# Foucault's expulsion of law: Towards a retrieval

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Abstract

In the change in the paradigm of power from the monarchic to the disciplinary traced by Michel Foucault in his grand genealogies, there is also a tendency to effect an expulsion of law. Foucault contends that power has changed in its nature from being centrist and repressive to being diffuse, micro-level and creative. Power has become normative and normalising. The most important sites of power now are not monarchic ones, but instead, the prison, the school, the doctor's surgery, one's own friends and neighbours and ultimately, one's own (constructed) conscience. Foucault goes on from this diagnosis to state that law no longer connects with power, it exists on a different scale and operates through different and outdated modes. It is the argument of this thesis that Foucault makes these claims about law only because he does not pause to understand fully the nature of law. This thesis will attempt to establish that law is a much more social and diffuse mechanism than Foucault was prepared to concede. Subsequently, it will be argued that in fact despite the tenor of the better known of Foucault's remarks about the law, there are also suggestions in his work about a new meld between law and discipline, and the creation of a combined, synergistic normative framework. Finally, briefly, there will be an analysis of ways in which resistance can be effected through the law. Hence the law is by no means irrelevant as Foucault sometimes claimed, instead it is critical and a potential source of hope in 'the carceral archipelago'.

# *Introduction*

It has become almost customary for commentators on Foucault to begin their works with an account of the 'difficulties' involved in reading and understanding him. Aspects of his style are adverted to, the nonlinearity, the orbital prose, his propensity for refining and sometimes outright altering theses without directly saying so, the apparent contradictions in his work. Thus Clifford Geertz proffers:

"He is a kind of impossible object: a nonhistorical historian; an anti-humanistic human scientist; a counter-structuralist structuralist. If we add to this his tense, impacted prose style, which manages to seem imperious and doubt-ridden at the same time, and a method which supports sweeping summary with eccentric detail, the resemblance of his work to an Escher drawing- stairs rising to platforms lower than themselves, doors leading outside that bring you back inside- is complete."[1]

In a similar vein, Baudrillard remarks:

"Foucault's discourse flows, it invests and saturates, the entire space it opens. The smallest qualifiers find their way into the slightest interstices of meaning; clauses and chapters wind into spirals; a magistral act of decentring allows the opening of new spaces which are immediately covered up."[2]

As ever, its not entirely clear what Baudrillard means, but in conjunction with Geertz and the analogy to Escher, there is this sense that to understand Foucault, the reader has to be hermeneutic, has to consider Foucault very much on his own terms. It will be an aim of this dissertation to do exactly that; Foucault's own schemas will be employed. There is of course the danger of conformation in this, and many refuse absolutely to make the move. Thus Camille Paglia contents herself with "throwing darts at Foucault's scrawny haunches", pointing out his inconsistencies and his 'misreadings' of history.[3]

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1 [1]C.Geertz, *'Stir Crazy'*, chapter 24, in *Michel Foucault: Critical Assessments*, ed.B.Smart, vol.4, Routledge, (London, 1995).

2 [2]J.Baudrillard, *'Forgetting Foucault'*, chapter 37, in *Critical Assessments*, vol.5.

3 [3]See *Salon*, at www.salonmag.com

Others at least try to construct a coherent Foucault but then when it comes to critique, they make the most egregious errors and ignore key sections of his work. What perhaps needs to be most clearly understood about Foucault is that he wrote in a spirit of ironism. He never claimed to be detailing some truth, he never claimed to be correct. As Baudrillard again puts it, "Foucault's is not therefore a discourse of truth but a mythic discourse in the strong sense of that word, and I secretly believe that it has no illusions about the effect of truth that it produces." This often becomes clear from Foucault's own comments. He makes reference to the 'Freemasonry of useless erudition'. He writes of his work:

"None of it does more than mark time. Repetitive and disconnected, it advances nowhere. Since indeed it never ceases to say the same thing, it perhaps says nothing. It is tangled up into an indecipherable, disorganised muddle. In a nutshell, it is inconclusive. Still, I could claim that after all these were only trails to be followed, it mattered little where they led; indeed, it was important that they did not have a predetermined starting point and destination. They were merely lines laid down for you to pursue or to divert elsewhere, for me to extend upon or re-design as the case might be. They are, in the final analysis, just fragments, and it is up to you and me to see what we make of them."[4]

Admittedly, this is a strange sort of mythic discourse but there is something still to Baudrillard's point. It connotes that we have to be very careful in considering Foucault's arguments, we must not take him entirely at even his own word, must always be prepared to take little detours, or start entirely again when his theses transmute. This dissertation at least will be written in that spirit.

Nevertheless, even with all the above said, it is necessary to delineate roughly what Foucault was trying to say and what this dissertation hopes to add. Basically, I intend to consider Foucault's theory of power. Foucault contended (most notably in *Discipline and Punish*[5] and the first volume of *The History of Sexuality*[6] though portents of the analysis were apparent in earlier works such as *Madness and Civilisation*[7] and *The Birth of the*

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4 [4]M.Foucault, *'Two Lectures'*, reprinted in *Power/Knowledge*, ed. C.Gordon, Harvester Wheatsheaf, (London, 1980), p.78. Hereinafter referred to as *2L*.

5 [5]*Discipline and Punish: The Birth of the Prison*, Penguin, (London, 1977). Hereinafter referred to as *DP*.

6 [6]*The History of Sexuality*, vol.1, An Introduction, Penguin, (London, 1979). Hereinafter referred to as *HS*.

7 [7]*Madness and Civilisation: A History of Insanity in the Age of Reason*, Routledge, (London, 1997).

*Clinic*[8]) that power had switched, in the period we have dubbed 'modernity', to the micro-level. He spoke of the disciplines, medicine, psychiatry, penology, and of intimate surveillance and normalisation. He spoke of power circulating throughout society, being employed and exercised in a net-like organisation. This conception of power will be explained in the first Section and its utility examined.

A concomitant of Foucault's conceptual shift in the study of power is however, his 'expulsion' of law.[9] Foucault argues that law is a centralised, juridical form, coupled to the monarch and to sovereignty and thus it is ineffective against the disciplines. In this way, power escapes the confines of right. For Foucault then, the public form of law and the polymorhpous disciplinary mechanism are utterly heterogenous. This position could be refuted perhaps or at least, dented, by showing that, *in fact*, law is still efficacious, that there are legal doctrines and legal rights that allow for the control of even disciplinary power but the argument in Section Two will be more ambitious. The contention will be that Foucault only effected this expulsion of law because he thought on the basis of a legal positivist conception of law. This will be explained, its shortcomings will be posited, the alternative of a more horizontal, rather than hierarchical model of law suggested, and then a re-reading of Foucault intiated in which a rapprochement or at least a creative antagonism between law and discipline is made possible.

Section Three will follow from that new mis-reading and consider the possibility of resistance to power in Foucault's schemata. It will be argued contrary to the many critics who contend that Foucault either contradicts himself when it comes to thinking about resistance or simply vacillates to power, that there is scope for a theory of resistance within Foucault's mythic discourse and that in fact, the law can assist greatly in that insurrectionary project.

Before we begin outright though, there are some particularly poor criticisms of Foucault made which were adverted to previously and which are useful to deal with at this early stage one, because the rebuttal will reveal important details of his actual ideas, and two, because I feel the need for a little creative critique in order to get myself warmed up.

For instance: Kent argues that there is a residual naturalism in Foucault's philosophy, the notion that once upon a time there were natural bodies which then became repressed

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8 [8] *The Birth of the Clinic*, Routledge, (London, 1997).

9 [9] Phrase used by Alan Hunt, Ch.12, *Explorations in Law and Society*, Routledge, (London, 1993).

through the disciplines.[10] Now undoubtedly, there are traces of such a tendency, particularly in Foucault's later work[11], but primarily, Foucault's thesis was not at all that the disciplines were the first form of repression, but that they were a new, more sophisticated form. Previously repression was far more crude, or at least emanated solely from more central loci. It is important to keep this in mind because it is central to Foucault's thoughts on resistance that we have never been and never will be free of power. Power mutates, it takes different forms, but it never dispels.

Critics also often remark that Foucault neglected macro-forms of power. Leftists say the state is missing from his analysis[12], feminists protest that he paid no attention to patriarchy and viriarchy, to male domination.[13] Now it is certainly true that Foucault did not have much to say about macro-forms, but that's because he was trying to challenge an orthodoxy in which macro-forms alone were considered. Foucault's peculiar insight, his greatest contribution was to focus attention on the capillaries, on the micro-maneouvres of power, indeed Sheridan asserts that he was the first theorist ever to so consciously analyse disciplinary power[14], but his theory certainly did not deny the importance of grander narratives. Foucault repeatedly states that the micro-level is only a starting point. For instance:

"the important thing is not to attempt some kind of deduction of power starting from its centre and aimed at the discovery of the extent to which it permeates into the base, of the degree to which it reproduces itself down to and including the most molecular elements of society. One must rather conduct an *ascending* analysis of power, starting, that is, from its infinitesimal mechanisms, and then see how these mechanisms of power have been- and continue to be- invested, colonised, utilised, involuted, transformed, displaced, extended, etc., by ever more general mechanisms and by forms of global domination. . . *above all* what must be shown is the manner in which they are invested and annexed by more global phenomena and the subtle fashion in which more general powers or economic interests are

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10 [10]R.Kent, *'The Human Body in Social Theory'*, Ch.58, in *Critical Assessments*, vol.6.

11 [11]See *The History of Sexuality*, vols.2 and 3, Penguin, (1984).

12 [12]See for example, B.Jessop, *State Theory*, Polity Press, (Cambridge, 1990), Ch.8.

13 [13]For example, certain of the essays in *Feminist Interpretations of Michel Foucault,* ed. Susan J.Hekman, Pennsylvania State U.P, (Pennsylvania, 1996). Or Sandra Bartky's piece, *'Foucault, Femininity and the Modalities of Patriarchial Power'* in *Femininity and Domination*, Routledge, (New York, 1990).

14 [14]A.Sheridan, *Michel Foucault: The Will to Truth*, Tavistock, (London, 1980), Part II, Ch.2.

able to engage with these technologies that are at once both relatively autonomous of power and act as its infinitesimal elements."[15]

Clearly then Foucault can also be read as laying out only this methodology for studying power. Sure, he didn't discuss 'man-power' himself but he provided the tools for others to do so and many feminist thinkers certainly have engaged productively with his work.[16] Keep in mind also the earlier quotation in which Foucault confesses to supplying only 'fragments'.

Hence, some easy prey has been captured and my fingers are moving more fluidly across the keyboard. Shall we begin now in earnest . . .

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15 [15]2L, p.99. Emphasis added.

16 [16]See for instance, J.Sawicki, *Disciplining Foucault: Feminism, Power and the Body*, Routledge, (London, 1991).

# Power

Michel Foucault's purest and perhaps most important work of genealogy, *Discipline and Punish*, begins with the following striking juxtaposition. First there is related in some detail, the public torture and execution of the regicide Damiens:

"He was to be 'taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds'; then, 'in the said cart, to the Place de Greve, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, burning oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds'.

Finally, he was quartered,' recounts the *Gazette d'Amsterdam* of 1 April 1757. 'This last operation was very long, because the horses used were not accustomed to drawing; consequently, instead of four, six were needed; and when that did not suffice, they were forced, in order to cut off the wretch's thighs, to sever the sinews and hack at the joints . . ."[1]

This is followed by an excerpt from the rules of a borstal for young prisoners:

"Art.17. The prisoners' day will begin at six in the morning in winter and at five in summer. They will work for nine hours a day throughout the year. Two hours a day will be devoted to instruction. Work and the day will end at nine o'clock in winter and at eight in summer.

Art.18 Rising. At the first drum-roll, the prisoners must rise and dress in silence, as the supervisor opens the cell doors. At the second drum-roll, they must be dressed and make their beds. At the third, they must line up and proceed to the chapel for morning prayer. There is a five-minute interval between each drum-roll.

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1 [1] *DP*, 3.

Art.28. At half-past seven in summer, half-past eight in winter, the prisoners must be back in their cells after the washing of hands and the inspection of clothes in the courtyard; at the first drum-roll, they must undress, and at the second get into bed. The cell doors are closed and the supervisors go the rounds in the corridors, to ensure order and silence."[2]

Effectively, we have here the two paradigms of penal power. The first sort is primal, both crude and cruel, it is, as Foucault soon argues, inefficient, but it is ritualistic, spectacular, it emphasises the absolute power of the monarch. The second we see as more sane, more rational, but also, as more insiduous. It is a power with more detailed ambitions, it is a form of punishment which seeks beyond the body, it has designs on the soul of its subject. This second form is evidently the main concern of this section but there are significant aspects which are worth commenting on, in the move from one to two.

**An immediate example of power/resistance**

It is an important detail of Foucault's accounts of power that resistance is almost ubiquitous. Thus as he goes on to detail the surround of the public execution, Foucault first describes the nature of the power being exercised but then also, that of the resistance thus engendered

Most obviously, there is the public character of the punishment. Clearly what is intended is a display of the sheer extent of the sovereign's power. Sovereignty is constituted in such a way, the fiction is set up that the sovereign himself has been wronged, that his authority has been injured, and though that was only a momentary hurt, a trivial one, the punishment seeks to restore that authority by manifesting it at its most spectacular. The act is gross, over the top, endlessly elaborate, it is in fact an act of the most ridicolous bravado. It is a statement from the sovereign that if you harm my 'body', this is how I will take revenge upon your body. I will not merely harm it, I will destroy it piece by piece, I will it efface it from existence. The sovereign's supremacy is established thus as not only one of right, but also of physical strength. Moreover, a whole military machine accompanies the process. There are cavalry, archers, guardsmen, soldiers. As Foucault concludes, all this,

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2 [2]*DP*, 6-7.

"made the public execution more than an act of justice; it was a manifestation of force; or rather, it was justice as the physical, material and awesome force of the sovereign deployed there. The ceremony of the public torture and execution displayed for all to see the power relation that gave his force to the law."[3]

Nevertheless, and even in the face of all this, Foucault relates that there were nodes of resistance. Thus people flocked to see these executions, and though these were designed to terrorize them, in part they came to hear the individual who had nothing more to lose, curse the judges, the laws, the government. And through the grievances of the doomed individual, and through the realisation that indeed, the execution represented a threat to them too, the threat "of a legal violence exercised without moderation or restraint"[4], executions often led more to an affirmation of solidarity amongst the subjects than of the power of the sovereign. Emboldened so, the crowd sometimes echoed the wails of the condemned man or woman, insults or stones were thrown at the executioner, the guards, the soldiers, or even the judges, attempts were made to seize the condemned, people would attempt to stall the proceedings by shouting that they could see the King's messenger coming with a special pardon, occasionally executions were even outright prevented. If the mob thought the charge unjust, they would obtain the man's pardon by force, simply grab him from the executioner's clutches and carry him off to the nearest tavern. The execution thus always had the potential to take on

"a whole aspect of the carnival, in which rules were inverted, authority mocked and criminals transformed into heroes. The shame was turned round; the courage, like the tears and the cries of the condemned, caused offence only to the law . . For the people who are there and observe, *there is always, even in the most extreme vengeance of the sovereign a pretext for revenge.*"[5]

**The historian of discontinuity?**

This aspect of the spectacle became soon one cause for its abolition. Also, there developed concerns about the plain and infeasible cruelty of the process. But the causal determinant to

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3 [3]*DP*, 50.

4 [4]*DP*, 63.

5 [5]*DP*, 61. Emphasis added.

which Foucault gives the most credit is that of plain economy. The public execution came to be seen as an inefficient method of punishment. Inefficient, that is, in terms of social control. It was too singular, it was only an isolated act and though it was symbolic and could be interpreted as an act against the entire body of society and not just against the body of the condemned individual, it remained too concentrated and inconstant. Foucault explains:

"The true objective of the reform movement, even in its more general formulation, was not so much to establish a new right to punish based on more equitable principles, as to set up a new 'economy' of the power to punish, to assure its better distribution, so that it should be neither too concentrated at certain privileged points, nor too divided between opposing authorities; so that it should be distributed in homogeneous circuits capable of operating everywhere, in a continuous way, down to the finest grain of the social body. The reform of criminal law must be read as a strategy for the rearrangement of the power to punish, according to modalities that render it more regular, more effective, more constant and more detailed in its effects; in short, which increase its effects while diminishing its economic cost."[6]

We will consider this matter in just a moment but first, there is something striking about this commentary and in fact, about the entire first half of *Discipline and Punish*. It reads very much like a 'conventional' history of punishment, there is frequent mention of social control as a guiding concern, there is causality and linearity. How does this fit with Foucault's conception of himself as a historian of discontinuity? In fact, here, he opens by exposing a rupture, and then spends over a hundred pages sealing it up. This is hardly what one expects from the essayist who wrote just four years previously:

"Genealogy does not pretend to go back in time to restore an unbroken continuity that operates beyond the dispersion of forgotten things . . Genealogy does not resemble the evolution of a species and does not map the destiny of a people. On the contrary, to follow the complex course of descent is to maintain passing events in their proper dispersion; it is to identify the accidents, the minute deviations- or conversely, the complete reversals- the errors, the false appraisals, and the faulty calculations that gave birth to those things that

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6 [6]*DP*, 80-81.

continue to exist and have value for us . . . it is to discover an unstable assemblage of faults, fissures, and heterogeneous layers".[7]

Pasquino relates that in his later years, Foucault used to laugh off the label of 'philosopher of discontinuity' that was attached to him.[8] In *Discipline and Punish*, certainly, the discontinuity is really just a point of departure, a challenge, a spur to the project itself. As Geertz remarks, the book is marked in fact by a historicism, it is a sort of "Whig history in reverse, a tale of the rise of unfreedom".[9] In a similar vein, Turner observes that there is a unifying theme of the rationalisation of the body and of populations by new combinations of power and knowledge.[10] We will come to see shortly how accurate this synopsis is, but the point in bringing up this latency in Foucault's work is that it augurs something for resistance. Foucault cannot now deny that there is a consistency to what power does, it has a theme, there is something public and identifiable holding it together and so though it may take diffuse and diverse forms, there is this something solid, at least partially determinate running through it and that something can become a focus for resistance.

**The Birth of the Prison**

The prison then comes about because there is a felt need to subject illegality to a stricter and more constant control. The execution is too irregular a mechanism, it cannot be used for each and every crime and yet each and every crime must be acted upon, each and every punishment must be made into a fable. The target of punishment is now much wider. There are not just the regicides and the blasphemers, but with the coming of the age of capital, there are crimes against property and crimes of dishonesty.[11] These must be treated, a punishment must be meted, and deterrence somehow effected.

In order to ensure that these objectives are achieved, in the quest for an economic, effective instrument and for consistency, certain rules are made to kick in.[12] For instance, there is *the*

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7 [7]M.Foucault, *'Nietzsche, Genealogy, History'*, reprinted in *Language, Counter-memory, Practice*, ed. D.F.Bouchard, Cornell U.P, (Ithaca, 1977), p.146.

8 [8]Pasquale Pasquino, *'Michel Foucault (1926-84): The Will to Knowledge'*, *Economy and Society*, 15 (1986) 97.

9 [9]C.Geertz, *'Stir Crazy'*, *Critical Assessments*.

10 [10]B.Turner, *The Body and Society*, (1984), p.157-76.

11 [11]Of course we suspect that these existed previously as well.

12 [12]*DP*, 94-99.

