Towards a Retrieval of Law in Foucault

An Encounter with:
Ben Golder and Peter Fitzpatrick. *Foucault's Law*.
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In their short yet insightful *Foucault's Law*, Golder and Fitzpatrick address the issue of Foucault's stance on the role of law in the modern period. The authors advance three main arguments. First, they contend that for Foucault, modern law is inter-dependent on productive modalities of power like discipline. Second, they argue that Foucault's law navigates between a static mode, whereby law controls and circumscribes with the purpose of securing order, and a dynamic mode, whereby law adapts itself to resistance. Finally, Golder and Fitzpatrick link the dynamic mode of law with Foucault's work on ethics to suggest that law is constitutive of the modern social bond.

The authors develop their arguments in three dense chapters. The first chapter, "Orientations: Foucault and Law," surveys a number of perspectives on Foucault's stance on law. Golder and Fitzpatrick start by discussing what they consider the orthodox understanding of Foucault's position on law: namely, the "expulsion thesis" (13). Advanced most notably by Hunt and Wickham in their *Foucault and Law: Towards a Sociology of Law as Governance*,¹ the "expulsion thesis" asserts that Foucault marginalised law from his analyses of the modern period and subordinated it to other powers. As Golder and Fitzpatrick note, this thesis rests upon three claims (15). The first claim is that Foucault viewed law as being essentially negative in its

operation: law functions by means of prohibition and responds to transgressions by punishing the criminal and repressing the infraction itself. The second claim is that for Foucault, law is tied to sovereign power, which violently deploys the punitive power of law in order to cow subjects into obedience. Thirdly and finally, Foucault is maintained to have asserted that modern law has been eclipsed or taken over by modalities of power that function not by repressing but by producing, managing, or fostering.

It is useful to linger on the productive modalities of power on which Foucault focuses: namely, discipline, biopolitics, and government. On the one hand, disciplinary power operates to create normal, docile individuals by means of extra-legal techniques like constant surveillance and examinations (Foucault, *Discipline* 135-94). Biopolitics, on the other hand, is geared towards fostering human life through regulatory mechanisms that target and intervene at the level of the population (Foucault, *Society* 259-264; Golder and Fitzpatrick 19-20). Finally, government denotes the art of managing one's own way of acting and thinking as well as other people's (Foucault, *Security* 227-254; Golder and Fitzpatrick 31-2).² Unlike law, which punishes one for her transgression of a law, these three productive modalities of power punish individuals for their failure to attain a norm—broadly defined as a standard of conduct or an appropriate way of being (Golder and Fitzpatrick 20, 43). Accordingly, theorists of the “expulsion thesis” argue that Foucault took the rapid diffusion of these modalities of power in the modern period to have implied the demise of law. In fact, on this account the law continues to exist only insofar as it has been colonised by, and subordinated to, discipline, biopolitics, and government (Golder and Fitzpatrick 14).

Golder and Fitzpatrick admit that the “expulsion thesis” is propped up by a wealth of textual evidence in Foucault's work (25). Before critiquing it, however, the authors outline three

other perspectives on Foucault's stance on law. *Prima facie*, these perspectives are diametrically opposed to the "expulsion thesis," for they maintain that Foucault did not expel law from the modern period. The first perspective, formulated by Anthony Beck, views law and discipline as being in a dialectical interaction with each other, either in a mutually supportive role or in confrontation with each other (Golder and Fitzpatrick 26-9). The second perspective views law as tactical element in the framework of governmental strategies aimed at the management of the population (Golder and Fitzpatrick 29-35). Finally, the third perspective is François Ewald's, who argues that the modern period has seen the demise not of law as such, but rather of the law as the expression of sovereign power. According to Ewald, the law has become normative in that it functions increasingly as a norm at the service of regulatory as well as disciplinary systems (Golder and Fitzpatrick 35-39).

Golder and Fitzpatrick rightly observe that the second and third perspectives subordinate law to modern technologies of power, thereby coming dangerously close to the "expulsion thesis." They single out the first perspective as the most promising for a retrieval of the role of law in Foucault's account. The authors embark upon such a retrieval in their second chapter, "Foucault's Other Law." In it, Golder and Fitzpatrick reverse the "expulsion thesis" by arguing that law both sustains and is sustained by modern modalities of power (61). Consequently, law and these modalities of power are inter-dependent. To corroborate their argument, Golder and Fitzpatrick focus on the relation between law and discipline, as I discuss below.

