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REVIEW ESSAYS

Foucault and the Incompletion of Law

BEN GOLDER*

Leonard M. Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*, Aldershot, Ashgate, 2007, 162 pp. (hb).
Sergei Prozorov, *Foucault, Freedom and Sovereignty*, Aldershot, Ashgate, 2007, 169 pp. (hb).

> *Uncompleted thoughts.* – Just as it is not only adulthood but youth and childhood too that possess value *in themselves* and not merely as bridges and thoroughfares, so incomplete thoughts also have their value. That is why one must not torment a poet with subtle exegesis but content oneself with the uncertainty of his horizon, as though the way to many thoughts still lay open. Let one stand on the threshold; let one wait as at the excavation of a treasure: it is as though a lucky find of profound import were about to be made. The poet anticipates something of the joy of the thinker at the discovery of a vital idea and makes us desire it, so that we snatch at it; he, however, flutters by past our heads, displaying the loveliest butterfly-wings – and yet he eludes us.
>
> Nietzsche

1. Introduction

In a late interview given to the French newspaper *Le Monde*, Michel Foucault discussed his dreams for a different style of criticism. 'I can't help but dream about a kind of criticism', remarked Foucault, in which one would 'not try to judge, but to bring an oeuvre, a book, a sentence, an idea to life; it would light fires, watch the grass grow, listen to the wind, and catch the sea-foam in the breeze and scatter it.'[1] This somewhat wistful, poetic thought resonates with more familiar Foucauldian notions regarding the use of theory as a 'toolkit' or 'toolbox'.[2] Common to both these tropes – critique as affirmation and theory as functional[3] – is the desire for thought

* Ph.D. candidate in the School of Law, Birkbeck University of London; sessional lecturer, New York University in London. Thank you to the anonymous reviewer for the LJIL, whose suggestions were helpful, and to Peter Fitzpatrick, to whom I am indebted for the argument developed in section 4.

1 M. Foucault, 'The Masked Philosopher', in M. Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984*, ed. L. D. Kritzman, trans. A. Sheridan et al. (1988), 323 at 326.

2 'All my books, whether *Histoire de la folie* or this one, are little toolboxes, if you will. If people are willing to open them and make use of such and such a sentence or idea, of one analysis or another, as they would a screwdriver or a monkey wrench, in order to short-circuit or disqualify systems of power, including even possibly the ones my books come out of, well, all the better', M. Foucault, 'Des supplices aux cellules', *Le Monde*, 21 February 1975, quoted in D. Eribon, *Michel Foucault*, trans. B. Wing (1991), 237.

3 See Gilles Deleuze's comment: '[a] theory is exactly like a box of tools. It has nothing to do with the signifier. It must be useful. It must function'. M. Foucault and G. Deleuze, 'Intellectuals and Power', in M. Foucault,

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to be put to work rather than put on trial, for sentences to be brought to life rather than delivered. And yet this presents the would-be Foucauldian book reviewer – and more so where the venue is the impeccably juridical one of the law journal – with a series of alluring problems. How might one elaborate such a Foucauldian critique in a context where one is expressly called upon to judge? What would such a non-judgmental Foucauldian critique look like? Are juridical practices of critique readily susceptible to Foucauldian appropriation or subversion?[4] This set of related questions is emblematic of a wider concern of mine which forms the subject matter of this review essay, namely the place of Foucault (if indeed he has one) in legal theory. How does Foucault, that fabled figure of postmodern antinomianism who supposedly announced the demise and 'expulsion' of modern law,[5] relate to legal theory? What might it mean to bring Foucault's unruly poststructuralism 'into law'?[6] And with what possible effects?

Thus the problematic which underpins my discussion of these two books and which I shall myself address more explicitly in the fourth part of this review essay is the place of law in Foucault's thought (and, by implication almost, the place of Foucault in legal studies). It seems to me that both these books provide possible (and divergent) answers to the question of how Foucault's thought might be brought into contact with law, and with how it might be put to work in law and legal theory. Throughout my discussion of both books, as my title and epigraph signal, my theme will be the question of law's (in)completion. In section 2 of the review essay I shall discuss Leonard M. Hammer's recent book, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*. My reading of this text is that it is an attempt – through deploying Foucault – to resolve and ameliorate, that is, in some measure to complete, certain doctrinal questions of international law. It represents a putting of Foucault to work in law, rather than a reflection upon Foucault's theorization of law (let alone international law) itself. In section 3 I shall discuss Sergei Prozorov's reading of Foucault's ontology of freedom in his recent book, *Foucault, Freedom and Sovereignty*. Whilst it is not ostensibly a text about law, I argue that Prozorov's recuperation of the concept of freedom in Foucault's work is a profitable way to reopen the question of law in Foucault's thought – a topic with which I conclude in section 4 of the review essay, offering my own position on this question. Throughout, I shall try to follow Foucault's poetic advice for the imaginative critic and focus my reading upon how these texts might be theoretically useful and not upon convicting them of infelicities of style, logical fallacies, and other such scholarly indiscretions. And indeed in my conclusion it

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Language, Counter-Memory, Practice: Selected Essays and Interviews, ed. and with an introd. by D. F. Bouchard, trans. D. F. Bouchard and S. Simon (1977), 205 at 208.

4 J. Butler, 'What is Critique? An Essay on Foucault's Virtue', in *The Judith Butler Reader*, ed. S. Salih, with J. Butler (2004), 302 at 304–5.

5 For the most sustained criticism of Foucault on the grounds that he 'expelled' law from modernity, see A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994). Of course, the claim that Foucault in his descriptive theses on modernity failed to accord law a constitutive or pivotal role does not necessarily depend upon or entail a view that he himself thought such a state of affairs preferable or desirable (although it frequently imports such). For a highly critical reading which emphasizes Foucault's antipathy to legality, see G. Rose, *Dialectic of Nihilism: Post-structuralism and Law* (1984), 171–207.

