

# REPRESENTATION REDUX: A REJOINDER TO ALESSANDRO FERRARA

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## ABSTRACT

Alessandro Ferrara has raised four sets of issues about the model of legal order I have developed in my earlier writings, issues which, in his view, remain problematic, despite my reply to his earlier comments. Each of these issues leads back, from different perspectives and with different accents, to the key notion of representation. This rejoinder fleshes out more fully how representation sheds light on legal ordering as an authoritative politics of boundaries, exploring points of convergence and divergence with Ferrara's judgment-centered theory of legal ordering.

## KEYWORDS

Representation, a-legality, constituent power, recognition.

I am most grateful to Alessandro Ferrara for carrying forward our earlier discussion concerning *Authority and the Globalisation of Inclusion and Exclusion* (hereafter *Authority*).<sup>1</sup> His thoughtful comments point to four issues that, in his view, demand further - critical - consideration. I am happy to respond to them in the same order in which they are raised. I am also deeply grateful to Ferdinando Menga, editor of *Etica & Politica*, for graciously acceding to host this new exchange of ideas in this prestigious journal.

## 1. ON A-LEGALITY, AGAIN

The first of Ferrara's concerns turns on the example of the clochard which introduces the notion of a-legality in my earlier book, *Fault Lines of Globalization*.<sup>2</sup> Ferrara was and remains unhappy with this example, as, in his view, it illustrates "the

<sup>1</sup> See *Etica & Politica / Ethics & Politics*, 21 (2019) 3, 363-501.

<sup>2</sup> Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013).

violation not so much of legal provisions or any strictly legal notion, but the violation of the life-world assumptions that undergird all social practices, not just specifically legal ones.” Referring to the reasons I had mentioned as justifying why the clochard’s invitation to the waiter could be viewed as a-legal, Ferrara points out, to begin with, that several of those reasons have no specifically *legal* relevance.

Ferrara’s objection on this point would be correct were I laying out those reasons in piecemeal fashion. But I am not. As I explicitly note at the outset of my reply to his initial comments, I offer a *catena* of reasons for why the incident illustrates a-legality, that is to say, an interconnected range of reasons. Only when taken in *conjunction*, which requires illustrating various facets of a-legality, do they offer a justification of why the incident might count as a-legal. An added advantage of this approach is, incidentally, that it allowed me to introduce key aspects of the IACA-model of law to readers of the journal who, in all probability, would not have read the book.

But this initial defense only takes me part of the way in parrying Ferrara’s objection. For, he will retort, the legal significance of the incident, to the extent that it has one, is dubious, and for various reasons. First, even if this incident upsets the subsection of one social practice, namely, eating at a restaurant, this can hardly be said to upset a specifically legal practice. Second, and to the extent that one accepts that it is a micro-political event, there is little or no evidence that “constitutional progress proceeds ‘bottom-up’ from accretion of micro-practices on the ground . . . and not the other way around.” Third, the incident shows that the very notion of a-legality blurs the key distinction between acts that remain within a life-world or lifeform and those that rupture them. Finally, and closely related to his third objection, by blurring this key distinction, the concept of a-legality conflates presently foregrounded practices and implicit background assumptions.

Is it the case, looking at Ferrara’s first objection, that the invitation to the waiter to sit down and share a meal for which the clochard will not be paying is devoid of legal significance? I have no doubt whatsoever that the incident upsets what counts, in the Dutch legal order, as legal expectations arising from a service contract between a client and the restaurant. To eat in a restaurant is, legally speaking, to engage in a service contract, in which different roles are to be played in certain ways. The incident registers in the Dutch legal order as illegal (*a-legality*) and as calling into question the very terms in which the law codifies the legal/illegal distinction as it pertains to “eating in a restaurant” (*a-legality*).

Ferrara’s second objection refers to my comment that what he dubs “‘the formal placing of a constitutional problem on the public agenda’, actually begins much earlier: in micro-political events like that of the clochard.” What I have in mind is that judicial acts of constitutional change, such as *Brown v. Board of Education* and *Loving v. Virginia*, are responsive representations to a range of challenges to what comes to count, retroactively, as the collective identity of the American Republic,

representations that posit a new default setting of constitutional norms that claim to do no more than to articulate “who we really are.” In my view, the two rulings illustrate the relevance of a theoretical model that insists on viewing constitutional change as a representational process. Indeed, and this is my second point, any and every macro-political event is preceded by a range of incidents, situations, and events—some large, many discreet—which *retroactively* come to appear, through narratives of (legal) origins, as preparing the way for more or less radical change. This is certainly the case for (judicial) acts of constitutional change—including *Brown v. Board of Education* and *Loving v. Virginia*. It would also be the case for the incident with the clochard, were it strung together with a range of other incidents that, in hindsight, came to appear as preparing the way for the transformation of the Dutch constitutional order. Third, constitutional transformations, like all acts of seizing the initiative to represent “us” otherwise, refuse any simple opposition between “bottom-up” and “top-down” hierarchies. Indeed, whoever seizes the initiative to represent us must reckon with the need to secure take-up by its addressees, such that an irreducible passivity is at the heart of the activity deployed by acts of constituent power.

In his third objection, Ferrara constructs a simple opposition between rule-violation within the legal order, which leaves the order intact, and rule-violation “that subverts the entire frame of meaning within which the practice takes place.” Succinctly, rule-violation is either inside or outside a legal order; only the latter is politically significant and might justify the predicate of a-legality. Here again I view Ferrara’s objection as misguided. To begin with, and as I noted in my initial response to his comments, a-legality need not take the form of rule-violation. It may well take the form of modes of action that register as legal, yet which resist qualification as legal. Moreover, I view his counter-example of destroying the goals of a soccer field as erroneous, if it is supposed to illustrate rule-violation that stands outside of a legal order. Like the foul in which a player kicks another player, removing the goals is in breach of what it takes to be able to realize the point of joint action in a soccer game. It is the equivalent of an “illegal” act, hence very much within the normative order of soccer, even though the rule “Do not destroy, remove, or move the goals from the soccer field” has not been rendered explicit in the codification of soccer rules.

