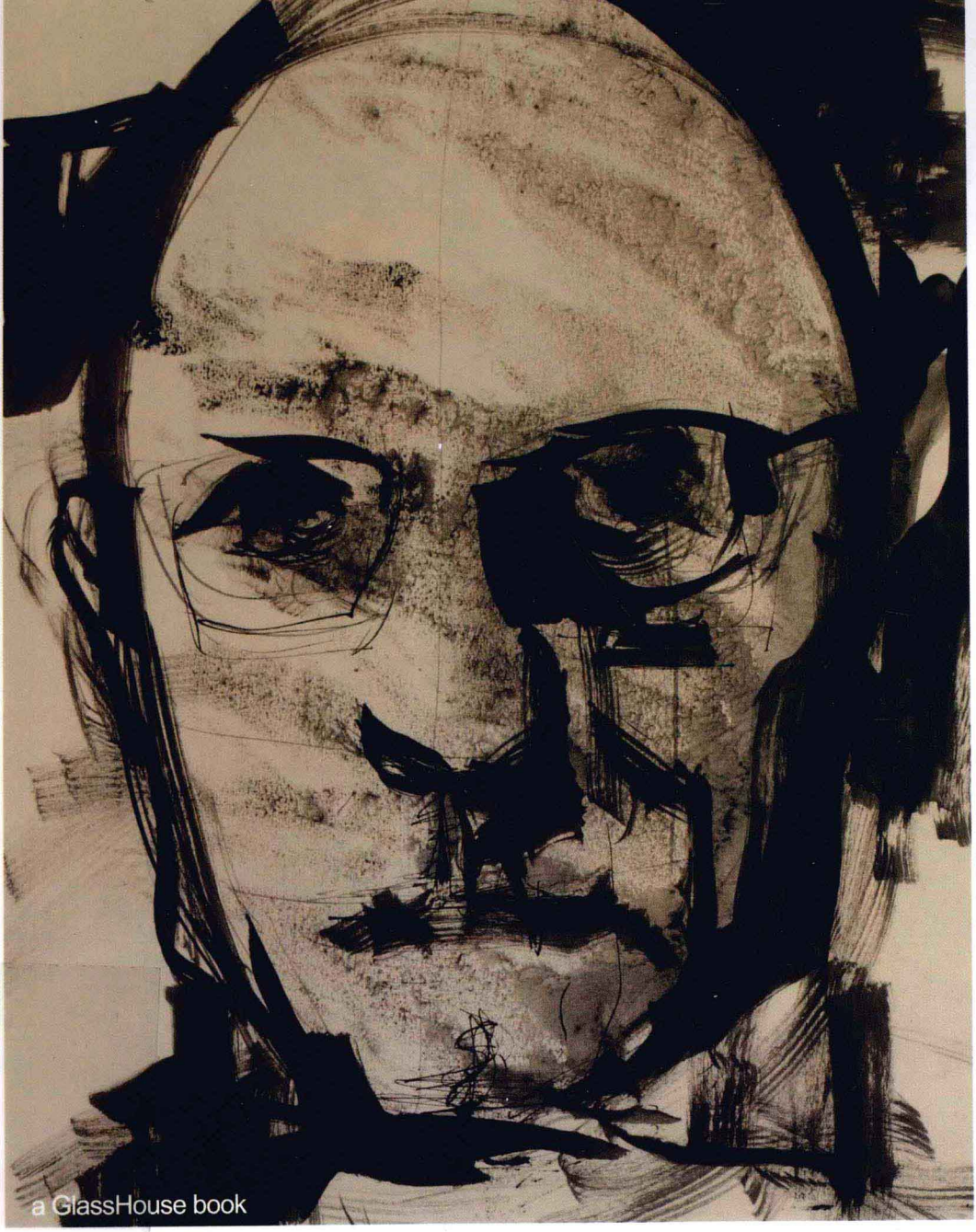

Re-reading Foucault: On Law, Power and Rights

Edited by Ben Golder

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Re-reading Foucault: On Law, Power and Rights

