Can Human Rights Have Merit in Foucault's Disciplinary Society?

Alexandra Solheim

Thesis presented for the degree of

MASTER IN PHILOSOPHY

Supervised by Professor Arne Johan Vetlesen and

Professor Espen Schaaning

Department of Philosophy, Classics, History of Art and Ideas

UNIVERSITY OF OSLO

December 2018

Can Human Rights have Merit in Foucault's Disciplinary Society?

2018

Can Human Rights Have Merit in Foucault's Disciplinary Society?

Alexandra Solheim

http://www.duo.uio.no/

Trykk: Reprosentralen, Universitetet i Oslo

Summary

This thesis's inquiry sets out to study the apparent irreconcilability between Foucault's notion of disciplinary power and the idea of human rights. By reconceptualising human rights, this thesis attempts to redeem the merit of human rights in the context of Foucault's disciplinary society.

This thesis shall, firstly, address four issues of human rights, which are: the large number of contestations concerning its content, the increasingly expanding scope, the technocratic characteristics of human rights practice, and lastly, the adverse effects of human right struggles. By looking at Foucault's power as disciplinary, it can account for and explain the challenges identified. Foucault does not envision himself to provide a normative theory, but rather a descriptive theory. This might illuminate why and how rights become problematic in practice.

If we adopt Foucault's notion of power, it appears that it would discredit the idea of human rights altogether. In this view, human rights reinforce power structures instead of opposing them. Firstly, disciplinary power renders emancipatory human rights nonsensical, as power is not uniform and the opposite of freedom. Power, in disciplinary society, is polymorphous, which implies that to claim a right cannot necessarily guarantee more freedom. Secondly, if we reject the normative basis for rights, it is unclear how we can decide what rights should entail and why we ought to respect them. Lastly, a third rejection of human rights shall argue that Foucault's notion of disciplinary power undermines the juridical institution, which leads to a supposition that rights must be independent of the law. This is problematic as human rights are embedded in law.

By turning to the notion of *parrhesia,* and Foucault's ethical work, we embed rights in the ethical sphere, in which rights take the form of activism. According to the Greeks, *parrhesia* is a truth-claim that leads to an unforeseen change and involves that the person takes a risk. *Parrhesia* can be argued to take place when a subject resists a power relation imposed on him. If we consider rights activism a practice akin to *parrhesia,* rights can be proved to have merit and empowering effects. This reconceptualisation of rights as a practice of *parrhesia* evades the criticism that rights cannot be empowering and the normative questions of what rights should entail. However, *parrhesia* does not address the question of the juridical institution.

This thesis will show that Foucault's critique of law is mainly towards philosophers who formulate social contract theories and argue that humans have natural rights. By turning to legal positivism and Herbert L. A. Hart's account of a legal system, this thesis argues that the legal system is not necessarily in conflict with Foucault's notion of power. From this perspective, laws are the collection of formalised rules that can be found in any society. A legal system must be supported by the dominant discourse, but it also displays a normalising function. When citizens respect these laws, they make them prescriptive and they assume others will do the same. If we accept this interpretation of a legal system, human rights have merit insofar as they take the shape of *parrhesia*. The thesis will argue that when rights become inscribed in law, they become part of the dominant discourse. A right that becomes part of the dominant discourse cannot necessarily guarantee empowerment, and may also lead to disciplinary effects.

Acknowledgements

This thesis has in many ways been a special project for me since I was first introduced to Foucault during my undergraduate degree. To further my research, I decided to spend a semester at the Sorbonne University in Paris. First and foremost, I would like to thank my supervisors Espen Schaaning and Arne Johan Vetlesen, for their insight and effort in refining my argument. It was crucial to have a supervisor that I could turn to when I found some of Foucault's passages difficult to understand, as well as to point to which books would be useful for me. I also owe my gratitude to the professors I had the privilege of meeting at Sorbonne, who introduced me to some key secondary literature.

As the thesis is written in English, I have cited the English translations of Foucault's work. I am convinced the translator would do a better job than if I were to translate the original work myself. The exception is when the texts were only accessible in French. I have in those cases translated the direct quotes myself and included the original quote in the footnotes.

Contents

Introduction

> The man described for us, whom we are invited to free, is already in himself the effect of a subjection much more profound than himself.[1]

There is an apparent incompatibility between Foucault's advocacy of rights from the mid-1970s onwards and his approach to analysing power.[2] Throughout his older works, we become familiarised with a Foucault who asks us to question and to be critical of what we know. In *Discipline and Punish: the Birth of the Prison,* Foucault develops his thesis that our conception of power does not manage to grasp how power truly operates, and that in modern society; the main modality of power is disciplinary. This disciplinary power "produces subjected and practised bodies, 'docile' bodies,"[3] according to Foucault. He refutes the notion of power as purely repressive; instead, he formulates a notion of power that is resourceful and productive. By reconceptualising power as such, Foucault's approach can shed light on the challenges, contestations and adverse effects concerning human rights and its aspirations.

An incompatibility arises, however, when Foucault claims that the individual who is endowed with rights is already a product of power. Foucault suggests that the right-claimer has already subjugated himself by identifying and manifesting himself as an individual who has rights. Human rights rely on the presumption that rights are imprescriptible, inherent, inalienable and equal to all human persons.[4] The individual who claims his fundamental human rights has already subjected himself to the objectification of knowledge when he identifies himself as a person endowed with rights and all the scientific and theoretical classifications that comes along with it. In this view, the individual has already constituted himself within the existing power relations. If human rights have the function to demand freedom from power and in disciplinary society, where the individual cannot escape power, the rights enterprise becomes futile. It becomes futile arguably because there is no point in demanding freedom from power if one adopts a model where absolute liberation from power is impossible. The idea of an autonomous individual endowed with fundamental rights appears discordant within Foucault's notion of power.

---

[1] Michel Foucault, *Discipline and Punish: the Birth of the Prison*, trans. Alan Sheridan (London: Penguin Books Ltd., 1977), 30.
[2] Ben Golder, *Foucault and the Politics of Rights (*Stanford: Stanford University Press, 2015), 13.
[3] Foucault, *Discipline and Punish,* 138.
[4] See the preamble to the UN General Assembly, *Universal Declaration of Human Rights* (Paris: 1948), https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

It would, however, seem counterintuitive or imprudent to discard human rights altogether, as there have been observed several instances where human rights have empowered citizens, rather than oppressed them. In everyday life, we tend to agree that rights have merit and that we ought to respect the rights of others. In Foucault's notion of power we have, on the one hand, a theory that sheds light on why rights are contested and engender adverse effects, but on the other hand, we have a theory that makes it paradoxical to advocate human rights. If we agree that rights have merit in virtue of liberating the individual from power, and if we agree on a notion of power where liberation is impossible, we arrive at a paradox. To resolve this, we must either choose Foucault's notion of power or human rights. With the presumption that both human rights and the notion of disciplinary power have some value, this thesis shall address the question of how we can escape this irreconcilability. By reconceptualising the theoretical justification of rights, we might be able to accept both notions of human rights and power. Let me first introduce the debate around how scholars attempt to understand Foucault's stance of rights, a debate that has inspired and forms the starting point of this philosophical inquiry.

I) The Debate Around Foucault' Stance on Rights

It is not uncommon to distinguish a philosopher's work into their younger and older thought, as so many philosophers have developed, iterated and revised their theories in the course of a lifetime. Frédéric Gros argues that there are at least three Foucaults,[5] which Ben Golder upholds when he points out that scholars tend to divide Foucault's work into "an archaeological phase, a genealogical phase and an ethical phase."[6] The archaeological phase consists of Foucault's work in the 1960s, where he situates discourses and rationalities in their historical situations. The genealogical phase covers his work in the 1970s when he developed his theories on the relationship between power and knowledge. Lastly, the ethical phase is widely considered to be from the end of the 1970s until his death in 1984. The ethical phase is considered to mark a break in Foucault's thought, as he in this period abandoned his original description of humans as "docile bodies"[7] – subjects that are construed through technologies of power – and instead specified them as subjects in charge of their own values, actions and

[5] Frédéric Gros, "Sujet Moral et Soi Étique chez Foucault," *Archives de Philosophie 65* (2002): 229, Cairn.info.
[6] Golder, *Foucault and the Politics of Rights*, 37.
[7] Foucault, *Discipline and Punish,* 138.

decisions. Within this framework, however, it is inevitable to encounter some logical inconsistencies across Foucault's philosophical work.

An inconsistency that has received plentiful of attention is Foucault's lack of account for how he arrives at the "ethical phase." Many would argue that Foucault neither ascertained a clear break nor an articulated development between what can be considered a rejection of rights and his later avocations on rights and ethics of the self. This inconsistency creates confusion as to whether Foucault rejects or affirms human rights. Golder remarks that on the basis of his early work, Foucault is commonly read as being a "trenchant critic of rights discourse."[8] This rejectionist stance can be supported by citations from Foucault's works that discredit the merit of human rights. In *Discipline and Punish*, he writes:

> 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 micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines.[9]

Here, Foucault claims that an unequal system of power sustains the system of rights. He categorises rights as a product of disciplines with the purpose to hide where power is situated, rather than the view that rights exist to protect individuals' freedom from oppressive power. The second problem with Foucault's later advocacy to rights is his theory on the relation between power and knowledge. According to Foucault, knowledge "permits and assures the exercise of power,"[10] which results in knowledge being "fundamentally implicated"[11] in power relations. If knowledge sustains the power structures that also produce it, it would seem that human rights with its truth-claims must be produced by and sustain some correlating power structures. If knowledge cannot be treated as independent and outside power relations, a discourse of human rights – in virtue of being knowledge – cannot either. The tension lies in the fact that human rights seem to "reinforce the very sovereignty which they claim to limit, contest or replace."[12] Would this mean that any invocation of human rights strengthens rather than challenges the dominating power?

Foucault's "increasing reliance upon a political vocabulary of rights in his philosophical, journalistic and political interventions from the mid-1970s onwards, has led

---

[8] Ben Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures," *Social and Legal Studies* 20, no. 3 (2011): 283, https://doi.org/10.1177/0964663911404857.
[9] Foucault, *Discipline and Punish*, 222.
[10] Michel Foucault, "The Subject and Power," *Critical Inquiry* 8, no. 4 (1982): 62, JSTOR.
[11] Foucault, "The Subject and Power," 62.
[12] Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures," 284.

many to argue that Foucault becomes in his late works, a proponent of rights."[13] Foucault has during his lifetime argued in favour of the right to choose one's own sexuality, the right to asylum, the right to a fair trial, the right to health and even discussed the right to commit suicide.[14] When Foucault advocates human rights, it would seem that he either rejects his earlier criticisms or contradicts himself. This "shift": from describing a subject who cannot be liberated from power, towards an individual who can claim rights, results in the possibility to read Foucault in sometimes contradictory ways. Golder has, in his works, outlined the ways in which scholars tend to interpret Foucault's shift from criticising to engaging with the empowering potential of rights.

II) Four Interpretations

One interpretation, which might be the most commonly "read," claims that Foucault marginalises and rejects emancipatory rights in his earlier writings. This interpretation argues that he is "suspicious in all his work of the ideas of a temporal and universal human essence that could serve as the basis for rights claims."[15] The scholars who back this stance argue that when Foucault is embracing human rights, he is contradicting himself and his early work. This is reflected in Eric Paras' words when he points out that Foucault "abandoned his hard structuralist position and embraced liberty, individualism and the thinking subject."[16] Foucault is considered an anti-humanist throughout the archaeological and genealogical phases when he rejects that there is a human essence. The first interpretation implies thus that one must distinguish and choose between a Foucault *before* or *after* the shift.

Another interpretation claims that Foucault's philosophical thought and political activism must be separated. This interpretation also adapts the position that there is an "irreconcilable conflict" between the two.[17] However, this reasoning demonstrates Foucault's radical denial of rights as a philosophical investigation, whilst his advocacy of rights takes a political and practical position. It is reasonable to assume that a radical sceptic will have to put his philosophical theories aside when he goes about his day, or else daily chores and

[13] Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures," 285.
[14] Ben Golder, "What is an Anti-Humanist Human Right?" *Social Identities* 16, no. 5 (2010): 554-655, https://doi.org/10.1080/13504630.2010.509570; Golder, *Foucault and the Politics of Right*, 15-16, 103-109.
[15] Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures," 284.
[16] Eric Paras, *Foucault 2.0: Beyond Power and Knowledge* (New York: Other Press, 2006), 4, quoted in Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures," 285.
[17] Golder, *Foucault and the Politics of Rights*, 18.

habits would never take place. We would not expect the sceptic to question whether his dinner is real before eating it or whether his wife exists. In a similar manner, this interpretation argues that it is irrelevant to compare Foucault's political and philosophical engagements; they have unrelated purposes and incentives. This interpretation categorises Foucault as a pragmatist who distinguishes between theory and practice. Even though this view accounts for his political activism, it does not solve the inconsistency of his ethical shift. The inconsistency described is not only visible when we consider his political activism but also when we consider his late philosophical work. This interpretation seems to me a poor compromise to disregard philosophical inconsistencies.

A third interpretation of Foucault voices a normative incoherence. This issue reflects a general challenge to Foucault, which Jürgen Habermas, Nancy Fraser and Charles Taylor have raised. They argue that Foucault creates a methodology that he intends to be purely descriptive and non-normative, but where he paradoxically appears to criticise modern society. It seems that whilst he provides a descriptive theory, he also assumes some normative grounds that enable him to draw his conclusions about modern society as non-ideal. Fraser points out that Foucault's "normative confusions" result in a desperate need for a set of "normative criteria for distinguishing acceptable from unacceptable forms of power."[18] Habermas criticises the similar normative inconsistencies in that Foucault's attempted value-free theories are "already by no means value-free."[19] Taylor argues that Foucault rejects the possibility to acquire freedom and truth.[20] Fraser, Habermas and Taylor emphasise the need for a normative criteria that distinguishes good and bad uses of power. Foucault's individual cannot escape power: the individual can only move from one state of domination to another, and this becomes a problem in questions of rights. Foucault writes:

> The first effect of power is that it allows bodies, gestures, discourses, and desires to be identified and constituted as something individual. The individual is not, in other words, power's opposite number; the individual is one of power's first effect.[21]

---

[18] Nancy Fraser, "Foucault on Modern Power: Empirical Insights and Normative Confusions," in *Michel Foucault: Critical Assessment, Volume five, Section 2*, ed. Barry Smart (London: Routledge, 1995), 147.
[19] Jürgen Habermas, "Some Questions Concerning the Theory of Power: Foucault Again," in *Michel Foucault: Critical Assessment, Volume five, Section 2,* ed. Barry Smart (London: Routledge, 1995), 271.
[20] Charles Taylor, "Foucault on Freedom and Truth," in *Michel Foucault: Critical Assessment, Volume five, Section 2*, ed. Barry Smart (London: Routledge, 1995), 326-351.
[21] Michel Foucault*, Society Must Be Defended: Lectures at the Collège de France, 1975-1976,* eds. Mauro Bertani and Alessandro Fontana, trans. David Macay (London: Allen Lane, 2003), 29-30.

Foucault argues that the individual is constituted through power relations. He thus dissolves the concept of the individual person as pre-political – the bearer of inalienable rights. Then, if power creates the individual, constitutes his identity and makes him who he is, why would the individual want to resist power? It appears that Foucault fails to provide any normative grounds to why we ought to resist power. The critique of his normative incoherence can hence be two-fold. For rights to make sense, Foucault must provide an argument for, firstly, why power domination should be challenged. He needs a theory that argues why domination is undesirable to justify why it should be challenged in the first place. Secondly, Foucault must to some extent allow the possibility to escape domination. Foucault's rejection of subjectivity results in a "normative void [that] slides every possibility of ethical responsibility, self-reflection, agency, engagement, critique, resistance, or progressive social and political change."[22] We are left with the question: What is the point of emancipating human rights if emancipation from power is impossible?

Finally, there is the interpretation that Foucault's engagement with human rights is consistent with his earlier work. It is necessary to note that theorists supporting this interpretation do not deny the evolvement of his thought, but primarily argue, that there is some consistency throughout his work, and that Foucault neither disowns nor rejects his earlier arguments. Golder, who takes a rather charitable interpretation, defines Foucault's approach as "critical counter conduct on rights,"[23] a term he takes from the lecture series *Security, Territory, Population*. Golder describes Foucault's activism as "articulation of provocations, critiques, deployments, interventions, and deportments towards rights."[24] Golder thereby describes Foucault's engagement with the rights discourse as the activity of challenging and renegotiating its values and facts. Golder's position demonstrates that Foucault is critical of a discourse of rights as a set of static and universal norms and that this critical approach becomes an affirmation and not a rejection of rights. In other words, by both criticising and engaging with the question of rights, Foucault acknowledges that rights have merit.

