CHAPTER 4

Biocriminals, Racism, and the Law: Friendship as Public Disorder

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> The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism. (Walter Benjamin, *Thesis of the Philosophy of History*)

> I'm sure I'm right, that the disappearance of friendship as a social relation and the declaration of homosexuality as a social/political/medical problem are the same process. (Michel Foucault, *Sex, Power and the Politics of Identity*)

Since its irruption in European civil codes during the nineteenth century, the notion of public order has become an essential part of state regulations of gender, kinship, and reproduction. Its common uses in the hands of governments, but also jurors and other public officers, entail the exercise of specific forms of sovereign power, often surpassing the limits of

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any meaningful separation of powers in Western liberal democracies. In this sense, while partly overlapping with the logics of exceptionality explored by Giorgio Agamben (2005), public order is the "dispositive", in the Foucauldian sense (Foucault, 1975, p. 133), through which sovereign power is disseminated in a microphysical form in the social field, extending its influence to (and from) every instance of the administrative and judicial structure of the nation state. This "internal" dissemination of the works of public order is in no way independent, though, from the biopolitical management of the borders, margins, and constitutive outside the community or the nation. On the contrary, the introduction of this strikingly slippery concept that, for some, "does not have the same meaning in different legal systems, and may not have any meaning at all in some legal systems" (Kiss, 1981, p. 295)[1] has served, from its inception, to put the legislative apparatus of the state at the service of reinforcing the internal *status quo*, in the very same gesture that "defends" the social order from alien and potentially contagious relational practices. In this sense, the biopolitics of public order are inseparable from the history of Western racism and anti-immigration policies, to which they belong as one of its vaguest and inapprehensible, yet ubiquitous and naturalized, constitutive elements.

In the name of public order, a wide range of "disordered" embodied life projects and relational practices, including gender transitioning, non-monogamous relationships, and queer reproductive projects, to name a few, are subjected to diverse forms of legal and moral scrutiny. However, in a similar way that migratory fluxes can be subjected to various forms of state violence, but are hardly ever stopped, so are deviant bodies and dissident relational practices exposed to "unequal distributions" of vulnerability (Butler & Athanasiou, 2013, p. 2), but it is hard to erase them from the cultural and political landscape. In the face of such a constitutive failure, a set of divisive questions arises: How are we to understand the incapacity of liberal state institutions, such as marriage, to contain the flux of "disordered" life projects and forms of relationality? And how can we

[1] Law studies provide as many definitions of public order as they raise concerns over its lack of one. As a preliminary approach, I suggest this eloquent definition from the early twentieth century France: "In legal language, '*ordre public*' is the collection of conditions—legislative, departmental, and judicial—which assure, by the normal and regular functioning of the national institutions, the state of affairs necessary to the life, to the progress, and to the prosperity of the country and of its inhabitants (….) It is neither a science nor a branch of the law. *It is a conception, and one so extensive that it rests upon our entire social structure and touches every cog of our legal organization* [emphasis added]" (Bernier, 1929, p. 85).

best describe this impulse towards relational heterogeneity and experimentation? Strategically speaking, should we aim at making already available institutions more inclusive, in a similar way that we can struggle to expand the scope of refugee and asylum policies, or should we aim, rather, at "opening of the borders" of state biopolitics of gender, kinship, and reproduction altogether? Moreover, are these two strategies compatible with one another, or do they just work in two opposite directions? If that were the case, is any of these paths intrinsically farther from the risks of neoliberal governance? Summing up, how can we best resist the order of public order?

