to ‘lack of workers’. According to the editor of the German edition, these notes were probably added in 1969 by

said, 'Revenge is mine', the state has monopolised the entire revenge business, and is it by the state that the individual is called to account, whether they commit sacrilege, rape and murder, embezzlement, or theft. State enterprise calls for uniform guidelines. The juridical concepts, too, are levelled out. Contradictions between them are expunged as every offence is weighed according to the same measure, acquiring a common denominator - the sentence.ⁱ The schema according to which this reduction took place⁶ was property. That the category of the commodity has seized all branches of human intercourse means [wirkt sich darin aus] that even life and limb are understood, attacked, and protected according to the model of property. Everything that lies within human reach becomes something at someone's disposal, an object of the legal subject [Gegenstand des Rechtssubjekts]. Even in the constitution of the body, law was involved. As every logical classification points back to painful separations in reality, so presumably does the classification of body parts to the oldest legal protection. Injury to the lord and his servants had its price according to the nuisance caused by the loss. The hand was dearer than the ear. The body parts belong to the body, and the body belongs to the person.ⁱⁱ The state protected its member as the proprietor of their own flesh, and through this protection was cultivated the individual as paragon of the psychological. The legal protection of the flesh is a special case of the protection of private property. The blossoming of penal law occurs in

Pollock in consultation with Horkheimer. (Horkheimer, *Gesammelte Schriften Band 12: Nachgelassene Schriften 1931-1949*, 250–51.) Rusche's suggestion is that property crimes are very harshly punished in periods where there is a large 'reserve army of labour', hence widespread immiseration: 'Unemployed masses, who tend to commit crimes of desperation because of hunger and deprivation, will only be stopped from doing so through cruel penalties.' (Georg Rusche, 'Labour Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice', trans. Gerda Dinwiddie, *Crime and Social Justice* 10 (1978): 4.) Conversely, he argues, where there is 'constant scarcity of workers, where everybody's labor is valuable, it would be an economically "senseless" cruelty to keep destroying criminals. Confinement to prison takes over the role of corporeal punishment and death sentences, "humanitarianism" replaces cruelty; wherever there used to be gallows, now prisons stand.' (Rusche, 6.) Forced labour in prisons is used either to generate profit, or as a means of torture and disciplining, depending on the economic conditions. (Rusche, 5, 7.) German edition: 'Arbeitsmarkt Und Strafvollzug. Gedanken Zur Soziologie Der Strafjustiz', in *Kriminologische Grundlagentexte*, ed. D. Klimke and A. Legnaro, Originally published in *Zeitschrift für Sozialforschung* 2, 1933, S. 63-78 (Wiesbaden: Springer Fachmedien, 2016), 171–84. This article was the basis of Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure*, Revised edition. Originally published 1939 by Columbia University Press (London: Routledge, 2003).

⁶ [KD] The New York typescript includes the qualifier 'in der europäischen Zivilisation' [in European civilization].

those periods when the centralised state identifies its inner peace with the security of property.⁷

[§3] In the concept of the criminal, bourgeois society confirms to itself that it knows how to unite the general interest with the particular, for only to the extent that it guarantees self-preservation to each can it simultaneously condemn with reason [aus Vernunft] what it prosecutes out of particularism. The theoretical⁸ concept of crime cannot be detached from the construct of the social contract [Konstruktion des Staatvertrags], which obliges people to obey the state because they have handed ultimate power over to it for their own good. ‘But by safety must be understood’, says Hobbes, ‘not the sole preservation of life in what condition soever, but in order to its happiness. For to this end did men freely assemble themselves, and institute a government, that they might, as much as their humane condition would afford, live delightfully’.⁹ If the social contract is in force, the criminal offends against his own pragmatic reason, which confronts him in the state as objective reason. This defines the criminal in contrast with the heretic. To bourgeois thinking there is no other sin than that against the principle of the self. Systematic, organised self-preservation is violated by the criminal in favour of the restricted, the anarchic kind. His cleverness is too brief. He cannot wait. He, who calculates everything, is still lacking in calculating intelligence. For his foolishness, he is punished. Every other theory of punishment betrays society’s doubt as to its own reasonableness [Vernünftigkeit].ⁱⁱⁱ In bourgeoisdom [Bürgertum],¹⁰ the concepts of the social contract and of rationality are equivalent. Society deems itself concrete reason [Vernunft], the unification of all who want collectively to protect themselves from nature. On he who does not pay for this incorporation with strict obedience, society itself executes nature’s destructive urge, which he, through society, had previously escaped, and becomes to him a premeditated,

⁷ [KD] This is a further reference to Rusche, ‘Labour Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice’.

⁸ [KD] ‘Theoretical’ is added by hand in the New York typescript.

⁹ Thomas Hobbes, *De Cive* (London: Printed by J.C. for R. Royston, at the Angel in Ivie-Lane, 1651), chap. XIII. 4.

¹⁰ [KD] This term was invented by the first translators into English of Marx’s *Capital Vol. 1*. For discussion of its satirical resonances, see Keston Sutherland, ‘Marx in Jargon’, in *Stupefaction: A Radical Anatomy of Phantoms* (Calcutta: Seagull Books, 2011).

systematic force of nature [Naturgewalt],¹¹ compared to which unmediated nature [die unvermittelte] in her brutality still appears a true state of innocence.

[§4] The stigma of the criminal is uselessness. He skips the stage of production and seeks to appropriate as much of the circulating surplus value as possible. Industrialist, trader, advertising agent, professor – they too adhere to circulation, but they perform a service for it.¹² The criminal, however, represents in internal affairs what war represents in external: the snatching of surplus value amid the elimination of exchange [unter Ausschaltung des Tauschs]. Robber-captain, condottiere, guerrilla, and racketeer veer [vagieren] between soldier and criminal. To which pole they are assigned depends not on them but on the state of domestic and foreign politics.^{iv} Crime is quite simply the act of appropriation without exchange. It forms the naive counterpart to property ownership, which like crime creates no goods, neither as manual nor mental labour, and yet wrests the tribute for itself, be that by direct squeezing in the factory, or by the circuitous path of interest and dividends. The secret kinship with crime, the social affinity of the poles: of the privileged and the condemned, provokes property¹³ to revenge. It has all the armed power on its side; the criminal has, at best, a machine gun. Property, however, without which admittedly there would be no ego and no conscience, unconscionably tolerates no other extortionists besides itself. The living scraped alongside it without contributing to the system violates the divine order. Criminal and capitalist are merely out for profit, they are not interested in what is produced {an keinem Werk interessiert}. The joy of work [Werkfreude] is an ideology of big industry in the period when this is already proceeding to the liquidation of the bankers as of the whole sphere of circulation: a conceptual scheme for the monopolistic administration of human beings. The capitalist perpetrator was not violent from the start. As bourgeois citizen he preferred profit without bloodshed to military actions. He resorted to war and martial law [Belagerungszustand] when the existence of the class was in question or surplus profits were

¹¹ [KD] ‘Naturgewalt’ could also be translated as ‘natural violence’. In the New York typescript, we see that ‘-gewalt’ is added to ‘Natur’ by hand. That means when the sentence was first written, ‘die unvermittelte’ referred simply to unmediated nature, but was transformed to mean unmediated natural violence.

¹² [KD] I have altered the punctuation to make this more readable.

¹³ [KD] In the New York typescript, ‘Besitz’ is changed by hand to ‘jenen’ (‘the former’). I have rendered this ‘property’ to preserve the connection, more obvious in the original, with the subsequent point that, ‘Property... tolerates no other extortionists besides itself.’

to be obtained. The professional criminal feels similarly. “In the execution of the crime, a “good” criminal avoids unnecessary cruelty and murder. The thing to aim at is “big money.” The risk is equal whether you are stealing seven or seventy thousand dollars. “I don’t look to kill anybody. If I can prevent it, I will. But I would shoot somebody to get away, if there’s plenty of money there, say \$100,000.”¹⁴ The criminal represents the more irrational and primitive racket as against the class monopoly protected by the state. His profession points back to early- and pre-bourgeois forms of domination; these continue to proliferate [wuchern fort] as the Mafia and Camorra, despised nowadays like fallen deities transformed into demonic powers by the new religion.¹⁵ The domination that at each point prevails, however destructive it proves towards human beings, perpetuates itself in forms in which social life simultaneously reproduces itself. The criminal, in contrast, too weak to swing himself up to the level of the contemporary,¹⁶ becomes the ape of that domination which has already become obsolete. In the social reproduction of life for the purpose of its mastery [Beherrschung] he has no stake: in this much, he is destructive.

[§5] Where bourgeois society grapples directly with nature, production and destruction coincide. In the slaughterhouse, murder is at one with the manufacture of the means of subsistence, a.k.a. groceries [Lebensmittel]. But in the relation of the classes to each other the functions are differentiated; the entrepreneur commands in manufacture, the policeman hunts the criminal. Violence is no less essential to bourgeoisdom than to those forms of society in which sword and whip were still in the hand of the lord or in his direct vicinity. Wherever one tribe or class retains the chance of a relatively secure life, while hunger, insecurity, and work are left to the rest, a battering violence is called for, whether in the form of the club defending the cave entrance from the stranger, or the truncheon murdering prisoners in the cellars of police stations. Because of the division of labour, this violence [Gewalt] crystallises itself beyond culture in the apparatuses of repression.^v In the police and penal system¹⁷ all

¹⁴ Frank Tannenbaum, *Crime and the Community* (Boston, MA: Ginn, 1938), 190.

¹⁵ [KD] In the New York typescript, ‘als Mafia und Camorra’ is inserted in pencil, perhaps accounting for the awkwardness of this sentence.

¹⁶ [KD] Although ‘sich aufschwingen’ means ‘to soar’, I have translated it as ‘swing himself up’ in order to preserve the ape imagery that Horkheimer is playing with here.

¹⁷ [KD] This is literally ‘their police and their penal system’, where the possessive refers to ‘die Staaten der Welt’ of the deleted sentence, ‘Durch die Staaten der Welt schlägt wie ein ewiger Rhythmus die Niederhaltung

destructive instincts find a hideout. The destruction practiced by crime, in contrast, does not fall to it through the division of labour. It only harms production. Despite Mandeville's illuminating suggestion regarding the productivity of destruction in general, and the dependence of arts and sciences on crime in particular,¹⁸ supplemented by Marx's satirical apology for crime in terms of its significance for technology, economy, and culture,¹⁹ it remains a ferment of mere regression [Rückfall] and dissolution. The criminal has only just made it to the level of the honest bandit, who procures the murder for a fixed sum. There he has stayed, as quacks and healing apostles today still stand with the alchemist, at the junction to science. The criminal does not want to give up his freedom, wants to rake in profit without integrating himself into a business he must submit to. He cannot make himself into a subject, however much he tries. Black Will, the cutthroat in *Arden of Feversham*, professes long before the *Beggar's Opera*, the ethos of the businessman, who sticks to the contract even when it proves inconvenient. 'I have had ten pound to steal a dog, and we have no more here to kill a man; but that a bargain is a bargain.'²⁰ His ideal is that of security for the branch of trade he is active in. 'Ah, that I might be set a work thus through the year, and that murder would grow to an occupation, that a man might follow without danger of law: - zounds, I warrant I should be warden of the company.'²¹ Will is a disabled entrepreneur. But privatised murdering was a bad sector. It formed the object of regular trade only so long as trade was itself still half taboo. It is different with the police. Henchman and hangman share with the criminal the dishonour and brutality of the profession, not its independence. Although licensed violence, too, operates around money, it does not receive it in trade for the service, not as profit like Black Will, but as wage. The policeman, the prosecutor and judge carry no

der Armen, die Jagd der Verdächtigen, der Terror gegen Protektionslose, die Bestrafung und Ausrottung der gerichtlich und gesellschaftlich Verurteilten'.

¹⁸ Cf. Bernard Mandeville, *Bienenfabel* (Munich: Otto Bobertag, 1914), 12, 16, 73–74. [KD] In English, *The Fable of the Bees: Or, Private Vices, Publick Benefits. With a Commentary Critical, Historical, and Explanatory by F. B. Kaye*, First published 1714, vol. 1, 2 vols (Indianapolis, IN: Liberty Fund, 1988).

¹⁹ Karl Marx, *Theorien Über Den Mehrwert*, ed. Karl Kautsky, vol. 1 (Stuttgart: Internationale Bibliothek, 1921), 385–87. [KD] In English, Karl Marx and Frederick Engels, *Karl Marx Economic Works 1861-63*, vol. 30, Marx & Engels Collected Works (London: Lawrence & Wishart, 1988), 306–10.

²⁰ Unknown, *Arden of Feversham, a Tragedy: Reprinted from the Edition of 1592*, ed. Ronald Bayne (London: J. W. Jarvis & Son, 1887), 36.

²¹ Unknown, 32.

responsibility for the existence and content of their profession. They are essentially tools. As such they have power. That is why they privately understand themselves to the third degree, because they publicly get remunerated for the first degree. If the criminal is the crippled, retarded twin brother of the bourgeois citizen, so the police agent is his proxy [Prokurist]. The principle in both is the same: the violence, without which bourgeois property cannot exist.

[§6] In the act of crime, however, the regression [Rückfall] to earlier stages of development is united with the ultimate consequences of progress. It negates the taboos. In planning and implementation, the criminal takes into account only power, the law and its servants, not the object [die Sache].²² Overcoming dread of the object [Scheu vor der Sache] was the path of bourgeois spirit from the start.^{vi} But after the dissolution of nature in things, which put a stop to the heretic, no reserve is left of nature in the human being either. He erects his domination unconstrained. Such radicality becomes overt in crime. If bourgeois thinking set forth to free itself from terror [Schrecken], as crime it shrinks from nothing [schreckt vor nichts zurück]. It becomes apparent that thinking and doing, carried to extremes, coincide: the deed discovers only the powerlessness of things [Ohnmacht der Dinge],²³ which thinking had already actualised. The content, the mind of matter [Geist der Sache], which the crime ignores, is the secret, which after enlightenment does not exist at all. That is why the worship of blind violence, as despair of salvation from the cycle of deed and revenge in which crime is mythic, is equally one with progress.^{vii} In crime, the abstract self of enlightenment, which can avail itself of nature for propaganda since it is no longer detained by nature's content and knows only its own ends, cannonballs into unity [schießt in eines zusammen] with the senselessness of utterly reified nature. It is the deed, which shies away from nothing and yet remains the shy deed of the primitive, into whose soul no notion of salvation from the dark cycle may penetrate: such a deed lights the path of bourgeoisdom to the dynamic society.

From Dialectic of Enlightenment, trans. Edmund Jephcott

. . . Like the criminal, imprisonment was a bourgeois affair. In the Middle Ages incarceration was reserved for the offspring of princes who symbolized an inconvenient hereditary claim. Criminals were tortured to death, to instill a respect for order and law in the mass of the population, since the example of severity and cruelty teaches the severe and cruel

²² [KD] 'Sache' also has the meaning of 'cause', as in a political or moral cause.

²³ [KD] 'Ohnmacht' also has the meaning of 'unconsciousness'.

to love. Regular imprisonment presupposes a rising need for labor power. It reflects the bourgeois mode of life as suffering. The rows of cells in a modern prison represent monads in the true Leibnizian sense. ‘The Monads have no windows, through which anything could come in or go out. Accidents cannot separate themselves from substances nor go about outside them, as the “sensible species” of the Scholastics used to do. Thus neither substance nor accident can come into a Monad from outside.’²⁴ The monads have no direct influence on one another; their lives are regulated and coordinated by God, or the prison administration.²⁵ The absolute loneliness, the enforced reliance on a self whose whole being consists in the mastering of material and the monotonous rhythm of work, spectrally prefigure human existence in the modern world. The radical isolation and the radical reduction to an unchanging, hopeless nothingness are identical. The human being in jail is the visual image of the bourgeois type he has yet to make himself in reality. Those who fail to achieve this outside have it inflicted on them with terrible purity inside. The rationalization of prison life through the need to segregate the criminal from society, or even to improve him, does not go to the root of the matter. Prisons are the image of the bourgeois working world thought through to the end, set up as an emblem in the world by the hatred of human beings for what they are forced to make themselves become. The weak, the retarded, the brutalized must suffer in modified form the order of life to which others have lovelessly adapted themselves; the introverted violence of the latter is grimly repeated against the former. The criminal, in whose crime self-preservation was paramount, has in reality the weaker, more labile self; the habitual offender is an enfeebled being.

Prisoners are invalids.²⁶ Their weakness has brought them into a situation which has undermined them in body and mind and continues to do so. Most were already sick when they committed the crime which put them in prison – sick through their constitution and their circumstances. Other acted as any healthy person would in the same constellation of stimuli and motives but were simply unlucky. A residue were more malevolent and cruel than most free people – as malevolent and cruel in their persons as the fascist world rulers are through their positions. The deed of the common criminal is petty, personal, directly destructive.^{viii}

²⁴ Gottfried W. Leibniz, *The Monadology and Other Philosophical Writings*, trans. Robert Latta (Oxford: Oxford University Press, 1925), §7, 219f.

²⁵ Cf. Leibniz, §51.

²⁶ [KD] This paragraph, labelled ‘Strafgefangene’ [Prisoners], was not originally part of ‘Theory of the Criminal’.

The probability is that even in the case of the most extreme crimes the living substance, which is the same in everyone, could not, in any embodiment, have escaped the pressure of bodily constitution and individual fate from birth onward which led the criminal to the crime; and that you and I, but for the grace of the insight granted to us through a chain of circumstances, would have acted like the person who committed murder. And now, as prisoners, they are mere invalids, and the punishment meted out to them is blind, an alien event, a misfortune like cancer or the collapse of a house. Imprisonment is a lingering illness. This is revealed by prisoners' expressions, their cautious gait, their circumstantial way of thinking. Like the sick, they can talk only of their sickness.

When, as today, the boundaries between respectable and illegal rackets are objectively fluid, psychological figures also merge. But as long as criminals were still invalids, as in the nineteenth century, custody represented a reversal of their weakness. The strength to stand out as an individual against one's environment and, at the same time, to make contact with it through the approved forms of intercourse and thereby to assert oneself within it – in criminals this strength was eroded. They represented a tendency deeply inherent in living things, the overcoming of which is the mark of all development: the tendency to lose oneself in one's surroundings instead of actively engaging with them, the inclination to let oneself go, to lapse back into nature. Freud called this the death impulse, Caillois *le mimetisme*.²⁷ Addiction of this kind permeates everything which runs counter to unswerving progress, from crime, which cannot take the detour through the current forms of labor, to the sublime work of art. The yielding attitude to things without which art cannot exist is not so far removed from the clenched violence of the criminal. The inability to say No which causes the young girl to succumb to prostitution also tends to determine the career of the criminal. He is characterized by a negation which lacks the power of resistance. Against such delinquency, which – without definite consciousness, timid and impotent even in its most brutal form – at the same time imitates and destroys pitiless civilization, the latter sets the solid walls of prisons and workhouses, its own stony ideal. Just as, according to de Tocqueville, bourgeois republics, unlike monarchies, do not violate the body but set to work directly on the soul, punishments of this kind attack the spirit. Those they torture no longer die broken on the wheel over long days and nights but perish mentally, as silent, invisible examples in the great prison buildings, which differ from lunatic asylums almost only in name.

²⁷ Cf. Roger Caillois, *Le Mythe et l'Homme* (Paris: Gallimard, 1938), 125ff.

Fascism absorbs both institutions. The concentration of command throughout production is causing society to revert to the stage of direct rule. As the detour of power via the internal markets of nations disappears, so, too, do intellectual mediations, including law. Thinking, which had developed through transactions, as a result of egoism's need to negotiate, is now given over wholly to the planning of violent appropriation. The fascist mass murderer has emerged as the pure essence of the German factory owner, no longer distinguished from the criminal by anything but power. The detour has become unnecessary. Civil law, which continued to function in regulating differences between entrepreneurs surviving in the shadow of big industry, has become a kind of tribunal against the lower orders, a justice which no longer upholds, however badly, the interests of victims – a mere instrument of terror. However, the legal protection which is now disappearing once defined property. Monopoly, as the consummation of private property, is annihilating the latter's concept. Of the international social contract, which fascism in its dealings with states is replacing by secret agreements, only the compulsion of the universal is allowed to apply in internal affairs, a compulsion its servants then liberally administer to the rest of humanity. In the totalitarian state punishment and crime are being liquidated as superstitious residues, and a naked eradication of opponents, certain of its political goal, is spreading across Europe under the regime of criminals. Next to the concentration camp, the penitentiary seems like a memory of the good old days, much as the old-style advertiser, though it already betrayed truth, appears beside the glossy magazine, the literary content of which – even if it concerns Michelangelo – performs the function, still more than the advertisements, of business report, emblem of authority and publicity medium. The isolation once inflicted on prisoners from outside has by now implanted itself universally in the flesh and blood of individuals. Their well-trained souls and happiness are as bleak as the prison cells which the rulers already do without, since the entire labor force of nations has fallen to them as spoils. The penal sentence pales beside the social reality.

ⁱⁱ Mit dem Gegensatz verschwindet allgemein auch die Möglichkeit des Übergangs von einem ins andere, dafür werden die quantitativen Unterschiede als starre hypostasiert. Intellektuelle Einebnung bannt, indem sie die Begriffe durch feste Definitionen ersetzt, stets auch die Worte, als beziehungslose Dinge, Kennmarken fest, die sich gegeneinander tauschen aber

nicht ineinander verwandeln, oder entfalten lassen. Die Umdeutung der widersprechenden Begriffe in Merkworte für blosse Grüßen trennt voneinander was sie untereinander vergleichbar macht. Radikale Isolierung und radikale Reduktion auf stets dasselbe hoffnungslose Nichts sind identisch wie alle äussersten Gegensätze. Menschen, Einrichtungen, Dinge werden eins wie das andere.

ⁱⁱ Das Individuum ist die psychologische Version der Person, ein Verfügungszentrum.

ⁱⁱⁱ Die moralische Unterstellung etwa, dass Verletzung des Gesetzes egoistische Bosheit sei, desavouiert den Staatsvertrag, der noch nichts anderes fordern soll als was zum eignen Guten unerlässlich ist.

^{iv} Solches unmittelbare Aneignen stellt ein Element in seiner Abstraktion dar, das im Tausch als ein legaler Zug enthalten ist. Es trat seit je in der Überredung der Kunden hervor, in der Suggestion der Reklame, in den Beutezügen auf den zirkulierenden Mehrwert, die von den Rackets der freien Berufe Händlern und Geldleuten unternommen wurden. Zur Zeit des Marktes trugen die Leistungen solcher Vermittler, dritter Personen und Kapitalisten zur Übersichtlichkeit des Marktes, Zuleitung der Waren zum Konsumenten bei, sie waren Hilfsmittel privater Planung, da die gesellschaftliche vereitelt war. Der Preis der Leistung übersteigt bei Erfolgreichen tausendfach das zu ihrer Qualifikation vorgeschossene Geld. Ist ihre Arbeit nützlich, so ist sie doch überzahlt. Wie die Unternehmer profitieren sie vom Klassenmonopol, nur dass jene an der Quelle sitzen: das Mehrprodukt ist zuerst in ihrer Hand. Bei der Verteilung freilich müssen auch die Unternehmer sich mit allen anderen Rackets, die eine fürs System erforderliche Leistung monopolisieren, auseinandersetzen. Wie die Agenten der Zirkulation so dienen auch Kirchen, Kinos, Fakultäten dem reibungslosen Ablauf der kapitalistischen Produktion, sie verwalten eine Funktion; mit den konsumfremden Künstlern aber bleiben die freien Dirnen als jene gesellschaftlichen Figuren zurück, die nicht nur dem Reproduktionsprozess keine materiellen Waren zuführen, sondern nicht einmal den

Umsatz fördern. Sie geben alles hin und doch besteht der ganze Preis ihrer Ware in Überschuss über den Wert. Vor dem Richterstuhl des kapitalistischen Nutzens weisen Geist und Sexualität nur einen Unterschied mit dem Verbrechen auf: sie üben keine Gewalt.

