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FOUCAULT AND THE POLITICS OF RIGHTS

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INTRODUCTION

In the last 50 years, human rights have become the international moral currency and 'umbrella' under which all kinds of justice claims are made. This includes not only foundational rights articulated in the *Universal Declaration of Human Rights* but, more recently, rights for a clean environment and rights for nature itself.[1] Such is the dominance of rights talk that they are sometimes billed as the only game in town[2] or the 'last utopia'[3] for social and political struggle. Against this trend (what Louis Henkin terms 'The Age of Rights'[4]) there is a growing critical literature that problematises the theoretical consistency and long-term efficacy of human rights.[5] Further, scholars have examined whether human rights might perpetuate harm[6] and crowd out more radical political projects that address the root of a particular political problem.[7] It is from within this growing critical literature that I situate Ben Golder's recent book, *Foucault and the Politics of Rights*.

Golder is one of the most original and innovative legal theorists working in Australia. His books and numerous essays demonstrate a consistent commitment to scholarly rigour and reflection on contemporary political problems. His work encapsulates

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1   Christopher D Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press, 3rd ed, 2010).

2   Kerri Woods, *Human Rights and Environmental Sustainability* (Edward Elgar, 2010) 8.

3   Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, 2012); Samuel Moyn, *Human Rights and the Uses of History* (Verso, 2014).

4   Louis Henkin, *The Age of Rights* (Columbia University Press, 1990).

5   Costas Douzinas, *The End of Human Rights* (Hart Publishing, 2000).

6   Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Harvard University Press, 2007).

7   Wendy Brown, '"The Most We Can Hope For": Human Rights and the Politics of Fatalism' (2004) 103(2) *South Atlantic Quarterly* 451, 461.

Edward Said's idea of the intellectual as someone who accepts the responsibility to raise difficult questions, to confront orthodoxy and dogma (rather than to reproduce them) and who is prepared to challenge conventional wisdom.[8]

His recent book achieves two purposes. The first is intellectual and explores Foucault's late appeal to rights in his philosophical writings and interviews. Driving this inquiry is an apparent inconsistency — why did Foucault, who is renowned for his critique of humanism and rejection of human nature, turn to the langue of rights in the last eight years of his life? Did Foucault accede to the power of liberal rights or did his investigations of subjectivity constitute a continuation of his earlier positions on the subject?[9] The second purpose is political and is demonstrated in the way Golder reads Foucault alongside (and against) important figures in contemporary philosophy and politics, such as Wendy Brown, Judith Butler, Samuel Moyn and others working within the Marxist tradition and critical theory. The latter investigation gives Golder a way to consider the role of rights in contemporary politics.

This review essay proceeds in three parts. In Part I, I elaborate on the problem that lies at the heart of Golder's book. In doing so, I also describe the basis for Foucault's critique of humanism and introduce examples of those who interpret Foucault's adoption of rights talk as a capitulation to liberalism. In Part II, I argue that Foucault's appeal to rights might be read as an example of 'late style'. Drawing on Theodor Adorno and Edward Said, I describe late style as a moment when a writer, who is fully in command of their medium, abandons communication with their readership and rejects synthesis or resolution with previous works. Finally, in Part III I describe Golder's argument that Foucault's adoption of rights is an example of creative and critical appropriation. As part of this discussion I highlight Golder's critical engagement with Foucault and note the risks associated with articulating an increasing number of justice claims using the language of rights. As Golder notes, there are times when it is strategically useful to avoid rights talk and to distance ourselves from the regulatory regime that is the object of contestation.

I ANTI-HUMANISM AT THE END OF HISTORY

> I try to consider human rights in their historical reality while not admitting that there is a human nature — Michel Foucault[10]

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8   Edward W Said, *Representations of the Intellectual: The 1993 Reith Lectures* (Vintage Books, 1996) 12.

9   Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press, 2015) 6.

10   Quoted in ibid 1. See also Michel Foucault, *Wrong-Doing, Truth Telling: The Function of Avowal in Justice* (University of Chicago Press, 2014) 265. For an important statement on Foucault's perspective on human nature, see Noam Chomsky, *The Chomsky-Foucault Debate on Human Nature* (New Press, 2006).

