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The Role of the Law in Critical Theory: An Engagement with Hardt and Negri's *Commonwealth*

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Abstract

This paper discusses the role of Law and Legal Thinking in Critical Theory with specific reference to the arguments that Michael Hardt and Antonio Negri offer in their book *Commonwealth*. The core idea is that Critical Theory is no less radical, but much more concrete, when it is performing not only an external, but also an internal critique of the Law. It shows that the role of the law in critical theory emerges as a problem when the latter claims that '*there is no outside*' and that '*the legal base of the system structures our lives*.' It then discusses optimistic and pessimistic strategies to overcome the problem, and argue for a demanding strategy which consist in articulating the external and the internal critique of the law. To make this point, the paper goes back to the epistemic context in which critical attitudes are deployed (the '*Conflict of the Faculties*'), describes the four theoretical moves constitutive of the historical moment in which, at the end of the 18th Century, modern law as we know it was conceived of and founded; and sketches the key moments of the history of the internal critique of the law. It then illustrates the demanding strategy with examples taken from the field of Intellectual Property, and concludes that the Law is malleable and open enough to allow the thinking and practicing of radical alternatives from within the legal system and also that alternatives spoken in the language of the law are no less radical, but certainly, more concrete than others.

Keywords Critical legal theory · Negri · Hardt · Commonwealth · Legal strategy · Copyleft

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The Problem of the 'Role of the Law' in Critical Theory

In this paper, I would like to present some remarks about the role of Law and Legal Thinking in Critical Theory (hereafter CT) with specific reference to the arguments that Michael Hardt and Antonio Negri offer in their important book *Commonwealth*. In a nutshell, my argument is that Critical Theory is no less radical, but much more concrete when it is performing not only an external, but also an internal critique of the Law.

In the first section, I will argue that 'the role of the Law in CT' emerges as a problem at the intersection of two of CT's ordinary claims: that '*there is no outside*' and that '*the legal base of the system is structuring our lives*'. In the second section, I will argue against CT's '*anti-juristic stance*' (in French: *anti-juridisme*). In the third, I will describe the epistemic context in which critical attitudes are deployed (which I call the '*Conflict of the Faculties*'). This will lead me to describe the four theoretical moves constitutive of the historical moment in which, at the end of the 18th Century, modern law as we know it was conceived of and founded. This will allow me to present this structure and demonstrate that, too often, CT is incomplete when only focusing on the critique of the '*Law of the philosophers*' whilst ignoring the '*Law of the Jurists*'. Put differently, CT is too often only about the external critique of the Law, to the detriment of the internal critique. In the fourth section, I will provide a brief summary of the history of the internal critique of law, which will lead me to propose a different (less 'modern') conceptualization of the concrete operations of the 'Law of the Jurists'. In section five, I will illustrate this conceptualization by the example of Intellectual Property, specifically the copyleft. This will lead me, in section six, to express my core argument: that Law is malleable and open enough to allow the thinking and practicing of radical alternatives from within the legal system. I will

also argue that alternatives spoken in the language of the Law are no less radical, but certainly, more concrete than others.

The problem of the 'role of the law' in CT is located at the crossroad of two ideas, widely spread throughout the critical literature, which are very well expressed by Negri and Hardt in *Commonwealth*. These ideas are that '*There is no outside*' and that '*The Law structures our lives*.'

There Is No Outside

Domination and oppression do not come from the outside (as God's punishment, Nature's necessary functioning etc.), but are consequences of the inner logic of the systems and institutions which shape our world. The alternatives to oppression and domination are *also* to be found within our societies; emancipation will not come from the outside, there will be no divine intervention, and no return to Pure Nature — such calls cannot seriously ground emancipatory projects.

That 'there is no outside' does not only mean that the alternatives are already available, in our world (or in its margins), but moreover that they are produced from within the system of oppression and domination, in the context of its inner logic of development. The emancipatory alternative is immanent to the system of domination. Negri and Hardt certainly take this line (2009, p. 1).[1] According to them, the revolutionary forces emerge from within the system — they are produced by it but are necessarily antagonistic to it (Negri and Hardt 2009, pp. 39–40).[2]

So far, so good.

Law Structures Our Lives

Law generally appears in CT as the 'bad guy'. This is not surprising. From its origins, CT has been directed at realizing the critique of practical reason, and later the critique of social ontology. And because, in our modern societies, human activities and social institutions are structured by the law, CT has mainly engaged with legal institutions and systems confrontationally.[3] For Negri and Hardt, what constitutes the current

[1] 'One primary effect of globalization, however, is the creation of a common world, a world that, for the better or worse, we all share, a world that has no "outside".'

[2] 'Since the dominant form of the republic is defined by property, the multitude, insofar as it is characterized by poverty, stands opposed to it. This conflict, however, should be understood in terms of not only wealth and poverty but also and more significantly the forms of subjectivity produced. Private property creates subjectivities that are at once individual (in their competition with one another) and unified as a class to preserve their property (against the poor) (…). The poverty of the multitude, then, seen from this perspective, does not refer to its misery of deprivation or even its lack, but instead manes a production of social subjectivity that results in a radically plural and open body politic, opposed to both the individualism and the exclusive, unified social body of property. The poor, in other words, refer not to those who have nothing but to the wide multiplicity of all those who are inserted in the mechanisms of social production regardless of social order or property.'

[3] In Negri and Hardt's words: "The primary form of power that really confronts us today, however, is not so dramatic and demonic but rather earthly and mundane. We need to stop confusing politics with theology. The predominant contemporary form of sovereignty — if we still want to call it that — is completely embedded within and supported by the legal systems and institutions of governance, a republican form characterized not only by the rule of law but also equally by the rule of property" (2009, p. 5).

'system of domination' is the intertwinement of two legal regimes: the first is called 'The Republique', a word they use in a sense which is close to the idea of the Rule of Law, understood as the prevalence or the supremacy of the Law upon other normative orders. Under this regime, the dominant powers and relations of domination are produced and reproduced *through Law*. They are defined, constituted, and enacted by complex sets of legal rules, procedures, and institutions. The second is 'Property', understood as the legal form of capital domination on men and things, through a certain design and distribution of property rights. What Negri and Hardt underline is that these two legal regimes are coupled, to form a 'system', which they call 'The Republic of Property'. Under this system, the formalization of the constitutional order turns on the protection and legitimization of property rights. The Republic of Property might not be the only thinkable version of Republicanism, but it's the one which has triumphed over all other candidates, to become hegemonic. What you therefore get in this Republic is the prevalence of the legal regime which structures capitalist relations of domination — the Law of Property.[4] That's the 'bad guy'.

There is more. The Law is also a concealer: it veils and misrepresents. For Negri and Hardt, the emancipatory forces are not to be found 'outside', they are already in the system, but their historical manifestation is at first veiled by the 'bad' forms imposed upon them by the dominant system. The unity of humanity is hidden by class distinctions, socialization is hidden by private property, cooperation at work is hidden by institutionalized competition and employer power.[5] Thus, the Common is hidden by the hegemony of the public/private divide.[6] Hence Law as both 'bad guy' and 'concealer'.

The striking element of these arguments is that the role of the Law is absolutely central to the everyday running of our lives. Law is not only a kind of 'general form' which would shape institutions and social relations at large, its negative effects are to be felt in every aspect of our lives including the most intimate, including the shaping of our bodies. Private property regimes do not simply protect owners then, they produce 'the human as commodity' (Negri and Hardt 2009, p. 22), in a deeper, diffused, and generalized way. But how?

If the Law affects every aspect of our intimate lives everywhere in the world, it must be because legal institutions structure the entirety of social relations and human activities at a micro-level. And if it is the case, the Republic of Property must be a complete, concrete, detailed, and effective legal system which rules all aspects of our existences, not only formally, but 'down to the bones'. Such a legal system cannot

[4] ' … one specific definition of modern republicanism eventually won out over the others : a republicanism based on the rule of property and the inviolability of the rights of private property, which excludes or subordinates those without property … Our point is simply that the republic of property emerged historically as the dominant concept. The course of the three great bourgeois revolutions — the English, the American and the French — demonstrates the emergence and consolidation of the republic of property. In each case, the establishment of the constitutional order and the rule of law served to defend and legitimate private property?' (Negri and Hardt 2009, p. 9).

[5] 'With the blinders of today's dominant ideologies, however, it is difficult to see the common, even though it is all around us.' (Negri and Hardt 2009, p. VIII).

[6] 'The standard view, however, assumes that the only alternative to the private is the public, that is, what is managed and regulated by states and other governmental authorities, as if the common were irrelevant or extinct' (Negri and Hardt 2009, p. VIII).

simply be a formal set of legal rules and principles — a Constitution or a codified body of legislation — it has to include a whole set of concrete and efficient practices. That, for Negri and Hardt, requires to move 'beyond' Marx. Indeed, Marx failed to 'grasp the entire set of effects that property, operating through law, determines over human life' (2009, p. 23). But 'many twentieth-century Marxist authors extend the critique of private property beyond the legal context to account for the diverse material dynamics that constitute oppression and exploitation in capitalist society' (Negri and Hardt 2009, p. 23).

So, the aim of an extended critique is to grasp 'the entire set of effects that property, operative through law, determines over human life', which requires moving beyond Marx, that is, 'beyond the legal context' (Negri and Hardt 2009, p. 23). That's exactly what Foucault did in *Surveiller et Punir*, with the concept of 'discipline' (1995, pp. 222–223). This sphere of disciplinary regimes is understood as distinct from the sphere of relations which are produced and ruled by the Law — a kind of 'counter-Law' (1995, pp. 222–223). Such a gesture introduces a tension, however.

If the structure of capitalist domination is legal (the Republic of Property), and if capitalist domination is producing our alienated and exploited bodies and subjectivities, why is it necessary to look '*beyond the legal context*' to analyze it? And what can there be '*beyond the legal context*'? How is it even possible to conceive anything '*beyond the legal context*', if the legal system is the structure and the direct cause of every micro-effect of capitalist oppression and domination, and if, at the same time, '*there is no outside*'? Or is it that the law does not structure everything? Or that, after all, there is an outside? Or that, actually, there is no need to go '*beyond the legal context*' to grasp the micro-effects of the legal system upon our lives?

A possible way to answer these questions would be to introduce the distinction between the legal *frame* and the legal *context*. The legal frame would be the legal structure, as 'abstract representations of social reality, relatively indifferent to social contents' (Negri and Hardt 2009, p. 22) — the Constitution, or codified legislation that is 'formal law'. The legal context would comprise the concrete and effective operations through which legal practice shape our everyday lives and our subjectivities — the concrete practical operations of the law. One could also speak of a legal *order*, as distinct from the formal legal *system*. It would then be possible to assert that the legal frame is indeed structuring our lives, but also that, in order to understand its concrete effects, one would need to analyze the entire 'legal context', as the 'entire set of effects that property determines over human life', and this by looking 'beyond the legal frame'. Put differently, one should not only look at the formal rules and principles, but also embrace the effects of their concrete legal enforcement at a micro-level. But Negri and Hardt do not introduce the distinction between abstract legal forms and concrete legal practices,[7] they locate the entirety of the Law in the abstract, and as a result, when they plea for a more concrete analysis, they have to look not only beyond the legal *frame*, but beyond the legal *context*, that is — beyond the law *itself*, in search for the 'diverse material dynamics that constitute oppression and exploitation in capitalist society' (Negri and Hardt 2009, p. 23).

[7] To such point the French translation gives "*cadre juridique*" — literally "*legal frame*" — for "*legal context*" (Hardt and Negri 2012, p. 51).

The justification for this move is the following: the anti-capitalist emancipatory forces are to be found '*within our world*', but not '*within the legal context*', because what constituted them is precisely their exclusion from the Republic of Property. In Negri and Hardt's own words: "property is the key that defines not only the republic, but also the people, both of which are posed as universal concepts but, in reality, exclude the multitude of the poor" (2009, p. 51). Creative and emancipatory lifeforms are emerging and expanding in this world, but do so *outside* of the legal frame which hides and excludes them. Otherwise said, these forms constitute the inner limit to the hegemony of the Republic of Property, they create a kind of 'internal outside', or a counter power, something like an inner enemy. And most importantly, this inner enemy is *not* structured by the Law. To the contrary, the multitudes are self-structured by their own material, creative lively forces, and these forces are not subjected in the sense of being *subjectified* (i.e. made into subjects; '*assujéties'* in French) in the legal frame, because they are excluded from the 'social body' which is constituted by it, but instead they are subjected as *dominated* ('*soumises*' in French) to the power of capital. In other words, they are subjected to, but not constituted by, capital. The force of the multitude is to embody the otherness of capitalist lifeforms - their enemy - and therefore the political alternative to the sphere of biopower as constituted by the legal system.

This clearly means that Negri and Hardt do not deny the productivity of the Law. According to them, the Law does actually structure most social relations and human activities in our world — but its productivity is only negative. The relations, activities, and subjectivities it produces are only subjugated, dominated, alienated, forms of life. Think of property, which only produces subjectivities that are impaired by individualism, competition, and identity. The positive productivity of lifeforms — the force to produce the Common — takes place *inside* our world, but *outside* of the power relations regulated by the Law. This outside is not only the sphere structured by the legal system (the Republic of Property), but it is an outside of the legal context in general, far from the negative productivity of the Law. The Common is a 'non-law sphere'. And this is where alternatives to the system emerge and self-constitute. Which means that the legal frame does not structure all our world, but only the field of oppression and exploitation, while the Common, understood as the principle of activity of the Multitudes, is not structured by the legal system, as it is located outside of the legal context.

To sum up: within this world, there is an outside of the system, as its limit and 'other'. The border of this internal outside is drawn by the Law/non-Law divide, and constitutes the core dynamic contradiction, namely the political contradiction between the (bad) capitalist domination and the (good) creativity of the multitude. In other words, the legal system allows the constitution of 'non-law spheres' located outside of itself, it does not structure the entirety of our lives. Negri and Hardt's theory, however fascinating, therefore contradicts its own presuppositions.

The "Role of the Law in CT" Problem

This is the 'role of the Law in CT' problem. On the one hand, to be systemic, the analysis of capitalism requires that the (legal) structure of the system produces its

negative effects on every aspect of our lives. On the other hand, if the system *necessarily* produces its negative effects upon every aspect of our lives, how can the 'good' alternative lifeforms be found within the system?