The authors suggest that, on the one hand, discipline relies upon law in two main ways. First, law has withdrawn from places such as the prison, thereby carving a space for disciplinary power to assert its authority (Golder and Fitzpatrick 64-66). While it is a fact that law still

intervenes when there are excesses on the part of discipline, this fact does not endanger the authority of discipline but rather proves it. For, as Golder and Fitzpatrick put it,

by purporting to exercise its supervisory jurisdiction *only* over the more egregious aberrations, abuses, and excesses of disciplinary power, law confirms the basic claim at the heart of disciplinary power to adjudicate on questions of normality and social cohesion. (64, italics mine)

The second way in which discipline depends on law is that law deals with insubordination that disciplinary power is unable to contain (Golder and Fitzpatrick 67). Insofar as this kind of insubordination poses a danger to the authority of discipline, the intervention of law “rescues” discipline and ensures its normal functioning. On the other hand, law’s reliance on discipline lies in the following: to control bodies, discipline requires the production of knowledge about human beings, which in turn is made possible by the exercise of disciplinary techniques like surveillance and note-taking. In the prison, the conjunction of power and knowledge has made possible the constitution of delinquency both as a target of intervention for law and as a field of knowledge authenticated by sciences like psychiatry (Foucault, in Golder and Fitzpatrick 66). In constituting delinquency as a scientific domain, discipline has given to the law “a certain compensating legitimacy of its own, allowing the law to function ‘on a general horizon of truth’” (Golder and Fitzpatrick 66).

Golder and Fitzpatrick are successful in showing the inter-dependency of law and discipline; however, in my view they are less successful in illustrating how law both sustains and is sustained by modern modalities of power. The reason for this is that the authors do not discuss the interaction between law and modalities of power *other than discipline*, such as biopolitics and government. And yet, it cannot be simply assumed that the interaction between law and discipline is the same as that one between law and biopolitics or law and government.

Consequently, their claim that modern technologies of power do not surpass and expel the law is somewhat weakened (Golder and Fitzpatrick 61). Golder and Fitzpatrick's argument that the law has played a central role in the constitution and re-constitution of the authority of discipline in the modern period is compelling, but one is left wondering whether the centrality of law is *limited* to the deployment of discipline or *extends* beyond it.

In the second half of the second chapter, Golder and Fitzpatrick contend that Foucault's conceptualisation of law navigates between two opposed poles—between a “determinate” law and a “responsive” one (72). By “determinate” law, Golder and Fitzpatrick mean a static law that prohibits, controls, and circumscribes with the purpose of securing order. By contrast, the “responsive” law is a dynamic law that adapts itself to resistance and transgression. Golder and Fitzpatrick construct the “responsive” dimension of Foucault's law on the basis of two resources: (a) Foucault's engagement with Bataille and Blanchot; and (b) Foucault's discussion of the interplay of power and resistance. As power arrangements must respond to resistance and modify themselves if they are to remain in force, so must law engage with and adapt itself to transgression if it is to rule (Golder and Fitzpatrick 76).

Importantly, Golder and Fitzpatrick argue that both the “determinate” and the “responsive” dimensions are *necessary* dimensions of law, even if they are opposed to each other (80). For, a wholly responsive law would fail to secure order by dissipating itself in its attempt to be responsive to everything. At the same time, law would become unable to rule effectively if unresponsive to the “ever-changing nature of society and the economy” (Golder and Fitzpatrick 80). Consequently, law constantly moves from its “determinate” pole to its “responsive” one and vice-versa. Golder and Fitzpatrick further argue that the capacity of the law to adapt itself to resistance means that the law has no fixed content, and is therefore ultimately vacuous (82). The

vacuity of the law makes it open to appropriation and subordination by external modalities of power (such as discipline), but also “to resignification and renewal that eludes the determination of a sovereign or a given regime of power” (Golder and Fitzpatrick 84).

Golder and Fitzpatrick’s re-construction of the “responsive” aspect of Foucault’s law is praiseworthy, as is their retrieval of Foucault’s largely ignored texts on Bataille and Blanchot. However, Golder and Fitzpatrick’s account is decidedly un-Foucauldian in that it lacks historical examples, not to mention an analysis of the operations of law in the modern period. Surely, constructing a theory of law entails a certain degree of abstraction from actual examples; however, the absence of examples in Golder and Fitzpatrick’s account leads one to believe that their Foucauldian theory of law is perhaps *too* abstracted from the actual operations of law in different contexts. In other words, this absence fosters the feeling the authors are trying to derive a grand theory of law from Foucault’s work—that is, a theory that is inattentive to the operation of law in different contexts. This grand theory (or, as Foucault would have called it, this “totalitarian” theory (*Society* 6)) is precisely what Foucault so insistently shunned in his own works.³

In addition to the above, I would have liked the authors to have expanded the focus of their account from the content of the law to its form. Golder and Fitzpatrick stress that law’s responsiveness to resistance results in a change to the meaning of the law itself—that is, in its resignification. What is left out here is, of course, how the *form* of law changes. Is modern law still a “law of prohibition” (Foucault, in Golder and Fitzpatrick 16)? Or, has law assumed the form of, say, a positive injunction (“Thou shall ...”), or of rights? To my mind, answering these questions is key to re-constructing Foucault’s position on, and account of, law in the modern period.

