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Debate

## Foucault, Surveillance and the Law of the Outside

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### Introduction

*The inside as an operation of the outside: in all his work Foucault seems haunted by this theme of an inside which is merely the fold of the outside, as if the ship were a folding of the sea.*

– Gilles Deleuze, *Foucault* (2006: 81)

This note could be even shorter than it has to be if a prevalent perspective on our brief were adopted. Broadly, that brief evokes the relation between law and surveillance in Foucault's work. The standard perspective would render that relation in terms of law's abjection. A compendious instance comes with the "expulsion thesis" (see Golder and Fitzpatrick 2009: chapter 1). This thesis has it that Foucault expelled law from a modernity formed by and in a conglomerate of disciplinary powers and a biopower made operative through the managed governing of whole populations. More precisely, with the expulsion thesis law is entirely if functionally subsumed within this conglomerate. It has no autonomous existence. Foucault did say as much (e.g. 1981: 89—all unnamed references will be to Foucault). And this does pose an obvious problem for what will be our contrary argument, and especially so in relation to surveillance since Foucault does vividly instance surveillance as subsuming the juridical (2001a: 73).

That Foucault also said the opposite may provide a life-line however. This "line" has already been posed in our choice of epigraph. The illimitable, uncontainable outside posited there would pervade and constantly constitute an inside and, placing this imperative in the present context, the inside would characterise the conglomerate powers as formed and emplaced. Because Foucault identifies law with this outside as we shall see, law could not be simply subsumed in the conglomerate but would subsist illimitably beyond it. The outcome, however, is not the dominance of one or the other. As Deleuze would have it, the outcome would be continually "non-stratified" (Deleuze 2006: 71-2). This seeming impasse will be, in a sense, resolved by seeing law as a generative fusion of its two seemingly contradictory dimensions, dimensions in which law is subsumed by surveillance whilst remaining illimitably uncontained by it. In that dimension of illimitability it ultimately surpasses surveillance.

The plot now unfolds by way of the following headings: Law's Abjection, Law's Outside, and finally, Law's Conclusion.

## Law's Abjection

Foucault often attributed something like a completeness to the range and purchase of the conglomerate of biopower and disciplinary powers. Biopower, along with its sustaining scientism, enabled a comprehensive “science of government” of whole “populations” thereby bringing a “governmentality” to bear on the entire social body, a social that “is the effect not of a consensus but of the materiality of power operating on the bodies of individuals” (1980a: 55; 2007: 104, 108-9; 2008: 15-16). Whilst this biopower, projected as co-extensive with “life”, operated “in a different scale” to “individualizing yet normalizing disciplinary powers”, it itself does mark off and serves to constitute the subjects of disciplinary power (2008: 184, 194). It “dovetail[s] into” the disciplines so that they “and the regulating of the population constituted the two poles around which the organization of power over life was deployed” (1981: 139; 2003a: 242). In turn, “discipline was never more important or more valorized than at the moment when it became important to manage a population”, and that “implies management of population in its depths and its details” (2001b: 219).

Disciplinary power itself in its “mechanisms” not only disciplined individuals but could “penetrate the social body in its totality” (2003b: 87). Through that comprehension, disciplinary powers penetrate and effect the very constitution of the individual. As Foucault has it, this individual is “a reality fabricated by this specific technology of power that I have called ‘discipline’” (1979: 194): “in himself the effect of a subjection much more profound than himself” (1979: 30).

Such powers are for Foucault “exercised...through permanent mechanisms of surveillance and control” (2003b: 87). And in the realm of biopower, surveillance would inhabit those “apparatuses of security” which were the “essential mechanism” of governing: “the essential function of security... is to respond to a reality in such a way that this response cancels out the reality to which it responds—nullifies it, or limits, checks or regulates it”—“the delimitation of phenomena within acceptable limits” (2007: 47, 108; and 2003a: 242-3). “We live” thence “in...a panoptic society, a society where panopticism reigns” (2001a: 70). The idea and efficacy of Foucault’s panopticism can be readily extended beyond Bentham’s institutional model in that Foucault understood the Panopticon “as a generalizable model of functioning; a way of defining power relations in terms of the everyday life of men” (1979: 205). As such, it can accommodate those tentacular technologies of information gathering, which have become more profuse since Foucault’s time (see Simon 2005). The force of its current defining effect can be instanced in the operation of US drones where individuals can become targets for killing where their behaviour conforms to a perceived “signature” suggesting suspicious activity (Chamayou 2015: chapter 5).