By contrast, destroying or removing the goal would become the equivalent of an a-legal act if doing so were linked to a demand to transform the point of soccer, such that, say, not scoring goals fairly but rather maximal ball possession within the court during the period of the match is what counts as winning a game. Or, in a more directly political mode, the removal of the goal would be a-legal if carried out by activists who stormed the field to protest against FIFA and the hosting state for having suspended ordinary procedural safeguards under criminal law for disturbances around the stadiums of a World Cup match. Along these lines, a-legality speaks to behavior that is both *inside and outside* a legal order, and not merely as

outside it, as Ferrara suggests. Moreover, a-legality need not concern behavior that calls into question the entire legal order, as is typically the case in a revolution. It may well refer to behavior that challenges a rule or a range of rules in a legal order.

I'll add some final remarks on Ferrara's concern that my account of a-legality blurs the distinction between presently foregrounded practices and implicit background assumptions. In his view, it is important to differentiate between "violations of practices as *foreground assumptions* in the life world" and "violations that reach much deeper insofar as they undermine the background, the '*Umwelt*' or circumambient world that enables us to make sense of [those] practices."

I am not sure about what it is that Ferrara takes umbrage at, perhaps in part because Ferrara refers to foreground and background assumptions, on the one hand, and to foreground practices and background assumptions that allow us to make sense of practices, on the other. In any case, backgrounds, I argue, inform collective action, even if any given way of ordering collective action does not exhaust the possibilities opened up by the background of assumptions, practices, and some such in which collective action is embedded. A background—an *Umwelt*—is pre-given and co-given with collective action, and precisely because, *qua* background, it remains unthematic as such and taken for granted in the course of collective action. We would not be able to disclose something as something—e.g. an act as a service contract—absent the unity of meaning-relations given indirectly in and through the things, events, and acts that populate an *Umwelt*. Crucially, although the circumambient world of collective action is always pre- and co-given as a unity of meaning-relations, its limited character usually remains more or less unthematic to participants in collective action. The normality of living within and towards this nexus of meaning-relations can be *interrupted*, such that what had been taken to be *the* world becomes visible as no more than *a* world. A-legality is the privileged mode of interruption of collective action that renders its *Umwelt* visible as limited, i.e. rendering it partially thematic in the mode of contingency. It may be the case that what appears as contingent is the background assumptions that inform a specific legal mode of collective action or even the more general modes of collective action in which it is nested. So, for example, a-legal behavior might not only challenge what ought to count as legal expectations about a service contract, but also about contract law as such. But doctrinal assumptions about a service contract or a contract in general by no means exhaust the background of legal modes of collective action. The clochard's invitation to the waiter to sit down to share the meal with him may also disclose the contingency of the roles assigned to waiters and clients in the framework of eating patterns in a given society; it may also disclose the contingency of, say, a capitalist organization of economic processes.

Thus, the IACA-model of law offers a phenomenology of a-legality as the experience that reveals the worldliness of legal modes of collective action, that is, of the

experiences in which the co-givenness and pre-givenness of a world become thematic as such, even if never completely. In no way does the model suggest, let alone entail, that “we need to give up the distinction between presently foregrounded practices and implicit background assumptions, along with the distinction between forms of conduct that challenge either of these kinds of normativity.” I would add that in responding to a-legal challenges, a collective can also transform those background assumptions to a lesser or greater extent, partially reconfiguring the *Umwelt* of collective action, without ever rendering it fully transparent nor operating a rupture that leads from one world into another fully different world. Legal modes of collective action are informed by and inform background assumptions. It is for this reason precisely that I refer to legal ordering as a mode of *enworlding*.

This rejoinder is not to say that my account of the distinction between the background and the foreground of legal orders is complete. In particular, I need to explore much more carefully the role played by the legal doctrine and legal scholarship in legal ordering, which brings into play a modality of what Husserl calls a “*Sonderwelt*”—a particular world. In the well-known *Beilage XVII* to the *Crisis* manuscript, “The Life-World and the World of Science,” Husserl notes that although we always already live in the life-world, our attention may be directed to living in a particular world which, with its own ends and goals, is a “self-enclosed ‘world’-horizon.”<sup>3</sup> He adds:

[A]s men with a vocation we may permit ourselves to be indifferent to everything else, and we have an eye only for this horizon as our world and for its own actualities and possibilities . . . Thus when we are living thematically only in the particular world (under the rule of the highest end that ‘makes’ it), the life-world is unthematic for us; and as long as it remains such, we have our particular world, the only world that is thematic as such as our horizon of interest.<sup>4</sup>

These considerations, although referred to the particular world of scientists, resonate well with what Cotterrell dubs the role—and task—of the jurist. Cotterrell notes that the jurist is committed to “maintaining *the idea of law* as a special kind of practice and enable that idea to flourish. One might say that the jurist’s role . . . is to safeguard and promote law’s general *well-being*.”<sup>5</sup> Cotterrell draws here on Gustav Radbruch’s well-known account of the idea of law as comprising three dimensions or poles which are both interconnected and in continuous tension with each other: justice, purposiveness, and legal certainty.<sup>6</sup> One could say, borrowing Husserl’s vocabulary, that realizing the idea of law as the inexhaustible process of seeking the

<sup>3</sup> Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology*, translated by David Carr (Evanston, IL: Northwestern University Press, 1970), 379.

<sup>4</sup> *Ibid.*

<sup>5</sup> Roger Cotterrell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Milton Park: Routledge, 2018), 32-33.

<sup>6</sup> Gustav Radbruch, *Rechtsphilosophie* (Heidelberg: C.F. Müller Verlag, 1999).

best possible accommodation between these three elements of legal orders is the “vocation” of the jurist, the “world-horizon” that governs the jurist’s “work-world,” and which distinguishes it from the all-encompassing life-world in which it is rooted. Kaarlo Tuori has rightly pointed to this lacuna in *Authority* and earlier work of mine, arguing for the need to integrate the specific perspective of specialized legislative, judicial, and scholarly practices into the concept of legal order.<sup>7</sup> I leave this issue for another occasion.

