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Santi Romano against the state?

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ABSTRACT

This paper argues that Santi Romano's legal institutionalism is driven by implicit normative assumptions that stand in tension with Romano's commitments to legal positivism and legal pluralism. Romano's approach to the individuation of legal orders is indefensible on purely descriptive grounds, as it rests on a picture of good social order. That picture, in turn, gives more prominence to the state, as an institution of institutions, than one would expect in a thoroughly pluralist legal theory. Romano's reflections on the different ways in which institutions can become legally relevant to one another is nevertheless highly valuable. It provides the toolkit for developing a normatively attractive conception of the legal relations of the state to other institutional orders.

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Introduction

Santi Romano's institutional theory of legal order – as presented in *The Legal Order* (Romano, 2017) – aims to lay the ground for what appears to be a particularly radical form of legal pluralism. Romano's key thesis is the identification of legal order and institution, that is, the claim that every institution *is* a legal order and that every legal order *is* an institution (16). This thesis implies that there are as many legal orders as there are institutions (50).

This claim is deployed not merely against the radical legal-monism championed by Hans Kelsen, who argued that it is inconceivable, from a legal point of view, that there be more than one legal order (Kelsen 1992, 113–114). The real aim of Romano's discussion is to call into question the view that all proper law emanates from the sovereign state. The latter view is of course compatible with legal pluralism, at least if legal pluralism is understood in the most undemanding way, as the view that there are (or that there could be) several independent legal systems. But its most prominent manifestations in the history of legal thought have tended to limit the scope of pluralism and to deny that there are any independent legal orders above or below the state (Austin 1995). Against this statist approach, Romano is concerned to vindicate the claim that international law, the law of the church, the internal organization of a municipality or an industrial corporation qualify as distinct legal orders and that they ought to be recognized as such by legal scholarship and legal practice.

This rather permissive approach to the identification of law implies a vast proliferation of legal orders. But Romano's institutionalism is also characterized by a deep interest in the way in which different institutions may come to be *legally* connected. While *The Legal Order* is replete with talk that would appear to imply that every institution is a separate legal order, in and by itself, Romano also argues that many institutions are created, authorized, conditioned or controlled by others, so that, in some cases, they form parts of a larger, encompassing legal order (Romano 2017, 66–100). The criteria that legal scholars typically use to individuate systems – such as the possibility of referring the norms that belong to one and the same order to a common origin, or the possession, on the part of the system, of its own courts – would seem to have little purchase in such a scenario (Raz 1980, 187–202). This raises the question whether Romano's conception of an institution provides a workable alternative criterion of the identity of legal order, and one that is compatible with an order's partial or even complete integration into an encompassing legal order.

True to his methodological colours, Romano addresses this question from a legal-positivist point of view, by appeal to considerations of descriptive accuracy. Statist conceptions of law deny legal quality to institutional orders that, in Romano's view, look to have most or even all characteristics of legality. Statists do that, Romano implies, for a purely ideological reason that detracts from the business of offering the most descriptively adequate account of legality: namely an undue veneration of the modern, sovereign state as a source of law that is itself above law (Romano 2017, 39–41). Once we leave that ideological blinder behind, we will come to see that there is law above and below the state.

While the plea for a radically pluralist institutionalism is thus introduced on descriptive grounds, it goes along with certain normative demands, which are seldom far from the surface in Romano's critical discussion of state-centred conceptions of legality. Romano repeatedly intimates that the fact that there are legal orders above and below the state makes it incumbent on the law of the state to give legal recognition to the autonomous legality of at least some non-state institutional orders. Statist legal theory, from this perspective, appears to be complicit in the modern state's tendency to suppress autonomous forms of legality, a tendency that Romano regards as misguided and unjustified.

