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*Between Governance and Discipline: The Law and Michel Foucault**

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Abstract—This article attempts to re-establish the importance of Foucault's work for an understanding of the way in which modern law operates. This argument has two stages. Firstly, there is a critique of the interpretation of Foucault's work by legal and sociological thinkers. It is argued that by reading the term 'juridical' as synonymous with the term 'law' in Foucault, people miss the substance of Foucault's argument. The term juridical describes an arrangement and a representation of power rather than the law. This is made clear through a critique of J. S. Mill's *On Liberty* which is shown to make a juridical distinction between power and a free space of action which is unsustainable. Secondly, Foucault's genealogy of power relations is recast from the perspective of a legal theoretician. Foucault's history of power relations is constructed from historical differences in the mode of operation of power and discourse. By analysing these differences and their relationship to the mode of operation of law, an account of the place of modern law in Foucault's genealogy is established. Modern law operates between Foucault's concepts of government and discipline. It provides a key way in which government decisions can adjust the relationships between disciplinary institutions. This introduces the idea that law begins to operate in the perspective of the complete lives of individuals rather than just to prevent certain actions. Law, then, operates in accordance with what Foucault calls 'bio-power'.

1. *Introduction*

A number of scholars whose approach is within the Critical Legal Studies movement have recently expressed scepticism about Michel Foucault's understanding of law. In turn, in this article, I would like to express scepticism about their understanding of Foucault's work in general and in particular his argument about the decline of the juridical matrix of power. In the first part of the article I would like to show some of the inadequacies of recent jurisprudential scholarship on Foucault. Briefly there are two different claims which have been raised against Foucault's understanding of law. The first is developed by Hunt and Wickham in their book *Foucault and the Law*¹ and is shared by Peter Fitzpatrick. They

* Many thanks go to Costas Douzinas, Gunther Teubner, Kenneth Campbell, John Gardner and Adam Tompkins for their instructive comments on an earlier draft of this paper.

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¹ *Foucault and the Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994). Hereafter referred to as Hunt and Wickham (1994).

argue that in contrasting 'juridical power' and 'disciplinary power' he reduces the law to simple formulae which do not adequately describe its nature in the modern world. In this reading 'juridical power' is equated with 'legal power', an equation which I would resist. The second criticism of Foucault, which is slightly more sophisticated, is argued for by Boaventura de Sousa Santos in his book *Toward a New Common Sense*.² He suggests that although Foucault is correct in highlighting the role which disciplinary power has played in modern society, he underestimates the extent to which disciplinary power is intertwined with juridical power. Again Santos equates 'juridical power' with 'legal power'. In failing to appreciate the contrast which Foucault makes between disciplinary power and the juridical matrix I would argue that the potential of Foucault's work to position modern law³ is lost.

Both Hunt and Wickham and Santos attempt to find in Foucault's work an answer to the question 'what are the minimum conditions for a statement or system of statements to be considered as law?'. By concentrating on this kind of question both the originality of Foucault's approach and the challenge which such an approach provides are lost. Foucault's genealogical method analyses the political structures of power relations in different periods, bringing out their particularity through the historical *changes* that take place. In line with this, it is the *differences* between the modes of operation of law that characterize a Foucauldian approach rather than what they have in common. That is not to say that one *could not* find the minimum conditions for a discourse to be considered as law but this is just not Foucault's question. Furthermore, his studies *do not* rely on any particular answer to this question. For Hunt and Wickham and Santos the term 'juridical' refers directly to law and thus, for them, it is by analysing this term that one could discover the answer to this question. But a careful reading of Foucault shows that it is not his intention to equate the terms 'juridical' and 'law'. The term juridical, as we shall see, refers to the *conception of power relations* which one might call Austinian. It is neither the case that all law is necessarily 'juridical' in Foucault's understanding of the term nor that the only way in which juridical power manifests itself is legal.

What is at stake in the different interpretations of the term 'juridical'? Once this term is understood correctly, the position of the law in Foucault's work becomes an open question. This leaves us with two problems which this article is designed to address. Firstly, if it is the case that law, for Foucault, is not necessarily juridical and that the juridical does not always find its expression in law the question remains as to the relationship between this juridical conception of power relations and the law. But secondly, and more importantly, if Hunt and Wickham are mistaken about the relationship between the juridical and the

² *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* (London: Routledge, 1995). hereafter referred to as Santos (1995).

³ Foucault's work, until the end of the 1970s, distinguishes between three periods; the Middle Ages, the Classical Age, and the Modern Age. Roughly, the Middle Ages extends from the twelfth century to the middle of the seventeenth, the Classical Age runs from the middle of the seventeenth until the end of the eighteenth century and the Modern Age begins at the beginning of the nineteenth century.

law, a re-evaluation of the relationship between the *other* mechanisms of power and the law is called for. For Foucault the juridical conception of power relations no longer adequately describes the way in which power predominantly operates in modern society; as Foucault has famously written, 'in political thought and analysis, we still have not cut off the head of the king';⁴ the ancient conception of power as a possession which is wielded to deny certain forms of action is still in place but it no longer effectively describes the various ways in which power manifests itself. If the law is not necessarily juridical in its operation, and I would argue that in modern society it is not even predominantly juridical in Foucault's sense, then the relationship between the law and the modern forms of power (that is discipline and government) needs to be re-evaluated. The criticism that Foucault reduces *law* to the Austinian conception of 'rules + sanctions' cannot, then, be levelled at Foucault as, for him, this is the very mode of operation of power which has been superceded. And this supercession has resulted not only in the proliferation of disciplinary power but also in the transformation of law. Whilst jurisprudential scholarship since Hart has not failed to perceive the changing character of law it has failed to situate it historically and politically. That is to say, by considering the analytical question 'what is law?' in isolation, jurisprudential scholarship has not accounted for the *historical differences* in law's evolution. The rich history of *critique* which is associated with this philosophy of difference is thus lost to the Anglo-American tradition. By attempting to bring this question of the *nature* of law back to Foucault, Hunt and Wickham also miss this vital element of Foucault's genealogical method.⁵

On a more general level, a Foucauldian account of the law should help to show some weaknesses in the liberal position on law. Foucault's work shows that the liberal understanding of power which opposes the areas controlled by social and state power to a space of freedom is inadequate when seen against the background of the multiplicitous operations of power. The liberal conception sees power as operating predominantly on a field of acts. The primary question for liberal theory is 'which acts ought to be permitted and which acts ought to be prohibited?' Foucault's account of power relations, however, shows that power is involved in the construction of the *lives* of individuals and, in modern society at least, is exercised on the field of lives. Power is not only preventative, it is also creative or as Foucault would put it, it is not only deductive, it is also

⁴ Foucault, *The History of Sexuality* Vol. 1 (trans Hurlley, London: Penguin, 1978) Introduction at 88–9. Hereafter referred to as *HoS*.

⁵ Whilst Hunt and Wickham are aware of Foucault's 'anti-subjectivist' view of history, they do not recognize the implications of this position. For Foucault, as for Heidegger, man is thrown into a historical frame which he inherits and which does not evolve according to the intentions of a rational animal that lies outside this evolution and directs it. The paradigm shifts in different historical periods, in Foucault, consist not just of an alteration of the subject, then, but of an alteration of the 'frame' of social phenomena themselves. By showing how the subject is constructed within the social frame, then, Foucault's predominant purpose is not to criticize traditional historical methodology (though this is one implication of his work). His predominant purpose is to provide a critique of modernity through a thorough analysis of the social frame in which the subject is immanent. The juridical conception of power provides one way in which the subject is constructed (as a transgressor) and it is to this that Foucault contrasts 'bio-power' whereby man is not seen predominantly through his transgression but with regard to his 'complete life'.

productive. But this creative or productive form of power does not take the spectacular form of legal or social interdiction. It operates through successive, trivial moments of exercise. Foucault makes this clear by using the concept of discipline. The succession of disciplinary forces, however, results in a dominating form which both constructs the subject and subjects him to subtle forms of control. As a result of Foucault's analysis, liberal theory, which still dominates legal philosophy, seems directed towards an archaic vision of society which was displaced more than 200 years ago. The dominant and dominating form of modern power which is characterized by discipline evades the liberal attack. As the law is complicit in this modern regime of power, the consequences of a Foucauldian account of the relationship between law and power provides a fundamental challenge to liberal jurisprudence. This can be shown most clearly against the background of Foucault's genealogy of power relations. Consequently, in the second part of the paper, I would like to try to re-establish Foucault's schema in order to discover the position of modern law in the continuum of power relations. To do this I will show how the juridical matrix has been replaced by the two poles of bio-power: the disciplinary network and techniques of governance. A brief summary of my argument would be as follows. The juridical conception defines power in relation to a series of acts. It defines which acts transgress and which are permitted. Law is not the only way in which the transgressive threshold is defined nor is it the only way in which it is enforced. As John Stuart Mill, who might be called a typically juridical thinker, makes clear in *On Liberty* both social power and legal power can define the transgressive threshold. Hence what Foucault calls 'the juridical' is not equivalent to legal power. It describes any form of power which attempts to prevent a certain type of action through the threat of legal or social sanctions.

