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Review essay
Foucault's rhetorical challenge to law

Foucault's Law
By Ben Golder and Peter Fitzpatrick, Abingdon/New York: Routledge, 2009.
143 pp.
ISBN: 978-0-415-42454-7 £22.99 paperback

Foucault's Monsters and the Challenge of Law
By Andrew N. Sharpe, Abingdon/New York: Routledge, 2010.
184 pp.
ISBN: 978-0-415-43031-9 £26 paperback

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> '[W]e make no claim to "discover" a ready-made theory of law in Foucault's writing. Law is never one of his explicit objects of inquiry. Nevertheless he has a considerable amount to say about law.' (Hunt and Wickham, 1994, p. 39)

Introduction

For scholars of law, the turn to Michel Foucault's works almost inevitably invokes an apology, a qualification, or a caveat. With the acknowledgement that Foucault never offers a sustained account of law as an 'object of inquiry' comes a sense that his work might nonetheless offer important insight into contemporary forms of law and modern legal problems. The difficulty with which many scholars struggle is how to begin from the position of this 'nevertheless' or 'however' that marks the contingent ground from which they argue. That is, scholars grapple with how to make Foucault say something about law when what he says is indirect or culled from several different works.

Such a task proves even more difficult in light of Alan Hunt and Gary Wickham's seminal work *Foucault and Law: Towards a Sociology of Law as Governance* (1994). Mining Foucault's vast body of work to show both its promise and limit for those studying law, they argue that Foucault's re-conception of power as disciplinary – producing and regulating individuals through techniques directed at the body – rather than repressive problematically equates law with a sovereign form of power that is negative and punitive. For these authors:

> '. . . the strict association which Foucault makes between sovereignty and law is at best unhelpful and at worst simply perverse in denying the self-evident truth of the intimate connection between modern forms of power and legal mechanisms.' (pp. 62–63)

On their reading, Foucault 'counterposes law to regulation' and claims that 'the disciplines supplant and even replace law as a primary mode of government' (p. 22). Seeing in Foucault a tendency to expel law from modernity, Hunt and Wickham understand their project as one that recuperates the role and operation of modern law by reading Foucault's understanding of governance alongside Durkheim and Weber to outline the methodology and principles of a sociology of law.

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While many before have contested this so-called 'expulsion thesis', recent work in the field opens new avenues of study that allow us to see the value of Foucault's writing for critical legal studies outside or beyond the terms Hunt and Wickham provide. This essay reviews two such works, *Foucault's Law* by Ben Golder and Peter Fitzpatrick, and *Foucault's Monsters and the Challenge of Law* by Andrew N. Sharpe. To illustrate the different ways scholars have recuperated Foucault for law, I draw on a distinction made by Golder and Fitzpatrick between two approaches to Foucault used by legal scholars: 'exegetical' (or 'interpretive') and 'applied' (or 'appropriative') (Golder and Fitzpatrick, 2009, p. 5). Exegetical approaches refer to those studies that question what law is and how it operates in Foucault's body of work (p. 5). Applied studies are 'relatively unencumbered by the exegetical debates around whether, and to what extent, Foucault theorized law' (p. 5). Instead, applied approaches employ Foucaultian ideas, concepts, methodologies, or frameworks to specific legal topics or controversies. Reading Golder and Fitzpatrick as an example of an exegetical study and Sharpe as an example of an applied approach, I show how each understands and extends Foucault's work for legal studies. In the end, I argue that these approaches, reading law *in* Foucault and *through* Foucault, invite a third approach: a rhetorical approach that reads law *with* Foucault. In other words, I suggest that a rhetorical approach bridges exegetical and applied approaches to provide a reading of specific legal practices that accounts for and makes sense of its 'application' of theoretical concepts. Such an approach takes as its object the language of legal and theoretical texts in an effort to discern the conditions of legal critique.

Reading law in Foucault

Situating *Foucault's Law* within the category of 'exegetical' study, Ben Golder and Peter Fitzpatrick perform a reading of Foucault's works in order to 'locate the position of law within Foucault's existing (and indeed posthumously expanding) body of work' (p. 5). A project that takes as its object of study Foucaultian texts, its express goal is 'to reverse standard understandings of the place and function of law within Foucault's thought' (p. 5). Unlike previous scholarship that set out simply to confirm or reject Hunt and Wickham's expulsion thesis by rereading Foucault's mid-1970s writings, these authors turn to his later writings on ethics to show how Foucault's law 'is a constant movement between determinacy and an illimitable responsiveness to alterity' (p. 3). In other words, Golder and Fitzpatrick argue that there is an instability that marks Foucault's law. Law is at once the 'determinate' law that Hunt and Wickham find in Foucault – a law inextricably bound with sovereign power – *and* an always changing (social) practice that unsettles this law. In their words:

> 'Our argument is that in his work Foucault sketches two different dimensions of law: law as a determinate and contained entity, and law as thoroughly illimitable and as responsive to what lies outside or beyond its position for the time being. Foucault's law, we shall see, is "located" in the uneasy, ambivalent relation of these two opposed yet generatively interacting legal dimensions. It is in the movement between these two apparently opposed dimensions that Foucault's law is revealed as a law of possibility, contingency and lability: that is, as a law always open to the possibility of its being otherwise.' (pp. 2–3)