*rule of minimum quantity*. Thus the punishment must produce a degree of harm that exceeds the good the criminal derived from the crime. The *rule of perfect certainty*, whereby the laws that define the crime and lay down the penalties must be perfectly clear and must be publicly accessible. The fact of punishment must be brought into the conciousness of the populace. This is one aspect of the rationalisation. Another takes place within the prison itself.

What animates the new technology of punishment is the desire to make it a procedure for requalifying individuals. They have to be disciplined, they have to be acted upon in even minute manners. As Foucault explains, punishment begins to operate methods of training the body, it decides to leave traces, in the form of habits, in behaviour. The old paradigm employed terror, it was brutish, but the new is rational, it is restrained, it uses signs and coded sets of representations. Thus precise timetables are set, labour is stipulated, isolation is effected. For instance, at one of the oldest prisons, the Raphuis of Amsterdam, there was:

"a strict time-table, a system of prohibitions and obligations, continual supervision, exhortations, religious readings, a whole complex of methods 'to draw towards the good' and 'to turn away from evil' held the prisoners in its grip from day one."[13]

I will come to the disciplinary techniques in more detail very shortly, for they come in fact to be not just vestiges of the prison, but of the disciplinary society as a whole, but first, there is a problem in Foucault's account of the birth of the prison, for he considers punishment merely in its utilitarian aspects. For him, punishment, especially in the prison, is purely about social control. There is no notion of moral retributivism involved in the process. Yet surely that is an important part of the ideology of punishment. Punishment too does have significatory effects beyond just those that pertain to social control.[14] This is however just a side point and Foucault can anyway argue with some force that such were not efficacious in the birth of the prison itself. More serious perhaps and more pertinent certainly to the slant of this dissertation is the fact that the law itself is hardly a presence in Foucault's account. It is the desire for social control that propels the evolution of the prison but clearly, that desire must first be encrypted in the law. It is the law that first interacts with social concerns, with the declaration of the capitalist, let's say, that his property be protected, with the social

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13 [13]*DP*, 121.

14 [14]See classically, E.Durkheim, *Moral Education*, Free Press, (New York, 1973) and *'Two Laws of Penal Evolution'*, *Economy and Society*, 2 (1973). Also, D.Garland, *'Frameworks of Inquiry in the Sociology of Punishment'*, *British Journal of Sociology*, 41 (1990) 1.

morality which wants to circumscribe its pet hates. It is also law which stipulates the penalties which the prison is to effect. Foucault does give some attention to this. We have already discussed the rule of minimum quantity. It is the law ultimately which stipulates this minimum quantity but whilst it is about that enterprise, will it not also, or at least, may it not also, stipulate a maximum quantity, or lay down conditions regarding the quality of the punishment. Similarly, if we consider the rule of perfect certainty, doesn't it verily manifest a rule of law virtue. Certainly it effects social control but it also enables social freedom of a sort, for it at least lets people know what the limits of their freedom are. It prohibits arbitrary punishment. By neglecting the intercursor of law, Foucault neglects a means of mediating the effects and ideology of punishment. Finally, the Disciplinary SocietyHaving expended the first half of his book explaining the evolution of punishment, Foucault turns in the second half to the thesis that the disciplinary techniques of the prison have since become societal. His contention is that discipline has become the common discourse of all sorts of institutions from schools to factories to barracks. He speaks of 'the carceral archipelago'. He establishes his argument by outlining certain generalities and then leaping from one historical document to another, from one site to the next, cataloguing, evidencing their pervasiveness. He writes:"To begin with, there was the scale of the control; it was a question not of treating the body, en masse, 'wholesale', as if it were an indissociable unity, but of working it 'retail', individually; of exercising upon it a subtle coercion, of obtaining holds upon it at the level of the mechanism itself- movements, gestures, attitudes, rapidity; an infinitesimal power over the active body. Then there was the object of the control: it was not or was no longer the signifying elements of behaviour or the language of the body, but the economy, the efficiency of movements, their internal organisation; constraint bears upon the forces rather than upon the signs; the only truly important ceremony is that of exercise. Lastly, there is the modality: it implies an uninterrupted, constant coercion, supervising the processes of the activity rather than its result and it is exercised according to a codification that partitions as closely as possible time, space, movement. These methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility, might be called 'disciplines'."[15]

This is powerful stuff and conveyed here certainly are some of the key aspects of the disciplinary society. It is concerned to construct 'docile bodies', it exercises a 'subtle' and

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15 [15]*DP*, 137.

'constant' coercion, it is most of all 'meticulous'. A few notes should perhaps be included about certain of its techniques:

*enclosure*: thus schools, factories, psychiatric institutions are all sealed. Around them are walls and embankments and gates. These exist to neutralise the inconveniences and distractions of the outside world, to enable the internal power to crystallise fully and circulate freely.

*partitioning*: each individual has his own space, and each space its individual. This strategy breaks up collective dispositions, prevents coagulation and the formation of any kind of non-transient counterculture.

*the timetable*: this establishes rhythms, creates cycles of repetition and thus stills creativity, and insurrectionary thoughts. Because of the timetable, the individual may not even have the opportunity to reflect, to step back from his stipulated activities and consider their aspects and effects. All his planning is done for him. From the point of view of power, the timetable ensures quality of time, the economic use of time.

*the body-object articulation*: discipline often defines in very great detail exactly how something is to be done, it defines each of the relations that the body must have with the object that it manipulates. It outlines what Foucault calls 'a meticulous meshing'. It effects a sort of synthesis between the body and the act and the object. We see this technique perhaps most notably in the army, with the stipulations as to how exactly a weapon is to be held, and used. Another important aspect of this technique is that it bonds, and that it does so through homogenisation. The timetable may have a similar effect. Disciplinary power then treats individuals as instrumentalities, it organises them into efficient units, then clicks them into rational, coherent wholes.

The ideal-type of this whole disciplinary mode of control is the Panopticon. This was a prison-model that Jeremy Bentham came up with. It consists of a central tower in which the guards are situated. All around the tower, from the floor to the ceiling are cells. Each prisoner is isolated, his cell is minimally illuminated. The aspect into the central observation space is however obscured. Thus the prisoner cannot see into the tower but the guards can see into the prisoner's cell. Power here is visible but unverifiable. Thus the prisoner must always assume that he is under surveillance though he may not be so at any particular

moment. Many of the features of the disciplinary society can be observed here, the individualisation, the normalisation, the precision, the cold economy of power's exercise, and also one that we have not discussed so far, surveillance, the notion of the gaze.[16] We can note the presence of the gaze in other contexts as well. For instance, in the army, it is meticolous and organised hierarchically. It is the gaze which ensures that the individual adheres to the disciplinary techniques. And because this gaze is persistent and constant, it eventually becomes internalised, the individual gazes upon himself. Power's project is finally and subliminally realised when the individual comes to discipline himself. The disciplines ultimately then are not just a strategy for the body but also for the soul. They are designed to be permanent and profound in their effects. The iron cage that they create is a truly dystopian one, it is situated both without and within the individual.

Dews has since argued[17] that the new institutional structures and technologies link with these new, pristine gazes to affect the psyche, subjectivity, personality, conciousness, they have a moralising function, as stated, but also, and this is a grand claim, they have epistemic effects, in that they transform their targets into possible objects of cognition. Foucault is never clear on just how great their effectivity is in the process, and neither is Dews, but it is submitted that they impact in the creation of modern self-reflective subjectivity itself. That however is a topic that requires a dissertation, nay a multi-volumed epic thesis of its own, and so you will I hope forgive me for eliding the issue and going on to add

**A few random but potentially significant points**

*a. the epochal leap*

Towards the end of Discipline and Punish, Foucault begins to get really quite excited about the epic realisation of a disciplinary society. He writes that we are now in "the carceral city" where "the prisons resemble factories, schools, barracks, hospitals, which all resemble prisons."[18] Also, "the judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the 'social worker' judge ; it is on

16 [16]See in particular, an interview entitled *'The Eye of Power'*, in *Power/Knowledge*.

17 [17]P.Dews, *'Power and Subjectivity in Foucault'*, vol.5, *Critical Assessments*.

18 [18]DP, 228.

them that the universal reign of the normative is based".[19] As Ewald makes clear, ultimately for Foucault, the disciplines homogenise social space, or at least create a sort of common language between all sorts of institutions and social spaces, making it possible for one to be translated into another.[20] Effectively then, prisons and schools differ only in terms of the degree of discipline exercised, the extent of repitition or insistence. Certainly this is a powerful and persuasive argument and Foucault is often thrilling and polemical as he puts if forward but it does involve something of a leap. There is no real genealogy presented of this dispersal of discipline. Rather, it is an entirely epochal argument.[21] And the gap is entirely visible. Part Two of Discipline and Punish ends with a chapter mischievously titled 'The gentle way in punishment', and Part Three begins by hopping from one site to another, describing the techniques whereby 'Docile bodies' are brought into being. What is not even mentioned is how these techniques proliferate themselves from the prison to all these other locations. The why undoubtedly involves considerations of social control and again, efficiency. Foucault suggests so repeatedly, but the how is not made clear.

Foucault may be correct in fact to infer that they have proliferated so, and I, as you may already have guessed believe that he is correct, but I wonder if he misses or perhaps even consciously obscures critical aspects by making the leap quite so swiftly, ie. before the prison began to utilise disciplinary power, the law had a role. Foucault concedes this. He does not give that role its proper exposition, but I have suggested certain points that we commentators may want to make. Now surely, law must again have featured when certain other social insitutions and power centres adopted disciplinary power. It must have been through law that they gained the license to do so. I am thinking particularly of state institutions. At least the formal source of their formal authority is the law. Overall and basically, the point and it is only inchoate at this stage, is that in this discontinuity, this brief rupture in Foucault's otherwise somewhat seamless history, we may well have been able to observe the first of a new species of interactions between law and discipline, and law and social power.

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19 [19]DP, 304.

20 [20]F.Ewald, *'A Power without an Exterior'*, in *Michel Foucault: Philosopher*, ed. T.J.Armstrong, Harvester Wheatsheaf, (London, 1992).

21 [21]This rupture is discussed for instance by M.Donnelly, *'On Foucault's uses of the notion 'biopower'*, in *Michel Foucault: Philsopher.*

*b. power as a relational concept*

This is a Foucauldian thesis that isn't directly relevant to the project of Discipline and Punish but it does pop up repeatedly in all his work and it will be significant when we come to think about resistance. It is perhaps even a banal point, but it is basically:

"power is exercised rather than possessed; it is not the 'privilege', acquired or preserved, of the dominant class, but the overall effect of its strategic positions- an effect that is manifested and sometimes extended by the position of those who are dominated."[22]

Effectively then, no-one possesses power per se. When we say someone or some institution is powerful, what we really should mean is that an equation something like p=(a-b)c + d is working out in their favour, where a, b, c and d are the other quanta of power in that particular social space.[23] Power really is just a convenient label. In actuality, everything is power, in the sense that everything does or may have a role in determining who or what is the beneficiary of a discrete field of social or individual relations. This ultimately has consequences for resistance because it means, as Foucault makes quite clear, that power never exists without resistance.[24] In fact, it would be more accurate to say that resistance is simply another form of power, or that we ascribe the label power to the discourse and acts of that party which is situated to gain the highest p rating from the above equation and resistance to the discourse and acts of all the parties who gain lower p ratings. In practical terms, this means that in a chosen emancipatory or transformative project, there may be no need to assail p or the power-holder directly, it will be enough to divest that holder of its power tag if we affect a, b, c or d.

If I understand Foucault correctly, the above also means that it is foolish to criticise Foucault for his rhetorical pronouncements that power is everywhere, or that there is no possibility of emancipation from power. Power was for Foucault, in his quiet moments at least, a value-neutral concept, just a term for describing the basic stuff of society.[25] Thus, he writes of:

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22 [22]*DP*, 26-27.

23 [23]Similar 'relational' views of power are taken by Jessop, *State Theory*, and Nicolas Poulantzas, *State, Power, Socialism*, New Left Books, (London, 1978).

24 [24]See for instance, *'Power and Strategies'*, in *Power/Knowledge*. Or Chapters 6 and 7 in M.Foucault, *Politics, Philosophy, Culture*, ed. L.Kritzman, Routledge, (New York, 1988).

25 [25]I will discuss in the last chapter how Foucault often uses words in two different ways and the sort of criticisms that this trait renders him vulnerable to.

"The omnipresence of power: not because it has the privilege of consolidating everything under its invincible unity, but because it is produced from one moment to the next, at every point, or rather in every relation to from one point to another. Power is everywhere; not because it embraces everything, but because it comes from everywhere."[26]

*c. power/knowledge*

It had long been Foucault's claim that power and knowledge are symbiotic. Previously it was an epistemological point, the notion that truth was a product of discourses, which were in turn constituted and changed by power.[27] In *Discipline and Punish*, the point is a little more mundane. It is merely this, that the disciplines incorporate techniques which intuit and draw knowledge from and about the individual. The individual is subjected to a detailed regulation and his reactions to that are observed. The efficiency of different methods can be noted, behaviours and attitudes can be logged. This all put together can constitute an expertise and this expertise can then be used to legitimate the disciplinary practice.[28] Power produces knowledge, knowledge produces power. Or as Rouse puts it, "A more extensive and finer-grained knowledge enables a more continuous and pervasive control of what people do, which in turn offers further possibilities for more intrusive inquiry and disclosure."[29] The professions too gain from the discipline-dynamic. They obtain docile bodies to study.

*d. ascending analysis*

One plane for such an analysis can be the notion of 'governmentality'. This became a topic for Foucault in his later work.[30] The idea is that the disciplines and professions don't just act discretely on individuals in a microphysics of power but also, they nourish the process of government. They are in fact a key resource of governing, especially in liberal, democratic states where the state is required to legitimate itself, at least partly in terms of expertise and results and where it can no longer simply dominate subjectivity.[31] The disciplines then

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26 [26]*HS*, 93.

27 [27]See *The Archaeology of Knowledge* and *The Order of Things*.

28 [28]See James Marshall, *'Educational Research'*, in *Foucault and Education*, ed.S.J.Ball, Routledge, (London, 1990).

29 [29]J.Rouse, *'Power/Knowledge'*, in *The Cambridge Companion to Foucault*, Cambridge U.P, (1991).

30 [30]In particular, M.Foucault, *'Governmentality'*, in *The Foucault Effect*, ed. G.Burchell et al, Harvester Wheatsheaf, (1991).

31 [31]Terry Johnson, *'Expertise and the State'*, in *Foucault's New Domains*, ed. M.Gane and T.Johnson, Routledge, (London, 1993).

contribute in the construction of governable realms of social reality. They produce normalised individuals arranged into surveillance hierarchies, they thus provide the government with the base of an in control society, and if they can also be made coherent or conducive towards governmental goals, those goals stand a greater chance of success. Thus, the support of doctors is always sought when a government is concerned to effect reforms in healthcare. Moreover, the disciplines and professions can supply knowledge of masses, the details and generalities uncovered by their micro-techniques can inform macro-techniques. As Foucault puts it,

"Discipline can reduce the inefficiency of mass phenomena: reduce what, in a multipilicity, makes it much less manageable than a unity. . . It clears up confusion; it establishes calculated distributions. . . it can oppose to the intrinsic, adverse force of multiplicity the technique of the continuous, individualising pyramid."[32]

One significance of such analysis is that because the government acts through law, here again we have a space in which law and disciplinary power are bound to interact. Law will draw knowledge from the disciplines and it will attempt sometimes to alter the operation of the disciplines towards the ends of government. In fact, Foucault himself suggests an interaction very much like this towards the end of the first volume of *The History of Sexuality*, when he is discussing biopower. Please abide with me until Section two for more on this.

The second plane of ascending analysis that I want just briefly to note appears in *Discipline and Punish* itself. Of course, social control was an overbearing theme in the rise of disciplinary power. That social control was for political purposes, ultimately that is the lesson of Damiens' execution. But Foucault also suggests that capitalism had something to do with the emergence of the new paradigm. Certainly, disciplinary techniques came to be employed in factories and workshops and for the purpose of efficiency. The following quotation sort of sums up both these motivations:

"Let us say that discipline is the unitary technique by which the body is reduced as a 'political' force at the least cost and maximised as a useful force. The growth of a capitalist economy gave rise to the specific modality of disciplinary power, whose general formulas,

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32 [32]*DP*, 219-220.

techniques of submitting forces and bodies, in short, 'political economy', could be operated in the most diverse political regimes, apparatuses or institutions."[33]

What's interesting about this passage is that though the emphasis previously had been on political purposes, here capitalism is (predictably and) firmly established as the villain of the piece. I don't want at all to dwell on this spectre of Marx[34], or is it Weber, but such ascending analyses are interesting because they appear to thematise, to coagulate the multifarious types and sites of disciplinary power in a way that Foucault's rhetoric sometimes suggests is not possible. He speaks of power as having many forms, he wants to place it at the capillaries, he wants to do a 'micro-physics' of power and because of all the dispersions that he effects, commentators worry about the consequences for resistance: must it be similarly disparate, nothing more than a ragtag of guerilla tactics. But perhaps it is this talk of themes and grander narratives that we need to focus on more when it comes to planning 'emancipation'. Once again I am forced to call a postponement- see Section three

**Disciplinary power today**

*a. Education*

The intention here is merely to suggest certain features of school education which bear affinity to disciplinary analysis. Foucault stated that in the latterday 'carceral archipelago', the schools too resemble prisons. I'm not sure that I want to be quite so didactic but some points are worth making. For a start, pupils are arranged into cellular structures, their desks are placed apart and in rows and this represents a preliminary individualisation. Then further there are panoptic and normalising aspects.[35] There is the precise organisation of time. In seconday schools there is a set timetable, and only a certain amount of time is allowed for the move from one classroom to the next, this movement may even be watched over by monitors or teachers. In primaries too, there are different slots alotted to different activities. The pupil is not permitted to be idle. Only minimum breaks are allowed, mid-morning and lunch. There is in place a hierarchy of observation. Thus the student is watched over by prefects who are watched over by teachers who in turn are watched over by the senior staff of the school and finally, they too are accountable to someone else.

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33 [33]*DP*, 221.

34 [34]Apologies to Monsieur Derrida.

The normalising aspects are similarly numerous. There are standardised curricula in place, standardised learning objectives and expectations. There is a process of continuous assessment, and so the child who wants to be successful, or the child who wants to wins the praise of her teacher and parents, is constantly required to apply herself to the work at hand, to adopt its criteria of excellence, and to internalise the same. In secondary schools and universities, the continuous assessment is in fact formal, in the sense that every small test that you take, every piece of work submitted can have a bearing on your overall results. That is a strong normalising influence, but even in primary schools, or in the first years of secondary school, there is the ever-looming prospect of the report card or the parents' evening and hence there is a sort of a constant economy of gold stars and black marks, points are deducted for lateness, inattention, insolence and points gained for good time-keeping, attentiveness, docility. Moreover, there is the examination and this is perhaps the most important prong in the disciplinary nexus. With the ongoing process of assessment, a history of each student has already been created, competition between them has already been instituted but the examination has further functions. The exam forces the student to make herself known, the exam creates each individual as a case, it allows for the setting of serious, formal norms and then for the measurement of deviations from those norms. It objectifies and it subjects. And as Hoskin notes, it is an ingenious mechanism, because it appears so value-free, it looks like a technique of pure knowledge, yet it is a technique also of power.[36] Too, it looks neutral but it is discriminatory. Minority groups tend not to perform as well in examinations as the dominant social group.

Finally, it is worth noting that it is not only the pupils who become subjects of disciplinary power in schools. It is also the teachers, there is an alert gaze upon them too, they too are set to certain norms and standard techniques.[37] Similarly, and I admit to being a little glib here, even scholars and university academics are not unfamiliar to the techniques. Their performance too is monitored. Their careers, styles and researches are disciplined by the requirements of university authorities and patterns of resource allocation.[38] They too experience the micro-physics of power.

