

Police is Dead: On the Birth of Economism

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Dissertation submitted in partial fulfillment of  
the requirements for the degree of Doctor  
of Philosophy in the Program in  
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ABSTRACT

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## Abstract

*Police is Dead* is an historiographic analysis whose objective is to change the terms by which contemporary humanist scholarship assesses the phenomenon currently termed neoliberalism. It proceeds by building an archeology of legal thought in the United States that spans the nineteenth and twentieth centuries. My approach assumes that the decline of certain paradigms of political consciousness set historical conditions that enable the emergence of what is to follow. The particular historical form of political consciousness I seek to reintroduce to the present is what I call “police:” a counter-liberal way of understanding social relations that I claim has particular visibility within a legal archive, but that has been largely ignored by humanist theory on account of two tendencies: first, an over-valuation of liberalism as Western history’s master signifier; and second, inconsistent and selective attention to law as a cultural artifact. The first part of my dissertation reconstructs an anatomy of police through close studies of court opinions, legal treatises, and legal scholarship. I focus in particular on juridical descriptions of intimate relationality—which police configured as a public phenomenon—and slave society apologetics, which projected the notion of community as an affective and embodied structure. The second part of this dissertation demonstrates that the dissolution of police was critical to emergence of a paradigm I call economism: an originally progressive economic framework for understanding social relations that I argue developed at the nexus of law and economics at the turn of the

twentieth century. Economism is a way of understanding sociality that collapses ontological distinctions between formally distinct political subjects—i.e., the state, the individual, the collective—by reducing them to the perspective of economic force. Insofar as it was taken up and reoriented by neoliberal theory, this paradigm has become a hegemonic form of political consciousness. This project concludes by encouraging a disarticulation of economism—insofar as it is a form of knowledge—from neoliberalism as its contemporary doctrinal manifestation. I suggest that this is one way progressive scholarship can think about moving forward in the development of economic knowledge, rather than desiring to move backwards to a time before the rise of neoliberalism. Disciplinarily, I aim to show that understanding the legal historiography informing our present moment is crucial to this task.

For Joe.

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# 1. Introduction

This dissertation takes up the question of how certain forms of political consciousness in the United States have emerged, enjoyed the status of common sense, and eventually dissolved over the course of the nineteenth and twentieth centuries. By political consciousness I mean the way in which speakers of a given historical moment go about representing their social relations to themselves. My focus here is on one particular kind of speech: legal discourse.<sup>1</sup> I seek to introduce an archive of legal thought into the historiography of US political consciousness in order to illuminate certain historical forms it has assumed but that have been covered over by a tendency within humanist political theory to project the dominance of liberalism—whether it be classical or “neo,” cultural or political, economic or humanist—back through Western history from the standpoint of the present.

Across a wide diversity of sites in the nineteenth-century United States, which range from commercial policy and political doctrine to intimate relations and slavery, we find reference to a mode of sociality that has several distinctive qualities: it bespeaks communal order as an embodied and hierarchical phenomenon, it negates the primacy of individualism, it attaches itself to the locality of habit, and it privileges a communally

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<sup>1</sup> Accordingly, when I refer to “law” in this dissertation, I generally mean to indicate its discursive manifestation in a broad swath of juridical literature that encompasses court opinions, legal treatises, and legal scholarship, rather than simply codes and legislation.

constituted notion of happiness. Because these sites are often partitioned off from one another in accordance with modern disciplinary divisions, such references are often treated as separate and thematic phenomena. Following the archeological method of discontinuous history, I propose that tying these disparate threads together into one associative whole can serve as a heuristic tool that allows us to make connections and see historical discontinuities that were previously obscure. Accordingly, in order to give some conceptual coherence to this network of associations, I group them into a single paradigm I name “police.” This dissertation proceeds with the conviction that in order to grasp what constitutes the specificity of the present, we must begin by comparatively understanding the contours of this paradigm, which it has displaced.

Displacement in this sense constitutes an historical rupture and the inauguration of new ways of making sense. I offer the notion of economism—which I will further elaborate as a contemporary form of knowledge structured by its intertwinement with modern economics—as marking precisely this epistemological rupture. It marks, that is, the emergence of a paradigm that is still with us and in fact has become hegemonic. My angle in this study is not causative but descriptive and expositional. In placing expressions of police and economism alongside definitive expressions of liberal reasoning, I hope to show that each of the former is, in its own style, a type of counter-liberal discourse. Likewise, by placing police side by side with economism, I hope to contrast the foreignness of the former with the familiarity of the latter insofar as each

provides a language for framing social relations. I propose that we can better grasp what is new about economism as a form of political consciousness by perceiving the decline of police as one of its major conditions of emergence.

Before I address this contention in greater depth, let me first provide some background on my use of the term police, which is both empirical and speculative. In distinction to its modern sense of an organized branch of law enforcement, I intend for the term here to capture a grid of conceptual reference points which together build a way of understanding sociality by situating it in reference to a particular image of community. On the one hand, this is simply what the term *meant* in the nineteenth-century legal discourse, which is to say, it indicated the proper ordering of a community. Hence the discordant grammatical ring of nineteenth-century legal statements declaring the imperative to promote “good police.”

Legal use of the term in the United States took its cues from Sir William Blackstone’s *Commentaries on the Laws of England*, in which police and “oeconomy” designated everything that belonged within the purview of social order. Drawing upon the classical correlation between good management of the household—reflected in the classical sense of “oeconomy”—and good management of the polis, Blackstone provided the following definition: “By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of

propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.”<sup>2</sup> As Blackstone indicates, and as held true for the United States context, “police” was interchangeable with the phrase “public police,” and meant maintaining the public order in a way analogous to the maintenance of familial governance.

Following from this, as a legal mechanism police served to translate or recode relations that might otherwise have been perceived as transpiring between private individuals, into relations felt to impact the internal order of an entire community. As legal scholar Santiago Legarre has shown, in “offenses against police there is an effect on the public such that even when it could otherwise be expressed in terms of offense to an individual—for example, the neighbor that suffers the nuisance caused by a disorderly inn—the reality is better conveyed with the language of the common goods protected by police.”<sup>3</sup> My analysis situates this act of translation as part of a larger associative structure, one that is also signaled by invocations of the well-constituted or well-ordered community, the public peace, the habits and conditions of a people, and even “happiness,” when uttered in a particular context. These words and phrases carried the weight of an historical signification clueing us into a world that existed alongside

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<sup>2</sup> Sir William Blackstone, *Commentaries on the Laws of England* (CreateSpace Independent Publishing Platform, 2013), Book IV.

<sup>3</sup> Santiago Legarre, “The Historical Background of the Police Power,” *University of Pennsylvania Journal of Constitutional Law* 9, no. 3 (2007), 762.

liberalism but was in no way compatible with it: when we see them, we have reason to suspect that police is afoot.

Conceiving police as a world rather than simply a legal mechanism brings me to the speculative dimension of my usage, wherein the etymology of the term is fundamental to my conception. The word police found its way into the United States juridical lexicon through the Middle French term *policie*, itself a translation of the ancient Greek *politeia*.<sup>4</sup> In Aristotle, *politeia* carries many denotations at once. It is a way of organizing the inhabitants of a city, a city's administrative structure (its "constitution"), its way of life and general character, and the best, most virtuous category of a city: its ideal form.<sup>5</sup> Most importantly for our purposes, Aristotle's *politeia* is a community that articulates character, affect, habit, and political association together into a single interconnected system. Thus, part of my use of police draws upon *politeia* insofar as it designates the political imagination of what I will call an *ethical* community. I mean ethical not in the modern sense of "moral," but in the Aristotelian sense of a correspondence taken for granted between one's general character and one's place in the social order. By contrast with the structure of abstract rights that underpins liberal

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<sup>4</sup> Hence, in nineteenth-century English translations of French political treatises, the French word *police* is alternately rendered as police and "polity," the latter frequently serving as the English translation of *politeia*. Ibid, 749-755.

<sup>5</sup> Aristotle, *The Politics* (Chicago: University Of Chicago Press, 2013), 62-63.

government, to be implicated by or within the ethical community of police necessarily involves a characterization of affective disposition.

There are certain parallels, then, between my employment of the term police and its popularization by Jacques Rancière, who uses it to characterize the distribution of social roles that presupposes a corresponding distribution of ways of being, doing, and speaking, on the basis of which a community allocates and legitimizes certain forms of exclusion.<sup>6</sup> It is clear that this definition also borrows much from *politeia*, but Rancière invests the concept with an ahistorical quality. "Archaic or modern," Rancière's police is a detachable structure that extends all the way back to the plebiscite, and all the way forward to representations of society that other social theorists might dub "neoliberal."<sup>7</sup> In this, Rancière is joined by a few volumes that track, from a legal perspective, the concept of police as a phenomenon that stretches into the present and is intimately bound up with the principles of liberalism.<sup>8</sup>

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<sup>6</sup> Jacques Rancière, *Disagreement* (Minneapolis: University of Minnesota Press, 1999), particularly at 28-29.

<sup>7</sup> Jacques Rancière, "Introducing Disagreement," trans. Steven Corcoran, *Angelaki* 9, no. 3 (December 2004). Rancière posits his definition of police as archaic or modern at 6. In discussing the victory of "formal democracy," he gives a modern example of police, that is, an identification of "the values of democratic debate" as "those of the liberal economy," (3) which would pass in many circles as one definition of neoliberalism.

<sup>8</sup> See for example Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005); Markus Dubber and Mariana Valverde, eds., *The New Police Science: The Police Power in Domestic and International Governance* (Stanford, CA: Stanford University Press, 2006); Mariana Valverde, *Police and the Liberal State*, ed. Markus Dubber (Stanford, CA: Stanford University Press, 2008); Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (Sterling, VA: Pluto Press, 2000); Mark Neocleous, *War Power, Police Power*, 1 edition (Edinburgh: Edinburgh University Press, 2014).

I propose that, at least insofar as concerns United States history, we must understand police as an historically specific phenomenon, and detach it from any association with liberalism, classical or “neo.” The first reason for this has to do with disparities between United States’ history and the Continental history informing most contemporary scholarship that pegs police as a liberal phenomenon. Here I do not intend to make an exceptionalist claim about state formation, but rather one concerning differences in social self-perception. Not least of all due to their divergent legal systems (that is, the common law system in Anglo-America by contrast with the civil law system on most of the Continent), the relationship of each region to police simply cannot be collapsed. In fact, both the word and the concept of police serve to index certain ideological disparities in conceptualizations of sociality in the early United States versus the Continent. In this vein, both legal historian Christopher Tomlins and Michel Foucault (whose use of police Rancière draws upon)<sup>9</sup> have shown how in Europe, police became an external mode of in-depth regulation imposed by the state in an attempt to reproduce a notion of the common good through the artificial recreation of social order. In Germany for example, following upon the early modern revival of Aristotle, police was reintroduced as a way to reproduce a social order that had dissolved along with the

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<sup>9</sup> Rancière, *Disagreement*, 28.

estate system, before eventually becoming an administrative science geared towards increasing state prosperity.<sup>10</sup>

Foucault drew upon this same European archive in order to situate police in reference to the concept of biopolitics. As Foucault put it, “with police there is a circle that starts from the state as a power of rational and calculated intervention on individuals and comes back to the state as a growing set of forces, or forces to be developed, passing through the life of individuals, which will now be precious to the state simply as life.”<sup>11</sup> For Foucault, police as a form of calculated state intervention was initially a paradigm antagonistic to “law,” conceived as a set of restrictions safeguarding an aggregate of rights-bearing individuals from state encroachment. While this paradigm historically gave way to law, however, it also remained preserved within it. Thus police bequeathed to law the concept of the wellbeing of the population as an *object* for enhancement, while the *method* for achieving that enhancement yielded to the principles of legal liberalism.<sup>12</sup>

These Continental histories subsume police into the trajectory of liberalism, positing it as an element perpetuated within modern forms of liberal government. I hold that the early United States, by contrast, provided the conditions for a unique ideological

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<sup>10</sup> Tomlins, *Law, Labor, and Ideology in the Early American Republic*, 41-46.

<sup>11</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978* (New York: Picador, 2009), 327.

<sup>12</sup> Foucault also discusses this point in “Omnes et Singulatim,” in *Power* (New Press, 2000).

armature to reproduce some of the classical features of *politiea* that markedly do *not* persist into the present. Again drawing on Tomlins, because of the dispersed structure of the colonies, police lent itself to a communitarian ethos that had less to do with institutional administration than it did with an “everyday life that itself became an essential mode of displaying and reproducing a well-ordered community.”<sup>13</sup> Hence an investment in the idea of locality—which assumed the shape of a glorification of the common law as the expression of local custom—configured police in the United States as an embodied and self-reproducing form of communitarianism that served as a counterweight to the mainstays of liberalism.<sup>14</sup>



Whether they proceed from the European or United States context, contemporary references to this particular notion of police are found almost exclusively within the discipline of law. This is because it is within the legal archive that police is most clearly visible as an organizing principle, and it is a large part of why this dissertation—which I fully characterize as a humanist pursuit—turns to an archive of law as its primary textual basis. Some further remarks on the use of law for humanist inquiry are warranted. In many regards, legal discourse can only be an expression of the

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<sup>13</sup> See Tomlins, *Law, Labor, and Ideology in the Early American Republic*, 56.

<sup>14</sup> Tomlins further claims that by the post-Revolutionary period the term “police” in the United States had become more identified with the administration and regulation of public life. I think that to the contrary, police and liberalism formed a continuing antimony into the nineteenth century.

victor's mentality. That is, we may take it as axiomatic that no one who was ever disenfranchised got to say what the law was. This gives law an association with "top down" history and places it in agonistic relation to any commitment one might maintain to subjugated knowledges. My project rests upon an inversion of this formula, proposing that within the history of legal thought, certain modes of political consciousness that have since been obscured remain uniquely visible.

This proposition raises two questions: first, what makes these modes visible, and second, what accounts for their obscurity? To a certain extent, both questions have to do with the form of legal discourse. Like literature or the physical sciences, I understand law as a semi-autonomous cultural artifact: a form of knowledge that has its own unique language, but is also and at once expressive of its particular historical moment. Rather than being hermeneutically submerged through aesthetic convention, the ways in which legal reasoning makes sense of its own endeavor are bared through such procedures as adherence to precedent. At the same time, the formal constraints of these procedures also contribute to the hermeticism of legal reasoning, making it a particularly elusive kind of text. Furthermore, the technicality of legal knowledge lends itself to keeping the discipline an insular affair.

On the other hand, there is a uniquely expressive element in law that comes from its continuous and explicit attempt to draw upon disparate threads of common sense and weave them into a statement capable of producing the response: "Yes, that is how it

is.” In other words, a legal system needs to strike *some* chord of recognition in at least *some* of those to whom it addresses itself in order to maintain legitimacy. This precondition of recognition makes legal reasoning somewhat naked in its ideational anatomy as compared with, for example, a work of fiction. By merit of its peculiar form, then, legal discourse often has the unique effect of distilling and anatomizing the ideological underpinnings of a given form of political consciousness.<sup>15</sup>

I maintain that for this reason, what I have called police and what I will presently define as the birth of economism remain distinctly visible within the annals of legal thought despite having gone largely unremarked by theorists and historians outside the discipline of law. Thus, if law in the nineteenth-century United States expressed the primacy of liberalism through concepts such as contract, private property, and separate spheres, it also served as a primary medium through which to express the antithetical principles of police.<sup>16</sup> Likewise, economism as a form of knowledge came into being

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<sup>15</sup> Despite being over thirty years old, Mark Tushnet's book on slave law in the United States offers one of the best discussions I have seen on the complications involved in treating court opinions as expressions their cultural milieu. See Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton: Princeton University Press, 1981), 3-37.

<sup>16</sup> Concerning the expressive relationship between liberalism and legal structures, legal theorists and historians have demonstrated how transformations in doctrine spanning the nineteenth-century United States tended to index the rising dominance of economic liberalism. Classics in the field are Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977); Lawrence M. Friedman, *Contract Law in America: A Social and Economic Case Study* (New Orleans, La.: Quid Pro, LLC, 2011). The structure of contract doctrine epitomized this indexical relationship insofar as it crystallized all the features of possessive individualism into an imaginary scenario that served as a lodestar for the adjudication of private law disputes. (On possessive individualism see C. B. Macpherson's *The Political Theory of Possessive Individualism: Hobbes to Locke* [Oxford, UK: Oxford University Press, 2011]). Within this scenario, rights-

through the induction of a legal perspective into its disciplinary foundation.

Economism, in other words, was born at the meeting ground of legal and economic thought.

I locate this development at the end of the nineteenth century. At this juncture, we see two events take place from the perspective of legal history. The first was that police lost its traction as an intelligible framework through which to perceive sociality and, more specifically, through which to formulate social relations in a mode alternative to the liberal paradigm. By the turn of the twentieth century, the world of police was dead.

The second event to take place was that certain structures of legal knowledge were adapted into the classical framework of political economy, which rendered important perspectival transformations within the discipline. My hypothesis is that these circumstances together created the conditions for the development of a novel kind of economic analytics. Given the absence of a preexisting historical language that could

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bearing individuals stand in a relation of strangership to one another and freely alienate their property in a social vacuum. The law of contract reflected this idea through such principles as the limitation of liability and the doctrine of consideration. The limitation of liability was, as one legal historian has succinctly put it, a theory "dedicated to the proposition that, ideally, no one should be liable to anyone for anything." (Grant Gilmore, *The Death of Contract*, 14). The doctrine of consideration is a set of rules according to which a contract agreed upon by two parties is not considered valid unless there are two things of value being exchanged, with the caveat that it is none of the court's business to assess whether there is parity between the two values. In other words, a compact between two people must be monetary to be enforceable, but there are no subsidiary restraints on whether the flow of wealth seems to be magically moving in the direction of capital accumulation. For an interpretation of this structure as ideology, see Peter Gabel, "Contract Law and Ideology," in *The Politics of Law: A Progressive Critique*, ed. David Kairys (New York: Basic Books, 1998).

lend itself to the task, this analytics formed a new discourse of sociality that served to counter the underlying principles of liberalism.

As I will expand upon in Chapter Three, this development entailed reconceptualizing the basic framework of economic knowledge that had been instituted by classical political economy, and which functioned according to a model of individual possession and commodity exchange. The integration of a legal perspective on questions such as ownership and distribution into the realm of economics enabled the latter's analytical focal point to shift away from individuals and objects, and towards an understanding of economics as a system of forces and relations. This, I argue, was the beginning of economism, which eventually became a perspective on sociality that collapsed ontological distinctions between formally distinct political subjects—i.e., the state, the individual, the collective—by perceiving them all from the vantage of economic force.

My analysis of these economistic formulations shows that they share explicit discursive correspondences with the modes of framing sociality that contemporary humanist scholarship characterizes as neoliberal. Yet they were articulated as early as the turn of the twentieth century, well before the revival of a “new” liberalism, and they came into being as part of a leftist political project. The second half of this dissertation is thus devoted to demonstrating that economism was an originally progressive discursive formation prior to its assimilation by neoliberal economics. I argue that neoliberal

economic frameworks for understanding sociality proceed from the same points of departure as a much earlier manifestation of progressive law-and-economics insofar as they harness a *modern structure of economic knowledge*. This structure is independent of the different doctrinal ends towards which it has been historically geared.

The present tendency to conflate economism with neoliberalism is pervasive, especially within the humanities and social theory. It is expressed in exposés charting the ways in which the political sphere has been reduced to the computations of an economic calculus, and the ways in which modern subjectivity itself is molded by the rationality of the market. The studies in this dissertation are not geared towards proving these diagnoses false, suggesting instead that they tend to train the focus of progressive inquiry on the wrong level of analysis. This is a consequence of the fact that many contemporary social theorists interested in critiquing neoliberalism premise their investigations on assertions found in Foucault's massively influential *The Birth of Biopolitics*. I argue that this quickness to accept Foucault's account as definitive is misguided. As the final chapter of this dissertation aims to demonstrate, most of the paradigms Foucault isolated in his readings of neoliberal texts—readings that brought them to the attention of a larger critical community of scholars—are simply rightist variations on the innovations in economic thought that preceded them.

This project thus concludes by urging that we disarticulate economism from neoliberalism—that is—separate a singular set of economic doctrines from its

underlying rules of formation. Critiques that attribute epistemic shifts to neoliberalism function according to a slippage between the level of doctrine and the level of episteme. The result is a certain incoherence of political desire, and a persistent nostalgia for a time before the rise of neoliberalism that places us in a regressive relationship with the present. Economism was an *advancement* in knowledge beyond political economy, an advancement that neoliberal theory puts towards its own ends and values. What is it, then, to which we would return? To a form of knowledge that belongs within a moment of the past? If we refuse this slippage, and consider this evolution on the level of knowledge, perhaps we can begin to think about advancing beyond economism, rather than dreaming of a time when it did not exist.



The first three chapters of this dissertation are meant to serve as close studies that shine a light on one region of the larger paradigm they exemplify. Focusing chiefly but not exclusively on court opinions, legal treatises, and legal scholarship, the first two chapters are synchronic and explicate what I see as the fundamental features of police in the nineteenth century; the third aims to capture economism at the moment of its emergence at the turn of the twentieth century. The final chapter brings this vantage of legal history to bear upon the present moment, situating it in relation to the branch of scholarship that draws upon Foucault's *The Birth of Biopolitics* in order to critique the phenomenon of neoliberalism.

Chapter One—“Public, Private, Police”—examines nineteenth-century legal constructions of intimate relations, highlighting privacy as a fundamental point of contention between liberalism and police. Here I engage feminist cultural and legal history in order to show how an enduring focus on the public/private distinction as hegemonic has tended to obscure and misread the ways in which police operated outside this framework. Drawing upon court cases that span the century and traverse all regions of the United States, I demonstrate how police worked to configure the family as a distinctly public rather than private phenomenon, while also negating the values of individualism and free will.

The second chapter—“The Ethical Community”—specifically addresses the apologetics underpinning antebellum slave law. I concentrate on a selection of North Carolina court cases, where the common law of US slavery was most fully elaborated. Drawing upon Aristotle, I demonstrate how courts linked together ideas of local custom, graduated governance, and the reproduction of social order. Consequently, I show how courts, guided by the common law mantra of “habits and modes of feeling,” articulated differentiated standards of provocation that relied upon the codification of how feeling was to be expressed, who had it, and to what degree.

The third chapter—“Against an Economy of Things,”—tracks developments within a progressive wing of economics that emerged in the late nineteenth and early twentieth century, showing how its theorization of economic relations shifted the

discipline away from the assumptions of classical political economy. I argue that this development was the beginning of a fundamental transformation of the subject-oriented form of reasoning that characterized classical liberalism. While the first iterations of this counter-liberal form of knowledge were motivated by the political desire to reinstitute a form of social holism, I show that its further refinement led to an economic analytic for understanding social relations whose structure was independent of political investment.

In the final chapter — “The Long Economic Century” — I explore the implications of this legal genealogy of police and economism for contemporary debates over neoliberalism. I focus in particular on the influence of Foucault’s *The Birth of Biopolitics*, demonstrating how many of the attributes Foucault perceives in the work of the neoliberal economists are in fact conceptual derivations of the preceding economic frameworks I have dubbed economism. I conclude by proposing that changing the way we understand present forms of political consciousness by situating them in relation to the legal histories documented here might reorient our assessment of what neoliberalism is and how we perceive its futures.

## 2. Public, Private, Police

### 2.1 Introduction

The study that follows has a simple premise. My contention is that a tendency to project liberalism back through United States history from the standpoint of the present has served to obscure historical modes of thought antithetical to its defining themes. Among these themes, privacy takes center stage. The phenomena attributed to the hegemony of privacy in the nineteenth century seem to consistently establish and reestablish liberalism as a dominant mode of economic, cultural, and political organization. These include, to name just a few: individualism (the private self), the rise of industrial capitalism (facilitated by the private law rules deregulating wage labor relations), patriarchy (definitive of male prerogative over the private household), and the emergence of private subjectivity (characterized as a self-enclosed, “psychic” phenomenon). We know the role these monoliths play in the nineteenth-century United States because they have been elaborated from many different angles, to varying effect. I am not concerned with proving the narratives of privacy wrong. My goal is rather to unearth competing ways of making sense of social relations contemporaneous with the so-called heyday of liberalism but effectively buried by the truisms it carries in tow.

These ways of making sense comprise what I am calling police. I begin my investigation into its discursive structures by situating it in respect to the fields of

feminist legal historiography and social theory.<sup>1</sup> In examining the legal rhetoric surrounding marital disputes, I will show how nineteenth-century courts produced a conception of a “public” whose articulation frustrated and negated the values of privacy liberal structures of thought consistently reinforce. In contrast to these values, courts projected a fictitious community said to override any claims to individual will and desire traditionally enshrined in the liberal valorization of private individuals. A subsequent close study of two specific cases allows me to flesh out the contours of this fictitious community by parsing its affective structuration, an examination that will also lead us into the concerns of the following chapter.

As a way to preface the succeeding analysis, let me reproduce here a court opinion delivered on a divorce case decided in the state of Kentucky in 1838. We will have occasion to circle back to its significance as I proceed. The question at stake in the case was whether a divorce authorized through an act of the legislature could be considered valid. Legislatures no longer have jurisdiction over marital disputes, which as a subset of private law fall under the purview of the courts. This question of

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<sup>1</sup> Because this study constitutes the beginning steps of an analysis rather than its conclusion, I have had to confine my investigation into police to two historical sites: the first being gendered relations, the second being slave society apologetics. This should not be taken to imply that police was circumscribed to domains traditionally considered “cultural;” indeed, such a distinction is part of a liberal framework of understanding within which—as I intend to argue—police does not belong.

jurisdiction was not a settled matter in the nineteenth century.<sup>2</sup> Accordingly, despite marriage's classification as a "civil contract," the court decided the legislature had prerogative over its termination. Here is the reasoning it provided as to why:

Marriage, though, in one sense, a contract...is nevertheless, *sui generis*, and unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and can not, like mere contracts, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will either with or without the consent of both parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved...The obligation is created by the public law, subject to the public will, and not to that of the parties.<sup>3</sup>

*Publici juris*—roughly translatable as "public right"—designates what belongs to the public in common rather than to private parties. Classic examples include such traditionally noncommodifiable goods as air, light, and ocean water.<sup>4</sup> The significance of a legislature having authorized the divorce rather than the courts lies in the fact that, theoretically, the legislature was associated with the state and thus matters held in common, while courts decided matters arising from the interactions that transpire between individuals. In this judgment, the court briefly acknowledges that marriage is

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<sup>2</sup> For a history on the nineteenth-century progression of divorce from being a legislative to a judicial affair, see Richard Chused, *Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law* (Philadelphia: University of Pennsylvania Press, 1994). Chused uses Maryland as a case study.

<sup>3</sup> *Maguire v. Maguire*, 37 K.Y. 181 (1838).

<sup>4</sup> This is of course a schematic distinction that loses precision in the practice of its application within legal practice.

technically a contract—that is, a matter of private law—before dismissing its categorization as such altogether. In denying marriage the classification of contract, the court at once negates the presumed sovereignty of the respective parties and any regard for individual will or consent. These mainstays of classical liberalism are instead supplanted by what the court deems in no uncertain terms, the public will. In so doing, it merges the “domestic relation” in question into the domain of the state, subordinating it to the notion of a public whose interests override these individual particulars.

I propose there is something at once familiar to the point banality, and yet strikingly alien in the assumptions about marriage the Kentucky court puts on display. The familiarity of the opinion arises from its intimation that society has an interest in marriage as a barometer of its moral fitness. Such a sentiment could presumably be expressed today with just as much intelligibility as it was in 1838. What renders this idea discordant is the lack of any division posited between an intimate sphere of domesticity and the broader public. Where is tell of the ideology of “separate of spheres,” that hallmark of liberalism with which feminists have had to contend for well over a century as it was supposedly *the* mechanism driving the history of gender relations in the West? The hypothesis I intend to pursue here takes a surface reading of the excerpt above at face value: it simply isn’t there.

The web of terms the court invokes—domestic relations, the well organized society, abrogation by the sovereign will, the irrelevance of mutual consent—taken

together signal the court's reasoning as falling within the compass of police.

Contemporary legal scholarship has done much to illuminate some aspects of this reasoning, demonstrating that certain pairings we take for granted as inextricable within modernity don't hold up under historical scrutiny. It shows us, for example, that the "private" realm of domesticity was, at least in the nineteenth-century United States, actually a quintessential object of the public will and regulation. Much of the same scholarship, however, tends to view this tendency as particular to the law's relationship to the family, and thus as a residuum of its more primary relationship to the market. I disagree. Nevertheless, I intend to put what is illuminating about these legal genealogies in conversation with the still-dominant narratives of feminist social theory that they seem to contradict, or at least to complicate. My goal is to question how we might continue to learn from, while learning to see differently from, the assumptions of feminist historiography that stem from a monolithic understanding of the public/private distinction.

## **2.2 Revisiting the Primacy of a Distinction**

There are two distinct but overlapping definitions of the public/private distinction, both of which bear upon the present analysis. As Morton Horowitz has argued, the emergence of the market as a "legitimizing institution" brought the public/private distinction to the forefront of legal thought in the nineteenth century. Its codification separated constitutional, criminal, and regulatory law (the public) from

torts, contracts, property, and commercial law (the private). In accordance with the desire to render legal reasoning a science rather than a valuative and hence “political” undertaking, legal thinkers correlated the realm of private law with an idea of objectivity and neutrality. The legal rules contained within this domain constituted a supposedly apolitical system (of course, it was anything but).<sup>5</sup> Duncan Kennedy situates this trend as part of a broader “liberal way of thinking about the social world,” that functioned according to a series of dichotomies including individual/group, objective/subject, legislature/judiciary, freedom/coercion, and so forth.<sup>6</sup>

Within feminist social theory, the ideological division between privacy on the one hand and neutrality and apoliticism on the other remains an object of critique, but the private comes to signal the domain of the family. In this framework, concepts that are opposed within the legal definition—such as will-based interaction versus state regulation, embodied as civil versus political society—are grouped into a single point of reference insofar as they serve to indicate the workings of a market freed from the social order of feudalism. By contrast, the family historically reproduced a domain of patriarchal order that paradoxically coexisted with and reinforced the social structures of the market-based society supposed to replace it. The dominance of this perception of

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<sup>5</sup> Morton J. Horwitz, “The History of the Public/Private Distinction,” *University of Pennsylvania Law Review* 130, no. 6 (June 1, 1982), 1424.

<sup>6</sup> Duncan Kennedy, “Stages of the Decline of the Public/Private Distinction,” *University of Pennsylvania Law Review* 130, no. 6 (1982), 1349.

a lasting and fundamental dualism between the family and the market is captured in Carole Pateman's assessment that the "dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is ultimately, what the feminist movement is about."<sup>7</sup> The absolutist ring of the claim might garner its share of feminist criticism, but it contains a seed of descriptive accuracy.

What is crucial to both the legal and feminist accounts of the public/private divide is that each of side of this dichotomy gains definition through its distinction from what constitutes the other.<sup>8</sup> The nineteenth century is central to this story insofar as it is widely perceived as the time period overseeing the consolidation, entrenchment, and codification of the tendencies that stem from this distinction within the United States. We can isolate and better evaluate the scope and dominance of these tendencies by understanding their embeddedness in a framework of subjective interiority. As I gestured towards in the Introduction and will elaborate further in Chapter Two, police relies on an understanding of social order wherein affective disposition correlates with social groups and their attendant "habits." By contrast, expressions of liberal privacy implicitly depend upon a notion of deep psychology that correlates to the figure of the

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<sup>7</sup> Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy," in *Public and Private in Social Life*, ed. Stanley I. Benn and G. F. Gaus (New York: Palgrave Macmillan, 1983), 281.

<sup>8</sup> For schematic purposes I have so far differentiated between the fields of law and feminist social theory, which is an artificial distinction. I will engage the work of scholars who bridge this divide more substantively in what follows.

liberal individual. A correspondingly psychological, sentimentalist understanding of intimate relations undergirds the ideology of separate spheres. As I will demonstrate, interpretive projections of this understanding often lead to a reincorporation of police modes of feeling back into the framework of liberalism. In what follows, I attempt to briefly map the history and coordinates of this framework. I then turn to contemporary advancements in critical legal history in order to show how they both supplement and controvert these basic coordinates. I will draw from as well as depart from both genealogies when I return our attention to specific cases.

### **2.3 Psychological Privacy**

The liberal configuration of privacy should be understood in relation to the modern development of civil society as a third term thought to mediate the relationship between the individual and the state. This third term is also, eventually, what gives privacy a positive valence. Both the early moderns and the classics considered the private realm beyond the state as comparatively debased. As historian Nancy Cott terms it, everything that did not constitute political participation in the classical state amounted to the “‘merely’ private”: a residual category at best.<sup>9</sup> The exaltation of privacy via the creation of civil society was an internal development within liberalism typically attributed to Hegel. In *Elements of a Philosophy of Right*, civil society consists in a

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<sup>9</sup> Nancy F. Cott, “Privacy,” in *A Companion to American Thought*, ed. Richard Wightman Fox and James Kloppenberg (Malden: Wiley-Blackwell, 1998), 540.

unity of different persons that maintains the particularity of each in anticipation of the political state, which orients those individuals towards the universal.<sup>10</sup> In this formulation, the “particularity” of atomized individuals assumes an inferior status. As Michael Hardt points out, prior to this introduction of civil society as a mediating third term between material life and the state, the depictions we receive from the early modern period (beginning with Hobbes) cast anything recognizable as civil society as coextensive with the state.<sup>11</sup> Hegel’s intervention turned civil society into a devalued realm in opposition to the perceived universality of the state. But this intervention also articulated the conditions necessary for the emergence of a conception of civil society that, by merit of its association with privacy, could *valued* over and above the state.

Hegel’s distinction between the state and civil society provided the fodder for Marx’s critique of the latter, an indictment of the liberal state that still contours contemporary debates over the discourse of rights that underpins liberal democracy. Marx’s critique of rights is intimately tied to the question of privacy. In “On the Jewish Question,” private life takes on its character insofar as it acts as a foil to the state, which in turn takes on the role of a universalizing mechanism. “It is only...*above* the *particular* elements,” Marx emphasized, “that the state constitutes itself as a universality.”<sup>12</sup>

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<sup>10</sup> G. W. F. Hegel, *Outlines of the Philosophy of Right* (Oxford University Press, 2008).

<sup>11</sup> Michael Hardt, “The Withering of Civil Society,” *Social Text* 45, no. 14 (Winter 1995), 27-28.

<sup>12</sup> Karl Marx, “On the Jewish Question,” in *Early Writings* (Penguin Books Limited, 2005), 220. Emphasis in original.

Concretely, to say the state aspires towards universality means it undertakes such measures as the elimination of qualifications for political participation based on attributes that identify individuals in terms of their particular associations, such as religion. The right to practice one's particular religion, or stated more generally, to freely act upon the particularities of one's identitarian commitments, is tantamount to the right to be a private person.