Human rights typically rely on claims about the nature of human beings as articulated by philosophers working out of the natural law tradition[11] or expressed in documents such as the *American Declaration of Independence* or the *French Declaration of the Rights of Man and the Citizen*.[12] These statements purport to enshrine what is fundamental to human flourishing and it is assumed that this account is relatively fixed and stable across culture, geography and time.

Foucault, by contrast, spent a good portion of his career destabilising the notion of an ahistorical subject that serves as a foundation for human rights. Put otherwise, Foucault resists the metaphysical closure of the human imported by liberal humanism. For example, Foucault concludes his 1966 book *The Order of Things* with the declaration: 'Man is an invention of recent date. And one perhaps nearing its end'.[13] Reflecting on the crumbling of classical thought at the end of the 18th century, he argues that 'one can certainly wager that man would be erased, like a face drawn in sand at the edge of the sea'.[14] Just as Nietzsche proclaimed the death of God,[15] Foucault's anti-humanism announced the death of man. Indeed, Nietzsche himself insisted that belief in humanity was itself just a hangover from a belief in God and, once God was eradicated, that belief in human beings would follow the same way.

Foucault's problem with humanism is neatly captured in a faculty seminar he gave at the University of Vermont in the fall of 1982:

> What I am afraid of about humanism is that it presents a certain form of our ethics as a universal model for any kind of freedom. I think that there are more secrets, more possible freedoms, and more inventions in our future than we can imagine in humanism as it is dogmatically represented on every side of the political rainbow: the Left, the Center, the Right.[16]

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[11] Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015).

[12] Henkin, *The Age of Rights*, above n 4, 1. See also Louis Henkin, *The Rights of Man Today* (Westview Press, 1978) 1–30.

[13] Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Vintage Books, 1994) 387.

[14] Ibid.

[15] Friedrich Nietzsche, *Thus Spoke Zarathustra: A Book for Everyone and No One* (R J Hollingdale trans, Penguin Classics, 1961) 114 [trans of: *Also Sprach Zarathustra: Ein Buch fur Alle und Keinen* (first published 1883–85)]; Friedrich Nietzsche, *The Gay Science: With a Prelude in Rhymes and an Appendix in Songs* (Walter Kaufmann trans, Vintage Books, 1974) 181 [trans of: *Die fröliche Wissenschaft* (first published 1882)].

[16] Michel Foucault, quoted in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009) 124. See also Luther H Martin, Huck Gutman and Patrick H Hutton (eds), *Technologies of the Self: A Seminar with Michel Foucault* (University of Massachusetts Press, 1988) 15.

Here one might pause and reflect on the kind of humanism that Foucault is responding to and whether or not his critique ultimately eviscerates the humanist project.[17] I will return to this point in Part III but for now it is clear that Foucault sees humanism as presenting a fundamentally diminished conception of the human.[18] Rather than accepting a fixed or stable account, Foucault proposes a thoroughly contingent subject that is open and vulnerable to reinscription: 'men have never ceased to construct themselves … to continually displace their subjectivity, to constitute themselves in an infinite, multiple series of different subjectivities that will never have an end and never bring us in the presence of something that would be "man"'.[19]

Yet, as Golder notes, Foucault's late period invokes the language of rights and assigns them a 'central and constituent role' in discussions of ethical self-formation.[20] For example, in 'The Social Triumph of the Sexual Will', Foucault proposes a 'new relational right',[21] which is 'the right to gain recognition in an institutional sense for the relations of one individual to another individual'.[22] In a lecture given in 1976 about the rights of prison inmates, Foucault argued that the 'internal rules' of the prison 'are always absolutely contrary to the fundamental laws that in the rest of society guarantee the rights of man'.[23] In 1981, Foucault delivered the statement 'Confronting Governments: Human Rights' at the United Nations in Geneva. Addressing 'all members of the community of the governed',[24] he argued that the 'suffering of men', too often ignored by governments, grounds a new right to intervene.[25] And, finally, in 'Sex, Power and the Politics of Identity', Foucault argues that '[h]uman rights regarding sexuality are important'[26] and that 'we have — and can have — a right to be free'.[27]

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17   See, eg, Edward Said, *Humanism and Democratic Criticism* (Columbia University Press, 2004).