It is not immediately clear, however, how the descriptive and the evaluative aspect of Romano's institutionalism relate to one another. Under one reading, Romano simply wanted to raise awareness of a normative question concealed by statist understandings of law. If there are distinct legal orders above and below the state, as Romano argues, then the question of whether and of how these are to be legally related to the state's law will have to be addressed in one way or another. The descriptive project of legal institutionalism, assuming it is sound, thus makes it clear that the state has a choice as to how to relate to non-state legal orders – to recognize them or to fail to do so. The way the state exercises that choice, it might plausibly be argued, stands in need of explicit justification. A legal theory that wrongly claims that the law that emanates from the sovereign state is the only law there is will conceal that need for justification, and thereby make it likely that the state's choices, whatever they may be, will fail to take account of all relevant considerations.

The critical force of legal institutionalism, so understood, is rather modest. Remember that Romano's descriptive institutionalism is billed as a form of legal positivism. Legal positivism is committed to the claim that the mere factual existence of a legal order does not imply that the order in question has practical value and that it is deserving of legal recognition, on the part of some other institution, simply in virtue of being a legal order (Hart 1958; Gardner 2001). Descriptive legal institutionalism, if it is to be a truly positivist project, would never dictate any particular answer to the normative question of whether and how different legal orders ought to be legally recognized by one another. The normative questions that it opens up are no longer the business of legal theory but of normative social philosophy.

We will see, however, that Romano frequently assumes that his legal theory at least suggests answers to those normative questions. This tendency indicates that Romano's institutionalism might be more value-laden than he cares to make explicit. There is a simple test to find out whether this suspicion is on target. A purely descriptive institutionalism would, presumably, allow us to individuate legal orders on purely factual grounds. The thesis that I am going to argue for in this paper is that Romano's conception of institution fails to supply a purely descriptive criterion of the identity of legal order. The way in which Romano's institutionalism individuates legal orders is animated by a vision of a well-ordered legal universe, that is, by an implicit account of the proper way for important social institutions to be legally related to one another.

My second claim will be that, notwithstanding Romano's attacks on statist visions of legality, his normative vision affords the state a much more central role than the text of *The Legal Order* makes fully explicit. The question of whether and how to legally interrelate institutionalism's surfeit of legal orders is implicitly posed from the perspective of the state. Romano's ideal legal universe is not, in the end, radically pluralist; it does not consist of a horizontal web of independent legal orders that relate to each other on their own terms. Rather, it is a universe structured by the central role of the state as the coordinating institution of institutions.

That Romano's institutionalism is ultimately an expression of a certain picture of good social order that continues to give a prominent role to the state does not in any way reduce its interest. The real value of *The Legal Order* does not consist in its flawed attempt to offer a general definition of law but rather in its rich and intricate discussion of the different ways in which institutions can become legally relevant to one another. This discussion offers the tools to overcome the excessive centralism of the modern state and to integrate different social groups into an institution of institutions that respects and supports their internal structure.

Romano's institutionalism

A brief clarification of Santi Romano's conception of institution is in order, before we can proceed to the main argument. According to Romano (see Romano 2017, 17–19), an institution is 'any entity or social body' (17) that exhibits the following four essential features:

- (1) An institution ‘must possess an objective and concrete existence, and its individuality, however immaterial, must be outward and visible’ (Romano 2017, 17).
- (2) An institution ‘is a social entity or body, in the sense that it is a manifestation of the social, not purely individual, nature of human beings’ (18).
- (3) An institution ‘is a bordered entity, which can be considered in itself and for itself precisely because it has an individuality of its own’ (18).
- (4) Finally, an institution ‘is a firm and permanent unity. In other words, its identity does not get lost, at least [not] always and necessarily, as its distinct elements vary [...]’ (19).

Examples of institutions mentioned by Romano in *The Legal Order* include entities as different as international society, the state, the municipality, parliament or other organs of government, business corporations, political parties, the Church, families and even the mafia. Any self-conscious social group that has an enduring existence and a determinate identity will qualify as an institution, on the further condition that ‘it is a manifestation of the social [...] nature of human beings’ (Romano 2017, 18). This latter requirement is intended, it would appear, to rule out patterns of social interaction which result from mere prudential calculation on the part of participating individuals. It is not necessary, however, for institutions to possess formal structures of authority or determinate rules of collective decision-taking. Romano emphasizes that institutions need not be legal persons and they need not possess secondary rules of recognition that provide formal criteria for the identification of their own norms (13–16).