In all, with the determining completeness of the conglomerate of powers in general and of surveillance in particular, Foucault may readily be understood as expelling law from modernity or, more precisely, as marginalising law in its relation to the conglomerate, or as subsuming law to it (e.g. 1979: 222). This abject law is denied any autonomous efficacy. So, taking surveillance as a telling instance, Foucault sees it as coming to saturate and even appropriate legal processes (2001a: 57, 71).

There is, however, an intimation of ambivalence in this abject relation between law and the powers of the conglomerate. Closer observation may render a saturation of law as a saturation by law. So, Foucault finds that “[a]t the heart of all disciplinary systems functions a small penal mechanism. It enjoys a kind of judicial privilege with its own laws, its specific offenses, its particular forms of judgement” (1979: 177-178). These systems, furthermore, mete out a “justice”, enforce “an ‘artificial’ order, explicitly laid down by a law” and import “a double juridico-natural reference”, this particular mix comprising “a new form of ‘law’” (1979: 179, 304). Still more, the operation of a normalising disciplinary power involves a “judging”: we are “in the society of the teacher-judge, the doctor-judge, the educator-judge, the ‘social worker’-judge” (1979: 304). And indeed, the doctor as thaumaturge “could only exert his absolute

authority over the world of the asylum insofar as he was...Father and Judge, Family and Law...” (2009: 506). Indeed “the activity of judging has increased precisely to the extent that the normalizing power has spread” (1979: 304). In sum, what we have here is “a single process of ‘epistemologico-juridical’ formation”, a “scientifico-legal complex” (1979: 23). Evidently more is involved than the simple subjection of law.

## Law’s Outside

Whilst Foucault did affirm a comprehensive, even constitutive, hold of the conglomerate on subjects and populations, he was also emphatic about its limits. So, whilst biopower would seek to “invest life through and through”, life still “constantly escapes”—life as a “living in complete mobility” (1981: 139, 143; and see 1980b; 138): “[w]hen power becomes bio-power, resistance becomes the power of life, a vital power that cannot be confined...” (Deleuze 1999: 77). Conversely, then, power “depends” on an uncontainable, resistant “life” that is insistently intrinsic to it (1981: 95, 144).

The individual likewise escapes—the individual as the erstwhile normalised subject created by an encompassing disciplinary power. The subject is an “enslaved sovereign” but a sovereign nonetheless, not only an effect of disciplinary power but a being who effects it (1970: 312). Surveillance plays a positive part in the efficacy of this individual “subjected to” it; and so the individual who “knows it”, or perceives its possibility,

assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.

(1979: 202-3; see also 1980c:155)

The comprehensive claims of, or associated with, the conglomerate powers now exhibit an aporetic gap. On one side of the divide, these powers exhibit an embedded positivity, a scientism, a “materiality” of which “nothing could be more real” (1980a: 55, 57). Yet, on the other, these powers would claim to “govern and administer” life, to encompass a “universality” (1979: 178, 304; 1981: 143). To do so, such powers have to meet an “ideal” of being “indefinite”, “without limit”, “never closed” (1979: 227). Thus it could be said of Panoptic power that it is “a machinery that no one owns”, a power “detached from any specific use” (1980c: 156; 1979: 145). In sum, the universality of conglomerate powers is advanced as consonant with their positivity. But this would be to make the illimitable immanent to the determinate, thence ramping up the determinate, a “Something”, to the status of the transcendent (Deleuze and Guattari 1994: 45). In a “modern” secular world a resolving resort to the transcendent is not available. It could however be argued that potential resolution is always impelled from within, impelled immanently, in that the advance of knowledge continually uncovers new facts that resolve the disparity between a present manifestation of a power and challenges to it. Quite apart from this competence being too occasional and serendipitous to meet the needs of powers brought constantly to bear on labile and changeful populations and individuals, it would also import an openness, a reaching to a constituent outside that cannot be made immanent to the extant.