18   James Bernauer, 'Michel Foucault's Philosophy of Religion: An Introduction to the Non-Fascist Life' in James Bernauer and Jeremy Carrette (eds), *Michel Foucault and Theology: The Politics of Religious Experience* (Ashgate, 2004) 77, 88.

19   Michel Foucault, 'Interview with Michel Foucault' in Paul Rabinow (ed), *Essential Works of Foucault 1954–1984: Power* (New Press, 2000) vol 3, 239, 276.

20   Golder and Fitzpatrick, above n 16, 123. For a summary, see Golder, *Foucault and the Politics of Rights*, above n 9, 13–20.

21   Michel Foucault, 'The Social Triumph of the Sexual Will' in Paul Rabinow (ed), *Essential Works of Foucault 1954–1984: Ethics* (New Press, 1998) vol 1, 160, 160.

22   Ibid 162.

23   Quoted in Golder, *Foucault and the Politics of Rights*, above n 9, 15.

24   Michel Foucault, 'Confronting Governments: Human Rights' in Paul Rabinow (ed), *Essential Works of Foucault 1954–1984: Power* (New Press, 2000) vol 3, 474, 474.

25   Ibid 475. See also Jessica Whyte, 'Human Rights: Confronting Governments? Michel Foucault and the Right to Intervene' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Routledge, 2012) 11, 11.

26   Michel Foucault, 'Sex, Power and the Politics of Identity' in Paul Rabinow (ed), *Essential Works of Foucault 1954–1984: Ethics* (New Press, 1998) vol 1, 160, 164.

27   Ibid 166.

In response to Foucault's curious adoption of rights talk, Golder posits a generative question:

> What may account for this puzzling shift from an iconoclastic anti-humanism and imperviousness to rights talk to a seemingly liberal defense of the classical Enlightenment tradition (of the rights of prison inmates, sexual minorities, asylum seekers, and more besides) — and this in such a staggering short period of time?[28]

There is no shortage of explanations or attempts to make Foucault's turn to rights consistent with his previous genealogical and archaeological projects. For some, this involves a radical reconstruction of Foucault as someone who 'emerged phoenix-like from the embers of Foucault's exhausted genealogical project'[29] and became a mature thinker who embraced liberal humanism. Eric Paras, for example, argues that Foucault broke with his previous structuralist positions and upgraded to 'Foucault 2.0: Beyond Power and Knowledge'.[30] Like the new iPhone, Foucault 2.0 comes with new features, including a dramatic embrace of 'the ideas that he had laboured to undermine: liberty, individualism, "human rights" and even the thinking subject'.[31] In agreement, Richard Wolin argued:

> Considerable evidence suggests that, later in life, Foucault himself became frustrated with the antihumanist credo. He underwent what one might describe as a learning process. He came to realize that much of what French structuralism had during the 1960s rejected as humanist pap retained considerable ethical and political value. That re-evaluation of humanism redounds to his credit as a thinker.[32]

In a separate piece, Wolin suggested that Foucault was 'pivotal' in influencing the French intelligentsia (and their followers) into accepting political liberalism.[33] This revisionist depiction of Foucault resonates with a broader political shift toward

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[28]   Golder, *Foucault and the Politics of Rights*, above n 9, 1–2.

[29]   Ben Golder, 'Foucault, Anti-Humanism and Human Rights' (Paper presented at the Centre for Post-Colonial and Globalisation Studies Conference: Foucault, 25 Years on, Adelaide, 25 June 2009) <www.unisa.edu.au/Documents/EASS/HRI/foucault-conference/golder.pdf>.

[30]   Eric Paras, *Foucault 2.0: Beyond Power and Knowledge* (Other Press, 2006).

[31]   Ibid 4. See also Francois Dosse, *History of Structuralism: The Rising Sign 1945–1966* (University of Minnesota Press, 1997) vol 1, 336.

[32]   Richard Wolin, 'Foucault the Neohumanist?', *The Chronicle Review* (online), 1 September 2006 <http://chronicle.com/article/Foucault-the-Neohumanist-/23118>.