Marx's critique of this general structure extended from his larger project of bringing to light the ideological dynamics of abstraction. Thus, the state *idealizes* its universality by distinguishing itself from the *material* particularity of men's private activities. In order to constitute itself as this ideal political community, the state must make a twofold gesture: it must retroactively *presuppose* the existence of particularity, and it must simultaneously cast that particularity as *imperfect* and *divisive* in comparison. In this sense, particular—or private—relations constitute the sphere of civil society in distinction to the state. Insofar as liberal democracy privileges the state as the realm of formal equality and community, it both debases civil society as the non-universal, and naturalizes an equation between material relations, private activity, and individual conflict. Privacy thus comes into being with civil society insofar as the latter acts as a subsidiary to the liberal state. Or put another way, liberalism's emergence from

feudalism *depoliticizes* civil society by associating it with “mere privacy” and reinvesting the political in the state as a universal ideal.<sup>13</sup>

Marx’s critique has had lasting impact for many reasons, one of which is that it elucidated the equation between particularity and inferiority that is often unwittingly reinforced by rights claims, and the degraded status such claims are thus at risk of attributing to the subject of rights vis-à-vis an imagined ideal of universality.<sup>14</sup> However, there are some terminological complications inherent in Marx’s analysis that reveal it as the product of a very particular moment in history. This moment was unique because Marx’s critique of the state took up a set of newly liberal social bifurcations that were still understood according to a “classical” system of value, wherein freedom was still coupled with the public sphere and privacy was considered a lesser realm of the particular.

Domesticity enters into the story as crucial to the inversion of valuation by which privacy comes to assume a privileged role relative to the state. As Jurgen Habermas’s

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<sup>13</sup> Ibid, 233.

<sup>14</sup> In terms not irrelevant to the immediate discussion, Wendy Brown frames the a contemporary instantiation of this conundrum like so: “The problem surfaces in the question of when and whether rights for women are formulated in such a way as to enable the escape of the subordinated from the site of...violation, and when and whether they build a fence around us at that site, regulating rather than challenging the conditions within. And the paradox within this problem is this: the more highly specified rights are as rights for women, the more likely they are to build that fence insofar as they are more likely to encode a definition of women premised on our subordination in the transhistorical discourse of liberal jurisprudence.” Wendy Brown, “Suffering the Paradoxes of Rights,” in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 422.

classic inquiry into the development of the public sphere demonstrates, liberal—or bourgeois—domesticity was an emergent formation on which the self-conception of civil society was constitutively dependent. In this sense, the idea of privacy that describes individual agents who participate in commodity exchange on the market is not distinct in kind from the idea of individuals who are able to conduct their private *familial* affairs within a separate sphere. For Habermas, this is because the idea of freedom that corresponds to the privacy of the civic realm is essentially illusory: it cannot produce the conditions necessary to create the image that secures the status of unfettered autonomy to which it otherwise aspires. This task falls to the exalted idea of intimate relations as a model for private autonomy:

Such an autonomy of private people, founded on the right to property and in a sense also realized in the participation in a market economy, had to be capable of being portrayed as such. To the autonomy of property owners in the market corresponded a self-presentation of human beings in the family. The latter's intimacy, apparently set free from the constraint of society, was the seal on the truth of a private autonomy exercised in competition.<sup>15</sup>

In this way privacy is refracted through its attachment to intimacy and reflected back onto civil society in such a way that it becomes a valorizing attribute. The family has special significance specifically as the site of the emergence of a novel category of experience: that of humanity and subjectivity experienced as detached from labor. Thus,

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<sup>15</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (MIT Press, 1991), 46.

the ideological separation of the family both from the market and from a larger notion of the public instated intimacy as a realm where one could experience his humanity free from all other social ties and obligations. “In the intimate sphere of the conjugal family,” states Habermas, “privatized individuals viewed themselves as independent even from the private sphere of their economic activity—as persons capable of entering into ‘purely human’ relations with one another.”<sup>16</sup> This notion of humanity that exists in and for itself was the seedbed for the rise of subjectivity as a privileged and particularly modern experience of privacy.<sup>17</sup>

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<sup>16</sup> Ibid, 48.

<sup>17</sup> For Habermas, the role of the family and its contribution to the rise of a detached form of humanity and a privatized subjectivity is a specifically bourgeois phenomenon. It is enabled by the attenuated independence of the property owner who exercises a limited freedom in the market. This form of privacy specific to the property-owning class is achieved in large part through the fact that it is complemented by the experience of patriarchal autonomy in the household. Private authority in the conjugal realm—grounded in the dependence of the wife and child on the head of the household—thereby buttresses and shapes the experience of private autonomy in the market. It is interesting to note, however, that we may reverse the terms of Habermas’s analysis and reach the same conclusion that the idea of a purely human realm detached from class was enabled by the emergence of a notion of deep psychology. In his analysis of the relationship between capitalism and the family, for example, Eli Zaretsky links the growth of a notion of pure humanity specifically to the experience of proletarian subjectivity under the regime of industrial capitalism. Where Habermas identifies the pattern of humanity set free by intimacy as a specifically bourgeois experience, Zaretsky identifies the same phenomenon as transpiring precisely through the experience of being property-less. Zaretsky pins the family’s separation from the market and the activity of goods production to the rise of industrial capitalism, but locates the cultivation of subjectivity as taking shape through the making of the proletariat class. While the ideology of “the family as the repository of ‘human values’” originated with the bourgeoisie, it was completed not as a reflection of being a dealer in commodities, but in the experience of having nothing but precisely that humanity to claim: “For those reduced to proletarian status from the petty bourgeoisie, one’s individual identity could no longer be realized through work or through the ownership of property: individuals now began to develop the need to be valued ‘for themselves’. Proletarianization gave rise to subjectivity. The family became the major sphere of society in which the individual could be foremost – it was the only space that proletarians ‘owned’. Within it, a new sphere of social activity began to take shape: personal life.” The idea of one’s need to be valued simply on the basis of being oneself echoes the idea of a detached sphere the value of which is determined precisely through its lack of reference to or interconnection with other material modes of being. Zaretsky draws out the fact that the psychology of the new form of in-and-for-itself humanity buttressed

Analyses of cultural production are, to my mind, most incisive in demonstrating how privacy became associated with a psychological depth that was distinguished from the political through its self-representation as a universal human quality. The formal properties of the novel, specifically in its emergence out of domestic and epistolary traditions, make it a uniquely effective barometer that gave space and voice to an emergent form of subjectivity. As Michael McKeon has succinctly put it, the novel is “a genre whose singularly formal dissonance is peculiarly susceptible to being expressed through...languages of privacy and interiority.”<sup>18</sup> In other words, this emergent liberal language described the self-consciousness of the self-enclosed individual.

Along these lines, Nancy Armstrong has deftly demonstrated the central role of literature in separating sexuality and domesticity out from the discourse of politics beginning in eighteenth-century England. Armstrong argues that the fictional domestic woman was pivotal in facilitating a transformation in the signification of social value from aristocratic markers of status to the subjectivity of the modern individual whose virtue resided in her psychological depth. This transformation facilitated the hegemonic rise of a liberal/psychological understanding of the individual. Because such subjectivity

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the rise of individualism, where Habermas contends that this subjectivity was always outwardly-oriented. With or without the Habermasian element of an inherent publicity, the form of subjectivity brought into being by the enclosure of the family revolves around a certain insularity that defines personhood as a form of intimate individualism. See Eli Zaretsky, *Capitalism, the Family, and Personal Life* (New York: Harper & Row, 1976). The quote is at 61.

<sup>18</sup> Michael McKeon, ed., *Theory of the Novel: A Historical Approach* (Baltimore, Md: Johns Hopkins University Press, 2000), 435.

could be seen, again, as “purely human,” the private domestic realm that was the province of the feminine garnered a decisively political power that could disavow itself as such. In this way “writing for and about the female introduced a whole new vocabulary for social relations, terms that attached precise moral value to certain qualities of mind.”<sup>19</sup> In this new vocabulary, psychological depth is the very marker of privacy and the pivot point of its distinction from the political realm.

Despite the fact that Armstrong’s focus is on eighteenth- and nineteenth-century England, her general analytical framework has held strong for interpretations of the same period in United States history. In an important work that undertakes a parallel approach to American literature, Gillian Brown has examined how the psychologism of domesticity bore upon the formation of American individualism. In Brown’s analysis, despite being a domain separated from the market, private life in the early United States signaled a haven for individuality insofar as it cultivated withdrawal of the self. Hence, “...nineteenth-century American individualism takes on its peculiarly ‘individualistic’ properties as domesticity inflects it with values of interiority, privacy, and psychology.”<sup>20</sup> Brown’s analysis thus complicates to some extent the terms of the public/private distinction insofar as it questions the respective locations of individualism

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<sup>19</sup> Nancy Armstrong, *Desire and Domestic Fiction: A Political History of the Novel* (Oxford University Press, 1987), 2.

<sup>20</sup> Gillian Brown, *Domestic Individualism: Imagining Self in Nineteenth-Century America* (Berkeley: University of California Press, 1992), 1.

and domesticity. It does so, however, by giving a materialist account of private life that folds it more completely into a history understood as entirely determined by the ideology of individualism. Thus do both the domestic sphere and the market remain securely under the aegis of “liberal humanism.”

My goal in relaying these various interpretive accounts has been to illustrate a set of political and cultural assumptions about the history of privacy, specifically in its relation to the public/private distinction. Taken as a whole, they weave domesticity, psychological interiority, and individualism together into a determinative knot of associations. If we touch upon one, we lean upon the explanatory capacity of the others. This *cultural history* informs, though it does not determine, many interpretations of concomitant *legal* realities. From this perspective, nineteenth-century legal discourse enshrines a certain idea of domestic privacy precisely through its presupposition of private subjectivity. The idea is that legal opinions define the space of judicial intervention by invoking and constituting privacy as its space of noninterference. Feminist legal scholar Katherine Bartlett articulates a fairly uncontested understanding of this trend when she states that “[t]raditionally, the law has viewed violence in the family as a private issue, into which the law should not intrude, for fear of exposing the family to ‘public curiosity and criticism’ and thus undermining it. Feminists have shown that, to the extent family violence is beyond the reach of the law, men’s abuse of and

power over women is enabled and affirmed.”<sup>21</sup> Hence domestic violence was sanctioned through the constitution of the private family as a site of legal exclusion. Privacy was thus coextensive with, in Bartlett’s words, the condition of being put “beyond the reach of the law;” and the family was a “refuge—a ‘haven in a heartless world’—requiring privacy and freedom from public interference.”<sup>22</sup>

## 2.4 Public Domesticity: An Open Secret

From the perspective of separate spheres then, legal and cultural history often dovetail in their portrayal of a link between domesticity and privacy. There is, however, an alternate understanding of this relationship made possible by investigations into the particular discursive patterns that attended nineteenth-century developments in legal doctrine. These inquiries have uncovered what I have come to think of as critical legal scholarship’s family secret: namely, that in the nineteenth-century United States, the private was in fact public. It was as public to the legal mind as anything could be, and neither does coming to terms with this fact require to a deep hermeneutic process. If we recall the passage from the 1838 Kentucky divorce case with which I opened, it is clear that the family in this rendering is a site through which the notion of a sovereign public could be conceptually elaborated and enforced: it was by definition *publici juris*, and subject to the public will “with or without the consent of both parties.” The precise

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<sup>21</sup> Katharine Bartlett, “Feminism and Family Law,” *Family Law Quarterly* 33, no. 3 (October 1999), 494-495.

<sup>22</sup> *Ibid.*, 475.

phrasing is important because the court makes clear it is not leaving family matters to the male head of household: it posits public prerogative over and above *both* the wife and the husband. In this sense, as historian Norma Basch has framed it, familial legal issues such as marriage and divorce in fact “*collapsed* the rhetorical separation of public and private life.”<sup>23</sup> How do we go about clearing up the discrepancy that thus emerges between an assumed historical *relegation* of the family to a domain of the private, and an explicit historical *revocation* of any claim of privacy to which the family might otherwise lay stake? That is, how do we begin to understand the family as part of an historical consciousness that negated rather than further entrenched the discourse of privacy?

In a genealogical examination of the development of legal consciousness in the United States, Duncan Kennedy has argued that a classic formula for understanding the legal perspective on the family—that it progressed from “status to contract”—should be inverted. The original formula comes to us from Sir Henry Maine, who claimed in 1861 that feudal notions of the household had progressively given way to the primacy of individual obligation.<sup>24</sup> If this was so, how do we account for the disregard shown to the issue of individual consent displayed by the Kentucky court? One answer is the lag

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<sup>23</sup> Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (University of California Press, 2001), 3. Emphasis added. On this point also see Nancy F. Cott, “Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century,” in *U.S. History as Women’s History: New Feminist Essays*, ed. Linda K. Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar (University of North Carolina Press, 1995), particularly at 108.

<sup>24</sup> Henry Maine, *Ancient Law* (New York, NY: Cosimo, Inc., 2005), see generally 67-100, particularly at 99.

theory, according to which “changes in the family reproduce but lag behind those in the market.”<sup>25</sup> Understood from the vantage of the lag theory, the legal treatment of marital relations slowly but surely progresses until it falls completely under the rubric of contractual liberalism. Thus, marriage begins as a “status” relation that eventually comes to be understood as a contract plain and simple, one that should be sustained or ended as per the will and desire of the individual parties. In contrast to this linear narrative, Kennedy contends that as a specific form of legal consciousness cemented over the course of the nineteenth century, it developed a “core” of legally significant relations that pushed everything antithetical to the primary tenets of liberalism to the legal periphery.<sup>26</sup> Hence, a nexus of objectivism, will, and autonomy became a centripetal organizing force within legal doctrine (exemplified in the configuration of private law as a neutral science, as described above by Horwitz, and enshrined in the will-theory of contracts), and pushed rules embodying the ideals of “regulation, paternalism, [and] community” to the lesser realm of “status.”<sup>27</sup> Thanks to this consolidation of liberal legalism, marriage duly moved from contract to status. This

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<sup>25</sup> Frances Olsen, “The Family and the Market: A Study of Ideology and Legal Reform,” *Harvard Law Review* 96, no. 7 (May 1983), 1513. Olsen's intent in the article is to question and complicate rather than reconfirm the lag theory. For a more recent reevaluation of the lag theory see also Reva Siegel, “The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930,” *Georgetown Law Journal* 82 (1994 1993), 2133-2141.

<sup>26</sup> Kennedy’s concept of consciousness comes from an adaptation of loosely structuralist notions into the field of juridical practice.

<sup>27</sup> Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, DC: Beard Books, 1975), quote at 190 but see generally 185-206.

process offers one framework for depicting how, despite retaining supposedly feudal characteristics like paternalism, the family nevertheless became considered the province of the community in the nineteenth century, rather than being afforded the liberal assignation of private.

Janet Halley has recently given further substance to this genealogy – which is more descriptive than causal – through a study of the emergence of family law. Halley argues that the emergence of family law as a disciplinary subdivision corresponded to the separation of a nuclear family out from the larger rubric of “the household” that reigned supreme in the early decades of nineteenth-century legal thought. The household, as opposed to “the home,” included within it not only marital relations but the relations of parent and child, guardian and ward, and master and servant.<sup>28</sup> Following Kennedy’s timeline, Halley contends that by midcentury, the law of husband and wife separated out from that of master and servant, and what had formerly been linked through the concept of the household became an opposition: one that described the nuclear family in distinction to the wage labor relations of capitalism.<sup>29</sup> The

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<sup>28</sup> This Blackstone’s original grouping of “private economical relations.” See Sir William Blackstone, *Commentaries on the Laws of England* (CreateSpace Independent Publishing Platform, 2013), in Book I: Rights of Persons.

<sup>29</sup> Kennedy’s timeline, in turn, follows a fairly standard periodization of American law that recounts three distinct phases: first from the American Revolution to the Civil War, second from the end of the Civil War to the beginning of the beginning of the twentieth century, and third from around World War I to the contemporary. See also Grant Gilmore, *The Ages of American Law*, 2 Edition (New Haven: Yale University Press, 2015).

terminological shift from “relations” as the dominant legal way to frame the province of the household, to “status” as the term for a legal condition that described solely the relation of husband and wife marked this transition, which was also concurrent with the ideological rise of laissez-faire and separate spheres. Thence forward, “each side of this family-market pair got its legal, social, and ideological clarification from the idea that the other was its opposite.”<sup>30</sup>

Kennedy and Halley provide an avenue for better grasping how the domestic was understood as a public rather than a private phenomenon. Their story of how this came to be, however, still clearly relies upon on the consolidation of a distinction between separate spheres (or core and periphery). Where they see a break in perceptions of the family—as for example indexed by the terminological shift from relations to status—that results from a midcentury ideological triumph of liberalism, I see continuity. In this facet I am aligned with the perspective legal historian William Novak’s work takes toward nineteenth-century notions of public welfare, which I see as having strong implication for understanding contemporaneous discourses of domesticity. Novak argues for the notion of a “well-ordered society” that was dominant continuously throughout the nineteenth century as a distinct paradigm, not “simply as the offsetting public corollary to a private law discourse of individual right and laissez-

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<sup>30</sup> Janet Halley, “What Is Family Law?: A Genealogy Part I,” *Yale Journal of Law & the Humanities* 23, no. 1 (June 2011), 3.

faire,” and not as the “lesser half of an ever present tension within liberalism between individualist and communitarian renderings of freedom.”<sup>31</sup> Viewed from this vantage, in the nineteenth-century:

Americans understood the economy as simply another aspect of the well-regulated society, inextricably intertwined with public safety, health, morals, and welfare and subject to the same kinds of legal controls. Far from viewing the state and the economy as opposed, the notion of “public economy” was part of a world view slow to separate public and private, government and society. It understood commerce, trade, and economics, like health and morals, as fundamentally public in nature, created, shaped, and regulated by the polity via public law.<sup>32</sup>

Novak abstracts this notion of an undifferentiated social order subject to the public will from an exploration into the historical exercise of the police power, a doctrine whose key term “police” also derives from the Aristotelian etymology I outlined in the Introduction. Novak is primarily concerned with practices and conceptions of state regulation, however, hence his study draws upon early-modern notions of *Polizei*, and thus posits a continuity between European and American police.<sup>33</sup> While I am also concerned with patterns of legal consciousness, I intend to elaborate, in a more speculative vein, the architecture of the fictional “public” that gave this conception of welfare its traction.

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<sup>31</sup> William Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (University of North Carolina Press, 1996), 9, 49.

<sup>32</sup> William Novak, “Salus Populi: The Roots of Regulation in America, 1787-1873” (Ph.D., Brandeis University, 1992), 327.

<sup>33</sup> Novak, *The People’s Welfare*, 13-14.

## 2.5 A Third Party Who Say “Me”

“Americans hold, that, in every state, the supreme power ought to emanate from the people; but when once that power is constituted, they can conceive, as it were, not limits to it, and they are ready to admit that it has the right to do whatever it pleases. They have not the slightest notion of peculiar privileges granted to cities, families, or persons....”<sup>34</sup>

Throughout the nineteenth century, American courts generally considered contracts made between wives and husbands, especially those whose purpose was to end the marriage, to be unlawful and hence void.<sup>35</sup> Why? Coverture supplied the original logic behind this legal rule. But the explanatory capacity of coverture and its usual association with patriarchal oppression has its limits. As Basch has noted, “what is striking about the long course of the legal fiction [of marital unity, i.e., coverture] was its ability to serve the legal needs of three shifting social structures: the kin-oriented family of the late Middle Ages, the patriarchal nuclear family of early capitalism, and even the more companionate nuclear family of the late eighteenth century.”<sup>36</sup> Basch’s observation describes the internal process of what we might call legal “common sense.” By this I

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<sup>34</sup> Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (New York: The Century Company, 1898), 358.

<sup>35</sup> Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, Mass.: Harvard University Press, 2002), 76-86. As concerns this precedent, Hartog quotes a case decided in 1824 [*Emery v. Neighbour*, 7 N.J.L. 142 (1824)], stating that it reflected “different sentiments and different decisions, by different men, at different time” (82).

<sup>36</sup> Norma Basch, “Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America,” in *Domestic Relations and Law*, ed. Nancy F. Cott, vol. 3, *History of Women in the United States* (New York, NY: K.G. Saur, 1992), 133.

mean to note the fact that a schema of legal rules can persist while the mores they originally codified inevitably shift and evolve. The contention is not novel, nor even particularly controversial, but it establishes an important point. Oliver Wendell Holmes gave particularly lucid articulation to this process within legal systems, thereby supplying a general formula for Basch's more specific observation. That is, he pointed out that legal rules usually outlive the context in which they originally emerged and then are tacitly repurposed in an effort—which often does not avow itself as effort—to account for the discrepancy. Here is Holmes:

The customs, beliefs, or needs of a primitive time establish a rule or formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.<sup>37</sup>

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<sup>37</sup> Oliver Wendell Holmes, Jr, *The Common Law* (New York, NY: Dover Publications, 1991), 5. With the phrase “legal common sense” I intend to reference the Gramscian conception. For Gramsci, common sense is a hodgepodge of often contradictory ideas that have been deposited in the present by preceding systems of thought. While the original ideas may have been specific to certain groups—that is, may have specifically catered to dominant interests—they gain general acceptance and consensus within a population, despite the contradictions they produce, through the process of hegemony. Common sense is in this way a “sedimentation” of historical doctrines, mythologies, and philosophies; however, it is not for this reason “something rigid and immobile, but is continually transforming itself, enriching itself with scientific ideas and with philosophical opinions which have entered ordinary life.” Antonio Gramsci, *Selections from the Prison Notebooks*, ed. Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers Co, 1971), 326. See also the section “Language, Languages, Common Sense” in Antonio Gramsci, *The Antonio Gramsci Reader: Selected Writings 1916-1935*, ed. David Forgacs (New York: New York University Press, 2000). These ideas seem to me to have explicit overlap with certain methodological apparatuses in legal theory. Both frameworks attempt to grasp the phenomenon by which we take for granted an historical artifact whose conduciveness or even pertinence to our present interests is dubious at best. I think Basch's and Holmes' approaches—at least as they are framed in the specific instances I have quoted—are susceptible of

Building on this contention that legal formulas have a tendency to embark on different careers over the course of their lifespan, my hypothesis is that whereas the prohibition against intra-marital contracts was born in the principle of male prerogative, nineteenth-century US courts came to attribute it to the primacy of a communal public. In so doing, they introduce a third term in the form of a “third party” who was harmed by the “collusive” agreements made between spouses attempting to dissolve their own marriages. This repurposing demonstrates how coverture was reimagined to fit the dictates of police ordering.

The form of the rule of coverture comes from Blackstone. According to this infamous description, “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.”<sup>38</sup> From this relation—or rather, this legal negation of relationality between two persons—flows the consequence that

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the analytic of hegemony that drives Gramsci’s conception. Distilled to a purely methodological contention, however, the approach does not necessarily entail a political or valuative slant. For example, a similar idea is evident in Friedrich Hayek’s defense of laissez-faire as a spontaneous order (*kosmos*) superior to the ideals of a made order (*taxis*), which he pegs to socialism. Here is Hayek: “that orderliness of society which greatly increased the effectiveness of individual action was not due solely to institutions and practices which had been invented or designed for that purpose, but was largely due to a process in which practices which had first been adopted for other reasons, or even purely accidentally, were preserved because they enabled the group in which they had arisen to prevail over others.” Friedrich Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1978), 9.

<sup>38</sup> Blackstone, *Commentaries on the Laws of England*, 247.

married partners are not able to enter into contracts with one another: “a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.”<sup>39</sup> Hence, the origin of this prohibition lies in the condition of the married woman, specifically in the subsumption of her identity by the husband, and subsequent foreclosure of the civil status required to be considered an individual with the capacity to contract. This passage in Blackstone serves as a common citation source for nineteenth-century US courts dealing with the issue of intramarital compacts.

In order to track how the content shifts, let me begin by laying out a schematic understanding of contract theory expounded by British legal scholar Hugh Collins. Collins sites two divergent conceptions of privacy expressed within the history of contract doctrine. The first functions according to the “estrangement” principle, meaning that within contract law, so-called third parties are considered strangers undeserving of the kind of legal obligations owed to the contracting parties. He provides the example of marriage to illustrate the principle of exclusivity that informs this conception (keep in mind Collins is not talking about the American context). According

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<sup>39</sup> Ibid, 248.

to this logic, “rights and duties remain personal to those who create them; all contracts resemble a marriage in so far as no third party can claim the right to share the intimate relations established between the spouses”<sup>40</sup> This means that the bond created between contracting individuals should be regarded with the same intimate exclusivity that characterizes familial relations. In other words, just as it is taken for granted that an individual not committing him or herself to a marriage should not be able to affect the terms of that contract, so this estrangement conception of contract works in regards to third parties.

The rival conception of privacy found within contract law in Collins’ account is based on the principle of intimacy. In this “intimacy” conception, contractual obligations may not be enforced between parties whose relation to one another is so intimate in the court’s view as to be antithetical to the instrumental type of relationship formed through the artificial bond of contract. In Collins’ telling, this conception has historically diminished into a “vestigial theoretical limit” as intimate relations were gradually reinterpreted through the lens of the purely formal equality that characterizes the market.<sup>41</sup>

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<sup>40</sup> Hugh Collins, *The Law of Contract* (London, England: Weidenfeld and Nicolson, 1986), 106.

<sup>41</sup> Hugh Collins, “The Decline of Privacy in Private Law,” in *Critical Legal Studies*, ed. Peter Fitzpatrick and Alan Hunt (New York, NY: B. Blackwell, 1987), 101. Collins’ schema clearly belongs in the lag theory camp. His account traces a progression from the patriarchal relations of authority that inform the intimacy conception of privacy to the liberal ideas of privacy that inform more contemporary understandings of contract. As I detailed above, I align myself in this chapter with the perspective of legal historiographers who contend that this narrative does not accurately describe the United State trajectory.

If Collins' description of marriage figuratively epitomizes the so-called estrangement logic of contract insofar as there can be no third party implicated in its terms and effects, nineteenth-century US courts called this very party into being in the form of a public. They materialized this public by assuming it could be duped and colluded against by the married partners' actions. In this way, an imagined community was given body through its metaphorical designation as a third party to divorce disputes.

The 1868 case of *Underwood v. Underwood* serves as an illustration.<sup>42</sup> The tendencies evinced in *Underwood* were not unique, but were in fact common and mundane. The backstory of the case involved a wife who, after moving into her husband's house, came into conflict with his children, who were apparently from a previous marriage.<sup>43</sup> Particularly at odds with the husband's eighteen-year old daughter, the wife left the house and refused to return, filing for a divorce on the grounds of extreme cruelty. Both the husband and wife agreed to a divorce through their attorneys, but when the price of the alimony had been decreed by the court, the husband objected. Rather than ruling on the alimony issue alone, the court held that since there was a lack

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<sup>42</sup> *Underwood v. Underwood*, 12 Fla. 434 (1868).

<sup>43</sup> All of the background information I provide for the cases discussed can be found in the opinions of the courts. I have done my best to confine this information to what the courts considered factual, and not to rely upon inferences concerning the parties' attendant actions and motives.

of evidence of cruelty justifying the claim to alimony, by extension the original, mutually agreed upon divorce was also invalid, based as it was on a lack of fault.

The court's recital of the testimony of the case's only witness emphasized the wife's exaggerated response to the discomfort of her new surrounds, and the seeming capriciousness with which she determined the household uninhabitable. It relays a narrative that hinges on details that showcase the wife's apparent impulsiveness: that she had reputedly claimed she would be willing to live with the husband "in a bark cabin" if it wasn't for the presence of his children, and that the discussion in which she told her husband she was leaving him was only fifteen minutes long.

In relating the details of this narrative in such a fashion, the court rhetorically manufactures a disconnect between the wife's explanation of her purported actions—that she acted in response to extreme cruelty—and what explanation could be meaningfully or reasonably ascribed to those actions. This disconnect opens space for the court—in the name of the community—to bestow upon those actions their proper meaning, i.e., in what way they do or do not fit the prescription for cruelty. In this implicit re-construal, the court imbues the expression of individual will with the character of frivolity, divesting it of the vaunted status it otherwise assumes in discourses centered on privacy. Its reason:

Ordinarily the court may enter a decree as desired by the parties, in the event it affects their interests alone. What creates the difference is that the husband and wife are not the only persons whose interests are affected, or whose desires are to be consulted in suits of this character...it is no less the duty of this court in this

class of cases to disregard their wishes here, if in following their desires and restricting ourselves to the consideration of only such portion of the record as they call to our attention, we inflict a wrong upon the public, and give efficacy to a system of practice which, if continued, must result in disaster to the well-being of society.<sup>44</sup>

Hence, in describing the marriage contract, the court essentially inverts Collins' formula by which the marriage is considered strictly a relation transpiring between two individuals. Within this inverted framework, the desires of sovereign individuals become suspect. In the liberal imagination, by contrast, the law acts at the behest of individuals in order to facilitate their civil interactions: it fictively positions itself as acting in accordance with the needs of individuals and the kinds of relations they choose to undertake among one another. Here we see this relationship reversed. The court

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<sup>44</sup> In order to demonstrate the regional and temporal pervasiveness of the discursive tendencies I am analyzing here, I will provide a selection of opinion excerpts to accompany the cases discussed in the body of the chapter, and that offer rhetorical variations on the themes in question. As concerns the demotion of the respective wishes and desires of the individual parties in the dispute, compare this passage with the following excerpts. "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties, as to their extent or duration, is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law." *Adams v. Palmer*, 51 Me. 480 (1863). "[The] legislature exercises power the marital relation, the obligations of which are not subject to the will of the parties, but which have their origin and their regulation in the sovereign power of the State...the consent of the parties can never change the nature of the power exercised over them, nor we may add, legalize what is in its nature forbidden." *State, to Use of Gentry v. Fry*, 4 Mo. 120 (1835). This quote is taken from counsel rather than from the opinion of the court. See also *Cabell v. Cabell's Adm'r*, 58 K.Y. 319 (1858), which quotes the case of *Maguire v. Maguire* with which I began. To recall: "[marriage relations are] subject to the sovereign power of the State, not like mere contracts, to be dissolved by the mutual consent only of the contracting parties, but to be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good, or justice to both are either of the parties, will be thereby subserved."

fashions itself not as the willing instrument of particular individuals, but as the safeguard of society at large, subordinating and declassing the principle of individual will accordingly. In so doing, the court does not simply make reference to “society,” but triangulates it in relation to the husband and wife by calling it into being as a separate and distinct party to the dispute. Configured in this way, divorce suits inevitably and generically involve three distinct “persons”:

It has been properly remarked that a divorce suit may be regarded as a civil suit between three distinct parties, the Government, the plaintiff, and defendant. It is the office of the Government to protect the interests of the public, the welfare of the entire community whose interests are involved, and to see that public morals are protected; and the rights of this party should never be forgotten by the court. (Underwood v. Underwood).<sup>45</sup>

Thus the court is able to negate the rights of the married partners by evoking a public that can be thought of as holding competing rights. The community the court invokes is coextensive with the state as a superordinate body of regulation, something projected

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<sup>45</sup> Compare with these variations on the theme of the wellbeing, welfare, or happiness of the community assuming precedent over the respective parties: “[marriage] cannot be dissolved by the consent of the parties. The State has an interest in it as a civil institution, designed to cherish virtue and to promote the happiness of the community.... It is for the legislative power to determine what will promote the general welfare and the happiness of the people in the regulation of this relation in life, as well as in that of parent and child, and master and servant.” *In re Justices Opinion*, 16 Me. 479 (1840). “[T]he Family is the foundation of the state. Upon the intangible sanctity, and almost indissoluble integrity of the marriage contract, depend the character and happiness of our population, the perpetuity of our institutions, the peace of our homes, and all the charities of social life.” *Head v. Head*, 2 Ga. 191 (1847). Emphasis in original. “[I]t is said, the husband subsequently concurred in the separation, and therefore has no right to complain of it. But that does not better the case. It only proves, that neither of these parties could be entitled to a divorce *a vincula*; for if the separation was not an injury to him, it was to society, and the welfare of the community is to be consulted more than the wishes of the parties.” *Wood v. Wood*, 27 N.C. 674 (1845).

back onto the intimate relation so that the latter does not escape the purpose which has been prescribed it, and dissolve in the face of subjective will.

This theme is further elaborated in cases that addressed the situation wherein married partners attempted to divorce from one another by mutual agreement, insofar as they independently decided upon and arranged the terms of their separation. The cases of *Cross v. Cross* (1878) and *Phillips v. Thorp* (1883) both involved an agreement between the respective spouses in which they determined how they would divide their assets, their children, settle issues of support, who would bring the claim and who would shoulder the burden of fault.<sup>46</sup> In the case of *Cross* the wife and husband, each preparing to sue the other for a divorce, decided upon a compromise instead. They sorted out the terms of a separation in which the wife would give to the husband a piece of property whose ownership was in question, while he would entrust promissory notes to a certain "M" for her use upon the divorce. It was agreed the wife would file for the divorce and the husband would make no defense, whereupon she would assume custody of three of their children while the other two would come under his care. When the wife was subsequently prevented from taking possession of the promissory notes, she filed a suit against her at that point ex-husband for their recovery.

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<sup>46</sup> *Phillips v. Thorp*, 10 Or. 494 (1883); *Cross v. Cross*, 58 N.H. 373 (1878).

In the case of *Philips*, the wife had promised the husband she would relinquish all claims to his property in exchange for a certain deed of land, and that she would further assume all the costs associated with the divorce suit if the husband agreed to put up no defense against her claims. The husband and wife proceeded as agreed but after the divorce was granted the (now ex-) wife discovered that the deed failed to include several acres of the land which her then-husband had initially promised. Upon taking the case to court in order to correct the error, the ex-husband's defense consisted in the argument that the agreement whose terms he was flouting was illegal in the first place because he and his wife had created a contract that was specifically for the purpose of dissolving their own marriage.

In both *Cross* and *Philips* the courts deemed these independent agreements collusion. This meant that the courts refused to recognize all of terms described above, which were individually agreed upon by the husband and wife. "Such an agreement" stated the court in *Cross*, "is contrary to sound public policy, and consequently illegal and void. The marriage contract is not to be dissolved or determined at the will or caprice of the parties...The law will not aid either party in enforcing their illegal contract."<sup>47</sup> Likewise, in *Philips*, the court openly acknowledged the guileful manner in

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<sup>47</sup> Compare with these variations on marital contract as being against "public policy," a term that has etymological links to "police:" "...as a voluntary agreement to live separate and apart, it is void...To give validity to such postnuptial contracts would be but holding out to the parties temptations to the voluntary repudiation of conjugal rights and abandonment of marital duties,--to encourage, in effect, a dissolution of the marriage contract...The agreement of separation was void as against public policy. It was executed

which the husband went about pleading his case—essentially arguing that he should not be required to fulfil the terms of his promise because that promise was illegal in the first place—and proceeded to decide in his favor nonetheless. Conceding that the husband’s was not a “commendable” defense, the court stated it did not decide against the wife out of regard for the husband’s interests, but “out of consideration for the interests and welfare of society.” Thus, the spousal agreement:

was clearly against the policy of the law as one being entered into for aiding and procuring by collusion the dissolution of the marriage relation. It was fraud upon the law which favors and sustains the marriage relation, and it will not give its sanction nor lend its aid to enforce or uphold the terms of any contract, nor countenance any contrivance which is designed to promote its dissolution.<sup>48</sup>

What is striking about these cases is not that they tend toward privileging the husbands over the wives, which is no great revelation given a legal structure that served to

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between the parties before separation, and for the express purpose of creating a separation.” *Poillon v. Poillon*, 61 N.Y. 582 (1899). “There is nothing...which forbids [a wife] to contract with her husband...The majority of the court, however, are of opinion that the contract set out in the declaration is, in its essence and character, against public policy, and that it must be held invalid upon that ground.” *Hamilton v. Hamilton*, 89 Ill. 349 (1878). Also continuing the theme of demoting the desires of the parties, compare these formulations that frame individual will as a matter of caprice: “[Marriage] is a contract, and relation, necessary to the existence of civilized society, and to be regulated accordingly—as to its continuance and obligations—not by the mere will of the parties, but by the general provisions of the municipal law.” *Clark v. Clark*, 10 N.H. 380 (1839). “It would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it.” *Palmer v. Palmer*, 2 N.Y. Ch. Ann. 645 (1828). “[Marriage’s] dissolution or determination is not to be left to depend on the caprice of the parties...The good order and well-being of society, as well as the laws of this State, require this.” *Sayles v. Sayles*, 21 N.H. 312 (1850). “It is not necessary to cite authorities to the effect that the law favors marriage, and does not sanction contracts intended to effect its dissolution...The dissolution of the marriage contract is not to be left to the caprice of the parties.” *Scherer v. Scherer*, Ind App. 384 (1899).

