

# Foucault Studies

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## REVIEW

**Ben Golder and Peter Fitzpatrick (eds.), *Foucault and Law* (Surrey and Burlington: Ashgate, 2010), ISBN: 978-0754628668**

As part of Ashgate's "Philosophers and Law" series, *Foucault and Law* presents a survey of scholarly work on Foucault's relevance for law and legal theory. Given Foucault's alleged rejection or, at the very least, marginalization of the role of law in modernity, this endeavor might seem unpromising from the outset. However, it is precisely because of its attempt to "outline an alternative understanding of Foucault and his relevance for critical philosophical engagement with law" that Golder's and Fitzpatrick's collection constitutes an important intervention in law and legal theory. (xi)

Organized around four principles of selection, the choice of essays represents the diversity of interpretations of Foucault's analyses of law while at the same time giving room to conflicting evaluations. The character of the volume which, according to the authors, is guided by the idea of a debate, is furthered by an inclusion of essays that place Foucault in a dialogue with other philosophical traditions, as well as by the editors' effort to find a balance between interpretive and applied readings of Foucault.

The chronological and simultaneously methodological periodization of Foucault's work proposed by the editors lends itself to the trajectory of Golder's and Fitzpatrick's project. Part one, "Epistemologies: Archaeology, Discourse, Orientalism," addresses the archaeological phase of Foucault's work that, so the editors suggest, began in 1963 with *The Birth of the Clinic* and represents Foucault's attempt to uncover the "discursive rules which dictate not only the emergence of objects but also the qualification of speaking subjects and the regulation of what, and how, statements about such objects can be formed, transmitted and put into circulation." (xiii) Sidestepping the ontological focus of feminist legal scholarship on the (im)possibility of a feminist subject, Maria Drakopoulou follows Foucault's archeological investigation of the epistemic field, taking the reader back to seventeenth century England to inquire into the very conditions that made the emergence of a feminist legal discourse possible. Teemu Ruskola problematizes orientalist undertones of comparative legal scholarship and shows how the presumed absence of a Chinese legal subjectivity functions as the constitutive outside of Western legal subjectivity.

Part two, "Political Philosophy: Discipline, Governmentality and the Genealogy of Law," speaks to the genealogical project that is concerned with the mechanisms of power in modernity. It is in the transformations in the economy of power, specifically in Foucault's ac-

count of the shift from sovereign power to disciplinary and biopolitical mechanisms of power, that Alan Hunt identifies Foucault's rejection of the role of law as being displaced by other, more productive forms of power.<sup>1</sup> Against this prevalent criticism of Foucault, François Ewald and Victor Tadros leap to Foucault's defense by showing how Foucault emphasizes law's persistence in a juridical system rather than in its legal form. (126) The essay by Nikolas Rose and Mariana Valverde as well as Rose's collaboration with Peter Miller elaborate on this last point by investigating the role of law as one element within an "ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics" that Foucault calls governmentality.<sup>2</sup> For Foucault as well as for Rose, Valverde and Miller, it is governmentality that allows power to function in modernity, within and beyond what is commonly identified as "the state."

Part three, "Embodiment, Difference, Sexuality and the Law," remains within the genealogical project concerned with the emergence and workings of power but shifts the focus from the place of law within modern power relations to the effects of law on the body. It is in this context that Judith Butler identifies a fundamental paradox in Foucault's conception of the constructedness of the body. She shows that Foucault's genealogical project depends on the existence of a body that is ontologically prior to its cultural and historical inscription, rather than seeing the body itself as a discursive practice. Ann J. Cahill responds not only to Butler's charge against Foucault but also to Foucault's 1977 suggestion that rape be desexualized and punished for the physical violence rather than the sexuality involved. She argues (against Butler) that cultural inscription begins with conception and that, therefore, there is literally no body prior to inscription. She insists (against Foucault) on the significance of the role rape plays in the construction of the feminine body through sexualization. Andrew N. Sharpe extends the focus on the body to analyze the ways in which, in the absence of the legal category of monster, ideas of monstrosity still influence legal and non-legal representation of human difference. Kendall Thomas reclaims the body, corporeality and embodiment as crucial elements for a critical scholarly engagement with homosexual sodomy law. Problematizing the language of privacy, Thomas shifts the focus to a political reading of homosexual sodomy laws as practices of homophobia. Thomas argues that the law legitimizes and, thus, partakes in homophobic violence, thereby breaching the most fundamental tenet of liberal constitutionalism, i.e. the individual's right to be free from violence exercised or legitimated by the state.