6 H. Baxter, 'Bringing Foucault into Law and Law into Foucault', (1996) 48 *Stanford Law Review* 449.

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will be seen that this ethos of imaginative Foucauldian criticism, of scattering and bringing to life, was all along implicated in Foucault's law itself. In section 4, rather than describing a relationship of antagonism between a judgmental and juridical law and an imaginative and transgressive critique, I shall try to show how Foucault's law must contain within itself the very possibility of critique; indeed, how it must, to borrow another Foucauldian description of critique, be a 'means for a future or a truth that it will not know and that it will not be'.[7]

2. Applying Foucault to law

It is possible to draw an admittedly crude (if nevertheless heuristic) distinction in Foucauldian legal scholarship between 'interpretive' or 'exegetical' accounts and more 'applied' readings of Foucault's work. The first strand of scholarship will often attempt to resolve questions such as whether and to what extent Foucault developed a theory of law, what role Foucault accorded law in his thought as a whole, and how Foucault conceived of law in relation to the forms of modern power which his work of the 1970s famously brings into relief (such as disciplinary power, governmentality, and bio-power).[8] Generally, as I shall discuss at greater length in section 4, the conclusions regarding Foucault's account of law have been either that he misunderstood modern law, that he was not interested in theorizing law or legal institutions, that he was in fact hostile to law or legal theory, or that he actively excluded a consideration of law from his wider project of analysing power in modern society. The second strand of scholarship does not attempt to locate a theory of law in Foucault's writings, or even to situate law in relation to his other objects of enquiry. Rather, scholarship in this vein focuses instead upon deploying Foucault's various methodologies or concepts in the service of a range of different critical approaches to law (and in a range of different legal contexts). In this respect it is entirely consonant with Foucault's hortatory remarks about toolboxes, screwdrivers, and monkey wrenches, instanced above. Thus, to take just a few examples, Foucault's *archaeological* method has been used to help formulate feminist critiques of law,[9] whilst his *genealogical* method has been employed to analyse and contest a host of different legal phenomena, from the self-presentation of international law's history as 'an evolutive process toward universal and neutral legal principles'[10] to the 'power–knowledge' configuration of contemporary international human rights law.[11] Moreover, Foucault's specific understanding of concepts such as power and resistance (and their necessarily indissoluble relationship), has proved especially fruitful in the field of

7 M. Foucault, 'What is Critique?', in J. Schmidt (ed.), *What is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Questions* (1996), 382 at 383.

8 As developed in M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A Sheridan (1991); M. Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, trans. G. Burchell (2007); and M. Foucault, *The Will to Knowledge: The History of Sexuality, Vol. 1*, trans. R. Hurley (1978).

9 For example, see M. Drakopoulou, 'Feminism and the Siren Call of Law', (2007) 18 *Law and Critique* 321.

10 M. Olmsted, 'Are Things Falling Apart? Rethinking the Purpose and Function of International Law', (2005) 27 *Loyola of Los Angeles International and Comparative Law Review* 401, at 405.

11 For example, see T. Evans, 'International Human Rights Law as Power/Knowledge', (2005) 27 *Human Rights Quarterly* 1046.

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international law scholarship. For example, Foucault's work on governmentality and its attendant emphasis upon practices of government which go beyond (or perhaps beneath) the institutions of the state has been used as a means to help theorize 'Third World' resistance to practices of development.[12]

A Foucauldian Approach to International Law places itself firmly within the second tradition of Foucault and law scholarship that I have just outlined. We are advised on the first page of the book that 'Foucault eschewed any notion of law or norms as maintaining an elevated position when compared to other forms of social forces' (p. 1). However, this reluctance to accord law a privileged or constituent role does not mean that Foucault is of no use in theorizing law:

> Rather, it is important to remember that Foucault was not necessarily offering a theory as such, but rather analytic devices and forms of interpretation. Thus, one purpose in referring to Foucault throughout this work is to allude to his descriptive model as an avenue towards interpreting and further examining events and existing conceptions within the international system. (p. 1)

What results is a singular attempt to apply Foucauldian methods of analysis to a series of interconnected problems in the field of international law. As Hammer observes, '[e]ach of the book chapters addresses various aspects of international law from a Foucauldian perspective' (p. 3). So we see here a Foucauldian perspective on the doctrine of the recognition of states at international law (chapter 3), a Foucauldian perspective on the question of customary international law (chapter 4), a Foucauldian approach to international human rights law, specifically the right to freedom of religion or belief (chapter 5), and discussions of the concept of human security and the role of non-governmental organizations in the international sphere, similarly from a Foucauldian viewpoint (chapters 6 and 7).

What coheres these varied endeavours in applying Foucault's conceptions of power to the system of international law is a belief that Foucault can help resolve certain methodological problems inherent in the study of that discipline. As Hammer puts it in chapter 2, describing the impasse between 'universalist or cosmopolitan' accounts of international law, which stress its putatively objective normative structure, and 'realist' accounts of international law, which emphasize the assertion of, and conflict between, state interests (p. 8),

> The assertion herein, and throughout the rest of the book, is that an alternative approach as dictated by the theories of Michel Foucault can begin to address some of the problems [inherent in the irresolvable opposition between the two theories] . . . The advantage in referring to Foucault is the possibility to ameliorate the contrasting viewpoints by addressing the underlying changes to the system. A clearer image of present day

12 For example, see B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), 13–15. Widening the field from 'international law' to 'the international' or 'the global', one would of course be tempted to include the work of Michael Hardt and Antonio Negri in such a list, even if their evocation of bio-power and bio-politics derives as much if not more from Deleuze and from traditions of autonomist Italian Marxism as it does from Foucault's usage. See M. Hardt and A. Negri, *Empire* (2000); M. Hardt and A. Negri, *Multitude: War and Democracy in the Age of Empire* (2004). For a very cogent critique of Hardt and Negri's interpretation of international law, see R. Buchanan and S. Pahuja, 'Legal Imperialism: *Empire*'s Invisible Hand?', in P. Passavant and J. Dean (eds.), *Empire's New Clothes: Reading Hardt and Negri* (2004), 73.