This quandary is not easy to circumvent or navigate. What makes the critique radical seems precisely to be that it analyzes the concrete micro-powers and disciplinary mechanisms as necessary effects of a structural domination (how radical would the critique be if its conclusion was *not* that bad effects are necessary outcomes of a *system*?). The more radical the critique is, the more totalizing and the more necessary its systemic (bad) effects shall be. Negri and Hardt's critique of capitalism is radical precisely because it claims that the Republic of Property is everywhere, *really* and *completely* shaping our lives. But then, how is it that the 'good' lifeforms are immune from being shaped by the 'bad' legal structure, although they are to be found *within* the world which is itself entirely shaped by this structure? What can possibly be the meaning of the words 'structure' and 'system', if the structure is not structuring the system *as a whole*, and if the whole does not structure every one of its parts?

The Law / Non-law Binary

There are many ways to try to solve this problem, either from outside or from within the legal context. I will return to the latter in a moment. When the critical theorist goes for the former, she has to weaken the 'there is no outside' premise in such way she can make room for an 'internal outside', something like a 'non-law sphere' located in this world but 'beyond the legal context'. The next step is generally a plea for a change of frame (e.g. a revolution). There are two versions of this strategy, the optimistic and the pessimistic. The optimistic version generally leads to arguments like: 'the law of capital is ruining our lives, and it veils a range of 'non-law spheres' where healthy human relations can flourish.' The possibility of a revolution lies in these healthy relations being left untouched by the legal structure of capital. The pessimistic version considers that human relations in the 'non-law spheres' are not that healthy, because the non-law sphere is not immune to power relations (though these are not legal ones). Otherwise said, the non-law sphere is where discipline, not love or friendship, is flourishing. This pessimistic version acknowledges that power relations and constraining mechanisms are not all legal, and generally leads to abandoning the very possibility of revolution in order to content oneself with (localized) 'resistances' and the '*souci de soi*.'

Negri and Hardt are certainly trying to seek alternatives from outside the legal context, and their version of this strategy is undeniably an optimistic one. In their view, non-legal alternative lifeforms can emerge, be deployed, and allow multitudes to self-constitute. But this move leads us from Charybdis to Scylla: if the sphere of non-legal relations is meaningful, it means the legal system does not structure every aspect of our lives, that its domination is *not* systemic. Their 'optimistic' view does not solve the problem.

Another way to navigate the problem would be to temper the law/non-law divide instead of tempering the 'there is no outside' claim. A way to do this would be to claim that contrary to the Foucault of *Surveiller et Punir*, the non-law sphere is not a counter-law, neither independent from nor immune to the law, but an extension of

the legal system. Which means that even if there are spheres that seem to be 'non-law' ones, they too are, at least indirectly, structured by the legal system, and therefore cannot be considered as being outside the legal context. In other words, human relations spoken in the language of the law condition, organize, or structure human relations spoken in other, non-legal languages. The argument goes like this: non-law spheres are in fact, if not ostensibly, legal spheres. A non-law sphere is only a sphere that the law does not regulate directly because it has explicitly withdrawn from it. But 'explicit withdrawal' is just another kind of legal regime (generally based on entitlements and permissions rather than prohibitions and sanctions). A classic example: during the 19th Century, the common sense among jurists was that the household, and family life, were where the powers of the head of the household — the *paterfamilias* — were exerted, and that therefore the domain of private life was where the Law should not enter — a 'non-Law' zone. But actually, what the law did was to entitle the *pater familias* to freely legislate, execute and adjudicate the household. That too is a legal regime. Except that it is enabling an authority to regulate instead of regulating itself. When, a century (and many feminist struggles) later, the law decided to limit the powers of the *pater familias*, to declare conjugal equality and to grant children with rights, one could certainly say that 'the law had finally entered the household,' but it would be more accurate to simply say that 'the legal regime applicable to the household changed.

From this perspective, what Foucault calls the 'disciplines' are not a 'counter-law', distinct and separate from the law (Kennedy 1991). At most they are its mere extension, through legal mechanisms of delegation of power. The *paterfamilias* regulates the household and subjects women and children to his authority, as a husband and as a father, *because* the enforceable family law enables him. Factory regulations are the concrete exercise of the legal powers of the employer, directly flowing from his property rights over the means of production. The way tables and chairs are disposed in the classroom is a result of the school's director exercising their legal prerogatives in the organization of the school, under the (legal) guidelines provided by the Ministry of Education. Legal theorists have shed light on how these apparently non-legal relations are shaped by the legal system — the actors are producing them 'in the shadow of the law'. A classic example is the case of amicable divorce, where spouses negotiate between themselves whilst keeping in mind what would happen if one of them were to change their mind and go to the judge. Of course, these relations are 'non legal', but although they are not spoken in the language of the law they are structured by the legal frame, and they are certainly not located 'beyond the legal context'. [8]

When people bargain in the shadow of the law, conflicts and bargains are conditioned by the way that the enforceable legal regime distributes powers and more generally legal prerogatives to the parties in conflict. Otherwise said, the law constitutes the force of these parties, or better said, constitutes these parties as social and political forces (for example, there are no classes without unequal distribution of property rights in the means of production) and orders the conditions of the conflicts and negotiations between them (there are no factory regulations without employers' powers to regulate the workplace, nor workers' rights without collective agreements between

[8] See Mnookin and Kornhauser (1979).

trade unions and employers). To be sure, the law does not entirely determine the outcome (perhaps the trade union will be capable of resisting the application of the factory regulations), it nonetheless draws the battle lines and distributes the weapons (resisting the application of the factory regulations is easier if striking is not illegal).

According to this line of reasoning, one of the main tasks of CT is to make sense of the articulation of the legal frame with the myriads of micro-powers and disciplines it conditions and produces under capitalism. And of course, to remain critical, the theory must go 'beyond the legal frame', in the sense that CT should not satisfy itself with just analyzing the formal frame itself but should also expand the critique to the analysis of its enforcement and concrete (devastating) consequences on our lives and bodies. But CT should certainly not go 'beyond the legal context', by separating (or worse by counter-posing) the analysis of the legal frame from the analysis of micro-powers and disciplinary mechanisms, which are, in fact, the very means of its enforcement. This is precisely because what matters is to understand how the micro-powers and disciplinary mechanisms are produced and organized by the legal frame, although they are not always spoken in the language of the law. In other words, the micro-powers and disciplinary mechanisms *are* the (legal) context in which conflicts among contradictory social forces take place.

From this viewpoint, 'Law is everywhere', not in the sense that everything would be directly regulated and determined by legal rules and principles (that is, not thanks to some kind of generalization of a purely juridical conception of social relations and human existences — in French "*juridisme*"), but in the sense that even the non-law spheres are 'within the legal context', in the sense that they are directly or indirectly structured by the legal system. The law, produces the constitutive forces of our societies and conditions the conflicting relations between these forces, even at the level of micro-powers and disciplinary mechanisms, and even if the language spoken at this level is not the legal one (and even if they are 'good' forces).

To conclude this point: the motto 'there is no outside' is more pervasive than just 'capitalism has expanded worldwide' or even than 'there is no transcendent principle or external force to wait for.' It means that if the legal frame is the structure of capitalist societies, alternatives to capitalism shall be found within, not beyond, the legal context produced by this legal frame. Or, simply, there is no outside of the legal context. The optimistic version of the 'from the outside' strategy to overcome the problem of the role of the law in CT does not lead anywhere.

This leaves us with two options: the first is depressing, the second is demanding. If 'there is no outside' and if 'law structures our lives' to the point that 'law is everywhere', even in the non-law zones, conceiving emancipatory forces and principles from within is a mere fantasy — that's the pessimistic version of the 'from the outside' strategy. A depressing option, indeed. The only remaining alternative is to consider that the emancipatory forces and principles are to be found *within* the legal context. That's the demanding option.

According to many of his commentators, Foucault famously chose the depressing option, reducing the possibilities of action against the system to mere resistances within it. Negri and Hardt are not prepared 'simply' to resist (although they love resistance too). They want to ground the concrete and theoretical possibility of the complete destruction/overcoming of the system — a revolution, understood as a

complete shift from this system to a better one. They want to act and think beyond capitalist and state domination, and all its devastating effects on our lives. But if they are serious about the immanence of their emancipatory project, they must opt for the demanding route: to act and think beyond the legal system, from within the legal context. Another way to express this idea is that CT should certainly be critical of *juridism*, whilst avoiding the trap of *anti-juridism*.

A Plea for Critical Theory to Abandon Anti-Juridism

Many critical theorists consider the law to be a constitutive part of the problem. They also think that the law cannot be part of the solution. Law is part of the problem because relations of domination need the help of the law to be sustained and moreover, because the law as such can only institute relations of domination. To use Rancière's terms, law is 'police' (1995) — the fact that a society must function through law is a symptom of it being ill-constituted. A society emancipated from relations of oppression and domination would not need a legal system.

From this viewpoint, the law is indeed totally embedded in an individualistic conception of human relations determined through ownership, and a cynical and negative conception of the political in which any collective activity translates into abyssal inequalities and relations of domination and power. In other words, the law is not only a 'bad guy' and a concealer, it also institutionalizes relations of domination and conveys a social ontology which formalizes, naturalizes, and essentializes these relations. So, CT ought not only look beyond the legal frame, and beyond the legal context, but more radically, beyond this legalistic vision of the world (Deleuze 1982). This last task is about emancipating our imaginary from the negative anthropology carried by legal thought in general. In other words, CT has to produce alternative conceptions of political activity, social ontologies purged from any theoretical and practical trace of juridism, in order to allow ourselves to conceive of another world, another humanity. In this too Toni Negri is a master (see Negri, 1999).

To conceive alternative forms of humanity, social relations, and political activity which would not need to be constituted by laws, one must start from principles positive enough to not require a corrective. Creativity, cooperation, friendship, or love are good candidates. The critique can then develop outside the law, in 'non-law spheres' like Temporary Autonomous Zones, and as *souci de soi*. Negri and Hardt's 'Common' depends on such a principle, conceptualized in contradistinction to the Republic of Property. The Common as a political principle invokes and deploys an anthropology (of the multitudes) and an ontology (of creativity) which are difficult to express in the language of the law, precisely because this language is made to express relations of domination, competition, and identity. To use Spinoza's words (in fidelity to Negri), law is the language of *potestas* (power as domination), but hardly the language of *potentia* (power as empowerment/capability). Jacques Rancière also expresses this idea clearly: everything which is not the deployment of democratic power is on the side of police, and therefore the law is entirely on the side of police (2005). From this perspective, to be radical, CT ought to locate itself not only outside and against the

law, but also outside and against legal thinking — the legalistic vision of the world. This is full-blown Anti-juridism.

Now, I would wish to underline that the 'demanding' strategy to which I am referring suggests the possibility of a strategy for critique which would be not *less*, but actually *more* radical that the anti-juridical one, as it would be radically critical not only in theory, but also in practice.

This strategy is demanding, because it seeks the 'remedy in the evil' (*le remède dans le mal*, in French, (Starobinski 1976). It is a strategy which seeks to locate alternatives within the legal context and aims at conceiving these alternatives by using any possible resources, including those provided by the legal tradition. Such a strategy locates CT at times 'outside and against', but also at times 'inside and for' legal thinking depending on the expected productivity of the move. Key here is that CT commits not only to the external but also the internal critique of the law.

Before going further, I would wish to repeat my admiration for critical theories that are motivated by the desire to move beyond the 'legalistic vision of the world' which is indeed colonizing our imaginaries. Thinking 'beyond' and 'below' is a noble ambition which has produced significant emancipatory effects, because, for sure, the law, legal regimes, legal categories and modes of reasoning do play a structural role in reproducing an impoverished conception of the world and of the human being that inhabits it. I am therefore not principally against *anti-juridism*; in fact, I am not against it at all. I am instead against the way that it curtails and depletes possibilities to 'remedy the evil' and to allow that 'effects of truth' (*effets de vérité* in French) in the broadening of the political imaginary and the pursuit of practicable alternatives can also be achieved through strategies that deploy the legal imagination rather than oppose it. To put it another way, if the critical enterprise is a search for an *Ausgang* — an 'exit' or a 'way out,' as Foucault reading Kant would put it (1984) — from relations of alienation, dispossession, and domination, such a project can certainly take many forms: the destruction or the overcoming of the dominant system, but also the crossings, bifurcations, subversions and reversions of it. My point is that destruction and overcoming are not always more radical than other patterns of critique. The radicalization of critique does not necessarily consist only in producing alternative anthropologies and social ontologies, but also in exploring and deploying the emancipatory potential of existing anthropologies and ontologies from within our existing world, as it is. That is, as it is structured by the law.

This, of course, requires learning to navigate the legal context, and learning the language in which it is spoken and its modes of reasoning and categories, in order to know it intimately enough to perform its internal critique. And, yes, such a strategy may be at the same time radical and concrete, where the radicalizing of critique through a rigorous anti-juridism is only a theoretical radicalization which sometimes leads to the practical weakening of critique. My bet is that, to achieve both radicalization and concreteness, CT should not perform solely the external critique of law and legal thought, but also its internal critique. Such a strategy also reveals the potential positive productivity of the law, in such a way that it becomes possible to locate radical alternatives (some of them drawn from the outside) in the only place they should be located in order to be concrete and practical, that is *within* the legal context of the existing system.

To develop this idea more in detail, I will start with a set of short genealogical remarks about the *epistemic dispositif* in which the critique of law is situated today, which I will call, after Kant (1992), The Conflict of the Faculties. This detour is helpful because the understanding of the frame in which this discussion is taking place matters to the discussion itself. Additionally, this detour offers an historical perspective on the articulation of the external and internal critique of the Law.

The Epistemic Dispositif of the Critique of the Law — The Conflict of the Faculties

When a critical theorist is asked to say something about the law, the common reaction is embarrassment (excluding, of course, Toni Negri, who, among many other things, has been a law professor). Law has the reputation of being very technical, difficult, obscure, and yes, boring. 'The law' here is the 'Law of the Jurists', the thing that lawyers do when they practice law, and when they theorize it, under the name of legal dogmatics or doctrine. That law is indeed technical, obscure, and, yes, somehow boring, although not always. Certainly, discussing it without proper knowledge is risky. Nonetheless, critical theorists do engage with the law all the time, as the critique of the law is indeed a central piece in CT. There is no paradox here, because what they are talking about when they talk about law is generally not the 'Law of the Jurists', but something else, that we might call the 'Law of the Philosophers'.