This set of questions is not new, in the sense that it inhabits the history of radical feminist thinking, queer politics, and the encounter between (bio)power and resistance in a broad sense. We are bound to them, however, if we are to occupy a "critically queer" political position, to borrow Judith Butler's phrasing (1993). With them in mind, thus, and partly inspired by Jasbir Puar's *Terrorist Assemblages* (2007), this chapter departs from Agamben's criticism of the logics of exceptionalism in order to expose some of its parallelisms, and differences, with the biopolitics of public order as such. Then, the relationship with the racist European genealogy of the very notion of public order will be considered, followed by an exploration of some of its works on state regulations of gender, kinship, and reproduction. By doing so, I hope to expose some genealogical links among the notion of public order and contemporary configurations of sexual and relational citizenship (Santos, 2019), including the homonationalist frame discussed by Jasbir Puar and whose links with monogamy, the institution of marriage, and French civil law may run somewhat deeper than we may think. Finally, I will turn to the critically *biocriminal* possibilities that remain inscribed in the forms of experimental cohabitation that Michel Foucault used to refer to as "friendship".

Hyper-Sovereign Dreams

In a similar way that, for Agamben, securitarian works of the state of exception concentrate nondemocratic forms of power in the hands of governments, the notion of public order does the same in those of jurors and other public officers in key state institutions. Moreover, the "quasilegislative" function of public order (Navarro, 1953, p. 61) would also extend the rule of law beyond the scope of written laws, hence blurring the distinction among judicial and legislative powers. There is, however, only one

president or prime minister, but countless judges. In that sense, whenever a court grounds its sentence in the name of the vague mandates of public order, it exerts both an *anti-* and a *hyper-*sovereign gesture: where the state of exception concentrates sovereign power, public order distributes it through the administrative and judiciary structures of the state. In this sense, the biopolitics of public order entail a profound destabilization of the Foucauldian opposition between sovereign, disciplinary power, associated with the figure of the "king", and the microphysical distribution of biopolitical governmentality.

At the same time, since the irruption of public order in modern private law and, more specifically, in the sixth article of the French civil code, where it is established that "public agreements must not contravene the laws which concern *public order and good morals*" (The Code Napoleon, 1824), public order has been closely linked to state policing of the moral order of society.[2] In this sense, public order was conceived as a limit to the exercise of negative freedoms in Western liberal thinking, intensely overlapping with the moral policing of the so-called private sphere. Furthermore, from that moment on, public order-based policy has been directly involved in the delimitation of what counts as a public or a private space in each historical context. Turkish historian Ferdan Ergut makes this link explicit when he notes that:

> The definitions of "private" and "public" spheres are constantly at work in public order policing. This is because of the special character of the term "public order" (. …) The lives of those who do not belong to any corporate body such as a family, guild, factory, etc., were treated as "public" and their lives were opened to police intervention. The police themselves justify their policing practices according to the dominant perceptions of "public" and "private" spaces. Furthermore, detection of "disorder" is in itself a subjective judgement that is difficult to disprove. (Ergut, 2007, p. 176)

This reflection stems from an analysis of the constitution of the public sphere in the late Ottoman Empire, but the works of public order over the moral distinction of the private from the public are anything but exclusive to any specific legal system. At the very least, it seems to be inherent to most receptions and national variations of the sixth article of the French

[2] Nowadays, this link is especially explicit in Anglo-Saxon criminology, since "crimes against-public order" stand for so-called victimless crimes, that is, crimes of an explicit moral nature, with the prosecution of pornography and sex-work as paradigmatic examples.

civil code. For instance, the Spanish Supreme Court provided a good example of this relation of public order with the moral realm when, literally referencing a sentence from the time of Franco's dictatorship,[3] it considered public order to be "integrated by those judicial principles, *public and private*, political, economic, *moral and even religious*, that are absolutely mandatory for the conservation of the social order in a given country and time [emphasis added]".[4] In this ambitiously all-encompassing but still profoundly indeterminate way, the court aimed at providing a "definition" of the otherwise opaque seven references to the public order in the Spanish civil code that still mimic the French one by simply juxtaposing "moral y orden público" [moral and public order].[5] In another telling example, the Portuguese civil code establishes no less than 13 times the limits of sociolegal legitimacy in the name of its "ordem pública" by adding the very Napoleonic complement "ofensiva dos bons costumes" [or offensive of good manners].[6] In Italy, for the sake of sticking to Southern Europe, where the civil code evolved from a direct translation of the Napoleonic Code, the correlation between "ordine pubblico" [public order] and "buon costume" [good manners] reaches up to nine mentions,[7] the most striking of which limits the "act of disposition over one's own body"[8] in the name of both. And the list could easily go on, provided that the emancipation of public order from the moral sphere is by large an unresolved matter in Western legal systems, serving as grounds for a fundamental part of its current biopolitical scope.