## 2. EXEMPLARITY, CIVIL DISOBEDIENCE AND THE LAW

Ferrara then turns to how a-legality relates to civil disobedience and exemplarity. A first source of concern is the distinction between an example and the exemplary; I conflate the two, or so Ferrara argues. By assuming that Heidegger’s notion of a sign (*Zeichen*) points to what is exemplary, I collapse the exemplary into an example, whereas “an example is the opposite of the exemplary.” Indeed, whereas the exemplary has a world-disclosing function in Heidegger’s sense, not so the example or sign, e.g. the automobile’s turning signal.

Let me begin with the notion of a sign in Heidegger, spelling out more fully how I have appropriated and broadened it in my response to Ferrara’s earlier comments. Indeed, while it is of course the case that drivers use a turning signal to indicate where they intend to go, the signal does much more than that: it has an orienting function that reveals a world. For this reason, Heidegger defines a sign as “something ontically ready-to-hand, which functions both as this definite equipment and as something indicative of the ontological structure of readiness-to-hand, of referential totalities, and of worldhood.”<sup>8</sup> Heidegger makes explicit the world-disclosing function of signs a bit earlier, when noting that it is “an item of equipment which explicitly raises a totality of equipment into our circumspection so that together with it the worldly character of the ready-to-hand announces itself.”<sup>9</sup>

So the point is not that signs do not have a world-disclosing function, as Ferrara claims; they most certainly do. The point is, rather, that the turning signal does not exhaust the ways in which world-disclosure can take place. As Kompridis aptly puts it, the expression “world-disclosure” is ambiguous. “At one level, it refers to the disclosure of an already interpreted, symbolically structured world, the world, that

<sup>7</sup> See Kaarlo Tuori, *Properties of Law: Modern Law and After* (Cambridge: Cambridge University Press, 2021).

<sup>8</sup> Martin Heidegger, *Being and Time*, translated by John Macquarrie & Edward Robinson (Oxford: Basil Blackwell, 1962), 114.

<sup>9</sup> *Ibid.*, 110.

is, in which we always already *find* ourselves.”<sup>10</sup> The turning signal illustrates, I submit, this first-order mode of world-disclosure. “At another level,” Kompridis adds, “it refers as much to the disclosure of new horizons of meaning as to the disclosure of previously hidden or unthematized dimensions of meaning,” and which Kompridis calls “second-order disclosure.”<sup>11</sup>

What I have done, both following and modifying Heidegger’s phenomenology of the sign, is to appropriate the sign as a generic term, and to illustrate how it operates a range of first- and second-order modalities of world-disclosure. I referred, in this vein, to monumentality, which calls explicit attention to an extant world by evoking and affirming collective origins. Yet other signs seek to preserve a world by transforming it, very much in line with the second-order disclosure of previously hidden or unthematized dimensions of meaning. Finally, there are signs which interrupt orientation within a given world by evoking another possible world for action, which Kompridis links to the second-order disclosure of new horizons of meaning. For this very reason, I referred to “the exemplary [as] a *modality* of what Heidegger calls a “sign,” a *Zeichen*.” (emphasis added). Lest there be any doubt about this, my discussion of Parks’ and Plessey’s civil disobedience clearly views them, in terms of Kompridis’ distinction, as second-order modes of world-disclosure, which is why, to repeat, I refer to the exemplary as a *modality* of the world-disclosing function of a sign. Ferrara’s valuable discussion of privacy falls within this second-order mode of world-disclosure, but by no means exhausts its compass.<sup>12</sup>

Ferrara also takes issue with my account of the exemplary as ambiguous. His first bone of contention concerns what he perceives as my too expansive use of the notion of negative exemplarity, which, in his view, should be limited to cases of radical evil, such as the Holocaust.

I will not fall into line with Ferrara’s admonition to be parsimonious in attributing negative exemplarity to those situations in which legal orders and societies “fall short of matching their constitutional ideals.” For the whole point of the matter, as I see it, is that there can be radical disagreement about constitutional ideals themselves, such that no agreement can be reached, in the course of struggles for representation and recognition, about what counts as “falling short” of constitutional ideals. To

<sup>10</sup> Nikolas Kompridis, “On World Disclosure: Heidegger, Habermas and Dewey,” in *Thesis Eleven*, 37 (1994), 29-45, 29.

<sup>11</sup> *Ibid.*

<sup>12</sup> It would be interesting to contrast Ferrara’s notion of the exemplary and the paradoxical reading of the example outlined by Agamben, a reading that resonates closely with the paradox of representation, as has been perceptively argued by Hanna Lukkari in her doctoral thesis, *Law, Politics, and Paradox: Orientations in Legal Formalism* (Helsinki, 2020; on file with the author). See Giorgio Agamben, *The Signature of All Things. On Method*, translated by L. Disanto & K. Attell (New York: Zone Books, 2009), 18. As I will argue in the following section of my rejoinder, the notion of judgment underpinning Ferrara’s account of the exemplary systematically blocks access to the paradoxical temporality deployed in constituent power, and which, as I read him, stands close to Agamben’s analysis of the example.

limit negative exemplarity to events such as the Holocaust is a reductive move that elides the extent to which the unification wrought by representational claims goes hand in hand with pluralization, hence the extent to which asymmetrical relations play out in the dynamic of question and response.

Ferrara's second objection turns on the weak and strong dimensions of a-legality as they play out with respect to the Lakota Sioux Indian Declaration of Sovereign Nation Status. As constructed by Ferrara, the kind of a-legality manifested by this declaration poses no political-philosophical problem, even if political realism has stacked the cards against accepting the secession of the Lakota Sioux and recognizing them as an independent political community. This objection goes to the heart of my account of a-legality, so it behooves me to deal with it at some length.

It may be helpful to note, at the outset, that I discuss the Lakota Sioux declaration of independence because Ferrara's initial comments to *Authority* cite, with approval, Bruce Ackerman's account of the foundation of the American Republic and its blemish, namely, its "politics of exclusion" with respect to slaves, women, and Native Americans. As narrated by Ackerman and Ferrara, the acts of civil disobedience which led up to the famous rulings of the American Supreme Court are exemplary for an emancipatory struggle oriented to realizing a collective of free and equal citizens. In this vein, struggles for representation and recognition, for Ackerman and Ferrara (at least as I understand his initial reply to *Authority*), are all about a *politics of inclusion*. That, indeed, is how political liberalism, as espoused by Rawls, Dworkin, Pettit and others, conceptualizes civil disobedience.<sup>13</sup> Ferrara now accepts that struggles for representation and recognition may seek exclusion from a community rather than inclusion therein, secession rather than integration, hence that a-legality need not be oriented only towards transforming the constitution as part and parcel of a politics of inclusion.

