
Foucault's functional justice and its relationship to legislators and popular illegality¹

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Abstract

This article presents two of Foucault's lesser known notions, "justice fonctionnelle" (functional justice) and "stratégie du pourtour" (strategy of the perimeter), in order to interrogate the role of legislators in regard to the policing of political dissent. This article contains three parts. First, I present the two lesser known notions referred to above. Then, I provide my understanding of the role of law for Foucault. Finally, in the third part, I explain how a consensual relationship between the police and legislators is established. I present briefly the work of Avrom Sherr (1989) and outline the contents of a recent U.S. anti-protest law (H.R. 347, or "Anti-Occupy Wall Street Law") which gives the police greater powers to redefine the legal nature of public space and to make arrests without having to show criminal intent (*mens rea*) on the part of protesters. My aim is to further think through the paradox that Foucault mentioned in his lectures on security societies: non-judicial methods used in security processes undermine the primacy of law but also lead to the overproduction of laws (*inflation législative*).

Keywords: Foucault; functional justice; catch-all strategy; spatial turn; police discretion; Federal Restricted Buildings and Grounds Improvement Act of 2011 (HR 347); UK Public Order Act

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Introduction

The most recently published of Foucault's various lectures focus on the justice system, laws and the emergence of a repressive apparatus (*Théories et institutions pénales*: 2015; *La société punitive*: 2013; *Mal faire dire vrai. La fonction de l'aveu en justice*: 2012). In this context, we might think that new debates on Foucault's posture on law will emerge in order to extend the work previously done by Hunt & Wickham (1995), Rose & Valverde (1998) and Golder & Fitzpatrick (2009) on the role of laws in security societies and Foucault's stance in regard to the politics of rights and the rule of law. In order to participate in those debates, I would like to review two of Foucault's lesser known notions: "justice fonctionnelle" (functional justice) and "stratégie du pourtour" (strategy of the perimeter), which can help us better understand the dynamic which underpins the management of popular illegality (like protest), and also to see how this dynamic operates in today's world.

In a 1977 French television interview,² Foucault states that the justice system has the task of making the police work: "Police is a normalization apparatus (instance de normalisation) which doesn't have so much to apply law as to take action (intervene) in ways that require individuals to adopt normal behaviors." In this regulatory perspective, "Justice has the function to record, in legal, ritual and official terms, those police controls of normalization". In other words, the justice system allows the police to manage conducts in ways that provide it with the proofs and confessions it needs to operate within the framework of rule of law and to impose its decisions upon Justice by meeting its procedural requirements.

Two years after this television interview, in 1979, Foucault reacted to the arrest of non-violent demonstrators in Paris by publishing in *Le Nouvel Observateur*, (n° 759, May 28-June 3th, p. 57) a text titled *La stratégie du pourtour*³ [literally, "Strategy of the Perimeter"]. In this text, he denounces arbitrary police procedures that take the form of the police invoking existing law in order to create an 'on the spot' offence (*délit*) and offender (*délinquant*), and drawing into codes of law the terms it needs to justify the arrest of individuals for suspected behavior or petty infractions. When those situations happen, Foucault states, the police work simultaneously outside and within the rule of law, or more precisely, on the edge of it, as the title to his *Nouvel Observateur* article suggests. Indeed, *stratégie du pourtour* refers to the police capacity to determine permissible types of behavior and sanction persons who do not conform. But Foucault also draws attention, in his article, to the police's will to dissuade protest by creating fear, which it accomplishes specifically through exerting pressures over individuals whom it believes need to be controlled. He notes that the convicted protesters

² "Michel Foucault: la justice et la police", Television interview, April 25th, 1977, Antenne 2. Director: Serge Moati; Producers: Jack Lang, Serge Moati, Jean Denis Bredin: <http://www.ina.fr/video/I06277669>

³ Michel Foucault. "La stratégie du pourtour", in *Dits et écrits II, 1976-1988* (Paris: Gallimard, 2001b), 794-797. [An English translation is available as "The Catch-all Strategy", *International journal of the sociology of law* 16 (1988): 159-162. Translated by Neil Duxbury.]

from Paris received aggravated sentences, while the strikers from Longwy⁴ facing similar charges were discharged. The differential treatment reserved for Parisian strikers (repression) in contrast to the one reserved for the mining strikers in northern France (tolerance) led him to believe that penal justice was transforming itself into a 'functional justice': a justice of security and protection which had to manage society in order to detect what is dangerous, and in turn effect its own dangers. 'Functional justice', he says "has the duty to promote the safety of a population rather than respect the legal subject"⁵ *La stratégie du pourtour* thus underlines the arbitrary aspect of security procedures which apply selective sanctions to the detriment of citizens' basic, fundamental rights. Foucault claims that for the sake of 'defending society', the justice system gives the police the power to circumvent the rule of law and the power to transgress the limits of the law while still remaining within the scope of legality.

What about the law makers' role?

Michel Foucault: la justice et la police and *La stratégie du pourtour*, recorded and written in the aftermath of the French 'années de plomb' [State-sponsored violence period], present Foucault's negative assessment of the police and his thoughts on the penal system considered as a consensual⁶ (and a submissive) apparatus. Nevertheless, those interviews he gave immediately before and after *Security, territory, population* facilitate understanding of what Foucault had in mind when, in his 1978 lectures, he asserts that police reason tends to be generally accepted and adopted by various entities within security societies. As a matter of fact, those interviews imply a collaborative relation between entities within the justice ap-

⁴ *La stratégie du pourtour* was written in the aftermath of a police brutality episode. On March 23th 1979, metalworkers from Longwy facing layoffs protested in Paris. Far-left activists and agents provocateurs (possibly working at the behest of the C.G.T. or the Socialist Party) broke shop windows at Place de l'Opéra to discredit the demonstration lead by the C.F.D.T. (a rival trade union). In response to this act of vandalism, the police arrested plenty of non-violent demonstrators.