There is, at this point, another important contrast to be made between the order of public order and that of the state of exception. In Agamben's view, refugee and prisoner camps are the paradigmatic spaces of the state

[3] Thus, literally inscribing the public order of the dictatorship in the temporality of the democracy. The court ruling providing the definition dates from 1966 (Spanish Supreme Court - RJ 1966\1684).

[4] Spanish Supreme Court, April 19, 2010.

[5] Specifically, in the article establishing to the limits of the rule of customary law in the absence of written laws (article 2) and also in the Spanish adaptation of the sixth article of the French civil code, limiting the "pacts, clauses and conditions" (article 1255) that can lawfully be established.

[6] Out of 22 references to the public order in the Portuguese civil code, the moralizing complement "or offensive of good manners" is included in Arts. 271, 280, 281, 281bis, 334, and 340.

[7] Out of 12 total references to the public order in the Italian civil code, Articles 5, 23, 25, 31, 31 bis, 634, 1343, 1354, and 2031 add the formula "and good manners".

[8] Article 5 of the Italian civil code.

of exception. The properly biopolitical, totalitarian gesture of the camp, in particular, would reside in the way it dehumanizes prisoners and refugees, reducing them from their status as subjects of rights to that of "mere bodies". Public order, for its part, points to an equally intimate, but quite different, relation between *bare* bodies and the state. Let me illustrate this by turning briefly to one of Michel Foucault's lectures at the Collège de France, where he established a particular relation between bodies, sexuality, and reproduction that is crucial, in my view, for the understanding of the biopolitical works of public order:

> On the one hand, sexuality, being an eminently corporeal mode of behavior, is a matter for individualizing disciplinary controls that take the form of a permanent surveillance (. …) But because it also has procreative effects, sexuality is also inscribed, takes effect, in broad biological processes that concern not the bodies of individuals but the element, the multiple unity of population. Sexuality exists at the point where body and population meet. And so it is a matter for discipline, but also a matter of regularization. (Foucault, 1997, p. 252)

Therefore, sexuality, for Foucault, would act as a surface loaded with biopolitical transcendence, where the encounter between the body and the population takes place, not only for being an "eminently" corporeal mode of behaviour, reducing human activity, as it were, to that of "mere bodies" but also, and crucially so, as a result of its reproductive dimension. In this sense, where the exceptionality of prison and refugee camps deals with the production of less-than, or simply "non-citizens", the dispositive of sexuality deals with their *reproduction* and, through it, with the set of norms and exclusionary frames of intelligibility sedimented in the legal frames of national citizenship. That would be the *ordinary* space of operation of the biopolitics of public order and of its multiple ramifications over the biopolitics of gender, kinship, and reproduction. In other words, where the state of exception represents the inclusive exclusion of those who are *no longer* treated as citizens, if they ever were, public order is the name of the biolegal dispositive that, while operating also in the threshold between life and the law, turns bare bodies into properly gendered and reproductive sexual citizens.