[33]   Richard Wolin, 'From the "Death of Man" to Human Rights: The Paradigm of Change in French Intellectual Life, 1968–1986' in *The Frankfurt School Revisited: And Other Essays on Politics and Society* (Routledge, 2006) 171, 180. Here Wolin argues: 'At the time of Foucault's death in 1984, prominent observers noted the irony that the ex-structuralist and "death-of-man" prophet had played a pivotal role in facilitating French acceptance of political liberalism.'

human rights that occurred during the 1970s. According to Samuel Moyn,[34] it was not until 1977 that an arbitrary confluence of factors created an environment in which human rights emerged as the dominant political idiom.[35] Prior to the 1970s, human rights were eclipsed by far more dominant social movements and by radical politics exemplified in anticolonial struggle and revolutionary communism.[36] It was only after the 'demise of revolutionary privilege'[37] that human rights emerged as a plausible ideological alternative.[38] In fact, it was precisely because human rights were represented as ideologically and politically neutral — accommodating both communism and capitalism on the one hand, and nationalism and individualism on the other — that human rights then emerged as the safest bet for the ideologically disenchanted.[39] Human rights did not require a commitment to political and social upheaval and they found success as a 'last utopia'[40] in the political juncture that right wing Hegelian Francis Fukuyama termed 'the end of history'.[41]

Golder is attentive to Wolin's reading of Foucault and he retrieves to great effect several quotes in which Foucault expresses his own disenchantment with radical politics. For example, Foucault remarked in an interview from 1983: 'You know, I belong to a generation of people who witnessed the collapse, one after another, of most of the utopias that had been constructed in the nineteenth and the beginning of the twentieth century'.[42] Foucault also affirmed the courage that it takes to 'begin

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34   Golder, *Foucault and the Politics of Rights*, above n 9, 4–5, 150–3, 156.

35   Moyn, *The Last Utopia*, above n 3, 4. Moyn highlights the events of 1977 as being pivotal — in this year, Amnesty International won the Nobel Peace Prize and US President Carter stated in his inauguration speech '[o]ur commitment to human rights must be absolute': at 155.

36   Ibid 45–7, 195–203. For a mapping of the links between the early human rights movement and anti-communism, see also Jessica Whyte, 'Intervene, I Said' (2012) 207   *Overland*   <http://overland.org.au/previous-issues/issue-207/feature-jessica-whyte/>. These links include Amnesty International's focus on religious and political dissidence in the Soviet Bloc and the work of Médecins Sans Frontières and Helsinki Watch (later to be renamed Human Rights Watch) with the neoconservative movement and the US State Department respectively.

37   Robert Horvath, 'The Solzhenitsyn Effect: East European Dissidents and the Demise of the Revolutionary Privilege' (2007) 29 *Human Rights Quarterly* 879.

38   Moyn, *The Last Utopia*, above n 3, 2.

39   Ibid 4.

40   Ibid 1–5.

41   Francis Fukuyama, *The End of History and the Last Man* (Free Press, 2006) xi. What Fukuyama meant by this was that with the defeat of fascism and the collapse of the Soviet Union, the 20th century exhausted any alternatives to Western liberalism.

42   Quoted in Golder, *Foucault and the Politics of Rights*, above n 9, 149. See also Michel Foucault, 'What is Called Punishing?' in *Essential Works of Foucault 1954–1984: Power* (New Press, 2000) vol 3, 382, 384.

anew', 'to abandon every dogmatic principle' and 'to construct another political thought' so that we might 'teach anew the vision of a future'.[43]

While suggestive, Golder does not accept that Foucault's political disappointments influenced his turn to rights discourse: 'the reading to which I am most opposed is that of Foucault as a belated convert to a liberal philosophy of the subject and of sovereignty'.[44] However, rather than dismissing Wolin completely, Golder uses Wolin's misreading as an opportunity to outline Golder's own explanation of Foucault's use of rights and to explore the importance of reading Foucault today. I will describe this explanation in Part III, following an alternative reading that highlights the contradiction that frequently accompanies the late work of creative people.

