Using the master's tools: rights and radical politics

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The story of origins and the possibility of re-imagining the state

What do we re-imagine when we re-imagine the state? Perhaps one of the reasons that political theorists tend to shy away from this question is that they lack a normative language to address it. As Chundran Kukathas notes, the concepts used to analyse our political orders have been moulded by the historical experience of the European state and they are 'as contentious as the notion of the state' itself (2014: 357). Kukathas chooses the concept of 'legitimacy' to illustrate the point. But there are plenty more. Amnon Lev's discussion of sovereignty is another example: the meaning it now assumes is derived from the 'historical analytics of power that relate to the semantic and aesthetic resources that made it possible to present sovereignty as a *political* force and hence, by implication, a force for good' (2015: 3). It is no coincidence that sovereignty moved centre stage in the political theology that prevailed during of the period of the European state's formation.

Working from the premise that the tools available to political theorists have been shaped by the prevailing order, Jens Bartleson argues that a substantial body of political theory has been unable to re-imagine the state. Scrutinising the history of anti-state theory, he diagnoses the theoretical problem of the state in the construction of 'anarchy'. However, this condition is described, anarchy is cast as the foil for the state. It is both integral to stories of the state's genesis and to the conception of the state as a political order. In Bartleson's view 'anarchy' haunts political theory, inventing a domestic 'inside' and international 'outside' that fixes the parameters of intellectual inquiry; not even anti-state theorists have managed to break free. Indeed, rather than re-imagining the state, Bartleson finds that they have only been able to replicate it. At one and the same time, 'modern political discourse ceaselessly questions the form and content of authority, its legitimacy and proper boundaries' and 'makes questions about the ultimate foundations of authority difficult to ask, let alone answer.' (Bartleson, 2001: 3) While 'its actual manifestations in political theory and practice are criticized from a variety of actual viewpoints', the state's presence is taken for granted (Bartleson, 2001: 3). Similar problems pervade cognate disciplines. Tuori's analysis of legal anthropology reveals how assumptions about the genius of the European state helped sustain unenlightening

distinctions between 'primitive' or 'savage' and law-governed 'cultured' peoples in historic (and some contemporary) scholarly investigations into the origins of law (2015).

Frustrated by this theoretical *cul-de-sac*, anarchists have turned to sociology, geography and anthropology to contest claims about the state's necessity and normative arguments about its historic achievements (Kropotkin, 1902; Morris, 2005; Scott, 2009). Yet, bringing these insights to bear on mainstream political theory has largely failed to advance our understanding of the state or anarchy. The concepts which anarchists deploy to present their alternative conceptions of order are too easily misconstrued in the context of state theory and by the binaries it supports. The political theory that casts anarchy as 'other' to the state survives intact. As a result, the re-imagination of the state remains unintelligible.

Bartleson notes that political philosophers have warned against delving into accounts of the state's 'origins'. Kant characterised the project as both speculative and dangerous: '[t]he origin of supreme power ... is not *discoverable* by the people who are subject to it'. So the 'subject *ought not* to indulge in *speculations* about its origin with a view to acting upon them'. It is 'futile' to ask whether 'an actual contract originally preceded their submission to the state's authority, whether the power came first and the law only appeared after it, or whether they ought to have followed this order'. The people were 'already subject to civil law' and to question why or how constituted 'a menace to the state' (Kant in Bartleson, 2001: 3).

Refusing to heed Kant's warnings and alarmed by the systemic injustices embedded in civil laws of liberal democratic states, some contemporary political theorists have recognised the constructive aspects of this destructive work. Yet, in crossing Kant's line, they have not asked questions about the state's origins so much as query the stories that political theorists relate in order to ground power relations within the state. In much political theory, these stories generally revolve around the idea of the contract. Stories are told to explain how and why individuals agreed to establish government. Contracts are thus imagined as foundational agreements which establish the basis for the state's just constitution and define the limits of legitimate protest, empowering the citizens who have purported to agree to act when the terms of the agreement when they are breached.

For Charles Mills and Carole Pateman, both leading contemporary critics of contract, there is no 'before' or 'after' the state, only conceptual tools that sanction injustice and inequality. By lifting the lid on the relationship between our prevailing institutional arrangements and the stories that undergird them, both ask how far contract is a master's tool or, as Audre Lorde once argued in another context, a device that allows 'only the most narrow perimeters of

change' (Lorde, 2007 [1984]: 111). For Charles Mills, one of the most celebrated liberal critics of liberalism, this is an exercise in thinking about what can be salvaged from liberal contract theory. For Carole Pateman, it is about developing an alternative to it. Both take a lead from Rousseau: Mills does this in order to develop a subversive contract that de-racialises mainstream contract theory, while Pateman seeks to recover the idea of free agreement that the social contract suppresses.

To what extent do these critiques help us re-imagine the state? In what follows I tackle this question by considering their prefigurative aspects. As will become clear, Pateman's rejection of contract reveals the limits of Mills' subversive reframing. My argument has four parts: firstly, it outlines Mills' reclamation of 'the master's tools'; second, it discusses prefiguration in contemporary anarchist political theory. This provides, thirdly, the platform to discuss Pateman's critique of contract and domination. The final section discusses two recent examples of activism and the reclamation of tools to support radical, prefigurative change.

