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THE CRIMINALIZATION OF SIN

In order to introduce the topic of this talk, I first have to introduce Paolo Prodi, who has been my teacher on this subject. Paolo and I met a good thirty years ago, when he had a scholarship at the Woodrow Wilson Institution in Washington. And there, in conversation with him, I found for the first time someone with whom I could discuss a point to which our common teacher, Gerhart Ladner, had led us. Ladner's preoccupation was the idea of reform — he wrote a book of that name — which he felt could not be understood unless one first grasped the Old Testament idea of an inner turning around, a turning inside out and upside down. This becomes in the New Testament the concept of conversion, and reconversion to the Other, the Friend, who is, of course, God become man, but who is known through the one who faces me at the moment. Ladner insisted on the unprecedented evil which can result from this unprecedented commitment to reform. He believed that a recognition of this evil was essential to the understanding of Western history and, at the very same time, he recognized that such a recognition was possible only for those who accepted the radical newness of the idea of reform as embodied in certain monastic communities which adopted it as a lifelong, theocentric practice of mutual conversion.

With Paolo I had, for the first time, an opportunity of reflecting, with a man several years younger than I, on the way in which the Western, Roman Church attempted to give a juridical shape to

the household rules by which monastic communities lived together. This attempt to create a canonical establishment, that's the technical term, out of the way of life of Franciscans or Dominicans, was the only way of preserving a certain spirit in an institutional form, but it produced a deep corruption. It led, as it has always led historically, even in the first generation, to a toning down of the message of the founder and to an abstract formulation of the melody in which he sang the Gospel. We've already talked about this.

Again and again Paolo and I met. He became a fully recognized academic, chairman of history at the University of Bologna, founder of the Institute of Italo-Germanic Historical Studies in Trento, rector of the University of Trento, and president, for many years, of the commission which appoints all humanity professors in Italy. (Unhappily, of the eighty-two items by Paolo Prodi that I was able to discover in the Library of Congress Catalogue, which I can now search on-line from Mexico, only one is available in English.) On the subject which I'm about to broach, I bow to his authority and feel pretty certain that he is right, and I say this having also carefully read his critics and satisfied myself that I am not allowing friendship to outshine my critical intelligence. But I would hardly dare to say what I'm about to say, if he were looking over my shoulder, because I will take liberties which are neither academically legitimate, nor necessarily kind. I'm sure, if he reads it later, he will bear with me.

I want to speak about the twelfth century, a period which I regard as an important historical hinge. Some of the reasons are subjective. There is no other period in which I dare to speak of my personal acquaintance with as large a percentage of the surviving authors. And my acquaintance with these authors has long made me puzzle over their extraordinarily fresh way with language and with concepts. Learned writing at this period was still overwhelmingly in Latin, though vernacular literatures had begun to appear, but it was a Latin unlike the dull, incompetent church and kitchen Latin of the eleventh century. There was a renaissance, but a renaissance unlike that of the fifteenth-century humanists who wanted to get back to classical Latin and modelled their styles on Cicero and Livy. The writers of the twelfth century invented a new Latin style, according

to what they had to say, and made it beautiful. How it happened is a mystery, and something of which few students are even aware.

The twelfth century can be interpreted as a turning point. I know that historians choose what they will write their poetry about, and that some other scholar more conversant with the time of Charlemagne might claim the same for the Carolingian renaissance, but I think there really is a turning point there. It is the time, as I've already discussed, when the idea of a tool comes into existence. It's the time in which the idea of text detaches itself from the actual, gooey word-stuff on the page and becomes something more general and immaterial.' And, it's the time — to come at last to my theme — when sin is criminalized.

We have already spoken about sin as a new kind of evil that shadowed the Christian possibility of finding God in the face of the other. This new kind of love made possible a new kind of very personal betrayal and demanded a new practice of mutual forgiveness and forbearance amongst those who accepted this Gospel. In the sixth, seventh, and eighth centuries sin became connected with doing penance. And, then, in the twelfth century, the Church found it desirable, for reasons which I'll explore in a moment, to define that intimate betrayal of the friend, or of God as a crime.

