

FOUCAULT AND THE LAW: AN ANTIJURIDICAL JURISPRUDENCE?

HERNANDO VALENCIA-VILLA *

Introduction

Describing himself, French philosopher and historian Michel Foucault has recently said: "I am a dealer in instruments, an inventor of recipes, a cartographer".¹ Why does a prestigious thinker, writer and professor, who holds a chair at the top academic institution of his country, the College de France, make such a paradoxical portrait of himself?

The point is more surprising if one takes into account the fact that Foucault has already written fifteen books and almost fifty papers and articles on psychology, epistemology, philology, sociology and intellectual history and enjoys the reputation of being the new Sartre, philosophy's Proust or the Nietzsche of the century's last quarter.

In the last five years, in a many Western European and Latin American graduate schools, a substantial amount of papers and seminars have attempted to explore the enigmatic and radical thought of this new master thinker. Moreover, the Left debate concerning critical issues such as the political function of the intellectual, the relationships between science and ideology, the status of the so-called total institutions (prisons, asylums, hospitals, barracks, factories, corporations, schools) and not only the viability but also the desirability of the revolution in countries like Italy, France, Spain, Mexico and Colombia is posed today in the fashion of an academic discussion on Foucault's work.

However, in the American intellectual field there is not a similar interest in the critical enterprise of the author of *Madness and Civilization* and *Discipline and Punish*. As a matter of fact, most of the people who teach and write political philosophy and jurisprudence in a formal way in this country, are still doing much the same characteristic Anglo-saxon stuff: either empirical research about microproblems or abstract theoretical constructions almost entirely separated from human and social reality. Such is the case of the *Theory of Justice* by Harvard's John Rawls, a long and arid essay on Kantian jurisprudence that is celebrated by many as the most outstanding achievement of American legal scholarship in the 1970s.

* Professor of Law, Universidad de los Andes, Bogotá, Colombia.

¹ M. Foucault, *Interview to the Nouvelles Littéraires*, March 1975, quoted in SHERIDAN, MICHEL Foucault: THE WILL TO TRUTH 224 (1980)

Nonetheless, the ten main titles in Foucault's bibliography have been translated into English and in the second semester of 1980 two remarkable books have been published on the subject. *The Will to Truth*, the first full-length study of the French philosopher by Alan Sheridan, his American translator, and *Power/Knowledge*, a collection of the political papers of Foucault in the last eight years, edited by Colin Gordon, a radical scholar engaged in social theory. It is early to say if this means a genuine interest toward the new perspective of negative, Nietzschean philosophy opened by the brilliant and polemic prose of Foucault, but it is worthwhile to try to summarize his whole effort and to describe his challenging hypothesis about power and law. For Foucault's archaeology, genealogy and micro-physics are not the odd chapters of a new metaphysics or the sacred words of a new philosophical church but rather the outcome of a research task over a quarter of a century tracing the roots of our established rationality or rather the tools, the weapons for an endless battle against moral satisfaction and intellectual accommodation.

Archaeology

It is hard and even senseless to classify Foucault as well as his production. Although in another place he has said that he is a historian of ideas rather than a philosopher, and his chair at the College de France holds the name of General History of Systems of Thought, one must recall one meaningful precedent. Nietzsche was a philologist rather than a philosopher.

Foucault was born in Poitiers in 1926 and did studies in psychology and philosophy in Paris with Jean Hyppolite, the great, perhaps the greatest, translator and commentator of Hegel. He served as director of the French Institute in Hamburg and of the Institute of Philosophy at the University of Clermont-Ferrand in Southern France, where he spent more than fifteen years. In the aftermath of May 1968, he was appointed as head of the Department of Philosophy in the experimental and radical campus of Vincennes. Two years later he went to the College de France where he remains since.

Between 1954 and 1971, the work of Foucault can be located under the sign of "archaeology". This word means here patient and careful archive research in order to rebuild and rebuild the process of a series of discourses and practices within the Western institutional and scientific development since the Classical Age, namely, along the bourgeois order's evolution. This is not to say that the archaeology attempts to study dead things but hidden, discrete things in the very core of our liberal societies such as the "positive" notions of normality, reason, health and knowledge through the "negative" notions of abnormality, madness, illness, and ignorance and error.