<sup>48</sup> Compare: “[The courts] will never lend themselves to the enforcement of a contract intended to promote the dissolution of marriage.” *Speck v. Dausman*, 7 Mo. App. 165 (1879).

disadvantage married women from the outset. What is notable is the absence in both of any reference to the idea of marital unity, the privileges of the husband, or the privacy of the household. Both *Philips* and *Cross* substantiate their decisions by naming the husband and wife's actions an instance of collusion, which entails the idea that the act in question is undertaken to the detriment of someone not privy to its machinations, and specifically undertaken to the effect of defrauding that party of its proper rights.<sup>49</sup>

This is an ongoing motif in nineteenth-century divorce cases. The case of *Blott v. Rider* will serve as a final variation on the same theme.<sup>50</sup> In response to a divorce suit entered *ex parte*—that is, a suit for divorce filed by the wife without the husband's presence in court—the court in *Blott* similarly reacted to the situation of potentially being misled by the parties to the divorce suit, with the risk that they were attempting to exercise their intentions beyond its judgment. The requirement of further proof as to why the divorce was taking place was not for the benefit of either party—insuring that

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<sup>49</sup> The courts' assignation of collusion in the instance of attempted intra-marital contracting is evocative for several reasons. To begin with, it once again lends a negative valence to the idea of will, acknowledging the effects of will that cause detriment to another party. As well, the rise of contract doctrine signaled courts' refusal to intervene into the contractual agreement on several levels: either into unforeseeable results or conditions affecting the contracting parties, or on behalf of entities who were not explicit parties in a contract but nevertheless found themselves affected by the circumstances that its terms produced. This systematic disregard of third parties flows from contract doctrine's emergence from a particular definition of privacy. In its avatar as a market value, the ideal of privacy that informs contract doctrine takes the shape of an autonomy proper to the contracting parties, the sanctity of which must be protected both from the state and from the encroachment of outsiders. Deference to the claims of people beyond the explicit scope of the formal contract, so the theory goes, would effectively encroach upon the autonomy of the contracting parties and constitute an invasion of their civic privacy.

<sup>50</sup> *Blott v. Rider*, 47 How. Pr. 90 (1873).

neither had been unduly wronged—but to satisfy “the conscience of the court” that the spouses were not colluding with each other beneath its sights. In the court’s words:

...though upon its face a controversy between the parties of record only—is, in fact, a triangular suit, *sui generis*, the government or public occupying the position of a third party without counsel, it being the duty of the court to protect its interests. From these principles it follows that no decree of nullity, or of divorce from bed and board, or from the bonds of matrimony, can be entered by the court upon the mere consent of the parties of record; because they cannot bind the public.<sup>51</sup>

In summary, what is important to emphasize about these formulations is that they negate the idea of individual interest so fundamental to liberalism *not* according to an appeal to privacy but according to an appeal to the presence of a third party in the form of a public that exercises dominion over intimate relations. This idea of a public as party to an intimate relation is nowhere present as an explanatory mechanism in Blackstone’s reasoning behind the prohibition of marital contracts and the state of coverture from which it derives, and this despite the fact that it is Blackstone’s very articulation of coverture that provides the precedent for the rule. The same principle has been rerouted back to a different origin.

## 2.6 “Mere Ebullitions of Passion”

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<sup>51</sup> In addition to the cases I have already cited, compare this formulation concerning the public as a third party to divorce disputes. “The public is regarded as a third party to the contract, because the public have an interest in making so important a contract a matter of certainty.” *State v. Barefoot*, 31 S.C.L. 209 (1845).

In this final section I will delve deeper into the notion of the public explicated above by exploring its affective structure. Part of my method will consist in noting how the distinctive signifiers of this structure tend to get read back into the psychic phenomena of liberalism that I outlined at the beginning of the chapter. I will proceed by focusing our attention on two midcentury court opinions, one concerning divorce (hence, a civil case) and one concerning domestic violence (a criminal case). The first was a Supreme Court case entitled *Barber v. Barber* (1858),<sup>52</sup> which turned upon a now defunct form of partial divorce termed divorce *a mensa et thoro*, essentially a legally recognized form of separation. According to divorce *a mensa*, the husband and wife agreed to live apart but were still considered married under the law and were not free to remarry.

In *Barber*, a partial divorce had been granted and the husband instructed to pay alimony to the wife during the separation. Following this decision the husband moved and established residency in a different state, apparently in an attempt to avoid responsibility for the payments. The wife sued in order to recover the alimony in district court, which covers matters of federal jurisdiction. The fact that the wife and husband were residents of different states potentially made the case eligible for federal jurisdiction. Because only a partial divorce had been issued, the wife was still legally

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<sup>52</sup> *Barber v. Barber*, 62 U.S. 583 (1858).

considered a married woman, however, and she could not bring the suit herself given her status as *feme covert*. According to the law of coverture, as I have recounted, when a woman entered into marriage she lost claim to her property as well as her civil ability, including the ability to file a lawsuit. The way around this law was to bring a suit by *prochein ami*, or to have someone else file the lawsuit on your behalf, which is what the wife did. The issue at hand in the court was two-pronged: if a woman under coverture was said to be merged with the person of her husband, was it possible for her to be legally considered a resident of a state different than that in which her husband resided? If not, the case was one of state jurisdiction and the suit was invalid from the get-go. If so, the Supreme Court could proceed to render an opinion.

The Court's majority ruled that according to precedent the wife could indeed establish a separate domicile, that she had leave to pursue the suit through *prochein ami* in either state or federal court as she so chose, and that the district court's ruling—which had ordered the husband to pay the alimony—was therefore valid. The dissent contested the wife's ability to establish a separate residence given her status as *feme covert*. It contested the conclusion reached by the majority that the federal district court should have the authority to rule on a matter that devolved on the husband and wife's obligations to one another. Its reason was the following:

It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and

nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household.<sup>53</sup>

A cursory reading situates the dissent as fully aligned with the ideology of separate spheres and the notion of psychic privacy that bolsters it. Interpreted from this angle, domesticity constitutes not just a world of governance unto itself, but one defined by an economy of affections and antipathies that makes the “inquisitorial” authority of governmental intrusion all the more vulgar and misplaced. This imaginary scene of intrusion is compounded by the dissent’s invocation of nurseries and bedrooms (“chambers”), which comes across both as alarmist and a bit of a reach, given that the actual issue at hand was whether a husband should pay alimony to his estranged wife, and which court system should be called upon to decide.

Let’s put this reading to one side. We are now in a position to recognize that the “domestic relations” referenced by the dissent comprise a more historically specific conception than timeless notions of domesticity would allow. As well, the “household” emerges from a circulation of terms that does not accommodate the notion of the bourgeois family. What is crucial to note in this case is that while the dissent decries *federal* interference into marital matters, it does not subsequently devolve the authority to manage intimate affairs onto “private” citizens themselves. Instead, it mobilizes the

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<sup>53</sup> Since I am primarily concerned with what was thinkable and sayable as evidenced in these decisions, rather than which legal ideas are achieving doctrinal dominance, I do not in this dissertation give greater significance to formulations made in majority opinions as opposed to dissents.

distinction between federal and state domains in order to invoke the notion of local community, and ascribes to the latter the power of regulation and control of domestic relations. Hence the dissent goes on to claim that the “Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.” It concludes by describing where the power to validate the wife’s claim to alimony should be vested. “That authority,” it says, “can exist nowhere but with the power and the right to control the private and domestic relations of life. The Federal Government has no such power; it has no commission of *censor morum* over the several States and their people.” We thus cannot conclude that the dissent projects the “affections” it sees as attending familial relations beyond the scrutiny of governmental control; it is rather that this control is properly exercised by the community—the state with a little “s”—in which the family is embedded.

Thus, instead of considering domesticity as systematically separated out from a socio-political notion of the public through the vehicle of separate spheres, we can begin to see how intimate relations were interwoven into a broader schema that worked to negate such divisions. The nineteenth-century form of consciousness that registered intimacy not just as a matter of communal regulation but as a “part” within a larger social “whole” entailed an idea of localism particular to the federated state structure.

This opposition between a federal government and the several states was crucial to police forms of ordering insofar as they took shape by reference to the idea of local community.<sup>54</sup>

With this contention held in mind, I will move forward ten years to the case of *State v. Rhodes*, decided in North Carolina.<sup>55</sup> The case has become notable within feminist legal scholarship for the reason that it articulates—or seems to articulate—the doctrine of separate spheres while at once explicitly acknowledging that such a doctrine is a de facto authorization of domestic violence. *Rhodes* was a criminal case wherein a female appellant brought an assault charge against her husband for having whipped her with a “switch.” The court’s opinion opened with the matter-of-fact concession that the

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<sup>54</sup> Consider also that this reference to the “several States” conspicuously echoes the language of the Tenth Amendment, which states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”) The Licenses Cases, which affirmed separate states’ prerogative to ban the importation of liquor, came about ten years prior to *Barber*. In these cases, Chief Justice Roger Taney, who was a member of the dissent in *Barber*, provided one of the more well-known, and more expansive, definitions of the principle behind the police power. Here is Taney: “what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power to govern men and things within the limits of its dominion.” License Cases, 46 U.S. 5 How. 504 (1847). While the attachment of a generic communal power to the “dominion” of the federate state can only be a distinctly American development, the idea of a broadly construed governance of “men and things” is not. This is a phrase that has garnered attention beyond legal scholarship because it was introduced by Michel Foucault in his elaborations of governmentality. The source materials Foucault drew from in developing the notion of governmentality as a form of governance that takes as its object a “complex of men and things” derive in large part from his studies of the early modern Continental political treatises referenced above that elaborate police as a variation of *politiea*. I question the timeline that informs the concept of governmentality when I turn to Foucault’s *The Birth of Biopolitics* in Chapter 4.

<sup>55</sup> *State v. Rhodes*, 61 N.C. 453 (1868).

“violence complained of would without question have constituted a battery if the subject of it had not been the defendant’s wife.” It consequently set itself the task of determining whether the context of the marital relation should affect its estimation of whether the batterer was criminally responsible.

The court claimed there were only two reported criminal law cases that might potentially provide a precedent according to which it could adjudicate the case at hand (the vast majority of similar cases falling into the realm of civil law given that they were tied to issues of divorce). It reasoned that neither case was similar enough to provide doctrinal guidance, the first because the wife was determined not to be a competent witness (to her own battery), and the second because it was decided that the assault came in response to “strong provocation.” By distinction, the *Rhodes* court proclaimed—on the basis of a witness’s testimony—that the husband’s violence was decidedly unprovoked. Rather than incorporate the issue of unprovoked violence into its rationale, the court then concluded that the violence of a husband’s conduct could not serve as a reliable criterion for determining intervention at all. Its reason was that what is reasonably considered an “intolerable” domestic situation—which could range from “insults, indignities and neglect” to “actual and repeated violence to the person [wife]”—depends too greatly upon the “peculiar surroundings” in which the family is embedded. Accordingly, the character of a given family government “will always be influenced by the habits, manners and condition of every community,” such that no

standard of conduct could be generically employed as a measure for determining proper conduct.

Upon this basis of the infinitely variable character of “family governments,” the court asserted that it would not attempt to interfere in order to convict or even assess the nature of the husband’s actions. The formulation in which this assertion is couched has often been read back into the doctrine of separate spheres, which fuels analyses of nineteenth-century discourses of domestic privacy.<sup>56</sup> Here the court seems to arrive at the conclusion that publicity is *inherently* a vice when considered in relation to domestic spaces, whose integrity is axiomatically damaged by exposure to external judgment. It states that:

The courts have been loth to take cognizance of trivial complaints arising out of the domestic relations...Not because those relations are not subject to the law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government...Our conclusion is that family government is recognized by law as being complete in itself as the State government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to control it, in favor of either husband or wife...For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.

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<sup>56</sup> This trend has even become notable within literature aimed at a popular audience: for example, a recent article in the *New Yorker* addressing the topic of domestic privacy and criminality cites Reva Siegel’s reading of *State v. Rhodes*—which I will come to below—abstracting the court’s assertions that “the evil of publicity would be greater than the evil involved in the trifles complained of,” that these trifles should be “left to family government,” and its cautioning against “raising the curtain upon domestic privacy.” See Margaret Talbot, “Matters of Privacy,” *The New Yorker*, October 6, 2014.

The parallels with *Barber* here are noticeable, with nurseries and bed chambers once again subject to the potential indignity of exposure. In the context of *Rhodes*, the court prefaced this idea by citing the particularity of the habits, manners and condition of the communities of which the family in question is a part. The contention that family governments have naturally variant conditions, however, does not necessarily lead to the conclusion that public exposure should thereby be read as pernicious. The small logical gap in evidence here is filled by the court's turn to rhetorical precedents that decry public curiosity as exercising an undermining influence on the family. This articulation of family governments that must be shielded from public scrutiny provides the hook for interpretations of the case as expressing the doctrine of separate spheres, where each sphere constitutes a world unto itself. In this understanding, the anxious projection of a nosy public serves to draw an imaginary partition between the bed chamber and the State, a division whose enforcement created the consequence of disempowering those whose primary context for existence was thereby confined to an unregulated domestic space.

Without dismissing that the denial of legal recourse to women and children was a pervasive reality, we should nevertheless question the forms of reasoning that rendered such effects. Thus, the discrepancy between the court's pronouncement of differential family governments and its assertion of familial privacy should give us pause. It betrays the instability of the rhetoric of privacy and the latter's inability to

account for the court's *initial* logic of communal differentiation. This is made clear by the fact that after it implies that the domestic space naturally and generically requires privacy for the maintenance of its well-being, the court *immediately belies and contradicts this equation by delimiting it to a particular class standing*. It goes on to describe the attributes of class status in the same terms it had previously used to define community, that is, in terms of the nature of the sentiments and manners that account for its particularity. In this way, the court's assessment of the sentiment that defines domestic space does not lend itself to the exaltation of privacy tout court, but rather gives affective substance to its initial and primary contention that households vary according to their respective placement within the community. In other words, imputed variations in affectivity become the anchor supposed to provide proof of the differentiation between family governments.

In illustration of this point, the court offers a remarkable description of how families that fall along different class strata have differing forms of temperament and differing levels of passion that lead to fundamentally different constitutions. The court's ultimate point is to reinforce the notion that there exists no universally applicable principle that could serve as a basis for deciding the question of intervention. The passage is worth quoting in full:

Suppose a case coming up to us from a hovel, where neither delicacy of sentiment nor refinement of manners is appreciated or known. The parties themselves would be amazed, if they were to be held responsible for rudeness or trifling violence. What do they care for insults and indignities? In such cases

what end would be gained by investigation or punishment? Take a case from the middle class, where modesty and purity have their abode but nevertheless have not immunity from the frailties of nature, and are sometimes moved by the mysteries of passion. What could be more harassing to them, or injurious to society, than to draw a crowd around their seclusion. Or take a case from the higher ranks, where education and culture have so refined nature, that a look cuts like a knife, and a word strikes like a hammer; where the most delicate attention gives pleasure, and the slightest neglect pain; where an indignity is disgrace and exposure is ruin.

The first thing that becomes clear in this account of class is that privacy is not rendered as a need or value attached *per se* to the family. It is only when we reach the mid-level refinement of the middle class that the invasion of privacy becomes injurious both to the members of the family and to society at large. This is because the court configures the so-called hovel, the middle class, and the “higher ranks” along an ascending line of refinement, or virtue, whose distinctions it makes sense of precisely through the ascription of sentiment. The attribution of affectivity thus provides the medium of differentiation that enables the court to distinguish among class standings, and that ultimately allows for the projection of their fundamental incommensurability. This facilitates the court’s claim that, in effect, the only thing family governments could be said to share is their singularity. Placing the same offense hypothetically committed in these different contexts side by side, “what conceivable charge of the court to the jury would be alike appropriate to all the cases, except, [t]hat they all have domestic government, which they have formed for themselves, suited to their own peculiar conditions, and that those governments are supreme...” Thus, the court’s decision not to

judge the husband's conduct, while couched at points in the rhetoric of privacy, rests predominantly on its assertion that no unifying principle can be located among disparate class communities that might be used to establish a criterion for intervention into the families those communities have shaped. The court validates—or at least attempts to validate—this claim by turning to the language of affect.

In an influential reading of *Rhodes*, legal scholar Reva Siegel has remarked this distinctly class-based formulation of privacy, summarizing it as a linkage between class and sensibility that then links sensibility to the need for privacy.<sup>57</sup> Siegel is concerned to show how courts in the nineteenth century turned to the language of “affective privacy” as they began to abandon the doctrine of chastisement. Emerging from the doctrine of marital unity, the doctrine of chastisement proclaimed the legal prerogative of the husband to beat, or “chastise,” his wife in his capacity as the master of the household. For Siegel, affective privacy belongs within a broader phenomenon of a rhetoric of interiority: a discourse that “invoked the feelings and spaces of domesticity.”<sup>58</sup> In response to feminist agitation over the legal codification of gendered dominance, Siegel argues that courts turned to supplementations of affective privacy that in effect performed the same function of shielding domestic violence from judicial oversight even

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<sup>57</sup> Reva Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy,” *The Yale Law Journal* 105, no. 8 (June 1996), 2158.

<sup>58</sup> *Ibid.*, 2206.

as, doctrinally, they departed from explicitly condoning relations of gendered inequality.

I offer to the contrary that this equation between the court's discourse of affect and the notion of subjective interiority does not bear out. Perceiving *Rhodes* within an idiom of interiority places it squarely within the history of bourgeois sentimentalism, which lends it the distinctly liberal set of reference points I outlined previously. This obscures what is striking about the court's language of "passions" and its idea that class communities comprise discrete affective worlds, namely, that these formulations conform to a distinctively Aristotelian model of social order. The court's articulation of differential governments, modelled after the "condition" of its members, which in turn corresponds to varying levels of passion (recall how different class strata were distinguished according to their propensity towards and sensitivity to "rudeness" and violence) reflect a set of assumptions that inform an historical structure of feeling different from psychological interiority. In this structure, an ascending line of continuity runs from the disposition of the individual through the type of government best suited to rule him, and correspondingly, the character of government is dependent upon the character of the citizens who compose it.

From the court's description of the behaviors and sentiments to be expected from the "hovel," it is apparent that what is at stake is not merely the diversity of community character but a hierarchy of worth, value, and virtue. Affect defined in this context is not

psychologistic because it does not reference back to the self-enclosed individual: it is rather, as the court says, an “ebullition.” Thus it can be understood why supposed variations in temperament—the perpetual insults hurled by those of the lower class and the delicacy of the middle and upper classes who are only “sometimes moved by the mysteries of passion”—are projections not of interiority but of manifestations of character as it is imbued through association with a given affective community. These manifestations express themselves in the incommensurability of governmental constitutions, which logically produces the conclusion that there could be no universally applicable principle that might serve as a basis for deciding the question of state intervention.

*Rhodes* puts this perception of affective community in service to the question of class. As it was initially and most essentially articulated by Aristotle, however, the fact that a community was defined by its *pathos* meant that individuals of a certain station were only suited to be *citizens* of corresponding forms of government. The following chapter is devoted to unpacking the nineteenth-century manifestation of this idea by exploring its expression in the legal principles of slave-holding society.

### 3. The Ethical Community

#### 3.1 Introduction

Consider the case of *State v. Jarrott*—decided in North Carolina in 1840—concerning an enslaved black man named Jarrott who had killed a white man during the course of a game of cards.<sup>1</sup> In assessing whether Jarrott had been provoked by the white man in such a way that would reduce the crime from murder to manslaughter, the state supreme court remarked the “vast difference...between the social condition of the white man and of the slave; in consequence of which difference, what might be felt by one as the grossest degradation, is considered by the other as but a slight injury.” It followed, concluded the court, “that some acts, which between white persons are grievous provocations, when proceeding from a white person to a slave—whose passions are, or ought to be tamed down to his lowly condition—will not, and cannot be so regarded.” This attribution of differentiated emotional responses to the same affront was picked up by the Georgian lawyer and politician Thomas R.R. Cobb, who in 1858 published *An Inquiry into the Law of Negro Slavery in the United States of America*, a treatise cum apologia

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<sup>1</sup> *State v. Jarrott*, 23 N.C. 76 (1840). Throughout this chapter I alternate between the term “enslaved” and “slave” to describe the subjects whom I am discussing. As regards the former term, I follow Adrienne Davis’ example in rhetorically drawing attention to the fact that bondage is externally imposed and not a state of being. See Adrienne Davis, “The Private Law of Race and Sex: An Antebellum Perspective,” *Stanford Law Review* Vol. 51, no. 2 (January 1999), 221 at footnote 4. On the other hand, because part of my aim here is precisely to internally occupy and explicate a perspective from which slavery *is precisely* a state of being, I sometimes make recourse to the term “slave.”

that attempted to consolidate the principles of Southern slave law. Cobb's gloss on the question of provocation in slave-holding society was that the "duty of the slave to obey, and his habit of subordination, would require a greater provocation to justify an 'infirmity of temper or passion.'"<sup>2</sup>

In these formulations, the language of race is conspicuously subordinated to the language of caste, though the former is not entirely evacuated. The court in *Jarrott* attributes the source of the slave's blunted emotional capacity to his "social condition," and thus by implication to the force of habituation. That racialized assumptions are at stake emerges only obliquely, through the fact that the court compares the "social condition" of the slave to that of the "white man" rather than, for instance, the freeman. This repression of a racial element displaces the apparent cause for why a slave's passions are respectively "tamed down" to the function of caste. But in effecting this displacement, the court inserts a puzzling aside. It concludes that as a result of their degraded *social* condition, slaves have a correspondingly benumbed *affective* condition, or at least, that they ought to. What seems an equivocation—a stumble between is and ought—recurs in the recapitulation of the principle as presented in the *Law of Negro Slavery*. For Cobb, the "habit" of enslavement creates a divergent emotional constitution that then informs a differential principle of the rule; at the same time, however, the rule

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<sup>2</sup> Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America*, ed. Paul Finkelman (Athens, Ga.: University of Georgia Press, 1999), 95.

extends from a duty to obey imposed externally. It asserts a duty for the slave not to be provoked regardless of whether he has been provoked.

We are clearly confronted with a double bind. Considered from jurists' angle, however, this aside emphasizing that to diagnose emotional capacity is also to prescribe it poses no internal contradiction. The jurists proceed by means of an *endoxon* (a foregone assumption) that the act of assigning people to their proper social role—which at once constitutes imposing a duty—is no different in kind from simply identifying a correspondence between that role and its associated mode of feeling. In this sense, the form of social order presupposed by Cobb and the court in *Jarrott* reproduces an older notion of political community: that of Aristotle's *politeia*. The present chapter will undertake a closer investigation into this aspect of police.

### **3.2 Towards the Habits and Passions of the Public Peace**

As I explained in the Introduction, *politeia* cannot be thought apart from the affective constitution of its members. Hence the order of the political community relies upon a corresponding distribution of moral and emotional dispositions. The rearticulation of this structure as performed above by the nineteenth-century jurists is what I propose to call the *ethical* community. "Ethics" in this sense names not a form of moral conduct, but those things that pertain to character (*ēthikē*), conceptually inseparable both from one's affective state of being, and from the disposition and

character of the polity.<sup>3</sup> The term ethics (*ēthos*), according to Aristotle, was derived from a modification of the term habit (*ethos*), which demonstrates the inseparable relation between character and habituation.<sup>4</sup> The result of this interplay is *hexis*: a condition of being that accounts for one's orientation towards the world based in her or his disposition vis-à-vis passion, where passion is not in this sense an extremity of emotion (a state of "passion" in the modern sense) but more generically an affective experience. Because *hexis* is a product of habit, "it makes no small difference...whether one is habituated in this way or that way straight from childhood but a very great difference—or rather the whole difference."<sup>5</sup> Correspondingly, the character of the polity as a whole rests upon the fine-tuning of affect in its multiple valences.

My contention is that the common law ideology of the early United States—which took mantric form as the "habits and conditions," "habits and thoughts," and

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<sup>3</sup> My decision to focus on slavery in this chapter inevitably raises the question: is what I am calling police an antebellum Southern phenomenon? I consider this dissertation project the beginning steps of an investigation, and at present have confined myself to one slice of a vast archive from which I presume to draw only a limited set of preliminary hypotheses. This being said, from the introduction and preceding chapter, it should be clear that I do not consider police a peculiar institution. Historian Larry Tise has shown, for example, that the principles undergirding the manifestation of slave society discourse that I examine here were grounded in an ideology that registered on a national level. This was evident in the commonly held belief, to cite one among others, that the general end of the "happiness of the whole" justly subordinated the liberty of a few. I see this principle as in alignment with the archive I explore here. See Larry Tise, *Proslavery: A History of the Defense of Slavery in America, 1701-1840* (Athens: University of Georgia Press, 2004), 32.

<sup>4</sup> Aristotle, *Nicomachean Ethics*, trans. Robert Bartlett and Susan Collins (Chicago; London: University Of Chicago Press, 2012), 26.

<sup>5</sup> *Ibid.*, 27.

“habits and modes of feeling” of a people—gave new play to this Aristotelian configuration between habit and *hexis*. I train our focus on North Carolina as the state had one of the most highly elaborated sets of slavery principles as articulated through common law, in distinction to those slaveholding states that relied on legislation for the development of a slave code.<sup>6</sup>

These principles began to find articulation in the early nineteenth century. In 1817, the North Carolina state legislature passed an act decreeing that the killing of a slave would thenceforth “partake of the same degree of guilt when accompanied with the like circumstances that homicide now does at common law.”<sup>7</sup> Ostensibly, the act was meant to confer legal protection to enslaved men and women. Our investigation begins with an exploration into how courts interpreted this act in light of the communal “habits and conditions” undergirding their conception of the common law.

Three years after the legislative act was passed, a case called *State v. Scott* arose that concerned the killing of an enslaved man named Caleb.<sup>8</sup> A jury had previously convicted a white man surnamed Scott for the murder of Caleb, this being the category of homicide carrying the highest degree of culpability. The North Carolina Supreme Court upheld the jury’s conviction, declaring that the purpose of the legislature’s act

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<sup>6</sup> On this point see Tushnet, *The American Law of Slavery, 1810-1860*.

<sup>7</sup> Paul Finkleman, *Law of Freedom and Bondage: A Casebook* (New York: Oceana Publications, 1986), 201.

<sup>8</sup> *State v. Scott*, 8 N.C. 24 (1820).

was “to give to a slave the character of a human being, and to place him *within the peace* of the state, as far as regards his life” (emphasis in original). The court stated flatly that according to the common law, killing attended by malice is murder, plain and simple. Several years later, in the case of *State v. Hale*, the court revisited *Scott’s* invocation of the public peace, giving it a noticeable twist.<sup>9</sup> *Hale* dealt with the “inhumanly beating” of an enslaved man by a white man.<sup>10</sup> In the opinion of the justices, failing to make such assaults indictable would constitute “an anomaly in the system of police.”

In describing how an assault against an enslaved person would constitute such an anomaly, the court moves through a parade of horrors, all of which could potentially lead to a breached or broken “public peace,” a specter it repeats throughout the opinion like an incantation.<sup>11</sup> For one, there is the potential for property endangerment that attends harm inflicted upon the body of the slave. For another, a lack of legal proscriptions against violence might encourage a corresponding lack of restraint upon the lower class stratum of dissolute whites, given the presumed tendency towards

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<sup>9</sup> *State v. Hale*, 9 N.C. 582 (1823).

<sup>10</sup> The court does not refer to this man by name.

<sup>11</sup> As historian Laura Edwards has shown, the concept of the peace “represented the metaphorical public body, subordinating everyone (in varying ways) within a hierarchical system and emphasizing social order over individual rights.” Laura Edwards, “The Forgotten Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law,” *North Carolina Law Review* 87, no. 3 (March 2009), 862. I thus understand the term as a fundamental expression of police. For further context on the use of the term “peace” in this sense see Edwards’ research into the legal culture of the post-Revolutionary Carolinas: Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009).

class mingling among subordinate ranks. As well, the court expresses the concern that failing to make slave assaults indictable would unleash the violence of the slave-holding class, whose members' provocation in response to having their property injured would potentially lead them to mete out extra-legal forms of retribution. After walking through this litany, the court concludes that "Reason and analogy seem to require that a human being, although the subject of property, should be so far protected as the public might be injured through him."

Let us pause and assess what has happened. In *Scott*, the court had purported to grant enslaved persons humanity by placing their lives within the peace of the state. In other words, it was through incorporation into the public body that slaves were to be considered human beings. By *Hale*, this pronouncement has taken a slightly different form. Here the court states that the slave should be so far protected as "the public might be injured through him," a formulation that draws a distinction between the community harmed and the medium through which this harm is conveyed. Consequently, the court acknowledges the slave as a "human being" through the same rhetorical act that serves to efface him from the political community of the public entirely.

This construction prefigures a double gesture in terms of the juridical articulation of the public vis-à-vis the enslaved that constitutes a simultaneous giving and taking away. Saidiya Hartman has given trenchant voice to the dynamics of this process, by which the law's circumscribed recognition of enslaved persons' humanity was anything

but a correspondingly partial step away from structures of oppression. To the contrary, selective recognition served the paradoxical function of intensifying the effects of subjection.<sup>12</sup> Following this pattern, the *Hale* court brings the category of enslaved people *into* the configuration of the public with the same gesture that serves to indicate that they are not *of* it.<sup>13</sup> As I will expand upon at greater length below, this operation is predicated not upon a racialized invocation of differences in nature, but rather upon an interlocking logic of habit, caste, and feeling that tends to suppress the question of race altogether.

With this in mind, consider the actual outcome of *Hale*. After detailing the many ways in which assaults upon enslaved persons were injurious to the public peace, the court granted the white man guilty of the offence a new trial. While it recognized that slaves must be acknowledged as vehicles through which injuries to the public may be committed, the court asserted that assaults against them nevertheless:

...must be considered with a view to the actual condition of society, and the difference between a white man and a slave...From this difference it arises, that many circumstances which would not constitute a legal provocation for a battery committed by one white man on another, would justify it, if committed on a slave,

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<sup>12</sup> Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997), 80.

<sup>13</sup> I see this structure, which is in some respects distinct to the United States, as generally conforming to the contentions of Orlando Patterson concerning enslavement as a form of social death. Though I do not see the American structure as falling neatly into the category of either the “extrusive” or “intrusive” mode, it does adhere to the formula Patterson borrows from Claude Meillasoux, in which enslavement introduces “the slave into the community of his master,” which in turn entails the “paradox” — the word is important — “of introducing him as a nonbeing.” See Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982), 38.

provided the battery were not excessive... [These] circumstances must be judged of...with a due regard to the habits and feelings of society.

It begins to become clear that what substantiates the peace as a metaphor for the social order is a system of caste understood in relation to a corresponding distribution of the habits and feelings of the community.<sup>14</sup> Appealing to a community understood as such, the court presents the legal principles it generates as simply a reflection of differentiated modes feeling between (black) slaves and white men that stem from differences in social condition. As will become clear, the slave cannot be incorporated into this system of correspondences without losing the attribution of the capacity of feeling. Thus, in reaching the legislature's act by going through the common law conception of the public peace, the courts have reconfigured the object of harm as the public, a simultaneous effacement of the slave whose protection the act had ostensibly intended to ensure. The dynamics of this operation become even more visible in the course of the courts'

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<sup>14</sup> To take another example, compare *Hale* with a comparable formulation in *State v. Tackett*, decided in 1820. *State v. Tackett*, 8 N.C. 210 (1820). Tackett was a white man who killed an enslaved man named Daniel, with whose wife—a free black woman—Tackett had been having an affair. During Tackett's trial, the lower court instructed the jury that, consequent of the 1817 act, the case "was to be determined by the same rules and principles of law as if the deceased had been a white man." As in the case of *Scott*, the jury accordingly found Tackett guilty of murder. In reviewing this case, the court provided a different reading of the legislative act. It stated the legislature did *not* in fact intend to declare that the killing of a slave could only be mitigated by circumstances that would also be considered legal provocation when considering the homicide of a white person. Determining the difference in provocation, the court maintained, was a matter to the discretion of the common law, "a system which adapts itself to the habits, institutions and actual condition of the citizens." The court went on to state that "where slavery prevails, the relation between a white man and a slave differs from that, which subsists between free persons; and every individual in the community feels and understands, that the homicide of a slave may be extenuated by acts, which would not produce a legal provocation if done by a white person."

extended deliberations upon passion—an assessment of feeling required by the determination of provocation.

### **3.3 Caesar**

The question of passion and the capacity to experience it was at the forefront of *State v. Caesar*, decided in 1849.<sup>15</sup> Caesar had been convicted by a jury of murdering a white man consequent to the following circumstances. One evening two white men, surnames Brickhouse and Mizell, had been drinking when they came upon Dick and Caesar—both enslaved men—who were lying on the ground. Brickhouse and Mizell told Dick and Caesar they were patrollers, Brickhouse then taking a piece of board and hitting the black men with it, apparently lightly enough that the two originally mistook the white men to be acting “in sport.” After some brief conversation, a man named Charles—also enslaved—approached the scene. Brickhouse seized Charles and ordered Dick to get a whip, claiming he was going to beat Charles with it. Dick went off a few steps but then stopped, whereupon Brickhouse let go of Charles, grabbed Dick, and began to beat him while Mizell restrained Dick’s hands. Allegedly proclaiming “I can’t stand this,” Caesar went to a fence, grabbed a piece of rail, and struck both Brickhouse and Mizell over the head with it. The white men fell and Charles, Dick, and Caesar ran.

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<sup>15</sup> *State v. Caesar*, 31 N.C. 391 (1849).

Later that night, after both had gone to bed, Brickhouse awoke to see that Mizell had “blood and froth” running out of his nose and mouth. He died several minutes later.

Upon appeal, the state supreme court declared that Caesar had been subject to a state of passion in being witness to the beating of his friend; the majority accordingly overturned the lower court’s finding of murder, holding that Caesar should be granted a new trial. Judge Richmond Pearson, who wrote the decision, concluded from the circumstances that Caesar had responded to a “generous impulse” that accounted for his assault against Brickhouse and Mizell. Such an impulse should be recognized as falling within the ambit of the “feelings and impulses of human nature,” and thus met the legal threshold of provocation. In dissent, Judge Thomas Ruffin declared that slaves lacked the capacity for passion altogether, and that heated emotions accordingly failed to serve as a mitigating explanation for acts of violence committed by slaves against whites.