1 Charles Mills: Rawls, Rousseau and the subversion of contract

In an important essay entitled 'Rousseau, The Master's Tools, and Anti-Contractarian Contractarianism', Charles Mills presents a qualified critique of contemporary contract theory, defending himself against critics who accuse him of adopting tools of domination to address racial injustice (Mills, 2015: 171ff.). He rejects the claim, put forcefully in another context by Audre Lorde, that 'the master's tools can never be used to dismantle the master's house' (ibid.: 172). Contesting the generality of this claim, he argues that the theoretical devices used to sanction systematic white racist violence and oppression can be emptied of their 'moral viciousness' (ibid.: 173). His special interest is in contract theory and he takes Jean-Jacques Rousseau's eighteenth-century critique of John Locke's seventeenth-century account of contract for his model. Styling himself a sympathetic critic of contract or an 'anti-contractarian contractarian', Mills contends that it is possible to use contract both to counter white supremacism in mainstream political philosophy and to redress the historic injustices that the contract has helped sustain. As will be seen, Mills diverges from Rousseau in significant ways, but follows Rousseau's lead in re-developing an existing account of contract to reveal its conservatism. The *Theory of Justice*, John Rawls's twentieth-century restatement of liberal contract theory, is Mills' target.

After its publication in 1971, the *Theory of Justice* defined mainstream Anglo-American political theory and played an important role in the resurrection of twentieth century political philosophy (Klosko, 2011: 458). It was elaborated in a period of intense unrest in America

when civil rights, anti-Vietnam war protest, women's and Black liberation movements drew attention to the failure of liberal political institutions to uphold liberal principles and values (Daniels, 1975: XXXV). As a modified version of social contract theory, the *Theory of Justice* introduced the device of the 'original position' to imagine what principles of justice parties to a hypothetical contract would choose in order to ground their political institutions. The 'original position' facilitated a thought-experiment about ideal political arrangements and fulfilled a role that was roughly equivalent to the hypothetical 'state of nature' in historical contract theory. However, Rawls departed from traditional theory in two ways. First, he invoked the metaphor of contract to devise what he called the 'basic structure' of society, not as Locke and Rousseau had done, to recommend ideal constitutions. The basic structure balanced liberty against equality and advanced a set of distributive rules that were open to a range of governmental arrangements. Second, whereas contract theorists drew their ideal constitutions from more or less chaotic descriptions of a 'natural' pre-government condition, Rawls modelled the basic structure on the choices of individuals made behind the 'veil of ignorance'. This meant that the contract was imagined as an agreement between individuals who knew everything about the world but who were ignorant about their personal circumstance or status within it. Using the uncertainty created by the veil to model the behaviours of his contractors (notably, their unwillingness to take significant risks or gamble on their life-chances), Rawls defended the fairness of the principles of justice with reference to the fairness of the process used to generate them. As the veil was removed, choosers were able to reflect on the justness of the chosen principles by examining 'hard cases' and fine-tuning them accordingly.

Mills' critique of the *Theory of Justice* turns on the distinction Rawls makes between 'ideal' and 'nonideal' theory. Rawls explains that the ideal 'presents a conception of a just society that we are to achieve if we can. Existing institutions are to be judged in the light of this conception' (Rawls in Simmons, 2010: 7). Nonideal theory instead 'asks how this long term goal might be achieved or worked toward' (ibid.). For Feinberg, ideal theory regulates 'well-ordered' societies where 'everyone always acts justly' (Feinberg, 1975: 117), while nonideal theory focuses on real-world non-compliance and the permissible, feasible and effective measures that might be taken to address injustice. By presenting a conception of a just society that is strictly compliant with the principles of justice, ideal theory is supposed to help 'with real-life problems of the non-ideal world' by 'mediating our "natural duty" to promote just institutions' (ibid.). In this logic, ideal theory may bear little relation to the real world, but it is a mistake to think that it is therefore 'simply irrelevant'. In fact, Simmons argues, ideal

justice guides 'a*ctivists* in the cause of justice'. Ideal justice is 'strongly *transitional ...* in character' (Simmons, 2010: 22) and Rawls outlines 'an ideal of justice toward which [nonphilsopher activists] take their campaigns to be ultimately directed' (ibid.: 35-6).[1]

Mills's complaint is about the content of Rawls's ideal theory and its transformative potential. His objections can be explained with reference to what Simmons refers to as the 'choice problem' that Rawls sets in the original position. The rational choosers who select principles of justice from behind the veil of ignorance are asked to think only about the future. They are not required to take historic injustices into account. Simmons writes: Rawls paid 'no attention to the long histories of injustice to people of color, to women, to various groups that constitute minorities in their religious convictions or sexual orientations'. Similarly his ideal conception 'pays no attention to the modern destruction of community and social and family networks, to the neglected pursuit of genuinely common ends, to the threat posed by liberal society to the values of culture and ethnicity' (ibid.: 32-33).