⁵ "Une « justice fonctionnelle » [est] une justice de sécurité et de protection. Une justice qui, comme tant d'autres institutions, a à gérer une société, à détecter ce qui est périlleux pour elle, à l'altérer sur ses propres dangers. Une justice qui se donne pour tâche de veiller sur une population plutôt que de respecter des sujets de droit." (*Stratégie*, 797).

"[The] penal justice is gradually becoming a 'functional justice', a justice of security and of protection. A justice whose job it is, as with so many other institutions, to manage a [*gérer*] society, to detect that which is perilous to it, to alert it to its own dangers. A justice which devotes itself to the task of vigilance over the population rather than respecting certain aspects of law." ("The Catch-all Strategy", 161.)

⁶ "De l'homme casqué et matraquant à celui qui juge en son âme et conscience, tout le monde, d'un mouvement solidaire, s'entend pour jouer un même rôle." (*Stratégie*, 796).

"All, from the person with helmet and truncheon to the person guided in judgment by soul and conscience, conspire solidaristically to play the same role." ("The Catch-all Strategy", *Ibid.*)

paratus which discredits the 'legalist scheme' (according to which lawmakers define by law what should be forbidden, the police apply laws, and judges hand down a sentence that fits the crime and reflects the spirit of the law). If the police have the capacity to determine who will be brought to justice and ensure a sanction by extracting from the code of law what it needs according to evidence it can provide, then it is surely the linchpin within a heterogeneous collection of actors with the potential to foster illiberal (illegal) tactics through legal means.

According to Foucault, the separation of accusation, prosecution, and sentencing is a fundamental principle of penal justice. "Prosecution and accusation should not be in the same hands," he writes. "The entity that brings charges in a case shouldn't have the task of establishing the facts."⁷ Consequently, in a case involving obvious crimes, it should be up to judges from the Justice Minister (*le Parquet*) to provide evidence permitting the Court to rule on the culpability of the detainee. However, in reality, the police collected and presented the evidence. The accuser (the police) therefore certifies the veracity of the charges, discharging factually the judgment of a third party: "Evidence: police saw it and took it",⁸ Foucault says.

Foucault's view of the mechanics of the justice system is not meant to imply that the rule of law is nonexistent, that the police is a strictly repressive apparatus, or that judges (portrayed as servants of the police) are mere puppets. In fact, he indicates that judges can 'refuse to play the game' by questioning the police's evidence or the validity of the charges and thereby attributing to them a decision-making freedom. He suggests that the police, mandated to protect society from disorder, performs its duty according to its own plan with the assistance of partners from adjacent fields. Foucault states adamantly: "Justice has given the key to the penal system to the police."⁹

The mechanics of the justice system as Foucault presents them in *La stratégie du pour-tour* rest on the collaborative (in)action of judges, state representatives (attorneys general/*le Parquet*), and law. This collaboration allows the police to work according to its wishes. That said, Foucault does not elaborate on precisely how legislators—as law-makers having adopted police reason—participate in 'functional justice' by, for example, providing legal tools that facilitate the police's changing needs. Nor does he interrogate the ability of legislators to embed powerful formalities in laws that are consistent with and in turn support

⁷ "Poursuite et infraction ne doivent jamais être entre les mêmes mains: celui qui soutient l'accusation ne saurait être lui-même chargé d'établir les faits." (*Stratégie*, 795)

"one of the basic principles of penal law is that prosecution and investigation ought never to be placed in the same hands; those who bring the accusation should not themselves be responsible for establishing the facts." ("The Catch-all Strategy", *Ibid.*)

⁸ "La preuve: la police l'a vu et l'a pris". (*Stratégie*, *Ibid.*)

"Proof: they were seen and caught by the police." ("The Catch-all Strategy", *Ibid.*)

⁹ Foucault, *La justice et la police*.

the evolution of police tactics. It seems to me that legislators are a spectral figure standing in the shadow of the police, a figure playing an essential role that has yet to be fully accounted for. Such an accounting is necessary for a clear understanding of Foucault's notion of functional justice.

Beyond my scholarly desire to explore Foucault's thoughts on the justice system, it seems important to understand the ins and outs of the apparatus undermining the process of perfecting democracy and the rule of law. Keeping in mind that Foucault's more ephemeral works can be used for contemporary critical engagement and that he tied the notion of 'functional justice' to a police rationality which has the potential to be adopted and shared by the police's partners, I would like to see how political representatives mandated to look after the interest of their constituents can be part of a flexible body of practices relying in part on arbitrary decisions. My goal is to show how politicians, as lawmakers, engage in 'functional justice' in order to see how their engagement modifies police abilities to intervene against dissenters. Consequently, my review of Foucault's lesser known notions serves to highlight mutations of public order laws which are likely to affect the way dissenters can express their discontent in today's democracies.

By performing an analysis of law that "would turn away from the canonical texts and the privileged sites of legal reason, and turn towards the minor, the mundane, the grey, meticulous and detailed work of regulatory apparatuses," we can reveal the participative role of legislators in 'functional justice' by highlighting the kind of powers of adjudication their laws give to police officers called to become little judges of conduct (Rose and Valverde, 546). The specific goal of my questioning is to see how lawmakers can modify legal codes in ways that support police management of protest in the light of its 'spatial turn' and in line with Foucault's thoughts on the mechanics of the justice system circumventing the rule of law. In the following, I will first discuss Foucault's stance on law. Then, I will present Avrom Sherr's¹⁰ (1989) comparative work on the UK Public Order Act. His work analyses the law to identify minor amendments that have been made over time in order to interrogate lawmakers' motivations and stances in relation to policing dissent; consequently, it provides a framework for understanding legal paradigmatic shifts. Finally, I will scrutinize the 'Anti-Occupy Wall Street Law' in order to show how lexical modification can have a great impact on the legal status of protesters and considerably increase police powers.