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> international law and the role of such law in the international framework can be better elucidated. (p. 9)

Why is Foucault adduced as the theoretical supplement to correct the 'seemingly dichotomous battle' (p. 8) between these competing theories? How can Foucault navigate international law between the Scylla of utopian cosmopolitanism and the Charybdis of state-centred realism? 'What distinguishes Foucault', argues Hammer, 'is that he understood power and its application as being subject to constant change and alteration' (p. 19). It is arguable that this does not in fact distinguish Foucault greatly from traditions of scholarship in other fields (certain species of functional sociology, for example), but no matter. Hammer again:

> There exist a host of influences that derive from a diverse array of actors external to the state and its apparatus . . . Given the multiplicity of actors that assert power or that maintain the capacity to do so, the real examination is the complex interplay of social relations between the various actors. (p. 19)

It thus transpires that the conceptual advance on earlier approaches which Foucault provides is largely one of improved powers of description (hence, presumably, Hammer's subtitle: 'Descriptive Thoughts for Normative Issues'):

> Foucault's approach to power essentially hinges on the ongoing tension and inherent conflict that has been identified within international law without creating a limiting dichotomous framework . . . [O]ne is to consider the variety of actors and influences on the same plane and account for their form of discursive developments and ongoing, ever-changing relationships. (p. 27)

Now, as some scholars have observed, Foucault did not explicitly comment upon developments in the fields of international relations, regional or supranational governance, or international law. As Nancy Fraser points out, he confined himself to making critiques of the disciplinary systems of modern nation-states (and, we might add, a select few of these).[13] According to thinkers such as Fraser, the application of Foucault's insights on power relations to contemporary formations of neo-liberal government, post-Fordist regulation and the many-hued concept of globalization hence requires both an updating and a 'creative transformation'.[14] Other commentators do not perceive such a necessity actively to *internationalize* Foucault in this way. 'Foucault wrote only of national governmentality', admits Ronnie Lipschutz in his book *Governmentality and Global Politics*, before quickly concluding that this poses no necessary conceptual obstacle to Foucault's wider deployment: 'As we shall see, the extension of his idea to the international arena is rather straightforward.'[15] Hammer is of Lipschutz's persuasion, implying that the 'changes that have developed within international law over the past century given the growth of international and regional organisations, a move towards globalisation with its attendant local and international effects (economic and social), and the rise in influence by actors

13 N. Fraser, 'From Discipline to Flexibilization? Rereading Foucault in the Shadow of Globalization', (2003) 10 *Constellations* 160.
14 Ibid., 161.
15 R. D. Lipschutz with J. K. Rowe, *Governmentality and Global Politics: Regulation for the Rest of Us?* (2005), 15.

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external to the state' (p. 9) are directly responsive to a Foucauldian analysis. Foucault's understanding of power as dispersed and relational 'conforms' (p. 131) neatly to the realities of contemporary international law.

What Hammer proposes is thus to expand the international lawyer's field of conceptual analysis so as to include the dispersed forms of regulation and emerging subjectivities engendered by practices of international rule which are not tied to the modernist nation-state. For reasons which are not immediately apparent, Hammer frequently terms such an expansion of analysis 'transgressive' (for example, see p. 28), but nevertheless the Foucault employed here is a familiar one – the Foucault who counsels that political power exists beyond, in the interstices of, in and against the forms of the state, and so forth.[16] What is unfamiliar and novel in this setting is the specific and sustained application of this insight to the framework of international law. I shall limit myself to giving a single example of Hammer's interrelated analyses. The example concerns international human rights law and is drawn from chapter 5 of his book. My discussion of this example raises the issue of the extent to which Hammer's professed descriptive approach actually constitutes an effort to ameliorate or complete international law in some way (which inevitably raises questions of exactly what international law 'is', could be, or should be). This thematic of completion, and its necessary opposite of incompletion, will then provide the leitmotif of my discussion of Foucault's law in the remainder of this review essay.

Briefly, then, in chapter 5 of *A Foucauldian Approach to International Law*, Hammer turns his attention to the international human rights regime – specifically to the right to freedom of religion and belief as manifested in a range of regional and international human rights instruments.[17] Through a reading of several decisions of the European Court of Human Rights concerning the scope of protection offered by Article 9 of the European Convention on Human Rights (ECHR), Hammer makes an argument that the scope of the right should be expanded and that courts should not narrowly frame the issue of whether a claimed interest is protected by considering only the relationship between 'the sovereign state and the individual' (p. 90). In this more expansive vein, courts should try to 'consider the broader interplay among the various actors and the implementation of their understanding of knowledge within society' (p. 90). In pursuing this Foucault-inspired method, the 'actual content of the belief is not the key issue' (p. 84), argues Hammer; rather, the social function performed by the belief in modifying existing social and religious practices is itself something to be recognized and given protection by a court. For example, in the case of *Cha'are Shalom Ve Tsedek* v. *France*,[18] the applicant was a minority Jewish

16 For example, see some of the work of Nikolas Rose and Peter Miller, which develop the insights of this work, especially N. Rose, 'The Death of the Social? Re-figuring the Territory of Government', (1996) 25 *Economy and Society* 327; P. Miller and N. Rose, 'Governing Economic Life', (1990) 19 *Economy and Society* 1; N. Rose and P. Miller, 'Political Power beyond the State: Problematics of Government', (1992) 43 *British Journal of Sociology* 172.

17 For example, Art. 18 of both the 1948 Universal Declaration of Human Rights (UN Doc. GA Res. 217A (III) (1948)) and the 1966 International Covenant on Civil and Political Rights ((1967)999 UNTS 171; 6 ILM 368); Art. 9 of the 1950 European Convention on Human Rights (ECHR) (213 UNTS 221); and Art. 12 of the 1969 American Convention on Human Rights ((1969) OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99).

18 *Cha'are Shalom Ve Tsedek v. France*, Judgment, 27 June 2000, No. 27417/95, ECHR 2000-IV.

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faction which adhered to a more stringent version of the 'schechita' process of kosher meat slaughter. The applicants claimed that the French government had violated Article 9 of the ECHR by failing to register their organization as being legally entitled to conduct this process, but a majority of the Court ultimately decided that there had been no violation of Article 9 because the appellants could obtain meat from alternative sources outside the country. What is not valued in this decision, according to Hammer's reading, is the interests of 'the ongoing discourse regarding the accorded interpretation of the Jewish law' (pp. 87–8). In this instance the Court should have adopted a 'more flexible approach', one more cognizant of the Foucauldian insight that a dominant religious practice (and, more broadly, any power formation) is constituently 'subject to constant influences and external exertions that would suggest the occurrence of ongoing change' (p. 85). Hammer's approach to expanding the right would thus counsel a court to appraise not the claimed right per se – an interpretive approach that entails it in assessing the inherent truth or worth of the individual religious claim and setting it against countervailing state (or majority religious) interests – but rather to attempt to value the role a rights claim performs in the 'transformative process' (p. 91) of dialogue within the social field.[19] Examples from *A Foucauldian Approach to International Law* could easily be multiplied, but the logic remains similar in all – a Foucauldian analysis of social power relations helps to excavate an altered international reality to which the theory (and practice) of international law must respond.