What this list of essential features of institutions is supposed to assure, above all else, is that the notion of institution will serve to capture what Romano considers to be the most salient characteristic of law, namely the objectivity of law (Romano 2017, 8–10). If legal order is equivalent to institutional order, we need to make sure that our concept of institution sustains that objectivity. To get at Romano’s conception of the objectivity of law, it is helpful to consider his description of the purpose of law:

The law does not simply consecrate the principle of the coexistence of individuals, but above all takes it upon itself to overcome the weakness and limitedness of their forces, to exceed their feebleness, to perpetuate their particular goals beyond their natural life, by creating social entities that are more powerful and durable than individuals. Such entities establish a synthesis, a syncretism in which the individual gets caught. (20–21)

In another telling passage Romano seems to go so far as to identify the law with its objectivity:

The characteristic of objectivity is one that is anchored to the impersonality of the power that elaborates and establishes the rule, to the fact that this power is something that transcends and raises individuals: it is the law itself. (9)

Romano’s talk of the objectivity of law is meant to convey two fundamental suggestions. The first is that an institution, as long as it exists, imposes itself on the individuals that are caught up in it, whether they want to or not. To be sure, the existence of an institution must, in some way or other, be grounded in the behaviour of the individuals who are involved with it. But the binding force of law on any particular individual does not depend, Romano suggests, on whether that individual has given and continues to

give its consent or endorsement, either to the institution as a whole or to any particular requirement that may be at issue. This suggestion is hardly novel, and Romano's statist opponents would certainly agree that the law of the state is objective in this sense. What makes Romano's understanding of law distinctive is that he argues that objectivity 'is the law itself' (Romano 2017, 9). It is this claim that implies that all social groups that exhibit an objective normative force in regard to their members are to be classified as legal orders.

Romano's second suggestion is that institutions have considerable value. Institutions are said to help individuals to 'overcome the weakness and limitedness of their forces' and to 'raise individuals' (Romano 2017, 21) to some higher, more desirable level of existence. Though Romano never makes that claim fully explicit anywhere in *The Legal Order*, his language intimates the view that, other things being equal, the existence of an institution and of its law is to be regarded as a good thing, as something that ought to be welcomed and supported, in the interest of helping individuals transcend their individual powerlessness and isolation and to realize the 'social nature...of a human being' (18). Where institutions have grown or been created it is typically desirable that they continue to exist, that their legal standing be recognized and their internal normative claims be affirmed by other institutions. To attribute the title of legality to all institutional normativity is perhaps the most dramatic way, for a lawyer, to emphasize the claim that institutions, other things being equal, deserve respect.

Romano on international law

According to Romano, 'the litmus test for all definitions of law is the so-called problem of international law' (Romano 2017, 25). More specifically, the adequacy of a definition of law should be ascertained by reference to whether it manages to sustain 'both the existence [...] and the autonomy of international law' (25). Romano's discussion of international law (25–32) aims to show that institutional legal theory does support the existence and autonomy of international law. Romano suggests, moreover, that institutionalism is the only conception of law that will allow us to reject sceptical accounts of international law, which either deny that international law is proper law or argue that international law is a marginal instance of legality remote from core cases of legal order.

Romano's path to the first of these two theses looks straightforward: If all institutions are legal orders in their own right, then all that needs to be done, it seems, to establish that international law is proper law is to show that international society is an institution. Whether that is the case or not should turn out to be a question of fact that can be answered on purely descriptive grounds, without engaging normative assumptions about the value of international legality.

The approach actually taken in § 17 of *The Legal Order* is somewhat more indirect – perhaps because it would be rather difficult to decide on observational grounds whether, say, international society 'is a social entity or body, in the sense that it is a manifestation of the social, not purely individual, nature' of its members (Romano 2017, 18). Romano begins by pointing out that an institution need not possess legal personality, so as to pre-empt the claim that international society cannot be an institution since it lacks legal personality. He goes on to concede that an institution must have

an organization, but claims that ‘the concept of organization does not necessarily imply a relation [...] of superiority and correlative subordination’ (26).