Generally, it seems that there is one agreement surrounding the interpretations: Foucault's scholarship and activism do not give a clear-cut conclusion and allow for several well-argued interpretations. In light of this, one might wonder whether, were it not for

[22] Golder, *Foucault and the Politics of Rights*, 9.
[23] Golder, *Foucault and the Politics of Rights*, 5, 166: footnote 12.
[24] Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures," 286.

Foucault's untimely death in 1984, there might not have been a need to bridge the conceptual gap between his critique of power and his advocacy of rights.

III) The Thesis

I have provided an overview of the debate around the tension between Foucault's notion of power and his late avocations of rights. He does not provide a clear account of the relation between his political activism and ethics, and his work from the 60s and early- and mid-70s has resulted in the open-ended debate on what he actually meant about rights.

This thesis does not set out to question whether Foucault was consistent in his philosophical thought, and to continue the debate of what Foucault actually meant about rights. This thesis attempts to reconcile Foucault's portrayal of disciplinary power with the notion of human rights. If we accept Foucault's notion of power, where the individual is embedded in power relations, what then becomes the function and merit of human rights? Disciplinary power does not only critique human rights, but it also appears to discredit it. Foucault's account of the disciplinary society is useful in order to make sense of certain issues, but it could also prompt us to reject the idea of human rights as emancipating. Having suggested such an uncompromising statement, I will briefly remark on some difficulties I have encountered in reading Foucault. We shall in the next chapters see that while some of his texts encourage this view, it does not necessarily mean that he rejects human freedom altogether.

Firstly, Foucault's style of writing opens up the possibility of interpreting him in several ways, some of which may or may not be his actual positions. This can be illustrated by the various analyses of his philosophical shift. In some places in his works, he appears to assert a specific view or position; at other times he appears to recollect historical events and point out trends. There is a difficulty then in distinguishing between where he communicates an observation and where he renders judgements. Moreover, there is no denying that Foucault appears at times to contradict himself, when he, in *Discipline and Punish,* describes power in a manner that inspires others to conclude that there is no escape from power.[25] Then in later interviews and texts, he assures his audience that there is always a possibility of escaping power.[26] Furthermore, Foucault's lecture series at Le Collège de France was meant to be

[25] *cf.* Taylor, "Foucault on Freedom and Truth."
[26] Foucault, "The Subject and Power," 794.

ongoing research.[27] He made it clear before his death that he did not want any of his unpublished texts to be published posthumously, although most of which have been today.[28] With this in mind, there is uncertainty in ascertaining whether a formulated opinion was an angle he tested and would later discard, or an affirmed position.

Another issue is the question of intent and focus. Foucault achieved a bachelor degree in psychology in 1947, and later became a clinical psychologist and gained experience from working in a psychiatric institution.[29] It would seem that he gained here sufficient insight and motivation to write about clinical (psychiatric) practice. As a homosexual growing up in a conservative Catholic family, it is not unsurprising he would be interested in questions of sexuality.[30] While Foucault's central work can shed light on other issues, such as human rights and law, it is useful to keep in mind the main focus of his works. The issues he raises might become misplaced when taken out of context. Another danger is to interpret Foucault from what he did not say, rather than what he did. One example of this would be Hunt's and Wickham's E*xpulsion thesis,* which partly argues that due to Foucault's unwillingness to address the notion of law, he prescribed a marginalised role to law.[31] This being said, only looking at *Society Must Be Defended,* the first volume of *History of Sexuality* and *Discipline and Punish,* it can neither be constructive nor justified to determine the role of human rights. Even though Foucault's texts encompass the shortcomings and dangers of rights in the context of certain disciplinary institutions, an account of rights inspired by these works alone could be considered incomplete and even misdirected.

My inquiry does not attempt to determine Foucault's original position on human rights; instead, this inquiry attempts to analyse how we can constructively conceptualise rights in light of Foucault's disciplinary power. In my research, I have become familiarised with different interpretations of Foucault's conceptualisation of rights, although I have yet to read an account that makes a substantive distinction between claiming rights that are embedded in legal documents, and claiming rights that have not yet been legally recognised as a right. I believe that these two activities are substantially different and should, therefore, be

---

[27] François Ewald and Alessandra Fontana, foreword to *The Courage of Truth (The Government of Self and Others II): Lectures at the Collège de France 1983-1984*, eds. Frédéric Gros et al., trans. Graham Burchell (New York, Palgrave Macmillan, 2011), xii-xiii.
[28] Gary Gutting and Johanna Oksala, "Michel Foucault," *The Stanford Encyclopedia of Philosophy,* ed. Edward N. Zalta, last modified summer 2018, accessed November 15, 2018, https://plato.stanford.edu/archives/sum2018/entries/foucault/.
[29] Frédéric Gros, *Michel Foucault* (Paris: Presses Universitaires de France, 1996), 5-6.
[30] Gros, *Michel Foucault*, 4.
[31] Ben Golder and Patrick Fitzpatrick, *Foucault's Law* (Oxon: Routledge, 2007), 1-2.

distinguished. I find an apparent similarity between the practice of *parrhesia,*[32] which is to speak frankly and courageously, and rights activism, which is often to claim "not yet" legal rights. Surprisingly, little of the secondary literature that tackles the question of Foucault's rights refers to *parrhesia.* Instead, these analyses tend to use Foucault's own rights activism, as well as his analyses of power, as the basis for interpreting his position on rights. This is why I have dedicated a large part of the thesis into the study of *parrhesia.* As I noted briefly, there are two aspects of rights-claiming: the first aspect would describe "not yet" legally recognised rights, and the other aspect describes legally inscribed rights. I believe it is equally important to address both aspects to gain a full picture of the rights discourse with its merits and faults. Now every goal of a rights struggle is for the right to become part of the legal system, and this would mean that we must investigate what form the juridical institution takes. In this endeavour, I shall turn to Herbert Lionel Adolphus Hart's legal positivism, as it gives us an alternative perspective on the legal system that is more compatible with Foucault's thought compared to traditional natural law theories and social contract theories. Both Foucault and Hart claim to deliver a descriptive, rather than a normative theory, and might therefore be more comparable. Turning to the study of *parrhesia* and Hart's theory of law, this thesis shall attempt to escape a reading where the role of human rights is undermined and rendered pointless in Foucault's disciplinary society.

The first chapter of this thesis will address what I call the disillusion of human rights. It will focus on the challenges and disputes of the human rights discourse. The chapter will look at how these challenges can be illuminated through Foucault's conception of power in comparison to what he coins as the *juridical model of sovereignty*.

Chapter two will look at Foucault's disciplinary society. I shall draw a parallel to the proliferation of knowledge of sex as laid out in *History of Sexuality: the Will to knowledge,* where Foucault provides a genealogical account of how the perception of sexuality has developed throughout the centuries. I will here identify the elements of disciplinary power that gives us reason to discredit the whole human rights project.

In the third chapter, I will look at the possibility of refuting the identified challenges to human rights by turning to Foucault's notion of *parrhesia*. The chapter will show that the practice of *parrhesia* bears resemblance to activism in general, as well as Foucault's activist work specifically. This chapter will consider the possibility for rights to belong to ethics, which opens the possibility for rights to be conceptualised as separate from law. However, as

[32] The works I have consulted have used different ways to write the term. This thesis uses p*arrhesia*, but it can also be written as *parrēsia* or *parrhēsia*.

parrhesia is placed outside the political sphere, I shall demonstrate that rights must still be embedded in the political structure.

Rights activists unmistakably fight for either rights that are already inscribed in law or new rights that they hope will gain the status of legal rights. If we are to understand rights, we first need to understand what law is. I will consider Hunt and Wickham's *expulsion thesis,*[33] which claims that Foucault has marginalised the role of law, and fails to grasp the complexities of the juridical apparatus. By demonstrating that Foucault's apparent rejection of law is a rejection of natural law theories and social contract theories, I shall look at law in the light of legal positivism and, consequently, Hart's descriptive and sociological account of a legal system. I will make the case that law today exhibits characteristics of a disciplinary mechanism. Linking this back to the question of rights, I will argue that during juridical procedures the agency of the participants, including convicts, victims and witnesses, are constantly scrutinised and undermined by the so-called experts (judges, lawyers, psychologists, investigators, and alike). However, one could argue that in these instances the experts enhance the agency of the persons in their care. The subordinate person's dependency on the experts challenges the simplicity of activism. In this sense, rights, which are embedded in law, are part of Foucault's disciplinary machinery. The juridical system regulates and generates knowledge similar to Foucault's other technologies of disciplinary power. At the end of the day, when a right becomes part of the juridical system, it does not necessarily guarantee empowerment, and it may instead lead to disciplining effects.

[33] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994).

1 The Disillusion of Human Rights

Today, the discourse on human rights plays a significant role in the political arena. If we look back at its first appearances, in the French Revolution's *Declaration of the Rights of the Man and of the Citizen*[1] as well as the *United States Declaration of Independence,*[2] human rights have steadily gained more influence in political decision-making. This trend would imply that societies are increasingly adopting an egalitarian and righteous power structure. However, during the twentieth and twenty-first centuries, and parallel to the successes of human rights-activism, the human rights project has encountered several drawbacks and criticisms. These criticisms are based both on failed attempts to limit abusive state power and on several contestations concerning the substantive content and merit of rights.

a) Contestations Towards Rights

A first challenge to the human right discourse could be said to be fundamental disagreements concerning what actually constitutes "human rights." One person may, for instance, claim a given human right to be true and justified, whilst another person might hold the alleged right to be false and believe it to incur unfair advantage. Such disagreements are most visible across the political field and between cultures. The question of taxes and social benefits may also stir disagreement between those who advocate private property rights and those who fight for rights to health care and social security. Looking at cultural rights, a popular topic, or dispute, is one concerning the adornment of religious clothing such as the hijab, which hides a women's hair, body or face. On the one hand, we have those that argue for freedom of expression, and that prohibiting cultural clothes is a violation of human rights. On the other hand, we have those that argue that religious clothing such as the hijab symbolises an oppressive culture, and by prohibiting the practice, one is empowering the women who wear oppressive clothing. It becomes a conflict between cultural rights versus women's rights. Though this was a simple example, it nonetheless illuminates the contestation

[1] See National Assembly of France, "The Declaration of the Rights of Man and of the Citizen, 1798," *American Bar Association,* accessed November 10, 2018, https://www.americanbar.org/content/dam/aba/migrated/2011_build/human_rights/french_dec_rightsofman.authcheckdam.pdf.

[2] See "Declaration of Independence: A Transcription," The U.S. National Archives and Records Administration, accessed December 10, 2018, https://www.archives.gov/founding-docs/declaration-transcript.

that human rights are culturally conditioned. Postcolonial thinkers, such as Edward Said[3] and Gayatri Chakratov Spivak, have argued that Western ideology, and consequently the human rights discourse is the new shape of Western imperialism. In her paper "Can the Subaltern Speak?" Spivak presents the Western rhetoric as "White men saving brown women from brown men,"[4] and with this underscoring the patronising and self-righteous attitude of Western culture. Spivak and other postcolonial thinkers argue that the Western world imposes its beliefs and social structures as a means to re-establish and contain their dominance of the non-Western cultures. While I will not elaborate on the postcolonial critiques to human rights, I do want to bring attention to the ongoing human rights debate in which the content of human rights are continuously being contested. My interest is not to answer whether Spivak is warranted or not in her claim, but rather to point out the contestation she provides. This debate does not only play itself between non-Western and Western cultures, but also across the political and social strata. In light of this, it seems to be an increasing acceptance that rights are culturally and socially conditioned. These contradicting perspectives challenge the idea of human rights as universal and contingent. To respond to this issue, we need a theory that manages to explain why rights can be contested.

b) The Multifaceted Implementation of Rights

A second challenge to rights is its multifaceted nature. We have a discourse that identifies what rights are, and identifies humans as holders of rights and the state as the guarantor of rights. However, the binary structure of rights does not grasp today's complexity of implementing rights in practice. Firstly, in the course of the twentieth and twenty-first century, rights have become increasingly elaborative. Rights have become more than just liberties that define the space where the state cannot interfere. *Freedom of expression*, which is mentioned in the French declaration, does not demand any action from the state. In concern to several rights the state can, in theory, be a passive actor when respecting the freedom of the citizen. The state would not involve itself and restrict the citizen, unless he was harmful to society. Today, rights demand another layer to the implementation and active participation of the state to ensure rights. *The right to education* means that the state must provide a school, teachers and an educational system. *The right to health* means that the state must ensure that

[3] Edward W. Said, *Orientalism* (London: Penguin Books, 1985).
[4] Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in *Colonial Discourse and Post-Colonial Theory: a Reader*, eds. Patrick Williams and Laura Chrisman (Taylor and Francis, 2015): 92.

its citizens have access to health care. The human rights discourse is ironically abstract considering that the practical implementation is left to the state's discretion.

A second problem is the binary structure of rights between the state and its citizens. Agents, other than the state, might be better equipped to produce the conditions for fulfilling rights. Medicins Sans Frontiers (doctors without borders) is an example of an organisation that we would think contributes to ensuring some of the inalienable rights in place of the state. The United Nations is an international organisation that plays a role in protecting and encouraging human rights, and is another example of an alternative provider of rights. Additionally, we have examples of states meddling in other states' affairs to restore the human rights of the other state's citizens.

In addition to the task of guaranteeing rights, we can also observe that not only states are responsible for violating rights. In traditional legal framework, the state has monopoly of power, and if one citizen violates the right of the other, he would be breaking the state's law and must be accountable to the state. One practical challenge to this framework, however, is the problem of multinational corporations who violate human rights, but cannot be held responsible because they are not recognised as actors in the government-citizen system. There are also many instances where someone's right has been violated, but there is an absence of a perpetrator. Nevertheless, if a citizen's right has been violated, he takes the state to the international courts. Only states can be responsible. The theoretical binary structure of the rights-holder and the guarantor fails to grasp the involvement of other actors. We thus need a theory that can account for the multiplicity of actors as well as the multiple tasks of guaranteeing rights.

c) The Technocracy of Human Rights

A third challenge to human rights is that they are, in many ways, inaccessible to the average citizen. Embedded in juridical procedures, human rights are only realisable in a language intelligible for jurists. One could therefore argue that the discourse of human rights forms a system that excludes, rather than includes citizens. Many grassroots movements have criticised human rights institutions for leading a discourse detached from the very people they are trying to empower.[5] There is a gap between the powerless and the rights activists who are trying to empower them. One could agree that without legal schooling, it is difficult to know

[5] Neil Stammers, "A Critique of Social Approaches to Human Rights," *Human Rights Quarterly* 17, no. 3 (Aug. 1995): 507, JSTOR.

the procedures and criteria for claiming one's rights. If rights are the weapons of the powerless, they should be easily accessible and utilised. Instead, rights are embedded in a system that the powerful, meaning those who have a university education and the economic resources to pursue a human rights case, can employ. It can be argued in fact, that in order to get a case taken to one of the human rights courts, the process is so complicated that one needs counsel from a lawyer to start with. This, however, reflects a paradox. One needs a lawyer to claim one's rights, and one has a right to a lawyer, but in cases when the state is neglecting one's rights, how is one going to secure a right to a lawyer? In such cases, the rights-claimer becomes powerless. Can we in these situations trust the powerful to show solidarity and help the cause of the powerless? Seemingly yes, or at least if we consider non-government organisations (NGO's), such as Amnesty International and Medicins Sans Frontiers, who have made it their business to help the powerless. Many non-profit organisations employ lawyers, doctors and other scholars: in other words, resourceful people, who are able to navigate the complexities of legal and socio-political matter in order to help the powerless. One is, however, never guaranteed help from humanitarian NGO's, so a core challenge to human rights therefore persists. Why have human rights become the language of the intellectuals, when they started off as the revolutionary language of "the people"?

d) The Adverse Effects of Human Rights

The last point is a general criticism based on the first three mentioned issues. In light of all the additional outcomes of the human rights regime that are conflicting with the original aspirations of human rights, one can say that human rights have adverse effects. Human rights are supposedly emancipatory, they protect the individual's freedom from abusive state power, and that is their supposed effect. However, in certain instances, they are used in such a way that they cause the opposite effect. Instead of protecting individuals, the invocation of human rights can lead to further oppression of them. This can be viewed in two ways: either the discourse of human rights has been directly deployed with non-righteous intentions, or it has been indirectly deployed, in which its deployment – independently of the intention – has become paternalistic. Postcolonial feminist thinkers have accused the feminist movement of taking a paternalistic attitude towards women's rights issues in non-Western cultures. Feminism criticises a culture where men have power over women, and postcolonial feminism criticises a culture where Western feminists have the power to direct and decide how non-Western women ought to feel and act. Human rights hold the potential to empower, but they

also hold the potential to oppress. How can rights be explained to have adverse, if not arbitrary, effects? We need a theory that addresses this issue.