I want to look at three issues which touch on this movement of criminalization, or legalization, in the twelfth century: the history of the oath, the history of marriage, and the way in which the institution of confession became a device with which to lay the foundations of the modern state. But I need to ask you first to remember that, in my explorations of how religiosity materializes previously unthought notions and makes them fleshy and impressive, I'm speaking in a Western, and at this date, entirely European context. Even Orthodox Christianity was outside this Western development, at least until the nineteenth century when the Russian czars decided they wanted to have a church as good as that of the Pope.

Remember, also, that what I will say emerges from a continuing conversation with perhaps two dozen people of whom Prodi is one. If I speak about this group as a "we," it is because we recognize that, as intellectuals, we have the common task of trying to understand the

cultural density of our time by exploring its formative axioms which have now disappeared. And this can only be done by establishing a certain distance from the present and trying to look at today with twelfth-century eyes. If, for example, I attempt an imaginary conversation with Peter Abelard [1079–1144?], I have to deprive myself of the assumptions that suffuse the words we use today. Such an imaginary conversation can be an extraordinarily effective heuristic device because it forces me to look critically — *cum grano salis*, with a little bit of salt, as the Romans said — at every word which I use in conversation today. This gaze into the present through the eyes of people who had faith can reveal what remains hidden to those who probe the past with the abstract instruments of contemporary social science.

And one final prefatory remark for those who may think I am less an historian than a novelist who happens to know Latin very well, and has read huge amounts of secondary literature about the twelfth century as well as the primary sources: I admit that I strongly believe in something which is usually called tradition. There is a physical and bodily tie with earlier generations, which makes the type of history I am doing something more than just dredging up memories. And, by placing myself in the tradition of twelfth century thinkers, I become aware of the search for Christian perfection, for the flowering of the gifts of the Holy Spirit, that animated these men. They cultivated a charity which couldn't have been financed through taxes, a charity which expressed a love more free than would have been possible without Christ's example. They felt they had been invited to love God in the flesh, as the son of Mary, and this faith was the ground of the concepts and the certainties with which they lived.

I have to begin my exposition by pointing out certain technological changes that were occurring in Europe at the time because they underlie the turn in Christian religiosity which took place in the twelfth century. The horse collar was invented, and this immensely increased the pulling power of horses and allowed them to replace oxen, which were much slower, in ploughing the deep, wet soils of Europe. This increase in speed, range, and efficiency meant that fields could be located much further from home and that the cultivators could live together in villages and still reach their fields. This

consolidation led to the establishment of parishes, centred on the parish church. Christian rural life ceased to be a dispersed style of life in tiny hamlets and became community-centred. In common speech the parish came to mean the community, and I believe in English law the word parish still refers to a secular entity.

Religious practices were an intimate part of this new sense of locality. There were, for example, special devotions based on relics: we have the right arm of such and such a martyr, and we will concede to you a fragment of it if you establish a village which is friendly but far enough away not to interfere with us. Days devoted to the cult of a certain saint became market days. Religiosity, word fields, and fundamental concepts interweave and intertwine, and this interweaving of religion and society gives the European peasant or villager his special character, which distinguishes him from the farmer of the New World. It was in this milieu, that the Church developed practices intended to support and stabilize the Christian practice of neighbourliness, practices which would then survive into a world without villages in which they no longer had the same application.

It was in this new world of parishes that we see a striking change in the nature of oaths. And here I am closely following the argument in a glorious lecture of Paolo Prodi's. By the thirteenth century oath-taking had become fundamental to European culture, in a way it had never been before. In the twelfth century, for example, the Church defined the formation of the basic cell of society, namely, the family, as a mutual contract made by two free people who choose each other and confirm their choice by an oath sworn before God. The oath makes the marriage a sacrament, so called, which places it under God's seal and protection. To see how very surprising it is that the oath could become a Christian entity, a Christian practice — I'm speaking now as a pupil of Prodi's, may he forgive me — you have to recall that there is, in the New Testament, nothing more absolutely forbidden than oath-taking. Let me quote the verses from the Sermon on the Mount as they are found in Matthew, Chapter 5, in the Jerusalem translation: "You have heard how it was said to our ancestors, 'You must not break your oath, but must fulfill your oaths to the Lord.' But, I say this to you, do not swear at all, either by

