French Sexual Politics from Human Rights to the
Anthropological Function of the Law

Camille Robcis

Abstract Since the 1980s, amid debates around assisted reproductive technologies, nontraditional families, same-sex parenting, filiation, and transsexuality, French judges and legislators have referred to the “anthropological” or “symbolic” function of the law. This idea was originally developed by a group of legal scholars, influenced by structuralist anthropology and psychoanalysis, who posited the primary purpose of the law as the proper integration of individuals into a “symbolic order” defined by a normative construction of heterosexuality. Civil law, they argued, upheld the social world and guaranteed psychic cohesion. This essay offers a historical hypothesis to account for why this rhetoric emerged in the context of these discussions around sexual politics. It argues that legal scholars began to invoke the “anthropological function of the law” in response to individuals who relied on the discourse of human rights to make a series of demands in the fields of gender, sexuality, and reproduction.

French political rationalism rests on the certainty that the general interest, inasmuch as it embodies the “truth” of society, cannot be deduced from particular interests.

Pierre Rosanvallon, Le sacre du citoyen

Over the past three decades French judges and legislators have been asked, repeatedly, to address difficult questions pertaining to the political and social organization of gender, sexuality, and kinship. In particular, lawmakers have had to contend with the emergence and popularization of assisted reproductive technologies. While the legalization of contraception in 1967 and of abortion in 1975 brought to light the disjunction between sexuality and reproduction, new procedures such as surrogacy, sperm donation, and in vitro fertilization prompted an additional set of legal and ethical dilemmas. Not only have these technological inventions widened the divide between sexuality and reproduction but they have also challenged the long-standing definitions of paternity, maternity, and filiation established by the Civil Code.1

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1 In French civil law, “filiation” does not simply refer to the biological link between parents and child. What is designated “legitimate filiation” requires a legal act of “recognition” from the parents, who agree to provide their family surname and a portion of their inheritance. The 1804 Civil Code defined maternity as the act of giving birth (mater semper certa est), while paternity was
Moreover, the steady decline in marriage rates, the banalization of divorce and of single-parent households, and the growing acceptance of homosexuality have pushed the courts and the legislature to look beyond the heterosexual nuclear family to define and conceptualize reproduction.²

France, of course, is not the only country where public officials have had to take a stance on controversial issues such as medically assisted reproduction, divorce, bioethics, same-sex marriage, and transsexuality. However, as lawmakers in other countries turned to religion, tradition, or morality to oppose these procedures or to the language of equal rights to support them, various French politicians began referring to a new concept to think through these new questions of sexual politics: the “anthropological function of the law.” The law, they insisted, did not simply exist to satisfy individual demands or to confer scattered “rights” to individuals. Rather, its primary purpose was to ensure the proper integration of individuals into the social world and to guarantee their psychic well-being. The law upheld the “symbolic order.”

The Anthropological Function of the Law

Although none of the politicians who invoked this “anthropological function of the law” ever clearly defined it, the term appeared to be derived from the idiosyncratic lexicon of Pierre Legendre, a legal scholar trained in Lacanian psychoanalysis, whose work draws on canon law, Roman law, structuralist anthropology, and psychoanalysis. According to Legendre, the Law with a capital L does not pertain exclusively to state institutions or to legislation. Rather, it is the fundamental principle underlying social exchange and regulating the construction of human subjectivity. To use one of the terms most recurrent in this field of “legal anthropology,” the Law’s responsibility is to institute subjects. As another contemporary legal scholar, Alain Supiot, explains: “The primary meaning of instituting the human being is setting it on its feet, standing it upright, by inscribing it within a community of sense by which it is linked to other human beings. Instituting the human being means enabling it to occupy its place within humanity.”³

In Legendre’s words, the anthropological function of the law consists in tying together “the biological, the social, and the unconscious. To institute life is nothing other than to gain normative effects from this process through which are played the great genealogical stakes, that is to say, the question of the bond [la problématique du lien] in humanity.”

Legendre’s conceptualization of the Law is largely inspired by the writings of Jacques Lacan, who himself borrowed the notion from Claude Lévi-Strauss’s Elementary Structures of Kinship and reworked it to apply to the psychoanalytic field. In Lévi-Strauss’s work, the Law essentially functions as a synonym for the incest prohibition, the universal “rule of rules” that forces men to marry outside their clan, to exchange their women, and ultimately, to establish social relations with other groups and families. Since the Law is premised on exogamy, sexual difference is, in Lévi-Strauss’s system of exchange, the condition of culture, of symbolic thought, of sociality, and, as Lévi-Strauss hints in the last pages the Elementary Structures, of language. As Lacan became increasingly interested in structural linguistics during the 1950s in his attempt to rescue Freud’s thought from what he perceived as the biological and humanistic impulses of ego psychology, he returned to Lévi-Strauss’s concept of the law, made it a proper noun, and tied it to the Oedipus complex. As Lacan wrote in 1953:

The primordial Law is therefore the Law, which, in regulating marriage ties, superimposes the reign of culture over the reign of nature, the latter being subject to the law of mating. The prohibition of incest is merely the subjective pivot of that Law. . . . This law, then, reveals itself clearly enough as identical to a language order. For without names for kinship relations, no power can institute the order of preferences and taboos that knot and braid the thread of lineage through the generations.

This structural equivalence between the law, the symbolic, kinship, the social, and sexual difference informs much of Legendre’s theories, as well as those of other contemporary legal scholars interested in this new field of “dogmatic anthropology.” One implication of this logical set, according to Legendre and many of these thinkers, is that any legal changes affecting gender, sexuality, and the family would also necessarily affect the social and the psyche, usually in noxious

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ways. As this discourse of legal anthropology was filtered into the legal and political worlds throughout the 1980s and 1990s, one of the arguments that began to circulate in the legislative debates around artificial insemination, same-sex parenting, and surrogacy was that, to prevent the demise of the symbolic that would bring about a generalized state of social chaos and psychic distress, French elected officials needed to defend the Law, or rather its “anthropological function.” Ultimately, this meant that they needed to oppose any legislative measures that would affect the traditional confines of the heterosexual reproductive family.

Thus, in the parliamentary discussions preceding the 1994 “bioethics laws” that sought to regulate assisted reproductive technologies, Christine Boutin argued against the legalization of anonymous sperm donations on the basis that the “eviction of sexuality and anonymity would lead to a series of contradictions in filiation law and to a destructuring of kinship relations [une déstructuration du lien de parenté].” Artificial insemination, Boutin insisted, would not only affect “our way of reproducing, but our way of thinking [notre façon de penser].” Others suggested that children conceived by sperm donors, delivered by surrogate mothers, or raised by lesbians or single mothers were more likely to be psychotic because they would be missing the Name-of-the-Father.