Hammer is insistent throughout the book that he is simply 'offering a framework by which one can refer to Foucault to better explicate international law' (p. 129). There is no attempt through Foucault to 'discern the law as such' (p. 28) or to 'provide an alternative normative framework or an improved legal argument, as that tends to stretch Foucault's ideas beyond their reach and intent' (p. 79, n. 26). And yet stretching Foucault's ideas is precisely what this book does,[20] and it does so in an interesting (if in places – perhaps necessarily – inchoate) manner. Foucault is pressed into descriptive service in order to 'account for the ongoing changes and developments' of the international landscape (p. 28). In a kind of realist gesture, the formalist pretences of international law are thence revealed to be lacking in

19 This project is open to certain theoretical objections. Although not expressly framed in this way, Hammer's proposed approach to human rights claims is no doubt a plausible attempt to put into practice Foucault's cryptic and unelaborated call in *'Society Must Be Defended'* for a 'new form of right' (see M. Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975–1976*, trans. D. Macey (2003), 40). Indeed it is in its attention to *practices* – here, modalities of judgment and questions of how judges resolve disputes – that Hammer's proposal is perhaps most in line with Foucault's general method (recall Foucault's rigorous insistence upon studying 'the "how" of power . . . [by] trying to understand its mechanisms': ibid., at 24). Nevertheless, Hammer leaves unaddressed precisely the kind of questions about what measures judges might employ to value the interest of ongoing social dialogue, or with what results. Moreover, it is unclear how Hammer's approach would necessarily result in the claimed displacement of the state and its formal legal institutions – rather, it might simply expand or reorient their jurisdiction. For an analogous criticism of Foucault on the topic of human rights see B. L. Pickett, 'Foucaultian Rights?', (2000) 37 *Social Science Journal* 403.

20 I should make it clear that I believe this stretching to be a necessary and productive venture. Recall Foucault's tribute to Nietzsche: 'the only valid tribute to thought such as Nietzsche's is precisely to use it, to make it groan and protest'. M. Foucault, 'Prison Talk', in M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. and trans. C. Gordon (1980), 37 at 53–4.

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regard to this restive landscape of agonistic transnational actors and dispersed sites of power. Law is then called to be 'more flexible' (p. 85) in its response to this constantly (re)negotiated reality. Foucault's descriptive analyses of power in its social dispersion can thus help to 'ameliorate' (p. 2) problems of international law; they can help to 'enhance the international system' (p. 3) by locating new sites and new objects of analysis. This is a novel use of Foucault, a novel way to bring him to law, which consists of offering a series of tentative Foucauldian 'solutions' to some doctrinal problems of international law. But does this smorgasbord of Foucauldian aperçus exhaust the potential of Hammer's approach (and of Foucault's law)? To the contrary, I think we can read here the beginnings of a more robust theorization of law itself in Hammer's text, discernible in those places where he hints at the 'mutual constitution, and reciprocity' (p. 27) of law and power. If Hammer aims towards a certain amelioration and resolution, if he gestures towards a more complete international law, he nevertheless intimates in the course of his discussion of Foucault's views on power's constituent 'change and alteration' (p. 19) that such completion is unattainable. If international law is to 'open' to 'new vistas' (p. 130), those horizons must necessarily remain uncertain. Could this, then, represent a way, against Hammer's stated intentions, of thinking about Foucault's law 'as such' (p. 28), and not simply by applying Foucauldian 'analytic devices' (p. 1) to law? As a step towards this possibility, let me now consider in section 3 a recent book which focuses on Foucault's concept of freedom. In this respect, Prozorov's *Foucault, Freedom and Sovereignty* differs from Hammer's *A Foucauldian Approach to International Law* in that it is more centrally 'about' Foucault's thought (although of course it is also about a range of other contemporary theorists). Prozorov's book does not centrally concern itself with law but it contains, I think, several very useful formulations which can help us to approach the problematic of law in Foucault's thought. In the spirit of an affirmatory (and appropriative) Foucauldian critique, these formulations are then constructively deployed in section 4 of this essay in the cause of thinking about law 'itself' in Foucault's work.

3. Foucauldian freedom

Prozorov's text is a rigorous and extended consideration of the question of freedom as it appears in Foucault's work. Part 1 of his book, 'Being Beside Itself: An Austere Ontology of Freedom' (chapters 1–3), develops his reading of Foucault's account of freedom, whilst part 2, 'Ecstatic Exodus: The Return of the Sovereign Subject' (chapters 4–6) brings this Foucauldian thought of freedom into proximity with a series of other thinkers (namely Schmitt, Agamben, Hardt, and Negri). The two parts are separated and conjoined by a Hardt and Negri-esque 'Interlude' on J. M. Coetzee's *The Life and Times of Michael K*. Despite the richness of the engagement with the thinkers in the second half of the book, it is the first of the two parts on which I want to focus in this part of my review.