I) From a Theory of Sovereignty to a Theory of Domination

As demonstrated above, the human rights discourse has received critique both in its theoretical content and its practical application. Firstly, on the contestation of what fundamental human rights should contain; secondly, on the uncertainty around the implementation and responsibilities of rights; thirdly, on the appraisal that human rights are technocratic; and lastly, concerning that rights have the potential to both empower and oppress. In light of these challenges, many traditional philosophical theories, such as social contract theories and natural rights theories, fail to wholly explain why rights have adverse effects. The theory of natural rights supports the idea of absolute, inalienable and contingent rights one has only by the criterion of being a human being. Modern philosophers such as Hobbes[6] and Locke[7] argue that humans are endowed with natural rights. Natural rights are assumed to pre-exist social relations and are defined by imagining a state of nature. As a result, Hobbes and Locke's theory cannot account for the fact that certain rights are results of the social culture. Firstly, it cannot support the reality that new rights are coming into existence and that some rights become irrelevant as a result of societal evolution. Secondly, these rights are considered universal and absolute; two rights cannot be contradictory and deemed warranted at the same time. This is to say that two persons cannot agree on disagreeing between whether a specific privilege should be considered a right. The theory defines a right to be objective, and thus, it has to be the same and applicable to all. The given right is also assumed to exist independent of whether the individual finds himself in society, meaning that his right is inherent. Natural right theories have, nonetheless, problems accounting for the contestations toward rights.

Many of the modern philosophers, who argue for natural rights, also present a social contract theory. Hobbes, Locke, as well as Rousseau[8] rely on the idea of a social contract in their political theories. In *Leviathan,* Hobbes argues that man gives up his natural rights in order to gain protection from the sovereign. Locke claims that men have natural rights, but

[6] Thomas Hobbes*, Leviathan,* (Baltimore: Penguin Books, 1968).
[7] John Locke, *The Second Treatise of Government; and, a Letter Concerning Toleration* (Mineola, New York: Dover Publications, 2002).
[8] Jean-Jacques Rousseau, *The Social Contract* (Harmondsworth: Penguin, 1968).

they will exchange part of these rights to receive the benefits of entering society. Locke also argues for rights to property as a natural right. In general, the social contract-theory imagines a situation where the individual gives up some of his freedom to gain the protection of the state. Social contract theories appear, however, insufficient to explain the notion of global citizenship, since what global society entails has not been adequately formalised. The social contract theory assumes a binary relationship between the government, which has the responsibility to enforce laws and guarantee rights, and the individual whom obeys the law and can exercise his liberties. However, in how the international community functions today, the binary relationship between the citizen and the sovereign has become distorted. There are governments, international organisations and private individuals. Governments still have to ensure the rights of their citizens and have to answer to the international community if they neglect their duties. Moreover, states are reluctant to claim responsibility for stateless persons. If they are stateless, they have not entered the hypothetical social contract, and thus they should not have rights. Natural rights theories would argue that stateless people do have rights, as they have them in virtue of being humans. However, it comes back to the question of who has the responsibility to ensure that stateless people have rights. Nevertheless, discursively we treat stateless persons as bearers of rights as well.

Both natural rights and social contract theories are dependent on imagining a hypothetical situation, and I believe Foucault would argue that instead of making up a situation that has not happened, or applying a situation one certainly has no information of, one ought to base one's theories on actual conditions one can observe presently or at least document historically. In his investigation on power, Foucault argues that we do not manage to grasp how power operates because we tend to analyse power according to a *juridical model of sovereignty*, which he claims is not "able to provide a concrete analysis of the multiplicity of power relations."[9] Foucault has repeatedly been quoted saying that we "still have not cut off the king's head."[10] By this, he means that when we analyse political systems and power structures, we still envision the monarch on the top and from which all power is exerted. Even though the symbol of the monarch has now changed to that of a democratically elected government, political thinkers hold onto the same model. This "sovereign theory" or model assumes that there is "a legislative power on one side and an obedient subject on the other."[11]

[9] Foucault, *Society Must be Defended,* 43.
[10] Foucault, *The History of Sexuality: The Will to Knowledge, Vol. 1,* trans. Robert Hurley (London: Allan Lane, 1998): 88-89.
[11] Foucault, *The History of Sexuality: Vol. 1,* 85.

This seems in line with social contract theories, as it depicts the exchange between the sovereign's rights and the individual's rights. This is to say, that the power relation can only be a binary relation, in which the king or the sovereign has unitary power and exerts it on the subjugated subjects.

This *juridical model of sovereignty* has three assumptions or preconditions.[12] The first precondition is the entity of the *subject,* who is the individual who obeys the sovereign. The subject cannot exert power, but is rather subjugated by power. The second assumption is that power is unitary; the sovereign theory assumes power to flow from one source to the object it is applied. In a monarchy, it was the king; in a democracy, it is the elected government. The king's command was justified through the state's history, the king's lineage and often religion. In our modern societies, governments obtain and justify power through democratic elections. The third precondition is the role of law to legitimise the king's- or the elected government's rule. In sum, the juridical model of sovereignty assumes power to operate on subjects, power is unitary, and it is legitimised through law.

Having identified what the general elements that explain sovereign power, Foucault goes on to suggest that it would be "a mistake to think that the individual is a sort of elementary nucleus, a primitive atom or some multiple, inert matter to which power is applied or which is struck by a power that subordinates or destroys individuals."[13] Here, he rejects the first element of the sovereign model, which is that power is applied on the *subject*. Moreover, this assumption that power is exercised on subjects promotes a view of power as fundamentally oppressive. The juridical model of power claims that the function of power is to limit the individual's freedom. On the question on the unitary image of power, Foucault argues that power should not be conceived of as something "appropriated in the way that wealth or a commodity can be appropriated."[14] By this, Foucault means that power cannot be conceived as property to be traded and exchanged, on the contrary, power is fleeting. He thus rejects the second assumption of unitary power.

We still think that power is represented and operated through law, and whilst this might have been true in purely monarchic societies, Foucault asserts that society "has gradually been penetrated by quite new mechanisms of power that are probably irreducible to the representation of law."[15] By this, he argues that law cannot grasp how power operates, as

[12] Foucault, *Society Must be Defended,* 44.
[13] Foucault, 29.
[14] Foucault, 29.
[15] Foucault, *The History of Sexuality: Vol. 1,* 89.

the predominant modality of power in modern society is disciplinary and works in localised spaces and particularities. He thus rejects the third element, that power is maintained by law. In light of how differently power operates in modern society compared to the old monarchic institutions, Foucault proposes to formulate a new theory or model of power, which looks for other elements than that of the autonomous subject, unitary and absolute power, and law.

It seems to me that natural right- and social contract theories follow this *juridical model of sovereignty*. When extracting theories based on the sovereign model, philosophers would imagine a state of nature, and freedom and power as two opposites that limit each other. This *juridical model of sovereignty* does not manage to explain shortcomings of human rights, and the reason might be that it fails to capture how power truly operates. Instead, Foucault focuses on the positive effects of power. He argues that: "We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks, it 'conceals, in fact power produces."[16] Instead, he looks at power as domination, not domination in the sense that it represses the authentic and natural subject, but domination that determines and produces what- and who the subject is.

Foucault coins this new model as disciplinary power; it is a power that disciplines subjects. According to Foucault, power is firstly something that cannot be seized or lost, is it "exercised from innumerable points, in the interplay of non-egalitarian and mobile relations."[17] Secondly, power relations have a "productive role": They are not only repressive and prohibiting. Thirdly, power comes from below, and not in the absolute sense where the sovereign exerts power on his subjects. On the contrary, the subjects reinforce and uphold the power relations. Fourthly, power is both intentional and non-subjective. When power is exercised it is usually linked to a larger strategy, all the tactics and methods are employed towards the strategy, and power is thereby intentional because it is exercised towards a desired effect. Power is non-subjective in the sense that it neither depends nor decides on the will of a person, but the person unconsciously supports the overall strategy in his actions. Lastly, according to Foucault, there is "a multiplicity of points of resistance: these play the role of adversary, target, support, or handle in power relations."[18] In a power relation, one strategy will be dominant to others, and the other strategies will try to resist or compete with the winning strategy.

[16] Foucault, *Discipline and Punish*, 194.
[17] Foucault, *The History of Sexuality: Vol. 1,* 94.
[18] Foucault, 95.

II) Power Relations

Let me now take a step back and properly explain what Foucault's notion of power entails. Foucault himself claims that the best way to map out and analyse power is by looking at power relations. Foucault claims that power becomes visible in confrontations, in juxtapositions of diverging rationalities and discourses. Foucault argues that "power must be analysed first of all in its concrete exercise, where it is first of all a relation."[19] Where there is power, there is a relation. These relations can both be between persons or groups. In the power relation, one will have the upper hand – this is to say one will be deciding the behaviour of the other. In the relation between a parent and a child, the parent will normally direct the conduct of the child. Chevallier describes Foucault's power relation as "an interaction between individuals, and it is this interaction which will qualify the respective position of the participants (as governing and governed), independently of the roles set for them by law."[20] As such, we see here that power operates in relations where one party will have the dominant and governing position, and the other will have the subordinated position of being governed. These power relations are made possible by overall strategies. An example of this would be, that before the feminist movements, the husband took the position of the governing and the wife the position of the governed, but this relation was supported by a whole culture that justified and reinforced their roles. Chevallier further specifies that these power relations have a "sustained openness", in a sense that "the respective position of the players is interchangeable and keeps the balance of forces unstable."[21] If, in the parent-child power relation, the child would do something to alarm child protection services, it would certainly modify the dominant position of the parent. Foucault did not address the question of freedom in *Discipline and Punish*, but he later states in an interview in 1984, that relations of power "are possible insofar as the subjects are free."[22] This illustrates that there always is a possibility of resistance. Foucault presents an example of this in describing the relationship between men and women, in which men have historically held more power, though women have still had the possibility to "deceive their husbands, pilfer money from them, and refuse

[19] Philippe Chevallier, "Michel Foucault and the Question of Right," trans. Colin Gordon, in *Re-reading Foucault: On Law, Power and Rights,* ed. Ben Golder (Oxon: Routledge, 2013), 173.
[20] Chevallier, "Michel Foucault and the Question of Right," 173.
[21] Chevallier, 173.
[22] Michel Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," in *The essential works of Michel Foucault, 1954-1984: Vol. 1: Ethics: Subjectivity and truth*, ed. Paul Rabinow, trans. Robert Hurley et al. (London: The New Press, 1997), 292.

them sexually."[23] Thus, there is always a possibility to overturn positions in power relations. Fittingly, Chevallier describes Foucault's notion of power as "supple and polymorphous."[24]

By analysing the points of resistance, Foucault believes one is more likely to discover where power is situated. Resistance helps to "bring to light power relations, locate their position, and find out their point of application and the methods used."[25] In short, Foucault proposes that if we look at the struggles of opposition against the authority, we come to see where power is truly manifested. By looking at power relations as "mobile, reversible, and unstable"[26], rather than absolute, and something that one either possesses or does not possess, we are better equipped to explain the fourth problem of human rights; that they can both have empowering and oppressive effects. Foucault's power relations illustrate the subtle and fluid nature of power, which can explain how it is possible for a man to be a revolutionary one day and a dictator the next.

Private property rights can be argued to have merit, in the sense that a citizen has a right to the fruit of his labour. One could, however, equally argue that when a citizen uses his private property rights to exploit or extort money from people, the rights lose their merit. One could also argue that certain patent rights are used immorally, when for instance a developer demands an unjustified high price for a necessity such as medicine. It seems that rights to property has been extended to such an extent that is serves non-righteous purposes. However, we would still deem the original justification for rights to property as valuable, as no person or government should be allowed to take the house of another person without just cause. These adverse effects, that can be observed in some human rights struggles, can be explained by the interplay and reversing roles in power relations.

III) Discourse

To better understand the powers that are at play, Foucault proposes to look at the relationship between power and knowledge. Every power relation, or power structure, generates and is sustained by knowledge. Foucault writes "that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same

[23] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 292.
[24] Chevallier, "Michel Foucault and the Question of Right," 173.
[25] Foucault, "The Subject and Power," 780.
[26] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 292.

time power relations."[27] Furthermore, Foucault argues that bodies of knowledge and power come together in discourse, and that discourse is therefore integral in power relations. He writes:

> We must make allowances for the complex and unstable process whereby discourse can both be an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.[28]

Different bodies of knowledge will confront each other, and one will turn to be the dominant form of knowledge while others are rendered inferior. A discourse that is taken as true is a dominant or hegemonic discourse, and holds this position by winning against countless confrontations. By studying the dominant discourses and identifying the confronting discourses it has defeated throughout history, we might be better equipped to understand where power is situated.

In the first lecture of *Society Must be Defended,* Foucault draws our attention to the resistances and contestations that have been expressed over the last decades towards knowledge that earlier was held to be indubitable. It is this theory of domination that illuminates how knowledge or discourse is made into a tool to sustain power. In the shift from an ideology of monarchy to an ideology of democracy, he compared the truth propositions of the 'old' discourse versus the 'new' discourse. The new discourse, he describes, is a revolutionary discourse – a discourse that can justify a revolution. The old discourse sustained the monarchy and justified the rule of a king. Foucault describes the old discourse as one purely consisting of histories of triumphant battles and glorious conquests of the winners. The new discourse inverted the old discourse, and told the violence and submission experienced by the losers. This is the reality of any revolutionary discourse that depicts the current government as abusive and unjust, according to Foucault. From the viewpoint of challenging discourses, the current government's constitution and laws are "seen as a Janus-faced reality: the triumph of some means the submission of others."[29] Foucault goes on to specify that a challenging discourse is not only a critique of abusive power: It is a demand or an attack on the existing power relation. He explicitly says that revolutionary discourse has the goal of "a

[27] Foucault, *Discipline and Punish*, 27.
[28] Foucault, *The History of Sexuality, Vol. 1,* 101.
[29] Foucault, *Society Must be Defended,* 70.

final inversion of relations of power and a decisive displacement within the exercise of power."[30] With the example of a monarchy and its revolution, Foucault illustrates how power relations are supported by one discourse, but how new discourses can destabilise and prompt changes in the current power relations.

Foucault also explains that: "There can exist different and even contradictory discourses within the same strategy; they can, on the contrary, circulate without changing their form from one strategy to another opposing strategy."[31] In other words, we cannot expect to observe simply one contest between the reigning discourse and a challenging discourse. Numerous discourses operate in an intricate web, where they contest each other in different localised spaces and on different levels. I believe we can demonstrate this web of multiple discourses by pairing it to the web of human rights discourses. The first sentence of Foucault's aforementioned quote suggests that there are contradictory discourses within the same strategy. If we consider the human rights regime to implement a strategy, an example of contradictory discourses would be the discourse on cultural rights versus the discourse on women's rights. We could argue that this issue is at a subordinate level and beneath the general discourse of human rights. Foucault's second point suggests that discourses can change strategies, and I think a good example of this is children's rights. Rights are generally rationalised as protections of the individuals' freedom, but sometimes the same rights can be used to limit individual freedom. Children's rights are rights specifically formulated to protect the needs of children. However, in many cases, children's rights give the state power to interfere, it gives the state right to protect the child from its parents if the parents are not judged to able to ensure the rights and wellbeing of the child. In this example, the parents are deemed to violate the rights of the child. Because the state has principal responsibility to ensure rights, it has a responsibility to interfere in the family. We see here that human rights discourse can also give the state more power of the individuals, and the rights of the child triumphs parental rights. A concrete example of this is the Guardianship Act of Norway (*Vergemålsloven)*[32] from 2010, which gives the state authority to appoint a legal guardian to make decisions for another person proved to be intellectually disabled or otherwise mentally diminished. The Guardianship Act has been criticised by human rights organisations to violate persons' right to self-determination.

---

[30] Foucault, *Society Must be Defended,* 79.
[31] Foucault, *The History of Sexuality; Vol. 1,* 102.
[32] Nils Muiznieks, *Report of the Commissioner for Human Rights of the Council of Europe Following his Visit to Norway from 19 to 23 January 2015* (Strasbourg: Council of Europe, 2015), https://rm.coe.int/ref/CommDH(2015)9.

