GOVERNED BY LAW?

NIKOLAS ROSE
Goldsmiths College, University of London, UK

AND

MARIANA VALVERDE
University of Toronto, Canada

> Another consequence of this development of bio-power was the growing importance assumed by the action of the norm at the expense of the juridical system of the law . . . I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory. A normalizing society is the historical outcome of a technology of power centred on life. (Michel Foucault, *The History of Sexuality Vol. 1*, 1979: 144)

> Foucault's analysis leaves open two questions: first, if the juridical is an inappropriate category to use in interpreting bio-power, how do we make sense of all those 'instruments of the law' (codes, constitutions, laws, regulations) that have developed and expanded during the era of bio-power? Second, if the actions of norms replaces the juridical system of law as the code and language of power, what role remains for law? (François Ewald, 'Norms, discipline and the law', 1990: 159)

HAVE THE instruments of law, today, become integrated into technologies for the government of life? To what extent are contemporary legal practices organized around the notion of the norm? What are the risks and the possibilities associated with the hybridization of law and norm in contemporary regimes of government and control? François Ewald raises these questions in his discussion of the implications of the rise of 'bio-power' for the status and function of law in modern societies (Ewald, 1990). He points out that the rise of the forms of knowledge and power that take the administration of life, individually and collectively, as their object and target has been accompanied by significant change, development and ramification of what one might term a 'legal complex'. The formation of a normalizing society, he argues, has neither diminished the power of the law nor caused legal

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institutions to disappear: 'normalization tends to be accompanied by an astonishing proliferation of legislation' (1990: 138).

This argument for the co-existence, hybridization and mutual inter-dependence of law and norm in societies where government takes the form of the calculated administration of life, may surprise those who think that Foucault denied the role of law and legal mechanisms in the exercise of modern forms of power. Many have suggested that Foucault was profoundly mistaken about law. They have argued that Foucault construed law along an Austinian model of commands backed up by threats and consigned the power of law in systems of rule to a past epoch of sovereignty, where power did not take charge of life but operated through the threat of death, represented itself spectacularly, spasmodically and violently, concerned itself with those who transgressed, and was exercised with the sword. This view of Foucault's argument is misleading. Foucault did not have much to say in any detail about these matters, and quotable quotes can no doubt be extracted from his writings to support all kinds of interpretations. But his argument had two facets, neither of which corresponds to this image.

The first concerned the juridical model for encoding power. This characterized justifications of monarchical and absolutist rule in 'the West' through to the 18th century. Foucault argued that this way of coding of power – power as an absolute right of a sovereign, power as centralized in a single person or institution, power as based upon a monopoly of the legitimate use of force – did not and could not characterize the exercise of power in modern societies. Political thought was therefore misguided, to the extent that it retained this image and tried to use it to characterize modern regimes and techniques of power. Hence his famous formulation: we sent our sovereigns to the guillotine long ago, yet in *political thought* we had yet to cut off the King's head. We should not make the sovereign–subject relation the universal principle of all concrete systems of power. We should not see the state–citizen relation, for example, as merely another instantiation of this principle. The diagram of sovereignty was appropriate to a particular mode of exercising power, but it characterized an historical period which is not our own (cf. Foucault, 1989: 113). Neither the head of state, the institutions of law, the parliament nor the executive in our modern, liberal democracies are sovereign in this earlier sense. Hence, when we analyse their undoubted powers we should not code these in terms that no longer define their specificity. We should ask a different question: in our current configurations of the true and the false, what role is played by the discursive deployment of these constitutional fictions and the narratives they engender.