Pearson and Ruffin, both drawing upon rhetoric established through the trajectory of criminal slave cases that preceded *Caesar*, exposit a parallel set of rationales in arriving at these differing conclusions. What I will attempt to demonstrate in the succeeding analysis is that these diverging assessments of passion are in fact two sides of the same coin. Pearson and Ruffin are in agreement in regards to the contention that slaves “do not and cannot” feel emotions such as arrogance, disgrace, and degradation because such emotions only emerge in relation to the habits that are cultivated by higher

ranking social groups.<sup>16</sup> The difference between the two opinions is that whereas Ruffin insists Caesar's actions cannot be evaluated in terms of affective expression at all, Pearson acknowledges Caesar's passion insofar as it accords with that "principle...which man has in common with the beast." In other words, the human attribute Caesar, as a slave, shares with whites is an attribute not proper to human beings at all. It is, to again borrow a term from Aristotle, not a human principle *unqualifiedly*, and as such it can only be substantiated by reference outside the bounds of humanity.<sup>17</sup>

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<sup>16</sup> This formula is occasionally modified to admit for the instance of degradation being caused in instances of confrontation within the slave group, which does not have the effect of impeding broader pronouncements on emotional capacity.

<sup>17</sup> Note that the revocation of passion effected by these invocations of beastliness results in a racist imaginary that essentially inverts the image of blackness produced by the longstanding history of equating Africans and African descendants with animality. As Winthrop Jordan has shown, the latter association can be traced back to English accounts that correlated the "beastliness" of West Africans with their perceived excessively passionate nature. This correlation was famously reiterated in Thomas Jefferson's *Notes on the State of Virginia*, in which he extolled the more delicate passions of whites in contrast to the animality and "ardent" nature of blacks. See Winthrop Jordan, *White Over Black: American Attitudes toward the Negro, 1550-1812* (Chapel Hill: The University of North Carolina Press, 2012), especially at 33 and 459-460. Other definitive accounts include Reginald Horsman, *Race and Manifest Destiny: Origins of American Racial Anglo-Saxonism* (Cambridge: Harvard University Press, 1981); and George Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* (Middletown, Conn.: Wesleyan, 1987). Fredrickson's research illustrates many instances of the historical coexistence of the association between passion and beastliness, and its inverse in police. To take one example, Fredrickson recounts how Virginian professor Thomas Dew, writing in the 1830s, proffered an apology of slavery that vacillated between privileging habit on the one hand, and relying upon a notion of intrinsic nature tied to color on the other. Hence he could proclaim that the "the blacks have now all the habits and feelings of slaves, the whites have those of masters" (45), in defense of conserving the social hierarchies of slavery, while also asserting that certain behaviors were distinctly racial and had an "inherent and intrinsic cause," separate and apart from habit. Thomas Cobb's *Inquiry into the Law of Negro Slavery* reinscribes this contradictory set of assumptions without giving heed to their inconsistency. Hence, where in one section—as outlined above—he asserts that the slave's passions are reliably stunted thanks to the "habit of subordination," in another he proclaims the lasciviousness of "the negro character," with lust as "his strongest passion." Cobb, *An Inquiry into the Law of*

In what way is Pearson's concession of passion an attribution of humanity if the proper principle upon which this attribution turns is beastliness? And if such a passion can only be substantiated through its relation to beastliness, is this a state that can be considered affective at all? Aristotle, as we shall see, calls this operation metaphor: the designation of certain (brute-like) behaviors as affective only by the application of an alien name that illustrates similarity while at the same time instituting a disjuncture in kind. It is in this sense that the majority's conclusion is of a piece with the dissent, which is to say that both drive a disjuncture between the enslaved and the political community either by equating the passion of the enslaved with a principle beyond the humanity otherwise meant to define that community, or by imputing to enslaved persons the lack of the affective capacity for passion altogether. The articulation and reproduction of this set of correspondences is in turn contingent upon defining the community as a certain distribution of affective disposition.

*State v. Caesar* is an exemplar of this operation, which was repeated, developed, and modified, but remained essentially consistent within the North Carolina criminal slave law cases that preceded it. That Caesar was responsible for Mizell's death was not up for dispute in the case; the operative opposition concerned whether the killing was to be deemed murder or manslaughter, which came down to the determination of whether

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*Negro Slavery in the United States of America*, 40. As with most oppressive structures of perception, then, these internal contradictions seemed to coexist relatively unproblematically. That is, until they didn't.

Caesar had acted out of “malice.” The legal definition informing the court’s assessment held that, by contrast with its nonlegal sense, malice need not flow from a perpetrator’s malicious feelings towards the person killed in particular. It could rather be derived from a determination that the crime was “attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit.”<sup>18</sup> In the case of implied malice, with which the court in *Caesar* was concerned, the instance of malignant spirit could be determined through an assessment of character, but could just as well be inferred from *circumstances* that seemed to indicate a “heart regardless of social duty and fatally bent on mischief.”<sup>19</sup>

While this rather florid definition of malice may seem lacking in terms of descriptive power, its purpose was to demonstrate the gravity of murder by placing it in relation to the importance of the shared bonds and sense of social duty that constitute the basis of community. This served to cast the notion of a “heat of passion” in a dubious light, in the sense that just because someone who has killed may be said to have acted out of passion, it does not follow that he was not also under the influence of a “wicked heart.” *State v. Will* (1834) recalls this principle in deciding upon the case of Will, an enslaved man who fatally stabbed an overseer who had several moments prior

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<sup>18</sup> Sir Michael Foster and Michael Dodson, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry: And of Other Crown Cases: To Which Are Added Discourses Upon a Few Branches of the Crown Law* (London, England, 1792), 256.

<sup>19</sup> *Ibid*, 257.

shot him in the back and ordered another group of enslaved men to pursue him.<sup>20</sup> Finding Will guilty only of manslaughter given the terrifying circumstances, the court nevertheless felt it incumbent to recall that “*passion*, however excited, is not set up as a legal defense, or excuse for a criminal act. To kill a man in a sudden fury is as much a *crime*, as to slay him because of personal malevolence, or of a general hostility to the human family. No one has a *right* to yield to passion....” (emphasis in original). In an even more telling formulation, South Carolina case law emphasized the peace of the community over deference to a supposed right of passion by adapting Matthew Hale’s gloss that a person who kills out of malice is legally considered “an enemy of mankind:” “If without provocation [a perpetrator] let loose his angry passions, which social duty required him to control, and inflicted an angry death blow on an unoffending brother, he exhibits that malevolence of heart which makes him in the language of the law, *hostis humani generis*.”<sup>21</sup> The term is Latin for “enemy of mankind.” Its use in the context of murder and manslaughter bespeaks an equivalence between passion and the state of

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<sup>20</sup> State v. Negro Will, 18 N.C. 121 (1834).

<sup>21</sup> Sir Matthew Hale, William Axton Stokes, and Edward Ingersoll, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, First American Edition (Philadelphia: R.H. Small, 1847), 454. This concept of the enemy of mankind was originally developed in maritime law to describe one who exists outside the scope of legal protection by merit of having committed crimes at sea, and thus beyond the laws of individual nations. As such, the enemy of mankind is open to prosecution by any nation. The term has familiarity in the present primarily for two reasons. The first is its proximity to the concept of *homo sacer*, treated of extensively by Giorgio Agamben. The second is the fact that it has been invoked numerous times by John Yoo, former legal counsel to the George W. Bush administration, as an appropriate category for contemporary terrorism. See for example John Yoo, “Obama, Drones and Thomas Aquinas,” *Wall Street Journal*, June 2012.

being excluded from the legal bounds of humanity. Thus the heritage of this notion of malice defines the political “community of brothers” in negative relation to passion.

Emphasis on maintaining a high bar for provocation reinforced the equation between passion and communal disruption, instating a limit point—albeit a subjective one—into the extenuatory capacity of passion due to the supreme importance of maintaining peace within the community. Differentiating standards for provocation in accordance with “habits and conditions” as a hierarchical distribution of social caste, on the other hand, delinks this association. And specifying these standards, which necessitates the attribution of correspondingly differentiated passions, is precisely what Judge Pearson undertook as he circuitously routed towards the determination that Caesar was guilty only of manslaughter.

Pearson begins by laying out what he proclaims are settled common law principles concerning violence conducted in the context of so-called status relations, i.e., perpetrated by a parent against a child, a tutor against a pupil, or a master against an apprentice. A blow given in these circumstances, he contends, “is less apt to excite passion, than when the parties are two white men ‘free and equal;’ hence, a blow, given to persons filling these relations, is not, under ordinary circumstances, a legal provocation.” In isolating provocation as key in the determination of criminal liability in status relations, Pearson has shifted emphasis from the master’s prerogative qua master to what the law may anticipate in terms of the victim’s affective disposition, telescoping

the issue to turn upon the question of passion. But the implication of passion or the lack thereof as playing an operative role in the legal justification of violence in such relations is specious. That is, admittance for the passion of one abused does not by common law play into the consideration of the power parents and masters have over their wards (here using the term “ward” as a catch-all indicating that original legal class of people under the near-absolute authority of another, including wards, but also children, servants, and apprentices, though not encompassing slaves). The peculiarity of this line of reasoning would have been rendered more explicit had Pearson not failed to mention that genre of status relations involving husband and wife, wherein the doctrine of chastisement afforded the husband the absolute prerogative of “moderate correction.” Thus, the eventual analogy towards which Pearson is working—that between wards and slaves—rests on a prior analogy that goes unacknowledged as such: the creation of a commensurability between wards and free white men through the imputation of affect as a shared and *legally relevant* capacity. From this vantage, passion and the procedure of calculating it can be taken for granted as differentially applicable across the divisions of class (taken in the legal sense). What has consequently disappeared is the suitability of passion to being held up against an uninterrogated standard of the universal “reasonable person.”

Having introduced passion as broadly and positively decisive, Pearson proceeds to an analogy between wards and slaves by reasoning that a blow to the latter is likewise

unapt to incite passion, because from the outset the one struck does not perceive himself an equal to the aggressor. The analogy falls short only in one regard, Pearson insists: whereas the law allows both the master of slaves and the master of wards to inflict blows without holding either indictable, the law does not allow a white man to beat a slave who is not his own property: “In other words, in this last case the blow *is not* a legal provocation, although the party, giving it, *is liable* to indictment; while in the other cases whenever the blow subjects one party to an indictment, it is a legal provocation for the other party” (emphasis in original). What Pearson means to say is that if we look to the class of free white men and to the law of status relations, we see a necessary link between liability and provocation as the anticipation of passion: where there is no provocation, as in the case of master and ward, there is no liability (a quiet fallacy, as detailed above). The operative end-point of a distinction between master/ward and master/slave relations is thus a supposed point of failure that institutes a disjuncture between liability for violence and provocation. The puzzle Pearson has constructed hinges on the question—seemingly particular to slave relations—of how we can have a situation in which an aggressor may be indictable for violence when the presence of provocation cannot be assumed.

It bears remarking that the procession of analogies Pearson has just walked through, though they “fail” in multiple ways, do not in point of fact fail in the manner stated. That is to say, we may assume the court would not imagine itself as facing legal

impediments to indicting a free white male who had beaten another man's child or apprentice. Furthermore, in a more standard move, the court here presumably takes for granted that the question cannot be reduced to the fact that the aggressor is indictable because he has injured another's property, given that this would fall into the realm of civil rather than criminal law. Pearson has effectively honed the question into one of passion as a legally differentiated phenomenon, but he has done so by way of negative imputation. In other words, the affective disposition of the victim has been brought into the scope of legal relevance precisely insofar as it has been foreclosed as existing. Thus, masters may beat wards *not* because it is their prerogative tout court, but because the *feelings* of the victim (their potential for incitement) determine the master's liability, and slaves, like wards, have been habituated out of the experience of having their feelings provoked. The analogy with the (white) ward serves as a way to import the question of feeling into legal construction of social relations, the ward then serving as a proxy through which such passion can be considered legally relevant.

The crucial point to note here is that Pearson's legal reasoning has inducted passion into the very substrate of how the community is to be understood. Or to put this another way, the public has become reconfigured in terms of its structure of feeling. As long as passion maintained an implicit connection to the concept of *hostis humani generis*, it indicated that which existed beyond the legal boundaries of political community. By

contrast, the insinuation of passion into the legal structure means that its absence is what serves to place enslaved persons outside the affective bonds of the community.

The extent of the fusion between habit as constitutive of caste and modes of feeling underpins the very language of justification used by the courts. Consequently, the unsettling of emotion becomes coextensive with the unsettling of a social order based on the distribution of social groups. This inscribes every term of criminal disruption with a double function—one that implicates both an affective and a caste dimension. It is in this way that the public peace that violence disrupts is also and at once the displacement of affective dispositions that have been emplaced by habituation. Thus it follows from what Pearson calls “our habits of association and modes of feeling” that:

a blow inflicted upon a white man carries with it a feeling of degradation, as well as bodily pain, and a sense of injustice; all, or either of which are calculated to excite passion: whereas, a blow inflicted upon a slave is not attended with any feeling of degradation, by reason of his lowly condition, and is only calculated to excite passion from bodily pain and a sense of wrong...

In distinguishing between wrong and injustice, Pearson makes a classic distinction. Wrong—that which the slave feels—is a zero sum game of gain and loss perceived in the form of pleasure and pain. Injustice, on the other hand, signifies the imbalance of proper proportions. This imbalance is what constitutes degradation as something only applicable to particular castes. Thus, for white men, degradation is not simply synonymous with humiliation but is an extrapolation from the state of having been de-

graded. Similarly, to speak of the slave's "lowly condition" is at once to speak what the term refers to in all its technicality—a social position—but also to speak of a state of being. The very term "condition" conjoins social status with a moral state of being. What the courts take for granted as reality is that slaves do not feel degradation because they cannot be "degraded": there is no caste lower than that of slave to which they might ever feel themselves inappropriately pegged. By the same token, *there is no such thing* as degradation without a breach of the proper ordering of the social along caste lines. The double signification of terms that expresses this shuttling back and forth between affective states and caste disposition is a symptom of the ethical system of correspondences whose self-evidence is the object of the court's performance.

Given this tight system of correspondences, Pearson can only come to the conclusion that Caesar acted in response to *justifiable* passion by qualifying it with a gesture that places it beyond the sphere of the public community. Noting that Caesar hit the white men only once and then ran, Pearson analogizes that a "wild beast wounded or in danger will turn upon a man, but he seldom so far forgets his sense of inferiority as to seek combat. Upon this principle, which man has in common with the beast, a slave may, without losing sight of his inferiority, strike a white man, when in danger or suffering wrong...." In other words, making sense of Caesar's actions, which only correspond to the system of relations between caste and affect underlying the peace of the political community if they are reinterpreted as beastly, requires Pearson to reach

outside the idea of humanity as such for a principle that might paradoxically serve to qualify those actions as human.

*State v. Jarrott* (1840) likewise reinforced this correspondence between caste and emotion in an attempt to make sense of, i.e., deny the possibility of a slave's "seeking combat." The circumstances leading up to the case took place over the space of a late-night game of cards. In the course of the evening, there had been an extended period of verbal confrontations during which an enslaved man named Jarrott was alleged to have threatened a white man named Chatham with a large stick. Chatham then pulled a knife on Jarrott and, with a fence rail in his other hand, began to chase him. After an unspecified time following these events, Chatham went towards Jarrott with the knife and the fence rail, apparently reacting to something he had said, and Jarrott responded by hitting Chatham with the large stick and killing him.

While Jarrott was also convicted only of manslaughter, the decision rested upon the fact that the objects with which Chatham threatened him were not "ordinary instruments of correction." As for Jarrott himself, he could not have been provoked according to a traditional understanding of the heat of combat, because the passion that mutual combat incites arises from a presumption of equality and a consequent "horror of personal disgrace." For slaves, wrote Judge William Gaston speaking for the majority, these feelings "do not prevail—they ought not to exist—between those who cannot *combat* with each other, without degradation on the one hand, and arrogance on the

other” (emphasis in original). The precise language of the court here is significant. Gaston does not consider emotional states such as degradation and arrogance on the part of slaves simply abnormal or inappropriate: in fact, they cannot serve as an explanation of behavior at all given their professed non-existence.

This is the alternate expression of the same gesture made by Pearson, one also given voice by Judge Ruffin in his dissent in *Caesar*. It serves to note that Ruffin had several years earlier, in his notorious majority opinion in *State v. Mann*, rejected analogies drawn between slaves and other domestic relations.<sup>22</sup> In *Caesar*, Ruffin’s opinion is not a vast departure from the majority, but rather a different conclusion derived from the same assumption concerning the same system of affective correspondences. Ruffin essentially concludes that if there is an eruption of sentiment that appears to contradict this system, it is in fact not sentiment at all. Citing the distinction elaborated between the “social condition” of the white man and that of the slave, Ruffin states that slaves are simply not “at all sensible to the provocation of an assault from a white man, as an incentive to spill blood.” He continues:

Such being the real state of things, it is a just conclusion of reason, when a slave kills a white man for a battery not likely to kill, maim, or do permanent injury, nor accompanied by unusual cruelty, that the act did not flow from generous and uncontrollable resentment, but from a bad heart—one, intent upon the assertion of an equality, social and personal, with the white, and bent on mortal mischief

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<sup>22</sup> *State v. Mann* was made infamous by Ruffin’s declaration that “the power of the master must be absolute, to render the submission of the slave perfect.” *State v. Mann*, 13 N.C. 263 (1829).

in support of the assertion. It is but the pretence (sic) of a provocation, not usually felt.

Ruffin's invocation of the bad heart is on the one hand merely a repetition of what has variously been reproduced throughout the decision as the "black heart," "the diabolical heart," and the "heart of a murderer" by the majority. But it is a repetition with a difference. If the wicked heart of the traditional common law definition of malice links affect with a passion that exists beyond the limits of political community, the affective community of police that is Ruffin's point of departure necessitates that communal disruption implicates the "bad heart" as an expression of passion that exists beyond the limits of community by virtue of its not being passion at all. In short, Ruffin's "bad heart" indicates not the eruption of passion but rather its absence. Hence the somewhat contradictory appearance of the notion of pretense, in terms of which Ruffin defines a slave's (and by implication, Caesar's) actions. A "provocation not usually felt" by all accounts seems to indicate a provocation *felt* but nevertheless inconsiderable as a legal threshold by merit of its presumed atypicality. This formula of passions that are experienced but not for that reason justifiable is implicit in the Hale's definition of first-degree murder as "letting loose one's angry passions": a lethal lack of self-restraint that nevertheless fails to serve as mitigating for all the fact of its being a heat of passion. But this is not Ruffin's final conclusion. Rather, proceeding from the idea that caste generates a one-to-one correspondence between habituation and emotion, the bad heart betokens not simply abnormal behavior, but pretense: the false profession of emotion.

This is the consequence of a circular relationship locking habit, affect, and caste into a hierarchical entailment. This system is a norm clearly visible in North Carolina by the late 1840s, but its roots extend farther back into the history of the state. It is simply the upshot of the type of ethical public that is at its roots fundamentally Aristotelian.

### **3.4 The Metaphor of *Akrasia***

I noted previously that in Aristotle's discussion of virtue, character—defined in terms of affective disposition—depends so fully upon habit (*ethos*) that in terms of the formation of the political community, habituation could be said to make “no small difference” but rather “the whole difference.” But virtue and its antipode vice are not the only traits with which Aristotle is concerned in his exploration into *ēthikē*. In addition to the moral virtues and vices, Aristotle engages in a lengthy discussion of their lesser cousins, restraint and lack of self-restraint, as well as the extremes of character, divinity and brutishness. Whereas the habit of virtue leads to a disposition in which the proper emotion is experienced in proper measure relative to a given circumstance, self-restraint and lack of self-restraint (*enkrateia* and *akrasia*, respectively) address a different kind of disposition in relation to passion, one in which the pull towards disproportionate or inappropriate passions is experienced but subsequently either resisted or indulged by merit of a *hexis* defined by its capacity for restraint. In describing the extremes of character, Aristotle notes that to be divine is to be other than human, thus in the case of divinity “it would be especially fitting to speak of the virtue that is beyond us, a certain

heroic and divine virtue," a virtuousness befitting of the gods. This is perhaps why Aristotle does not bother to give an account of what divine virtuousness might look like. Brutishness is extremity in equal measure: a term that derives from the same root used to speak of beasts, brute animals. Thus, "if (as people assert) human beings become gods through an excess of virtue, it is clear that something of this sort would be the characteristic opposite of brutishness. For just as a brute animal has neither vice nor virtue, so also a god does not either..."<sup>23</sup>

The balance of this dichotomy between divinity and brutishness is skewed, however, by the fact that while the former appears to exceed the limits of humanity — exemplified only in the realm of myth and deification — the latter does not. This places the trait of brutishness in a paradoxical position: it is an extremity of character beyond the limits of humanity that exists nevertheless within the scope of human experience. And indeed, Aristotle does not hesitate to go into detail defining what composes a "brutish *hexis*," doing so in relation to the experience of pleasure. In this sense, to be brutish means to take pleasure in things beyond the pale, cannibalism being Aristotle's illustration of choice. It is the extremity of brutishness — its proximity to madness, disease, and brute animality — that also places it beyond the diametrical balance of passions that is definitive of character. Thus, in "every instance of *excessive* foolishness,

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<sup>23</sup> *The Nichomachean Ethics*, VII.1.1145a15-30

cowardice, licentiousness, and harshness, some people are marked by brutishness, others by disease."<sup>24</sup> This effort to define the boundaries of what exceeds the human inversely institutes a strange equivalency concerning what it means to exist *within* the realm of human affect, something along the lines of being human "within reason:" existing within a certain spectrum of affective experience. As such, to indulge or restrain from the impulse towards excessive foolishness, cowardice, licentiousness, etc. cannot be said to flow from a trait of character properly conceived. What it might mean to be affectively oriented in an excessive way, to have a "brutish *hexis*" must in this sense be *qualified*. Thus, the possession of such a condition is tantamount to the possession of an affective disposition that in the last instance can only be considered metaphorical: "It is clear then that lack of self-restraint and self-restraint are concerned only with matters to which licentiousness and moderation pertain; and that lack of self-restraint pertaining to other things [i.e., brutishness and disease] is another form of it, which is spoken of as lack of self-restraint only metaphorically and not unqualifiedly."<sup>25</sup> In other words, a brutish *hexis* is not an affective disposition proper, but only so "by way of a certain similarity," or as Aristotle speaks elsewhere of metaphor, by the "application of an alien name."<sup>26</sup> Which is to say, it is not an affective disposition at all.

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<sup>24</sup> Ibid., VII.5.1149a5-1149a10. Emphasis added.

<sup>25</sup> Ibid., VII.5.1149a20-1149a25.

<sup>26</sup> *The Poetics*, 1457b.

To state that an affective disposition can only be reached through metaphor means that it does not fit within the system of correspondences that define the political community. This is what gives brutishness its paradoxical nature: it is at once human and non-human. Put another way, if police—*politeia*—is the implementation of political community as a self-evident correspondence between affect and caste distribution, affective states and conditions that exceed the terms of this distribution can only be accounted for as at once beyond both the terms of habit, and the terms of affective being qua affect.

This structure sheds light on the similarity between the gestures of the dissent and majority in *Caesar* mentioned at the outset. The ethical foundation of the polis necessitates this system of correspondence that extrudes supposedly anomalous sentiment either as tantamount to beastliness, or as simply not sentiment at all. It also accounts for a certain kind of haunting found in Aristotle's construction of habituation, and that will in turn lead us to a hypothesis concerning the reflexive conjunction I mentioned previously and tracked through the trajectory of North Carolina criminal slave law. This haunting emerges in a telling moment of the *Ethics*. Extrapolating from the etymology linking habit and character (*ethos* and *ēthos*), Aristotle surmises that "none of the moral virtues are present in us by nature, since nothing that exists by nature is habituated to be other than it is." This is a strange construction, given that it seems to emphasize the fixity of "nature" when Aristotle's objective is allegedly make character

the result of an artificial and thus flexible process of habituation. Aristotle moves on to illustrate this fixity through example: a stone is by nature borne downwards, and thus it could never become habituated to being borne upwards, not even if one were to throw it upwards ten thousand times, “nor could anything else that is naturally one way be habituated to be another.” Despite the seeming paradox inherent in his approach, what Aristotle intends by setting up this dichotomy between nature and character becomes clearer when he moves to a comparison with the physical capacities with which we are naturally endowed: “in the case of those things present in us by nature, we are first provided with the capacities associated with them, then later on display the activities, something that is in fact clear in the case of sense perceptions.” We do not, for example, have the sense perception of sight as the result of “seeing many times,” but rather we exercise that capacity because we have it. This is supposedly what makes nature different from character. Through this line of argument Aristotle arrives at the conclusion that “neither by nature nor contrary to nature are the virtues present; they are instead present in us who are of such a nature as to receive them, and who are completed through habit.”<sup>27</sup>

The contrast between character as formed through habit and “nature” as fixed in the form of physiological attributes—of parts in the larger whole of the human being—

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<sup>27</sup> *The Nichomachean Ethics*, II.2.1103a15-35

makes a certain kind of sense. It does not hold, however, to conclude that in speaking of “nature” this is what Aristotle has been speaking of all along. For by this point, “nature” has suddenly and enigmatically split to assume two different forms. In its second appearance, interpolated into the discourse on sense capacity, it serves to modify an “us” who in its totality is defined as having the necessary conditions for the development of character, or by implication, the lack of those conditions. We could substantiate this second nature by reference back to the *Politics*, where Aristotle makes a comparable distinction in reference to moral virtue when he states that men become virtuous on account of three things: nature, habit, and reason. Elaborating upon the first, he states that “one must first develop naturally as a human being and not some one of the other animals, and so also be of a certain quality of body and soul.”<sup>28</sup> In other words, the condition of body and soul that admits of virtue does so thanks to a human nature, by contrast with an animal nature. If we were to understand moral virtue as given in the *Ethics* in this light, nature in the total sense that provides for a certain kind of *hexis* would simply turn upon this distinction between human and animal. But as it turns out, this distinction is not as clean as it seems, given that the beast is also a trait that exists within—while at the same time being excluded from—the scope of human character.

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<sup>28</sup> *The Politics* VII.7.1332a40

The persistent interruption of this ill-defined and paradoxical presence of that which exists beyond the tight, ascending correlation between habit, affect, caste, and social order is what haunts otherwise definitive statements of habituation in the North Carolina courts. It is this haunting that frustrates the work of habit, which is otherwise tasked with making “the whole difference” in the construction of the ethical public. It becomes visible in moments when eruptions of sentiment, expressed through violence in the instance of criminal slave law, do not seem to accord with the system of affective correspondence but whose existence must nevertheless be accounted for by the courts. In the case of *Caesar* this interruption occurs in a telling moment. The rationale behind both the majority and the dissent relies upon the supposed self-evidence of the same system of correspondences outlined in Aristotle, an assumption expressed in Pearson’s assertion that “the only incentive to passion [is] a sense of degradation, which a slave is not allowed to feel.” It is made clear from alternate contextual usages that in asserting a slave is not allowed to feel degradation, Pearson means to convey that courts do not “recognize it to be the case” that a slave feels degradation, much as he might similarly quip they “allow” that a beast feels pain but not something like humiliation. On the other hand, it would be a mistake to dismiss a second and more common sense the term simultaneously evokes, which is to give permission. But this means that contradicting presumptions underlie the respective meanings encased within the single term, that is, permitting versus declaring to be so. In the first sense, to say a slave is not allowed to

feel degradation concedes by implication his capacity to do so, insofar as the exercise of that capacity must be explicitly proscribed. In the latter sense—the sense intended by the court—to say the same amounts to a preemptive foreclosure of capacity: the purpose of such a statement is to make manifest by refutation what is implicitly conceded in the first sense.

In this way the court inadvertently raises the specter of an implicit assumption about capacity, rendering unstable the otherwise absolute linkage between degradation and habituation. This indeterminacy is not just incidental to Pearson's particular phrasing: it is further brought out in the persistent reflexivity that pervades the court's attempt to match habituation with "modes of feeling," and thus with communal order, without the evidence of a remainder. This tendency extends from *Hale* (1823), wherein the court proclaimed that the "the instinct of a slave may be, and generally is, turned into subserviency to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission," through *Jarrott* (1840)—in which Judge Gaston parenthetically remarks in reference to a slave that his passions "are, or ought to be tamed down to his lowly condition,"—and on up to *Caesar* (1849). In *Caesar* this doubling back is not just expressed by Pearson, who states that a provocation that excites the passions of a white man "would not and ought not to produce this effect,

when given by a white man to a slave,” but also by Ruffin, who likewise replicates Gaston’s remark concerning what a slave’s passions “ought to be and are.”<sup>29</sup>

These rhetorical stutter steps bring out the double-sided nature of police as the ethical community. They betray the fact that the ordered system of passion subtending the courts’ projection of the public relies upon a certain self-evidence at the same time that its prescriptive—and hence artificial—nature is alternately repressed and conceded.

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<sup>29</sup> Mark Tushnet treats extensively of the North Carolina cases I have analyzed here in Tushnet, *The American Law of Slavery, 1810-1860*. I find Tushnet’s work in this area extremely edifying and indeed path breaking—I am sorry that there are not more works like it that assume an internal perspective of laws regarding American slavery in order to bring them within the compass of cultural analysis. Tushnet’s is a Marxist perspective that follows the same basic conjectures as Eugene Genovese’s work, namely, that in the Old South there was a liberal-bourgeois system of capitalism existing in fundamental contradiction with the organicist, patriarchal structure of slavery. For Tushnet, the legal system gave body to this essentially liberalist framework. Hence, bourgeois law needed to accommodate interest while also making room for a totalizing social structure that could not divide and remit a portion of its authority the way that liberal law requires in its “world premised on partial relationships” (33). The very interference of legal rules and regulations into master-slave relations contradicted the “total relationship” upon which slavery was meant to function. The laws of slavery reproduced this contradiction through an operative separation of law from sentiment. Slave law evidenced the labor of working through a contradiction that it could never fully subsume: it attempted to insert the sentiment-based, patriarchal relations of slave society into a liberal-bourgeois apparatus of law in such a way that did not break up its fundamental structure. Hence “...there was a fundamental contradiction between the idea of a law of slavery and a social structure that provided the basis for the idea that slave relationships should regulated by sentiment, not law” (230).

What Tushnet describes is exactly analogous to theories of the public/private divide construed in terms of state-civil society/intimacy and resulting in the extrusion of familial relations from the liberal-legal domain. I don’t think this is wrong, in fact I find it highly illuminating. In having surveyed the present analysis, however, I expect the reader will note that the conclusions I have come to concerning the common law structure and the way in which it expresses and accommodates its subtending social structure are almost completely the opposite of Tushnet’s. To me it seems that the common law itself structurally accommodated and even fortified rather than contradicted the social forms it translated and codified. In this sense, the mantra of habits and passions parallels and conveys a differentiated system of feeling that is part and parcel of a holistic communal structure. This is fundamentally different from the assertion that “the underlying structure of slave law required that it be no law at all, but only regulation by sentiment” (121), and that the judges most representative of the “logic” of slavery were the ones, like Ruffin, who denied their authority to regulate (28). A more recent work devoted entirely to this latter contention is Mark Tushnet, *Slave Law in the American South: State v. Mann in History and Literature* (Lawrence, KS: University Press of Kansas, 2003).

Evident within this trajectory of criminal law cases, and exemplified in the twists and turns in reasoning and rhetoric of *State v. Caesar*, is the continual articulation—rendered in the form of a discovery or simply an explication—of what feeling is and is not, of who has it, and to what degree. Actions on the part of enslaved persons that might otherwise imply discordant expressions of affect are thus not simply considered inappropriate or even abnormal expressions of emotion, as such an acknowledgment of incongruity would in itself compromise the performance of self-evidence. Such actions instead required either substantiation through reference to a commonality that only exists beyond the bounds of the political community, or a translation out of the terms of affect, and thus away from states of emotion that *should* have been the necessary realization of habit. That these proclamations are at once prescriptive—that what is at stake in the maintenance of order is that the disposition of a slave *may, should, and ought* to correspond to the social stratification of that order—haunts the contention that the community reproduces itself through the sedimentation of habit.

### **3.5 On Artifice, Force, and Feeling**

Before concluding this study, I am going to shift our focus to a small episode in an infamous antebellum treatise extolling the merits of slavery. In *Cannibals All!*, published in 1857, Virginian George Fitzhugh conveys a scene of Southern tranquility supposedly recounted by a certain Reverend Adams. In Fitzhugh's retelling, the Reverend had visited Charleston during a "public occasion" and was "struck with the

good order and absence of all dissipation” surrounding the event. When he asked the residents: where was their mob? he was told they were at work. At this moment the Reverend immediately perceived, Fitzhugh tells us, that slavery “is an indispensable police institution.”<sup>30</sup> We are given to conclude that this police institution—what Fitzhugh elsewhere refers to as a “police system”<sup>31</sup>—is responsible for the phenomenon of public order.

Contemporary readers who remark this mention of slavery as a police institution tend to understand it as Fitzhugh’s admission of naked force, much as Ruffin made clear in his pronouncement of the master’s absolute power.<sup>32</sup> It is this, but as the preceding analysis should foretell, it is at once something else. For Fitzhugh is also rightly considered a paradigmatic thinker of the organic society. This means his conception of slavery as a social system has a bifurcated structure, that is, we can see a distinction in Fitzhugh between the ethical community on the one hand, and the idea of law as a force of artifice on the other. *Historically*, the latter idea had long been thinkable; *contextually*, it

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<sup>30</sup> George Fitzhugh, *Cannibals All! Or, Slaves without Masters*, ed. C. Vann Woodward (Cambridge, Massachusetts: Belknap Press, 1960), 66.

<sup>31</sup> *Ibid.*, 29.

<sup>32</sup> This interpretation is perhaps partially due to the phrase’s misleading evocation of the modern notion of the “police state” and totalitarianism. In his study of nineteenth-century literature, for example, Kerry Larson places the reference on one side of a “fundamental dualism” in Fitzhugh, wherein the other side of affection, socialism, and welfare. Kerry Larson, *Imagining Equality in Nineteenth-Century American Literature* (New York: Cambridge University Press, 2009), 50-51. Eugene Genovese reads the phrase as indicating the application of force. See Eugene Genovese, *The World the Slaveholders Made: Two Essays in Interpretation* (Middletown, Conn: Wesleyan, 1988), 189. For Ruffin’s opinion in *State v. Mann*, see above, note 22.

is not something we see at play in the North Carolina court opinions. In Fitzhugh, the distinction is made only insofar as it then collapses back in upon itself. Hence, if the courts posit a circularly reinforcing relationship between habit, caste, and affect, in Fitzhugh these concepts both lose their essential relationship to one another, and in effect lose their capacity to designate a distinct form of social ordering. In other words, I believe that in Fitzhugh we can see the initial traces of how police begins to lose its meaning.

My approach to demonstrating this will be to focus on the distinct philosophies of law that thread through Fitzhugh's thought. Fitzhugh was notably a civil law practitioner (albeit an unsuccessful one) and, for a brief time following the Civil War, an associate judge for the Freedmen's Bureau.<sup>33</sup> His writings come to us not in the form of court opinions, however, but as pamphlets, articles, and treatises intended for popular audiences. Perhaps for it is for this reason that the extent to which his formulations are based on legal paradigms remains underappreciated by non-legal commentators. As a tool for deciphering this basis I will draw upon Walter Benjamin's famous philosophical investigation into the relationship between law and force.