Foucault argues that this is not the predominant way in which power is exercised in the Modern Age. Rather, he suggests, modern power can be described by the term 'bio-power'. Bio-power does not operate in relation to a series of acts but rather in relation to the lives of individuals. Bio-power has two poles; discipline and governmentality. Discipline operates on particular individuals in a particular space. It collects information about an individual and acts according to that information. In the Classical Age it occurs in schools and workshops. In the Modern Age it spreads to families and hospitals and begins to be exercised by marginal religious groups, psychiatrists, psychologists, and social workers. Governmentality, on the other hand, operates on particular groups of individuals. It receives information through statistical analyses, financial reports and population registers. Its techniques of power are directed to making adjustments in the population and their economic condition. Legislation is one technique which is used to make these adjustments. It works alongside the other governmental devices which, in the eighteenth century, were collected under the name of the police.

Once we have developed the mode of formation and operation of these two poles of bio-power we will be in a position to consider the role of modern law.

Law, in my understanding operates as a field through which techniques of governance can intervene in the disciplinary network. Law, then, acts as an interface through which governmental decisions can take effect by adjusting the operations and arrangements of the disciplinary mechanisms. But by connecting itself to both of the poles of bio-power law, in justifying itself, it masks the need of each of these forms of power to legitimate themselves.

2. *Critique Misses the Target*

In *Foucault and the Law* Hunt and Wickham state that Foucault's understanding of law does not take into account the variety of roles which law plays in modern society. Their argument is based on two related claims. The first is that Foucault regards the law as equivalent to rules backed up by power and the second is that he equates the law with sovereignty. Of the former they write; 'the formula "law=rules+sanctions" lies at the heart of the positivist tradition in jurisprudence. It is thus pertinent that Foucault chooses to direct his fire against this widely held and influential conception of law, but fails to engage with any more sophisticated conceptions which seek to explore the connection between legal regulation, legal rights and constitutionalism' (Hunt and Wickham, 1994: 41). Hence they suggest that Foucault's conception of law falls to the same criticism which H. L. A. Hart famously made of Austin in *The Concept of Law*. To equate the law with criminal law, they argue, simply excludes too much. If regulation is one of the primary modes of power in modern western society then the law has an important role to play in the exercise of this form of power. In arguing for the latter the authors claim that Foucault equates law with pre-modern forms of power. They suggest that Foucault regards the law as emanating at every instance from sovereignty. They write that 'the strict association which Foucault makes between sovereignty and law is at best unhelpful and at worst simply perverse in denying the self-evident truth of the intimate connection between modern forms of power and legal mechanisms' (Hunt and Wickham, 1994: 62-3).

By formulating their argument in this way Hunt and Wickham have made clear a fundamental misunderstanding about Foucault's project as a whole. Foucault, as they themselves suggest, does not have a theory of what law, in all its different manifestations, *is*. Foucault was anything but a closet positivist. The law, in Foucault's account, operates in a number of different ways and within a number of different relationships of power. Hence François Ewald, who was a close colleague of Foucault, has written that we must 'imagine a history of law that would give meaning and function to the law's varying modes of formal expression'.⁶ *The Law* does not operate in the same way and in the same structures over history. And both its role and its formal

⁶ Ewald, 'Norms, Discipline and Law' in Post (ed.), *Law and the Order of Culture* (University of California Press, 1991) at 139. Hereafter referred to as Ewald (1990).

expression are at least partially governed by the predominant ways in which power is exercised.

Hunt and Wickham derive their argument about law from a number of statements which Foucault has written concerning 'the juridical'. Hence they quote Foucault from *The History of Sexuality* Vol. 1 where he writes 'we shall try to rid ourselves of a juridical and negative representation of power, and cease to conceive of it in terms of law, prohibition, liberty and sovereignty' (*HoS*: 90-1; Hunt and Wickham, 1994: 40). But whilst Foucault is arguing that power must not be understood in terms of the juridical, Hunt and Wickham seem to be suggesting that law must not be understood in terms of juridical power. Whilst they are clearly correct in not seeing law in this way, their argument would seem to have little relation to Foucault's understanding of the juridical. In his essay *Norms, Discipline and the Law* Ewald has already warned against lawyers equating juridical power and real law itself. We must, he writes, be careful to 'distinguish law and its formal expression from the juridical' (Ewald, 1990: 139). This is what Hunt and Wickham fail to do. In failing to provide an analysis of what Foucault means by 'the juridical', the nature of Foucault's argument is lost.

A similar criticism can be levelled at Boaventura de Sousa Santos. Santos argues that whilst disciplinary power is an important part of modern society, it has not replaced but only supplemented juridical power. For Santos, juridical power and disciplinary power are compatible with each other. There is, he writes, 'a deep interpenetration' between the two, which allows the 'isomorphic transformation of the former into an alter-ego of the latter' (Santos, 1995: 4). It is the possibility of these transformations, Santos suggests, that allows defendants to be at once legal and medical subjects and hence to be disposed of either to prisons or psychiatric institutions from the courtroom.

Again, this account seems to equate juridical power with the law. Furthermore, in *Discipline and Punish* Foucault provides us with a more than adequate account of the 'isomorphism' of which Santos writes. He suggests that the colonization of the punitive technology by the disciplinary mechanism has resulted in a continuum which operates between the hospital and the prison as well as including schools, the military and even social services. The possibility of alternative methods of disposal, in an account compatible with Foucault, would arise from the fact that *both* the prison and the psychiatric hospital are disciplinary institutions. The law, in this account, operates as a relay between the police and the disciplinary institutions, an idea which I hope to develop later.

The whole issue of the relationship between law and the different manifestations of power, which is probably the central theoretical advantage which can be provided by a Foucauldian account of law, is obscured if the term 'juridical' is read as synonymous with the term 'law'. The shifting structure of power relations provides the background against which the evolution of law can be understood. Even the criminal law, which has often been seen as the sole justification for an Austinian conception of law, can be understood as operating as a part of a disciplinary regime against which its gradual transformation can be better

appreciated. The psychiatrization of the modern criminal law, which has been well recognized, can best be understood as a disciplinary phenomena. It is not, I would argue, an example of the law bowing to the pressure of 'scientific knowledge'. Rather it is the law bowing to a disciplinary necessity:⁷ discipline requires more than just a legal transgression to impose a punishment. It requires that punishment *serves a purpose* in the context of the complete life of the individual or the particular group of which he or she is a part. Whilst the criminal law, to a certain extent, retains its juridical justifications and operates in a juridical way (punishing according to the nature of the transgression alone to deny that transgression) it also begins to evolve according to the disciplinary network of which it is a part. As we can see, and this should become clearer later, in modern society there is a complex relationship between the juridical justifications of law and the disciplinary network in which it takes its place in modern society.

3. *What is the Juridical?*

Perhaps a first step towards a more rigorous understanding of Foucault would be to consider more carefully the term 'juridical'. I have already suggested that for Foucault the juridical is not equivalent to law in all its manifestations. What, then, does the term refer to?

The term 'juridical', in Foucault's work, is somewhat difficult to pin down. He seems to use the term both to describe a discursive understanding of power, which could be either Modern or Classical and to describe a particular network of power; a real set of power relations which are connected together in a particular form. Ewald suggests that when Foucault uses the term he is referring merely to the discourse through which power articulates itself. The juridical, for Ewald, is a "code" that enabled monarchical power to constitute itself" (Ewald, 1991: 139). This is a little misleading. In *HoS* Foucault, in talking of 'the juridical system of law', suggests that 'law cannot help but be armed, and its arm, *par excellence*, is death' (*HoS*: 144). The juridical system, then, is not merely a discourse: it is armed. We must, however, be careful in interpreting this statement by Foucault. It is clear that Foucault is not talking about law as it manifests itself in the Modern Age. As he writes later, when bio-power grows in importance at the expense of the juridical 'the law operates more and more as a norm' (*HoS*: 144). The modern form of law, in Foucault's understanding is not juridical. Foucault contrasts modern law itself with juridical law. In order to capture the

⁷ On the one hand this results in extreme sentences being given to offenders who commit a series of minor 'social nuisances' (see, for example, *Dawn Clarke* (1975) 61 *Cr App R* 320). On the other it results in extremely light sentences for offenders who seriously transgress but for whom there is no purpose in punishing; a vivid example of this can be seen in the infanticide legislation. In both cases psychiatric concepts, which are at best scientifically dubious, are used to justify these legal decisions. In the former it is the concept of psychopathy, in the latter it is the psychiatric conditions following birth (see the Infanticide Act 1938). The former has been shown, by Baroness Wootton amongst others, to be circular whereas the latter, as Seabourne Davies notes in an article written at the time at which the Infanticide Act was passed, was never the basis upon which that Act was passed: see 'Child Killing in English Law' (1937) 1 *MLR* 203.

heterogeneous nature of 'the juridical' in Foucault's work, then, we must understand the term as referring both to a code which is used to describe power (a juridical discourse) *and* as a real network of power relations that was once in place.