Prozorov begins with a 'thought experiment' which is really a question:

> How can we define freedom? While political philosophy has offered us an impressive array of such definitions over millennia, it quickly becomes apparent that any positive

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> definition of freedom demonstrates its own insufficiency at the very moment of its enunciation. The very act of predicating certain qualities and attributes to the subject of freedom logically invites the question of whether this subject must not retain the capacity to become free from these very attributes to remain genuinely free . . . Perhaps, freedom is nothing but this spectre itself, which keeps rupturing our most rigorous definitions, ensuring that the question of freedom remains a philosophical problem that must prohibit its own solution. (p. vii)

This is the notion of freedom, freedom 'as utterly heterogeneous to any form of political order' (p. viii), that Prozorov goes on to read in Foucault's work. This reading is developed in response to critiques of Foucault (and they are legion) that stress his related failures to articulate either the freedom of the individual (freedom as a determinate attribute of a human being) or the form of social organization that would definitively guarantee such freedom (freedom as an attribute of a political order).[21] As Prozorov reminds us, writing caustically of the 'complex choreography of aggressive intervention' for the advancement of the more muscular varieties of neo-liberal freedom contained in the National Security Strategy of the United States (p. 1), the violent export and imposition of reified institutional 'freedoms' remains amongst the most pressing political issues of our time. For Prozorov, it is 'precisely *because of* Foucault's famous scepticism towards all grand narratives of emancipation that his work is exemplary as an affirmation of freedom that goes beyond its attribution to a certain "perfect order"' (p. viii, emphasis in original). It is important to stress that this exemplary affirmation of freedom is *not* conceived as the necessary property of a self-present, autonomous subject. Several gleeful (mis)readings of Foucault's late work, discerning therein a certain apostasy towards the failed post-structuralist project of the deconstruction of subjectivity, maintain that he furtively reintroduced a constituent subject under cover of a description of classical Greek and imperial Roman ethics in the second and third volumes of the *History of Sexuality* project.[22] This is not a misreading in which Prozorov engages. 'The Foucauldian critique of power relations, immanent to the social realm, does not stop, as liberalism does, at the individual as the "last instance" of freedom', argues Prozorov (p. 13). Rather, 'Foucault's philosophical ethos is an affirmation of being human beyond any known humanism' (p. 14). This thought of freedom is thus not the affirmation of a subject's self-enclosed identity, but rather the celebration of the risk of non-identity, of what it might mean to 'occupy that ontologically insecure position which poses the question anew: who will be a subject here, and what will count as a life[?]'.[23] This is Foucault's theoretical project, pursued with some vigour in the last years of his life, of becoming otherwise, of constituent self re-creation, of imagining new modes of ethical relation to oneself and to others.

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21 The best-known of these critiques include C. Taylor, 'Foucault on Freedom and Truth', in D. C. Hoy (ed.), *Foucault: A Critical Reader* (1986), 69; and N. Fraser, 'Foucault on Modern Power: Empirical Insights and Normative Confusions', (1981) 1 *Praxis International* 272.

22 The classic instance is of course P. Dews, 'The Return of the Subject in Late Foucault', (1989) 51 *Radical Philosophy* 72. For a much more extensive engagement which maintains that Foucault reintroduces the subject in his late work, see E. Paras, *Foucault 2.0: Beyond Power and Knowledge* (2006).

23 See Butler, *supra* note 4, at 324.

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Freedom in Prozorov's reading of Foucault is both a point of departure and a departure (exodus, escape, subtraction) itself. This departure is at one and the same time an escape from the enclosure of a sovereign subjectivity and from the stultifying effects of political community – here rendered in Deleuzian terms as 'the positive structure of authority [called] a *diagram*' (p. 6, emphasis in original). This departure, this 'potentiality for being otherwise' (p. viii) is something which resides at the heart of all structures of political authority and yet cannot be contained in and by the exercise of political order. As Prozorov argues, freedom in Foucault's account is 'both anterior and exterior to any form of positive order, functioning as its singularly paradoxical "slippery foundation" that simultaneously makes possible both its establishment and its transgression' (p. 10). Thus Prozorov arrives at a formulation of Foucauldian freedom which sees it as being both the foundation of political authority and that which exceeds and eludes all authority. As Foucault himself puts it in a late essay which serves as a kind of conspectus of his thinking on power relations from the mid-1970s onwards, '[p]ower is only exercised over free subjects'[24] and freedom is the very 'condition for the exercise of power'.[25] Such freedom, in Foucault's later work of the 1980s, also resurfaces as 'the ontological condition of ethics'.[26] Freedom is thus what makes possible the instantiation of any given political order – a political order relies on freedom for its construction and imposition. And yet (and it is precisely this 'and yet' with which Prozorov is most concerned) no given political order can entirely subsume the rebellious freedom which is its necessary precondition:

> Concrete freedom no longer appears as something a certain governmental diagram can *guarantee* through its positive intervention or a commitment to non-intervention but rather as a result of the ontological impossibility of the diagram to achieve the degree of closure and stability that it attests to. (p. 45, emphasis in original)

Freedom is an 'unsubsumable remainder' (p. 45); it remains 'singular and supplementary in relation to all positive modes of knowledge' (p. 54). In these tantalizingly Derridean formulations, the free ground of power constantly disturbs its given sedimentations – we cannot ever be fully 'abducted' (p. 6) by a power formation and the 'full coincidence' of ourselves with a given regime of power is 'impossible' (p. 45). What remains, what escapes and eludes power, is not the interiority of a liberal humanist subjectivity but rather the potentiality of its exteriority, the irrepressible possibility of other subjectivities and ways of being:

> It is in this sense that Foucault's ontology may be said to postulate a 'human nature', with a caveat that the content of this 'nature' is entirely exhausted by the unnameable exteriority of the outside that exceeds every historically conditioned mode of subjectivity. (p. 40)

So Prozorov's text gives us a resonant reading of the constituent possibilities of freedom in Foucault's work. Freedom is constituent because it founds a power

24 M. Foucault, 'The Subject and Power', in M. Foucault, *Essential Works of Foucault 1954–1984, Vol 3: Power*, ed. J. D. Faubion, trans. R. Hurley et al. (2000), 326 at 342.
25 Ibid., at 342.
26 M. Foucault, 'The Ethics of Concern for Self as a Practice of Freedom', in M. Foucault, *Essential Works of Foucault 1954–1984, Vol 1: Ethics, Subjectivity and Truth*, ed. P. Rabinow, trans. R. Hurley et al. (1997), 253 at 284.

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relation, but it also comes to reconstitute it, challenging and transgressing its instant determinations through its ineluctable anterior exteriority.[27] What of these philosophical insights for law?