The first book by Foucault is *Mental Illness and Personality*, 1954, published again in 1966 as *Mental Illness and Psychology*. It is an academic

text, actually his master's degree thesis, that deals with the metascientific, almost ideological, character of the notion of pathology. Under the influence of Georges Canguilhem, a medical historian, it is a first, precarious step toward the ambitious project of its author. However, it already points out to two questions from now on essential in the forthcoming reflection: on the one hand, the abnormality as the outcome of a discourse of exclusion, and on the other hand, the possibility of reading the human sciences as political technologies.

In 1961 his doctoral dissertation, *Madness and Civilization. A History of Insanity in the Age of Reason*, appeared and it is Foucault's first best seller and, according to many reviewers and critics, his best book by far. This long and brilliant essay on the origins and development of madness and psychiatry arose a strong public discussion among the experts, especially the medical professionals. To some extent, the book is regarded as the main source of the antipsychiatric movement of the 1970s, which has representatives as distinguished as Franco Basaglia in Italy, David Cooper and Ronald Laing in England, and Thomas Szasz in the United States. With his powerful and original rhetoric Foucault shows how the constitution of asylum as the paradigmatic total institution was the sole condition of possibility for the formation of psychiatry and medicine and human sciences in general. It is indeed the first application of the archaeologic method: a critical description of ancient documents and monuments that allows to see the strategic correspondence between knowledge and power; in this particular case between the formation of psychiatry and the construction of the mental hospital.

The same kind of critical weaponry is used two years later in *The Birth of the Clinic. An Archaeology of Medical Perception*, where the power/knowledge dialectic is unmasked at the heart of the prestigious medical profession, reputed as the matrix for the other social and human disciplines.

Also, in 1963, *Raymond Roussel* is published. This is a sophisticated work of literary criticism concerning a French author of the beginning of the twentieth century who did remarkable idiomatic experiments. It should be said that Foucault himself used to be and still is a superb reviewer as may be seen from the Cornell University edition of his early literary and philologic papers.

Two years before May 1968, Foucault published *The Order of Things. An Archaeology of the Human Sciences*, perhaps the most comprehensive and problematic of his works. Although it is a case study on the formation of three of the major human sciences, due to its complexity and broad perspective, it may be Foucault's only effort to design to some extent a general system of thought. Hence its difficulties. In the following book, however, the whole purpose of the archaeology of the human sciences is

carefully pointed out, that is to say, it is clear that *The Order of Things* is not at all an essay of a general theory. It is instead an extrapolation of the former studies about psychology, psychiatry and medicine to the wider field of the social sciences in order to emphasize the lastly antihumanist orientation of these discourses and disciplines. Indeed the text presents three "referential axis": wealth analysis, general grammar and natural history which became, in the eighteenth and nineteenth centuries, political economy, philology and biology, first, and sociology, linguistics and psychology, later on. Through them Foucault is able to show the breaks rather than the continuities in the Western evolution of thought and also to judge in a global fashion the "episteme" or criteria of scientific knowledge that has taken man as a formal and proper object by its discourse for the first time.

Three years later, in 1969, the time came for autocritics. As a response to the many attacks to his last work and also as an outcome of a deeper and more complex process of inner appraisal that will be seen below, Foucault writes an enigmatic discourse of method, *The Archaeology of Knowledge*, which is actually the only Foucaultian product without an empirical reference to reality. It is a highly abstract theoretical study full of definitions and methodological rules as used in his four earlier books. At the same time, Foucault announces a number of themes and fields of reflection and research that only will be specified and detailed in the near future. Thus far, the young professor has successfully accomplished a series of solid analysis leading to developing a new, fresh and bold look at the old Western humanism with its respectable disciplines. The ironic name of the enterprise is quite revealing of the author's intentions. If so far the goal has been to expose the hidden rationality of institutional discourses and practices in the realm of human (and humanist) sciences, from now on the task will be one of finding out and describing the proliferating network of power and force relationships that supports and shapes our bourgeois order. Genealogy is the name of the game.