One could argue that the intricacy of the web of power relations gives room to adverse effects of the right discourse, which was the fourth critique of the human rights discourse. Analysing rights by the confrontations of discourses gives a more comprehensible picture of the power mechanisms in play. The theory of dominating power relations manages to explain the multiplicity of actors, because this theory refutes the binary power relation between the state and the citizen, as seen in *juridical moral of sovereignty*. This other power gives room for the relation between the husband and wife, the parent and the child, the teacher and the student, the prime minister and his ministers, the prime minister and his advisors, the prime minister and his electorates – in short an intricate web of multiple power relations and their supporting discourses.

By identifying different strategies of power through the dominant and challenging discourses, we may explain the first critique that rights are contested and disagreed on. Human rights rely on an assumption of what it is to be human. Foucault is first and foremost suspicious towards human rights because of their innate presumption that there is a human essence, and that humans have universal, static and objective characteristics and needs. Golder reaches the same conclusion that Foucault is fundamentally critical of the ideas of a human essence. He writes that:

> Foucault's critical methodologies are ranged against the fictive yet powerful truth of a naturalized and absolutized human being understood as existing outside networks of power and knowledge.[33]

Foucault rejects the assumed timelessness, universality and objectivity of what it is to be a human endowed with rights, and places rights as "the result of political struggle"[34] – they are produced and evolved through history. By relying on a fixed idea of what it entails to be human, rights run the risk of becoming repressive, rather than empowering. That is to say, contradictory to what liberalist thinkers argue; rights do not represent an authentic and indisputable representation of a human, they present a politicised idea. The problem for Foucault is that identities are never fixed, but contingent. The identity of a human is thus a contingency. Human rights must also then be considered contingencies, as they should not be assumed to have a metaphysical origin, or, since it cannot be said to exist a conclusive definition of what it is to be a human. Rights must be perceived as ungrounded and

[33] Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures," 287.
[34] Golder, "What is an Anti-Humanist Human Right?" 662.

illimitable.[35] This addresses the first and fourth challenge to the human rights projects. Foucault's relation between power and knowledge can explain the first critique concerning the contestations of human rights. The fourth critique, which addresses the adverse effects, can be explained through Foucault's "supple and polymorphous" power, as stated by Chevallier. Before addressing the two other critiques, which can be illuminated by disciplinary mechanisms, I first want to turn to a brief interlude and explain what could be considered a dismissal of the four issues with the human rights project I have previously identified.

IV) The Theoretical Boundary Between Theory and Practice

I think we can all generally agree that social life is not as predictable as physical laws, and relating to this observation, one could argue that conflicts are inescapable when a theory is applied to real life situations. Critics of Foucault could say the only thing he has managed to do, is to show that when a theory of human rights is applied to real-life situations, it encounters dilemmas and practical problems. Normative theorists are aware of this reality, and argue that for any theory to work, it must be imagined theoretically – in a vacuum with ideal agents. However, I believe this is what Foucault wants to illuminate with his critical theories. Why do we take it for granted that any theory will encounter issues when applied to real life? Where is the proof that this assumed framework for the necessary gap between theory and practice does not reflect incompetence of the normative theories? Foucault would argue that these theories fail to address the fundamental and mutually reinforcing relationship between power, knowledge and the subject.

On the one hand, we have theories that aim to answer normative questions and prescribe actions. On the other hand, we have Foucault's perspective, which tells us to draw attention to the instances of conflict and try to explain why the methodologies, which work so well in theory, become arbitrary in practice. Foucault does not want to create a normative theory that tells us how one should act. His aim is to cast light on how discourses affect power relations and vice versa. He does not want to formulate a doctrine of morality or propose an ideal political system. He arguably envisions his work as a "toolbox" for theorists to think critically.[36] He questions our dogmas and points out contested areas of knowledge.

[35] Golder, "What is an Anti-Humanist Human Right?" 662.
[36] Ben Golder, "Foucault and the Incompletion of Law," *Leiden Journal of International Law* 21 (2008): 747, https://doi.org/10.1017/S09221508005293.

2 Disciplinary Society

Foucault explains that modern society is characterised by two forms of power; the disciplining power that normalises and construes bodies; and biopower that manages the population. However, I will not elaborate on the techniques of biopower because its purpose is slightly different from the question of human rights. Biopower quantifies and measures differences within the populations and regards citizens as numbers, or as Chevallier puts it, "biopower is exercised not over subjects of right."[37] In other words, the disciplines are our point of interest as they construe and create the subject endowed with rights. In *Discipline and Punish*, we are given a glimpse into how disciplinary power operates in its extreme. It is a society where disciplinary power and its mechanisms are the main operative power and individuals appear to be entirely controlled.

By comparing pre-modern techniques of punishment with modern techniques of punishment, Foucault sheds lights on the ethos of modern society. What defines pre-modern punishment is public spectacles and physical pain, which would symbolise the sovereign's "affirmation of power and of its intrinsic superiority."[38] Whenever a person broke the king's law, the power relation would be destabilised because he challenged the king's domination. By displaying physical force, the king reinstituted and demonstrated his sovereign power. Pre-modern punishment thus conceived the criminal as an enemy of society that must be struck down. In modern society, we see a transformation from corporal to corrective punishment. Instead of demonstrating physical power, modern penal practices "intended to correct, reclaim, (and) 'cure'."[39] In modern society, we see the creation of "a whole set of assessing, diagnostic, prognostic, normative judgment concerning the criminal have become lodged in the framework of penal judgment."[40] It is not just the question of what the law says and who broke it. The criminal procedures have developed into "an assessment of normality and a technical prescription for a possible normalization."[41] The criminal has become an abnormal or impaired citizen who must be mended back into a good citizen. Foucault gives an account of how the examination of the criminal becomes a whole new component of punishment. The psychiatrist and the doctor gain access to the criminal and are necessary to judge the sentence. The judge, with the help of his experts, then decides the sufficient period for the criminal to

[37] Chevallier, "Michel Foucault and the Question of Right," 175.
[38] Foucault, *Discipline and Punish*, 49.
[39] Foucault, 10.
[40] Foucault, *19.*
[41] Foucault, 22.

be corrected into a proper citizen. During the imprisonment, a criminal's good behaviour gives proof that the estimated time was longer than required and must subsequently be readjusted. Bad behaviour would result in a prolonged sentence, and the parole officer is necessary to reassure the authorities that the criminal has indeed become "normalised." The criminal is considered the abnormality and the citizen normality. In modern penal procedures, the criminals are examined and differentiated from the general population.

Foucault repeatedly draws parallels between the functioning of the French prison system and other institutions or situations where correction takes place. He makes the case that disciplinary power exists in the education system, at the hospital, at the mental institution and especially in the family. A person judges the other, and either rewards or punishes the other person depending on whether he fulfils the expectations. Foucault is careful to point out that these punishments as not vindictive as seen in the public spectacles of torture and hangings. On the contrary, modern techniques are micro-punishments leading to corrective effects. The main characteristic of the disciplinary institution is its normalising feature, and this is achieved through the continuous examination and following correction of subjects. Foucault uses the example of the teacher's examination as "a constant exchanger of knowledge; it guaranteed the movement of knowledge from the teacher to the pupil, but it extracted from the pupil a knowledge destined and reserved for the teacher."[42] In this exchange, knowledge is transferred from the teacher to the pupil, but through the examination of the pupil, knowledge is created and added to the science of pedagogy. This science wants to learn how to teach better – how to create ideal pupils. The "expert" examines the subject, compares it with other subjects, identifies its deficiencies and tries to repair them. Foucault, therefore, argues that disciplinary power imposes normalisation because these practices attempt to make the individual fit the general population. Consider this explanation that:

> The power of normalization imposes homogeneity; but it individualizes by making it possible to measure gaps, to determine levels, to fix specialties and to render the differences useful by fitting them one to another.[43]

In these procedures, we observe two levels of objectification. The disciplined subjects are, on the one hand, homogenised when they are being worked on with the purpose of fitting into normality. On the other hand, the mass of people is individualised when their specific

[42] Foucault, *Discipline and Punish*, 187.
[43] Foucault, 184.

features and characteristics are being studied in order to judge how well they fit the normal, and which characteristics must be adjusted to mend them into what is considered normal. The two processes are co-dependent: in order to homogenise, one must determine normality and classify citizens, which demands individualisation. The mass of people must be made into separated entities in order to judge whom to include and whom to exclude. The further away from the normality the individual is judged to be, the more objectified and individualised he is. This is why Foucault writes that: "The child is more individualized than the adult, the patient more than the healthy man, the madman and the delinquent more than the normal and non-delinquent."[44] If we compare these processes of individualisation and homogenisation to the discourses of human rights, we can infer that the new rights, which are being explored and suggested today, take part in this augmentation of individualising and homogenising judgments. New rights movements do not talk about more rights of the average human; they are more preoccupied in specifying the special rights for women, children, persons with disabilities, old persons, and refugees and so on. What is the purpose of all these special rights? Many politicians and theorists believe that special rights will enable every "deficient" and "abnormal" individual to become closer to normality and will be able to enjoy human rights at the same level as the "optimal" human.

The quota systems are one example of intrusions of government to aim to homogenise or normalise the population. The French law, named *La Loi Coppé Zimmerman* and passed in 2011, made a decree that by January 2017 forty per cent of a company's board members have to be of the opposite gender.[45] Previously, the boards have been predominantly male, but this new law forces companies to elect forty per cent women. While it could be argued that this law will help strengthen equality in the society, it also sheds lights on society's quest to push every individual lagging behind into the accepted sphere. Such as this example illustrates there is a paradoxical change in the right institution. Before, individual rights were achieved through the non-interference of the state: if the individual did a harmful action, his rights were retracted, and the state has a right to interfere. Today, the state interferes to ensure the rights of the individual. The human rights project can, therefore, be argued to objectify and correct

[44] Foucault, *Discipline and Punish*, 193.
[45] The French National Assembly, "LOI n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle," *Légifrance: Le Service Public De L'accès Au Droit,* accessed November 15, 2018, https://www.legifrance.gouv.fr/eli/loi/2011/1/27/MTSX1001906L/jo/texte.

subjects in the same way disciplinary techniques are explained to do. To better illustrate this point, the discourse of human rights advocates that men and women should have equal opportunities. With quota laws, these rights become normalised: it is not a question of can women have top position, no, women must have top positions. *La Loi Coppé Zimmerman* means that not having forty per cent of women on the board is illegal. We see here that similar to Foucault's disciplinary society; the rights discourse has normalising effects.

I) The Constitution of the Observed Subjects

Disciplinary power does not only constitute the observed subject, but it also sustains the power relationship between the examined and the observing subject. Foucault ultimately states that in disciplinary society the subject "inscribes himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection."[46] The objectified subject is thus responsible for his own subjection. If we think of the psychologist and the patient, their interactions may reinforce the self-knowledge of the observed subject and sustain the current power relation.

There is, firstly, a form of maintenance in upholding the power relation. By telling his inner darkest thoughts and accepting the analysis of the psychologist, the patient is reinforcing his inferiority and the psychologist's superiority. In examining the patient, the psychologist is reinforcing his dominant role as well as making the patient into an object to know about and asserting himself as a subject who perceives. Secondly, the interaction gives the psychologist room to construct the patient's self-knowledge. I think this point is essential because Foucault allows the possibility of an active subject. Power is not only being applied on the subject. The subject constitutes himself in letting himself be examined and judged. He makes the truths imposed on him part of his self-knowledge.

The patient has the potential to adjust and challenge power relations between himself and the psychologist. Imagine then if the patient refuses to tell his secret: the psychologist's role is weakened. Without the compliance of the patient the psychologist cannot perform his ritual that gives him superiority. We see here that the "docile body" is as much an active part of the power relation; the question is whether he chooses to sustain the existing power relation or to resist it.

[46] Foucault, *Discipline and Punish*, 202-203.

Foucault refers to Jeremy Bentham's panopticon to explain the constant disciplining in society. Foucault describes the panopticon as a prison structure in which the inmates are separated from each other, but there is a perpetual presence of a guard. The structure is made in such a way that the inmates can never be sure whether the guard is observing them or not, and they will therefore automatically adjust their behaviour as if the guard was observing them at any point. In the panopticon, the inmates are subjecting themselves without the actual interference and disciplining of the guard. With this analogy, Foucault illustrates how the discipline functions in modern society. This disciplinary society is the society in which power operates through perceived constant surveillance. This society has three characteristic features, firstly, the functional alterations of disciplines, which makes it possible "to increase the number of disciplinary institutions and to discipline the existing apparatuses."[47] Secondly, disciplinary mechanisms are numerous and intersecting, they are not isolated independent institutions. Disciplinary mechanisms sustain each other, the legal institution is necessary for the prison institution to function and the medical and psychiatric institutions are necessary for the legal institution to function. Thirdly, the state takes control of the disciplinary mechanism. In sum, disciplinary power is everywhere. Foucault argues that our modern society is primarily disciplinary. If it is the case that our society is a disciplinary society, it gives grounds to suspect that the discourse of human rights, as it is embedded in society, must be operated partly or entirely by means of disciplinary power.

II) Two Transformations Towards our Human Rights-Institution

In the shift from feudal to modern society, Foucault describes two transformations relevant to the human rights regime; the first is how the right of the sovereign became human rights. The second transformation is how disciplinary mechanisms infiltrate other institutions, including what we can define as the human rights institution.

According to Foucault, right and law were initially the tools of the sovereign power. Foucault describes of how the discourse of sovereign right becomes the discourse of civil right. The original discourse of sovereignty had the purpose to "dissolve the element of domination in power and to replace that domination, which has to be reduced or masked",[48] with legal rights and laws. The king's power was achieved through violence and conquest, but the discourse of sovereignty reformulated the King's domination into a system of laws that

[47] Foucault, *Discipline and Punish*, 211.
[48] Foucault, *Society Must be Defended,* 26.

legitimised his reign. From the king's power being accepted by winning wars, his power was accepted through laws. With the appearance of disciplinary power, one would have thought that the discourse of sovereign right, together with its "juridical edifice,"[49] would have disappeared. Instead, this discourse of sovereignty that sustained the sovereign power was inverted and transformed into an ideology of right – the sovereignty of the king became the sovereignty of the private individual. Juridical systems survived the power shifts of democratisation and made itself indispensable through the new discourse of rights. In *Discipline and Punish*, Foucault even claims that: "The 'Enlightenment', which discovered the liberties, also invented the disciplines."[50] The rights of the private individual came hand in hand with the disciplines. In sum, the discourse of sovereign right that masked the king's power was transformed into the discourse of private rights and masked disciplinary power. What is being illuminated in this genealogy of rights is that these rights came into being through discourse and their meaning be traced back to the right of conquest. This shows that rights are not intrinsically liberating as certain theories tend to believe. Foucault's genealogy of right traces the notion of right from the right of conquest to the king's right and finally to the human rights. If we accept this to be true, it would mean that rights have only recently been conceptualised as emancipatory. In light of this, it makes us wonder why individual emancipation is considered inherent to rights, as it is equally probable that rights may lead to domination.

The second transformation is from a purely juridical machinery to a legal institution corrupted by disciplines. The introduction of a science on humans facilitated a "proliferation of the authorities of juridical decision-making."[51] In the criminal investigations "psychiatric expertise was called upon to formulate "true" propositions as to the part that the liberty of the offender has played in the act he committed."[52] The law in modern society has become extra-juridical because it turns to other non-juridical authorities to judge the individual and influence the juridical process. In a purely juridical procedure the judge would only want to know whether the criminal committed the crime, but in modern society, the judge needs to know the state of his mind when he committed the crime as well as when he is being judged before the court. This means that the judiciary began to concern itself with the questions of intent, the sufficiency of punishment, the medical and psychological state of the criminal and

[49] Foucault, *Discipline and Punish*, 36.
[50] Foucault, 222.
[51] Foucault, *21*.
[52] Foucault, *Discipline and Punish,* 22.

the purpose of punishment, which was not part of the juridical inquiry of sovereign power. So while laws in pre-modern systems of power were "strictly liable", the practice of law today has become a discipline mixed with other sciences.