Law of the Jurists / Law of the Philosophers

It seems that this 'Law of the Philosophers' emerged at the end of the 18th Century, under the name of the 'science of the legislation' (Filangieri 2003), a new knowledge associated with the names of Filangieri, Beccaria, Bentham, but also Kant, Sieyès, Condorcet and many others. For them, the 'Law of the Jurists' was only the law actually enforced — that is, the law flowing from the will of the Prince and its agents. Such law was to be considered as fairly unrelated, or even not related at all, to the set of rational laws any Radical Enlightener might wish to be adopted. 'Legal science' being associated with some obscure and boring commentaries of the *Corpus iuris civilis* was considered by them as a contradiction in terms. What this was called for was a new science, as the knowledge required to produce a new — more rational — law. To produce such new knowledge, it was necessary first deeply to entrench the sharp distinction between the description of existing enforceable laws and the reflection on what they ought to be, as the latter could certainly not be deduced from the former. Secondly, it was necessary to assign the description of what law is to the Jurists, and the conception of what law ought to be to another (new) kind of thinker, the 'Philosopher', also called the 'Publicist'. Why? Because the Jurists would ground their knowledge on the existing laws, that is on the authority of the government, and on the authority of authoritative texts and commentaries, mainly the *Corpus iuris civilis*, while the Philosophers would ground their knowledge solely on the authority of Reason as the only legitimate ground. Of course, there would be no agreement amongst them as to what Reason actually is. Bentham would oppose 'the law

according to the science of utility' to the fallacies of the Jurists, while Kant would consider that the task of the philosopher is to deduce from the pure concept of law the immutable principles of justice of any possible positive legislation, and so on. What is significant here is that despite their sharp differences, they would unite in claiming competence over the rationalization of the existing laws, and the subsequent need to depose the Jurists from their previous monopoly over the matter. They would introduce a 'Conflict of the Faculties', more precisely, a conflict between the faculties of law and philosophy. As a result of this conflict, the Jurists would be confined to describing the existing laws while the Philosophers would produce the model for transforming these existing laws into better, more rational ones. This conflict is obviously and directly political — it's about depriving legal science of its key function of providing guidelines for orienting legal change. Or, more bluntly, it's about determining who shall whisper in the ear of the reformer Prince. The introduction of this conflict is the birth of critique.

In other words, *Critique* emerged as a specific epistemic and political dispositive (in the sense of the knowledge/power dyad), or more precisely, as a new way to conceive and produce the law and legal thinking. What follows is an outline sketch of the four theoretical moves which constitute this dispositif, in telegraphic style.[9]

The Project of the Radical Enlightenment for the Law

At the end of the 18th Century, something like a 'radicalization of the Enlightenment' occurred. For clarity, I am using the term 'Radical Enlightenment' with all due respect to the work of Jonathan Israël but with a very different meaning (2001). I do not equate it with the fate of Spinozism in the 18th Century but rather with the emergence of the ideal of autonomy and specifically of 'political autonomy' (Castoriadis 1990). The idea here is that after losing faith in every traditional authority (clerical, feudal, and monarchical), it appears that the only way to avoid chaos and corruption is to found society on the unique principle that people shall be autonomously governed — that is governed by themselves — and that all social and political institutions should flow from this principle.

My hypothesis is that, after 1760, the core question of the period is this collapse of traditional authority. Thus, the projects that seek to answer to this question are developing the idea that autonomy is the only legitimate ground, both in the life of the mind (the authority of reason as autonomous thinking) and in real life (the authority of the self-governed community), for both the individual (the free person) and the collective (the sovereign people). This may be why these projects share a certain family resemblance, despite their obvious differences – one could name Rousseau, Beccaria, Kant, Bentham, Sieyès, Condorcet, and many others. There is a sense, then, that these projects all perform in diverse and contradictory ways the four same structural moves which produce a new intellectual space within which it becomes possible to conceive of a 'politically autonomous' community, as the legitimate and desirable answer to the collapse of traditional authorities. I will illustrate each of these moves

[9] A whole book is needed to offer a complete exposition of this epistemic dispositif. At the moment this article is written, the book does exist as a project and as a work in progress.

by reference to the work of Kant, as I admire him as much as Toni Negri and Michael Hardt do.

First Move: Autonomy of Thought

In the first move, philosophy, understood as the free and public use of reason, is elevated to the rank of an architectonic knowledge. In doing so, the capacity of each human being to think autonomously, not only *without* but *against* institutionalized knowledges and traditional authorities is claimed. For centuries, the good old *scientia iuris* had claimed a monopoly on theorizing and rationalizing the law — well, one is not obliged to defer! Each of us can (and therefore should) freely wonder if the laws to which she is subjected are just and if their justification is rational. Philosophy therefore becomes the proper knowledge to answer these questions. Philosophy here does not mean a discipline, but the free and public use (individual and collective) of each's capacity to reason freely, that is autonomously, which is not only the capacity to think according to the rules reason gives to itself, but also the capacity to endlessly question and criticize these rules — philosophy here *is* critique, and includes the critique of philosophy. For Kant, this critique takes the form of a transcendental deduction. For other thinkers, it will enter the scene under the name of 'social science', 'new social science', 'social physiology', 'science of utility', 'political economy' etc.

This free knowledge is architectonic in the sense that it has universal competence over our actions in real life and over our thoughts in the life of the mind, including over the constitution of other knowledges (Kant would say that both pure and practical reason are the object of transcendental deduction). For Kant indeed, reason is sovereign and only the free use of reason can trace the boundaries and establish the rules of its correct (rational) use.

Second Move: Autonomy in the Production of Knowledges of Government

The first move is clearly happening in theory but has concrete practical consequences as well. Among the various human knowledges which fall under the sovereignty of philosophy is the knowledge of practical reason, and more specifically the knowledge of the law, and further, the knowledge of the legislation.

In the Western Legal Tradition (see Berman 1985), the law claims its autonomy, and realizes it by ascribing to a specifically *legal* knowledge the task of rationalizing the bodies of applicable legal rules and the guiding of its evolution — a knowledge internal to the law itself. This knowledge is internal because it is made by lawyers and because it is a constitutive element of the law itself, in the form of doctrines and opinions of the jurisprudent. This is precisely because the law produces its own science that it can pretend to evolve autonomously (systems-theory here would speak of the 'self-referentiality' of the law as an 'autopoietic system'). Thus, the rationalization of the bodies of applicable legal rules amounts to inducing from these bodies the general principles of justice which guide their evolution, in such way that this evolution will always be harmonious and continuous, as it should be for a living organic totality. Legal change is determined by the law itself. That is very precisely what the Radical Enlighteners are aiming to dismantle (and what makes their project so radical).

Indeed, according to those philosophers (or critical theorists), once the sovereignty of philosophy has been reclaimed, the competence of critique will extend as far as determining the guiding principles of the evolution of the law. As such, these principles will *not* be induced from the existing bodies of legal rules, but entirely determined by a philosophical inquiry, which appears to be completely distinct and indifferent to the knowledge of the existing laws, seen as entirely irrelevant for determining what the law ought to be. Therefore, because legal change takes the form of adopting new statutory laws, this new external knowledge of the law — the 'Science of Legislation' — appears as a philosophical one (see (Baranger 2018), and often takes the form of projects of legal reform through the adoption of new codes. Kant, on this, is particularly sober, as he considers that philosophy ought only to determine the principles of justice and not the specific legal rules. His *Doctrine of Right* is committed to revealing the immutable principles for any positive legislation.[10] This is achieved by deducing those principles from pure reason — that is, from a reason purified from the will of the Prince, the authority of the authoritative texts, and their hermeneutic traditions. As such, it is a knowledge *external* to the law, produced by non-lawyers and meant to criticize the law from the point of view of external principles of justice. What results is a critical knowledge, or, better said, a knowledge of "opposition" to use Lorenz von Stein's words.

This move has at least three direct political consequences.

1) It locates the external critique of the law inside the new epistemic dispositif responsible for the rationalization and development of the law. The evolution of the law will, henceforth, not be determined by the internal development of the law itself, but by the dictates of heterogeneous principles of justice. Or, legal change is determined by Critique itself.

2) When determining those principles of justice, critical philosophy has an imperative duty to *ignore* the existing dominant legal dogmas and opinions, the inherited traditions and the enforceable law (which express the will of the Prince). Which means that, going forward, future law will not flow from present law, nor from legal tradition. This also means that its evolution could very well be discontinuous, and lead to abrupt bifurcations, like for example the immediate and complete abolition of unjust laws, followed by the adoption of radically new ones. Legal revolutions therefore become possible, and even desirable.

3) The Enlightened Prince should therefore make immediate and radical changes in his cabinet. Concretely, he should fire his advisors — the Legists — and hire new ones — the Philosophers. The Conflict of the Faculties is not only an epistemic conflict, but a direct political conflict, between the representatives of the legal tradition and the free thinkers, as to who should advise to the prince what the new laws ought to be.

Conceiving new just laws alone is not enough, however — an Enlightened Prince, eager to promulgate such laws must be found, or better said constituted. Such a constitution can only be made under certain conditions: this is the third move.

[10] See Introduction of the Doctrine of Rights, § A p. 55 in Kant (1797).

Third Move: Autonomy of the Constituent Power (the Politicization of the Source of the Law)

To institutionalize the autonomy of the political community, one can either rely on contingent and precarious miracles (*à la* Frederic the Great), or travel to Petrograd (*à la* Catherine the Second) or write a book to explain what an Enlightened Prince complying to his own concept should be (*à la* Kant the *Doctrine of Right*). Such a book would certainly conclude that the State should be constituted, which would mean that no private individual could claim to own it privately (the critique of the doctrine of the Patrimonial State); and that the people (the constituency of the members who are capable of being citizens) would form the political sovereign of the polity. This is the basic formula of political autonomy: that the people subjected to the laws are the ones who are making them; such sovereignty should be exercised either directly by the people assembled or by its elected representatives, gathered in a legislative body. The sovereign will of the people should therefore be expressed under the form of a coherent system of general and impersonal legal rules — a codified legislation. As a result, within the constituted State, only the legislative authority shall be sovereign, in the sense of being competent for the making of the law. Any legal rule that does not originate in this legislative power should be considered illegitimate. Or, to be legitimately enforceable, a legal rule must necessarily flow from the political will of the sovereign in statutory form. In the case of Kant, this means that to be just, the law should not only consist of rational legislation in accordance with the immutable principles of justice, but should also be an autonomous, freely legislated, and coherent set of general legal principles — a codified legislation. The Kantian well-ordered state would be republican, statutory, and legiscentrist. In other contexts, the same ideals might lead to different outcomes. In the US for example, the locus of autonomous political power articulates itself in the Constitution — 'We, the people'; the problem, of course, is to decide what to do with the inherited common law tradition.

This idea brings with it a major difficulty: it is widely accepted that nothing is less rational than a political force which expresses itself through a collective will. The constituent power and its activities are located on the side of flux, contradictions, movements, mere opinions, passions, in one word — life (not as a pre-existing natural order but as the sound and fury of vital energy, without form). So, how can one dream the expression of this collective will to take a rational form? The typical answer is that the new 'knowledge of government' invented by the Philosophers is here to establish a dispositif of rationalization through which the lively irrational will of the constituent power will be encoded into rational codified legislation (or a rational constitution, or any other rational form the fundamental Laws of the community might take). For Kant, this dispositif of rationalization is the dialectical progress of public reason, which requires the institution of the faculty of Philosophy and the guarantee of freedom of thought and expression, which constitute a public space in which it becomes possible to make free and public use of reason. Critique therefore becomes a key element for the emergence and institutionalization of an always improving Enlightened public opinion, capable of constituting itself as a political subjectivity — a political force aimed at the transformation of the existing laws. Would this alone be enough to actually realize the just laws dictated by the new prin-

ciples of justice? Well, even Kant is inclined to think that, sometimes, strong revolutionary moves which result in the promulgation from scratch of brand-new laws might help greatly in this endeavor and discusses how 'strong' those moves ought to be, and what would be the fair price to pay for those shortcuts.

But certainly, the encoding of the general will of the community into a rational system of laws has to be realized: its mode of production is philosophy understood as the free and public use of reason (or critique), its sword arm is public opinion, and its aim is to convince/dictate new Laws to the Princes. If those Princes are reluctant, revolutions may follow. At the core of this dispositif is the continuous transformation of the informal will of the community into a formal system of general and impersonal legal principles — a system of general laws. Sometimes this formal system is a Constitution, sometimes a body of codified legislation (a common idea in France is that for centuries, the Napoleonic Code was the 'civil constitution' of France) and sometimes it takes the form of a doctrinal / scientific reconstruction of judge-made Law. Space prevents further explication here, so let us just say that modern positivism can take many different forms. The key element here is that to realize in practice what philosophy dictates in theory, the critical thinker requires the general will of the community to be embodied in the establishment of a rational system of Laws. That is necessary for the realization of the principle of political autonomy but is not yet enough. Once the rational system of Laws is established and promulgated as enforceable Law, one still must make sure that this system will be concretely applied: that is the fourth move.

Fourth Move: Heteronomy of the Functioning of the Law

We might consequently think of the legal order as a vast system of *plumbing*, in which the 'will of the sovereign' is *encoded* in legislation, and *flows down* through a series of texts, in such a way that it can be *decoded* when applied to concrete cases. Thus, to ensure that this will is accurately decoded, it is necessary to expunge from the system those sites at which the arbitrary idiosyncrasies and prejudices of individual judges and administrators might take effect. This fourth move then, is about neutralizing the apparatus in charge of the application of the legislation.

In the 18th Century, this problem is acute. Whilst French politics at this time were revolving around the role of the 'parliaments', the harshest critique of the arbitrariness of the Jurists is arguably to be found in England, with Bentham. If those agents in charge of applying the law can simply use the system to realize their own arbitrary will, then the effort of establishing a rational system of law that expresses the general will of the people is surely futile. But depoliticizing the process of application of the legal system is not an easy task. Kant, for example, has many ideas on how to manage this — chiefly, judges and administrators should be public servants harshly submitted to the hierarchical power of the executive. Another common idea at this time was to have Courts of Appeal review the decision of first instance judges, and Supreme Courts review the decisions of Courts of Appeal (a very efficient tool, as every Judge who wants to make a career will do their best to please the upper level). Sieyès thought that a special body of advisers of the State (Conseil d'État) with the competence of surveilling the whole process would efficiently realize the task. Ben-

tham thought that the decisions of the agents should be harshly scrutinized by a 'Tribunal of Public Opinion'.

Institutional disciplines, checks and balances mechanisms, hierarchical submission to executive powers are certainly effective neutralizing devices, but cannot alone be enough, as the conflict is a conflict of *wills*, between the sovereign will and the will of the agents (individual will, as subjectivity and arbitrariness, but also collective will as ideological bias and professional corporative interests). This conflict is therefore happening both externally (in their life) *and* internally (in their mind) for these agents, so the control cannot simply be external, it must operate on an internal register in order to structure the ways that those agents think and argue.