Genealogy

Just at the time of his writing *The Archaeology of Knowledge*, some very important events occurred in the lives of Foucault and France. First, the upheaval of May 1968 in Paris, which failed to seize the state power but succeeded in revealing to everyone "that the state was not sufficiently in one place to be seized, that the state was everywhere and that therefore the 'revolution' had to be everywhere, ubiquitous as well as permanent".² That Foucault was perhaps the first one who had learned this lesson is apparent in a remarkable statement made in 1972 by his colleague Gilles Deleuze: "You were the first to teach us something fundamental: the indignity of speaking for others. We ridiculed representation and said it was

² SHERIDAN, *op. cit. supra*, note 1 at 13.

finished, but we failed to draw the consequences of this 'theoretical' conversion: to appreciate the theoretical fact that only those directly concerned can speak in a practical way on their own behalf".³

Second, a very creative return to Nietzsche's texts. In his Vincennes classes and in a contribution for a collective volume of essays published in memory of Jean Hyppolite, Foucault radically reformulates the whole purpose and sense of the term and concept of genealogy. The paper, entitled "Nietzsche, Genealogy, History", is not only a landmark in the intellectual career of the author but also a breakthrough in the dark forest of Nietzschean studies. It begins: "Genealogy is gray, meticulous, and patiently documentary . . . Genealogy does not oppose itself to history as the lofty and profound gaze of the philosopher might compare to the molelike perspective of the scholar; on the contrary, it rejects the meta-historical development of ideal significations and indefinite teleologies. It opposes itself to the search for origin."⁴ And Sheridan comments: "Foucault's genealogy, like Nietzsche's is gray only in contrast with the blue skies of great ideas."⁵

Third, a growing development of Foucault's political commitment, mainly with regard to the great hunger strikes in the prisons of France during the early 1970s. As an outcome of this, a number of intellectuals, artists and scholars founded the Information Group about Prisons, from which eventually *Discipline and Punish* would originate.

This new set of concerns, this up-dated genealogy, finds out its first coherent formulation in *The Discourse on Language*, the inaugural lecture at the College de France in the winter of 1971. In this little masterpiece of self-conscious and ironic art, that is indeed a discourse about discourse, a speech on the institutional constraints that operate on speech not only from without but from within, Foucault reviews his own work, acknowledges his intellectual debts (Hegel, Hyppolite, Canguilhem, Dumézil) and announces his current project in a characteristic fashion: "In any society the production of discourse is at once controlled, selected, organized and re-distributed according to a number of procedures whose role is to avert its powers and its dangers, to master the unpredictable event."⁶ The political question, the functioning rather than the nature of power, is now on the thinker's agenda.

In fact, the problematics of power appear in an articulated way with the celebrated monography about the prison, *Discipline and Punish*, published in 1975. The target of the well-documented and far-reaching study;

³ Quoted in FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE* 20 (1977).

⁴ FOUCAULT, *Nietzsche, Genealogy, History*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE*, *supra*, 139-140.

⁵ SHERIDAN, *op. cit. supra*, note 1 at 220.

⁶ Foucault, *The Discourse on Language*, in *THE ARCHAEOLOGY OF KNOWLEDGE*, pp. 10-11.

according to its own terms, is to write a history of the French jail from the standpoint of the parallel formation of a knowledge and a power effectively modern in its structures, functions, and reciprocal relations. In other words, Foucault's aim is to describe, with his distinctive accurateness, the birth and deployment of a new technology of power that makes possible and viable the accumulation of men which is functional to the accumulation of capital in the rise of the bourgeois order. The key notion here is that of discipline, a novel technique of political power that works on the body and in the body, through the individual and within the individual. The Classical Age (1660-1810) produces a modality of power, the liberal, capitalist power that "increases the forces of the body (in economic terms of utility) and diminishes the same forces (in political terms of obedience)."⁷

Like Marx with regard to the production process, Foucault proposes an analytic approach to the question of power that is absolutely radical in its manifold implications: "We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to his production."⁸ Therefore, the Copernican revolution for the political and juridical theory is, *mutatis mutandis*, comparable to the Marx's fracture regarding the economic and social sciences.

The central hypothesis of the book on the jail system, by large the best ever written on the subject, is that the technology of discipline, which finds its "natural" testfield in the carceral apparatus but pervades all the social structure, overrides two other technologies of surveillance and punishment historically formulated as alternative solutions for the problems of the political economy of Western power. As a matter of fact, there was a conflict of carceral strategies at the very end of the eighteenth century: the old monarchical law, based upon torture as vengeance of the sovereign, the project of the Enlightenment reformers, based upon rehabilitation of the criminals as subjects of law, and the penitentiary institution program, based upon transformation of individuals within a double scheme of docility and utility. Why does the third one become the new principle of control and domination in the total institutions as well as in society as such? Because this productive and proliferating technology is by far the most effective for the building and development of the capitalist production. And also because discipline itself was born from the same matrix than the human sciences. To put it in another way: a common technology of power is the very principle both of the modern penal system and of the modern knowledge of man.