This becomes a little clearer in Foucault's *Two Lectures*.⁸ In the second lecture, Foucault talks of the disjunction between the operations of disciplinary power and the juridical code that masks them. He suggests that power has maintained a way of describing itself which has little relation to the actual operations of power in modern society. Foucault calls the code by which power is described juridical whereas the actual mechanisms of power are known as disciplinary. However, in making this distinction he also suggests that the juridical code was originally articulated along with a particular arrangement of power relations that we might call a network or matrix. That is not to say that *power itself* can ever be described according to a juridical configuration but rather that individual power relations were once linked together in a network which can be so described. It is the whole system of connected power relations in the Middle Ages that we might call juridical rather than any particular exercise of power.

Hence we must consider three different phenomena if we are to understand the sophistication of Foucault's argument about law; firstly there is the law itself (which may take a number of different forms), secondly there is the network of power relations (which, at different times, may be either juridical or disciplinary, for example) and finally there is the code by which power presents itself (which for Foucault is consistently juridical).

We are now in a position to consider some of the elements of the juridical code itself. To do this I would like to consider the work of John Stuart Mill, a typical juridical thinker. I would like to show how Mill attempts to make a distinction between power and the free space which it maintains and how this distinction, in Mill's own work, collapses.

4. *What is in the Libertarian Space?*

'One still believes in good and evil and experiences the triumph of the good and the annihilation of evil as a task (that is English; typical case: the flathead John Stuart Mill)'.⁹

As the juridical discourse would have it, the series of acts form the field on which power is exercised. The law or morality traditionally defines, more or less precisely, the series of possible actions, certain of which are prohibited and certain of which are left within the free space. The liberalism of John Stuart Mill

⁸ Foucault, *Two Lectures in Power/Knowledge*, C. Gordon, (ed.) (Hemel Hempstead: Harvester/Wheatshaf, 1980). Hereafter referred to as *TL*.

⁹ Nietzsche, *The Will to Power*, Kaufmann and Hollingdale (trans) (New York: Vintage, 1968) at 21. Many thanks go to Adam Tomkins for drawing my attention to this quote.

is a good example of this juridical trend and by considering his essay *On Liberty*¹⁰ I hope to bring out the shift which Foucault traces from the juridical matrix to the modern forms of power.

In *On Liberty* Mill argues that there are two forms of power; the power of the state and social power. The former operates through the threat of legal punishments whereas the latter operates through social mandates. Both of these utilize sanctions in order to discourage the individual from committing certain acts. In general, Mill continues, independence needs to be defended against both of these forms of power. Mill therefore writes that 'there is a limit to the legitimate interference of collective opinion with individual independence' (Mill, 1859: 9). The role of good politics, for Mill, is to discover that limit. However, Mill suggests, the very possibility of benefiting from a free life depends on limiting certain actions by others. 'All that makes existence valuable to any one,' Mill writes, 'depends on the enforcement of restraints upon the actions of other people' (Mill 1859: 9). Therefore some rules of law and some forms of moral or social mandate must be imposed in order to restrain these undesirable, liberty-limiting, actions. It would seem, then, that it is freedom itself that legitimizes or authorizes the exercise of power. One could, Mill thought, decide whether a particular action ought to be restrained according to the principle of harm; it is those actions which are significantly harmful to others that need to be prevented through legal and social power. He writes: 'the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others' (Mill, 1859: 14). This argument would seem to be in line with his famous utilitarianist doctrine of which I need say no more.

If Mill's *On Liberty* can be regarded as a typical example of juridical thinking, then, it would seem that the juridical understanding of power is only articulated against a series of acts that it helps to define. In the juridical system acts must be distinguished according to what Luhmann calls a binary code; legal/illegal, or moral/immoral. And it is against this background of acts that its success or failure becomes visible. Hence, if we consider Mill's scheme in terms of law alone, we might find a 'loophole in the law' within which the law allows one to commit a harmful act. This would be an example of legal inadequacy. Alternatively, we might find the law overextending itself; the law might exercise its power to prevent a certain act which is not harmful.¹¹ Hence the problem of

¹⁰ J. S. Mill, 'On Liberty' in *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991). Hereafter referred to as Mill (1859).

¹¹ The case of *R v Brown* has been argued along these lines. In that case the defendants were convicted of sado-masochistic activity with full consent. On the one hand the case has been regarded as a substantial infringement on the liberty of the defendants, who did no harm to anyone outside their circle. Hence Lord Lowry states the case for the defence as follows; 'So far as I can see, the only counter argument is that to place a restriction on sado-masochism is an unwarranted interference with the private life and activities of persons who are indulging in a lawful pursuit and are doing no harm to anyone except, possibly, themselves' *R v Brown* [1993] 2 All ER 75 at 100; see also Lord Mustill's dissenting judgment in which he states that although the acts are morally repulsive, they are within the sphere of private morality and hence should not be punished by the law. On the other hand the decision to convict was defended on just this basis. Hence Lord Templeman stated that 'society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized'—*ibid* at 84.

legitimacy unfolds only on the basis of which acts are to be prevented and which are to be allowed. Whether power is exercised socially or legally, it defines a threshold of transgression; to act 'against' the predominant mechanisms of power in this scheme is not to resist; it is to transgress, to cross the threshold which marks the limit of the legal or social free space.

The absolute difference between this free space of legitimate action and the acts on which power could legitimately be exercised is the core distinction of *On Liberty* and of liberal thought in general. Through the liberal discourse, then, rules are articulated onto a series of acts and these rules are general and impersonal. As Anne Barron has put it; 'General rules therefore delineate spheres of autonomy within which individuals may pursue ends of their own choosing absolutely free of state interference'.¹² General rules are directed at acts and not at individuals; they are not specific to a class or to an individual. The paradigm of power, in this reading, is law.

As we have seen, at the beginning of *On Liberty*, Mill defines his problem in terms of the extent to which power can legitimately limit action; 'some rules of conduct', he writes, '... must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of the law. What these rules should be, is the principal question in human affairs' (Mill, 1859: 9). But in Section IV of *On Liberty* there is a slippage of this distinction and this slippage undermines it. It arises because Mill becomes aware that juridical power cannot go to the heart of individual action. Power, in Mill's scheme, can only prevent the most disordered action from occurring. It cannot encourage ordered or advantageous action. But we cannot be expected not to interfere with the actions of another in any way at all unless these acts are harmful. Mill is aware of this difficulty and he hopes to overcome it with a further distinction. And this distinction can be read as superceding that between the sphere of power and the 'autonomous spheres' which help to legitimate it. It is worth quoting the relevant passage in full.

'It would be a great misunderstanding of this doctrine to suppose that it is one of selfish indifference,' Mill writes, 'which pretends that human beings have no business with each other's conduct in life, and that they should not concern themselves about the well-doing or well-being of one another, unless their own interest is involved. Instead of any diminution there is a need of a great increase of disinterested exertion to promote the good of others. But disinterested benevolence can find other instruments to persuade people to their good than whips and scourges, either of the literal or the metaphorical sort' (Mill, 1859: 84).

The new difference which emerges, then, is the difference between 'whips and scourges' (that is the social and legal power that Mill defined at the beginning of his essay) and 'other instruments' of persuasion, the 'disinterested exertion to promote the good of others'. But it is difficult to see how this difference is

¹² Barron, 'Legal Discourse and the Colonisation of the Self in the Modern State' in Carty (ed.), *Post-Modern Law* at 110.

anything more than the difference between two ways of exercising power. The term 'exertion' itself is nothing more than a synonym for the exercise of power. Furthermore, the distinction between the social power of Part I and these 'other instruments' is barely intelligible. 'Human beings,' Mill writes, 'owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter'. And yet he suggests that 'neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it' (Mill, 1859: 84). But Mill provides us with no way of distinguishing between the 'encouragement' of the first quote and the 'saying to another creature . . . that he shall not do' of the second.

The precise meaning of this 'shall' in Mill's sense of social power is unclear. When one uses the word 'shall' there is an imperative to act or not to act. But this imperative, like encouragement, can always be resisted. The 'shall' does not have legal force behind it but only social sanction. But it is unclear how the 'encouragement' of the first quote is anything other than a force which can be resisted itself. If there is a distinction in the quality of such a force, Mill does not make it clear precisely what that distinction is. The more likely solution is that it would be a distinction in quantity. In that case, though, it would be difficult to support the assertion that the imperative of the 'shall' is always stronger than the exertion of the encouragement.