Kant thinks that this problem can be solved by ensuring that legal decisions are the conclusion of a syllogism, whose major premise is the applicable text and minor premise is the facts of the case. Where this works, decisions will be only an act of knowledge, and not an act of will, an objective judgment, not a subjective one. Posterity has called this move 'mechanical jurisprudence' (Pound 1908). Kant himself speaks of judges as mere 'agile workers' (Kant 1992).

This could, of course, lead us to identify a 'fifth' move — that the best way to ensure 'objective' judges is to conceive of the law as a pure form, that is, a form purified from everything other than the will of the sovereign and legal interpretation as mere *literal textualism*. Kant — and Bentham in many ways — will go as far as making that claim. Formalism means here that any consideration other than the pure will encoded in the legal rule must not be considered by the judge when adjudicating the case. So, no equity, natural law, factual circumstances, not even a possible change of will in contractual relations, no administrability of the case, nor, of course, any political considerations are to be considered as 'law'. Law is only the will as expressed literally in the applicable text.

A legal historian would recognize here a project of the complete subordination of the traditional *Ius* to a modern, codified, and republican *Lex.* The triumph of this *Lex* over the *Ius* would generate something like a 'law without lawyers' or at least a law without the intellectual authority and the political power of the lawyers. A law entirely politicized at its source, and entirely depoliticizing in its functioning. This chiasma is both producing and reproducing a political maxim: that the political community will be autonomous in so far as its legal system is heteronomous. Indeed, the project of the Radicalized Enlighteners for the law is a project of 'exiting' the western legal tradition — and of course, this project did not please the Jurists.

Toward a Status Quo (circa 1830)

Soon after, by the beginning of the 19th Century, many jurists like Portalis and Savigny explicitly reacted to, but also silently internalized, some key features of this project. In their reactive mode, they sought to throw away the ideal of political autonomy, to reclaim the autonomy of the law (the monopoly of legal science over its own rationalization) and to advance the restitution of the intellectual authority and political power of the jurists (although very often masquerading as mere servants of the legislation, especially in France). In their internalizing mode, they embraced the preeminence of written texts over other sources, the centrality of literal textualism

in legal reasoning, and the reconducting of the architecture of private law, based on the capacity-property-contract triad, which translates as both patriarchy (with few exceptions, only adult men are fully capable) and capitalism (absolute property and freedom of contract).

Moreover, these jurists underscored the need for a more sophisticated neutralizing device and advocated for more sophisticated modes of reasoning to offer more sophisticated avenues for the judges applying the laws. The rational exposition of those rules and protocols is often known under the name 'legal methodology'. Savigny might be considered the writer of the first canon of this new knowledge (see 1913), which contains all the beauties of syllogistic deduction, but also analogy, reasoning by precedent, teleological reasoning, and reasoning by consequences. The result of the construction of this new intellectual discipline is what one could call the birth of modern legal technique, understood as the setting of formal structures which are made to guarantee that the decision of the agents will be, for each case, strictly determinate. The outcome in each case can only be the unique right answer (one meaning of the expression 'legal positivism' is the belief that there always is a 'unique right answer'). One could also call this the birth of 'classical legal thought' (Kennedy 2006).

From this, one can conclude that what we still call today 'modern law' was born as the precarious status quo achieved in a violent conflict between the project of political autonomy carried on by the Radicalized Enlighteners and the modernized version of the western legal tradition — a new epistemic dispositif, articulated to a new institutional architecture, from which flows a new conception of the legal system and its functioning.

The Twofold Structure of Modern Law

The structure of the Modern Law, as understood by many theorists at the end of the 18th Century, is twofold. At the first level, the *dispositif* of rationalization articulates the law and the political by giving a legal form to the originary political community. At the second, the role of the *dispositif* of rationalization is to ensure that this legal form will realize itself in actual practice.[11]

This first level articulates the existence and activities of the originary political subjectivity (the community as subjectivity), understood as a constituent power, from which is produced a coherent and complete system of general and impersonal legal principles (the laws). This originary subjectivity is often understood as a 'general will' (Rousseau), a 'united will' (Kant) or the 'will of the legislator' (Bentham). However, in some versions of the project, this subjectivity is a force, or a relation of forces, or even a spirit, a consciousness. Of course, these different versions lead to very different regimes of articulation of the legal and the political (expression vs. representation) and very different mechanisms by which the legal form of the political subjectivity is produced. All of modern political philosophy lies somewhere between these differences. My point here, however, is to underline that this 'translation' of the political into a legal system, is being achieved via the invention of a 'new knowledge

[11] The structure of medieval Law was twofold too (See Legendre 1965).

of government', whose generic term is Philosophy. Sometimes, very different philosophies which conceive the 'nature of the political' in alternate ways will determine divergent ways to conceive the legal system, but sometimes not. Take for example Kant and Savigny: radically different conceptions of the political but very similar conceptions of the legal system, at least as far as private law is concerned.

This question of translating the nature of the political into a legal system raises questions of competencies. Who is the proper translator? What kind of knowledge is competent for this task? Who shall be at the structural position of Counselor to the Prince (be that Prince be an Enlightened King or Public Opinion)? The competition among the many pretenders inaugurates the Conflict of the Faculties — traditionally, the job was given to the old *Scientia Iuris*. However, philosophy appears here as the 'new kid in town', with the new 'Science of Legislation' (Filangieri) as its weapon to wield against the Jurists.

Soon, this new knowledge will turn the critique against itself, giving rise to a multiplicity of new and contradictory versions. Transcendental philosophy will develop into speculative philosophy, historical materialism and so forth. Some versions are more empirical (Bentham) and they will develop into political economy, social physiology, sociology and more. In fact, neither the old *Scientia iuris* nor the rapidly proliferating 'new kids' will win out, each of them will continuously provide different conceptions of what Law is, what it should be and how the question should be asked. Thus, the modern *dispositif* of knowledges about the Law is structurally fragmented and, in an important sense, agonistic. What is at stake here then, is the question of determining which knowledge will best contribute to the production, maintenance, and transformation of the 'legal system' as a coherent set of general legal principles. Today, it seems to be the case that neoclassical economics has established a position of dominance in this regard.

This first level of the structure is not self-sufficient, as the goal of the whole enterprise is not simply to express the principles of what a rational law ought to be, but to change the world by applying them. The exposition and promulgation of the legal system must be complemented by the conception, implementation, and development of an apparatus in charge of its application in real life, to guarantee that the applicable law will be, in each concrete case, strictly determined by the legal system itself. This apparatus is the second level of the structure.

At this second level, the question becomes how best to guarantee the proper decoding of the political element which has been encoded in the legal system at the first level. To achieve this outcome, the agents of the apparatus must be politically neutralized, which requires another *dispositif* of rationalization — the invention of another kind of knowledge of government, which aims to produce the rules and protocols of legal practice as a technique. The difference at this level is that competition is much less spectacular, perhaps because critical theorists are less interested in criticizing the technicalities of the Law — their new knowledges of government deals only with the general and impersonal principles of Laws, which is confined to the first level. Indeed, in general, Enlightened philosophers do agree that the mere description and application of the Law remains the competence of the Jurists. As a result, a

modernized and rationalized version of legal science has gained a quasi-monopoly of production of this knowledge.[12]

So, we have therefore, a twofold structure, with two different *dispositifs* of rationalization, one producing, maintaining, and developing the 'legal form' of the political subjectivity, the other producing, maintaining, and developing the apparatus of its concrete realization. The first is where Law and Politics are articulated (the substance is political / the form is legal), the second is where Law and Politics are opposed (legal practice as a depoliticized technique).

This detour was useful to shed light on the significance of the distinction between the 'Law of Jurists' and the 'Law of Philosophers', to which I can now return. The critique of Law is today often a critique of those political principles which are embedded in the system of general and impersonal legal principles as an 'abstract representations of social reality, relatively indifferent to social contents' (Negri and Hardt 2009, p. 22) — that is to say the legal structure of the dominant political regime. This critique is aimed at displacing those principles and replacing them with better ones. For example, according to Negri and Hardt, although the system claims to be the legal form of freedom and democracy, property is its core operative principle, and this ought to be changed. The critique is addressed to the Prince, very often the democratic Prince (generally public opinion, but sometimes also the *popolo in armi*, the working class or the multitudes). The key element here is that this critique is general, not dealing with the technicalities of the Law. It implicitly argues that changing the first level of the structure would be enough to change the whole — as if what happens at the second level of the structure is not important or strategic enough to warrant critique. In this, current critical theory is reproducing one of the core ideas of the "project of the Enlightenment for the Law" which is to believe that, if the legal system is well conceived at the level of principle, *l'intendance suivra.* But 'stewardship' will only follow if the apparatus in charge of the realization of the Law is actually neutralized, or, in the anti-juridism version of CT, if the realization of new political principles will not actually need to be realized through Law (that is, of course, Negri and Hardt's position). In relying on the neutrality of the apparatus one must obviously be overwhelmingly confident in the success of the modernizing project for the Law and thinking Law will not be needed after the current legal system is replaced gives rise to other problems that we will discuss in the fifth section.

Thus, the contemporary critique of the Law is very often following the fault lines of the 'project of the Enlightenment for the Law', as an external critique of the Law. External here is to be understood in at least two senses. Firstly, the critique is external because the critical knowledges which produce it originate 'outside' of the legal tradition. Lorenz von Stein was correct to describe these 'outside knowledges' as 'oppositional knowledges' (see Xifaras 2008), because they contest the competence of the old *Scientia Iuris* to provide the legitimacy of the existing laws and establish what the legal system ought to be. Secondly, the critique is external in the sense that

[12] This monopoly is 'quasi' only, because of a very notable exception in Bentham's 'science of utility', which is not only a 'legislative knowledge' but also a critique of internal modes of reasoning and arguing in Law. This may explain why, today, law and economics, once oriented to case law in the second part of the 20th Century, is the only of 'new kid in town' to have seriously challenged legal doctrine in knowledge production.

it deals with the political substance, which is introduced from beyond the bounds of the legal system, and not at all with the internal operations required for the enforcement of the Law, which is generally understood as mere technicalities. In fact, current critical theories are very often theories about the first level of the structure, where the legal and the political are explicitly articulated, and not at all about the second level, in which political significance has been supposedly neutralized. The critique of Law is therefore generally a critique of the 'Law of philosophers" and not a critique of the "Law of jurists". It is as if, most of the time, Critique had naively accepted the idea that political stakes are only to be found at the first level, not at the second, and therefore would only focus on the former. Or, Critique seem to have forgotten to criticize the chiasmatic structure of modern law itself.

Indeed, Negri and Hardt's theory is a classic example of the merely external critique of the Law, in both senses of the expression. It is a critique of the Law made from an epistemic 'outside' — namely political philosophy — and whose object is a system of legal rules, understood as the legal form given to a set of political principles which are external to those forms. In this way, the critique aims to 'unveil' the hidden forces at the origin of the legal order ('bourgeois revolutions'), to demonstrate that the legal order is not what it appears to be (not a constitutional order, but private property regimes). The material constitutions founded by bourgeois revolutions are structured by property rights, and the inevitable result of this foundation is the constitution of plutocratic regimes and capitalist domination, not the democratic liberal regimes they claim to be through their formal constitutions. The key element here is that the real legal structure (private property regimes) produced by the real origin (the material constitution as domination of capital) of the formal legal system is the *necessary* cause of the bad consequences (oppression and domination).

Clearly, this critique focuses only on the first level of the structure of modern Law: the articulation of the real constituent power (the bourgeois class) within the legal system (public law as ideology, private property as the real legal base of the material constitution). There is no need to study the second level, that of legal practice, to arrive at this result.

Moreover, Negri and Hardt espouse a radically anti-juristic version of critical theory. Here, it is not even necessary to study this second level to produce alternatives, because the alternative can only seek to displace the constituting power (the multitudes instead of the bourgeoisie) and its core political principle (the Common instead of private ownership). Once this shift is made then, there is no need for a new better legal system, because the multitudes are self-constituted and not constituted through Law. Law cannot constitute the multitudes because it cannot be distinguished from the legalistic vision of the world it ascribes, which conveys an individualistic and competitive conception of singular subjectivities and a reified and totalizing conception of the Common. Law, therefore, is the language of *potestas* (power as domination) not *potentia* (power as empowerment/capability).

This loyally reproduces the conception that the Radical Enlightened founders of modern law had of its structure. Of course, for Negri and Hardt, the real constituent power is not the 'general will of the people', as it is for Kant or Bentham. It is in fact, not a will at all, but a relation of force — the domination of the bourgeois class. However, as far as its articulation in the legal system is concerned, the scheme is the same:

a political thing (here a relation of force) is constituted and imposes its hegemony through the establishment of a coherent system of legal principles (here property Laws) which is strictly enforced in every aspect of the everyday life (the production of human life, the subjection of our bodies). The role of the apparatus in charge of the application of law is similarly *neutral* in the sense that the outcome of the application flows down from the top (here: from the real, hidden top — private property regimes, not constitutional orders). The system of plumbing, as it was described earlier, works fine. Structurally then, the exclusive source of law is a political element (class domination), and this political element is being translated into a set of legal forms and principles. The outcome of the prevalence of this legal system is the realization of the originary political principle in the material world, establishing the reign of private property on every aspect of our lives. Thus, if you do not support the political element embedded in the legal system, you simply have to find a better one (the Common) with which to replace the former — this is what we might call a Revolution. From this perspective there is no political interest whatsoever in the process of application of the law, nor in the functioning of the apparatus in charge of it. At the level of legal practice, there are only technical rules, procedures, protocols, and technical decisions made by agents which are politically neutralized.[13] I contend however, that many politically interesting things do in fact occur at this technical level in the structure of modern law, where the system is applied by the apparatus in charge of it.

My argument here is that this 'oversight' is a serious problem which might be to the detriment of the whole project, for at least two reasons. Firstly, one must be overwhelmingly confident in the stewardship of legal actors to think that it is enough to simply rewrite the Constitution or the Civil Code to actually effect change in the world.[14] The fact is, that legal technique might have never been able to successfully politically neutralize the apparatus. In this sense, if the apparatus is *not* neutral, then something might be missing from the critical enterprise. Secondly, because the articulation of the internal and external critique seems to me to be key for a proper understanding of the whole structure of the law and its development in the last two Centuries. However, without criticizing the second level of the structure, CT cannot grasp a holistic understanding of this structure and cannot therefore provide an accurate account of its role in constituting our current world. Not to mention that the articulation of the internal and external critique is also a very promising avenue for emancipatory projects and the building of concrete political alternatives.