Law figures in Prozorov's account largely in its diagrammatic guise as a form of political order, yet a form of order that is – according to Foucault's historical analyses, we are told – very much in 'retreat' (p. 109). The 'biopolitical subsumption of the law' (p. 112), its very 'subordination . . . to the expert knowledge generated by the administrative apparatus in the spheres of health care, social work or education' (p. 112), attest to the fact that in modernity 'practices of resistance . . . ought to target precisely that which subsumes law but remains heterogeneous to it, i.e. biopolitical governmentality' (p. 112). This recalls the orthodox reading of Foucault's law to which I adverted earlier in this review essay (and shall address below) – that is, the view that Foucault 'expelled' modern law and instrumentally subordinated it to new forms, modalities, and technologies of power. Yet surely Prozorov's own theses on freedom can help us to rethink Foucault's law, to think it otherwise than simply as order and system, indeed to think it as amenable to disorder. What of law's own freedom? Of law's generative incompletion?

4. Foucauldian legalities

In section 2 of this review essay I discussed two possible avenues of Foucauldian legal scholarship. Reductively, no doubt, we can say that one avenue attempts to apply Foucault to law whilst the other seeks to locate law within Foucault. Leonard Hammer's book furnishes an apt example of the former avenue. As the title of his book reveals, Hammer's method consists of using a Foucauldian analytic in order to 'approach' law – that is, a bringing of Foucauldian methodologies to bear upon the disciplinary object of international law. In Hammer's approach, Foucauldian descriptive insights are deployed to ameliorate and complete a lacking law. Prozorov's *Foucault, Freedom and Sovereignty*, which I discussed in section 3, parts company from Hammer's Foucauldian diagnostics. Focusing perhaps more conventionally (or at any rate more monographically) upon Foucault's body of work as a whole, Prozorov's articulation of a Foucauldian concept of freedom aimed to show us how the 'full coincidence' of a structure of political authority with its objects of control was constitutively 'impossible' (p. 45), and yet also how that authority necessarily relied upon a resistant freedom for its very foundation. In this final part of this review essay, I want myself to offer an example of the second strand of Foucauldian legal scholarship. In applying Prozorov's insights to law itself, the law that I now want to find in Foucault turns out to be a law that, in its very incompletion, can never (*contra* Prozorov) be definitively subsumed or subordinated. This is law as critique. And whilst this law which emerges from Foucault's writings is not a

27 We can contrast Prozorov's reading of freedom in Foucault's thought with the most influential treatment of freedom in the Foucauldian literature, namely the work of Nikolas Rose. Whereas Prozorov sees freedom as uncontainable by any political programme, Rose reads freedom as an instrument of governance. See, e.g., N. Rose, *Powers of Freedom: Reframing Political Thought* (1999).

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specifically international law, nevertheless it can prompt us to think in new ways about issues of central concern to international law scholarship, such as the (really, unanswerable) question of (international) law's relationship to structures of power and political authority, and international law's instrumentalization by politically powerful sovereign states. Before articulating this alternative reading of Foucault, let me first address the way in which Foucault has conventionally been read in the exegetical or interpretive strand of legal scholarship.

The preponderance of the first strand of Foucauldian legal scholarship may be due to the fact that Foucault himself – as we have seen – counselled readers to use his work creatively and not to approach it in the reverential spirit of the exegete. This, after all, was the iconoclastic author of 'What is an Author?'[28] However, the imbalance of scholarship might equally be attributable to the achieved orthodoxy of one particular interpretation of what Foucault had to say about law itself. This view, which we might call the 'expulsion thesis', contends that Foucault did not have a coherent theory of law and that to the extent that he did theorize about law it was to argue that law had been superseded by other, more important, forms of modern power. Alan Hunt and Gary Wickham's 1994 book, *Foucault and Law: Towards a Sociology of Law as Governance*, contains the most succinct statement of the case. They write thus:

> [I]t is apparent that the most distinctive features of Foucault's account of the historical emergence of modernity led him to present a view which can be aptly summarised as the expulsion of law from modernity. This 'expulsion of law' is found in his metahistorical thesis that law constituted the primary form of power in the classical or pre-modern era and in his point that law lingers on in the doctrine of sovereignty which continues to play a significant ideological role in political discourse. In the real world of power, law has been supplanted by the disciplines and by government as the key embodiments of power in modern society.[29]

Where law persists in some form, where it 'lingers on' in Foucault's modernity, it is, according to Hunt and Wickham, 'a mechanism that is ineffectual and generally epiphenomenal, confined mainly to providing legitimations for the disciplinary technologies and normalizing practices established by the other mechanisms'.[30]

So, according to this reading of Foucault, the emergence of the disciplinary technology of power marks the historical transition to the modernity we still inhabit – a modernity in which the old forms of law and sovereignty have become decreasingly

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28 See M. Foucault, 'What is an Author?', in D. Lodge (ed.), *Modern Criticism and Theory: A Reader* (1988), 196, where Foucault argues that the concept of an author is a discursive 'function' that limits the available meaning of texts.

29 Hunt and Wickham, *supra* note 5, at 56. This interpretation finds its most developed, and sustained, expression in both the sole- and joint-authored work of Alan Hunt and Garry Wickham (although they are by no means the only, or indeed the first, scholars to have raised the objection that Foucault minimizes the importance of law). For the fullest expression of the argument see their *Foucault and Law* (*supra* note 5). See also A. Hunt, 'Foucault's Expulsion of Law: Toward a Retrieval', (1992) 17 *Law and Social Inquiry* 1; A. Hunt, 'Law and the Condensation of Power', (1992) 17 *Law and Social Inquiry* 57; A. Hunt, 'Getting Marx and Foucault into Bed Together!', (2004) 31 *Journal of Law and Society* 592; G. Wickham, 'Foucault, Law, and Power: A Reassessment', (2006) 33 *Journal of Law and Society* 596; G. Wickham, 'Foucault and Law', in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory* (2002), 249.

30 Hunt and Wickham, *supra* note 5, at 57.

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important as a site, and mode of operation, of power. Foucault, on this reading of him, renders law in positivist terms as an instrument of repression, control, and social ordering, which is much beloved of pre-modern sovereigns but which in modernity is overtaken by more expansive and regulatory modes of power with a more involving capacity to insinuate themselves into the social body, to enter into the very fine-grained depths and details of 'the social', and so forth. On this reading of Foucault, importantly, the nature and form of the new disciplinary and bio-political modalities of power are largely incompatible with and irreducible to the outdated forms of law and sovereignty. While the former, in Foucault's by-now-famous formulation, are variously positive, productive, continuous, and dispersed throughout the social body,[31] the latter are repressive, deductive, violent, and occasional in their operation, tied to the sclerotic form of the centralized state apparatus and thoroughly inefficient as a means of surveilling and correcting individual bodies or managing populations (hence their eventual eclipse in modernity).