Yet his acceptance of a-legality as calling for a politics of exclusion does not remove the ambiguities accruing to the dynamic of demands for recognition and the recognition granted, and which are papered over by the simple opposition between political realism and philosophical clarity. Is the rejection of a demand for secession by the Lakota Sioux only the expression of "political realism," as Ferrara claims? Conversely, would recognizing their right to secession merely be the expression of "sound" normative judgment?

As I have insisted in *Authority* and elsewhere, the emergence of a collective takes place through acts that seize the initiative to speak and act on behalf of a "we," representing it as this unity rather than that one, hence pluralizing in the very process of unifying, and differentiating a collective with respect to itself in the same move by which it allows for collective self-identification. So also the Lakota Sioux declaration of independence: some, perhaps most, Lakota Sioux will recognize themselves as

<sup>13</sup> For a discussion of Rawls' and Pettit's accounts of civil disobedience, and why civil disobedience does not exhaust the compass of a-legality, see Lindahl, *Fault Lines of Globalization*, 182-184.

members of an independent collective, as “Natives,” but not as “Americans”; others, perhaps the minority, will not, preferring to identify themselves *as* Native American or even as American citizens, and to understand themselves *as* struggling to obtain real rather than formal equality and freedom within the American Republic. Would the rejection of secession only be the expression of political realism? Could the recognition of an independent Lakota Sioux people under these circumstances be fully exonerated of engaging in an instrumental calculation of the costs and benefits for the American Republic, hence that political realism may have carried the day?

But assume that all the Lakota Sioux (assume, therefore, that there are no problems about (self-)identification as a Lakota Sioux) are adamant in their desire for independence, and that the American Republic is prepared to recognize them as a sovereign state. What would it mean to *recognize* them as such? For, presumably, recognition would also mean recognition of the harm that has been visited upon the Lakota Sioux through their violent incorporation into the American Republic. Would not recognition involve reparations for that harm? What kind of reparations should be granted? Focusing on just one of the many—political *and* philosophical—issues this question raises, would recognition involve returning their ancestral lands to the Lakota Sioux people, rather than letting them have the patch of land—the enclave—in which their “reservation” is located? If so, what to do with all those contemporary American citizens who live in what have been Lakota Sioux ancestral lands? And if the American Republic were to bite the bullet and go down this path, could it in good faith reject the demands by other indigenous peoples who would queue up to be recognized as sovereign states? How, then, to deal with claims by all those Americans who do not identify themselves as Native Americans, but who view themselves as indigenous to the country because, having been born and grown up in it, they are attached to the land and call it their “own”? And what about those Native American peoples who might claim that all or part of the ancestral lands of the Lakota Sioux were the result of acts of conquest, hence that those lands are theirs, not of the Lakota Sioux? Is it merely an exercise in political realism to consider alternatives to secession under these circumstances? Conversely, would such circumstances justify qualifying the recognition of Lakota Sioux independence as a “sound” normative judgment?

At bottom, two issues are at stake here. On the one hand, there is the question about what it means for a collective to come to terms with its more or less forceful, even violent, origins when responding to a demand for secession. On the other, secession can never be a “clean break,” to borrow the slogan of some Brexiteers, because no collective is ever simply identical to itself nor different from its Others. These are issues that, highlighting the ambiguity of cognitive acts, elude the simple opposition constructed by Ferrara between political realism and political-philosophy-

ical judgment. Likewise, these issues challenge the simple opposition, as constructed by Ferrara, between recognition of the Other (in ourselves) as one of us, on the one hand, and recognition of the Other (in ourselves) as other than us. The entire thrust of my account of asymmetrical recognition is to connect these two dimensions of recognition, while also illuminating the misrecognitions of self and Other which inhabit struggles for recognition.

But there is more. While I have focused primarily on the strong dimension of a-legality in my initial response to Ferrara, I also explore the ambiguities arising from the Lakota Sioux demand for independence when dwelling on the problem of equality, as raised by Zanetti.<sup>14</sup> Indeed, I argued that the demand for independence by the Lakota Sioux is not only a demand for the recognition of a *difference*, hence for exclusion from the American Republic. It is also, and constitutively, a demand for the recognition of an identity that the Lakota Sioux claim to share with the American people, namely, as sovereign states. So theirs is a struggle for reciprocal recognition of the American and Lakota Sioux peoples as sovereign states. The Lakota Sioux demand for recognition amounts to a demand for exclusion that makes possible their *inclusion* in a collective composed of equal and free peoples.

Hegel's dialectic triumphs, so it seems. And so also Ferrara's critique of my reading of representation and recognition as irreducibly ambiguous: even if the Lakota Sioux demand for independence is unorderable within the American Republic, it is certainly orderable for the American Republic by way of a generalizing move that recognizes them as a free and equal member of the international community of sovereign states. The ambiguity that asymmetrical recognition seeks to make its own yields to the clarity of reciprocal recognition for all concerned parties.

But this is not the end of the story. As I pointed out in my response to Zanetti, statehood is a historically specific mode of political organization, such that recognition of the Lakota Sioux as a sovereign nation within the international community shuts down other modes of their recognition as a polity. Their demand to be welcomed back into the international community of nations is not, if met, a "return" to a condition of original equality; it amounts to a process of *equalization* the effects of which are never neutral or innocent. No equalization with other states absent a concomitant self-inequalization. I take the liberty of citing the relevant passage of my response to Zanetti:

An indigenous people is in excess of the representation of itself as a sovereign nation under international law, and so also its demand for equality is in excess of the equality that the international community of nations has on offer, were it to respond by welcoming the indigenous people "back" into its fold. This is not to say that the Lakota Sioux people would not be prepared to pay the price of sovereignty under international law. There is a form of inclusion and recognition to be had in such equalization.