To sum up this section: the project of the Radicalized Enlightenment for the Law is not only ambivalent, in the way it connects and sometimes confuses the emancipatory promotion of political autonomy with a fetishized conception of the powers of Reason (a critique one can find in Negri and Hardt's book, with which I fully agree). It is also incomplete, because its critique is only a critique of the legal system (the first level of the structure, that of the general principles) and not a critique of their application (the second level of the structure, that of the technical operations of the

[13] Of course, I imagine that, for Negri and Hardt, the agents are not 'neutral' because applying bad Laws is a highly political activity, but they *are* 'neutral' in the sense that they are attempting only to faithfully apply these Laws according to the duty ascribed to their position.

[14] A position still adopted by the majority of left parties in France.

law). The crux of the problem of this incompleteness is that somewhere between the 18th Century and now, a change in the functioning of this second-level structure deeply transformed what happens at the first level. This transformation is such that it might be that the legal structure of the dominant political regime cannot anymore be described as the 'Law of the Philosophers'.

Otherwise said, the emergence of this *dispositif* does not involve one, but two developments, parallel but deeply intertwined. The better-known one is the story of the 'Law of the Philosophers' or the history of the 'external critique' of the law, which is the story of the endless 'end of metaphysics', from Kant to Hegel to Marx to Nietzsche and so on. The other, no less important one, is the history of the internal critique of the law, that is the story of the slow but certain disaggregation of the internal coherence of the technical dimension of the law. Although it appears unintelligible, and because it is far less well-known than the first one, I will now briefly attempt to sketch it in a few paragraphs.

Transformations of the Modern Structure of the Law Through Its Internal Critique

(Almost) Two Centuries of Internal Critique

What does *not* appear in Negri and Hardt's analysis, at least in *Commonwealth*,[15] is the story of the emergence and deployment of an internal critique of property, which has developed into an internal critique of the Law generally. In that regard, this confirms at least the epistemic centrality of the debate over property in legal thought in the 19th and early 20th Centuries. The effect of this critique has been to transform deeply not only the way we think about the Law, but also how we practice it. I will return to this below.

As we saw, in the minds of the founders, particularly Kant, the process of applying the legal system in the real world ought to be purely mechanical. To achieve political autonomy, the will encoded in the legal system (for Kant, in the form of codified legislation) must be applied as such. The process of application itself should be objective, the agents in charge of it should be akin to workers limited to decoding the Law inscribed in the applicable texts. The idea here is fairly simple: for each concrete case, there is a relevant 'jural relation', every 'jural relation' is governed by an 'institution of law' to which corresponds a unique 'rational concept'. The inner determinations of this rational concept are a series of 'attributes' which are translated into 'principles' from which it is possible to deduce the rule applicable to the given case. The logic is as follows: Case → jural relation → institution of law *qua* concept → inner attributes of the concept → principle → rule → case. For example, A gives B a sum of money in deposit for renting a car (case), the jural relations here are 'deposit' and 'rent', rent belongs to the institution of law 'property' and 'deposit' to the institution

[15] As Michael Hardt and Toni Negri rightfully point out in their response to this paper, they discuss the internal critique of the law in *Assembly*, the book they published after *Commonwealth*. See below, footnote no. 25.

of 'contract'. The rational concept for the institution of property is that of 'real right' as a universally opposable right. The rational concept for the institution of contract is 'personal right' — the merging of the wills of the parties which operates to produce a third will opposable to the parties. From the concept of real right, one can deduce the following 'inner attributes': the right is subjective (its holder is a person), the owner has exclusive power upon the thing owned (property is absolute), property rights are perpetual and so forth. The inner attributes to the rational concept of the institution of contract are freedom to contract, obligation to subject oneself to the provisions of the contract, impossibility to change these provisions during the execution of the contract etc. From these principles, a judge will be able to deduce that B shall return the deposit to A once A has returned the car to B. This is mechanical, indeed — all that is required here is to identify the jural relation at stake (a task that requires experience), to read the applicable text and perform the syllogism. This has been called the 'Jurisprudence of Concepts' because the outcome is presented as a necessary effect of the syllogistic deduction from the inner determinations of the concepts ruling the relevant institutions of Law which regulate the given jural relation.

Nevertheless, it soon appeared that those agents responsible for applying the Law were not only 'workers' but were in a position to exercise a much broader and creative power of interpretation.[16] Savigny, as usual, offered the clearest critique of mechanical jurisprudence along this line. Moreover, it appeared that simply transforming legal agents into civil servants to neutralize them politically was insufficient, as the constraint of hierarchical power was external and the question at stake was the internal submission of their own will to the will encoded in the applicable texts. Indeed, it was necessary to supplement the external constraints (the fear of sanction from hierarchical power) with internal ones, which would ensure that their modes of reasoning were purely 'legal', and not the expression of their subjective will, nor (God forbid!) of their ideological preference. In doing this, a *dispositif* of rationalization of the way they reason and argue was also necessary. Portalis advocated for the reintroduction of a professional common sense to judicial decision making (2007). Savigny, as usual, had a far more sophisticated answer, he sought to invent nothing less than a new knowledge — the knowledge of producing objective interpretation within the technical element of the law, which he called 'legal methodology'. This new knowledge blossomed everywhere, especially in Germany, which was the epicenter of legal science in the 19th Century. This knowledge is akin to the grammar of 'how lawyers think'. It produces a whole system of methods and protocols (in which analogy, and not mere syllogism now plays the primary role) meant to frame and contain the otherwise recognized and celebrated freedom of interpretation of the judges, which nonetheless ensures that their decisions are objective — not in a mechanical, but in an organic sense. This is still the 'Jurisprudence of Concepts' but a much more sophisticated version than the mere 'Mechanical Jurisprudence' favored by Kant.

The birth of internal critique then, can be traced to the beginning of the critique of this view. It is not beyond the bounds of possibility here to attribute this development to the second Jhering (see Von Jhering 1999). This revelation occurred to him whilst performing a private consultation on a property case (*Basel City v. Basel County*).

[16] See 3.2.5.

Jhering realized that from the same concept (absolute property), he was able to deduce (through attributes → principles → rules) two contradictory rules, one favoring each of the two opposite parties, and this, with the same perfect logical rigor. This experience horrified him — as it meant that the deductive method was too indeterminate to decide the case. Why? Because contrary to the requirement of the method, external elements could *always* mediate between competing inner determinations of the concept and the outcome of the decision in any case. He later theorized these external elements as necessary and unavoidable expressions of the 'interest of the society', an interest that judges could not and should not ignore. Additionally, he theorized that these external elements were too closely related to the factual context of the concrete case to be susceptible to systematization. This conclusion was dire — there was no conceivable 'right answer' to the case deducible from the process of 'application' of a concept. A further example will illustrate this. Primus built his house with stones taken from Secundus's garden. The jural relation is theft, the institution is property, the concept is absolute property, one of its inner attributes is the 'right to follow' the thing and the principle is that the remedy ought to be the restitution of the thing to its legitimate owner (*restitutio in integrum*). But, in the given case, this means that Primus must destroy his house to give the stones back to Secundus. If he had built a garden shed, the judge may very well order him to destroy it. However, had he built a palace, 'the interest of the society' may not be that people build, destroy, and rebuild palaces, because of the loss of time and money. Therefore, the judge may very well order Primus to compensate Secundus with money and not give the stones back. On occasion then, the 'interest of the society' will mediate the deduction and change its outcome, and other times it will not. It will depend entirely on the context of the case, and there can be no way of knowing in advance. The role that the 'interest of the society' will play is contingent then. Jhering's concludes that the Law cannot be solely about 'applying concepts' but must be about balancing the various legitimate interests at stake. That is, it must secure a (precarious) equilibrium between the forces at work. He will call it the 'Jurisprudence of Interest' — and Nietzsche will love it.

Decades later, the French jurists of the Belle Epoque, namely Saleilles, Gény and others, who were careful readers of Jhering, would realize that when the judges decide a case using the formal legal system (the Code) as the major premise of their syllogism, they are unable to account for the new interests emerging from recent transformations of society. For example, a consequence of the recent development of industrial capitalism was the emergence of the collective interest of factory workers, and their subsequent claim for the right to unionize and strike. Many jurists of the time argued that it was not possible to simply 'apply the code' and began to harshly criticize the 'abuse of deductions' in legal reasoning as 'formalist'. Some concluded these attacks by articulating a need to preserve syllogistic reasoning but advocated for the replacing of the major premise with 'social laws.' In this vein, Léon Duguit went as far as to claim that property is not a subjective right, but a way for society (not the State) to recognize that each of its members must hold some prerogatives on certain things, distributed according to the 'Law of Solidarity' (a concept borrowed from Durkheim (see Duguit 1999)). These insights deeply transformed the ways in which lawyers thought. They brought forth new modes of reasoning, in particular teleological reasoning, and the proportionate balancing of interests. These new

modes of reasoning soon became ordinary ways to reason and argue, broadening greatly the repertoire of arguments available to legal practitioners. They therefore deeply transformed the ways in which we conceive and make law.

The death of metaphysics is endless — because critique is soon followed by the critique of the critique, and the critique of the critique of the critique. It is the same in the story of the internal critique of the law. Soon after, other jurists would claim that Jhering's conception of the 'interest of the society' or Duguit's conception of the 'Law of Solidarity' were equally as dogmatic and as formalistic as the methods they were criticizing. This is because (respectively) society has never had one unique interest, nor is it governed by one unique 'Law of Solidarity' determinate enough to lead to a single right answer to the given case. These new voices would claim that the determination of the interest of society is the object of harsh political conflicts and that societies contain too many conflicting functions for a theorist to usefully remain a functionalist. Think here of the attacks of the American legal realists on sociological jurisprudence. Further, remember the later critique of the US legal realists, and against those who made these attacks. Here, again, we encounter the usual pattern — critique, critique of critique, etc.

To cut this long story short, in the aftermath of 68, under the influence of French theory, many legal theorists came to the conclusion that the role of legal agents was to balance, with arbitrariness and uncertainty, an impossibly wide set of conflicting considerations — not simply legal rules and principles, but a range of political and ideological stakes, including interests, values, good administration and policy making. In a world so fragmented, contradictory, and elusive, agents could hardly pretend to be inherently more rational or determinate than the features of that world. This was a blow, because if the world promised by the law is no more rational than the real world it pretends to rule, then the use of law to regulate that real world is surely futile. To borrow from Duncan Kennedy, this looks like the historical process of the disenchantment of the legal inner rationality (see Kennedy 2004).

Each of these internal critiques had, of course, to face backlashes, generally in the form of a 'reconstructive project', aimed at rebuilding the inner rationality of the Law, and this fight is still ongoing. Generally, the allure of these projects is always the same, oddly enough, that of a three-steps waltz: first, they acknowledge that the last disturbing critical person who spoke has a strong point but then, refuse the generalizing of her point (she's correct but what she describes is marginal), and finally, they go on to restate a lower (but nonetheless satisfactory) standard of inner legal rationality. Thus, the history of modern legal thought looks like this:

Starting Point: Law is objective because legal reasoning is mechanical, pure deduction.

Critique: Of course not, judges are creative.

Reconstructing Project: Certainly, but nonetheless, they are framed by legal methods.

Critique: That's not the point, deducing from concepts is not objective, the interest of the society always mediates between the major premise and the conclusion of the syllogism.

Reconstructing Project: Yes, but then you can deduce the right answer from social laws (for example the "Law of Solidarity").

Critique: the interest of the society cannot be deduced from any 'laws', it's a disputed matter.

Reconstructing Project: maybe, but then you can balance the interests at stake to reach the right answer.

Critique: Sure, but the balancing of interests is discretionary, not objective, and also, there is much more that "interests" at stake.

Reconstructing Project: True, but there are objective methods with which to balance proportionally, not only interests but any kind of considerations.

Critique: these so-called objective methods are full of gaps and indeterminacies, and some of these considerations are inherently politicizing the process of balancing them.

In any case, at this point, the law does not claim any longer to be rational, but at best it to be reasonable, and it seems that that is sufficient, even for the promoters of fancy reconstructive projects — a slow but inevitable process of disintegration of the inner rationality of the law. This process not only happened in theory, but of course also in practice, because at every step, the task of deconstructing arguments produces novel arguments, which become available to practitioners, who may employ them to a case at hand if it is in their interest.

The European critical schools and movements, Critical Legal Studies, Critical Race Theory, Feminist and Queer Jurisprudence in the US, have all played key roles in this work of deconstruction. It is to their credit that it is now difficult to approach the practice of law as though it was simply about politically neutralized agents applying a system of legal concepts.[17] A symptom of this difficulty then, is the success of approaches that are completely indifferent to the internal rationality of the law — for example the economic analysis of the Law.

What are we left with then, after two centuries of furious internal critique of the Law? Of course, legal theorists cannot agree when it comes to providing a conception of the Law or a description of how it really works. Some hold fast to the 'project of the Radicalized Enlightenment for the Law' — they still imagine the Law, and their own practice, as a modernizing project the point of which is to make, maintain, and develop a system of general principles and rules coherent and determinate enough to be 'applied' by a neutral apparatus. The price they pay is to be in denial of the objec-

[17] Although deduction is still present as one of many available tools.

tions made by the whole tradition of internal critique — and yet, those jurists are still modern.[18] Those jurists are 'positivists' in a very particular sense: they believe that for most cases (enough cases to claim that the system as a whole is offering a surplus of rationality to the real world it pretends to regulate) it is possible to deduce the 'right answer' from the application of the system.

Other jurists took lessons from the long story of internal critique — they realized that the Law may not be that coherent, nor that determinate. For them, the law is not merely a "technical element". Indeed, that technical element itself may not be all that technical, because legal technicalities are replete with political and ideological considerations, subjective inclinations, and arbitrariness at every level. Some of them (the promoters of reconstructive projects) acknowledge deconstruction but nonetheless attempt to rescue the idea that to each case, there is a 'right answer', or a limited set of acceptable answers. They could not deny, however, that this mess suggests that the Law is much more pervasive, malleable, and open to various and contradictory enterprises than it appeared to the radicalized enlighteners. They must accept then, that the law could be open to transformative and emancipatory projects, even revolutionary ones.