The modern apparatus of law examines the individual and makes judgments of accountability. This is demonstrated in the criteria of *mens rea* and *actus reus*, the criteria of a guilty act and a guilty mind. Sovereign law was only interested in the *actus reus*-criterion, but in modern society, the norm is that a guilty act is not sufficient without proving a guilty mind. The *mens rea* - criterion gives a new dimension to law, as it now concerns itself with identifying the scope for guilt. For example, article 64 of the French penal code of 1810 "stipulates that there is no crime if the individual is in a state of dementia at the moment of the act."[53] The legal system is considered egalitarian in principle because every person is treated equally before the law. However, in practice, it is dependent on "all those systems of micro-power that are essentially non-egalitarian and asymmetrical we call the disciplines."[54] Through this new extra-juridical procedure, criminals are not treated equally before the law: they are differentiated and given different sentences depending on their age, their level of sanity, their position in society and their adolescence. The 1958-article C345 asks whether the criminal is "dangerous, amendable to penal sanction and curable,"[55] which is to judge a person's personality more than the crime he committed**.** While law, under sovereign power, was to "punish an act on the basis of a code,"[56] in the context of disciplinary power, law functions "to correct an individual in terms of their personality."[57] Let me illustrate this idea through the modern practice of criminal justice.

Anglo-American juridical systems have four levels of culpability. There is negligently, recklessly, knowledgeably and purposely.[58] These layers of culpability will determine the gravity of his punishment. If the criminal did the crime purposely, he would receive the worst punishment, as he is ill-willing. The next level is knowledgeable; he did the act that led to the crime fully aware of the consequences, even though the motivation for committing the crime

---

[53] Chevallier, "Michel Foucault and the Question of Right," 175.
[54] Foucault, *Discipline and Punish,* 222.
[55] Chevallier, "Michel Foucault and the Question of Right," 175.
[56] Chevallier, "Michel Foucault and the Question of Right," 177.
[57] Chevallier, 177.
[58] The American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Philadelphia: The American Law Institute, 1985), 21-22. http://www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf.

was not the crime itself. It implies that, while he did not commit the crime purposely, as a citizen that should respect the order of society, he has violated the norm. Recklessness relates to when the offender knows there is a considerable risk his action would result in a crime, but still does it. Reckless driving is an example of this level of culpability. Then negligence is the lowest form of culpability, where the offender was not aware he was doing anything wrong, but the judge considers the actions so evident that any objectively rational person should have foreseen the outcome, and the offender is in other words guilty of being unintelligent. The levels of culpability prove that the focus of the court is not the crime in itself. The focus is on the individual's attitude as part of society, and how far he breaks the norm. Chevallier argues that modern power makes "visible the figure of the individual, whereas feudal power passed either over or beneath it."[59] I believe this is appropriately illustrated in the *Mens Rea*-condition of modern law. This is not to say the *Mens Rea*-condition was invented by modern society: Foucault points out in the lecture series "Truth and Juridical Forms" that Roman society developed the juridical inquiry and towards the end of the middle-ages it resurfaced in modern society.[60] However, modern society has altered the *Mens Rea*-condition to become a tool for experts to make the criminal into an object of study. This addresses the second critique, and can explain the multifaceted effects of human rights. The insurgence of disciplinary mechanisms would mean that rights cannot only belong to the legal institutions but find themselves overlapping with other domains such as education, health and so on.

III) Rights as Power-Knowledge: The Proliferation of Rights Discourse

I believe we can see a similar trend of expanding discourses when comparing Foucault's investigation of the discourse of sexuality with the history of the discourse of human rights. In the *History of Sexuality: The Will to Knowledge* Foucault refutes the *repressive hypothesis,* which claims that during the 17th century, concerning "the subject of sex, silence became the rule."[61] The topic of sex was prohibited and frowned upon, and this led to the sexual liberalisation in the 20th century. Foucault, on the contrary, argues that what in fact happened was: a "steady proliferation of discourses concerned with sex."[62] The citizens in modern society "dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the*

[59] Chevallier, "Michel Foucault and the Question of Right," 177.
[60] Michel Foucault, "Truth and Juridical Forms," trans. Lawrence Williams and Catherine Merlen, *Social Identities* 2, no. 3 (1996): 327-342. http://dx.doi.org/10.1080/13504649652213.
[61] Foucault, *The History of Sexuality, Vol. 1,* 3.
[62] Foucault, 18.

secret."[63] While the activists in the sexual revolution thought they had broken the stigma of talking about sex, they were oblivious to the reality that "Western man has been drawn for three centuries to the task of telling everything concerning his sex."[64] However, the methods for talking about sex was highly regularised and formalised, with confessions as a major method. The Christian would confess his sins to the priest; the madman would confess his illicit thought to the psychiatrist; the criminal would confess his crimes before the court. Foucault claims that the very act of confessing became "a digression, a refinement, a tactical diversion in the great process of transforming sex into discourse."[65] Not only did the person confessing accept and enforce what society determined to be true, but the confession needed the presence of an authoritative figure – such as a judge, a priest, a teacher, a parent or a psychiatrist – who would "judge, punish, forgive, console, and reconcile."[66] Through "disciplining" activities, actions are being formulated into discourse. Foucault describes "an explosion of distinct discursivities, which took form in demography, biology, medicine, psychiatry, psychology, ethics, pedagogy, and political criticism."[67] While Foucault narrows his investigation down to the question about sex, it illustrates the linkage and correspondence between different discourses and how they seem only to multiply and never decrease.

I think this proliferation is visible in the human rights discourse. Since the French revolution, rights have become more numerous, more specified, and more elaborated, and so-called juridical experts have influenced this development. In the last seventy years, we have seen the creation of so many human rights conventions that it would be wrong not to call this a proliferation of the discourse of human rights. This proliferation would explain why the human rights regime has become a technocracy – it is the result of an ever-expanding discourse influenced by experts and corrupted by other disciplines. We have now an explanation for the third critique. Moreover, I see that in the same way Foucault argues that the repressive hypothesis is false and deceptive; the human rights discourse is falling into the same trap. When new rights are claimed, they seem to presuppose a repression; they imply that a truth has been hidden and denied, and now it must be liberated. Claiming a new right seems to make a statement: that until this proposed right becomes inscribed in law, someone is being oppressed. Claiming a right does in a way carry with it this nostalgia of natural rights, that there are entitlements pre-existent of society. Considering new rights come into existence,

[63] Foucault, *The History of Sexuality, Vol. 1,* 35.
[64] Foucault, 23.
[65] Foucault, 22.
[66] Foucault, 61-62.
[67] Foucault, 33.

and other rights become outdated and disappear, we can draw the conclusion that the truths that new rights reveal, did not exist before someone formulated them and claimed them as rights.

IV) The Rejection of Rights

Foucault's disciplinary society sheds light on several current human rights issues. I have tried throughout the previous chapter and this to demonstrate how rights issues can be explained or better understood through Foucault's notion of power. The rights issues I pointed out were a) contestations and disagreements concerning what should be human rights, b) problems concerning the practical implementation and realisation of rights, c) the technocracy of human rights, and d) the double effects of human rights. These issues can be explained by looking at the power relations with their disciplinary effects. At the same time, there are parts of Foucault's disciplinary power theory that suggest that we might need to do away with rights. Once we make use of the Foucauldian notion of power, we must be prepared to dismantle the whole human rights regime. Let me systematically go through the reasons we are given to reject human rights.

a) Denial of Emancipation

Many would agree that the merit of rights hinges on their ability to protect individual freedom, and rights could, therefore, be considered to be intrinsically emancipatory. When Foucault proposes "to rid ourselves of a juridical and negative representation of power and cease to conceive of it in terms of law, prohibition, liberty, and sovereignty",[68] it challenges this assumption. Foucault refutes the view of power as purely repressive as he argues it is also productive. According to Foucault, power does not only prohibit and repress but it "also traverses and produces things, it induces pleasure, forms knowledge, produces discourse."[69] He draws attention to the multiple discourses surrounding sexuality in illustrating the productiveness of disciplinary power. He concludes that the knowledge of sexuality was "far more one of the positive products of power than power was ever repressive of sex."[70] Foucault's notion of power is thus productive, creative and resourceful. When we choose the

[68] Foucault, *The History of Sexuality, Vol. 1*, 90.
[69] Michel Foucault "Power and Truth," in *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power,* ed. James D. Faubion (London: Allen Lane, 2001), 120.
[70] Foucault, 121.

productive image of power over the repressive image of power, the notion of disciplinary power cannot fit into our current conceptualisation of human rights. Charles Taylor points out that because Foucault's notion of power is so "coextensive with human society",[71] one cannot break utterly free from power. Liberation from disciplinary power would then mean to break away from all social relations with any human being. When escaping a power relation, one necessarily enters into new power relations. The only way one can be absolutely sure that one is not being subjugated in a power relation would be to live a reclusive and solitary life. It is evident that Foucault does not encourage this position. The image of liberation from power is incompatible with Foucault's notion of disciplinary power.

This is not to say that power never has repressive or oppressive effects. Techniques of power can both repress and produce. When parents raise their children, they use several coercive methods with the aim of repressive effects; parents may, for example, wish to repress the natural urges of the baby to urinate on themselves sporadically. They raise them to be polite; by means of micro-punishments and praise, they repress the children's gestures and behaviour that would be perceived as rude. Even though some of the child's habits are being repressed, new habits are also being produced in the process. We would not call this repressive with the intention to claim that the parents are violating the rights of their child. Nevertheless, it is a form of repressive practice when a person in a dominant position directs the behaviour of the person in the subordinate position. My interpretation of Foucault is that he would indeed define this as techniques of disciplinary power. These everyday repressions and productions that happen on a localised level would not qualify as a human rights issue.

Foucault himself describes the sexual rights movement as a tactical shift of the popular and dominant morality. He writes that: "this whole sexual "revolution" this whole "anti-repressive" struggle, represented nothing more, but nothing less – and its importance is undeniable – than a tactical shift and reversal in the great deployment of sexuality."[72] What is illustrated in Foucault's denial of the repressive hypothesis is that the sexual liberation in the twentieth century did not mark an end of sexual repression, but instead introduced a new way to talk about sex. Foucault notes that when describing the past as repression of sexuality, one proclaims the current discourse of sexuality to be the truth. He states that the "irony of this deployment [of sexuality] is in having us believe that our "liberation" is in the balance."[73] In other words, Foucault explains that within the semantics of being repressed and liberated, we

[71] Taylor, "Freedom and Truth," 326.
[72] Foucault, *The History of Sexuality, Vol. 1*, 131.
[73] Foucault, 159.

have the illusion that our freedom and knowledge about ourselves have been repressed by powers, when in reality we are still subjugated by power after, just as before the "liberation." In the 1984 interview, he revisits the repressive hypothesis and clarifies that according to the "hypothesis, all that is required is to break these repressive deadlocks and man will be reconciled with himself, rediscover his nature or regain contact with his origin and re-establish a full and positive relationship with himself."[74] If the merit of human rights relies on the possibility of being liberated from power, and if Foucault is correct in his analysis of the sexual revolution as illusory, we must question whether any human right fought for, and its subsequent liberation, is also illusory.

However, I do not say that Foucault would disagree with the claim that slavery is oppressive. Foucault even mentions the example of slavery, although he argues that the act of removing the slaves' chains "is not in itself sufficient to define the practices of liberty."[75] Furthermore, physical restraint, such as the slave's chains, can be used as techniques to maintain a power relation, but according to Foucault, what is crucial is the attitude of the slave and the master. Being in chains presents a physical constraint, but disciplinary power describes the type of power that constitutes subjects. What is key in Foucault's thought is that even though "the liberation" changes the power relation between the coloniser and his slaves, it does not mean that the slaves' power struggles end in one liberation. Freedom is, in this view, a never-ending process that does not finish because of one manifestation of liberty. Foucault here focuses on practices of freedom rather than a single affirmation of liberation.

Foucault's notion of disciplinary power conceptualise power differently, and in such a way that it appears impossible to be emancipated. The escape from one power struggle will necessarily result in another power struggle. Chevallier illuminates the issue that the human rights discourse defines what qualifies "an individual endowed with rights", but in this instance, it also defines disqualifying characteristics of "an individual endowed with fewer rights." The criminal or madman has fewer rights than the normal person. Furthermore, when an individual claim his rights, he finds himself "qualified, administratively and juridically, by these psychological, biological and sexual indicators."[76] In short, when struggling against domination in the name of individual rights, this struggle carries with it a set of scrutinising objectification of the agent.[77] In actively resisting one power struggle, the person is already

[74] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 282.
[75] Foucault, 282.
[76] Chevallier, "Michel Foucault and the Question of Right," 176.
[77] Chevallier, 176-177.

subjugating himself in another power relation. When we look at human rights through the lens of disciplinary power, the emancipatory project becomes a process where objectifying and disciplinary techniques are being employed. Let me sum up the two main implications.

Firstly, power does not only result in repression, but it is also productive. If power represses, emancipation from power would mean that the person would no longer be repressed. Intuitively, that would seem a reasonable incentive to resist power. If power is productive, it is unclear what the promise of emancipation would entail. Without the image of repressive power, emancipation could be deemed inconsequential.

Secondly, where the human rights discourse imagines a final liberation from repression, Foucault has criticised this absolute manifestation of freedom as illusory and instead reconceptualises freedom as a practice resulting in a never-ending power struggle. If disciplinary power is productive and operates at all levels of society, and if freedom cannot be achieved in one single battle, it appears that we must let go of the idea of that human rights can lead to emancipation.

b) The Forfeiture of the Authentic and Uncorrupted Human

Foucault's theory on the relationship between power and knowledge is problematic to a discourse of human rights. Discourses on human rights often presume that there is a human essence; the idea of a human endowed with fundamental rights. However, if we agree on Foucault's notion of power, it appears that we would have to discard the image of a pre-political human of nature, the original and authentic human. There are two implications.

Firstly, we are forced to reject the image of man of nature. Foucault argues that knowledge is produced by systems of power. Foucault asserts that sexuality "must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure truth knowledge tries to gradually uncover."[78] This remark seems equally relevant to the question of what a human entails because it relates to Foucault's power-knowledge relation. Foucault states that his "aim will be to show how social practices may engender domains of knowledge that not only bring new objects, new concepts and new techniques to light, but also give rise to totally new forms of subjects and subjects of knowledge."[79] In his inquiry on the source of knowledge, he is inspired by Nietzsche, and he appears to adopt a similar position where "the

[78] Foucault, *The History of Sexuality, Vol. 1*, 105.
[79] Michel Foucault, "Truth and Juridical Forms," in *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power*, ed. James D. Faubion (London: Allen Lane, 2001), 2. This and the following footnote, have a difference reference than the other citations with the same title.

ideal has no origin: it too was invented, manufactured, produced by a series of mechanisms."[80] By studying notions through their genealogies, Foucault can "account for the constitution of knowledges, discourses, domains of objects."[81] Foucault's approach is to assume that knowledge has no pre-historical origin, and therefore his account of the human subject is where it is constituted "within a historical framework."[82] It is evident that Foucault would agree one should refrain from formulating a-historical truths, which is what a human rights discourse appears to be doing. Human rights should not make universal and fixed statements of a human's characteristics and needs. From the viewpoint of disciplinary power, rights of the human cannot be conceived as something that pre-exists power and that power masks and corrupts. Both the ideas of rights and the human person must be analysed as concepts that constantly interact with and are shaped by power.

The other implication is a natural consequence of the first. If truth and knowledge have no origin, it must come into existence through social practices. Taylor remarks that according to Foucault "there is no truth that can be espoused, defended, or rescued against systems of power. On the contrary, each system defines its own variant of truth."[83] Foucault's power-knowledge relation shows that truth is "thoroughly imbued with relations of power."[84] It is not the case that power conceals what is true; on the contrary, power produces truth. It appears that any belief that is accepted as true is already subjugated by practices of power. Foucault elaborates that truth must be understood as "a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements."[85] The purpose of his historical analyses it to identify the structures that posit a statement to be accepted as true. Foucault mentions that "subjectivity" and "personality" are some of the concepts that have been constructed within the modern system of power.[86] Foucault claims that one cannot isolate truth from power, because the truth is produced through power. This suggests that human rights could also be one of the constructed concepts of the current system of power. This would mean that human rights could be produced by the same system of power that it is trying to resist. His theory on the mutually reinforcing relationship between power and knowledge would have us leave the image of natural man. Problematically, this power-

[80] Foucault and Faubion (ed.), "Truth and Juridical Forms," 7.
[81] Foucault, "Power and Truth," 118.
[82] Foucault, "Power and Truth," 118.
[83] Taylor, "Foucault on Freedom and Truth," 326.
[84] Foucault, *The History of Sexuality, Vol. 1*, 60.
[85] Foucault "Power and Truth," 132.
[86] Foucault, *Discipline and Punish*, 29.

knowledge relation suggests that any human right we attempt to formulate would always end up being the product of the power relation we are trying to resist. Of course, if it was possible to have a human right that is distinguished from truth and knowledge, it could avoid the predicament, but I cannot imagine what such a right would entail. We are therefore left with no foundation to determine what human rights should entail.

c) Disciplinary Power Undermines Legal Rights

Human rights are enshrined and embedded in a system of law, which forces us to ask what law is from the viewpoint of Foucault. Foucault seemingly rejects the juridical edifice. Chevallier points out that "Foucault speaks of 'law' and 'right' as a model which impedes the analysis of power."[87] Foucault's critique of the juridical model suggests that if one is to change the power structures, we have to look outside the legal institution. If power does not operate through law, human rights, if its purpose is indeed to challenge power, cannot be fought in the legal sphere. Firstly, Law fails to detangle the complicated web of power relations that reaches down to the most localised levels; it operates solely on a generalised level. Secondly, it is perceived as a system of prohibitions, but as Foucault has claimed power does not only function as prohibition, but is also productive.

