

Foucault Studies

© Max Rosenkrantz 2010

ISSN: 1832-5203

Foucault Studies, No. 8, pp. 146-150, February 2010

REVIEW

Ben Golder and Peter Fitzpatrick, *Foucault's Law* (New York: Routledge, 2009), ISBN: 978-0415424547

Golder and Fitzpatrick's *Foucault's Law* is a brief, yet rich, contribution to the burgeoning literature on the place of law in Foucault's thought. In three densely elaborated chapters they defend the view that, far from being the antinomian thinker he is often taken to be, Foucault provides the resources for the development of a positive conception of law.

Golder and Fitzpatrick present their interpretation in dialogue with previous writers on Foucault's analysis of the role of law in the exercise of power. Chapter One ("Orientations: Foucault and Law") is a critical discussion of the so-called "expulsion thesis," defended most notably by Alan Hunt and Gary Wickham in *Foucault and Law: Towards a Sociology of Law as Governance* (1994). The expulsion thesis finds its textual home in Foucault's lament that "in political thought and analysis, we still have not cut off the head of the king."¹ In Foucault's view, political thought remains tethered to an obsolete model in which power is held by a sovereign who exercises it by imposing laws and punishing transgressions of them.² It would seem then that part of what is required in order to "cut off the head of the king" is to downplay the significance of law in the analysis of power. That this is part of Foucault's agenda is suggested by his assertion that "we have entered a phase of juridical regression in comparison with the pre-seventeenth-century societies we are acquainted with."³ Thus, an adequate analysis of power must eschew a concern with law and turn to more fundamental mechanisms, in particular

¹ Michel Foucault, *The History of Sexuality Volume I: An Introduction*, translated by Robert Hurley (New York: Vintage Books, 1978), 88 – 89.

² Hobbes's *Leviathan* is the paradigm of this type of analysis. Foucault rejects what he calls the "Leviathan Model" in *Society Must Be Defended: Lectures at the College de France 1975 – 1976*, edited by Mauro Bertanin and Alessandro Fontana; translated by David Macey (New York: Picador, 2003), 34 – 36. His remarks there echo those from *The History of Sexuality*.

³ Foucault, *The History of Sexuality Volume I: An Introduction*, 144.

the “disciplines.”⁴ In short, the expulsion thesis takes Foucault to offer a “univocal narrative of law’s demise.” (22)

Golder and Fitzpatrick rightly argue that such a narrative places more on Foucault’s injunction to “cut off the head of the king” than it can bear. In fact, Foucault never denies that law remains important in modernity. For example, his announcement that “we have entered a phase of juridical regression” is preceded by the qualification that

I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.⁵

It is clear then that Foucault rejects a particular conception of law – one that fits with the Leviathan model described above – but not law *per se*. Thus, the question is not whether Foucault “expels” law (plainly he does not) but how he conceives of it, and how he theorizes its relationship to power. Golder and Fitzpatrick address this issue by taking up the work of writers who in various ways have contested the expulsion thesis. (25–26) The authors identify three such readings. The first argues that law and discipline, far from being incompatible with one another, are “interrelated and are deployed jointly in modernity.” (26) The second examines Foucault’s view of law in light of his writings on “governmentality,” which denotes a pattern of thought Foucault sees emerging in the sixteenth century. It is concerned “not [with] the maintenance of a transcendent and singular sovereign power over a principality but rather the care and maximization of the potential of the population itself.” (31) According to this second reading, law is an essential instrument of that project. The third reading, defended by Francois Ewald, argues that the expulsion thesis ignores the distinction Foucault makes between the “legal” and the “juridical.” The “juridical” is the conception of law appropriate to the Leviathan model; it is a species of the genus “legal.” According to Ewald, Foucault’s analyses trace a transformation in law from a set of rules that simply prohibit and punish (i.e., the Leviathan model) to

⁴ Golder and Fitzpatrick point out that *Discipline and Punish* is the work “most commonly relied upon by those who allege Foucault marginalized and expelled law from modernity.” (61) Of course, Foucault’s analysis of power is not limited to the disciplines; governmentality and bio-power figure prominently as well. Golder and Fitzpatrick recognize this (see 55) but wisely hold the complications it raises at arm’s length (an exception is their brief discussion of the relationship between bio-power and governmentality, 32–33). In what follows I shall use “power” as a category term encompassing discipline, governmentality and bio-power, and I shall use it or some sub-set of the three crucial Foucaultian terms as the context demands.