This thesis is developed and explained in three chapters. In the first, 'Orientations: Foucault and Law', Golder and Fitzpatrick return to the expulsion thesis and its commentators not only to set the stage for their critical intervention but also to show how critiques of Hunt and Wickham fail fully to appreciate the complexities of Foucault's understanding of law. To be clear, the purpose of this chapter is not to refute the expulsion thesis. Instead, Golder and Fitzpatrick accept the primary tenet of this thesis:

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> 'the point is that . . . Foucault does seem to want to circumscribe the role of *law* (a particular form of power) as being pre-eminently negative and as functioning within a very restricted juridico-discursive economy.' (p. 16)

Law operates as a determinate, clearly bounded power that 'lays down a rule which demarcates the licit from the illicit, seeking to repress and negate that which it prohibits' (p. 15). For Golder and Fitzpatrick, it is not the reading itself that is the problem, but that scholars treat this reading as totalising, presenting a 'univocal narrative of law's demise' (p. 22). Even in the 'counter-readings' meant to recover Foucault's law for critical legal study, they find the return to this vision of law as a sovereign power subsumed by other modes of power or disciplines. For example, they cite scholarship that reads Foucault's work on 'governmentality' – a mode of power aimed at regulating and producing populations – to demonstrate the persistence of law in Foucault's study of modernity. Despite the fact that this line of argument succeeds in demonstrating that law has not been altogether abandoned by Foucault, Golder and Fitzpatrick worry that:

> '. . . what it fails to address is precisely the tension and ambivalence between modes of legality and modes of administration and governmentality, and in so doing it fails to grasp something of the "specificity" of law's relationship with these new modes of power.' (pp. 34–35)

This scholarship understands law as a 'tactic', one mode of power among many, and thus subsumes or subordinates law to governmentality. As such, this counter-reading, for Golder and Fitzpatrick, works to confirm what Hunt and Wickham have argued rather than unsettling or refuting it.

In work that defines the relationship between disciplinary power and law as either compatible or agonistic however, Golder and Fitzpatrick discover an opening that allows them to re-think the form and operation of law in Foucault. Pointing to Anthony Beck's work (1996) among others, the authors show how some scholars understand law as compatible with, rather than opposed to, disciplinary power. 'On this view', they explain, 'law, which is anterior to disciplinary power, facilitates the operation of the latter by constituting spaces which are then traversed and invested by the disciplines' (p. 27). This argument is promising, according to Golder and Fitzpatrick, because law is not conflated with or subordinated to disciplinary power. Similarly, scholarly work that understands law and disciplinary power as 'agonistic' – such as Jan Goldstein's work – highlights the 'relation between law and discipline, between law and the power that in a way lies outside it' (p. 29).

In both lines of argument, law and disciplinary power operate relationally, presuming that law acts, at least in part, independently of disciplinary power. Law, that is, exceeds disciplinary power, working either to condition or to constrain its operations. This presumption offers Golder and Fitzpatrick a point of departure to examine how Foucault himself understands law as something more than a bounded body of rules impressed upon subjects. Their second chapter, 'Foucault's Other Law', takes up this project by reading Foucault for a more dynamic sense of law. Again, Golder and Fitzpatrick do not altogether abandon Hunt and Wickham's characterisation of Foucault's conception of law. Instead, alongside this vision of a determinate and sovereign law, they find in Foucault a law that shifts and changes, shaping society in its responsiveness to a variety of discourses. Their task in this chapter, as they define it, is to 'derive a certain coherence from the series of apparently contradictory statements by Foucault on law' (p. 53). That is to say, this chapter explains how Foucault's work supports a vision of law that entails two dimensions: law as a bounded, fixed entity and law as a discourse that, in its responsiveness and openness to that which is outside it, exceeds the determinate form of law. Central to their work in this chapter is the claim that:

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> 'Foucault's law, like his more famous (re) thinking of power as relational, cannot be rendered in any enduring stasis but, rather, must always remain incipiently responsive to the advent of alterity, and to the ineradicable and importunate demands of resistance and transgression.' (p. 54)

This dimension of law that is 'held open' and responsive is not a different law from the determinate law they find in the first chapter; both are 'related dimensions of the very same law' (p. 53). Because Golder and Fitzpatrick read in Foucault's law a movement or responsiveness to things such as science or medicine, law exceeds a positivist account. It is not marked by its content or rules, but instead is marked by a '*self-resistant* legality' (p. 54). As it responds to other discourses outside of itself, law undoes itself, unsettling both the content of the norms and the boundaries or form of a determinate law. It is precisely this unsettling, or what Golder and Fitzpatrick call the 'restlessness' of law, that prevents it from becoming subordinate to or completely contained by disciplinary power as it is ever-changing.