So, every relevant social institution, either formal like the state or informal like the family, and especially the military, penitentiary and educa-

⁷ FOUCAULT, *DISCIPLINE AND PUNISH* 138 (1979).

⁸ *Ibid.*, p. 194.

tional organizations, shapes its inner structure according to the paradigmatic disciplinary model: the famous (and infamous) Panopticon of Jeremy Bentham. As it is well known, the Panopticon was a project of perfect prison: a circular building or set of buildings where the major feature is the constant and total surveillance of the inmates by means of an "effect of visibility" which depends on the combined use of architectural and optical devices. The major effect is "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."⁹ Foucault talks of the laboratory of power, of the orthopedical machine. For the Panopticon it is not only a dream building: it is also a mechanism, a principle of economic power and control over problematic populations. Hence, the panopticism, genuine policy of a whole disciplinary generalization extended to every institution and to every organizational level and region in our society. The next step in Western history is the constitution of the carceral archipelago and the disciplinary society.

The last published text of our thinker is *The History of Sexuality, I: An Introduction*, 1976. This time, the English translation is far from the French original title: *La Volonté de Savoir*, "the will to know" or "the will to knowledge", following the last words of Nietzsche's *Gay Science*. This thin book is at once the first part and the general, methodological introduction to an ambitious set of six volumes on the history of sexuality since the Classical Age. The hypothesis cannot be more heretical: the sexual repression, says Foucault, is not the central feature in the evolution of the Western discourse about sex. On the contrary, although the prohibition of pleasure has been an empirical fact in many circumstances, the main trend is another one, namely, the invitation to confess, to talk about. "I do not maintain that the prohibition of sex is a ruse; but it is a ruse to make prohibition into the basic and constitutive element from which one would be able to write the history of what has been said concerning sex starting from the Classical Age. All these negative elements — defenses, censorship, denial — which the repressive hypothesis groups together in one great central mechanism destined to say no, are doubtless only component parts that have a local and tactical role to play in a transformation into discourse, a technology of power, and a will to knowledge that are far from being reducible to the former."¹⁰

Sex became sexuality through a whole set of discourses and knowledges deployed during the last two hundred years by the power relations network with the aim to reinforce the truth production. If the East gets the sexual truth by means of an *art erotica*, the West in turn does so by means of a *scientia sexualis*, a will to knowledge based on the confession, regarded by Foucault as the great procedure of production of the sexual truth from the Middle Ages confessional to the contemporary psychiatric couch.

⁹ *Ibid.*, p. 201.

¹⁰ FOUCAULT, *THE HISTORY OF SEXUALITY* 12 (1980).

This will to knowledge itself is a technique of power from which four specific strategies have been extorted: the hystericization of the female body, the pedagogicization of children's sexuality, the socialization of procreation, and the psychiatrization of perverse pleasure, which will be subject of the next volumes of the history. To study the sexuality apparatus that those strategies form together, Foucault turns again to the question of power, enriched now with new insights and notions.

In fact, this time the reflection is deeper in its implications for the jurisprudential concern and sharper and bolder in its language: "In political thought and analysis, we still have not cut off the head of the king... And if it is true that the juridical system was useful for representing, albeit in a nonexhaustive way, a power that was centered primarily around deduction and death, it is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus... We must at the same time conceive of sex without the law, and power without the king... If it is true that Machiavelli was among the few—and this no doubt was the scandal of his 'cynicism'—who conceived the power of the Prince in terms of force relationships, perhaps we need to go one step further, do without the persona of the Prince, and decipher power mechanisms on the basis of a strategy that is immanent in force relationships."¹¹

The message is crystal clear: only a strategic model rather than a juridical one may be capable of describing and explaining, in the heart itself of our disciplinary, disciplined societies, the productive and profitable mechanisms of political power. Only a dynamic, polemic approach can be able to grasp the relational power which constitutes the framework of our everyday life.

Microphysics

Since the opening pages of *Discipline and Punish* one can read that the modern political technology of the body operates a kind of "microphysics of power" which paradigm is "a perpetual battle rather than a contract". The term, albeit unusual, is quite accurate to describe the endless and changeable and proliferating dynamics of power relationships that Foucault has discovered and explained in his case studies and more recently in his lectures and interviews.

From these materials, since we do not have any other up-dated, systematic version, arises a set of five hypotheses that would form the Foucaultian microphysics of power:

¹¹ *Ibid.*, pp. 88, 89, 91, 97.