The discourse warning against the dangers of producing “symbolically modified children” gained momentum in the late 1990s as the French government debated the PACS, the Civil Pact of Solidarity, which allocated domestic partnership benefits to unmarried heterosexual and homosexual couples alike. Similarly, in the legislative sessions leading

7 Most of the legal scholars who have written about the anthropological function of the law have not been translated into English. Some of Legendre’s writings, however, are available in Peter Goodrich’s anthology, Law and the Unconscious: A Legendre Reader (New York, 1997); and Supiot’s Homo Juridicus was recently translated by Verso. For an overview of these legal debates, see the introduction to Marcela Iacub, Le crime était presque sexuel et autres essais de casuistique juridique (Paris, 2002); Olivier Cayla and Yan Thomas, Du droit de ne pas naître (Paris, 2002); Gilles Lhuiller, “Les jurists sont-ils des clercs? Sur la dimension anthropologique du droit,” Esprit, no. 289 (2002): 183–95; and Denys de Béchillon, “Porter atteinte aux catégories anthropologiques fondamentales?” Revue trimestrielle de droit civil, Jan.–Mar. 2002, 47–69. See also the interviews of Alain Supiot, “La fonction anthropologique du droit,” Esprit, no. 272 (2001): 151–73; and of Legendre, “Ce que nous appelons le droit,” Le débat, no. 74 (1993): 107–22.

8 Christine Boutin, Assemblée Nationale, Nov. 19, 1992, 5746. The case of Boutin is interesting, since she is one of the representatives most vocal about her Catholicism. Yet she never invoked religion or theology to oppose reproductive technologies, only this “anthropological function of the law.”

9 “Gare aux enfants symboliquement modifiés” was the title of an article published in Le monde des débats in Mar. 2000 by the psychoanalyst Jean-Pierre Winter. For an analysis of how these debates around kinship played out with the PACS, see Eric Fassin, “Same Sex, Different Politics: ‘Gay Marriage’ Debates in France and the United States,” Public Culture 13 (2001): 215–32; and the collection edited by Daniel Borrillo and Eric Fassin, Au-delà du PACS: l’expertise familiale à l’ipérouse de l’homosexualité (Paris, 2001). For a study on how the PACS debates fit in the historical context of French natality, see Robert A. Nye, “The Pacte Civil de Solidarité and the History of Sexuality,”
up to the 2004 patronymic reform that ended the centuries-old mandate requiring all children to carry the name of their father, deputes opposed to the bill insisted on the importance of the father’s name as a social and psychic support for the child. In the words of the representative Marie-Thérèse Boisseau, what was important was “the practical juridical function of the name as a marker of paternity, as well as its essential symbolic function.” Citing the work of Françoise Dekeuwer-Défossez, a family law professor and an important proponent of the anthropological function of the law, Boisseau reminded the Assembly that “the transmission of the paternal name allows us to socially balance kinship ties.”10 In his analysis of this same law, the psychoanalyst Michel Schneider contended that the fundamental question was not one of equality between men and women but one of the “transmission of the status of subject.” By refusing the symbolic position of the Name-of-the-Father, parents would confine their children to the overwhelming and all-encompassing realm of the maternal, to the Real and the Imaginary, a space of nondistinction and of incest. “What is the name?” Schneider asked in a recent book, “This tiny thing transmitted by the father to prevent the mother from becoming everything [Ce presque rien que transmet le père pour que la mère ne soit pas tout].”11

Within the logic of these arguments, the battles against these particular legal reforms centered on sexuality and reproduction were suddenly portrayed as battles for the preservation of the law in its very essence—or more specifically, for its anthropological function, for the social and the psyche at once. Catherine Labrusse-Riou, a legal scholar who has written extensively on the symbolic function of the law, recounted that her interest in legal theory arose, significantly, in the context of her research on medically assisted procreation: “I realized very quickly that the bioethical affected the law in its entirety, in its most fundamental notions, at least those of civil law.”12 Similarly, Irène Théry, a sociologist who was hired by the government to evaluate the PACS in 1997, condemned it precisely for what she perceived as this law’s “desymbolizing passion.” As she put it:

The law is not a simple management or policing tool [un simple outil de gestion ou de police]. It also has, maybe primarily, an instituting function, in the sense that it contributes to setting up, in the language of a common law, a certain number of fundamental anthropologi-

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12 Catherine Labrusse-Riou, Écrits de bioéthique (Paris, 2007), 424.
For Legendre, who also intervened in the PACS debates, the idea of giving same-sex couples domestic partnership rights was symptomatic of a deeper crisis of the law, a crisis of meaning and of authority. As he suggested in an interview with *Le monde*: “The little PACS episode is indicative of how the state relinquishes its function as the guarantor of reason. . . . To institute homosexuality at the level of the family is to put the democratic principle at the service of fantasy. This is fatal given that the law, founded on the genealogical principle, gives way to a hedonistic logic descended from Nazism.” He continued, “[the state] reproduces an instituted subject by guaranteeing the universal principle of noncontradiction: a man is not a woman, a woman is not a man. Filiation categories are constructed as such. The anthropological function of the state is to found reason, thus to transmit the principle of noncontradiction, and hence to civilize fantasy.”

This essay forms part of a larger project in which I trace the intellectual and political genealogy of structuralist concepts in French family law. In particular, I am interested in how legislators and social scientists came to endorse this vision of a universal and transhistorical “law” of kinship premised on sexual difference and at the root of all social and psychic formations. Ultimately, my aim is to understand how they translated these extremely abstract and difficult concepts of anthropology and psychoanalysis into concrete legal measures and policy decisions. If this theory of kinship found its intellectual justification in a particular reading of Lévi-Strauss and Lacan, it also drew on a longer tradition of French sociology, which from Jean-Jacques Rousseau, Émile Durkheim, and Marcel Mauss on insisted on the specificity of “the social” and on the importance of heterosexual exchange for social integration. Moreover, this positioning of the family as the enactor of universality and sociality coincided in surprising ways with the structural positioning of the family in French civil law and public policy. Indeed, from the end of the nineteenth century, as fears of “depopulation” began

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to agitate social reformers, to the 1960s, French familialists lobbied steadily (often with the help of social scientists convened as “experts”) to convince public officials that the family was the best unit to organize solidarity and build political consensus, the most universal and most abstractable mode of social representation, the purest expression of the “general will.” I suggest, in other words, that the family was the condition of sociality both in the structuralist and in the republican social contracts.

My intention in this article, however, is not so much to engage further with the arguments put forward by Legendre, Théry, or Labrusse-Riou, or to explore how they might relate to this double articulation of the social contract, but to ask a more precise and specifically historical question: Why did this rhetoric of the anthropological function of the law emerge in the context of these discussions around bioethics, nontraditional families, and filiation law of the 1980s and 1990s? How did gender, sexuality, and reproduction become the privileged sites for rethinking legal theory, for reasserting a particular kind of social and psychic normativity, and for ultimately anchoring a new \textit{état de droit} in France? To answer these questions, I propose to focus on two case studies in which the language of legal anthropology was deployed particularly forcefully: the work of a committee founded by François Mitterrand to study the new bioethical questions raised by reproductive technologies, and the challenges posed by transsexuality to French civil law. My aim is to show how, in both instances, lawyers, politicians, and activists began to employ a discourse of individual rights—or \textit{droits humains} as the French referred to them—in the hopes of acquiring certain freedoms. I argue that the rhetoric of the anthropological function of the law was developed \textit{in reaction} to this discourse of and demand for individual rights. By referencing the symbolic dimension

of the law, legal anthropologists contended that gender, sexuality, and reproduction did not pertain to particular human rights or to the private sphere of the individual but that they constituted the transhistorical and universal foundations of the public, the social, and the psychic. Ultimately, I want to suggest that these French theorists and politicians reframed human rights not as the prerogative of every person to live free of discrimination but as the “right” of all human beings to be integrated into a “symbolic order” defined by a normative construction of heterosexuality.