This thesis initiates Romano’s response to a challenge to the existence and autonomy of international law which he expects from his statist opponents. That challenge portrays international law ‘as an articulation or projection of the domestic law of the various states’ (Romano 2017, 25–26). Roughly, the view that Romano is concerned to reject here is the influential interpretation of international law developed by Heinrich Triepel (Triepel 1899). The latter argues that there are no norms of international law other than those that have been agreed upon, in international treaties, by contracting states. Such norms, moreover, bind only the contracting states themselves. These claims are presented as an implication of the principle of the sovereign equality of states, understood as the equal freedom of all states not to be subject to norms that they have not consented to.

Romano’s rebuttal of this challenge argues that its account of the nature of international law is incoherent. Scholars who defend the voluntarism implicit in the challenge, Romano observes, nevertheless identify in international law ‘elements that necessarily entail the organization of states’ (Romano 2017, 26). The voluntarist account still assumes that a treaty, once entered into, is binding on the states that have become party to it, and that said states lack the power to disregard or to unilaterally withdraw from the resulting obligations. In other words, even the voluntarist account concedes that international law is objective, in the sense of binding states, potentially against their (present) will, once they have committed themselves to a treaty. Romano goes on to argue that since there can be no legal objectivity where there is no social organization, international society must be organized and thus be an institution.

In further discussion, Romano compares the voluntarist view to the fiction of the social contract. The domestic theory of social contract is to be rejected, Romano claims, because it attributes to individuals a moral status – that of agents capable of entering into binding agreements – that is conferred by positive domestic law and therefore cannot be used to explain the latter’s creation. Romano goes on to observe:

It is odd that a this very objection has not been made to international law scholars. If states are independent from each other, from a legal point of view this position does not pre-exist international law, as it is established by it; and the principle by which states cannot be obliged but by norms that they themselves have contributed to producing through their own will is a principle of positive international law, which then presupposes an already constituted and valid international law. (Romano 2017, 28)

Here, the claim is that the principle of sovereign equality is itself a legal principle, that is, it is a part or even the key part of the organization of international society. At the same time, the principle cannot coherently be regarded as having been produced by some antecedent agreement. Rather, the practice of treaty-based lawmaking in international society presupposes the principle. Again, the suggestion is that this provides the principle with legal objectivity that can only be grounded in the existence of international society as an organization or institution.

We can grant to Romano that the voluntarist conception of international law that he attacks is indeed incoherent (see Hart [1961, 215–221] for a similar argument). But this concession does not vindicate the claims that Romano’s discussion of international law

makes on behalf of the institutionalist theory of law. The first problem is that a sceptic about international law might deny the very starting point of Romano's reasoning, namely the assumption of the objectivity of international law. One might take the view – and such views are still defended today by notable scholars of international law (Goldsmith and Posner 2007) – that international law lacks genuine objectivity, that compliance with international law is ultimately prudential and that fundamental principles of natural law have a status akin to Hobbesian laws of nature, that is, that they are rules which bind only as long as compliance is mutually beneficial. Such a view may not strike us as morally attractive, but there is no doubt that it can account for a good deal of state behaviour.

If the institutional nature of international law was an uncontested, easily observable empirical fact, one could counter the sceptic's challenge by pointing out that international law is institutionalized and then ground its objectivity in its institutional nature. Romano, however, cannot offer a reply of this sort, given that he infers the institutional nature of law from its assumed objectivity. The sceptic might go on to observe that the analogy to the reasons for rejecting the theory of social contract in the domestic sphere is not likely to be helpful either: The reason why the state's law can assign objective individual status is that the state, as a matter of uncontested empirical fact, undoubtedly is an institution, and a very powerful one at that, while it is unclear at best whether there would be factual grounds to qualify international society as an institution if we did not already assume what is to be shown, namely that international is objective.