In pre-modern society, law's primary function was concerned with legitimising and accumulating power, but in modern society, power becomes polymorphous and versatile, and the legal institution gains normalising and disciplining effect. If we want to adopt the viewpoint of disciplinary power, the legal institution cannot be seen as purely juridical. In disciplinary society, the legal institution takes on other non-juridical operations. Foucault writes:

> 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 juridical institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.[88]

The legal system is still relevant, but it has been infiltrated by disciplinary power.[89] It goes two ways: on the one hand all "technologies of power that are foreign to the concept of

[87] Chevallier, "Michel Foucault and the Question of Right," 172.
[88] Foucault, *The History of Sexuality, Vol. 1*, 144.
[89] Foucault, *Discipline and Punish*, 216.

law"[90] have been recoded into the legal system; on the other hand, non-legal technologies of power have a say in legal judgments. The juridical apparatus limits the exercise of power, while the numerous mechanisms of power undermine the limitations established by law.[91] Human rights as part of the juridical system must run into the same challenges: the rights that appear to limit state power are at the same time it is being undermined by disciplinary mechanisms. This gives us leverage to argue that Human Rights, within the legal institution, subjugate rather than empower.

V) The Need to Revitalise Human Rights

Now if rights are not emancipatory, and rights are not inherent to us and protect our authenticity, what is their merit? By rejecting rights as inherent and rights as emancipatory, it becomes difficult to justify why we should have rights in the first place, and furthermore, to establish what these rights should entail. We must ask whether we are prepared to dismantle the human rights regime. Even though the human rights discourse has in many cases failed, and has resulted in unwanted consequences or arbitrary situations, we also have instances where rights have been proven useful. During his life, Foucault engaged in rights activism, which would make us think that he, as well, must have believed human rights to have some merit.

In *Society Must Be Defended,* Foucault invites the audience to think of a "new right that is both anti-disciplinary and emancipated from the principle of sovereignty,"[92] but he does not elaborate further on what this new right entails. Nevertheless, if there is room for human rights from the viewpoint of Foucault's power, it seems that we must rethink rights as independent of disciplinary power. If we want to keep the idea of human rights as an empowering tool of the oppressed, rights must be proven to not take the form of a disciplinary mechanism, even though it is situated in a disciplinary society.

The paper "The Subject and Power" was published in 1982, two years before Foucault's death, when we meet the older Foucault who voices a moderated, but consistent, view of his earlier scholarship. Surprisingly, Foucault here disclaims that the goal was to "analyse the phenomena of power."[93] Instead, he clarifies that his focus has always been to investigate how

[90] Foucault, *The Will to Knowledge, Vol. 1,* 109.
[91] Foucault, *Discipline and Punish*, 223.
[92] Foucault, *Society Must Be Defended,* 63.
[93] Foucault, "The Subject and Power," 777.

"human beings are made subjects."[94] While the reader should stay critical of Foucault's own portrayal of his earlier work as the premeditated road towards his "ethical" phase, the article manages nevertheless to establish a commitment to his original critique of power and knowledge. More importantly, this reaffirmation of his earlier work indicates that he does not disown his theories on knowledge and power, and desires them to be generally consistent with his ethical work. In this paper Foucault holds the same sentiment of "docile bodies" when he writes that power:

> Applies itself to immediate everyday life, categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him that he must recognize and others have to recognize in him. It is a form of power which makes individuals subjects. [95]

The quote describes how mechanisms of power constitute the individual. Having established the same description of power as seen in his older works, he adds that: "power is exercised only over free subjects, and only insofar as they are free."[96] When someone is asserting his power over someone, the subjugated person could either submit or oppose the assertion. The subject has before him available a "field of possibilities in which several ways of behaving, several reactions and diverse comportments, may be realized."[97] The subject has some freedom to act and to respond between the possibilities given to him. The same sentiment is present in *Discipline and Punish* when Foucault writes that the disciplined bodies, "in the struggle against it, resist the grip"[98] of power. It seems clear that Foucault envisioned there to always be "the means of escape or possible flight"[99] in a relationship of power, even though he did not explicitly address this question in his older works on power.

Foucault explains that "when an individual or social group succeeds in blocking a field of relations of power, immobilizing them and preventing any reversibility of movement"[100], the power relation becomes a state of domination. In light of this new aspect of the possibility to resist power relations, Foucault invites us to rethink rights in terms of struggles against domination, instead of inalienable entitlements we have by virtue of existing. I shall now turn

---

[94] Foucault, "The Subject and Power," 777.
[95] Foucault, 781.
[96] Foucault, 790.
[97] Foucault, 790.
[98] Foucault, *Discipline and Punish*, 27.
[99] Foucault, "The Subject and Power," 794.
[100] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 283.

to the notion of *parrhesia,* which Foucault has investigated and which seems to coincide with his activist work. I shall argue that Foucault's ethics give grounds to participate and engage in activism. It shall subsequently consider whether human rights could be embedded in the ethical sphere, which would evade the first and second tensions between Foucault's notion of power and human rights.

3 Parrhesia

The previous chapter presented three arguments of how Foucault's notion of power can persuade us to reject human rights. Firstly, disciplinary power operates in such a way that it becomes irreconcilable with the ambitions of human rights – that of complete liberation from power. Secondly, without any normative basis or ideology such as natural rights, we are left with no framework to formulate what our rights should entail and why we must respect them. And lastly, the juridical model is insufficient to analyse power: if we should keep human rights, we must fight them in another area than juridical tribunals.

In the last years of his life, Foucault became increasingly preoccupied with questions of the ethics of self. His later *Collège de France* lecture series, in addition to his four-volume collection of *the History of Sexuality*[1] look at – to broadly summarise – the formation of self. Foucault introduced, in this period, new ideas connected to ethics and how to conduct one's life. The notions of *parrhesia* and *le souci de soi* are central themes in this endeavour. *Parrhesia* comes from ancient Greek and can be translated to "speaking the truth" or "telling all." Foucault uses the term *franc-parler* synonymously to *parrhesia,* which can be translated in English to "speaking frankly." *Le souci de soi*[2] can be understood as self-care or -concern; it is the activity of taking care of oneself, and of cultivating one's subjectivity. In reading Foucault's investigations of these ideas, there is always a challenge of ascertaining Foucault's position. Gros rightly pinpoints the issue, which is that:

> Foucault's concepts are often inseparable from the historical reality that they claim to read and reveal, and they always "stick" to it, so that we never know if the dominant concepts of Foucault are pure concepts, notions articulated in a relatively autonomous conceptual set, or if there are ever only reading grids, ways of collecting, or configuring an archive domain.[3]

[1] Foucault published three books during his lifetime, and was working on a fourth volume at the time of his death. The fourth volume was published February 2018, edited by Frédéric Gros.
[2] *Le Souci de Soi* is also the title of the second volume of the *History of Sexuality* and has been translated to *Care of the Self* in English.
[3] Gros, "Sujet Moral et Soi Étique chez Foucault," 229. My translation: "Les concepts de Foucault sont souvent indissociables de la réalité historique qu'ils prétendent lire et révéler, et ils y « collent » toujours forcément, de telle sorte qu'on ne sait jamais si les concepts dominants de Foucault sont des concepts purs, des notions articulées dans un ensemble conceptuel relativement autonome, ou s'il n'y a jamais là que des grilles de lecture, des manières de rassembler, ou de configurer un domaine d'archives."

In reading Foucault, there is the uncertainty in trying to decipher whether Foucault is asserting his views, reiterating and agreeing with the opinions of others, or simply providing the historical context and development of a concept. Nonetheless, I believe that we can observe similar characteristics between the truth-telling in *parrhesia* with political activism in general, as well as Foucault's activism. I shall in this chapter argue that if we regard rights-activism from the viewpoint of the *parrhesiast*, we can evade some of the tensions between Foucault's power and human rights. Before turning to the question of *parrhesia*, I will first look at Foucault conceptualisation of truth. Not only is it relevant to the notion of *parrhesia,* which is to speak the truth, but to claim a right is to assert a truth.

When the person claims: "I have a right to A", he arguably asserts that he believes it is true that he has a right to A. Firstly, it can be true because of the legal documents it refers to. Secondly, it could otherwise be the person's opinion. One could argue that what is actually being asserted is "I ought to have a right to A", making it a normative claim. However, it seems counterintuitive to fight for a right one do not think one is yet entitled to. If we look at the semantics of rights activism, it is rarely suggested to invent a new right. The activist would demand the state to "recognise" or to "respect" rights. Discursively, we tend to treat rights as if they existed prior to, and independently of, their legal foundation. It would seem that the rights-claimer perceives himself to have an inherent right. The normative aspect of the claim is then directed to the fact that the state ought to respect a person's rights, not that the person ought to have a right. One could therefore argue that the human rights discourse depends on ideas of natural right. This relates to the second issue that would discredit human rights. If one lets go of the idea of natural rights that assumes given truths, what is a right asserting? Foucault's ethical pursuit of truth can possibly solve this issue. Considering that Foucault has, in his earlier work, been sceptical to the acquirement of truth, it is necessary to understand what Foucault talks about when he talks about truth in the context of *parrhesia* and care of self.

I) Foucault's Truths

In his lectures at Berkeley, Foucault addresses the question of what the Greeks meant when they were speaking the truth. He asks: "how is it that the alleged *parrhesiastes* can be

certain that what he believes is, in fact, truth?"[4] He answers that the question "is a particularly modern one which, [he] believe[s], is foreign to the Greeks."[5] In other words, Foucault regards the question of what we could call scientific or objective truth as a distinct inquiry from the Greeks' truth. In this lecture, Foucault states that the necessity for scientific evidence is inconsequential for the Greeks. Foucault explains:

> Before Descartes obtains indubitable clear and distinct evidence, he is not certain that what he believes is, in fact, true. In the Greek conception of *parrhesia*, however, there does not seem to be a problem about the acquisition of the truth.[6]

According to Foucault, Cartesian doubt and the necessity for scientific, empirical evidence is part of a modern institution of knowledge. Moreover, Foucault writes that modern society's neglect of parrhesiastic practices allows "for the relation to truth to be validated and manifested in no other from than that of scientific knowledge."[7] Foucault expresses, here, a regret that modern structures of knowledge do not include this other modality of truth that was practiced in Ancient Greece.

In identifying what truth is for the Ancient Greeks, Foucault looks at the origin of the Greek word *alēthēs* which can be translated to "the unconcealed, the unalloyed, the straight, and the unchanging and incorruptible."[8] *Logos alēthēs*, which is translated to true discourse, is a way of speaking that reveals everything. It is a speech that aims to say what the truth is, without using flattery or rhetoric to convince the audience. Foucault clarifies further that the true discourse must be consistent with "the rules of the law."[9] He demonstrates that the ethics of living cannot be realised in a solipsist sense, but are dependent on interaction and relations with others. Based on this presumption, it makes sense that a true discourse must be in accordance with the structure it takes place and must to some extent adhere to linguistic, political and social laws. Foucault asserts that true discourse cannot be refuted or be proven false, whilst it might imply absolute truths, Foucault clarifies that, for the Greeks, the speaker does not need to acquire the knowledge of what is true before he speaks, instead; "truth must

[4] Michel Foucault, "Discourse and Truth: the Problematization of Parrhesia," six lectures at University of California at Berkeley, California, October-November, 1983: 3, https://foucault.info/parrhesia/.
[5] Foucault, "Discourse and Truth," 4.
[6] Foucault, 3.
[7] Foucault, *The Courage of Truth*, 237.
[8] Foucault, 219.
[9] Foucault, 220.

be constant and permanent function of the discourse."[10] Facts are not a necessary precondition for speaking a discourse of truth; the Greeks' truth comes into being in the discourse itself.

The Ancient Greeks' notion of truth is consistent with Foucault's criticisms of a continuant human identity. The pursuit of scientific evidence presumes that there is a concealed objective truth that must be revealed; but Foucault chooses to focus on how truths are constituted through discourse. It is important to clarify that Foucault does not contest that scientific and empirical evidence can lead to truth. Foucault clarifies in an interview[11] that he does not attempt to study purely theoretical fields such as physics and chemistry. Instead, he turns to analyse the relation between power and knowledge in sciences "as "dubious" as psychology."[12] One could say that Foucault is interested in domains of truth that relies on evaluative judgments. Foucault elaborates that the purpose of his historical analyses was not to prove a relativist position or to show how knowledge changes over time. The purpose was, instead, to look at how a subject constitutes himself within structures of truth. By looking at historical material, one can understand how subjectivity is established through the obligations of truth.[13] What we perceive as true, and the methods we apply to infer truths, implicate and influence how we think of ourselves.

Foucault further explains that Greek philosophy "plays the dialectical game of its own truth."[14] Obtaining truth can be observed a contest, where utterances are shared, challenges and exchanged, and together they form a discourse of truth. To properly explain this "game of truth," Foucault relies on the term *veridiction*. *Veridiction* can be understood as the conditions to establish truth. By knowledge, one assumes something to be objectively true, independent of the cultural, historical and physical position of the person who obtains the knowledge. *Veridiction,* on the contrary, acknowledge that the subject affirms a truth from a certain perspective with a specific frame of reference.

In this game of truth, utterances have consequential effects. If the first person who saw an animal and called it: "mouse", happened to convince the bystanders of this utterance to be true, the word "mouse" might have become the designator for what we today identify as a rat. To say "it is a mouse" would then be correct in the alternate context, even though it would be

[10] Michel Foucault, *The Government of Self and Others: Lectures at the Collège de France 1982-1983*, eds. Frédéric Gros et al., trans. Graham Burchell (Hampshire: Palgrave Macmillan, 2010), 331.
[11] Foucault, "Power and Truth."
[12] Foucault, "Power and Truth," 111.
[13] Michel Foucault, *Subjectivité et Verité: Cours au College de France, 1980-81*, (Paris: EHESS, 2014), 15-16.
[14] Foucault, *The Government of Self and Others,* 354.

false for us. This illustrates rudimentarily how "a game of *veridiction* comes to add to the real and transmute it, which transforms it."[15] Another example of this game of truth, and relevant to the topic of the thesis, is how the truth conditions for gender have changed. Today, sex is generally established by biological factors of reproductive organs or whether the person has the XY or XX chromosome combination. The European Court of Human Rights has ruled that, as society's morality has changed, one should be allowed to change one's juridical gender if one identifies oneself as the opposite sex of what one's chromosome combination predicates.[16] The European Court of Human Rights had in the preceding cases concerning the question of legal sex change; *Rees v. United Kingdom*, *Cossey v. United Kingdom* and *Sheffield and Horsham v. United Kingdom*, concluded that there was no violation to article eight of the *European Convention of Human Rights*. However, in the case *Christine Goodwin v. United Kingdom* the Court ruled a violation to article eight based on "clear and uncontested evidence of a continuing international trend in favour of not only increased social acceptance of transsexuals but also of legal recognition of the new sexual identity of post-operative transsexuals."[17] The truth of a person's sex, which used to be biologically and scientifically determined, can now be reversed by personal self-knowledge. Here we can identify two different sets of conditions to establish gender: one is conditioned on biological factors and another on self-identification. The court's conclusion posits that the definition of legal gender is today less dependent on biological factors. Nonetheless, if a person changes his gender, the chromosome combination stays the same. What Foucault is trying to make us aware of is whenever we assert a truth, we should be conscious that this truth is dependent on and makes sense within the framework we are speaking.