Mills argues that Rawls's failure to address historic injustices in the construction of ideal justice constrains the transformative power of nonideal theory and raises fundamental questions about the priority attached to the ideal over nonideal. Mills' criticisms of process are normative and factual. Normatively, he objects that Rawls is wrong to exclude consideration of racial injustice 'from the start'(Mills, 2015: 177). As Mills puts it, in a 'perfectly just society, no race would have been discriminated against ... so no rectificatory measures would be needed'. Mills also argues that Rawls's '*factual* assumptions about the shaping of the modern world' are defective. Rawls's discussion of international justice, elaborated after the publication of the *Theory of Justice*, simply glosses over 'European imperialism, the genocide of native peoples, and the Atlantic slave trade' (Mills, 2015: 177). Mills' conclusion, Stemplowska and Swift note, is that Rawls's contract it is not only conservative but also ideological (2012: 378f.). If Rawls were motivated to address the failures of liberalism identified by civil rights activists in the 60s, then Mills' finding is that *The Theory of Justice* clearly fails to provide an adequate response. Indeed, he argues that Rawls' near-exclusive focus on ideal justice simultaneously embeds and conceals white racial domination, airbrushing real world injustice from view. In short, as it is currently configured, the *Theory of Justice* is of 'little help to us in trying to adjudicate appropriate public policies to deal with the actual history of racial subordination in societies like the United States, where ... racial discrimination has been the norm' (Mills, 2015: 177).

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[1] In this context, 'transitional justice' describes the use of theoretical benchmarks as drivers for political change, not post-conflict transformation and the transition from war to peace building.

Rather than re-run the contract using a different choice problem and retain the priority of ideal over nonideal theory, Mills argues that nonideal theory should be reframed and its priority reversed. His aim is to develop robust 'principles of *transitional* justice' (ibid.: 177). To do this, he turns to the analysis of traditional contract theory and argues that Rawls repeats the mistake that Rousseau had identified in Locke: he adopts a consensual model of contract to defend liberal principles and values and treats consent as an indicator of fair process. Rousseau, Mills observes, showed that the Lockean contract was mistaken because it takes the existence of inequality and privilege for granted. This exposed the structural domination that liberal constitutions actually entailed and explained how voluntary agreements concluded in these imagined conditions cemented real-world injustice.

The story of the origins of inequality that Rousseau told focused on class-domination. However, Mills argues that the 'restrictive' contract he described is adaptable to the analysis of other types of oppression. Indeed, even while Rousseau was 'sexist and arguably ... racist', Mills contends that his 'innovative concept of an exclusionary contract' can be 'applied more broadly than he himself intended' – to encompass sex and race (ibid., 174). This is the task that Mills sets himself.

Just as Rousseau retold the story of the Lockean contract to explode the image of an agreeable social order, Mills seeks to expose the normative and factual limitations of Rawls' *Theory of Justice*. This project differs from Rousseau's in one important regard. Unlike Rousseau, who devised a new social contract as an alternative to the Lockean model, Mills limits his ambition to 'purge' liberalism of 'its historic injustice' (ibid., 176). He has no grand plan for a new social order. His contract is 'minimalist', drawing 'normatively' on the recognition of the equal moral status of human beings central to liberal-democratic ideals and 'factually on the simple insight that humans create the sociopolitical' (Mills in Pateman, 2008: 14). The normative claim sets a benchmark for the marginalised and disadvantaged to assess existing institutions and guide justice struggles. His factual insight grounds the priority Mills attaches to nonideal theory. Invoking the liberal commitment to moral equality to assess actual and historical injustices, Mills strips ideal theory of the status Rawls gives it and invites choosers to make policy choices on the basis of ignorance, reconfiguring the hypothetical contract to focus on nonideal realities:

> The 'anti-contractarian contractarianism' I am advocating, then, corrects this grossly misleading factual picture of modernity by (following Rousseau) representing the actual 'contract' as a domination contract, a racial contract imposed by whites on people of colour. Correspondingly, the normative mission becomes the rectification of the resulting 'non-ideal' 'basic structure': what public policies, what

institutional measures, would we choose behind the 'veil of ignorance', worried that we might turn out to be black in what will be a white-supremacist sociopolitical order? (Mills, 2015: 177).

Mills' critique of the *Theory of Justice* is that it constrains the possibilities for social transformation by measuring nonideal justice against an ideal in which injustice is already embedded. Instead, as a political demand, the commitment to moral equality empowers the dominated to challenge prevailing systems of domination in accordance with liberal values and principles. The reclamation of contract from the master is a critical tool but it also gives real weight to the constitutional powers that the principle of moral equality enshrines in liberal democratic states. There 'is nothing in the definition of *rights* or *freedoms* that limits them to white males' (ibid.:183), Mills argues. The feebleness of these tools is explained by the imperfect imagining of perfect justice. Rawls' ideal theory wrongly suggests that these rights and freedoms have been perfected. Shattering this illusion enables citizens to articulate their just demands and use rights and freedoms available to them to advance transformative, egalitarian and emancipatory change.