**Assisted Reproductive Technology and the Bioethics Debates**

On February 24, 1982, the first French “test tube baby,” Amandine, was born in a maternity clinic outside Paris. By that time “sperm banks” and fertility clinics were already operational in many French cities. In 1983 it was estimated that seven thousand children had been born by artificial insemination in the previous ten years. The legal status of these children, particularly their filiation, remained unaccounted for. In the summer of 1983, the first official surrogacy center had opened its doors to the public, despite the fact that the legality of surrogacy was still under dispute. The press followed each of these developments with acute interest. It became particularly captivated by the story of Sacha Geller, a doctor who had developed an ingenious plan to circumvent the various legal and ethical questions raised by surrogacy, specifically in terms of these children’s filiation. Geller suggested that surrogate mothers be paid the minimum wage during their pregnancies. Moreover, he encouraged surrogates to give birth anonymously, relying on a particular clause of the Civil Code known as the accouchement sous X. Thus, if an infertile couple requested a surrogate, Geller would impregnate the surrogate with the sperm of the intended father. The child would be “born under x” with no official mother but would be recognized by the father at birth. Eventually, his wife would also be able to adopt the child, so that in legal terms, and in perfect accord with French filiation laws, the baby would have one father and one mother only.17

These new reproductive technologies, however, hardly generated unanimous enthusiasm. Many compared surrogacy to slavery. Others worried about giving individuals who would otherwise be unable to repro-

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17 For more on Geller and this early history of medically assisted procreation in France, see Jacobs, L’empire du ventre; Dominique Mehl, Naître: La controverse bioéthique (Paris, 1999); and Dominique Memmi, Les gardiens du corps: Dix ans de magistrature bioéthique (Paris, 1996). For a history and legal analysis of the accouchement sous X, see Cécile Ensellem, Naître sans mère? Accouchement sous X et filiation (Rennes, 2004).
duce (single women, homosexual couples, postmenopausal women) access to medically assisted procreation. For these skeptics, the legislature needed to impose limits and restrictions; it needed to outlaw certain procedures and to reserve others exclusively for married couples who had been diagnosed with infertility. In 1983, to reflect on the many legal and ethical questions raised by medically assisted procreation, President Mitterrand founded a national ethics committee, the Comité Consultatif National d’Ethique pour les Sciences de la Vie et de la Santé (CCNE). At the president’s request, this advisory body composed of prominent scientists, social scientists, legal experts, philosophers, theologians, and public health officials organized a two-day colloquium titled “Genetics, Procreation, and the Law” in January 1985. This was one of the first instances in which legal scholars, in reference to the supposedly disastrous social and psychic effects of surrogacy, anonymous sperm donation, and frozen embryos, and in reaction also to Geller’s legal scheming, alluded to a particular anthropological function of French civil law. Since the CCNE had invited a number of public officials, the colloquium also provided a forum for these legal scholars to interact with lawmakers, many of whom would later refer to the symbolic function of the law in the parliamentary debates and procedures that followed.

Jean Carbonnier, the former dean of the Faculty of Law at the Sorbonne and one of the most important law professors in France, claimed in his public intervention that although French civil law gave a central role to the notion of personal “will” (volonté), the new modes of artificial reproduction rested on a “highly individualistic philosophy.”18 Carbonnier condemned the legal philosophy espoused by many advocates of assisted reproduction for whom the law appeared simply as a “cooperative of individual happinesses [une coopérative de bonheurs individuels].” The pursuit of happiness, however, was not “a properly legal notion in France, despite the fact that the term [was] inscribed in the U.S. Constitution.” Instead, Carbonnier suggested, what was really at the heart of French law—particularly that of family law—was the “collective interest.” “A more impalpable social interest is attached to filiation law: by linking children to their parents, this law contributes to the cohesion, vertical and horizontal, of the entire social body.”19 Along similar lines, Labrusse-Riou invoked the law’s symbolic function to argue against the possibility of allowing unmarried individuals to have access to artificial insemination:20

19 Ibid., 81.
20 Ibid., 39.
Single-parent artificial procreation would force the jurist to found filiation—which is paternal most of the time—on a purely genetic basis. This would not be opportune, especially at a time when we have tended to privilege, in artificial procreation particularly, that which has always been the fundamental basis of kinship and which cannot be entirely subsumed in the biological [ce qui a toujours été l’élément fondamental de la parenté et qui n’est pas entièrement résumé dans le biologique]. A father and a mother are more than just genitors.\textsuperscript{21}

Among the government representatives invited to the colloquium was Robert Badinter, who was, at the time, the minister of justice. While Badinter avoided taking a public stand on these questions of bioethics during the CCNE colloquium, he did so a few weeks later in a talk titled “Human Rights in the Face of the Progress in Medicine, Biology, and Biochemistry,” delivered at the Council of Europe on March 18, 1985. Given the hesitation concerning medically assisted procreation that many of the legal scholars and social scientists had expressed at the CCNE colloquium, Badinter’s speech appeared an unequivocal argument in favor of the liberalization of the new reproductive technologies. Indeed, for Badinter, medically assisted procreation for heterosexual married couples was relatively straightforward, in both ethical and legal terms. In such cases civil law would only need to be slightly adapted to permit one or both of the intended parents to adopt their child prior to the birth. A much more contentious issue, he argued, was the possibility of allowing single women to have children on their own, through an anonymous sperm donor, for instance. As he put it: “To give all human beings the freedom of using artificial procreation technologies is ultimately to expand the possibilities for the woman to engender. More to the point, it is underlining the fact that while a man needs a woman to procreate, the woman, herself, might no longer need a man!”\textsuperscript{22} According to Badinter, it was this fear that one day a woman might no longer need a man to have a baby (or, to use his terms, the fear of “un masculin déclinant et une liberté declinée au seul féminin”) that was really behind the opposition to artificial insemination.

A second argument often invoked to prevent nonmarried individuals from accessing reproductive technologies was that it was in the child’s best interest to have two parents. “To be sure,” Badinter replied,

for the child, two parents are most likely better than one. But what is the weight of this wise observation in our societies in which divorce

\textsuperscript{21} Ibid., 41.
is common, where a mother can choose to be single or to ignore everything about her partner, where we are not moved by the fate of children born out of a syphilitic woman marrying an alcoholic man. There is surely some paradox in invoking the child’s interest to forbid him from being born.23

Thus, Badinter continued, legislators needed to find answers, not in this fictive “right of a child not yet born” or in sexist fears about women taking over society but in “our philosophy of human rights,” the philosophy, he argued, underlying French law and “European civilization” more broadly.24

To link human rights to the question of reproduction, Badinter singled out two rights in particular, both of which, he reminded us, were solidly inscribed in the European Convention on Human Rights. The first, corresponding to Article 2, was the right to life. For Badinter, this formulation implied not only the right to live but also the right to give life and, consequently, the right to choose the means by which to do so.25 The second was Article 8, stipulating a right to intimité, which, in the English version of the convention, is translated as a “right to privacy.” Thus, Badinter continued, if the French state were to limit reproductive technologies to married couples, it would do so in violation of Article 8, since one’s marital status ultimately concerned one’s private life, and, in one’s private life, “every adult is an absolute master in our society. Our laws give him the right to be chaste or not, heterosexual or homosexual, to live alone or in a couple. And our laws guarantee the right for each one to not only lead the kind of private life one chooses but also to see the absolute respect of the intimacy of this private life.”26

Given this definition of privacy, which Badinter underscored was one of the cornerstones of French republicanism, banning single women from access to artificial insemination would not only block their roads to personal fulfillment or happiness (in his words, the voies de l’épanouissement). It was also an act of explicit discrimination and thus unacceptable in French law: “The right to give life cannot be denied to a woman who wants to have a child. We should thus not prohibit the means to do so. Unless we want to enter into a different type of society. And all discrimination in this regard, whether it has a theological, philosophical, or political foundation, can only be the source of human injustice.”27

The press reacted vigorously to Badinter’s declarations. The head of France’s most important family association, the Union Nationale

23 Ibid., 8.
24 Ibid., 6.
25 Ibid., 8.
27 Ibid., 39.
des Associations Familiales (UNAF), decried Badinter’s “savage liberalism.”