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35 [35]This arrangement of observations is suggested by K.Hoskin, *'The Examination, Disciplinary Power, and Rational Schooling'*, in vol.7, *Critical Assessments.*

36 [36]K.Hoskin, *'Foucault under Examination'*, in *Foucault and Education.*

37 [37]See V.Walkerdine, *'Post-Structuralist Theory and Everyday Social Practices'*, Ch.4 in *Feminist Social Psychology*, ed. S.Wilkinson, Open U.P, (1986).

38 [38]This point is made in more detail by I.Goodson and I.Dowbiggin, *'Docile Bodies'*, in *Foucault and Education.*

*b. cyberspace*

What is most interesting about disciplinary power in cyberspace is that it performs the function of a sort of infra-law. The Net is widely understood to be an awkward arena for legal regulation. It sprawls irresistibly over jurisdictional boundaries, it is fluid and mammoth and hence impossible to police. Law can only have the most limited effectivity in cyberspace. In certain loci however, we can observe the existence of disciplinary practices. But first, a word from Foucault:

"Regular, institutional as it may be, the discipline, in its mechanism, is a 'counter-law'. And, although the universal juridicism of modern society seems to fix limits on the exercise of power, its universally wide panopticism enables it to operate, on the underside of the law, a machinery that is both immense and minute".[39]

We can see such machinery at work on certain sites. Thus internet chat groups are pretty well insulated from the dictates of the law but they tend over time to develop their own disciplinary practices.[40] Thus there may be sanctions against someone who resorts to gratuitous abuse. Other members of the group may subject him too to insults or he may be barred from the group for a period of time or even excluded altogether. He will have no avenue of redress. Also, there is an element of panopticism in play at such sites, for every word that you type is at least usually and at least potentially accessible to the person or persons who control the site. A more elaborate form of counter-law can be found in 'virtual communities'.[41] Those applying to be members are often required first to complete questionnaires or even assessments, entry gives them the ability to create architectonics of their own desire, they can take whatever imaginary form they wish, the primary idea is to encourage a free play of difference and creativity but problems develop over time. There are issues involving property rights, claims to a certain space, freedom of speech and many of these communities now have private 'legal' systems. There is process, there is a means of adjudication and of enforcing final decisions. Here again there is a panoptic gaze. It is interesting too that here, individuals are acceding to disciplinary power. It is not being imposed upon them, they are submitting to it willingly.[42] This is another important aspect of

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39 [39]*DP*, 223.

40 [40]See for example, www.mirc.co.uk

41 [41]Link from www.buffalo.edu

42 [42]Cf. M.Poster, *'Foucault and Databases: Participatory Surveillance'*, in vol.7, *Critical Assessments*. Poster considers other examples such as storecards whereby we become both the source and recorder of

disciplinary power, it does not always secure its hold through the threat of violence or force, often it works on the back of desires and specific identities that individuals may crave.

Another form of disciplinary power in cyberspace is that of private censorship.[43] The all-too-human desire to quell other points of view manifests itself anxiously in the absence of a properly legal framework. There are on the other hand moderate groups like America Links Up and the British Internet Watch Foundation which warn parents of 'dangerous' and 'offensive' sites. Such groups have also prevailed very much on governments recently and on internet service providers. Many of the latter now employ filtration devices for the benefit of those subscribers who want no pornographic or extreme viewpoints intruding on their online experiences. Programs like NetNanny perform a similar function, they can be installed on any PC and they scan a webpage for 'keywords' before allowing it to be displayed on-screen. Such techniques then do have a normalising influence on websites that want to be broadly viewed and in fact, need to clock up a high number of hits in order to ensure advertising revenue.

There are more radical exercises of power too, the acolytes of white hate groups and anti-racism groups for instance, often hack into each others' websites, deface them and add contrary content. Many of the old skool netheads also resent the presence of big, commercial companies and advertisements on the Web and they sometimes resort to similar guerilla tactics.

In essence, because everyone on the Web may view and interact with everyone else, cyberspace is a sort of a hyperreal panopticon. Moreover, there is clearly power on the Web, and it is private power, it is local, discrete power, it is not exactly disciplinary power except at the sites mentioned earlier, because it is not really hypostasised in any way, it is not consistent and constant but certainly, that paradigm of power is far closer than any other, and it is more accurate particularly than the juridical, centrist model that Foucault set himself up in opposition to.

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information, the store uses the information we collect for them through the card to target promotions at us and vitiate our spending decisions. Thus we participate in our own disciplining.

43 [43]See James Boyle's excellent article, *'Foucault in Cyberspace: Surveillance, Sovereignty, and Hard-wired Censors'*, at www.wcl.america.edu/pub/faculty/boyle/fouc1

*c. the call centre*

Apparently, there are currently thousands of such call centres now across Europe and North America. Call centres are set up by a diverse range of companies for a diverse range of services, insurance quotations, telephone banking, troubleshooting for consumer products and of course, the sale of double glazing. It is estimated that somewhere in the region of a million people are employed in call centres in the UK alone. And the accent in such institutions is very much on efficiency, throughput and service. Surely the capitalists must be employing here disciplinary power upon the workforce. And indeed they are.

Many of the Foucauldian features can be observed in call centres.[44] Thus there is the strict organisation of time, there are recommended limits on call duration, breaks are precisely apportioned and monitored. The time pressure is added to for salespersons, they are often required to sell a certain volume every day or every week, similarly, service personnel are expected to field a certain number of calls per day. In considerable detail, there is a body-object articulation. There is a script which must be adhered to, and it is laid out in substantial detail. Even the pleasantries are ordained. Thus predictably there occurs a certain meshing, the script takes over from the individual's personality and idiosyncracies, the body and soul are submerged under a constant vapid politeness and maintenance of the company line. There is a substantial degree of surveillance. The desks are arranged in a geometry which allows ease of supervision, also the individual has no cubicle or partition, he or she is always in the open, is always and easily subject to the gaze. Calls are also often recorded for subsequent evaluation. The recording equipment is usually situated in another room, and the recording is random. Not every call is recorded but any call may be recorded. The larger call centres also set up a sort of hierarchy. Operators are divided into teams, and each team is given a quota or target, a team leader is appointed and that leader is then responsible for the performance of the team. Commissions and bonuses are often attached to meeting of the target and so the team leader begins to exercise further disciplinary power, other team members even will pressurise a lackadaisacal or unfortunate member, one not delivering his or her share. The forces of normalisation are thus overall very powerful. Perhaps even more cutely than the factories which Foucault discusses, the features of the call centre fit the elements of Foucault's analysis of power.

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44 [44]There is an excellent fictional account of call centres in D.Kennedy, *The Job*, Little, Brown, (London, 1998). Also see *The Guardian,* 11th November, *G2* section, p.2-3.

*d. The New Reproductive Technologies*

By considering such, I really mean to consider the work of Jana Sawicki, one of the few feminists who properly engage with Foucault's work.[45] First of all, Sawicki stresses much more the intersection between different disciplines emanating from different sources. This thesis so far certainly has focused on particular institutions but Sawicki discusses wider social spaces. It is a feature of the disciplinary society certainly that power is diffuse and that power is privatised. It is no longer tied just to the state. Cyberspace was a fine example of such power pluralism. As Foucault explains,

"the mechanisms [of the disciplinary establishments] have a certain tendency to become "de-institutionalized", to emerge from the closed fortresses in which they once functioned and to circulate in a "free" state; the massive, compact disciplines are broken down into flexible methods of control, which may be transferred and adapted"[46]

This "swarming" of disciplinary power is though never fully realised in Foucault's work. He continues only by writing of *institutions* other than the prison. Even in *The History of Sexuality*, the focus is mostly on the professions and at most, the family. It has been later commentators much more who have clung to the point. For now though, lets delve into the field of the NRT.[47]

The term - NRT, New Reproductive Technologies - refers both to existing techniques such as in vitro fertilisation, embryo replacement, transfer, freezing, and to frontier technologies such as artifical wombs and cloning. All of these are supplemented by techniques of surveillance and examination, ultrasound, fetal monitors, etc. The radical feminist concern, expressed say by Corea[48], is that the NRT fragment once unified biological processes of motherhood into separate functions- egg donor, womb donor, social mother- and so degrade the concept. Furthermore, because all this relies on the agency of doctors, medical, legal, and governmental agencies, women will no longer be able to appeal to reproduction as a basis of power. In fact, the NRT seem to commodify women's bodies wholesale, this

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45 [45]J.Sawicki, *Disciplining Foucault: Feminism, Power, and the Body.*

46 [46]*DP*, 211.

47 [47]Sawicki, Ch.4.

48 [48]Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, Harper & Row, (New York, 1985).

reduces women both in their own eyes and in the eyes of others.[49] The ultimate fear is for how patriarchial modes of thinking and behaving will interact with the possibilities of the NRT and realise disciplinary structures. The title of Corea's book, *The Mother Machine*, is quite explicit. The organisation FINRRAGE, set up to protest the issue, has made the following resolutions:

"We call for all women to resist the take-over of our bodies for male use, for profit making, population control, medical experimentation and misogynous science.

We seek a different kind of science and technology that respects the dignity of womanhood and of all life on earth. We call upon women and men to break the fatal link between mechanistic science and vested industrial interests and to take part with us in the development of a new unity of knowledge and life."[50]

Sawicki however is ill-content with such analysis. She takes the Foucauldian thesis to be that power is never so unidirectional. The social field then consists of a network of intersecting practices and discourses, power relations shift, individuals and groups occupy various and changing positions in the network, positions both of power and of resistance. This is the idealist outcome of Foucault's relational and microscopic theory of power. Power is always accompanied by resistance, in fact, as I have argued already, power and resistance are just tags, the situation is more complex still. The consequence is that the NRT must be seen in terms of a myriad of micro-practices, struggles, tactics and counter-tactics. Analysis must be contextual and not broad brush and crude like that of the radical camp. Also, she wants to get away from repression-chat, rather she wants to say that the NRT create new norms of motherhood, make infertile bodies useful too. The point works per se, and it has echoes in Foucault, he also talks less about repression and more about normalisation, but what is that normalisation aimed at, ultimately also, subjection and control. It is subtle, sure, it operates by inciting desire, by attaching the individual to a specific identity (the call centre employee to a 'team player', the pupil to 'an A student'), but it has the same aim. It represses more 'productively', but it still represses.

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49 [49]*Made to Order: The Myth of Reproductive and Genetic Progress*, ed. P.Spallone and D.L.Steinberg, Pergamon Press, (Oxford, 1987).

50 [50]Quoted in *Made to Order*, p.211-12.

Sawicki is on firmer ground with her contextualist analysis.[51] Then she can say that for the infertile woman, the NRT are not wholly repressive, but positive too, for they give her a capacity she would not otherwise have. She can argue that the radical feminist analysis fails to explain how that woman's interests are bound up with the system of alleged male domination. The analysis neglects that the NRT also enable choice, the concomitant surveillance techniques make childbirth safer. Moreover, it ignores the fact that some women too are in positions of power and knowledge, such that they can interact with patriarchial power or at least resist its designs upon themselves, and that some men, even some doctors, even some of those at the frontiers of research, are potential allies in struggles against nefarious use. This is the kernel of a thought about countervailing power. Sawicki's conclusion is fundamentally this, that Foucauldian analysis allows a pluralist reading of the field, it allows us to escape crude, blanket judgements. Thus,

"rather than reject newly emerging technologies outright, feminists can meet multiple-edged developments with multiple-edged responses. We can resist the dangerous trends, the tendencies towards depoliticization, privatization, decreased autonomy, and the elision of women's experiences and interests in the process of developing and implementing reproductive technologies and the laws and policies regulating them. We can also allow ourselves to envision utopian possibilities for technologically transforming reproduction."[52]

As I have already suggested, when Foucault turns to ascending analysis, he threatens positive, careful, emancipatory spin-offs such as these, but this is nevertheless a good point on which to end our analysis of disciplinary power, having said already so much and turn precisely to Foucault's expulsion of law

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51 [51]Another theorist who argues that Foucault be used by feminists in this way is Amy Allen. See for instance *'Foucault on Power: A Theory for Feminists'*, in *Feminist Interpretations of Michel Foucault.*

52 [52]Sawicki, p.90.

# *Law*

**The basic manoeuvres**

Primarily, the reason why law must be expelled from our analyses of power, Foucault maintains, is the same reason why we can no longer conceive of power relations in terms of monarchic power. Power has morphed, it has changed, it represents a different sort of entity in the disciplinary society, it has different methods and it corresponds to a different scale. Foucault's complaint about the old paradigm of power resurfaces immediately as he commences any discussion of law. For instance, in *The History of Sexuality*:

"Underlying both the general theme that power represses sex and the idea that the law constitutes desire, one encounters the same putative mechanics of power. It is defined in a strangely restrictive way, in that, to begin with, this power is poor in resources, sparing of its methods, monotonous in the tactics it utilizes, incapable of invention, and seemingly doomed always to repeat itself. Further, it is a power that only has the force of the negative on its side, a power to say no; on no condition to produce, capable only of posting limits, it is basically anti-energy. This is the paradox of its effectiveness: it is incapable of doing anything, except to render what it dominates incapable of doing anything either, except for what this power allows it to do. And finally, it is a power whose model is essentially juridical, centered on nothing more than the statement of the law and the operation of taboos."[1]

So for Foucault, the law shares the traits of the monarchic paradigm of power. Law too is seen as centrist, law too is seen as capable only of working through plain repression, it does not produce, it only limits, law too does not swarm into the social body. And hence, when a new paradigm, a new type of power emerges, disciplinary power, which does produce, which is local, which is intimate, law cannot engage with it. Law then is redundant, immobile when faced with disciplinary power. There is a dichotomy between them fundamentally of scale and of form.

"I would say that we should direct our researches on the nature of power not towards the juridical edifice of sovereignty, the State apparatuses and the ideologies which accompany them, but towards domination and the material operators of power, towards forms of

1 [1] *HS*, 85.

subjection and the inflections and utilisations of their localised systems, and towards strategic apparatuses. We must eschew the model of Leviathan in the study of power. We must escape from the limited field of juridical sovereignty and State institutions, and instead base our analysis of power on the study of the techniques and tactics of domination."[2]

There is actually a careful point here. Foucault is expelling law because it is of no aid in the study of the disciplines. It does not connect with them, a few pages later he remarks that they are "absolutely incompatible". Nevertheless, he would not want to deny that law is now entirely inefficacious. Instead he writes,

"Impossible to describe in the terminology of the theory of sovereignty from which it differs so radically, the disciplinary power ought by rights to have led to the disappearance of the grand juridical edifice created by that theory. But in reality, the theory of sovereignty has continued to exist not only as an ideology of right, but also to provide the organising principle of the legal codes which Europe acquired in the nineteenth century, beginning with the Napoleonic Code."[3]

Or:

"We have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, of serving as its system of representation. Our historical gradient carries us further and further away from a reign of law that had already begun to recede into the past at a time when the French Revolution and the accompanying age of consitutions and codes seemed to destine it for a future that was at hand."[4]

Foucault's supplementary complaint then, though it is as above, most often implicit, is that because, "In political thought and analysis, we still have not cut off the head of the king", law is still of use in the legitimation of existing social relations. Our gazes remain directed at the law, we seek its agency against the effects of discipline, rather than struggle directly against the disciplines and disciplinary power.

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2 [2]*2L*, 102.
3 [3]*2L*, 104.
4 [4]*HS*, 89.

"But I believe that we find ourselves here in a kind of blind alley: it is not through recourse to sovereignty against discipline that the effects of disciplinary power can be limited, because sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society."[5]

In this manner then, Foucault dismisses for the disciplinary culture, law both as a useful analytical concept and as a modality for resistance. Over the course of this section and the next however, I hope to show how law's empire can strike back.

**Foucault and Bentham**

I have noted already the concept of the Panopticon, which Foucault found in the writings of Jeremy Bentham, eighteenth century political and legal philosopher. I don't now intend to suggest that Foucault found also his theory of law in the writings of Bentham but their accounts are similar in at least two significant ways and on account of these similiarities, the first prong in my strategy is to explain the shortcomings of Bentham's 'legal positivism'. Foucault probably does not discuss law at sufficient length to outright warrant the tag of 'legal positivist' but in view of what he does say, the tag is appropriate.

Thus, the story that Foucault tells about the rise of juridical law is this:

"The great institutions of power that developed in the Middle Ages- monarchy, the state with its apparatus- rose up on the basis of a multiplicity of prior powers, and to a certain extent in opposition to them: dense, entangled, conflicting powers, powers tied to the direct or indirect dominion over the land, to the possession of arms, to serfdom, to bonds of suzerainty and vassalage. If these institutions were able to implant themselves, if, by profiting from a whole series of tactical alliances, they were able to gain acceptance, this was because they presented themselves as agencies of regulation, arbitration, and demarcation, as a way of introducing order in the midst of these powers, of establishing a power that would temper them and distribute them according to boundaries and a fixed hierarchy. Faced with a myriad of clashing forces, these great forms of power functioned as a principle of right that transcended all the heterogeneous claims, manifesting the triple distinction of forming a unitary regime, of identifying its will with the law, and of acting through mechanisms of

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5 [5]*2L*, 108.

interdiction and sanction. The slogan of this regime, *pax et justitita*, in keeping with the function it laid claim to, established peace as the prohibiton of feudal or private wars, and justice as a way of suspending the private settling of lawsuits."[6]

I apologise for quoting at such considerable length but this is an important passage. Foucault here conceives of law as a form emerging out of a pluralism of powers and goals. Law then is a means of co-ordinating society, it is autonomous and it is public and so a means of establishing peace between conflicting objectives and moralities. As Postema explains,

"Simplifying and focusing our practical reasoning, law mediates between our conflicting interests and our ultimate, often contested, values and principles, on the one hand, and our concrete decisions and actions on the other. It does so by displacing or focusing practical reasoning onto a limited domain of publicly accessible norms, and isolating that reasoning from the conflicting interests, principles, and values that stand as obstacles to social co-operation. Through its mediation, law enables us, as Finnis puts it, to achieve a kind of unanimity in our practical deliberation and resulting interaction despite the lack of actual unanimity. In Pufendorf's more colourful language, it turns the noise and jarring dissonance of social life into musical harmony; or at least it substantially reduces the dissonance."[7]

Law then aids co-ordination and makes planning on the basis of the juridical structure and other's actions possible. We know too that if a dispute arises, the law's justice is on hand to decree and enforce a settlement, eg. hold the other party to a contract. Crucially, it is conceived too as a singular, statist, centrist institution. It is linked inextricably to the sovereign. The law then is a sort of Leviathan.

Importantly, Bentham tells a similar story about the function of law. The previous passage was essentially a sly synopsis of what he writes in *Of Laws in General* and *A Fragment on Government*.[8] Postema was really just summing up the positivist theory of law's autonomy. His stress too is very much on ideas such as the law being publicly ascertainable: otherwise of course it wouldn't be able to fulfil any co-ordinating or reforming function; general:

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6 [6]*HS*, 86-87.