What I wish to emphasize here is that, paradoxically, critical theorists often share with the modernist jurists (conservative or progressive) similar conceptions of the Law. They often believe that the law is deploying a 'legalistic vision of the world', embodied in a system of concepts, which are realized as such in real life through a neutral apparatus - 'The Law of the Philosophers', or the 'Jurisprudence of Concepts' at its finest. Indeed, they seem to think that the law is coherent and rational enough for its origins to determine its consequences. Thus, if the origins of the law are indeed, the 'Idea of Humanity', then the legal system will properly express the Rights of the Man and the Citizen, and their realization will effectively carry the promise of equal freedom and dignity for all human beings. Or, in a more critical vein, if the origins of law lie in the bourgeois 'legalistic vision of the world', because the legal system is a tool for class domination (the Republic of Property), then the consequences of its application will necessarily be the exploitation and alienation of those who have no capital. There is, of course, a significant difference between the orthodox and the critical view, but in both cases, the origins of law objectively determine its consequences — and the legal system is indeed politically 'neutral' in the sense that it works fine to deliver the expected outcome, whatever the initial political input is. They are, therefore, both modern.

To put this differently, after two centuries of internal critique, the Law (in both theory and practice) has not been saved from the twilight of modernity. The structure of modern Law imagined by the 'project of the Enlightenment for the Law' and enacted by the great bourgeois revolutions has indeed collapsed (or, better said, disintegrated). The project itself might, at least ideologically, have succeeded — ideals of political autonomy have largely triumphed in the hearts and minds of the citizenry. It has been the victim of its own success though, as the core elements of its structure have been radically transformed. As a result, there is no suitable (rational or coherent)

[18] Bruno Latour has wondered if we have ever been modern (see Latour, 1991), my answer would be that if any of us succeeded, they were certainly jurists….

legal system that can realize the triumphant ideals of political autonomy and it can be no surprise that these ideals do not realize themselves in the real world. At the end of the day, our political condition is schizophrenic — the ideal of ourselves as polities is democratic, but our institutions are not. But what are they? What does the law look like after its many inner transformations? The question remains open and the answers multitudinous. Of one thing we can be certain: it is not what it was at the dawn of modernity, because the various dispositifs of rationalization at work in the structure of modern law have been radically transformed. These transformations can only be conceived of as inventing new knowledges for the understanding of Law. The division of labor, as beautifully elaborated by Kant in the *Doctrine of Right* (1991, p. 55) under the misleading trichotomy *ius naturae*, *juriscientia*, *jurisprudentia*, expressed here as the division between philosophy, the science of legislation, and legal science has become obsolete. Why? Because it does not offer a coherent account of how the legal system encodes principles in laws nor of how legal practice on the ground articulates, or fails to articulate, those principles. The external critique can only be incomplete if not carefully addressed to the internal one, because the latter deeply weakens the causal link between the origins of the legal system and the consequences of its application, by presenting the whole legal machinery as much more pervasive, malleable, and open than that. The political principles at the source of the law cannot therefore predict the outcome found in practice. This does not mean that sometimes bad origins do not really lead to bad consequences. Rather, it means that in any case, many things happen between origins and consequences, which are deserving of careful consideration. My conclusion then, is a call for better articulations of the internal and external critique in CT — a call for the development of new critical knowledges of the law, made of their encounters, articulations, and the juxtapositions of their respective divergent inclinations. Philosophy, alone, even *hors les murs*, cannot do that.

The Law After Modernity

Let us return then to the Law after its deep transformation through internal critique (among many others factors of transformation). Here, I will borrow from semiotics, and more precisely its post-structuralist fashion, as popularized by Critical Legal Studies and their aftermath (Kennedy 2008). Law here, cannot be accurately described as the operation of realizing a system of concepts or principles flowing from an external political element.[19] Let us set aside also the fixation on the provision of a definition of what law is, and rather propose a suitable account of how it works. We can start then by noting that it has the appearance of a practice, and a specifically discursive practice at that. This is a discursive practice of a particular kind, in essence, speech acts here are enunciated in a particular *langue* and vested with various levels of authority when they are enunciated in particular situations by particular specialists. Seen in this way, Law is not merely a system of legal forms (concepts),

[19] That said, systems, external concepts or principles, and the work of 'application' can indeed be found 'within' the Law.

but rather something akin to an ocean of *paroles*, enunciated in a specific *langue*, which permeates every possible aspect of human life.

Following this line of reasoning, it is possible to observe that, as in every language, the two iron laws which govern the production of legal discourses are: (1) That everything can be said from within the *langue* and (2) That nothing can be said outside of it. From this perspective, the Law appears as a self-referential system, functionally closed but cognitively open, with the ability to learn, evolve, and produce the knowledge of its own evolution (autopoiesis) — something akin to a natural language.

However, the analogy with natural languages will only take us so far. Law is not a natural language *à la* Saussure, rather it is closer to a "technical language" or a "secondary language", something akin to poetry according to Jakobson[20], or further, something like fashion *à la* Barthes (1967): a semiotic system.[21] It is, therefore, a 'code within a code'. The result here is that even if you are not a Derridean, you must acknowledge that the structure of the law cannot be accurately captured by the Saussurian conception of the structure of natural languages. Indeed, for Saussure, this structure is static and rigid — *paroles* cannot in any way transform the *langue* (see De Saussure 1959). In the legal language, however, this structure is in a state of constant motion. A common metaphor is illustrative of this: contrary to popular opinion, law is *not* at all like a chess game, because unlike chess games, players are able, under certain circumstances, to change the rules of the game whilst playing — law then, is akin to *play*, rather than *game*.

A myriad of consequences flow from this. Firstly, if the law appears as a certain type of discourse, spoken in a *langue* in which an infinity of *paroles* can be spoken — then, one must admit that the *langue* of the law may not only express sanctions and interdictions, but may also allocate powers, faculties, freedoms, and immunities. It is the same legal language then that both punishes and authorizes, that both encloses and liberates, that both empowers and disempowers, and that allocates and deprives prerogatives, wealth, bargaining power, reputation, and so much more. It does this at all times, and all at the same time.

In the early 20th Century, Westley Newcomb Hohfeld (see 2001), produced a concise but powerful summary of the grammar of this language. He identified the types of legal prerogatives distributed by the Law and established their relations of opposition and correlation. He listed the following: rights, duties, privileges, non-rights, powers, liabilities, immunities and disabilities. This list is obviously open to contestation, but key here is that the law does much more than just forbid and sanction. The view according to which the Law is mainly a concealer (ideology) and an apparatus of repression (violence) is surely too narrow to grasp all of these things that the law does.

Secondly, using that grammar, American legal realists were able to distinguish between rules which are directly applicable to a given situation, which they called

[20] "No doubt, for any speech community, for any speaker, there exists a unity of language, but this overall code represents a system of interconnected subcodes: every language encompasses several concurrent patterns, each characterized by different functions" (See Jakobson 2012, p. 352).

[21] On reading Barthes's *The Fashion System* as a Law book, see Xifaras (2019).

'foreground rules', and rules indirectly related to the situation, which nonetheless play an important role in structuring it whilst remaining 'invisible'. They call these 'background rules'. For example, under our latitudes, where workers negotiate pay increases, the foreground rules are generally to be found in the collective agreement regulating the workplace. However, whether the employer is entitled or not by the legal system to easily outsource the factory will play a crucial role in this negotiation. This entitlement may flow from another legal regime, not directly applicable to the case, or even from the absence of any specific rule forbidding it, in which case the entitlement would be 'invisible'. The most important background rules are generally not those which forbid and sanction, but rather those which permit and authorize — and those rules are very often 'invisible' because they are implicit. To borrow from Kelsen, the absence of a rule forbidding a practice amounts to the permittance of that practice. In other words, the legal regime which structures any given situation is the entirety of the legal system (including those background rules) and not just the directly applicable rules. Further, the legal system encapsulates all of the rules distributing legal prerogatives to actors, both explicitly and implicitly. That is why it is often difficult to know and predict what the distributive effects of the background rules will be. Not only is the entire system too complex and too messy and not only do given situations bring in too many elements — but additionally, the margin of appreciation in decision making afforded to actors is often given such importance that to even imagine the strict 'determination' of a case becomes impossible. By this lack of strict determination, I mean both the unknowability of the causal relation and the absence of a single identifiable 'right answer'. It also means that, where judges or legislators create new rules, they are completely unable to predict the consequences — a fact which has given birth to a new 'legal knowledge', under the name of the 'impact study'. It goes without saying, of course, that this new knowledge did not restore the lost objectivity of predictions.

Thirdly, this distinction between foreground and background rules affects how we might conceive of an alternative legal regime for the regulation of a given situation. For example, to empower our negotiating workers, it may be useful to forbid outsourcing. Where a given legal regime crystallizes a certain relation of force, alternatives to this crystallized relation of can be provided by the changing of background rules. In some situations, the adoption of a new background rule will have transformative revolutionary potential for the concrete situation at hand.[22] What this means then, is that conceptual space is required to allow for the conceiving of such 'revolutionary changes from within the system'. That is why it is crucial to be able to identify where and by whom the background rules are produced in the system. Many Critical Theorists would locate it only at the level of the legal system (Constitution and / or codified legislation); but of course, a whole lot of crucial background rules are also produced in the obscurity of the technical operations of the law, by judges are other practitioners. This makes the struggle to transform the background rules more diffuse.

[22] Imagine, for example, what it would concretely mean to adopt the background rule 'all incomes superior to X are taxed 100%' or 'no difference of income can be superior to Y'.

Fourthly, what is true of the rules themselves is also true of the arguments available for the reasoning of decision-making agents. As we have seen, decisions are made using rules and principles, but also with reference to whole range of heterogeneous 'conflicting considerations' (values, interests, policies, standards of good administration and so on). What is structuring the situation then, is not only a system of formal rules and legal institutions, but the legal system in its entirety, understood as the entire repertoire of argumentative tools used to justify the decision, that is the entire *langue* of the law.

Fifthly, in a natural language, if I describe the weather as beautiful, then I can also describe the weather as not beautiful, provided that the grammar of the language allows for negating. In a similar way, the legal language is made up of couplets of arguments and their possible counterarguments. If it is possible to argue that property is absolute then, it must also be possible to argue that property is not absolute. Similarly, if it is possible to argue that there is no liability without fault, it must also be possible to argue that there is liability even without fault and so on. This is why everything (and its correlate, and its opposite too) can be said in the *langue* of the Law. Put differently, the *langue* of the law conditions *how* to say things, not the content of *what* can be said.

In this way, in any given situation, the legal system, understood as the repertoire of actually available arguments, will often, rather than produce a determinate solution, instead simply condition the contradictory ways of reasoning by which a conclusion might be reached. If it can be said that law structures human activities and social relations, this is not because given legal forms are 'subsuming' these activities and relations, rather it is because the repertoire of available arguments in any given situation shape the strategy of actors interacting 'in the shadow of the Law'. Law is indeed everywhere and indeed structures everything, but at the level of conditioning and orientation, and not at the level of being the necessary cause of every decision. That is the lesson of Foucault's micro-politics of power relations — that the micro-politics of power relations and disciplinary regimes are nothing else than law in action (see Kennedy 1991).

There are many other consequences (we will encounter a sixth one below).

What we can conclude from this then, is that the law cannot just be understood simply as a 'concealer' and a 'bad guy', nor can legal practices be its blind spot. Rather, legal practices should be considered as at least its playground, or perhaps its battlefield — the locus in which possible alternatives to domination and exploitation can be given voice. From the point of view of the 'role of the Law in CT' then, this changes everything.

An Example: The Invention of the Copyleft

An example will illustrate these developments. I am particularly fond of this example, because it seems to me to say a great deal, both about the malleability of legal technique and the possibility of building serious political alternatives from within the legal system.[23]

In recent decades, we have seen a massive extension in the field of Intellectual Property, be that copyrights, patents, or trademarks — which has resulted in the private appropriation of a great number of intellectual modes of production and the subsumption of these processes to the logic of enclosure, control, and capital accumulation. A key moment in this sad tale has been the fate of the internet, which has been characterized by the subjection of its incredible potential to the power of a few large firms. A key feature which has turned this story into a sad one, has been the extension of the copyright regime to software. When those firms were just start-ups on their way to establishing hegemony, some communities of computer programmers felt that the *raison d'être* of their jobs was at risk. They understood programming as a free and collective enterprise, based on the sharing of each one's work and animated by the spirit of hacking. They felt that it was necessary to resist this logic and felt compelled to invent something with which to protect themselves. Robert Stallman is perhaps the most famous example here. He, and the lawyers with whom he was associated, pioneered the invention of the free software or copyleft, which then diffused under different labels (open source, creative commons etc.) and spread from software development to the sphere of artistic creation and scientific research.

The idea here is simple: according to copyright law, every author of an original piece of software owns it. Of course, with programming chiefly being about improving each other's work, originality and authorship might not be appropriate concepts here. Hence, by law, each 'author' of a new program (e.g. a modification of existing programs which is significant enough to count as an original creation) enjoys a copyright on this program — she owns it.

The copyleft adopts the same logic. It is often thought that the copyleft is the inverse of the copyright, yet this has never been the case. Rather, in technical terms, the copyleft is simply a good old-fashioned copyright. Thus, by law, the owner of a software is entitled to determine what to do with it — amongst many possibilities, she can license it, meaning that she can require that every third-party user agrees to a unilateral contract to access the software. That's what almost all owners of copyright on software do. However, herein lies the shift: this license is called 'free' where it respects four liberties: to run, to use, to study, and to modify the software. In this way, every person that clicks "I agree" will be free to access the software, to use it,[24] to study its code and to transform it freely — meaning that she will be free to create derivative software. However, this license also forbids the licensing of new derivative software under a non-free license. Thus, the author of the derivative software (and the derivative of the derivative, and so on) will own it, but that ownership will be subject to the copyright of the original owner of the software used to derive the

[23] For a more in-depth treatment, see my article on this (Xifaras 2010).

[24] Including commercial uses — the license is free akin to free speech, not free beer.

product. Therefore, derivative creators will have the right to do whatever they wish with their creations, *except* to prevent third parties from running, using, studying, and modifying them. Their natural right of property in their creations is therefore limited by the conditions under which they could access the necessary material to make that creation. This mechanism then goes viral — the only prohibition being the licensing of new products under anything other than a free license, it creates an infinite chain of new, free, derivative software. This 'four freedoms and one prohibition' structure establishes a free community of programmers where every work is accessible to the whole and protects the community against dispossession, by 'excluding the exclusion' on each member's copyright. The result then, is the proliferation of communities of programmers collaborating in the creation of common goods, that offer a concrete alternative to the commodification of software, the marketization of internet, and the biopolitical nightmare that accompanies it. This concrete alternative keeps alive the idea of an economy of information free from capital accumulation and control. It does this on the back of a basic property right articulated in one of the most controversial contractual forms, the license as a unilateral contract, in which one party imposes its will on the other, without negotiation. In this way, the unity of these two 'bad legal forms', the exclusive right and the authoritarian contract, has brought forth an amazingly inclusive mechanism that engenders relations of cooperation. Achieving this required the engagement of activists who were not only politically realistic enough to resist the idea that they could ever spontaneously abandon their right in their work but who were also sufficiently intellectually free from the dominant legal ideology to resist the idea that property rights are necessarily exclusive. Put differently, those activists were great legal hackers — they managed to create an inclusive regime of property rights, through the unity of exclusive copyright and unilateral contract. In doing so, they invented, in both theory and practice, an alternative to market hegemony, from *within* the system of private appropriation of intellectual works — the copyright regime. This concrete alternative is neither beyond nor outside the current legal system, rather, it is a subversion, operated from within, of its most ordinary and alienating uses. Of course, this alternative is also full of limits, contradictions, ambivalences, and problems, but we should not mask our pleasure: it is a concrete, and fairly radical alternative, built from within a borderless world of domination and exploitation. Moreover, it is built with those legal tools of domination and exploitation — absolute property and the worst of all possible unilateral forms of contract.