A second shortcoming of Romano's discussion of international law is that it assumes that we must accept the institutional theory of law if we are to regard international law as objective. Whether that is true or not is at least doubtful, given that there are prominent non-institutional theories of (international) law that equally emphasize international law's objectivity. Hans Kelsen's influential conception of international law is a case in point (Kelsen 1992, 107–125; 1920). Kelsen agrees with Romano that the assumption that international law is objective forces us to accept the legal validity of fundamental principles of international law that are not created by state consent. In Kelsen's view, such principles must be presupposed by the legal scientist aiming to offer an account of international law as objective. Kelsen believed that making this presupposition would only be meaningful on the condition that state behaviour was by and large compliant to the system of law so constructed, but he did not think that the presupposition could be justified by appeal to an observational claim to the effect that international law is an institution. Rather, Kelsen held that the adoption of a legal construction that holds that international law is 'a projection of the domestic law of the various states' (Romano 2017, 25–26) is equally possible, from the point of view of legal science, since it can equally be brought into line with most actual state behaviour. The choice between the two hypotheses, Kelsen argued, would ultimately have to depend on questions of value, on whether one was interested in strengthening international legality or in keeping it wholly under the control of sovereign states.

It seems clear that Romano, again like Kelsen, had strong sympathies for the first of these two options. What seems equally clear is that Romano's claim that international law is an institution is an expression of a normative preference, not the result of a dispassionate factual observation that remains within the methodological confines of a purely descriptive and positivist legal institutionalism.

Romano on subordinate institutions

We have seen that Romano's treatment of international law is informed by normative assumptions that stand in tension with his commitment to positivism. Similar observations can be made about Romano's treatment of sub-state legal institutions.

Romano's institutionalism differs from contemporary versions of legal pluralism in one key respect: Romano's criterion of the identity of a legal order is much less demanding than the criteria that are typically employed in contemporary debate to individuate legal systems. Contemporary debate usually assumes some version of the view that an independent legal system must possess its own rule(s) of recognition and/or its own law-applying institutions that successfully claim supremacy (Barber 2010, 145–171). The key characteristic of an independent or distinct legal order, in this view, is its normative autonomy. Romano's institutionalism, by contrast, claims that every distinct institution (in Romano's rather permissive sense of the term) is a distinct legal order, irrespective of whether it is normatively independent or not.

Romano holds, unsurprisingly, that distinct legal orders can and often are related to other legal orders by a connection of legal relevance (Romano 2017, 69). One order will be legally relevant to another, according to Romano, if and only if 'the existence or the content or the effectiveness of an order [is] conditional on another order on the grounds of a legal title' (69). Most of the second chapter of *The Legal Order* is taken up with a rich and intricate account of the different ways in which one legal order can be relevant to another. A full presentation of this very interesting discussion is beyond the scope of this paper. What I would like to emphasize here is that many of the possible connections between institutions or legal orders that Romano elaborates are connections that, as Romano concedes (36–37, 106) make the connected institutions mere parts of one encompassing legal order.

One of Romano's more frequently used examples of such a case is that of a municipality (Romano 2017, 72). A municipality may well derive all its legal authority from the authorizations enacted by a central government. In that case, the existence, the content and the effectiveness of the municipality, as a legal order, will wholly depend on superior law. Why, then, should we regard the municipality as a distinct legal order?

Romano's answer, presumably, would be that the municipality, though it is created by superior law and wholly dependent on it, satisfies the four criteria of institutionality. The municipality possesses a concrete and visible existence. It could be regarded as a manifestation of the social nature of human beings. Or to put the point differently, it makes sense to hold that the municipality's (delegated) powers of lawmaking may allow it to create norms that are objectively binding on its inhabitants. In some sense or other, moreover, the municipality is clearly a bordered entity with an individuality of its own. After all, we can distinguish municipalities from one another and from superior layers of government. Finally, a municipality may of course be enduring, throughout changes in the composition of its personnel and its inhabitants. So far so good.