2   Prefiguration and the rejection of the master's tools

The activist objection to Mills' argument is that the deployment of the master's tools corrupts the campaigns they are designed to advance. This was Lorde's warning: the master's tools only give access to the master's house. Using them 'may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change' (Lorde, 2007 [1979]: 112). The same argument, though often articulated as a fear of co-optation, is expressed in contemporary radical politics as a commitment to prefigurative change.

Prefiguration is the idea that the ends and means of political action must be aligned**.** Particularly associated with horizontal social movement activism and anarchistic anti-hierarchical organising, prefigurative politics establishes a framework for political action that limits the possibilities for engagement in the mainstream and militates against the use of existing representative institutions to advance political change. The adoption of consensus-decision making in many social movement actions is an example of a prefigurative approach: the embrace of the practice is integral to the participants' commitment to struggle for a future participatory, transparent and direct democratic politics.

How far prefiguration entails a refusal to use the master's tool, as Mills envisages, is a moot point. Uncertainty emerges from the complex relationship between the theory and practice of prefiguration. Hostility to using master's tools has its roots in a historical argument rehearsed in the European socialist movement about instrumental use of the state to realise

revolutionary goals. Subsequently theorised, prefiguration amounts to a meta-ethic of revolutionary activity. The strap line, 'be the change you want to see', is sometimes invoked to describe prefiguration in this sense. Absorbed into movement politics, the idea is now also linked strongly to a principled commitment to direct action, that is, action, which advances change by disregarding established mechanisms, rules and norms. This also has a historic root and extends naturally from the rejection of participation in conventional politics. These three aspects of prefiguration prompt questions about the ways in which marginalised or historically dominated groups should articulate their demands and about the latitude they have to use rights without compromising principles of direct action.

The first view, that the use of the master's tools is inevitably corrupting, has its origins in a nineteenth-century debate about the possibility of capturing state power to deliver anti-state, anti-capitalist change. On the assumption that anarchist and non-anarchist revolutionary socialists shared the same socialist, egalitarian ends, anarchists argued that only their anarchist methods were capable of the state's destruction or abolition.[2] Though the term was not then used, prefiguration underpinned three separate anarchist positions: (i) *the rejection of political action*, that is, the refusal either to enter into parliamentary institutions where circumstances allowed, or to be bound by constitutional rules; (ii) *the disavowal of proletarian dictatorship*, i.e. the Marxist idea that the proletariat must temporarily seize control of the machinery of government to secure its position against the bourgeoisie; (iii) *the condemnation of vanguardism*, the view expressed most forcefully by Lenin, that the oppressed cannot fully emancipate itself without the support of enlightened party workers.

The second view, more familiar in contemporary anarchist political theory, treats prefiguration as a distinctive meta-ethics. There are two versions of the thesis. For Benjamin Franks, a leading analyst of prefigurative ethics, prefigurative politics is a rejection of consequentialism and deontology. Consequentialism evaluates the rightness of actions by their outcomes rather than the actor's intentions or motives and deontological approaches refer to the application of binding moral rules, (accepted as such by autonomous, rational individuals). In distinction to both, prefiguration leaves the evaluation of the rightness of actions to the actors themselves. It closes the gap between means and ends by defining ethical behaviour as behaviour designed to realise short- or long-term increases in autonomy,

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[2] The socialist anarchist view is that the state and capitalism are co-constituted and it diverges from minimal state, right libertarianism and so-called anarcho-capitalism, which typically call for the removal of state controls on markets and the enforcement of contacts by states to uphold the inequalities markets create.

irrespective of the action's success. The 'moral framework' requires 'agents of change' to 'act autonomously to end their own oppression' (Franks, 2006: 114). The methods are 'pragmatic and local, as no ultimate or universal ground for "the good" exists' (ibid.). Saul Newman advances another version of the thesis. His account resonates with Franks' rejection of 'instrumentalist strategies that appeal to the ultimate end of millennial events such as "the revolution"' (ibid.). However, Newman follows the nineteenth-century egoist Max Stirner in order to flesh out his model, and so ties prefiguration to the self-liberation of sovereign beings. Prefiguration is coupled with a type of 'hyper-liberalism' that Franks rejects. For Newman, it involves the abandonment of all pre-determined 'utopian' ends or political causes. It describes continuous disobedience or insurrection (Newman, 2016: 64ff.). In Newman's words, it is 'an expression of ownness', a 'reclamation of the self' and a 'constant work on oneself to invent subjectitivies and relationships which are self-governing and no longer enthralled to power' (ibid.: 65).