The Biopolitics of Public Order

Where the refugee camp, for Agamben, represents an exemplary instance of the logics of exceptionality, the paradigmatic form of the biopolitics of public order is no other than the institution of monogamous and reproductive marriage sustained over the binary conception of gender. This seems to be the case, at the very least, since the jurist Jean-Étienne-Marie Portalis introduced his sole reference to the notion of public order in his preliminary address on the first draft of the Napoleonic Code, referring to it as a tool assuring that "the legislator can, in the interests of public order, establish such impediments [to civil marriages] as they deem appropriate" (Portalis, 2016, p. 17). The Islamophobic undertones of this link are made especially evident when, in a text filled with references to the moral advantages of European climates over those places of the world where polygamy might be admitted, he expresses his wish that "the publicity, the solemnity, of marriages may alone prevent *those vague and illicit unions* [of uncivilized peoples] that are so unfavorable to the propagation of the species" (Portalis, 2016, p. 16). Ever since, and emulating the propagation of the species, as it were, uses of public order propagated in a chain of performative repetitions favoured by the imperial and colonial system, way beyond the limits of Europe, from Latin America to Japan (Noriega, 2007; Novoa Monreal, 1976). As a result, the senses of public order were disseminated geographically and semantically, without ever abandoning a vagueness of its meaning that, as many law scholars have argued, poses specific authoritarian threats. This is made especially clear, perhaps, in the field of public law, where the maintenance of public order acquires its so-called material sense, associated with the task of state security forces. Nonetheless, its biopolitical role as a fundamental organizer of the interrelated fields of gender, reproduction, and kinship, with equally arbitrary, authoritarian, and "material" effects, largely remains until the present.

Let me illustrate this point by recourse to a few contemporary examples of the works of public order-based policy in the so-called private realm. Gender identity, to begin with, is strictly policed precisely in the name of public order. An important part of this takes place through the intimate relations that Western states tend to establish among public order and personal data comprised in the civil registration and/or civil status, that is to say, bureaucratic information such as date of birth, nationality, and marital status, including two of the main gender performatives administered

by the state: proper names and legal gender marks.[9] Romania provided a telling example when, in 2016, a national court refused legal gender recognition to a Romanian trans man who had already obtained it in Italy, on the understanding that "a request for legal gender recognition *pertained* [emphasis added] to the public order, and therefore fell within the exclusive remit of Romanian courts" (Köler & Ehrt, 2016, p. 63). Similarly, in the case of Ms Stephanie Nicot, a French trans woman, the courts grounded their forced sterilization policies resulting from their cis-reproductive concern that, otherwise, "a person who is male in appearance would continue to have female genitalia and could thus give birth to a child",[10] on the basis that "the information pertaining to civil status *belonged to the public order* [emphasis added] and therefore it could not be left to the discretion of the individual" (Köler & Ehrt, 2016, p. 51). Indeed, as these and other similar cases show, the information comprised in civil status, including proper names and gender marks, is commonly considered as a public order issue in Western legal systems.

In a similar way, the allegedly inherent monogamous character of public order is invoked as a protective mantra by European courts, on the basis that polygamous marriages "present a threat to the national public order, which is why most of these [European] countries hesitate to recognise their validity and tend to activate the public order reservation" (Stybnarova, 2020, p. 106). Typical examples range from the denial of widow's pensions and family reunions to migrants and refugees alike (Welfens & Bonjour, 2020), to plain deportations. In a recent, blatant case, the National High Court of Spain refused the appeal of a Senegalese citizen whose residence permit renewal had been denied due to his polygamous civil status, on the basis that polygamy would "*sicken* the Spanish public order".[11] The rhetorical assumption that public order can be "made sick" has, indeed, a history that precedes even the French Revolution[12] and

[9] For a discussion of administrative control over gender performatives and their relation with the construction of national identities, focusing in the case of Spain, see Pérez Navarro and Silva (2020).

[10] *Case of A.P., Garçon and Nicot V.*, (April 6, 2017), European Court of Human Rights, France, Strasbourg.

[11] *SAN 465/2019*, (February 4, 2019), National High Court of Spain.

[12] The expression "Il y a quelque chose [in the Jesuit institute] *qui repugne à l'ordre public*" is already used in the *Comptes rendus des constitutions et de la doctrine des sois-disans jésuites* (Bertrand, 1762, p. 5) in a passage that closely links public order, the hostility to Jesuit institutions, and their disgusting effects on the sovereign's physical body.

nowadays is still very expressive of the role of public order as protection from moral contagion. As a result, and despite the ebullient historical variations and resignifications of public order, the premise that "public order is monogamous in the Western world" (Noriega, 2007, p. 2) exposes non-monogamous kinship, including polygamous, polyamorous, and multiparent family structures to extensively naturalized forms of social vulnerability and legal discrimination (Klesse, 2019; see Pérez Navarro, 2017). In this sense, the biopolitics of public order impose their monogamous "relational performativity" (Santos, 2019) *within* the community, the nation, or even the "civilization", in the very same move that restricts their permeability to alien arrangements of sexuality and kinship coming from their constitutive and racialized outsides.