^v [...] durch deren Funktionieren die Verfeinerung der Sitten, der Sinn fürs Schöne, Wissenschaft und Kunst erst möglich werden. Durch die Staaten der Welt schlägt wie ein ewiger Rhythmus die Niederhaltung der Armen, die Jagd der Verdächtigen, der Terror gegen Protektionslose, die Bestrafung und Ausrottung der gerichtlich und gesellschaftlich Verurteilten.

^{vi} Er war auf Befreiung vom Mythos, auf die Herrschaft des Menschen über alle Wesen und über sich selbst gerichtet. Der irre Blick auf Natur, die in Göttern und Dämonen zur undurchdringlichen vergeistigt war, hellte sich auf zum durchdringenden Gedanken des Forschers, dem jedes Ding die Elemente preisgibt, aus denen es sich gewinn lässt, zum elektrischen Strahl, vor dem es kein Geheimnis mehr gibt. Die Menschen selbst werden vor der Wissenschaft zu Apparaten, die man für die eigenen Zwecke ankurbeln, reparieren und benützen kann. Nachdem der bürgerliche Verstand die *qualitates occultae*, die dunklen Qualitäten, ihre je eigene Natur als Hirngespinnste aus den Dingen ausgetrieben hatte, blieb als mythologischer Rest noch die Seele, der Geist in den Menschen zurück, die litzte der Substanzen, welche die Philosophen noch zu erhalten sich mühten. Solche Residuen wollte die bürgerliche Gesellschaft nicht entbehren. Um sich zusammenzuhalten hatte sie neben den Hunger, neben der Aussicht auf Erfolg und der Angst vor Repressalien stets auch des Glaubens an die Sanktionen der Ewigkeit bedurft. Entgegengesetzte bürgerliche Doktrinen treffen sich in diesem Punkt. Leibniz lehrt nach Aristoteles, es gäbe selbst in Tieren den angeborenen sozialen Instinkt; in Menschen fordere dieser die Scham, die Bestattung der Toten, den Widerwillen gegen Inzest und Anthropophagie, die Abneigung Lebendiges zu verschlingen. Dieser Instinkt, meint Leibniz, könne zum strengen Wissen erhoben werden,

wie ein Axiom. Er soll die Gesellschaft möglich machen. Hume lässt es zwar offen, ob der moralische Sinn natürlich oder künstlich gezüchtet ist, und doch erklärt er, die moralischen Gefühle seien 'so verwurzelt in unserer Konstitution und Anlage, dass es unmöglich ist, sie auszujäten und zu zerstören ohne den menschlichen Geist ganz zu verwirren, sei es durch Krankheit oder Wahnsinn.' Und Voltaire sagt, 'jedes Tier hat seinen Instinkt und der Instinkt des Menschen, durch die Vernunft verstärkt, treibt ihn zur Gesellschaft wie zum Essen und Trinken... [sic] mit Ausnahme einiger ganz vertierter barbarischer Seelen, oder vielleicht eines noch vertierteren Philosophen, lieben die härtesten Menschen, auf Grund eines beherrschenden Instinkts, das Kind, das noch nicht geboren ist, den Leib, der es trägt und die Mutter, die selbst ihre Liebe für den verdoppelt, von dem sie in ihrem Schoss den Samen eines ihr ähnlichen Wesens empfangen hat.' Diesen Lehren steht die Not auf die Stirn geschrieben: das krampfhafte Bemühen, die Menschenliebe, der die theoretische Aufklärung den objektiven Grund entzog, als subjektiv notwendig darzutun. All diese imperativischen Naturen und Formen in Menschen sind nicht weniger metaphysisch und vorbürgerlich als die, welche in den Dingen wohnten.

^{vii} Rousseau, der den gemeinsamen Ursprung des Eigentums, des Verbrechens und der Zivilisation erkannte, lehrte auch, im Gegensatz zum grossen Strom der Aufklärung, die Geschichtlichkeit der guten Gefühle. Er weiss, dass Zärtlichkeit der Sexualität nicht notwendig eigen ist. Was die Gesellschaft verfehmt, ist der Natur nicht entgegengesetzt. Das Gefühl des Vaters, all die gepriesenen Instinkte, auf denen die Gesellschaft ruhe, sei der Natur ganz fremd, die Rousseau trotzdem nicht verdammen will. 'All das ist grauenvoll', sagt zu solcher Lehre Voltaire; 'aber glücklicherweise gibt es nichts, was falscher wäre. Wenn diese barbarische Gleichgültigkeit der wahre Instinkt der Natur wäre, hätte die menschliche Gattung sich fast immer so betätigt. Der Instinkt ist unwandelbar: seine Abweichungen sind sehr selten.' In Wirklichkeit legt Geschichte - mit sehr seltenen Abweichungen - von jener

barbarischen Gleichgültigkeit Zeugnis ab, zu der Natur sich wandelt, wenn die Menschen sie anbeten. Voltaire verklärte die Natur, aber nicht wie Rousseau als eine kritische Instanz gegen die Welt, sondern als deren Rechtfertigung. Die Notwendigkeit, die schrankenlose Perfektibilität der bürgerlichen Ordnung sollte der Naturbegriff begründen. Davor hatte selbst Montaigne, der Verkünder der Natur, gewarnt: ‚Die Philosophen‘ sagte er, ‚verweisen uns mit grossem Recht auf die Regeln der Natur; aber diese haben mit so hoher Weisheit nichts zu tun: die Philosophen fälschen sie und stellen ihr Gesicht mit zu schönen Farben und allzu spitzfinig dar.‘ Unter dem Zeichen der veredelten Natur strebt die Gesellschaft auf deren radikale Unterjochung zu und verwirklicht sie im Sturmschritt mit dem Raffinement der technisierten Zivilisation.

^{viii} Sie sind die Affen der grossen Gewalthaber.

CRIMINALITY AND CLASS CONSCIOUSNESS

A Criminal's Theory of Horkheimer

The only thing that can perhaps be said is that the good life today would consist in resistance to the forms of the wrong life that have been seen through and critically dissected by the most progressive minds.¹

‘Beweist durch die Tat, dass Ihr anders denkt!’
[Prove by your deeds that you think differently!]²

¹ Theodor W. Adorno, *Problems of Moral Philosophy*, trans. Rodney Livingstone and Thomas Schröder, Lectures from 1963 (Stanford, CA: Stanford University Press, 2000), 167–68. Amended translation taken from Rahel Jaeggi, ‘No Individual Can Resist: Minima Moralia as Critique of Forms of Life’, *Constellations: An International Journal of Critical and Democratic Theory* 12, no. 1 (2005): 70.

² Sophie Scholl et al., ‘Die Flugblätter Der Weißen Rose (1942)’ (Dauerausstellung - Die Weiße Rose. Widerstand gegen die NS-Diktatur [Permanent exhibition - The White Rose: Resistance to the National Socialist Dictatorship], LMU Munich, 2017). English translation: ‘The Six Pamphlets of the White Rose Society’, History Is A Weapon, accessed 13 December 2017, <http://www.historyisaweapon.com/defcon1/whiterose.html>.

Premeditation

Horkheimer's 'Theory of the Criminal' dissects modern law as an instrument of domination. Mirroring and violently enforcing the commodity form's repression of the particular, law's false universality provides an ideological mask for the interests of the few who own the means of production. The pathological character of existing social relations is reflected in the violence required to maintain them. As Horkheimer puts it, 'Wherever one tribe or class retains the chance of a relatively secure life, while hunger, insecurity, and work are left to the rest, a battering violence is called for, whether in the form of the club defending the cave entrance from the stranger, or the truncheon murdering prisoners in the cellars of police stations... In the police and penal system all destructive instincts find a hideout'.³ The pathological impulses nurtured and concealed in the ostensibly rational practices of crime control are explored through allusions (both overt and oblique) to Freudian categories: repression, the death drive, the uncanny.

Yet, while Horkheimer clearly *sees through* the law as the sadomasochistic enforcement of the forms of wrong life, the subject who *resists* the law features in his story only as another pathogen. His criminal is an 'enfeebled being',⁴ a regressive ferment of repressed nature, a brutal individualist who fails to achieve individuality – an ape-like prototype of the fascist. It is of course not impossible, and from a dialectician's point of view highly likely, that something and its opposite should be as bad as each other. In the construction of companionably guilty opposites, however, the possibility of *resistance* – of a critical consciousness manifested and forged 'durch die Tat'⁵ – gets lost. So too does an understanding of fascism's own reliance on the construction of the criminal, that is, on the logic and technologies of dissent-suppression through criminalization handed down to it, each time, by real existing liberalism. That, at least, is what I will argue in this chapter.

The title I have stolen not simply out of kleptomania. True to Lukács,⁶ its underlying

³ Horkheimer, 'Theory of the Criminal [Unpublished]', §5.

⁴ Horkheimer and Adorno, *Dialectic of Enlightenment*, 188.

⁵ Scholl et al., 'Die Flugblätter Der Weißen Rose (1942)'. My reason for sticking with the German here will become clear later.

⁶ György Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, trans. Rodney Livingstone (Cambridge, MA: MIT Press, 1999).

concern is epistemological: from what standpoint can the forms of wrong life⁷ become visible as such? How can ideology be broken through? My suggestion is that *some* kinds of conflict with the law have the potential to manifest and forge what Howard Caygill calls ‘resistant subjectivities’.⁸ I am not, though, trying to posit the criminal as subject-object of history.⁹ On the contrary, I want to make you see that *there is no such thing as* ‘the criminal’. There is the *ideological concept* of the criminal, and then there are actual criminalized people, who are identical neither with the concept ‘criminal’, nor with each other. Reading Horkheimer’s text from the perspective of (not *the*, but) *a* criminal means pushing on these moments of non-identity. It means illicitly appropriating the text’s critical resources and putting them to use against its authoritarian tendencies.

I will present a sequence of interrelated fragments in which various strands of Horkheimer’s text are examined, stretched, and, where necessary, broken.¹⁰ Part I (‘Pathologies of policing’) develops Horkheimer’s critique of the law and social contract theory. Part II (‘Resistant subjectivities’) considers whether *some* forms of law-breaking might have the potential to manifest and forge critical consciousness, suggesting that critical theorists, in particular, have reasons to take these possibilities seriously. Part III (‘Enlightenment reverts to myth’) confronts Horkheimer’s own refusal to do so. I will argue,

⁷ The ways I will use this Anglicisation of Adorno’s ‘das falsche Leben’ will not always track what Adorno meant by the term.

⁸ Caygill, *On Resistance: A Philosophy of Defiance*.

⁹ This is, in Fabian Freyenhagen’s summary, ‘Lukacs’s conception of the proletariat as both capable of and required by their interests to see through capitalism.’ *Living Less Wrongly: Adorno’s Practical Philosophy*, 182. The concept requires a great deal more explanation than this, but going into that here would be a digression.

¹⁰ In the last chapter, I adopted some of the conventions, stylistic and substantive (not that the two are wholly separable), of political philosophy in the ‘analytic’ tradition. This included presenting arguments in the form of numbered premises and conclusion, signposting at every stage, talking in terms of ‘dominant groups’, ‘the least well off’, ‘criteria of legitimacy’, etc. and using phrases like ‘a state, S, is legitimate *if and only if*...’, ‘this gives us a *prima facie* reason to take seriously the possibility that...’. In this chapter, I will write a bit more like a critical theorist – this being no more and no less of an ‘act’ than the previous chapter. This means that sometimes I will run with Horkheimer’s ideas, or ideas I draw out of Horkheimer, without stating explicitly to what extent I am committed to them. Since I am trying to make my case in a way that will be convincing to people broadly in sympathy with Horkheimer’s project. I do not think this is a problem. Suffice to say that the ideas I will run with are those I find compelling enough to be worth running with. Where I think that Horkheimer is wrong I will make that clear.

ultimately, that the failure to break apart the concept of the criminal – to expose the violence behind its false appearance of unity – frustrates critical theory’s emancipatory promise, threatening to render it (to use Horkheimer’s words against him) ‘a negation which lacks the power of resistance’.¹¹

¹¹ Horkheimer and Adorno, *Dialectic of Enlightenment*, 189.

1. Pathologies of policing

The royal ‘we’

In bourgeoisdom the concepts of the social contract and of rationality are equivalent.¹²

The police are the public and the public are the police.¹³

Horkheimer understands law in bourgeois society as a means [Mittel] and a mediation [Vermittlung] of domination. It expresses ‘the will of the minority’ by enforcing the order of private property, which is concentrated in the hands of the few. It ‘gives itself the form of the majority’ by being enacted *in the name of* a larger collective: ‘we’, the rational community of the consenting.¹⁴ The law’s assumption of the form of the majority is given theoretical expression in the idea of the social contract. A central concern of ‘Theory of the Criminal’ is to profile the ‘features of untruth, of repression’ carried by this ‘theoretical appeal to the community of reason’.¹⁵ To describe the face of social contract theory as wearing a false nose or ear is not, however, to claim that the face has no reality in the first place. Horkheimer sees social contract theory as both true and false. He thinks it articulates *partial* truths about our social world in such a way as to prevent us from recognising their partiality (in both senses of the term).

In Horkheimer’s genealogy, the masters accede to the law because each, individually, needs protection against his rivals as well as the capacity to suppress challenges to his economic power ‘from below’. By curtailing the executive powers of individual property owners, law allows them to exercise power as a class. In ‘Vernunft und Selbsterhaltung’

¹² Horkheimer, ‘Theory of the Criminal [Unpublished]’, §3.

¹³ Robert Peel, 1829, cited in Nina Power, ‘Who Is the Public of “Public Order”? Sovereignty, Citizenship and the Commons’ (Birkbeck, University of London, 2017), 5. Peel is regarded as the father of modern British policing.

¹⁴ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §1.

¹⁵ Max Horkheimer, *Gesammelte Schriften Band 5: Dialektik Der Aufklärung Und Schriften 1940-1950*, ed. Gunzelin Schmid Noerr (Frankfurt am Main: S. Fischer Verlag, 1987), 326. My translation. Original: ‘Weil die Allgemeinheit die Übereinstimmung der Interessen in einer Welt hypostasiert, in der sie noch unversöhnlich divergieren, trägt die theoretische Berufung aufs Allgemeine der Vernunft stets Züge der Unwahrheit, der Repression’.

[Reason and Self-preservation], a text written concurrently with ‘Theory of the Criminal’, Horkheimer puts it like this: ‘However fractured by rivalry and competition, over and against the slaves, serfs and masses in general the superiors’ concentrated will to self-preservation held sway, equipped with the latest material and intellectual instruments of power’.¹⁶ The law, on this account, replaces the ‘simple perpetuation of barbaric-physical force’¹⁷ represented by the feudal lord, but serves essentially the same end – to keep down the dispossessed. This requires a ‘battering violence’ because prosperity for one class is premised upon ‘hunger, insecurity, and work’ for the rest. Violence is therefore ‘no less essential to the bourgeois than to those forms of society in which sword and whip were still in the hand of the lord or in his direct vicinity’.¹⁸ The policeman’s truncheon is the whip displaced, allowing the lords’ inheritors to keep their hands clean.

Horkheimer does not want to say, though, that law is *merely* a mask behind which domination persists unchanged. Rather, law ‘as a means of domination develops a logic of its own, whose contradiction to domination the silken thread it carries over cannot overcome’.¹⁹ When the will of the masters became objectified into law, their power *was* in a sense constrained, even while it was enhanced. We might understand this ambivalence by thinking of two rather different meanings of *arbitrary power* as figured in the republican critique of domination. On the one hand, ‘arbitrary’ can mean ‘unpredictable’ - on a whim, out of the blue. On the other hand, arbitrariness can refer to the *unaccountability* of power, the absence of effective mechanisms compelling it to answer to those affected.²⁰ The move from unmediated to mediated domination, on Horkheimer’s account, seems to amount to a reduction of arbitrariness primarily in the first sense, far less so in the second. The exercise of power becomes more systematic and predictable, but it still does not track the interests of the

¹⁶ Horkheimer, 328. My translation. Original: ‘Gegenüber Sklaven, Leibeigenen und Massen überhaupt herrschte der konzentrierte, mit den jeweiligen materiellen und intellektuellen Machtmitteln ausgestattete Selbsterhaltungswille der Oberen, wie sehr er auch durch ihre Rivalität und Konkurrenz zersplittert war’.

¹⁷ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §1.

¹⁸ Horkheimer, §5.

¹⁹ Horkheimer, §1.

²⁰ For discussion of procedural vs. substantive accounts of domination, see Orlando Lazar, ‘A Republic of Rules: Procedural Arbitrariness and Total Institutions’, *Critical Review of International Social and Political Philosophy* Advance Online Publication (2017).

majority over whom it is exercised. As he puts it in another contemporaneous text, ‘The laws find themselves in pre-established harmony with the domination of cliques, who possess (the) weapons and means of production’.²¹ The law, on the whole, tracks the interests of capitalists as a class, although individual capitalists are constrained by it.

To the extent that this is true, the central conceit of the contractarian tradition – that society is a cooperative venture for mutual advantage to which ‘we’ consent, or rationally ought to consent – will be, in one sense, simply false. However, for Horkheimer, that is not the end of the story. He says that the law ‘gives itself the form of the majority’.²² As the *form* the law takes, the majority remains implicated, even if the law is, as he claims, antagonistic to their interests and largely beyond their control. How does this happen? One possibility is that the law’s claim to represent the majority has the character of a *self-fulfilling prophecy*. Insofar as people can be induced to believe (by whatever means) that the law expresses the will of the majority, it can become the case that the law *does* express their will – because the majority lend their support to it, participating actively or passively in its enforcement, simply because they believe this is what everyone *else* wants. It can become true that the law expresses the agreement of the collective simply to the extent that, and *because*, it is believed to. Seeming makes it so.²³

Horkheimer, however, is more interested in ‘hypothetical consent’ arguments for political obligation, which make the claim (not that we *do in fact* consent, but rather) that *if we were rational we would* consent. He suggests – strikingly – that, although this claim is not

²¹ ‘Straftheorie’ [Theory of Punishment] in Max Horkheimer, ‘Konzepte Als Zugabe Zur Festschrift Für Friedrich Pollock [Sammlung B]’, Available online in the Max Horkheimer archive in the Universitätsbibliothek, Goethe Universität, Frankfurt am Main, 1944, 74, <http://sammlungen.ub.uni-frankfurt.de/horkheimer/content/thumbview/7317058>. My translation. Original: ‘Die Gesetze befinden sich in prästablierter Harmonie mit der Herrschaft von Cliques, welche Waffen und Produktionsmittel inne haben’.

²² Horkheimer, ‘Theory of the Criminal [Unpublished]’, §1.

²³ The question to what extent appeals to the consent of the public to *justify* the police are undermined by this observation about direction of fit cannot be settled here. Clearly, though, there is some illusion involved if the direction of fit is not acknowledged. For discussion of ‘direction of fit’ in (purported) justifications of social power, see Rae Langton, ‘Feminism in Epistemology: Exclusion and Objectification’, in *The Cambridge Companion to Feminism in Philosophy*, ed. Miranda Fricker and Jennifer Hornsby (Cambridge: CUP, 2000). Cf. Raymond Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (Cambridge: Cambridge University Press, 1981), 14–15.

false, neither is it capable of demonstration. This is because it has the character of a tautology. ‘In bourgeoisdom’, he says, ‘the concepts of the social contract and of rationality are equivalent’. Let me try to flesh this out.

The Hobbesian argument for political obligation, which Horkheimer seems to regard as the most honest expression of the ‘bourgeois spirit’,²⁴ runs as follows. The pursuit of self-preservation would push any rational person, confronted with a choice between law and anarchy, to pick the former. The rationality of the existing form of society is to be deduced from a prior commitment to, ‘as much as [our] humane condition would afford, live delightfully’.²⁵ The attempted derivation, however, encounters familiar difficulties. What one would choose depends on what one must choose between. To ensure that one would pick the *status quo*, Hobbes notoriously paints the foil in as brutish and short a light as possible. But then someone who does not *already* believe that the ‘humane condition’ must be filled with satraps and detention centres has no reason to accept the terms of the question.

This sceptic will ask: why not compare the current state of things with some other collective life, for instance, one in which no human is illegal and no-one goes hungry any more?²⁶ From this rather different foil, she might derive the urgency of dismantling the powers that keep so many humans both hungry and illegal. Such a comparison is idle, the Hobbesian will say, because the proposed contrast case is impossible. But that begs the question. To rehearse the standard objection from Rousseau, it depends upon the hypostatisation as ‘human nature’ of a historical product of domination, which the critic of that domination is given no *new* reason to accept.²⁷

‘Benefits received’ (or ‘gratitude’) arguments for political obligation similarly turn on a presupposed option-set that the sceptic is unlikely to agree to.²⁸ This is because the idea of

²⁴ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §6.

²⁵ Hobbes, *De Cive*, chap. XIII. §4. Cited in Horkheimer, ‘Theory of the Criminal [Unpublished]’, §3.

²⁶ Theodor W. Adorno, *Minima Moralia: Reflections from Damaged Life*, trans. Edmund Jephcott (London: Verso, 2005), 156.

²⁷ ‘The Philosophers who have examined the foundations of society... continually speaking of need, greed, oppression, desires, and pride transferred to the state of Nature ideas they had taken from society; They spoke of Savage Man and depicted Civil man.’ Jean-Jacques Rousseau, *The Discourses and Other Early Political Writings*, trans. Victor Gourevitch, First published 1997 (Cambridge: Cambridge University Press, 2012), 132.

²⁸ See: A. D. M. Walker, ‘Political Obligation and the Argument from Gratitude’, *Philosophy and Public Affairs*

a ‘benefit’ is essentially *relative*. Someone who offers me a hole in the ground is clearly benefitting me relative to the possible world in which I die of exposure, but if they prevent me from building a house to make of me a paying tenant for their hole, I might not be so grateful. Whether I count myself, on balance, as benefitted or as harmed by the existing order, and hence whether the ‘benefits received’ argument will strike me as any more than a recommendation of Stockholm Syndrome, will depend in part on *whether I accept the proposed contrast case*, relative to which all the sins of the power-holders are to appear under the aspect of redemption.

In short, the idea I draw out of Horkheimer is this. Hobbesian arguments for obedience reduce to the assertion: There Is No (acceptable) Alternative; but that is just what the sceptic doubts. Like ontological arguments for the existence of God, ‘state of nature’ stories give reasons only to those who already believe. The rationality of following the law cannot be deduced from anything deeper; but that does not make it straightforwardly irrational – for ‘in bourgeoisdom’, it is (partly) *definitive* of rationality.²⁹ At the practice of obedience, the bourgeois citizen hits bedrock. His spade is turned. But instead of saying to the sceptic, ‘This is simply what I do’, he calls the police.³⁰

False levellers

There is no joy in sacrifice, death and revenge. Just as there is no joy in counting oneself.
Arithmetic is the negation of joy.³¹

17 (1988): 191–211; John A. Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), 162–63.

²⁹ This might be one way of understanding Rawls’s difficulties in coming up with a non-circular definition of ‘reasonableness’ such that all reasonable persons must accept his favoured political arrangement. See Finlayson, *The Political Is Political*, 55. I say obedience is *partly* definitive of rationality because the argument of the *Dialectic of Enlightenment* is that the concept of rationality is split against itself.