Benjamin's study goes by the title "Critique of Violence," violence being the approximate English counterpart of the German *Gewalt*. *Gewalt*, however, carries an

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<sup>33</sup> For this and other biographical information on Fitzhugh see Harvey Wish, *George Fitzhugh: Propagandist of the Old South* (Gloucester, Mass.: Peter Smith Publisher, Inc., 1990).

indeterminacy lost in the English translation, given its double signification of violence as both simple destruction, and as legitimated force. For this reason, as Etienne Balibar has noted, *Gewalt* “contains an intrinsic ambiguity: it refers, at the same time, to the negation of law or justice and to their realisation or the assumption of responsibility for them by an institution (generally the state).” Because of this essential ambiguity, we should keep in mind that “force” as *Gewalt* always signals the existence of a “unity of opposites”.<sup>34</sup>

This relationship between institutionalized force—or, law—and violence proper is what Benjamin takes up in his critique, holding that one cannot be understood without reference to the other. Within a system of legal order, Benjamin contends that this relationship inevitably assumes the form of a dynamic between means and ends, which he finds respectively expounded in the twin theories of natural versus positive law. For the former, “violence [force] is a product of nature, as it were a raw material, the use of which is in no way problematical unless force is misused for unjust ends.”<sup>35</sup> This is why Benjamin calls natural law a form of “law-making” force: it instantiates an order through violence, and the constitution of the order retrospectively excuses the violence inherent in the means that created it. In this way, “natural law can judge all evolving law only in criticizing its ends,” meaning it poses the question: have the means

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<sup>34</sup> Etienne Balibar, “Violence,” *Historical Materialism* 17 (2009), 101.

<sup>35</sup> Walter Benjamin, “Critique of Violence,” in *Walter Benjamin: Selected Writings, Volume 1: 1913-1926*, ed. Marcus Bullock and Michael Jennings (Cambridge, Mass.: Belknap Press, 2004), 236-237.

realized a naturally ordained order? If the terms of the question are satisfied, the means are just. When viewed as “natural,” then, law is about the origin of order and the perception of force as a “natural datum.”<sup>36</sup>

Positive law, on the other hand, attempts “to ‘guarantee’ the justness of the ends through justification of the means.”<sup>37</sup> Once there is already an order in place, the use of violence becomes justified insofar as it is geared towards the maintenance of that order. In other words, the means, however violent, have already been sanctioned as legal, and thus are just insofar as they serve the end of maintaining legality. In this sense, positive law is “law-preserving,” and it perceives violence as “historical.”

As Derrida has shown in his commentary on the “Critique of Violence,” despite Benjamin’s attempt to keep positive and natural law conceptually distinct, they have a tendency to collapse back in on one another. In this way, Benjamin’s two laws are paradigmatic of the relationship of iterability, meaning that “there can be no rigorous opposition between positioning [i.e., the act of positing] and conservation, only...a *diffirantielle* contamination between the two, with all the paradoxes that this may lead to.”<sup>38</sup> Benjamin slips into acknowledging this fact when he cites the instances of the

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<sup>36</sup> Ibid, 237.

<sup>37</sup> Ibid, 237.

<sup>38</sup> Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority,’” *Cardozo Law Review* 11, no. 5–6 (July 1990), 997.

police brutality, with its “spectral mixture”<sup>39</sup> of two forms of violence, and capital punishment.<sup>40</sup> Where the death penalty is supposedly in service the preservation of the extant order, in its execution “the origins of law jut manifestly and fearsomely into existence,”<sup>41</sup> that is, its origin as an order-establishing form of violence.

The same acknowledgment also comes to the fore, though less spectacularly, in Benjamin’s discussion of legal contract. Underpinning every official contract, he notes, is each party’s right to invoke the force of the state in order to compel compliance if the other party breaches its terms. In this sense, contract implies the penumbral existence of potential violence, but it is also always “pointing towards” an original violence, insofar as the monopoly of force invoked would have historically required violence for its constitution.<sup>42</sup> Thus the idea that an original force haunts a seemingly non-violent institution in the form of a spectral presence of force indicates the mutual contamination of these previously distinct frameworks of violence. For Derrida, mutual contamination in the form of iterability is its own “law,” and as such “is not a modern phenomenon” in

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<sup>39</sup> Benjamin, “Critique of Violence, 242”

<sup>40</sup> Christopher Tomlins interprets Benjamin’s use of “police” in this instance as interchangeable with a notion that overlaps with my definition of the term. Though I find Tomlins’ essay illuminating, I am not myself convinced that the two uses are comparable. See Christopher Tomlins, “To Improve the State and Condition of Man: The Power to Police and the History of American Governance,” *Buffalo Law Review* 53 (October 2005).

<sup>41</sup> Benjamin, “Critique of Violence, 242”

<sup>42</sup> *Ibid.*, 245. This interpretation of contract appears to be influenced by John Austin’s famous—and not particularly well-regarded—command theory of law, which holds that law is a command backed by a threat to exercise force in compelling its compliance.

the way that Benjamin's text tends to present it.<sup>43</sup> I believe it is a modern phenomenon, at least, it is modern in its perspective. Writing at the same time Benjamin's critique was published, Robert Hale was arriving at strikingly similar formulations, albeit constructed through the perspective of economics, a development I will come to in the next chapter.

In his own way, Fitzhugh anticipates this formal collapse. Despite being pegged as a thinker of the organic society, he stresses a similarly strict separation between two ideas of law and two distinct philosophies of social order that also, in the course of their explication, seem to lose this very distinction. In Fitzhugh's treatises, the lineages of natural and positive law are reflected in the distinction between "government" and "law," or what he at several points more suggestively refers to as "mere law."<sup>44</sup> The split embodies the conflict between a mode of deep regulation geared towards the benefit of the general welfare on the one hand, and the formalizing tendencies of the rule of law and constitutionalism on the other. Fitzhugh is not vague on where he stands: "THERE IS TOO MUCH OF LAW AND TOO LITTLE OF GOVERNMENT IN THIS WORLD."<sup>45</sup> The concept of government here is not merely regulatory, however: it is grounded in an

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<sup>43</sup> Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" 1009.

<sup>44</sup> Fitzhugh, *Cannibals All! Or, Slaves without Masters*, 80.

<sup>45</sup> *Ibid*, 249. Emphasis in original.

affective understanding of order. This is because government as a form of force models the public order after that “first and most natural” social form, the family.<sup>46</sup>

Fitzhugh’s notion of government reflects and extends the family model insofar as it constitutes a form of authority that adapts itself to the needs and conditions of those subjected to it. In “family government,” the relations “between parent or master and his family subjects are too various, minute and delicate, to be arranged, defined, and enforced by law.”<sup>47</sup> In like fashion, so should political rule “accommodate the amount and character of government control to the wants, intelligence, and moral capacities of the nations or individuals to be governed.”<sup>48</sup> Hence slavery is the ideal form of government, because in contrast with the rule of law, the “kind of slavery is adapted to the men enslaved.”<sup>49</sup> As the family was hierarchically organized according to the differential needs and capacities of the child, the mother, and the patriarch, so in slavery did the “degree of government must depend on the moral and intellectual condition of those to be governed.”<sup>50</sup> In this way, we see that Fitzhugh is of a piece with the North

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<sup>46</sup> Ibid, 193.

<sup>47</sup> Fitzhugh, *Sociology for the South*, 105.

<sup>48</sup> Ibid., 82-83.

<sup>49</sup> Fitzhugh, *Sociology for the South*, 86.

<sup>50</sup> Fitzhugh, *Cannibals All! Or, Slaves without Masters*, 77. For all this, it bears remarking that the family Fitzhugh ends up defending is in many regards essentially bourgeois in its structure. This is because the family Fitzhugh envisions takes on its form vis-à-vis the image of an external sphere, imagined not as an extension of that form but as its complement. Note that Fitzhugh’s sentimental depiction is the nuclear family through and through: “It is pleasing...to turn from the world of political economy, in which ‘might makes right,’ and strength of mind and of body are employed to oppress and exact from the weak, to that other and better, and far more numerous world, in which weakness rules, clad in the armor of affection and

Carolina judges, insofar as their implementation of a differentiated principle of provocation also relied on the notion of graduated moral conditions.

A second attribute government borrows from the family in Fitzhugh's view is that it generates bonds of sentimental attachment. This is a crucial part of what makes government an organic phenomenon that mere law is constitutively unable to reproduce. Hence "love for others" is the "organic law" of Southern society because the "institution of slavery gives full development and full play to the affections"<sup>51</sup> The North, by contrast ruled by the law of liberty (which does not recommend it as far as Fitzhugh is concerned), implemented the relations of self-interest exemplified in classical political economy. In Fitzhugh's telling then, only hierarchical reciprocity—in distinction to equality—could facilitate sociality by generating affective forms of relation insofar as reciprocity supposedly gave rise to a sense of duty through affection. "A state of dependence," wrote Fitzhugh, "is the only condition in which reciprocal affection can exist among human beings."<sup>52</sup> This made slavery a paragon of government insofar as it "identifie[d] the interests of rich and poor, master and slave, and [begot] domestic

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benevolence. It is delightful to retire from the outer world, with its competitions, rivalries, envyings, jealousies, and selfish war of the wits, to the bosom of the family..." Ibid, 204. In brief, Fitzhugh's family scene is a haven from the heartless world. Genovese arrives at a similar conclusion in noting that Fitzhugh's family continues to rely upon the prerogative of a master whose authority implicitly depends upon an external source of reinforcement, i.e., state sanction. Genovese, *The World the Slaveholders Made*, 198-200.

<sup>51</sup> Fitzhugh, *Sociology for the South*, 248.

<sup>52</sup> George Fitzhugh, *Sociology for the South: Or the Failure of Free Society* (London, England: Forgotten Books, 2012), 246.

affection on the one side, and loyalty and respect on the other.”<sup>53</sup> The fact that members of the Southern social body were organically “tied to each other by invisible chords of sympathy,” was the natural consequence of the fact that the social relations of Southern political community mirrored and follow upon the primary organic hierarchies of the family.<sup>54</sup>

The way in which he constructs a link between the hierarchies of the family and the hierarchies of government would make it appear that sentiment is an inseparable element within Fitzhugh’s depiction of force. This idea of a co-constitutive relationship between affection and force is precisely what Hartman has labeled the pastoral.<sup>55</sup>

Perceived through the mode of the pastoral, slavery becomes an organic relationship capable of reconciling sentiment with “brute force,” wherein the absolute despotism of the master over the enslaved is softened by the affective reciprocity it supposedly instills.<sup>56</sup> For Eugene Genovese, the association Fitzhugh posited between slavery as a form of government and the family relied on showing that “despotic power, when conditioned by ties of affection and a sense of responsibility, need not be feared.”<sup>57</sup> These

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<sup>53</sup> Ibid., 43.

<sup>54</sup> George Fitzhugh, “Southern Thought,” in *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860*, ed. Drew Gilpin Faust (Baton Rouge: Louisiana State University Press, 1981), 293.

<sup>55</sup> Hartman, *Scenes of Subjection*, 89-90.

<sup>56</sup> Ibid., 52-53.

<sup>57</sup> Genovese, *The World the Slaveholders Made*, 196.

readings, which posit a dynamic of “reconciliation” and contingent “conditioning” between force and affection, make an inference which I believe to be correct but which neither emphasizes.<sup>58</sup> They imply that Fitzhugh presents an image of force in which the element of sentiment is secondary, contingent, and in fact nonessential. That is, to say that force *can be* attended by sentiment constitutes an entirely different claim from one that posits force as necessarily embedded within an affective chain of meaning.

The result is that for all its organicism, government for Fitzhugh is a thing of artifice. Hence he describes slavery, which supposedly realizes the social form of the family as its natural end, as the “inside necessity” that enables the perpetuation of “artificial social arrangements.”<sup>59</sup> For Fitzhugh then, all “government proceeds *ab extra*,” that is, from outside a social order and acting upon it rather than emergent from within it. The South—supposedly governed by the organic “law of love,”—is yet also “governed by the necessity of keeping its negroes in order.” In other words, Fitzhugh tends to collapse the distinction between law and government that underpins his defense of slavery in the first place:

Physical force, not moral suasion, governs the world. The negro sees the driver’s lash, becomes accustomed to obedient cheerful industry, and is not aware that the lash is the force that impels him. The free citizen fulfills *con amore*, his round of social, political, and domestic duties, and never dreams that the Law, with its

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<sup>58</sup> I should also note that these two descriptions are similar, indeed identical, because Hartman sees Genovese as complicit in perpetuating the conception of slavery he describes.

<sup>59</sup> Fitzhugh, *Cannibals All! Or, Slaves without Masters*, 133, 248.

finer and jails, penitentiaries and halts, or Public Opinion, with its ostracism, its mobs, and its tar and feathers, help to keep him revolving in his orbit.<sup>60</sup>

Like Benjamin, Fitzhugh approaches the question of force — ambiguously both naked violence and institutional violence — from the perspective of means. Here, however, we see that the question of habituation — accustomation to obedience and cheer — is at stake. And by placing the preservative force of mere law on an equivalent place with what he has been calling government, Fitzhugh effectively undermines the idea of affect as the realization of a natural order. Law as preservation of an established order is no less a form force for its having come into being after the fact, and government likewise takes on the character of mere physical force for all its realization of supposedly natural social forms. We are left with a fundamental indistinction between the natural force that establishes order, and the rule of law that works to preserve it.

This brings me to the quality in Fitzhugh's work that has sustained him as a figure of interest in the history of Southern pro-slavery literature, namely that his entire defense of slavery was intended to vindicate the institution "in the abstract." Fitzhugh's challenge to his contemporaries was that slavery should be delinked from its racialized manifestation in the Southern United States. Comparing the situation of persons enslaved in the South against reports of the working conditions in industrial regions such as the North and Great Britain, Fitzhugh argued for the benefit of slavery as a

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<sup>60</sup> Ibid., 249.

generalized, i.e. abstract, system of social relations. But the fundamental paradox in Fitzhugh stems from the contradiction between his allegiance to slavery in the abstract and his claim that government is superior to law precisely because it accommodates particularity.<sup>61</sup> One way he tries to reconcile the two is by attempting to balance the distinct forms of law and government such that they might correspond to two different social groups: white, property-owning males on the one side, and essentially everyone else on the other:

To protect the weak, we must first enslave them, and this slavery must be either political and legal, or social; the latter, including the condition of wives, apprentices, inmates of poor houses, idiots, lunatics, children, sailors, soldiers, and domestic slaves. Those latter classes cannot be governed, and also protected by mere law, and require masters of some kind, whose will and discretion shall stand as a law to them, who shall be entitled to their labor, and bound to provide for them.<sup>62</sup>

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<sup>61</sup> I am attempting to account for this contradiction by approaching it through the perspective of law, but Fitzhugh is a notoriously slippery figure. I also find Genovese's traditional Marxist account very compelling, and not necessarily at odds with my approach. For Genovese, Fitzhugh represented a set of underlying contradictions that antebellum Southern society could not reconcile. On the one hand it was fully embedded in both a national and global capitalist economic system, with its attendant liberal and possessive individualist social relations. Against this, the South presented a countervailing worldview grounded in a holistic and patriarchal conception of social relations. The only thing that could have rendered this conception pure and self-consistent would have been the (impossible) development of a corresponding economic order that could perfect slavery as a system of class rule. But the racialized legacy of American slavery prevented the ideological closure of this conception and in so doing, prevented the South from even being able to mount this challenge. The racism that constrained American slavery to a particularized mode of subjection inhibited the abstraction of slavery into a full-blown economic system — one whose implementation could be expanded beyond the categories of race. In Genovese's view, Fitzhugh gave expression to this contradiction insofar as he presented slavery as both particularizing and abstract. See Genovese, *The World the Slaveholders Made*.

<sup>62</sup> Fitzhugh, "Southern Thought," 293.

Whereas legal slavery may have distinguished the race-based institution of the South, Fitzhugh holds that this form should not be considered different in kind from the social and political slavery that adapts itself to other “weak” members of society. The weak are differentiated from free property-holders (note that “inmates of poor houses” and people who must sell their labor are also not fit for the rule of law) by their incapacity to be governed by law, by the fact that their condition is complemented by the solicitous duty of reciprocity, a complementarity that cannot be inculcated by the formal regulations of law. Yet, while the legal and the social may distinguish between different forms of slavery, what loses distinction is the very condition of government itself. To say a sailor or a soldier, for example, suffers a condition of weakness is to define the term through reference to social station, while so-called idiots or lunatics, and—we may assume—women, are weak by merit of their inferior moral and intellectual capacity. In other words, they are natural subjects of government thanks to their conditions of being.

This is an equivocation concerning what and who defines the proper subject of slavery that Fitzhugh makes routinely. And just as Fitzhugh’s depiction of force indicated a collapse between law as order-making and law as order-preserving, so this equivocation results in a parallel collapse between natural forms of government and the positive force of the rule of law. Notice how, in a different text, Fitzhugh reiterates the assertion made above almost exactly, but with the notable difference that he ushers the master in under the umbrella of those fit for the government of slavery:

Wives and apprentices are slaves; not in theory only, but often in fact. Children are slaves to their parents, guardians and teacher. Imprisoned culprits are slaves. Lunatics and idiots are slaves also. Three-fourths of free society are slaves, not better treated, when their wants and capacities are estimated, than negro slaves. The masters in free society, or slave society, if they perform properly their duties, have more cares and less liberty than the slaves themselves. "In the sweat of thy face shalt thou earn thy bread!" made all men slaves, and such all *good men* continue to be.<sup>63</sup>

The notion that slavery is a universal condition consequent of original sin is as old as Augustine, but the assertion takes on a special significance in this context. The rhetorical shift marking a progression from the claim that everyone *should* be enslaved to the claim that everyone already *is* enslaved is emblematic of the loss of distinction I have been describing. In other words, if everything is slavery, then nothing is. The mutual contamination between organic law and law as force *ab extra* reflects an indeterminacy in the very idea of force, and a collapse in the classification of subjects under the weight of this indeterminacy. This framework of mutual contamination is what we can begin to detect in the internal dissolution of police forms of ordering. It could have been consolidated and elaborated through many different discursive avenues. My hypothesis is that, thanks to historical contingency, the emergent language of economics (in distinction to its forebear, political economy) becomes its dominant vehicle.

### **3.6 Segue**

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<sup>63</sup> Fitzhugh, *Sociology for the South*, 86. Emphasis in original.

I will close by briefly noting that George Fitzhugh carried the unlikely distinction of being the United States' first self-proclaimed "sociologist."<sup>64</sup> His first full-length book, published in 1854, carried the novel title *Sociology for the South*. In the preface, Fitzhugh correctly identifies—though not without editorial flare—the term sociology as a "new-born science" meant to treat the "disease" of what he disparagingly refers to as "free society," a catch-all phrase meant to encompass laissez-faire, political economy, capitalism, and anti-slavery. Fitzhugh does not state outright why he chooses to call his anatomy of Southern society a sociology, given that he proclaims the South free of the very calamities that require its diagnostics. He writes merely that he aims to show why slave-holding society is free from the "ailments" that gave rise to sociology, and why "no doctors have arisen to treat it of its complaints, or to propose remedies for their cure."<sup>65</sup> What we see reflected in Fitzhugh's approach, then, is a basic credo of physiology, namely that the workings of a body in good condition can be revealed through an examination of pathology. The idea supplied the methodological point of departure for Auguste Comte, the founder of sociology proper.<sup>66</sup>

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<sup>64</sup> C. Vann Woodward, "George Fitzhugh: Sui Generis," in *Cannibals All! Or, Slaves without Masters* (Cambridge: Belknap Press, 1966), xii. Apparently he beat fellow slavery apologist Henry Hughes by a hair.

<sup>65</sup> George Fitzhugh, *Sociology for the South: Or the Failure of Free Society* (London, England: Forgotten Books, 2012), v-vi.

<sup>66</sup> On this knowledge dynamic between normal and pathological states see Georges Canguilhem, *The Normal and the Pathological* (New York: Zone Books, 1991), specifically at 43 on the connection to Comte.

Fitzhugh's—at the time unprecedented in the United States—incorporation of the concept of sociology into his pro-slavery treatises indicates that he stood at a special place in history. As I described in the Introduction, drawing upon the work of Foucault and Christopher Tomlins, by the nineteenth century, police in Europe had long since become a keyword of state regulation, detached from any sense of communal ordering generated endogenously. Given its dispersed, federated structure, the United States arguably followed a different timeline. The sociological impulse—a question I will turn to now—arises within this context. It has more to do with instituting a sense of social holism through a positivist notion of science rather than through an affective notion of self-reproduction. Thus, Fitzhugh's description of his project as “sociological” is one indicator of the emerging admixture of artificiality into the conception of social order that foretells the dissolution of police.

## 4. Against an Economy of Things

### 4.1 Introduction

George Fitzhugh began *Sociology of the South* with a diatribe against political economy. To this “science of free society” he attributed the maxims of *laissez-faire* and *pas trop gouverner* (“don’t govern too much”): the twin embodiments of everything his utopian rendering of slave-holding society was not.<sup>1</sup> It was a telling way to commence his philosophy, because Fitzhugh was not chiefly interested in economics, nor—it is clear—did he know much about the subject.<sup>2</sup> In making it the target of his critique, Fitzhugh located political economy at the center of everything opposed to the kind of organicist, communitarian vision he espoused through his defense of slavery, an entire litany of isms including capitalism, individualism, liberalism, and constitutionalism (history’s antidote to “governing too much”). In this sense, Fitzhugh was not simply uttering a truism, namely, that insofar as political economy characterized the North and was a harbinger of wage labor capitalism and *laissez-faire*, it was essentially antithetical to an economy based in slavery. He was also giving voice to a deeper historical antagonism.

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<sup>1</sup> George Fitzhugh, *Sociology for the South: Or the Failure of Free Society* (London, England: Forgotten Books, 2012), 7.

<sup>2</sup> Eugene Genovese has also noted that Fitzhugh’s opening attack on free trade has puzzled historians because it seems a narrow concern and deceptively makes Fitzhugh look as if his chief aim was to argue for protectionism. See Eugene Genovese, *The World the Slaveholders Made: Two Essays in Interpretation* (Middletown, Conn: Wesleyan, 1988), 165-166.

As I gestured towards in the previous chapter, however, in naming his project sociology, Fitzhugh put himself in the peculiar position of calling upon the reparative principles of a method associated with “free society” —in this case, industrializing Europe—in order to explicate a communitarianism he understood foremost as a structure feeling. In this sense, Fitzhugh’s critique was of a hybrid nature, extolling an organicism that was affective on the one hand, scientific on the other. In terms of its latter manifestation, historian C. Vann Woodward has noted that in many ways, Fitzhugh’s criticisms of free society prefigured Thorstein Veblen’s critique of capitalist social and economic institutions, articulated nearly half a century later.<sup>3</sup> I propose that this affinity between the two exceeds a shared identification with sociology. Veblen was also associated with the school of institutional economics, a movement that took shape around the turn of the twentieth century. That the kind of holistic social critique associated with sociology could be assimilated into the project of economics demonstrates that by the late nineteenth century, an internal transformation had taken place within the program of political economy. Institutional economics, as I intend to show, marks a moment when political economy as a form of knowledge subsumes the very communitarian project to which Fitzhugh had — accurately — posed it as

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<sup>3</sup> C. Vann Woodward, “George Fitzhugh: Sui Generis,” in *Cannibals All! Or, Slaves without Masters* (Cambridge: Belknap Press, 1966), xxii; Thorstein Veblen, *The Theory of the Leisure Class* (New York: Dover Publications, 1994).

antithetical. This new political economy became a vehicle through which to reimagine social holism in opposition to classical liberalism, and to do so in and through the very framework of economics.

## **4.2 Liberalism Redux: from Political Doctrine to Form of Knowledge**

The contention I plan to pursue here is that what I am provisionally calling “economism” begins to become intelligible in the contours of this framework.

Economism is a style of thought, a particular way of making sense, that tends towards collapsing previously conceptually distinct social entities through the language of economics.<sup>4</sup> We see this style beginning to take shape within institutional economics through the ways in which it refutes the basic contentions of classical political economy. Economism is thus the continuation, or rather the rebirth, of a form of knowledge that occupies the role of a counter-discourse vis-à-vis liberalism. By this I do not simply mean that it runs counter to liberal economics: I mean that it runs counter to the underlying logic of absolutes that gives a theory such as laissez-faire its internal coherence.

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<sup>4</sup> As this definition should make clear, the way in which I am using the term economism bears no relation to what has been called economic, or “vulgar” Marxism. That is, economism here is not meant to indicate a style of Marxist analysis that projects a strictly determinative relationship flowing from base to superstructure.

This schema of logical absolutes is what we could call liberalism's discursive register. Accordingly, my deployment of economism as a conceptual framework derives from a particular iteration of Foucault's critique of what he names "juridico-legal mechanisms." This critique has been subject to extensive critical-legal scrutiny insofar as it is implicated in Foucault's tendency to dismiss law as more or less straightforward, and anyways to one side of more significant sites of domination and knowledge production.<sup>5</sup> But Foucault's definition of law is not of primary interest here. Of interest is his description of a formal isomorphism that tends to exist between material social processes and the corresponding methods used to decipher them.

Foucault's critique proceeded by positing a disjuncture between two different processes of social domination, which in turn correlated to two distinct methods of analysis. When he explicated this opposition in the *College de France* lectures, it was to express dismay at the general lack of an analytic adequate to the task of grasping the type of power dynamics he was attempting to theorize. Famously, this power dynamic was discipline: a form of power that stood in opposition to juridico-legal mechanisms. According to Foucault, the practice of social criticism was stymied by the fact that it had

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<sup>5</sup> Two works in particular address both Foucault's relationship to law, and how this relationship has been perceived in secondary scholarship. These are: Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law As Governance* (Boulder, CO: Pluto Press, 1994); and Ben Golder and Peter Fitzpatrick, *Foucault's Law* (New York, NY: Routledge-Cavendish, 2009). The Hunt and Wickham is more critical of Foucault's interpretation of law and juridical structures; Golder and Fitzpatrick take a more reparative approach.

up to that point only accommodated itself to critiquing social dynamics characterized by the juridico-legal mode. In correspondence with juridical relations, these critical tools obeyed a way of thinking in which social dynamics are understood to occur according to a set of exchanges or transactions, where power is a resource subject to different distributive arrangements. In this model, "power is taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate, either wholly or partially, through a legal act or through some act that establishes a right, such as takes place through cession or contract."<sup>6</sup> Thus Foucault designated the concepts of exchange, rights, and contract as belonging within this theoretical model, which he associated broadly with developments in political liberalism.<sup>7</sup>

In Foucault's account, political liberalism (pushed forward by the *philosophes*) coopted a discourse originally generated by the monarchical system in order to justify and legitimize the absolute and arbitrary exercise of sovereign power. By appropriating the motif of sovereignty, the liberals turned it against the monarchy, reorganizing its conceptual constellation of acquisition, prohibition, and punishment such that it

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<sup>6</sup> Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon, 1st American Ed edition (New York: Vintage, 1980), 88. I am quoting here from a different version of the same text as I prefer the translation.

<sup>7</sup> Foucault also described this model characterized by an "economism" in the theory of power" or an "economic functionality of power." Foucault, *Society Must Be Defended*, 13. Foucault's use of the term "economic" here will become important in the next chapter as I believe his understanding of what the term means changes as he becomes more familiar with neo-liberal innovations in economic thought and how they differed from classical political economy. Here, in the liberal model, we can take Foucault's use of economic to mean "exchange-oriented."

privileged individuals, their rights, and the wrongs perpetrated against them. Though he identified a network of associations that sprung from these liberal developments, Foucault also delinked this network from liberalism by classifying it more broadly as an analytic: as a particular style of reasoning. Understanding liberalism in terms of its analytic, detached from the specifics of political or legal liberalism, enables us to see how something like, to take one example, the repressive hypothesis is wrapped up in the same process of sense-making as the concept of sovereignty, despite the fact that it is not a “liberal” phenomenon per se. That is to say, the repressive hypothesis operates according to the same spatial and conceptual dynamics of a commodity: it projects sexuality as something you have or don’t have, or are allowed or disallowed to have.<sup>8</sup> And just as there is a material process of exchange and transaction, or similarly a social process of sovereign right, so is there a corresponding schema of interpretation that perceives social dynamics through the prism of a dichotomy between oppression and liberation, possession and privation, and so forth. The juridico-legal schema arranges the terms of analysis according to definitive limits and concrete absolutes.

For our purposes, however, it obviously will not do to call this analytical schema juridico-legal. I propose to rechristen it the liberal analytic. The liberal analytic is not coextensive with liberalism, which is a particular set of legal or political contentions; but

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<sup>8</sup> See generally Michel Foucault, *The History of Sexuality, Volume 1* (New York: Vintage, 1990).

it is formally isomorphic with these contentions, and it indicates an entire system of associations through which we pass social phenomena in order to make sense of them. Returning to the question of institutional economics, then, my claim will not be that its practitioners were counter-liberal within a doctrinal register. That is, they were not communist, they advocated a regulated form of capitalism, they defended private property—despite radically reconfiguring the property concept—and they often explicitly (if opportunistically) couched their formulations as faithful adaptations of classic liberal thinkers such as Locke and Mill. Economist Robert Hale, who I will argue demonstrated a refinement of economism precisely because he approached it at the analytical level, was also “reformist” in this same sense in which it is used to describe institutional economics. The whole of early twentieth-century progressive economics is thus often read as essentially compatible both with the economic structures of capitalism and with the political tenets of liberalism. When I say then that what is at stake in these analyses is a transformation of the terms of liberalism, I mean to indicate the discursive register. In this sense, what will become the rubric of economism is a complete overthrow of a liberal epistemic structure, but one that nevertheless frequently placed itself under the auspices of political liberalism.

### **4.3 The New Political Economy**

In 1886 Richard Ely, one of the earliest economists later to be associated with the institutionalists, proposed that what “the political economist desires is such a

production and such a distribution of economic goods as must in the highest practicable degree subserve the end and purpose of human existence for all members of society.”<sup>9</sup> The course of modern economic thought was directed at what “ought” to be, which made it a purposive, ethical undertaking, confluent with the values of Christian socialism. The title of Ely’s essay was “Ethics and Economics:” two domains that modern economists, he claimed, brought into an “inseparable relation,” indeed that they understood to be mutually definitive.<sup>10</sup> The task of what he called the new political economy was to make this connection between ethics and economics more salient.

How did this task diverge from the original approach of political economy?

Adam Smith’s *Wealth of Nations* marked the departure away from the economic theories of mercantilism, which aimed for a balance of trade that would increase the material wealth of the kingdom or nation-state, necessitating heavy regulation of commerce. The idea that self-interest could cumulatively enhance prosperity *across* nations shifted economic attention away from the state as an isolated economic community and towards the individual as its primary unit of analysis. In terms of economic theory, this meant a concomitant shift away from protectionism and towards free exchange.<sup>11</sup>

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<sup>9</sup> Richard T. Ely, “Ethics and Economics,” *Science* 7, no. 175 (June 1886), 531.

<sup>10</sup> *Ibid.*, 532.

<sup>11</sup> On Smith, mercantilism, and the rise of political economy, see Henry Spiegel, *The Growth of Economic Thought*, 3rd edition (Durham: Duke University Press, 1991).

The emphasis on free exchange laid down by the classic political economists was carried forward into the late-nineteenth century American context in the orthodox school. For these economists, also known as “the classics” in retrospect, the freedom of economic exchange produced a system of prices and a distribution of wealth that should be considered both fair and “natural” precisely because it resulted from the supposed freedom of economic actors. Economics in this model was the process of deciphering these processes scientifically, i.e., through a method that was divorced from political investment. Because free exchange was free and natural, the economic results it produced were just.<sup>12</sup> In this context, Ely’s sociological assertion that economics must strive to place “society above the individual, because the whole is more than any of its parts” carried several weighty implications for the discipline.<sup>13</sup> First, that it ran counter to the trajectory of classical liberal political economy; second, that its goal was to read communitarianism back into the project of political economy; and third, that this holism was no longer considered a social order capable of reproducing its own structure.

#### **4.4 Reimagining the Ethical Community**

I do not plan to focus on institutional economics as a school. I intend instead to pick up on some of its major threads, whose development was enabled by certain shifts

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<sup>12</sup> Duncan Kennedy, “The Role of Law in Economic Thought: Essays on the Fetishism of Commodities,” *American University Law Review* 34, no. 4 (June 1985), 941-944.

<sup>13</sup> Ely, “Ethics and Economics,” 532.

concerning how economics should be understood, and what comprised its proper province. Significantly, those developments I am most interested in occur in conjuncture with simultaneous transformations within the realm of legal discourse. For this reason, I focus on economist John Commons, though there will be occasion to revisit Ely further on.<sup>14</sup> Commons was a student of Ely's, and likewise turned to the realm of legal thought—specifically the common law—as an avenue through which to rethink the discipline of economics.

For Commons, as for Ely, the inextricability of ethics and economics entailed an understanding of society as a whole greater than its parts. And for Commons, too, departing from the primacy of individual interest involved a sociological rediscovery of the social organism. Conceiving “society as a whole,” meant perceiving “individual man, not as a separate particle, but as an organ intimately bound up in the social organism. It is this organic nature of society which alone furnishes the reason for a science which can be called sociology.”<sup>15</sup> Commons here refers to the science of sociology, but we must not forget that he approaches the question of the social organism as an economist. From this perspective, what is that makes the social body an “organic”

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<sup>14</sup> Another significant institutional economist was John Mitchell, who focused on business cycles, but who I don't take up in this chapter. Thorstein Veblen, whom I mentioned in the introduction, was also an institutional economist, but addressing the magnitude of his work would require a separate analysis.

<sup>15</sup> John Commons, “The Christian Minister and Sociology,” in *John R. Commons: Selected Essays*, ed. Malcolm Rutherford and Warren Samuels, 1 edition, vol. 1, 2 vols. (New York, NY: Routledge, 2002), 14.

phenomenon? In the previous chapter, I demonstrated that juridical thought earlier in the nineteenth century maintained a tendency to attribute the organicism of the social body to an ordered distribution of affect. In the courts, this manifested as judges differentially assigning emotional states of being to free people versus the enslaved. In Fitzhugh this tendency manifested as a vision of naturally despotic hierarchies that give rise to equally natural relations of reciprocal affection: a vision that begins, however, to break down with the admission that artifice is necessary to keep this order in place.

Commons, while extending an insistence upon social holism, attributes its organicism to the dynamics of production and exchange. Thus, in place of a vision of social cohesion that relies upon modes of feeling, interdependence becomes defined through its relation to the question of material resources. Hence, the “fact that I am dependent for the clothes I wear, not on the individual of whom I bought them, but on millions of individuals working together throughout our whole nation, with more or less harmony, teaches me that it is this organism, society, which determines my weal or woe.”<sup>16</sup> Distilling the elements comprising the common welfare—the “weal or woe”—as Commons presents it in this depiction of social interdependence, we are left with the activities of production and consumption. Furthermore, moving back from the “nations” in the plural of Adams Smith’s *Wealth of Nations*—arrived at through a departure from

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<sup>16</sup> Ibid, 14.

nationalist mercantilism and towards an analysis of cumulative individual interest— Commons places the social organism back at the level of national production. His attribution of the organic nature of this singular organism to economic interchange has effectively supplanted affective relationality as the fundament of social cohesion.