Foucault and the Law

For Foucault, law once wielded by monarchs was at the very heart of sovereign practices. Law allowed the sovereign to impose its royal will, obtain privileges, and collect goods essential to sustaining itself as a juridical being. However, antimonarchist struggles,

¹⁰ Avrom Sherr. *Freedom of Protest, Public Order and the Law*, (Oxford: Basil Blackwell, 1989).

changing geopolitical realities, cameralism, and the growing needs of the population characteristic of the rise of biopower and its accompanying emphasis on protecting the population from the hazards of everyday life, marked a fundamental and permanent change in the field and role of law. With the rise of anti-Machiavellian governmentality, law became secondary to prophylactic and normalization measures.¹¹ Foucault claims that a 'new art of governing' focused on satisfying the needs of the population and the advent of normalized bodies decentralized the justice system; this in turn caused the decline of the politico-juridical matrix (*matrice juridico-politique*) of sovereignty. The receding of sovereignty in the face of biopower and normalization does not mean, however, that law moves aside or that the institutions of justice tend to disappear, but rather that law works as a norm, and that judicial institutions more and more function on a continuum as part of a regulatory apparatus.¹²

Foucault refutes the idea that judicial and police institutions are attempting to apply laws or ensure their enforcement. Those institutions have the task of adapting their decisions and modulating their sanctions in order to obtain behavioral inflections. Insofar as this is the case, they operate according to the primacy of order (*primat de l'ordre*) rather than the supremacy of law (*primauté de la loi*) and "[tend] less to punish offenses than to penalize behaviors."¹³ Foucault asserts that legislation (which was originally intended to prohibit forbidden actions) has inherited over time the function of providing the necessary

¹¹ "The inter-dependence of law and norm in societies where government takes the form of the calculated administration of life, may surprise those who think that Foucault denied the role of law and legal mechanisms in the exercise of modern forms of power". Nikolas Rose and Mariana Valverde. "Governed by Law?", *Social Legal Studies*, 7 issue 4 (1998): 542.

¹² "Je ne veux pas dire que la loi s'efface ou que les institutions de justice tendent à disparaître, mais que la loi fonctionne toujours davantage comme une norme, et que l'institution judiciaire s'intègre de plus en plus à un continuum d'appareils (médicaux, administratifs, etc.) dont les fonctions sont surtout régulatrices". Michel Foucault. *Histoire de la sexualité I. La volonté de savoir*, (Paris: Gallimard, 1976):190.

"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 in a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.", *The History of Sexuality. Volume I: Introduction*, trans. Robert Hurley, (New York: Vintage Books, 1990): 144.

¹³ "Lemon and milk", in *Power*, ed. James D. Faubion, trans. Robert Hurley (New York: New Press, 1997): 438.

"[à] sanctionner les infractions [qu'à] pénaliser les comportements". Michel Foucault, "Le citron et le lait" in *Dits et écrits II, 1976-1988* (Paris: Gallimard, 2001a): 697.

latitude so certificatory measures can take place. That is why normalizing societies are characterized by a proliferation of laws and by-laws, or as he puts it, by a 'legislative inflation'.¹⁴ From this perspective, it appears that police bodies can invoke legislation to bring individuals into a regime of popular illegalism (considering popular conducts through the prism of illegality) open to judicial sanction, if the need arises.

Laws constitute for Foucault a juridical substrate that allows non-judicial activities. That said, it is important to bear in mind that law is not a mere weapon lying ready for powers to forge, implement, and enforce it.¹⁵ Foucault's judicial realism posits law as a reversible and flexible tool, slipping from the hands of authorities to be turned against them. Against a static understanding of law, he claims: "My rights exist and Law respects me because I'm defending myself. Therefore, it's the dynamic of defense which gives laws

¹⁴ "Les mécanismes de sécurité eux aussi sont fort anciens comme mécanismes. Je pourrais dire aussi, à l'inverse, que si l'on prend les mécanismes de sécurité tels qu'on essaie de les développer à l'époque contemporaine, il est absolument évident que ça ne constitue aucunement une mise entre parenthèses ou une annulation des structures juridico-légales ou des mécanismes disciplinaires. Au contraire, prenez par exemple ce qui se passe actuellement, toujours dans l'ordre pénal, dans cet ordre de sécurité. L'ensemble des mesures législatives, des décrets, des règlements, des circulaires qui permettent d'implanter des mécanismes de sécurité, cet ensemble est de plus en plus gigantesque. Après tout, le code légal sur le vol était relativement simple dans la tradition du Moyen Âge et de l'époque classique (...) tout l'ensemble législatif qui concerne ce qu'on appelle justement les mesures de sécurité, les surveillances des individus après l'institution : vous voyez qu'on a une véritable inflation légale, inflation du code juridico-légal pour faire fonctionner ce système de sécurité." Michel Foucault, *Sécurité, territoire, population*, (Paris: Gallimard-Seuil, 2004a) 9.

"Mechanisms of security are also very old as mechanisms. Conversely, I could also say that if we take the mechanisms of security that some people are currently trying to develop, it is quite clear that this does not constitute any bracketing off or cancellation of juridico-legal structures or disciplinary mechanisms. On the contrary, still in the penal domain, look at what is currently taking place in the domain of security for example. There is an increasingly huge set of legislative measures, decrees, regulations, and circulars that permit the deployment of these mechanisms of security. In comparison, in the tradition of the Middle Ages and the Classical age, the legal code concerning theft was very simple (...) the whole body of legislation regarding what are called, precisely, security measures, the supervision of individuals after they leave a penal institution, you can see that getting these systems of security to work involves a real inflation of the juridico-legal code." *Security, Territory, population*, ed. Michel Senellart, trans. Graham Burchell, (New York: Palgrave Macmillan, 2007): 7.