³⁰ Cf. ‘If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: “This is simply what I do.”’ Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe, 3rd edition; 1st edition published 1953 (Oxford: Blackwell, 2001), §217. Also: ‘it is our *acting*, which lies at the bottom of the language-game’; ‘... and write with confidence, “In the beginning was the deed.”’ Cf. Goethe, *Faust I*. Ludwig Wittgenstein, *On Certainty*, ed. G. H. Von Wright and G. E. M. Anscombe, trans. Denis Paul and G. E. M. Anscombe (Oxford: Wiley-Blackwell, 1991), §204, §402.

³¹ Alfredo Bonanno, *Armed Joy*, trans. Jean Weir, Original title ‘La gioia armata’, published 1977 by Edizioni

The rationality of the market, according to its Marxist critics, consists in the reduction of all useful things to a single measure. Anything that sells is fungible, and anything that doesn't is useless. In a social world dominated by markets, money – the universal equivalent – mediates the relations between human beings in an ever more totalizing manner. As Adorno puts it, 'Bourgeois society is ruled by equivalence. It makes the dissimilar comparable by reducing it to abstract quantities'.³² The qualitative element of experience is progressively lost, as objects are forced to fit the categories which best aid their manipulation by instrumental reason.³³

Horkheimer is interested in the way that modern penal systems mirror this logic by making every crime commensurable. 'Juridical concepts too are levelled out', he observes. 'Contradictions between them are expunged as every offence is weighed according to the same measure, acquiring a common denominator – the sentence'.³⁴ The unit of measurement is time, i.e. how long I am incarcerated for. Since money is itself a token of timed misery (which is what it means to say that capital is dead labour), punitive fines are equally reducible to this measure. This levelling out is not an accident, on his account, but corresponds to the delegation of 'the entire revenge business' to a single body.³⁵ Since 'state enterprise calls for uniform guidelines',³⁶ the diverse must be made identical.

In the case of both 'mediations of the economy' – money and law – universality of form *masks* particularity of substance. As Horkheimer puts it, 'one does not inspect the law to find out whom it will hit, and one does not inspect money to find where it was taken from, even though in reality the former is drawn to the poor and the latter to the rich'. He goes on, 'Indeed, the neutrality of the mediations, their formal universality, determines the member of

Anarchismo, Catania (London: Elephant Editions, 1998), chap. 5.

³² Horkheimer and Adorno, *Dialectic of Enlightenment*, 4.

³³ 'The elimination of qualities, their conversion into functions, is transferred by rationalized modes of work to the human capacity for experience, which tends to revert to that of amphibians.'; 'By sacrificing thought, which in its reified form as mathematics, machinery, organization, avenges itself on a humanity forgetful of it, enlightenment forfeited its own realization.' Horkheimer and Adorno, 28, 33.

³⁴ Cf. Rusche, 'Labour Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice'; Rusche and Kirchheimer, *Punishment and Social Structure*.

³⁵ Horkheimer, 'Theory of the Criminal [Unpublished]', §2.

³⁶ Horkheimer, §2.

the bourgeois world as a subject, in each case the same'.³⁷ That the law's formal universality – the form of the majority – conceals the particularity of the interests it serves, is familiar from Marxist, and subsequently feminist and black radical, criticisms of liberal rights.³⁸ They point out that when subjects are *unequally situated*, formally universal laws – specifying what all subjects in situation *X* must do, or forbidding all subjects from doing *Y*, for instance – can be particular in their application insofar as member so oppressed groups are disproportionately likely to find themselves in situation *X*, or to need to do *Y*. I will take this up in the next chapter.

Here I want to think about another way in which the law's universality can be a mask for targeted violence against oppressed populations. It flows from the fact that the law depends, in a very basic sense, on the application of concepts – that is, on judgements. It depends on determining whether this person's behaviour *counts as* an instance of *Y*, where *Y* is the forbidden conduct. Wittgenstein reminds us that the notion of a rule *determining* its applications only makes sense in the context of *practices* of applying the rule.³⁹ The meaning of *Y* is tied up with *what tends to get called Y*. Because the practice of applying the concept *Y* is something extended in space and time, the meaning-as-use of a law forbidding *Y* is not something we can necessarily glean from inspecting the rule in its abstract formulation ('one does not inspect the law to find out whom it will hit').⁴⁰ Whether, for instance, a person's behaviour *counts as* loitering, or as threatening, or as reasonable self-defence, is not something that can be determined wholly independently of whether people who look like *this*, have *this* accent, wear *these* clothes, walk in *this* manner, live in *this* area, etc. are routinely judged to be loitering, threatening, or acting in reasonable self-defence. In practice, we know that a well-to-do person usually does not count as loitering when they stand on a street corner, a black man often does count as threatening when he reaches for his driving license, and a police officer almost invariably does count as acting in reasonable self-defence when he shoots him. This is part of the meaning-as-use of the law. That is not to say this meaning is

³⁷ Horkheimer, §1.

³⁸ Cf. MacKinnon, *Toward a Feminist Theory of the State*; Karl Marx, 'On the Jewish Question', in *Early Political Writings*, ed. Joseph J. O'Malley (Cambridge: Cambridge University Press, 1994), 28–56; Mills, 'White Ignorance'; Young, *Justice and the Politics of Difference*.

³⁹ See Wittgenstein, *Philosophical Investigations*, §151–241.

⁴⁰ Horkheimer, 'Theory of the Criminal [Unpublished]', §1.

uncontested, or that it cannot be changed. It is rather to recognise the power of meaning-making as part of the concrete practice of the penal system, the day to day activity of *judging* people criminal.

A similar point is made by Franz Neumann in his analysis of the fascist state.⁴¹ On Neumann's account, law's universality becomes spurious when legal principles build in, or judges are permitted to appeal to, vague and contentious concepts such as 'being counter to healthy popular sentiment', or 'being harmful to public morals'. These kinds of clauses, he says, are 'nothing but a mask under which individual [i.e. particular] measures are hidden'. This is because, 'in present-day society there can be no unanimity on whether a given action, in a concrete case, is immoral or unreasonable, or whether a certain punishment corresponds to or runs counter to 'healthy popular sentiment''. Therefore, he says, these concepts 'have no specific content'.⁴² By expanding the number of contexts in which such 'so-called general principles' (*Generalklauseln*) can be invoked, Neumann argues, National Socialist jurists destroy the law's 'legal character'.

However, *contra* Neumann, the contrast with real existing liberalism is not so simple to make out. In British law currently, the right to freedom of assembly is limited in the following way:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.⁴³

Similarly, the Victorian offence of 'public nuisance', resurrected in 2012 to imprison Trenton Oldfield for protesting at the annual Oxford-Cambridge Boat Race, is defined like this:

⁴¹ Franz L. Neumann and William E. Scheuerman, 'The Change in the Function of Law in Modern Society', in *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Original title 'Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft', published 1937 in *Zeitschrift für Sozialforschung* 6, no. 3 (Berkeley and Los Angeles, CA: University of California Press, 1996), 101–41. This text would have been a point of reference for Horkheimer when writing 'Theory of the Criminal'.

⁴² Neumann and Scheuerman, 107.

⁴³ Article 11 in European Court of Human Rights and Council of Europe, 'European Convention on Human Rights, as Amended by Protocols Nos. 11 and 14, Supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13', 2010, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[to] do an act not warranted by law, or omit to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.⁴⁴

More generally, Iain Channing observes that:

In public order law, legal powers and regulation are defined by vague terms, such as breach of the peace; threatening, abusive or insulting words or behaviour; and causing harassment, alarm or distress. Therefore, the police's discretionary powers are so wide that virtually any action can, depending on its context, be plausibly branded as criminal so as to justify an arrest.⁴⁵

(Attending to the construction and application of concepts as moments of state power again raises the possibility, grasped by Walter Benjamin, that the struggle against fascism may require us to recognise the 'state of emergency' – the penetration of the arbitrary into the juridical – as not the exception but the rule.)⁴⁶ Of course, while these legal powers *could* in a sense be used against *anybody*, in practice they are used disproportionately against the marginalized, the oppressed, and the dissenting. Arbitrariness in the first sense – whim, discretion, unpredictability – here correlates to arbitrariness in the second – the systematic subordination of some people's interests to others. Concepts having 'no specific content' and concepts having *too* specific a content are two sides of the same coin.

Living dolls

we all have natural bodies, even officers of the law, in and out of uniform, on and off duty, since they had to come from *somewhere* [...]⁴⁷

Horkheimer's criminal is the *Doppelgänger*, the estranged 'twin', of the bourgeois

⁴⁴ Defined in the civil case of *Wilkes v Hungerford Market Co* (1835). For further details and discussion, see Power, 'Who Is the Public of "Public Order"? Sovereignty, Citizenship and the Commons', 29.

⁴⁵ Iain Channing, *The Police and the Expansion of Public Order Law in Britain, 1829-2014* (London: Routledge, 2015), 23. Cited and discussed in Power, 'Who Is the Public of "Public Order"? Sovereignty, Citizenship and the Commons', 1.

⁴⁶ Walter Benjamin, 'On the Concept of History', in *Walter Benjamin: Selected Writings, Volume 4: 1938-1940*, ed. Howard Eiland and Michael W. Jennings, trans. Edmund Jephcott (Cambridge, MA: Belknap Press of Harvard University Press, 2006), 389–400.

⁴⁷ Danny Hayward, 'Other People Die Meaningfully' (J30 picket line, Birkbeck, University of London, 2012).

citizen.⁴⁸ Like Freud's *Doppelgänger*, he is the trace of a more ancient power, transformed into a *Schreckbild* by the new, rationalised religion (bourgeois law).⁴⁹ In Freud's story, we invent *Doppelgänger* in our striving for self-preservation, doubling the soul to guard against the fear of death. The double is fated to repeat the same crimes down the generations.⁵⁰ Horkheimer's criminal, as a regressive perversion of the striving for self-preservation, is painted from this palate. Later I will say what is wrong with this. But there is another idea to be found in Horkheimer, which is worth developing. The idea is that the state, too, as the 'stony' and 'pitiless' product of that same striving, embodies both an original trauma and a drive towards the inhuman - the twin roots of the uncanny.⁵¹ In Horkheimer's narrative, the warding off of the stranger through the force of a blunt object is repeated down the generations, as 'the introverted violence' of the coercively-socialized subject 'is grimly repeated against' anyone who fails or refuses to conform.⁵² State repression is the return of the repressed.

'In story-telling', says Ernst Jentsch, 'one of the most reliable artistic devices for producing uncanny effects easily is to leave the reader in uncertainty as to whether he has a human person or an automaton before him in the case of a particular character'.⁵³ In some sense, we *know* that each police officer is a human being. Wittgenstein comments on the

⁴⁸ Horkheimer, 'Theory of the Criminal [Unpublished]', §5.

⁴⁹ 'His profession points back to early- and pre-bourgeois forms of domination; these continue to proliferate as the Mafia and Camorra, despised nowadays like fallen deities transformed into demonic powers by the new religion.' Horkheimer, §4. Cf. 'The double has become an object of terror [Schreckbild], just as the gods become demons after the collapse of their cult – a theme that Heine treats in 'Die Götter im Exil' [The Gods in Exile].' Sigmund Freud, *The Uncanny*, trans. David McLintock, Original title 'Das Unheimliche', published 1919 in *Imago* 5, *The New Penguin Freud* (London: Penguin, 2003), 143.

⁵⁰ Freud, *The Uncanny*, 141–42.

⁵¹ Original in both the phylogenetic and the ontogenetic sense. For discussion of trauma and the uncanny, see Nicholas Royle, *The Uncanny* (Manchester: Manchester University Press, 2003).

⁵² 'Against such delinquency, which – without definite consciousness, timid and impotent even in its most brutal form – at the same time imitates and destroys pitiless civilization, the latter sets the solid walls of prisons and workhouses, its own stony ideal.' Horkheimer and Adorno, *Dialectic of Enlightenment*, 189.

⁵³ Ernst Jentsch, 'On the Psychology of the Uncanny (1906)', trans. Roy Sellars, *Angelaki: Journal of the Theoretical Humanities* 2, no. 1 (1997): 13. Cited in Freud, *The Uncanny*, 135.

strangeness of the use of ‘know’ when speaking of a body’s having a soul,⁵⁴ yet we can give it a sense in this context. This is because, as ‘proxy’ of the bourgeois citizen, instrument of the King’s doubled body, this individual appears under the aspect of the inhuman. Just as, according to Horkheimer, ‘the origin of the law’ is ‘human-inhuman’,⁵⁵ so is its preserver today. He moves in formation, his arms extended by weaponry, his hands transformable at any moment into the metallic grip of a pair of handcuffs. He has an identification number, which may or may not be visible. ‘If you peer through the visor of his helmet’, wrote a recent observer, ‘you see the human inside, his personality almost entirely swallowed up by the machine.’⁵⁶ He is only doing his job. As Horkheimer says, ‘The policeman, the prosecutor and judge... are essentially tools. As such they have power’.⁵⁷

The uncanny is a curious comingling of the familiar and the unfamiliar. The secret passageway between the familiar and homely (*heimlich*) and its apparent opposite (*unheimlich*) is the notion of secrecy itself, of things going on behind closed doors.⁵⁸ The battering violence on which the smooth functioning of bourgeois society depends has this character. It takes place in ‘the cellars of police stations’ (or, as the euphemism would have it, their ‘custody suites’). There, Horkheimer intimates, ‘all destructive instincts find a hideout’.⁵⁹ The thousands of young comrades beaten and tortured behind prison walls by the Italian state in the suppression of Autonomy (*Autonomia*) at the end of the 1970s, Nanni Balestrini names ‘the unseen’.⁶⁰ Their dissent is rendered unseeable not just by the physical isolation of their sites of incarceration, but by the *concept of the criminal* as materialised in

⁵⁴ Wittgenstein, *Philosophical Investigations*, Part II, iv. Cf. discussion of Moore’s use of ‘I know’ in Wittgenstein, *On Certainty*.

⁵⁵ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §1.

⁵⁶ Anonymous, “‘Dear Citizens, This Is Your Police’: In Praise of the Police-Free Zone in Hamburg”, CrimethInc.com, 2017, <https://crimethinc.com/2017/07/10/dear-citizens-this-is-your-police-in-praise-of-the-police-free-zone-in-hamburg>.

⁵⁷ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §5.

⁵⁸ ‘*Heimlich* thus becomes increasingly ambivalent, until it finally merges with its antonym *unheimlich*. The uncanny (*das Unheimliche*, ‘the unhomely’) is in some way a species of the familiar (*das Heimliche*, ‘the homely’).’ Freud, *The Uncanny*, 134.

⁵⁹ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §5.

⁶⁰ Nanni Balestrini, *The Unseen*, trans. Liz Heron, Original title ‘Gli Invisibili’, first published 1976 (London: Verso, 1989).

the pseudo-public spectacle of the court process: ‘*before you [says the prosecutor] you have not revolutionaries but men and women transformed by hatred against society into savage wild beasts the jurors’ heads turn again towards the cage*’.⁶¹ Balestrini’s point is that the unseen are not the ones with sand in their eyes.⁶² This is the thought that will be developed in Part II. Walking familiar streets after being *inside* for the first time – inside the cage, inside the concept, outside the community of the reasonable – you hear sirens to which your ears were previously stopped. You notice, for instance, the many boots planted, impassive, around the kid against the wall, just off the main road, the opaque windows of the prisoner transport vehicle stuck in traffic, the mundane violence that underlies public order – and you wonder why you never noticed it before.

Uncanny is what one calls everything that was meant to remain secret and hidden and has come to light.⁶³

Two ideologies of rules

‘Society deems itself concrete reason,’ says Horkheimer. But immediately after this, he says: ‘On he who does not pay for this incorporation with strict obedience, society itself executes nature’s destructive urge, which he, through society, had previously escaped, and becomes to him a premeditated, systematic force of nature [Naturgewalt], compared to which unmediated nature in her brutality still appears a true state of innocence’.⁶⁴ We have already seen how, for Horkheimer, law’s taking ‘the form of the majority’ is an ideological process which aims to generate its own truth. Now we can see that this process has two contradictory aspects – what we might call the two faces of law. On the one hand, law appears to be generated by the consent of those subject to it. On the other hand, it appears as *Naturgewalt*,

⁶¹ Balestrini, 226. Cf. ‘[A] Criminal, who having renounced Reason, the common Rule and Measure God hath given to Mankind, hath [...] declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no society’. Locke, *Two Treatises of Government*, §11.

⁶² The sand-man who ‘comes to children when they won’t go to bed and throws a handful of sand in their eyes, so that their eyes jump out of their heads, all bleeding...’, Freud identifies with Coppeliuss, avatar of the law. Freud, *The Uncanny*, 136.

⁶³ Schelling, cited in Freud, 132. Translation amended by me.

⁶⁴ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §3. I will use the German term in what follows because I want to keep in mind its two meanings of ‘force of nature’ and ‘natural violence’.

irresistibly powerful and beyond the control of those subject to it; this appearance is maintained precisely by the violence that the myth of consent disavows.⁶⁵ Although these two appearances are supposed to serve the same end – to deter insubordination – they exist in fundamental tension with each other. Law's need to appear as *Naturgewalt* gives the lie to its appearance as consensual. To put it simply, if everyone believed in the social contract, there would be no need to violently enforce it. Conversely, the need for law to appear as consensual gives the lie to its appearance as *Naturgewalt*. If the violent forces of law really were powerful enough to crush any resistance, then it wouldn't matter whether people believed in the social contract or not.

2. *Resistant subjectivities*

Corresponding to the two ideological appearances of law identified by Horkheimer, I propose two ways law-breaking might break through ideology:

- (1) by making manifest the violent nature of the law, bringing what is usually hidden into view, we can undermine its appearance as consensual;
- (2) by making manifest the limited power of the law, by refusing to obey the law and getting away with it, we can undermine its appearance as an irresistible *Naturgewalt*.

As it stands, this proposal is schematic – which is not to say it is useless. Already, what is brought out by framing these strategies (which in themselves are hardly new) as counter-actions to Horkheimer's two faces of law is the need to think of them *together*. This can help us to notice that, just as the two ideologies of consent and *Naturgewalt* exist in

⁶⁵ Although this, admittedly, applies more to actual consent theories than to hypothetical or 'rational' consent ones. Rational consent theories do not disavow violence, but insist that it this violence is directed only against the *unreasonable*. The previous chapters questioned whether standard liberal version of this claim could with justice be applied to any existing regimes. The Hobbesian version of hypothetical consent theory I have addressed far more briefly. The point made in the last chapter that liberals cannot just help themselves to Hobbesian arguments when it suits them, however, is pertinent here. We can also observe that, outside of political philosophy, the claim that people *actually* consent is quite frequently invoked as a *justification* for a given regime or policy, and must therefore be seen as bestowing legitimacy in a normative sense.

tension with each other, so the two strategies of ideology critique directed against them can end up undermining each other, if we are not careful. For instance, provoking a spectacle of state violence against ‘innocent, non-resisting bodies’⁶⁶ – as in the liberal model of civil disobedience – might undermine the myth of consent but prop up the state’s ideological appearance of omnipotence, and naturalise the suffering it inflicts.

However, the proposal is unhelpfully schematic in that it speaks of ‘law-breaking’ in the abstract, when the unity of that category is precisely what I want to contest. The following fragments – ‘Cultures of non-compliance’, ‘The commodity form and its practical critique’, and ‘Work does not work’ – take up the task of making this proposal more concrete. In ‘Revelation’ I connect these possibilities more speculatively with some answers to the question of what makes ideology critique possible.⁶⁷

Cultures of non-compliance

Thinking about resistance often gets stuck in the valorization of heroic individual acts of conscience. Howard Caygill makes a case for moving beyond this valorization to look at the ‘everyday practices of resistance’ and ‘cultures of defiance’ that constitute each ‘historically specific capacity to resist’.⁶⁸ One way he effects this shift in our economy of attention is through the concept of a ‘People’s War’ – a guerrilla war of attrition waged by a population against an occupying army. A People’s War frequently involves ‘passive’ forms of non-compliance rather than outright confrontation: the ‘wall of silence’ the authorities encounter in trying to track down dissidents; the anti-occupation slogans appearing on walls faster than they can be cleaned off; the unofficial go-slows and small acts of sabotage that hobble production in the oppressor-owned factories. Caygill stresses that such everyday, often undramatic but usually illegal, modes of resistance can nevertheless be cumulatively effective against a powerful enemy.⁶⁹

Wherever the ongoing and periodically re-declared War on Crime is experienced as a

⁶⁶ Hooker, ‘Black Lives Matter and the Paradoxes of US Black Politics’, 456.

⁶⁷ There is, of course, no *one* account to which every critical theorist subscribes. I will draw on ideas from Adorno because I find them the most illuminating. An obvious avenue for future research would be to investigate other accounts, including Horkheimer’s own. More generally, the fragments of this section look *outwards* at the broader tradition of critical social theory and practice.

⁶⁸ Caygill, *On Resistance: A Philosophy of Defiance*, 156–58.

⁶⁹ Caygill, 61–62.

domestic occupation, these modes of resistance become salient. For instance, in *There Ain't No Black in the Union Jack*, Paul Gilroy shows the significance of cultures of 'de-arresting' – that is, of spontaneously and collectively intervening to prevent individuals from being arrested – in creating a crisis of authority for the police in 1960s and 70s Britain. In the mid-1970s, a London Metropolitan Police report noted 'incidents between police and black youth with a potential for large-scale disorder' occurring at an average rate of one per week. As Gilroy explains, these typically involved 'attempts by a crowd to release blacks who had been arrested', and often featured 'struggles over a black presence in public space which was thought to be illegitimate because of its size or character'.⁷⁰ Solidarity with the criminalized took a diversity of forms beyond the immediacy of the de-arrest. Gilroy points to many 'new types of political organization and struggle which were constructed as part of the various campaigns to defend those who had been arrested'.⁷¹

While Horkheimer was in the United States writing 'Theory of the Criminal', back in Germany the young comrades of the White Rose were distributing pamphlets urging non-compliance with the institutions of everyday life under National Socialism:

Sabotage in armament plants and war industries, sabotage at all gatherings, rallies, public ceremonies, and organizations of the National Socialist Party. Obstruction of the smooth functioning of the war machine... Sabotage in all the areas of science and scholarship which further the continuation of the war – whether in universities, technical schools, laboratories, research institutes, or technical bureaus...(etc.).⁷²

They called this 'passive resistance'.⁷³ Caygill criticises Hannah Arendt, among others, for failing to register these modes of dissent. The unintended irony of Arendt's 'lament for an absence of resistance' to the Shoah,⁷⁴ he argues, is that it is *her own theoretical perspective* – seeing resistance only in overt acts of conscience by named individuals – which effectively erases from view the multiple and often collective forms of resistance on which more easily

⁷⁰ Paul Gilroy, *There Ain't No Black in the Union Jack: The Cultural Politics of Race and Nation*, First published 1987 by Unwin Hyman Ltd (London: Routledge, 2002), 117.

⁷¹ Gilroy, 116.

⁷² Scholl et al., 'The Six Pamphlets of the White Rose Society', 3rd Pamphlet.

⁷³ It goes without saying that sabotage is illegal not only in Nazi Germany.

⁷⁴ Caygill, *On Resistance: A Philosophy of Defiance*, 157.

visible heroic acts depend.⁷⁵ Such a myopic conception of resistance lauds the heroic individuals of the White Rose, yet would struggle to recognise most of the forms of resistance their pamphlets advocated.