In the third view, prefiguration describes a form of activism that is elaborated through contemporary movement practices. Examples include the development of alternative co-operative and democratic practices and 'anti-utopian utopian' imaginaries; anti-representational politics, horizontal organisation, 'nowtopian' experimentation and community building, the ethics of mutual aid and the practice of anti-oppression politics. The common principle is direct action. Marianne Maeckelbergh explains: 'prefiguration is not a theory of social change that first analyses ... and then sets out a ... plan for changing the existing landscape' (2001: 3). It is 'a different kind of theory, a "direct theory" that theorizes through action, through *doing*.' (ibid.). Importantly, prefigurative doing is designed to by-pass the state. Uri Gordon describes it as a form of action intended to 'challenge the basic legitimacy' of the state through a particular commitment to build movement principles into everyday life (Gordon, 2008: 18). It involves a principled rejection of the state's legitimacy, disallows actions that are designed as appeals to governments and also demands for the introduction of reforms, whether or not the methods are legal. For example, at the turn of the twentieth century, anarchist women often classified illegal women's suffrage campaigns as pragmatic appeals to the state, which reinforced its legitimacy. Even though they adopted direct action (and 'terrorist' tactics) the suffragettes' actions were not prefigurative because they struggled calculatedly for the extension of rights and sought the most effective means available to secure them. In a similar vein, Gordon describes civil disobedience as

a selective refusal to obey some of the regime's laws or politics, as a means of pressuring it into changing them. Tax strikes, refusal of conscription, and sitting in the "wrong" section of a segregated bus all fall into this category. There is no intention to overthrow the regime, only to force it to negotiate (ibid.: 52).

To summarise: prefigurative politics variously denies the possibility of realising revolutionary change through the seizure of state power. It commits activists to locally determined direct actions that are intended to increase autonomy and it is substantively defined by sets of activities and projects that activists undertake. These different conceptions intersect in multiple ways, but proponents of prefigurative politics typically focus their attention on resistance to the state in an effort to realise alternatives in the 'here and now'. In advancing a particular politics of transformative change, they address issues of systematic, legally sanctioned injustice and the tools that may be used to combat it.

Advocates of prefigurative politics have little to say about contract. Nevertheless, the concept of prefigurative change sheds important light on the nature of the tools that Mills' proposes to reclaim from masters to advance transformative change. Prefigurative approaches beg two significant questions about the transformative potential of Mills' subversive contract. The first is about the extent to which the retention of an ideal conception of justice necessarily restricts the local determination of action and constrains activism by keeping it within moral boundaries that are defined by the state. The second is about the extent to which the rights guaranteed by states can be used prefiguratively in direct action struggles against injustice. Does prefiguration rule out both of the tools Mills defends or can these be reconfigured to enable their deployment? Carole Pateman's critique of Mills' contract theory indicates that prefiguration rules against the minimalist ideal theory that Mills recommends but also suggests that struggles for rights can be construed prefiguratively. To the extent that activists are able to articulate their demands and able engage in direct actions, they are also free to appropriate tools from masters to advance radical change.

3   Contract and Free Agreement

Carole Pateman's critique of Mills develops two interrelated lines of argument: first, she rejects contract as a potential tool for recuperation from the master and second, she recommends a concept of 'free agreement' as an alternative to ideal justice (Pateman & Mills 2008: 15). The gist of her critique is that Mills' 'anti-contractarian contractarianism' reinvents the state. In contrast, 'free agreement' can provide a route to its re-imagination. To explain the difference, I set Pateman's critique of Mills alongside Michael Bakunin's anarchist critique of Rousseau's social contract and then turn to Martin Buber's anti-

contractarian, anti-state critique of Rousseau to recover the notion of free agreement from the story of the contract as the condition that contract suppresses.

Like Mills, Pateman depicts contract theory as an integral part of the state's conceptualisation. She argues that the contract, advanced during a tumultuous period of European state formation, was deployed to justify the 'specific forms of political order' (Pateman & Mills 2008: 20). Ultimately smoothing the passage from absolutism to liberalism and republicanism, contract cemented constitutional protections for private property ownership, political liberties and rights and, for Pateman, the systems of structural inequality that these regimes regulate and protect. Contract is 'about the creation of the modern state and structures of power, including sexual and racial power' (ibid.). The generic order it defends, which extends beyond the particular constitutional settlements that contract theorists variously recommended, is one of domination.

Pateman's fundamental objection to contract is that it requires individuals in the modern state 'to give up their right of self-government' (ibid.: 15). Rousseau 'was well aware' of this. Taking up the story of contact with Rousseau's *Social Contract* (at the point Mills leaves it) she argues that contract theory introduces a counterfactual condition, which denies the material reality that 'humans create their own social and political structures and institutions' (ibid.: 14). For Pateman, this counterfactual plays a primary role in legitimising patterns of actual domination in modern states by sustaining an idea of consent that is deeply conservative.

Pateman's critique has a strong anarchist flavour. Exposing the ideological role that contract played in legitimising inequalities in the state was a central concern of nineteenth-century anarchists and Rousseau was a particular target of their critiques. For Bakunin, Rousseau's error was to mis-describe the processes that explained the imposition of the contract of domination. He concluded that Rousseau had advanced a brilliant critique of tyranny and slavery through his analysis of Locke but that his alternative construction of the social contract proceeded from the faulty and inconceivable assumption of 'primitive men enjoying absolute liberty only in isolation' (Bakunin 1972 [1895]: 175f.). In the *Origin on the Discourse of Inequality*, Rousseau narrated a novel story that described insecurity in physical and psychological terms. Yet in telling it, Bakunin argued, Rousseau recycled the contractarian fallacy that men are 'antisocial by nature' and 'destroy each other's freedom' when 'forced to associate' (ibid.). Having misconstrued politics as a field demanding a

solution to the problem of mutual destruction, Rousseau had mistakenly argued that natural beings had to 'conclude a contract, formal or tacit, whereby they surrender some of their freedom to assure the rest' (ibid.).