The resulting impasse, this inherent limiting of a putatively positive illimitability, is a clouded call for law to move from being dependent on conglomerate powers to their being dependent on it, a call for the exclusion thesis to be complemented by an inclusion thesis. And here we could return to that insinuate law abundantly instanced towards the end of the last section—a law coupled in “a single process of ‘epistemologico-juridical’ formation”, in a “scientifico-legal complex” (1979: 23).

Law cannot be contained in or by such couplings. The recalcitrant, the transgressive, the demands of a sheer and constant being otherwise, all would call for a responsive openness ever beyond the positivity of

the “epistemologico” or the “scientifico”. Tellingly, “without the possibility of recalcitrance power would be equivalent to a physical determination” (2001c: 342). So, the subject, encountered earlier escaping an encompassing disciplinary power, would include the legal subject. And the “life” that escapes biopower would include the life of “the social body”, a “social” in which law is innate (1980b: 138; Golder and Fitzpatrick 2009: 124-30).

Which leaves a puzzle and a provocation: if law, like the conglomerate powers, has a determinate existence in the world, an existence which adopts nonetheless a situated illimitability casting its decrees as “universal norms” (1979: 223), how can it avoid assuming a transcendence intrinsically incompatible with a modern ethos? The brief answer is that law’s posited existence is explicitly and always contingent on its being otherwise and as such escapes an encompassing positivity. A somewhat longer answer involves Foucault’s law of the outside.

Perhaps the most striking affirmation of this law comes from Foucault’s beautiful engagement with Blanchot in the chapter “Where Is the Law/And What Does It Do?”:

How could one know the law and truly experience it, how could one force it to come into view, to exercise its powers clearly, to speak, without provoking it, without pursuing it into its recesses, without resolutely going ever farther into the outside into which it is always receding?

(1987: 34)

Along with its “going ever farther into the outside” there is “the silent and infinitely accommodating welcome of the law” in which law becomes of “the outside that envelops conduct, thereby removing it from all interiority” (1987: 34, 38). Yet there is also a counter-movement, as it were. This infinitely trajected law is “placed under restraint”, put “beside itself”, as it separates itself “via the very separation that institutes it as form, in the very movement by which it formulates...exteriority as law”, whence “the law takes place (has found its place)” (1987: 35, 36; Blanchot 1993: 434). In taking place, in taking on formed content “beside itself”, “the presence of the law” is still “its concealment”, and that elusive presence “haunts cities, institutions, conduct, and gestures” (1987: 33). Law is not “self-evident” (1987: 33). It “has no existence on its own” (Savignin in Rahmatian 2007: 6).

Having to eschew being an enduringly posited “Something”, law does not endow any transcendent claim with content: to law “alone, pure transcendence”, as Blanchot has it (1992: 25). In the absence of materiality, law derives its content from elsewhere—an elsewhere that would include, as Foucault observed and in so many ways, a normalising “continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory” (1981: 144).

## Law’s Conclusion

The outcome then would be an appositive and mutual relation, but the further outcome could be a confirmation of law’s ultimate dependence on conglomerate powers, including surveillance. Such a further outcome would be the obverse of what is imported by Foucault’s law. Whilst this law takes on the likeness of a vulnerable vacuity, a void, this is a void that has affect: there is still a “fullness of the void, something one cannot silence” (1987: 23). Law shares with other exemplars of the outside a fullness that “envelops conduct”, that enfolds an inside, rendering it as an “operation of the outside” (1987: 34; Deleuze 2006: 81). In so doing, law can create any reality, or unreality, it chooses (Dayan 2011). In “the forgetting of its origin” law alienates its derived content, its incipient inside, recreating that content as entirely its own—a “drying up” of “the source from which...it sprang” (Blanchot 1992: 25). Law is not ultimately dependent on any reference apart from self-reference. Law, then, ever provokes and awaits radical realisation.

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