In his older work, Foucault focused on the structures, institutions and systems put in place to impose truths on its subjects. An example can be found in Foucault's study of the psychiatric institution: for the psychiatrist to diagnose a patient, he turns to the list of symptoms that classifies a disorder. When the psychiatrist concludes that the patient has in fact schizophrenia, the patient himself will believe this to be true. This then would be an example of a structure of *veridiction*, the system that facilitates the subject to affirm some

[15] Gros, "Sujet Moral et Soi Étique chez Foucault," 224. My translation: "un jeu de veridiction qui vient s'ajouter au reel et qui le transmute, qui le transforme."
[16] European Court of Human Rights, "Gender Identity Issues," *ECHR,* accessed November 12, 2018, www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf.
[17] European Court of Human Rights, "Grand Chamber Judgment Goodwin v. United Kingdom," *ECHR,* accessed November 12, 2018, hudoc.echr.coe.int/eng-press#{"itemid":["003-585597-589247"]}.

information to be true. This is supported when Foucault clarifies that what he "wanted to try to show was how the subject constituted himself, in one specific form or another, as a mad subject or a healthy subject."[18] If a schizophrenic person found himself at another time or place, his abnormality might be judged different. While he in contemporary society is categorised as schizophrenic, he might have been possessed by demons in another era. In each of these instances, he has the choice to subjugate himself to the truth proposed to him. He would constitute his subjectivity in light of what the structure of *veridication* predicates.

In later years, Foucault's focus shifted to the ethics of self. From studying how institutions affect what is considered true, he would start to look at the subject's ability to shape truth. Comparing his work on disciplinary power with his ethical work, he clarifies that his focus on "games of truth no longer involve(s) coercive practices, but a practice of self-formation of the subject."[19] The disciplines can be seen as coercive techniques to dominate the subjects' knowledge of themselves, while Foucault's ethics can be seen as resistance of coercive practices in establishing the relation of self to self. This ethical practice also includes active participation in the game of truth. Gros clarifies that in any given situation, the subject has a choice to produce the truth himself, or accept or submit to what is already considered true.[20] Foucault explains that in this refocus he leaves the analysis of "epistemological structures" and instead, focuses on "alethurgic forms."[21] This other analysis of truth is then irreducible to epistemology because it tackles a modality of truth that leads to the "ethical transformation of the subject."[22] It is a modality of truth that Foucault has studied in Ancient Greek texts, but appears to be almost absent from modern culture. The subject's active participation in constituting truth becomes an ethical endeavour for Foucault; it becomes part of care of self.[23]

In sum, it appears that Foucault's inquiry of truth is differentiated from a modern investigation of truth that looks for scientific evidence. What is important to understand is how Foucault treats truths as neither continuant nor timeless, but dependent on their historical reality and the subjects who asserts and reasserts them (and consequently constitutes themselves). Foucault's theory of the ethical formation of self can become an alternative to the natural and pre-societal ideal of the subject that the human rights discourse often assumes.

---

[18] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 290.
[19] Foucault, 282.
[20] Gros, *Michel Foucault,* 15.
[21] Foucault, *The Courage of Truth,* 3.
[22] Fréderic Gros, "Course Content," in *The Courage of Truth,* 344.
[23] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 285.

We thus leave the image of a truth concealed by power and arrive at a different conception of truth compatible with Foucault's thought. Now, that we have a clearer view of Foucault's truths, I shall move on to the questions of *Parrhesia.*

II) Parrhesia

The term *Parrhesia* is explored in two of Foucault's lecture series at *Le Collège de France*: *The Government of the Self and Others*[24] and *the Courage of Truth.*[25] The former explores the political aspects of it while the latter explores the ethical aspect. Foucault tries to explain what *parrhesia* entails on the outset, where he states that:

> There is always *parrhesia* when telling truth takes place in conditions such that the fact of telling the truth, and the fact of having told it, will, may, or must entail costly consequences for those who have told it.[26]

Parrhesia is used in different instances and has been treated in ancient Greek texts both as a "virtue, duty, and technique."[27] It is evident that Foucault wants to tackle the idea of *parrhesia* as different from a discourse, when he claims that *parrhesia* cannot be found in "discursive strategies."[28] Moreover, the focus of interest is the effect on the speaker rather than the effect on the person listening. This is exposed in the quote above, which specifies that the parrhesiast (the person displaying *parrhesia)* must be willing to risk his life in speaking the truth.

To enlighten the risk the parrhesiast is willing to take, Foucault makes a comparison between *parrhesia* and "a performative utterance."[29] A performative utterance takes place when the person speaking is performing an action whose effect is greater than the verbal assertion. Saying "I apologise" is performative in the sense that, at the same time as saying two words, one is undergoing the action of apologising. Saying "the sky is blue" is not performative, as the speaker would be stating a fact, and there would be no difference before or after he stated it. It may, of course, depend on the context, but normally this utterance would be an observation rather than to provoke an action. The main difference between a

[24] Foucault, *The Government of Self and Others.*
[25] Foucault, *The Courage of Truth.*
[26] Foucault, *The Government of Self and Others*, 56.
[27] Foucault, 43.
[28] Foucault, 55.
[29] Foucault, 62.

performative utterance and a normal utterance is that it will lead to a change of situation. Foucault provides an example of the chairman who declares the meeting open. It leads to a change: when the chairman says "I declare the meeting open", the meeting starts.

Foucault identifies three characteristics of a parrhesiastic utterance where; firstly, the speaker takes a risk of unforeseen consequences; secondly, the speaker affirms the truth; and thirdly, he has the courage to speak truly without fear of the effects it might lead to.
The first characteristic is illustrated by the distinction between *parrhesia* and a performative utterance. *Parrhesia* also leads to change, but in a different sense. According to Foucault, *parrhesia* introduces a rupture to the discourse that consequently "opens up to unspecified risk."[30] Unlike the performative utterance of the chairman that leads to a specific and predicted effect, *parrhesia* leads to "undefined eventuality."[31] The second characteristic is that the parrhesiast must always believe his utterance to be true. With an apology, the speaker does not necessarily need to mean it, but in saying "I apologise," he does apologise nevertheless. For an utterance to be *parrhesia,* Foucault says:

> The parrhesiastic enunciation is the affirmation that in fact one genuinely thinks, judges, and considers the truth one is saying to be genuinely true. The speaker makes a pact to be binded to the truth and to own its consequences.[32]

We see here that a second characteristic is that the speaker must believe what he asserts to be true. The third characteristic is the courage of the speaker. Any person, independent of position, is capable of *parrhesia,* as long as he has the courage to speak the truth and risk his life. In the example of the chairman, only the chairman, himself, has the authority to open the meeting. He holds this power based on his status. According to Foucault, a parrhesiastic utterance is both "risky and free,"[33] and Foucault describes the courage to speak the truth, despite the consequences, as an ethical duty.

Foucault's elements of *parrhesia* appear similar to activism. Activism is defined as "the doctrine that action rather than theory is needed at some political juncture; an activist is therefore one who works to make change happen."[34] Firstly, Foucault distinguishes between *parrhesia* and discourse by its performative nature, which seems to coincide with the

---

[30] Foucault, *The Government of Self and Others,* 62.
[31] Foucault, 62.
[32] Foucault, 64.
[33] Foucault, 66.
[34] Simon Blackburn, *The Oxford Dictionary of Philosophy* (Oxford: Oxford University Press, 2008), 5.

description of activism leading to change rather than theory. In the cases where activists inspire revolutions or are prosecuted, we could agree that their activism led to an unspecified risk. The second criterion, given by Foucault, is that the subject speaking must affirm the truth. It would be counterintuitive to entertain the idea that activists are fighting for a cause they do not at the same time believe in. The last element is that he must have the courage to risk his life. When engaging in political activism, activists are usually aware of the dangerous character of their campaigns. If we take Foucault's three criteria of unspecified change, truth and courage, and apply them to activist cases, we would arrive at the conclusion that many of these activist cases can be judged to be similar to *parrhesia*.

Foucault goes on to study the notion *parrhesia* in its historical realities, where we see how the term is developed from being strictly political to becoming philosophical. Firstly, he looks at texts from the fifth century Before Common Era (BCE), where he identifies a political use of the word. Then he identifies a philosophical or Socratic-platonic perception of the word found mainly in work from the fourth century BCE.[35]

a) Political Parrhesia

Foucault remarks that the "notion of *parrhesia* was first of all and fundamentally a political notion"[36] and it is described as the citizens' equal right to speak freely in the political arena.[37] To further study the notion, Foucault turns to Euripides' play *Ion* about a man's search to find the truth about his birth. Ion is the result of Apollo's crime of raping Creusa, an Athenian citizen. While Creusa left Ion to die as a baby, he is found, and grows up at the temple of the Oracle in Delphi. Creusa is later married to Xuthus, the king of Athens. Unable to conceive a child, Xuthus journeys to Delphi to seek advice. The Oracle tells Xuthus that the first man he encounters on his way out from his temple will be his son, and consequently Ion becomes Xuthus' adoptive son. Ion is not content in his new role until he knows the truth of his birth. He remarks that unless he can prove that he is of Athenian decent, he cannot practice *parrhesia*. The truth of Ion's birth will "enable him to exercise a fundamental political right."[38] In other words, the truth that Creusa is his biological mother is decisive for Ion to practice *parrhesia*, and it is only his mother and father who knows the truth and who can reveal it.

---

[35] Foucault, *The Government of Self and Others,* 340.
[36] Foucault, *The Courage of Truth*, 8.
[37] Foucault, *The Government of Self and Others*, 71.
[38] Foucault, 82.

In Euripides' *Ion, parrhesia* is described as a fundamental political right one has in virtue of being a citizen. Foucault underscores that *parrhesia* consists in more than a constitutional right, even though the right to speak freely is embedded in *politeia* – the state's political structure and its constitution.[39] We are introduced to the concept of *isēgoría.* In order for there "to be *parrhesia* there must be this *politeia* which gives each individual the equal right to speak (*isēgoría*)."[40] *Isēgoría* thus defines the constitutional and institutional framework that makes it possible to practice *parrhesia* as a free and courageous activity.[41] *Isēgoría* is a legal right; it is a positive law that allows citizens to speak. However, while any citizen has *isēgoría,* one only has *parrhesia* when speaking truthfully and courageously. Foucault remarks that there is a co-dependent relationship between political *parrhesia* and democracy. For a society to be a democracy, it needs *parrhesia.* However, one can only have *parrhesia* in a democracy where its constitution gives the equal right of *parrhesia* by means of *isēgoría.*[42]

There are four conditions of democratic *parrhesia* described in *Ion*; firstly, is the formal condition of the constitution and the political structure. To be able to practice *parrhesia,* the citizen must have access to the assembly and the political platform. Secondly, there is a *de facto condition* of ascendancy. The most gifted and virtuous citizens will naturally gain the authority to govern the city. The third condition is truth, that the person practising *parrhesia* is speaking a discourse of truth. Lastly, there is the moral condition to have the courage to tell the truth even though others might disagree.[43] The *parrhesiaist* must speak up even though he might anger the others and risk his own life. When these four conditions fail, democracy opens up for false truth-telling.

If we turn to political *parrhesia* to establish the merit of rights, we encounter a problem. *Parrhesia* is here only justified in a democracy because the democracy can only function if citizens practice *parrhesia,* and consequently participate in governing. This implies that other political structures have no need for *isēgoría* and *parrhesia.* Human rights, as we treat them today, are deemed to exist independently of the political structure of a society. If we follow the conditions of democratic *parrhesia,* it would suggest that only democracies need constitutional freedom of speech, and citizens in other political systems do

[39] Foucault*, The Government of Self and Others,* 82.
[40] Foucault, 157.
[41] Foucault, *The Courage of Truth*, 158
[42] Foucault, *The Government of Self and Others,* 155.
[43] Foucault, 168.

not. This description of *parrhesia* in *Ion* justifies the right to speak freely in a democratic structure, but leaves out its usefulness in non-democratic structures.

From the progression of Foucault's lectures, it is clear that he is not encouraging political *parrhesia.* At the start of *the Courage of Truth,* he even states that his realisation that *parrhesia* had its origin in the political constitution was an unexpected drawback.[44] Before he started his research on *parrhesia,* he had the impression that it was purely an ethical notion, and not that the origin was connected to a democratic constitution. On the other hand, his purpose becomes clear to aim for philosophical and ethical *parrhesia.* In Plato's *Republic,* the idea of non-virtuous *parrhesia* is introduced. *Parrhesia* is translated to "telling all", but in this instance, a person who practices *parrhesia* could be an "impenitent chatterbox."[45]

Parrhesia, as "freedom of speech given to everybody and anybody, true and false discourses, useful as well as bad or harmful opinions,"[46] becomes a danger to democracy. According to Plato, the democratic city, with its four conditions for good *parrhesia* and good government, will inevitably lead to its own dissolution. Democracy becomes dysfunctional when; firstly, anyone can speak, which means that it is not necessarily the best citizens who speak, and consequently, the *de facto* condition of natural ascendancy is not achieved. Secondly, instead of speaking what is the truth and what they believe to be true, citizens will speak the popular opinion. As democracy will be governed by conformity instead of a discourse of truth, the truth condition also fails. Lastly, when citizens speak popular opinions, there is no courage, and the citizens will only flatter and say what cannot offend others in order to secure themselves. So we see the moral condition fails as well. Plato illustrates that democracy inhibits rather than makes virtuous *parrhesia* possible. He asserts that a good political structure "must be founded on a true discourse, which will exclude democracy and demagogues."[47] In Plato's democracy, the citizens are too preoccupied with their own safety that they only achieve to flatter and speak what others want to hear, and it will lead to bad government.

While we should not so readily accept Plato's criticism of democracy, it is an unmistakable default of democracy that anyone can speak, and this freedom of speech can at times be harmful, by giving a space to dangerous and false discourses. Even in our society, several laws are put in place to limit the scope of a citizen's freedom of speech. While

[44] Foucault, *The Courage of Truth*, 8.
[45] Foucault, 10.
[46] Foucault, 36.
[47] Foucault, 46.

freedom of speech is essential to a democracy, it demonstrates that a society also has to regulate freedom of speech. If we were to talk about a democracy with absolute freedom of speech, it would possibly lead to Plato's concern. Whilst Euripides depicts a democracy where the parrhesiasts direct the rest of democracy through true discourse, Plato criticises democracies for allowing false discourse. A paradox created by the relation between democracy and *parrhesia* is that there can be "no democracy without true discourse, but democracy threatens the very existence of true discourse."[48] Democracy is necessary for *isēgoría* and the right to speak freely, but it also opens up for anybody to speak and voice popular opinion.

To identify the resemblance between *parrhesia* and rights activism, we encounter two issues if we use the political notion. Firstly, by applying the political notion of *parrhesia*, activism would only be justified in a democracy, as it is argued to result in good government. Secondly, if we consider political *parrhesia* to give merit to human rights as activism, and if Foucault would agree with Plato's diagnosis that democratic *parrhesia* is a danger to true discourse, then *parrhesia* only discredits human rights further rather than giving it merit.

b) Philosophical Parrhesia

Foucault demonstrates a change from a form of *parrhesia* practiced in the political sphere towards the ethical and philosophical sphere (the *ēthos*). The Socratic-Platonic *parrhesia* is mainly found in Plato's texts and Foucault identifies three main transformations from political to philosophical *parrhesia.* The first transformation results in a shift from constitutional rights to the focus on the individual's soul, as what grounds *parrhesia*.[49] This ethical-philosophical *parrhesia* can take place in any political institution and not only democracy. While the ethical-philosophical notion avoids the shortcomings of political *parrhesia,* the transformation makes philosophical *parrhesia* independent of the legal institution. The second transformation is that the purpose of *parrhesia* is not the good government of the city, instead, is it the healthy formation of the individual's *ēthos*. Third, *parrhesia* becomes a practice that constitutes and cultivates the self – it becomes an operation of self-care (*le souci de soi).*[50]

[48] Foucault, *The Government of Self and Others,* 184.
[49] Foucault, *The Courage of Truth*, 64.
[50] Foucault, 65.

Parrhesia is a modality of truth-telling. Foucault identifies three other fundamental modalities of truth-telling in Ancient Greece, which are prophecy, wisdom and knowledge or *tekhne.*[51] These modalities are different from *parrhesia.* Whereas the oracle delivers the prophecy in riddles and chooses what to hide and what to reveal, the parrhesiast speaks frankly without concealing anything. The sage shares wisdom, but has no duty to tell. The parrhesiast has a duty to speak the truth. Lastly, the teacher conveys knowledge. Where the teacher risks nothing, "the person who practices *parrhesia* risks death."[52] A teacher is only redistributing already accepted truth, but the parrhesiast invokes a rupture and change to the discourse.