The second aspect of Foucault's argument concerned the 'legal complex'. We use this term nominalistically to refer to the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms and forms of judgement. Foucault likened France's legal system to one of Tinguely's constructions: 'one of those immense pieces of machinery, full of impossible cog-wheels, belts which turn nothing and wry gear-systems: all these things which "don't work" and ultimately serve to make the thing

"work"' (Foucault 1978, quoted in Gordon, 1980: 257). The analogy highlights the hybridity of the legal complex: it is composed of elements with very diverse histories and logics. But nonetheless, Foucault suggested, the workings of this legal complex had become increasingly pervaded by forms of knowledge and expertise that were non-legal. Its regulations, practices, deliberations and techniques of enforcement increasingly required supplementation by the positive knowledge claims of the medical, psychological, psychiatric and criminological sciences, and the legal complex thus enroled a whole variety of 'petty judges of the psyche' in its operations. Further, the legal complex had itself become welded to substantive, normalizing, disciplinary and bio-political objectives having to do with the re-shaping of individual and collective conduct in relation to particular substantive conceptions of desirable ends. The legal complex, that is to say, had been governmentalized.

It is the second of these arguments that will concern us in this paper. We would like to suggest some ways to investigate the role of legal reasoning, legal authorities, legal forums and legal techniques in the practices of governing modern societies. But before turning to these issues, we would like to say a little about the first of these arguments. What is the role of law in the encoding of power in modern societies? Some of Foucault's brief remarks here are less than helpful. In his 'Two Lectures' given in 1976, Foucault asserted that the exercise of power in the form of discipline was incompatible with the relations of sovereignty (Foucault, 1980). He claimed that the discourse of sovereignty continued to exist largely as a kind of ideology of right, which was superimposed upon and concealed the actual operation of discipline. But as Keith Baker has pointed out, this formulation is pretty unsatisfactory: it is little more than a re-working of the Marxist view that the formal equality and justice in the discourse of law and right simply masks and legitimates real relations of coercion and exploitation (Baker, 1994). In fact, both in France and elsewhere, governmental strategies of discipline and bio-politics have required a framing in the languages of law: this has not merely legitimated them but actually composed the authorities, techniques and lines of force that have made them possible. Even in societies suffused by technologies for the normalizing administration of life, the discourse of rights and justice is more than merely an ideological mask: it has been deployed both to extend, and to contest normalizing political strategies. On the one hand, throughout the 19th century and into the 20th century the codes, instruments and practices of law have functioned to extend the powers of administration over life in the name of reason. For example, the powers of the Nazi State to administer the lives of its subjects on eugenic principles were encoded in and framed by law, from the Sterilization Law for those who constituted a hereditary burden on the state to the Castration Law for habitual criminals: here reason, law and a particular idea of justice combined in a bio-political strategy of blood, race and earth. On the other hand, both in the 19th century and in the 20th, the discourse of rights and legality has been deployed as principle of critique of the extension of such rationalized powers over life. For example in the United

AUTHORIZATIONS

We have already suggested that legal mechanisms played a key role in the authorization of disciplinary and bio-political authority, in the constitution of those deemed capable of exercising authority over others, and in the regulation of their powers. In contemporary forms of government, not merely legal licensure, but also the shadow of the law – the threat of legal action, the encoding of responsibilities and standards in law – act as powerful strategies of the regulation of the exercise of professional powers 'at a distance', along with the control of budgets and the use of audits and evaluations. One could also point to the legal constitution of certain para-legal forums within which persons and authorities are brought together – for example, divorce court mediation, or the requirement in certain jurisdictions that mothers who wish to avoid having their children taken into care should attend classes in parenting skills. Combining these dimensions, one could point to the hybridization of legal and non-legal authority, as for example in the cases where judges order offenders into medical treatments for addiction, or require them to participate in the programmes of ethical reconstruction provided by organizations such as Alcoholics Anonymous. If the authority of authority has been a problem for liberal mentalities of rule since the mid-19th century, it has frequently been established and defended through alliances between the different legitimacies conferred by law and expertise.

CONCLUSIONS

We have suggested that the lines of analysis opened up by Michel Foucault's notions of governmentality provide some productive ways of considering the role of the legal complex in the government of conduct. In order to open up these productive possibilities, it is necessary to step aside from the dreary debate about sovereignty versus discipline, and to engage directly with the analysis and diagnosis of particular problematizations and of the strategies used in their regulation.

REFERENCES

Baker, Keith M. (1994) 'A Foucauldian French Revolution', in Jan Goldstein (ed.) *Foucault and the Writing of History*. Oxford: Blackwell.