Accordingly, reproductive technologies that defy the binary gender norms or the monogamous organization of kinship represent a common target of public order-based policy. Transnational surrogacy arrangements are, no doubt, a case in point, especially when involving the presence of same-sex parents on birth certificates. This has been made evident the proliferation of legal struggles in European national and communitarian courts in recent years, frequently entailing the intervention of public order-based arguments (Fenton-Glynn, 2017; Igareda González, 2019). Turning again to the telling example of Spain, where surrogacy arrangements have no legal backup in the national territory, the fact stands out that the only surrogacy case that has reached the level of the Constitutional Court involves a birth certificate with two fathers which, it has been argued, would be at odds with the national public order. The role of public order in consolidating heterosexual reproduction as the solid infrastructure of kinship in this case is specially made clear when considering that gay and lesbian kinship relationships have been formally equal to heterosexual ones since 2005 and, also, that the recourse of same-sex parents to gestational surrogacy represents a small proportion of the total of surrogacies performed abroad every year (Pérez Navarro, 2018).

It is, therefore, under the influence of the lasting "marriage" between public order and the cisgender, monogamous, reproductive couple in the Napoleonic Code that a wide range of sexual and racial others, from queer to transgender and non-monogamous relationships, are subjected to the *état de siege* of Western regimes of "sexual exceptionalism" (Puar, 2007). Persuasively, Puar has argued that queer bodies are constituted as such as a result of an assemblage of discourses, affects, and norms within the terms provided by an imperialist frame hierarchically distributing the legitimacy

of claims of national sovereignty in the international arena. For the most part, Puar relates this regime to US military campaigns and foreign policy and to the various ways in which the Islamic Other is transfigured from an erotically invested "site of homophobic fantasy" (Butler, 1995, p. 12) into a threat to the emerging, queer-friendly public order of the West, hence justifying the exercise of various forms of state violence in the name of the protection of both public order and national queer communities. However, taking into account the role of public order policy in recent evolution of Western securitarian paradigms, notably so after *both* 9/11 (see Hörnqvist, 2004) *and* COVID-19,[13] could a reading of its European genealogy shed a new light on the genealogical bonds established among racial politics and state regulations of the sexual field? If that were the case, what is there to be learned from the sexual imaginaries involved in the racist genealogy of the "fortress Europe"? This line of inquiry seems to be a good complement to Puar's understanding of homonationalism, especially when considering the role of public order as a biolegal dispositive in European imperial and colonial projects since the times of the first French Empire at the very least and its works as a shield against the moral and cultural influences of the "Oriental world".

Racism as Public Order

Therefore, to understand the role racism plays in the French genealogy of public order, I would like to turn briefly (again) to Foucault's account of biopolitics. At the end of one of the most influent discussions of biopower that Foucault offered in his lectures at the College de France, he introduced a crucial analysis of its relations with state racism. If biopolitics, he argued, refers to the governmental rationality substituting the sovereign right to kill by the regulation of populations considered primarily as a community of living beings, then how do modern nation states justify their "need to kill people, to kill populations, and to kill civilizations" (1997, p. 257)? For Foucault, this necropolitical side of biopower, as Mbembe refers to it, would not reside in a specific kind of governmental

[13] This chapter was written before non-pharmaceutical responses to COVID-19 strengthened the link among public order policing, bio-securitarian paradigms, and racial politics in previously unthinkable ways. While revising it, I decided to include this sole reference to the ongoing effects of the health crisis on the biopolitics of public order. For a preliminary discussion, please refer to Pérez Navarro (2020).