The problem is that all the criteria of institutionality may well apply in much the same way to several of a municipality's own administrative sub-units, such as, say, the office that issues building permits or the office that handles fines for violations of the local traffic rules. Of course, these sub-units are wholly dependent on the municipality, but so is the municipality itself (on the central state). It thus seems that it would be arbitrary – given

Romano's criteria of institutionality – to claim that the municipality is a distinct institution (and thus a distinct legal order), but that its sub-units, or, for that matter, the province in which the municipality is located, are not. But if any administrative unit can be regarded as a distinct legal order, our concept of legal order, it might be argued, has clearly become over-inclusive.

The institutionalist might respond by biting the bullet and insisting that, our intuitions notwithstanding, every social entity that satisfies the four criteria of institutionality qualifies as a distinct institution, and thus as a distinct legal order, no matter how intimately it may depend on some encompassing order. But such a move, without further explanation, seems ill-motivated. What could be the reason for claiming that any identifiable organizational unit should be regarded as a distinct legal order, even where it is also a part of that encompassing normative order?

In truth, we do not regard the traffic office as a distinct institutional order, and neither, I suspect, would Romano. The reason that we so regard the municipality – or perhaps more precisely, the reason why it appears to make a good deal more sense so to regard the municipality – is that the municipality strikes us a natural and useful locus of (limited) collective decision-taking. This observation, however, embeds a normative claim about proper administrative organization and proper allocation of decision-making powers within a continuous hierarchy of governmental authorities. As in the case of international law, the way in which Romano individuates institutions or legal orders turns out to be governed by implicit considerations of legal policy.

In § 45 of *The Legal Order* Romano offers a discussion of industrial relations that is equally instructive. Romano claims that 'the organization of a factory' (Romano 2017, 96) is an institution and thus forms a distinct legal order. To be sure, this order, in contrast to the municipality, is not a mere creation of the legal order of the state. In Romano's view (which undoubtedly reflects the lack of fully developed labour law at the time of writing) the legal order of the factory stands in tension to the legal order of the state, which, as a law of 'simple contract between persons in a position of equality' refuses to recognize that in the order of the factory 'some persons have a power of supremacy over others who are subordinate to them' (97). Or to put the point in Romano's terminology of relevance: The state legal order does not accord legal relevance to the distinct legal order of the factory, though the order of the factory, of course, will have to reckon with the state's law of contract, notwithstanding the fact that the latter fails to reflect the actual structure of authority within the factory.

Romano makes it abundantly clear that he thinks it would be desirable for the tension between state legal order and the order of the factory to be eliminated, and in such a way as to give greater effect to the legal order of the factory:

It is known that the law of the modern state intended to rule out all relationships implying one private individual's dependence on another private individual. Although it was a reaction to the oldest order and the abuses it engendered, in doing so it has gone too far. [...] the state misrecognizes certain manifestations of social life that still require and will probably require inequality among individuals, the supremacy of some and the subordination of others. (Romano 2017, 98)

The state ought to give legal relevance to the purportedly autonomous law of the factory, which is structured by the supremacy of the employer and the subordination

of the employees. Romano's classification of different forms of legal relevance opens up different ways in which the state might do that: It could, for instance, enact laws that reflect the internal order of the factory more closely. It could alternatively decide to settle conflicts arising within the order of the factory in accordance with that order's own norms.

Let us grant that the institution of the factory indeed has an internal order, as a matter of sociological fact, and one that is not fully recognized by state law. It might be argued, obviously, that the fact that the state's law does not fully recognize that order is a good thing. The claim that the state's law ought to pay respect to the institutional order of the factory is patently a normative claim that stands in need of justification. Romano suggests that the internal order of the factory is a quasi-natural 'manifestation of social life' (Romano 2017, 98). The intended implication here is surely that, other things being equal, manifestations of social life are worthy of respect on the part of the state. This implication, I submit, is what motivates the institutional theory of law. If the internal order of the factory is legal, in exactly the same way as the state's, then, or so one might conclude, it must have a credible *prima facie* claim on the state's legal respect.