¹⁵ "Foucault's attitude towards the law was more radical, and more complex, than simply an assertion that it remained in place alongside the new powers he was describing". Ben Golder & Peter Fitzpatrick, *Foucault's Law* (New York: Routledge, 2009): 71.

and rights an indispensable value for ourselves. Right is nothing if it doesn't emerge from a sparking defense; and only defense validly gives force to Law."¹⁶

In light of this, Golder and Fitzpatrick (2009) contend that law bears a 'polyvalent vacuity,' an 'insubordinate openness' that allows the justice system to avert sovereign determination.¹⁷ However, if law's flexibility avoids its unequivocal use, we can suppose—as I am endeavoring to do here—that law can be formulated in such a way that its appropriation, reinterpretation, or repeal in the name of fundamental rights may be difficult. At this point, we might therefore ask: How is it possible to formulate law in ways that both inhibit its misuse and retain its openness?

The law guarantees common values and normative behaviors through the articulation of interdictions prohibiting certain activities. If social norms change, so will the law and its enforcement. Nevertheless, because some unwanted gestures may elude its scope, the law has to act as a reactive force capable of bringing back within the justice system reprehensible conducts that cannot be laid down accurately. This is why the need for resistance to unforeseen situations demands that laws include a prerogative aspect. For that matter, enunciation of an interdiction through legal dispositions (clauses ordering objects within a semantic field) is likely to be articulated in a certain manner to bring down elusive actions on the interdicted. Hence, the law does not so much take its strength from defined interdictions but through its ability to grasp unconsidered situations, to compete with evasive actions; law is both prohibitive and adaptive. Foucault shows, in *La stratégie du pourtour*, how a law condemning violent gestures (*loi 'anti-casseur'*) can be called upon to charge innocent demonstrators with reprehensible actions. By according an irrevocable dimension to police statements, this law usefully provides a way to transform popular (mis)conducts into lawless actions.

In what follows, I will show how some public order laws are adapting to restrain evasive dissenting behaviors.

¹⁶ “[C’est] dans la mesure où je me défends que mes droits existent et que la loi me respecte. C’est donc avant tout la dynamique de la défense qui peut donner aux lois et aux droits une valeur pour nous indispensable. Le droit n’est rien s’il ne prend vie dans la défense qui le provoque; et seule la défense donne, valablement, force à la loi”. Michel Foucault, Jean Lapeyrie, Dominique Nocaudie, Henry Juramy, Christian Revon et Jacques Vergès, “« Se défendre »” (1979): http://www.cip-idf.org/article.php3?id_article=6191.

¹⁷ According to Golder and Fitzpatrick: “a polyvalent vacuity, an insubordinate openness, for the ‘strategic reversibility’ of Foucault’s law consists precisely in the fact that what makes it open to appropriation and domination simultaneously makes it open to a resignification and renewal that eludes the determination of a sovereign or a given regime of power.” (*Foucault’s Law*, 84).

Expanding the scope of police power in times of unrest

Sociologists and social movement historians note that policing of public protest is marked by strategic permutations in which different models of demonstration management overlap and succeed one another. They indicate that the management of demonstration have taken a 'spatial turn' (Gillham, Edwards & Noakes: 2013; Zajko & Béland: 2008; Della Porta, Reiter & Peterson: 2006; Vitale: 2005; King: 2004). Contemporary tactics, particularly those used during anti-globalization events, tend to disperse demonstrators (through the use of repellent agents, for example) and forbid unauthorized presence in sensitive areas (zoning). Is it possible that legislators, having adopted the police's practical reason, have taken the same 'turn' and consequently forged laws that assist the police in controlling undesirable individuals? If so, we should be able to identify cases in support of this hypothesis or, at least, cases that illustrate how laws can be amended in ways that increase police power to intervene in and curtail public protest.

In *Freedom of Protest, Public Order and the Law*, Avrom Sherr compares the UK Public Order Act of 1936 (POA1936, adopted to counter political extremism such as fascism by focusing on the symbolic aspects of protest, including flags, uniforms, and masks) and a reformed version of that law, the Public Order Act of 1986 (POA1986), enacted during the Thatcher era. His comparative analysis reveals a transformation in the spirit of the law by analyzing developments that occurred in the fifty years separating the two pieces of legislation. Far from seeing 'progress,' Sherr's analysis shows that the reformed law is more prejudicial because it increases the number of spatial and administrative constraints and allows police to take action merely on the basis of suspicion. It is helpful to know that the 1936 POA distinguished between two types of activity: procession and assembly. Premised upon the view that a (dynamic) procession is more likely to generate disturbance because a convoy may create congestion, blockages, and delays (in contrast to a [static] gathering of people), the POA1936 focused on public roads as a source of movement and consequently imposed more constraints on the movement of motor vehicles. This legislation does not abolish the right to use public roads. It retains it, but only for the purposes of passage. Therefore, if a procession stopped or interrupted traffic, participants would be charged with trespassing. With respect to assembly, the 1936 law allowed the police to ban marches, but also required it to impose conditions that organizers must meet in order to receive authorization to use public streets. Interestingly, this law does not forbid assembly or procession in rural areas. In contrast, the 1986 POA removes the distinction between procession and assembly. Focusing on 'any' gathering 'in open air of twenty persons or more', the reformed law widens the spatial scope of policing.