rationality. In his view, the category that makes it possible for the political economy of biopower to exercise the right to kill *on its own terms* would be no other than race. In his account, therefore, racism would be the name of the biopolitical strategy through which the Other is depicted as a threat to the well-being of the group and the moral or the eugenic health of the population—not to mention "the survival of the species", as it is typically argued in the rejection of polygamy in the Orientalist tradition, from Montesquieu's *Persian Letters* to Portalis' presentation of the Napoleonic Code. Through racism, Foucault argues, the state performs its killing function in the name of the protection of life itself. Furthermore, departing from the model of state racism, the eugenic logic of racism would extend its rule to a whole spectrum of deviant subjects: "Once the mechanism of the *biocriminal* was called upon to make it possible to execute or banish criminals, criminality was conceptualized in racist terms. The same applies to madness and the same applies to various anomalies" (Foucault, 1997, p. 258).

There is, however, a topological ambivalence involved in this account of the right to kill. The literal or metaphorical killing—"when I say killing, I obviously do not mean simply murder as such, but also every form of indirect murder: the fact of exposing someone to death, increasing the risk of death of some people, or, quite simply, political death, expulsion, rejection, and so on" (Foucault, 1997, p. 256)—of the biocriminal Other cannot be depicted as the killing of an *absolute* Other. Otherwise, the racist construction of the threat of miscegenation as a model for moral and cultural degeneration would lose its sense. That is to say, the target of state racism *always already* belongs to the population whose well-being justifies its killing: an absolutely alien Other can hardly be constructed as a threat of contamination. In this sense, the biocriminal is never fully outside nor a member of the population. She/he defines, rather, where its margins are. Never within nor fully outside, hence, of any historical configuration of citizenship, the racial and sexual biocriminal would, like Agamben's refugee, be a "limit concept" (1998, p. 134).

The biopolitics of public order are embedded in this topological ambivalence, as an effect of the killing function defining the inside, the outside, and the margins of the community or the nation. The *Convention Relating to the Status of Refugees* of 1951 provides a paradigmatic example when it establishes that states shall not expel lawfully a refugee save on the grounds of national security *or public order* (The UN Refugee Agency, 2010, art. 32). By doing so, the Convention reenacts the understanding of public

order as a legal shield against potential threats coming from the outside of the nation state, while, at the same time, however, it posits public order as the very element of the nation that is in need for protection from external threats. Through this gesture, which is also paradigmatic of the uses of public order in international private law, public order is posited as the lens through which vulnerable others can be read as that which the state is in need of protection from. Unsurprisingly, the temporality of the operation is close to an indefinite detention turned inside out, in the form of a preventive, "indefinite expulsion" that shares its extralegal dimension and the racist topology exposed in Judith Butler's (2004) and Giorgio Agamben's (2005) criticism of detainee and refugee camps, respectively.

Allow me to further illustrate this by recourse to an interesting essay by Chilean jurist Eduardo Novoa Monreal, in which he defends the nationalization of the Chilean copper industry from neoliberal, universalist understandings of the international public order. In particular, he turns to what he refers to as the "unlimited" use of the concept of public order by French jurists, reading it as a sign of judicial *and* cultural imperialism. According to him, this would be made especially evident in the work of influent legal theorists of twentieth-century France such as Lerebours-Pigeonnière and Loussoam, who explicitly refer to the role that public order plays in defending Europe from legal and moral influences coming from "states of inferior or radically different civilization" and to the necessity of "protecting our Western civilization against the debilitating factor that would result *from the penetration of the customs of Orientals who are already established in Europe* [emphasis added] or from the assimilation of Europeans to Oriental customs" (Lerebours-Pigeonniére & Loussouam, 1970, p. 500). The ambivalence of the margins of a civilization that is allegedly in need from protection—internal and external at once—is quite clear in the Islamophobic tradition of public order that Novoa Monreal refers to. In this work, he was primarily worried by the works of public order in the Chilean's autonomy in economic matters, but he does emphatically notice that public order is primarily a moral tool of the judicial system in the field of family law. Moreover, the history of public order, he argues, would be bound to the project of avoiding the conflicts arising "among Western countries recognizing monogamous marriage and Muslim countries accepting polygamy" (Novoa Monreal, 1976, p. 134). For that reason, he argues, the proper field of application of public order would be no other than family relations, including the recognition of paternity, acceptation or not of divorce, and the like. It is precisely in this