Castel, Robert (1994) '"Problematization" as a Mode of Reading History', in Jan Goldstein (ed.) *Foucault and the Writing of History*. Oxford: Blackwell.

Denno, Deborah W. (1996) 'Legal Implications of Genetics and Crime Research', in G. R. Bock and J. A. Goods (eds) *Genetics of Criminal and Antisocial Behaviour*, Ciba Foundation Symposium 194: 248–64. Chichester: John Wiley.

Ewald, François (1990) 'Norms, Discipline and the Law', *Representations*, 30: 138–161.

Foucault, Michel (1978) Interview. *Le Monde*, 21 October 1978.

Foucault, Michel (1979) *The History of Sexuality, Volume 1*. London: Allen Lane.

Foucault, Michel (1995) 'Governmentality', pp. 87–104 in G. Burchell, C. Gordon and P. Miller (eds) *The Foucault Effect: Studies in Governmental Rationality*. Chicago: University of Chicago Press.

Foucault, Michel (1989) *Résumé des cours, 1970–1982*. Paris: Julliard.

Foucault, Michel (1980) 'Two Lectures', in C. Gordon (ed.) *M. Foucault: Power/Knowledge*. Harvester.

Garland, David (1997) '"Governmentality" and the Problem of Crime: Foucault, Criminology, Sociology', *Theoretical Criminology* 1(2): 173–214.

Gordon, Colin (1980) 'Afterword', in C. Gordon (ed.) *M. Foucault: Power/Knowledge*. Harvester.

Hermer, Joe (1997) 'Keeping Oshawa Beautiful: Policing the Loiterer in Public Nuisance By-Law 72–94', *Canadian Journal of Law and Society* 12(1).

Sarat, Austin (1990) '"... the Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor', *Yale Journal of Law and the Humanities*, 2(2): 343–79.

of 'legal consciousness' as in Austin Sarat's notion of the legal consciousness of the welfare poor, although it shares this focus on the points and places where the human subject gets transformed into a legal subject (Sarat, 1990). It is a matter of the emergence and emplacement of certain practices of the self in particular sites and practices. It entails analysis of the modes of self-display and self-identification that persons are offered within those practices and of the incitements that exist to represent oneself in certain ways. This is neither a matter of the constitution of subjects in legal form nor of the disciplining of subjects whose natural form is otherwise; but of the encouragement, support and shaping of self-projects in such ways that in specific practices, these come into alignment with the diverse objectives of regulation. No single subject – legal or otherwise – is constituted here: practices of subjectification work in heterogeneous ways and they do not sum into a particular 'personality': the forms of personhood that result are similarly mobile, hybrid and shifting.

NORMALIZATIONS

We have expressed reservations about some of the ways in which Foucault posed the antagonism between juridical codes and disciplinary mechanisms. But we share his view that the legal complex is increasingly invested with the problematics of the norm, and connected up to, and dependent upon, a matrix of apparatuses whose features are in the main regulatory or governmental. This generates a series of productive antagonisms and alliances between different conceptions of the objects, subjects and mechanisms of government. This is not so much a displacement of law as an embedding of legal practices of different sorts within governmental strategies.

In strategies for the government of childhood, sexuality and domesticity, legal mechanisms have become inextricably bound up with regulatory ambitions and social aspirations to turn the home and family into a normalizing mechanism for the rearing of children according to the norms of citizenship and adjustment, for the stabilization of sexual activity and for the enhancement of consumption. In such normalizing and therapeutic practices, the image of law can itself be deployed to support and authorize the power of the norm. For example, in mediation and conciliation in divorce, the 'shadow of the law' plays a key role in the authorization and support of various normative therapeutic moves by counsellors and other experts of relationships.