Having demonstrated the irreconcilable, yet productive, dimensions of Foucault's law, in their final chapter, 'Futures of Law', Golder and Fitzpatrick turn to Foucault's ethics and critical ontology. Through a reading of this work, they explain how law, understood as a critical responsiveness that cannot be consumed by disciplinary power, makes possible social bonds and organisation in modernity. As Golder and Fitzpatrick explain, Foucault's modernity entails two problems. First, modernity lacks sacred or transcendent grounds on which we might base claims to truth or justice (p. 102). Meaning then must be negotiated, as Golder and Fitzpatrick claim, citing Foucault, 'in an uncertain context, in certainties … immediately upset' (p. 102). Second, it poses a problem of futurity: namely, political formations must account for 'an as-yet-unimagined and unimaginable future, with new ways of being, of being otherwise' (p. 102). To explain how law might address both problems of modernity, Golder and Fitzpatrick argue that 'law is a constituent source of our continuate being-together and it is precisely through its responsiveness that it achieves this' (p. 101). Exploring how law's responsiveness relates to forms of social being and becoming, they show that Foucault's work gestures toward two understandings of social formations: modernity as closure and rupture (p. 102). Taking their cue from the work of François Ewald (1988), they argue that legal closure 'attempts to constrict society by proposing the means by which society can coincide with itself' (p. 102). As a 'counter-response' to this reading that understands law as 'normalization and settlement' (p. 102), Golder and Fitzpatrick suggest that we might read Foucault's ethics with an eye toward the ways it describes a future modernity in which law acts as rupture – 'a being beyond oneself' (p. 103). For them, Foucault's work on ethics articulates a form of solidarity in which social bonds are redefined and remade in response to unknown futures. Law thus acts as 'the truth of the social bond, of our being-with each other' in a way that calls attention to the contingency of truth in modernity (p. 103).

In these three chapters, Golder and Fitzpatrick read Foucault against himself to offer a vision of law as a dynamic and responsive practice that makes possible a social world amidst the uncertainties of modernity. This account of law defines law as a critical force, negotiating and redefining social bonds and the truths we live by in the very moment when law itself – its boundaries, its form, its content, its being – is reshaped. This work is valuable because it offers a more nuanced vision of law in Foucault's work. Understanding Foucault's fragmentary account of law less as a problem to be overcome and more as an opportunity to explore the productive possibilities of his seemingly contradictory claims, Golder and Fitzpatrick wrest from Foucault a sense of law outside of positivistic terms. Through this argument, the authors demonstrate the significance of Foucault's mature work on ethics and critical ontology for scholars of law. As well, they complicate Hunt and Wickham's expulsion thesis in a way that offers scholars a different framework, vocabulary, and point of departure for Foucaultian studies of law.

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Reading law through Foucault

While exegetical accounts explore law in and for Foucault's philosophical framework, applied accounts draw on Foucaultian concepts to interrogate contemporary legal problems. Perhaps one of the best examples of recent work in this area of study is Andrew N. Sharpe's *Foucault's Monsters and the Challenge of Law*. Sharpe draws on Foucault's 1975 lectures at the Collège de France published under the title *Abnormal*. A series of lectures aimed at exploring the emergence of the abnormal individual in and through medico-legal discourses, Foucault argues that the monster is one of the three figures – the individual to be corrected and the onanist being the other two – through which the problematic of the abnormal individual develops. According to Foucault, 'what defines the monster is the fact that its existence and form is not only a violation of the laws of society but also a violation of the laws of nature' (2003, pp. 55–56). Sharpe investigates this idea of the monster as a 'double breach, of law and nature' to understand how outsiders are produced in modern law. In contrast to exegetical studies, Sharpe's study takes as its object the history of English law to discern 'how certain individuals or groups come to receive the label monster, and why this appellation proves successful in cultural terms' (p. 2). Throughout the book he is clear that his object is not Foucault, but law itself (p. 145). Such a focus lends itself to a set of arguments different in kind from Golder and Fitzpatrick's work. Sharpe's study yields an analysis that demonstrates the ways the monster category, while not explicit, is still at play in legal definitions that bear on who is recognised (in law) as human. As such, the monster category, he claims, offers a critical view on how law addresses and conceives of human difference, giving us a site from which a progressive politics might be built.

Sharpe divides his study of legal monsters into two parts. In the first, 'Theory/History/Monsters', he builds a case for the value of exploring the monster category to understand the constitution and political implications of 'outsiders'. To do this, he first separates the monster category from other figures used to explain the same topic: René Girard's 'scapegoat' (1986) and Zygmunt Bauman's 'stranger' (1993). For Sharpe, neither of these figures fully explains the way this category is not merely regulated or restricted, as both the scapegoat and the stranger appear to be, but actually 'placed outside the law', expelled from communities, and classified as non-human (p. 21). The monster category thus offers Sharpe a heuristic through which he investigates the ways some forms of being – or, in his language, human difference – breach 'core linguistic and cultural binary structures' (p. 27). That is to say, monsters present a challenge to legal taxonomy as they 'serve to mark the boundary between human and non-human while simultaneously calling into question the stability and coherence of that very boundary' (p. 30). Sharpe turns to Foucault precisely because his work in *Abnormal* explicates *how* legal definitions of who is human are called into question. Relying on a distinction between monstrosity (defined as morphological irregularities) and monstrousness (defined as transgressions of law), Sharpe argues that:

> 'Foucault renders explicit the concept of monstrousness as a constitutive element of the category monster. In addition to a breach of nature, the designation monster requires a breach of the law, and by breach of the law Foucault is referring both to the fact that a particular body renders important legal questions uncertain, indeed undecidable (the body as an obstacle to the law), and calls into question the categorical structure of law.' (p. 33)

We see in this quotation that, for Sharpe, the Foucaultian monster creates a crisis in law's ability to name the subject before it and to apply its rule to that subject, suggesting that this subject must remain outside the law, foreign to it. Contrary to historical ideas, the breach of nature that accompanies this breach of law in Foucault's monster does not have to be sensed at the level of

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the body. That is, Sharpe points out that Foucault reworks the concept of monstrosity so that it refers not only to corporeal irregularities but also to irregularities of the psyche or soul (p. 41).