In one sense, Commons simply continued the project of integrating a sociological imperative into the field of economics. However, the resulting framework for understanding social relations engenders a mutually constraining relationship between the concept of ethics and that of economics, in that each cabins the other's field of reference. In this framework, when ethical relations shed their affective valence they become synonymous with economic relations. For Commons then, ethics evolved from constituting what he calls a "passive" concept, found in the notion of the divine or in calculations of pleasure (utilitarianism), to an "active" concept, which consists in collective action that works to create harmony out of conflicts of interest that arise from the problem of scarcity.<sup>17</sup> To understand ethics as essentially a conflict of interests is to purify and refine the concept, purging it of metaphorical associations that muddy it through notions of the "theological, cosmical, or utilitarian."<sup>18</sup> It is also to conjoin it with economics such that the two become analogous dimensions of, or perspectives on, the

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<sup>17</sup> John Commons, "The Place of Economics in Social Philosophy," in *John R. Commons: Selected Essays*, ed. Malcolm Rutherford and Warren Samuels, 1 edition, vol. 2, 2 vols. (New York, NY: Routledge, 2002), 480.

<sup>18</sup> *Ibid.*, 480.

shared phenomenon of material scarcity. For what is else is economics, Commons tells us, but the “quantitative measurement of degrees of scarcity in terms of price.”<sup>19</sup> Hence ethics becomes an alternate way to describe the same forms of social relationality that could equally well be rendered quantitatively through the perspective of economics.

As should be clear by the choice of terms “conflict of interest” to describe social relations, Commons’ displacement of ethics from the “cosmical” realm to the material realm of scarce resources depended upon a legalistic understanding of relationality. This is because as part of their reconceptualization of social relations, the institutionalists integrated the legal perspective into their definition of economic relationships. From the institutionalist angle, every economic relation has a corresponding legal relation. Or, I offer that it would be even more precise to say: in institutional economics, every relation has a social dimension *because* its economic dimension can be configured in legal terms. I will spell out what this looks like in Commons momentarily, but first let me give some background.

The notion of legal relationality Commons turned to in order to better understand economic dynamics was itself in flux. Among other concepts undergoing the process of legal reconceptualization, Commons picked up on a shifting notion of property. Recognizing the fundamental relationship between legal and economic

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<sup>19</sup> Ibid, 480.

structures, this shift amounted to a departure from the classical economic definition of property as individual possession of a thing, to the idea of property as a social relationship among people that consisted in the interplay of legal rights. Jurist Wesley Hohfeld is credited with initiating this shift insofar as he redefined property as consisting not in a vertical relationship between people and things but rather in a horizontal relationship among people in their capacity as owners and non-owners. Property thus consists in a “bundle of rights,” individual claim to which imposes corresponding incapacities on those adversely affected when the claim is exercised.<sup>20</sup>

Ely drew out this idea in his treatise on property and contract. “Strictly speaking,” he maintained, “property refers to rights only. Property is an exclusive right...not a thing but the rights which extend over a thing.” It logically followed that the “essence of property is in the relations among men arising out of their relations to things.”<sup>21</sup> In other words, property is a *relation* rather than a *thing* insofar as the rights that attend ownership define who can do what, with what, and to whom, within the economic world in which these rights are exercised.

Commons attempted to discover a collectivist tendency within this model by building upon the insight that commodity exchange involves both the physical

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<sup>20</sup> See Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *The Yale Law Journal* 26, no. 8 (June 1917).

<sup>21</sup> Richard T. Ely, *Property and Contract in Their Relations to the Distribution of Wealth* (New York, NY: Macmillan, 1922), 96-108. Emphasis removed.

transference of a thing but also the legal aspect of the transference of ownership.<sup>22</sup> He articulated the difference as one between exchange and transaction, the first being an economic interaction per se, the latter its corresponding legal dynamic. And while the individual may be the primary focus in terms of exchange, the ultimate unit of economic analysis resides, or should properly reside (the institutional perspective), in the transaction. The latter—a relational rather than material phenomenon—is the legal contribution to the ethical orientation of institutional economics precisely because law sees that “individual actions are really *trans*-actions instead of either individual behavior or the ‘exchange’ of commodities.” The idea runs like this: I can give you something in return for money, but your ongoing claim to that thing—your ability to say “no” if someone wants to take the thing from you—is the social relationship put in place by the alienation of “ownership” that attends the initial exchange of the thing. While the individual is therefore capable of exchange, she is incapable of transferring ownership per se: “Only the state, by means of the courts, transfers ownership by reading intentions.”<sup>23</sup> Thus ownership, strictly a legal phenomenon, is the relational aspect of exchange and sets into motion an entire system of relative capacities and incapacities describing who can do what and where. In consequence, supplanting the individual via

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<sup>22</sup> The idea is theoretically transferable to intangibles, such as credit.

<sup>23</sup> John Commons, “The Problem of Correlating Law, Economics and Ethics,” in *John R. Commons: Selected Essays*, ed. Malcolm Rutherford and Warren Samuels, 1 edition, vol. 2, 2 vols. (New York, NY: Routledge, 2002), 455.

a detour through legal analysis has the effect of making the transaction the paradigm of social relationality, as well as the evidence of its collective nature. For Commons then, the legal perspective is what allowed for the “shift from commodities and individuals to transactions and working rules of collective action that marks the transition from the classical and hedonic schools to the institutional schools of economic thinking.”<sup>24</sup>

Commons refined his theory of the collective character of the transaction by turning to trends he located within the common law. Specifically, he identified custom as the “grand contribution which the science of law gives to the science of economics.”<sup>25</sup> In the previous chapter I explained how earlier in the nineteenth century, common law reasoning cited custom as a form of habituation supposed to produce differentiated modes being. This differentiation served as the basis for distinguishing between the legal status of whites and enslaved persons. Custom thus carried with it the capacity to

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<sup>24</sup> John Commons, “Institutional Economics,” in *John R. Commons: Selected Essays*, ed. Malcolm Rutherford and Warren Samuels, 1 edition, vol. 2, 2 vols. (New York, NY: Routledge, 2002), 447. The institutional economic analysis of property as a social relation raises the question of the degree of its affinity with Marx’s critique of commodity fetishism, viz., the notion that economic relations proceed from the properties of alienable things rather than from the social relationships that make up the substrate of the thing’s existence. The institutional economists disavowed any kinship with Marx, but Kennedy offers a convincing argument that the realist/progressive economic analysis is both derivative of Marx while exceeding his analysis by elucidating the structural intertwinement of economic and legal relations. See generally Kennedy, “The Role of Law in Economic Thought.” A different way to think of the relation between Marx and the progressive economists is that they respectively offered two different paths towards understanding relationality away from individualism, and that certain facets of the legalistic understanding developed by the progressives in fact become dominant, while Marx’s conception represents the road not taken within the modern discipline of economics.

<sup>25</sup> John Commons, “Law and Economics,” in *John R. Commons: Selected Essays*, ed. Malcolm Rutherford and Warren Samuels, 1 edition, vol. 2, 2 vols. (New York, NY: Routledge, 2002), 336.

signify a circular link between modes of behavior, character, and respective position within a social order.

While the notion of custom Commons lifted from the history of the common law retained an opposition to the liberal conception of sociality, it also underwent a distinct reconfiguration due to his emphasis on the economic. Thus, Commons maintained that law furnished economics with a new starting point because in proceeding from custom, it provides a method of approach to social relations that “transcends the dualism” between individual and society. The difference between how Commons conceives this negation and how it is imagined in the historical operation I’ve charted in the preceding chapters resides in the fact that Commons imagined this transcendence as a principle imposed externally. Thus, in his depiction of common law reasoning through custom he states that:

The court always begins...with the common practices of two opposing classes of persons instead of a mass of disconnected individuals, as the economists had done in imitation of Jeremy Bentham. This conflict of interests, then, is transcended by applying a rule or custom that has been found to be good, in that it lies in the direction of what is believed at the same time to be the common interest of individuals and classes within the same group or society. The court begins with a transaction, where economists, following Bentham, begin with individuals.<sup>26</sup>

The antipode of Commons’ notion of custom is the same “mass of disconnected individuals” that constitutes the antithetical object of police, and that is here attributed

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<sup>26</sup> Ibid, 334.

to Bentham, though could just as easily have been pinned to Smith or Mill. The significant change is located in the fact that custom here acts as a rule that transcends social groups such that it can be perceived as retroactively and externally applied, rather than as arising from the particular character of those groups. Consequently, rather than a principle of differentiation embodying the particularity of “habits and modes of feelings,” custom becomes a leveling agent serving to render diverse interests commensurable. In this way, custom, when integrated into Commons’ contribution to institutional economics, continues to provide a counterpoint to classical liberalism while also becoming an element of homogenization, akin to a principle that establishes units of measurement for weight, length, currency, etc.<sup>27</sup>

As a result, the custom of common law now ends up shouldering the task of providing both a principle of collectivity by elevating our perspective to the transaction over the individual, and a principle of standardization. The combination of these two elements—that is, a focus on the transaction and the commensurability of interests—is what further allows Commons to draw a formal equivalency between individual

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<sup>27</sup> Commons, “Law and Economics,” 341. It is clear that in order to define common law as the assertion of common interest in opposition to liberal individualism, Commons must jettison an alternate trajectory of adjudication, one that bends towards the arch of free exchange. This fact is especially noticeable given that Commons is focused specifically on market relations (rather than, for example, a branch of public law). One could derive a completely different model of relationality based on the history of the law of contract, wherein the ascription of “interest” could equally well result in the negation of liability via the appeal to free will. By suppressing this liberalist aspect of legal history in favor of an interpretation of common law as enforcing communal obligation, Commons mines a legacy of public purpose in order to imagine into being a relational model that rests at a very specific nexus of law and economics.

persons and institutions, or associations. Thus, when the common law courts

“...converted the economists’ ‘individual’ into a set of relations, habits, transactions, or customs, of associated individuals,” they demonstrated that:

the true unit of economic theory is not an individual but a going concern composed of individuals in their many transactions of principal and agent,<sup>28</sup> superior and inferior, employer and employee, seller and customer, creditor and debtor, bailor and bailee, patron and client, etc. Each individual in society, for the purposes of economic theory, comes to the surface as a member, a participant, a “citizen,” in several of these going concerns...”<sup>29</sup>

Assuming the perspective of the transaction thus means that associative relations supplant the individual as the primary unit of economic analysis. And *for the purposes of economic theory*, these relations take on an accordingly commercial valence. What Commons has done is extend and generalize the legal principle that corporations are equivalent to people as far the application of legal rules is concerned. This flows from the fact that the point of application of the rule is not the transacting partner, but the relation between entities. Thus, people “associate in families, partnerships, communities, unions, nations, but the law imputes to their association as a unit many of the legal relations that it attributes to natural persons,”<sup>30</sup> a fact which becomes of particular interest to the project of economics. Proceeding from this point, Commons identified the

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<sup>28</sup> A principal is a person or organization who legally authorizes an agent to act on its behalf, such as in order to make contracts.

<sup>29</sup> Commons, “Law and Economics,” 335.

<sup>30</sup> John R. Commons, *Legal Foundations of Capitalism* (The Macmillan Company, 1924), 143.

“going concern” as both the primary analytic unit of economics, and also the ideal model for understanding social relations. A going concern is a legal-economic term for a solvent corporation. It is an established business enterprise that has been deemed capable of paying its debts and continuing to generate income for the foreseeable future. The difference between a going concern and a business not yet established resides in the assumed value the former has over a new business that will face start-up costs and presumably take some time to establish efficiency. The going concern thus maintains a going concern value, or going value, which is an intangible value derived from transactions between the business and consumers.<sup>31</sup>

For Commons, the going concern is the appropriate model for understanding social associations because it is the transfer point facilitating the individual’s legibility to economic analysis. This means that the perspective of the transaction does not merely shift focus from the individual to the business, but also establishes a formal equivalency between the two. And because society is composed of relations read as transactions, the corporation becomes the paradigm for social relationality. The corporation represents the heart of the institutional conception of (ethical) sociality because it is a series of transactions defined by their collective nature:

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<sup>31</sup> Going value could incorporate, for example, the costs of advertising, networking, solicitation, promotional give-aways, etc. In other words, going value is a legal estimate of the transaction costs involved in establishing a business, an estimate that gives the extant corporation—the going concern—a boost in value over rival, upstart businesses.

Individuals are no longer the mere individuals of the classical economic theory—they are members, citizens of a concern, with rights and liberties conferred or withheld by associated action. In the habits of business these organized customs are named “going concerns”...The fact that they are “going” gives them a money value far beyond that of their scrap value. They live in the future but act in the present, as do all human beings. A nation, or a family, or a church, is a “going concern.”<sup>32</sup>

The classical economic individual Commons insists upon abandoning is the atomistic man as conceived by the original political economists, grappling with the problem of material scarcity in a social vacuum. Commons characterized this conception as a form of “materialist” economics, a term that grouped together the classical economists (everyone from Smith and Malthus to Ricardo and Marx) and the so-called hedonist economists (such as Bentham and Mill).<sup>33</sup> Materialist economists focused on the “physical control and use of materials,” and in so doing, they “started only with the individual in his relation to nature and not to man.”<sup>34</sup> Commons posited to the contrary that this relationship was “incidental to, or a consequence of the transactions between men [where] the subject-matter of these transactions is ownership—not the physical

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<sup>32</sup> Commons, “The Place of Economics in Social Philosophy,” 475.

<sup>33</sup> Though Marx subscribed to the labor theory of value, grouping him under the rubric of “man and nature” rather than “man and man” is an odd characterization given the broader context of his critique. It could be attributable to a misreading, or an opportunistic mischaracterization given the stigma of associating with Marx in the field of economics, especially at the time. Additionally, the term “materialist” here should be understood in the simple sense of physicality, not to be confused with dialectical materialism despite the association made with Marx.

<sup>34</sup> Commons, “The Place of Economics in Social Philosophy,” 483.

things owned, as was materialistically assumed,” but ownership in the relational, or transactional, sense in which it is conceived as a relation between people.<sup>35</sup>

The going concern as a model for social relations was Commons’ contribution to the broader institutional reconfiguration of the relationship between man and nature as a set of relationships between people that forms a social collectivity. This adaptation of legal relations offered one plausible alternative to the labor theory of value: the contention that a commodity’s economic value is determined by the total amount of labor it took to produce it. In this way, the legalistic approach also offered a different route from the more traditionally socialist approach to liberal economics. The latter consisted in an adaptation of the labor theory of value that led to the idea that because production requires social interdependence, the value of the resulting products reflects this collective contribution, and are consequently the prerogative of collective social enjoyment.<sup>36</sup> By contrast, the analytic produced at the nexus of progressive economics and law opened up an avenue for departing from the so-called materialist relationship between man and nature. Hence Commons’ evocative formulation that the corporation

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<sup>35</sup> See Commons, “The Place of Economics in Social Philosophy” at 477, and Commons, “The Problem of Correlating Law, Economics and Ethics” at 453.

<sup>36</sup> On this point of difference between early progressive law and economics and socialist economics, see also Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Cambridge: Harvard University Press, 2001), 27-28, 130-132.

is the epistemic model allowing for the elevation of the individual above the level of “scrap value.”

At this point let me pause to emphasize what I think is significant about Commons’ integration of legal models into economics such that they became paradigms of social relations. Rather than being a quirk unique to his style of thought, I believe it demonstrates how the economic mode of analysis I have been recounting lends itself to a collapse between the framework of the market, social entities, and social action. The conceptual integration of the legal perspective into an economic understanding of relationality leads to a world in which sociality begin to take on the attributes, we could even say becomes indistinguishable from, the dynamics that comprise a legally advanced market. In classical political economy, economic action constituted its own discrete sphere; in institutional economics, by contrast, we see the boundaries of this sphere begin to dissolve. Hence this mode of analysis is where we see the perspective begin to take shape that, as one economic historian has put it, “human action in all its facets was the proper province of the economist.”<sup>37</sup>

At the same time, this legalistic perspective also provided a way to conceptualize value in terms that exceeded the mechanism of self-interest. The individualist focus of classical economics correlated value to self-interest, where the individual maximization

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<sup>37</sup> Ben Seligman, *Main Currents in Modern Economics* (New Brunswick, NJ: Transaction Publishers, 1990), 157.

of income (or happiness, in the utilitarian counterpart) led also to the maximization of social wealth. What this equation famously suppressed was attention to the deleterious effects of individual accumulation on the larger social environs. Refocusing on the legal relation had the effect of introducing new forms of value that could serve to integrate the perspective of public purpose. Commons attempted to capture this perspective in the notion of “goodwill,” which seemingly moved away from a materialist, physical, understanding of value insofar as it captured and quantified the element of value produced by ethical market relationships. Goodwill value, like going value, is an intangible asset created by consumers who pay above tangible value based on something like, for example, brand naming or a convenient location. It embodies the consumers’ favorable disposition towards a company for intangible reasons, providing a channel through which the expression of collective will can augment corporate value.<sup>38</sup> Commons concluded from this set of rules, successively codified by the common law, that “goodwill is purely an institutional value, that is, so-called ‘intangible value,’ of man’s equitable relations with other men,” which transcends the “physical relation” and “materialistic foundation” that served as the points of departure for the orthodox liberal economists.<sup>39</sup>

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<sup>38</sup> Companies can only account this value through fair practices, which means they cannot use the value as a means for charging monopolistic prices, nor can they count it as a liquid asset: this is part of Commons’ reason for calling it an inherently ethical value.

<sup>39</sup> Commons, “Institutional Economics,” 490.

The concept of goodwill was attractive to Commons because it is created by a community of consumers: this is why he calls it a purely institutional value. The collective generation of goodwill value is supposedly a sign of fair relations, meaning that consumers willfully contribute to the value of a corporation through their patronage, an augmentation that due to legal regulations can only be achieved through fair business practices. In this way, goodwill “lifts its owner above the level of the free competition of traditional economics, yet it differs from other monopolies in that it exists only as long as its owner fulfils the public purpose of rendering to others what they willingly agree are reasonable services at reasonable prices.”<sup>40</sup> Goodwill was thus the ethical answer to an unregulated free market because it provided corporations an edge over competitors that was obtained, however, through consumer consensus rather than through the pursuit of self-interest to the detriment of third parties. It served to augment private net income, while also embodying the “reasonable ethical relation towards other buyers and sellers, who are also members of the same national economy.”<sup>41</sup>

#### **4.5 Institutional Economics: Anticipating a Formal Collapse**

Taken together, the legal-economic model I have been describing spells out something that I think is a rather novel configuration, namely, a community that receives its definition as such via the logic of economics. Here, social relations assume an

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<sup>40</sup> Ibid, 489.

<sup>41</sup> Ibid, 489.

ethical coherence of sorts, but only through the point of contact of their economic dimension. Goodwill, for example is the quantitative dimension of liberty, something that can only be owned by a corporation—or a person, insofar as he represents a going concern—and can only be supplemented or diminished through collective economic action. I have chosen Commons' formulations because despite their occasional fancifulness, I believe they indicate certain transformations leading up to and following the turn of the nineteenth century that expand past this "heterodox" science and eventually become hegemonic. These transformations begin with a counter-liberal position advanced through the watered-down organicism of sociology, and end up at a deeply economistic and legalistic understand of social relations.

Thus, it should be evident from the structure of Commons' formulations that these legal-economic locutions have only become more entrenched, even as the actual economic theories which brought them into being have fallen out of favor within the discipline of economics. This is why I think that today, it does not take training in law or economics to recognize the proposition that, for example, a "citizen" becomes politically and ethically legible as such insofar as she is considered to be an economic member of corporate relations. Or to put this another way, I believe that what I have outlined above constitutes the beginning of a conceptual and analytical breakdown of distinctions between formally discrete political entities such as state, citizen, corporation, etc. As Commons notes, the going concern can be public or private; it can be the state or the

individual just as well as the firm, insofar as all can be perceived through the medium of a legal transaction.<sup>42</sup> Further exploration into this analytical breakdown is what I will pursue in the ensuing section.

## 4.6 Buchanan v. Warley

Let me now turn to a case decided in 1917. It is significant for two reasons. Firstly, it evidences the discursive contestations I have been tracking throughout the body of this dissertation. Secondly, its terms provide an illustrative point of departure for some of the legal-economic analyses developed by economist Robert Hale, who modified and extended the premises of the institutionalist formulations I have been tracing. *Buchanan v. Warley* was a Supreme Court case that concerned a neighborhood segregation ordinance in Louisville, Kentucky.<sup>43</sup> The stated objective of the ordinance was to “preserve the public peace and promote the general welfare,” in this case prohibiting members of so-called colored races from occupying houses on blocks where the majority of residences were occupied by whites. It likewise prevented whites from moving onto blocks whose residential majority were people of color. The ordinance did *not* prohibit whites and blacks in the neighborhood from selling property to one another: it did not, that is, specify who could own and exchange the residences, but rather who could *live* in them. What had happened leading up to the case was this. A white

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<sup>42</sup> Commons, *Legal Foundations of Capitalism*. Commons is most detailed on this point at 146.

<sup>43</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917).

homeowner named Charles Buchanan, who lived in a majority white neighborhood, had contracted to sell his house to a black man named William Warley. Their contract included the proviso that Warley had the right to live in the house he was to purchase. When Buchanan later took Warley to court for refusing to fulfil the contract, Warley cited the ordinance as the reason for his refusal to complete the sale. Buchanan proceeded by claiming that the ordinance was a violation of the Fourteenth Amendment, which makes a citizen of anyone born in the United States and gives them equal protection and due process under law, including protection against the deprivation of property.<sup>44</sup> His argument was that the ordinance was effectively an unconstitutional infringement on property, because it prevented him from freely exchanging it with black people, such as Warley.

The Fourteenth Amendment overturned *Dred Scott v. Sandford*, which it would be instructive to revisit for a moment.<sup>45</sup> Decided sixty years prior to *Buchanan*, *Dred Scott* was made infamous by Chief Justice Taney's proclamation that black Americans were "so far inferior that they had no rights which the white man was bound to respect." While boasting the distinction of being the most rhetorically spectacular assertion in the

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<sup>44</sup> The precise language of the Fourteenth Amendment is this: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>45</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

opinion, however, Taney's assessment arose from a somewhat less arresting consideration: that of jurisdiction. This was because it hinged on whether Dred Scott could legally be considered a citizen of the state of Missouri, thus making the case eligible for federal jurisdiction because Sandford was a citizen of a different state (New York).<sup>46</sup>

In Taney's language, the question of jurisdiction boiled down to whether descendants of African slaves could be considered, as he phrased it, members of the "political community" of the United States, a community he interchangeably referred to as "one political family." In dissent, Justice Curtis offered a traditional liberal formulation in defense of the regulatory powers of Congress, which Taney had undermined in the course of the decision.<sup>47</sup> Without "government and social order," he claimed, "there can be no property; for without the law, its [property's] ownership, its use, and the power of disposing of it, cease to exist, in the sense in which those words are used and understood in all civilized States." Curtis's formulation was what the institutional economists would have called materialist. For the recognition of property as a legal relationship of ownership enabled by law does not, however, change the conception of property here as a material thing exchanged between individuals thanks

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<sup>46</sup> The power that gives federal courts jurisdiction over disputes between members of different states is called diversity jurisdiction (i.e., the parties involved in the dispute are from diverse states).

<sup>47</sup> Taney claimed Congress did not have the authority to ban slavery in the territories, and thus ruled the Missouri Compromise unconstitutional.

to the passive facilitation of the state.<sup>48</sup> We could thus say that the conflict between Taney and Curtis expressed two divergent principles, one organized by a police notion of community, the other by a liberalist conception of property: something that you own, use, and exchange at your discretion, with the help of legal protection.

Taney's reference to the separate states as political families has deep affinity with the history behind the Kentucky ordinance's reference to the public peace. Recall from the previous chapter historian Laura Edwards' demonstration that the public peace was essentially a juridical metaphor meant to indicate the interests of the collectivity over the individual. Its content, however, was purposefully vague insofar as it was fundamentally localist, and therefore varied by locality.<sup>49</sup> Justice Day's dismissal, in 1917, of the ordinance's pretenses to public welfare indicates that the idea of communal ordering giving substance to the public peace no longer has traction. In its place, Day proclaimed that the issue of racial segregation turned upon the question of rights, specifically property rights.<sup>50</sup>

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<sup>48</sup> Priscilla Wald has also remarked the construction of property in Curtis' formulation here, describing it as indicative of how law is called upon to make the terms of subjectivity and personhood meaningful. See Priscilla Wald, *Constituting Americans: Cultural Anxiety and Narrative Form* (Durham: Duke University Press, 1994), 45-46.

<sup>49</sup> Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009), 7.

<sup>50</sup> Day also noted that the ordinance had been defended as the proper object of police power regulation. He dismissed this claim, relegating the police power to the concerns of health, safety and welfare, in accordance with the decision of *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court famously truncated the police power by confining its purview to the issues of health, safety, and morals. In this

To do this, Day first had to dismiss the potential relevance of *Plessy v. Ferguson*, rejecting the argument that the Louisville ordinance was merely promoting the public peace by establishing separate but equal residential patterns that would ostensibly prevent racial conflict by isolating racialized communities.<sup>51</sup> The case, Day declared, did “not deal with an attempt to prohibit amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.” What became the issue in *Buchanan*, then, was the white man’s prerogative over his property, which the Court determined had been tampered with by the racial zoning ordinance. The ordinance violated the Fourteenth Amendment by abridging the right of black persons to acquire property in such a way that consequently inhibited the right of white persons to dispose of their own property. The question the Court posed was: “can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?” To Day it was obvious that the answer to this question was no: in

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dissertation, I view legal changes to the police power as the aftermath and surface effect of the deeper discursive shifts I am tracing, rather than as causative.

<sup>51</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896) established the "separate but equal" doctrine, overturned in 1954 by *Brown v. Board of Education*, 347 U.S. 483 (1954).

order to insure the property rights of white homeowners, black people must have their full range of rights as well.

Thus did *Buchanan* determine the Louisville segregation ordinance a danger to fundamental rights. Because it interfered with the black man's ability to buy from the white man, it consisted in an infringement on the right to acquire property, which Day interpreted as tantamount to a deprivation of property by the state, the "state" here embodied in the ordinance as a form of legislation. Additionally, the ordinance violated the white's seller right to free contract which, again, Day determined unconstitutional. Civil rights in this instance took the form of the possession and transaction of property, which, stated the Court, was "more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it." The formal similarity between Day's pronouncement here and Curtis' dissent in *Dred Scott* is clear. This is because the liberal/material articulation of rights, property, and law was as intelligible in 1917 as it was in 1857. As is evident in the ease with which Day writes off the idea of the public peace, however, the police principle that countervailed this conception has in the meantime dissolved.

I have been focusing on *Buchanan* up to this point because it illustrates the continuity of the liberal construction of property, while also putting into relief the decline of the police forms of ordering that embodied that construction's most substantive counter-discourse. The case becomes a triply important historical marker,

however, insofar as it plays a role in the further development of the economic mode of thought I traced in the opening section. I contend that this mode of thought essentially comes to fill the gap left by the dissolution of police, and that we can see its refinement and consolidation in the analyses of Robert Hale.<sup>52</sup>

Writing in 1934, Hale reinterpreted the facts behind *Buchanan* in an attempt to show up the Court's appeal to constitutional rights as an instance of the dissimulation inherent to the logic of liberal rights discourse. While Day had put the liberalist defense of property rights in service to desegregation in *Buchanan*, its more prominent contemporary application was the doctrine of laissez-faire. This application of the same conception of property was the target of progressives aspiring towards a fairer distribution of wealth, and hence the concern motivating Hale's attention to the case.

Noting that Day's opinion in *Buchanan* was "quite specific on the point that it [was] the white man's right, not the negro's, that [was] at issue,"<sup>53</sup> Hale scrutinized the contention that the ordinance amounted to a deprivation of property (i.e., insofar as it consisted in the loss of Buchanan's ability to dispose of it). The ordinance, he recalled,

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<sup>52</sup> In the course of the chapter I only quote from a selection of Hale's essays. The works of Hale that inform this analysis but which I do not quote directly are the following: Robert L. Hale, "Rate Making and the Revision of the Property Concept," *Columbia Law Review* 22, no. 3 (1922): 209–16; Robert L. Hale, "Prima Facie Torts, Combination, and Non-Feasance," *Columbia Law Review* 46, no. 2 (1946): 196–218; and Robert L. Hale, *Freedom through Law: Public Control of Private Governing Power* (New York, NY: Columbia University Press, 1952), which is his only full length book and is mostly comprised of versions of the articles he published in the preceding decades.

<sup>53</sup> Robert L. Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion," *Columbia Law Review* 35, no. 2 (1935), 178.

did not explicitly prohibit people who wished to sell their property from selling to certain people. It did not declare, for example, that white people could not sell their homes to black people. Rather, it set out a condition that reduced the likelihood of the participation of a potential market—a black market. While there are plenty of reasons why someone might buy a house without intending to live in it—a possibility still preserved under the ordinance—the number of people who fit such a description is fewer than the number of people who would be looking to purchase a residential house because they wished to live in it. Viewed in this light, “the ordinance imposed on [Buchanan] no duty to refrain from disposing of the property; in that sense of the word he still had a ‘right’ to sell to the Negro. All that the ordinance did to the white man was to destroy his negro market, with a high degree of certainty.”<sup>54</sup> Thus, in place of a situation definable in terms of the protection or revocation of rights taken in the absolute, Hale offers us a picture of intrinsically malleable markets whose manipulation occurs in terms of degree.

Moreover, if the state, in the form of the ordinance, is not what interfered with Buchanan’s attempt to sell his property—as the Court claimed—the “only force that reached the seller was refusal of the negroes to buy.”<sup>55</sup> In other words, it was not “the state” but rather the individual buyer who infringed on the seller’s free use of his

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<sup>54</sup> Ibid, 179.

<sup>55</sup> Ibid, 177.

property, and he did so by exercising his ability to refuse to buy. If the black men in the community were to have collectively decided not to buy the white man's property, Hale pointed out, it would have amounted to the same effect achieved by the ordinance, with the exception that the men's actions could not have been legally construed as an attack on fundamental rights. Seen from this perspective, there ceases to be a way to distinguish between the actions of individuals, of collectivities, and of the state. These entities are only distinguishable by the difference in degrees of economic force they are capable of exerting.

For the sake of the present discussion, it is important to understand Hale's reinterpretation of *Buchanan* on two different levels. The first is the motive compelling the analysis. In taking the Court's opinion to task, Hale was not condemning the outcome of the case, which was to hold racial segregation ordinances unconstitutional, at least insofar as they concerned housing. As I stated at the outset, he was motivated by the desire to deconstruct the logic of abstract rights insofar as its primary application in the arena of laissez-faire served as a tool of distributive injustice.

Our interest resides on a different level, which is the interpretive schema of Hale's analysis. This schema enabled thinking a fundamental confluence between state power and individual action by dissolving the division upon which the liberalist notion of rights hinged, namely, the separation and immunity of fundamental properties of the individual from state interference. This division has a specific trajectory in American

legal history, though I believe its discursive structure generically conforms to the terms of the liberal analytic as I have parsed it with the help of Foucault.<sup>56</sup> Hale breaks down the dichotomy this division institutes by introducing a specific type of counter logic from the perspective of which every action, whether it is undertaken by an individual, a group of individuals, or an arm of the state, is a mode of regulation of other people that modifies their behavior by modifying their economic options. Thus in Hale's model, instead of the state acting as a safeguard of rights, it acts by exerting various degrees of pressure that facilitate or constrain economic subjects through the manipulation of their economic environment. This is the same type of pressure, furthermore, that economic subjects exert on one another.

In this way Hale follows the institutional reconceptualization of economic action by making the relation (in this case economic force) rather than the subject (i.e. the state or the individual) the point of departure of economic analysis. This means that the economic subject receive definition consequent to the relation, rather than preceding the relation as its point of generation. What Hale's analysis does is bring to light more clearly something that remained implicit in institutional economics, namely, that

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<sup>56</sup> Constitutional rights discourse in the United States has historically alternated between different political ends depending on the era in which it was applied. Where the progressives attacked laissez-faire early in the twentieth century by arguing against the coherence of rights discourse, the same argument was used by midcentury conservatives against the codification of civil and human rights. On these historical transpositions of rights discourse see Duncan Kennedy, "The Critique of Rights in Critical Legal Studies," in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press Books, 2002); and specifically in relation to Hale, Fried, *The Progressive Assault on Laissez Faire*, at 207-208.

departing from the individualism underpinning classical political economy also means departing from an entire system grounded in the dynamic of logical absolutes. In this way, I intend to show that Hale in fact opens the door to imagining a formal collapse between economic subjects that institutes an ontological equivalency, a furtherance of the perspectival equivalency instituted by the institutional economists.

In this sense, I aim to build on extant assessments of the changes inaugurated by progressive economics while also shifting their focus. Traditionally, legal scholars group Hale in among the early century movement of legal realists, who opposed the liberal analytic in its instantiation of formalism, or “conceptualism.” Formalism refers to the judicial practice of deciding cases by applying formal rules, the prescriptions of which supposedly flow from an abstract principle, or “concept.” By contrast, realists redirected attention to the material effects of legal decisions, that is, what actually happens to workers, monopolies, and unions when such high-flown liberal concepts as “property,” “free-will,” and “liberty” were applied through the process of formal deduction.<sup>57</sup> In the late nineteenth- and early twentieth century, these material effects were the entrenchment and perpetuation of wealth disparity.<sup>58</sup>

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<sup>57</sup> A standard-bearing critique of formalism was Felix Cohen's “Transcendental Nonsense and the Functional Approach,” *Columbia Law Review* 35, no. 6 (June 1935). The title itself goes a long way towards explaining Cohen's position.

<sup>58</sup> For a good overview of this history see Joseph Singer, “Legal Realism Now,” *California Law Review* 76, no. 2 (March 1988).

Grouping Hale under the rubric of “realism,” however, suppresses the fact that the kind of economic logic to which he gave voice was not necessarily “anti-conceptual,” which is to say it was not simply supplanting liberalist fallacies with a more accurate picture what was *really* going on (though it did do some of that as well). Rather, the economic schema that underpinned Hale’s argument for redistribution involved a *reconceptualization* of social action that rested on a deeper theoretical reconfiguration of terms. I posit Hale as the clearest expression of this schema precisely because he examines liberalism at what we could call its lowest common denominator, that is, its elementary logical components. In other words, in Hale we are dealing not—or not simply—at the level of ideological components, such as property rights, individualism, laissez-faire, and free exchange, but also at the level of an analytic.

#### **4.7 Towards Potentiality**

Let me begin explicating this analytic in its most basic terms. Consider Hale’s depiction of a scenario in which, having started a vehicle and begun driving it, I do not exercise care in stopping it at a particular moment. As the legal configuration of a wrong would have it, the result is that I have run you over. Which is to say, I have committed a “tort” on account of which I am responsible to you for damages. Hale takes this legal interpretation of the circumstance in question as an instance of rhetorical manipulation. Would it not be more accurate to say, he proposes, that my running you over was not an *act* in the positive sense, but rather a *failure* to act: a “failure to make the requisite

motions for stopping the car.”<sup>59</sup> Why should it matter whether we locate the legal wrong in the act of my hitting you, or in my failure to step on the breaks? The point is that in the extant legal framework, the law “wants” to identify something’s having been done rather than simply nothing’s having been done in order to classify the (in)action as a wrong. It is easy to see how the liberal analytical style gives this process of reasoning its sense. In this schema, there is either concrete action or its absence, and since there is no way to account for the absence of action as a material concern, anything susceptible of the legal assignation of a wrong must take the form of a positive action.