Marcel Gauchet, the editor of Le débat, invited Badinter to publish his speech a few months later, in a special edition of his journal titled “Law, Medicine, and Life.” Gauchet also asked five “experts” in questions of reproduction—a biologist, a theologian, a scientist, an anthropologist, and a sociologist—to respond to Badinter. As Gauchet stated in his introductory editorial, what was at stake in these debates was the “definition of individual rights, which is to say the political articulation between the living and the social.” Despite the differences in disciplines and methodologies among these five respondents, all converged on an essential point: the legal framework of human rights could not provide an adequate basis for thinking through the problems of reproduction, gender, and sexuality. Anthropology, or at least a particular version of structuralist anthropology, could.

This vision of legal anthropology in which the law held a double structural function for the social and the psyche found one of its most compelling theorizations in the response of Françoise Héritier, a student of Lévi-Strauss and one of the most important contemporary anthropologists in France. Héritier’s publications and public interventions, particularly during the “Genetics, Procreation, and Law” colloquium, were cited extensively throughout the bioethics debates. In her contribution to Le débat, Héritier contended that Badinter’s argument rested on a fundamental confusion between engendrement, the biological fact of reproduction, and filiation, the legal act through which paternity and maternity were inscribed into the social order. Speaking “as an anthropologist,” she explained that “there are no societies, to my knowledge, which have not distinguished the social roles of Pater and Mater that establish filiation from the physiological functions of genitor/genitrix, in other words, filiation from engendrement.” While engendrement could indeed be understood as a private choice, filiation was, by definition, public, since it was the legal translation of a norm previously defined by the community. And as a norm, filiation had always (i.e., in

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30 Héritier was Lévi-Strauss’s successor at the Collège de France, where she occupied the chair of Comparative Studies of African Societies from 1982 to 1999. During these years, she also directed the Laboratoire d’Anthropologie Sociale, founded by Lévi-Strauss in 1960 and attached to the Ecole des Hautes Etudes en Sciences Sociales. Héritier, one of the most influential “experts” on social questions, has served on numerous governmental committees, among which we can list the Conseil National du Sida, the Conseil Economique et Social, the Haut Conseil de la Population et de la Famille, and the Conseil de l’Association Française des Femmes. She has often commented on her role as an expert, as a scholar engaged with the “problèmes de la Cité.” See, e.g., her recent collection of interviews, Une pensée en mouvement (Paris, 2009).

all times and all cultures) linked back to a mother and a father. In other words, filiation was, by definition, *premised* on sexual difference:

Filiation is by definition a social link [*un lien social*], which society takes cognizance of [*prend acte*] to mark the inscription of a child into one or many groups. As we understand it [*Dans notre usage*], it is nondifferentiated [*indifférencié*] and bilateral, in the sense that it links in the same way the child, through the individuals incarnating the social roles of Pater and Mater, to the different lines that pass through ancestors of both sexes as they have been also designated through filiation.\(^{32}\)

As Héritier put it, “the social can never be reduced to the biological.”\(^{33}\) This by no means implied, however, that all biological configurations could or should be legally acceptable: “If filiation is cut from, or at least does not necessarily stem from engendering, it is nonetheless substantially linked to the idea of a bisexuated reproduction, which is to say that it necessarily refers to the paternal and maternal status as the supports of the affiliation to the group. The idea of the thing is more important than the reality [*L’idée de la chose prime sur la réalité*].”\(^{34}\) As this last statement suggests, the crux of the problem for Héritier was not of an empirical nature. From a purely biological standpoint, all kinds of kinship permutations were possible and imaginable, and indeed, Héritier cited the growing number of single-parent households in the 1980s as an example. The main issue, however, concerned the normative, the “idea of the thing,” which, for Héritier, was inevitably rooted in sexual difference. Thus, what differentiated a married couple unable to conceive and having to resort to medically assisted procreation from a single woman desiring to have a child on her own was that the former, by having committed to marriage, had also somehow committed to this normative imperative, to this “idea of the thing,” to what Héritier designated as the “arbitrary or artifice of the social”:

“It is evident to me that the crucial element to make this distinction is the previously expressed will of the partners inscribed in a matrimonial status [*l’élément fondamental qui sert de pierre de touche pour opérer ce partage est la volonté préalablement exprimée par les partenaires, inscrits dans un statut matrimonial*], that is to say, in the arbitrary or the artifice of the social.”\(^{35}\) From this claim we can deduce that the law is the mechanism responsible for institutionalizing this “arbitrary and artificial” nature of the social, a social made possible only through sexual difference, or

\(^{32}\) Ibid., 29.

\(^{33}\) Ibid.

\(^{34}\) Ibid.

\(^{35}\) Ibid.
more precisely here, through heterosexual marriage. Thus, according
to Héritier’s argument, unmarried women wanting to have children on
their own posed a problem, not at the level of nature or biology, but
at the level of culture. In other words, they were the ones imprisoned
in “biologism” for refusing to comply with the “arbitrary and artificial”
dimension of the social.

The exchange between Héritier and Badinter brought to light not
only two conflicting visions of kinship, but also two conflicting notions
of social organization and normativity. While Badinter based his argu-
ment on a definition of marriage as pertaining to “private life,” Héri-
tier’s response presented marriage and heterosexual kinship as the
condition of sociality. Far from belonging to “one’s private life,” mar-
riage and kinship constituted the very essence of the social: they were
the public. As such, privacy or human rights—which, Héritier sug-
gested, were for Badinter closer in spirit to “individual rights”—could
not possibly provide an adequate framework for legislating sexuality
and reproduction:

The individual who enjoys human rights is an anonymous, abstract,
asexual [asexué], nontemporal being: he is a pure bearer of rights,
him alone. However, in the act of engendering, one has to admit
that the abstract individual is at the same time active and passive:
the one who procreates and the one who is procreated [dans l’acte
d’engendrer, il faut bien admettre que l’individu abstrait est à la fois partie
prenante et partie prise: celui qui procrée et celui qui est procréé]. By this
simple observation, we are sent back to a fundamental philosophy:
it is impossible to think pure individuality, either intellectually or
socially. The individual can only be thought of in relation to the
Other, to others. Thinking the individual thus stumbles over the
relation, which immediately involves the very essence of the social
[La pensée de l’individu achoppe donc sur la relation, laquelle implique immé-
diatement l’essence même du social].