<sup>14</sup> Gianfrancesco Zanetti, "A New Book by Hans Lindahl," in *Etica & Politica / Ethics & Politics*, 21 (2019) 3, 403-415.

The point I want to make is, instead, that the equality to which their recognition as a sovereign people would give rise does not amount to equality without remainder, as suggested by egalitarian universalists—a *vertical* form of equalization. Their recognition as members of the international community of nations would be a *lateral* equalization that opens up one way of being equal by closing down others.<sup>15</sup>

This takes me back to the Ferrara's claim that "I see no alternative to assuming, as an evaluative benchmark, the furthering of the project of a democratic order of free and equal citizens who do not oppress each other." I agree. But this does not mean that the evaluative benchmark offers an objective criterion that can settle struggles for representation and recognition for the parties involved, ridding those struggles of their irreducible ambiguity. For if equality is the ever provisional outcome of an equalization, and if equalization goes hand in hand with unequalization, then equality operates as a strictly *negative* evaluative benchmark. As I put it, when wrapping up my discussion of this issue,

basic equality does not have a critical function with respect to any given collective because it operates as a pre-existent, independent, and objective criterion to which all parties must have submitted in advance of their struggle if their interventions are to count as interventions aiming to secure human equality. Instead, basic equality enjoys a critical function because it does not collapse into any of its representations, that is, because every legal and political representation of human equality is contingent . . . Perhaps, then, a case can be made for defending a certain reading of the universal without defending universalism. It would be a strictly negative universal called forth by the *Faktum* that there are first-person plural perspectives *on* human equality, but no first-person plural perspective *of* human equality.<sup>16</sup>

To conclude, my insistence on the ambiguity of struggles for recognition cuts deeper than Ferrara's claim that although political realism might work against bringing about reciprocal recognition between free and equal members of a collective, reciprocal recognition remains intact as an evaluative benchmark that could unequivocally settle struggles for representation and recognition. The problem, as I have sought to show in my account of the Lakota Sioux struggle for recognition, is *internal* to reciprocal recognition itself qua evaluative benchmark. In effect, "every legal order claims to be binding, hence objective, by dint of instituting [or being capable of instituting] reciprocal relations between the members of the collective; but this claim has a blind spot that cannot be closed by reciprocity; to the contrary: it is the condition of possibility of reciprocity."<sup>17</sup>

<sup>15</sup> Hans Lindahl, "A-Legality, Representation, Constituent Power: Reply to Critics," in *Etica & Politica/Ethics & Politics*, 21 (2019) 3, 417-503, 486

<sup>16</sup> *Ibid.*

<sup>17</sup> Lindahl, *Fault Lines of Globalization*, 239.

### 3. THE PARADOX OF CONSTITUENT POWER

I am delighted that my earlier comments on constituent power have been of some help to Ferrara in re-elaborating his contribution to this topic. The changes he proposes to his earlier ideas on the emergence of a collective show some convergence with the approach I have defended in my reply to his earlier comments and a range of other pieces I have dedicated to this topic.<sup>18</sup> So I am in full agreement with Ferrara when he notes that “[m]uch of the art of philosophical conversation consists in not letting oneself be misled by terminological and lexical differences under which similar trains of thought can be found.” Nonetheless, I carry forward this conversation about constituent power, in the spirit of pinpointing where differences remain that may be significant to an understanding of *die Sache selbst*, and precisely because the thing itself is recalcitrant to full elucidation.

I’ll begin with suggesting how further convergence would be possible as concerns the core concepts through which Ferrara and I approach constituent power: judgment and representation. We are in agreement that the Kantian opposition between reflective and determinative judgments does not adequately capture the specificity of political and legal judgment. And we are also in agreement that the notion of an “oriented reflective judgment,” inspired by Makkreel’s interpretation of the third *Critique*, offers a promising alternative to this massive opposition. But this is not enough to bridge our differences, nor, much more importantly, to adequately account for the temporal dynamic of judgment itself and, by implication, a judgment-based theory of constituent power.

My invitation to Ferrara is to embrace my claim, which he cites but does not really engage with, that “judgment rejudges.” The key here is, of course, the “re” of rejudges. For this opens up the possibility of focusing on the “as” of judging something as something in a way that not only conceptualizes the inevitably situational character of judgment, as Ferrara is rightly keen to emphasize, but also the internal connection between situationality and temporality. Were Ferrara to strike down this path, I suspect we might be able to join paths further down the road: (re)judgment deploys the paradoxical temporality deployed in representation. I cannot engage with this broad set of issues in this rejoinder. It may suffice to suggest that the first step in this direction requires justifying that judgment is perforce re-judgment.

Thomas Fossen has sketched out an inspiring contribution to this effect in his paper, “Political Judgment as Attunement to Reality.” He notes that, in different ways, a range of political theorists have drawn on Kant’s concept of reflective judgment to counter the assumption that judgment is the application of given principles to a situation at hand—the “standard picture,” as he calls it. As Fossen nicely puts it,

<sup>18</sup> See, amongst others, Lindahl, Authority and the Globalisation of Inclusion and Exclusion, 391-421; Hans Lindahl, “Collective Self-Legislation as an Actus Impurus: A Response to Heidegger’s Critique of European Nihilism,” in *Continental Philosophy Review*, 3 (2008), 323-342.