Bakunin acknowledged that contract was only one of several theoretical devices available to advocates of state organisation and he classified it as particular expression of the principle of domination. Domination has its roots in what Bakunin called 'political theology'. In common with other theories of government, the contract rested on a pervasive belief that humans were imperfect, corrupt beings who required discipline and external guidance to straighten out their crookedness and bring them to perfection. Contract theorists were typically political liberals, individualists and Kantians. Yet, their idea of government broadly dovetailed with the conceptions of the conservatives who considered the state 'the work of God' and the metaphysicians – Hegelians – who founded the state on a 'more or less mystical realisation of objective morality' (ibid.: 174). Having placed human fallibility and frailty at the heart of politics, Bakunin complained that all these political theologians passed off their preferred systems of government as ideal, perfect and beyond contention.

Bakunin's understanding of political theology helps explain Pateman's opposition to Mills' anti-contractarian contract. The divergence between Pateman and Mills is not about the fairness of the power relationships contract cements but about the intelligibility of theorising the state's origins, which contract necessarily involves. Pateman takes issue with Mills' view that the moral equality of persons assumed by contractual agreement enables us to reflect on justice. She does not do so because she disputes the commitment to equality but because she considers that contract inevitably skews it.

Pressed by Mills, Pateman acknowledges that contract can be construed in two ways. A contract may take the form of either 'contractarianism' or of 'contractualism'. Contractarianism refers to the bargains struck by individuals deemed to possess property in themselves, who contract to sell their labour and/or acquire services, goods and chattels. Contractualism, by contrast, promotes the moral philosophy of personhood and the duty not to treat others as mere means. Locke advanced a form of contractarianism. Mills, on the contrary, places himself in the tradition of Kant and Rawls and proposes contractualism. Yet, Pateman considers both as forms of domination. Contractarianism is particularly pernicious because it embeds economic inequalities in the state: rich and poor are said to agree to rules that maintain the principles of equality that underpin class differences. Contractualism operates differently, but Pateman maintains that it is still tainted by the power relations that states regulate and which contract theory normalises. Unable to see the relationships of

domination that structured eighteenth-century societies, Kant had advocated moral equality and endorsed a social contact that subordinated workers to owners, women to men and non-white peoples to whites. Moreover, Kantianism cannot, 'be washed clean' (Pateman & Mills 2008: 21) precisely because the 'actual "contract" that has established the present social order' is not 'so radically different from the sanitized version presupposed' by the theory, as Mills contends (ibid.: 23). Similarly, Rawls' contractors are anything but abstract trans-historical individuals who can help us model ideal justice. They are persons with interests who perpetuate forms of domination managed by states. Pateman concludes:

> [c]ontract, in particular contracts about property in the person, is the major mechanism through which these unfree institutions are kept alive and presented as free institutions. Contemporary contract theory provides no help in either of its guises if we wish to create a more democratic and a more free society (ibid.: 20).

The alternative that Pateman recommends is free agreement. This conveys 'the meaning of a voluntary mutual undertaking', genuinely recognising that human beings create the socio-political realm (ibid.: 15). In anarchist political thought, free agreement describes the social relationships that the state attempts to control, namely the spontaneous initiatives of groups of individuals to meet a need or provide a service and to settle terms voluntarily on the basis of mutuality. On this account, the obstacle to free agreement is the enforcement of contractual obligations by the state, whether these regulate the sale of servants to masters or relationships between employers and labourers or prospective marriage partners (Kropotkin, 1985 [1906]: Ch. 11).

To theorise free agreement anarchists returned to the story of contract and used it to reveal what the story of contract consciously denies and deliberately represses. Bakunin set out its main lines of the argument when he argued that the contract squeezed out all other forms of social and political relation. The contract 'becomes the foundation of society, or rather of the State, for we must point out that in this theory there is no place for society; only the State exists, or rather society is completely absorbed by the State' (Bakunin, 1972 [1895]: 176).

Writing in the twentieth century, Martin Buber, a sympathetic critic of nineteenth century anarchism, developed this insight by offering yet another critique of contract. He explained the pervasiveness of statism in political theory with reference to the 'defective differentiation between the social and the political principles' (1957: 161). Tracing the roots of the confusion to classical thought, he explored the implications in a genealogy that tracked the absorption of the social principle in the concept of 'the political'. For Buber, the social

principle sustains community and the latter tends towards the centralisation of power. He understood the incorporation of the social in the political as a process that resulted in the excision of the rights vested in independent associations through the state's constitution. This process was eased, Buber felt, by the wrongful claim that the state represented society.