Sherr addresses how the 1986 law, while similar to its predecessor, expands police power by modifying the temporality of its intervention. Prior to the reform, police officers were required to witness a breach of peace in order to intervene. The reformed law removes this requirement, thereby giving the police more latitude in determining whether and how to act. "Previously, public gatherings could take place and the police would have to wait to

see whether any breach of peace or obstruction of the highway had occurred before they could intervene. Now a prior assessment can be made, and if a senior officer deems it to be necessary, s/he can impose conditions on a gathering under Section 14 of the Public Order Act 1986.”¹⁸ In other words, the police can intervene without waiting for an incident to occur.

This preventive legislation tries to annihilate disturbance beforehand by encouraging police judgment. However, to avoid arbitrary decisions, mistakes or blunders that may be committed by field officers, POA1986 keeps a 1936 disposition giving only chief officers the ability to decide if a protest is legal or not. Paradoxically, the law allows an anticipatory intervention but prohibits regular officers from acting on their own. Its goal is to prevent disturbance while protecting against police abuse resulting from an anticipated and unjustified intervention. The legislators working in 1986 seem aware that prevention carries an iatrogenic aspect, and they raise prescriptions to limit negative effects that may derive from security measures. Nonetheless, that does not restrain the new law to widen police discretionary power. If the POA1936 allows police to intervene based on reasonable doubt, the POA1986 permits restrictive intervention when authorities presume malicious intent.¹⁹

Sherr notes that previously, organizers had to give information in advance to the authorities (names, date, location, point of departure, event duration, itinerary, etc.), which

¹⁸ Sherr, 68.

¹⁹ “The main structure of provisions remains the same. The senior police officer must have ‘regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route and proposed route’. There are minor variations of the wording, but the same issues are to be taken into account by the senior police officer under both the old and new statutes. The new Act, however, has a second dimension, having regard to those issues, in terms of the senior police officer’s assessment of the situation. Under the old legislation, where the chief officer (CPO) had ‘reasonable ground for apprehending that the procession may occasion serious public disorder’ the CPO could impose conditions on the procession. [...] The new legislation therefore allows the senior police officer to make conditions not only where that police officer ‘reasonably believes’ that serious disorder may occur, but also where serious damage to property may result or ‘serious disruption to the life of the community’. The latter could conceivably include any long term closing of a major road to traffic because of a public procession. To these are added the police officer’s reasonable belief [...] that the organizer’s purpose is ‘intimidation’. It is not clear what intimidation would mean in this context, since it is possible for any large public procession to be regarded as intimidating, and the line between urging or persuading and ‘the intimidation of others with a view of compelling them’ may be quite thin at times in the eyes of a senior police officer.” (Ibid. 70-71).

was used to impose conditions to control the progression of the event. The reformed law duplicates those requirements by specifying that information must be given 'six clear days before the procession' and by determining where organizers must do so (the notice must be delivered to a police station in the area in which the procession will start). The 1986 law also determines the kind of event subject to those regulatory constraints: "(a) to demonstrate support for or opposition to the views or actions of any person or body of persons, (b) to publicize a cause or campaign, or (c) to mark or commemorate an event."²⁰ Therefore, those provisions forbid *de facto* spontaneous protest and impose a juridical responsibility on specific individuals: "An offense is committed by 'each of the persons organizing' a public procession if either notice is not given, or the date, time or route of actual procession differ from those actually specified in the notice."²¹ However, the law does not define what kind of involvement is needed for a person to be held responsible, other than those related to the above. Considering this imprecision deplorable, Sherr claims that: "it might have been more sensible to have provided a wider definition in the Act of what 'organizing' might mean."²² Following Foucault's thought on law, we might think that the law's vagueness is a way to reinforce the police's discretionary power.

Sherr's comparative analysis shows that something changed. The old legislation recognized the culpability of any individual violating imposed conditions, while the new one makes organizers accountable for any misconduct. In other words, the latest legislation predetermined those who would be accused if breaches take place. The law specifically made into arrestable offenses by statutory designation brawl, provocation, and harassment, as well as any action that may cause anxiety. The POA1986, which supports the institutionalization of protest, sides with "victims" of demonstrations by considering disturbance or small offenses as a crime, and by acting against distress resulting from protest. The law, worries Sherr:

tends to leave a great deal of subjectivity and discretion to a complainant and an attending officer. Behavior which may cause 'harassment, alarm or distress' near, e.g. a home for the aged, may be quite different from what may do so at a pop concert, and both of these may be quite different from what may cause reactions in a political meeting, demonstration or protest.²³

In short, POA1986 modifies the boundaries of the previous law by imposing new conditions that widen the police's ability to make decisions. It predetermines a judicial responsibility on the part of organizers and penalizes petty misconducts. Written to fight hooliganism, this legislation gives police agents the ability to arrest vociferous individuals by claiming that their aggressive attitude is causing psychological suffering; the POA1986 can be

²⁰ Ibid.

²¹ Ibid., 69.

²² Ibid.

²³ Ibid., 97.

used to ban demonstrations that some might find upsetting. Repression historian Robert Justin Goldstein writes:

Before 1848 almost every European state imposed highly restrictive statutory or administrative restrictions on freedom of assembly and association [...] Most European countries maintained harsh restrictions on such activities, either through explicit legislation or under the tradition of Roman Law, which regarded voluntary association for any purpose as suspect and required such group to obtain governmental authorization to be regarded as legal.²⁴

Sherr's analysis thus shows that legal modifications appearing over time are constrained by a restrictive paradigm that is not about to be dismissed.