It should be clear that the identification of the internal order of the factory as a distinct legal order is again driven by implicit normative aims. But of course, these should, strictly speaking, play no role in a theory of law that bills itself as positivist. From a positivist point of view, the bare fact that some order is legal can have no bearing on whether some other order ought to recognize and to support it in its internal aims. The latter is a question of legal policy the answer to which cannot be derived from a purely descriptive account of the nature of law. And if the legal quality of the factory's internal order does not help to settle the question whether it deserves state-recognition, why claim, in the first place, that the factory's internal order is a distinct legal order?

The value of Romano's legal theory

There is one example of institutional order discussed in *The Legal Order* which appears to conflict with my claim that Romano thinks that institutions are inherently worthy of respect, namely the law of the mafia. Romano is perfectly happy to argue that the mafia is an institution and therefore is a legal order, but he does not demand, needless to say, that it should be given legal relevance by the law of the state or by any other institution (Romano 2017, 21, 58–59).

I do not think that Romano's handling of the mafia shows that his concept of institution is truly value-neutral. Institutions, Romano argues, are worthy of respect, other things being equal. In the case of the mafia things are not equal. To be more specific, there is one obvious difference between the mafia and all other institutional orders – the family, the Church, the factory, the municipality, international society – that Romano mentions in *The Legal Order*. There is no way to harmonize the claims of the internal order of the mafia with the state's law, by making the two orders legally relevant to one another in the right way. The mafia's rules flatly conflict with the state's law. In particular, the mafia contests the state's claim to a monopoly on the legitimate use of physical coercive force. Contrast this with the relations of the state and the Church. The state, Romano points out, no longer requires citizens to pay the tithe, but

it does not make it illegal for religious believers to do so and thus makes it possible for the Church to maintain the view, in its internal order, that paying the tithe is a legal duty for its members, even while it refrains from demanding that the state enforce membership in the Church. Such mutual accommodation through proper self-limitation is unavailable in the relationship of mafia and state.

Romano's considered view, it would appear, was this: Institutions ought to be paid respect, by the state and its law, on the condition that they are healthy expressions of the social nature of human beings, and that their claims can be harmonized, through a proper self-limitation on the part of the state, with the state's own law, which is indispensable, in virtue of its unique capacity to control the use of raw force, as a coordinating framework (Romano 2017, 106–109). Ironically, such a view is far from anti-statist. Romano does not argue against the claims of the state as much as he advocates a certain picture of the good state. The good state, for Romano, is an institution of institutions that draws strength and sustenance from the subordinate institutions which it integrates into its encompassing order by paying proper respect to their internal structure. When Romano rejects the claim that all law is the law of the state, the real target is not the state as such, it is the state that accepts no autonomous intermediate institutions between itself and the multitude of its individual citizens.

This insight allows us, I would like to suggest, to make consistent and productive sense of Romano's project. It would be best not to understand the institutional theory put forward in the *The Legal Order* as just another general positivist theory of legal order or legal system. In that regard, I have argued, it can only be judged as a failure. The considerable and enduring value of Romano's approach consists in his theory of legal relevance (Romano 2017, 66–100) which deserves much more careful discussion than I have given it here. This theory provides the most detailed and careful account that I am familiar with of the many different ways in which different social institutions could come to be legally related to one another. And the sheer intricacy and richness of Romano's observations might well provide us with a sufficient kit of tools to construct a sound institution of institutions, one which relates to those of its potential component parts that are deserving of moral respect in ways that are, in each instance, properly supportive of their justifiable internal normative claims. This is the sense in which 'approaching social phenomena through Romano' can, hopefully, help us to 'produce a revision of the state in the sense of its compatibility with other orders' (Croce 2017, 128). What I have denied here is that a purely juristic standpoint can do all the work. Institutional theory will have to connect to a normative understanding of the proper relationship between the state and international as well as societal institutions to realize its full value.

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