I am particularly fond of this example because it illustrates how greatly malleable legal technicalities are and it demonstrates clearly how revolutionary alternatives can be built from within. More precisely, it effectively illustrates that property is neither a stable, given legal form, nor a limited number of stable legal forms, but a language made of an infinite number of elements, with which, at least in theory, almost any form can be spoken, including the most inclusive ones. Put differently, it illustrates property, not as a given legal form, but as a myriad of elements available for building almost any legal regime.[25]

[25] I have already mentioned in above that the initial setting of this paper was to focus on a chapter of an 'important text', namely the first chapter of *Commonwealth*. Though, in a more recently published book,

There are two further reasons for which I am fond of this example.

The first is that it shows us that the productivity of the law is not only negative. Contrary to what Negri and Hardt suggest, the law is not only the language of power as *potestas* (domination), it also expresses and guarantees power as *potentia* (empowerment/capability). The copyleft creates an institutionalized space for sharing, and for collaboration, and for the marginalizing (although not the complete exclusion) of marketization. If these free communities of programmers are not on the side of *potentia* rather than *potestas*, the side of the common rather than capitalist domination, then I simply do not understand the meaning of these divides. That is to say: legal regimes have the potential to constitute and protect the free creativity of communities of productive bodies. Private property does not only produce subjectivities that are at once individual and unified (Negri and Hardt 2009, p. 39) it also produces

Assembly, Hardt and Negri did provide an explicit account of the history of internal critique (see below, their response to this paper). For the present conversation I decided to not make any addition to the version of my paper Hardt and Negri read and responded to, except for this footnote, in the hope that it would clarify the disagreement. What Négri and Hardt take from this history is the critique of absolute property and the opening of new forms of property, including social ones. They also take note of the blurring of the public / private divide by the legal realists, who indeed understood private property as an expression of sovereign power. Moreover, they recognize that for some contemporary legal thinkers, namely CLS, the law is not autonomous from the economy, rather it should be conceived of as a political weapon, with such views allowing projects of reforming it from within. They also discuss the legal theorists in Italy who are reclaiming a right to the *common goods* against the individualism and absoluteness of neoliberal property rights (Ugo Mattei, Stefano Rodotà). All these things considered however, they conclude that the critical legal tradition fails to properly understand the common, which is to be 'defined first' and only 'then, in contrast to property, both private and public' because 'it is not a new form of property, but rather non-property, that is, a fundamentally different means of organizing the use and management of wealth. The common designates an equal and open structure for access to wealth together with democratic mechanisms of decision-making. More colloquially, one might say that the common is what we share or, rather, it is a social structure and a social technology for sharing.' (Hardt and Negri 2017, p. 97). They also write that 'The common therefore is not really a tertium genus, beyond private property and public property, if that were to mean it is simply a third form of property (indeed, Ostrom's formulation of "common-pool resources" and Ugo Mattei's conception of "common goods" [*beni comuni*] often seem to name merely another form of property). The common stands in contrast to property in a more radical way, by eliminating the character of exclusion from the rights of both use and decision-making, instituting instead schema of open, shared use and democratic governance.' (Hardt and Negri 2017, p. 90).Very clearly, their understanding of the history of the internal critique of law is that it led to a healthy pluralization of the forms of property. However, they have missed the key point: When they argue that the Common is not a 'third form of property', they still endorse a Modernist view of public and private property as 'legal forms'. The point, though, is the disintegration of all forms of property. After legal realism, Property is just a language (a set of linguistic resources) to express any possible jural relations to goods (rights and things), rather than a specific legal form. This language can be used to express any relation, be they capitalist or non-capitalist. Even the word 'communist' is etymologically a legal term developed to designate the members of a joint ownership! Moreover, the disintegration of property is accompanied by the disenchantment of legal rationality, the subsequent discovery of the openness and malleable texture of the law and its potential for revolutionary transformation. This makes less urgent and less necessary the search for a leap 'beyond' property. Hardt and Negri think such a leap is still necessary to properly conceive the common and consider it a sign of the radicality of their theory. I concede that the binary within/beyond is sometimes useful, when it allows us to conceive new radical ideas that we could not conceive otherwise, but sometimes it is less so, especially when it is simply a 'leap' that allows us to stop thinking concretely what could become our relations to rights and things in a non-capitalist context. Although Hardt and Négri do agree that some kind of law and institutions of the Common is necessary, by which I assume that they imply some kind of system of allocation of goods, they do not tell us much about it.

(far less often, I admit) creative singular subjectivities that collaborate within non-unified open communities.

Of course, in no way am I resisting the idea that law can be, and often is, the language of the most abject subjection, arbitrary power, and absurd violence. Of this, Negri knew much more than most, my comments on his work here are made with all due, and heartfelt, respect.

The second reason for which I am fond of this example, is that it shows that not only are legal forms unstable and inconsistent, but they do not have any intrinsic political signification. Copyright is a property right on intellectual works, but using it does not necessarily mean commodification, marketization, and plutocratic hegemony (of course, often it does). A regime of private property rights can be used to exclude and dispossess for the profit of oligarchic powers, but it can also be used to protect creative and collaborative communities of workers, depending on its design. Unilateral contract can be a tool for removing from consumers any power by which to contest conditions of the sale, but it can also grant openness and inclusivity to a process of production. Law is everywhere — on both the 'bad' side, and the 'good'.

One objection to this might be that in theory, it may be possible to speak any alternative (anything can be spoken in a given *langue*), but in reality, those alternatives are so rarely spoken that their existence is merely abstract. The concrete life of the Law is a life in submission to the hegemony of certain conceptions of the law — those that favor capital domination. It may be true that everything can be said in the *langue* of the law, but this truth is merely theoretical, as in real life, not only is everything *not* said in the *langue* of the law, but certain forces, interests, and values will never actually be expressed. An interesting example of this comes to mind. In 2018, Etienne Balibar wrote an interesting article in *Le Monde* (See Balibar 2018), to plea for the recognition of a right to hospitality for migrants against States, where migrants have risked their lives in arriving. In the discussions which followed the publication of the article, it appeared that such rights were already enshrined in enforceable texts but had been almost forgotten in practice. Not only was the linguistic resource there, but the textual reference was also there, ready for use, but no agents of the law were making use of them. According to this objection, my argument about 'whatever can be said in the *langue* of the law' is just abstract.

This objection is strong: not every possible argument available in the *langue* is really spoken, because what can be spoken in the *langue* of the law depends on what's in the mind of the jurists who speak it — it depends therefore on an historically specific legal consciousness (See Kennedy 2006). It seems then, that the recognition of a migrant's a right to hospitality against the state is not central in the consciousness of French judges. In fact, they have in mind the bestowing of a right to *ask* for asylum, which is to be balanced against the State's right to refuse it, with the burden of the proof falling on the shoulders of the asylum seeker. What this means then, is that certain rules, certain considerations, modes of reasoning and arguing are used more often than others. To answer this objection, I must complement the series of consequences flowing from the disintegration of the internal rationality of the law — here then, is the sixth consequence.

Whilst everything can be said in the *langue* of the law in theory, in practice, some paroles are spoken, whilst others are not speakable. Here, the analogy with fashion

according to Barthes becomes pertinent. For Barthes, the distinction between trousers, skirts, shorts and shoes belongs to what is called '*Costume'* — the *langue* of fashion. According to the grammar of the *langue*, one cannot, for example, wear two pairs of trousers. Distinguished from this, there is *Dressing* (*Habillement*). *Dressing* is the infinite ocean of *paroles* within the fashion system, in which everything is possible in theory. In practice, however, this winter, yellow trousers will not work with green shirts, and long skirts will work with trainers. This is the intermediate level, which Barthes calls *Garment* (*Confection*). This intermediate level belongs to the structure in a way but is far more open and malleable than the 'pure structure' of *Costume*. It is made of fixed phrases, (*Syntagmes figés*, in French) that is — of our habits, routines, and techniques. Further, it is open to the voluntary transformative action of groups of decision makers (stylists, fashion journalists etc.). Thus, there are not two, but three levels — the pure structure (the *langue*), the intermediate entity (*Usage* or also *Écriture*) and the infinity of uttered *paroles*. The intermediate entity operates as a technical element offering resistance and constraint but open to voluntary transformations prompted by group decisions (Xifaras 2019, pp. 55–59). The analogy here with the law is striking, *The Fashion System* is indeed a great law book! It is true then that, within the *langue* of the law, everything can be said in theory. In practice, however, not everything is always said, because in a given time and space, a specific 'legal consciousness' dominates the group decision-makers (judges, professors) who play a direct role in the utterance of legal *paroles*. As a result, this 'legal consciousness' favors certain forms of argument over others, rendering it easier to say certain things and more difficult to say other things in the *langue* of the law. Of course, relations of power, authority, and influence within various groups of decision makers are all about moving the boundaries of what can be said and what must remain unspeakable. This then, is what legal theory does, it decides what can and cannot be concretely spoken in the language of the law — a crucial battlefield.

With this, it is possible to begin to make sense of the ways in which the dominant usages of the legal *langue* are associated with the ideological inclinations and professional routines of jurists, and the political relations of force in wider society. This 'legal consciousness' is not, therefore, autonomous of the historically specific general consciousness. In this way, it is not contentious to posit that, in France, speaking generally, migration laws tend to favor the State over migrants and labor laws tend to favor employers over employees. This is precisely because there is nothing more political than making laws — the Jurists cannot avoid this, despite their commitment to neutrality. They are, in fact, very often inclined towards oligarchical tendencies — the inclination to concentrate the power in the hands of experts who are, indeed, quick to constitute themselves as a Juristocracy. Our actual tendency to fetishize Supreme Courts contributes to this inclination. This does not mean, however, that a whole legal regime and moreover that the entire legal system has a fixed and intrinsic political significance. Contradictory other usages, ideologically inclined in different directions, could very well be promoted, from within that same legal regime, or from within the entire legal system. If those alternative usages do not appear, it is simply that there are not enough jurists to invent and promote them — not enough activists to push in this direction, from inside and outside the legal system. This is a material question, of course, rulers generally pay much more than resistors, but at its core it is

the same question of political and ideological relations of force that runs writ through every level of our societies.

To conclude here: law is a playground — or a battlefield, wherein the main players are often inclined to promote their own interests and their own ideologies, and yet it is too often forgotten by critical theorists and radical activists. If law is a battlefield, then one of the key sites must be the legal consciousness of the jurists — what it is and what it ought to be in our societies, how these experts should be educated, how broad their legal imaginary should be and how broad the repertoire of available arguments should be. Which also raises of course the question of who these jurists are and how they should be selected. When the legal imaginary of a given society is broad enough to allow the conception of alternatives, those alternatives do materialize concretely. When it is not, those alternatives might exist in theory, but they will remain abstract, unrealistic propositions. I strongly believe that abstract ideas and unrealistic propositions are absolutely necessary to the building of alternatives — they have immense virtue, by the effects of truth (*"effets de vérité"*, in French) that they produce, but they are not in themselves concrete alternatives, available in practice, to be realized here and now.

Final Remarks

I can now close the loop of my argument. If there is truly 'no outside', not only in the sense that salvation cannot come from outside, but also in the sense that the alternatives to domination and exploitation are to be found within (not beyond) the current legal system; and if it is true that 'Law is structuring our lives', because the 'material constitutions' of our societies are structured by legal systems, then concrete political alternatives are, in this world, the ones that can be spoken in the language of the law. Put differently, those alternatives become concrete when radical jurists are creative enough to speak them in the language of the law — something they can only do when the necessary intellectual resources are present in the historically specific legal consciousness of the age.

I can now return to the distinction between the 'Law of the philosophers' and the 'Law of the Jurists'. The 'Law of the philosophers' conceptualizes the law as the legal form of a political settlement — in general, for CT, the effects of the enforcement of the law are unjust because the political settlement formalized by the dominant legal system is unjust. The critical agenda then, is to invent new concepts and principles, and to either try and find for them an adequate legal form, or to deny the need for such form, because those principles are located 'beyond the legal context' — the latter is Hardt and Negri's approach. For them, the former is to be considered insufficiently radical. The problem with *both* strategies, however, is that the 'Law of the philosophers' is a modernist fantasy. In reality, no legal regime or legal institution is coherent enough to be the sole and unique form of a single concept or principle — no legal technique has a unique political significance. It is therefore both abstract and incorrect to assert, for example, that 'private property rights constitute the domination of capital on men and things'. Of course, it is true that private property rights play a crucial role in the institution of the domination of capital, but they can also

help to protect individuals from the domination of capital and constitute the proliferation of communities of creative workers who wish to collaborate freely. Private property establishes the reign of exclusion over inclusion, of competition over cooperation, the power of those who have over those who have not, but can also operate inversely, to include as well as to exclude, to cooperate as well as compete and to distribute wealth in an egalitarian way. A regime of property rights is a machinery to distribute legal prerogatives in any possible way, a machinery with which to draw the frontier between what is 'proper' and what is 'common', which means that it both constitutes and guarantees the 'proper' and the 'common' simultaneously. Simply put, the 'proper' and the 'common' are two sides of the same coin. For something to be 'proper' there must also exist a 'common' and vice versa — the two concepts are mutually constitutive. So, if in our world, exclusivity and competition are dominant, this is not simply because of the 'reign of private property', this is because of the reign of specific dominant usages and conceptions of property regimes. Other property regimes would produce different outcomes. I am not saying that there are no legal regimes that should just be abolished. It is, of course, more emancipatory to simply abolish slavery, apartheid, or the death penalty rather than trying to subvert them from within. It is, however, much more difficult to free oneself from the need to draw distinctions between the 'proper' and the 'common', or from the need to settle agreements with others, than it is to free oneself from the need to classify human being under absurd bio-racial categories, or to kill them out of revenge.