Employing Foucault's definition of the monster as a violation of nature and law, Sharpe rereads English history to show, first and foremost, that traces of the monster, declared an unworkable concept by English judges, are in fact found throughout English law. At his best in the chapter entitled 'An English History of Monsters', Sharpe cautions against the 'uncritical acceptance of a characteristically pre-modern/modern divide where tolerance and rationality are viewed as replacing a less civilized past' (p. 59). Perhaps more importantly, Sharpe considers this 'English history' of the monster category a counter-reading to Foucault's 'French history' (pp. 53–54). Specifically, he understands himself to be making five important interventions into Foucault's notion of the monster. First, Sharpe argues that, because Foucault 'adopted an ambivalent stance' towards bestiality in the history of monsters, he does not fully flesh out how the production of monsters depends on sexual transgressions (p. 53). Second, Sharpe sees in his historical analysis evidence to suggest that 'it may be that law understands monsters as having been thrown into the world fully formed' (pp. 10–11). Highlighting the moment of birth as important to the construction of the monster, Sharpe demonstrates that the monster appears from the start as an outsider. Third, and related to his second intervention, Sharpe charges Foucault with investing too little time in explaining how the monster is constructed in relation to a concern for culpability or responsibility for the creation of the monster. He believes that:

> 'this relationship between monster status and human agency may bear significance for understanding the degree of demonisation experienced by individuals and groups labeled monsters. In other words, the presence/absence of the element of culpability may point to a monster hierarchy within law.' (p. 10)

Fourth, Sharpe calls for a renewed attention to what constitutes a breach of nature. Although he acknowledges Foucault's link between the 'abnormal' and the 'unnatural', he argues that 'ideas of abnormality and 'unnaturalness' are more profoundly implicated in each other' than Foucault acknowledges (p. 56).

Sharpe's final intervention is framed as his most important. He reads Foucault's genealogy as a 'linear history in which the notion of the human monster as absolute difference from humanness takes on an increasingly relative character' (p. 54). Here, Sharpe reads Foucault as saying that there is a linear progression from the figure of the human/animal hybrid to a creature with two heads and one body to an '"ambiguously" sexed body' wherein each transformation moves the monster and human closer together (p. 54). Leaving aside for now a consideration of the accuracy of this reading, what Sharpe demonstrates is that the English legal history of the monster category supports the idea that 'it is increasing legal anxiety over the possibility of human/animal hybridity, rather than its diminution, that characterises an English legal history of the monster category' (p. 54). As well, Sharpe shows that in English law, in opposition to what Foucault – and Western thought more generally – claim, 'it is the body, not the mind that proves to be the ultimate bedrock of what it means to be human' (p. 59). Sharpe qualifies these claims by clarifying that his purpose is not to challenge the historical or chronological accuracy of Foucault's 'French history', but rather to show how English jurisprudential history figures the issue of human/animal hybridity in a way that might bring about different cultural consequences from those in Foucault's account.

While departing from some of Foucault's insights, then, in the second part of the book, 'Contemporary Monsters', Sharpe maintains the central idea of the monster as a breach of law and nature to analyse three case-studies: transsexuals, conjoined twins, and animal/human admixed embryos. In the fifth chapter, 'Changing Sex: The Problem of Transsexuality', Sharpe explores the

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legal impact of *Corbett v. Corbett*,[1] an English probate case that defined sex as a congruence of gonadal, chromosomal, and genital characteristics. *Corbett* established the criteria according to which an individual is assigned a legal sex – either male or female – at birth. Within this framework, transsexuals, in their desire to transition from one sex to another (or to occupy a third sex) transgress the terms of law and nature (p. 98). For Sharpe, analysing reform jurisprudence concerning the legal recognition of trans people through the category of the monster allows us to understand the conditions in which one is brought inside the law, 'demonsterized'. In the case of post-operative transsexuals, the demonsterisation takes place because, once they have undergone surgery, they appear no longer to threaten the law's binary gender categories. According to Sharpe, other (pre-operative) transsexuals, however, inhabit the monster category as a type of 'hermaphrodictic mutant' –'a body with no clear gender home' recognisable by courts (p. 102). The monster category, according to Sharpe, here illuminates the limits of law's binaries and points the way toward a 'politics of demonsterization' that contests the terms of law and recognition.

In the sixth chapter, 'Sharing Bodies: The Problem of Conjoined Twins', Sharpe shows how the monster status of conjoined twins betrays the limits of liberal law. Understood as two minds encased in a single body, conjoined twins are considered monsters because they challenge constructions of proper legal subjects who enjoy bodily integrity. Demonsterisation by the law takes place only when conjoined twins are surgically separated so as to resemble single, embodied subjects. Sharpe advocates a rethinking of embodied subjectivity that reshapes 'the relationship between body and mind, and therefore the conditions of legal subjecthood' (p. 124). Put another way, this monster challenges the autonomy of the subject that grounds and is grounded by liberal law.

