REVIEW ARTICLE

BETWEEN DETERMINATION AND RESPONSIVENESS: A THIRD SPACE IN FOUCAULT?*

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Perhaps it would not be altogether unacceptable to suggest that throughout the 1970s, Foucault was found struggling in intellectual directions not easily reconcilable. Consequently, his positions on law (developed mostly during this phase) show a measure of inconsistency[1]. Critical scholarship on Foucault's law has so far progressed in two opposed theses: expulsion and retrieval. The first suggests that Foucault views modern power as driven not by codes of law but by codes of normalization. In other words, it would argue that Foucault subscribes to the progressive attenuation of law (read as juridico-political) by the two exclusively modern forms of power: discipline and biopolitics. Retrieval thesis in contrast emphasizes the crucial dependence of disciplinary apparatus on law; as such law and the disciplines are interdependent, which also explains the constant proliferation of law in modernity. To be noted, in neither of these two approaches does law have a measure of autonomy; instead, the debate has been around whether or not Foucault's 'regicide' of political power is complete in terms of law itself.

Critical more of the first than the second thesis, *Foucault's Law* offers a third position. Stressing the 'productive *ir*resolution' (56) that the two dimensions of law –

*Ben Golder and Peter Fitzpatrick, *Foucault's Law*, Routledge-Cavendish, London & New York, 2009, $ 32. 35, 160 pages.

determination and response – are caught in, Golder and Fitzpatrick argue that Foucault's law cannot be either confined or contained effectively as suggested by both these theses in their opposed ways. The authors maintain that far from expelling or extricating law or subordinating it to different sources of power, Foucault was in fact thinking along lines of an uncontainable and illimitable law – a law that is always spilling over, always open to possibilities of 'being otherwise' and thus making any question of expressing this or that power look unconvincing. Given that it is the first book to come in this area in almost fifteen years and the notoriety that Foucault's law has enjoyed among scholars, this slender volume might well have some long vibrant years ahead of it.

The authors read in Foucault two crucial, 'uneasily but integrally' related dimensions of law which they spell out as follows: "The first dimension is...a determinate law which expresses a definite content. This is...law 'on the side' of the norm – a law to be resisted and transgressed. The second dimension of law is that dimension in which law, in a constitutive engagement by way of that same resistance and transgression, extends itself illimitably in its attempt to encompass and respond to what lies outside its definite content." (71) Law in its exactitude only pursues its recesses; transgression and limits do not have a life of their own outside the ceaseless act of negation and renewal. Textually rich in illustration, this is a markedly Nietzschean Foucault (at times via Blanchot and Bataille). (Occasional disappointments with some of Foucault's own takes on law are not concealed.) Since law is a form of power and since power for Foucault is primarily the power of dispersal, therefore for Fitzpatrick and Golder Foucault's law – much like violence itself – involves an excess, a supplementary effect on the conditions that produce both.

For a good part of the book, what the authors argue is, however, not at great variance with the so-called retrieval

thesis. They begin by situating liberal law in the governmentalization of the modern state – that is, the penetration of the pastoral gaze to effectively manage population through calculated means and targeted ends. The transition from the government of oneself to biopolitical management of life may not, however, be as seamless as they suggest ("We read the difference as being largely one of emphasis and of detail" 32). Recently it has been argued that by the mid-70s, Foucault had started questioning the idea of discipline as a defining modern power. Apparently, the economic liberalism of the Physiocrats alerted Foucault to the potentials of the non-disciplinary regimes of modern power[2]. Roughly coeval in the sense that both originated in the eighteenth century (with a slight time lag), I doubt whether Foucault read the anatomo-political techniques (discipline) and the techniques aimed at the collective or social bodies (biopolitics) in such dispersed manner. What is more, besides Foucault's citing of thanatopolitics in *History of Sexuality* Volume 1 (an argument that receives grudging acceptance by Golder and Fitzpatrick; 32) and the attempt to frame society in the lines of war in *Society Must Be Defended*, *Birth of Biopolitics* makes it sufficiently clear that – 'counter-Machiavellian art of government' (29), regardless – Physiocratic freedom (which would subsequently pave the way for governmentality) was possible to a large extent due to the sustaining structures of the erstwhile *raison d'etat*. In contemporary regimes of biocapitalism, are we moving out of disciplinary space as such with the coming of neoliberalism or is there an attempt to frame a new disciplinary space based on the current tides of economic self-interest and empowered community and matched with an aggressive biopoliticization of governance?