[t]his [alternative] view conceives of judgment as a concrete encounter of a subject with a particular object in the absence of a determinate conceptual or normative frame of reference, and draws attention to the ways in which the judging subject is situated in a practical context with a plurality of perspectives.<sup>19</sup>

Despite its merits, he argues, “this approach shares with the standard picture the presupposition that judgment is at bottom a mental capacity employed in *discrete* moments of decision.”<sup>20</sup> (emphasis added) Instead, Fossen suggests,

judgment refers in first instance to the complex of activities through which our sense of political reality is constituted, maintained, transformed, and sometimes subverted. Judging is a matter of getting a grip on, or coming to terms with, a political situation. Let me call this cluster of activities *attunement to political reality*.<sup>21</sup>

Fossen’s insistence on viewing judgment as “an ongoing, intersubjective practice” offers, in my view, a powerful argument for interpreting judgment as re-judgment. Once this step is taken, a path is opened up for incorporating the problem of representation into a theory of judgment in a way that could do justice to the temporal dynamic deployed in acts of constituent power.<sup>22</sup>

So much for what I take to be the fundamental discussion that would allow for further convergence between Ferrara’s approach to constituent power and mine. Shifting now to divergences, a first point in which we continue to differ significantly turns on the scope of our approaches. Ferrara’s reflections link constituent power to peoplehood, exploiting the distinction between *ethnos* and *demos*, a distinction he contrasts to nationhood. Although his comments make no specific claims to this effect, Ferrara’s approach seems to take the emergence and career of modern states as being the locus of a theory of constituent power. In this vein, he notes that “the EU lacks a unitary *demos*, and even more a unitary *ethnos*, though it regulates the life of half a billion individuals who are citizens of a plurality of *demoi*.” This choice of locus is backed by a powerful historical reason. After all, the notion of constituent power was minted in the course of the French Revolution, even though linked—fatefully, Ferrara avers—to nationhood. Not surprisingly, therefore, the contemporary debate on constituent power is largely dominated by the assumption that a peo-

<sup>19</sup> Unpublished manuscript on file with the author.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> It should be said, however, that I construe the structure and temporal dynamics of representation differently than Fossen does, as should be clear from his intervention in the *Etica & Politica / Ethics & Politics* special section on *Authority* and from my response thereto. See Thomas Fossen, “Collective Action, Constituent Power, and Democracy: On Representation in Lindahl’s Philosophy of Law,” in *Etica & Politica / Ethics & Politics*, 21 (2019) 3, 383-390, and my response, Lindahl, “A-Legality, Representation, and Constituent Power: Reply to Critics,” 439-451.

ple is its subject, and that constituent power manifests itself in the enactment, revolutionary or otherwise, of a constitution that authorizes the exercise of constituted powers.<sup>23</sup>

I cast a far wider net in my reflections on constituent power. While certainly acknowledging the historical and political importance of the notions of peoplehood and constitution-making, I view a state-centered approach to a theory of constituent power as a province of the latter's more general and proper bailiwick: *the emergence of collective action as such*, regardless of the number of participants, whether it be two or two billion, regardless of whether collectives are short-lived or long-lived, and regardless of any specific typology one might want to propose as to the modalities of constituent power. For this reason, I had no conceptual qualms when accepting Thomas Fossen's challenge to consider the symposium convened by Peter Niesen to discuss *Authority* as an instance of constituent power. While a broad range of constitutional lawyers would be dismayed by this move, I found Fossen's challenge particularly apposite because, in my reading, the dynamic of convening the symposium shows that the emergence of a group to discuss a book is governed by the very same representational paradox at work in the emergence of a people. Indeed, it is my conviction that the dynamic of constituent power cannot be understood independently of a general account of the paradox of representation that holds sway in the emergence of all collectives.

One of the implications of this approach is that, in my view, the European Union, as we know it today, is the provisional outcome of the exercise of constituent power. A comparison with the emergence of the United States is instructive here. Whereas the Preamble to the American Constitution kicks off with the canonical, "We the people," the Preamble to the Treaty of Rome is introduced with the no less canonical ". . . determined to lay the foundations of an ever closer union among the peoples of Europe . . ." Ferrara would by no means be the only scholar to infer from these texts that an essential difference governs the emergence of these two polities: whereas the Preamble to the American Constitution bears witness to the exercise of constituent power by the American people, not so the Preamble to the Treaty of Rome, which goes no further than enacting an organization of peoples.<sup>24</sup>

There are no doubt significant differences between the European Union and the United States as putative polities. But the judicial ruling of *Martin vs. Hunter's Lessee*, issued by the American Supreme Court, and the *Van Gend & Loos* and *Costa*

<sup>23</sup> A notable exception is, of course the theory of constituent power defended by Antonio Negri and Michael Hardt. I have dedicated a section of *Authority* to explaining why, even on the authors' own terms, the notion of the multitude as the subject of constituent power demands the representation of collective unity. See Lindahl, *Authority*, 186-199.

<sup>24</sup> For a trenchant and influential defense of the no-European-demos thesis, see Joseph Weiler, "Fischer: The Dark Side," in Christian Joerges, Yves Mény, and Joseph Weiler (eds.), *What Kind of Constitution for What Kind of Europe? Responses to Joschka Fischer* (San Domenico: European University Institute, 2000), 235-247.

*vs ENEL* rulings of the European Court of Justice, are, in both cases, exercises in constituent power that retroactively constitute collective unity, deploying to this effect the same circular reasoning.<sup>25</sup> If the constitutional history of the United States shows that the jurisprudence of the American Supreme Court about the meaning of “We the people” has played a key role in constituting the American people as a single people, so also the jurisprudence of the European Court of Justice shows that Preamble to the Treaty of Rome already presupposes something like a European people when stating that the integrative process is premised on “an *ever closer union* among the peoples of Europe,” that is to say, a unity that is presupposed to already exist and which is to be carried forward and intensified through a common economic and legal order. In both cases, like in all cases of constituent power, this presupposition amounts to a representation of collective unity and, as such, a claim that can never overcome a residual groundlessness, as becomes starkly visible in situations of crisis.

Two further implications follow from this approach. First, it does not assign a privileged position to the distinction between *ethnos* and *demos*, which is at the core of Ferrara’s theory of constituent power. Instead, I focus on the more general problem of the paradoxical representation of collective unity: representation creates what is given. Indeed, the enigma of a community that must somehow be given as a unity, yet only can *become* such retroactively, through its representations, is the more general and adequate formulation of what I take to be the decisive issue at work in Ferrara’s distinction between *ethnos* and *demos*.