In the final case-study, Sharpe turns to recent legislation regulating genetic technologies that threaten to violate the law's separation of humans and animals. As he explains in 'Admixing Embryos: The Problem of Human/Animal Hybrids', human/animal hybrids made possible by new genetic and reproductive technologies might be the most feared monster today. While it appears that science has 'breathed new life into this legal figure' (p. 130), law seeks not to regulate but to prohibit such monsters. Sharpe cites the Canadian Assisted Reproductive Act 2004 and the UK Human Fertilisation and Embryology Act 2008 to show the way law categorises this monster. What Sharpe finds in these laws is a study of how culpability functions in monster production. He explains:

> 'While births of conjoined twins can be viewed as occurring within nature . . . this cannot so easily be said of a creature that begins its life in a laboratory and, in contrast to human forms of artificial reproduction, does not replicate the processes of nature. With these monsters, blameworthiness resurfaces through a reading of scientific endeavour as monstrous arrogance.' (p. 141)

These monsters belie the law's assumption of 'ontological purity' – a belief that humans are of one species, set apart from all others. Sharpe, however, views the mixing of animal/human as a way to come to terms with our 'fragmented selves' and destabilise 'an injunction against the mixing of genres' (p. 142).

Sharpe's reading of Foucault's monsters demonstrates how an applied reading can illuminate the ways law operates to produce and regulate subjects. In such a reading, Foucaultian concepts serve not only as heuristics that can help make sense of contemporary legal events and discourses, but also as critical tools that allow authors to intervene in legal controversies to imagine a more progressive politics. In Sharpe's work, this possibility lies in viewing the monster as a metaphor that calls attention to law's binary logic. His analysis thus provides an occasion to re-evaluate the way law

1 [1971] P. 83.

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fails to address the multiplicity of human difference, calling on us to consider how we might mobilise the monster category to bring about a 'political project of resistance' (p. 152).

Reading law with Foucault: towards a rhetorical approach

Whether exegetical or applied, these recent works bringing Foucault to bear on law open important avenues of study. For one, Golder and Fitzpatrick make a strong argument for complicating Hunt and Wickham's expulsion thesis. Finding in Foucault seemingly contradictory statements about how law operates (in relation to other modes of power), they read this contradiction and 'irresolution' as the very logic of Foucault's law. In so doing, they give law a place and purpose in Foucault's critical framework: namely, law becomes a responsive mode of power that enables and creates social and political relations in the flux and uncertainty of modernity, allowing law and society to become otherwise. Moreover, Sharpe's work demonstrates the political potential of a critique offered through the analytical lens of one of Foucault's concepts or figures. His study, most importantly, shows that Foucault's work has a certain purchase for those concerned with the very real effects of legal language and logics in particular historical moments.

Despite the value of these studies for rethinking the significance of Foucault for legal studies, each of these approaches poses a challenge to legal scholars. As Golder and Fitzpatrick point out, the applied approach often leads to a 'piecemeal Foucaultian jurisprudence' (p. 5). Although they show that this work is not inconsistent with Foucault's methodology – if we can call it that – they do see in this approach a certain 'conceptual violence to his broader arguments and critical focus' (p. 5). To some extent, this conceptual violence appears in Sharpe's work when he reads the progression of the human monster as a linear narrative in which one figure, representing or standing in for a certain time period, gives itself over to the next. This critique becomes problematic because he does not account for the larger context in which Foucault analyses the creation of the monster category. In *Abnormal*, Foucault states:

> 'I would like to try to study this appearance [of the abnormal individual], this emergence of techniques of normalization and the powers linked to them by taking as a principle ... that these techniques of normalization, and the powers of normalization linked to them, are not simply the effect of the combination of medical knowledge and judicial power, of their composition or the plugging of each into the other, but that a certain type of power – distinct from both medical and judicial power – has in fact colonized and forced back both medical knowledge and judicial power throughout modern society.' (pp. 25–26)

In this quotation, Foucault defines his object of study as the techniques of normalisation that regulate and produce the abnormal individual as opposed to juridical discourses concerned with criminals and medical discourses concerned with patients. Foucault traces the ways in which the abnormal individual becomes a problem in and through a new technique or mode of power, making clear that this mode of power cannot be contained by or ascribed to medical or legal discourses alone. To this end, the figures Foucault examines – the human monster, the individual to be corrected, and the masturbating child – are important less because of their historical significance and more because they provide a site at which we might study how particular modes of power operate.

The significance of Sharpe's work on the creation of monsters in English jurisprudence is not lessened by understanding the context and trajectory in which Foucault's monsters appear. Sharpe himself points out that 'the principal difficulty that English legal history raises for Foucault's history lies not in chronological accuracy' (p. 60). Still, Sharpe's critique presumes a coherent and linear progression in Foucault that he himself imitates in his construction of a history of English law. What is potentially lost here is an understanding of how Sharpe's contemporary legal

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monsters might be sites where strategies of power are operating in excess of the monster's double breach of law and nature. That is to say, we might question whether transsexuals, conjoined twins, and admixed embryos are simply monsters or whether these various figures are operating in relation to different techniques of power.