Golder and Fitzpatrick locate law in a triangle: "sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism" (33). This is not an

altogether new position, certainly not one that would place it too far from the retrieval thesis, neither is the subsequent elaboration of discipline's dependence on law due to unconvincing 'truth claims' of the human sciences (61), though seldom the point has been made with such elaboration and astuteness. What is doubtlessly new is the deliberation on law's response to recalcitrance. By alerting the determinate in law, recalcitrance opens a whole new theatre of illimitable responsiveness, of transgression and limit, to the point where the very reason for discipline's recourse to law is in jeopardy or nearly so (proving once more the 'absolute irreducibility' of the two axes of power: juridical and discipline 78)): "We locate Foucault's law between a subordinated law and a surpassing law, between a law which is confined by the emerging modalities of disciplinary power and biopower and one which is illimitable and always going beyond itself and those who would seek to instrumentalize it. It is in the seeming inconsistency between these two different facets of law that Foucault is in fact saying something entirely consistent – and very apposite – about law." (39)[3]

I say 'nearly so' because for the play framed around positive law to continue, the circuit can never be completely jeopardized; a return has to be enacted at some point. The theatre is renewed with every return: "the law in modernity comes to be ever more constantly involved in deploying and harnessing the disciplines – a kind of constitutive compatibility of law and discipline." (28) In other words, law enacts the possibility of what it can only be otherwise: containment. Such formulation, albeit fascinating, leaves a number of issues unsettled. Thought, Foucault observes, exists independently of 'systems and structures of discourse' ('Practicing Criticism' in *Politics, Philosophy, Culture: Interviews and other writings, 1977-1984*, Routledge, 1988). In a similar vein, one is tempted to ask whether recalcitrance too can be imagined as a space outside the systems and structures of

discourse. To extend the analogy further, one might also be curious to know whether the alerting of the determinate by recalcitrance is comparable to the materialization of thought in discourse, which has its 'conditions of existence and rules of formation' (ibid). Such equivalence between thought and recalcitrance would have wider implication for Golder and Fitzpatrick's project. If recalcitrance is continuous resistance to prescriptive modes of conduct, then as a relation of power it is part of the wider syndrome of 'strategic games between liberties'. Law's responsiveness as much as it's determination is essential for the strategic games of power; as a matter of fact, 'inventiveness of adjudication' is one of those things that resist recalcitrance from imbibing what can be called, the logic of rule – in other words, losing its agonal quality – a problem most identity movements face at some stage.[4]

Let me cite one last example of such unsettled issues. Early in the book – and much in lines of the retrieval thesis – the authors had suggested that the coexistence and interaction of law and the disciplines actually help them to realize their fullness. (59 – 60) These do not come to interact as fully formed modalities, but are actually constituted in the very process of cooperation. How would the aporic space that the authors imagine between the disciplines and the law in the earlier citation fit in here? Is it being suggested that coming to fullness – for the disciplines, especially – is also a process of being irreversibly fissured? If that is one of the arguments that the book offers, then the implications are well-nigh torrential for both a re-reading of Foucault and the extensive interpretative literature on the topic.

There is indeed something playful, even tireless, in Golder and Fitzpatrick's emphasis on the responsiveness of law. The gesture, however, is predominantly political - a meditation (or, for that matter, a series of meditations) on the limits of politics reduced to representative-calculative governance; by the same token, it is an usurpation of the question of justice from the habitual grooves of thought stuck

in the rhetoric of security and self-preservation. Ever since Hobbes' fragile formulation of the modern state to help transform the *homo hominus lupus* into the *homo hominus dues*, the human to be properly inclusive has to pass as it were through the security check. Therefore, a suspected non-citizen can well be kept in indefinite detention by a decree, bringing together the two axes of security – geopolitical and biopolitical – in perfect unison. It is here that the limits of liberal law are met. As part of the same political gesture mentioned above, if Golder and Fitzpatrick are interested in positive law, it is only by way of inviting the excluded – either as insurrection, or pathology or both – into the realm of Business as Usual. As a matter of fact, they are not interested in the positivities of law as such but in their opposite: transgression. Transgression, the book reminds us at different places, is that what brings positivities into effect. The emphasis on limits and transgressions is an attempt to look for new sources of possibilities for justice at the limits of law, beyond legal positivities and verifiable empirical realities.[5]

Continuing on the same register, the play between endless responsiveness and ever-renewed returns also shows that power by definition is incomplete - better, it is at once more than complete and always inadequately complete. All this goes to suggest that law cannot have an autonomy from power, neither can power *be* without the law and the subject; law, subject and power form a mutually constitutive circuit. What allows law to be illimitably responsive – i.e., law's alterity – is precisely its empty form. This is a theme that runs throughout Fitzpatrick's collection of essays, *Law as Resistance* (reviewed in the last issue of the *LCH*) – especially, in the second half of the collection. In a way the argument reaches its climax in *Foucault's Law*: "(T)he strategic reversibility of Foucault's law consists precisely in the fact that what makes it open to appropriation and domination simultaneously makes it open to resignification and renewal that eludes

the determination of a sovereign or a given regime of power." (84)