Although Héritier described Badinter’s invocation of human rights
as “generous,” she warned against the terrible consequences of con-
ducting social policy along these lines. On a psychic level, individuals
could not be “instituted”—or “integrated”—into the social. On a social
level, this would result in chaos, in a fragmented world in which “any-
thing goes” and “everyone marches to the beat of their own drum.”
As she concluded her essay:

Robert Badinter’s interpretation of human rights is certainly a vec-
tor of freedom, and it is profoundly generous, but it makes the indi-
vidual a self-enclosed monad, the unique reference for being in the

36 Ibid., 30.
37 Ibid., 31.
world. As such, it is contrary to the goal we should strive for, of altruism and solidarity. This is, without doubt, a utopian point of view, to the extent that it misunderstands or misconstrues the very notion of the social. However, the individual can never be thought alone: he exists only in relation [il n’existe qu’en relation]. There only needs to be a relation between two individuals for the social to exist. [Moreover, the social] is never the simple sum of the rights of each of its members but an arbitrary dimension constituted by rules, in which filiation (social) can never be reduced to the purely biological.38

The idea that the liberalization of medically assisted reproduction—or, more specifically, the legal recognition of nontraditional forms of kinship made possible by assisted reproduction—would be tantamount to the destruction of the social and to psychosis was one of the recurring themes in the other contributions to this issue of *Le débat*. All of the scholars asked to respond to Badinter insisted on the excessive “individualism” and “liberalism” of his legal approach, which they opposed to a more “anthropological” vision of the law, one that would ground the individual and the social at once. The biologist Antoine Danchin, once again positioning himself on the side of culture, argued that the main object of the law should be not biology but culture, since “it is impossible to speak of man while making an abstraction of his culture.”39 While Danchin acknowledged that the scientist in him was drawn to biological experimentation and possibilities, “as a man,” he explained, “what really counts is cultural kinship, not biological kinship.”40 Indeed, he continued:

What counts for the creation of a balanced, if not stable, social group is the individual feeling of an identity. This feeling is constructed throughout childhood, through the assimilation of sociocultural markers [repères] that allow each of us to make choices. The possibility of making choices is the very foundation of freedom. But nobody can choose without rules. In our societies, written law is a sort of concrete explanation of these rules. As such, the law allows each of us to have an identity and to belong to a defined social group.41

In an interesting passage echoing Héritier’s assertion that the “idea of the thing” was more important than the thing itself—in other words, that the normative trumped the empirical—Danchin suggested that “we must be capable of admitting the arbitrariness of our laws, and their provisional nature. But that does not in any way dispense us from

38 Ibid., 32.
40 Ibid.
41 Ibid., 21.
observing them.” Among these rules, arbitrary and yet inviolable, Danchin mentioned one in particular: “The first rule that a society should put forward is the preservation of diversity. . . . This would also mean, for man, the preservation of sexual difference.” It is this notion of the law rhetorically assimilated to the social and to sexual difference that Danchin opposed to Badinter’s “positivism,” which, he argued, overlooked fundamental anthropological transcendental:

It is as the result of a profound positivist illusion, which tends to confuse our desires with reality, by making us believe in a definitive and totally objectified form of knowledge, that we could choose to submit our ethics to scientific knowledge. It seems to me that a more healthy realism would show us how much our knowledge is tributary to one of our biological particularities, which is our capacity for language and for the formation of cultures.

Finally, Danchin concluded, Badinter’s legal perspective announced “the concretization of a dangerously destructive individualism that little by little makes the idea of the public good [bien public] disappear, to concentrate only on individual well-being [bien-être individuel].”

This opposition between individualism and sociality also underlay the contribution of Olivier de Dinechin, a theologian who turned not to religion but to anthropology to refute Badinter:

We must hence arrive at the question of filiation. To engender, to postulate a son, a daughter, mother and father, is a foundational human reality. Its juridical manifestation is only a surface formality. It has psychological, relational, social, cultural, and spiritual dimensions, which are the object of specialized approaches that prove its consistency. Like all great anthropological realities, however, it is enigmatic, that is to say, it carries aporias [porteuse d’aporie] that constantly raise questions about it.

Like Héritier and Danchin, Dinechin reproached Badinter for conceiving of the law as a simple “game of formalities,” for “proposing to displace ethical norms under the robe of a juridical extension [le déplacement de normes éthiques sous le vêtement d’une extension juridique],” for his “cultural relativism,” and for his “accentuated individualism [that] goes toward the logic of a certain liberal philosophy.” As he put it, “every person is, to be sure, an absolute, and a pole of inalienable

42 Ibid.
43 Ibid., 23.
44 Ibid., 21.
47 Ibid., 25.
48 Ibid., 26.
rights. However, these rights are not unlimited; they are measured by the commitment [engagement] that the person must take in relation to the other.”

As the responses by Héritier, Danchin, and Dinechin make clear, it was Badinter’s appeal to human rights that encouraged them to turn to anthropology to argue for a different understanding of “man” and the law, but also of society. Writing at the end of the 1980s, Labrusse-Riou emphasized the need for a new legal theory to account for the profound changes in the fields of gender, sexuality, and reproduction: “What is missing, dramatically, in our thought is the foundation of the limit. Human rights in their various manifestations cannot account for this. . . . What we will need are new juridical categories that we will have to elaborate in an attempt to regulate this power over life.” Unless jurists could elaborate these “new legal categories” to think through sexual politics, the law would remain purely “positivistic” in content:

Our current legislative and regulatory law is perceived as a mere technical tool of social and bureaucratic management [un simple outil technique de gestion sociale et bureaucratique]. It has lost its capacities of abstraction and interpretation. It is inflationist and casuistic, freed from all idea of permanence to adhere to the constantly changing immediate reality. It no longer thinks of itself as authorized to signify what is just from the point of view of the law, and it no longer offers active resistances. Its complexity defies all possibility of deriving meaning [sens]. Human rights require a secular arm, institutions and procedures that are clear enough, without which they are only a wordy ointment [une pommade verbeuse] of good intentions with no sanctions.

Here again, Labrusse-Riou assimilates human rights, legal positivism, social deregulation, and what she describes as the psychic malaise of the subject caught in the “excessive individualism of Western societies.” And, indeed, since these debates on bioethics began in the 1980s, Labrusse-Riou (along with Legendre, Supiot, and other legal theorists) has devoted much of her work to the creation of these “new legal categories” that would supersede the discourse of human rights. Although this new legal philosophy inspired by structural anthropology and psychoanalysis would not necessarily emanate from a position of consensus, it would ultimately provide one. As she explained in another article on bioethics, in a language reminiscent of mysticism:

49 Ibid.
51 Ibid., 65.
52 Ibid.
Even if the origins or the foundations of its legitimacy remain partly enigmatic, the principle of a normativity, articulated around values, implicit or not, and the requirement of a coherence among the elements composing the genealogic institution, are vital for individuals as for society. We know this is necessary from sources localizable by experience, knowledge, conviction, but not verifiable by experimental science. Their functions stem not only from the operative efficacy [l’efficacité opératoire], or even from a positive demonstration of their grounding. In today’s jargon, we speak of a symbolic order, a sort of normativity that is objective because it is exterior to the individual and yet protective of its person within a culture that cannot be completely relativistic.53