II Foucault's Late Style

> In the history of art late works are the catastrophes — Theodor W Adorno[45]

Another explanation for Foucault's turn to rights, which is not explored by Golder,[46] is that it represents an example of late style in which the writer (or artist) acquires a new idiom towards the end of their career. From this perspective, the last or late period of life, with the decay of the body and the onset of ill health, produces not harmony and resolution but intransigence and contradiction.[47] An example can be noted in the late works of Henrik Ibsen, whose final plays, such as *When We Dead Awaken*, burst open his career and reopened questions thought resolved.[48] Far from reconciliation, Ibsen's late works suggest a restless artist who deploys drama as a means to provoke anxiety and leave his audience more perplexed and unsettled than

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43   Golder, *Foucault and the Politics of Rights*, above n 9, 150–1. See also Michel Foucault, 'Dialogue between Michel Foucault and Baqir Parham' in Janet Afary and Kevin Anderson (eds), *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism* (University of Chicago Press, 2005) 183, 185.

44   Golder, *Foucault and the Politics of Rights*, above n 9, 20.

45   Theodor W Adorno, 'Late Style in Beethoven' in Richard Leppert (ed), *Essays on Music* (Susan H Gillespie trans, University of California Press, 2002) 564, 567.

46   Golder does comment on the 'normative incoherence' of Foucault's advocacy for rights: Golder, *Foucault and the Politics of Rights*, above n 9, 17. See also Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (University of Minnesota Press, 1989) 31.

47   James Miller, *The Passion of Michel Foucault* (Anchor, 1994) 13–36.

48   Henrik Ibsen, *When We Dead Awaken* (Robert Brustein trans, Ivan R Dee, 1992) [trans of: *Når vi døde vågner* (first published 1899)].

when they arrived.[49] This is why, as Kretschmar says in Thomas Mann's *Doctor Faustus*, late works frequently give the impression of being unfinished.[50]

Theodor Adorno first used the phrase 'late style' to describe Beethoven's last works.[51] While sometimes dismissed as the work of a deaf and increasingly isolated composer, Adorno describes these final compositions as a mechanism through which Beethoven achieved exile from his milieu. After noting that the mature work of significant artists does not 'resemble the kind one finds in fruit', Adorno describes late style as 'furrowed, even ravaged' and as 'devoid of sweetness, bitter and spiny'.[52] Late style defies consistency and lacks the harmony that the celebrated writer or artist is in the habit of demanding from their medium (and which their audience expect). While some final works attain a sense of holiness and resolution,[53] late style is characterised more by history than growth.[54] A life's work may be torn apart and, to quote Foucault, 'we are, so to speak, at point zero'.[55]

For Adorno, late style is what happens when creativity does not abdicate its direction in favour of reality.[56] Inconsistencies are not the result of indifference and cannot be explained with reference to personality alone. Rather, late style emerges from a 'formal law' that is 'revealed precisely in the thought of death'.[57] He argues further:

> If in the face of death's reality, art's rights lose their force, then the former will certainly not be able to be absorbed directly into the work in the guise of its 'subject'. Death is imposed only on created beings, not on works of art, and thus it has appeared in art only in a refracted mode, as allegory … The power of subjectivity in the late works of art is the irascible gesture with which it takes leave of the works themselves. It breaks their bonds, not in order to express itself, but in order, expressionless, to cast off the appearance of art. Of the works themselves

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49   Foucault's turn to rights certainly had that impact on his readers. Philip Furbank likens Foucault to 'Lilburne or Benjamin Franklin': P N Furbank, 'Unhappy Man' (1993) 15(14) *London Review of Books* 11.

50   Edward Said, *On Late Style: Music and Literature against the Grain* (Vintage Books, 2007) 10. See also Thomas Mann, *Doctor Faustus: The Life of the German Composer Adrian Leverkuhn as Told by a Friend* (Vintage Books, 1999) 57–60.

51   Theodor W Adorno, 'Spätstil Beethovens' in *Moments Musicaux* (Suhrkamp Verlag, 1964) 13; republished in Theodor W Adorno and Rolf Tiedemann (eds), *Beethoven: The Philosophy of Music* (Edmund Jephcott trans, Wiley, 2002) 123, 123–61.

52   Adorno, 'Late Style in Beethoven', above n 45, 564. Adorno writes, 'in the last five piano sonatas, one finds formulas and phrases of convention scattered about. The works are full of decorative trill sequences, cadences, and *fiorituras*': at 565.

53   See, eg, Sophocles' last Theban Play, 'Oedipus at Colonus': Sophocles, *The Three Theban Plays: Antigone; Oedipus the King; Oedipus at Colonus* (Robert Fangles trans, Penguin Classics, 2000).