heaven, since that is God's throne; or by earth, since that is his footstool . . . Do not swear by your own head either, since you cannot turn a single hair white or black. All you need to say is 'Yes' if you mean yes, 'No' if you mean no. Anything more than this comes from the Evil One." This is again one of those rule-breaking innovations of the New Testament. The importance of oath-taking was as certain and as fundamental as the existence of a threshold over which I can bring a guest, or the local boundaries which establish the nature of virtue in a particular place. It was, if you like, one of the fundamentals of feeling human, an anthropological constant. All cultures seem to possess this possibility of giving special weight to a statement, to an utterance, by making it clear that I'm taking my own flesh and blood into my mouth when I say it. Women, characteristically, take their hair into their hands when they take an oath; a man may take his balls or a piece of his soil into his hands. The Norseman holds on to his ship. By oath-taking, I incarnate my own statement.

So the total proscription of oath-taking in the New Testament is something radically new, and what I would like to understand is why and in which context does Jesus proscribe oath-taking? He does so in the context of the covenant between God and his people. The covenant of the Old Testament consisted in God taking an oath to Abraham. It is his prerogative to take an oath and, thereby, establish Abraham and his descendants as his people. People do not swear before God. Only God incarnates himself in the word of the prophets and in his people. The New Testament continues this covenant and excludes the oath. Instead of joining people through an oath, the New Testament proposes to unite them in the Holy Spirit. This is historical fact, not theology or preaching, and it was understood in a very physical way. The high point of Christian ritual and ceremony still consists in a communal meal of bread and wine, a *symposium*, but in the first centuries of Christianity there was also *conspiratio*, that is a breathing into each others' mouths. That's what Christians did. They came together to eat and to kiss, to kiss on the mouth. In this way they shared the Holy Spirit and became members of a community in flesh, blood, and spirit; and so long as this ritual remained the basic way of constituting the community,

there was no sense of *conjuratio*, that is of establishing community by swearing to each other. It is, therefore, very surprising to find that oaths only became part of Roman law under one of the early Christian Emperors, Theodosius, whose Codex first recognized oaths as a legal instrument.

Prodi examines how this could happen, how people could tire under the enormous burden imposed on the ordinary word of having to be always truthful, and how this could lead them to make an institution of their mutual engagement by calling on God to witness their oaths. This re-introduction of oaths reaches an epochal point in the twelfth century at the height of feudalism, which was based on *conjuratio*, or oath-taking. It was then that the relation of love in its supreme form, the commitment of a man and a woman to each other forever, on the model of the Gospel, became defined as a juridical act, through which an entity called marriage comes into existence. And for this juridical act, God becomes, so to speak, the necessary instrumentality when he is summoned as a witness. The fealty of citizens in Europe's expanding cities was conceived along the same lines — as a contract sealed by a divinely-witnessed oath. This *conjuratio*, or swearing together, in the face of God, gives the European city the particular quality of sacredness which it takes on between the thirteenth and fifteenth centuries. It reaches a high point when Girolamo Savonarola [1452–1498] chases the Medicis out of Florence and insists on the God-willed basis of city-life in the *conjuratio* of the citizens.

It is surprising to me that medieval historians have not really noticed this. When they speak about a contractual society coming into existence during the twelfth, thirteenth, and fourteenth centuries in Europe, and then becoming a model for the modern state in the late Renaissance and on into the nineteenth century with the establishment of the nation state, they locate the origins of this society in the *conjuratio*, the swearing-together of burghers and artisans which allowed them to regulate their trades and commerce under the protection of a feudal lord. I think the emergence of this type of society can be discerned even earlier, and I would point particularly to the Fourth Lateran Council (1215), where marriage was defined in this new way.

Someone who *has* noticed the novelty of this type of marriage is the anthropologist Jack Goody. Goody travelled the world like a butterfly collector, gathering the many forms of marriage, and he wrote marvellous stuff about how it is done from place to place: if the marriage is arranged by the parents or the uncles, if consent is required and so on. Then, when Goody returned to England as an older man, he realized that Western thinking about marriage is unique. It had never existed before and could not be found anywhere else. Never had it happened that Joan would bring Johnny home and say to her father, "Johnny's the man I'm going to marry." Getting Joan and John married had been an affair among patriarchs, or an affair of families or go-betweens. The idea that marriage is a free, individual act modelled on that freedom in the spirit which we have received through the parable of the Samaritan was unthinkable. So Goody went to some friends, who were medievalists, and asked them to help him to write a book on medieval marriage. The resulting book² was an extraordinary breakthrough, but it was also full of mistakes, and this allowed most medievalists to dismiss the book. What does Jack Goody know of the Middle Ages? they said. Their anger and their prejudice prevented them from reading him carefully.