Transsexuality beyond the Privacy Principle

If the so-called bioethics debates can help us understand why legal theorists and social scientists would turn to this notion of anthropology in their attempt to counteract the discourse of human rights, the question remains why this new field of legal anthropology emerged in the 1980s. After all, Badinter was not the first to invoke human rights in relation to sexuality and reproduction. Throughout the 1960s and 1970s, feminist groups, and in particular the Mouvement de Libération des Femmes, insisted on a woman’s right to choose.54 Yet, in the writings of these legal thinkers, whether it be Legendre, Labrusse-Riou, Théry, or Héritier, neither abortion nor contraception appears to have had the same shattering effect on French law or the same apocalyptic social and psychic consequences. By the time reproductive technologies, same-sex parenting, and sex-reassignment surgery had become social realities, the context appeared to have changed. Why, then, did this retour du droit or retour au droit occur in the 1980s? To address this question, I would like to turn to the work of the legal scholar Denis Salas, whose 1994 book Subject of Flesh and Subject of Law provides an account of this shift. Just as bioethics served as a platform to rethink legal theory for scholars such as Labrusse-Riou, transsexuality offered Salas (who, unlike many of the legal scholars previously mentioned, is a magistrat with no particular specialty in family law) a case study to analyze the contemporary crisis

53 Catherine Labrusse-Riou, “Sciences de la vie et légitimité,” in Droits des personnes et de la famille: Mélanges à la mémoire de Danièle Huet-Weiller (Strasbourg, 1994), 284. Many of Labrusse-Riou’s texts on bioethics can be found in her anthology Ecrits de bioéthique. The introduction, by Muriel Fabre-Magnan, provides a good overview of Labrusse-Riou’s theoretical concerns.

54 See, e.g., Sylvie Chaperon, Les années Beaucor (1945–1970) (Paris, 2000); Mossez-Lavau, Lois de l’amour; and Françoise Picq. Libération des femmes: Les années-mouvement (Paris, 1993). In the first issue of the feminist journal Le torchon brûle, published in 1970, the Mouvement pour la Liberté de l’avortement et de la Contraception published a manifesto claiming that the organization would “no longer accept that women are forced to have children against their wishes. The point is not to legalize a social fact [un état de fait] but to obtain the recognition of our rights” (quoted in Claire Laubier, The Condition of Women in France, 1943 to the Present [London, 1990], 80).
of the “subject of law” (sujet de droit). “If we consider that filiation, sex, and genealogy constitute the very backbone of the subject,” Salas explained, with transsexuality, “the fracture is obvious.”

The same year as Salas’s book was published, Labrusse-Riou also reflected on the threat that transsexuality posed to the psychic and social orders. It was “fallacious,” she contended, to talk about “transsexual rights” modeled on human rights because gender and sexuality did not pertain to “private life.” Rather, because transsexuality involved sexual difference, it affected everyone: it had a direct social impact and public implications:

It is impossible, unless we wish to destroy all conjugal and genealogic institutions, to consider that transsexualism pertains to private life, when the civil status of others [l’état civil d’autrui] is directly affected. . . . It is evidently the very principle of sexual difference that is at stake here. Yet the very possibility of the alliance of the sexes presupposes this difference. Scramble the tracks and nobody knows who they are anymore [Brouillons les pistes et personne ne sait plus qui il est]. More dangerous even is the fate of transsexuals’ children who must bear, because of their parents’ change of status [change-ment d’état], a true permutation of their paternal filiation into maternal or vice versa.

Here again, the legal context in which both this article and Salas’s book were written can be enlightening. In March 1993 the European Court of Human Rights ruled that France was in violation of Article 8 of the European Convention on Human Rights, the article protecting privacy, in the case of Line B. As a male-to-female transsexual operated on in the early 1970s, Line B. had, for seventeen years, fought in the French court system to change the sex on her official documentation. Salas carefully establishes, from the introduction on, that he condemns not transsexuality per se but the idea that a “right to privacy” justifies modifying one’s état civil, since gender and sexuality are, in his argument, intrinsically public. In that sense, his objections to privacy resemble the ones previously mentioned in the context of kinship. In particular, Salas insists on the importance of the law to uphold a normative ideal instead of trying to satisfy all individual demands: “That the law ought to accommodate [s’arranger] sociological reality is in some ways its vocation. [But] that the rule be legitimized by the demands of a suffering minority . . . carries the risk of sliding toward a purely utili-

55 Denis Salas, Sujet de chair et sujet de droit: La justice face au transsexualisme (Paris, 1994), 27.
57 Ibid., 295. Labrusse-Riou is playing here with the double meaning of état as physical state and as legal status (as in état civil).
tarian function of the law whose only mission would be to prevent suffering. All of its symbolic function would be absent.”

Salas’s book is most useful for my purposes here because it offers a chronology, a narrative that accounts for this “crisis of the law” to which his work, and legal anthropology more generally, responds. While Salas holds biotechnologies (in this case, the possibility of surgically changing one’s sex) responsible for the accentuation of the crisis, the true culprits in his book are “individualism” and the “rule of the private me” \[\text{[le moi privé]}\]. Salas is never clear on the exact origins of this “mass individualism,” which he at times attributes to the emergence of “modernity,” at other times to the Enlightenment, and at still other times to the period of the 1960s and 1970s. Indeed, starting in the 1960s, Salas tells us, the law was subjected to a double attack. On one front, Marxism and Marxist theory reduced the law to a mere tool of exploitation for the dominant classes. On a second front, poststructuralism—or, as Salas calls it, the \textit{pensée 68}—presented the law as a “finished episode in the history of power to the benefit of flourishing disciplinary technologies \[\text{un épisode révolu de l’histoire du pouvoir au profit des technologies disciplinaires foisonnantes}\].” Captured in this dichotomy, the “subject of law” could only be articulated in two ways: as an insignificant entity within a homogenized and oppressive “whole” or as an autonomous individual governed exclusively by his or her own desires. In one extreme, the social had the potential to become totalitarian, as was the case with communism and fascism. In the other extreme, collective life was “further atomized” and “any demanded freedom . . . emptied from all substance.” In both instances, the individual experienced alienation and psychic distress.

According to Salas, the decisive break in this history of the law came with the end of the “totalitarian experience” and the fall of Marxism—in other words, toward the late 1980s. At this point, a new concept of the law could emerge: “No longer conflated with power or with the state, the law as a public space in which common norms are elaborated, interpreted, and applied could, little by little, regain a central place.” The law—once again equated with the social and the public—could function as a “reference” for the subject confronted with the “mass individualism of the end of the century,” a subject increasingly lost.

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58 Salas, \textit{Sujet de chair et sujet de droit}, 86.
59 Ibid., 10–12.
60 Ibid., 9. The reference to “disciplinary technologies” is, of course, an allusion to Michel Foucault’s theory of power as pervasive and ubiquitous.
61 Ibid., 11–12.
62 Ibid., 9.
63 Ibid., 10.
Moreover, the law could overcome the double bind of Marxism and poststructuralism by thinking the individual and the social no longer in opposition or as interchangeable but as working together. Only the law, serving as an anchor point for both the social and the psyche, could “organize a nondivisible relation to the other and to oneself [rapport indivisible à l’autre et à soi-même].”