54   Adorno, 'Late Style in Beethoven', above n 45, 564.

55   Quoted in Golder, *Foucault and the Politics of Rights*, above n 9, 150.

56   Adorno, 'Late Style in Beethoven', above n 45, 564.

57   Ibid 566.

it leaves only fragments behind, and communicates itself, like a cipher, only through the blank spaces from which it has disengaged itself. Touched by death, the hand of the master sets free the masses of material that he used to form; its tears and fissures, witnesses to the finite powerlessness of the I confronted with the Being, are its final work.[58]

It is the episodic character of Beethoven's late works, its apparent carelessness about its own continuity, that Adorno finds so gripping. Its power is its negativity — a work unco-opted by a higher synthesis. The late works are about 'lost totality', and it is in this sense that they are catastrophic.[59] Might something similar be at play for Foucault? To paraphrase Said, might Foucault's late turn to rights represent a moment, not of capitulation to liberalism, but when the writer who 'is fully in command of his medium nevertheless abandons communication'[60] and achieves a contradictory and alienated relationship to his audience?

This interpretation has several features to recommend it (not least of which is that one is saved from the laborious task of making Foucault consistent with himself). Foucault's final period had the politics and the ethics associated with late style — a devotion to the truth of unreconciled relations. Moreover, as James Miller has noted, Foucault thought of death as the 'lyrical core' of his life and his last works were consciously informed by his own mortality and his constant drive towards 'limit-experiences'.[61] After all, Foucault did seek to confront the void that lies beyond language and political concepts. Commenting on the work of Maurice Blanchot, he noted that in the void that lies beyond language what one finds 'is not a positivity that contradicts it, but the void that will obliterate it'.[62] This void is, to use Miller's words, 'the occluded, Dionysian dimension of being human'[63] and to win access to it is the ultimate object of all that Foucault writes.

Against this interpretation, one might note that Foucault's understanding of the dissolving self did not lead him to inhabit his last works as a 'lamenting personality'.[64] Foucault wanted to continue with the self's making and if we divide his work into early (aesthetics), middle (power) and late periods (ethics), he still had other creative possibilities open to him when he died at the age of 57. While older than Beethoven, we might consider this too early for real lateness today. Moreover, while Golder is attentive to the disrupting consequences that followed from Foucault's turn to rights, he would argue that his late work is not catastrophic but consistent with

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58   Ibid.

59   Ibid.

60   Said, *On Late Style: Music and Literature against the Grain*, above n 50, 8.

61   Miller, above n 47, 29–30.

62   Ibid 83.

63   Ibid 69.

64   Adorno, 'Late Style in Beethoven', above n 45, 564. For insight into Foucault's approach to the self, see Foucault, 'Interview with Michel Foucault', above n 19, 236–53.

his earlier writing. In making this argument, Golder argues that Foucault approaches rights in a spirit of creative and critical appropriation. I turn now to consider that argument.

III Creative and Critical Appropriation

> This is humanism after the death of Man: what Foucault calls '*le travail de soi sur soi*,' the continuous constituent project to create and re-create ourselves and our world — Michael Hardt and Antonio Negri[65]

For Golder, Foucault's turn to rights is not an example of capitulation to liberalism or late style. Rather, he argues that Foucault's early writings on liberalism, sovereignty and humanism are not only consistent with, but also inform, his approach to rights — an approach that operates independently from the idea of a naturalised and fixed human subject. The shorthand Golder adopts to describe Foucault's approach is 'critical counter-conduct'.[66]

The term 'critical' connotes two points. First, Golder reads Foucault as maintaining a clear distance from liberalism even as he 'draws tactically' from its 'resources, practices and institutions'.[67] Foucault's engagement with liberalism is not acceptance nor mere opposition. Rather, it is an intervention or 'contrary inhabiting' that undermines and destabilises liberalism by working within and against it.[68] Second, the term 'critical' assumes particular attributes that reflect Foucault's understanding of critique.[69] This is a complex area that consumes the bulk of Golder's attention in chapter one. For now, at the risk of being maddeningly brief, I will highlight one example drawn from Foucault's writing on resistance to forms of government. In an essay called 'What is Critique?' Foucault describes critique as 'the art of not being governed so much'.[70] While vague and fuzzy, this starting point provides Foucault with 'several precise anchoring points' for what he calls 'the critical attitude'.[71] Golder summarises the essential point:

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[65]   Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2001) 92.