Later I will show how Horkheimer performs a similar erasure through his pathologization of ‘the criminal’. For now, I want to focus on Caygill’s response. Caygill argues that overt shows of defiance, both individual and collective, cannot be adequately understood as self-sufficient candles in a dark, empty night; in fact, they *rely on* the day to day practices of non-compliance and solidarity that Arendt ignores. This is because, firstly, visible defiance needs broader support if it is not to be immediately repressed. (In Toxteth during the 1981 riots, residents turned off the lights to hamper police efforts to apprehend the active participants.)⁷⁶ Secondly, though, it is because *though* participation in cultures of non-compliance, resistant subjectivities are forged. This thought is familiar from Rosa Luxemburg’s critique of Lenin. There was a disagreement not just about strategy, but about how people *come to know* the things that matter in politics. Luxemburg argued that it was not the prefabricated teachings of the professional revolutionaries that would, as the professionals put it, ‘prepare the masses’, but the living education of ongoing struggle.⁷⁷

The next question is: what counts as ‘struggle’?

The commodity form and its practical critique

Crime is quite simply the act of appropriation without exchange.⁷⁸

Question: what is the difference between an expensive sandwich and a free lunch?

⁷⁵ Another example of this is Arendt’s sweeping claim that colonial slavery was not resisted: ‘The rarity of slave rebellions and of uprisings among the disinherited and downtrodden is notorious; on the few occasions when they occurred it was precisely “mad fury” that turned dreams into nightmares for everybody’. Hannah Arendt, *On Violence* (London: Harcourt Brace Jovanovich, 1969), 21. Cf. Linebaugh and Rediker, *The Many-Headed Hydra*, 137; C. L. R. James, *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution*, Second edition, revised. First published 1963 by Random House (New York: Vintage Books, 1989).

⁷⁶ I am grateful to Ben Beach for this detail from his research at the archive of Churchill College, Cambridge.

⁷⁷ Rosa Luxemburg, *Revolutionary Socialist Organization [Leninism or Marxism?]*, Original title ‘Organisationsfragen der russischen Sozialdemokratie’, first published in Iskra and Neue Zeit, 1904 (Ann Arbor: University of Michigan Press, 1961).

⁷⁸ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §4.

Answer: the police. As Horkheimer says, ‘The market... demands law’.

the centre was always open we made a show of closing it in the evening shutting the door but the fact was that there were no keys there were people coming and going all the time there were meetings of workers of students of casual workers of hospital workers of women but also groups that turned up there with guitars flutes and so on to play to smoke joints to fix up dates for the evening it had become everybody’s regular drop-in place⁷⁹

Marx distinguishes, on the one hand, the domination produced by the ‘internal’ logic of the market – accumulation-by-exploitation, the operations of capital – from, on the other hand, ‘so-called primitive accumulation’ – the state- or para-state violence that clears the way for capital by destroying other forms of life.⁸⁰ Alternative modes of sociality and of relating to non-human nature must be eliminated because they offer the to-be-exploited a material basis for autonomy from, and resistance to, the predatory global market.⁸¹

This distinction was a significant strategic intervention on Marx’s part for (at least) two reasons. Firstly, ‘moralising’ socialists had condemned the ‘force and fraud’ of the capitalists and their lackey state while extolling the virtues of contractual exchange, calling for ‘a fair day’s work for a fair day’s pay’. Marx’s point is this: so long as people have no access to the means of subsistence outside the market, enforcing the exchange of equivalents will be *enough* to perpetuate the domination of dead over living labour, with all the immiseration, precarity, and crisis that entails.⁸² Secondly, these socialists invested their hopes in petty and communal production, the building of cooperatives, little communities outside capital. Marx’s point is this: the state being dependent for its revenue on the

⁷⁹ Balestrini, *The Unseen*, 131.

⁸⁰ Karl Marx, *Capital: A Critique of Political Economy*, trans. Ben Fowkes, vol. 1 (London: Penguin, 1976), chaps 26–28. My exposition here owes a great deal to William Clare Roberts, ‘What Was Primitive Accumulation? Reconstructing the Origin of a Critical Concept’, *European Journal of Political Theory* Advance Online Publication (2017): 1–21. See also Nichols, ‘Disaggregating Primitive Accumulation’.

⁸¹ Cf. ‘Our Forests and great Commons (make the Poor that are upon them too much like the Indians) being a hindrance to Industry, and are Nurseries of Idleness and Insolence’. John Bellars, cited in Perelman, *The Invention of Capitalism*, 124.

⁸² Karl Marx, ‘Critique of the Gotha Programme’, in *Later Political Writings*, ed. Terrell Carver (Cambridge: Cambridge University Press, 1996), 208–26. For controversies of interpretation, cf. Steven Lukes, *Marxism and Morality* (Oxford: Oxford University Press, 1987), 48–70; Allen Wood, ‘The Marxian Critique of Justice’, *Philosophy and Public Affairs* 1, no. 3 (1972): 244–82.

accumulation of capital ('economic growth'), you cannot expect it magnanimously to tolerate projects that threaten its own conditions of existence; insofar as peaceful little communities are successful in providing the to-be-exploited a material basis for autonomy, the state will try to crush them.⁸³

Having distinguished *enclosure* from *enforcement*, however, a problem arises when we then think of the state's violent face primarily in terms of the former. The danger here is of colluding with liberalism's greatest conceptual coup – the painting of the state as 'minimal' or 'merely negative' when it enforces private property titles. This amounts to a naturalization of the existing order of property. Here is how the confusion might arise. If we think of the state's use of force in the face of resistance to the logic of capital as *enclosure*, and then think of enforcement as something wholly different from enclosure, we are liable to forget that enforcement, too, encounters resistance, and that this resistance is equally a challenge to the logic of capital. Insofar as processes of enforcement are *contested*, the already-enclosed always threatens to burst out of its enclosure and must therefore be continually recaptured – or, we might say, *re-enclosed*, so long as that does not make us forget the original strategic point of the enclosure/enforcement distinction.⁸⁴ We must throw away the ladder, not climb back down it.

What we see from the top of the ladder is that property is a *process*. Preventing the direct appropriation of would-be-commodities by the expropriated classes is a necessary part of that process. This is achieved, in part, through violence and the threat of violence. After all, contracts do not enforce *themselves*. Resisting magical thinking about the market means recognising the state in penal mode as continuously carving out the borders of enclosed wealth – and, noticeably, carving the more vigorously the greater the quantity enclosed. *The market demands law*. That is not to say, in Hobbesian vein, that people are incapable of treating each other with concern without the threat of punishment. Rather, it is to say that the social relations that constitute capital are not of a kind that can be maintained through mutual concern. As Horkheimer puts it, 'Every human could arrive at universality by means of

⁸³ '[Marx argues] that existing forms of petty production, and the forms of social solidarity they foster, are too vulnerable to the violent encroachments of capital's mighty servant, the state.' Roberts, 'What Was Primitive Accumulation? Reconstructing the Origin of a Critical Concept', 3.

⁸⁴ The extent to which Marx himself falls prey to this confusion cannot be investigated here.

insight, it would not require pain. The recourse to pain is the confession to the illegality of the law'.⁸⁵

of course the comrades also used the centre as a place for working out the various systems for not paying electricity bills gas bills telephone bills systems for not paying for transport for sabotaging the ticket machines on the buses for forging train tickets and so on they were things that started spontaneously with individuals or small groups and that by word of mouth would lead to the organization of real mass struggles around these things for instance we'd started going to the cinema on Sundays for free fifty or sixty of us would push our way in or at a pinch if it was clear that they'd call the police we'd throw down a derisory sum that was no more than token⁸⁶

Suppose we take seriously the Marxist thought that 'value is not "measured", but established in the confrontation of the market';⁸⁷ and then we ask, what happens to *value* when that confrontation does not go as planned – or, to put it another way, when the marketplace becomes (overtly or covertly) a site of confrontation in the *political* sense? The fetish character of the commodity is the illusion that value is something other than a set of hierarchical social relations established and maintained by force. In a quite straightforward sense, then, acts like shoplifting, trespass, squatting, criminal damage – interacting with objects and spaces in ways not sanctioned by their legal owners (what the Italian autonomists called *autoreduzione*,⁸⁸ in French: *autoréduction*; in English: the self-service checkout) – can,

⁸⁵ Max Horkheimer, 'New Yorker Notizen 1939-42 [Sammlung C]', Available online in the Max Horkheimer archive in the Universitätsbibliothek, Goethe Universität, Frankfurt am Main, 1942, 73, <http://sammlungen.ub.uni-frankfurt.de/horkheimer/content/thumbview/7316809>. My translation. Original: 'Zur Allgemeinheit könnte jeder Mensch durch Einsicht kommen, es bedürfte nicht des Schmerzes. Der Rekurs auf den Schmerz ist das Eingeständnis der Illegalität des Rechts.' Cf. 'Deutlicher als durch jede andere Institution bekundet die Gesellschaft durch die Strafe, dass sie nicht die Allgemeinheit sondern die Partikularität darstellt. [Through punishment, more clearly than any other institution, society shows that it represents not universality but particularity.]'. Horkheimer, 74. It might be too strong to claim that *all* humans could learn how to live well together without *any* recourse to pain, but that does not invalidate the point that the amount of suffering inflicted by existing penal systems is cause for suspicion about the order they enforce.

⁸⁶ Balestrini, *The Unseen*, 131.

⁸⁷ William Clare Roberts, *Marx's Inferno: The Political Theory of Capital* (New York: Princeton University Press, 2016), 102.

⁸⁸ Eddy Cherki and Michel Wievorka, 'Autoreduction Movements in Turin, 1974', in *Autonomia: Post Political Politics*, ed. Sylvère Lotringer and Christian Marazzi, trans. Elizabeth A. Bowman, Second edition, Intervention Series (Los Angeles: Semiotext(e), 2007).

when aptly directed, strip these objects and spaces of their commodity character.⁸⁹

Work does not work

‘It is time to oppose the work ethic with the non-work aesthetic’, wrote Alfredo Bonanno in a 1977 text, for which he was imprisoned for eighteen months.⁹⁰ ‘Capital devours everything’, he warned, ‘even the revolution. If the latter does not break from the model of production, if it merely claims to impose alternative forms, capitalism will swallow it up within the commodity spectacle’.⁹¹ The targets of his critique were ‘pious’ revolutionaries’ who replicated the forms of the capitalist workplace in both their modes of organizing and their supposedly ‘communist’ utopias. As Paul Lafargue put it one hundred years earlier, ‘bourgeois men of letters... have intoned nauseating songs in honor of the god Progress, the oldest son of Work’.⁹²

The white men are landing! The cannon! Now we must submit to baptism, get dressed, work.⁹³

Horkheimer recognizes the penal system as having an intimate relationship with work discipline. His criminal, like Locke’s, is characterized by the refusal of work. (‘God gave the world... to the use of the Industrious and Rational [...] not to the Fancy or Covetousness of the Quarrelsome and Contentious.’⁹⁴) She evades the division of labour, ‘harms production’, and ‘has no stake in the social reproduction of life for the purpose of its mastery’.⁹⁵ Conversely, penal institutions ‘are the image of the bourgeois working world thought through to the end, set up as an emblem in the world by the hatred of human beings for what they are

⁸⁹ At least temporarily. For how long depends on what is done with them afterwards.

⁹⁰ Bonanno, *Armed Joy*, chap. 4. Translation amended.

⁹¹ Bonanno, chap. 8.

⁹² Paul Lafargue, *The Right to Be Lazy: Essays by Paul Lafargue*, ed. Bernard Marszalek (Oakland, CA and Chicago, IL: AK Press and Charles H. Kerr Publishing Company, 2011), 29. Translation amended by consulting Kristin Ross, *The Emergence of Social Space: Rimbaud and the Paris Commune*, First published by University of Minnesota Press 1988 (London: Verso, 2008), 64.

⁹³ Arthur Rimbaud, *A Season in Hell/The Drunken Boat*, trans. Louise Varèse, Second Edition. Translation first published 1945. First published in French 1873. (New York: New Directions, 2011), 19. Translation amended.

⁹⁴ Locke, *Two Treatises of Government*, §34.

⁹⁵ Horkheimer, ‘Theory of the Criminal [Unpublished]’, 4–5.

forced to make themselves become'.⁹⁶

The rows of cells in a modern prison represent monads in the true Leibnizian sense... The absolute loneliness, the enforced reliance on a self whose whole being consists in the mastering of material and the monotonous rhythm of work, spectrally prefigure human existence in the modern world'.⁹⁷

The law determines its objects as 'separate but equal' in the ironic sense by imposing separation and sameness in the literal sense on those who do not 'voluntarily' conform to the regime of divided labour it exists to enforce.

if what you want is jobs/for everyone, you are still the enemy,/you have not thought thru, clearly,/what that means⁹⁸

To be sure, what a critical theorist might call the 'determinate negation' of work is not, according to Bonanno, to be found in leisure. He shares with Adorno and Horkheimer the critique of 'free time' under capital. 'The spectacle offered by the bureaucratic leisure organizations' he calls 'a macabre ritual. An awaiting death. A suspension of work in order to lighten the pressure of the violence accumulated during the activity of production'; 'The experience of free time programmed by our exploiters is lethal. It makes you want to go to work'.⁹⁹ Similarly, Kristin Ross argues in her study of Rimbaud and Lafargue's politics of laziness, 'It is crucial... not to mistake laziness for leisure. Laziness, for [them], constitutes a kind of third term outside the programmed dyad of labor and leisure'.¹⁰⁰

In Part III, I will suggest that Horkheimer's programmed dyad of bourgeois subject and criminal non-subject represses the possibility of just such a third term. (In the construction of companionably guilty opposites, the possibility of resistance – of a critical consciousness manifested and forged 'durch die Tat' – gets lost.) For now, I just want to make one practical point about resistance: *it takes time*. And time is something you can steal.

⁹⁶ Horkheimer and Adorno, *Dialectic of Enlightenment*, 188.

⁹⁷ Horkheimer and Adorno, 187.

⁹⁸ Diane di Prima, *Revolutionary Letters*, Fifth edition. First published 1971. (San Francisco: Last Gasp, 2005), 31.

⁹⁹ Bonanno, *Armed Joy*, chap. 4. Cf. 'The Culture Industry: Enlightenment as Mass-Deception', in Horkheimer and Adorno, *Dialectic of Enlightenment*.

¹⁰⁰ Ross, *The Emergence of Social Space: Rimbaud and the Paris Commune*, 61.

*Giddy friends, our fun begins./O floods of fire we'll never work.*¹⁰¹

The *operaists* demanded for their class *more money, less work*.¹⁰² In its mischievous simplicity, this demand represented an attack on the ethic of work and self-denial that bourgeoisdom demands of its subjects. Using things without paying for them is one obvious way of making this demand concrete. Since *real wages* are determined by how much it costs for me to live,¹⁰³ the auto-reduction of commodity prices is equivalent to an auto-increase in wages – and what Marxist would doubt that wages are a terrain of class struggle? To be sure, increases in real wages, whether they are achieved legally or otherwise, are not just an end in themselves; that way lies co-option. Nonetheless, to be able to access, simultaneously, the material bases of life *and* time in which to live, is a *precondition* of many other forms of resistance.

The opposite of the commodity is the commons, as Locke realised. Alternative modes of sociality between humans and non-human nature, insofar as they offer the to-be-exploited a material basis for *autonomy from, and resistance to* the now-prevailing order of work and property, must be repressed if capital is to flourish. However, in thinking about resistance we cannot neglect the fact that, between these poles, there is a great deal of middle ground. The non-commodity is not thereby automatically the commons. As Nina Power emphasises, commons ‘are not simply resources that anyone can use in whatever way they choose, leading to depletion..., but carefully managed assets that are shared and overseen in such a way that exploitation and resource-stripping is minimised or absent’.¹⁰⁴ To construct and nurture the commons requires not just the re-appropriation of the resource itself, but time and energy – precisely what capital sucks into itself.¹⁰⁵

Insofar as they reclaim this time and energy from capital, attacks on the commodity

¹⁰¹ Arthur Rimbaud, ‘What’s It to Us, My Heart? (1872)’, trans. Simon Bull (London: Distributed as a pamphlet at the Bloomsbury Social Centre, 2011).

¹⁰² See Steve Wright, *Storming Heaven: Class Composition and Struggle in Italian Autonomist Marxism* (London: Pluto Press, 2002). To claim these *only* for oneself is, of course, a very different thing.

¹⁰³ And not just to survive, but to ‘live delightfully’, which is after all what we all want.

¹⁰⁴ Power, ‘Who Is the Public of “Public Order”? Sovereignty, Citizenship and the Commons’, 33.

¹⁰⁵ The length of the working day (see Marx, *Capital: A Critique of Political Economy*, vol. 1, chap. 10.) has been just one terrain of the struggle over proletarian time.

form *outside* the site of production can, therefore, be attacks on the order of work (this being simply the flip side of the order of property).

the same thing went for the transport struggles we'd travel in large groups and we'd say we weren't paying then we'd give out leaflets to the rest of the passengers to encourage them to do the same thing until it became routine and the conductor didn't even ask the comrades for tickets not even when they were on their own in the early days the bus company had the idea of putting guards on the buses but then it had to give this up because along with this it had to budget for the cost of wrecked bus stations and even a pair of buses that went up in smoke one night¹⁰⁶

Let's put it this way. Making a shopping mall into a rough and ready commons is not the realisation of autonomy. It is not what we would be doing in a free society, because in a free society there would be no such things as 'shopping malls'. It might, though, serve as a (not *the*, but *a*) 'polemical counter-image to the suffering under social compulsion' – and this is significant if we suspect, with the later Adorno, that such counter-images may be the only way we can at present conceptualise freedom.¹⁰⁷

Revelation

The last two fragments focused on contesting the assumption, widespread not only among liberals but among Marxists who really should know better, that criminal acts cannot manifest critical consciousness. Now I want to pick up again the further thought that conflict with the law might *forge* critical consciousness. Caygill makes this claim, as we saw, and I have already illustrated it with Gilroy's account of non-compliance in the face of racist policing. I also suggested, more schematically, that law-breaking might undermine the twin ideologies of consent and *Naturgewalt* by exposing the violence upholding the existing order as well as its points of weakness. I now want to present another example of critical

¹⁰⁶ Balestrini, *The Unseen*, 131.

¹⁰⁷ Theodor W. Adorno, *Negative Dialectics*, trans. E. B. Ashton (London: Routledge & Kegan Paul, 1973), 223. Amended translation found in Freyenhagen, *Living Less Wrongly: Adorno's Practical Philosophy*, 88. For our purposes, what matters most is that it is *one* way to conceptualise freedom, never mind whether there are others. Still, I am sympathetic to the thought, which contemporary 'left-realists' like Charles Mills and Lorna Finlayson draw from the Marxist critique of utopianism, that there is a difficulty with 'positively' or 'directly' conceptualising freedom from our standpoint in the present, where unfreedom is so much the norm. I will now go on to explain this.

consciousness forged at the sharp end of the law, and connect it with some of Adorno's thoughts on what makes ideology critique possible.¹⁰⁸ This might seem an unusual move. I would respond that drawing analogies between breaking the law and doing critical theory is not so strange, since my suggestion is that both are ways we can *potentially* come to know significant things about the social world, and moreover, that critical theory betrays this potential when it adopts a disparaging attitude towards law-breakers.

Let's begin with the example, which I take from Peter Railton's 2015 Dewey Lecture to the American Philosophical Association. Describing his experiences as a participant in the Free Speech Movement at Berkeley in the late 60, Railton asks, 'Why dredge up these old memories of fear and [police] clubs and mass meetings?' Here is his answer:

Because I need to give you a sense of *rupture* — a sense of the way that a set of relations we students had had to the world of authority and legitimacy, which had been fraying for years, could finally be *torn apart in the most concrete and visible way* in a matter of hours, and remain torn for years to come. It was a rupture of the order of things that was occurring across our society — cities were burning, National Guardsmen were marching down the street with bayonets fixed, and people were being beaten, expelled, jailed, and shot. This rupture at the same time created a space of liberation and possibility we had not known before — not freedom from repression, but freedom when one is willing to face repression. Once again, Dewey was right — *once we allowed ourselves to think — and act — in our own right, beyond existing boundaries and institutions, seemingly immovable aspects of the system could be put in jeopardy*. But we would have to accept placing ourselves in jeopardy as well.

...Anti-war protestors had generally faced much less violence and repression than had the civil rights protestors in the South or the rebellious youth of the urban riots of the North, but the shooting at Kent State and Jackson State [both 1970] made it clear that there were no limits that could be taken for granted. Even the most peaceful demonstrators *came to know the sour taste of fear when the police charged*. Men and women, young and old, *learned the feeling of tear gas, heavy clubs, and hard sidewalks*. But they *also learned that they could force change if they paid the price*.¹⁰⁹

What Railton is pointing to is the epistemic significance of *disruption*. The suggestion is that sometimes we come to know the nature of a social object by disturbing its smooth running,

¹⁰⁸ While these connections can only be tentatively sketched here, I propose them as an avenue for further investigation. As I said earlier, I focus on Adorno's ideas because I think they have the potential to illuminate the examples I am interested in.

¹⁰⁹ My emphases. Peter Railton, 'Innocent Abroad: Rupture, Liberation, and Solidarity', 2015, <http://dailynous.com/2015/02/22/peter-railtons-dewey-lecture/>.

pushing it to breaking point.

We do not need any controversial Marxist theory to see one sense in which this is true. Some of the significant properties of any object – but particularly of any social object – will be *dispositional* ones. Having a dispositional property is a matter of counterfactuals: how the object would react under various conditions. Knowledge of dispositional properties can be achieved by putting the object under those conditions. I discover that a rod is brittle when I exert force to bend it. I discover the nature of the violence backing up an order when I refuse to comply with it. As Railton says, ‘By trying to make things different, one can learn... where power lies and how it is exercised’ (power being the dispositional property *par excellence*); but also, one can make discoveries about modality, for instance the possibility that ‘seemingly immovable aspects of the system’ can be changed.¹¹⁰ However, the connections between breaking and knowing, for some critical theorists at least, have gone beyond this point about dispositional properties.

Ideology, as noted in my introduction, consists in distorted forms of consciousness which arise out of social relations of domination and help to perpetuate them by masking their oppressive character. Conversely, the critical concept of ideology is supposed to help us understand and challenge these processes of domination-upholding distortion – to *unmask* what ideology conceals. The difficulty is, once we recognize that our minds and our concepts are the products of concrete conditions of domination – this being the *materialist* commitment of the theory of ideology – it becomes clear that we cannot simply think our way to a place wholly outside these conditions. We cannot escape ideology without transforming the social relations that give rise to it. This is one reason why Marx is wary of utopian theorizing, and contemporary left-realists are wary of ideal theory. To blithely pump one’s socially conditioned intuitions for blueprints of a free society is, they think, to refuse to take this point about ideology seriously.¹¹¹ But then the question is: how is it possible to criticize ideology *at all*? How can critique gain a foothold?¹¹² Adorno’s response to this question depends on an

¹¹⁰ Railton suggests, too, that acquiring this knowledge means taking a risk – ‘placing ourselves in jeopardy’ to bring about the antecedent of the counterfactual.

¹¹¹ Geuss, *Philosophy and Real Politics*; Mills, ‘White Ignorance’; Young, *Justice and the Politics of Difference*, chap. 4.

¹¹² Marx’s own suggestion, which we already saw echoed in Luxemburg, he calls ‘practical-critical activity’.

understanding of wrong life as (1) contradictory, and (2) destructive and distorting of human potential.¹¹³ I suggest that thinking about critical consciousness as *made possible* by these two features of reality might help us make sense of the experience Railton describes, as well as describing the kind of experience critical theory aims to produce.