Hypothesis of the property of power. The power is, not a commodity but a strategy; its effects of domination are due not to an appropriation but to functionings, maneuvers, techniques.

Hypothesis of the place of power. The state is not the home of power; its power is always precarious and unstable. Power comes from below, is everywhere. There is no binary and all-encompassing opposition between rulers and ruled but rather a manifold production of domination relations which are partially incorporated into global strategies.

Hypothesis of the dependence of power. Relations of power are not in a position of exteriority with respect to other types of relationships: economic processes, knowledge relations, sexual links but are immanent in them. Power relations are both intentional and nonsubjective.

Hypothesis of the functioning of power. The power neither essentially nor exclusively works by means of mechanisms of repression, denial or rejection. The power produces knowledge, pleasure, truth. It is a productive network that crosses all the social body rather than a super-ego or a master whose role would be to repress. Power relations produce the real, the normal, the individual.

Hypothesis of the legality of power. The power does not express itself mainly through the law. Law is neither the truth of power nor its alibi. It is an instrument of power which is at once complex and partial.

These propositions, however, do not amount to a new theory, that is to say, they do not try to design an alternative scheme to the existing one. Instead its usefulness comes from the mere fact that they show the relational, anonymous, multiple, and ubiquitous character of power in Western countries. Thus, an unavoidable question arises: Is there any chance of opposing this almighty dynamics?

The answer is two-fold. On the one hand, one must recall, last but not least, another feature of power relationships pointed out in *The History of Sexuality*: "Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power. . . . Just as the network of power relations ends by forming a dense web that passes through apparatuses and institutions, without being exactly located in them, so too the swarm of points of resistance traverses social stratifications and individual unities. And it is doubtless the strategic codification of these points of resistance that makes a revolution possible, somewhat similar to the way in which the state relies on the institutional integration of power relationships."¹²

On the other hand, Foucault has developed his microphysics of power in a couple of relevant ways: a reappraisal of the notion of plebs or

¹² *Ibid.*, pp. 95-96.

populace, that is exceptional in the whole universe of the contemporary radical tradition, and a reformulation of the political function of the intellectual, which major feature deals with the idea of the scholar as a destroyer of evidences and universalities.¹³

One should say that there is no programmatic or even ideological purpose in the critical task performed by the French philosopher, at least in the sense of a new platform for the left in the early 1980s, but rather a broad and far-reaching theoretical search at once Socratic in its unpredictability, Machiavellian in its realism, and Nietzschean in its heterodoxy.

The latter is quite clear in the memorable last page of the book on the prison. After quoting a forgotten and anonymous letter sent in 1836 to the anarchist newspaper *La Phalange*, in which the warfare in the very core of the bourgeois city is painted, Foucault remarks with special energy: "The model of the carceral city is not, therefore, the body of the king... nor the contractual meeting of wills from which a body that was both an individual and collective was born, but a strategic distribution of elements of different natures and levels... Consequently, the notions of institution, repression, exclusion, marginalization, are not adequate to describe, at the very center of the carceral city, the formation of the insidious leniencies, unavowable petty cruelties, small acts of cunning, calculated methods, techniques, 'sciences', that permit the fabrication of the disciplinary individual. In this central and centralized humanity, the effect and instrument of complex power relations, bodies and forces subjected by multiple mechanisms of 'incarceration', objects for discourses that are in themselves elements for this strategy, we must hear the distant roar of battle."¹⁴

Antijurisprudence

As we have already seen, there is a persuasive and pervasive distrust in Foucault's blueprint with regard to the law. But is there as such a specific, explicit conception of law in these hard texts?

The answer is, of course, not so far. And probably it will not be a single book or even a whole chapter on the matter in the remaining, hopefully long, writings of Foucault. For he is a nonmarxist materialist, an entire "school" himself, and thus, his perception of the juridical system is in principle quite critical, even negative, although for different reasons than the Marxist tradition.

Nevertheless, from the few pages dedicated to the law in *Discipline and Punish*, *The History of Sexuality*, and *Power/Knowledge* and also from the general perspective exposed above, we are able perhaps to articulate a couple of hypotheses for further discussion, reflection and research.

¹³ See FOUCAULT, *Powers and Strategies* and *Truth and Power*, respectively, in GORDON (ed.), *POWER/KNOWLEDGE* 134ff and 107 (1980).

¹⁴ FOUCAULT, *DISCIPLINE AND PUNISH* 307-308 (1979).