[66]   Golder, *Foucault and the Politics of Rights*, above n 9, 20.

[67]   Ibid.

[68]   Ibid.

[69]   Ibid 31–60. See also Talal Asad et al, *Is Critique Secular? Blasphemy, Injury, and Free Speech* (Fordham University Press, 2013).

[70]   Golder, *Foucault and the Politics of Rights*, above n 9, 22. See also Michel Foucault, 'What Is Critique?' in James Schmidt (ed), *What is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Questions* (University of California Press, 1996) 382, 384.

[71]   Foucault, 'What is Critique?', above n 70, 384.

to be critical in this … more specific sense, is to pose questions of the government of conduct ('or [its] principles, … objectives … [and] methods') using the available political resources and repertoire furnished by government itself, a kind of refractory turning of government against itself from within the discursive and political field of possibilities opened up by government.[72]

The critic, in this particular example, is someone who seeks to resist or destabilise government from an immanent vantage point and thus seeks to open governmental arrangement to new creative possibilities.[73] In a similar way, Foucault's late engagement with human rights should be seen as a critical engagement within and against his subject with the view to opening new possibilities, secrets and interventions not previously encountered in human experience.[74] This is human rights in the name of an unfinished humanity and a critical ontology that affirms the 'need to produce something that doesn't exist yet, without being able to know what it will be'.[75]

Golder's reading of Foucault is nuanced and convincing. In the spirit of continuing his intervention, I was left with questions regarding Foucault's description of humanism and liberalism. For example, might humanism be understood outside of the totalising and essentialising trends that Foucault identifies? If, as Said suggests, 'attacking the abuses of something is not the same thing as dismissing or entirely destroying that thing', might Foucault's critique of humanism discredit some branches of humanism, without discrediting humanism itself?[76] Moreover, I wondered about the relationship between Foucault's late turn to rights and his description of liberalism as a political technology or form of governmentality.[77] In Foucault's 1978–79 lecture at the Collège de France, he described liberalism as follows:

> Liberalism, as I understand it, the liberalism we can describe as the art of government formed in the eighteenth century, entails at its heart a productive/destructive relationship [with] freedom … Liberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etcetera.[78]

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72   Golder, *Foucault and the Politics of Rights*, above n 9, 22. See further 31–59.

73   Ibid.

74   Foucault, 'Interview with Michel Foucault', above n 19, 124.

75   Foucault, 'The Social Triumph of the Sexual Will', above n 21, 275.

76   Edward Said, *Humanism and Democratic Criticism* (Columbia University Press, 2003) 13. For a broader perspective on Said's engagement with Foucault, see Edward Said, *Beginnings: Intention and Method* (Columbia University Press, 1985) 279–321.

77   Andrew Barry, Thomas Osborne and Nikolas Rose (eds), *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government* (University of Chicago Press, 1996).

78   Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (Picador, 2010) 64.

In this passage, Foucault suggests that the freedom that is at stake in liberalism is not natural, but rather something that is produced by governments. The liberalism that is articulated in this passage (and throughout the lecture series) is not underpinned by humanism, sovereignty or natural rights. It is something other and it was on this basis that Daniel Zamora argues: 'Foucault was highly attracted to economic liberalism … [h]e especially saw in neoliberalism a "much less bureaucratic" and "much less disciplinarian" form of politics than that offered by the postwar welfare state'.[79] I suspect that Golder would disagree with Zamora but it should also be noted that Foucault's account does not exhaust liberalism. This is particularly true after the 1970s when a brand of liberalism emerged that was openly hostile to sovereignty.[80]

Golder is conscious of the limits of Foucault's analysis. In fact, one of the most intellectual satisfying aspects of his book is the fact that he has no interest 'in saving Foucault from himself'.[81] Golder is keenly aware of Foucault's susceptibility to feminist and postcolonial critiques[82] and at the end of chapter three directly interrogates Foucault of analysis of the human:

> in the spirit of Foucault's questioning of the human, we need to begin to question this very questioning itself … It is clear that a critical interrogation of the ground of rights seeks to open them to certain future political possibilities, reinscription, and rearticulations. But it is equally clear that the exposure of contingency, however important and necessary, cannot be the resting point of a critical engagement with rights. Whereas it is true that the contingency of the human betokens the radical openness and futural possibilities of human rights, it is equally true that not all futures and not all possibilities manage to install themselves with equal force within the juridical institutions of human rights.[83]

Passages like this deserve a standing ovation. Golder goes on to suggest, drawing on Susan Marks,[84] that the 'horizons for human history' are not 'boundless but very much bounded'.[85] While Foucault is attuned to the many aspects of progressive thought, he omits serious discussion of the material dynamics that prevent 'certain figures of humanity, being, relation, and community from signifying within the texts of human rights'.[86] In response, Marxists like David Harvey have claimed that the

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79   Daniel Zamora, 'Can We Criticize Foucault?', *Jacobin* (online), 12 October 2014 <https://www.jacobinmag.com/2014/12/foucault-interview/>. See also Daniel Zamora and Michael C Behrent, *Foucault and Neoliberalism* (Polity, 2016).

80   Hardt and Negri, above n 65, 67–182.

81   Golder, *Foucault and the Politics of Rights*, above n 9, 61.

82   See, eg, Caroline Ramazanoglu, *Up Against Foucault: Explorations of some Tensions between Foucault and Feminism* (Routledge, 1993).

83   Golder, *Foucault and the Politics of Rights*, above n 9, 86.

84   Ibid. See Susan Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1.

85   Golder, *Foucault and the Politics of Rights*, above n 9, 86.

86   Ibid 88. On the term 'signifying', see Michel Foucault, *Archaeology of Knowledge and the Discourse on Language* (Vintage Books, 2010) 89, 109, 111.

term 'right' is itself indeterminate and that its operative dynamics depend on who gets to fill the right with meaning.[87] According to this analysis, we actively need to confront the question *whose rights are being identified* while recognising, as Marx suggested, 'between equal rights, force decides'.[88]

Struggle is important, but as Golder notes, rights are a 'particular modality' and not entirely devoid of content. The form of rights and the dynamics involved in claiming them might indeed 'foreclose the futural and performative possibilities' of the human.[89] Moreover, while it might be strategically useful to articulate certain justice claims using the language of rights, in other instances rights talk will enmesh us deeper in the regulatory regime that we seek to contest. For this reason, there will be circumstances where it is tactical to avoid rights talk altogether. Golder provides an instructive example with respect to Foucault's opposition to the death penalty[90] and his analysis is even more urgent today as an increasing number of egalitarian projects seek to gain political traction by collapsing themselves into the idiom of rights.

Conclusion

Golder's book is a major intervention in Foucauldian studies and research into the legalphilosophical dimensions of rights. It deserves to be read and to be taken seriously by legal scholars, including those unfamiliar with Foucault. While his subject has historical dimensions, it is also a book for today and responds thoughtfully to the possibilities and limits of rights discourse. My hope is that Golder's book, which is part of a growing critical literature on rights, can play a role in breaking open political possibilities and help us envision other, and perhaps more productive, possibilities for social and environmental justice. This includes larger projects for equality, self-governance and the collectivisation of power. Legal rights are no substitute for these projects and as Golder notes, limiting our political horizons to rights might reinscribe dominant conceptions of power and value.

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87   David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (Verso, 2013) xv. For an alternative Marxist perspective, see Evgenii Bronislavovichy Pashukanis, *Selected Writings on Marxism and Law* (Academic Press, 1980); Daniel McLoughlin, 'Post-Marxism and the Politics of Human Rights: Lefort, Badiou, Agamben, Rancière' (2016) 27 *Law and Critique* 303.

88   Karl Marx, *Capital: Volume One* (Ben Fowkes trans, Penguin, 1992) 344.

89   Golder, *Foucault and the Politics of Rights*, above n 9, 88. See, eg, 103–13.

90   Ibid 138–46. Golder notes at 144

> that Foucault hesitated to openly engage a 'right to life' approach to the death penalty suggests that when it came to the death penalty, the terrain of contemporary biopolitics was not susceptible of critical rights-based subversion from within and in fact presented the significant danger of strengthening the apparatus of (capital and other) punishment.