The first idea developed in Adorno, then, is that the possibility of breaking through ideology stems from the fact that existing reality just doesn't fit together. As Freyenhagen puts it, 'Despite society's becoming more and more an integrated whole (a totality), it remains in Adorno's eyes antagonistic and characterized by ruptures'.¹¹⁴ Ideology critique, on this view, depends upon making manifest antagonisms in existing reality. This finds a resonance in Railton's testimony, where an escalation of social antagonisms, made manifest in the fixed bayonets of the National Guard, creates a moment of rupture in which both the violence of the existing order (contra the myth of consent) and its contingency (contra the myth of *Naturgewalt*) are revealed. In the second line of thought (corresponding to (2) above) a particular species of contradiction comes to the fore, namely, 'the gap between human beings as they are now – damaged, reduced to appendages of the machine, lacking real autonomy – and their potential – their humanity yet to be realised'.¹¹⁵ Furthermore, a particular *way of registering* these contradictions comes to the fore, namely, through our somatic (bodily) responses to the bad.¹¹⁶ In Railton's narrative, learning a sour taste, or the hardness of a sidewalk – direct bodily experience of the human-inhuman – can be world-disclosing.

Adorno's notion of the 'non-identical' provides a further way of thinking about how critical consciousness is possible.¹¹⁷ Attending to the non-identical, according to Adorno,

Karl Marx, *Karl Marx: Selected Writings*, ed. David McLellan, Second edition (Oxford: Oxford University Press, 2000), 171. On this account, the manifesting and the forging of resistant subjectivities cannot be separated.

¹¹³ All this he shares with Marx, but a comparison is beyond the scope of this fragment.

¹¹⁴ Freyenhagen, *Living Less Wrongly: Adorno's Practical Philosophy*, 89.

¹¹⁵ Freyenhagen, 11. The idea that this gap 'provides the normative resources for a radical critique of our social world' Freyenhagen calls 'negativism'. However, we do not need to be thorough-going negativists in his sense to think of this as *one* way in which critical insights can be achieved.

¹¹⁶ As Freyenhagen puts it, 'suffering and the physical reaction to suffering are central to the new categorical imperative'. Freyenhagen, 157.

¹¹⁷ Adorno, *Negative Dialectics*, 1973. My exposition here draws especially on Brian O'Connor, *Adorno's*

means attending to the excesses of reality that resist the imposition of general rules. On his account, concepts – their ways of dividing up the world – contain a sedimented history of domination. We saw this in action, or something like it, when thinking about the role of judgement in law. But Adorno recognizes that concepts are also a precondition for thinking. We cannot get at the truth by simply doing away with them, immediately releasing the non-identical from the limits of that sedimented history. As he puts it,

The need to give voice to suffering is the condition of all truth. For suffering is objectivity, which weighs on the subject; what it experiences as most subjective, its expression, is objectively mediated.¹¹⁸

In Adorno's deliberate hyperbole, it is because suffering *is* objectivity – and cannot just be imagined away – that the need to express suffering is a condition of all truth. The suggestion here recalls Marx: 'The tradition of all dead generations weighs like a nightmare on the brains of the living.'¹¹⁹ What weighs on the living is the tradition of all dead generations. What weighs on the subject is objectivity, which is experienced as the most subjective, as suffering.

Negative Dialectic: Philosophy and the Possibility of Critical Rationality (Cambridge, MA: The MIT Press, 2004). I do not mean to suggest that this way of thinking about ideology critique is wholly distinct from the previous two ideas. For instance, we might think of 'attending to non-identity' as making contradictions manifest, since it involves a mismatch between categories and individuals. Equally, what evades or pushes against the imposition of pre-conceived categories is often a bodily impulse or inchoate emotion, not something already conceptualized, so, in that sense, thinking in terms of non-identity might align with the 'negativist' model laid out by Freyenhagen. I am not claiming that we need to choose between these ways of thinking. More generally, I do not pretend to do justice to Adorno's notion of the non-identical in this short section. Rather, I use it to propose a *form of attention towards a given case of law-breaking* which, if nothing else, will be unfamiliar. The problem of 'identity-thinking' will return in the next chapter.

¹¹⁸ Adorno, *Negative Dialectics*, 1973, 17–18. Translation amended. I was assisted by Dennis Redmond's online version. 'Negative Dialectics', trans. Dennis Redmond, 2001, <http://www.efn.org/~dredmond/ndtrans.html>.

Original: 'Das Bedürfnis, Leiden beredt werden zu lassen, ist Bedingung aller Wahrheit. Denn Leiden ist Objektivität, die auf dem Subjekt lastet; was es als sein Subjektivstes erfährt, sein Ausdruck, ist objektiv vermittelt'. Theodor W. Adorno, *Negative Dialektik; Jargon Der Eigentlichkeit*, ed. Rolf Tiedemann, 7, first published 1970 ed., vol. 6, *Gesammelte Schriften* (Frankfurt am Main: Suhrkamp Verlag, 2015), 29.

¹¹⁹ Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte', in *Later Political Writings*, ed. Terrell Carver (Cambridge: Cambridge University Press, 1996), 32. Translation amended. Original: 'Die Tradition aller toten Geschlechter lastet wie ein Alp auf dem Gehirne der Lebenden'. Karl Marx, 'Der 18. Brumaire Des Louis Bonaparte', in *Karl Marx Friedrich Engels Gesamtausgabe (MEGA): Abteilung 1, Band 11* (Berlin: Dietz Verlag, 1985), 97.

Bringing the two together, the thought would be that objectivity *is* the tradition of all dead generations, the unfree conditions under which people try to make history. By ‘objectivity’ is meant here both (a) what is objectively the case, the world as it is, and (b) the socially dominant concepts that stand over and against us but are also a precondition for us saying anything true. The only way forward, on this account, is to push up against these fossilized social relations, reveal them *as* limits by making their violence manifest, and reflect on how they have been constructed. Adorno sometimes calls this process the ‘disenchantment of the concept’.¹²⁰

I propose we read Horkheimer’s claim that the law ‘confronts [the criminal] as objective reason’ in light of this connection between suffering and objectivity.¹²¹ (This is not a matter of Horkheimer exegesis, of course, but an unsanctioned appropriation of the text. Still, I am suggesting that sometimes we can learn through unsanctioned appropriation.) As objectivity, we cannot just imagine the law away.¹²² As universal generalisation, the law’s violence inheres in its suppression of the non-identical, the humanity that overflows its dictates. Much of the time that violence remains latent because threat and habit are enough to keep us within the forms of wrong life. Non-compliance, however, can sometimes make it manifest. The disenchantment of the concept takes place through the recalcitrant body.

but he still keeps on at me bad temperedly I said the lot you have to strip right off the lot have you got it and he flicks my back with the tip of his taut outstretched fingers and with contempt on his face I see this contemptuous expression of his and my immediate reaction is to look straight at him and I see this contemptuous expression in his eyes and I feel a surging burst of hatred and rage you’re a piece of shit I tell him with my eyes I’m not brave enough to say it to him because I can see him there all poised and ready to let me have it if I make the slightest move and so I take off my socks and underpants and I stand there naked I’m cold but I don’t move it’s like a *revelation* for me and I think to myself *this is the way they are this is what they’re like* but why do I find it so staggering how many times have we told ourselves that this is how they are¹²³

¹²⁰ Adorno, *Negative Dialectics*, 1973, 11–15; Adorno, *Negative Dialektik; Jargon Der Eigentlichkeit*, 6:23–27.

¹²¹ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §3.

¹²² Whether we ultimately need law as much as we need concepts is, for reasons already given, not a question I try to settle.

¹²³ Balestrini, *The Unseen*, 76. My emphasis.

3. *Enlightenment reverts to myth*

Horkheimer disagrees. He insists the criminal ‘remains a negation which lacks the power of resistance’.¹²⁴ In ‘Weak selves’, I lay out Horkheimer’s account of the criminal’s failure to achieve selfhood. In ‘Reaction’ I offer a preliminary sketch of what I think is wrong with it. After that, I consider how Horkheimer might respond. In ‘Horkheimer’s Foole’, I suggest that his claim that criminals fail to achieve selfhood might be made sense of in terms of his and Adorno’s broader analysis of the trajectory of Weberian disenchantment – specifically the idea that ‘enlightenment reverts to myth’. The end-point of this trajectory, and the ultimate target of Horkheimer’s critique in ‘Theory of the Criminal’ is, of course, fascism. Horkheimer’s figuration of the criminal is supposed to be a cipher through which to comprehend the mass-murdering Nazi. I want to suggest, however, that this attempt to instrumentalise the concept of the criminal fails on its own terms. It does not help us to understand and resist fascism because, or at least insofar as, it mystifies the relations between criminalization, the order of property, and the rise of the far-right. This is the point of ‘First they came for the criminals’.

Weak selves

An ‘enfeebled being’, ‘without definite consciousness, timid and impotent’,¹²⁵ Horkheimer’s criminal is the ‘crippled, retarded twin brother of the bourgeois citizen’. Like the capitalist, this ‘disabled entrepreneur’ is driven by self-interest, and like the capitalist he wants to make a profit without having to work for it. Like the capitalist, he is reliant upon violence, although, lacking the opportunity to outsource it to the police, he must get his own hands dirty.¹²⁶ The only significant difference between criminal and capitalist, in this picture, lies in the fact that the criminal’s violence and pursuit of profit refuse to be bound by the framework of self-denial bourgeois subjecthood requires: ‘The criminal, in whose crime self-

¹²⁴ Horkheimer and Adorno, *Dialectic of Enlightenment*, 189.

¹²⁵ Horkheimer and Adorno, 189.

¹²⁶ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §5. ‘Henchman and hangman share with the criminal the dishonour and brutality of the profession, not its independence [...] If the criminal is the crippled, retarded twin brother of the bourgeois citizen, so the police agent is his proxy. The principle in both is the same: the violence, without which bourgeois property cannot exist.’

preservation was paramount, has in reality the weaker, more labile self'.¹²⁷

Haplessly 'calculat[ing] everything' yet 'lacking in calculating intelligence', violating the 'systematic, organised self-preservation' offered by the state 'in favour of the restricted, the anarchic kind',¹²⁸ Horkheimer's criminal 'cannot make himself into a subject, however much he tries'.¹²⁹ His life-course is determined simply by the 'inability to say No':¹³⁰

The strength to stand out as an individual against one's environment and, at the same time, to make contact with it through the approved forms of intercourse and thereby to assert oneself within it – in criminals this strength was eroded. They represented a tendency deeply inherent in living things, the overcoming of which is the mark of all development: the tendency to lose oneself in one's surroundings instead of actively engaging with them, the inclination to let oneself go, to lapse back into nature.

Too 'weak' and 'retarded' to inflict on themselves the bourgeois principle of the self-as-monad, criminals must have it inflicted on them from without.¹³¹ Through exaggerated selfishness, they condemn themselves to selflessness.

Reaction

If stereotypical thinking involves the reduction of differentiated persons to quasi-natural kinds, one cannot help but wonder if the social-psychological method of the study itself has not deployed the very technique it marks as pathology.¹³²

One cannot help but wonder at Horkheimer's wholesale appropriation of the language of Nazi eugenics – 'degenerate', 'crippled', 'feeble', 'regressive', 'ape'-like, 'backwards', 'weak', 'retarded', etc. – to express his contempt for people who break the law. He might as well have called us '*Untermenschen*'.¹³³ Terminology aside, though, the basic claim that

¹²⁷ Horkheimer and Adorno, *Dialectic of Enlightenment*, 188.

¹²⁸ Horkheimer, 'Theory of the Criminal [Unpublished]', §3.

¹²⁹ Horkheimer, §5.

¹³⁰ Horkheimer and Adorno, *Dialectic of Enlightenment*, 189.

¹³¹ Horkheimer and Adorno, 188. Cf. 'die Gewalt, die das moderne Individuum sich antun muß'. Horkheimer, *Gesammelte Schriften Band 5: Dialektik Der Aufklärung Und Schriften 1940-1950*, 331.

¹³² Peter E. Gordon, 'The Authoritarian Personality Revisited: Reading Adorno in the Age of Trump', *Boundary 2: A Journal of Literature and Culture* 44, no. 2 (2017): 31–56.

¹³³ Remembering Horkheimer's complaint about the levelling-out effected by the bourgeois penal system, we might also worry that his relegation of criminals *en masse* to the status of degenerate non-subjects repeats that

criminality is *defined* by the violent pursuit of self-interest seems unwarranted.¹³⁴

On Horkheimer's own account, the law is an instrument of domination, designed by the propertied to keep their subordinates in check. On his own account, the main target of criminal acts is property: 'the illusion, that there might be any criminals in the bourgeois world other than those against property' he calls 'ideological in its real sense'.¹³⁵ How, then, can presenting property crime as *inherently* violent not be to use the term 'violent' in its most ideological sense? In fact, grounds are lacking even for the milder assumption that crimes are inherently selfish. Consider two cases. In case 1, you buy an expensive shirt from a large department store. In case 2, you take an expensive shirt from a large department store without paying. In both cases, you might be motivated by self-interest, a desire to treat yourself (not that this is usually grounds for condemnation).¹³⁶ Equally, the shirt might be a gift for someone else. Your motive might be benevolent, or it might be malign - to manipulate the gift's recipient. Whether you buy or steal the shirt, though, is irrelevant to whether the act is 'selfish', i.e. self-interested in the pejorative sense. The fact that an act is against the law does not give us any *additional* reason to subject the motivations and character-profile of its doer to an Ayn Rand-style expose.

But, it will probably be asked, does Horkheimer really mean to throw the eugenicist dictionary at *actual* criminals? Or is he, rather, explicating a *concept* of the criminal, a concept he regards as ideological? The answer is that he means to do both. However, he does not distinguish clearly between these two tasks, or attend to where they might conflict. Therein precisely lies the problem. To the extent that he ignores the contradictions between 'the criminal' as a category of bourgeois thought and the human individuals it 'hits', I suggest, his story reaffirms the concept's appearance of objective validity (in something like

levelling logic.

¹³⁴ Of course, some crimes are violent and self-interested, and so, surely, are some criminals. But that is not the same thing.

¹³⁵ Horkheimer, 'Theory of the Criminal [Unpublished]', §2. To be sure, he thinks that the law treats human being and body parts as property too, and protects them as such.

¹³⁶ Indeed, since it will usually be in the interests of the oppressed to overcome unjust barriers to their advancement, it would be rather odd to dismiss as regressive any action based on their recognition of, and attempt to further, their own interests.

the Kantian sense), thereby reverting to myth.

Horkheimer's Foole

Horkheimer's criminal is clearly modelled on Hobbes's 'Foole' – the manipulative materialist unleashed, who turns against his creator.¹³⁷ What this character is supposed to reveal, in Horkheimer's hands, is that the bourgeois conception of reason is divided against itself. Rational egoism is supposed to be the foundation of the Hobbesian argument for compliance, submission to the law being deduced from a self-regarding interest in living (and, as Horkheimer correctly notes, not *merely* surviving). The problem Hobbes confronts is that there are clearly circumstances, particularly those in which detection is unlikely, where one's own interests are better served by skilful free-riding than plodding compliance. This produces the gothic moment of *Vatermord*. As a system based on the rational calculation of advantage, Hobbesian rule-egoism threaten always to disintegrate into act-egoism. At least, that seems to be Horkheimer's reading.

That instrumental reason tends to kill its own Gods is, of course, the central theme of the *Dialectic of Enlightenment*. 'Just as Kant's moral philosophy set limits to his enlightened critique in order to rescue the possibility of reason', write Adorno and Horkheimer, 'unreflecting enlightened thinking has always sought, for its own survival, to cancel itself with skepticism, in order to make room for the existing order'.¹³⁸ Skepticism, though, can also threatens that order.¹³⁹ Like Nietzsche and de Sade, Hobbes's Foole (a sceptic about political obligation) 'pushes the scientific principle to annihilating extremes',¹⁴⁰ and must therefore on Horkheimer's account contain a kernel of true revolt against bourgeois asceticism.¹⁴¹

¹³⁷ Thomas Hobbes, *Leviathan*, ed. Richard Tuck, revised student edition, Cambridge Texts in the History of Political Thought (Cambridge: CUP, 1996), chap. XV.

¹³⁸ Horkheimer and Adorno, *Dialectic of Enlightenment*, 74.

¹³⁹ The oscillating political tendencies of scepticism are charted in Max Horkheimer, 'Montaigne Und Die Funktion Der Skepsis', *Zeitschrift Für Sozialforschung* VII (1936).

¹⁴⁰ Horkheimer and Adorno, *Dialectic of Enlightenment*, 74.

¹⁴¹ This is a matter for future research, but it is worth noting that elsewhere in the *Dialectic of Enlightenment* he says as much. Speaking of de Sade's Juliette, he writes: 'Juliette's critique contains the same inner discord as the Enlightenment itself. In so far as the criminal violation of taboos, which once made common cause with the bourgeois revolution, has not been simply absorbed into the new matter-of-factness, it lives on, with sublime love, as fidelity to the utopia brought near by the availability of physical pleasure to all.' I would say that, while

Enlightened thinking's fearful self-cancellation, on the other hand, figures as Hobbes's insistence that we give up on rational calculation (i.e. renounce the right to private judgement) at just the moment when its results might come into conflict with the will of the sovereign it has itself enthroned.¹⁴²

So, while the Foole is foolish by tautology (the concept of rationality, in bourgeois thought, being tied up with obedience to law) Horkheimer also wants to say that the Foole is, both logically and historically, the end-product of pragmatic reason in its unreflective form.¹⁴³ 'In the act of crime,' he says, 'the regression to earlier stages of development is united with the ultimate consequence of progress'.¹⁴⁴ Just as market-society produces its own opposite through the growth of monopolies, every hitherto existing form of rationalism 'turns against its own principle and, time and again, folds back into scepticism'.¹⁴⁵ Just as the process of capital valorisation is indifferent to the particular, concrete aims and character of the labour it exploits,¹⁴⁶ so Horkheimer's criminal ignores everything but the balance of power.

the Romantic strand in Marxism which I earlier found promising in Rimbaud and Bonanno here finds expression, it is worrying that Horkheimer does not distinguish between the violation of a taboo (or a law) and the violation of a human being. Cf. *The Eclipse of Reason* where Horkheimer figures the 'revolt of nature' as equally present in (what I would call) 'upward punching' rebellions and 'downward punching' pogroms: 'Resistance and revulsion arising from this repression of nature have beset civilization from its beginnings, in the form of social rebellions—as in the spontaneous peasant insurrections of the sixteenth century or the cleverly staged race riots of our own day—as well as in the form of individual crime and mental derangement.' Max Horkheimer, *The Eclipse of Reason*, trans. J. Cumming (New York: Seabury Press, 1974), 66.

¹⁴² Hobbes would say we have renounced right to private judgement. As Horkheimer says, Hobbes 'predigt [...] die Abschwörung des eigenen Urteils für alle Zeit, aus Vernunft' [preaches... the renunciation of private judgment for all time, out of reason']. Horkheimer, *Gesammelte Schriften Band 5: Dialektik Der Aufklärung Und Schriften 1940-1950*, 325. A difficulty, which cannot be pursued here, is how we are then supposed to judge whether the restricted conditions under which Hobbes allows resistance obtain in any particular case.

¹⁴³ He describes 'the principle of self-preservation' as 'the nominalistically purified concept of reason'. Horkheimer, 329. My translation. Original: 'Der nominalistisch gesäuberte Begriff der Vernunft, das Prinzip der Selbsterhaltung...'.
¹⁴⁴ Horkheimer, 'Theory of the Criminal [Unpublished]', §6.

¹⁴⁵ Horkheimer, *Gesammelte Schriften Band 5: Dialektik Der Aufklärung Und Schriften 1940-1950*, 321. My translation. Original: '...kehrt sich gegen sein eigenes Prinzip und schlägt immer wieder in die Skepsis zurück'.

¹⁴⁶ See Roberts, *Marx's Inferno: The Political Theory of Capital*, 162.

Embodying a reason that ‘more radically than ever, reverts to its instrumental meaning’,¹⁴⁷ the Foole’s relation to the particular – ‘die Sache selbst’ [the thing itself] – is brutally instrumentalizing. In the trajectory of bourgeois philosophy, thought has already been reduced to an ‘labour-saving function’,¹⁴⁸ ‘which no longer thinks its objects concretely, but satisfies itself with ordering them, classifying them’.¹⁴⁹ Similarly, Black Will, the fictional contract-killer, is a disenchanter of the Protestant mould, in whose hands ‘the whole world [becomes] mere material’.¹⁵⁰ His deed ‘discovers only the powerlessness of things, which thinking had already actualised’.¹⁵¹

Suppose we are convinced by Horkheimer’s reading of ‘the Foole’ as a grotesque cricket spun from bourgeois law’s wooden brain.¹⁵² Does it follow that someone who falls foul of the law is, *in reality*, more likely than anyone else to be an avatar of instrumental reason gone mad? Clearly not. However, Horkheimer has a dialectical reason for making the criminal into such an avatar. His purpose, as I will explain, is to model the character-type of his real opponent, the fascist. My purpose is to show the limitations of this as an anti-fascist strategy.

First they came for the criminals

Of what use is it to write something courageous which shows that the condition into which we are falling is barbarous (which is true) if it is not clear why we are falling into this condition? We must say that torture is used in order to preserve property relations. To be sure, when we say this we lose a *great* many friends who are against torture only because they think property relations can be upheld

¹⁴⁷ Horkheimer, *Gesammelte Schriften Band 5: Dialektik Der Aufklärung Und Schriften 1940-1950*, 322.

,radikaler als je auf ihre instrumentale Bedeutung zurückgeführt’

¹⁴⁸ Horkheimer, 323. My translation. Original: ‘arbeitsparende Funktion’.

¹⁴⁹ Horkheimer, 327. My translation. Original: ‘...die nicht länger ihre Gegenstände konkret denkt, sondern sich begnügt, sie zu ordnen, zu klassifizieren’.

¹⁵⁰ Horkheimer, 331. My translation. Original: ‘die ganze Welt wurde zum bloßen Material’.

¹⁵¹ Horkheimer, ‘Theory of the Criminal [Unpublished]’, §6.

¹⁵² Cf. Marx: ‘The form of wood, for instance, is altered if a table is made out of it. Nevertheless the table continues to be wood, an ordinary, sensuous thing. But as soon as it emerges as a commodity, it changes into a thing which transcends sensuousness. It not only stands with its feet on the ground, but, in relation to all other commodities, it stands on its head, and evolves out of its wooden grain grotesque ideas [*Grillen* – crickets], far more wonderful than if it were to begin dancing of its own free will’. *Capital: A Critique of Political Economy*, 1:163–64.

without torture, which is untrue.¹⁵³

The crackdown on illegal criminals is merely the keeping of my campaign promise. Gang members, drug dealers & others are being removed!¹⁵⁴

Horkheimer's text builds to an analysis of fascism as a species of criminality. 'In the totalitarian state', he says, 'punishment and crime are being liquidated as superstitious residues, and a naked eradication of opponents, certain of its political goal, is spreading across Europe under the regime of criminals'.¹⁵⁵ This being the purpose of the text, my scruples about Horkheimer's derogatory generalizations about criminals – my insistence that *not all criminals are like that* – might seem, even if correct, to miss the point. If 'criminal' means 'fascist' or 'proto-fascist', it makes sense to say that the criminal is a Foole; it is true that both Fooles and fascists propel rationalization, disenchantment, and the reduction of the world to manipulable matter, to that extreme form in which it coincides with the age-old irrationality of the blunt instrument.¹⁵⁶ Equally, Horkheimer's deployment of a Nazi vocabulary of feebleness and degeneracy might be explained by the observation that he is appropriating this language only to cunningly turn it upon its proponents.¹⁵⁷

Of course, Horkheimer wants to use the concept of the criminal not just to insult fascists, but to give an account of how fascism *arises* – develops within and then destroys, nominally liberal and enlightened orders. According to Horkheimer, the criminal's activities in the high-bourgeois era were untimely in their brutality, 'point[ing] back to early- and pre-

¹⁵³ Bertold Brecht, 'Writing the Truth: Five Difficulties', in *Galileo*, ed. Eric Bentley, trans. Richard Winston, Original title: "Fünf Schwierigkeiten beim Schreiben der Wahrheit". Published in *Unsere Zeit* (Paris), 1935. Translation first published 1943. (New York: Grove Press, 1966), 150.