It is with this particular understanding of the law that Salas addresses the various legal issues raised by transsexuality, from the surgical intervention to the modifications of official documents. Salas’s point is not that transsexual demands are wrong or misplaced, since, as he puts it, transsexual suffering is “real.” However, as a magistrate and a scholar, he is interested in the kinds of responses that the court (and, indirectly, the state) should give to this emerging discourse of “transsexual rights.” In this context, invoking a particular “right to privacy,” as was the case in the Line B. trial, is unsatisfactory, since it only deepens the “crisis of representation” at the root of the transsexual suffering. Thus the law needs to help these suffering “subjects of flesh” — subjects caught in the whims of their desire—to become “subjects of law.” It needs to institute them into the social order, integrate them into the world of common significations, into a symbolic order ultimately anchored in sexual difference:

What is at play here is the integration of the subject of flesh into the collective representation of the body where his symbolic unity can be forged [Ce qui se joue ici c’est l’intégration du sujet de chair dans la représentation collective du corps où se forge son unité symbolique]. The subject can only receive his identity by experimenting and communicating with an outside that assigns him a place in the network of human communication where our identity is tied [cet ailleurs que lui-même qui lui assigne une place dans le réseau de la communication humaine où se noue notre identité]: filiation and sexual difference. We are assigned as subjects of law to this double differentiation between generations and sexes, given by our parents, inscribed in the law, and reinforced [rappelée] by the judge.

Because sexual difference lies at the origin of all systems of exchange, including sociality and language, the purpose of the law is to constantly reassert this anthropological reality so that the transsexual subject can learn to narrate his or her identity in the social world:

The entry into a symbolic world supposes that we leave behind the symptom, which has meaning only for oneself to join the world of significations shared by all. The symbolic function of the law for the

64 Ibid., 13.
65 Ibid., 101.
subject is the ability to place all human exchange under a law that forces us to actualize this rule and that situates us in the reciprocity of this exchange. If we place ourselves outside this exchange, the difference that is lost—the division of the sexes—can bring about the loss of all differences.\textsuperscript{66}

As an example of this “deregulated circulation of signs, sexes, and codes that makes it impossible to represent the world,” Salas mentions Balzac’s novella \textit{Sarrasine}, in which “things and beings submerged in an ‘unstoppable metonymy’ [\textit{métonymie effrénée}] can no longer be separated, individualized, distributed. It is to neutralize the risk of disarticulating human identity by a devastating imaginary that we must find the forgotten symbolic part [\textit{C’est pour neutraliser le risque de désarticulation de l’identité humaine par un imaginaire dévastateur qu’il faut retrouver la part symbolique oubliée}].\textsuperscript{67}

Practically speaking, it is never exactly clear what the legal translation of this “entry into the symbolic” would look like. However, accepting the normativity of sexual difference through this process of symbolization is presented as the only way to live in a social context, to exist in history:

The subject of law . . . marks the symbolic of an entity at once carnal and relational, which imposes duties on us. It cannot be assimilated to any living being characterized by its capacity to feel and to suffer as it has been defined by utilitarianism. It is reducible neither to biological determinism nor to sociopsychological interpretations, a sterile oscillation in which so many interpreters of transsexuality have lost themselves. Finding its dignity in the privilege of not being interpreted, the subject of law is neither the unconscious subject of psychoanalysis nor the suffering subject of medicine. He is neither the user of public services nor the entitled self of the welfare state [\textit{ni l’usager de service public, ni l’ayant droit de l’Etat-providence}]. He is also not the mere recipient of subjective rights. Beyond these dismemberments, it is the part of ourselves engaged in public space. It is a subject \textit{actually or virtually} autonomous, free, and capable of answering for his own actions. He is a mutual engagement placed under the observation of a third party that guarantees all pacts [\textit{Il est un engagement mutuel placé sous le regard d’un tiers, garant des pactes}]. As the subject of his history, he articulates his identity with the responsibility of his past actions and his commitments for future actions.\textsuperscript{68}

\textsuperscript{66} Ibid., 128.

\textsuperscript{67} Ibid. We can note here that Salas’s choice of \textit{Sarrasine} as the literary example of “deregulated circulation of signs, sexes, and codes” is significant, since \textit{Sarrasine} was also famously studied by Roland Barthes in his 1970 work, \textit{S/Z}. Barthes’s text is often considered one of the first examples of poststructuralist literary criticism, which, for Salas, appears to be synonymous with the \textit{pensée}

\textsuperscript{68} Salas, \textit{Sujet de chair et sujet de droit}, 107.
The opposition between subjective rights (or privacy) and the welfare state is important because it points to a larger dichotomy underlying Salas’s argument, and many of those previously mentioned: that between an “Anglo-Saxon” model and a French republican form of social organization. It is not incidental that every time Salas and most of the other legal scholars I have mentioned refer to “privacy,” they leave the term in English, as if the concept were untranslatable. It is also relevant to note that two other dossiers accompanied the 1985 issue of Le débat on “Law, Medicine, and Life”—one titled “The Opacity of the United States,” the other, “Faced with the Soviet Union.” In this triangular relation with the United States (as a metaphor for unbridled liberalism, individualism, and anomie) and the Soviet Union (standing for a homogenized and oppressive social), the French republic epitomizes the “third party that guarantees all pacts,” the only political in which the social and the individual are not thought in opposition but as working together, in unity and cohesion. From this perspective, legal anthropology appears as the corollary of the French republic, just as positive law, human rights, and privacy come to operate as synonyms for liberalism and the United States.

**Privacy in Translation**

From an American standpoint, the rhetorical conflation of privacy, liberalism, and the “Anglo-Saxon model,” on one side (as the Soviet reference falters after 1989), and of sexual difference, sociality, and French republicanism, on the other, seems doubly puzzling. First, the rejection of privacy as a foreign concept imported into French law is surprising given that, aside from a few exceptions, the majority of French intellectuals still consider the distinction between public and private one of the most distinctive characteristics of Frenchness. From this perspective, respect for one’s “private life” is what sets French society in polar opposition to American *communautarisme*. In fact, many scholars of France have observed this reluctance of the French to consider the private as anything other than a transparent and self-evident category, encompassing everything from sexuality to religion and race.69 “Privacy” was one of the arguments mobilized by the supporters of

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the 2004 law banning “ostentatious” religious signs (and in particular, the Islamic hijab) in schools. For the unconditional supporters of this version of laïcité, religion belonged to the private sphere of the home, but not in the school, a quintessentially public space designed to mold future French republican citizens. Similarly, it was under the banner of privacy that many intellectuals and politicians on the left (including Théry) opposed the PACS. Théry’s argument against the PACS equated homosexuality with the private, thus not requiring state recognition.

Privacy was also invoked as the distinctive marker of Frenchness during the American “sex scandals” of the 1990s, involving first Clarence Thomas and then Bill Clinton. For many French commentators, these affairs were symptomatic of an American obsession with politicizing the private. They inevitably contrasted this obsession to the French respect of “private life,” exemplified, for instance, in the laissez-faire attitude around Mitterrand’s mistress and illegitimate daughter.

Second, while it is certainly correct that many “Anglo-Saxon” liberal thinkers have valorized privacy as a privileged location of individual self-expression—and, in this context, of sexual self-expression—this understanding of privacy has been under attack in the United States, from both the left and the right, for at least the last thirty years. More paradoxical is the fact that much of the left-wing academic critique of privacy in the United States, originally emerging out of the feminist rearticulation of the private as the political, turned to French poststructuralist theory in the 1980s, and in particular to Michel Foucault, whose work on the history of sexuality insisted on the mutually constitutive nature of the private and the public. Thus, many American scholars have anchored their critiques of a liberal definition of privacy in a reflection around gender and sexuality. Yet their intention was never to reify the foundational status of sexual difference for the social order; rather, they aimed to explore how gender and sexuality could offer new platforms to render the private, in all of its nonnormative configurations, politically legible and relevant in the public sphere.