7 [7]G.Postema, *'Law's Autonomy and Public Practical Reason'*, in *The Autonomy of Law*, ed. R.George, Clarendon Press, (Oxford, 1996), p.91.

because it after all needs to guide and be a guide for society as a whole; autonomous: the law must be determinate in reference to itself, thus Bentham severs any necessary connection between law and morality, and finally, because he was very much concerned with the use of law for the purposes of reform, law and society as it exists now. He writes then that a law must always be:

"a piece of discourse- conceived mostly in general, and always in determinate words- expressive of the will of some person or persons, to whom, on the occasion, and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience."[9]

That then is the first similarity between Foucault and Bentham, they both think akin about the function of juridical law and consequently, many of its important features. The other similarity is again connected, is very much in relation to the theme developed above, but it is worth mentioning separately, or rather, I will mention it separately to highlight a counterpoint I hope to make shortly: it is that both contend the law is ultimately a repressive tool wielded by a singular, central entity. Thus Bentham says that laws are commands of the sovereign. The following quotation gives a measure of just how didactic he is on this connection:

"In the defintion that hath just been given of a legal mandate it follows that the mandate of the sovereign be it what it will, cannot be illegal: it may be cruel; it may be impolitic; it may even be unconstitutional . . . but it would be perverting language and confounding ideas to call it illegal."[10]

It is submitted too that they are defined by the accompaniment of and always backed up by, judicial sanctions, and necessarily, because those are the guarantee of its efficacy and effectiveness. Similarly, Foucault unites law and sovereignty, often he even bands the two together with hypens. He speaks of the monarchic codes and in line with Bentham's accent on command,

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8 [8]Included in *The Works of Jeremy Bentham*, ed. J.Bowring, (1838). Use has also been made of H.L.A.Hart, *Essays on Bentham*, Clarendon Press, (Oxford, 1983) and G.Postema, *Bentham and the Common Law Tradition*, Clarendon Press, (Oxford, 1986).

9 [9]Bowring, vol.viii, p.94.

10 [10]*Of Laws in General*, I.8.

"the law of transgression and punishment, with its interplay of licit and illicit. Whether one attributes to it the form of the prince who formulates rights, of the father who forbids, of the censor who enforces silence, or of the master who states the law, in any case one schematizes power in a juridical form, and one defines its effects as obedience. . . A legislative power on one side, and an obedient subject on the other."

I intend to argue shortly that this is an anaemic view of the law, that the law has decentered forms, that it has enabling effects too, and that rather than simply draw out obedience, the law can also become a horizon for creative interactions.

**The shortcomings of legal positivism**

Having I hope convinced that the outline of law which Foucault gives in his work is essentially a legal positivist one, I propose to demonstrate the lacunae of that theory. There are many features of the law which it is simply unable to explain and others which it neglects entirely.

*a. the common law*

For two reasons, the common law escapes a Benthamite understanding of law. First, because it does not issue from a sovereign. Second, because it is not publicly ascertainable and certain in the way that legal positivism demands law be. I will resist the urge to be contrary and begin with the first point.

Bentham insists that the sovereign is the source of all law. All law is positive; it is posited. As subsequent commentators have noted however, the common law certainly is not authored by the sovereign. There is in fact a certain amount of mystique and confusion surrounding the authorship and provenance of the common law. Hale remarks of its components:

"They are grown into use, and have acquired their binding Power and Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom. The Matters, indeed, and the Substance of those Laws, are in Writing, but the formal and obliging Force and Power of them grows by long Custom and Use."[11]

There's no real need here to get deeper into the origins of the common law, but it is clear that they have something to do with custom and with the mores of the community. But even if we mark off the issue of its origins, common law still represents a serious problem for the positivist because it is always developing, it is fluid. Case by case, it undergoes both subtle and serious shifts. Doctrines are refined, they are superseded, they are synthesised with others and this process does not at all involve the sovereign.[12] A possible argument is that the judges here are the representatives of the sovereign and it is in that capacity that they fill the gaps in the law and develop the law. Certainly the first component of the argument seems plausible. But then, it has always been thought that the judges do not make the common law as such but merely declare what it is. Again, Hale asserts:

"they do not make a Law properly so called . . . yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever."[13]

Now this is a very traditional common lawyer's position, but it does nevertheless have some resonance. Thus when judges do decide cases, even cases where the previous rules conflict or where clearly they are developing the law, they do not act and write as if they have a discretion to make the law, they continue as if the law does conclude itself. Both the judges and the lawyers assume and put forward still *legal* arguments for how the case ought to be decided. If the positivist is to succeed in his counter-argument, he must be committed to arguing that all the participants are involved in 'a noble lie'.[14]

Here we can also involve the second problem that the common law poses for Bentham's and Foucault's theories. Even if we accept the positivist rebuttal of the first point, in fact, especially if we accept that rebuttal, the common law cannot fulfil the function of being a publicly ascertainable guide to conduct. For a start, common law rules are never announced outright, they are concealed in cases. Secondly, recall that Bentham stipulated, again in relation to his thesis of law's function, that a law must be general and determinate. Clearly

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11 [11]Sir Matthew Hale, *A History of the Common Law*, 3rd ed, ed. C.M.Gray, (1971), p.17.

12 [12]B.Simpson, *'The Common Law and Legal Theory'*, in *Oxford Essays in Jurisprudence,* 2nd series, ed. B.Simpson, Clarendon Press, (Oxford, 1973).

13 [13]*History of the Common Law*, 45.

14 [14]R.Dworkin, *Law's Empire*, Fontana, (1986), Ch.2.

the rules of the common law are not precisely determinate. They are always susceptible to change for one thing. And they do not change per some set grand plan or with the aid of clear deductive syllogisms. Rather they change situationally, judges reason from an old case to the present one using analogy, and this all is controversial or at least complex, involving as it does interpretation and attention to coherence and principle. Nevertheless, there may be sufficient predictability, especially if we consider the course of past decisions, or if we accept that the judges are merely announcing the law of the community, but the positivist has just committed himself above to saying that in any such situation of indeterminacy, the judge as a part of the body of the sovereign merely decides the case. He has a discretion and fills the gap in the law by exercising his discretion. But if this is really the case, the common law cannot be dubbed publicly ascertainable. For a start, it has become essentially retrospective. Moreover, it involves the discretion of the individual judge and hence, exactly those controversial, partial considerations which the law as a public authority was supposed to exclude.[15] Postema makes this point well:

"it follows that we cannot depend on source-based rules rooted in common law decisions to help us solve typical identification problems that plague social co-operation. We can still rely, perhaps, on the court's settling matters in particular cases, but this always has a very limited impact. Its wider impact depends on subsequent courts and, more importantly, on citizens being able to uncover the rules of precedent decisions. But this process has been thrown back entirely into the legally unstructured and, by hypothesis, conflicted domain of moral reasoning, from which law was supposed to have liberated us."[16]

What I'm trying to establish here, I think, is that the positivist is caught in a trap by the phenomenon of the common law. One the one hand, he cannot concede that the common law is to do with custom or community morality because then it is decoupled from the sovereign, it is no longer a command, it ceases to be autonomous and finally, can no longer accurately be described as holding citizens in a relation of obedience. The alternative for the positivist is to argue that when judges are deciding common law cases, they are exercising a discretion but in actual fact doing so on behalf of and with the authority of the sovereign,

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15 [15]Certain positivists would concede this point and attempt to argue instead that though public ascertainability is of course the ideal, due to the complexity and rate of change in society, it is not possible to have every change in the law effected by a parliament but judicial law-making is an honourable compromise. This is of course a strong argument but I do not see how Bentham or Foucault could attempt this argument and for that reason, I have chosen to give it only the scant attention of a footnote. It would also be the positivist's argument, it would have to be, that in these situations, the judge has a discretion and that of course, again brings into doubt, the positivist stance on the absolute autonomy of law.

but then the law is no longer publicly ascertainable and also, if you consider the substance of how they are exercising their discretion, the considerations in play, once again, not autonomous.

It is a measure of the problems that the positivist interpretation has with the common law and, I hope, a vindication of the above argument that Bentham came finally to detest the common law and seek its abolition and replacement by a series of codes. He writes for instance that the common law is akin to "dog law". He writes in response to the fact that the judges are continuously interpreting and evolving the common law:

"When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do* . . . they lie by till he has done something which they say he should not *have done*, and then they hang him for it."[17]

Clearly though this point only stands if the judges are actually making law, ie. only if one assumes the positivist viewpoint to begin with. A different opinion may be that they are only moving in line with the morality of the community or even some true morality and hence, their decisions are not retrospective but instead, reflective of the domain from which they are drawing justification. Or to make an even simpler argument, if their decisions are propelled by an ideal of coherence within the law, then also, they are to an extent predictable and so not exactly capricious as Bentham maintains.

The objective in this subsection has then been to show both a first failing in the positivist view of law and to bring common law into the scope of this thesis. As I have suggested above and hope to elaborate on shortly, the common law does not fit Foucault's assumptions about the scale of law and about its alienation from the disciplinary society.

*b. normativity*

It is an important feature of law that it creates rights, duties and obligations amongst individuals. It creates 'oughts' and this creation has somehow to be accounted for. The

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16 [16]Postema, *Law's Autonomy*, p.98.

17 [17]Bowring, vol.v, p.235. Emphasis in original.

Bentham-Foucault conception of law must however struggle to do so. In fact, it doesn't really engage the question at all. Thus for Bentham, a law is a command backed by sanctions. Foucault similarly talks of law as part of the repressive paradigm of power. The only mention they make of its effects on individuals is in terms of obedience. Thus Bentham in a quotation above, wrote of law, "whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience." Foucault similarly pictures the citizen's perspective only in terms of obedience, "A legislative power on one side, and an obedient subject on the other." Hart described such a view as "the gunman situation writ large" for it could make no meaningful distinction between law and coercion, or between having an obligation and being obliged.[18] The point is well-made. For if the legal system is merely directing at the individual a command backed up by physical violence, it doesn't really make much sense to say that the individual is thereby placed under an obligation just as it doesn't make much sense to say that one owes an obligation to the gunman who sardonically intervenes upon a night-time stroll to demand 'your money or your life'.

The command/obedience model basically is not rich enough to pick up on the way law comes to be taken as a standard of conduct between individuals and within a society.[19] Failure to adhere to the law tends to be thought of as a legitimate ground for criticising both oneself and others. Law becomes a part of social relations, complements and reinforces the mores of the community. Bentham-Foucault do not even identify this feature, let alone attempt to explain it.

*c. enabling law*

Finally, there is this lacuna in the positivist account of law. It has law down as an exclusively negative form of discourse. The theory then misses a number of important phenomena.

Thus, the law often enables individuals to effect certain acts, to discover certain capacities. For instance, if you mark down on a piece of paper your intentions vis-a-vis the distribution of your estate upon death, the document will have little or no effect. On the other hand, if you employ the proper legal process for making a will, your intentions will gain the authority

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18 [18]H.L.A.Hart, *The Concept of Law*, 2nd ed, Clarendon Press, (Oxford, 1994), Ch.2.

19 [19]P.Soper, *'Law's Normative Claims'*, in *The Autonomy of Law*; *'Two Puzzles'*, *Legal Theory*, Sept 1998, p.359-380.

and support of law. If you and your beloved stand in a church and mumble sweet nothings to one another under the gaze of a reverend, your family and friends, you will merely have enacted a curious ritual and incited the jealousy of others, but if you proceed to a registry office and have your union registered as a marriage, this will tie you too in law and bring licit tax benefits.[20] The law enables and protects also contracts, from the most humble purchase of sweets to billion dollar bond dealings, from the shining of a shoe to the building of the grandest architectonics. The odd thing is that both Bentham and Foucault see law in terms of an organising force, as an authority. We have already discussed that, yet they still fail to conceive of law as anything other than repressive. It is a genuine inconsistency.

Law is enabling however also in a more esoteric sense, in the sense that there is a flipside to all its prohibitions, in the sense that it permits at the same time as it prohibits. I will return to this slightly cryptic pronouncement in a forthcoming section, explain it in some more detail and give some examples.

Finally, there is enablement in the sphere of public law. Administrative agencies use law not to repress others, but to enable themselves. They derive their powers and discretions from the law, their capacity to regulate and be effective in certain social subsystems. This is I suppose really just another version of the first point, except upsized from individuals to public bodies. I will return to this sort of enabling law in another subsequent section.

**A slightly fuzzy but hopefully convincing alternative**

Foucault may complain at this point that we have employed the common law to punch holes in the positivist edifice but that he was writing in a civil law context, in a country of codes, and there, his positivist account of law is much more tenable. Even however if we accept this complaint, its rebuttal follows from the previous argument. The point about the common law was that it repudiated fundamentally the positivist's claim about the autonomy of law. If the positivist gave up that claim, his thesis would still be tenable in its major aspect. Thus he could still claim that law is posited and that it issues (through the agency of the judges) from the sovereign if he accepted that the judges were using interpretation proper and the customs and mores of the community, that their decisions involved a positivisation of such.

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20 [20]Hart was the first theorist to stress such enabling laws explicitly. See *The Concept of Law*.

But really this is just to taunt the positivist, for autonomy is the most basic tenet of his thesis. The positivist believes that the law must be autonomous from the community because it is attempting to solve the problems of the community. For him, law is an invention, an invention mothered into existence by the necessity of social complexity and difference. It is these beliefs about the nature of society which cause the positivist to insist that law must be autonomous and that it must be publicly ascertainable on its own terms.

So lets fit the entity of a code into this problematic. Clearly it is an abstract equipment and it would appear to be per se autonomous. But surely even a code requires interpretation, its words do not reveal their own meaning. I intend here to use to ideas of Nigel Simmonds so let us use the example which he uses.

He suggests that we imagine an ordinance which states: Dogs must be carried on the escalator.[21] Now this ordinance can be given a number of interpretations. It may mean that a person is prohibited from using the escalator if she has no dog to carry. It may require her to use the escalator and to find a dog for that purpose. Given that a plural has been used, it may mean that more than one dog has to be carried. It may mean that anyone who wants to carry a dog can only do so when on an escalator. If so, it may also mean that she is free to let her dog walk up the escalator if she has no particular taste for dog-carrying as an activity. We can dismiss these interpretations and take perhaps the obvious interpretation that when a person is accompanied by a dog and wishes to travel on the escalator, she must not allow the dog to stand directly on the steps of the escalator, but to pick the dog up and hold it in her arms, however this implies a shared understanding of the nature of dogs and escalators, and of the concerns that the drafter may have had about a dog's smaller feet becoming trapped in a slot or moving part.

The objection that may be made at this point is that we can simply include this shared understanding in the ordinance. Fair enough. But the problems are far from solved. First of all, those extra words will too need to be interpreted, they cannot constrain independently. Second, we can still pose the ordinance problems with a different set of situations. For example, what if the person involved is a suspected criminal, and is being shadowed by a police dog, is she required to carry that dog? Of course the objector replies, the ordinance refers only to your own dog. But then does that mean, a person could leave her friend's dog to be mangled? The objector next says, well, a dog that you are responsible for. But then all

sorts of fresh indeterminacies arise: is our hypothetical female responsible for a stray dog who has been following her around for a short while, someone else's dog whom she just gave a biscuit to, what if she is a minor, or suffering from serious depression, or of unsound mind? The point is that interpretation will always be required, the law will always have to draw on more than itself. It really cannot be autonomous. This was a fairly frivolous example and of a fairly simple ordinance, the difficulty increases exponentially when complicated concepts such as negligence, or error in contract are considered. The final scenario for the positivist really then is that if the world is a chaos of subjectivity, think back particularly to the quotation from Foucault, shared general rules whether they be in the form of common law principles or in codes, are impossible. The authority and autonomy of law may appear to be an absolute necessity in such a society, but autonomy as we have seen is untenable, and so authority can only be partially, if at all extant. And yet law does exist, shared, general rules do exist, and we do ascribe considerable sense to the authority of law. So clearly something has gone wrong in the construction of the positivist account. Foucault errs when he labels law as an abstract, grand, absolutely distinct realm.

Simmonds suggests an alternative account and he begins by severing the link between autonomy and authority. Thus Simmonds argues that law has authority, and that law is able to fulfil the function that the positivist stipulates, precisely because it is not autonomous and precisely because there are still shared, crystalline, determinate practices and understandings in society that the law is able to utilise. Consider again the previous example. We understood the ordinance, we immediately extracted a 'common sense' meaning from it and we would probably even be able to deal with most of the additional situations. We were able to do this, as already suggested, because of certain shared understandings. Those clarified the rule for us, and really the positivist got into all his painful contortions only because he was precluded by his insistence on the autonomy of law from relying on them. Indeed, if Foucault's brief account and Postema's explanation of the positivist thesis are examined, the loyal positivist would maintain that such shared understandings do not even exist.

Simmonds sums up his alternative position like so:

"Order is valuable in so far as it enables us to form reliable expectations about the conduct of others, and thereby enables us to pursue the medium and long term projects in which we

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21 [21]N.Simmonds, *'Between Positivism and Idealism'*, *Cambridge Law Journal*, 50 (1991) 308.

invest our hopes and our labour. The best way for the law to encourage a stable system of expectations is by seeking to confirm and enforce those informal rules and understandings that characterise social life apart from law. In the absence of law, such rules and understandings would be considerably less reliable, partly because of problems of enforcement, and partly because of the scope for conflict created by ambivalence and ambiguity in informal rules and relations. Law embodies an authoritative interpretation of social relationships and in that way emerges into our understanding of social life. Yet, at the same time, our understanding of social life makes a vital contribution to the stability and ascertainability of law."[22]

A little later, he adds:

"The relationship between law and social relations is, then, one of symbiosis. Yet the basic patterning of law runs from bottom to top. Contrary to positivism, which is inclined to suggest that the texts and sources of law come to shape a formless social world, an adequate view should see the institutions of law as reflecting (but systematising) the informal texture of social life, while formal criteria of validity and formal provisions for legislative and adjudicative power stabilise the stabilisers. Law in large part reproduces and confirms the structure of society."[23]

Simmonds instantiates this analysis in the field of private law. Thus he argues against those views which seek to rationalise private law into a means for achieving distributive justice. Simmonds argues that such a conception again, like positive authoritative rules, is not self-interpreting and so no matter what it will have to draw on society. Moreover, it threatens to treat the individual and the individual scenario as mere instrumentalities. Simmonds maintains then that private law should be thought of as expressing and stabilising the understood meanings of social relations. It is certainly clear that private law does not utilise abstract theory much, it is more accurate to say that it expresses the moral bonds that hold directly between citizens. Thus contract law does not think in terms of instrumentalities of distribution, but agreements and promises. Torts are not upsets to patterns of distribution

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22 [22]Simmonds, p.321.

23 [23]Simmonds, p.322.

but wrongs to be rectified and acknowledged as such in compensations flowing from wrongdoer to victim.[24]

The common law as a whole in fact can be seen with this pragmatic, social illumination. The positivist necessarily has to conceive of the common law too as a matter of general, posited rules and we have tracked the problems that he runs into. The conceptualisation of this fuzzy alternative is perhaps best expressed by Llewellyn.

"Every fact-pattern if common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place: it is thus not eternal or changeless or everywhere the same, but is in-dwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law."[25]

There is a certain amount of irony in this passage. For instance, Llewellyn was a value-skeptic himself and so he doesn't mean that there is some immanent Natural Law to be discovered in every situation. The idea really is just that common law is essentially contextualist. It is defined by its "situation-sense" and that is an instrument for the uncovering of regularities and coherences in social fact.[26] The common law thus weaves together doctrine and reality, its rules draw their meaning and application from pragmatic particulars, the habits and shared conventions of life and not from abstract universals. Thus,

"The people who do a certain thing get to doing it in a certain way. They get to expecting it to be done in a certain way. When this process has gone far enough and long enough to take on the shape of a definite, shared practice, we have the raw stuff for the law to take hold of and work on, and the legal institution will be built according to the mold of life it finds already being lived."[27]

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24 [24]N.Simmonds, *'The Possibility of Private Law'*, in *Laws, Values, and Social Practices*, ed. J.Tasioulas, (1997). Also see *'Bluntness and Bricolage'*, in *Jurisprudence: Cambridge Essays*, Clarendon Press, (Oxford, 1992); *'Bringing the Outside in'*, *Oxford Journal of Legal Studies*, 13 (1993) 147; *'Pashukanis and Liberal Jurisprudence'*, *Journal of Law and Society*, 12 (1985) 135.