¹⁵⁴ Tweet by Donald Trump, 12 February 2017.

¹⁵⁵ Horkheimer and Adorno, *Dialectic of Enlightenment*, 190. The White Rose pamphlets, too, use the concept of a 'clique of criminals' to denounce Hitler's regime. Scholl et al., 'The Six Pamphlets of the White Rose Society', 2nd pamphlet.

¹⁵⁶ 'For the rulers... human beings become mere material, as the whole of nature has become material for society. After the brief interlude of liberalism in which the bourgeois kept one another in check, power is revealing itself as archaic terror in a fascistically rationalized form.' Horkheimer and Adorno, *Dialectic of Enlightenment*, 68.

¹⁵⁷ The White Rose do this too, when they describe Nazi officials as '*Untermenschen*'. Scholl et al., 'Die Flugblätter Der Weißen Rose (1942)', 1st and 2nd pamphlets.

bourgeois forms of domination'. Hence, criminals were despised 'like fallen deities transformed into demonic powers by the new religion'.¹⁵⁸ The subsequent twist is that the new religion, having amassed an unparalleled arsenal of technologies of control, proceeds to deliver these over into the hands of the now-ascendant apes of the demonic powers it had displaced.¹⁵⁹ Refusing to submit to the social contract, and thereby abolishing the precondition of the collective's forced march into the future, the criminal/monopolist/fascist is a throwback to the simple-minded domination of the past:

As the detour of power via the internal markets of nations disappears, so, too, do intellectual mediations, including law... The fascist mass murderer has emerged as the pure essence of the German factory owner, no longer distinguished from the criminal by anything but power. The detour has become unnecessary.¹⁶⁰

As this stage, it becomes a moot point who is aping whom – 'The deed of the common criminal is petty, personal, directly destructive. [They are the apes of the great power-holders.]'.¹⁶¹

There is an affinity here with Neumann's claim that law under National Socialism loses its 'legal character', but to this point is added a psychological drama. The dizzying amount of aping featured in Horkheimer's narrative corresponds to the withering of individuality that both he and Adorno believe is characteristic of late modernity:

The ego constituted itself in each case through caring for property, an activity made possible by fairly stable relations under conditions of regulated competition and general law [...]

With the disappearance of independent existences in the economy, the subject itself disappears as a synthetic unity.¹⁶²

¹⁵⁸ Horkheimer, 'Theory of the Criminal [Unpublished]', §4.

¹⁵⁹ 'The new order denoted a leap in the transformation of bourgeois domination into direct domination and yet still continued the bourgeois'. Horkheimer, *Gesammelte Schriften Band 5: Dialektik Der Aufklärung Und Schriften 1940-1950*, 332. My translation. Original: 'Die neue Ordnung bezeichnet einen Sprung in der Transformation der bürgerlichen in unvermittelte Herrschaft und setzt doch die bürgerliche fort'.

¹⁶⁰ Horkheimer and Adorno, *Dialectic of Enlightenment*, 189.

¹⁶¹ Horkheimer and Adorno, 188. The sentence in squared brackets is from the New York typescript, where it has been scored out by hand. Horkheimer, 'New Yorker Notizen 1939-42 [Sammlung C]', 75. My translation. Original: 'Sie sind die Affen der grossen Gewalthaber'.

¹⁶² Horkheimer, *Gesammelte Schriften Band 5: Dialektik Der Aufklärung Und Schriften 1940-1950*, 336. My translation. Original: 'Das Ich hat sich jeweils in der Sorge ums Eigentum konstituiert, wie

As Peter Gordon puts it in his Adornian analysis of the phenomenon of Trumpism, ‘substantive “individuals” correspond to a historical phase that has been surpassed’.¹⁶³ Under conditions of economic monopoly and political authoritarianism, we see ‘social standardization weakening the individual psyche’.¹⁶⁴ Whereas previously the criminal’s failure to achieve subjecthood set her apart from the capitalists she sought to emulate, now the (monopoly) capitalists, the clique in charge of the state, can be told from the criminals only, if at all, by their superior weaponry.¹⁶⁵ As the populace must increasingly conform to survive, individuality disappears. In a crucial sense, then, ‘high-scorers’ on the authoritarian personality scale are *well-adapted* to Hitler’s historical moment (and, perhaps, to ours).

Here, then, is Horkheimer’s story in brief. Bourgeois society produced the criminal as a pathology of instrumental reason, and then the criminals took over. Now the criminals are in charge, and the rest of society is infected by their flabby, selfish non-selfhood. Enlightenment reverts to myth.

Here is a problem with this story. In figuring fascism as the rule of criminals, and criminals in general as nascent fascists, it obscures the extent to which fascism *relies on* the ideological concept of the criminal as a technology for the dehumanisation of dissent. It is no accident that ‘illegal’, ‘criminal’, and ‘law and order’ are the bread and butter of far-right rhetoric. But this is not just about rhetoric. Horkheimer recognises that fascist regimes incorporate – expanding and intensifying – bourgeois institutions of punishment, like prisons and workhouses.¹⁶⁶ What he misses, I suggest, is the role of these institutions in paving the

sie unter einigermaßen stetigen Verhältnissen, bei geregelter Konkurrenz und allgemeinem Recht, sich betätigen kann [...] / „Mit dem Verschwinden der selbständigen Existenzen in der Wirtschaft verschwindet das Subjekt selbst als synthetische Einheit“.

¹⁶³ Gordon, ‘The Authoritarian Personality Revisited: Reading Adorno in the Age of Trump’, 44.

¹⁶⁴ Gordon, 43.

¹⁶⁵ Horkheimer and Adorno, *Dialectic of Enlightenment*, 189.

¹⁶⁶ We could add, following Aimé Césaire’s analysis of the ‘boomerang effect’ of colonial violence, that this expansion and intensification is, to some extent, simply a matter of relocation – targeting different populations than in ‘liberal’ eras, e.g. on home soil rather than in the colonies. On Césaire’s account, the rise of fascism in Europe in the twentieth century ‘proves that colonization... dehumanizes even the most civilized man; that colonial activity, colonial enterprise, colonial conquest, which is based on contempt for the native and justified by that contempt, inevitably tends to change him who undertakes it; that the colonizer, who in order to ease his conscience gets into the habit of seeing the other man as an animal, accustoms himself to treating him like an

way for fascism in the first place.

This point can be put very simply. In real existing liberalism, openly fascist groups are not ‘officially’ endorsed. They are condemned, with varying degrees of sincerity, by the political establishment. They may even be criminalized. None of this has been effective in stopping them, and liberal institutions have been criticised for facilitating the rise of the far-right.¹⁶⁷ However, this criticism tends to be framed in the terms of Karl Popper’s so-called ‘paradox of tolerance’:

Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.

The question becomes how far the liberal state should ‘tolerate’ Nazis. The risk of facilitating fascism’s triumph seems to reside in the liberal state being, essentially, *too nice*.

What this framing of the matter obscures is the liberal state’s active – and decidedly *not* nice – role in clearing the ground for those very groups it then wrings its hands over. It clears the way for the far-right street movement by expending vast resources, day in and day out, on demonising, incarcerating, surveilling, threatening, harassing, and sometimes outright killing, precisely the people who would be most likely to oppose a far-right street movement: migrants, black people, Roma, poor, queer and gender non-conforming people, Muslims, and others scapegoated by the far-right, not to mention self-declared leftists and antifascists. Criminalization is the material and ideological snowplough that opens up the highway to the tiki torch brigades.

Horkheimer misses this because he is so busy constructing the law-breaker as a fascist that he forgets the law might be negated in a different way, as resistance to the forms of wrong life.¹⁶⁸ He misses therefore that the set of people subject to criminalization and the set

animal, and tends objectively to transform *himself* into an animal.’ Aimé Césaire, *Discourse on Colonialism*, trans. Joan Pinkham, Originally published as ‘Discours sur le colonialisme’ by Editions Presence Africaine, 1955 (New York and London: Monthly Review Press, 1972), 41.

¹⁶⁷ I am here describing a familiar public discourse, rather than a particular theorist.

¹⁶⁸ The strangeness of psychologically amalgamating the criminal *per se* with the fascist is brought out by this comment from Adorno: ‘Our high-scoring subjects [on the authoritarian personality scale] do not seem to behave as autonomous units whose decisions are important for their own fate as well as that of society, but rather as

of people who might have resisted the rise of fascism have a not insignificant intersection. In other words, the problem is that Horkheimer's critique of tyranny ends up replicating Locke's – castigating the absolutists for their betrayal of the law while simultaneously suppressing the possibility of challenges to the order of property from below.

Conviction

Expounding Adorno's 'ethics of resistance', Freyenhagen offers the following hopeful thought:

While Adorno seemed to think of the critical individuals on roughly the model of his own life, there is clearly room for extending the ambit beyond white males from a privileged background and educated in modernist high culture – for it might well be that others will be more attuned to the experience of negativity and the denial of human potential that (according to Adorno) characterizes our social world.¹⁶⁹

My reading of 'Theory of the Criminal' has identified a serious blockage in Horkheimer's thinking which would prevent him, at least, from 'extending the ambit' in this way.¹⁷⁰ The problem is that Horkheimer seems, *firstly*, to tie the possibility of resistance – which requires acting in the world, instead of passively being pushed around by it – to the development of a bourgeois self, and *secondly*, to equate transgression of the law with a failure to achieve bourgeois selfhood. This is respectability politics with a vengeance. But it is respectability politics with a weighty theoretical apparatus behind it, an apparatus built around the denigration of 'the criminal'. Consequently, it is not enough just to *say* that critical individuals need not be privileged white males. If we really want to extend the ambit of what

submissive centers of reactions, looking for the conventional "thing to do". Whatever it might be, crime is not generally the conventional thing to do. Theodor W. Adorno, 'Remarks on The Authoritarian Personality', Available online in the Max Horkheimer archive in the Universitätsbibliothek, Goethe Universität, Frankfurt am Main, 1948, [67] 72r, sammlungen.ub.uni-frankfurt.de/horkheimer/content/zoom/6323018?zoom=1&lat=1600&lon=1000&layers=B.

¹⁶⁹ Freyenhagen, *Living Less Wrongly: Adorno's Practical Philosophy*, 179.

¹⁷⁰ I suspect a similar blockage in Adorno's thinking, but demonstrating that would be beyond the scope of this study.

is recognizable as resistance, we need to criticize this apparatus piece by piece.¹⁷¹

To be sure, Horkheimer does not see bourgeois subjecthood as simply a Good Thing. According to the *Dialectic of Enlightenment*, the formation of the bourgeois subject requires the violent subjugation of non-human nature, other humans, and – in the recasting of emotions and impulses as heteronomous forces to be mastered by the Kantian central command – aspects of the subject herself.¹⁷² To say that criminals 'fail to achieve' individuality in this sense is not, therefore, a straightforward insult. Yet Horkheimer still seems to think of the bourgeois subject, in a sense, rather as Lenin thinks of the party – that this is a form of the old, hierarchical society that we *need* to break out of that society.¹⁷³

It is possible they are both right – but given the repressive character of these forms, it is worth attending to alternatives. That is something I have done in this chapter, as well as trying to understand why Horkheimer does not, and suggesting that, from his own point of view, he should. Reconstructing his account of law as the stony face and bloodied hand of property, I have argued that developing an adequate conception of resistance would require him, not just to look into the cellars of police stations, but to *listen* to some of the people he found there. In refusing to do this, his critique goes awry.

Perhaps the most disturbing thing about 'Theory of the Criminal', from the perspective

¹⁷¹ I have merely begun that project here, but hope to have shown that it is a worthwhile one for anyone committed to the kind of emancipatory social theory that Horkheimer took himself to be engaged in.

¹⁷² 'The principle of individuality was contradictory from the outset. First, no individuation was ever really achieved. The class-determined form of self-preservation maintained everyone at the level of mere species being. Every bourgeois character expressed the same thing, even and especially when deviating from it: the harshness of competitive society. The individual, on whom society was supported, itself bore society's taint; in the individual's apparent freedom he was the product of society's economic and social apparatus.' Horkheimer and Adorno, *Dialectic of Enlightenment*, 125.

¹⁷³ In lectures from the same period, Horkheimer makes this claim: 'In psychoanalytic terms, one might say that the submissive individual is one whose unconscious has become fixed at the level of repressed rebellion against his real parents. This rebellion manifests itself in officious conformity or in crime, according to social or individual conditions. The resistant individual remains loyal to his superego, and in a sense to his father image.' Horkheimer, *The Eclipse of Reason*, 80. Cf. Adorno: 'With the family there pass away, while the system lasts, not only the most effective agent of the bourgeoisie, but also the resistance which, though pressing the individual, also strengthened, perhaps even produced him. The end of the family paralyses the forces of opposition.' Adorno, *Minima Moralia: Reflections from Damaged Life*, 22.

of *a* criminal, is that it exhibits the asymmetrical power relation between theoretician and subject (or rather, object) characteristic of positivism.¹⁷⁴ The object does not speak. She has no opportunity to push back against the derogatory and depoliticizing concept of the criminal which Horkheimer, like too many other Marxists who should know better, takes over from bourgeoisdom's repository of conventional wisdom. The only voice of a criminal we hear in his text is a character in an Elizabethan Drama – a sort of minstrel performance. I imagined Horkheimer responding to this: so much the worse for criminals who won't shut up; the urgent task is to resist fascism by any means necessary, and the derogatory concept of the criminal is a necessary means. Against this, I argued that Horkheimer's attempts to understand fascism, at least in 'Theory of the Criminal', are themselves undermined by his inability to see how anyone might heed the injunction of the White Rose:

'Beweist durch die Tat, dass Ihr anders denkt!'
[Prove by your crimes that you think differently!]¹⁷⁵

¹⁷⁴ See, for instance, Langton, 'Feminism in Epistemology: Exclusion and Objectification'.

¹⁷⁵ Scholl et al., 'Die Flugblätter Der Weißen Rose (1942)'. Unofficial translation.

FEMINISM AGAINST CRIME CONTROL

On sexual subordination and state apologism

Introduction

At the height of the Black Lives Matter movement, I had a typical interaction with a liberal. He claimed to support the protesters, at least in principle. However, he thought the police shooting of Michael Brown in Ferguson was ‘a poor choice of case’ to rally around (if only they had consulted him!). It would fail to impress ‘the public’, he claimed, because the police officer in that incident was ‘probably justified’. As evidence, he cited the media smear accusing Michael Brown of shoplifting shortly before he was gunned down. I refused to concede the shooting would have been justified *even if this smear were true*. Given the structural racism of the existing order of property, I argued, surely it would be a strategic dead-end to endorse police powers to attack anyone who transgressed it.¹ ‘Oh, I see’, he said, ‘so you are against the police’. Immediately he parried: ‘But suppose a man were raping a woman...’

The point of this anecdote is not simply to illustrate the ease with which the liberal mind slips from thoughts of property to thoughts of women’s bodies, but to highlight an assumption I take to be widespread, including among feminists: *the struggle against sexual violence is fundamentally at odds with any deep opposition to the criminalizing state*. By ‘the criminalizing state’ I mean the police, criminal courts, prisons, detention centres, surveillance apparatus, border guards, the military, and so on. Taking sexual violence seriously, it is generally assumed, means inducing the state to overcome its notorious unwillingness to ‘punish perpetrators’ and ‘protect vulnerable women’.² Of course, this must involve

¹ Jackie Wang argues powerfully against making solidarity conditional on ‘innocence’, as defined by existing institutions under conditions of injustice. See ‘Against Innocence: Race, Gender, and the Politics of Safety’, *Lies: A Journal of Materialism Feminism* 1 (2012).

² This is a simplification in several ways. Firstly, there is not just one state – ‘the state’ – but many. My concern is primarily with the states of Western Europe and their former settler colonies (so-called ‘liberal democracies’) while recognising that the operations of these states often are intertwined with, and depend economically upon, those of other kinds of states, such as China and Saudi Arabia. Secondly, this is a simplification because it ignores the question of how international law and paralegal institutions such as NGOs, which often operate internationally, relate to processes of state power. Nonetheless, my point is that mainstream discourse assumes that the struggle against sexual violence must rely upon the punitive – i.e. criminalizing, sanctioning, punishing – functions of existing liberal states and their satellites or proxies. When I speak of ‘state-power-wielding strategies’, I mean punitive state power. Of course, separating punitive from other state functions, such as

criticising existing institutions insofar as they fail – and fail systematically – to do so.

However, for the struggle against sexual violence thus conceived, distrust of these institutions must be mitigated. The aim, to put it crudely, cannot be to *undermine* the state's power to criminalize, but to *wield* that power against the perpetrators of sexual violence. Bernstein calls this the project of 'feminism-as-crime-control'.³ Within the framework of options defined by this assumption, caring about sexual violence means side-lining concerns about state violence and the classed and racialized construction of 'criminality'. Conversely, political strategies seeking to disrupt and challenge existing processes of criminalization appear to demand that we downplay the problem of sexual violence. It seems we must be either rape apologists or state apologists.

This assumption is at work in *both* sides of the debate around 'Governance Feminism', or so I will argue. Governance Feminism is defined by its most prominent critic, Janet Halley, as the 'incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power'.⁴ Emphasising the punitive aspects of governance, Elizabeth Bernstein labels this 'a carceral turn in feminist advocacy movements'.⁵ From collaboration with border regimes in the drive to criminalize 'sex trafficking', to the 'pink-washing' of neoliberal gentrification (concern for the safety of women and queers being transfigured into calls for 'the removal of race and class Others from public space', to the delight of property developers), feminism-as-crime-control is everywhere in evidence⁶ – and, significantly for

resource provision – insofar as that is made *conditional* on compliance – is no simple matter. On this, see Threadcraft, 'Intimate Injustice, Political Obligation, and the Dark Ghetto'.

³ Bernstein, 'Carceral Politics as Gender Justice?', 251. This is not to say that feminists have always accepted this brief. For accounts of some alternative responses to sexual violence, including 'community accountability' and 'transformative justice' projects, see: Ching-In Chen, Jai Dulani, and Piepzna-Samarasinha Leah Lakshmi, eds., *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn, NY; Boston, MA: South End Press, 2011); Various, 'Community Accountability: Emerging Movements to Transform Violence', *A Special Issue of Social Justice: A Journal of Crime, Conflict & World Order* 37, no. 4 (2012 2011).

⁴ Halley, *Split Decisions: How and Why to Take a Break from Feminism*, 340.

⁵ Bernstein, 'Carceral Politics as Gender Justice?', 251. While recognising that they are not exactly equivalent, I will be using the terms 'Governance Feminism', 'carceral feminism', and 'feminism-as-crime-control' largely interchangeably.

⁶ Bernstein, 249. See also: Laura Agustin, *Sex at the Margins: Migration, Labour Markets and the Rescue*

our purposes, is understood by its critics as a pernicious form of *identity politics*. As Wendy Brown argued over twenty years ago, this brand of feminism mobilises a social identity defined by injury and vulnerability – the sexually violated woman – to demand coercive state action, then washes its hands of the oppressive consequences through a show of powerlessness.⁷

Governance Feminism's most important theorist-advocate, according to both Brown and Halley, is Catharine MacKinnon. The increasingly go-to position for those critical of 'the carceral turn' is therefore to reject MacKinnon's 'radical feminist' analysis of sexual violence (the content of which we will come to shortly).⁸ Meanwhile, however, aspects of this analysis are gaining traction in philosophy departments *via* work on 'hate speech', objectification, and silencing.⁹ In *this* context, MacKinnon's work constitutes an important challenge to dominant liberal understandings of concepts like 'freedom', 'speech', and 'consent'. However – and here MacKinnon's assumed affinity with Governance Feminism again rears its head – this project of MacKinnon-mainstreaming still tends to presuppose that liberal states must ultimately be the political agents, and 'hate speech' legislation the political means, to put a radical feminist analysis into practice.¹⁰ If there is a feminist revolution going on in political

Industry (London: Zed Books, 2007); Christina Hanhardt, *Safe Space: Gay Neighbourhood History and the Politics of Violence* (New York: Duke University Press, 2014); Sarah Lamb, 'Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment', *Law and Critique* 24, no. 3 (2013); Miriam Ticktin, 'Sexual Violence as the Language of Border Control: Where French Feminist and Anti-Immigrant Rhetoric Meet', *Signs: Journal of Women in Culture and Society* 33, no. 4 (2008): 863–89.

⁷ Brown, *States of Injury*.

⁸ MacKinnon does not call herself a 'radical feminist', preferring to call her approach 'feminism' simpliciter, or 'feminism unmodified'. See *Feminism Unmodified*. However, she is referred to in this way often enough for the label to be of some use. For helpful discussion of controversy around the term see 'Faces and Facades', in Lorna Finlayson, *Introduction to Feminism* (Cambridge: Cambridge University Press, 2016), 82–100. Of course, radical feminism is known for its tendency to exclude of trans women and sex workers. I will touch on these exclusions insofar as they relate to problems of criminalisation and agency, but clearly there is much more to be said. The partial and critical re-appropriation of MacKinnon I propose should not be taken to imply any endorsement of trans or sex worker exclusionary positions.

⁹ See Rae Langton, *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford: Oxford University Press, 2009).

¹⁰ For critical discussion of this trend, see Lorna Finlayson, 'How to Screw Things with Words: Feminism Unrealized', in *The Political Is Political: Conformity and the Illusion of Dissent in Contemporary Political*

philosophy, critics of carceral politics are not invited.

My aim is to shake up the entrenched battle lines of these debates. One thing MacKinnon and her anti-statist critics seem to *agree on*, and that I want to challenge, is the close connection between: (a) endorsing a radical feminist analysis of sexual violence – what Halley dubs the ‘subordination paradigm’; and (b) endorsing the project of feminism-as-crime-control.¹¹ Now, I do not wish to deny that there is any such connection; my intervention is more orthogonal. I want to ask: what reasons might the radical feminist analysis of sexual violence *itself* give us to be suspicious of strategies that embrace the punitive state? In raising this question, I hope to show those sympathetic to MacKinnon’s analysis that they have reasons *from their own point of view* to consider a more state-sceptical politics. Equally, though, I hope to persuade those in ‘the other camp’ not to dismiss MacKinnon’s analysis of sexual violence wholesale simply because of its association with Governance Feminism; some of its insights, I suggest, might be mobilised in another direction.

In Part I (‘Subordination’), I outline those aspects of MacKinnon’s analysis I take to be most pertinent. I will show, firstly, how she takes this analysis to justify state-power-wielding strategies, and secondly, how her critics take it to be implicated in such strategies, and therefore reject it. In Part II (‘Insubordination’), I go on to propose three ways in which the radical feminist analysis of sexual violence might support a politics more alert to the violence of criminalization, hence more antagonistic towards the punitive state.