This distinction which is indistinct, or rather difference to which we are indifferent, becomes, for Mill, the touchstone of legitimation. It is only the 'shall' which, in *On Liberty*, is subject to the requirements of legitimation. It is only in the cases of social sanction that we must decide whether interference is justified according to the principle of harm. There is an absence of legitimation in the free space, which itself is filled with the power of the 'encouragements'. This absence is itself legitimized by reference to 'nature'. Hence he writes;

though doing no wrong to anyone, a person may so act as to compel us to judge him, and feel to him, as a fool, or as a being of an inferior order . . . We have a right in various ways, to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours . . . We may give others a preference over him in optional good offices, except those which tend to his improvement. In these various modes a person may suffer very severe penalties at the hands of others, for faults which directly concern only himself; but he suffers these penalties only in so far as they are the natural, and, as it were, spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment. (Mill, 1859: 85-6).

However, the nature of these 'natural consequences' remains ambiguous. Mill avoids speculation about how these supposedly natural consequences are constructed, how they organize themselves and what relationship they have with the principles of ethics, truth, and justice themselves. It is not until one investigates the organization of the free space and the devices of power that are located there

that one can consider the question of liberty at all. For the distinction between liberty and power upon which Mill relies and which underpins the whole discussion about the legitimacy of power turns out to be merely a distinction between one arrangement of power relations and another; in other words, there is a background to the question of legitimacy upon which it rests and which, in itself, cannot be the subject of legitimation. One cannot even raise the discussion about legitimacy without the social distinction between different forms of power.

Foucault's genealogy of power relations can be seen as tracing the background against which ethical decisions are made. This background is masked by the juridical contest between liberty and power. There is, for Foucault, no free space in which 'spontaneous' and 'natural action' occurs. The 'free space' is overdetermined by disciplinary power which partitions its gaps and which eventually colonizes the traditional site of juridical power as well. In what follows I would like to attempt a brief exegesis of this genealogy.

5. *State, Law, Sovereignty*

In order to trace this genealogy of power relations we must attempt to consider the juridical network at the time of its emergence in the Middle Ages. The law evolved in a particular way and it associated itself with particular mechanisms of power. By considering the form of law as it emerged in the Middle Ages I hope to show why it was that the juridical understanding of power came to establish itself so firmly as the way in which power was to be described.

Prior to the solidification of the state, according to Foucault, one finds a certain amount of disorganization in the field of power. Territory, more often than not, governed power relations; vassalage, suzerainty, and serfdom were common manifestations of this power. However, this disorganization gave rise to certain conflicts whose resolution could not be guaranteed. Without a hierarchy to unite them, the different territorial powers could only resolve conflicts through the sword. The principle of hierarchy was accepted as a solution to this violence. So long as every potential conflict could be solved at the pinnacle of the hierarchy, society would always be moving towards a state of order. Hence Foucault writes that if the states 'were able to gain acceptance, this was because they presented themselves as the agencies of regulation, arbitration, and demarcation, as a way of introducing order into the midst of these [prior] powers' (*HoS*: 87).

This is not to say that hierarchy was the way in which power was *exercised*. Hierarchy was a way of understanding power; it was, Foucault writes, 'by no means adequate to describe the manner in which power was and is exercised, but it is the code according to which power presents itself and prescribes that we conceive of it' (*HoS*: 88). The concept of the state achieved the codification of power. One could say that the codification of power responded to the urgent need for order. The power relations through which this hierarchy was constructed

were already more or less in place. In achieving the codification of these power relations the state in Foucault is equivalent to what Deleuze and Guattari call an 'assemblage of capture'.¹³ And perhaps the most important mechanism in this operation of capture was the law.¹⁴

The introduction of a more or less complete system of law, then, should not be thought of as a force wielded by the monarch to ensure compliance through the threat of a violence which he holds. The law succeeded not by exerting violence but by unifying through the alliance of power relations that were already in place. By the beginning of the Classical Age the codification of power relations was sufficiently established to have converted the prior mechanisms of power into a legal mechanism. The law, then, co-ordinated the pre-existing relationships of power and reduced the potential for conflict between the structures that they formed. In order to do this the law presented itself as a threshold of transgression and as the right of the Sovereign to use violence where the laws that constituted his sovereignty were violated. Law's *symbolic representation* was as a monopoly of the *right to violence*, primarily exercised by a Sovereign. Power was symbolically represented as a possession which is ultimately given to the Sovereign by God but which he could divide up as he saw fit, thus constructing hierarchies. However, as I have suggested, this does not adequately represent the way in which law actually operated. Whilst the law maintained the appearance of force, it actually worked, at least partially, by a co-ordination of pre-existing powers; trust law was a residue of this operation. The symbolic representation of law as the sovereign right to violence was a condition for the law's acceptance as well as a method for co-ordinating the form which the legal structure took. However, at least in a Foucauldian account, law operated as much through co-ordination as it did through violence.

This symbolic manifestation of law did, however, have its effects. It resulted in a juridical mechanism of law which had two parts which together produce truth and which together help to legitimize the operations of law today. The first part of the mechanism was the *investigation*. Through the investigation the court attempted to establish the truth of the act. It introduced into the law what Foucault calls 'an authoritarian search for truth'. The mechanism of power through which it functioned was the confession. Through confession the individual introduces into the law the truth about himself; where previously he had been authenticated by the ties of alliance and the truth of his crime had been established through the ordeals, in the confession he was 'authenticated by the discourse of truth he was able or obliged to pronounce concerning

¹³ Deleuze and Guattari, *A Thousand Plateaus* (trans Massumi) (London: Athlone, 1988) at 437. Hereafter referred to as Deleuze and Guattari (1988).

¹⁴ Deleuze and Guattari make the argument that the territorial powers already anticipated the form of the state, which they at once instituted and resisted. They write that 'there exist collective mechanisms that simultaneously ward off and anticipate the formation of a central power. The appearance of a central power is thus a function of a threshold or degree beyond which what is anticipated takes on consistency or fails to, and what is conjured away ceases to be so and arrives' (Deleuze and Guattari, 1988: 431-2). Foucault's account seems to be consistent with that of Deleuze and Guattari. Unfortunately there is not space to consider their rigorous account of state formation here.

himself' (*HoS*: 58). Hence by introducing the confession the law appropriated an advantage previously exercised solely by the Church: the ability to stimulate the power relationships which an individual had with himself for its own ends. The power relation which an individual had with himself became coupled to the law. The investigation also had the advantage of making the interdictions articulable to the law. When the method of establishing the truth was the ordeal, there was no need to specify the particular nature of the crime, the precise mode of its commission. However, once the confession was introduced it became possible to distinguish precisely one crime from another both in terms of its gravity and its type. The more the law required offences to be articulated by the defendant, the more it could respond to its own language and thus reproduce and regulate its own development.

The second part of the juridical network was spectacular punishment. In the Middle Ages a public and spectacular violence was guaranteed in cases of transgression. The aim of the execution, Foucault writes, 'was to make an example, not only by making people aware that the slightest offence was likely to be punished, but by arousing feelings of terror by the spectacle of power letting its anger fall upon the guilty person'.¹⁵ But this form of punishment, unlike the modern penal system, also served as an articulation of the law itself. This articulation took two forms. Firstly the punishment was regarded as the final extraction of the confession. Hence Foucault writes that 'in the eighteenth century judicial torture functioned in that strange economy in which the ritual that produced truth went side by side with the ritual that produced the punishment' (*DP*: 42). But secondly this public violence expressed the force of the sovereign which was temporarily diminished by the crime. As the sovereign was the public embodiment of the law, the ritual of the scaffold was itself an articulation of the power of the law. In turn, although the law was not confined to its punitive form, the symbolic representation of law took a juridical form.

It is easy, then, to see why the juridical understanding of power became predominant in political theory in the Middle Ages and the Classical Age. Through the form of the confession the law effectively articulated a series of carefully defined acts which it would not tolerate. In order to discourage the public from committing these acts it utilized the threat of violence. By defining a series of acts the law defined a threshold beyond which it would not interfere. Hence the problem of legitimacy, towards the end of the Classical Age, was articulated in terms of where to draw this threshold. The problem remains the same for Mill and he answers it according to the principle of harm.