25 [25]K.Llewellyn, *The Common Law Tradition*, Little, Brown, (1960), p.122.

26 [26]K.Llewellyn, *'One Realist's View of Natural Law for Judges'*, Ch.5, in *Jurisprudence*, (1962). Note that by 'realist' is connoted here 'legal realism', which is a brand of scepticism in legal theory. It is quite, quite different from 'moral realism'.

27 [27]Quoted by K.Casebeer, *'Escape from Liberalism'*, *Duke Law Journal*, 1977, p.684.

This may appear a somewhat idyllic conception of how the common law forms, and I will argue eventually that it does neglect the effectivity of power but the *prima facie* evidence for it is certainly plentiful in the literature of legal anthropology. It is clear that customary laws in particular and even positive laws are culturally specific.[28]

Hopefully then, this discussion of the fuzzy alternative and of the common law, in this section and the last, has convinced that the law is microphysical in a way that Foucault did not appear to acknowledge. It is evidently situationist. It both draws from and feeds back into grassroot social relations. Foucault also seemed to believe that the law was exclusively repressive, it was said to be a part of that anachronistic paradigm of power, but we see again from the common law that this is a misrepresentation. Law complements, it reflects, it does not simply dominate social life. In fact, the argument stretches beyond just the common law. It stretches too to the codes and statutes that Foucault's home legal system worked in.

Thus Ewald submits that the key is to comprehend that the law is normative.[29] And that clearly is correct. The law does enter into our own deliberations, and not merely for prudential reasons. We use it as a practical guide to action, we have it internalised, we adopt towards it, in Hart's phrase, a "critical reflective attitude". We accept it for instance as a legitimate basis for criticising others and for being criticised. We require considerable justification to be convinced of the legitimacy of even acts of civil disobedience. In view of this, the notions that law comes from a sovereign, that it is a command, that it is exclusively repressive and that it creates only the anorexic relation of obedience do not satisfy. Our relation to the law is deeper and closer than that. So Ewald argues that law consists essentially of norms, and that these are created by the collectivity, they are the group's observation of itself. The legislator is reduced to a fiction, a form necessary to ensure the community's respect for the common standard. Perhaps the word 'common' here mediates the idealism too, it is recognised that the standard is not universal, for if it was universal, it would probably not be made into law. Laws thus issue only when there is some degree of controversy, some sort of divergence in the society, only then is law required, only then is there need to set a public standard. This is implicit in Simmonds' theory too, he clearly

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28 [28]See E.Attwooll, *The Tapestry of Law*, (1996); P.Sack, ed, *Law and Anthropology*, (1992).

29 [29]F.Ewald, *'Norms, Discipline and the Law'*, *Representations*, 30 (1990) 138.

states in what is quoted above that the law and the informal texture of social life come together for the creation of order.

There are difficulties latent in all the above. In particular, there is the concern that if law is symbiotic with society, doesn't that also mean that social power will leak into the law. Clearly it will and I will discuss this soon. Certainly, the claim has not so far been that plugging law into society is a 'good thing', but that it leads to more accurate conceptions. Thus we are now better able to understand the common law, we have a grasp on the notion of law's normativity. I want to continue just briefly, the process of socialising law, and of showing more of its microphysics, by presenting a series of

**Illuminating case studies**

*a. law in a field of social relations / the individual in a field of socio-legal relations*

Robert Hale suggests that we take the example of bargaining between employees and employer.[30] He wishes to stress the role of the law in such a dispute but first perhaps we may outline how Foucault would analyse such a situation. Clearly he would conceive of it more in terms of disciplinary power than anything else. He would refer to the normalisation of the workforce, to the relations of surveillance and hierarchy. It would fundamentally be these 'relations of production' which would dominate his take on the situation. He may however make reference to the law if it restricted protest possibilities and thus bolstered the employer's position, and thus this would be an instance of the individual being caught between the law and discipline. Hale contends however that the role of the law here is more pervasive. The law is effectual on two levels. On the first, there are the rules governing strikes, lockouts, picketing, blacklisting, dismissal for union activity, sabotage, boycotts, and so on. But Hale insists there is a second level too and that contains both the rules that influence the availability and desirability of alternative employment and those that influence the possibility and desirability of abandoning employment altogether and taking up either self-sufficiency or self-employment.

His point is that though we immediately see the relevance of a rule say regarding the legality of secondary boycotts (where the union's actual dispute is with employer F but it refuses to

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30 [30]R.Hale, *Freedom through Law: Public Control of Private Governing Power*, (1952); *'Bargaining, Duress and Economic Liberty'*, 1943 *Columbia Law Review* 603.

deal with employer G in an attempt to induce him to stop dealing with employer F), we tend not to think about the rules pertaining for example to the level of and eligibility for welfare payments, or to the existence of and conditions for licensing of petty commerce, say, driving a taxi. Hale's point then is that law has a key role in setting the background conditions to the conflict. So if it was relatively easy to get a taxi licence, an individual so inclined would be less likely to be coerced by the disciplinary power of his employer into accepting an unfavourable settlement. If the law was fairly generous in providing welfare payments or retraining, again this would strengthen the individual's resolve.

Hale looks particularly at crisis situations. In such, every vote becomes important, every action that the union has freedom to pursue may have significance, it may draw publicity, it may just cause the employer to give in. Both parties may in such a situation litigate particular aspects. The employer may dispute the legality of a particular union resolution or of a particular act of protest. The union may dispute the legality of a lockout or of arrests precipitated by the employer. Both parties will attempt to throw any rule which is unfavourable to them into legal doubt. In this sort of crisis then, very small shifts in the legal framework could have decisive and long-term effects. Causation will be complex and key. Kennedy summarises Hale's analysis thus:

"1. If you went about systematically changing the rules of bargaining behaviour that affect an outcome, you could dramatically change that outcome, so that law is a major 'cause' of the existing distribution, even if we restrict our focus to situations of stable equilibrium.
2. In situations of unstable equilibrium, small changes in apparently insignificant legal rules can make the difference between victory and defeat for one side or the other, and thereby affect subsequent distributions much more dramatically than seems at first sight compatible with the minor character of the rules and the changes. A rule is sometimes the 'nail' for want of which a kingdom is lost."[31]

I think it is clear that Foucault's analysis of law cannot even begin to connect with such an analysis. Repression by law does not fit the relations apparent here. Rather there is interaction with the law; the law is used both by power and by resistance; the law is constitutive of the situation. It is a common language used in the conversation between the two sides. Compare Foucault's remarks that "the discourse of discipline has nothing in

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31 [31]D.Kennedy, *'The Stakes of Law'*, in *Sexy Dressing etc*, Harvard U.P, (Cambridge, 1993).

common with that of law, rule, or sovereign will"[32] and that law and discipline are "two absolutely heterogeneous types of discourse."[33] Finally, it is not just what the law prohibits that is significant here, but also what it permits. This last point perhaps deserves an example of its own.

Sexual harassment suggests itself as a possibility. We now do have by virtue of the efforts of liberal feminism, rules, both common law and statutory proscribing sexual harassment. These rules however come with a threshold. The harassment must reach a certain level before the law can kick in and even then, of course, legal process has to be intiated by the victim. It should be clear then that if we wish to consider the effectiveness of the law as it stands, we cannot look just to what it has managed to blot out of the workplace, but also at what it allows to remain. We should also be canny to the possibility that employers or other employees resort now to more insidious and less obvious tactics of harassment. The psychological effect of these might be the same, they may still be felt as sexual harassment but the law on sexual harassment may nevertheless be unable to restrict their occurrence. We can see also in this example, the possibilities for creative interaction with the law. Thus an employer, in his position of power, may be able to flirt with the limits of proscribed sexual harassment or even go beyond them at times, secure in the knowledge that because he pays well, or because it is a dynamic, interesting company, or because the particular employee has limited alternative options, he or she will not seek the protection and penalties of the law. Similarly, the harassed individual could also use the law instrumentally. He or she could suffer the harassment, and derive benefits from his or her employer's favour, knowing too that if the benefits dry up or if the harassment goes beyond a point he or she has agreed within their self, recourse to the law is possible. Here are then interplays between power, law and resistance.

*b. law as a praxis*

It is interesting that for all Foucault's chat about power and about its complexity, he never conceives of it having an existence within the process of lawmaking. Thus he initially argues that law is plain repression, determined entirely by the sovereign will and then in his second basic maneouvre, that it simply legitimates and diverts attention from the play of disciplinary forces. Now this clearly is a somewhat lazy and inane analysis.

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32 [32] *2L*, 106.

33 [33] *2L*, 107.

The court case for instance is a crystallisation process in itself. Thus the two parties present "reasoned proofs and arguments"[34] before a judge who seeks at least to give the appearance of neutrality and certainly must present a reasoned and impartial decision. Both sides present rationalisations for the outcome they prefer through reference to the law and by appeal to morality, principle and policy. The judge makes a decision, prefers one interpretation, one set of justifications and values over another and this clearly has ramifications for the arrangement of power in society. Thus the judge may make a decision to restrict freedom of contract along some particular dimension, and this will impact upon how people arrange their affairs. For instance, and lets be crude for a moment, the extent to which powerful capitalists are able to impose their will on less 'equal' economic partners. Power too will play a part inside the courtroom, for example, economic power, regarding the quality and number of lawyers hired. I will return to this.

This characteristic of law is apparent perhaps most obviously in the parliament of a liberal democracy but I want instead to consider its aspects in secondary rule-making. Such rule-making is significant because first, it is enabling law, it is to do with the powers of public bodies, with the arrangements of permission and limit in particular fields of social relations, for instance, adoption, or the administration of a hospital, or the internal workings of a welfare agency, and second, because it is micro-level. Often these rules don't just relate to one discrete field of activity, but to one type of organisation only, or even one particular organisation alone.

Such rule-making has become essential and efficacious in the wake of the welfare and interventionist state. The scale of the state is now such, and the complexity and profusion of regulatory mechanisms and government agencies so, that they cannot be directed in their activities entirely by the centre. Rather the centre can only lay down broad policies, tendencies of principle, the detail needs to be sorted out at the micro-level. It is felt in addition that the legislature does not have the precise expertise to make the detailed policy and operational decisions required. The agencies themselves have a far better knowledge of the field, of its configurations, requirements and idiosyncracies.[35]

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34 [34]L.Fuller, *'The Forms and Limits of Adjudication'*, 92 *Harvard Law Review* 353.

35 [35]For the evolution of such rule-making, see D.Galligan, *Discretionary Powers*, Claredon Press, (Oxford, 1990), Ch.1 & 2; C.Harlow and R.Rawlings, *Law and Administration*, 2nd ed, Butterworths, (London, 1997).

The interesting and for our purposes, essential thing, is that these agencies tend to make these rules entirely at their own discretion. The final formulation is certainly theirs, but there are first, consultative and participative procedures. In the USA, there are the requirements of the Adminstrative Procedure Act 1948 (APA).[36] The act requires a notice and comment procedure. Thus the agency must publicise an intial draft of its proposals and invite submissions from all interest groups and all public and private concerns affected by the proposals. These groups then present their points of view, there may be need for a public hearing at which evidence and counterpoints are presented. Thereafter the agency makes up its final draft. It still has then the final say but it must in its final report, respond to criticisms and submissions made, it must explain why the action or rule document is nevertheless necessary and it will be held to this ideal of reflexivity by the courts who can be called upon at this stage to exercise their power of judicial review.

In the UK, there are similarly formal and strict requirements for consultation and comment laid out in certain enabling statues but there is no general, all-applicable process.[37] Within the administrative apparatus however, there is an almost universal practice of seeking submissions from affected interests and pressure groups before proceeding. The problem in the UK is that though there is a facility for judicial review, the review is not as searching as in America. This is due to more general doctrines of administrative law and stuff about the separation of powers and whatever.

Crucially however, there at least exists this node for participation and praxis. This form of law cannot be understood in terms of repression and it is in no aspect autonomous, rather it is tied in quite inextricably to the particular field of social relations. Moreover, it is a decentered sort of law and belies Foucault's centrist, statist conception. I will return to the issue of power in its domain however, and in the ultimate Section to how the participation possibilities it offers may be radicalised.

*c. law in the perpetual spirals of pleasure and power*

Foucault writes in his *History of Sexuality*:

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36 [36]See S.Breyer, *Regulation and its Reform*, Harvard U.P, (Cambridge, 1982).

37 [37]See Harlow and Rawlings.

"The medical examination, the psychiatric investigation, the pedagogical report, and family controls may have the over-all and apparent objective of saying no to all wayward or unproductive sexualities, but the fact is that they function as mechanisms with a double impetus: pleasure and power. The pleasure that comes of exercising a power that questions, monitors, spies, searches out, palpates, brings to light; and on the other hand, the pleasure that kindles at having to evade this power, flee from it, fool it, or travesty it. The power that lets itself be invaded by the pleasure it is pursuing; and opposite it, power asserting itself in the pleasure of showing off, scandalizing or resisting. Capture and seduction, confrontation and mutual reinforcement: parents and children, adults and adolescents, educator and students, doctors and patients, the psychiatrist with his hysteric and his perverts, all have played this game continually since the nineteenth century. These attractions, these evasions, these circular incitements have traced around bodies and sexes, not boundaries to be crossed, but *perpetual spirals of power and pleasure*."[38]

This is an acute analysis. It has many aspects but I want particularly to focus on the line, "the pleasure that kindles at having to evade this power, flee from it, fool it, or travesty it" and the final italicised phrase. Foucault's point is that power incites pleasure too, sexuality revels in the presence of a trangressive limit, it uses that limit, it plays with it, teases it, travesties it, for the kindling of pleasure. What is interesting to me, having adopted so intently the spectacles of the legal theorist looking in on Foucault's world, is that he expels the law from his analysis of sexuality. He says quite plainly, we must "conceive of sex without the law". But this seems bizarre, for doesn't law present the most solid and serious transgressive limits in a society. On reading the full sentence however, the same-old Foucault mis-reading emerges as an explanation:

"We must at the same time conceive of sex without the law, and power without the law."[39]

You see, once again, he is making the same assumptions and implicit claims about the nature of law. Once again, I believe he is wrong.

Take the example of sexual expression. There remain certain limits upon the 'freedom of expression' of pornographers, at least if they wish their material to be displayed and sold in mainstream outlets. There are certain anatomical details that they may not picture, certainly

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38 [38]*HS*, 45. Emphasis in original.

39 [39]*HS*, 91.

penetration may not be depicted. But what are the consequences of this? I am reliably informed that pornographers proceed to play with the limits that have been imposed on them. Thus they come close to the point of almost too-close, they depict nearly states, essentially they fetishisise the limits. They interact creatively with the law, they draw on the force and proscription of law and use it for the creation of desire, for the creation of an impression of illicitness and that is of course profoundly sexy. In fact, in zones where there is no law, pornography and sexual expression more generally, sets its own limits. They are acutely aware of the force of a limit, they intuit that their product's attraction may be lost if they erase all the limits.[40] Thus they usually hold something back, implicitly promising or coyly suggesting its revelation in the future but denying it for now. Thus they offer suspense, the possibility of forthcoming transgression, and also, by so doing, they leave room for the viewer's imagination, they encourage him or her to indulge in fantasy and so develop a yet closer connection to the product.

David Cole poses an excellent discussion of a U.S Supreme Court case in which the constitutionality of an Illinois statute requiring 'nude' dancers to retain G-strings and pasties.[41] The U.S Supreme Court upheld the law on fuzzy grounds of decency and such but Cole argues powerfully, that the decision does not in any way make the activity or the establishments in which it is performed any more moral. In fact,

"By maintaining an aura of mystery and imposing a set of taboos, the regulation of sexual expression contributes (in most instances unconciously) to what makes sex sexy."[42]

This is undoubtedly correct. Cole also makes the point that the statute in this instance may in fact lead to a proliferation in 'nude' dancing because it will not appear somewhat less sleazy. After all, there's now not really all that much flesh being shown and the spectator forever has the reassurance that there are limits in place, and that he is not likely to lose himself entirely. Cole sums up his self-confessedly Foucauldian argument thus:

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40 [40]Cf. M.McIntosh: "An essential ingredient of pornography is the desire to shock, to cross the boundaries, to explore forbidden zones . . . represents a contradiction within bourgeois Christian morality, in that it exists only because it is condemned. Pornography and censoriousness are an inseperable couple.": from *'Liberalism and the Contradictions of Sexual Politics'*, in *Sex Exposed: Sexuality and the Pornography Debate*, ed. L.Segal and M.McIntosh, (1993).

41 [41]The case is *Barnes v Glen Theatre* 501 U.S 560 (1991). The article is D.Cole, *'Playing by Pornography's Rules'*, *University of Pennsylvania Law Review*, 143 (1994) 111. Alas, despite wide-ranging enquiries, I have as yet been unable to find out what 'pasties' are.

42 [42]Cole, p.166.

"Sexual expression, I propose, inevitably confounds society's attempts to regulate it. It subverts every taboo by making it a fetish. The forbidden is simultaneously eroticised. As a result, attempts to regulate sexual expression are doomed to failure; by creating taboos to transgress, regulation only adds to sexual expression's appeal. At the same time, by obsessively seeking to regulate and control sexual expression, we construct a sexuality that is in turn obsessed with transgression and taboo, often to the exclusion of other values. Our regulations endlessly reproduce a pornographic conception of sexuality, which in turn limits our ability to remake sexuality in a different light. Thus, those who are critical of the pornographic character of sexuality- whether from an aesthetic, moral, or feminist perspective- may only reinforce that character if they continue to insist on a strategy of suppression."[43]

Cole is quite right to identify this as a Foucauldian thesis. It follows Foucault's conceptions of power/resistance and power/pleasure and it chimes with much of his later work on the transgressive character of sexuality.[44] The only problem is that for Cole, the law is the most important modality of suppression whereas Foucault, somewhat bizarrely, doesn't want law to figure at all in his thinking about sexuality. I should also point out that one does not of course have to agree with the argument about the transgressive nature of sexuality to accept the force of the point against Foucault. The argument being attempted here is not elementally that Foucault or Cole are correct in according so much importance to perpetual spirals of pleasure and pain, but that if one wants to effect that sort of analysis, if one has a predilection for it, as Foucault so clearly does, it is almost absurd to expel the law from one's thoughts.

The law then once again has shown itself to be more diffuse, more social and more interactive than Foucault understood it to be. I have I hope been convincing in deconstructing Foucault's conceptions of law. I have shown that his positivism collapses even on its own terms, and that anyway it does not possess explanatory adequacy and I have with these case studies, put the seal on the thesis that law is a social phenomenon, that it is microphysical, that it does work in modes other than plain repression, I hope to have succeeded in the socialisation of law. Certain issues are however outstanding, not the least of which is Foucault's apparent re-conception of law.

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43 [43]Cole, p.116.

44 [44]M.Foucault, *'A Preface to Transgression'*, in *Language, Counter-Memory, Practice*; see also the further volumes of *The History of Sexuality*.