Legislative precautions in the immediate aftermath of Occupy Wall Street

Following Sherr's example, I will analyze emblematic contemporary legislation to see how legislators offer a way to circumvent the rule of law: the *Federal Restricted Buildings and Grounds Improvement Act of 2011* (H.R. 347),²⁵ infamously known as the 'Anti-Occupy Wall Street Law' or the 'Criminalizing Protest Bill' by its detractors (even if the legislation was not originally inscribed on the US House of Representatives' agenda to weaken the protest movement). This federal law is one of those used to punish dissent.²⁶

First of all, let us remember that the *Federal Restricted Buildings and Grounds Improvement Act* was inscribed in the legislative agenda in January 2011 to revise the 2006 dispositions which modified the original 1971 law. The revision of the act, which focuses on the protection of federal buildings, was planned before the occupation of Zuccotti Park (September 17, 2011); Occupy Wall Street and the legislative revision occurred at the same time by coincidence. That said, its inscription in the legislative agenda was a gift for those opposed to the protest movement, who now had a chance to modify the prescriptive substance of the previous law. At the end of the year, the bill was adopted unanimously by the Senate and almost unanimously by the House of Representatives (399/3). The bill was then approved by President Obama, who didn't try to override by veto this bipartisan law. Adoption of this law says something about Washington's antipathy towards OWS, but also about an existing desire to widen the protection of representatives in times of uncertainty – the goal of this legislation is to restrict areas and sites where political officers and government dignitaries transit.

²⁴ Robert Justin Goldstein. *Political Repression in 19th Century Europe*, (Totowa: Barnes and Nobles Books, 1983): 47.

²⁵ Government of the United States of America. "Federal Restricted Buildings and Grounds Improvement Act of 2011" (subsequently cited as HR347): <https://www.govtrack.us/congress/bills/112/hr347/text>

²⁶ ²⁵ In Washington DC, police used the DC's anti-riot law (§ 22-1322) to arrest dissenters at President Trump's inauguration ceremony.

The *Federal Restricted Buildings and Grounds Improvement Act of 2011* was reviewed to correct and simplify the original law that forbids unauthorized presence in restricted buildings and grounds, and not to create an emergency law empowering government to implement restrictive measures on protest. However, it was seen as such by critics and civil right activists.

What does the law say to generate resentment? It states:

(a) Whoever—(1) knowingly enters or remains in any restricted building or grounds without lawful authority to do so; (2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions; (3) knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions, obstructs or impedes ingress or egress to or from any restricted building or grounds; or (4) knowingly engages in any act of physical violence against any person or property in any restricted building or grounds; or attempts or conspires to do so, shall be punished.²⁷

The punishment for a violation is: “(1) a fine under this title or imprisonment for not more than 10 years, or both, if— (A) the person, during and in relation to the offense, uses or carries a deadly or dangerous weapon or firearm;” or “(B) the offense results in significant bodily injury [and] (2) a fine under this title or imprisonment for not more than one year, or both, in any other case.”²⁸ The law precisely designates what the term ‘restricted buildings or grounds’ means:

(A) the White House or its grounds, or the Vice President’s official residence or its grounds; (B) a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or (C) a building or grounds so restricted in conjunction with an event designated as a special event of national significance.²⁹

Also made clear is the meaning of the term ‘other person protected by the Secret Service’: “any person whom the United States Secret Service is authorized to protect (...) under section 3056 of this title or by Presidential memorandum, when such person has not declined such protection.”³⁰

It is important to bear in mind that this legislation doesn’t create any ‘new crime.’ It reaffirms the restrictions of existing laws which sanction disorder and considers unauthorized entry and interruption of governmental activities as offenses. (Scaling the

²⁷ USA Government, *H.R. 347*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

White House fence or conducting a protest action on the steps of the Supreme Court of the United States are illegal). Let's note, though, that while H.R. 347 does not create any 'new crime', it does place under federal jurisdiction those misdemeanors which were previously under municipal jurisdiction, regardless of the nature or dangerousness of the oppositional action. Consequently, trespassing, which may be punished by a light sentence, is now subject to more severe punishments. Under the reformed law, the "Standing Man" (Erdem Gündüz)³¹ from Taksim Place or Femen's succinct action could face federal prosecution if they occur close to a government building. As it is, this legislation, which does not deny the right to assemble, allows more severe sanction of conduct that disturbs governmental administrative and official activities, or which occurs in, or near, sensitive areas. It is important to underscore that this law rests on the idea that symbolic spaces, persons, and activities are more likely to become a point of convergence for expressions of popular discontent. Thus, they must receive special protection. The law prohibits unauthorized presence near the president or 'any other person' protected by the Secret service, and forbids protest where important events (political conventions, Heads of State visits, international summits) take place; it thereby suppresses legal expression of grievances against those in power.

A performative disposition

To sum up, the H.R. 347 dispositions: 1. modify legal access to areas in accordance to dignitaries' travel; 2. give restrictive powers to a secretive body (secret services); 3. ratify President Clinton's decision to grant nationally important events a special status (Academy Awards, Super Bowl, Macy's Thanksgiving Day Parade); and 4. allow prosecution of someone standing near a protected person. Those dispositions are changing the vocation of a location, modifying *ex tempore* the legal status of those who stand there. Therefore, if hypothetically the Occupy movement resurrects, occupants may face criminal charges if an administrative member of *Brookfield Office Properties* (owner of Zuccotti Park), having obtained protection from the Secret Service, would have the idea to visit the park. Similarly, Washington campers can face the same kind of charges if a senator, traveling from Capitol Hill to the headquarters of the *Washington Post*, decides to walk through McPherson Square. Even if those hypothetical situations do not occur, it is important to underline that the law sanctions those events by transforming the nature of places that hold them. By insisting on the site and the proximity (with protected persons or a restricted buildings) rather than on the nature of incriminating activities, the new dispositions facilitate the entry of individuals into a prejudicial legal universe.