Within the perspective of the Gospel, adultery had taken on a new and unprecedented standing. In the old story of Susanna and the elders in the book of Daniel, Susanna would have been legally stoned had she been found guilty of tempting the two old men who observed her nakedness as she bathed in the pond in her garden, but no Jew would have imputed sin to her in the modern sense. In the teaching of Jesus even the most secret of imagined adulteries is seen as an infidelity which is offensive not only to your wife but also to God, to Christ, in whom we are united in the flesh through his act of love. Then, in the twelfth century, this sinful infidelity became a crime. The marriage oath legalizes love, and sin becomes a juridical category. Christ came to free us from the law, but Christianity allowed the legal mentality to be brought into the very heart of love.

My point here is not to impute fault to the theologians and church lawyers who reconceived the union of a man and a woman as a Christian marriage in the twelfth and thirteenth centuries. What I'm

trying to emphasize is what Jack Goody noticed: the sheer novelty of the idea that a man and a woman can contract with each other in the matter of their intimate access to one another, which is precisely what the Lateran Council talked about. The idea that households are founded by the free choice of one man and one woman marks a major epoch in the formation of the individual. It is the first attempt to give women the same status as men and to attribute to them the same legal and physiological capacities. Marriage is torn out of the family and community nexus in which it was formerly embedded and put into the hands of individuals. And this is the foundation of the idea that social entities come into existence by mutual contract.

I also want to draw attention to the fact that, in the new legislation about marriage, for the first time in history — and there are good historians who have studied this — the woman's consent to the desire and will of her future husband is just as important as his will in relation to her. In Rome, when one spoke about *consensus*, it meant that the father had asked the son, "Are you willing to shack up with Flavia?" In the case of the woman, the idea of having the father or the family or the uncles seek her consent begins to appear only in the late ninth and early tenth centuries. There is, for example, at that date, a record of an aristocratic woman from Brittany, who appeals to the Pope for relief from her husband's abuse and says that she had always resisted the idea that she should become this man's wife. To the best of my knowledge, the first clear statement by a woman that she is a wife by virtue of her consent is made by Héloïse, in one of her letters to Abelard. She was by then already a nun, but she wrote to him that she was and would always remain his wife because she had freely consented to their liaison. If I had the skill I would write a novel about Abelard and Héloïse, and in it there would be a scene in the Paris tavern where Abelard played his songs. Sitting there, by chance, would be the old monk Gratian, from Bologna, who first codified church law; and he would watch as Héloïse, having escaped her uncle's house through a window, entered the tavern and explained to Abelard her revolutionary conception of marriage. It would be from this overheard conversation in a Paris tavern, according to my conceit, that the great lawyer and jurist would take the idea that marriage is created by the free consent of a man and a woman.

But, to return to my main theme, Prodi has promised me that if I can wait another seven years, he will present me with the finished manuscript of a book in which he will argue that this extraordinary criminalization of sin holds the key to understanding Western political concepts for the next 500 years. In the meantime, I can only look at chapters, but these already show how this could happen. Part of his explanation concerns the struggles over the power of investiture which took place in the tenth and eleventh centuries. Investiture is the power to name, or invest, a bishop, and the Pope and the Emperor each claimed that he was uniquely competent to do this. This period was also an epoch in the history of law during which it came to be understood that the Emperor and the Pope had separate and distinct jurisdictions, within which each was solely capable of making laws. Two courts, two juridical spheres, began to separate. And this happened just at the moment I spoke of earlier, when parishes came into existence and Europe was transformed from a landscape of hamlets into a landscape of steeples, on which clocks would soon appear. As these steeples were erected, the Church, through the Popes of the time, began to take a new approach to what today would be called pastoral care. By 1215 we find in the pronouncements of that same Fourth Council of the Lateran of which I spoke a moment ago, a sentence which has, several times in my life, been important to me. It reads this way: every Christian, be they man or woman, will go once a year to their pastor and confess their sins or otherwise face the penalty of going to hell in a state of grievous sin. This codified a dramatic departure from the prevailing practice, up to this time, of public confession and public penance. Another new law made it an extraordinary misbehaviour for the priest to speak about what he heard in confession. It is remarkable to me as someone who is interested in the university and its procedures that the implications of these new laws have never become a major issue in historical studies. One significant feature of this sentence is that it distinguishes women from men, rather than simply addressing every Christian, and this gives women a new recognition in law. It also establishes the pastor as somebody who, in secret, judges or takes a juridical position in front of each Christian male or female. This makes the forgiveness of sin, in an entirely new way, a