Re-reading Foucault: On Law, Power and Rights is the first collection in English fully to address the relevance of Michel Foucault's thought for law. Foucault is the best known and most cited of the late twentieth century's 'theory' academics. His work continues to animate a range of different critical work across intellectual disciplines in the arts, humanities and social sciences. There has, however, been comparatively little examination of the legal implications and applications of Foucault's work. This collection helps to fill that gap, providing an in-depth analysis of Foucault's thought as it pertains to a range of different legal themes, such as: the opposition between 'law' and 'the juridical'; the problem of moral and legal judgment; the historical basis of rights; and the political dimensions (and limitations) of contemporary human rights discourse. Including contributions from acknowledged experts on Foucault's work, as well as pieces by emerging scholars, *Re-reading Foucault: On Law, Power and Rights* will be of considerable interest across a range of disciplines, including law, philosophy, political theory, sociology, social theory and criminology.

Ben Golder is a Senior Lecturer in the Faculty of Law at the University of New South Wales.

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Notes on contributors

Philippe Chevallier, PhD, is the author of *Michel Foucault. Le pouvoir et la bataille* (Pleins Feux, 2004), and *Michel Foucault et le Christianisme* (ENS editions, 2001), and the co-editor, with Tim Greacen, of the collection *Folie et justice: relire Foucault* (Erès, 2009). He is currently working at the Bibliothèque nationale de France.

Peter Fitzpatrick is currently Anniversary Professor of Law at Birkbeck, University of London and Honorary Professor of Law in the University of Kent. In 2007 he was given the James Boyd White Award by the Association for the Study of Law, Culture and the Humanities. He has taught at universities in Europe, North America and Papua New Guinea, and published many books on legal philosophy, law and social theory, law and racism, and imperialism, the latest ones being *Law as Resistance: Modernism, Imperialism, Legalism* (Ashgate, 2008) and, with Ben Golder, *Foucault's Law* (Routledge, 2009). Outside the academy he has been in an international legal practice and was also in the Prime Minister's Office in Papua New Guinea for several years.

Ben Golder is a Senior Lecturer in the Faculty of Law at the University of New South Wales (UNSW). He holds undergraduate law and English literature degrees from UNSW and a doctorate in legal theory from the University of London. Prior to joining the faculty, Ben taught law at the University of East London, University College London, Birkbeck College and New York University in London. With Peter Fitzpatrick he is the author and editor, respectively, of *Foucault's Law* (Routledge, 2009) and *Foucault and Law* (Ashgate, 2010), and is currently at work on a manuscript on Foucault's politics of rights in the late work.

Colin Gordon has been translating, editing and writing about Michel Foucault's work since the 1970s, alongside a career in health informatics. He edited *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* by Michel Foucault (Harvester, 1980), co-edited and co-authored *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, 1991), selected the contents and wrote the introduction to *Power: Essential Works of Foucault, 1954–1984, Volume 3* (New Press, 2000) and co-organized the conference *The Foucault Effect 1991–2011* at Birkbeck College in June 2011.

Alan Hunt is Chancellor's Professor of Law and Sociology at Carleton University in Ottawa. He has published on the sociology of law, on Foucault and law, on governmentality and many fields of moral regulation.

Lissa Lincoln joined the American University of Paris after completing her doctoral work in French theory and literature at McGill University. Her dissertation, entitled *Albert Camus et la question du juste*, presents a Foucaultian reading of normative language in Camus's fiction, specifically the language of judgment, and its (de)construction through legal discourse. She also holds an MA in French literature from the University of Alberta, the focus of her Master's thesis being a comparative study of seventeenth-century French moralists. She teaches courses in law and literature, critical legal theory, literary scandal and censorship, critical theory, French literature, and composition, and her research interests focus upon law, jurisprudence, legal theory and discourse, particularly in their interrelationship with literature, philosophy and critical theory. Lissa is currently preparing for publication her book, *Albert Camus: Legal Discourse and the Problem of Judgment*.

Pat O'Malley is Professorial Research Fellow in Law at the University of Sydney. Most of his writing in the past 20 years has focused on risk as a technology of government, especially in criminal justice. Recent books on the topic include *Crime and Risk* (Sage, 2010), *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge, 2009) and, with Kelly Hannah Moffatt, *Gendered Risks* (Cavendish, 2006). A more general book on *Risk, Uncertainty and Government* was published in 2004 (Cavendish). Current work is exploring the role of fire prevention as a critical domain of urban security; also in preparation is a monograph on *Crime, Excitement and Risk*, exploring the place of risk-taking and excitement in contemporary crime and consumer culture, and their correlates in the apparatus of criminal justice.