71 Théry, “Le contrat d’union sociale en question.”


These cross-Atlantic translations and mistranslations suggest that privacy and human rights are never self-evident, timeless, or universal. Instead, they appear as historical and political categories, as discursive constructions adapted to particular times and contexts. The historian and legal scholar James Whitman develops this point in a fascinating comparison of Continental and American privacy law. Far from being a human “intuition,” as many privacy advocates (relying on moral philosophy) have implied, privacy reveals contrasting political and social ideals in Europe and in the United States. More specifically, Whitman argues, while privacy in Continental law has been primarily concerned with the protection of personal dignity, privacy in the United States has been much more oriented toward values of liberty, and especially liberty against the state. In fact, as Whitman makes clear in his analysis of the development of French privacy law from 1790 to 1900, even under France’s more “liberal” regimes, privacy law has always resisted “in the name of ‘honor,’ [the] two fundamental values of American liberty: the value of free speech and the value of private property as distributed through the market.”

As Whitman’s case studies indicate, this concern for “dignity” (which, according to Whitman, is not so much a product of the post–World War II reaction against fascism as it is a concept shaped by the sharply hierarchical societies of the early modern period) has always masked a concern for social norms, for preserving the unity and coherence of the “community.”

The social body and social norms were clearly at stake in the debates around medically assisted procreation and transsexuality. As lawyers and politicians speaking on behalf of minority communities (whether it be homosexuals, transsexuals, or single mothers) tested the elasticity of this meaning of privacy in the hope of acquiring certain rights, other legal scholars abandoned the concept. Instead, they turned to structuralism in hopes of finding the “new juridical categories” that Labrusse-Riou called for, categories that would presumably protect the integrity of the French social body. Whether this democratizing impetus came from within France (as in the examples of Geller and Badinter) or


75 See in particular Whitman’s reading of the 1877 dispute involving the painter Jean-Auguste-Dominique Ingres and one of his nude sitters, Madame Moitessier, whose husband sued Ingres for violating his privacy right, a “right to his wife’s image.” The court held that “property itself recognized limits established not only by positive law, but also by social norms [les convenances sociales]” (quoted ibid., 1177). We can also relate Whitman’s observations on dignity to Carolyn Dean’s in her book The Fatal Social Body: Pornography, Homosexuality, and Other Fantasies in Interwar France (Berkeley, CA, 2000). In this study Dean traces how in liberal discourses, “dignity” has functioned as a trope for social wholeness and social integrity. In this context, Dean argues, pornography and homosexuality have come to signify the modern violation of this particular self-evident and pervasive understanding of “dignity” and of the liberal social body.
from outside (as in the ruling of the European Court of Human Rights in favor of Line B.), in both cases sexual politics provided a field and a language to fight over the meaning and model of French republicanism, to argue over social norms and the kind of “community” that France was becoming. In the face of encroaching “European” or “American” law and culture (whether the encroaching was phantasmatic or real), legal anthropology offered a discourse to reaffirm French uniqueness, a means to reinstate republican sovereignty and cultural identity.76

Sexual Difference and the Critique of Human Rights

In 1980 Gauchet, the previously mentioned editor of Le débat, published an article titled “Human Rights Are Not a Politic.” In this piece, Gauchet elaborated one of the most forceful and influential critiques of human rights understood as individual civil rights. Salas’s introduction to Subject of Flesh and Subject of Law and his attack on privacy are in fact almost directly imported from Gauchet’s piece, which also begins with an analysis of the impact of Marxism and poststructuralism on social and political theory. “Should human rights be a politic [une politique], our politic?”77 Gauchet asked. In emphasizing the “our” here, Gauchet suggested, the society at stake was France. His question can thus be reformulated as follows: “Should civil rights provide the basis for theorizing the French political in the wake of poststructuralism and the collapse of Marxism?” Gauchet answered this question with an unambiguous no:

Here lies the greatest peril concealed by this return to human rights: to fall back into the rut [l’ornière] and the impasse of a theory of the individual against society, to succumb to the old illusion that we can

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76 Although this falls outside the scope of this article, one could point to many interesting parallels between these debates on sexual politics and those on the voile. Not only was the voile depicted as a foreign import (in this case, from “radical Islam”) but it also challenged the division of public and private that was at the heart of laïcité. Here again, many turned to “republicanism” in an attempt to reinstate a distinction that was no longer operative in this particular case (was wearing the hijab a private or a public act?). See, e.g., Talal Asad, “Reflections on Laïcité and the Public Sphere,” Ithaca: Social Science Research Council 5, no. 3 (2005): 1–11.

build from the individual and begin with the individual, with his demands and his rights to reach back up to society [la vieille illusion qu’on peut faire fond sur l’individu et partir de l’individu, de ses exigences et de ses droits pour remonter à la société]. As if we could disjoin the search for individual autonomy from social autonomy.78

Like Salas, Gauchet lists the devastating effects that this emphasis on human rights would have on the social, where individuals, increasingly delinked from one another, are forced to adhere to communities of interest (or communautarisme in its French label), and on psyches, increasingly prone to depression, psychosis, and paranoia. Individual autonomy, according to Gauchet, has only brought more “collective heteronomy” and more alienation, with alienation taken in its literal meaning as a “privative disjunction between the individual point of view and the collective point of view.”79 Unless theory can rethink the individual in conjunction with the social, Gauchet predicts the “reinforcement of the role of the state, the accentuation of social anonymity, the further aggravation of the lack of interest for public affairs [l’aggravation encore du désintérêt pour la chose publique], and the anguished banalization of behaviors.”80

Thus, returning to my original question of why this discourse of the anthropological function of the law came to be so prevalent in the field of sexual politics after the 1980s, I would argue that legal anthropology offered precisely this alternative social model sought by Gauchet, one compatible with French republicanism and premised on sexual difference. Gauchet, in another text, specifically refers to Lévi-Strauss and Lacan as “masters” who can help us “build a bridge between the theories of societies and those of the psyche, via the notion of structure,” by “taking into consideration language that presents this very particular interest of being at the same time irreducibly personal and purely social, without it being possible to separate the two sides of the same coin.”81 This theory that Gauchet calls a “transcendental anthroposophiology”82 is essentially what legal anthropology sought to enact in the legal field. On a theoretical level, it avoided the “impasses” of Marxism and poststructuralism by insisting on the interdependence of the individual and the social. On a political level, it functioned as an alternative to totalitarianism and to American-style liberalism, as an escape from social homogenization and social warfare, as a new mode of expression for republican sovereignty. Legal anthropology could hence provide a new

78 Gauchet, Le démocratie contre elle-même, 17.
79 Ibid., 25.
80 Ibid.
81 Marcel Gauchet, La condition historique (Paris, 2003), 18.
82 Ibid., 13.
political framework, a new *politique*, one that would foster solidarity and inspire individuals to participate in the res publica, not as defenders of their own particular interests, but as abstract citizens capable of embodying the collective good. While human rights could no longer constitute a politic for France, sexual difference, it seemed, suddenly could.