juridical act — a juridical act organized on a model or hierarchy which reaches down from the steeple into the hearts of the people, and therefore creates a court structure far beyond what any emperor could ever have even thought of creating. This becomes even clearer when you consider the idea which also emerges at this time of reserved sins, that is sins too grave for the local magistrate to deal with which had to be sent on to the higher magistrate, the bishop.

So a juridical state structure was created, and sin was made into something that could be dealt with along the lines of criminal justice. But because in confession one accuses oneself, this also involved a new concept of the *forum internum*, the inner court. If you look up the word forum in a history of law, as I did this morning, it will tell you that during this period the *forum ecclesiasticum*, the bishop or Pope's court, and the *forum civile*, the emperor's or lord's court, get separated from each other. But much more significant is the fact that people begin to be taught what a court is by being told that they have to accuse themselves with true sorrow for having offended God and with a true desire for amendment. To create this sense of a *forum internum*, or conscience, is an enormous cultural achievement, though something of which I was not aware until Prodi pushed my nose into it.

As you know, I have written a book called *In the Vineyard of the Text* in which I argued that the development of conscience is linked to the new prevalence of writing around this same time. Conscience was conceived as an inner writing, or record, and this idea was reinforced by the appearance in churches of statues of writing devils who note people's sins, and by the image of the Last Judgement as the reading of a book in which all sins are recorded. Prodi has made me more hesitant about attributing all this to the appearance of a new kind of text. For him the primary implication of the idea of a *forum internum* is that the law now governs what is good and bad, not what is legal and illegal. Church law became a norm, whose violation led to condemnation in hell — a fantastic achievement and, I would argue, one of the most interesting forms of perversion of that act of liberation from the law for which the gospel stands.

I do not want to be understood here as speaking against confession. I practise it. I am only trying to indicate a crucial moment in the

transformation of the impiety which I commit by betraying love, which is the meaning of sin, into a crime which can be judged in a juridical fashion within an institution. Anyone who understands what I'm saying as taking sides in current discussion about the practice of confession in the several churches which have retained it has missed the import of my argument. In fact, I consider the wise use of the confessional over the last 500 years as, by far, the most benign model of soul counselling, pastoral care, and the creation of an inner space for deep conversation, centring on my feeling of sinfulness. It is incomparably better than anything else which I've seen so far in my service, and I include my experience with modern psychology.

Something else that's interesting about this requirement of annual confession is the way in which it was circumvented by the faithful. The Council had conceded that people might not want to confess to their own priest, and had therefore allowed confession to some other priest, with permission. Christians in massive numbers used this provision to avoid confessing to the pastor who lived among them. The foundation of the so-called mendicant orders, the Franciscans and the Dominicans, provided two enormous pools of friars, with the power of hearing confessions anywhere where they came to preach, and they became the principal confessors.

Now, to return to that pregnant sentence produced by the Fourth Lateran Council, it enjoins the duty of confession on women just as much as on men. As I've said, this is the first important statement of the legal equality of women with men. This equality is also reflected in the Council's new definition of marriage as a contract which is entered freely and knowingly by a man and a woman, rather than being dictated by their families or their milieu, and which constitutes a legal reality with standing in heaven. This definition is simultaneously a statement about individuality, about the coming into existence of conscience, and about the equal legal standing of man and woman.

I once had a chance to discuss this point with Michel Foucault, who was then working on his *History of Sexuality*; and I suggested that, with the establishment of this legal equivalence between man and woman, in which each is put into the same box of individual with a conscience, the possibility of sex really came into existence. Until

this time, gender had divided men and women into incommensurable categories. Men's customs were different from women's customs. Infidelities could only be judged within the context of the two genders, which together formed the people. The marriage contract put them on the same level, and, as a result, the sin of adultery became the same kind of crime for either a man or a woman without distinction.