To be clear, these are not arguments for a politics of purity, for ‘keeping our hands clean’ by never relying upon, utilizing, or engaging with the state, as if that were even possible. The state is obviously not a monolith; it is multifaceted, porous, often contradictory. Sometimes one of its branches can be fought with the aid of another of its branches, to some

Philosophy (London: Rowman & Littlefield International, 2015), 89–111.

¹¹ Particularly in her earlier work, MacKinnon was keen to emphasise the difference between ‘empowering the state, as criminal law does’ (and as she, at the time of the notorious Minneapolis Ordinance against pornography, in fact opposed), and civil law remedies, which she hoped might ‘put more power in the hands of women both to confront the state [...] and to directly confront men in society who harm them’ (*Are Women Human? And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard University Press, 2007), 33). How seriously she took this proviso is questionable. In more recent decades, she has focused her interventions on international legal institutions. Her associations with both US and Israeli state forces are traced in Lorna Finlayson’s review (‘Butterfly Torture’, *London Review of Books*, forthcoming) of MacKinnon’s latest collection, *Butterfly Politics* (Cambridge, MA: Belknap Press of Harvard University Press, 2017).

effect. Fighting to expand access to Legal Aid (a function of the state) can be part of fighting against women's incarceration (another function of the state) or deportation (another function of the state), to take just one example. In fact, rejecting the quest for purity is at the heart of what I am trying to do. MacKinnon is a flawed theorist. Governance Feminism as a form of identity politics causes real harm, in which she is complicit. And yet, while the charge of state apologism levelled against MacKinnon is well-founded, securing a conviction against her, then swiftly arranging the mass deportation of her tainted ideas from our political communities, will not take us much further towards emancipation. On the contrary, I think reducing everything she has ever said and done to grim identity with her worst moments would itself exhibit the carceral logic that insists the world must be simply divisible into good and evil, allies and apologists. This logic imposes unity, sameness, unchangeability on whatever it finds. It delights in the application of labels, ungraciously lopping off aspects of reality that do not fit the preconceived scheme. Contradictions cannot be recognised. The possibility of transformation cannot be thought. Another flawed theorist called this 'identity thinking'.¹² We might equally call it (one kind of) identity politics. Looking for secret passageways between the hostile encampments of MacKinnon's supporters, on the one hand, and her critics, on the other, is my attempt to get beyond denunciations and put a critique of these politics into practice.

1. Subordination

1.1. The con in consent

MacKinnon argues that sexual violence is the norm rather than the exception under conditions of male domination. Indeed, she argues that the very categories 'male' and 'female' are constructed through the material practices of eroticised hierarchy jointly known as 'sexuality':¹³

Sexuality [...] is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we

¹² Adorno, *Negative Dialectics*, 1973.

¹³ This claim is far from unique to MacKinnon. Cf. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990); Monique Wittig, *The Straight Mind and Other Essays* (London: Harvester Wheatsheaf, 1992); Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction* (Vintage, 1990).

know them, by the social requirement of its dominant form, heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality.¹⁴

Women's vulnerability to sexual violence is the result, not of some apolitical given called 'biology', but of a pervasive system of social power.¹⁵ Sexual violence – the normalised use of women as objects – in turn props up that system. Rape, sexual harassment, intimate partner violence, forced reproduction,¹⁶ 'prostitution',¹⁷ and pornography consequently take centre stage in MacKinnon's analysis of 'male power as an ordered yet deranged whole'.¹⁸ Sexual violence is the lens through which she views gender politics.

At the heart of MacKinnon's account is a critique of the liberal concept of consent as it is encoded in laws which purport to prohibit rape but, in her view, merely 'regulate' it:

Consent is supposed to be women's form of control over intercourse, different from but equal to the custom of male initiative. Man proposes, woman disposes. Even [in] the ideal it is not mutual. Apart from the disparate consequences of refusal, this model does not envision a situation the woman controls being placed in, or choices she frames. Yet the consequences are attributed to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction.¹⁹

¹⁴ MacKinnon, *Toward a Feminist Theory of the State*, 113.

¹⁵ One issue is important to flag at the outset. MacKinnon speaks primarily of *women* being harmed by sexual violence. Insofar as I will be adopting her language, 'women' should be understood as including all trans and cis women. However, there is still a danger of erasing many people who are systematically targeted for sexual violence precisely because they do not conform to the categories of binary gender, or because they were assigned female at birth. Given the role MacKinnon attributes to sexual violence in constructing and policing gender categories, she should be attentive to this problem, but her relentlessly binary language can rightly be criticised for perpetuating it. On the other hand, I do not think we can do away with 'woman' as a political category while gender persists as a system of oppression. I find helpful Iris Marion Young's concept of 'gender as seriality', and Katharine Jenkins's distinction between 'gender as class' and 'gender as identity'. See: Iris Marion Young, 'Gender as Seriality: Thinking about Women as a Social Collective', *Signs* 19, no. 3 (1994): 713–38; Katharine Jenkins, 'Amelioration and Inclusion: Gender Identity and the Concept of Woman', *Ethics* 126, no. 2 (2016): 394–421.

¹⁶ In an over-sight typical of white feminism, she spends less time talking about forced sterilization. Cf. Angela Davis, 'Racism, Birth Control and Reproductive Rights', in *Women, Race & Class* (London: The Women's Press, 1981), 202–21.

¹⁷ This is the term MacKinnon uses for sex work.

¹⁸ MacKinnon, *Toward a Feminist Theory of the State*, xi.

¹⁹ MacKinnon, 175.

The problem with ‘consent’, MacKinnon argues, is that it is blind to the social power relations that actually make people do things, or go along with things, or not quite managed to say no to things in a way that gets taken seriously. It does not distinguish between enthusiastic mutuality and reluctant submission in the absence of any acceptable alternative. It ignores the ways women are socialized into passivity, silenced by dominant representations,²⁰ and ‘kept poor, hence socially dependent on men, available for sexual or reproductive use’.²¹ ‘Consent’ is routinely imputed to women simply because the thing happened and they did not stop it, never mind how they felt about it or how unequal the conditions. While taking for granted the formula ‘man fucks woman; subject verb object’,²² the liberal notion of consent simultaneously maintains the fantasy that we are pure choosing agents, abstracted from all material conditions and power inequalities, hence free by default. Against this, MacKinnon insists that freedom of the kind feminism should aim at is *incompatible* with subordination – with being an object at another’s disposal, bargaining from a position of weakness; insofar as women are subjected to these conditions, there is an important sense in which we are not free.

1.2. If the state is male how come you love it so much?

MacKinnon takes this analysis of sexual violence to ground a feminist politics that aspires to wield state power against the perpetrators: the rapists, the pornographers, the sexual harassers, the pimps, the ‘traffickers’, and so on. Yet she conceives of herself as offering a *critique* of the liberal state as ‘male’. This is not so puzzling, however, once we realise that her critique is directed primarily against the pretensions of existing states, and the American state in particular, to what liberals call ‘neutrality’. Her target is the view – given its most drawn-out philosophical expression in the ‘political liberalism’ of the late John Rawls – that the state respects freedom through ‘non-intervention’ in matters deemed ‘private’. Attacking the so-called ‘negative state’ advocated by political liberalism, MacKinnon exposes the linguistic manoeuvre of labelling ‘intervention’ only those exercises of state power that *challenge* the existing distribution of social privileges.²³ What appears as ‘inaction’, and

²⁰ This aspect of MacKinnon’s argument has been persuasively developed by Rae Langton. See *Sexual Solipsism: Philosophical Essays on Pornography and Objectification*.

²¹ MacKinnon, *Toward a Feminist Theory of the State*, 168.

²² MacKinnon, 124.

²³ This point is also made in: Cass Sunstein, ‘Neutrality in Constitutional Law (with Special Reference to

therefore *prima facie* unproblematic from a liberal perspective, is the state's role in enforcing the *status quo*: defining and administering the institution of marriage; refusing to fund reproductive healthcare; failing to prosecute those everyday rapes that do not threaten (and indeed help constitute) the prevailing order of which men own which women and which business is to be conducted where.

This is a familiar criticism, of course, going back to Marx's dissection of the merely 'political emancipation' offered by liberal rights:

The state dissolves distinctions of *birth*, of *social rank*, of *education*, and of *occupation* if it declares birth, social rank, education, occupation, to be *non-political* distinctions; if without consideration of these distinctions it calls on every member of the nation to be an *equal* participant in the national sovereignty, if it treats all elements of the actual life of the nation from the point of view of the state. Nevertheless the state allows private property, education, occupation to *function* and affirm their *particular* nature in *their own way*, i.e. as private property, education, and occupation. Far from superseding these factual distinctions, the state's existence presupposes them.²⁴

Marx's argument is mirrored in more recent criticisms, articulated by Charles Mills and Michelle Alexander, of the slippery ideology of 'color-blindness'.²⁵ While ostensibly anti-racist, the ideal of just 'not seeing race' insidiously maintains white supremacy by erasing 'the long history of structural discrimination that has left whites with the differential resources they have today, and all of its consequent advantages in negotiating opportunity structures'.²⁶ Refusing to recognise this history depoliticizes existing inequalities, which can then be blamed on individual choices. Similarly, MacKinnon argues, the state which purports to be 'gender blind' in fact 'protects male power through embodying and ensuring existing male control over women at every level – cushioning, qualifying, or *de jure* appearing to prohibit its excesses when necessary to its normalization. *De jure* relations stabilize *de facto* relations'.²⁷ When asked to rectify this which it has done, the liberal state cries that this would violate the principle of 'neutrality'.

Pornography, Abortion, and Surrogacy)', *Columbia Law Review* 92, no. 1 (1992): 1–52; Young, *Justice and the Politics of Difference*.

²⁴ Marx, 'On the Jewish Question', 35.

²⁵ Mills, 'White Ignorance'; Alexander, *The New Jim Crow*.

²⁶ Mills, 'White Ignorance', 28.

²⁷ MacKinnon, *Toward a Feminist Theory of the State*, 167.

MacKinnon's analysis of sexual violence, then, aims to disrupt the familiar strategy of pointing to women's 'consent' to legitimise an oppressively gendered status quo. While she does criticise the state as 'male', hers is a critique of the so-called 'negative state' – the state which seeks to preserve its 'neutrality' by leaving social domination untouched, while masking and legitimising it through the formal universality of law. Having dispensed with this liberal objection to wielding the law in women's name, and exposed the extent to which the law is *already involved* in the administration of patriarchal social reality ('non-intervention' being an ideological cover for supporting the already-powerful), MacKinnon derives the urgent need for feminists to wield state power in the battle against sexual violence.²⁸

1.3. The McCarthy in MacKinnon

Halley, like MacKinnon, holds that a radical feminist analysis of sexual violence (which they call the 'subordination paradigm') leads to Governance Feminism, although they take this connection to undermine the former rather than vindicate the latter.²⁹ The connection as they see it is essentially this: MacKinnon portrays women as so thoroughly subordinated, male domination as so total, sexual violence as so pervasive and devastating, that we need the state to save us. The basic argument derives from Wendy Brown's critique of 'identity politics', and of MacKinnon for engaging in them.³⁰ Although the 'identity politics' label has often been used simply to dismiss struggles for emancipation that do not place the waged white hetero cis male subject at their centre, this is not how Brown uses it. Her concern is rather with the relation a struggle stands in to the liberal-bureaucratic state. Distinctive of identity politics, on her account, is the demand, directed towards the state, for legal recognition and protection ('rights') for a group defined as *different* and *injured*.³¹ Brown articulates two interrelated worries about identity politics, both of which she takes to apply to MacKinnon: (1) by being written into the 'ahistorical rhetoric of the law and the positivist

²⁸ She also briefly considers what she (spuriously) takes to be *the* leftist alternative: epiphenomenalism – i.e. the view that the state is a causally inert by-product of an 'economic base'. I will come to this in section 2.2.

²⁹ Halley does allow that 'governance feminism has been, in manifold ways, a good thing' (*Split Decisions: How and Why to Take a Break from Feminism*, 33).

³⁰ Brown, *States of Injury*.

³¹ A group engaged in 'identity politics' in Brown's sense might be white, waged, etc. – as with the 'blue Labour' identity politics of 'British jobs for British workers'.

rhetoric of bureaucratic discourse', identities which are, in fact, effects of social power are naturalised, while 'the injuries contingently constitutive of them' are reinscribed;³² (2) in the process, the state is empowered and legitimised, forestalling possibilities for more radical transformation.³³

If we look at the record of Governance Feminism, Brown's worries seem well founded.³⁴ In any case, let us assume for the sake of argument that they are. The question is: in what ways, and to what extent, does a radical feminist analysis of sexual violence push us towards identity politics in this sense? Halley locates the source of Governance Feminism's state-collaborationist tendencies in MacKinnon's incessant focus on the sexual violation of women, accusing her of a 'paranoid structuralism' that denies women agency. For instance, Halley complains that:

Much contemporary feminist rape discourse repeatedly insists that the pain of rape extends into every future moment of a woman's life; it is a note played not on a piano but on an organ.³⁵

The implication is: *rape is not so bad as the feminists say*. Halley even encourages us to ask, 'Why so many feminisms want women to experience themselves as completely devoid of choice when they bargain their way past a knife by having sex they really, really don't want.'³⁶ The implication is: *women have agency even when they are raped at knifepoint; it is not the rapists but the feminists who take their agency away*.³⁷

³² Brown, *States of Injury*, 28.

³³ MacKinnon is not unaware of these dangers. For instance, she criticises various legal protections for women workers on these grounds: 'Concretely, it is unclear whether these special protections, as they came to be called, helped or hurt women. These cases did do something for some workers (female) concretely; they also demeaned all women ideologically. They did assume that women were marginal and second-class members of the workforce; they probably contributed to keeping women marginal and second-class workers by keeping some women from competing with men at the male standard of exploitation.' (MacKinnon, *Toward a Feminist Theory of the State*, 165.) However, Brown and Halley argue that her own approach inadvertently replicates this problem.

³⁴ As well as works cited already, see Julia Sudbury, ed., *Global Lockdown: Race, Gender and the Prison-Industrial Complex* (New York: Routledge, 2005).

³⁵ Halley, *Split Decisions: How and Why to Take a Break from Feminism*, 354.

³⁶ Halley, 355.

³⁷ The context is a case in which the woman describes herself as having been raped. Halley offers a creative re-

These quotations – and my pointedly crass glosses on them – of course do not capture the nuances of Halley’s position. Nonetheless, they highlight a *strand* in the critique of Governance Feminism that I am interested in because it reproduces the dilemma with which we began: state apologism or rape apologism.³⁸ Halley’s remarks, not only in content but in tone, foster the distinct impression that the critique of Governance Feminism is pursued *at a price*. What must be sacrificed, it seems, is the visceral commitment, which resonates throughout the writing of radical feminists like MacKinnon, to naming, theorising, and fighting against the myriad forms of sexual violence that constitute gender as we know it. To combat the state-affirming dangers of Governance Feminism, Halley seems to suggest, we need to (a) *decentre* or *downplay* the problem of sexual violence in our analysis, and (b) regard women as *more free* than the subordination paradigm suggests. These two points are clearly intertwined, since the question of whether, or to what extent, one is a victim of sexual violence is closely related to the question of whether, or to what extent, one’s sexual encounters are exercises of freedom.

As we have seen, MacKinnon takes freedom to require some measure of equality, conceived as the absence of hierarchy or domination. Halley rejects this. Indeed, they claim that MacKinnon’s formulation of freedom as incompatible with subordination is directly implicated in the ‘totalitarian trend visible in some feminist law reform proposals’.³⁹ Instead of freedom as (requiring) non-subordination,⁴⁰ Halley invokes the value of ‘agency’, which

reading. Therefore, it is not that Halley is more committed than MacKinnon to respecting a woman’s description of her own experience. Both, in fact, are attentive to the ways that existing social narratives and legal institutions may influence our self-presentation and even self-understanding.

³⁸ Halley is not the only critic of Governance Feminism to treat her opponent’s concerns – and even experiences – with a certain callousness. For instance, Bernstein reports an anti-prostitution activist, Chyng Sun, making the (surely correct) point that commercial sex and pornography also affect women *not* working in the industry by setting standards for ‘how all women “should look, sound, and behave”’, and another author, Kristen Anderberg, ‘describing how watching pornographic videos with her male lover lead to debilitating body issues and to plummeting self esteem’. Bernstein diagnoses these women as, essentially, jealous frumps ‘harbour[ing] a set of investments in “family values” and home’, and threatened by a ‘recreational’ sexual ethic. (Bernstein, ‘Carceral Politics as Gender Justice?’, 245.)

³⁹ Halley, *Split Decisions: How and Why to Take a Break from Feminism*, 125.

⁴⁰ MacKinnon is clear that non-subordination is a necessary condition for freedom, but not committed to the claim that it is sufficient. Freedom and non-subordination are not presented as equivalent.

they illustrate with the following example.⁴¹ Imagine a war-time situation in which an occupying army is committing atrocities against the local population. Under these circumstances, a woman might decide it is better to offer or supply under pressure sexual favours to a powerful soldier in exchange for food or protection from the sexual violence of other soldiers. In doing so she exercises *agency*; she actively negotiates the power-relations in which she finds herself, shows courage and resourcefulness, and brings herself (or perhaps her family and friends) certain advantages.

On MacKinnon's conception, this woman's freedom is undermined because, however ingenious her survival strategies, it is still the case that she consents to, reluctantly submits to, or solicits sex in response to circumstances that are coercive; the soldier's power over the woman is the main reason that sex takes place. Halley argues that such a conception denies the woman's agency, reducing her to a passive victim. Notice that there are two possible meanings of 'deny' in this context: firstly, one can deny *that* such-and-such is the case (e.g. denying that I can leave my prison cell because the door is locked); secondly, one can deny something *to* someone, that is, prevent them from having it (e.g. locking the cell door). Halley's claim is that denying women's agency in the first sense – denying *that* women are exercising their freedom when, for example, they have sex to avoid violence they consider worse – has the consequence of denying women's agency in the second sense – that is, preventing women from having agency.

1.4. Our deformed state

We reach a familiar dilemma. *On the one hand*, there is a good deal of truth to the claim that MacKinnon presents a narrative of women as powerless. Particularly when written into the machinery of governance, this narrative does, plausibly, serve to undermine women's attempts to negotiate, resist, re-signify, or subvert, ('overthrow' is not in Halley's vocabulary, but perhaps it should be) the multifarious power relations to which we are subject. It thwarts our self-recognition as active agents rather than passive victims. *On the other hand*, Halley's insistence on women's agency seems to make us responsible even when we are coerced, which can sound a lot like victim-blaming. Indeed, anyone sympathetic to the radical feminist analysis of sexual violence will perceive this notion of 'agency' as steering perilously close to

⁴¹ Halley takes the example from the anonymous memoir, *A Woman in Berlin*. See Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict', *Melbourne Journal of International Law* 9, no. 1 (2008): 78–124.

the old liberal notion of ‘consent’. Never mind how restrictive the options, never mind the pressures of socialization, never mind the threats for non-compliance, Halley seems to say, agency is there for the taking. Ironically, the only thing that appears effectively to undermine women’s agency, on Halley’s story, is Governance Feminism denying our agency. This can’t be right.

My modest preliminary suggestion is that some daylight needs to be inserted, in our political language, between the concepts ‘passive’ and ‘victim’. We should be suspicious of how easily the two words roll off the tongue together. Why should being a victim – being wronged, oppressed, subject to injustice – imply passivity? In one sense, it is clear why: something (wrong) is being *done to you*. Passivity is there in the grammar. Yet ‘passivity’ in the demeaning sense means something further: it means not showing courage, not making difficult decisions, not engaging in resistance; it means not being resilient, brilliant, inventive, or worthy of admiration. Must I declare myself passive in these ways simply to say that I am or have been victimised?

To some extent, yes – but only to some extent. It is a necessary part of criticising processes of dehumanisation to claim that, in a sense, they make us *less than we could be*; simply to exalt the qualities we develop under such conditions would be to naturalise our deformed state – as both Halley and MacKinnon criticise ‘cultural feminism’ for doing.⁴² The problem is: as the debate is currently framed, looking that state square in the face seems to entail a plea for rescue by a state no less deformed. This is the inference I want to disrupt.⁴³ I make no pretence thereby to solve the dilemma – anything purporting to be an abstract resolution would be glib. However, I do hope to find some movement in what has come to

⁴² Cultural feminism, in Halley’s words, emphasises ‘unjust male derogation of women’s traits’, and ‘reserve[s] a special place for the redemptive normative insights that women derive from their sexuality and their role as mothers’. Halley, *Split Decisions: How and Why to Take a Break from Feminism*, 27–28.

⁴³ William Clare Roberts makes a parallel point in his exposition of *Capital Volume I*, in response to the objection that Marx denies agency to proletarians: ‘The significance of [Marx’s] comments about individuals in modern commercial society being bearers of economic relations is not that these individuals suffer an impairment of their agency, but that they suffer an impairment of their *freedom*. Commodity producers in a commercial society are *dominated* agents, not nonagents [...] If domination leaves freedom intact, then there is no such thing as domination [...] Marx does not argue that economic relations manipulate individuals like puppets, but that economic relations dominate their decision making.’ (Roberts, *Marx’s Inferno: The Political Theory of Capital*, 95.)

seem a fixed set of options. In what follows, I will sketch three ways in which radical feminism's commitment to challenging sexual violence, and MacKinnon's analysis in particular, might be turned (against her own Governance Feminist tendencies) towards a politics more alert to the oppressions inherent in the state's construction of the criminal.

2. Insubordination

2.1. Institutionally rapist

You are surrounded by an armed gang. They order you to remove your clothes. If you don't do as you're told – if you don't 'consent' – then they will forcibly remove your clothes. This means that they will pin you to the ground and use painful metal implements to prevent you from being able to move your arms and legs. They will tear your clothes off, or cut them off with scissors. They may use their weapons to make you comply, or punish you for not complying. Their weapons include truncheons and tasers, and sometimes guns. They may force your body into a position where they can peer inside your 'cavities' with a torch. They may insert their fingers, or even a whole hand, inside you.

Strip searching of arrestees by police is standard practice in the UK. Between 2013 and 2015, figures from 13 police forces in England and Wales show 113,000 strip searches, including 5,000 on children aged 17. The remaining 32 forces would not provide data in response to FOI requests by the BBC.⁴⁴ In the 2 years following the official end of routine strip searching of children in state institutions in 2011, over 40,000 such searches were recorded. Almost half of these were perpetrated against children of colour. Illegal items were recovered on 15 occasions.⁴⁵

Women at Yarl's Wood detention centre, run by private security firm SERCO on behalf of the British Border Force, have spoken out repeatedly over the past decade about

⁴⁴ Adrian Goldberg, 'The Girl Who Was Strip-Searches Aged 12 by Police', BBC News, 30 October 2016, <http://www.bbc.co.uk/news/uk-37801760>.