There is of course, it must immediately be admitted, more than enough warrant for such a reading in Foucault's works – particularly amongst his genealogical analyses of power formations in the mid-1970s. To take one of the more cited examples, Foucault observes in the first volume of the *History of Sexuality* that

> We have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, of serving as its system of representation. Our historical gradient carries us further and further away from a reign of law that had already begun to recede into the past at a time when the French Revolution and the accompanying age of constitutions seemed to destine it for a future that was at hand.[32]

Indeed, in the same work he talks in terms of our entering a 'phase of juridical regression' characterized by 'the growing importance assumed by the action of the norm, at the expense of the juridical system of the law'.[33] Foucault's law in these, and other, places seems set in its constrained negativity. Unable responsively to accommodate change, law is instrumentally subordinated to and surpassed by the more fecund powers of modernity, which Foucault describes in intricate detail in *Discipline and Punish* and the first volume of the *History of Sexuality*. Enter power; exit law.

And yet if law is in places rendered by Foucault as a contained and surpassed creature of delimitation, as a positivist caricature of restraint and calculation (that is, in his own words, law as the 'terminal form' which 'power takes',[34] law as that 'which says no',[35] law as 'the law of prohibition',[36] and so forth),[37] then in other places he gives us a very different picture of law. This other picture of law is more aligned with his own more nuanced (and better-known) considerations of power. For Foucault (as Hammer rightly observes), power could never be contained or rendered

31 See, e.g., Foucault, *Discipline and Punish*, *supra* note 8, at 194, 297.
32 Foucault, *History of Sexuality, Vol. 1*, *supra* note 8, at 89.
33 Ibid., 144.
34 Ibid., 92.
35 M. Foucault, 'Truth and Power', in *Power/Knowledge*, *supra* note 20, 109 at 119.
36 M. Foucault, 'Powers and Strategies', in *Power/Knowledge*, *supra* note 20, 134 at 139.
37 For a critique, see D. Kennedy, 'The Stakes of Law, or Hale and Foucault!', in *Sexy Dressing Etc.* (1993), 83 at 119.

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in any determinate form but was always constituently attuned to change. Power was neither the outcome of a juridical contract which founded society nor the reified object held by an economically or politically dominant class:

> Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised from innumerable points, in the interplay of nonegalitarian and mobile relations.[38]

And again:

> Power must, I think, be analyzed as something that circulates, or rather as something that functions only when it is part of a chain. It is never localized here or there, it is never in the hands of some, and it is never appropriated in the way that wealth or a commodity can be appropriated. Power functions.[39]

But, crucially, power's functioning was never set or complete. There is always something, Foucault reminds us, 'which in some sense escapes relations of power'.[40] Power formations are never (as Prozorov also observes) adequate to their object. This unavoidable lack of power is then famously supplied by resistance. 'Where there is power', Foucault remarks, 'there is resistance',[41] and these movements of resistance are themselves *constitutive* of power. These 'mobile and transitory points of resistance' dispersed throughout the social field come to 'inscribe [themselves] in [power relations] as an irreducible opposite', repeatedly contesting and reforming power throughout and across the social body.[42] Reversing standard perceptions of resistance that would see it in terms of a responding to or a resiling from a power formation that is complete and coherent, Foucault depicts a relational dynamic in which any power formation, if it is to continue in force, must respond to and incorporatively engage with the 'diversity of forms and extensions, of energies and irreducibilities' of resistance,[43] 'for there has never existed one type of stable subjugation, given once and for all' that was immune to the 'effects of resistance and counterinvestment'.[44] That is to say, finally, that if 'resistance comes first' and 'resistance remains superior to the forces of the process', then 'power relations are obliged to change with the resistance'.[45] So, *pace* those critics who discern in Foucault the stultifying contours of a carceral present from which we cannot escape,[46] Foucault actually describes a constituent instability of power relations which is the very key to their (and our) futurity.

And predictably Foucault's law, like power, also assumes such changeable dimensions. In an important early engagement with the French novelist and philosopher Maurice Blanchot, Foucault evokes a very different image of law from the one

38 Foucault, *History of Sexuality, Vol. 1*, *supra* note 8, at 94.
39 Foucault, *supra* note 19, at 29.
40 Foucault, *supra* note 36, at 138.
41 Foucault, *History of Sexuality, Vol. 1*, *supra* note 8, at 95.
42 Ibid., 96.
43 Foucault, *supra* note 36, at 138.
44 Foucault, *History of Sexuality, Vol. 1*, *supra* note 8, at 97.
45 M. Foucault, 'Sex, Power, and the Politics of Identity', in *Essential Works of Foucault*, *supra* note 26, 163 at 167.
46 They are too many to list here. The oft-quoted example is Clifford Geertz's observation of *Discipline and Punish* that it described 'a kind of Whig history in reverse – a history, in spite of itself, of the rise of Unfreedom', quoted in D. C. Hoy, 'Introduction', in Hoy, *supra* note 21, 1 at 11.

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offered (and laboriously criticized) above. In stark contrast to the positivistic and determinate law that was set in its constrained negativity, that same law that was thence invested and overtaken by more adaptive and insinuative technologies of power, Foucault describes a law of constant mutability. This is not a law which is determinately closed to improvization and new ways of being, but is, on the contrary,

> the outside that envelops conduct, thereby removing it from all interiority; it is the darkness beyond its borders; it is the void that surrounds it, converting, unknown to anyone, its singularity into the gray monotony of the universal and opening around it a space of uneasiness, of dissatisfaction, of multiplied zeal.[47]

Like the labile power formations which adaptively respond to the unavoidable lack which characterizes their formation and operation, this other law (this law of otherness) practises an 'infinitely accommodating welcome'[48] to that which opposes and resists it. Foucault asks of this more responsive law,

> How could one know the law and truly experience it, how could one force it to come into view, to exercise its powers clearly, to speak, without provoking it, without pursuing it into its recesses, without resolutely going ever farther into the outside into which it is always receding?[49]

In this dimension Foucault's law engages formatively with exteriority, being ever 'constrained to perpetually reach beyond itself'.[50] It is a law which must ever remain responsive to the range of possibilities, a law which is constantly and unavoidably incomplete.