The Fourth Lateran Council of 1215 belongs to the high Middle Ages, and is one of this period's most grandiose occasions, but it is my contention that it is also a key to understanding what happened in the early modern period, during what is called the Counter-Reformation. This period begins with the Council of Trent, which sat for thirty years trying to adapt Catholic doctrine and practice to the new situation created by the appearance of competing churches, as well as by the appearance of an entirely new view of ecclesiastical power. For the first time, the bishops who were delegates to that Council, met as representatives of the Church rather than of Christianity, as had been the case ever since the early Church councils of antiquity. They sat there not only as believers but as magistrates. And they discussed the affairs of a church in which the frontier between its rules and its doctrine had begun to crumble. There was no longer a clear distinction between the personal feeling of being sinful, which goes beyond the feeling of being guilty, and the feeling of guilt resulting from disobedience to Church rules. The internal forum had come into existence, and people began to feel bound by the laws of the Church. This makes it difficult to tease apart the legal and the dogmatic pronouncements of that council, as its great historian Hubert Jedin has shown.

At the Council of Trent, which sat at Trento in northern Italy during the generation after Luther, the Roman Catholic Church presented itself as a *societas perfecta*, as a law-based church, whose laws were obligatory for its members in conscience. This self-understanding was reflected in the legal and philosophical thinking of the time, which had begun to portray the state in the same terms, that is as a perfect society whose citizens internalize the laws and constitution of the state as the demands of conscience. In other words, through the criminalization of sin, the basis was created for a

new way of feeling citizenship as a command of my conscience. The Church laid the groundwork by abolishing, or, at least diminishing and making permeable the frontier between what is true and what is commanded; and, on this ground, the state was later able to claim an allegiance founded on conscience.

I believe there is a parallel between the argument I am making here, and the one I made earlier about the way in which the spirit of contingency led to the death of nature. In that case I asserted that the doctrine of contingency, in which the world was conceived as lying in God's hands, would later allow the world to be taken out of God's hands, and that, in consequence, nature would lose not only the intensity which came from its being a product of continuous creation, but also its very aliveness, its being a living womb, which had never before been doubted. And I said that you cannot really understand modern science and technology unless you can see them as a perversion of the spirit of contingency. So now I would argue that, if we want to understand the idea of *patria* of the seventeenth, eighteenth, and nineteenth centuries, the idea of fatherland, the idea of mother tongue, to which I owe sacred loyalty, the idea of *pro patria mori*, that I can die for my fatherland, the idea of citizenship as something to which my conscience obligates me, then we have to understand the appearance of the internal forum in the Middle Ages.

I also want to say briefly in conclusion — I will take up the point at greater length in our next session — that the criminalization of sin opened Christians to new fears, a point on which I have learned a lot by reading a French historian called Jean Delumeau who has made it his task to study the transformation of fear between the twelfth and the nineteenth centuries in a never-ending series of fat volumes. Through the Incarnation, as I have said, a new kind of betrayal becomes possible. The Christian is called to be faithful not to the gods, or to the city's rules, but to a face, a person; and, consequently, the darkness he allows to enter him by breaking faith acquires a completely new taste. This is the experience of sinfulness. It is an experience of confusion in front of the infinitely good, but it always holds the possibility of sweet tears, which express sorrow and trust in forgiveness. This dimension of very personal, very intimate failure is

changed through criminalization, and through the way in which forgiveness becomes a matter of legal remission. Once the sinner is obligated to seek legal remission of a crime, his sorrow and his hope in God's mercy becomes a secondary issue. This legalization of love opens the individual to new fears. Darkness takes new shapes: the fear of demons, the fear of witches, the fear of magic. And the depth of these fears is also expressed in the new hope in science as the way of banishing this darkness. In my index cards I give this subject matter the heading "UFOs, Unidentified Flying Objects," an anachronism obviously, and I think the phenomena that I group under this heading are almost an inevitable result of the criminalization of sin. These fears are easily exploited by politicians, and Delumeau contends that this is one of the main ways in which the power of the state is consolidated. I will return to this subject.