⁴⁵ Carolyn Willow, 'Many Thousands of Children Stripped Naked in Custody. Ignites Memories of Being Raped.', Open Democracy, 4 March 2013, <https://www.opendemocracy.net/shinealight/carolyne-willow/many-thousands-of-children-stripped-naked-in-custody-ignites-memories-of>. The same report notes that many searches go unrecorded.

widespread sexual abuse by male guards.⁴⁶ Women involved in protests against fracking have complained of ‘sexualised intimidation’ by police.⁴⁷ Prisoners can still be forced to give birth in shackles and chains.⁴⁸ Her Majesty’s Inspectorate of Constabulary has admitted that the hundreds of reported incidents of police officers using their authority to sexually coerce ‘domestic abuse victims, alcohol and drug addicts, sex workers and arrested suspects’ are probably just the tip of the iceberg, given the barriers to victims coming forward.⁴⁹ Riot police raiding suspected brothels in Soho bring journalists along to photograph the women they drag semi-naked onto the street, creating pornographic images of cowering women for distribution in the press.⁵⁰ Perhaps most explicitly of all, women who were tricked into sexual relationships with undercover police posing as left wing activists have said they feel ‘raped by the state’.⁵¹ These examples appear to show a liberal state *relying on* sexual violence perpetrated by its agents for the routine upholding of public order, private property, and the business of borders as usual – and that is before we even get to talking about what goes on when it wages war abroad. If there is any truth to this, then a commitment to challenging sexual violence gives us reason to distrust the state’s criminalizing power.⁵²

⁴⁶ Diane Taylor, ‘Dossier Calling for Yarl’s Wood Closure Chronicles Decades of Abuse Complaints’, The Guardian, 15 June 2015, <https://www.theguardian.com/uk-news/2015/jun/15/yarls-wood-report-calling-for-closure-decade-abuse-complaints>.

⁴⁷ Damien Gayle, ‘Police “Used Sexualised Violence against Fracking Protesters”’, The Guardian, 23 February 2016, <https://www.theguardian.com/uk-news/2016/feb/23/fracking-police-sexualised-violence-barton-moss-protest>.

⁴⁸ Stephen Ginn, ‘Women Prisoners’, *BMJ* 346:e8318 (January 2013), <https://doi.org/https://doi.org/10.1136/bmj.e8318>.

⁴⁹ Jamie Grierson, ‘Hundreds of Police in England and Wales Accused of Sexual Abuse’, The Guardian, 8 December 2016, <https://www.theguardian.com/uk-news/2016/dec/08/hundreds-police-officers-accused-sex-abuse-inquiry-finds>.

⁵⁰ Molly Smith, ‘Soho Police Raids Show Why Sex Workers Live in Fear of Being “Rescued”’, The Guardian, 11 December 2013, <https://www.theguardian.com/commentisfree/2013/dec/11/soho-police-raids-sex-workers-fear-trafficking>.

⁵¹ Sorchia Pollak, ‘Trauma of Spy’s Girlfriend: “Like Being Raped by the State”’, The Guardian, 24 June 2013, <https://www.theguardian.com/uk/2013/jun/24/undercover-police-spy-girlfriend-child>.

⁵² I focus on the British context partly because it is the state with which I am most familiar, and partly to pre-empt the complacent ‘Things are different here!’ response so often given to US examples. For examination of the US context, see ‘Police Sexual Violence’ in Andrea J. Ritchie, *Invisible No More: Police Violence against*

Of course, some would deny that these are all instances of sexual violence. For instance, they might deny that strip-searching is sexual, and they might deny that it is violent – except in aberrant cases, and even then, they might say, prisoner non-compliance is generally to blame. To be clear, I do not claim that *every* strip search constitutes a sexual assault, but that strip searching as an institutional practice *systematically* (i.e. often, and not accidentally) inflicts sexual violence on those who fall foul of the state. My suggestion is that MacKinnon's analysis of sexual violence introduced in Part I can help us see this.

Firstly, consider the claim that a strip search cannot be a sexual assault because it is not sexual: it does not involve penises inside vaginas; if an officer has a hard-on, that is an accidental not an essential element of the process; not all officers even have penises; the motivation for strip-searching prisoners is not erotic enjoyment but the need to hunt for evidence or forbidden items. Now here is MacKinnon:

Like heterosexuality, male supremacy's paradigm of sex, the crime of rape centers on penetration. The law to protect women's sexuality from forcible violation and expropriation defines that protection in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality. This definitive element of rape centers upon a male-defined loss.⁵³

I do not see sexuality as a transcultural container, as essential, as historically unchanging, or as Eros. I define sexuality as whatever a given society eroticizes. That is, sexual is whatever sexual means in a particular society [...] In the society we currently live in, the content I want to claim for sexuality is the gaze that constructs women as objects for male pleasure. I draw on pornography for its form and content, for the gaze that eroticizes the despised, the demeaned, the accessible, the there-to-be-used, the servile, the child-like, the passive, and the animal.⁵⁴

If a forcible strip search exactly mirrors – in the positioning of bodies, the script ('There's a good girl'), the props, the backdrop – scenes from violent pornography, that social fact must be understood as both reflecting and inflecting the meaning of the event. So too must the fact that CCTV cameras have been used to record strip-searches and broadcast them

Black Women and Women of Color (Boston, MA: Beacon Press, 2017), and 'How Gender Structures the Prison System' in Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories, 2003). For international examples, see Sudbury, *Global Lockdown: Race, Gender and the Prison-Industrial Complex*.

⁵³ MacKinnon, *Toward a Feminist Theory of the State*, 172.

⁵⁴ MacKinnon, *Feminism Unmodified*, 53–54.

on monitors for other officers to view.⁵⁵ The regularity with which prisoners are strip searched in the absence of any reasonable suspicion that they are carrying forbidden items reveals its use as a tactic of intimidation and punishment, a show of power. To even make sense, this tactic depends upon the social meaning of being stripped naked, against one's will, before strangers, as paradigmatically humiliating; the scene is a symbol of abjection. That is not to say it can never be subverted or resisted by individuals, but that *this* is the social meaning that attempts at subversion must address. On MacKinnon's account, it would not undermine this analysis to say that many – even most – individual police officers carry out strip searches without the conscious intention of inflicting sexual violence. As she emphasises, most men who rape do not think of what they are doing under that description. Rapists tend to think that what they are doing is normal – and they are right, since it happens every day. They believe they are treating their victim as it is appropriate to treat that category of person – e.g. wife, slut, criminal. They are usually right that law courts will condone their perspective.⁵⁶

It might be objected that many strip searches are carried out without overt violence. The Home Office guidelines state that 'reasonable efforts should be made to secure a detainee's cooperation'.⁵⁷ On MacKinnon's analysis, however, this is hardly decisive. She argues that:

The deeper problem is that [we] are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive.⁵⁸

Compare this with Laura Whitehorn's recollection of her time in prison:

For me, one of the most damaging and nearly invisible forms of sexual abuse was the daily pat-searches by male guards. On a regular basis in my years in federal prisons, I was forced to stand still and allow men to touch my body in ways that

⁵⁵ Clare Sambrook, 'Strip-Searched in Derbyshire', Open Democracy, 1 October 2013, <https://www.opendemocracy.net/ourkingdom/clare-sambrook/strip-searched-in-derbyshire>.

⁵⁶ There are occasional prosecutions of police officers for other forms of sexual abuse. We might map this onto MacKinnon's argument that sexual violence, although not in practice prohibited, is *regulated* just enough to uphold the social order's appearance of legitimacy. To the best of my knowledge, there have been no prosecutions for strip searching.

⁵⁷ Goldberg, 'Strip-Searched Aged 12'.

⁵⁸ MacKinnon, *Toward a Feminist Theory of the State*, 177.

would have automatically provoked me to fight back if I had been outside of prison. But as long as I was labeled with that federal prison number, such self-defense would have gotten me an assault charge adding five years to my sentence. (Repeated legal challenges have proved unable to stop this practice in federal prisons.)⁵⁹

When women are sexually assaulted outside the walls of prisons and police stations, submitting to survive is interpreted as consent;⁶⁰ when we are sexually assaulted inside, not only is submitting to survive seen as erasing the violence of the encounter, but *not being submissive enough* provides legal grounds for an escalation of force.

Not resisting means that what happens does not count as violence; resisting means asking for it.

2.2. Property is rape

Vulnerability to sexual violence, MacKinnon emphasises, is not a ‘natural’ feature of women, but a product of unjust circumstances, such as not being able to leave an abusive partner or stand up to an abusive boss because you are economically dependent on him.⁶¹ Indeed, on MacKinnon’s account, coercive circumstances can render a sexual encounter

⁵⁹ Victoria Law, *Resistance Behind Bars: The Struggles of Incarcerated Women*, 2nd Edition (Oakland, CA: PM Press, 2012), vi.

⁶⁰ Women may also be criminalized for defying the demands of femininity by putting up resistance – women of colour being disproportionately targeted in this way. Cases that have received some publicity include Sarah Reed, who died while on remand in HMP Holloway awaiting trial for defending herself against sexual assault, and Ce Ce McDonald, imprisoned for defending herself against a transphobic attack. See: Amelia Gentleman and Damien Gayle, ‘Sarah Reed’s Mother: My Daughter Was Failed by Many and I Was Ignored’, *The Guardian*, 17 February 2016, <https://www.theguardian.com/society/2016/feb/17/sarah-reeds-mother-deaths-in-custody-holloway-prison-mental-health>; Parker Marie Molloy, ‘CeCe McDonald: Rebuilding Her Life after 19 Months in Prison’, *Advocate*, 3 March 2014, <https://www.advocate.com/politics/transgender/2014/03/03/cece-mcdonald-rebuilding-her-life-after-19-months-prison%20>.

⁶¹ There is an important Marxist-feminist literature theorising gendered economic dependence and struggles against it, as well as the relations of these to various facets of the state. The analysis presented here has been informed especially by the following: Sylvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (Oakland, CA: PM Press, 2012); Camille Barbagallo, ‘Leaving Home: Slavery and the Politics of Reproduction’, *Viewpoint Magazine*, 31 October 2015, <https://www.viewpointmag.com/2015/10/31/leaving-home-slavery-and-the-politics-of-reproduction/>; Mariarosa Dalla Costa, *Women and the Subversion of the Community: A Mariarosa Dalla Costa Reader*, ed. Camille Barbagallo (Oakland, CA: AK Press, Forthcoming).

violent, even if no blows are struck. Coercion is a matter of counterfactuals. It is a matter of knowing what *would* happen if you were to defy an order, or decline an ‘invitation’: if I were to fight back, he would beat me up; if I were to refuse him, he would fire me; if I were to leave him, I would be homeless, my children would be taken into care, I would be deported, and so on.

In her critique of liberal ‘neutrality’, MacKinnon points to the state’s role in upholding coercive circumstances, for instance through divorce laws which systematically disadvantage women by devaluing the contribution of domestic and caring labour to the household economy. However, there is a more basic point that she repeatedly overlooks: all economic power, including that of men over women, depends upon the enforcement of property. That enforcement is carried out, in the final analysis, by the criminalizing state. The liberal state’s enforcement of property, through violence or the threat of violence, is therefore partly *constitutive of* male domination. Let me put this less abstractly. In 2015, theft offences accounted for 49% of all prison sentences handed out to women in England and Wales. 46% of women in prison report having suffered domestic violence.⁶² These are only the cases where the state’s threat is carried out. The counterfactual, though, inflects every decision. If I were to refuse him, I would have no money for food, or nappies for my children; if I were to take food or nappies without paying for them, I would risk arrest and imprisonment.

Of course, for liberals, this is still the ‘negative state’, because it is definitive of liberalism to take the property-enforcing function of the state for granted. MacKinnon insists that the state maintains male domination even in its negative mode because ‘men’s forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life’.⁶³ The problem is, this still grants too much weight to the liberal misnomer ‘negative’. Economic domination does not occur ‘prior to the operation of law’. Locking women up for shoplifting or for handling stolen goods *is* an operation of law, albeit an everyday one, upon which the operation of the economy depends. Neglecting the way women are kept in line by *the state’s activity of criminalizing transgressions of the order of property* allows MacKinnon’s critique of the negative state to slide into advocacy of a ‘positive’ or

⁶² Clinks, ‘Key Facts’, Registered charity, Women’s Breakout: Chances to Change, 2017, <http://womensbreakout.org.uk/about-womens-breakout/key-facts/>.

⁶³ MacKinnon, *Toward a Feminist Theory of the State*, 161.

‘interventionist’ state.

This slippage may be partly explained by a blind-spot in MacKinnon’s understanding of the historically available options for thinking about the state. In defending her own ‘positive state’ solution to the strategic question, she positions herself against two alternative accounts. The first is the liberal account already considered. The second, which she calls ‘Marxist’, is an account of the state as ‘superstructural’, hence (on MacKinnon’s vulgar reading) ‘epiphenomenal’ – which means that it does not make a difference to anything. As she puts it:

The liberal view that law is society’s text, its rational mind, expresses the male view in the normative mode; the traditional left view that the state, and with it the law, is superstructural or epiphenomenal, expresses it in the empirical mode. A feminist jurisprudence, stigmatized as particularized and protectionist in male eyes of both traditions, is accountable to women’s concrete conditions and to changing them.⁶⁴

Even leaving aside from the problems with this as a reading of Marx, what MacKinnon erases here is the possibility that the state is actually *effective* as an oppressive force. This erasure serves to naturalise women’s oppression by obscuring a key means by which it is – artificially – maintained. Yet, I have argued, MacKinnon’s own account of coercive conditions makes clear how vulnerability to sexual violence can be generated by the enforcement of a system of property relations in which women systematically lose out. The slide into Governance Feminism might be halted if she followed through on this insight.

2.3. Free as a bird

According to Halley, MacKinnon’s critique of consent, which corresponds to her account of freedom as (requiring) non-subordination, results directly in a statism that disregards and even impedes women’s agency. In this final section, I want to suggest that MacKinnon’s trenchant excavation of the myriad ways in which a context of subordination renders our choices unfree can in fact be seen to undermine the liberal state’s account of its own legitimacy.

The point can be put quite schematically. Liberalism means liberal capitalism; the liberal state maintains a capitalist economy. Capitalism is based on wage-labour, that is, the sale of labour power as a commodity. I sell my labour power to someone else, who (if all goes

⁶⁴ MacKinnon, 249.

well) exploits me to make a profit. The reason I sell them my labour power is because otherwise I don't have any way of living, or certainly of living decently (a core function of the state being to prevent me from using things I cannot pay for). The reason I sell my labour power to them, and not *vice versa*, is because of a crucial disparity between us: they own the means of make useful things, things to satisfy human wants and needs, while I do not. I therefore contract – consent – to be exploited by them, my other option being to starve on the streets.⁶⁵ This is, of course, the ‘double freedom’ to which Marx satirically refers:

[The free worker] must be free in the double sense, that as a free individual he can dispose of his labour-power as his own commodity, and that on the other hand he has no other commodity for sale, i.e. he is rid of them, he is free of all the objects needed for the realisation [*Verwirklichung*] of his labour-power.⁶⁶

Now, it is crucial for liberalism that the labour contract remain valid, and that I count as *free* when I 'consent' to it. No matter how much any particular liberal might want to regulate markets, or support state redistribution, they cannot give up on this, otherwise they would be giving up on the claim that we could, in principle, reach an acceptable level of freedom under capital. Then they would no longer be a liberal in the relevant sense (although they might be holding to the more emancipatory *strands* of liberalism's contradictory inheritance). Maintaining the validity of the wage labour contract, however, depends precisely on ignoring those material and ideological constraints on freedom exposed by MacKinnon's critique of the patriarchal concept of consent. The basic power imbalance between me and my would-be boss (constituted by our owning and not owning means of production, respectively, and my subsequent dependence on him for survival) would be enough, on her account, to vitiate much of the normative force of my reluctant submission. That's before we even start talking about ideology and social construction, about the ways in which productive, compliant capitalist subjects are moulded.

In fact, it is unsurprising that MacKinnon's conception of freedom should undermine the validity of the capitalist labour contract, since she deliberately invokes the Marxist critique of liberal freedom to make what is often seen as her most controversial point:

Most people see sexuality as individual biological and voluntary; that is, they see it in terms of the politically and formally liberal myth structure. If you applied such an analysis to the issue of work [...] would you agree, as people say about heterosexuality, that a worker chooses to work? Does a worker even meaningfully

⁶⁵ Or to become a very good thief.

⁶⁶ Marx, *Capital: A Critique of Political Economy*, 1:272–73.

choose his or her specific line or place of work? If working conditions improve, would you call that worker not oppressed? If you have a comparatively good or easy or satisfying or well-paying work, if you like your work, or have a good day at work, does that mean, from a marxist perspective, your work is not exploited? Those who think that one chooses heterosexuality under conditions that make it compulsory should either explain why it is not compulsory or explain why the word choice can be meaningful here.⁶⁷

It is ironic that MacKinnon's analysis should so often be taken to support the view that sex workers are *uniquely* unfree and need to be rescued by the very state which enforces the property relations constitutive of all workers' unfreedom. It will hardly suffice to respond that we 'consent' to the government which enforces these conditions, as social contract theory seeks to do. Given the massive power imbalance, the pressures of socialization, and the threats for non-compliance, MacKinnon might say, 'the issue is less whether there was force than whether consent is a meaningful concept'.⁶⁸

Conclusion

By refusing the demand to *pick a side* when the construction of sides is itself part of the trap, hoping instead to fracture the received framework of options and allegiances, this intervention into the Governance Feminism debate has been an experiment in *impure* thinking. It reflects my conviction that such thinking is required if we are to escape the identitarian fly-bottle in whose distorting walls each person's reflection appears as *one unchanging essence*: either ally or apologist.⁶⁹ It will have been successful insofar as I have convinced some radical feminists to listen to critics of carceral politics rather than dismissing them as rape apologists, and some critics of carceral politics to listen to radical feminists rather than dismissing them as state apologists – *even though* both accusations contain elements of truth. Precisely because everyone is guilty of something, the prosecutorial mode of engagement will not get us very far.

Questioning the presuppositions of the debate's usual set-piece, I have argued that

⁶⁷ MacKinnon, *Feminism Unmodified*, 61.

⁶⁸ MacKinnon, *Toward a Feminist Theory of the State*, 178. I do not suggest that this would be the *end* of the debate. My point is that MacKinnon's analysis of gendered subordination should push us seriously to raise this question.

⁶⁹ 'What is your aim in philosophy? To shew the fly the way out of the fly-bottle.' Wittgenstein, *Philosophical Investigations*, §309.

taking sexual violence seriously, as per the radical feminist analysis, need not entail support for state-power-wielding strategies. On the contrary, following through that analysis shows real existing liberal states in a pretty dim light. The punitive state emerges as not merely an inadequate protector, but as itself a perpetrator – perhaps the biggest single perpetrator – of sexual violence. An advocate of Governance Feminism might say that this simply adds ammunition to MacKinnon’s critique of the state as ‘male’. Rather than telling against Governance Feminism, they might say, it shows the urgent need to reform the liberal state ‘from within’. Of course, there is no simple dichotomy between within and without. To target our efforts at tempering or counter-balancing the abjectifying powers of police, border, and prison officials would already be a significant and welcome departure from the trajectory of feminism-as-crime-control, even while we might work *in part* through legal channels. I have suggested, though, that MacKinnon’s account of ‘coercive circumstances’, considered in relation to the capitalist order of (exploitative) work and (vastly unequal) property, gives us cause to be sceptical about the liberal state’s capacity for positive transformation. That does not vitiate all strategies that work ‘with’ or ‘within’ the state. They may create vital breathing space for more radical alternatives. It does require, though, that we be clear-sighted about their limitations.

This point is very different from the standard liberal objection to ‘state intervention’. That objection points to the ‘coerciveness’ of the state as a reason against using the law to fight oppression, and criticises proposed feminist and anti-racist reforms as dangerous and ‘totalitarian’. The liberal concern about the state’s ‘coerciveness’, however, emerges only when the state goes *beyond* those basic functions I described earlier. As we have seen, liberals tend not to think of the state as acting or intervening *at all* when it maintains existing property and power relations. My concerns about the institutionally rapist character of existing states, on the other hand – which I have suggested MacKinnon’s analysis of sexual violence itself gives us reason to take seriously – do not apply only or even primarily to proposed feminist departures from what passes for ‘state neutrality’ (though they point towards ways these efforts may, if we are not careful, be counter-productive). Rather, they suggest that challenging domination for *all* those subordinated by gender, not just a white, affluent, and obedient few, will require us to direct our critical attentions at precisely the criminalizing activities of liberal states which constitute business as usual. They suggest, in other words, that we need to make feminism ungovernable

CONCLUSION

As I'm driving off laughing this is what I'll say...

I have investigated the ideological construction of ‘the criminal’ as a category opposed to the political. My ‘negative’ claim has been that this construction prevents various forms of *deep dissent* from registering as dissent at all. Specifically, I have argued that the concept of the criminal serves to *depoliticize* some of the most obvious ways in which people might resist, and historically have resisted, the now-prevailing order of property. This is convenient if what you want is to pass that order off as broadly uncontested, and therefore justified (perhaps because you feel you are profiting rather nicely from it). It should be worrying if what you want is to make any significant headway against the multiple forms of oppression that order encodes.

On the picture presented here, liberalism has been torn, since its inception, between these contradictory aims.¹ The derogatory and depoliticizing concept of the criminal can therefore be seen as, on the one hand, serving liberalism’s ideological purposes, while on the other hand thwarting its emancipatory promise. I traced this ‘tangle of emancipation and disemancipation’² in the theory and practice of John Locke. Contemporary liberals need to decide which aspects of his contradictory inheritance they want to take forward. This decision coalesces around the question of legitimacy under conditions of real existing liberalism. I have argued that adhering to the pseudo-realist *presumption of quasi-legitimacy* means sacrificing on the altar of an unjust order of property the very values that made liberal accounts of legitimacy compelling in the first place.

Marxists are, paradigmatically, critical of this order. Yet they too tend to dismiss those who fall foul of it as mindless wrong-doers. I criticised this tendency through a study of Horkheimer’s ‘Theory of the Criminal’.³ A further aim of that chapter was to address the worry, potentially raised by my project, that undermining the presumption of quasi-legitimacy opens the door to fascist lawlessness. We saw Horkheimer giving sophisticated articulation to this worry. My response was to show how his understanding of fascism is compromised by his reliance on a concept of the criminal, taken over from liberalism, that misleadingly

¹ The studies presented here have of course not established that this holds true for all of liberalism. Rather, by identifying a *pattern* in Locke and showing how it is replicated within (significant strands of) contemporary liberalism, I have laid the groundwork for investigating other cases where that pattern might be found.

² Losurdo, *Liberalism: A Counter-History*, 302.

³ Again, investigating how widespread this is in the Marxist tradition has been beyond the scope of this thesis, but is an avenue for further research.

amalgamates downward-punching Nazis with their upward-punching opponents. Similarly, my final chapter used MacKinnon's analysis of sexual violence to question why the familiar objection – *but what about the rapists?* – should always be levelled against those criticising the police, rather than those defending them.

My 'positive' contention has been that political philosophy, insofar as its purpose is emancipatory, should be more interested in the perspectives of criminals than it hitherto has been. This is because conflict with the law has the potential to manifest and forge resistant subjectivities. To a certain extent this positive claim follows directly on from my negative one. If some crime constitutes just resistance to oppression, then it is no surprise that it can manifest critical consciousness of oppression. I have suggested something further, however. This further suggestion I earlier expressed by saying 'the disenchantment of the concept takes place through the recalcitrant body'.⁴ That was perhaps a grandiose way of putting it, but the thought is one that recurs time and time again in the testimony of people involved in resistance of various kinds: coming up against the law made them realise that the world they live in is quite other than what they supposed. In my introduction, I said that this thesis as a whole, and every part of it, represented an attempt to show the truth of this claim. What I meant was that, if *any* of the distinctive arguments advanced here are convincing, that provides a reason to take my positive contention seriously, because I would never have made those arguments if I were not looking at political philosophy from the perspective of a criminal.

⁴ In 'Revelation'.

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