The solution to Sharpe's limitations, however, cannot easily be found by turning to an exegetical account of Foucault's work. Although Golder and Fitzpatrick succeed in providing a nuanced reading of law in Foucault — one that does not whitewash the apparent contradictions, tensions, or paradoxes that appear in his fragmented considerations of law — their argument does little to explain particular legal cases or specific questions of jurisprudence. To be clear, this is not their intention. As they explain, their work aims at reading Foucault against himself in order to better understand:

> '... how Foucault conceived of the law; what importance he assigned it within his overall philosophical framework; and how it relates to his successive formulations of disciplinary power, bio-power, governmentality, and so forth.' (p. 5)

This project thus resists creating a model of law that can be used to explain, examine or evaluate modern legal forms. Golder and Fitzpatrick explicitly state that they do not wish to transform or translate Foucault's work into a '"theory" of law as it has conventionally been understood in certain traditions of legal theory' (p. 4). Although they intervene in the ways in which legal scholars might understand Foucault, they do not explain how their insights might prove valuable for those wanting to perform a reading of a set of cases or a legal issue. In other words, Golder and Fitzpatrick's work seems to run up against the same problem of application that we find in Sharpe's work. Are the insights they provide meant only to respond to a set of scholarly debates about the value of Foucault for critical legal scholarship? If not, how are scholars meant to use their rich arguments to better our understanding of specific legal problematics without performing or recreating a kind of conceptual violence?

The answer, I believe, lies within Golder and Fitzpatrick's reading of Foucault. Here, it matters less what they say about Foucault and more that their way of reading of his work makes possible a critical analysis of specific laws or legal problems while accounting for and attenuating the violence of theoretical application. Golder and Fitzpatrick explain:

> 'In this endeavour our re-reading of Foucault is perhaps at its most Foucaultian, for in seeking to retrieve, re-read and extend Foucault's thoughts on law we place ourselves within his critical legacy, the legacy of *penser autrement*, of thinking law (and indeed Foucault himself) otherwise.' (p. 6)

This practice of reading Foucault against himself, of reading his texts to imagine law other than it is, I argue, is a practice of reading the law rhetorically. In what follows, I argue that a rhetorical approach brings the theoretical insight of exegetical accounts together with specific, historical instances of law, drawing out and making sense of the tensions that appear in this intersection. Importantly for critical legal studies, a rhetorical approach examines the tensions and relations between theory and practice without treating theory as a ground or foundation for critical inquiry and without presuming that specific cases or concepts offer themselves unproblematically as objects of study.

A rhetorical approach to reading Foucault and law, first and foremost, takes as its object of study the language of both law and Foucault. One might object that all approaches to reading Foucault address the language of texts, as this is what it means to read. As Marianne Constable argues however, there is something distinct in the way a rhetorician reads texts. 'To the rhetorician', she explains, 'words do not necessarily represent propositions and neither words, ideas, nor propositions can be analyzed independently of their use' (2005, pp. 16–17). Constable suggests

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here that a rhetorical reading is different from a philosophical reading that attends to propositions as logical statements as well as from social scientific readings that read language as '*empirical* correspondence' (p. 15). Perhaps more importantly for this study, Constable suggests that we cannot read concepts, ideas or words apart from the larger content in which they appear, or apart from the function they perform in that context. 'Rhetoricians don't just read the lines, then. They read between the lines; they read around the lines' (p. 17). This is more than word play. A rhetorical reading, according to Constable, opens up possibilities of troubling received logics by re-imagining relationships between concepts or by posing questions that complicate what we think we know (p. 18). The value of such a reading is that:

> 'Rhetoric recognizes that legal language is inseparable from legal behavior. Having recognized such inseparability, rhetoric provides a language in which to speak of the ways in which law and studies of the legal system nevertheless sometimes insist on separating language from behavior.' (p. 20)

What this means is that, for Constable, rhetorical readings provide an opportunity not only to study what something says but also what it does or how it produces meaning in its operation or performance. This understanding of language then helps us to see how legal logics operate in excess of what is said (literally or denotatively).

It might be easier to understand the value of a rhetorical approach if we return to the work of Sharpe and of Golder and Fitzpatrick. A rhetorical approach extends their insights by reading their work in relation to understanding the effect of law's language. Sharpe's application of Foucault's monster category allows him to offer a critical reading of English jurisprudence. This reading, however, brackets the larger context and function of the monster within Foucault's lectures. Sharpe reads the abnormal individual as a 'condensation of concerns over the physical body, criminality and sexual non-conformity' (p. 47), glossing over the ways in which different techniques of power produce these problematics. Understanding the abnormal individual then as a 'pale monster' (p. 47), Sharpe analyses contemporary legal figures as if they were defined solely by and in law. He emphasises the idea that 'the monster is a category of the law; it has a legal life' (p. 145). Moreover, in the chapter on conjoined twins, he claims that it is law that ultimately determines the status of the monster:

> '[T]he monster is best understood in terms of the effects it is interpreted to have on law. For science slays monsters only when, in addition to understanding them, it neutralizes the threat they pose to legal taxonomy.' (p. 112)

In both these quotations, Sharpe circumscribes the figure of the monster in law, ultimately discounting other discourses (such as science) that might determine or challenge who or what counts as a monster. The life of the monster does not appear to exceed the terms of law.