Paul Patton is Professor of Philosophy at the University of New South Wales in Sydney, Australia. He is the author of *Deleuze and the Political* (Routledge, 2000) and *Deleuzian Concepts: Philosophy, Colonization, Politics* (Stanford, 2010). He is editor of *Deleuze: A Critical Reader* (Blackwell, 1996), with Duncan Ivison and Will Sanders of *Political Theory and the Rights of Indigenous Peoples* (Cambridge, 2000), with John Protevi of *Between Deleuze and Derrida* (Continuum, 2003) and with Simone Bignall of *Deleuze and the Postcolonial* (Edinburgh, 2010). He has translated work by Deleuze, Foucault, Nancy and Baudrillard. His publications deal with aspects of French poststructuralist philosophy and a variety of topics in contemporary political philosophy. He is a member of the Editorial Board ('Contemporary-Critical Continental') for the Sage *Encyclopedia of Political Theory* (General Editor: Mark Bevir), and a member of the Editorial Boards of *Philosophy Compass* (Continental), *Deleuze Studies* and *Derrida Today*.

George Pavlich is a Professor of Law and Sociology at the University of Alberta. He has published on law, legal theory, sociology and criminology. Much of

his work has centred on Foucault, such as the collection, co-edited with Gary Wickham, *Rethinking Law, Society and Governance: Foucault's Bequest* (Hart, 2001). Recent work includes the collection *After Sovereignty* (Routledge, 2010) and *Law and Society Redefined* (Oxford University Press, 2011).

Bal Sokhi-Bulley is a Lecturer in Law at Queen's University Belfast. She has a PhD from the University of Nottingham, where she also obtained an LLM in International Human Rights Law, and an LLB in European Law from the University of Warwick. Her research interests lie in critical theory and human rights. She has recently published in *Law & Critique*, *Social & Legal Studies*, and the *Human Rights Law Review* on the theme of using Michel Foucault's concept of 'governmentality' to understand the regulatory and governing potential of the European Union's rights discourse.

Véronique Voruz is Senior Lecturer in Law and Criminology at the University of Leicester, and in Foucaultian Perspectives in Criminology at the School of Criminology of the Université Catholique de Louvain-la-Neuve in Belgium. She is currently writing a book on Foucault and criminology for Routledge as well as writing the introduction for, and translating from French into English, with Dr Suzanne Yang, Dr Biagi-Chai's book, *Serial Killers: Criminology, Psychiatry, Responsibility*.

Jessica Whyte is a Lecturer in Cultural and Social Analysis at the University of Western Sydney, Australia. She has published widely on contemporary continental philosophy (Agamben, Foucault, Rancière), theories of sovereignty and biopolitics, critical legal theory and critiques of human rights. She is a co-editor of the *Theory and Event* symposium 'Form of Life: Giorgio Agamben, Ontology, Politics' (2010), of the *Australian Feminist Law Journal* special edition 'Law, Crisis, Revolution' (2010) and of the *Agamben Dictionary* (Edinburgh University Press, 2011). She completed her doctorate on the political thought of Giorgio Agamben in the Centre for Comparative Literature and Cultural Studies, Monash University, in 2010. Her current research is on the emergence of the 'right to intervene' in the practices of the new activist humanitarian NGOs of the 1970s, and its transformation into a legitimising discourse for state militarism.

Contents

Introduction

Re-reading Foucault on law, power and rights

Ben Golder

What is the place of law in Foucault's various and varied accounts of modernity? What does Foucault have to say about law and what importance does he accord it in the social and political order of things? Has he omitted or excluded it illegitimately? Of course, these opening questions themselves betray a certain *methodological legalism* which Foucault's oft-canvassed theoretical opposition to juridical styles of thought would seek fundamentally to put into question. Rather than problematizing the category of law, these ways of posing the question of Foucault's relationship to law tend arguably to accept the stability and legitimacy of law. They assume the utility of law as a grid of intelligibility for the operation of power and take law as a starting point for analysis rather than as that which is itself in need of problematization. Alternatively, then: Can one even speak of 'law' outside of the rationalities and technologies of power operative in a given social formation? In speaking of law (and thus necessarily *speaking the law*) what does the theorist enable (and, more to the point, occlude)? Must not one rather ask how it came to be, and with what effects, that (a certain form of) law itself furnished the premises of political and social analysis and critique? Who speaks when law speaks, and who and what gets silenced? How might we think law *autrement*, as Lissa Lincoln asks perceptively in her contribution to this collection?