By the end of the Middle Ages, then, there was a juridical network of power that consisted of a hierarchy that was supported by the confession and spectacular punishments. To this was attached a juridical theory of power that articulated both the justification of sovereign power (which was at this stage more or less religious) and its form (which was hierarchical; power was held at the top of a

¹⁵ Foucault, *Discipline and Punish* (trans Sheridan) (London: Penguin, 1979) at 58. Hereafter referred to as *DP*.

hierarchy and exercised downwards). That is not to say that there were not laws and other forms of power which operated above the juridical threshold. However, prior to the Classical Age, these forms of power were not symbols for the law; they consisted mostly of the ancient feudal and religious rights and the relationships of familial alliance that were already beginning to decline. Eventually, as the law took the juridical structure as its form, these ancient rights began to lose if not their effect then their coherence. Furthermore, because of the visibility of the punitive technology, there developed a symbolic equivalence between the criminal law and law which was, until very recently, maintained by political and legal theory. As a result of this symbolic equivalence law was seen as the Sovereign's right of force rather than the mechanism for a politics of direction.

6. *Discipline: Partitioning the Gaps*

'The disciplines,' writes Foucault, 'established an "infra-penalty"; they partitioned an area that the laws had left empty; they defined and repressed a mass of behaviour that the relative indifference of the great systems of punishment had allowed to escape' (*DP*: 178). In order to understand the development of modern law it is necessary to be specific about the differences between this disciplinary form of power and the juridical form of which there are four.

1. *Discipline Intensifies as well as Represses.* The juridical, as we have seen operates by means of interdiction. It controls action by denying. Discipline, on the other hand operates in two directions at once. It discourages undisciplined action but it also encourages disciplined action. The encouragement may take a number of forms, not least of which is repetition; by encouraging the individual to repeat the same action over and over he attains what might be called a norm of behaviour; he becomes *normalized*.

2. *Discipline Homogenizes through Activities.* Juridical power operated by defining a threshold between two fields of activity. Either one had crossed the threshold or one hadn't. Discipline, on the other hand, prescribes a norm which one may hope to attain or a maximum which one may hope to achieve. There is no absolute difference between the space of the transgressive and the space of freedom for discipline. One does not transgress in discipline, one deviates or underachieves. Consequently, discipline does not describe spaces into which it cannot enter. It has the density of a 'perpetual penalty that traverses all points and supervises every instant in the disciplinary institutions' (*DP*: 183). This precise quantification and qualification of behaviour allows a series of comparisons from which one can develop a hierarchy of values: a table.

3. *Discipline Acts in the Production of Subjects.* If the juridical network permanently presented itself to the subject in a spectacular form, its effect on the subject and his understanding of himself was difficult to direct. It was only the defendant, he who transgresses, that was encouraged to investigate

himself through the confession. Discipline, however, is more direct in the production of subjects. Through a homogenous application on a number of different subjects, discipline produced a norm. Deviation from this norm should not be seen as a minor transgression, it should be seen as defining the place of the individual amongst a series of other individuals. The most prominent example of this 'placing' occurs in the form of the examination of which, Foucault writes, 'each individual receives as his status his own individuality' (*DP*: 192). For Foucault, then, discipline does not just control or prevent particular acts, it produces particular subjects who will not just do what one wishes but who will always act in a particular manner, in the way one wishes.

4. *Disciplinary Power is Ideally Invisible in its Application.* The juridical network was attached to a visible exercise of power through which, as we have seen, it became effective. In doing so, the individual himself only became visible to the extent to which he transgressed; only as a site of transgression and a site upon which the power of the sovereign can be exercised. Disciplinary power, on the other hand, attempts to cast light away from itself and onto the individual. Panopticism is the predominant example of this principle. The principle of Panopticism is to see without being seen; to exercise power through observation alone. By making the individual constantly observable to itself, discipline exercises power with the minimum of violence and is, as a result, more difficult to resist; disciplinary power is less apparently present in its exercise.

Disciplinary power, then, filled the gaps which the juridical network treated with 'indifference'. It organized the actions of individuals in a productive manner where the juridical network could only be deductive. But, during the Classical Age, it operated alongside the juridical network. At least until the beginning of the eighteenth century, the methods through which the state and the law exercised power remained more or less the same as in the Middle Ages. The disciplinary mechanism was contained within the spaces left free by juridical power. This is what Foucault calls the 'discipline-blockade'. As a result of their containment within institutions, and despite the differences in their mode of operation, disciplinary techniques could exist alongside the law, organizing power relations within the spaces left by the juridical network. And yet, because of their unspectacular symbolic manifestation, these disciplinary techniques escaped the juridical necessity of legitimacy. In contrast to the very public violence of the juridical network, disciplinary controls were symbolized as a 'gentle' operation of power. Discipline, unlike juridical force, is exercised through *the love of man* rather than the spirit of revenge. Consequently they were not exercised as of right, to be granted by God, but as of care and expediency. The survival and proliferation of the disciplines, unlike juridical law, did not depend on their justification. It is this that allows these disciplinary forces to pass unnoticed in Mill's account. Discipline appeared symbolically as the 'natural order of things';

a form of power to which no right needed to be attached. Whilst political theory debated the right of the Sovereign to exercise his power, discipline evolved in the gaps which Sovereign power left, constructing its edifices in these 'natural spaces'. The continuing trend of liberal thought that chants the right to freedom against the law remains blissfully unaware of this development in the field of power relations.

Towards the end of the Classical Age, however, the mechanisms of the State and the law themselves began to evolve. Whilst the spectacular forms of punishment were still in place, the way in which the law was used began to be transformed. This transformation is described by Foucault as the concept of *governmentality*, a concept which sits more comfortably with the *modus operandi* of the disciplinary institutions. Together, the two poles of discipline and governmentality constitute what Foucault calls 'bio-power'.

7. *The Regulation of Populations*

Towards the end of the 1970s Foucault gave a series of lectures on the political technology of the Classical Age. The title of the most famous of these lectures is *Governmentality*.¹⁶ In that lecture the concept of governmentality is connected to the economy and the population. Governmentality defined as its object the population on which it acted through the field of the economy. I will go on to consider each of these elements

A. *The economy*

According to Foucault, in *Governmentality*, the word 'economy' was originally used in the sixteenth century to designate a form of government whose aim was 'the correct manner of managing individuals, goods and wealth within the family . . . and of making family fortunes prosper' (*G*: 92). When the sovereign acted economically he acted with the same diligence 'as that of the head of a family over his household and his goods' (*G*: 92). In the eighteenth century the aim was still the correct management of goods and wealth. However, the object of control was altered from the family to the population. The family was still important but only as a segment of the population rather than as a model of the state. Hence the word 'economy', in the eighteenth century, was used similarly to the way in which it is used today. It was articulated in relation to 'the perception of new networks of continuous and multiple relations between population, territory and wealth' (*G*: 101). As we shall see, with this new object the economy provided a field of analysis and a field of intervention for government.

B. *The population*

A whole new set of targets emerged by making the population the primary object of government and economics. I will limit myself to two examples. Firstly the

¹⁶ Foucault, 'Governmentality' in Burchell, Gordon and Miller (eds), *The Foucault Effect: Studies in Governmentality* (Hemel Hempstead: Harvester/Wheatsheaf, 1991). Hereafter referred to as *G*.

size of the population became important. Hence the control of the birth rate became a function of government. This created the conditions for sex to become an object of political science; sex was directly related to the size of the population (*HoS*: 26). Secondly the relationship between the wealth of the nation and the size of the population became a political target. Through the new statistical sciences the average wealth of the population became calculable. An important aim of government was to maximize average and/or total wealth and, perhaps, also to distribute wealth effectively.

C. *Government*

The method through which these aims were to be achieved was through what Foucault calls the 'disposal' of things. By disposal he means an arrangement of things through which one can achieve certain ends. But the things are not just objects. They are 'a sort of complex composed of men and things' (*G*: 93); that is, men in relation to objects and events in the world. Government was utilized to make adjustments in the relationships between men and things which became available to it through the economy.

Foucault, then, describes a three-tier network of government. The population was the object for analysis and alteration; for disposal. The government was the political technology which performs this alteration and the economy was a field of action which connected the two together. The economy both provided a description of the population and a place where governmental decisions could be organized. Government could intervene tactically into the economy by utilizing laws but it could also do so by adjusting taxation, prescribing standards for education, by building an infrastructure as well as by directing moral and religious education.

8. *Government and the Law*

The law did not itself fade from view as a result of this new political technology. However, the law no longer provided a model which described or unified the State. Although there was an increase in the quantity of legislation, this legislation was not only used in order to describe a threshold of transgression. It was also used as a tactic amongst other governmental tactics for disposal. 'With government,' Foucault writes, 'it is a question not of imposing laws on men, but of disposing of things: that is to say of employing tactics rather than laws, and even of using laws themselves as tactics—to arrange things in such a way that, through a certain number of means, such and such ends may be achieved' (*G*: 95). No doubt some of the juridical technology still remained (and still remains today) but the predominant use of legislation was altered through governmental technology.