⁵ *The History of Sexuality Volume I: An Introduction*, 144.

a set of norms that establish standards, averages, etc. that in turn constitute subjects and manage populations.⁶

Golder and Fitzpatrick have a decided preference for the first reading. The basis for their preference provides the opportunity for a clarification of the expulsion thesis and their reasons for rejecting it. The second and third readings are alike in attributing to Foucault the view that though law does not disappear in modernity, it is subordinated to power. In denying law any autonomy those readings “rehearse some of the same critical gestures of the ‘expulsion thesis’ and end by confining Foucault’s law and assimilating it to the emergent forms of rule in modernity rather than recuperating it.” (26) Indeed, one can go further and hold that those readings do not depart from the expulsion thesis in *any* significant way. For, as Golder and Fitzpatrick acknowledge elsewhere (55), the expulsion thesis asserts not that law simply recedes from the scene, but that it is subordinated to power in the way the second and third readings contend.⁷

So it would seem as if the first reading is the only genuine alternative to the expulsion thesis. Even here though, one may question whether Golder and Fitzpatrick have succeeded in identifying an alternative to the expulsion thesis. The writers assembled under that banner share the view that law and discipline are “interrelated.” (26) Yet there is no reason to think that this “interrelationship” – which, it should be said, Golder and Fitzpatrick sketch only schematically – is incompatible with the crux of the expulsion thesis. To take one example, it is no doubt the case that disciplinary institutions such as the prison, the school, the workplace and the hospital depend upon criminal law, property law, contract law and so on. (26–27) However, that is consistent with the claim that the function of those bodies of law is best understood as preserving and reproducing a disciplinary society (rather than, say, protecting natural rights).

The inconclusive character of Golder and Fitzpatrick’s discussion of alternatives to the expulsion thesis – which, at this point, might be more aptly labeled “the subordination thesis” – does not show their rejection of that thesis to be misguided. Ultimately, the persuasiveness of their position depends on developing an account of law in which it is something other than a mere handmaiden of power. Golder and Fitzpatrick take up that task in Chapters Two (“Foucault’s Other Law”) and Three (“Futures of Law”). Their approach is innovative in two respects. The first is their attempt to ground law’s autonomy in the incompleteness of power. The second is

⁶Francois Ewald, “Norms, Disciplines and the Law,” in Robert Post (ed.), *Law and the Order of Culture* (Berkeley and Los Angeles, CA: University of California Press, 1991), 138 – 141. See Golder and Fitzpatrick, 35 – 39.

⁷ For example, Hunt and Wickham write, “Foucault’s account of the decline of law does not seem to involve the thesis that law will wither away. Rather the position can be characterized as allocating to law an increasingly subordinate or support role within contemporary disciplinary society.” *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994), 56.

their use of a number of texts that are generally ignored in this context, namely Foucault's writings from the 60's on Blanchot and Bataille and from the 80's on ethics and politics.

Golder and Fitzpatrick locate the incompleteness of power in two sources. The first is epistemological. For example, disciplinary power is inextricably tied to the knowledge produced by the human sciences. Yet, "the claim of this knowledge in its own terms to 'scientific' and 'true' status is never convincingly made out." (62) Law is thus required to provide the human sciences with the foundation that purely epistemological considerations cannot. (67) Put slightly differently, the human sciences are taken seriously not because a due regard for the truth demands it, but because the law does. The second source of power's incompleteness is the resistance to it. "Simply put [the human sciences] can identify and stigmatize abnormality but not enforce sanctions against it of their own scientific motion." (70)