Following from this fact that “wrong conduct” legally consists of “wrongful acts instead of wrongful *failure to act*,”<sup>60</sup> Hale points out that nonaction—legally termed “non-feasance”—was rarely considered by the courts a potential instance of unlawfulness. Not showing up to work, for example, is not unlawful per se because it is simply nonaction (i.e., non-presence: the worker is simply not there) rather than the harmful doing of an action. And yet, strikes were often deemed unlawful acts. How could this be so, if a strike is merely an instance of workers not showing up for work, multiplied across bodies? Hale answers this question by showing how courts were inclined to assess strikes by translating action from the negative to the positive register.

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<sup>59</sup> Robert L. Hale, “Coercion and Distribution in a Supposedly Non-Coercive State,” *Political Science Quarterly* 38, no. 3 (1923), 475.

<sup>60</sup> *Ibid.*, 475. Emphasis in original.

Thus, courts would hold that strikes as a collective instance of non-work do not constitute the precise moment of illegality. Rather, what is determined illegal is the prior, positive act of combination that enabled the strike in the first place. “When workers *combine* to quit work, it is the affirmative act of combining, not the failure to work, which the law pronounces illegal....”<sup>61</sup> Likewise, if the employer wins its battle, what the court mandates is not that the workers return to work, but rather that they “cease from the affirmative acts of instigating and supporting the strike.” The same rhetorical operations inform interpretations of contract. Hence, failing to fulfill the terms of a contract seems as though it should constitute a form of nonaction, but rhetorically the courts do not render it as such. Along with *committing* negligence, and *combining* to not work, failing to perform the terms of a contract becomes *committing* a breach of contract.

By specifying how this legal operation works, the effect of Hale’s explication is not to show up what are legally considered positive acts as in fact belonging to the realm of nonaction. This would amount merely to a repetition of the same analytical gesture performed by the courts of shifting between positive and negative registers, acts and non-acts, all the while remaining within the same configuration of terms. Rather, the analysis demonstrates a logical parallel between the line dividing action and inaction,

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<sup>61</sup> Robert L. Hale, “Bargaining, Duress, and Economic Liberty,” *Columbia Law Review* 43, no. 5 (1943), 607. Emphasis in original.

and the principle of absoluteness that undergirds the theory of laissez-faire. That is to say, the distinction between action and inaction that applies to the legal assessment of driving a car parallels the distinction between regulation and leaving alone, between the state's actively manipulating the economy and simply letting it be. Furthermore, Hale draws attention to the fact that though there is nothing necessarily "liberal" in the legal or political sense about a strict dichotomy between action and the absence of action, the interpretive assumption according to which this dynamic functions belongs within a larger discursive totality. Accordingly, the idea of negative freedom that undergirds laissez-faire was circularly reinforced by a rhetorical operation that sorts reality into negative and positive registers.

By contrast, Hale offers a reinterpretation of legal scenarios that emphasizes the indistinction of these two poles. In stepping outside the framework of absolutes, what we arrive at is an understanding of nonaction that constitutes a form of activity with its own specific character. This premise underlies Hale's reworking of the concept of coercion. Coercion in Hale's sense is a function of market economics because it defines a relationship of what I will call potentiality. Potentiality is a term Hale uses explicitly, but we can draw out the implications of the concept more fully by turning to Giorgio Agamben's explication of its use in Aristotle.

The essential characteristic of potentiality is that it does not define pure absence, or non-being, in the way this notion is configured within the terms of the liberal analytic,

where it is equally assimilable to privation, repression, or freedom. Potentiality describes instead the fullness of a reality shaped by its relation to absence. This means something different from the fact that a given reality could potentially be transformed by the translation of what is absent into actuality. Consider the distinction Agamben draws, following Aristotle, between “existing” and “generic” potentiality. The latter indicates a situation in which an extant state of being must undergo an alteration—must become other than what it is—in order for what is potential to arrive into actuality. An example would be the child who must learn a new skill in order to then be someone who can exercise it, for instance the skill of playing the piano. By contrast, existing potentiality is what it is precisely because it preserves what is potential in its actuality. It belongs to the architect who *can* build thanks to an existing foundation of knowledge but may choose not to; to the poet who can compose a poem but may not.

We can better understand existing potentiality by taking an illustration, this time not from Aristotle, but from Hale’s citation of a particular court case.<sup>62</sup> The case dealt with a situation in which a field of cedar trees bore a fungus that was harming a neighboring expanse of apple trees. If left alone, the cedar trees would eventually kill off the apple trees. Accordingly, the Court mandated the felling of the cedar trees in order to protect the apple trees. Part of its justification of the decision was that both a

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<sup>62</sup> Miller v. Schoene, 276 U.S. 272 (1928).

definitive ruling and the refusal to lay down a ruling would have revealed the ineluctable presence of the state (or of the government, if we are distinguishing the courts from the state). This meant the Court acknowledged that if it were to refuse to regulate by *abstaining* from issuing a ruling, this would be tantamount to a sanctification of the death of the apple orchard. In other words, this abstention would constitute the same form of action undertaken if it *positively* ruled in favor of the cedar trees. In effect, the Court could not *not* be present: whatever it did, including doing nothing, it would either be killing the apple orchard, or killing the cedar trees.<sup>63</sup>

This interpretive light gives the reality of the trees a particular quality. It is *not* that if the court had acted by making a ruling, the situation would have been transformed by the presence of what was not there suddenly come into being, in the form of a command about what was to be done. It is rather that the reality of the trees, including the (potential) death of the apple orchard and life of the cedars, was a mode of existence defined by the potentiality of the state to pass into actuality. We could posit this mode of existence as an answer to Agamben's question, "*how is it possible to consider the actuality of the potentiality to not-be?*"<sup>64</sup> It means that the state is always-already there in the life of the trees. Agamben calls this the mode of existence of privation. The

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<sup>63</sup> Hale, "Force and the State," 200–201.

<sup>64</sup> Giorgio Agamben, "On Potentiality," in *Potentialities: Collected Essays in Philosophy* (Palo Alto, CA: Stanford University Press, 2000), 183. Emphasis in original.

concept of privation enters into our context because the state is not actually there in the form of a material ruling or intervention, but it is implicated in existence nonetheless.

For the liberals, this form of existence is implicitly argued away, which is what the theory of laissez-faire is built upon. It is clear to see, then, how certain historical preoccupations shaped Hale's reconceptualization of what I have been calling the liberal analytic. He was not so much concerned with tree fungus as he was with showing that the state—insofar as it authorizes a legal system of rules and restrictions—actively creates and regulates the economic universe. And it is continually regulating that universe even when it supposedly declines to interfere by not making this regulation explicit in the form of codified legislation. The practical effect of these insights is that once there is a legal system in place, even when the state does not appear to be in force in the form of active intervention, it has a shaping effect on the dynamics inherent to the situation it “leaves alone” precisely through the presence of its absence. Concretely, the purpose is to show that policy choices are being made even when that does not appear to be what's going on. While this analysis was politically motivated, the logic of the claim itself is not partisan in structure. Which is to say, it does not serve to demonstrate that laissez-faire is a bad idea, either because the values it projects are not just, or because it is not the most effective way to realize those values even if they were. It aims to demonstrate that laissez-faire does not logically exist.

While this angle is relevant to legal analysis, specifically to considerations of policy-making, it is not our primary point of focus at present. What is lost in training attention solely on the consequences of this analysis for the legal structure of economic distribution is precisely the formal isomorphism Foucault indicated between political paradigms, analytic methods, and frameworks of knowledge.<sup>65</sup> The notion of a framework of knowledge is what I wish to bring into relief by focusing on Hale's extension of the progressive model into an analytic of potentiality. Existing potentiality describes a reality in which there is no negative space. Hale's analysis of the hit and run that could equally well be described as an act or a failure to act is the first step towards this analytical picture because it initiates the indistinction between positivity and negativity. It is also an extension of the innovations in economic analysis initiated by institutional economics. Recall that in place of the so-called materialistic concept of property organized by man's relationship to nature, the institutional economists saw property as a variable configuration of relationships between economic subjects. Rather than property as a possession that one had a right to keep, exchange, or sell (as in the respective articulations of Justices Curtis in 1857 and Day in 1917), we begin to approach a system of relationships, albeit from the perspective of their legal-economic dimension.

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<sup>65</sup> Duncan Kennedy likewise notes the similarity between the liberalist framework that is an object of critique for Foucault in the *Society Must be Defended* lectures and for progressive Robert Hale. See "The Stakes of Law, or Hale and Foucault!" in *Sexy Dressing Etc* (Cambridge: Harvard University Press, 1995). In this piece, however, I think Kennedy interprets Foucault's notion of "the juridical" as confined too strictly to the concept of law per se, rather than understanding it as referencing an entire set of discursive tendencies.

Within this reformulated picture of socio-economic life, ownership signals a relative set of capacities and incapacities whose balance is determined by the extant configuration of legal rules. In this sense, enforcing a right does not mean staking your claim to a thing; it means exercising a capacity to behave in a certain way that will in turn impose an incapacity to do something on someone else. By consequence, ownership consists not in the liberal concept of having or not having, but in a field of relational pressures and reciprocal infringements that modify the abilities and behaviors of others.

As detailed above, this conception of sociality as a field of relational pressures also led to the idea of a formal equivalency between political entities (i.e., persons, the state, corporations). In Commons, this equivalency emerged through the perspective of the transaction, intended to reveal the ethical dimension of economic behavior. When Hale goes to the root of the liberal analytic by overturning its discursive grounding in the opposition between absolutes, he extends Commons' formal equivalency into a form of knowledge that changes the status of economic entities not just perspectively, but ontologically. We arrive at an homology between state action and individual action. If within the framework of liberalism, the opposition between the state and the individual is monolithic and mediated by rights understood according to the logic of commodity exchange, the dynamics of economism negate these distinctions. The social milieu becomes a field of force rather than a stage for the actions of discrete subjects. Within

this field, the state's relation to the apple orchard can equally well serve as model to describe people's relations with one another.

For Hale, it is the dynamic of ownership that brings to the fore how people may relate to other people *like a state* rather than mediated *by the state*. Ownership consists in the ever-present potential of a property claim to be brought into actuality at the owner's discretion. This reality places the person who needs or desires the thing owned in a state of coercion, where the price is the cost of the owner's not carrying out the threat of continuing to withhold the thing.<sup>66</sup> Price therefore signals that the non-owner's reality is shaped by the potential of a fine or imprisonment passing into actuality in the event that the owner's stuff is taken from him. The non-owner affects the owner in a formally analogous way. Thus, the potential force of the laborer reciprocally affects the employer through its capacity to be withheld. In this dynamic, income functions like price: it is "the price paid for not using one's coercive weapons," or "the price of escape from damaging behavior" that the worker can exert if things get too bad.<sup>67</sup> This means that although non-owners may not have a material power of coercion based on the accumulation of capital, they exist formally vis-à-vis owners within the same dynamic of potentiality.

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<sup>66</sup> Hale, "Bargaining, Duress, and Economic Liberty," 604.

<sup>67</sup> Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," 474-478.

What contributes to this formal reciprocity, however, is different for the two parties. For owners, it is property that enables coercion, which means the vector of this relation is enabled by the state. Because the state is both there and not there, or there in its potentiality (“Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents”),<sup>68</sup> the owner relates to the non-owner like a state. In other words, ownership means a relation to others defined by the active force of law in its suspension, just as the state relates to the apple trees.

The point is drawn out best in Hale’s analysis of the Civil Rights Cases.<sup>69</sup> Decided in 1883, these cases involved owners of various inns who were brought to court in violation of the Civil Rights Act (1875) for refusing accommodations to aspiring black patrons. The Court held the act unconstitutional because it attempted to regulate the private actions of innkeepers, which could not in themselves be considered actions undertaken by the state. Such transactions were instead a form of private exchange and hence involved not state force but private force. The reasoning behind the decision stemmed from adherence to a liberalist interpretation of constitutional law, according to which private persons do not have the power to take away one another’s rights, and consequently, do not need constitutional protection against one another, only against the

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<sup>68</sup> Ibid, 471.

<sup>69</sup> The Civil Rights Cases, 109 U.S. 3 (1883).

state. As the Court phrased it, “civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.” A wrongful action of one individual is merely a “private wrong.” A person can thus “invade” the rights of another person, but she does not have the power to completely destroy or “abrogate” those rights. The reason for this is that, presumably, the person injured by a private party is free to use his invaded but still intact rights to appeal to a higher power for redress.<sup>70</sup>

This depiction, which familiarly conceptualizes a right as something that one holds like a commodity, allows for a distinction to be made between “invading” a right (what a person might do) and “abrogating” a right (what the state might do), where the latter involves actually extinguishing it or taking it away. This distinction, in turn, depends upon an ontological distinction between states and subjects. But if a property right preexists an act of private prejudice, the only thing keeping a potential black patron out of a discriminating innkeeper’s abode is the fact that entering will legally make of him a trespasser, which puts him at the mercy not of the individual per se, but of the state. This means that private acts of exclusion are also and at once acts of the

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<sup>70</sup> Hale, “Force and the State,” 182-186. In the United States, the Constitution concretizes the ontological distinction between state and individual—or political and private—forms of power. Insofar as the Constitution is interpreted as providing a kind of protection, i.e. rights, against the state that it does not correspondingly provide against individuals, it distinguishes a public monopoly of force from the collective force of individuals.

state, insofar as they reveal its mode of existence in the form of potentiality. From this perspective, the force of the private innkeeper *is* the force of the state, and it is precisely this type of force that “permeates the entire economic system.”<sup>71</sup>

#### **4.8 Conclusion: Towards Economism**

The idea of the market as an entire economic system of relational constraints attributable either to the state, an individual buyer, or a potential (commercial) community is a continuation of the idea that the individual is homologous with the corporation insofar as each can be considered as a network of legal transactions. What if we were to expand this idea just one step further, and say that the entirety of social relations consisted simply in an extension of this model of economic relationality? This, I think, is the prevailing critical-humanist definition of neoliberalism. From it flow familiar diagnoses such as that, today, people imagine themselves as “enterprises,” or are compelled to conduct themselves like enterprises in relation to their subsistence and to their desires. Or again, the idea that the state behaves or should behave as a market actor in relation to legal and social domains. These ideas are familiar beyond the sphere of legal analysis because they are commonly considered the social byproducts of the economic and *epistemic* projects associated with neoliberalism.

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<sup>71</sup> Ibid, 199.

But why do we call them “neoliberal?” I have been classifying them as counter-liberal, because this is the discursive trajectory from which I believe they emerge. The next and final chapter addresses this discordance. Briefly, the reason why these trends are associated with neoliberalism is quite simply that they can *also* be found in the cannon of texts associated with notable proponents of the movement to revive economic liberalism. Here, too, we find the tendency to posit the market as the principle of intelligibility for the social. What I have suggested in this chapter is that in order to understand what this really means and where it comes from, we have to look farther back than the neoliberals and consider how these ideas became thinkable in the first place. We must, in other words, attempt to interrogate their conditions of possibility. My contention is that these conditions were set in place by the merger of law and economics into a single discourse, a process that, in the United States, began in the late nineteenth century and was refined throughout the early part of the twentieth. During this period we see the first articulations of trends that began as disciplinary concerns but that are still familiar, even dominant, precisely because they became generalized beyond the singular and distinct disciplines in which they were born.

## 5. The Long Economistic Century

### 5.1 Sojourn at the Law School

I want to commence this final chapter by circling back to a beginning that resides circumstantially in my initial encounter with the fields of legal theory and legal history. I approached these fields as a humanist accustomed to a style of seeing grown so familiar I had forgotten its particularity. Coming across Robert Hale in the context of a law school reminded me of this. Legal scholars consistently pose a dichotomy—both at the practical and at the philosophical level—between the movement of progressive jurists loosely associated with realism and institutionalism that I have just touched upon, and those proto-neoliberal thinkers at the origin of the now-dominant law and economics movement. The dichotomy positions Robert Hale at the one pole, and Friedrich Hayek at the other. These two thinkers are emblematic of their respective schools—if we may call them that—because they are thought to have given the most nuanced, most self-consistent expression to two diverging trajectories within the history of legal thought.

The opposition between positive and natural law that informs jurisprudence deeply influences the construction of this antithesis between progressive and neoliberal juridical theory. I will replicate the reasoning as faithfully and succinctly as I can. Friedrich Hayek asserts a classical conception of *nomos* as law that expresses social custom. *Nomos* inclines towards a socio-legal order that has spontaneously adapted itself to people's needs by facilitating their interaction. It does so by emplacing abstract rules

by which people abide even if they are not necessarily aware that they are doing so. Because these rules are facilitative rather than directive, Hayek calls *nomos* the “law of liberty,” reserving the idea of directive law, which should have a far smaller compass, to the province of the legislator. Judges, insofar as they “discover” the form of these abstract rules, articulate the codes of conduct that custom has generated for the purpose of enabling people to pursue their separate goals.<sup>1</sup> By the terms of this framework, state intervention into the legal apparatus—in the form of directive legislation—interferes with the separate purposes being served by the smooth functioning of these abstract rules.

Hale offers a completely different picture of law’s relationship to social interaction. For Hale, the extant operation of legal and economic institutions derives its character from legal rules that *precede* it. This means that a given distribution of resources does not express but is predetermined by a set of legal rules that has unequally allotted economic power to different economic groups in the form of their respective capacity to bargain. These “ground rules,” in slightly more technical legal terms, are private law rules. In this understanding, law does not realize a “purpose”: it is simply an artificial mechanism that has always already set up the terms of distribution

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<sup>1</sup> Friedrich Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1978), 123.

by differentially allocating material capacity. And if the mechanism is producing an unacceptable wealth disparity, the ground rules should be reconfigured.

Hale was part of the legal realist movement, which had various points of overlap with positive law theory. For realists, as for positivists—whose forebears included Hobbes, Bentham, and John Austin—law comes from the outside. This means legal rules are artificial constructs. The consequence, as I noted in the previous chapter, is that there is no guarantee or even likelihood that starting from an abstract legal value like liberty or equality and then reasoning backwards will produce a just result. From this vantage, it is easy to show that the same express principle to which judges professedly ascribe may produce statements that range from being inconsistent or self-contradictory to simply meaningless.

Hayek explicitly situates himself within the natural law lineage of jurisprudence. By his own account he follows a legacy that begins in the West with Aristotle (recall *nomos*), moves through Thomas Aquinas, and receives some important updates from David Hume. From this vantage, law facilitates the evolution of social custom towards tacit and collective purposes. If you can identify the purpose—say freedom of exchange—you can keep the law on its proper course by accommodating the expectations people carry as a result of the customs they have generated through their successive interactions.

The difference between the progressives and the neoliberals is thus not merely one of policy; there is also a deep schism located at a theoretical level that cannot be chalked up to one side advocating for regulation and redistribution, the other for unregulated markets and privatization. Nevertheless, the theoretical level at which I comprehended these two camps spelled out a completely different relationship. I realized this was because my first pass at them occurred at the dimension of their discursive organization, and also because as I approached these two trajectories, I had Foucault's reading of neoliberalism in the back of my mind. This sort of reading is not accounted for by the jurisprudential angle, which takes direction from a specific set of questions, all of which are implicit in the accounts I've just given. They include: what is law, what is just law, what is the relationship between law and society, and how should we characterize what judges do? What if the question were instead, when did it become feasible to conceive sociality as an economic milieu in which political and social entities act as vectors of economic force?<sup>2</sup> To my mind, this is one of the central questions animating Foucault's *The Birth of Biopolitics*. I see a mode of analysis that accords with this description when I read the theories of Robert Hale. Foucault attributes it to neoliberalism.

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<sup>2</sup> What this question describes should be distinguished from a Marxist model in which social relations are perceived as "economic" insofar as they are determined in the last instance by the economic formations underpinning them. The difference resides in the fact that, to put it schematically, the economic model posits a formal collapse between economic and social action, while the Marxist model posits a vertically determined relationship between distinct "structures."

Foucault's formulations in *The Birth of Biopolitics*—what he chooses to accentuate and the correlations he makes—thus bring to light certain discursive undercurrents at work in these otherwise antithetical poles of socio-legal analysis. But there is a catch to Foucault's reading. As others have pointed out, the method driving this peculiar work departs substantially from the methods that went into producing what we now think of as genealogy.<sup>3</sup> *The Birth of Biopolitics* is in many ways more of a history of ideas, specifically ideas that correlate with liberal economics. By consequence, the discursive formations Foucault reveals through this research get telescoped into the history of liberalism. In fact, these formations belong within a broader discursive history of Western law and economics. The problem is that the ones who have the keenest knowledge of these developments are also the ones prone to approach their history through the lens of jurisprudence.

## 5.2 Two Neoliberalisms, and then Some

For those less concerned with questions of jurisprudence and more interested in what Pierre Bourdieu and Loïc Wacquant have termed the symbolic violence of “constrained communication” that “consists in universalizing the particularisms bound

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<sup>3</sup> For example, Wendy Brown claims that since Foucault's investigation functions as an intellectual history of, at the time, an only partially formed movement, it reads more like a history of the future than a genealogical “history of the present.” Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015), 52-54.

up with a singular historical experience," *The Birth of Biopolitics* looms large.<sup>4</sup> We are now almost ten years beyond the date of the English translation of the lectures and their massive impact is indisputable. If scholarly discussions foregrounding the term "neoliberalism" had been swelling in the first decade of the twenty-first century, publication of the lectures catapulted them off the charts.<sup>5</sup>

This surge resulted in the fusion of certain conceptual pairings arising from the conjunction of interest in critical discourse analysis in general, more extensive access to Foucault's work on liberalism in specific, and what seems to me is vaguely felt as the increasing hegemony of certain economic paradigms attributed off-handedly to the phenomenon of neoliberalism. Out of this cauldron, two more or less distinct approaches to the concept of neoliberalism have emerged. The first focuses on legal-economic developments that reinvigorate some of the fundamental tenets of classical laissez-faire, albeit with significant alterations; the second could loosely be categorized as studies that engage with the Foucauldian notion of governmentality.

The economic aspect of neoliberalism is fairly easy to isolate: it includes the idea of a free market carefully nurtured by legal policy, state policies that encourage individual entrepreneurialism, the dismantling of the welfare state, and the onset of

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<sup>4</sup> Pierre Bourdieu and Loïc Wacquant, "NewLiberalSpeak: Notes on the New Planetary Vulgate," *Radical Philosophy*, no. 105 (February 2001), 2.

<sup>5</sup> Those with a penchant for numbers should consult Terry Flew's "Six Theories of Neoliberalism," *Thesis Eleven* 122, no. 1 (June 2014).

sweeping deregulation and privatization regimes. An important difference between classical liberalism and neoliberalism is the latter's deep implication in the processes of globalization, the dominance of finance capital in the contemporary economic landscape, and increasing emphasis on the value of the individual, whose thriving must be insured by business-friendly environments.<sup>6</sup>

Neoliberalism as governmentality is a slipperier fish. Work in this vein begun by building upon dispersed references to political concepts Foucault made in lectures, essays, and interviews given later in his life, and also from what is found in the College de France *résumés des courses*, which were made available before the lectures themselves were consolidated for publication.<sup>7</sup> Invariably, this work attaches liberalism and the rise of neoliberalism to more general social trends that involve the economization of social relations. In one of the more influential essays in the field, for example, Wendy Brown asserts that according to the particular political rationality of neoliberalism, the "political sphere, along with every other dimension of contemporary existence, is submitted to an economic rationality; or put the other way around, not only is the human being configured exhaustively as *homo oeconomicus*, but all dimensions of human life are cast in

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<sup>6</sup> There are many examples, work done in the field of cultural anthropology seems to be most extensive. See for example Jean Comaroff and John Comaroff, eds., *Millennial Capitalism and the Culture of Neoliberalism* (Durham, NC: Duke University Press, 2001).

<sup>7</sup> Andrew Barry and Timothy Osborne's volume *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government* (Chicago: University Of Chicago Press, 1996) is a product of this timeline.

terms of a market rationality.” Brown goes on to clarify that within this rationality, all human action is submitted to a calculus of profitability and entrepreneurialism. This is a code of conduct that extends equally from the individual to the state, such that “the state must not simply concern itself with the market but think and behave like a market actor across all of its functions, including law.”<sup>8</sup>

I do not find this contention to be in error. I would only call attention to what will serve as our present point of departure, namely, that there is a slight disjuncture evident in such formulations. It emerges in the fact that there is no necessary link between the political projects of neoliberalism and the kind of economistic hegemony to which Brown refers, and that has its origin in the paradigms Foucault identified in *Biopolitics* lectures. We thus see a logical leap between particular value-laden ends—such as efficiency and profitability—and the more general discursive framework that conditions and constrains how these terms signify in the first place.<sup>9</sup> My own contention is that this leap is due to a lack of proper inquiry into the historical transformations in

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<sup>8</sup> Wendy Brown, “Neoliberalism and the End of Liberal Democracy,” in *Edgework* (Princeton: 2005), 41-42.

<sup>9</sup> Wacquant, who similarly identifies two major threads of scholarship on neoliberalism, touches upon a similar point when notes that it is unclear what links a favorite formula of governmentality studies—that government is a “technology of conduct”—specifically to the logic of neoliberalism. Such techniques as audits, performance indicators, and benchmarks *can* be put towards neoliberal ends, but can also just as easily be put towards any other political-economic end. Similarly, “there is nothing about norms of transparency, accountability and efficiency that makes them necessary boosters to commodification: in China, for instance, they have been rolled out to pursue patrimonial goals and to reinscribe socialist ideals.” Loïc Wacquant, “Three Steps to a Historical Anthropology of Actually Existing Neoliberalism,” *Social Anthropology* 20, no. 1 (February 2012), 70.

knowledge occurring at the nexus of law and economics that emerges subsequent to the developments I have been describing throughout this dissertation, and of which neoliberalism is only one branch or manifestation.<sup>10</sup> I propose that we might begin redressing this lack by building a better understanding of what Foucault's *Birth of Biopolitics* illuminates and what it forecloses; what it offers and what it fails to offer.

### **5.3 Situating Method in the *Birth of Biopolitics***

As I mentioned at the outset, an important piece of this inquiry consists in being able to distinguish between methodological approaches, for the reason that different methods produce different genres of insight into a particular problem. At the beginning of *The Order of Things*, Foucault uses a particularly illuminating phrase to describe how he understands his own approach to the study of history. Rather than attempting to uncover and restore what has eluded historical consciousness, Foucault states he wishes to “reveal a *positive unconscious* of knowledge.”<sup>11</sup> The phrase in all its paradox captures beautifully a complex interplay between hiddenness and visibility that poses a challenge to traditional hermeneutic interpretation. How can something be posited—laid bare to

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<sup>10</sup> Corinne Blalock, for example, has shown the extent to which inquiry into the legal conditions of hegemonic paradigms conducted from a perspective internal to law on the one side, and political-theoretical inquiries into neoliberalism on the other, have remained almost completely divorced from one another in terms of shared knowledge and conversation. See Blalock, “Neoliberalism and the Crisis of Legal Theory,” *Law and Contemporary Problems* 77, no. 4 (October 2014).

<sup>11</sup> Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York, NY: Vintage, 1994), xi. Emphasis in original.

view—and hidden all at once; and what would hermeneutics look like if set to the task of “revealing” what was never concealed? Paul Veyne reminds us that this is in fact a very simple principle as well as an immediately familiar experience, it was just not one attended to often enough in conventional historical analysis. Positive unconsciousness is essentially the experience whereby we are aware of what we say and do but not the limitations that conform those expressions to a certain set of rules, or “grammar.” Historical analysis that takes up this grammar as an object of scrutiny is concerned with showing that “the realm of what is said presents biases, reticences, unexpected salient features and reflex angles of which the speakers are completely unaware.”<sup>12</sup> The pattern of these angles and blind spots describes a structure of limitations and enablings the exploration into which helps shed light on how ways of saying, knowing, and doing become historically configured.

Veyne terms this level of what is said but not reflected upon as such by the speaker the “preconceptual”: a form of consciousness that does not however reach the level of a self-consciousness. The institutionalization of these discursive acts into forms of knowledge contributes to the formation of a positive reality. The idea is that certain “rules of formation, which were never formulated in their own right” organize ways of saying and knowing that serve the function of bringing corresponding modes of

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<sup>12</sup> Paul Veyne, “Foucault Revolutionizes History,” in *Foucault and His Interlocutors* (Chicago: University of Chicago Press Journals, 1998), 156-157.

existence into being.<sup>13</sup> The idea is *not* that whatever is spoken as truth at a given moment provides a blueprint, merely by fact of its having been said, for how reality will proceed to organize itself.

I make this distinction because it seems to me that the latter idea becomes an implicit premise when bits and pieces of insight are taken from *The Birth of Biopolitics* without considering that this lecture series undertakes a very different type of study from Foucault's previous inquiries into practice and discourse. In these lectures, Foucault traces a history of neoliberalism almost entirely through a sustained examination of economic thinkers attempting to forge a political program for a new brand of liberalism. What is unique about this approach is precisely that it resides "at the level of reflection," as Foucault states at the outset. The distinguishing feature of these lectures is thus that they constitute an investigation into "government's consciousness of itself."<sup>14</sup> The difference should be immediately apparent. At a certain point in history, "liberalism" became a discursive endeavor fully aware of constructing itself as such.<sup>15</sup> In exploring it we are dealing at the level of the self-consciousness of knowledge, not its positive unconscious.

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<sup>13</sup> Foucault, *The Order of Things: An Archaeology of the Human Sciences*, xii.

<sup>14</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79* (New York: Palgrave Macmillan, 2008), 2.

<sup>15</sup> See Duncan Bell, "What Is Liberalism?," *Political Theory* 42, no. 6 (December 2014), on the timeline of this consolidation. Bell places it in the early nineteenth century, perhaps surprisingly later than most might think.

Despite being so clear a distinction, indeed a methodological reversal of sorts, it is understandable how we could miss the difference. Throughout the lectures Foucault proclaims the correspondence between his analysis of governmental practice and his past works, fashioned as genealogies. Both conform, he insists, in the project of tracing the emergence of “transactional” realities. The goal in investigating madness, disease, delinquency, sexuality, and “what I am talking about now,” claims Foucault, “is to show how the coupling of a set of practices and a regime of truth form an apparatus (*dispositif*) of knowledge-power that effectively marks out in reality that which does not exist and legitimately submits it to the division between true and false.”<sup>16</sup> The assertion pops up everywhere in the lectures, threading a supposed affinity between these investigations into liberalism and Foucault’s other work on discourse and practice. It is not an assertion that should be taken at face-value.

Why? For the reason that the analysis of discourse and practice supplies a method of inquiry into the formation of subjectivity. The latter is what emerges from the complex interplay between positivity and what remains unconscious in the discursive process. To imply the same could be said of a self-reflective process amounts to a completely different claim, and an infinitely more dubious one at that. Its logical presupposition is that self-reflective speech acts contain a magical degree of material

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<sup>16</sup> Foucault, *The Birth of Biopolitics*. The quote is taken from 19, but see also 3, 20, 297.

effectivity. Such a presupposition is implied in the claim, to cite one ubiquitous instance of how the *Biopolitics* lectures have been adapted, that *homo oeconomicus* marks a contemporary mode of subjectivation. But *homo oeconomicus* is an explicit construct that emerges from a particular school of thought, not the effect of a set of discursive rules of formation. Forgetting the difference leaves us with the idea that, like a small pack of Judeo-Christian Gods, the neoliberals pronounced us human capital and it was so. Perhaps if they had never *spoken* it, things would not have happened this way.

What's more, and I will return to this, such notions as *homo oeconomicus*—like many if not most contemporary economic renderings of social processes—were self-consciously aspirational. That is, they were intended as hypothetical models of an idealized reality (an economist's ideal, that is), not as descriptions of the way things really worked. As one economic philosopher who is also a sympathetic reader of Foucault reminds us, while Chicago School economists were quick to give policy advice, they also insisted the economic models they developed did not and were not meant to provide a picture of "what is *really* going on."<sup>17</sup>

## 5.4 Liberalism Gets a Makeover

Foucault's meditation on the self-consciousness of liberal governance has the inevitable effect of shifting the connotation of terminology he used more figuratively in

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<sup>17</sup> Francesco Guala, "Critical Notice," *Economics and Philosophy* 22, no. 3 (2006), 437. Emphasis in original.

prior work. Recall that in the previous chapter, I borrowed the term “liberalism” from *Society Must be Defended*, describing it as belonging within an analytic based on a principle of dichotomies and absolutes. This concept of liberalism undergoes something of an inversion when it makes its way into *The Birth of Biopolitics*. At the beginning of the lectures, Foucault recites the familiar formula undergirding the “principle of right” — construed either historically or theoretically, he says: it doesn’t matter — as pertaining to the external limits constructed against royal prerogative.<sup>18</sup> This principle extends from limits instituted against power through public law, to the logic underlying the rights of man, to rights discourse in general.<sup>19</sup> In other words, this is commodity-oriented liberalism as I have described it. It is eclipsed by an altogether different mode of reasoning, which will provide the touchpoints for what later becomes the framework, both for Foucault and in secondary scholarship, for governmentality. Foucault locates the progenitor of this shift in political economy.

Political economy, to recall, is the point of origin of modern liberal economics. Drawing from the *Journal économique*, Foucault recounts the governmental approach towards commerce insisted upon by a merchant in the mid-eighteenth century, who says simply: *laissez-nous faire*. Leave us alone. “I think this,” Foucault states, “is broadly

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<sup>18</sup> Foucault, *The Birth of Biopolitics*, 13.

<sup>19</sup> *Ibid*, 42.

what is called “liberalism.”<sup>20</sup> With this citation, the liberalism of *Biopolitics* becomes equated with the economic theory of laissez faire, which now assumes a different epistemic status from the commodity-oriented liberalism with which it would otherwise seem to share some affinity. This counter-intuitive distinction allows the economic liberalism which will undergird Foucault’s exposition of neoliberalism to assume a wholly novel set of associations. Together, these associations constitute an historical break from the basic characteristics of a prior liberalism equated with the conceptual constellation of rights discourse, exchange, and so-called juridical structures.

What makes *this description* of economic liberalism different from the liberal analytic as I expounded it in the previous chapter? Put simply, what I believe Foucault very accurately and very brilliantly tracks in *Biopolitics* are certain patterns and evolutions of knowledge that took place in the domain of economics writ large. These forms of knowledge do constitute the epistemic shifts that Foucault attributes to them, but they belong on a deeper discursive level. What Foucault describes—and attaches to economic liberalism in contradistinction to the liberal analytic—are ways of sense-making that arose from the historical meeting ground of legal and economic thought. Uncharacteristically, however, he locates these developments at the level of political

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<sup>20</sup> Ibid, 20.

ideology. I mean ideology with a small “i,” so to speak: a body of doctrines attended by a set of ideas for their implementation.

This is precisely what “neoliberalism” is, and, as is well-known, it was developed in departure from an opposing set of doctrines associated with the welfare state. Hence, when Foucault locates the overhaul of the liberal analytic (his older definition) with neoliberalism, the plane of analysis is immediately constrained to the level of doctrine. Here is the narrative as Foucault relates it. Interventionism was the shared counterpoint of the emergent strains of neoliberalism (i.e., German and American), expressed in ideas for a planned economy in England, the New Deal in the United States, and associated—at least for new liberals—with the rise of Nazism in Germany. Interventionism and totalitarianism thus become the origin point of economic liberalism’s critique against excess, which leads to Foucault’s characterization of socialism as not in fact containing its own form of critique. Liberalism alone, which in this telling has become economic liberalism, is “imbued with the principle” that governmentality—a reflective rationality for how to go about governing—should not be exercised without a “critique.”<sup>21</sup> The latter is given form by its opposition to the idea of state intervention. By contrast, there is no governmentality proper to socialism, and if one could even be possible, Foucault insists it has yet to be invented.<sup>22</sup> Consequently, we are left to conclude that socialism by

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<sup>21</sup> Ibid, 319.