Read literally, such formulations should not have made François Ewald's conception of the social law entirely unacceptable to Golder and Fitzpatrick. For Ewald, the social is the space of ever renewed contestation and negotiations with the aim of reaching provisional consensus. What propels law's strategic reversibility for Golder and Fitzpatrick, conversely, is law's illimitability, its perceived propensity to break asunder even the slightest semblance of consensus. Committed as the authors are to "the dispersal and the suscitating opening of society to alterity" (100), Ewald's understanding of social bond framed in the lines of what can be called a discursive *modus vivendi* is politically contestable6; in fact, they call it "the comfortable enclosure and sheltering of a socius" (100) and read in his enterprise an attempt to propose means by which "society coincide with itself" (102). Even though Ewald moves away from Kant's notion of law as rational statements making the basis of the social, he sees an untarnishable source of reflexivity in society as this comment would illustrate: "It is a fact that there is no (positive) law without a law of law, no law without a principle, an instance of reflexion, whereby the law thinks about itself." (104) Such faith in ratiocination helps Ewald to embrace the social in a disenchanted world but by the same measure it constricts the scope of his argumentative democracy.

Ewald's arguments are not without purchase in governmentality literature and bear some apparent similarities with Foucault's notion – developed in the 1970s – of the modern liberal state being framed in the lines of civil society. What often is missed out in this context is Foucault's argument that the deployment of pastoral power in modern societies is structured and mobilized by the perceived threat of the illiberal. The agenda of limited government is actually a call for pervasive governance, promoting the new emphasis on the self-forming, self-

monitoring, ethical citizen. It can perhaps be said that what Foucault was trying to achieve over the 1970s – contrary currents regardless – is a cartography of the new classificatory state. As a matter of fact, his enterprise seems more relevant today as everyday life is kept hostage at the juncture of all kinds of risks and explained by a host of risk discourses: anthropological, medical, criminological, public safety, etc. The aim is to produce a governable biopopulace and quarantine the new savage.

The crucial question is: how does this book (along with Fitzpatrick's *Law as Resistance*) – the stress on illimitability and alterity of law being so abiding for the authors – match up with this new scenario? For law to be indefinitely responsive, it needs a liberal space; by implication, the 'beyond' that responsiveness imagines has ultimately to be folded back unto the very matrix it desperately wants to exceed. This is in a way a veritable aesthetic format. Viewed in another way, infinite response is a disavowal of representation, of any systemic knowledge as such; it is an opening to the ethics of illimitable responsibility for the other. But regardless of whether one takes the aesthetic or the ethical route, the question that remains to be answered is what chance does legal responsiveness have in a world where liberal freedom is increasingly implicated in liberal war? If we wish, we can perhaps take the question a step further and ask, wasn't this always so right from the very inception of liberalism as a philosophy of governance? Hasn't liberalism always been driven on the one hand to discipline, quarantine or even eliminate what it perceived as illiberal internally and on the other wage war to expand the zone of liberal peace externally?[7] One can think of two prospects here. First, the optimistic prospect. Here justice wills itself into the body of law as a corrosive moment and paves the way for ceaseless agonism. The other is pessimistic, where an illimitable law operating within a liberal matrix is exhausted in the dialectical spiral of secrecy and revelation, of rights and counter-rights. This is also not to forget also

that illimitable response logically also implies illimitable determinacy.

NOTES

1. A different version of the essay came as a book review in *Law, Culture and the Humanities* (Vol. 6, No. 3, October, 2010)
2. Michael C. Behrent: "A Seventies Thing: on the limits of Foucault's neoliberalism course for understanding the present" in Sam Binkley and Jorge Capetiillo (ed) *A Foucault for the 21st Century: Governmentality, Biopolitics and Discipline in the new Millennium* (2009).
3. The idea of law's infinite responsiveness is profoundly Derridean – thought's journey from the finitude of experience to a generalized realm beyond finitude. Comparing Derrida's scheme with Kant's autonomous subject of reason and pure duty, Claire Colebrook comments: "Without that appeal to an original, if purely formal, subjective ground, Derrida's deconstruction can never arrive at justice or pure law, but can only regard any positive law as necessarily haunted by the possibility of a justice that resists full conceptualisation and actualisation." Colebrook, "Legal Theory after Deleuze" in Rosi Braidotti, Clarie Colebrook and Patrick Hanafin (ed) *Deleuze and Law: Forensic Futures* (2009), p. 10.
4. For a somewhat comparable line of analysis of thought and recalcitrance, see Jon Simons, *Foucault and the Political*, 1995, especially pp. 54-56, 82; see also the introduction of *Deleuze and Law*, cited above.
5. Marriane Constable does a similar kind of exercise in engaging with the silences of legal texts. See her, *Just Silences: the limits and possibilities of modern law* (2005). In this context, of interest is her argument that illimitability is actually the sign of eternal deferral and spiraling incompletion of the positivist legal system; either it is eternally replacing custom or it is being already transformed into something else (pp. 30-31).
6. For a Rawlsian modification of Foucault, also see Duncan Ivison, *Postcolonial Liberalism* (2002), especially, chapter 6: "The Postcolonial State".
7. Julian Reid, *The biopolitics of the war on terror* (2006) and Michael Dillon and Julian Reid, *The Liberal Way of War: killing to make life live* (2009) make a forceful argument along these lines.