In the final chapter of the book, Golder and Fitzpatrick propose to “develop [Foucault’s] thought along lines he never fully explored” (99) by arguing that law is central to the modern social bond. They start by distinguishing between two conceptualisations of the modern period in Foucault’s work: namely, modernity as “closure” and as “rupture” (Golder and Fitzpatrick 102). The former view of modernity is a version of the Weberian iron cage picture. On this view, the modern period has experienced such an explosion of disciplinary and regulatory techniques that any possibility of escape from their normalising effects is impossible. By contrast, the view of modernity as rupture finds its most salient feature in a willingness to go beyond limits—defined as “forms of thought and action which are taken for granted and not questioned or contested” (Tully 75; cf. Golder and Fitzpatrick 102). On this view, modernity is not so much a historical period as an attitude or a way of being. For Foucault, this attitude enjoins “the historical analysis of the limits imposed on us and an experiment with the possibility of going beyond them” (Foucault, in Golder and Fitzpatrick 109).

Golder and Fitzpatrick are interested in elaborating their argument on the centrality of law as it relates to modernity as rupture. To this end, they retrieve Foucault’s texts on ethics, which emphasise the way in which individuals disrupt inherited subjectivities by self-consciously working on themselves in order to attain a specific mode of being (Golder and Fitzpatrick 119). For Foucault, the aim of ethical practice—the authors suggest—is “not to rest content with the achievement of a sense of self but to constantly ‘form oneself, to surpass oneself’” (Golder and Fitzpatrick 119). In this sense, ethics centres on an incessant activity of self-fashioning and self-transformation. Importantly, Golder and Fitzpatrick contend that the subject of Foucault’s ethical project is not a self that is enclosed in itself, but rather one whose subjectivity is always formed “in a relational and contestatory field of affects, encounters and

engagements with others” (121). Following Jean-Luc Nancy, the authors call this field of encounters wherein one acquires one’s subjectivity, “being-together” (Golder and Fitzpatrick 101). If we take modernity to mean a limit-transgressing attitude, then a *modern* “being-together” is a field always open to contestation, as subjects go beyond their own limits through practices of ethical self-transformation.

According to the authors, the “responsive” law is a *constitutive* or formative component of this “being-together” constantly open to alterity (Golder and Fitzpatrick 99). The reason that Golder and Fitzpatrick advance for their claim is that law, by engaging with and adapting itself to resistance and transgression, opens up society to new ways of being (109). Indeed, the authors, rehearsing a Derridean gesture, intimate that justice is harboured in “the responsive dimension of Foucault’s law, in its ever incorporatively engaging with its outside and in its undoing of its determinate self in the process” (Golder and Fitzpatrick 109). Golder and Fitzpatrick pit the “responsive” law, which opens up society to alterity, against François Ewald’s theorisation of the law as an instrument of compromise and settlements among disputing interests. For Ewald, this compromise gives rise to a norm that functions as both the criterion for how society is now and the ideal for what society should be. It follows that this norm acts as a “principle of justice” for society, and becomes the basis upon which social relations are reconfigured (Golder and Fitzpatrick 104-107). Golder and Fitzpatrick take Ewald’s account to mean that law operates primarily to determine relations and ways of being rather than to open them up to alterity. Against Ewald’s treatment of law as an instrument of a self-enclosed modernity, the authors advance their account of law as constitutive of a “being-together” constantly in flux.

The argument that Golder and Fitzpatrick advance in their last chapter is ambitious and original. However, in my view the authors are more successful in showing that there are

similarities between Foucault's view of law and his ethics than in illustrating the *link* between them. More generally, it is not very clear to me why and how exactly the law is constitutive of our modern being-together. In this respect, I would have liked the authors to linger on the role that law plays in shaping people's subjectivities. In other words, does a modification to one's subjectivity involve or come about through the resignification of the law? To my mind, this question must be answered in the positive if we are to hold that law is formative of our subjectivity, and therefore of our being-together.

Despite my criticisms, *Foucault's Law* is a thought-provoking book well worth reading. Although relatively short, this book introduces the general reader to (a) a wealth of texts written by Foucault; (b) some of Foucault's main concepts; and finally, (c) the secondary literature on Foucault's stance on law. For the expert reader, the book sketches what a Foucauldian jurisprudence might look like. That said, in my view the principal merit of *Foucault's Law* lies in having once more brought to the fore the issue of Foucault's position on law; an issue that, after the publication of Hunt and Wickham's *Foucault and Law* fifteen years ago, has been sidelined if not forgotten. This book is precisely what is needed to spark an indispensable activity of mutual elucidation among scholars on Foucault and law.

Notes

¹ Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994). Cited in Golder and Fitzpatrick 6.

² While analytically discrete, these technologies of power in fact often overlap. Commendably, the authors discuss the connection between biopolitics and government (32-33).

³ It must be noted that Golder and Fitzpatrick discuss Foucault's aversion to "grand" and "comprehensive" theories (3-5). Here, the authors argue for the need to theorise law while

avoiding the pitfalls of such comprehensive theories. As I have argued, the authors are not successful in avoiding these pitfalls.

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