These, no doubt, represent some of the methodological counter-questions and analytical detours whereby Foucault seeks to displace the theoretical privilege, the sovereignty even, of the 'juridico-discursive' theory of power (for example, see Foucault 1979: 83). But remaining for a while within the orbit of my opening set of questions and their juridical entailments – Where is the law in Foucault and what has he done with it? – it is fair to say both that these questions have (tellingly) structured much of the extant debate within legal scholarship on Foucault's relationship to law *and* that, according to their terms, the judgment entered has been, on the whole, a negative one. As several of the contributors to this collection begin by discussing, Foucault's alleged failure to take proper account of law in his analyses of modernity has been a significant cause of concern, castigation and critique in the literature on Foucault and law. Colin Gordon puts the matter in the following way in his chapter, entitled 'Expelled questions: Foucault, the Left and the law'. He writes:

> A discussion of Foucault and law is almost routinely obliged, very much in the same way as a discussion of Foucault and gender, Foucault and geography or Foucault and post-colonial studies, to begin by acknowledging a widely held opinion that his work can be criticized for saying too little about law, or for belittling and disparaging the historical importance of law, its function in the constitution of modernity, and its constitutive and normative presence in social reality.
>
> (see Chapter 1, p. 13)

In Anglophone legal scholarship the best-known exponent of the view that Foucault downplayed the significance of law in modernity is the work, either sole-authored or in collaboration, of Alan Hunt (1992, 2004) and Gary Wickham (2002, 2006).[1] Their 1994 book, *Foucault and Law: Towards a Sociology of Law as Governance* (Hunt and Wickham 1994), articulated what subsequently came to be popularized as the 'expulsion thesis' – namely that Foucault had expelled law from any significant role in modernity. As Philippe Chevallier makes clear in his chapter (Chapter 8), citing French sources, this interpretation has by no means been confined to the Anglophone reception of the French thinker (see, also, Lincoln's chapter, Chapter 4). Indeed, Chevallier opens his chapter with what can stand as a succinct statement of the 'expulsion thesis':

> Is law the poor relation among the topics of Foucault's work? There has been widespread complaint to this effect, often with the suggestion that the philosopher remained limited here to a narrow, statist view of law and right, a viewpoint largely guided by the Napoleonic Codes, which fails to take account of contemporary developments which multiply the possibilities for individuals of legal recourse, including against the state. Foucault, it is claimed, neglected the virtues of political justice, which he discounted as an abstract, transcendental doctrine of traditional political thought, ill-suited for grasping the real functioning of modern power in its two principal forms, 'disciplinary power' and 'biopower'. For this French philosopher, starting with the early modern 'classical age', political power over the bodies of individuals operated principally through a *physis*, as a science of the growth and multiplication of beings, relegating juridical fictions to the prop room.
>
> (see Chapter 8, p. 171)

This dominant interpretation of Foucault – a 'widely held opinion', as Gordon has it in the above quotation – has recently been contested, revised, supplemented, extended and problematized along a number of different fronts.[2] It is to this interpretive work of re-imagining law in, and through, Foucault's work that the present collection, *Re-reading Foucault: Law, Power and Rights*, is dedicated. As I have been discussing, the common approach to assessing the legal theoretical import of Foucault's work has been to examine what he has had to say about law in a number of places – often restricted to a fairly circumscribed range of