A proper examination of such practices would have to attend to the technicalities of legal procedure, and to the ways in which non-legal knowledges can be introduced into legal forums. For example, there are major differences between the role of normative knowledges in adversarial legal regimes as opposed to inquisitorial regimes. And normative knowledges are neither singular nor consensual. A plurality of different forms of expertise have attached themselves to the institutions and procedures of the law. Disputes between biological, psychological, psychiatric and sociological forms of knowledge open a potentially inexhaustible space of disputation. As current

debates over 'DNA fingerprinting' show, even within any sub-discipline, legal agents have considerable discretion to call upon experts representing different factions. Different criteria are used in law to determine admissibility. For example, in the United States standards have become more flexible over the course of this century: in 1993 the Supreme Court displaced the 1923 'Frye standard', which required that a scientific technique be inadmissible in a federal court unless it is 'generally accepted' within the scientific community, by the 'Daubert standard', in which 'if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of an opinion or otherwise' (cf. Denno, 1996). Normalization does not describe an achievement, but rather a kind of mobile and heterogeneous transactional zone of conflict and alliance between forms of expertise.

SPATIALIZATIONS

By spatialization, we refer to the ways in which legal practices are involved in the constitution of what we can term 'governable spaces'. David Garland has drawn attention to the ways in which, in discourse on crime, new spatializations have emerged for the identification and regulation of conduct (Garland, 1997). It is now possible to govern not the individual offender but the criminogenic situation: a set of routines of everyday life distributed within specific kinds of space – the shopping mall, for example, or the public park. One can observe analogous spatializations of governable conduct in other arenas. Consider, for example, the minor laws that govern particular spaces: the laws on the use of the streets, concerning begging and soliciting, loitering, vagrancy, sleeping rough, busking and the like (Hermer, 1997). The government of the new poverty is conducted largely through such practices for the control of spaces, attempting to establish and demarcate a territorial division between the excluded and the included, between the spaces of consumption and civility and the savage spaces on the margins.

This patchwork of local law, of by-laws and regulatory laws, does not partake of the abstraction and universality of statute law. It entails a combination of different types of authority – local authorities, merchants' associations, landlords of shopping complexes, security firms, parks authorities, transport police. Despite its heterogeneity, in its strategic orientation it is, perhaps, the closest contemporary equivalent to the forms of 'police' and cameralist regulation which spread throughout Europe in the 17th and 18th centuries. It entails codes that embody specific conceptions of desirable and undesirable conduct. But these are not regulated by the norms of positive knowledge, or indeed by any knowledge other than everyday knowledges of order and disorder. Conduct, here, is indeed governed by law, but by ways of thinking, regulating and enforcing that are very different from those usually associated with legality.

States, which had the dubious privilege of passing the first compulsory sterilization laws and of incarcerating large numbers of its citizens on eugenic grounds for many decades, the movements to uphold the civil rights of confined mental patients in the 1960s used the discourse of right as the basis of its critique of the legally encoded powers of the state to administer the population in the light of knowledge claims about the consequences of its hereditary make-up.

Further, as Baker once more points out, with the emergence of rule-of-law states in the 19th century, the constitution of subjects as citizens was more than illusory. In according at least some subjects a new political subjectivity, and in re-coding the legitimacy of the state in terms of the democratic expression of the popular will, the sovereignty that was claimed by the population could act as a powerful legitimating device for the governmentalization of the state. Early strategies for the 'totalitarian' extension of the powers of the sovereign throughout the nation in order to raise taxes and support military expenditure and the control and defence of territory faced resistance and their legitimacy were frequently questioned by those upon whom they sought to act. The 'democratization of sovereignty' helped overcome these resistances. As Baker puts it 'democratized sovereignty serves the ends of surveillance by destroying the obstacles hindering the development of disciplinary society' (1994: 204).