Golder and Fitzpatrick offer a compelling argument that power is incomplete in both respects. Nevertheless, by itself it is inadequate to establish the autonomy of law from power. As it stands, it shows only that power depends on law – but that is compatible with the latter being subordinate to the former. (A general cannot function apart from his troops; that does not mean they are not subordinate to him.) Interestingly, Golder and Fitzpatrick seem to accept this objection. Having concluded their discussion of the incompleteness of power, they state that their next task is to go beyond showing that law "remained in place alongside the new powers [Foucault] was describing." (71) They argue that in addition to the instrumentalized conception of law that has appeared in the book to this point, one can discern in Foucault another conception of law, a conception that deserves not criticism, but valorization.⁸

Unfortunately, in elaborating this second conception Golder and Fitzpatrick are content to rely on words that succeed only in vaguely suggesting something radically different from the instrumentalized conception of law. Their preferred term for describing this other conception of law is "responsive" (see, for example, 72, 73, 77, 78, 80, 81, 83, 100, 103, 109, 111, 125, 130), supplemented at points by near synonyms such as "labile" (71) and "mutable." (77) However, they provide no detail concerning the changes towards which their terminology gestures. Let me illustrate the difficulties this presents by examining one characteristic formulation. The intent of Chapter Three is to show "how law through its responsive orientation to the ultimate contingency and unpredictability of the future is a constituent component of the social bond in modernity." (100) In the absence of any further specification of the "responsiveness" of law, the formulation suggests nothing so much as H.L.A. Hart's argument that many legal rules and concepts have an "open texture" (i.e., they lack completely determinate criteria of application), a feature Hart finds desirable precisely because it gives law the

⁸ It should be noted here that Golder and Fitzpatrick think that the two conceptions are "integrally related," 71. Therefore, they are not arguing that the second can or should replace the first.

flexibility necessary to respond to the contingency and unpredictability of the future.⁹ There is no doubt that Golder and Fitzpatrick intend something different than Hart's solid liberalism, but they have not made clear what that is.

The difficulties I have just described are mirrored in Golder and Fitzgerald's attempts to ground their positive conception of law in Foucault's texts. The tone and broad themes of the works on which they rely have an obvious affinity with that positive conception. For example, Foucault's writings from the 60's are concerned with the possibilities of transgression; his writings from the 80s with the contingency and mutability of the self. What they do not have is any obvious concern with law in the sense that is relevant here. Golder and Fitzpatrick are under no illusions on this score, and they readily acknowledge that the "responsive" conception of law they develop is not one that Foucault himself puts forward. (99, 125–126) This is not to say, of course, that the works in question cannot provide the foundation for such a conception. Yet, considerable interpretive work is required to bridge the gap between, if I may, their manifest and latent content. Here again, the necessary detailed work is lacking; in its place are extensive quotations, unaccompanied by commentary. While those passages *may* point toward a "responsive" conception of law, Golder and Fitzpatrick have not shown that they do.

These reservations show, I think, that Golder and Fitzpatrick have not made the case that the expulsion thesis is inadequate as an interpretation of Foucault. Nevertheless, that judgment must be tempered by recognition of the book's considerable merits. Even if unpersuasive, its main thesis is original and thus well worth considering. In addition, the authors bring to their task an impressive command of the primary and secondary literature. Those looking for an entry point into the issue of Foucault and law would do well to begin here. Last, but by no means least, in attempting to extract from Foucault a positive conception of law Golder and Fitzpatrick helpfully remind us that he was not simply a theorist of power but an activist who issued the admonition, "Do not think that one has to be sad in order to be militant."¹⁰

Max Rosenkrantz
Associate Professor
Department of Philosophy
California State University, Long Beach
1250 Bellflower Boulevard
Long Beach, CA 90840

⁹ H.L.A. Hart, *The Concept of Law*, second edition (Oxford: Oxford University Press, 1994), 126 – 136; cf., Golder and Fitzgerald, 80.

¹⁰ Michel Foucault, "Preface to *Anti-Oedipus*," in *Power: The Essential Works of Foucault 1954 – 1984, Volume 3*, edited by James D. Faubion, translated by Helen Lane, Mark Seem and Robert Hurley (New York: The New Press, 1997), 109.