³¹ Erdem Gündüz, a performance artist, protested against the Erdogan government in Taksim Square during the 2013-2014 protests in Turkey by standing still for hours. He became a symbol of the protest movement and was imitated by a great number of demonstrators.

It seems that the adoption of H.R. 347 was motivated by the sense that preventive inaccessibility is better than a reactive intervention that sanctions misconducts which are yet to happen. In regard to this, the 'Anti-Occupy Wall Street Law' has something in common with other legislation that annihilates a protest's disruptive capacity without having to openly repudiate the right to protest. Examples include Quebec's Law 12 (Bill 78) enacted during the 2012 student strike, which forbids the gathering of more than 50 persons and demonstration within 50 meters of an educational establishment, and the UK *Serious Organized Crime and Prevention Act* (2005), which closes the heart of London by forbidding protest near Westminster and Buckingham palaces. Let's note that Quebec's and Britain's spatial proscriptions are simultaneously "static" and "dynamic." They both determine interdicted spaces (colleges and universities, House of Representatives, official residence, government buildings) and transform places which are free of restriction into unauthorized locations. The H.R. 347 carries "static" proscriptions as well (White-House, military bases, Camp David) but also gives a "sporadic" aspect to the "dynamic" proscriptions by linking them with the wanderings of important protected peoples, and the secret service's planned itineraries and decisions. The *Federal Restricted Buildings and Grounds Improvement Act of 2011* articulates a basic proscription allowing an infringement to be automatically established: it is forbidden to be in a restrictive area without proper authorization. Adding to that, the law specifies that governmental spaces (welfare bureaus, for example) are covered with the same legal prerogative as official buildings or sites (the Senate, Camp David). More importantly, the law also gives the secret services the ability to prohibit unwanted presence in unrestricted areas, spreading interdiction outside restrictive buildings and sites. Therefore, we can ask: Is it possible to incriminate individuals occupying Zuccotti Park or participating in protest activities in the adjacent streets (procession, leaflet distribution) close to the State of New York General Procurer Bureau, the Federal Hall, the New York Stock Exchange and the Federal Reserve Bank of New York? Yes, it's possible. In fact, the dispositions of the law dispel doubts about the legality of protest activities by placing in the hands of secret services the capacity to decide whether any activity is legal or not.

A significant lexical modification

Detractors of the law claim that by withdrawing protestors from political or symbolic places, this legislation acts to obscure them from media attention without having to ban assembly or use other tactics that would attract public attention. More significantly, they reveal that this law rests on a seemingly unimportant, but powerful, lexical modification. Indeed, the original text of the *Federal Restricted Buildings and Grounds Improvement Act of 2011* was adopted in 1971 (and revised a few times since then). Previous versions of the law contain the terms 'willfully' and 'knowingly.' The 2011 legislators chose to withdraw the word 'willfully' for the latest version. By doing so, police officers obtain the power to start criminal procedures without having to prove the deliberate action of an unauthorized

presence in a restricted area. By only keeping the term ‘knowingly’ – which refers to the non-alienated mental condition of an individual who has entered a restricted area and the principle that no one should ignore the law – this legislation rests advantageously on a minimal criterion (having a sound mind) that could be use against unwanted individuals. The *American Civil Liberties Union* (which is opposed to the law) claims that:

Most crimes require the government to prove a certain state of mind. Under the original language of the law, you had to act “willfully and knowingly” when committing the crime. In short, you had to know your conduct was illegal. Under H.R. 347, you will simply need to act “knowingly”, which here would mean that you know you're in a restricted area, but not necessarily that you're committing a crime.³²

The *stratégie du pourtour* emerging through the ‘*anti-casseur*’ law presented by Foucault eliminates the need to disclose evidence while giving an inviolable character to police statements. The strategy behind the ‘Anti-Occupy Wall Street Law’ rests on a different basis. It allows – as would any anti-riot legislation or public order act – the establishment of a breach ‘on the spot’ and the criminalization of unwanted individuals standing in restricted zones, public or private. But more importantly, as a result of the lexical modification of 2011, it compels police officers only to inform arrested persons that the site where they are standing bears a new legal status (so they will know) – therefore, they are in an infringement situation – without having to prove any desire to do wrong. By considering trespassing similarly to a parking infraction (there is no need for a traffic enforcement agent to consider the psychological state of mind of a ‘bad driver’ when issuing a parking fine), this law permits the recording and punishing of an offense without regard to the mental condition of the infringer or proof of criminal intention. With the elimination of the term “willfully” in 2011, *mens rea* disappears.

The *Federal Restricted Buildings and Grounds Improvement Act of 2011* is not an emergency law suspending the Rule of Law stripping individuals of their fundamental rights. But it gives secret services the power to decide which places should be restricted and to call for the arrest of those within them. This law doesn’t place unwanted persons under a general state of exceptionalism, but creates, like other laws with spatial restrictions, partial

³² Gate Rottman, “How Big a Deal is H.R. 347, that ‘Criminalizing Protest’ Bill?” ACLU Blog: <https://www.aclu.org/blog/how-big-deal-hr-347-criminalizing-protest-bill>. Justin Amash (R) is one of the three members of Congress who voted against the bill [along with Paul Broun (R) and Keith Ellison (D)]. He justified his opposition in similar terms: “The bill expands current law to make it a crime to enter or remain in an area where an official is visiting even if the person does not know it’s illegal to be in that area and has no reason to suspect it’s illegal. (It expands the law by changing “willfully and knowingly” to just “knowingly” with respect to the mental state required to be charged with a crime”: <https://www.facebook.com/repjustinamash/posts/318812154832493> .)

exceptions which disadvantage unwanted individuals. It seems reasonable to assume that the law's dispositions effect a kind of sovereignty transfer by giving police the ability to makes decisions leading to judicial consequences. By considering non-violent spatial occupation as an infringement of common right, we may think (as Arendt would have done) that this law depoliticizes civil disobedience activities and re-hierarchizes Law by placing constitutional Right under common law.