This change altered the relationship between man and the State. Prior to the eighteenth century man had been seen by the State more or less as a juridical

subject. He was understood only as a site of action which was legal or illegal or at least transgressive or legitimate. Other than that he was constituted through a feudal hierarchy. However, government began to see each man as a complete individual with a particular way of living. Men could be grouped, divided and controlled according to their function in the population as determined by the economy. Foucault describes the difference thus: "feudal power consisted in relations between juridical subjects insofar as they were engaged in juridical relations by birth, status, or personal engagement, but with this new police state the government begins to deal with individuals, not only according to their juridical status but as men, as working trading, living beings".¹⁷ For Foucault this is nothing less than the 'entry of life into history' (*HoS*: 141).

We can now begin to see the difference between modern law and the juridical understanding of power. Power, in the juridical understanding is predominantly exercised on acts. However, once the governmental technology was put in place, the law began to be exercised in order to adjust the relationships between individuals *qua* individuals. The primary aim of law was no longer to prescribe general rules which defined a level of transgression, it was to intervene into the relationships between particular groups of people according to information carefully collected and analysed in the form of the economy. By failing to see the difference between this new role of law and the juridical form of power, both Hunt and Wickham and Santos fail to appreciate the place of law in Foucault's scheme. The principle of harm, then, becomes inadequate to legitimize *all* law because government, towards the end of the Classical Age, could utilize law productively as well as deductively. Hence if one wanted to develop a relationship between Foucault and Hart it would be that Foucault situates Hart's critique of Austin historically. The 'positive' role of law, in a Foucauldian account, takes its place amongst a more general technical apparatus of governmental control which intervenes into the lives of individuals and groups in response to knowledge collected about those lives. Whilst legal theory has remained focused on the legitimacy of legislating on certain acts (pornography, civil disobedience, homosexuality, prostitution, and so on) the *way in which law operates* has shifted to the regulation of the lives. The modern regulatory aspect of law, then, ought not to be understood merely as 'power-conferring' but should be seen as intervening in the social construction and government of the modern subject.

However, our understanding of the role of law in Foucault's analyses is not complete until we have seen the shift in disciplinary power in the Modern Age and the relationship of law to this shift. We can then see how law is caught between the two poles of bio-power: discipline and government.

¹⁷ Foucault, 'The Political Technology of Individuals' in Martin, Gutman and Hutton (eds), *Technologies of the Self* (London: Tavistock, 1988) at 156.

9. *Discipline and the Prison System*

At the beginning of the Classical Age, then, the legal machine combined two mechanisms; the investigation and the punitive technology. The investigative process, by making law articulable to itself, helped to create a unified legal code. The State or the sovereign could intervene into this legal code through legislation. Towards the end of the eighteenth century the traditional juridical form of legislation was at least supplemented by a governmental form. Laws were not passed just as general rules which applied to the juridical subject but as specific rules which were designed to intervene in the lives of particular groups of subjects and to 'dispose' their relationships differently. It was not until the beginning of the nineteenth century, however, that the punitive technology itself began to be transformed. One could call this transformation the colonization of legal punishment by the disciplinary mechanism. The architectural form which resulted from this colonization was the prison. In order to understand this development it is first necessary to consider Foucault's analysis of discipline in the Modern Age.

10. *Swarming Discipline*

As we have seen, discipline, in the Classical Age, was confined to what Foucault calls the 'discipline-blockade'. It was utilized within certain institutions for the ends of those institutions. In the nineteenth century, however, the disciplinary mechanism becomes dislodged from these institutions. This led to the free circulation of discipline within the social plane. In *Discipline and Punish* Foucault elegantly describes this process. 'While, on the one hand, the disciplinary establishments increase,' Foucault writes, 'their mechanisms [*mécanismes*] 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' (*DP*: 211¹⁸). This is what Foucault calls the 'swarming of the disciplinary mechanisms [*mécanismes*]' (*DP*: 211; *SP*: 246).

The delocalization of discipline resulted, for Foucault, in its 'democratic' application; that is, discipline, unlike the juridical network, was applied relatively homogeneously throughout the social field. This was achieved through the extension of disciplinary functions from the institutions to the community. The primary method by which this extension took place was surveillance. Two examples should suffice to show what Foucault means when he suggests that discipline was extended beyond the walls of the institutions. Firstly, the information collected about pupils in the schoolroom began to be seen as evidence of parental practice; by observing a child the school could indirectly observe its parents which, in severe cases, could lead to their investigation by social services.

¹⁸ Foucault, *Surveiller et Punir* (Paris: Éditions Gallimard, Paris, 1975) at 246. Hereafter referred to as *SP*.

Secondly, the observation of patients in hospital and the statistical analyses carried out there began to make hospitals aware of the general health of their local communities. The hospital could thus monitor the rise of epidemics, give sanitary advice to the inhabitants of the region as well as advising state authorities of the health problems in that region. In each of these cases discipline was applied not only to the subjects within the institutions but to subjects outside its walls. This tended to stimulate the emergence of extra-institutional disciplinary sites. Families and even individuals began to discipline themselves.

The result of this extension of discipline from the institutions was the constitution of a delocalized mechanism or what Foucault calls a *dispositif*.¹⁹ This *dispositif* becomes available for use in multiple settings and for a broad variety of functions. As we have seen, the disciplinary *dispositif* began to regulate its own operations outside of its institutional beginnings. The disciplinary regime of the school begins to monitor the disciplinary regime of the parents. But this relationship could always be reversed; the indiscipline of the child in the home can be monitored by the parents who can, as a result, monitor the disciplinary regime of the school. As a result a certain amount of homogeneity was created between the family and the school; their disciplinary regimes began to evolve together in a symbiotic fashion. And this analysis can be extended to the hospital and the military as well as the work place and also psychiatric institutions. Finally, the homogeneity of the different disciplinary sites results in what Santos calls 'isomorphism'; the ability to transfer a single subject between institutions for a variety of exercises and functions which, to a certain extent can be integrated in the individual. For example, the child is disciplined in the school. If the results of this regime are significantly bad he can be transferred to borstal. If this is unsuccessful he can be transferred to a psychiatric institution, or to the prison. Only once the subject becomes disciplined, or what Foucault calls 'docile' can he escape these corrective institutions. He does not, though, escape the disciplinary network; he is transferred to the work place where the disciplinary regime continues.

The disciplinary *dispositif*, then, reproduces itself by providing the solutions to its own failures. Discipline constructs observations of its own functions to which it can respond. For example, information can be developed in the school about the child which can be used to observe the parents. The parents can, in return observe the school. But the school can also produce information about its children in general in the form of statistical tables. By responding to this information, discipline begins to discipline itself.²⁰ This reflexive operation of discipline is used to redirect the operations of the school itself and, at a

¹⁹ The term *dispositif* has been translated as mechanism, apparatus, device, grid of intelligibility and deployment. None of these terms does full justice to Foucault's notion of *dispositif*. What Foucault is getting at is the system of relations that can be established between a heterogeneous ensemble of discourses and power relations. For a general discussion of the term see 'Confessions of the Flesh' in *TL* above n 8 at 194–8. For the original see *Dits et Ecrits*, Defert and Ewald (eds) (Paris: Gallimard, vol III, 1994) at 298–30. Also see Gilles Deleuze, 'What is a *Dispositif*' in Armstrong (ed.), *Michel Foucault: Philosopher* (London: Routledge, 1992).

²⁰ This self-observation is the equivalent of 'second-order observation' in systems theory. The ability of discipline to respond to self-observation with new disciplinary techniques can be called 'autopoiesis'.

governmental level, schools in general. Furthermore, the information produced directs decisions in the family. The family, rather than simply observing the operations of the school through the child, observes the school through the form of 'league tables'.

These techniques, however, are not limited to a particular discourse (in this case the educational discourse). Discipline exploits the differences between discourses. For example, observations can be passed from the prison to the psychiatric hospital. The techniques of one institution can be used to direct the operations of another. The psychiatric hospital tends to emphasize the desired end of cure whereas for prison it is control, deterrent, and rehabilitation that constitute the desired ends. However, the techniques that are used to achieve these ends are similar in each case. For example, each distributes its subjects in a similar way and each manages the individual's time in a similar way. Each observes, produces reports and adjusts its operations according to its observations. This creates the possibility for the transfer of information between the institutions. Each individual becomes a 'case' (*DP*: 191) about whom a *dossier* is produced. This dossier can be transferred from institution to institution to construct an integrated disciplinary regime which responds to the complete life of the individual. Furthermore, it allows the techniques of one institution to take effect in another institution; the role of the psychiatrist in the prison system provides one obvious example. Even the criminal law begins to play a part in this disciplinary regime; in deciding sentences the law must take into account all of the information with which it is provided. Rather than responding merely to the crime, the criminal law begins to respond to the life of the individual. In this sense, even the criminal law, in a Foucauldian reading, cannot be seen as conforming to an Austinian jurisprudence.