<sup>22</sup> Ibid, 94.

its nature lacks the very form of critique that is the object of Foucault's investigation in the lectures.

As Serge Audier has noted, Foucault's attribution of this concept of critique to liberalism should not be separated from his broader explorations into critique as a reaction against the excess of power. For Audier, this attribution emerges from a confluence, perhaps one by which Foucault was "almost embarrassed," between Foucault's own critique of discipline and the liberal economic reaction against the potential excesses of wartime interventionism.<sup>23</sup> At the very least, the liberal critique was opposed in principle to the type of deep regulation Foucault associated with processes of normalization.

I am less interested in the question of motivations, but I share Audier's conviction that aligning socialism and interventionism as a shared counterpoint to the formulations Foucault identifies throughout the course of the lectures is a suspect move. It replicates the same familiar dichotomy between New Deal-style policies and the neoliberal revival against interventionism that is also voiced in any given law school classroom. This leads to the idea, one I intend to prove is inaccurate, that what Foucault associates with economic liberalism—for example the idea that social relations are a

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<sup>23</sup> Serge Audier, "Neoliberalism through Foucault's Eyes," *History and Theory* 54, no. 3 (October 2015), 418. Audier's claim here is not tantamount to the proposition put forth elsewhere that Foucault was himself a neoliberal.

form of data modifiable through the modulation of an economic environment—can be deciphered at the level of doctrine. Because of the shift in method I outlined above, we’ve bypassed the realm of the formation of economic knowledge itself and have remained confined within the sphere of little-i ideologies, despite Foucault’s frequent proclamations to the contrary.<sup>24</sup>

## 5.5 Governmentality: Where are They Now

I have referred several times to the formulations Foucault charts throughout the lectures without giving precise definition to what these are. Let me now give this reference some substance, from the perspective first of what has had most influence on the current conversation. I’ll return to the lectures subsequently. A certain cluster of concepts has driven analyses derived from Foucault’s studies of liberalism, each of which leans upon the others for definition. They share the common feature of further elaborating a relationship between neoliberalism and contemporary economic social and cultural trends, while keeping in place the same blind spot regarding the broader legal and economic context that Foucault’s approach foreclosed from the outset. The literature is vast, but I’ll isolate three major concepts characteristic of the field as pertinent to the present discussion. The first is the idea that modern governance consists in the “conduct of conduct;” the second centers on the figure of *homo oeconomicus* as a

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<sup>24</sup> Foucault, *The Birth of Biopolitics*, for example at 318, where Foucault insists that he is not talking about ideologies but practices.

modern subject thought to correlate with this notion of government; and the third is the notion that the neoliberal instantiation of *homo oeconomicus* assumes the form of an enterprise. Following from this last point is the idea that neoliberalism has, through its configuration of *homo oeconomicus*, exploded the economic paradigm beyond the discipline of economics, and initiated a generalization of the enterprise form throughout all aspects of society.

To begin, the “conduct of conduct” is a maxim that vacillates between attempting to describe what the act of governing has always consisted in, and an historical form of governing that is characteristically liberal. In one sense then, the conduct of conduct is simply what it means to govern: the attempt to guide and mold the activity of a group or groups of people, a practice that has taken on different shapes and followed different principles in various times and places. On the other hand, there is an historical specificity that attends the phrase. Following Foucault, Wendy Brown describes the concept as a style of governance formed in reaction to Keynesianism insofar as it advocates hands-off guidance of economic action over direct intervention and regulation.<sup>25</sup> Likewise, Jacques Donzelot locates the specificity of the conduct of conduct with “political economy,” according to which principles the population “is not controlled but regulates itself according to resources which involve the development of

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<sup>25</sup> Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution*, 21.

commerce... Instead of commanding men's actions, one should act on the interactions between them, conduct their conduct, in short, manage rather than control through rules and regulations..."<sup>26</sup> In brief, the conduct of conduct describes the intent to manipulate an environment that facilitates or constrains the nature, frequency, and direction of activity taken at a collective level. It is action at a distance, an indirect style of social control.<sup>27</sup> This focus on environment brings the significance of relations and activities to the fore as the object of governance, as opposed to the psyche or the body. Furthermore, because this way of understanding conduct was developed as a political economic perspective on specifically commercial conduct, it has an implicitly economic valence. Hence, this model considers conduct to be any given type of behavior that nevertheless responds systematically to modifications in the availability of resources.

*Homo oeconomicus* captures this dynamic as a mode of existence. It began as an experimental means of ascertaining certain information about human behavior by applying a mathematical model to the economic dimension of social activity. The economic dimension is precisely that in which "means and ends can be set in a

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<sup>26</sup> Jacques Donzelot, "Michel Foucault and Liberal Intelligence," *Economy and Society* 37, no. 1 (2008), 121.

<sup>27</sup> These formulations can be found respectively in Nikolas Rose, "Governing 'Advanced' Liberal Democracies," in *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government* (Chicago: University Of Chicago Press, 1996); and Lois McNay, "Self as Enterprise: Dilemmas of Control and Resistance in Foucault's The Birth of Biopolitics," *Theory, Culture & Society* 26, no. 6 (2009).

calculable relation to one another."<sup>28</sup> Insofar as we can isolate a sphere that follows the laws of means and ends, *homo oeconomicus* is an abstraction that represents how human behavior will respond in an equally calculable manner to changes in economic stimuli. The presumption is that there is at least one aspect of individuals that is rational-economic. The idea that has risen to the fore in governmentality studies is that this presumed dimension has, under neoliberalism, expanded its compass beyond the economic sphere. Neoliberal *homo oeconomicus* extends the econometrics of human behavior beyond the domain of the market, such that she orients herself to life in general as a rational choice actor. In this sense she is self-governing, not in terms of a Kantian conception of autonomy, but because she conforms her conduct to economic rules and principles—to a calculus of means and ends—of her own accord. Neoliberalism thus “configures human beings exhaustively as market actors, always, only, and everywhere as *homo oeconomicus*.”<sup>29</sup>

The fact that *homo oeconomicus* is an economic abstraction meant to capture statistically significant patterns of behavior, however, requires a brief note about the perspective of analysis to which this creature correlates. Given that *homo oeconomicus* is the construct generated by a perspective “exercised over an entire population as a

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<sup>28</sup> See for example the theories of Vilfredo Pareto, the late nineteenth- and early twentieth-century economist who was also very influential in the field of law and economics. The quote is taken from Joseph Femia, *Pareto and Political Theory* (New York, NY: Routledge, 2006), 34.

<sup>29</sup> Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution*, 31.

collective being," it is somewhat confusing to refer to it as a singular form of embodiment.<sup>30</sup> Because modifications to an environment cannot be directed towards manipulating action taken at an individual level but only aggregate action, what counts is the main current. This does not mean, however, that it is necessarily contradictory to perceive *homo oeconomicus* at the level of the individual subject. It only means that to do so involves merging two separate arguments into one. That is, it means we have agreed that repeated patterns of behavior encouraged by a particular environment will engender corresponding forms of self-recognition as a sort of aftereffect. Thus, if *homo oeconomicus* embodies the "ethos or subjectivity of the contemporary neoliberal subject"<sup>31</sup> by merit of the fact that he "governs himself according to economic laws,"<sup>32</sup> this is not because such an ethos *necessarily* represents a normative social goal. It is because we take it for granted that, *homo oeconomicus* having done so much kneeling and praying, he must by now believe.

The actions encouraged by this neoliberal environment are summed up by the concept of enterprise, which marks the advancement of *homo oeconomicus* past the exchange-oriented theories of Adam Smith and John Mill (with whom the construct is

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<sup>30</sup> Pheng Cheah, "Capitalizing Humanity: The Global Disposition of People and Things," in *Accumulating Insecurity: Violence and Dispossession in the Making of Everyday Life*, ed. Charles Geisler and Gayatri Menon (Athens, GA: University of Georgia Press, 2011), 310.

<sup>31</sup> *Ibid.*, 83.

<sup>32</sup> Donzelot, "Michel Foucault and Liberal Intelligence," 130.

associated but who did not employ the term). Graham Burchell gives standard expression to this contention when he states that “the generalization of an ‘enterprise form’ to *all* forms of conduct—to the conduct of organizations hitherto seen as being non-economic, to the conduct of government and to the conduct of individuals themselves—constitutes the essential characteristic of this [neoliberal] style of government: the promotion of an enterprise culture.”<sup>33</sup> Contemporary examples of this tendency at the policy level are apparent enough in many states’ reconfiguration of public goods like healthcare and education such that they are made to function according to market logics of incentive, competition, and the implementation of metrics of achievement based on economic definitions of efficiency. Again, by implication, if the economy and the social sphere are privatized and configured in terms of competition, individuals too must adapt by conducting themselves as enterprises, with concomitant effects on self-consciousness. Thus, “governance through enterprise construes the individual as an entrepreneur of his own life, who relates to others as competitors and his own being as a form of human capital.”<sup>34</sup> Brown refers to this process as remaking the soul in the image of the firm.<sup>35</sup>

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<sup>33</sup> Graham Burchell, “Liberal Government and Techniques of the Self,” in *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government* (Chicago: University Of Chicago Press, 1996), 28-29. Emphasis in original.

<sup>34</sup> McNay, “Self as Enterprise: Dilemmas of Control and Resistance in Foucault’s *The Birth of Biopolitics*,” 63.

<sup>35</sup> Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution*, 27.

The reason why this gives many social theorists the willies is not merely that the idea of a person behaving like an enterprise is dehumanizing (by definition) but also that “the organization of society around a multiplicity of enterprises profoundly depoliticizes social and political relations by fragmenting collective values of care, duty and obligation, and displacing them back on to the managed autonomy of the individual.”<sup>36</sup> I will note here only in passing, as I will return to this point below, that because of the inextricability implied in these critiques between neoliberalism, economization and market logic, “enterprise” becomes a shorthand for the further atomization of the individual within society. This accounts for the interchangeability between the notion of enterprise and that of the entrepreneur, rendering “self as enterprise” and “entrepreneur of your life” synonymous formulations. Recalling the analysis of the previous chapter, however, it serves to note that while both enterprise and entrepreneurialism are business models and thus derive from the logic of the market, they ultimately mean different things. The difference is simple: an enterprise is a business partnership while an entrepreneur is a person. Hence, while a hypothetical “enterprise society” is by definition an economistic society, it could not *for that reason alone* be equated with the values of individualism.

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<sup>36</sup> McNay, “Self as Enterprise: Dilemmas of Control and Resistance in Foucault’s The Birth of Biopolitics,” 65.

Some of the formulations I have been tracing were articulated before either the French or English version of *The Birth of Biopolitics* was available, some after. In any case, the publication of the lectures does not seem to have sparked any major reconsideration of these fundamental premises. I have chosen to highlight certain concepts both because they are touchstones within the critical scholarship, and also because they will come up again in my reinterpretation of the lectures. Literature that follows in the footsteps of Foucault's analyses of liberalism comprises an enormous field, so there is of course much I have not touched upon in this focused recapitulation.<sup>37</sup> Within what I have covered, let me identify two common threads which assume the form of givens. The first is a conflation of neoliberalism with certain paradigms of marketization, or what is also referred to as economization, and is loosely conveyed in the concept of governmentality.<sup>38</sup> The second given is that because these paradigms have become hegemonic precisely thanks to neoliberal developments that have affected everything from state policy to states of being, they are radically new and practically without precedent. The question of whether this is so guides my reading of the lectures that

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<sup>37</sup> Something I have not addressed, for example, is a very large body of literature that revolves around the concept of biopower, which is also connected to the analyses contained in *The Birth of Biopolitics*. Because this concept opens up a different pathway of analysis concerned with questions of biological life that is not immediately relevant to this study, I have chosen not to focus on it here.

<sup>38</sup> On economization see Koray Çalışkan and Michel Callon, "Economization, Part 1: Shifting Attention from the Economy Towards Processes of Economization," *Economy and Society* 38, no. 3 (August 2009).

follows. I believe the historical developments exposited in the previous chapters put us in a good position to answer it.

## 5.6 Foucault's Neoliberalism and Progressive Economics

In the middle of the *Birth of Biopolitics* lectures, Foucault gives sustained attention to modern trends within the field of economics, remarking what he calls an “essential epistemological transformation.”<sup>39</sup> What he identifies—and attributes to neoliberalism—is a fundamental shift in ways of economic knowing that cleared the path for two subsequent developments. The first of these was the theory of human capital, which provided a foundation for the second: “the possibility of giving a strictly economic interpretation of a whole domain previously thought to be non-economic.”<sup>40</sup> The notion of an economic matrix applied to social and intimate relations such as marriage and child-rearing comes to us most boldly through thinkers like Gary Becker, whose theories of human capital Foucault touches upon at various points. What, in Foucault’s account, enables the neoliberals to develop a model like human capital? The uniqueness of their approach resides in the fact that they take up human behavior as an object of analysis precisely by moving economics from the realm of material phenomena to that of activity. This shift away from the concerns of classical political economy is the epistemological transformation that “unblocks” economic analysis and allows for the

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<sup>39</sup> Foucault, *The Birth of Biopolitics*, 222.

<sup>40</sup> *Ibid*, 219.

emergence of the art of governmentality. Whereas Adam Smith was concerned with the mechanisms of production and exchange, “the new governmental reason, does not deal with...the things in themselves of governmentality, such as individuals, things, wealth, and land.”<sup>41</sup> Instead, it becomes the analysis of activities that bear a relationship to the question of resources. Foucault quotes Becker as providing the most apt formula for understanding this new form of economic knowledge: the latter does not focus on “material goods” proper but rather consists in “the science which studies human behavior as a relationship between ends and scarce means which have mutually exclusive uses.”<sup>42</sup>

Recall in the previous chapter I recounted how the institutional economists drew upon legal thought in an attempt to redefine economics such that it would pivot upon conflicts of interest arising from scarce resources. This reinterpretation, too, because it centered on conflict as a human relation, aimed to divert the proper object of economics from material goods and individuals as atomistic partners of exchange, to relationality. From this point of departure, John Commons posited the transaction as the conceptual framework allowing for a shift away from “commodities and individuals,” and towards the “working rules of collective action.” For Commons, this development marked the

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<sup>41</sup> Ibid, 45

<sup>42</sup> Gary Becker, *The Economic Approach to Human Behavior* (Chicago: University of Chicago Press, 1978), 3. Foucault’s quotation in the lectures is slightly different but basically accurate.

historical “transition from the classical and hedonic schools to the institutional schools of economic thinking.”<sup>43</sup> The former characterized the so-called materialist approach of classical political economy.

For Commons, this shift had an ethical valence because it moved the focus of economics from the individual and his stuff to the interrelations between people. What Foucault emphasizes in neoliberal economic theory is an expression of this same evolution, but his methodological approach has homed in on the ideologically liberal (here opposed to leftist) branch of economics. Further, it is not simply that Foucault has only paid attention to liberal economics at the expense of other schools; because of the historical narrative his analysis relies upon, the epistemological transformation he identifies at the base of subsequent conceptual developments such as human capital *receives definition through its contradistinction* with socialist economics. Recall that in *The Birth of Biopolitics* the welfare state, New Deal policies, Keynesianism, even Nazism, collectively form the fundamental antagonist of liberal governmentality. The conduct of conduct is what it is because it is not those things. What if the question of definition did not pivot upon the dichotomy between interventionism and abstentionism, but instead had to do with internal transformations within the field of economics as a shared form of knowledge? My concern in proposing this is not to rescue a little relevance for socialist

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<sup>43</sup> John Commons, “Institutional Economics,” in *John R. Commons: Selected Essays*, ed. Malcolm Rutherford and Warren Samuels, 1 edition, vol. 2, 2 vols. (New York, NY: Routledge, 2002), 447.

economics, but rather to indicate its shared epistemic basis with certain ways of knowing we have come to associate exclusively with neoliberalism.

This is not to say that institutional economics and neoliberalism are the same thing. What we could say, however, is that neoliberal economics, in marking its departure from classical political economy, follows along the path of the same epistemological breaks effected by a prior institutionalist development (of course, it does not proclaim any such affinity), but splits off into a different ideological direction. Now, instead of an emphasis on *transaction* as an avenue into thinking collectivity, we have *activity* as a means through which to incite competition, a core capitalist value. Both are forms of action rather than material “things in themselves” and both, as it happens, are configurable in terms of enterprise.

In this sense, “relation” and “activity” are forked possibilities made available by the concept of enterprise. What they share is a departure from the analytic of exchange; as Foucault puts it, the new “*homo oeconomicus* sought after is not the man of exchange or man the consumer; he is the man of enterprise and production.”<sup>44</sup> As the institutionalists noted, the trouble with exchange and consumption is that it configured the individual as the primary unit of economic analysis. Foucault, too, notes that in the economic analyses with which he is concerned, the “basic element to be deciphered...is not so much the

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<sup>44</sup> Foucault, *The Birth of Biopolitics*, 147.

individual, or processes and mechanisms, but enterprises.”<sup>45</sup> Hence the “multiplication of the ‘enterprise’ form within the social body,”<sup>46</sup> is a mantra lifted from the lectures and invariably associated with the neoliberal configuration of the social. The picture could have just as easily been painted by Commons.

In fact, moving from the individual to the enterprise as the hinge point of economic analysis makes sense precisely insofar as the latter can be perceived in collectivist terms. What we see happening in Foucault is the constant assimilation of enterprise back into an individualist framework to the extent that it becomes equivalent to the notion of the entrepreneur as an enterprise of one.<sup>47</sup> Hence “the stake in all neoliberal analyses is the replacement every time of *homo oeconomicus* as partner of exchange with a *homo oeconomicus* as entrepreneur of himself, being for himself his own capital, being for himself his own producer, being for himself the source of [his] earnings.”<sup>48</sup> And insofar as the entrepreneur exists only for himself, his social world is a “society subject to the dynamic of competition.”<sup>49</sup>

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<sup>45</sup> Ibid, 225.

<sup>46</sup> Ibid, 148.

<sup>47</sup> Maurizio Lazzarato takes this concept from Foucault and updates it in accordance with the more contemporary problems of debt and finance capital. See Lazzarato, *The Making of the Indebted Man: An Essay on the Neoliberal Condition*, trans. Joshua David Jordan (Los Angeles, CA: Semiotext, 2012), especially at 90-91.

<sup>48</sup> Foucault, *The Birth of Biopolitics*, 226.

<sup>49</sup> Ibid, 147.

## 5.7 Of Economic Environments

The analytical shift from exchange to enterprise correlates with a perspectival shift that moves its focus away from the individual psyche or body and towards the environment as a manipulable milieu. By way of conclusion, I will explore two different manifestations of this concept of an economic environment. The first we find in the *Biopolitics*, in Foucault's notion of an economic milieu, which he derived from the work of select neoliberal economists. The second we find in Hale's interpretation of legal force as a mode of conduct regulation. These two approaches take up crime and taxation, respectively, as case studies that instance the development of a new form of knowledge that acts on the "rules of the game rather than the players."<sup>50</sup>

As I noted above, Foucault arrives at the idea of environment by tracing how economic thought went from perceiving the proper object of economic knowledge as the political-economic partner of exchange, to focusing on sites of economic activity. This shift in perception concomitantly involved understanding people's behavior as having an economic dimension that was "'responsive' to some extent to possible gains and losses, which means that [one] must act on the interplay of gains and losses or, in other words, on the environment."<sup>51</sup> Thus, *homo oeconomicus* is "someone who responds systematically to systematic modifications artificially introduced into the

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<sup>50</sup> Ibid, 260.

<sup>51</sup> Ibid, 259.

environment,"<sup>52</sup> a formula which introduces a new avenue into understanding the relationship between people and their social environs. According to the terms of this new relationship, insofar as aggregate behavior shows a statistically significant change in response to modifications of supply, it manifests as an object of knowledge in the form of an economic datum.

Foucault's focus on the neoliberal analysis of crime as an example of what is new about this epistemic model provides an apt counterpoint to the forms of knowledge he previously located at the intersection of psychiatry and criminal justice. Through these investigations, Foucault described how a psychological correlate taken to reveal an internal truth about the criminal subject supplemented legal determinations of guilt and punishment. Accordingly, "every crime and even every offence now carries within it...the hypothesis of insanity, in any case of anomaly. And the sentence that condemns or acquits is not simply a judgment of guilt...it bears within it an assessment of normality and a technical prescription for a possible normalization."<sup>53</sup> In essence, judgment of crime could not constrain itself to evaluating the legality of behavior in a purely formal manner: it functioned instead by asking of the criminal: "Who are you?"<sup>54</sup>

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<sup>52</sup> Ibid, 270.

<sup>53</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995), 20-21.

<sup>54</sup> Michel Foucault, "About the Concept of the Dangerous Individual in Nineteenth-Century Legal Psychology," in *Power* (New York: The New Press, 2001), 177. Foucault abstracts this fundamental criminal-psychiatric question from a marvelous scene contained within a contemporary trial transcript. As Foucault

Neoliberal economics moves away from this intent to discover what makes a criminal a criminal—which is both a psychically and physiologically oriented form of inquiry—to focus strictly on crime as a set of behaviors. The pathological mind in this model—distinguished by its “moral or anthropological traits”—is irrelevant. The criminal, in answer to the question “who are you?” is: “absolutely anyone whomsoever.”<sup>55</sup> Divorced from the psyche, criminal behavior becomes susceptible of econometrics insofar as it changes predictably and systematically in response to modifications of supply and demand. Consequently, to address the problem of crime in neoliberal fashion means to “act on the market milieu in which the individual makes his supply of crime and encounters a positive or negative demand.”<sup>56</sup>

If a person or population avoids an activity for whatever reason—for example, because it is too costly or too risky—this is “negative demand.” Hence, making certain things more costly will amount to an environmental modification of negative demand. As concerns crime, this involves balancing the costs of intensifying law enforcement against the rate of returns in terms of reduced offenses. For example, if we take an area where the theft rate is twenty percent, we can modify the environment by intensifying law enforcement at a reasonable cost up until we’ve reduced theft to, say, five percent.

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relates it, after the accused continually remained silent in response to the judge’s demand that he “explain himself,” an agitated juror finally cried out: “For heaven’s sake, defend yourself!”

<sup>55</sup> Foucault, *The Birth of Biopolitics*, 253.

<sup>56</sup> *Ibid*, 259.

This has increased negative demand by increasing the risk of getting caught and thus the “loss” of imprisonment. This leaves us with a small portion of persons who continue to commit theft despite the increased risk of a loss. Because increasing law enforcement to the point of reducing theft from five percent to, say, two percent would be more costly than what we have determined those few percentage points to be worth, however, neoliberal crime solutions content themselves with an inevitable margin of imperfection. Along the same lines of analysis, we can reduce the “supply” of instances for crimes of passion by relaxing divorce laws, which is low on cost, but some percentage of crimes of passion will remain regardless, and we may determine it too costly to nullify them completely. Consequently, focusing on the main current of criminal conduct rather than on transforming the soul of the criminal individual means giving up on the goal of eradicating crime completely and accepting a margin of criminality.

Drawing on Friedrich Hayek—whose theories of law I recounted at the beginning of this chapter—Foucault attributes this new way of understanding economic subjects and environments to the integration of the rule of law into the economic system. For Hayek, the rule of law belongs within the province of *nomos* and indicates a set of formal principles that can guide spontaneous order, in contradistinction to so-called made orders order which rely on planning.<sup>57</sup> Staying within the formal principles of the

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<sup>57</sup> Ibid, 171-172.

rule of law means “modifying the terms of the game, not the players’ mentality,” as demonstrated in the neoliberal approach to crime reduction.<sup>58</sup> In a second move, Foucault further attributes this particular notion of the rule of law to a “change [in] the conception of law” in general.<sup>59</sup> Perceiving law as a set of formal principles that comprise “the rules of the game” is the necessary precondition to the neoliberals’ economistic vision of how manipulating an environment can direct the action of individuals towards desired ends from a distance. This is different from understanding law simply in terms of “prohibition and constraint,” a function of the command-theory of law as it was expounded by John Austin and that I described in the second chapter.

It is tempting to conclude from these remarks that Foucault is noticing something about law — through the neoliberals’ construction of it — that perhaps he had not paid attention to in the past. In fact, we can already see the outlines of this reconceptualization of law as early the late nineteenth century. In taking up the common law structure of contract, for example, Oliver Wendell Holmes attempted to demonstrate that the law does not work by way of direct compulsion. Rather than acting as a force of command that compels a party to fulfill the terms of a contract, the law erects consequences that function as *disincentives*: either fines, or in rarer cases,

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<sup>58</sup> Ibid, 260. Quote taken from the manuscript notes that follow the text of the lectures.

<sup>59</sup> Ibid, 260-261. What I recount here is found in a portion of Foucault’s manuscript notes that unfortunately did not make it into the body of the lectures but were included by the editors of the volume.

imprisonment.<sup>60</sup> “If, when a man promised to labor for another, the law made him do it, his relation to his promise might be called a servitude *ad hoc* with some truth. But that is what the law never does.”<sup>61</sup> Which is to say, the law never compels compliance. Instead, it leaves one who would break the contract in the situation of having to choose between undesirable options: either fulfill the terms of the contract you no longer wish to honor, or pay a fine.<sup>62</sup>

Hale expanded this idea to describe a form of force that “permeates the entire economic system.” In modifying the rules of the system, we accordingly manipulate flows of conduct. By way of demonstration, Hale took up the questions of taxation and financial incentives. In these instances, a “government can induce conduct, not only by making those who do not perform it worse off [than] before (as by taxing them), but likewise by making those who do perform it better off than before (as by paying them for the performance).”<sup>63</sup> In this way, both the creation of incentive and the fact of taxation constitute the “regulation of conduct” insofar as they work by guiding conduct

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<sup>60</sup> Compare this against Benjamin’s characterization of law compelling compliance to the terms of a contract as I described in Chapter Two.

<sup>61</sup> Oliver Wendell Holmes, Jr, *The Common Law* (New York, NY: Dover Publications, 1991), 300-301.

<sup>62</sup> Commenting on Foucault’s tendency to characterize law a set of prohibitions and constraints (prior to the *Birth of Biopolitics* lectures), Duncan Kennedy has likewise aligned Foucault with the Austinian view of law. Kennedy also point outs that Holmes departed from this, what he called “criminalist,” perspective by imagining law as a structure, or as the “rules of the game” in which people pursue objectives rather than follow commands. Duncan Kennedy, “The Stakes of Law, or Hale and Foucault!,” in *Sexy Dressing Etc* (Cambridge: Harvard University Press, 1995), 119.

<sup>63</sup> Robert L. Hale, “Force and the State: A Comparison of ‘Political’ and ‘Economic’ Compulsion,” *Columbia Law Review* 35, no. 2 (1935), 168.

in one direction rather than another.<sup>64</sup> Taxation thus provides an instance of how negative demand can be created and modulated towards the end of manipulating conduct.<sup>65</sup>

As I explained in the previous chapter, this dynamic is not particular to state power: it is just what power *is* perceived through the lens of economics in its contemporary manifestation. It is only within the liberal analytic that we distinguish between forms of state power and private power. In the economistic analytic, nothing distinguishes between vectors of economic force. Thus, when “people desist from conduct in order to avoid payment of a tax on it, they desist under compulsion; so do they also when the payment which the law requires is called a “price.””<sup>66</sup> Thus the fact of ownership—the precondition of price—replaces the same regulatory dynamic between people that a tax replaces between people and the state.<sup>67</sup>

## 5.8 Conclusion: Beyond Economism

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<sup>64</sup> Ibid, 164.

<sup>65</sup> Neil Duxbury also comments on Hale's analysis of taxation as a form of disincentive: “Robert Hale and the Economy of Legal Force,” *The Modern Law Review* 53, no. 4 (July 1990), 433-434.

<sup>66</sup> Hale, “Force and the State,” 168.

<sup>67</sup> The fact that this is a perspectival shift is shown in Hale's demonstration that the courts historically did not acknowledge an equivalence between taxation and the regulation of conduct. Taxation has the same effect as a formal prohibition, but because taxation is justified on the grounds of the state needing revenue, the courts understand it as having a different legal status from coercion. If the motive of the tax changes, however—say it shifts from raising revenue to encouraging the desistence of the conduct being taxed—the tax becomes unconstitutional because it is interpreted as coercion on the part of the state. That is, unless it can be proved that there is something about the conduct itself that makes compelling its desistence unconstitutional.

Circling back to where I began, I hope my exposition of these examples has served to illustrate how Foucault may stand as a bridge through which to understand the confluences between progressive economics and neoliberalism insofar as together they constitute a form of knowledge. At the same time, we must pay heed to the crucial role the history of law and legal thought has played in this development, as well as amend our understanding of what this knowledge is and whence it came. I call it economism not because it applies the principles of quantification to social phenomena, but because it has a structural specificity grounded in innovations in economic thought that have primarily to do with ideas about relationality. As I have intended the trajectory of this dissertation to demonstrate, with economism we are not dealing with an extension or rebirth of liberalism; we are dealing with something that functions according to a completely different set of discursive rules and injunctions.

Conceptually detaching economism from neoliberalism produces a different set of historical associations and discontinuities through which to evaluate the present, enabling us to see in a different way the scope, contingency, and finitude of things that have become so hegemonic their absence feels unthinkable. Such a disarticulation also has the potential to nudge critiques of neoliberalism off a certain circular path they seem to have been tracing for some time. By this I mean to suggest that the conflation between neoliberalism and economism allows progressive scholars to reflexively dis-identify with the former insofar as the latter can assume the status of a catch-all term for any and

every manifestation of political rightism. But economism is a hegemonic, not a doctrinal formation. This fact locks progressive critique into a self-defeating circle, in which it indicts economism as antithetical to progressive aims on the one hand, while yet perceiving it as a constant and corrupting infiltration into the discursive structure of progressive thought on the other. Recognizing this discourse as a contingent set of innovations in *knowledge* and *power* helps us to understand its historicity, and begin imaging the ways in which we might redirect it, rather than retreat from it.

## Coda: An Apprenticeship in Genealogy

Having taken up a trajectory of legal thought that traverses issues of political justice, racial oppression, and the unequal distribution of social wealth, the preceding pages comprise a history that cannot help but take itself seriously. What I imagine have been its most successful moments, however, were driven by my own experience of laughter, horror, and amazement in encountering the texts on which this analysis is based. Put differently, this analysis has been guided by a stubborn faith in naiveté. Naiveté as method is what I associate with Foucault's account of laughter when he happened upon a "certain Chinese encyclopaedia" whose taxonomy was so foreign, so unthinkable, that it shattered the landmarks of the familiar. The method consists not only in posing the question of what supplies a given system of thought with its principles inclusion and differentiation, but to respond to the moment of the encounter by allowing it to be bizarre rather than immediately knowable.

The encyclopedia—composed by Argentinian novelist Jorge Louis Borges—was not a tangible historical artifact, but a fiction. Nevertheless, it provided an idea of what history could be, and more importantly what it could do: how it could bring into clearer focus the contours of the present if perceived in a certain way, or from a certain angle. In describing the disorientation that is the point of departure for such a project, Foucault emphatically identified *his* thought as *our* thought. I see three levels implicated in this act of identification. At the first level this statement is a general sort of truism, given that

we cannot help but think within, even insofar as our goal is to think against, the terms that frame our historical moment. At another level, the conviction begins to break down: it is a fool's errand to assume that what produces wonderment in the author will have a similar effect on the reader. At a final level, this disorientation assumes the form of a method, that is, it describes a reaction that should be desired and sought after even if it is not—especially if it is not—reflexive and immediate. At this level, that to which I have tried to ascribe in this dissertation, naiveté becomes an effortful practice, something along the lines of what Bertolt Brecht called the estrangement effect. The idea is that making the familiar strange is what allows us to think and see differently.

Each chapter of this dissertation has thus been guided by the experience of a complete dis-familiarity, and borne forward by the hope that in its successful moments, I could make this dis-familiarity a shared project. My own work in the field of feminist theory, for example, had not prepared me for statements issued with such assurance from nineteenth-century courts proclaiming the public nature of the family. To me, the continued imperative to give the question of gender a political language was a struggle against contemporary manifestations of a longer history according to which anything cognized as “gendered” received definition through its excision from the realm of the political proper. Having to rethink the path of this history was origin of my research agenda. Searching around that moment in the United States, it seemed to me there was something touching a diverse array of phenomena that imbued them with a similar sort

of unfamiliarity, and that could be articulated into a single historical paradigm. I took discourse as the model for this paradigm: you can track its internal logic by unpacking the grammar that orders its forms of expression, that relay the way its peculiar styles of meaning were conceptually organized.

Much of this grammar relies heavily on common law ways of understanding sociality, which led me to its manifestation in expressions justifying the dynamics of slave-holding society. Here again, police institutes confounding conceptual reversals concerning the ways in which the language of race and patterns of racialization in the United States have been historicized. According to a familiar set of historical coordinates, a correlation between blackness and primitivism in the West lent itself to an interlocking association between nature, color, and passion: an association that has been put in service of post-bellum mechanisms of racial oppression every bit as much it was placed in the service of proslavery. Within the terms of this discourse, the question of physiology—expressed through differences of color—linked up with the idea of an excessively “passionate” nature, providing a language through which to differentiate and subjugate Americans of African descent. It is particularly striking, then, to see that when “habits and conditions” become a dominant organizing term, passion undergoes a corresponding resignification, and becomes something whose *lack* indicates the status of degradation. Hence we see two clashing forms of thought—both equally implicated in processes of subjection—that revolve around and contradict one another. When it is

interwoven with the history of racialization and physiology, “passion” becomes a damning trait insofar as it takes on the connotation of hypersexuality. This inflection is then inverted when passion is thought to be the marker, the exclusive possession, of the free citizen. I think it would be wrong to view these inconsistencies as opportunistic, or, as evidence of a disingenuous rhetorical manipulation that conformed to whatever the justification of inequality required in the moment. I believe they stem instead from different lineages of thought in which histories of racialization are diversely embedded. Their coexistence in contradiction has been remarked upon, but it demands further research and assessment.

Just as my exploration into police was guided by the experience of defamiliarization, so my attempt to track its displacement by economism was driven by the odd discovery that the rhetorical marketization of social relations had early origins in a leftist political project. Today it is commonplace to associate the idea that corporations are people with the prerogatives of big business. The legal fiction of “corporate personhood” itself is pre-modern, but it takes on a very particular character in its contemporary expression. Through decisions such as *Citizens United*, for example, corporate personhood has facilitated an ever more intimate relationship between political power and the concentration of wealth. How strange, then, to note that some of the first articulations of this idea in the context of the twentieth century were mixed up with the political desire for a more egalitarian form of democracy and a fairer

distribution of material resources. To my mind, this discovery enables us to ask more nuanced questions about the mechanisms of marketization. For example, when does reversing the equation that a corporation is a person become thinkable? That is, when does corporate personhood become a mutually definitive framework in which, just as corporations can be people, people can be enterprises? My hypothesis is that *this* development marks an important beginning of *our* moment in history, in distinction to what came before.

My thought was that such a genealogy could reorient current thinking about neoliberalism: the way we understand its history, its limits, and its knowledge. Using genealogy in the form of an historical corrective as I have done in the final chapter of this dissertation, however, is only one possible application of the knowledge it produces. My hope is that this knowledge will continue to be refined, revised, and where necessary, overturned in the process of creating it anew.

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## Biography

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