

## REVIEW

**Ben Golder (ed.), *Re-reading Foucault: On Law, Power and Rights* (London: Routledge, 2013), ISBN: 978-0-415-67353-2**

Although Foucault can rightly be defined as one of the most important and influential thinkers of the past 50 years, his ideas have never been immediately accepted without some degree of controversy. As a matter of fact, all his major books – from *Madness and Civilization* (1965) to *The Will to Knowledge* (1979) – have spun bombastic debates and his frequent contributions to current social and political events have generated wildly different reactions ranging from the enthusiastically positive to the irredeemably negative.

Only the problematic relationship between Foucault's thought and the legal field seemed to elicit a sort of consensus. Authors as diverse as Habermas and Poulantzas, have claimed that Foucault excessively underplayed the role of law in modern societies in favour of disciplinary or governmental *dispositifs*, and, most importantly, that he did not pay enough attention to the liberating force of rights against the ploys of power. Not surprisingly, for many years, the only monograph on the subject published in English<sup>1</sup> suggested the so-called "expulsion thesis". Such thesis, in very short terms, holds that Foucault expelled law from the locus of power, thus overlooking and distorting the whole modern legal phenomenon to an unacceptable extent.

More recently, such trenchant criticism has come itself under scrutiny. Ben Golder, through several articles<sup>2</sup> and a monograph written together with Peter Fitzpatrick<sup>3</sup> has revived the debate, arguing that it is indeed possible and fruitful to extrapolate a theory of law out of Foucault's scattered remarks, that shows how law itself is not to be seen as opposite to and subjugated by disciplinary/governmental apparatuses, but that law both legitimizes and limits them, favouring a dynamic which leaves always open the possibility for resistance and change.

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<sup>1</sup>Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994).

<sup>2</sup> Ben Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights", *Social & Legal Studies*, vol. 20, no. 3 (2011), 283-312; "Foucault and the Unfinished Human of Rights", *Law, Culture and the Humanities*, vol. 6, no. 3 (2010), 354-74; "Foucault and the Incompletion of Law", *Leiden Journal of International Law*, vol. 21, no. 3 (2008), 747-63.

<sup>3</sup> Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge: London, 2013).

The collection of articles that form *Re-reading Foucault: On Law, Power and Rights* represents an interesting and stimulating addition to such a revival, attempting to use Foucault's toolbox to show that the legal discourse is not just a smokescreen for the machinations of an omnipresent power, but to explore in a critical and engaged way how law establishes its own legitimacy and how it would be possible to think about the legal field in *different* terms. The aim of the book is thus to "re-read Foucault in order to draw out the legal implications of his work – either directly or via some application of his work" (3).

The book is divided in three parts which – as the title makes evident – address respectively the issues of law, power, and rights. Since, in my opinion, there is a theoretical continuity between the first and the third parts of the book, while the second part represents a sort of parenthesis, I will address preliminary the latter, in order to develop a more organic analysis of part one and three subsequently.

The three articles by George Pavlich, Veronique Voruz, and Pat O'Malley, constituting the second part of the book, present a familiar vibe for the Foucauldian scholar as they address respectively three well researched Foucauldian concepts: sovereignty, surveillance, and biopolitics. While threading a more familiar path than the other contributions to this collection, these articles offer valuable insights into Foucault's work.

Pavlich, focusing upon the governance of the colony of the Cape of Good Hope at the turn of the 19th century, follows Foucault's famous reading of Hobbes's concept of sovereignty to argue that colonial rule is best understood as "an ongoing achievement of local power relations that seek to fashion legitimate and effective legal or governmental forms" (109), and thus a model that in turn folded back into the governmental home rule of European powers.

Voruz's aim is to "map what Foucault says of the gaze at different times" (128). Through a rich textual analysis, Voruz demonstrates that the Foucauldian gaze is not "about what one sees but rather how one looks" (135). This shows both that panopticism is not to be understood as the grid of intelligibility of the present, but as an historically contextualized manifestation of a particular regime of visibility; and that the gaze is at the centre of Foucault's inquiry which ultimately aimed at showing "that what and how we see, what and how we look, is the effect of the apparatuses within which we see and look" (145).

In his very intriguing chapter, O'Malley amends or rather supplements Foucault's insights into neoliberal governance. O'Malley suggests that the roots of neoliberal biopolitical project can be traced as early as Jeremy Bentham's later works. Bentham, in fact, not only proposed the famous Panopticon, but, later in his life, linked this idea with a legal model relying heavily on fines and economic transactions, a model not unlike the "law and economics" model spearheaded by the neoliberal Chicago School in the USA in the 1970s. O'Malley thus claims that there is a logical continuity between individualising discipline and environmental governmentality, offering an original and organic view on the – largely neglected – relationship between these two modes of governance (165).

As mentioned, the first and third part of the book, both focusing on the legal field, are characterized by a common theme: how can we use Foucault's ideas to create a positive critique of the legal field, one that would not only illuminate its oppressive side but also open up possibilities for change and liberation?

The first part of the book is composed of four articles authored, respectively, by Colin Gordon, Peter Fitzpatrick, Alan Hunt, and Lissa Lincoln. While Gordon's and Lincoln's contributions are both stimulating – the first suggesting that the unsatisfactory readings of Foucault's ideas on law on the part of leftist authors boils down to the fact that such ideas posed troubling questions that leftist orthodoxy preferred to ignore for contingent political reasons; the second suggesting an unexpected (albeit superficial one would argue) similarity between Camus's sceptical humanism and Foucault's genealogical approach to contemporary problems, in so far as both positions "imply a perpetual calling into question of their own discourses" (96) – it is the interaction between Fitzpatrick's and Hunt's positions which provides more titillating food for thought.