Buber considered contract theory to be a powerful part of this pretence. Turning to Hobbes, he observed that the civil society associations that embody the social principle are painted out of existence in the anarchy that had Hobbes imagined. Individuals possess rights, but there are no social rights because individuals in the state of nature are said to lack the capacity to co-operate. Moreover, the natural rights they possess are nearly all surrendered to the state as a condition of its order. Buber concluded that

> [i]n Hobbes' view civil society is entirely identical with the State'. Hobbes was aware of the 'social principle' and the 'free contracts between individuals for the recognition and preservation of the rights of ownership'. Yet the thrust of Hobbes's argument is that the state's perfection entails the annihilation of the 'last vestige of society (ibid.: 168).

Taking the analysis forward to the eighteenth century, Buber argued that Rousseau had reworked Hobbes's thesis, replacing Leviathan with the general will: the invention the general will thoroughly confused 'the social and political principles'. Although Rousseau had been perfectly able to 'distinguish between the social contract and the establishment of the State in a legal manner' he had called for free associations to be expunged from the body of the state. In the *Social Contract*, Buber contends, he had prohibited the existence of

> any society which is constituted of various large and small associations; that is to say, a society with a truly social structure, in which the diversified spontaneous contacts of individuals for common purposes of co-operation and co-existence, i.e. the vital essence of society are represented (ibid.: 169).

The significance of Buber's account is not that it presents a definitive sociology of either society or the state. He tells a story about the state, but his story centres on the appropriation of power not its establishment. This shift illuminates what is at stake in the substitution of free agreement for contract as a principle of association. In Kukathas's terms, free agreement implies that the state's interests do not 'map closely onto the interests of the groups and individuals that fall under its authority' (2014: 357). Rather, the state subordinates all other associations and regulates them according to the terms of the one-off choices that rational, morally equal individuals purportedly make. Free agreements can be concluded in the body of the state, but not through the legal mechanisms that contact establishes within it. Civil society associations are, then, able to contest the arrangements or decisions that issue from the state but not the principles on which the decisions are based. The substitution of free

agreement for contract means leaving the terms on which agreements are made and remade to groups and individuals organised in infinitely plural bodies.

In recovering the 'social' from political theory, Buber also recovers an understanding of rights that contract theory smothers and distorts. He defines them as powers that regulate relations within and between self-governing associations. They do not have their origins either in the state of nature or in contract. Located in the social sphere, rights are simply part of a matrix of regulatory tools that social groups use to structure their relations. Where free agreement prevails, the legal enforcement of contracts is relinquished to the 'societies, groups, circles, unions, co-operative bodies, and communities varying very widely in type, form, scope, and dynamics' that comprise civil society (Buber, 1957: 173). Rights function in the same way within and between local communities. In 'the social-federative sphere' Buber argues, 'Society (with a capital S)' realises its object. He continues:

> Just as Society keeps individuals together in their way of life by force of habit and custom and holds them close to one another and, by public opinion, in the sense of continuity, keeps them together in their way of thinking, so it influences the contact and the mutual relations between the societies (ibid.).

The power imbalances, dysfunctions and transgressions that states and societies confront are similar. As Buber comments, 'Society cannot ... quell the conflicts between different groups; it is powerless to unite divergent and clashing groups' (ibid.). The grounds on which contract and free agreement are secured and evaluated are thus also divergent. Contract refers back to the original terms of the agreement, assuming those terms to be fair and enforces compliance, treating it as consent. Free agreement has no such authority and it assumes social conflict as well as the possibility of injustice as a result of interest, custom and tradition. Like contract free agreement, it thus recognises the limits of consent and the possibility of domination. In what sense, then, can it help re-imagine the state?

Pateman's argument that free agreement replace contract has two significant implications. The first is that groups and individuals must articulate ideal principles themselves and not just accept them as part and parcel of a contractual arrangement. The moral equality of persons is one possible standard that the disadvantaged can use to combat actual injustice. Yet, free agreement gives individuals and social groups latitude to formulate alternative principles to address problems of domination. Decoupling the ideal of justice from any fixed contractual principle ensures that existing arrangements are always open to renegotiation. Even if habit and custom in fact militate against this, no contractual obligation exists to pre-empt or hinder the possibility free agreement. Second, the reframing of rights reinforces Mill's view that the

master's tools can be used to destroy the master's house, while significantly altering the grounds of the argument. To assert a right is not, as Mills suggests, to use a master's tool. It is to argue that the right was never the master's to take in the first place.

4   Prefiguration, free agreement and rights

Prefiguration is incompatible with Mills' subversive contractualism for two reasons. First, it introduces a universal principle of justice and second, it perpetuates the principle of domination vested in contract. Mills argues that the contract treats humans as creators of socio-political realm and that the liberal commitment to moral equality provides a yardstick to assess the injustices of actual societies in ways that facilitate redress. Advocates of prefigurative politics disagree about the moral grounding because contract wrongly obliges local agents to adopt the universals that 'masters' use to settle disputes, rather than allow the dominated to explore problems of justice and injustice as they perceive or experience them. Yet, prefigurative politics does discount the possibility of ideal theory. In a warm assessment of P-J Proudhon, the first advocate of anarchy, Peter Kropotkin argued that he had correctly placed ideal theory at the heart of anarchist justice. According to this view, transformative change is driven by the perception of the gaps between actual injustice and its ideal. As injustices are addressed, the conception of the ideal also changes. Proudhon

> ascribed great importance to idealization, to the ideals that in certain periods acquire ascendancy over the petty daily cares, when the discrepancy between the law, understood as the highest expression of justice, and actual life as the power of legislation, acquires the proportions of a glaring, unbearable contradiction (Kropotkin, 1968 [1924]: 272).