I think (but I am not certain) that I rejoin here, in legal theory, a position that has been well expressed by Etienne Balibar in anthropology (see Balibar 2002). Possessive individualism may be the dominant form of subjectivity in our modern times, and yet this form cannot be separated from its reversals (Rousseau's separation of usages and ownership, Marx's trans-individual appropriation, socialization of property, Derrida's ex-appropriation). All of these schemes of the reversal of possessive individualism from within anthropology are drawing on alternative subjectivities, which are more creative, more emancipatory, and more promising than those dominant ones. It seems to me that these schemes are, in fact, the only thinkable schemes that we can promote when trying to free ourselves from the 'self-ownership' mode of subjectification.

The conclusion here is that the 'proper' and the 'common' can only be thought of together. This means then, that the liberal dream of a sphere with no common (the generalizing of juxtaposed spheres of 'proper', granted by private property rights) and the communist dream of a common without an internal distinction of any singular subjectivity are simply powerful fantasies. This means also that no political theory can escape the question of how to distribute the 'proper' and the 'common' and how to operate the modalities of their articulation. This is exactly what property regimes do. One can attempt to change the name of the machinery, but a machinery is still necessary, both (and inseparably) on the legal and on the anthropological sides. Alternatives to capitalism are, therefore, not to be found 'beyond' property and are not to be expressed in 'other' regimes of property, rather alternatives exist within that same property regime, conceived of, and used differently.

Negri and Hardt are saying no more than this, on the anthropological side, when they define the multitudes as non-totalizing cooperation amongst singular subjectivi-

ties. Their common is full of the 'proper' it seems, and that is, in itself, good news. And yet, Negri and Hardt are opposing the positive productivity of the 'common' to the negative productivity of the 'proper' (and its dominant legal form, private property rights). If these words have meaning, and if the multitudes are made of singular subjectivities, then they must distinguish the 'proper' and the 'common' in the collaborative process of production, and decide on the modalities of their articulation, which necessitates some machinery — that is, some principles, rules, and values to be balanced in concrete situations. Whatever they wish to name it, and whatever it is, they concretely need a theory of property. Therefore, because Hardt and Negri agree that there is 'no outside', there is a good chance that the constitutive elements of this theory are situated in the tradition of the internal critique of the dominant conceptions of modern property in the western tradition of legal thought — where subversive, emancipatory views about property are also to be found. [26]

Negri and Hardt do not think that they need a theory of property for the common however, they think that legal systems are merely 'formal' and that real alternatives are to be found 'beyond the legal context', in the sphere of 'real practices' — in social movements. Now, I am fond of social movements (really), but I also recognize that this line of argument loyally follows the fault lines of the conflict of the faculties. I see here the typical blind spot of critical theory, where legal practice is not seen as 'real', or at least much less 'real' than social movements. What is 'real' for Negri and Hardt are social relations of production, disciplinary regimes, and resistances to them. These processes of production are structured by law and disciplinary regimes though — which are not some 'counter-law', but rather an example of 'Law in action'. This point is missed though, which is a bit sad, because it is only just getting interesting, in a critical sense. It is within the 'Law of the Jurists' that one can analyze the structure of the material constitutions of our societies, and also explore possible concrete alternative constitutions. The 'Law of the jurists' then is the Law as it is, actually deployed in real life — it is the law which is structuring the material constitution of our world.

Thus, the critique of Law is only complete when every aspect of the structure of modern law of is taken in account — which includes the internal critique of the 'Law of the jurists'. The level of radicality of a critical theory cannot therefore be measured by the intensity of its anti-juristic leaps, nor by the degree of its indifference to the language of the law. Of course, a theory is critical not only when it seeks to emancipate itself from legal ideologies, the 'legalistic vision of the world', but also from various conservative, naïve, or ad hoc corporative theories about the functioning of the law. The radicality of a critical theory therefore depends on how deeply the suggested ruptures in the current dominant system and its hegemonic modes of legitimization run. Further, its radicality

[26] I can also certainly think of non-western ways with which to produce subjectivities that are fairly unrelated to the 'self-ownership' western fairytale. I can also see how these ways might constitute productive and radical alternatives to the model of self-ownership and offer great resources for starting the work of imagining what a post-capitalist subject could be. But even these forms must deal with individualization and therefore must draw lines between the 'proper' and the 'common' and operate the modalities of their articulation. Also, because no place on earth has been left untouched by the expansion of European legalism, these alternatives are, in one way or in another, in contact with the self-ownership model. From these encounters, new hybrid subjectivities were born, which too may possibly offer interesting alternatives, although not in any sense from the outside.

depends additionally on its capacity to enlarge our political imaginary and to provide us with possible alternatives. Of course, amongst the ideas, principles, projects, and propositions that a CT is conveying, some are more abstract than others. The ones which cannot be spoken in the language of the law, which cultivate indifference to their eventual translation into this language, are thus more inclined to remain abstract. This does not mean that they are not interesting, or politically productive — sometimes, abstract theories, unrealistic propositions, and utopian visions can be tremendously politically productive. Rather, it suggests that the critical quality of a theory is a pragmatic feature which can only be decided ex post once the critical move has been performed. So, sometimes the call to perform a 'leap beyond' actually stretches our imaginations, but other times it does not. In any case, the productivity of such theories remains somehow incomplete, as the alternatives that they draw upon are not intended to work in our current world, in which 'law is everywhere'. By contrast, critical theories which can be spoken in the language of the law, or at least which can be translated into that language, do provide resources for concrete emancipatory projects, through the enlargement not only of our imaginary, but in a more mundane fashion, of the available repertoire of arguments available to concrete legal practice. Even if they are not really available, because they remain marginal in the legal consciousness of the time, they have the necessary quality to possibly *become* concrete, which makes them suitable candidates for becoming in the near future, suitable alternatives.

My project here then, is to reconcile political radicality with concrete practice, by getting politically radical critical theories to better speak the language of the law — or to put it another way, to better articulate the internal and external critique of the law. This project encounters obstacles in both the conflict of the faculties and the modern division of labor between internal and external critique, and these obstacles are difficult to overcome — but that is no reason not to attempt this.

I would further like to emphasize that, of course, law is not the only language available for structuring human activities and social relations. Many of those languages are in fact completely foreign to it. I doubt, for example, that a theory of love — a central concept in Negri and Hardt's work — expressed only in legal terms would be satisfactory. My argument is not a plea for the *restitutio in integrum* of classical juridism (God forbid!) — I really hope this paper made this point clear. Juridism is the pretension of the *scientia iuris*, against any other social science, to provide the knowledge of both the legal principles and the legal technique as the constitutive principles of all human relations. In today's world, this pretension is an attempt to avoid the modern invention of critique. Contemporary legal knowledges are structured by the conflict of the faculties, and as a result, our knowledge of the law is fragmented — this is one of the successes of the critique of the western legal tradition. That said, law remains one of the main languages in which relations of *potestas* (domination) and *potentia* (empowerment/capability) are spoken in our current world. Why? Because law so often prevails over other ways to express and constitute communities.[27] It structures most human activity and social relations. Thus, deciding not to care about law, in the name of radicality, and seeking alternatives 'beyond the legal

[27] 'The "legal" has to do with ways and standards which will prevail in the pinch of challenge, with rights and the acquisition of rights which have teeth, with liberties and powers whose exercise can be made to stand up under attack' (Llewellyn 1940, p. 1364).

context', on the assumption that law is a concealer, that is surely one of the ways in which the law deceives. In this sense, to do so is to miss concrete alternatives by not looking where they can be found, it misses a whole part of the real world as it is. Of course, law is never neutral — in its ordinary usages, it is very often the language of power as domination, and even when it is not, it tends toward Juristocracy. And of course, not all forces are equal before the law, it generally serves the interests of the rich and the powerful. However, duly criticized from within, it becomes open enough, malleable, and pervasive enough to offer ways of resisting, protections for *potentia* (empowerment/capability) and to open revolutionary pathways. I can find no reason why radical critique ought to shift away from this resource — especially if such critique claims to be immanent and post-modern. On the contrary, I see every reason to inquire as to the ways in which to deploy the law to its most subversive effects.

Hâtons-nous de rendre la critique (interne) du droit populaire !

Acknowledgements Publishing this article in English alongside Michael's and Toni's response is a project which emerged one year ago. In the meantime, Toni passed away. The tone of the article is one of dispute, not of eulogy. But disputes can be tributes to works and ideas which are important enough to be disputed. Thank you, Toni.

References

Balibar, Etienne. 2002. Possessive individualism reversed: from Locke to Derrida. *Constellations* 9(3): 299–317.

Balibar, Etienne. 2018. Pour un droit international de l'hospitalité. In *Le Monde*, 16 août 2018. https://www.lemonde.fr/idees/article/2018/08/16/etienne-balibar-pour-un-droit-international-de-l-hospitalite_5342881_3232.html.

Baranger, Dennis. 2018. *Penser La Loi, étude sur le législateur des temps modernes*. Paris: Gallimard.

Barthes, Roland. 1967. *Système de la mode*, Paris: Seuil. [English edition translated by Matthew Ward, Richard Howard. 1990. *The fashion system*, California: University of California Press].

Berman, Harold. 1985. *Law and revolution, Vol.1: the formation of the western legal tradition*. Cambridge, MA: Harvard University Press.

Castoriadis, Cornelius. 1990. Pouvoir, Politique, Autonomie. In *Le Monde Morcelé, les Carrefours Du Labyrinthe III*, 137–170. Paris: Seuil.

Deleuze, Gilles. 1982. Préface à Antonio Négri, *L'Anomalie Sauvage*. In *Puissance et Pouvoir Chez Spinoza*, Paris: PUF.

Duguit, Léon. 1999 reprint. *Transformations Générales du droit privé depuis le Code Napoléon* Paris: Félix Alcan, 1912, reprint Paris: La Mémoire du Droit.

Filangieri Gaetano. 2003. *La Scienza della legislazione*. Napoli: Grimaldi & C (1780–1788).

Foucault, Michel. 1984. What's enlightenment? In *The Foucault reader*, ed. Rabinow. 32–50. New York: Pantheon Books.

Foucault, Michel. 1995. *Discipline and punish: The birth of the prison*. New York, NY: Vintage Books.

Hardt, Michael, and Antonio Negri. 2009. *Commonwealth*. Cambridge, MA: Harvard University Press.
Hardt, Michael, and Antonio Negri. 2012. *French translation of commonwealth*. Paris: Stock.
Hohfeld, Wesley Newcomb. 2001. (1917) *Fundamental legal conceptions as applied in judicial reasoning*. Dartmouth Publishing Co.
Israël, Jonathan. 2001. *Radical enlightenment, philosophy and the making of modernity 1650–1750*. Oxford: Oxford University Press.
Jakobson, Roman. 2012. Closing remarks: Linguistics and poetics, In *Style in language*, ed. TA Seabok, 350–377, Literary Licensing.
Kant, Emanuel. 1992 reprint. (1794) *The Conflict of the faculties*. Translated by Mary Gregor, Lincoln, NB: University of Nebraska Press.
Kant, Imanuel. 1991 reprint. (1797) Introduction to the Doctrine of Right. In *The metaphysics of morals*, translated by Mary Gregor, Cambridge: Cambridge University Press.
Kennedy, Duncan. 1991. The stakes of Law, or Hale and Foucault! *Legal Studies Forum* XV(4): 327–368.
Kennedy, Duncan. 2004. The disenchantment of logically formal legal rationality, or Max Weber's sociology in the genealogy of the Contemporary Mode of Western Legal Thought. *Hastings Law Journal* 4: 1031–1076.
Kennedy, Duncan. 2006. *The rise and fall of classical legal thought*. Beard Books.
Kennedy, Duncan. 2008. A semiotics of legal arguments. In *Legal reasoning: collected essays*, 87–152. Aurora, Colorado: The Davies Group.
Latour, Bruno. 1991. *Nous n'avons jamais été modernes*, Paris: La Découverte. [English edition translated by Catherine Porter. 1993. *We have never been modern*, Cambridge, MA: Harvard University Press.].
Legendre, Pierre. 1965. Le droit romain, modèle et langage. De la signification de l'Utrunque Ius. In *Études d'histoire du droit canonique dédiées à Gabriel Le Bras*, tome 2, 913–930, Paris: Sirey, 1965.
Llewellyn, Karl N. 1940. The normative, the legal and the law-jobs. *Yale Law Journal* 49: 1355–1400.
Mnookin, Robert N, and Kornhauser Lewis. 1979. In the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950.
Portalis, Jean Etienne. 2007 reprint. Marie. *De l'Usage et de l'abus de l'esprit philosophique durant le XVIIIe siècle, précédé d'un essai sur l'origine, l'histoire et les progrès de la littérature française et de la philosophie*, par M. le Comte Portalis, 2e Edition, Moutardier et Balland, 1827 (1799). Paris: Dalloz.
Pound, Roscoe. 1908. Mechanical jurisprudence. *Columbia Law Review* 8: 605–623.
Rancière, Jacques. 1995. *La Mésentente, Politique et Philosophie*. Paris: Galilée.
Rancière, Jacques. 2005. *La Haine de la Démocratie*. Paris: La Fabrique.
Saussure, Ferdinand de. 1995(1916). *Cours de linguistique générale*, Genève: Payot. [English edition translated by Wade Baskin, edited by Meisel and Haun Saussy. 1959. *Course in general linguistics*. New York: Columbia University Press].
Savigny, Friedrich Carl. 1913. (1840–1849) Interpretation of written laws. In *System of the modern roman law*, translated by W. Holloway, 166–194, London: Hyperion Press.
Starobinski, Jean. 1976. *Jean-Jacques Rousseau, La Transparence et l'Obstacle, Suivi de Sept Essais sur Rousseau*. Paris: Gallimard.
von Jhering, Rudolf. 1999 reprint. *Der Zweck im Recht*, Leipzig: Breitkopf & Härtel (1877). English translation by Isaak Husik, *Law as a mean to an end* (1877), New Jersey: The Lawbook Exchange.
Xifaras, Mikhail. 2008. Introduction. In *Généalogie des savoirs juridiques, le carrefour des Lumières*, ed. Mikhail Xifaras. Bruxelles: Bruylant.
Xifaras, Mikhail. 2010. Le Copyleft et la théorie de la propriété. *Multitudes* 41: 50–64. [English translation available at. https://www.eurozine.com/copyleft-and-the-theory-of-property/].
Xifaras, Mikhail. 2019. Analyse structural du droit (avec Barthes). In *Barthes face à la norme, droit, pouvoir autorité, langage(s)*, ed. Guittard and Nicolas, 31–66, Paris: Mare Martin, 2019.