Leaving these general issues of political rights in a governmental state to one side, however, we turn to consider how one might approach the role of law as an historian of the present, and from the perspective of government. By the perspective of government, we mean an analytical focus upon the formulation and functioning of rationalized and self-conscious strategies that seek to achieve objectives or avert dangers by acting in a calculated manner upon the individual and collective conduct of persons (Foucault, 1991). We do not think that it is fruitful to analyse the role of law here in terms of some global opposition between sovereignty and discipline. We are happier with a more modest and empirical concern, one that might begin with the distinctions between the techniques of juridical rule and the techniques of the norm. François Ewald suggests that this is best understood in terms of the emergence of 'social law': law which is welded to the power of norms. What is involved here can be clarified by considering some differences between the operations of 'rule' and 'norm'. A rule is external to that which is governed: it is imposed upon its subjects in relation to an extrinsic standard of authority, morality, virtue, order, duty or obedience. A norm, on the other hand, appears – or claims – to emerge out of the very nature of that which is governed. Its normativity is predicated upon and justified by its normality: the normal child, the normal family, normal conduct, normal business practice. Ewald suggests that 'The norm is the group's observation of itself; no one has the power to declare it or establish it' (1990: 155). This is a telling phrase, but it suggests more about the idea of a norm than the actual conditions under which norms are established and achieve their authority and normativity. But it is true that to govern in the names of norms is to complicate the binary

distinction of legal and illegal. It is to institute an 'impersonal' – perhaps even a 'democratic' – judgement of each individual in relation to the collectivity of which they form a part. The norm is 'individualizing' – it affirms the equality of individuals in relation to a common standard. But at the same time, that standard makes visible and practicable the differences, discrepancies and disparities amongst individuals. And norms are inescapably plural. Different norms emerge out of different 'natural' domains, and norms are inherently open to justification or contestation in the name of positive knowledges.

'Normalization establishes the language that allows these different groups [buyers, sellers, producers, and consumers] to understand one another and to form a society' (Ewald, 1990: 151). In governing in the name of society, rather than governing in the name of sovereignty, the normative order appears to be valid simply because of its normative quality. The processes by which some have claimed or acquired the power to identify and validate this normativity appear more technical than political. In the process, normative government and the social laws that it generates actually institute society itself: 'the norm is a means of producing social law, a law constituted with reference to the particular society it claims to regulate and not with respect to a set of universal principles . . . when the normative order comes to constitute the modernity of societies, law can be nothing else than social' (1990: 154–5).

It is too simple to say, however, that the juridical has given way to the normative, that legal reasoning has been supplanted by normative reasoning and that the law is now constitutively regulatory and social in nature. This is first and foremost because *there is no such thing as 'The Law'*. Law, as a unified phenomenon governed by certain general principles is a fiction. This fiction is the creation of the legal discipline, of legal textbooks, of jurisprudence itself, which is forever seeking for the differentia specifica that will unify and rationalize the empirical diversity of legal sites, legal concepts, legal criteria of judgement, legal personnel, legal discourses, legal objects and objectives. Rather than seeking to unify law, either jurisprudentially or genealogically, we would prefer to take an alternative route. While it might seem obvious to begin by asking 'what does law govern?', from the perspective of government we would not start from law at all. Instead, we would start from problems or problematizations (cf. Castel, 1994). A problematization, here, is a way in which experience is offered to thought in the form of a problem requiring attention. The analysis of problematizations is the analysis of the practices within which these problematizing experiences are formed. The intellectual premises and analytic methods of legal studies tend to presuppose that objects and problems form within the workings of law itself. But in order to analyse the ways in which problems form at the intersection of legal and extra-legal discourses, practices and institutions, it is necessary to de-centre law from the outset.

As an example, it is now commonplace to ask how 'the law' regulates 'sexuality'. But we would prefer to ask how does a particular problem – say that of homosexual relations or prostitution – come to emerge as a target for government, and what role is played by legal institutions, functionaries and

calculations in this? Hence, to investigate the legal complex from the perspective of government is to analyse the role of legal mechanisms, legal arenas, legal functionaries, legal forms of reasoning and so on in strategies of regulation. It is not merely that the law here has no unity – whether it be as a unique source of legitimate authority or as a unique form of reasoning. It is also that the law has no privilege, and indeed we would want to cast some doubt upon the power attributed to law by constitutional theorists and critical legal scholars alike. The codes, techniques, discourses and judgements of law are only one element in the assemblages that constitute our modern experience of subjectivity, responsibility, citizenship both public and private, even of rights, or of guilt and innocence. The workings of law are always intermixed with extra-legal processes and practices. Indeed, an analysis of law from the perspective of government would turn away from the canonical texts and the privileged sites of legal reason, and turn towards the minor, the mundane, the grey, meticulous and detailed work of regulatory apparatuses, of the control of streets, of the government of transport, of the law of health and hygiene, of the operations of quasi-legal mechanisms for the regulation of relations between men and women, parents and children, of the laws of property and trust, of inheritance and of slander – of all the places where, in the bureaucratic workings of our over-governed existence, laws, rules and standards shape our ways of going on, and all the little judges of conduct exercise their petty powers of adjudication and enforcement.