As a result of this integration between different institutions and discourses through the disciplinary *dispositif*, a certain homogenization is achieved between institutions. Even the functions of the different institutions become, to a certain extent, homogeneous. Hence the prison itself becomes utilized for diagnosis whereas the psychiatric hospital becomes a site for control.²¹ Foucault's notion of discipline, then, has the advantage of explaining Santos's observation of 'isomorphism' whilst maintaining the potential for discursive differences between

²¹ The nineteenth-century concept of moral insanity shows how the psychiatric discourse managed to combine these two ends. Moral insanity was a disorder which was characterized only by anti-social behaviour. Psychiatry, in developing this disorder, combined its therapeutic aims with the necessity to control certain individuals who 'could not manage their own affairs' but who were not subject to the criminal law. This psychiatric function still remains in the modern concept of psychopathy. In general it is used in cases where the individual commits a series of minor transgressions which do not necessarily break the law. The case of *Dawn Clarke* (see n 7 above) is one rare example when a 'psychopath' came to court. She had already been released from a psychiatric hospital by a Mental Health Tribunal and so could not be returned to such an institution by the Court. This resulted in a sentence of 18 months' imprisonment at first instance for the breaking of a flowerpot which was reduced to a fine of £2 by the Court of Appeal. Lawton LJ's judgment clearly shows that the Court was more concerned with responding to her undisciplined life than it was with the actual offence which it was considering.

institutions. It also helps to explain how these differences begin to break down in the twentieth century.²²

11. *The Colonization of the Mechanics of Punishment*

In a relatively short time, Foucault suggests, the visible and violent technology of punishment was replaced by one that hides its operations, one that is intense but relatively unspectacular; the use of the scaffold declines and the prison is erected in its place. As a disciplinary regime, the prison system is distinguished from the discursive production of law. In the Classical Age, as we have seen, punishment was the final articulation of the law. The law was represented in punishment. In the Modern Age, however, punishment is fundamentally a part of the disciplinary regime to which the penal law is a party but of which it is not a part.

The only significant way in which penal law was involved in the techniques of the prison was that it determined the sentence. But eventually even the sentence was subject to alteration by the prison regime.

There are three related ways in which discipline functions within the prison.

- Discipline introduced the most rigorous regime of alteration into the prison. Whilst the prison had originally been intended as a punitive apparatus to deprive the individual of his liberty, it soon became an intense institution of transformation. The prison must, Foucault writes, 'assume responsibility for all aspects of the individual, his physical training, his aptitude to work, his everyday conduct, his moral attitude, his state of mind' (*DP*: 235).

- Discipline functions continuously on the individual. Every moment of the prisoners time is controlled by the regime. There is no interruption in its programme. When Foucault writes that the prison 'has no exterior or gap' (*DP*: 236) he means that the individual, for the time that he is in prison, has his whole mode of living accounted for.

- The continuity of the prison system led to a new target for punishment. The prisoner was not punished *qua* offender. He was punished *qua* delinquent. The delinquent is a source of crime, a dangerous individual. It is his life in general that is the target of punishment rather than the gravity of the act which he has committed.

But the prison, for Foucault, does not only function on the delinquency which it discovered. It actually produces this delinquency. By gathering together those

²² In this sense Foucault's disciplinary *dispositif* can be seen as an example of non-systemic autopoiesis. Discipline is self-observing and self-reproducing but it does not form a system. Discipline consists of a series of techniques whereas systems consist of differences in codification. As Luhmann suggests, a system reduces complexity in its observations 'insofar as it announces a selection and thereby reduces possibilities'—Luhmann, *Social Systems* (trans Bernarz Jr) (Stanford, CA: Stanford University Press, 1995) at 68. A particular disciplinary institution also selects in this way. However, discipline exploits the differences between the codes; its self-evidence and hence its autopoiesis becomes possible through its potential for aligning different systems and making possible isomorphism not just in terms of subjects (Santos) but also in terms of information. Through the similarity of their disciplinary operations disciplinary institutions can translate information easily between different codes; it is easy to transform the dossier into the *curriculum vitae* through the subject herself, thus connecting the school to the work-place and so on.

who have transgressed the prison helps to form a community of delinquents; by leaving the family of the criminal without support the prison helps to encourage further crime and so on. This delinquency does, however, have the useful function of segmenting crime within a particular segment of the community.²³ This, for Foucault, is what makes it acceptable. Crime, through the concept of delinquency, is confined to a particular class and particular geographical locations rather than being dispersed amongst the community as a whole.

The delinquents which were produced in prison were soon returned to it by the police. What Foucault describes, then, is an autopoietic ensemble of the prison, the police and delinquency which is closed in upon itself. 'One should speak of an ensemble', Foucault writes, 'whose three terms (police-prison-delinquency) support one another and form a circuit that is never interrupted' (*DP*: 282). The system reproduces itself by creating a particular form of problem to which it is the only available solution. There is no other way to combat the rise of delinquency other than by imposing a stronger disciplinary regime in the form of the prison which then produces more delinquency. The law is merely a relay in this system.

Hence there are two reasons why the prison was so acceptable to modern society. Firstly, it utilized the disciplinary mechanisms that were already in place in the other institutions of the nineteenth century. And secondly it produced a problem to which it was the only solution. In doing so it segmented crime within an autopoietic cycle and thus made crime tolerable; so long as crime was located within a certain section of the community it could be controlled and regulated in such a way as did not disrupt the social order.

12. *Where is the Law?*

The problem for legal scholars after Foucault's analysis of the modern techniques of power is that the justification for the law appears quite distant from the way in which law actually operates. Both of the traditional juridical elements of the law have become captured by more modern techniques of power; governmentality and discipline. Consequently the analyses of juridical scholars such as Mill appear inadequate to legitimize modern law. This is so for two reasons. Firstly, the free spaces which law is supposed to protect have been filled by other techniques of power and secondly laws are no longer predominantly applied in order to prevent certain harmful transgressions but to dispose more efficiently the relationships between members of the population. Two questions then emerge. Firstly, what is the precise role of the courts in modern society? And

²³ Foucault suggests that the disorganization of criminal activity was particularly threatening to the social order of the late eighteenth century. The popular fear of crime that arose was one of the principle reasons why the prison system was acceptable. It created the impression of order amongst the disorder of crime. Hence Foucault writes that the prison system, despite its inability to reduce crime, 'does not miss its target; on the contrary it reaches it, in so far as it gives rise to one particular form of illegality in the midst of others, which it is able to isolate, to place in full light and to organize as a relatively enclosed, but penetrable, milieu', *DP* at 276.

secondly, why is it that the law and power have continued to justify themselves in a way which has little relation to their modern mode of functioning?

I have already alluded to Foucault's understanding of law as a relay in the autopoietic ensemble of police-prison-delinquency. Of course these comments are confined to the criminal law. Let us flesh out the way in which this works by relating a familiar narrative. The police capture an individual. He is tried in the court according to statute and common law. He is transferred to prison where he mixes with other prisoners in a disciplinary regime. On release he continues to be observed. But, having a criminal record he finds it difficult to return to work. He then utilizes the connections which he has established in prison in order to commit a further crime or series of crimes until he is returned to the prison. The legal system is, in Foucault's sense, a relay because it transfers an individual from the police to the prison which then produces or reproduces him as a delinquent. But there is another sense in which the legal system is a relay which has not been considered by Foucault; it is also a relay between governmental decisions and the disciplinary network.

The role of law which I want to suggest is similar to that which Foucault gives to the *dispositif* of sexuality in *HoS*. In the last chapter of that book Foucault considers the two poles of bio-power that developed in the Classical Age and which I have considered above; disciplinary power and governmentality. He goes on to suggest that in the nineteenth century these two forms became connected 'in the form of concrete arrangements [*agencements concrets*] that would go to make up the great technology of power in the nineteenth century' (*HoS*: 140). He suggests that the *dispositif* of sexuality would be one of the most important of these *agencements*. But the way in which this *dispositif* would operate to connect the two poles of bio-power is left unclear in *HoS* and as far as I am aware Foucault did not return to this problem.²⁴ It would like to suggest that alongside the *dispositif* of sexuality, it is the law, in modern society, which is the predominant institution through which this connection is made.