As far as we are concerned, the first references to the law appear along the exposure of discipline and panopticism as the proper technologies of power within the rise of capitalist order. In presenting the connection between the formation of the disciplinary society and a number of broad historical processes, Foucault uncovers the deep tie: "Historically, the process by which the bourgeoisie became in the course of the eighteenth century the politically dominant class was marked by the establishment of an explicit, coded and formally egalitarian juridical framework, made possible by the organization of a parliamentary, representative regime. But the development and generalization of disciplinary mechanisms constituted the other, dark side of these processes. The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micropower that are essentially non-egalitarian and asymmetrical that we call the disciplines. And although, in a formal way, the representative régime makes it possible, directly or indirectly, with or without relays, for the will of all to form the fundamental authority of sovereignty, the disciplines provide, at the base, a guarantee of the submission of forces and bodies. The real, corporal disciplines constituted the foundation of formal, juridical liberties. The contract may have been regarded as the ideal foundation of law and political power; panopticism constituted the technique, universally widespread, of coercion. It continued to work in depth on the juridical structures of society, in order to make the effective mechanisms of power function in opposition to the formal framework that it had acquired. The 'Enlightenment', which discovered the liberties, also invented the disciplines."¹⁵

One can see here not only an uncovering of the liberal constitutionalism but also a sharp criticism of the role of law in Western democracies since the bourgeois revolutions.

In appearance, adds Foucault, the disciplines constitute an infra-law. In fact, they should be regarded as a sort of counter-law: "Whereas the juridical systems define juridical subjects according to universal norms, the disciplines characterize, classify, specialize; they distribute along a scale, around a norm, hierarchize individuals in relation to one another and, if necessary, disqualify and invalidate. . . . Although the universal juridicism of modern society seems to fix limits on the exercise of power, its universally widespread panopticism enables it to operate, on the underside of the law, a machinery that is both immense and minute, which supports, reinforces, multiplies the asymmetry of power and undermines the limits that are traced around the law. The minute disciplines, the panopticisms of everyday may well be below the level of emergence of the great apparatuses and the great political struggles. But, in the genealogy of the modern society, they have

¹⁵ *Ibid.*, p. 222.

been, with the class domination that traverses it, the political counterpart of the juridical norms according to which power was redistributed."¹⁶

Later, the philosopher asks for the problem of the generalization of the prison-form: "The question is often posed as to how, before and after the [French] Revolution, a new foundation was given to the right to punish. And no doubt the answer is to be found in the theory of the contract. But it is perhaps more important to ask the reverse question: how were people made to accept the power to punish, or quite simply, when punished, tolerate being so. The theory of the contract can only answer this question by the fiction of a juridical system giving to others the power to exercise over him the right that he himself possesses over them. It is highly probable that the great carceral continuum, which provides a communication between the power of discipline and the power of the law, and extends without interruption from the smallest coercions to the longest penal detention, constituted the technical and real, immediately material counterpart of that chimerical granting of the right to punish."¹⁷

The first hypothesis is, therefore, that there is a conflicting but functional relationship between the egalitarian law and the asymmetrical discipline in the so-called constitutional régimes.

The second one amounts to say, like the fifth proposition of the microphysics of power, that the law, albeit it has been the principal mode of representation of power, does not constitute the sole or main tool of social control and domination. Insofar as the juridical model is centered in the state and in the authoritative decision-making apparatuses and processes, it is necessary to appeal to a strategic model to explain the power structures and relations which hold the key for social change. Only withdrawing the mere denounce of political oppression and repression, and assuming instead the analysis of power production, power functioning and power mobilization, we may be able to understand.

Jurisprudence thus must be regarded as a discourse of power, a knowledge of order, because, as Sheridan puts it, "knowledge cannot be neutral. All knowledge is political not because it may have political consequences or be politically useful but because knowledge has its conditions of possibility in power relations."¹⁸ There is no knowledge without power. There is no power without knowledge. There is always power/knowledge and knowledge/power. So, perhaps we need an antijuridical jurisprudence or rather an antijurisprudence. Otherwise, so long as we continue thinking of the law in terms of a neutral tool or even an utopian realm of fairness, we will still become the very battlefield of a tireless will to power and to knowledge which is indeed another astuteness of reason.

¹⁶ *Ibid.*, p. 223.

¹⁷ *Ibid.*, p. 303.

¹⁸ SHERIDAN, *op. cit. supra*, note 1 at 220.