**Foucault Mk II**

I stated way back in the prologue my intention to approach Foucault hermeneutically, to take him up on his own terms. So far this has been my excuse for the extensive quotations and for caricaturing Foucault as a Benthamite legal positivist. I am about now, I suggest, to deliver on this promise properly for there are passages (the use of the plural form is slightly misleading here, I have in fact located just two) in Foucault's work which suggest a different, more nuanced appreciation of law.

Ivison writes:

"it is often assumed by commentators that for Foucault, law becomes simply the epiphenomena of a grid of impersonal relations of power that overlays all social and political practices. This implies that Foucault does not have much to say about the law or the rule of law, and hence attention shifts to the emphasis on the ubiquity of power and its manifestation in 'disciplinary practices'. Even among philosophers of law and critical legal theorists who have taken Foucault's work seriously- and there are many- one rarely finds an extended discussion of what precisely Foucault says about law in the many different places in his work where it is discussed. Instead, the disciplinary moment of Discipline and Punish, that is, the eclipse of the juridico-discursive conception of power (the rule of law), is seen as wholly supplanting the force of law. The discussion of law necessarily becomes a discussion of something else- power, discipline, governmentality, practices of self, etc."[45]

Ivison goes on to write a slightly strange and certainly garbled essay but there are some points of interest in this particular passage. Thus he does identify Foucault's basic manoeuvre correctly, and he is right to say that most legal theorists who have considered Foucault's work have only done so glibly.[46] He remarks somewhat strangely that Foucault talks about law in many different places. He does not. There are only isolated remarks and

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45 [45]D.Ivision, *'Foucault, law and the reinscription of rights'*, in *The Later Foucault*, ed. J.Moss, Sage, (London, 1998).

46 [46]See for instance, A.Hutchinson, *Dwelling on the Threshold*, Sweet & Maxwell, (London, 1988). For his theory of law, Hutchinson takes from Foucault that there are multiple sites of power and of resistance in a society. There is no discussion of Foucault's own ideas about law, no indication of his ascending analyses and no consideration of the history of power's dispersal.

they are invariably, fairly brusque. Nevertheless, I consider myself warned about the existence of a different account of law in Foucault's work.

The first hint of such an account comes in the lecture from which we (okay, I) have already quoted so much. Foucault first argues that by right, law should have exited our analyses with the coming of the new paradigm of power and then second, that law remains because it is a legitimating force. Exactly in the midst of these two claims, there is however the following passage:

"I believe that in our own times power is exercised simultaneously through this right [of sovereignty] and these [disciplinary] techniques and that these techniques and these discourses, to which the disciplines give rise invade the area of right so that the procedures of normalisation come to be ever more constantly engaged in the colonisation of those of law. I believe that all this can explain the global functioning of what I would call *a society of normalisation*. I mean, more precisely, that disciplinary normalisations come into ever greater conflict with the juridical systems of sovereignty: their incompatibility with each other is ever more acutely felt and apparent; some kind of arbitrating discourse is made ever more necessary, a type of power and of knowledge that the sanctity of science would render neutral. It is precisely in the extension of medicine that we see, in some sense, not so much the linking as the perpetual exhange or encounter of mechanisms of discipline with the principle of right."[47]

This is really an astonishing passage. It is prefaced and followed by the remarks that we have noted, and is followed too by *The History of Sexuality*, where the expulsion of law is more detailed still. The ramifications of this passage are enormous. Foucault is saying here exactly what I have been urging, that law is not some abstract discourse and that it can interface with the micro-level. He is effectively saying that yes, law and discipline are not "two absolutely heterogenous types of discourse", but in fact, they come together, they both exercise normalising, rather than repressive power. He is quite clearly contradicting his thesis from just earlier in the lecture. And then he contradicts this new thesis by what he claims in *The History of Sexuality* and then as if things weren't complex and befuddling enough already, near the end of the first volume of that work, he writes:

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47 [47] *2L*, 107.

"The law always refers to the sword. But a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms. It is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility. Such a power has to qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendour; it does not have to draw the line that separates the enemies of the sovereign from his obedient subjects; it effects distributions around the norm. 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."[48]

A few clarifications now offer themselves. First, that Foucault was meaning only to expel and deconstruct the juridical form of law. He seemed to adopt that conception of law for himself, but we may now credit him with doing that only to show its shortcomings. Thus whenever Foucault made a claim about the nature of law, he was writing ironically, he was representing someone else's opinion, or at least, whenever he wrote 'law', he meant for us to include the qualifier 'juridical' or 'monarchic' before it. He never implied in those passages that he was holding back a different conception of law, or that there was a modern form of law which he didn't really mean at the same time to expel, but we can now impute that intention to him. Certainly if we want to represent his work in its best possible light, we should do so, for we have already deconstructed at substantial and it may now appear somewhat unnecessary length, that 'juridical', positivist notion of law.

Second, these remarks should be put in the context of what else Foucault was thinking about at the time. They come in the later half of his career and this was when, he was beginning to turn from talk of disciplinary and microphysical power to bio-power and to governmentality. Essentially, his concern was the themes that power adopted. So in the last section of The History of Sexuality, he writes about the bio-politics of the population which is,

"focused on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health,

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48 [48]*HS*, 144.

life expectancy and longevity, with all the conditions that can cause these to vary. Their supervision was effected through an entire series of interventions and regulatory controls."[49] Bio-power then is a form of power which is not concerned directly with social control, or with disciplining with the body. Rather, it wants to foster the body, it wishes to aid its growth and to fulfil the species. Obviously to do this, it does exercise some sort of power on the body. And that is the power of normalisation, it seeks to guide conduct, and to regulate conduct. Foucault's discussions of governmentality have a similar theme. Thus again the accent is less on control and more on regulation.[50] Disciplinary power could be said to be similar, also there control was exercised not just for the sake of control, but for positive reasons. There isn't then necessarily a serious dichotomy between disciplinary power and bio-power, there is perhaps only a change of emphases, but Foucault does seem to perceive bio-power and governmentality as manifesting *meso-forms* of power. Thus they are small-scale, in that their surveillance and methods are still fairly precise, but there are of a larger scale too, for there is a consistency of theme in what they do. Also, though they do encompass the totality of the social body, they do not do so through repression, or the juridical edifice, but rather through a variety of normative forms, and in fact, an alliance of law and discipline. Thus the law assists the functioning of the disciplines by empowering them with its gravitas and force, and by providing them with a new source of legitimacy, licensing for the professions for example[51], and the disciplines feed the knowledge that they produce into the making of the law, thus allowing the law to be not only perhaps more effective but also better able to legitimate itself, in an age which values expertise.

Third, the heretofore analysis has not been entirely useless. There were suggestions contained therein which Foucault has not assimilated. Thus Foucault has conceded to an extent that the law is a praxis, but only in the sense that it takes material from the disciplines. He still does not see that the law offers opportunities for individual and group interventions, in the forms that we have discussed of court cases and informal rule-making. There is still this impression of law being pre-given. Moreover, it is not as if the law appears pre-given because it is really just hypostasising social norms. There are still connotations of law being autonomous, it draws on the disciplines for knowledge perhaps, but where does it go for an interpretive context. The Simmonds critique still stands. Also, though Foucault has confronted somewhat the actuality of law's normativity, he is not accepting the deeper point

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49 [49]*HS*, 139.`

50 [50]M.Foucault, *'Governmentality'*, in *The Foucault Effect.*

51 [51]A.Ogus, *Regulation: Legal Form and Economic Theory*, Clarendon Press, (Oxford, 1994), Ch.10.

that law exists in a field of social relations and that it is for individuals too, a part of the rules of the game, it also enables them, they interact with it creatively, it is not simply something used by some anonymous power elite to effect rational, goal-driven government or a bio-politics of the population. In all then, there is not, even in this no doubt substantial and no doubt exceptionally perceptive re-conception of law, a full socialisation of law. I am still left with a thesis then. I am still left with something to say, or rather, what I have already said is not already redundant and what I am about to add is not irrelevant.

**So what happens when law is plugged into society?**

I suggest that there are awkwardances resulting from the presence of power and complexity. The two are interlinked and so I will consider them roughly together. A good starting point is the work of Bohannan, an eminent legal anthropologist, who is quoted by Simmonds and many of the others who argue a similar thesis.[52]

Bohannan argues that the law rests on "a double institutionalisation". So first there are customs, social practices, those form, those are the raw material for law, but for them to actually become law, they must be re-institutionalised through the agency of legal institutions. This is undoubtedly correct but the problem that arises is exactly of what effect that agency has. It should be expected that the more highly developed the legal institutions become, the greater the phase between law and custom. Similarly, Cotterrell states that there are two shapings for legal doctrine: its practical contexts, and the institutional characteristics of the agencies that monitor and control that use.[53]

The problem that this creates cannot however be properly comprehended until we at least note the present complexity of these practical contexts. So although there may have been a time when social practices were straightforward and uniform enough to be translated directly into the law, surely this is no longer the case. There is a certain amount of social disorder too. There are conflicts of value, divergent tendencies, greatly increased levels of specialisation and differentiation. I do not intend here to establish this thesis myself, but really just to assume its veracity and consider the implications that it has.

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52 [52]P.Bohannan, *'The Differing Realms of the Law'*, in *Law and Warfare*, The Natural History Press, (New York, 1967).

53 [53]R.Cotterrell, *Law's Community*, Clarendon Press, (Oxford, 1995), Ch.1.

Fundamentally, it means that there are no general social practices which can simply be translated into legal ones. Lets realise the consequences of this then in the common law. When the judge comes to decide a case, in which he has to make a deduction about community morality or about the prevailing social practice, there are three possibilities. One, because the social field is complex and unclear, the judge suddenly has a greater degree of discretion in declaring what the law is. He can pick out that social practice, or that principle, which fits most his own political and moral beliefs. The common law will quickly come then to reflect the dominant ideology of the judiciary. Two, he may strive to be impartial. So not to make the argument more complex, lets assume that impartiality is possible. Even so, there is a problem, for we may expect then that the judge will pick out the most prominent or most ancient social practice within a particular social space and that practice will only be so because of the play of power. Thus the doctrines of the law will reflect the pattern of power in society. Third, this may not be just an implicit consequence, but an explicit one. Thus Eisenberg writes in his theory of the common law that where precedent does not settle a case, the judge should look to community morality. In addressing the difficulties of doing so, primarily the one of moral diversity, Eisenberg states quite plainly that well, the common law must reflect the dominant or institutional morality.[54] Dworkin takes a different tack.[55] He argues, and I confess to simplifying here, that the judge must ultimately decide a case so to make the law appear the morally best it can be. What is to be the reference point for that, whose morality is to count? Apparently the judge's own and thus again we confront the possibility of an elite or at least particular morality coming to dominate the law. Complexity then increases the role of power within the law. After the coming of the differentiated, postmodern society then, the only sources of determinacy and solidity in the law are power and ideology.[56]

To the extent however that these do not harmonise judges' perspectives, we should also expect complexity within the law. We should expect the presence of conflicting principles even within a discrete doctrinal and social space. And then when we consider the law as a whole, we should expect inconsistencies and divergences between different spaces. As Cotterrell puts it, "society presses in on law, dissolving it into a diversity of regulatory

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54 [54]M.Eisenberg, *The Nature of the Common Law*, Harvard U.P, (Cambridge, 1991), Ch.4.

55 [55]R.Dworkin, *Law's Empire*.

56 [56]J.Balkin, *'Ideology as Constraint'*, *Stanford Law Review*, 43 (1991) 1133.

practices".[57] There is then a strain placed on notions of the unity of law, of its systematic character, its essential integrity as a discipline. This is the final horizontalisation of law. Law becoming specific to doctrinal and social spaces. There is a decentering of society, the replacement of a real centre with at best a series of plurality of virtual centres or virtual determinants, law follows, and power presses into its discombobulated forms.

We can observe a similar interplay between complexity and power in the realm of regulatory law which was discussed earlier. So the agencies are confronted with a range of participants and a range of views. Their decision-making is problematised for a start and here the tendency to favour the powerful is yet stronger. Major commercial and governmental interests certainly have the edge in the participatory process. They are better able to marshal evidence for their submissions, they have better access to members of the rule-making body, they invest more money, hire lawyers, commission research, and so have a definitive edge over less well-endowed participants and most public interest groups. The worst case scenario is of effective 'agency capture', whereby one set of interests comes to dominate the rule-making agency almost entirely.[58]

The further problems are that again, between regulatory areas, inconsistencies develop, different orientations develop and so there is no unity to governmental administration. Also, these administrative processes find themselves outrun by changes or at odds with tendencies in the social field. This is something else we must expect in the postmodern, differentiated society. The law, and I'm including again the common law in this, has to take a position. This is much more apparent and acute now. Whereas before, if ever before, law was simply coterminous with society, just re-institutionalised custom, there could be a phase between them, however no radical inconsistency. Now, because there are competing social processes and practices, law chooses one from among them, that is the consequence of a situationist common law and of modern regulatory law, and we have already argued that power is determinative in this, but in addition to that, because law is being partial, is having to be partial, it threatens the social processes and practices that it does not institutionalise. It now suddenly stands also in opposition to society. Essentially, law is still trying to integrate what cannot be integrated. Murphy phrases this well:

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57 [57]Cotterrell, Ch.14.

58 [58]See Harlow and Rawlings, *Law and Administration*.

"It is mistaken to assign to law some special role, because to do so is to play with a memory of a different kind of scheme for social organisation and co-ordination. Indeed, it is to play with the possibility of co-ordination or integration, which is precisely what seems no longer the appropriate problematic. Because it continues to dream that what is dynamic can some day be static, that what is unstable can be stabilised, that what is fluid can be fixed, that what is in movement can somehow come to rest."[59]

How would Foucault respond to this analysis? It seems to me that he must accept the points about complexity. After all, he was one of the first postmodern philosophers to write about dispersal. But ultimately I think Foucault would say that though it may be regrettable and though local resistance will thus be engendered, law is still able to pursue the regulatory project, it is still able to organise itself around say a meso-biopower-theme. It may not be able to secure genuine integration but it normalises sufficiently to effect its aims. The problem of complexity thus is mediated by the operation of power. This is most probably correct, and I have suggested already something similar above when discussing the problematic in the context of the common law. The question arises however of whether power and the law are quite as consistent and thematic as Foucault has supposed. Is there really across the vast domain of the situationist, particularist common law, a common law which works through analogy and fuzzy reasoning, a common law which disposes of thousands upon thousands of cases a year, a common law in the keeping of a multiplicity of judges across a multiplicity of courts, is there really such constancy and vigilance? Judges may well employ their own moral predilections and ideologies in their reasoning, but do they really apply something as stubborn and rigorous as an anatomo-politics of the human body? Similarly, across the uneven landscape of regulatory law, do all the agencies in all the different zones really coagulate so? Despite all the conflicting pressures placed upon them and the range of arguments placed before them? Foucault could admit the presence of some resistance, of some variances from the theme, but still, is his ascending analysis not substantially unconvincing? I submit that Foucault still has not come entirely to grasp the horizontality of law. This thesis finally is not in a position to consider the factuality of the issue, but I hope I have at least convinced that even this Foucault Mk II leaves a great deal to be desired.

**A note on autopoiesis**

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59 [59]W.T.Murphy, *The Oldest Social Science?*, Clarendon Press, (Oxford, 1997), p.170.

From the tenor of Murhpy's remarks, it may appear that he is readying to effect an altogether different expulsion of law but in fact, his discussion of the differentiation of law and society is a preface to a new concept of law and both aspects of his work are guided by theories of autopoiesis. In autopoietic systems theory, law is realised as one more self-referential, self-reflexive, self-regulating social subsystem. Essentially and I do intend to be somewhat glib here, the functional differentiation of society induces highly specialised subsystems to develop, there occurs, in Luhmann's words, the "interruption of continuity in the spectrum of the possible".[60] The systems that form are attempts to reduce the complexity of the world, to bracket out a certain amount. The legal system then consists of "all social communication that is formulation with reference to law".[61] From what we have already discussed, this is still a fairly diverse and broad field. Nevertheless, the argument progresses and it is that the legal system becomes self-referential and self-organising. Thus when law recourses to society say for an interpretive context, it does so very much on its own terms, it only utilises, as Teubner puts it, that material which appears on its own screens. Social practices or conflicts are not merely translated into legal terminology, they are reconstructed as autonomous legal conflicts within the legal system. Also, legal evolution is not determined by societal evolution, rather social processes appear as "perturbations" to the legal system and the legal system initiates its own processes of selection, variation and retention.[62]

In a sense, this is really just a high-concept version of Bohannan's point about "re-institutionalisation". Thus social practices do not come into the law pure. Also, the legal system selects what enters and what does not and we have already seen that especially in a situation of social complexity, that is indeed what happens. Neither Luhmann nor Teubner directly implicate power in this process of selection but I suspect it is implicit in their work.

Probably the most important consequences of systems theory for law are in what it implies for the effectiveness and style of legal regulation. Because social subsystems have become so differentiated and different, substantive legal programs are either ineffective or effective only at the price of destroying the patterns and flows of the social subsystem they are

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60 [60]N.Luhmann, *The Differentiation of Society*, trans. S.Holmes and C.Larmore, Columbia U.P, (New York, 1982), p.345; W.T.Murphy, *'Modern Times: Niklas Luhmann on Law, Politics and Social Theory'*, *Modern Law Review* 47 (1984) 603.

61 [61]Luhmann, p.122.

62 [62]G.Teubner, *Law as an Autopoietic System*, Blackwell, (Oxford, 1993), Ch.4.

seeking to regulate. This is because they obey a functional logic and follow criteria of rationality and patterns of organisation which are of the legal susbsystem and those are poorly suited to the also distinctive internal structure of the regulated spheres of social life. This again, I believe, is a more sophisticated version of the point made above that it is power which mediates in the face of complexity. Power/law/discipline brings its own diction and prerogatives to bear on a social situation and inevitably in doing so it destroys or harms or represses those social practices and principles which were neglected or abandoned for the sake of opposing or different ones in its formation process and development. Autopoietic theory says too that law cannot integrate, it cannot truly integrate, but of course law nevertheless attempts to and its effects can still be pervasive. Thus, it may achieve a degree of normalisation, it will not be entirely successful in that project, but it will also encounter a degree of resistance and it will also do a degree of harm to less favoured social practices and principles, those perhaps which appear on its screens but which it is committed to ignore in favour of others.

What Luhmann and Teubner both then conclude is not that there ideally be 'no law' but that there be 'some law'. As Teubner puts it, the idea is to find a middle path between representationalism and solipsism, to draw some sort of legal order from the social noise.[63] The suggestion is of a new "reflexive" sort of law. Reflexion is the process whereby a social susbsystem looks back and within itself, in an attempt to reconcile the tensions within itself,

"so that it can survive novel choices and innovations by reconstructing its past history as a consistent series of intentions and actions . . . an exploration of concepts, problems, solutions, and idealisations".[64]

Law is only to facilitate this process, to safeguard the structures in which it can occur, refine and redefine them as circumstances require. Of course the parameters that law sets will influence outcomes, but at least law will not be determining the outcomes.[65]

Many object to this future for law. It is argued for example that it is odd to cede so much to and to be quite so respectful of the social field.[66] Won't this reflexive model after all result in

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63 [63]G.Teubner, *'How the Law Thinks: Towards a Constructivist Epistemology of Law'*, *Law and Society Review*, 23 (1989) 727.

64 [64]Luhmann, p.238.