Fitzpatrick, in his contribution, develops further the argument that he and Golder put forward in *Foucault's Law*,<sup>4</sup> namely law's double nature, at once legitimating discipline/governmentality and limiting their effect. Fitzpatrick suggest, in this regard, that law must be understood as an "exteriority that brings together yet holds necessarily apart law of the inside [i.e. law's internal discourse] and law of the outside [i.e. the variegated regimes of power/knowledge that continuously attempt to colonize law itself]" (57). As a consequence, while law can represent an instrument of oppression, it also represents a powerful instrument of resistance as "it maintains inextricably an illimitable openness, a receptive regard to what is ever beyond power" (58).

Hunt – incidentally one of the theorists attacked by Gordon in his article – seems to chime in to these considerations by recognizing the fruitfulness of Foucault's vision of juridical forms as part of an assemblage of power. He thus addresses the concept of the "juridical" which, he contends, was linked too hastily by Foucault to a command theory of law, where legal rules are exclusively prohibitory. According to Hunt the juridical can be more properly defined as designating "those social relations and practices that involve the application of rules by means of prescribed processes and procedures through which decision making occurs that involves a determination of the rights of the participants and where this invocation of rights serves to confer legitimacy on such decision" (78). By amending in such a way Foucault's concept of the juridical, he claims, we can better identify those heterogeneous assemblages – uniting legal norms and disciplinary mechanisms – that constitute the variegated constellation of legal practices.

From these two chapters, which almost support each other, there emerges the possibility of an engagement with law that would not be limited to the unfruitful dichotomy "law in the books" vs "law in action", but would rather take into serious

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<sup>4</sup> Ben Golder and Peter Fitzpatrick, *Foucault's Law*, n. 3.

consideration both aspects of law at the same time, as the two sides of the same coin. Foucault's ideas on law become hence a powerful "toolkit" for the legal scholar willing to approach law as a living and changing object, characterized by a heterogeneous, multiform, ambiguous and ultimately open-ended relationship with power, knowledge and truth.

The final part of the book seems to take advantage of such insight and attempts to explore law's openness by addressing a notoriously problematic issue in Foucault's thought. Foucault's later apparent endorsement of a humanistic ideal relying on the language of rights as a means of resistance, would, in fact, represent a sort of U-turn with regards to his previous critical position on rights understood as expression of sovereign power. Philippe Chevalier, Paul Patton and Jessica Whyte's articles offer some ways out of this dilemma. Building on the consideration that Foucault's approach was always context specific, they suggest that Foucault's cursory references to a new kind of rights, "the rights of the governed", must be understood as an original set of "counter-conducts" that aim at undermining contemporary regimes of governance moving from the very same ideological premises that inform those regimes.

In this sense, Patton argues – through a reading of Rawls as an advocate of contextualism that parallels Foucault's commitment to historicism – that we should commit to a theory of rights that would focus on their politically contingent – and therefore challengeable, mutable and ultimately agonistic – nature. Chevalier scrutinizes the inherent difficulty of such manoeuvre by pointing out that the liberal and neoliberal discourse on rights, while providing room for dissident practices, has taken a turn towards management-risk style of governance that isolate instances of protest making it more difficult to practice collective forms of resistance (183). Whyte, in a similar vein, critically maps out how the potential field of counter-conduct against the state represented by NGOs' international action in the area of human rights, has now become colonized by states' neoliberal interventionism in the name of global humanitarianism.

Such theme, that rights can be strategically deployed both as a means of oppression and counter-conduct is further developed in the final chapter by Bal Sokhi-Bulley. More specifically, she claims that the European Union's agency devoted to the protection of human rights (Fundamental Rights Agency) is ultimately to be seen as a governmental *dispositif* in so far as it contributes to the social construction of certain ethnic groups or communities as victims, thus making them more manageable and "disciplined into self-reflection" (239).

These arguments are all valuable and insightful but leave one wondering. What is the difference between this kind of approach and the stance of a liberal critical theorist? If what Foucault had to say about right boils down to the claim that they are to be theorized as ungrounded, strategic, and performative,<sup>5</sup> would not Foucault just provide an internal and localized critique to the modern liberal discourse leav-

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<sup>5</sup> Golder, "Foucault and the Unfinished Human of Rights", n. 1.

ing its framework substantially intact? Would not the force of Foucault's radical critique of contemporary nexuses of power/knowledge be almost irredeemably lost? This "danger" is clearly visible in Patton's article. If – so to say – Foucault and a liberal champion like Rawls can be read alongside one another, then Foucault should be interpreted as a scholar defending the liberal ideal (which, as an ideal, is a noble one indeed), and the ideological discourse of liberalism comes to be elevated to the status of a universal master discourse from which it is impossible to escape. This is certainly a legitimate possibility. But is it a necessary one? Are there no other ways in which Foucault's could be used to criticize structurally our contemporary legal discourse? This remains an open question to which this otherwise interesting and thought-provoking book does not provide an answer.

Jacopo Martire  
School of Law  
University of Stirling  
Stirling, FK9 4LA, UK