sense that public order defines and operates within a multidimensional biopolitical space linking the fields of gender, sexuality, reproduction, and kinship in such a way that they sustain an Islamophobic narrative constructed upon a set of constitutive exclusions of the idea of the West.

Of course, what counts as "disorder" changes in different ways and paces in different locations. Biocriminality is not an ahistorical social marker but a contested field where political struggles take place, often resulting in the sedimentation of once "exceptional" norms in the public order of the nation. That would be precisely how the protection of a restricted spectrum of gay and lesbian and trans rights has crystallized in the ordinary public order in some Western states, accompanied by a narrative of historical progress from de facto to civil unions to gay and lesbian marriage, with the monogamous structure of kinship as its cornerstone, the heterosexual organization of the reproductive field as its sound infrastructure, and binary gender as its glass ceiling. That this narrative of progress is not at odds with the mandates of monogamy constitutes a good sign of the contemporary strength of the Western/Oriental divide that it emerges from. Moreover, the European genealogy of the biopolitics of public order may deepen our understanding of the homonationalist frame of international relationships by situating the emerging, gay-friendly layer of citizenship in a specifically European, historical relation to postcolonial sexual politics.

Friendship as Public Disorder

It should be clear by now that, despite its fragmentations and its emerging forms, public order is a state performative of the social *status quo*. Therefore, while it is true that jurors and public servants invoke its name in often arbitrary ways, producing new meanings for an otherwise empty signifier, they do so only to allow for the effective distribution of its deeply normalizing inertia. As a result, even the most unexpected resignifications of public order works to slow down the pace of the changing landscapes of the relational field. In other words, the performative power of public order would be antagonistic to gender, reproductive, and relational dissidence in a broad sense.

At this point, it is not easy to take this antagonism into account without reducing it to just another variation of the repressive hypothesis and of the judicial model of power against which Michel Foucault warned us about in his *History of Sexuality*. With that in mind, in the search for theoretical

and political alternatives for thinking resistance to the mandates of public order, it might be useful to turn to Foucault's insights given to gay magazines such as *Christopher Street*, where he provides a compelling account of the tension existing among of law-sanctioned relational structures and possibilities for overcoming them, a tension that exceeds the relation with the law without being finally independent from it. For sexual countercultures to be part of a political project, he argued, they should exceed individual rights in direction to the creation of a "mode de vie" (Foucault, 1994a, p. 158). That is to say, they should cherish a kind of relational creativity entailing the overcoming of the terms of recognition provided by state institutions to what counts as a legitimate, lawful form of sexuality, kinship, or cohabitation and the parodic subversion of the law itself. In one of those interviews, he provided a quite specific example:

> We should fight against the impoverishment of the relational fabric. We should secure recognition for relations of provisional coexistence, adoption [of children] or—why not?—of one adult by another. Why shouldn't I adopt a friend who's ten years younger than I am? And even if he's ten years older? Rather than arguing that rights are fundamental and natural to the individual, we should try to imagine and create a new relational right that permits all possible types of relations to exist and not be prevented, blocked, or annulled by impoverished relational institutions. (Foucault, 1994a, p. 158)

By suggesting the use of adoption in a creative way for which the institution was not intended, Foucault was not solely thinking of the political interest of producing alternative kinship and sexual bonds. In a way, he certainly was, but he was *also* thinking about how to turn these alternatives into a proliferation of institutional mutations. Therefore, the political move that Foucault had in mind encompasses a desire for investing in the kind of "vague and illicit unions" that Portalis was so concerned about in the presentation of the Napoleonic Code. Moreover, he inscribes that desire in the very same *quasilegislative* political realm that is, precisely, the domain of public order: one step backwards, within the field of the written law, and the other decidedly beyond its limits.