We can see from the brief picture that I have just sketched that Foucault gives us a much more nuanced picture of law than he is usually credited with by legal commentators writing about his theory of law (or lack thereof). There are of course those oft-cited passages in his work, some of which I discussed above, wherein law seems to enter into an almost terminal decline in modernity and is utterly surpassed and subordinated to power. But then Foucault significantly counters this perception in other places. The law which emerges from his engagement with Blanchot, for example, is a law which evokes something of Prozorov's freedom. This is an attenuated law which, in its very insufficiency and incompletion, always necessarily remains attuned to what could be. This law, which 'demonstrates its own insufficiency at the very moment of its enunciation' (Prozorov, p. vii), is ultimately a law of freedom which retains within itself the ability to become otherwise. It is a law which must 'prohibit its own solution' (Prozorov, p. vii) in order to remain in force. As Peter Fitzpatrick observes, this constituent insufficiency is of course a necessary property of law: law must be both determinate and adaptively responsive to change in order for it to be law, yet neither of these two opposed imperatives of

47 M. Foucault, 'Maurice Blanchot: The Thought from Outside', in M. Foucault and M. Blanchot, *Foucault/Blanchot* (1987), 9 at 34.
48 Ibid., 38.
49 Ibid., 34.
50 J. D. Leonard, 'Foucault: Genealogy, Law, Praxis', (1990) 14 *Legal Studies Forum* 3, at 11.

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law can ever be fully and enduringly satisfied (the satisfaction of either would result in law's terminal stasis or its utter dispersion).[51]

How might such a thinking of law be relevant to international law? As I mentioned earlier, Foucault's formulations of this other law are not offered as reflections upon international law per se (although perhaps I am here simply replicating jurisprudence's oft-unstated confining of law to the municipal, for to be fair Foucault does not frame the matter in terms of national law either). And nor are his formulations offered as interventions into particular political or legal debates, as much of his later work was to be. Nevertheless, this way of thinking about law through Foucault can be of use in theorizing issues in international law, and I shall just indicate one of these here. This issue was mentioned above in the course of discussing Hammer's text: that is, the seemingly insuperable divide between formalists and realists. Hammer sought to circumvent this debate by using Foucault to better describe the actuality of an altered international law (in method, at least, more realist than formalist). Here, perhaps, we might use Foucault slightly differently. The formulation of law that I have described in this section shows how law must respond and adapt to powers outside it – in this sense it is reliant on political power for its content and enforcement. Instead of reading this power-dependence of law, as is so often done with regard to international law, as being revelatory of international law's not really being law, of its having no binding normative structure of its own, of its being suffused with politics (as the classic jurisprudential distinctions between law and not-law become dangerously attenuated), Foucault might in fact invite us to observe how this is only partly true (and something, at any rate, which pertains equally to the national as it does to the international). Law might be partly dependent upon power but this dependence is not total – it cannot be total because Foucault teaches us how law retains the ability to be other to itself, and this sustaining responsiveness means that it cannot be encapsulated by any political actor, however imperial their reach and intentions; it is in this orientation that law's slippery autonomy resides, rather than in some universal normative structure. Hence those querulous or triumphant observations of international law's supersession by realpolitik, of its enduring capture by and instrumentalization in the service of certain national interests (a narrative which mirrors the narrative of law's demise and expulsion wrongly attributed to Foucault), are in error. International law is both dependent upon the political practice of dominant (and resistant) political actors, but it can never be rendered totally in these terms.

Let me return belatedly, then, to the thematic of critique with which I opened this review essay. There is of course the intriguing question – one I have not really tried to answer here – of how one *does* Foucault in the context of law, how one brings him to law. In fact, there are many possible answers (none of them complete) to this question, of which Hammer's text provides an example. However, one implication of the way in which the question is often framed in the literature on Foucault is,

51 See P. Fitzpatrick, *Modernism and the Grounds of Law* (2001), esp. ch. 3. For an application of this line of thinking about law and its relationship to power in the specific context of international law see P. Fitzpatrick, "'Gods would be needed . . .": American Empire and the Rule of (International) Law', (2003) 16 LJIL 429.

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of course, that Foucault's critical ethos is somehow antithetical to, or not able to be brought into productive dialogue with, law and legal theory. To the contrary, I have tried to show in this part of my review essay that, in fact, Foucault actually did have a nuanced conception of law which was itself fundamentally reliant upon an ethos of critique. In his later work, and especially in texts such as 'What is Enlightenment?' and 'What is Critique?',[52] Foucault developed a set of valuable reflections upon critique and critical ontology. The purpose of this critical ontology – a mode of philosophical reflection Foucault saw as being distinctively modern, and one which he identified with Kant – was precisely to disrupt the existent, to put into question the mobile and transitory limits of what 'we are' in order to imagine ourselves otherwise:

> The critical ontology of ourselves must be considered not, certainly, as a theory, a doctrine, nor even as a permanent body of knowledge that it is accumulating; it must be conceived as an attitude, an ethos, a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits imposed on us and an experiment with the possibility of going beyond them [*de leur franchissement possible*].[53]

It is something of this restless 'going beyond', this constant self-interrogation, which I think Foucault also saw as being part of law itself, and which I have tried to sketch in the above discussion.[54]

5. Conclusions

It is frequently remarked in Foucault scholarship – and often as a polite way of indicating Foucault's alleged inconsistency as a philosopher – that there are 'many Foucaults' – Foucault the structuralist, Foucault the post-structuralist, Foucault the recusant humanist, and so forth. What I have tried to demonstrate in this review of these two very productive books on Foucault is not only the different ways of approaching Foucault and, more specifically, his relevance for legal theory and international law, but also that within Foucault's work itself there is room for multiple conceptions and re-imaginings of law.

52 See M. Foucault, '"What is Enlightenment?"', in *Essential Works of Foucault, supra* note 26, 303.
53 Ibid., 319.
54 These intimations are developed at greater length in B. Golder and P. Fitzpatrick, *Foucault's Law* (forthcoming).

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