Sharpe's analysis of the monster as a legal category matches Foucault's description in *Abnormal* when he claims that '[t]he frame of reference of the human monster is, of course, law' (pp. 54–55). What we learn from Foucault however is that the techniques of power that produce the abnormal individual – a figure that cannot be collapsed entirely into the monster category – work to transform legal knowledges. He explains that the medico-legal opinion that regulates the abnormal individual:

> '. . . comes from somewhere else. It derives neither from law nor from medicine . . . It is something that inserts itself between them, securing their join, but which comes from elsewhere with different terms, different norms, and different rules of formation.' (p. 41)

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The emergence of the abnormal individual thus indicates a new set of techniques of power that belong neither to law nor to medicine. In fact, Foucault understands that these techniques introduce 'a certain power of normalization' which 'tends gradually to transform judicial power as well as psychiatric knowledge and to constitute itself as the authority responsible for the control of abnormal individuals' (p. 42). Here, the suggestion that the power of normalisation operates to transform discourses of law and science recalls Golder and Fitzpatrick. In their account of Foucault's law, they find that:

> '... law in this responsive dimension forms itself through an encounter with its outside, with what lies beyond itself. Law thence becomes self-resistant, disrupting itself through becoming receptive of resistances that constantly challenge its position, its content, its being.' (pp. 71–72)

Techniques of power thus have the potential to call into question the ontological conditions and the content of law.

Turning back to Sharpe, this insight proves important because it allows us to understand the different ways law itself is destabilised. The challenge that the monster presents to law, according to Sharpe, is one that interrupts the terms of law. For example, he writes that:

> '... humans/animal creatures, hermaphrodites and conjoined twins can be viewed as problematizing a variety of legal questions concerning baptism, marriage and inheritance, as well as challenging core legal distinctions between human and animal, male and female, and the idea of the proper legal subject as a single embodied mind.' (p. 33)

While monsters in this description critique the content of law, its identity categories and binary logics, they do not appear to question or unsettle law itself. Sharpe seems to suggest, in other words, that monsters do not challenge the boundaries or the object-ness of law. Foucault suggests otherwise:

> 'The monster, in fact, contradicts the law. It is the breach of the law taken to its furthest degree. And yet, although it is a breach of the law (in the raw state, so to speak), the monster does not bring about a legal response from the law. It could be said that the monster's power and its capacity to create anxiety are due to the fact that it violates the law while leaving it with nothing to say. It traps the law while breaching it. When the monster violates the law by its very existence, it triggers the response of something quite different from the law. It provokes either violence, the will for pure and simple suppression, or medical care or pity. But the law itself does not respond to the attack on it represented by the monster's existence.' (pp. 56–57)

In Foucault's work, monsters trap the law, rendering it inoperable, silent. Here, it is not simply the case that law fails to produce the language to speak for or to the monster. Law's operation, its function of address and representation, is violated, held hostage, and suspended as other discourses must be introduced to respond to the appearance of the monster. The monster then, for Foucault, works to upset the very conditions in which the law maintains a recognised and recognisable form. Law fails in this instance when we consider what Constable believes is its fundamental task: 'law tells those whom it addresses (and responds to) what to do' (p. 18).

Sharpe's example of legislation aimed at transforming laws that define sex and gender might offer a site to understand how monsters call into question not only the terms of law but also the conditions in which law appears and operates *as law*. Echoing some of his arguments from previous work, Sharpe claims that reform courts addressing transgender people's rights and legal status

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reintroduce and shore up the binary logics of gender in practices of legal recognition (pp. 99–100). This claim is undeniable. Almost all reform jurisprudence has refused to consider categorising gender or sex outside the dyadic structure of male or female. If we extend Foucault's insight about how the monster breaches law, however, we begin to see the way that some demands for trans rights level a critique of law itself, not simply its language. The United Kingdom Gender Recognition Act 2004 provides such an example.[2] A law meant to grant legal status to trans people according to their 'acquired gender', it signifies a departure from prior laws that demand some form of surgery or body modification for individuals to receive legal recognition. Requiring only that an individual prove that he or she is currently 'living in' a gender and plans to continue to 'live in' this gender permanently, the law generated much anxiety about what kinds of evidence would constitute such a proof. As I have argued elsewhere, parliamentary debates over evidence for living in a gender illustrate the extent to which medico-legal discourses upset not just what passes for male and female but even the conditions in which law maintains its ability to offer a binding and effective judgment (Burgess, 2009). In the debates concerning the draft bill, MPs concede that, because medical knowledge about sex and gender has changed over time and continues to change, it cannot offer an authoritative or absolute definition of sex and gender. In the absence of clear and objective (read biological) criteria, MPs voiced their anxiety that law would be nothing more than a 'rubber stamp' – an impotent body that merely pretends to make some judgment about the status of a person that has already been decided by other means.[3]