As suggested above, the name given by Foucault to resistance within that realm—that is to say, the antagonistic force to public order—was none other than friendship. In effect, in the aforementioned interview, but also in others like "Sex, Power, and the Politics if Identity" (1994b) and "Friendship as a Way of Life" (1994c), Foucault attributes to friendship

the role of exciting our political imagination towards the radical transformation of the liberal state institutions. In a way, Foucault points to an anarchist-like project of producing new forms of relationality beyond the normalizing powers of the state that is, at the same time, bound with the project of producing alternative arrangements of private law as a means for subverting the order of the public order. This is, in my view, a productive liminal position and, also, a criticism of liberal struggles for individual or minority rights, which I take to be similar to the one Lisa Duggan points to in "Queering the State":

> What I am suggesting in substance is *that we look beyond the language of rights claims for a fixed minority and calls for antidiscrimination* [emphasis added] (rhetorical positioning largely borrowed from the civil rights movement and feminism), and instead borrow from and transform another liberal discourse, that surrounding the effort to disestablish state religion, to separate church and state. We might become the new disestablishmentarians, the state religion we wish to disestablish being the religion of heteronormativity. (Duggan, 1994, p. 9)

Following Duggan's account of "disestablishment" as a suggestive model for thinking queer struggles, I would like to conclude with a final example that may shed light on the antagonism existing between friendship, in the Foucauldian sense, and public order. It is related to a worrying episode of Spanish gay and lesbian activist discourse that took place in 2017, when a group of Saharawian migrants was retained at Madrid airport, waiting to initiate their petitions for political asylum. Meanwhile, they were in a legal limbo, not asylum seekers yet nor just undocumented migrants. In the interim, some of them were accused of using homophobic slurs among them to refer to their interpreter, without knowing that he was in fact their interpreter nor that he could actually understand them. On the sole grounds of this accusation, two of them were directly deported and, therefore, deprived from their right to even ask for asylum. Promptly, the LGTB+ Collective of Madrid, COGAM, along with two LGBT police collectives, among other groups, published a letter supporting the deportation (Fernández García, 2018). In a way, this letter reflected the growing force of the punitive approach to hate speech in the emerging set of regional laws (not including Madrid at the time) in Spain, to the point that any concerns over the violation of the rights of refugees was superseded by the determined will to ban homophobic slurs, that is to say, to ban their

use by migrants in a particularly vulnerable position, given that its use within the national territory—by migrants and nationals alike—is only prosecuted by administrative sanctions and that only in a few regional jurisdictions.

As a response, the manifesto *Not in our name* was published and signed by a heterogeneous group of activists and collectives in rejection of the deportation and, also, in solidarity with Sahrawian struggles for political autonomy. Curiously, even though it started with the words "We, fags, dykes, trans and other dissidents" (Orgullos Críticos, 2017) and was signed primarily by queer and LGBTQ collectives, including Christian LGBT groups, the final list of signatories included refugees' rights organizations, migrant collectives of all sorts, sex worker organizations, anti-islamophobia associations, anti-austerity groups, and gender nonconforming children's parents collectives, to name a few. Unfortunately, in a sense, the manifesto was utterly useless, as the deportation had already taken place. Yet in another sense, the encounter among these collectives offered an example of radical cohabitation among disparate political cultures, one that was intended, precisely, to resist the increasingly violent effects of homonationalism over the mobility of racialized others and, hence, over the limits of cohabitation in the public sphere. In this sense, the manifesto expressed a collective desire for cohabitation precisely intended to disestablish the homonationalist layer of racial and sexual citizenship, that is to say, a desire for friendship as public disorder. And that might well be a particularly productive kind of desire, for it points to directly into the risky path that any radical sexual politics needs to venture into at one point or another, even if it is at the risk of losing, in the encounter with its "others", its most cherished features identifying it as radical, as sexual, or as politics.

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