An analysis of problematizations would entail an investigation of the *surfaces of emergence* of problems for government. The problem of 'maladjustment' in children, for example, did indeed form in a legal site, in the juvenile courts established in many jurisdictions in the early decades of the 20th century, which acted as the matrix for connecting subjects, objects, authorities and judgements and linking the details of domesticity with the authority of expertise. The problem of workers' rights, of health and safety at work and the welfare of the worker, however, emerged first of all in political struggles in the factory, and only later was re-framed as something that could legitimately become the object of legislation. One would also try to identify the *authorities* who define and delimit the problem to be investigated. These may be legal or quasi-legal – as in tribunals or commissions of enquiry, for example. But the authorities who produce, define and delimit a problem for government by law may not themselves be legal at all. For example, it was medical personnel who defined the problem of the future health of the population in terms of the adequacy of child rearing, and their efforts led to the construction of a complex and legally configured regulatory apparatus for scrutinizing the health and welfare of babies and infants and intervening upon the home in order to ensure its adequacy as a machine for the production of health. And one would investigate the *conceptual codes* and *criteria of judgement* within which problems come to be formed, and the clashes and alliances between different explanatory logics and types of judgement. In the familiar example of criminal responsibility, for example, the clash between the logic of individual responsibility and the logic of psychiatry has shaped disputes

concerning the identification, explanation and disposition of the dangerous individual since the mid-19th century.

Beyond the analysis of problematizations, it is worth highlighting some more specific foci for an investigation of the legal complex from the perspective of government. Here we can single out four: subjectifications; normalizations; spatializations; authorizations.

SUBJECTIFICATIONS

Marxists have long argued that a particular form of subject is brought into existence by capitalist relations of production and that this underpins the form that law gives to its subjects: individual, autonomous, possessive, self-responsible, bearers of rights. From our own perspective, however, such a unification of the subjects of law, both over an historical epoch and across a diversity of practices, is profoundly misleading. Subjects are constituted in a whole variety of ways in different legal contexts and forums. Each of these subjectifications has a history, each is differentially suffused by the norms and values of positive knowledge. For example, in the criminal justice system, despite a hundred years of positivistic criminology, the adult male defendant is only rarely biologized, psychologized or sociologized prior to verdict, although psychologization is routine after the verdict is delivered, in deliberations over sentencing, and in the penal system. The woman is more psychologized and biologized than the man – for example in the cases where a woman's responsibility is considered to be mitigated by her reproductive biology, in infanticide and in defences of pre-menstrual syndrome. The child is more psychologized than the adult – the idea of a reasonable person with his or her age subtracted is too abstract and foreign for most judges to contemplate. The legal subject is thus both gendered and aged in relation to definite and historically variable norms, beliefs and conventions – even if these do not conform to the explanations currently authorized by contemporary psychological, anthropological or sociological experts.

In other practices, different modes of individualization and subjectification are operative. Some, for example, are racial and genetic: for example, in cases in the United States where the supposed hereditary susceptibility of North American Indians to the influence of alcohol acts in an exculpatory manner. Other forms of individualization are based upon a peculiar combination of moral and theological convictions, biological knowledges and policy concerns: consider for example the different status at law of embryos fertilized in vitro, or of the 'unborn child'. Still others individualize and personalize the subject in very different ways: for example those concerning the duty of care owed by professionals to their clients, the nature of reputation in cases of slander or libel, and the nature of authorship in intellectual property and copyright.

This is not just a matter of 'legal ideology' as suggested by writers in the tradition of critical legal studies. Nor is it simply a question of the fabrication