65 [65]G.Teubner, *'Substantive and Reflexive Elements in Modern Law'*, *Law and Society Review*, 17 (1983) 242.

social, disciplinary power simply running amok? Undoubtedly this is a concern, but then there will be resistance too. We can draw on Foucault perhaps for assurance of that. Also, this vision at least has the virtue of denying to power directly the additional physical, psychological, and legitimating force of law. Plus law is always on hand for the grossest abuses, presumably basic rights will be protected too. It is undoubtedly still a tragic vision. Again Murphy phrases this well. He argues that law can at least become the conscience of society, it can provide an ethical arena in which everything can be subjected to a kind of critical scrutiny. It will persist as,

"a temporary refuge from the squalls of the rest of existence, as a temporary resting place in which we can, for a time, possess ourselves, assert ourselves, take comfort in the achievement of justice or surrender to grief in the face of its failure."[67]

Still, we may worry that power will surge up from the subsystem and pollute the ethical horizon itself. It may be able to restrict access to the law. It may be able to prevent the law from adjusting the reflexive structures. Nevertheless . . . well, perhaps if our pessimism runs so deep, there is no more to say. I however believe that the law does offer deeper possibilities for resistance. There were hence three reasons for discussing this model here and not in the keep-faith-not-far-now section on Resistance. One, it seemed to run neatly on from our discussion of complexity and power. We had just concluded plugging law into society and now it appears that for the sake of both law and society, it might be best if they were to an extent apart. Second, I will be back in the next section to using Foucault's own conceptions. And third, because I want there to be, perhaps just a touch, more cheery about our prospects in the face of power/law/discipline.

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66 [66]See for example, H.Rottleuthner, *'The Limits of Law- the Myth of a Regulatory Crisis'*, *International Journal of Sociology of Law*, 17 (1989) 273; E.Blankenburg, *'The Poverty of Evolutionism'*, *Law and Society Review*, 18 (1984) 273.

67 [67]Murphy, *The Oldest Social Science?*, Ch.7.

# *Resistance*

**Once again, we are confronted by two Foucaults**

There is first of all the Foucault who in his interviews often criticises attempts at resistance, who says that resistance is always merely absorbed by the present system. There is the Foucault who writes, "I think to imagine another system is to extend our participation in the present system", or, "it is possible that the rough outline of a future society is supplied by the recent experiences with drugs, sex, communes, other forms of conciousness, and other forms of individuality."[1] This Foucault is uninterested in conventional forms of resistance, such merely bolster the current system on a deeper level, because they utilise the set norms of truth and freedom. This Foucault suggests for us then, or perhaps not for us, but only for himself, not another system, not a different form of political and societal organisation, but a reactivation of "bodies and pleasures".[2] Foucault never quite concretises the content of this 'new ethics', but it represents roughly perhaps an aesthetic ideal, dandyism, the notion of life as a work of art, abstract, decadent, selfish. We may want to ask at this point whether a society full of such louche types could actually survive, or if is even intially possible. The questions are pertinent perhaps though they were never satisfactorily answered. But then perhaps Foucault didn't want to answer them, perhaps such questions fail to understand the nature of this transformative project. As Rorty supposes, Foucault didn't present this aesthetic ideal as a general prescription, and so he may well have responded,

"I stand with you as a fellow citizen, but as a philosopher, I stand off by myself, pursuing projects of self-invention which are none of your concern. I am not about to offer philosophical grounds for being on your side in public affairs, for my philosophical project is a private one which provides neither motive nor justification for my political actions."[3]

Rorty continues that the reply would sound less shocking if one replaced 'philosopher' with 'poet' and this is the point, Foucault refused to be bound by the requirement of producing a basis for our moral obligations, or our politics, or of exhibiting the universal validity of his position. He was then "a philosopher who claimed a poet's privileges". Even however if we

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1 [1]M.Foucault, *'Revolutionary Action: "Until Now"'*, in *Language, Counter-Memory, Practice.*

2 [2]M.Foucault, *The History of Sexuality.*

3 [3]R.Rorty, *'Moral identity and private autonomy'*, in *Michel Foucault: Philosopher*; also, *'Foucault and Epistemology'*, in *Foucault: A Critical Reader*, ed. D.C.Hoy, Blackwell, (London, 1986).

set the evaluation of this ideal aside, it is unclear if it is actually possible. After all, is the body too not adversely socialised, fundamentally marred by disciplinary power? Or does Foucault believe that (his) imagination can break through all of that? Does microphysical power leave us the space still to pursue this reactivation? Is Foucault contending that the body is some sort of transcendental signified? What is clear regardless is that this Foucault is not of much use in the conceptualisation of resistance. Indeed, as Walzer predictably complains, this Foucault displays only, "rhetoric", "posturing" and "radical chic".[4]

In addition to this *transgressive* or French Foucault, there is however also an *immanentist*[5] or American[6] Foucault. This Foucault is interested in enabling and guiding resistance. This Foucault takes his genealogies to have alerted others to the dangers of the disciplinary society and to the new configuration of power which any act of resistance must now take into account. This Foucault writes:

"it seems to me that among all the conditions for avoiding a repetition of the Soviet experience and preventing the revolutionary process from running into the ground, one of the first things that has to be understood is that power isn't localised in the State apparatus and that nothing in society will be changed if the mechanisms of power that function outside, below and alongside the State apparatuses, on a much more minute and everyday level are not also changed."[7]

Or:

"it's true that certain people, such as those who work in the institutional setting of the prison- which is not quite the same as being in prison- are not likely to find advice or instructions in my books that tell me 'what is to be done'. But my project is precisely to bring to about that they 'no longer know what to do', so that the acts, gestures, discourses which up until then had seemed to go without saying become problematic, difficult, dangerous. This effect is intentional . . . The problem, you see, is one for the subject who acts- the subject of action through which the real is transformed. If prisons and punitive mechanisms are transformed, it won't be because a plan of reform has found its way into the heads of the social workers; it will be when those who have to do with that penal reality, all those people, have come into

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4 [4]M.Walzer, *'The Politics of Michel Foucault'*, in *Foucault: A Critical Reader.*

5 [5]N.Fraser, *'Foucault's Body Language'* in *Unruly Practices*, Polity Press, (Cambridge, 1989).

6 [6]Rorty, *'Moral identity and private autonomy'.*

collision with each other and with themselves, run into dead-ends, problems and impossibilities, been through conflicts and confrontations; when critique has been played out in the real, not when reformers have realized their ideas."[8]

There is then still this aversion to grand architectonics of resistance. Foucault isn't presenting an alternative, utopian vision for society and motivating us all to get each other there, his model of an effective resistance is a progressivist one, indeed, an immanentist one. The idea is to work within current structures, to problematise them, to take current notions and radicalise them. And also, this all is nicely and typically contrary. Thus the more radical, transgressive Foucault espouses decadence and the less radical, quieter Foucault espouses intelligent and rigorous resistance.

Finally, it is worth noting that if this immanentist Foucault hadn't made an appearance, the claim that resistance always accompanies power would have seemed somewhat strange and isolated. If we take the relational model of power seriously, it follows that resistance must follow. Hence Foucault writes, "coextensive with every social relationship, there is the possibility of action upon the action of others".[9] Mechanic has researched certain examples of this. Thus, even in prisons, where disciplinary power was first honed, the prisoners acquire possibilities. So although the guards can report inmates for disobedience, if they do so too frequently, it will seem that they are unable to command obedience and do not have command over their wing. Hence, guards tend to allow minor or agreed violations of the prison rules in return for generally co-operative behaviour.[10] Prisoners so possess a node of counter-power. Moreover, it can be seen that even in the most hostile and closed situations, there is active resistance. Foucault himself tells about the activities of the crowds at public executions like that of Damiens. Scott establishes that where the oppression and surveillance is too acute for such public actions, a "hidden transcript" of jokes, gossip, rumour and speculation forms. He gives the example of how the slaves in America developed their own pidgin language, powerful spirituals and a distinctive take on Christianity. This hidden transcript becomes a source for edification and it inspires and grounds resistance when bigger oppurtunities arise. Indeed, Scott maintains that to look

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7 [7]M.Foucault, *'Body/Power'* in *Power/Knowledge*, p.60.

8 [8]M.Foucault, *'Questions of Method'*, in *The Foucault Effect*, p.84-5.

9 [9]M.Foucault, *'Afterword: The Subject and Power'* in *Michel Foucault: Beyond Structuralism and Hermeneutics*, H.Dreyfus and P.Rabinow, (1984), p.208.

10 [10]D.Mechanic, *'Sources of power of lower participants in complex organisations'*, in *Power: Critical Aspects*, ed. J.Scott, Routledge, (London, 1994).

only to public political acts is "to miss the immense political terrain that lies between quiescence and revolt and that, for better or worse, is the political environment of subject classes. It is to focus on the visible coastline of politics and miss the continent that lies beyond."[11]

My intention now is to show how the law can be utilised for a progressivist politics of resistance. I will be drawing mainly on the work of theorists belonging to the school of Critical Legal Studies (CLS) but before I may do so, it is necessary to repudiate the critiques of those who allege that the immanentist Foucault is incoherent and in a terrible normative muddle.

**The unbearable lightness of being Michel Foucault**

There are a number of such critiques made of Foucault, and they appear fairly powerful, indeed they should, for they issue from some of the most prominent figures in contemporary philosophy: Nancy Fraser[12], Charles Taylor[13], Jurgen Habermas[14], Michael Walzer[15]. Walzer's critique I will set aside immediately for he does not make the distinction between the two Foucaults and in fact ends up taking on only the easy target, the French Foucault. I will consider here then the particular remarks of Fraser and Habermas together, for they point to the same inconsistency, though will begin with Taylor, whose remarks unconciously lead us, I think, to my preferred way of understanding Foucault. I should point out though, and yes, this is partly because I am unsure of the exact strength of the arguments I am about to make, that vindicating Foucault against these critics is not an essential step that I have to take. It is possible for me to strip away some of Foucault's more expansive claims and more controversial vocabulary and epistemology and state that nevertheless, it is important to effect resistance in an immanentist, Foucauldian fashion, if only because Foucault's analysis of power is in many of its details, persuasive. One doesn't have to be whole-heartedly Foucauldian to acknowledge and pay attention to the shards of truth in

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11 [11]J.C.Scott, *Domination and the Arts of Resistance*, Yale U.P, (New Haven, 1990), p.199.

12 [12]N.Fraser, *Unruly Practices*, Chs.1-3.

13 [13]C.Taylor, *'Foucault on Freedom and Truth'*, in *Foucault: A Critical Reader.*

14 [14]J.Habermas, *The Philosophical Discourse of Modernity*, trans. F.Lawrence, MIT Press, (Cambridge, 1987), Chs.10 & 11.

15 [15]M.Walzer, *'The Politics of Michel Foucault'.*

Foucault's descriptive account of power and modulate one's attempts at resistance in accordance with that account. Nevertheless. .

Taylor's argument is essentially this:

"'Power' in the way Foucault sees it, closely linked to 'domination', does not require a clearly demarcated perpetrator, but it requires a victim. It cannot be a 'victimless crime', so to speak. Perhaps the victims also exercise it, also victimize others. But power needs targets. Something must be imposed on someone, if there is to be domination . . . this means that 'power' belongs in a semantic field from which 'truth' and 'freedom' cannot be excluded. Because it is linked with the notion of the imposition on our significant desires/purposes, it cannot be separated from the notion of some relative lifting of this restraint, from an unimpeded fulfilment of these desires/purposes."[16]

This seems per se logical. Clearly the notion of imposition does not make sense unless there is something actual being imposed upon, unless there is some tenet of what it means to be free and Foucault did write that power is ubiquitous and there is no possibility of absolute or true liberation. Foucault's first reply could however be that the "significant desires/purposes" have themselves been created by power. Certainly his analysis of the normalising effects of power does on occasion run that deep. Our notions of sexuality and sexual freedom for instance are said to have been created so. So Foucault writes:
"We must not think that by saying yes to sex, one says no to power, on the contrary, one tracks along the course laid out by the general deployment of sexuality."[17]

Think back basically to our discussion of pornography and "the perpetual spirals of pleasure and power". Power is creative too, Taylor seems to be assuming that it is only repressive. Thus the laws in the area of sexual expression may in fact create or at least enhance the desire for such expression. It is arguable that if those laws were to be repealed, if power was to disengage, pornographic desires will not be liberated, but instead annihilated. The craving for pornography is based on its illicitness, on its edginess, on its taboo status, take that away, and perhaps it will recede and eventually into oblivion.

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16 [16]Taylor, p.91.

17 [17]HS, 157.

We are inciting here though whole panegyrics about 'false conciousness' and so lets consider another possible reply. Taylor adverts to the fact that Foucault's analysis is incoherent without the concepts of truth and freedom. But did he really discard those concepts in his work? Consider the following passage from 'The Subject and Power':

"When one defines the exercise of power as a mode of action upon the actions of others, when one characterizes these actions by the government of men by other men- in the broadest sense of the term- one includes an important element: freedom. Power is exercised only over free subjects, and only insofar as they are free. By this we mean individual or collective subjects who are faced with a field of possibilities in which several ways of behaving, several reactions and diverse comportments may be realized . . . Consequently there is no face to face confrontation of power and freedom which is mutually exclusive (freedom disappears everywhere power is exercised), but a much more complicated interplay . . . At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom. Rather than speaking of an essential freedom, it would be better to speak of an "agonism"- of a relationship which is at the same time reciprocal incitation and struggle; less of a face to face confrontation which paralyzes both sides than a permanent provocation."[18]

This on the face of it appears exactly equivalent to what Taylor surmises about the essential relationship between power and freedom. There is however one outstanding difference. Taylor thus is fairly fundamentalist about freedom, he writes of the "unimpeded fulfilment" of desires and purposes. Foucault's account is more nuanced. Thus there is always an "agonism" between power and freedom, never a resolution of the situation one way or the other. Power is ubiquitous sure, but this does not mean that freedom cannot be also. Eventually, Taylor wants to argue that yes, we have gained freedom in the course of time since the public execution and the oppressive monarchy. He contends that Foucault cannot agree with this because he believes that power is ubiquitous. That doesn't really make sense on the face of it but the deeper point is this: Foucault is also arguing that when the regime of power changes, so do the notions of truth and freedom. Truth for Foucault is determined by power within a particular discursive formation, similarly freedom must be regime-specific. Now Taylor's point becomes clear:

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18 [18]*'The Subject and Power'*, p.221-2.

"There has to be a place for revolt/resistance aided by unmasking in a position like Foucault's, and he allows for it. But the relativity thesis will not allow for liberation through a transformation of power relations. Because of relativity, transformation from one regime to another cannot be a gain in truth or freedom, because each is redefined in the new context. They are incompatible. And because of the Nietzschean notion of truth imposed by a regime of power, Foucault cannot envisage liberating transformations within a regime. The regime is entirely identified with its imposed truth. Unmasking can only destabilize it; we cannot bring about a new, stable, freer, less mendacious form of it by this route."[19]

Taylor is confusing here for he is running two arguments side by side. First, there is the argument that Foucault cannot argue that there has been a gain in freedom from one regime to the next because he insists that each regime defines freedom in a different way. But can even Taylor satisfactorily make this argument about yield? He says that we in Western civilisation have gained freedom on account of personal independence and collective self-rule. But isn't that also a situationist judgement? Wouldn't a communitarian point say to the sense in which personal independence is not true freedom, or the anarchist argue that collective self-rule is actually an illusion used for our oppression? Surely we can only agree with Taylor that yes, we have freedom now if we share his political principles and theory of self. Foucault would make exactly this point, that each regime defines these notions for itself and we cannot compare degrees of freedom between regimes. The second argument that Taylor is trying to make is that resistance within a regime can only destabilize that regime, it cannot make it less mendacious or freer. But what if the regime is failing to deliver on its own promises of freedom? That really is the point that the immanentist Foucault is trying to make. We live in a regime which promises us individual freedom and autonomy but it does not fulfil this promise, instead the disciplines compromise our freedom, bio-power restricts our autonomy. So Foucault writes:

"to say that there cannot be a society without power relations is not to say either that those which are established are necessary, or, in any case, that power constitutes a fatality at the heart of societies, such that it cannot be undermined. Instead I would say that the analysis, elaboration, and bringing into question of power relations and the "agonism" between power relations and the intransitivity of freedom is a permanent political task inherent in all social existence."[20]

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19 [19]Taylor, p.94.

20 [20]*'The Subject and Power'*, p.223.

The key to understanding this passage, I believe, is that by "freedom" is meant regime-specific freedom. Foucault does not believe that there is any such thing as freedom outside of a particular power-regime, that much is clear, that indeed is why Taylor tries to catch him out on the gains between regimes thing. However, there is clearly a notion of freedom specific to each regime for without it, as Taylor has argued and as Foucault has also, the notion of power itself does not make sense. Hence resistance involves using the system's own definition of freedom against the system.

Of course, Taylor or someone else may question at this point whether Foucault can do this, how can he utilise something that the regime has itself created, won't the regime's own notion of freedom be tainted? Of course it will, but then all notions of freedom are tainted, at least for the immanentist Foucault. This Foucault would argue that there is no Archimedean point from where we can go find some universal notion of freedom, and so we must necessarily use the one that we have here and now. Sure to do so is ultimately to extend our participation in the present regime, but that is the essence of an immanent critique. As Foucault explains,

"My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do".[21]

Of course we should remain aware of the fact that our resistances are dangerous. This, I suppose, is meant in two senses, in that an act of resistance can become an act of power too and so impinge on someone else's freedom, and that we are, regardless of what we are achieving through our resistance, nevertheless confirming the present regime by using its definition of truth and freedom. This finally is the unbearable lightness of being Foucault or I suppose being a follower of Foucault that I referred to in the title of this section. The Foucauldian can only ever resist ironically, or "under erasure" to use a Derridean phrase, because she knows that at the same time, she is affirming the power-regime. Similarly, and perhaps this is the unbearable burden of being Foucault/Foucaldian, she must always resist, no matter what sort of regime comes to pass, for power is ubiquitous and so freedom is always in some way being impinged upon. In Bernstein's phrase, under these rules, critique is the philosophic ethos. And indeed, Foucault recognised this, he spoke of being committed

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21 [21]M.Foucault, *'On the Genealogy of Ethics'*, in *The Foucault Reader*, ed. P.Rabinow, Pantheon, (New York, 1984).

to permanent critique and permanent reactivation.[22] Given the above quotation, though, Foucault can say that one regime is less bad than another, his judgement will only be a situated one, sure, but he can say it out loud, and anyway, isn't a situated judgement the only kind that anyone can make. He only must ensure that he remains aware of the possibilities for domination.[23]

All this established then, or in the hope that it has been established, we can turn to the critique of Habermas and Fraser. Their point really is that Foucault gets stuck in a crypto-normativism, to use Habermas' phrase. Thus though he sometimes claims or perhaps ought to claim, given his antifoundationalism, in *Discipline and Punish* and T*he History of Sexuality* in particular, that he is giving a purely descriptive account, the problem is that he ends up using normative language. For instance, he speaks of the oppression of disciplinary power, describes in harsh terms the normalisation and surveillance of the individual. As Fraser puts it,

"he continues to make tacit use of the same humanist rhetoric he claims to be rejecting and delegitimating. *Discipline and Punish*, for example, even as it indicts humanist reform for complicity in disciplinary power, depends on its *own* critical force on the reader's familiarity with and commitment to the modern ideals of autonomy, reciprocity, dignity, and human rights."[24]

Habermas' concludes the point in a slightly different way. He argues that ultimately Foucault is drawing support from the biological-somatic, ie. he is making reference to the body and betraying a vitalism in the "self-experience of the body".[25] From what we've said above however, it can be argued that what Foucault is really drawing on is, exactly as Fraser says, notions of autonomy and human rights. How can he do this? Well, first because there is in the absence of an out-there, no other language for him to speak in, so he has to do it. Second, he actually is drawing on those notions but once again, ironically, ie. without committing to them himself (indeed he can't commit to anything entirely, but for strategic and rhetorical purposes). Clearly as Fraser implicitly acknowledges, use of such bolsters the force of his critique and that is exactly and only what Foucault wants to achieve. Obviously

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22 [22]M.Foucault, 'What is Enlightenment?' in The Foucault Reader.