Second, generalizing the dynamic of constituent power beyond state-centered approaches thereto has the added advantage of sidestepping the endless debate about what counts as an *ethnos*, a *demos*, and a nation, and how they might differ from each other. In my view, what is cardinally important is that representations of collective unity are always and necessarily substantive in character: “we” (are deemed to) constitute ourselves as *this* (rather than as that) collective. Because representation is substantive, the exercise of constituent power is irreducibly ambiguous: it empowers by enabling certain (legal) ways of acting together; it also disempowers by disabling or closing down other practical possibilities for acting together. This holds for states, as we see all around us, not least the US. It also holds for emergent transnational and global legal orders, including the EU. Far from depoliticizing constituent power, extending its scope beyond the state has the opposite effect, namely, revealing the deeply political, rather than simply “technical,” nature of emergent transnational and global collectives.<sup>26</sup>

<sup>25</sup> See Hans Lindahl, “The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union,” in *Ratio Juris*, 20 (2007) 4, 485-505.

<sup>26</sup> For a critique of the depoliticization of constitutionalism and constituent power through its transnationalization, see Martin Loughlin, “What is Constitutionalisation?,” in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010). For a profound analysis of constituent power that engages with some of the authors who inspire Loughlin’s

Having offered these rather fragmentary ideas about the different scopes of our approaches to constituent power, let me now turn to the dynamic of constituent power as such, to its peculiar temporality. Here again, what interests me is not so much the temporality of the relation between an *ethnos* and a *demos* in particular, but rather the general and fundamental problem of the temporality and ontology of *change*, of the emergence into being of a collective, as adduced by the notion of *constituent* power. In effect, what sense of novelty is afforded by constituent power, and how to interpret the temporal continuities and discontinuities absent which no sense can be made of the surging forth of a new collective? I have elsewhere discussed this issue at considerable length and will not return to it here, as I think that the analyses offered in that earlier piece still hold their ground.<sup>27</sup> Of interest here is whether Ferrara's account of constituent power succeeds in overcoming a linear conception of temporality when explaining the change leading from an *ethnos* to a *demos*.

Ferrara distills his views on the temporality of constituent power as follows: "the political identity of a people-*qua*-*demos*, differently from its identity-*qua*-*ethnos*, emerges not *prior* to but *from* the constitutional principles through which the people decides to regulate its political life." If I understand him correctly, Ferrara holds that while an *ethnos* has a pre-political identity given prior to the constitution, the *ethnos* only becomes a *demos* through the decision to regulate its political life by means of a constitution. Initially, there is an ethnic group as a pre-given cultural unity and identity; subsequently, this ethnic group constitutes itself as a political unity and identity. This is consistent with Ferrara's earlier claim that "an *ethnos* becomes a *demos*—it takes on a *political* identity—through the act of ratifying or accepting a constitution." So there is a temporal continuity of a people *qua* people in the passage from its ethnic to a demotic mode, and which, in Ferrara's reading, allows us to speak of the exercise of constituent power as an act of *self*-constitution.

Accordingly, it is with reference to the notion of an underlying subject that persists across time, first as a cultural, then as a political unity, that Ferrara, drawing on Montaigne, conceptualizes the notion of a *supplement*, that is, of something that is added onto a something that is already given independently of a representation. The supplement has a "bidirectional" character, in Ferrara's reading, because by adding something to a given subject, the supplement changes the latter's nature, *in casu* transforming a cultural into a political people. True, Ferrara cautions his readers: there is no necessary passage from cultural to political identity: while all *demosi* are *ethnoi*, not all *ethnoi* become *demosi*. Yet an *ethnos* functions in this account of

critique, while also reading those authors in a way that sheds light on the paradox of constituent power, see Ferdinando Menga, *Potere costituente e rappresentanza democratica: Per una fenomenologia dello spazio istituzionale* [Constituent Power and Democratic Representation. On a Phenomenology of Institutional Space] (Naples: Editoriale Scientifica, 2010).

<sup>27</sup> See Hans Lindahl, "Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change," in *Constellations*, 22 (2015) 2, 163-174.

constituent power as an underlying substance or *hypokeimenon* which may or may not take on a new attribute. By taking on this new attribute, the ethnic people *actualizes* one of its original possibilities, where “actualizes” should be understood as the linear passage from *dynamis* to *energeia*. In brief, I have read, and continue to read, Ferrara as defending a theory of constituent power that interprets change, ontologically and temporally speaking, as the linear passage of time in which political unity is added to an original cultural unity: constituent power as supplementing a pre-given origin.

This is something less and other than the paradoxical notion of an *originary* or *originating supplement* developed by Derrida and others, and which I have sought to render fruitful in the mode of a paradox of representation and constituent power: unity is originated through the successful representation of an original unity.<sup>28</sup> In a slightly different formulation, representation has a paradoxical structure because constituent power can only originate a community by representing its origin. Representation supplements what it represents in the twofold sense of *adding* something to it and *substituting* for it: the “as” of representing ourselves as this or as that is the locus of both functions of the supplement. This supplementary “as,” which differentiates that which it re-identifies as the same, precludes direct access to an original unity that could vouch for the continuity across time of, say, an ethnic, culturally defined people that later, both logically and chronologically, becomes a demotic, hence politically self-conscious people, yet all the while persisting as the same people—as a substance, I daresay.

I have resisted using the notion of an *ethnos* throughout my work because I think it is subject to the same kinds of objections that can be raised about the notion of a nation. Most fundamentally, the unity that is presupposed when speaking about an ethnic group is always and necessarily a *represented* unity, and, as such, is bound to be controversial in whom and what this representation includes and excludes. But with a view to marking the difference between Ferrara’s approach and mine, let me paraphrase the paradox of constituent power in his own terms: constituent power originates an *ethnos* by successfully representing it as a *demos*.

The reference to “success” is important in two ways, one of which stands close to Ferrara’s own concerns. Indeed, constituent power, despite the Scholastic heritage of the concept, is not an *actus purus* because it is a *representational* act that seeks to articulate a unity it does not possess as its own creation. This is what I take to be the important point defended by Ferrara when introducing the notion of an *ethnos*. I fully endorse this concern when elaborating on the paradox of constituent

<sup>28</sup> See Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology*, translated by Leonard Lawlor (Evanston, IL: Northwestern University Press, 2010); Jacques Derrida, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore, MD: Johns Hopkins University Press, 2016); Jacques Derrida, *Writing and Difference*, translated by Alan Bass (Chicago: Chicago University Press, 1978).

power as a paradox of authority: “[i]n the same way that there is a paradox of representation, so also there is a *paradox of authority*: an authority can only lead if it succeeds in appearing to its addressees as obeying what they are really about.”<sup>29</sup> But “success” is an ingredient feature of the paradox of authority because, as I add immediately thereafter, “[t]his success is irreducibly ambiguous: authority, to be such, must hearken to a summons; but an ineradicable positivity animates its response, in which commanding and leading the way are inextricably intertwined.”<sup>30</sup> If I defend the notion of successful, rather than legitimate, representations of collective unity, it is to highlight the irreducibly forceful, on occasion violent, dimension of representations of collective unity, and which defeats any attempt to characterize authority simply as the articulation of what we really are about.