We can consider how this would work particularly effectively from the example of the criminal law. If we return to our example we can see that the modern criminal law effectively transfers delinquents from the police to the prison system. However, it does a little more than that. It also designates, at least to a certain extent, who will be so passed and for what term. This is done according to common law and statute. The code of law is thus connected to the disciplinary network through the mechanisms of the trial. Hence, by adjusting the code of law, adjustments are also made in the autopoietic system of police-prison-delinquent. As a result the modern governmental technology could dispose of the relationships between the police, the prison, and the delinquents by passing legislation, one of the most important governmental tactics. The proliferation of legislation governing police powers, the specific codification of minor crimes and the Mental Health Acts of the nineteenth and twentieth

²⁴ The volumes with which Foucault originally intended to follow *La Volonté de Savoir* were eventually abandoned and were replaced by two books on antiquity, *The Uses of Pleasure* and *The Care of the Self*.

centuries are all examples of the way in which governmentality has directed and adjusted relations established in the disciplinary network.

Hence Foucault's understanding of law as a governmental tactic (from *Governmentality*) and the incorporation of law into a 'continuum of apparatuses (medical, administrative and so on)' (*HoS*: 144) from *HoS* are compatible. Law is at once 'plugged into' the governmental pole and into the disciplinary network. This explains, in an account compatible with that of Foucault, why the law, despite losing its juridical foundations, has continued to develop as such an important device of power during the Modern Age. The law was 'enchained' between the governmental technology and the disciplinary network; these three elements combined together symbiotically, resulting in their mutual evolution.²⁵

But although the position of law as a field of intervention between the two poles of bio-power is inconsistent with the juridical justification of law, this juridical justification has been maintained both in political theory and in the law itself. The question, then, which Foucault asks in *HoS* is 'why is this juridical notion of power, involving as it does the neglect of everything that makes for its productive effectiveness, its strategic resourcefulness, its positivity, so readily accepted?' (*HoS*: 86). The answer that he gives there is very brief; that 'power is tolerable only on condition that it mask a substantial part of itself' (*HoS*: 86). He expands upon this comment in the second of his *Two Lectures*.

In the second of these lectures Foucault suggests that the theory of sovereignty, in the eighteenth century, had two roles. The first was that the developments in this theory actually limited the power of the monarch. This in turn extended the spaces in which disciplinary power could develop, spaces which were still inscribed by the juridical network of power. The democratization of sovereignty in the work of Rousseau, for example, provided 'a permanent instrument of criticism of the monarchy and of all the obstacles that can thwart the development of disciplinary society' (*TL*: 105). In effect by grounding the notion of sovereignty in the will of the population, political theory articulated the idea of a legitimate libertarian 'free space' in which disciplinary power and the governmental technology could develop. A similar argument can be directed at Mill as I have attempted to show above.

Hence the second role of the theory of sovereignty was that it masked the operations of disciplinary power. As it was articulated in the eighteenth century, Foucault suggests, the theory of sovereignty was superimposed upon the disciplinary mechanisms, concealing their modes of operation and domination. And yet, for Foucault, the theory of sovereignty was also 'fundamentally determined and grounded in mechanisms of disciplinary coercion' (*TL*: 105). He explains this duality in the following way. When the rise of the disciplinary mechanisms became necessary in the Classical Age, it at once became necessary to mask their method of domination. The theory of sovereignty was incapable of legitimizing

²⁵ The law appears only to be a relay in one direction; it provided a way for the governmental pole to adjust the disciplinary machines. The transfer of information from the disciplinary network to the governmental pole is provided, for the criminal law at least, by the discourse of criminology.

disciplinary power but its democratization did suggest a public right which came out of a homogenous democratic society. But the homogeneity on which this public right depended was articulated at once through the disciplinary mechanisms that hierarchized the population and the governmental mechanisms which unified it through the notion of the economy.

But the theory of sovereignty did not just operate in political theory. It also operated in the law, resulting in substantial changes to the law.²⁶ And because the law was 'plugged into' both the disciplinary network and the governmental technology, the theory of sovereignty managed to legitimize both of these activities without effectively representing their mode of operation. The privileged locus of political criticism was cast in juridical terms; it was always a question of the overextension of political power. The actual points at which power was exercised were invisible to this theory even as they dominated the social field. Hence the success with which law covered up its own paradoxes²⁷ and articulated its legitimacy was not just a condition for its own evolution. It was also a condition for the masking of the governmental and disciplinary exercise of power. This is why, whilst both sides of the juridical machine have become infested with more productive operations of power, the juridical code has flourished, and nowhere has it flourished more than in legal discourse.

13. *Conclusions*

The consequences of Foucault's work for the law have still to be effectively evaluated. I hope that I have shown how some of the current scholarship underestimates the complexity and rigour of Foucault's position as well as providing some new directions in which a Foucauldian analysis of law could be developed. The implications of Foucault's analysis for legal theory are difficult to evaluate. Foucault was not primarily concerned with law and offered little analysis of the role which was played by law in different epochs. Nevertheless we can reach a few tentative conclusions concerning these implications.

By focusing on the question 'What is the Law?', Anglo-American legal theory has lost the richness of the historical differences in law's genealogy. By attempting to reduce the law to its ahistorical *minimum conditions*, Anglo-American scholarship has failed to engage with the question of the operation of *modern law* and its theoretical relationship to the institutions with which it interacts. Foucault, on the other hand, establishes the importance of historical difference in analysing phenomena. By examining the historical transformations of the institutions of

²⁶ One example of this was the introduction of proportionality in sentencing.

²⁷ For a forceful account of the covering up of legal paradoxes see Niklas Luhmann's, 'The Third Question: the creative use of paradoxes in law and legal history' (1988) 15 *Journal of Law and Society* 153. Luhmann argues that 'there are paradoxes everywhere, wherever we look for foundations. The founding problem of law, then, is not to find and identify the ultimate ground or reason which justifies its existence. The problem is how to suppress or to attenuate the paradox which an observer with logical inclinations or with a sufficient degree of dissatisfaction could see and articulate at any time' (Luhmann, 1988 at 154). Foucault would not, as Luhmann does, see the paradox as the main motivating factor behind legal discourse.

power, Foucault shows how transgressive acts have, in general, begun to decline as the focus of power to be replaced by a *field of lives*. The institutions of power are no longer predominantly concerned with preventing the most disordered acts from occurring. Rather they are concerned with the direction of the lives of individuals, groups and the population as a whole.

The rise of what Foucault calls 'bio-power' (that is, government and discipline) does not result in an annihilation of the law. It results in the at least partial transformation of its mode of operation. The criticism that Foucault sees the law according to the Austinian 'rules + sanctions' formula is misplaced. Foucault did indeed have a tendency to concentrate on the criminal law (as it was most closely associated with the institutions with which he was concerned) but even the criminal law, in Foucault's account, begins to respond to the complete lives of individuals in the Modern Age. As Foucault suggests in his article, *The Dangerous Individual*, there is a question which 'is essential in the Modern Tribunal, but which would have had a strange ring to it 150 years [previously]: "Who are You"'.²⁸ Foucault's point is that even in the criminal law it is the life rather than the act to which the law responds.

Whilst Foucault did not effectively consider the role of the other areas of law in his genealogy I believe that his account *encourages* rather than *precludes* an account of law which directs rather than forces. The modern law takes place within a field of powers for which it no longer provides the model but in which it plays an important part. Foucault's concept of governance seems to encapsulate something significant about the modern role of law. But this legal governance can only be effectively evaluated if it is seen as the result of a historical evolution in which the juridical structure of the State has been displaced by a mobile, flexible, and self-reproducing technology of power which responds to an entirely different field of knowledge; the field of lives as opposed to the field of acts. In this paper I have attempted to show how the law takes its place between the two poles of bio-power, allowing the governmental technology to adjust the disciplinary mechanisms. In doing so I have attempted to focus on the question 'How does law operate?' rather than the question 'What is law?' In doing so the law, in its modern form, appears in a new guise. Rather than the structure or fabric which constitutes our society, the law is a machine which oils the modern structures of domination, or which, at best achieves a tinkering on the side of justice.

Finally, an engagement with Foucault, displaces the liberal trend that opposes individual freedom to the law. By concentrating on the legal right to expression, the density of the modern operations of power and the creativity of its institutions is passed over. Mill's conception of power is too limited to be useful as a way of analysing modern society or modern law. Whilst, from Mill's perspective, we can construct a critique of the overextension of the criminal law into our private lives, we are incapable of understanding the way in which law regulates (and

²⁸ Foucault, 'The Dangerous Individual' in Kritzman (ed.), *Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984* (London: Routledge, 1988) at 126.

thus legitimates) the operations of discipline. It is these operations, rather than juridically imposed interdictions that constitute the fabric of the modern subject. However, Mill's conception of power is still widely accepted by many Anglo-American jurists (Hart and Dworkin to name but two of the most prominent) who fail to see that the opposition between freedom and the law is no longer adequate to ground jurisprudential thought. The law operates in a field of power relations within which it is only a directing force. Consequently, liberation from the blunt technology of the juridical does not prevent the individual being subjected to the loving force of bio-power.