texts from the mid- to late-1970s that are felt to have a more directly 'political' bearing – and then, on the basis of such a survey, often to conclude either that he did not have a great deal to say about the matter or that what little he did have to say was not particularly edifying – and this often in line with the 'expulsion thesis'. By contrast, the chapters in this collection take a range of different methodological approaches. By no means all of the contributors take the 'expulsion thesis' as their starting point, nor even the place and function of law in Foucault's work as an orienting frame of reference, nor indeed even law *per se* as their explicit object of inquiry. Some *do* return to the question of law in Foucault's work and seek thereby to articulate a different understanding of law (indeed an 'other law', as Peter Fitzpatrick has it (Chapter 2)) in his work. Others approach the question of Foucault's relation to law differently, discerning in his work the critical, methodological resources for thinking law and its functions in a different register (for example, Lincoln's chapter on judgment (Chapter 4)). Yet others perform this very work themselves, deploying Foucaultian insights in order to theorize legal and political formations, whether they be historical (as, for example, in George Pavlich's analysis of colonial sovereignty (Chapter 5)) or contemporary (as, for example, in Bal Sokhi-Bulley's use of 'governmentality' to expose the regulatory dimension of human rights discourse (Chapter 11)). What links these various chapters, in sum, is a concern to re-read Foucault in order to draw out the legal implications of his work – either directly or via some application of his work.[3] The following chapters hence confront a range of questions surrounding the place and function of law and legal concepts (the juridical, judgment, sovereignty, right, rights, normativity) in Foucault's work *and* also, crucially, of how Foucault's work helps us to think of these very categories differently.

The chapters

Colin Gordon (Chapter 1) begins by problematizing the very question with which I opened this introductory chapter, namely the question of the place of law in Foucault's thought. Rather than assuming that law is somehow lacking in Foucault's account of modernity, Gordon proceeds by questioning why it is that the very presence or absence of law comes to assume such theoretical and political importance in engagements with Foucault. Gordon poses himself what he calls a 'maliciously genealogical' (see p. 14) question along the following lines: 'What may be at stake in our politico-intellectual culture, and what interests, struggles or stratagems can potentially be involved, when a thinker such as Foucault is accused from various directions of insufficient attention or respect for law?' (see p. 14). What is essentially at stake for him is the response within contemporary Left politics to the question of legality – and that both the concerns, and the style, of the discourse around Foucault and law are to be understood as refracted through these questions. Whilst the first half of Gordon's chapter pursues this question by situating Foucault in regards to the contemporary Left

and its own engagement with questions of legality, the second half of his chapter picks up on a range of different 'legal themes and strands in Foucault's work' (see p. 25ff.). This survey then opens on to the remainder of the collection, as many of the contributors subsequently pick up, and reflect upon, these very themes in their engagements with Foucault.

The following two chapters, by Peter Fitzpatrick (Chapter 2) and Alan Hunt (Chapter 3), both take up the question of alternative understandings of law in Foucault's work, and both do so, at least initially, through the series of lectures 'Truth and Juridical Forms' which Foucault delivered in Brazil in 1973 (2000). For Fitzpatrick, developing an argument explored in the book *Foucault's Law* (Golder and Fitzpatrick 2009), this series of lectures provides the opening (and the structural motif) for a discussion of law's 'nested halves' – being its two, aporetic, dimensions of determinacy and responsiveness – which is layered throughout the chapter. Fitzpatrick here extends this argument about law to Foucault's constituting of the individual, and of society, and, finally, to theory itself – engaging here explicitly with questions of whether Foucault 'had' a theory of law. For his part, Hunt takes the Brazil lectures as an occasion to revisit a question previously posed – and answered – in his 1994 book, with Gary Wickham, *Foucault and Law*, namely 'whether Foucault's stimulating and original account of the place of law in modern society excludes or marginalizes the role played by the expansion and diversification of legal mechanisms in constituting modernity' (see Chapter 3, p. 64). Here the answer is somewhat different, taking account as it necessarily must for Hunt of 'an important dimension of Foucault's discussion, . . . [that is,] the nature and role of the "juridical", [which] did not receive the attention it deserve[d]' in his previous account of Foucault due in part to the delayed availability of Foucault's Rio de Janeiro lectures in English translation (p. 64). Hunt's chapter begins with a survey and a critique of these lectures. Ultimately finding Foucault's account deficient in several respects, Hunt nevertheless finds the lectures revealing for how they 'open[ed] up the field of the juridical' (see Chapter 3, p. 71) in Foucaultian analysis. Hunt's chapter draws upon this idea in advancing 'an understanding of law as a "juridical assemblage"' (see Chapter 3, p. 71) – a contingent, aleatory, non-systemic field characterized by 'the coexistence of different combinations of legal, judicial, and normative elements' (see Chapter 3, p. 80). Hunt concludes thus:

> The deployment of the concept of the assemblage makes it possible to bring together some of the disparate elements found in Foucault's engagement with the juridical field. We no longer need to castigate him for his narrow emphasis on the imperative dimensions of law. We can appreciate that his focus on the interaction between different fields of power, knowledge and governance manifested itself in his substantive preoccupation with the ways in which forms of law interact with mechanisms of discipline and with strategies and techniques of governance.
>
> (see Chapter 3, p. 81)

In Chapter 4, Lissa Lincoln approaches the question of the juridical – and more particularly of the modalities of legitimation and judgment – through a reading of both Foucault and Camus. As with Gordon's chapter, which methodologically displaces the standard questions of whether there is an adequate theoretical account of law in Foucault's work in favour of a problematization of the legal privilege in contemporary readings of Foucault, Lincoln herself approaches the question of judgment through asking after how the problem of judgment is itself constructed. As we shall see, she does this through a reading of Camus and Foucault. Whilst Camus the moralizing humanist would at first blush seem very much opposed to Foucault the critic of humanism (and, indeed, of philosophy understood as the legislation of values and the prescription of the good), Lincoln's chapter uncovers 'an interesting, if unexpected, connection' between the two thinkers (see Chapter 4, p. 87) the two thinkers. For her, what in fact unites both thinkers is precisely their shared problematization of the modality of judgment. Her chapter explains both how a reading of Foucault allows one to understand the Camusian project *autrement* but also how Foucault's analytic approach itself productively opens up the problem of legal judgment.

The next three chapters engage with law and legal issues from a different direction – that is, via a series of reflections which take particular power relations well-theorized by Foucault (sovereignty, surveillance and biopolitics) as their focus, before then relating this analysis to law or introducing legal questions in light of the analysis. In Chapter 5, George Pavlich deploys Foucault's reading of Hobbes in the lecture course '*Society Must be Defended*' (Foucault 2003b) in order to theorize a historical example of what he calls colonial sovereignty politics. The example that Pavlich focuses upon is the administration and governance of the Cape of Good Hope at the turn of the nineteenth century. Pavlich draws upon Foucault's 'perceptive interpretation of Hobbes' (see Chapter 5, p. 109) in '*Society Must be Defended*' in order to demonstrate how the maintenance of sovereign control actually relies upon a range of different political technologies (including law). As he puts it:

> Drawing on a 'softer' version of Hobbes, colonial sovereignty might equally be understood less as a top-down imposition following conquest, and more as an ongoing achievement of local power relations that seek to fashion legitimate and effective legal or governmental forms. In other words, by returning to Foucault's interpretation of Hobbes, this chapter draws attention to de Mist's emphasis on the ongoing, dynamic, and always-volatile bottom-up political relations that must be harnessed for effective juridical and sovereign governance to emerge.
>
> (see Chapter 5, p. 109)

In Chapter 6, Véronique Voruz conducts 'a reflection on the status of the gaze in our societies, often called control . . . or surveillance societies' (see Chapter 6, p. 127). Distancing herself from current and popular approaches in criminology and

surveillance studies that seek to deploy Foucault's understanding of 'panopticism' as some kind of Weberian ideal type to the study of society, Voruz returns to Foucault's work in order 'to map what Foucault says of the gaze at different times' (see Chapter 6, p. 128). This rich textual study of the various articulations of the gaze in Foucault's work has a range of possible applications for legal and criminological thinking. As Voruz foreshadows them:

> A close scrutiny of the gaze, and of what the gaze is made to perform in Foucault's own work, may help us fruitfully to elucidate whether it is truly the *visual* which is at stake in our closed-circuit television . . . culture, but also in multi-factorial risk registers, DNA databases and the current tendency to introduce practices bypassing subjective responsibility in criminal justice via neuro-scientific visibilization of the operation of the brain in the emergent field of neuro-law.
>
> (see Chapter 6, p. 128)