Conclusion

Against a Marxist analysis (Sartre, Althusser) which would consider the police as a repressive apparatus protecting a bourgeois order, Foucault suggests that the modern state developed through integrating mechanisms of population control. Thereby, he refutes the idea that the State is a kind of "cold monster" or a "constable that would come to knock out people",³³ and claims instead that security societies are characterized by the replacement of a Machiavellian reason of state in favor of a regulatory *raison policière* – by a normalizing approach instead of a legalist one. This substitution allowed the police to become firsthand judicial actors to the detriment of members of the judiciary. This does not imply that the police are unable to use repressive methods, but rather it is a choice of tactics; the police have the freedom to decide how to control popular illegality, however that may harm the principles of law. The police act, according to Foucault, not so much by sanctioning infractions but by preventing dangers through punishing conducts with the benediction of the justice system, which allows the police to maneuver according to an imperative to secure the public order.³⁴

³³ "L'État ce n'est pas un monstre froid, c'est le corrélatif d'une certaine manière de gouverner. Et le problème est de savoir comment se développe cette manière de gouverner [...] et non de faire de [l'État], sur la scène d'un guignol, une sorte de gendarme qui viendrait assommer les différents personnages de l'histoire." Michel Foucault. *Naissance de la biopolitique* (Paris: Gallimard-Seuil, 2004): 7-8.

"The state is not a cold monster; it is the correlative of a particular way of governing. The problem is how this way of governing develops, what its history is, how it expands, how it contracts, how it is extended to a particular domain, and how it invents, forms, and develops new practices. This is the problem, and not making [the state] a puppet show policeman overpowering the different figures of history". Michel Foucault, *The Birth of Biopolitics*, ed. Michel Senellart, trans. Graham Burchell (New York: Palgrave Macmillan. 2008): 6.

³⁴ "C'est pour cause d'ordre qu'on décide de poursuivre ou de ne pas poursuivre. Pour cause d'ordre qu'on laisse à la police bride sur le cou. Pour cause d'ordre qu'on expulse ceux qui ne sont pas parfaitement « désirables »." ("Le citron et le lait", 697)

"For the sake of order that the police are given free rein; for the sake of order that those who aren't perfectly "desirable" are expelled". ("Lemon and Milk", 438.)

Foucault's functional justice assumes that the justice system (judges and general attorneys) benefits from a police capacity to provide necessary evidence required by procedural mechanisms. In exchange for the burden of policing society, functional justice also assumes that the police have received from its legal partners the latitude they need to operate. Following Foucault's assumption, I hypothesize that legislators must play an active role within functional justice by creating helpful legal tools for the police. Law, as we all know, is an instrument used by *suzerains*, government bodies and citizens wishing to regiment an unwanted state, obtain legal legitimacy, or start a judicial procedure against prejudicial actions. It is a tool activated by an operative hoping to modify a current situation (e.g., financial retribution, condemnation, cessation of an activity). It is a prohibitive force that takes shape through its convening and is empowered by flexible dispositions permitting it to take on a number of activities. Sherr's comparative analysis of public order acts and the overview of the "Anti-Occupy Wall Street Law" gave the opportunity to understand how legislators inlay elements allowing a *stratégie du pourtour* to emerge in legal texts. Foucault suggests that the police is a normative body mandated to regulate misconducts. We might want to add to his suggestion that legislators—when they 'play the game'—encourage the police, in times of dissent, to adopt a regal role and to exercise illiberal practices on the citizenry by providing the police with legal immunity.

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References

- Avrom Sherr. *Freedom of Protest, Public Order and the Law*, (Oxford: Basil Blackwell, 1989).
- Ben Golder & Peter Fitzpatrick, *Foucault's Law* (New York: Routledge, 2009): 71.
- Gate Rottman, "How Big a Deal is H.R. 347, that 'Criminalizing Protest' Bill?" ACLU Blog: <https://www.aclu.org/blog/how-big-deal-hr-347-criminalizing-protest-bill>.
- Government of the United States of America. "Federal Restricted Buildings and Grounds Improvement Act of 2011" (subsequently cited as HR347): <https://www.govtrack.us/congress/bills/112/hr347/text>
- James D. Faubion, "Lemon and milk", in *Power*, ed. «trans. Robert Hurley (New York: New Press, 1997)
- Michel Foucault, *The Birth of Biopolitics*, ed. Michel Senellart, trans. Graham Burchell (New York: Palgrave Macmillan. 2008)
- Michel Foucault: la justice et la police", Television interview, April 25th, 1977, Antenne 2. Director: Serge Moati; Producers: Jack Lang, Serge Moati, Jean Denis Bredin: <http://www.ina.fr/video/I06277669>
- Michel Foucault. "La stratégie du pourtour", in *Dits et écrits II, 1976-1988* (Paris: Gallimard, 2001b), 794-797. [An English translation is available as "The Catch-all Strategy", *International journal of the sociology of law*16 (1988): 159-162. Translated by Neil Duxbury.]
- Michel Foucault. *Histoire de la sexualité I. La volonté de savoir*, (Paris: Gallimard, 1976)
- Michel Foucault. *Naissance de la biopolitique* (Paris: Gallimard-Seuil, 2004)
- Nikolas Rose and Mariana Valverde. "Governed by Law?", *Social Legal Studies*, 7 issue 4 (1998): 542: <https://doi.org/10.1177/096466399800700405>
- Robert Justin Goldstein. *Political Repression in 19th Century Europe*, (Totowa: Barnes and Nobles Books, 1983)