More recently, Benjamin Franks has also argued that prefigurative politics is compatible with the 'use of a moral framework to assess anarchist methods' (2006: 97).

Direct action, on this view, commits anarchists to work outside state institutions to bring about change and to adopt methods that do not reinforce the state's claims to legitimacy. How to do this is a matter of judgment. Analysing shifts in the politics of Occupy Wall Street, Gordon argues that the participants blunted the critique of corporate capitalism even as they adopted 'quintessentially anarchistic modes of organizing' which were 'non-hierarchical, decentralized, consensus-based, and mindful of the need to overcome enactments of domination among the participants' (n.d.: 49). The protestors' error, he suggests, was to appeal to the will of the sovereign people to call for social justice and policy change at elite level. By issuing this call they mistakenly legitimised the proxy power government claims.

The potency of Gordon's view depends on the ways that transformative claims are made and the content they are given. Demanding the right to free speech can be prefigurative if it is made through direct action. The direct actions by the feminist performance group Speaking of IMELDA, which call on political elites to appeal the 8th Amendment of the Irish Constitution (prohibiting abortion in Ireland) are similarly prefigurative. Their performances explicitly challenge the legitimacy of government to determine birth rights on behalf of women. The Aboriginal Embassy protest in Canberra is another example of a direct action that reclaims a tool from 'masters' to advance radical political change. Established in 1972 to assert the land rights of Indigenous people against the claims of the settler government, the Embassy consists of a set of tents and signs outside the Old Parliament Building in Canberra. The establishment and persistence of the Tent Embassy is designed to highlight the illegitimacy of the settler government. As Paul Muldoon and Andrew Schaap explain, '[b]y speaking from a position outside the constitution, the Aboriginal Embassy makes present the anomaly of Indigenous people within the Australian polity'.

> The demonstrators act, on the one hand, as Australian citizens who are made alien in their own land by the continuing process of colonial dispossession with which the constitutional order is complicit. On the other hand, they act as members of a pan-Aboriginal sovereign nation, whose recognition the constitutional order requires to become legitimate. In doing so, the Aboriginal Embassy provokes the decolonization of the Australian state and society (2016: 219f.).

Prefiguration, in short, does not necessarily prohibit use of master's tools, only the rights of masters to grant them as permissions. Rights are important tools available to activists involved in prefigurative struggles. Many anarchists, including Franks and Newman, argue that individuals also have rights as members of groups in both the social and the political realm, society and the state. To this extent, prefiguration gives individuals latitude to reclaim what masters have misappropriated from the social realm. It allows them to assert rights individually and in groups, whether or not those rights actually exist in law, as long as the right is asserted through direct actions, that is, in ways that avoid reinforcing the master's permissive power.

5 Conclusion: Re-imagining the state

I have argued here that Mills' assessment of Rousseau and the contract of domination indicates how justice might be articulated by using free agreement as a prefigurative principle. In drawing attention to Rousseau's critique of Locke, Mills shows that contractual agreements, made on the basis of a presumed moral equality, take the social, cultural and economic inequalities that exist in the social realm and cement them in the political in ways

that perpetuate patterns of domination. Free agreement recognises the relationship between nonideal and ideal justice but jettisons the liberal principles and values, which Mills recommends to redress actual injustices. Recognising the inequalities that the liberal commitment to moral equality conceals, it recommends open negotiation to realise justice and thus articulates a principle of non-domination that does not compromise prefigurative commitments to the determination of justice by local actors.

Seen through the lens of contract and domination, the state is constructed as a sociological reality which cannot be re-imagined but which can be anarchised through prefigurative action. This involves attacking law without dispensing with rules and redeveloping the principles of political association collaboratively and co-operatively, rather than abandoning them, as the convention construction of 'anarchy' disingenuously suggests. Indeed, it might be argued that because anarchists reject law as it is conventionally understood, they are especially obliged to pay attention to the showing how 'societal processes in which one can be held responsible for his or her acts' can be made 'known ... before hand and be developed fairly' (Holterman, 1993: 350). Similarly, anarchising requires that disputes and conflicts are resolved through negotiation not *diktat* and that justice is not determined in advance of the negotiations. Challenging the state is a conceptual and creative process, which involves both rethinking political theory and reinventing practice. According to the anthropologist James Scott, the uplands in South East Asia, home to approximately one hundred million marginal people, have not yet been colonised by the state (2009: ix). It is a huge geographical area and lot of people and the inhabitants practice a range of sophisticated arts to avoid being governed. For most of the rest of us, the state is our reality and there is no escape from it. We have to adopt different practices. One thing we can do is understand that the tools that masters call their own are in fact ours and that we can use them to challenge domination.

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