23 [23]And given his slipshod manner with words, that he doesn't get drawn into elaborating in too much or too theoretical detail the meaning and sense of the word 'bad'.

24 [24]Fraser, Ch.3.

25 [25]Habermas, p.335.

Fraser and Habermas will find this lightness entirely unbearable, but I don't see how they can deny Foucault this form of detached, ironic critique.

Fraser asks also of Foucault, "Why is struggle preferable to submission? Why should domination be resisted?"[26] She wants again to catch Foucault out in the normativity trap, but he will infuriate her even more at this point and impishly reply, exactly because of the ideals of autonomy and dignity and such which you yourself and the power-regime hold so dear, my dear. Fraser and Habermas want to do earnest critique, they want to use ideals of reason, truth and freedom to which they themselves are committed, but Foucault is immanentist and ironic and insistent that those ideals too will not liberate outright, but will only change the configurations of power, truth and freedom. Janicaud in fact suggests that Habermas and Fraser and their ilk could do worse than learn a little from Foucault:

"If one ignores the requirements of genealogy, one ends up with a form of rationality which is too pure or exclusively argumentational, casting power back into 'outer darkness' in a way which is incapable of explaining how we became 'prisoners of our own history' (according to Foucault's expression) . . . The dialogue between truth as game and truth as pure normative requirement becomes impossible only if reason forgets that it is only ever truly itself when it criticises itself and attempts to grasp its own limitations. Power imposes itself on rationality as an enigma, and therefore as the sign of a task to be done, precisely because thought recognises then that there cannot be (and perhaps must not be) any final solution- only aporias."[27]

I hope now that we can move on and consider how to pursue this immanentist, ironic resistance through the law.

**Critical legal possibilities**

The Critical Legal theorists are a band of mainly American jurists who emerged in the early 1980s and shook the legal establishment seriously with their polished, intellectually rigorous

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26 [26]Fraser, Ch.1.

27 [27]D.Janicaud, *'Rationality, force and power'*, in *Michel Foucault: Philosopher*, p.299.

leftism.[28] It is a fairly broad movement, ranging as Duncan Kennedy, one of its most prominent members puts it, "from the disaffected liberal to the crypto-anarchist". In view of this diversity of opinion and prescriptive vision, many have said that it no longer makes much sense to speak of a CLS movement. That is most probably correct, especially during the past decade, the internal differentiation has become marked, with on one margin a blurring of CLS into postmodernism and on the other, a return to Marx. I however will not be pursuing a survey of the movement, or anything of that sort, rather the objective is simply to pluck certain techniques for resistance from the work of certain theorists. CLS writers also often pursue transgressive programmes and those too will not be considered here. To give our discussion a more precise context then, I would like to begin by quoting what is Foucault's most extensive statement on what a progressive, immanentist politics involves.

"1. A progressive politics is one which recognizes the historic conditions and the specific rules of a practice, whereas other politics recognize only ideal necessities, one-way determinations or the free-play of individual initiatives.

2. A progressive politics is one which sets out to define a practice's possibilities of transformation and the play of dependencies between these transformations, whereas other politics put their faith in the uniform abstraction of change or the thaumaturgical presence of genius.

3. A progressive politics does not make man or conciousness or the subject in general into the universal operator of all transformations: it defines the different levels and functions which subjects can occupy in a domain which has its own rules of formation.

4. A progressive politics does not hold that such discourses are the result of mute processes or the expression of a silent conciousness; but rather that - whether as science, literature, religious utterance or political discourse - they form a practice which is articulated upon the other practices.

5. A progressive politics does not adopt an attitude towards scientific discourse of 'perpetual demand' or of 'sovereign criticism', but seeks to understand the manner in which diverse scientific discourses, in their positivity (that is to say, as practices linked to certain conditions, obedient to certain rules, susceptible to certain transformations) are part of a system of correlations with other practices."[29]

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28 [28]On CLS generally, see *Critical Legal Studies*, ed. A.Hutchinson, Rowman & Littlefield, (New Jersey, 1989); *The Politics of Law*, ed. D.Kairys, (1994); R.Unger, *The Critical Legal Studies Movement*, Harvard U.P, (Cambridge, 1986).

29 [29]M.Foucault, *'Politics and the study of discourse'*, in *The Foucault Effect.*

*a. Rights*

Using rights is perhaps the most obvious way of pursuing an immanentist politics, of turning a discourse that the power-regime holds dear against it, or as Foucault puts it above, of using "the specific rules of a practice". Rights discourse certainly has become one of the dominant discourses of our time. Of course, Macintyre[30] may be correct and rights may just be moral fictions which have arisen in the wake of our crisis of morals and/or justice but the point is, rights-talk is hegemonic now and if it can be used to advantage by a progressive politics, it should be used.

It certainly does offer substantial possibilities. For instance, in the prison, we can pursue reform based on the right to privacy or personal autonomy. Such are central to the liberal individualist programme and so the scope of surveillance can be challenged, eg. relating to prisoners' correspondence, the use of solitary confinement can be restricted, the conditions of prison labour can be challenged.[31] Of course, it may be objected that these are fairly minor interventions but in actual fact, we can reasonably expect them to have wider effects. The idea behind them is to break down the general theme of normalisation and subjection. And so if rights-conciousness is increaed within the prison, prisoners' will begin to litigate such matters, they will begin to feel empowered, rights proffer worth, they are a confirmation even if only in ideal terms, of an individual's autonomy and moral personhood, and thus the psychological grip that disciplinary power has attained can be loosened.

Further possibilities exist also however and this is where the CLS strategising comes in. Hence, because rights are now such a paradigm, we can seek to extend the scope of rights. Presently the use of rights can only be fairly defensive, rights set only bare minimum thresholds and most rights documents consist only of civil and political rights. All of this can however change. We can campaign for rights that demand higher standards, we can campaign for the extension of rights into areas to which they do not at present pertain. For example, between employer and employee, we can insist that the law protect the individual's freedom of speech, we can stipulate through the law a minimum wage, we can enshrine more rights for trade unions, effectively, if the power-regime wants to use rights as a legitimating device, lets force their hand, lets radicalise rights. Similarly, with regard to

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30 [30]A.Macintyre, *After Virtue*, 2nd ed, Duckworth, (London, 1989).

31 [31]See for eg. the use made of the ECHR: D.Harris, *European Convention on Human Rights*, Butterworths, (London, 1996).

information collected through surveillance, Foucault clearly believes we live in a panoptic society but again, rights can have some effectivity in this regard. Thus the right to individual privacy can require that we not be placed under surveillance without good reason, or without the decree of a court, if an employer or a school or a government agency wants to survey, we should have a right of access to the information held about us. In this way again, the process of normalisation can be resisted, the methods of disciplinary power challenged.

The furthest and most ambitious attempt to use rights in a progressive politics is suggested by Roberto Unger. Unger discusses the idea of "complex enforcement".[32] He argues that simply declaring that a right to such and such exists and that there is a present violation of that right is not enough. Sometimes that judgement will have only the most limited effect. In that only the litigating individual may benefit, or a policy may be altered thus but only minimally, it may still not conform and a fresh challenge may not be possible for any number of reasons. What Unger then proposes is that once a court finds a violation of a right, it be able to command a new agency to go into and reshape the institution involved.

"The method is the effort to advance more deeply into the causal background of social life than traditional adjudication would countenance, reshaping the arrangements found to be most immediately and powerfully responsible for the questioned evil. Thus, the remedy may require a court to intervene in a school, a prison, a school system, or a voting district, and to reform and administer the organization over a period of time. Complex enforcement will demand a more intimate and sustained combination of prescriptive argument and causal inquiry that has been characteristic of lawyers' reasoning . . . Once we begin to penetrate the causal background of contested practices and powers, why should we stop so close to the surface? . . . As we deepened the reach and extended the scope of intervention, the reconstructive activities of complex enforcement would become ever more ambitious, exercising greater powers, employing bigger staffs, and consuming richer resources."[33]

This then is a clearly microphysical form of legal intervention. It could plainly have substantial effects, for instance, imagine a breach of the right to privacy or bodily integrity was found in an asylum or a hospital. This agency would intervene and could peel back

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32 [32]R.Unger, *What Should Legal Analysis Become?*, Verso, (London, 1996).

33 [33]Unger, p.31.

many of the unnecessary layers of power.[34] That is a fairly radical step, yet all Unger is proposing really is that we take rights seriously. That if there is a violation, that violation be corrected, and recurrence of the violation be prevented.

It is worth noting at this point perhaps that on the use of rights, there is some resistance within the resistance. Thus some Crits, Peter Gabel for one, argue that rights are ultimately disempowering, because they are claims, they are pleas to the state.[35] Gabel however has been roundly assailed by a CLS offshoot, Critical Race Theory.[36] Thus writers such as Matsuda and Delgado argue that for minorities, the gain of rights was an essential affirmation of personhood and moral citizenship. Of course rights are only a base (though not necessarily, I have argued above), but they are an important base, for they fundamentally enable the pursuit of a politics. I mention this tension really only because we should expect the existence and development of such from Foucault's ideas about the multi-play of power and resistance.

*b. Doctrine*

A significant portion of the Crits' writings are committed to showing the indeterminacy of legal doctrine. The argument runs something like this: that first of all, legal reasoning does not conclude itself. That is the formalist position in legal theory, that the use of logic or formal reasoning alone can resolve legal disputes. The Crits reject that argument because the law is in fact replete with conflicting principles and conflicting rules. Thus Mensch in her unravelling of contract law argues that the basic rule of freedom of contract in fact oftentimes collides with the notion of freedom in a broader sense.[37] Thus in a case involving a covenant in restraint of trade, that is, a contract that an employer sometimes insists a departing employee sign and which forbids him from say, taking up a job in the same field for the next five years, the doctrine of freedom of contract should dictate that the covenant stands. But in actual fact, such contracts are prima facie illegal and can only be upheld if certain conditions of 'reasonableness' and 'proportionality' are met. Mensch argues that of course these conditions cannot admit of a single correct legal solution. What can

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34 [34]Of course this is now me being careless with words. At the same time as it is peeling back layers, it will of course be adding fresh layers of its own.

35 [35]P.Gabel and P.Harris, *'Building Power and Breaking Images'*, in *Critical Legal Studies*.

36 [36]See in particular, *Critical Race Theory Symposium*, *Harvard Civil Rights-Civil Liberties Law Review*, vol.22.

37 [37]E.Mensch, *'Contract as Ideology'*, *Stanford Law Review*, vol.33.

'reasonableness' mean when strung between the ideology of freedom of contract and the ideology of freedom per se. She goes on to argue that technically all contracts are in restraint of trade, especially when circumstances have changed in the interim before performance and the contract is no longer value-enhancing to one party. The legal system then is essentially involved in the ideological task of drawing lines in the field of contract, using both a formal notion of freedom and a substantive one.

This Critical project of showing up the indeterminacies in legal doctrine has taken in very many fields of doctrine, contract law, welfare law, labour law, employment law. They draw attention also to at least one "fundamental contradiction"[38], that is, between, the individual and the community. The legal system essentially has to embody values from both spheres, because it at once wants to protect autonomy and maintain some sort of semblance of community. Thus again if we turn to contract law. We can see the fundamental contradiction in play in a case relating to say, a clause limiting the liability of the supplier in a consumer contract. The Unfair Contract Terms Act requires that a court scrutinise such a term for its 'reasonableness' but again, that is a meaningless stipulation for the court is confronted with a choice between freedom of contract, the classic affirmation of autonomy and individual freedom and the 'communitarian' intentions of the statute.

Now of course some may argue that such a case is resolvable, so if we think back to Eisenberg, the judge may be able to conclude the case by reference to the dominant social morality. The ultimate point behind the CLS critique however, once they have demonstrated the contingency of case-decisions, the involvement of 'politics', is to argue that judges should not decide the cases according to the dominant moral and political principles of the time. The aim is to convince judges that they can make legitimate, legally tenable, alternative judgements. Unger dubs this the realisation of "deviationist doctrine", Kennedy calls it "the vocation of social transformation". There are a number of possible aspects which this practice can realise:

- power is not fully efficacious unless it is consistent in its operation. Normalisation, or the bio-power pursuit of an anatomo-poltics which utilises also the law can be challenged through this deviationist doctrine. Its aim is to to shatter consistencies in the law, to disrupt

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38 [38]D.Kennedy's phrase, from *'The Structure and Substance of Blackstone's Commentaries'*, excerpted in *Lloyd's Introduction to Jurisprudence*, ed. M.Freeman, 6th ed, Sweet & Maxwell, (London, 1994).

any thematisations. As Kelman puts it, the critical legal project is fundamentally concerned with "trashing" law's empire and breaking up established patterns of power and doctrine.[39]
- individual decisions can have substantive effects. So for instance in a case regarding a labour dispute, a case of the sort we discussed earlier in the context of the individual existing in a field of socio-legal relations and the work of Robert Hale, the dominant doctrine may favour the employer and militate against the freedom of action that the protesters possess, if the case is decided through a deviationist doctrine however, the trade union can be favoured and a mediation of power ultimately achieved.
- acts of power often rely on or are aided by legal doctrine, it is a source of legitimation and it can confer power. Thus the social worker, one of Foucault's pet hates, has certain legal powers of intervention and removal and so on. If a deviationist doctrine is in play, the social worker will first of all be more wary of exercising these powers, will be more rigorous in her fact-checking and use of less invasive techniques because she will be aware that if a challenge is made, the court is now more likely to make a properly independent and thorough evaluation of her actions, and ultimately more likely also to rule against her. Second, certain of her powers may be taken away entirely by a court.
- Foucault writes, in the quotation above, point 2, that a progressive politics focuses on the play of dependencies between the local transformations it effects. This remark finds consonance in the Robert Gordon's discussion. Gordon too is considering the possibilities of a deviationist doctrine and his comments join also with the socialisation of law that we have already attempted at length:

"Many Critical writers would, I think, claim not only that law figures as a factor in the power relationships of individuals and social classes but also that it is omnipresent in the very marrow of society- that lawmaking and law-interpreting institutions have been among the primary sources of the pictures of order and disorder, virtue and vice, reasonableness and craziness, Realism and visionary naivete and of some of the most commonplace aspects of social reality that ordinary people carry around with them and use in ordering their lives. To put this another way, the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live. "Either this world," legal actions are always implicitly asserting, "some slightly amended version of this world, or the Deluge.""[40]

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39 [39]M.Kelman, *'Trashing'*, *Stanford Law Review*, 36 (1984) 293.

40 [40]R.Gordon, *'Critical Legal Histories'*, *Stanford Law Review*, 36 (1984) 57, at p.109.

For Gordon then law is more than merely social, it is constitutive of conciousness and so if a deviationist doctrine comes into operation, even in a limited way, even if a few judges are convinced by the Crits, the sense that the present order is the only one possible should begin to fade. Deviationist doctrine can then lead to the imagination of alternative possibilities more generally. Clearly this is not a leap up to a transgressive politics because no broad, new vision is being sought, we are not hereby putting our, Foucault's words, point 2 again, "faith in the uniform abstraction of change or the thaumaturgical presence of genius", rather we are learning that the current is not a uniform abstraction and that there may be no genius thaumaturgically present in it. Deviationist doctrine threatens merely to free up our conciousness to the realisation that we can make changes, that bit by bit, progressively, we can attain a different world. Deviationist doctrine bolsters really our ability to creatively interact with the law, an activity that was discussed in the last Section, we can under its instantiation be more bold in how we resist, we will undoubtedly begin to challenge more rules and principles because the possibility of them being reformed will be greater, we will thus be less prone to normalisation, less vulnerable overall to the functionings of disciplinary power.

*c. Visions of practice*

First of all, the Crits often write of radicalising or politicising the courtroom. Thus Gabel and Harris contend:"The robed judge who sits elevated from the gathering, the official and hushed character of the legal proceeding, the architecture of the room, the complex procedural technicailities- all of these and many other features of the courtroom ritual serve to reinculcate the political authority of the State, and through it the legitimacy of the socioeconomic order as a whole."That final clause is perhaps a little too strong but the point overall is a fair one. The prescriptive argument then is that lawyers interact more with the environment and with the formal legal process. Thus a defence lawyer should argue for bail standing next to his client, hence, the judge will have to turn in her seat and look directly at the accused. Those sympathetic to the accused should be brought to sit in the courtroom and to observe the trial and to be observed, it is argued that especially in freedom of speech cases or cases involving violence against women, this can be important in that it gives the case some social context. Really though these are all matters of strategy, and can be utilised as much by the 'conservative' side as by the 'radical' one. A deeper suggestion is

that there be a deprofessionalisation of the lawyer-client relationship. So lawyers with progressive ideas should be explicitly progressivist. They should not attempt to appear objective and neutral to their clients but instead empathise with them, demonstrate to them that the case they are involved in can become a source of political strength to them, to the lawyer and also, to broader social movements. Simon in fact goes further, he argues that lawyers should be pro-active in this.[41] Progressive lawyers should seek out cases which could undermine hierarchical relationships. Also, they should encourage their clients to enter into non-hierarchical communities of interest, ie. commune with other clients of theirs, and clients of other law firms, or with pressure groups and reform movements. The lawyer should then become a sort of recruitment officer for the progressive politics. And also, of course, if he is attempting to wow judges towards deviationist decisions, he is a front-line political activist.

A final idea relates to the forums of rule-making that we discussed earlier. It is clear that at present many of these forums are dominated by the usual suspects of the power-regime, industrial interests, the professions, and so forth. It is arguable however that more and more rigorous participation in such processes could bring rewards. Thus, McAuslan for instance, submits that agencies are still able to use the obfuscatory language of 'public interest' when it comes to announcing their decisions and formulating initial and final drafts of the rules.[42] What then is necessary is for participation to be first of all stepped up, and for that participation to stress exactly the ways in which the rules do not satisfy the public interest or how they further partial interests. Administrative law isn't perhaps a field in which one would expect to find radicals but they are many others such as McAuslan.[43] Their stress too is on the fact that this delegated rule-making is extremely important and pervasive. It is through such rule-making that the state often pursues micro-level objectives, for example, the guidelines for regulatory agencies are formulated in this way, the licensing requirements for certain professions, even the formulation of prison rules involves an initial consultative process. And so, the involvement of progressives is essential, if unable to ensure that the rules are rigorous and properly protective of autonomy and so forth, such involvement could at least dent the public image and legitimation effects of the process, and that perhaps would persuade the courts into being less deferential in the judicial review of such regulations.

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41 [41]Gabel and Harris, p.317.

42 [42]W.Simon, *'Visions of Practice in Legal Thought'*, *Stanford Law Review*, 36 (1984) 469.

43 [43]P.McAuslan, *The Ideologies of Planning Law*, (1983).

And so really and somewhat abruptly concludes my quick guide to going through and using the law for the purposes of resistance. Foucault, or at least, a part of Foucault believed in the worth of a progressive politics, and though he himself either expelled law entirely or tied it in entirely to the projects of the power-regime, I have attempted to show and given suggestions as to how law is useful in acts of resistance. It follows I hope from the plugging of law into society that was pursued so doggedly in the last Section, that these are relevant and potentially efficacious suggestions.

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