#### 4. COLLECTIVE SELF-RESTRAINT AND POLITICAL LIBERALISM

Ferrara concludes his comments by arguing that the IACA-model of law remains squarely within the normativity “scripted at the core of political liberalism,” namely, the normative assumption “of an irreducible distinction between legitimate authority and arbitrary power.”

This is, as I see it, the most fundamental point raised by Ferrara’s comments. I will avoid agreeing or disagreeing with his claim that restrained collective self-assertion is a variation on the account of normativity defended by political liberalism. Instead, I would like to very briefly recall some normative issues I still find troubling and in need of further reflection, and which have led me to resist too quickly embracing the predicate of political liberalism for an inquiry into legal ordering as an authoritative politics of boundaries. If further reflection were to vouch for accepting the irreducibility of the distinction between legitimate and arbitrary power, as Ferrara holds, then I would have no problem with qualifying restrained collective self-assertion as a modulation of political liberalism. For the time being, what interests me is showing why the distinction itself seems to run into problems that are normative, not merely factual.

By “factual” I mean that authority *must* present itself as legitimate power and that, as such, it *must* differentiate itself from what it calls arbitrariness. Obviously, this claim to legitimate power can be contested in struggles for representation and recognition. So when Ferrara asserts that the distinction is irreducible, he means something more than this structural feature of power, namely, that there has to be an *unconditional* criterion that allows of distinguishing unequivocally, and for all parties involved in struggles for representation and recognition, between legitimate

<sup>29</sup> Lindahl, *Authority*, 330.

<sup>30</sup> *Ibid.*

and arbitrary power. For in the absence of this unconditional criterion, the distinction itself would collapse and, with it, the very possibility of normativity. He spells out this criterion—an “evaluative benchmark,” in his words—as the injunction to realize “a democratic order of free and equal citizens who do not oppress each other.”

I read this thesis about normativity as a defense of reciprocal recognition. Engage with the Other who calls us into question in such a way that our legal order yields reciprocal recognition between all parties concerned as free and equal citizens. This is what we ought to do unconditionally. Reciprocal recognition, I read Ferrara as arguing, is the practical mode of the a priori, i.e. of practical necessity. Reciprocal recognition is what must always already have been presupposed when authority is criticized as arbitrary, and when it is demanded that its exercise be legitimate. If restrained collective self-assertion is to function as the criterion of legitimate authority, then reciprocal recognition must be its normative content. Yes, collective self-restraint seeks to recognize the Other (in ourselves) as other than us; ultimately, however, this asymmetry is at the service of reciprocal recognition, namely, that we, the concerned parties, can come to recognize each other as different, while also recognizing ourselves as the same, that is, as free individuals or groups who enjoy equal standing within one collective: collective self-rule. Thus reciprocal recognition must subordinate plurality to unity, and difference to identity, if it is to operate as the unconditional criterion of legitimate authority.

I have already had the opportunity to show why I think reciprocal recognition is such a powerful interpretation of the normativity of an authoritative politics of boundaries, when discussing the Lakota Sioux demand for independence. Even if theirs is a demand for exclusion from the American Republic, hence for their recognition as *different* to the American people, this demand only makes sense if paired to a demand for inclusion in the international community, hence to a demand for their recognition as the *same* as the American people. When demanding that they be admitted into the group of sovereign states, that is, when challenging the American legal order as the exercise of arbitrary power, the Lakota Sioux have already, presupposed that legitimate authority consists in the reciprocal recognition of the two peoples as free and equal participants in a wider collective.

But I have also cautioned against assuming that granting independence to the Lakota Sioux would mark the simple passage from inequality to equality and from misrecognition to recognition. The reciprocal recognition that would ensue from Lakota Sioux independence would continue to be ambiguous, folding inequality into equality, and misrecognition into recognition: collective *self*-misrecognition by the Lakota and collective misrecognition of the *Other* by the American Republic. A remainder, an excess, remains; a difference that arises because of an identification; a demand that eludes recognition within the international community, and that refuses integration through a dialectic that takes us into a yet higher-order collectivity. I referred for this reason to a possible recognition of the Lakota Sioux as giving

rise to a lateral, not vertical, form of equalization that opens up one way of being equal to others while also closing down—and misrecognizing—others. Reciprocal recognition, I aver, affords a first-person plural perspective *on* humanity, but never the first-person plural perspective *of* humanity.

Thus I remain unconvinced that the injunction to realize a democratic order of individuals [and groups] who can recognize each other as free and equal manages to extricate itself from the ambiguities that accrue to reciprocal recognition. These ambiguities do not ensue because, as a matter of fact or even of political realism, recognitive practices fall short of realizing reciprocal recognition. Collective recognition of the Other (in ourselves) is irreducibly ambiguous because it is conditioned by a blind spot in the form of demands for the recognition of an identity/difference threatened or violated by a collective and which the latter cannot recognize *because* it aspires to realize reciprocal recognition.

Ferrara and I agree that collectives are “fully” contingent, as he puts it. Here we stand shoulder to shoulder. But if I am right in arguing that every collective has a recognitive blind spot, then no collective can recognize itself, when recognizing the Other, as fully contingent. And this entails, as far as I can see, that reciprocal recognition does not suffice to unconditionally distinguish legitimate authority from arbitrary power for all parties involved. Let me therefore reformulate what I take to be the unconditional injunction at the core of collective self-restraint. Its content is strictly negative: do not reduce the Other who demands recognition to the Other in whom you can recognize yourself. It may remain an open question whether collective self-restraint, interpreted thus, is “scripted at the core of political liberalism.”