This example provides important insights that might extend Sharpe's analysis in productive ways and help us better grasp the significance of a rhetorical approach to Foucault and law. For one, it demonstrates that the challenge trans people pose in their demand for legal recognition extends beyond taxonomy. More specifically, this example illustrates that the concern is not for whether the law can make sense of the gender of trans people according to their logics, but whether the law can act as law, applying norms to particular situations in order to render a judgment. As an example of a rhetorical approach to reading law in and through Foucault, it asks us to understand how law constitutes itself as law or, better yet, how law is recognised as law in its pronouncements. This line of inquiry differs from Sharpe's, which presumes that the boundaries of law – that which marks what it is – are given and self-evident. In his chapter on conjoined twins he explicitly states that his goal is to:

> '... draw attention to the challenge that law poses to a more pluralistic understanding of embodied difference. That is, liberal law represents a barrier to the realization of the promise that these particular forms of embodiment offer politically.' (p. 123)

Here, law poses a challenge to the diversity and plurality of human life that exists outside and apart from it. The presumption is quite clearly that law neither constitutes nor participates in the creation of this diversity or plurality.

A rhetorical approach, however, might see in the above example law's constitutive force – its ability not only to respond or challenge different forms of human life but to create these differences in and through its language. In this sense, law is not opposed to (political) life; it depends on and constructs this life. Golder and Fitzpatrick help explain how this takes place. Their account of Foucault's law suggests that law's 'responsiveness' places law in a dependent relationship with that which lies beyond it. They write:

2 Although Sharpe has addressed the Gender Recognition Act at length in other work (2002), he only briefly mentions this Act in the fifth chapter to demonstrate the ways in which courts have refused to consider accepting gender categories other than male and female (p. 103).

3 HC deb. 9 March 2004, col. 13.

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> 'Law in this responsive dimension forms itself through an encounter with its outside, with what lies beyond itself. Law thence becomes self-resistant, disrupting itself through becoming receptive of resistances that constantly challenge its position, its content, its being.' (p. 71)

Of note in this quotation is the way the authors understand the critical capacity of law's 'encounter' with that which lies outside it. Law here is not collapsed with other disciplines; there remains an inside and outside of law. But law does not simply close down or challenge what is outside of it. In their language, law becomes 'receptive' (to that which the law either fails to or cannot speak) in such a way that calls into question what the law says (its content) but also 'its being'. Golder and Fitzpatrick thus offer us a way to theorise how law turns on itself, opening itself to practices of resistance that might transform how law responds, for example, in practices of legal recognition.

The example of the UK Gender Recognition Act invites us, then, to see how law, in its interactions with its 'outside', is destabilised and refigured. It is therefore difficult to accept Sharpe's claim that law presents a challenge to diversity and plurality without understanding how individual and social forms of life, monsters included, present a challenge to the ontological conditions of law (or, to use different terms, the conditions in which law is recognisable). Taken as an example of a rhetorical approach to Foucault and law, this Act also enables us to understand better how the monster category might, as Sharpe posits, become a site of progressive politics. Closely reading Foucault, we learn that such political possibilities lie in the ways monsters cannot render themselves transparent, knowable in and by law. As Foucault explains:

> 'Paradoxically, the monster is a principle of intelligibility in spite of its limit position as both the impossible and the forbidden. And yet this principle of intelligibility is strictly tautological, since the characteristic feature of the monster is to express itself as, precisely monstrous, to be the explanation of every little deviation that may derive from it, but to be unintelligible to itself. Thus, it is this tautological intelligibility, this principle that refers only to itself that lies at the heart of analyses of abnormality.' (pp. 56–57)

For Foucault, abnormality marks and is marked by a problem of intelligibility — a problem of what it means to be recognised by others and law. While the monster appears as a principle of intelligibility, serving as the limit of what constitutes human life and the yardstick against which such life is measured and understood, the monster itself remains unintelligible. That is, the monster cannot be rendered transparent in and by law. The monster thus seems to be non-recognisable as it provides the terms of recognition for others. In its non-recognisability, the monster holds something back from the law as it renders the law silent.

It is precisely in this unintelligibility that the monster category holds open a space to re-imagine and critique the terms of recognition offered by law. Such insight points to the value of a rhetorical approach to Foucault and law. Attending to the language of both legal and theoretical texts and bridging exegetical and applied approaches, a rhetorical approach explores the conditions of critique; it explains *how* we might intervene and re-imagine the language in and through which we become (human) subjects and agents. For example, a rhetorical approach to Foucault's monsters might attend to the question of how subjects positioned 'outside' or 'against' the law appropriate, refuse, or struggle against the terms of law. This kind of study understands that a critical project of law must account for the ways in which legal language produces and is produced by legal subjects. In very different ways the exegetical and applied approaches reviewed presume that law affects, transforms, influences or produces subjects. But neither investigates precisely how law does this or how these practices might be open to critique. A rhetorical approach to law, as a sort of middle between the applied and exegetical approaches, offers us then a critical view into how the language of law shapes and limits the conditions in which subjects

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alter or transform law itself. It provides a way to imagine the ontological, epistemological and ethical conditions in which law binds individuals together in contemporary political landscapes by investigating the rhetorical forms and structures we employ to address one another. In the end, this approach might be valuable because it reads law with Foucault, exploring how the relationship between theoretical insight and specific historical instantiations of law informs the ways legal language understands who we are today and makes possible a space to imagine who we might become.

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