Finally, in Chapter 7, Pat O'Malley reconstructs, with and (in part) against Foucault, a genealogy of what he calls 'biopolitical justice'. Focusing on questions of punishment, O'Malley retraces the shift from a disciplinary anthropology of the offender to a biopolitical and environmental modulation of the population via apparatuses of security. For O'Malley, Foucault's own account of this transition underplays key connections between Benthamite penology and the neoliberal penological imagination of the 1970s. Central to this process, a fact also unexplored by Foucault, was the fine (which was of central importance to the late Bentham's thinking on punishment). The genealogy offered by O'Malley in this chapter both points backwards to the Benthamite lineages of contemporary practices and also illuminates the contours of our contemporary, commodified biopolitical 'domain of governance [which is] policed primarily at the margins by risk, within which there is a "floating" of the moral order, [and] in which the market and money optimize all circulations, good and bad' (see Chapter 7, p. 165).

The last four chapters each concern rights and, once again, the different engagements approach the question of rights in (and through) Foucault's work in a variety of ways. Each of the chapters, however, refuses a simplistic and summary judgment of Foucault – that, for example, he was simply a negative critic of rights discourse and that he had nothing constructive to add to debates around rights, that he failed to develop a theory of rights, and that his work is consequently of no real use for thinking through the juridical or political dimensions of contemporary rights regimes. To the contrary, each of the final four authors locates in Foucault's work either a much richer consideration of rights or the methodological possibility of deploying Foucault's insights in order productively to (re)theorize rights. A number of shared concerns circulate through these chapters, albeit addressed in different ways by the authors – the possible modern grounds, or normative bases, of rights once they are detached from metaphysical

claims about human nature or essence; the connection between (current and novel) rights claims and pre-existing political formations; and the extent to which rights can effectively pose themselves against those extant political formations (within which they are embedded) in the name of counter-conduct, critique, or even revolutionary change.

In Chapter 8, Chevallier returns to both Foucault's lecture courses at the *Collège de France* and a series of political and journalistic interventions contemporary with these lectures in order to outline a new understanding of rights in Foucault's work. Beyond Foucault's well-known critique of sovereign right, indeed even beyond his occasional 'strategic' or 'instrumental' deployments of given juridical rights for particular political purposes, Chevallier argues that in these sources it is 'possible to find premises for a more positive and non-disciplinary approach to right' (see Chapter 8, p. 178) – recalling here the cryptic 'new right' that Foucault had tantalizingly alluded to towards the end of the second lecture of '*Society Must be Defended*' in 1976 (Foucault 2003b: 40). Chevallier discerns, and elaborates upon, this possibility in Foucault's development of the concept of the 'rights of the governed' from 1977 onwards and his chapter here proceeds to situate it within Foucault's then current genealogies of liberal (and neoliberal) modes of governmentality in the lecture courses of 1977 and 1978: *Security, Territory, Population* (Foucault 2007) and *The Birth of Biopolitics* (Foucault 2008a).

Similarly, Paul Patton in Chapter 9 returns to this work of Foucault's on different forms of modern governmental reason in order to help construct what he calls a 'naturalistic' account of rights, by which he means an account which 'grounds [rights] in existing forms of political normativity and legal practice . . . [which] does not depend on any transcendent conception of the moral basis of rights, or of the human nature in which they are grounded, and in which rights are an important part of the social world in which we live' (see Chapter 9, p. 188). For Patton, then, Foucault's work provides theoretical support for the proposition, and itself helps empirically to illuminate and substantiate the different ways in which 'criticism of the exercise of power, often in the name of particular rights, invariably draws upon rationalities of government that are available in the prevailing political culture' (see Chapter 9, p. 199).

Jessica Whyte's critical examination in Chapter 10 of Foucault's own turn to rights discourse in his late work proceeds from this very proposition; namely, as she puts it, 'Foucault's argument that counter-conducts share a set of elements with the governmental rationality they oppose' (see Chapter 10, p. 213). Accepting this premise, and in line with recent revisionist histories of human rights that understand the hypertrophic rise of the discourse of human rights in the late 1970s as being connected to the deemed exhaustion of existing forms of (communist, socialist, revolutionary) political utopia (see especially Moyn 2010), Whyte situates Foucault's deployment of 'rights talk' in this particular historical juncture characterized by the ascent both of the discourse of human rights and, concomitantly, of neoliberal global capitalism. Are we then to understand human