Part four, "The Subject of Rights and Ethics," attempts to make sense of Foucault's paradoxical return to the language of rights in what Golder and Fitzpatrick describe as his ethical work on technologies of the self. The editors propose that this ethical phase of Foucault's work corresponds, in methodological terms, to a move from genealogy to problematization. Carlos Ball uses Foucault's work on ancient Greek and Roman sexual ethics in order to em-

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<sup>1</sup> This charge against Foucault is probably most prominently advanced by Giorgio Agamben. Agamben criticizes Foucault for his "decisive abandonment" of the juridico-institutional model of power and his subsequent misrepresentation of the politicization of biological life. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 5.

<sup>2</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978* (Basingstoke: Palgrave Macmillan, 2009), 108.

phasize the role of the individual in determining sexual norms. Through a queering of liberal conceptions of autonomy, Ball appropriates liberal rights discourse as the foundation of a gay and lesbian sexual ethic. Mobilizing Nietzsche and Derrida respectively, the essays by Paul Patton and Thomas Keenan seek to explain and reconcile Foucault's critique of rights with his affirmation of rights in his later work. Given that Golder's and Fitzpatrick's volume convincingly makes the case for Foucault's relevance for legal theory by emphasizing the creative potential of what seem to be the ambiguities and contradictions in his thinking, the critical reader is left wondering if Patton's and Keenan's attempt at reconciliation is the right note on which to end this impressive survey of scholarship. The notion of reconciliation seems particularly problematic since the variety of perspectives included in the volume constitute, in themselves and in their constellation, the premise as well as a performative demonstration of Golder's and Fitzpatrick's argument that, "for Foucault, law was never (and nor could it ever be) only a unitary and determinate entity, a monolithic category." (xx)

Insisting on the impossibility of an absolutely fixed law, the editors postulate a "responsive dimension" of law in Foucault's thinking over and against the common view that Foucault's position on law is reductive insofar as it conceptualizes law as merely a tactic used by other, more pervasive forms of power. (xx) On Golder's and Fitzpatrick's view, law finds itself in a relation of mutual dependence with other forms of power, which it both presupposes and makes function at the same time. As a consequence, Golder and Fitzpatrick argue, "law can never be totally mastered by any external power." (xx) Yet, "it must constantly give way to, and engage with, that which lies beyond its fixity for the time being" in order to remain in force. (xx) In other words, the editors see law as relying on both determinacy and responsiveness for its "operative effect." (xxi) Put differently, "Law can neither be a pure determinacy nor a pure responsiveness but its cohering force subsists precisely in an antinomic imperative, in this incessant movement between the two dimensions." (xxi)

Golder's and Fitzpatrick's interpretation of the shifting place of law in Foucault's work is a salutary counter-argument against the aforementioned attempt to reconcile Foucault's idiosyncrasies, and is substantiated by ample evidence. However, Giorgio Agamben has proposed an alternative interpretation of the paradoxical nature of the law that merits consideration. He suggests that it is precisely the absolute indeterminacy of law that allows it to function in exceptional circumstances. Agamben's claim would seem to contradict Golder's and Fitzpatrick's observation that "if law were only a pure responsiveness then it would never have any content at all and would be dispersed in responding to the singular demands made upon it." (xxi) This diagnosis, I want to suggest, fails to account for Agamben's claim that "in extreme situations 'force of law' floats as an indeterminate element," and "acts that do not have the value of law acquire its 'force.'"<sup>3</sup> This does not mean that the law disappears; rather, it remains in force as pure force without significance, that is, precisely as pure responsiveness.<sup>4</sup>

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<sup>3</sup> Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005), 38.

<sup>4</sup> Cf. Agamben's reflections in §4, "Form of Law," in his *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 49-62, as well as his discussion of the indeterminacy of law in chapter two of his *State of Exception* (Chicago: The University of Chicago Press, 2005), 32-40.

Given Agamben's devastating critique of law, it might be worthwhile to explore what Foucault calls "a new right that is both antidisciplinary and emancipated from the principle of sovereignty."<sup>5</sup> One might wonder if such a right could give way to a new kind of politics that would not, perhaps, code its violent substratum in the dialectic between the determinacy and responsiveness of the law. For Foucault, this dialectic masks the "war (which) continues to rage in all the mechanisms of power."<sup>6</sup>

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<sup>5</sup> Michel Foucault, *Society Must Be Defended* (London: Penguin Books, 2004), 40.

<sup>6</sup> *Ibid.*, 50.