The primary concern of philosophical *parrhesia* is the self. Foucault illustrates this in the case of Socrates. Socrates explains his reasons not to engage in political life, that "if one wishes to safeguard one's life, one must lead the life of a private individual."[53] Contrary to political *parrhesia,* now the individual is justified in keeping silent in the political sphere and does not have a duty to speak up in politics. We thus see that what is the primary concern is not the city, but the self. Socrates encourages others to engage in the practice of parrhesia to constitute "oneself in relation of self to self."[54] In the transformation from political to philosophical *parrhesia,* we gain the aspect of cultivating one's self.

Even though the philosophical *parrhesia* takes place in the ethical sphere, Foucault demonstrates that it has political effects. Plato argues that for philosophy to be complete, it must include action, and that it should not only include discourse.[55] Philosophical *parrhesia* is not only about telling the truth, it is also about living and implementing truth. Moreover, Foucault states that:

> This moral parrhesia, this ethical veridiction puts itself forward and justifies itself, in part at least, by its usefulness for the city and by the fact that it is necessary for the good government and safety of the city.[56]

The effect of philosophical *parrhesia* influences the political sphere. Even though we leave the political notion of the term, its political effect will still be present. In this view, *parrhesia* would be embedded in the ethical sphere, but will have visible "side-effects" in the

[51] Foucault, *The Courage of Truth,* 15.
[52] Foucault, 25.
[53] Foucault, 315.
[54] Foucault, 86.
[55] Foucault, 217.
[56] Foucault, 157.

political sphere. The problem is that if we were to follow Foucault's retreat to ethical practice in our inquiry of human rights, it would mean that rights claiming should be considered primarily an ethical practice rather than a political one. There is also the issue that philosophical *parrhesia* is independent of a political constitution and law, whilst human rights are primarily embedded in law. It could, therefore, be suggested that the ethical notion of *parrhesia* does not resemble human rights or rights activism.

c) *Parrhesia in Modern Philosophy*

Foucault touches on the role of *parrhesia* in modern culture, and traces the development from philosophical *parrhesia* to the Cynics' practice of *parrhesia,* into Christianity's inversed interpretation of self-care, as self-renunciation and asceticism. Foucault considers further the role of modern philosophy in the sixteenth century as criticisms against pastoral practices, and that it could be deemed assertions of *parrhesia*.[57] He claims on the contrary, that at the start of the nineteenth century "philosophy became a teaching profession"[58] and also, that "the question of true life has continually become work out, faded, eliminated and threadbare in Western thought."[59] I think we can conclude that Foucault believes *parrhesia* to be almost absent from the philosophical institution today. He would argue that when philosophy is a set of doctrines and theories, it is incompatible with the practice of *parrhesia*.

Even though Foucault claims that *parrhesia* as a modality of truth-telling has disappeared from modern society, he suggests that it can appear through the other modalities. He goes on to say that: "revolutionary discourse plays the role of parrhesiastic discourse when it takes the form of a critique of existing society."[60] Foucault entertains the idea that the practice of *parrhesia* to have been transformed into "the revolutionary life."[61] From Foucault's pessimistic description of modern philosophy, he appears to imply that *parrhesia* cannot be found in philosophy, but can take place in revolutionary and, what I infer could include, activist endeavours.

---

[57] Foucault, *The Courage of Truth*, 349.
[58] Foucault, 210.
[59] Foucault, 235.
[60] Foucault, 30.
[61] Foucault, 211.

III) Resisting Power Relations

We have discussed two virtuous forms of *parrhesia* in Ancient Greece. The first is grounded as a political right, and its purpose is the good of the city. The second is an ethical practice and its purpose is the formation of self. They both have the criteria of truth, courage and unspecified change. While Foucault asserts that *parrhesia* as a way of living is absent from modern society, he admits that *parrhesia* appears through instances where the subject is being critical of the current dominant discourse or political structure. It is time that we turn back to Foucault's notion of power and his power relations to see how *parrhesia* may fit in.

Foucault argued that power operates in networks of multiple power relations that continuously confront each other. In these networks, one can find strategies that attempt to provoke and challenge each other and the dominant strategy. Foucault writes:

> Every strategy of confrontation dreams of becoming a relationship of power, and every relationship of power leans toward the ideas that, if it follows its own line of development and comes up against direct confrontation, it may become the winning strategy.[62]

Power relations can be regarded as the continuous provocation (or rather a wrestling match) between adversaries. The winning adversary will always subsist, if one adversary repeatedly wins over those whom it confronts: it will become dominant. Thus, domination comes into being "by means of long-term confrontation between adversaries."[63] Rights have been constructed and gained power through triumphant power struggles, and as human rights become a dominant discourse, it might also risk enforcing dominant power relations.

To evade the problem of dominant power relationships, one could argue that Foucault uses the notion of a *right of the governed*.[64] The person in a dominant position is governing the other. When claiming a right based on this unfair power relationship, Foucault argues that one is "establishing a right marked by dissymmetry, establishing a truth bound up with a relationship of force."[65] Foucault's conception of a right is thus a claim someone who is in a submissive position of a power relation makes on the person in the dominant position. Foucault's invocation of a right of the governed "signifies that there is no longer a reference

---

[62] Foucault, "the Subject and Power," 794.
[63] Foucault, 795.
[64] Michel Foucault, "Va-t-on Extrader Klaus Croissant?" in *Dits et Ecrits III, 1978-1979*, eds. Daniel Defert and François Ewald (Paris: Gallimard, 1994), 362.
[65] Foucault, *Society Must be Defended,* 54.

to an abstract point of origin,"[66] instead it refers to an actual relation between a dominant subject and a subordinate subject. Foucault's conception would amount to that:

> Rights (are) never anything more than an actual, present relation between those who govern, and the governed, a relation where the measure of the "too little" freedom that exists is given by the "yet more" freedom which is demanded.[67]

The right of the governed represents the freedom that is exercised in demanding more freedom. It is to protest against "too much governing."[68] Chevallier underscores that the formulation of a right of the governed "escapes the vice-like grip in which modern legislative texts tend to confine the right of resistance."[69] Chevallier claims that human rights documents make assumptions about what a human is and wants, but a *right of the governed* only addresses an unequal power relation. Rights can thus be conceptualised as tools to reverse and resist power relations. However, it does not provide an incentive to why one ought to resist the dominant power relations. In formulating his theory of power, he portrays resistance of the governed as a natural fact, instead of an ethical reason to fight for rights. In other words, the subordinate person in a power relation will always try to resist, and the dominant person will always coerce or direct the governed person. This refers back to a lack of normative reasons to engage in resistance, mentioned by Taylor and Fraser.[70] If power relations are everywhere, how can one distinguish between a good power relation and a bad power relation? Foucault seemingly lacks the framework that would justify resistance.

The need for an incentive or normative reason to engage in resistances towards dominant power relations might be found in the study of *parrhesia*. Even Foucault's rights activism could be argued to take the shape of *parrhesia*. His rights activism can be demonstrated through articles, statements, open letters and commentaries published in journalistic magazines and newspapers. In December 1972, a commentary appeared in *Le Nouvel Observateur* concerning President Pompidou's decision to allow the death penalty to be carried out on Buffet and Bontems. Foucault criticised that "the penitentiary administration

---

[66] Chevallier, "Michel Foucault and the Question of Right," 180.
[67] Foucault, *Naissance de la biopolitique: Cours au Collège de France 1978-82*, (Paris : Gallimard, 2004), 64, quoted in Chevallier, "Michel Foucault and the Question of Right," 180.
[68] Chevallier, "Michel Foucault and the Question of Right," 180.
[69] Chevallier, 180.
[70] See Taylor, "Foucault on Freedom and Truth" and Fraser, "Foucault on Modern Power: Empirical Insights and Normative Confusions."

overstepped the legal system."[71] In the same paper, he co-signed a statement in favour of the legalisation of voluntary abortion in November 1973,[72] as well as the open letter to the Iranian Prime Minister Mehdi Bazarghan about a government's duties.[73] He published an article named "Useless to Revolt?" in the French newspaper *Le Monde* in 1979, where he looked at the purpose of revolution.[74] The *parrhesiast* has a duty to tell the truth, and is always running the risk of the other person's negative reactions. Foucault's political activism takes this shape when he criticises governments and political leaders.

In addition to his journalistic activism, Foucault held a speech at the United Nations in Geneva[75] where he proclaimed that "there exists an international citizenship that has its rights and its duties"[76] and this citizenship "obliges one to speak out against every abuse of power."[77] He here utilises language one would think was irreconcilable with his philosophical thought such as the "absolute right to stand up and speak to those who hold power."[78] It could also be argued to echo his *right of the governed.* However, when he refers to rights and duties of an international citizen to speak up, it reflects the sentiment of political *parrhesia.* It is as if Foucault took the role of the democratic parrhesiast to speak up in the political arena and direct others. The difference is that the Greek city has been replaced with the United Nations. Furthermore, another important project co-founded by Foucault, is the *Groupe d'Information sur les Prisons* (GIP). GIP's objective was to provide a platform for prisoners to speak and share their experiences and injustices.[79] This did, in many ways, give an opportunity for the prisoner to practice *parrhesia.* In the case of GIP, Foucault invested efforts in giving the weak a possibility to stand up and speak against the powerful "who misuses his own strength."[80]

Foucault's rights activism does not take the shape of violent protests, but he attempts to counsel and direct the actions of governments and people. One could argue that his

---

[71] Michel Foucault, "Pompidou's two deaths" in *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power*, ed. James D. Faubion (London: Allen Lane, 2001), 421.
[72] Michel Foucault, "Summoned to Court" in *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power*, ed. James D. Faubion (London: Allen Lane, 2001), 425.
[73] Michel Foucault, "Open Letter to Mehdi Bazargan" in *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power*, ed. James D. Faubion (London: Allen Lane, 2001), 442.
[74] Michel Foucault, "Useless to Revolt" in *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power*, ed. James D. Faubion (London: Allen Lane, 2001), 449-453.
[75] Michel Foucault, "Confronting Governments: Human Rights" in *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power*, ed. James D. Faubion (London: Allen Lane, 2001), 474-475.
[76] Michel Foucault, "Confronting Governments: Human Rights,"475.
[77] Michel Foucault, 475.
[78] Michel Foucault, 475.
[79] Gros, *Michel Foucault,* 10.
[80] Foucault, *The Government of Self and Others,* 98.

activism resembles Socrates' *parrhesia,* where the duty is to tell the truth to the one governing, even though the truth will be uncomfortable to hear, and he will risk the ruler's rage. Rights are not in themselves embodying *parrhesia,* but *parrhesia* is asserted when Foucault employs, tests, questions and criticises the rights discourse. When Foucault engages with the questions of rights, he is not reiterating that these specific rights are fundamentally emancipating. Foucault is, on the other hand, taking a parrhesiastic standpoint towards rights, which is an empowering practice. According to Foucault, there is a fundamental relationship between "the production of truth (*alētheia*), the exercise of power (*politeia*) and the moral formation (ē*thos*)."[81] This fundamental relationship between truth, power and the subject is what shapes the ethical dimension to power relations.[82] By questioning truths and challenging power relations, the parrhesiast will impact the ethical formation of the self.

IV) The Ethical domain of Rights: Response to the Rejection of Disciplinary Coercion

Rights-activism on its own cannot prove the merit of human rights because we tend to think of rights as outside institutions. A discourse of rights can resist the current power relations, but they may also construe and constitute the subjects who invoke the discourse. In the previous chapter, I identified three issues that would discredit human rights because of Foucault's conceptualisation of power: firstly, there is no absolute emancipation from power; secondly, power produces, not only represses truth; thirdly, disciplinary power undermines legal rights. If we were to consider rights-activism in terms of *parrhesia,* we take into account the subjects that are embedded in social structures. The merit of rights would then be founded on the ethical practice of *parrhesia* and its effects of care of self. Chevallier underscores that claiming one's rights is to resist the dominant power relations and "must manifest at the same time a reflected form of subjectivity."[83]

If we turn to *parrhesia,* rights may be considered empowering. It might be misconstrued to use the term emancipatory, as this notion implies an absolute and final liberation. Foucault argues that to practice one's freedom is the practice of ethics,[84] and *parrhesia* is an action that is free. If claiming a right is to practice *parrhesia,* the right has merit because in claiming the right the subject is practising his freedom. In the question of

[81] Foucault, *Courage of Truth,* 68.
[82] Foucault*,* 350.
[83] Chevallier, "Michel Foucault and the Question of Right," 183.
[84] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 284.

resistance, Foucault claims that there is always a possibility to resist in some way, even though he does admit that, in some power relations, the only form of resistance possible is to take one's own life. In the article "Useless to Revolt?" this freedom to resist is underscored when he states that, when a people choose to revolt, they "prefer the risk to death to the certainty of having to obey."[85] The practice of freedom is again emphasised in that freedom cannot be achieved once and for all. Freedom is not established in one liberating act.

> A convict risks his life to protest unjust punishments; a madman can no longer bear being confined and humiliated; a people refuse the regime that oppresses it. That does not make the first innocent, doesn't cure the second, and doesn't ensure for the third the tomorrow it was promised.[86]

While resistance is omnipresent and there are possibilities for resistance everywhere, it is a continuous effort. In a case where a person is fully paralysed, one could claim that the person has no possibility of resistance, as he is incapable of performing any action that would change his situation. There are some, however, who would argue that this state of living could not amount to a free life. Nevertheless, to relentlessly question, and thereby resist dominant discourses and power relations, it appears that the subject is practising his freedom. The subject, who engages in right-activism, and consequently practices *parrhesia*, participates in the game of truth.

The parrhesiast participates in the game of truth, but with attention to Foucault's power-knowledge relation, how can the parrhesiast be sure that the truths are his own, and not produced by the disciplines and what he has internalised as his own truths? In *Discipline and Punish* we gain the impression that the dominant power structure has the monopoly of truth, but I believe the solution lies in the courage of *parrhesia.* The conditions of *parrhesia* are: firstly, the truth, secondly, the unspecified change, and lastly, the courage to risk one's life. Even though we could not know whether the truth was of the ethical form or produced by power, the two other conditions cannot go together with dominant truth. If the truth that is being uttered leads to a change, it must be because it is different from the hegemonic discourse. If the truth involves a risk for the speaker, it must mean that it opposes the hegemonic discourse. A truth that does not lead to any change, and does not pose a risk, could be a truth that is produced by a system of power, but because it fails two of the conditions, it does not qualify as *parrhesia*. Not only does this respond to the rejection that we have no way

[85] Foucault, "Useless to revolt?" 449.
[86] Foucault, 452

of knowing what a right should entail, it further addresses Foucault's major concern of his power-knowledge relationship. If knowledge is implicated in power relations, it means that the inferior class cannot use the accepted knowledge to disband power relations. Foucault is generally critical of religion and any dogmatic institutions of thought. It seems reasonable to assume that Foucault would refrain from writing a rigid normative theory. If it ever gained the position of a dominant theory, it would become beneficial to the powerful group. When Foucault talks about the right of persons who are being governed, he is only making reference to an uneven power relationship as the foundation to claim rights. He thus avoids a detailed and uncompromising methodology for what grounds a right, except for that of a relational position. Even though all theories might be misused, the scope of exploiting Foucault's relational rights is narrow, compared to other normative theories. When the inferior person gains a dominant position, the same person can no longer hold this right.

In accordance with the parrhesiastic ideal, there would be cases of rights activism that confirm an attitude of *parrhesia* and other cases that would be based on other non-parrhesiastic reasons. After all, the first persons initiating a revolution might practice *parrhesia,* but people will also take part as a result of the bandwagon effect. Citizens might join a political movement out of conformity or uninformed choice, and their actions would not likely qualify for *parrhesia*. Therefore, it is possible to have examples of activism that can be considered *parrhesia*, and examples that are not: it depends on the speaker and his attitude to the cause.

There is an issue if we deem the merit of human rights activism to be the practice of *parrhesia*. It is that it can only be emancipating for the acting individual. In this view, one cannot claim another person's rights and be sure that the right empowers them at the same time. It can only be the person who is claiming these rights that is undertaking the practice of freedom. On the contrary, if we adopt this view, it explains the patronising side-effect of the human rights project. The concern of self includes a concern for others because one cannot care for oneself in a vacuum, detached from one's environment. In claiming rights of others, one could be decreasing the coercive techniques that will enable them to practice care of self. However, the rights-claimer must be cautious, as his activities might end up dominating the conduct of the people he attempted to liberate, resulting in reversed effects. If we look back at the GIP, the project was said to give rise to the increased prisons revolts from the end of 1971 to the beginning of 1972. GIP was shortly thereafter disbanded. Despite its aspirations of

providing better conditions for the prisoners, the initiative can be argued to have led to worsened results when the government took measures to control the prison situations.[87]

V) The Right of the Governed and the Insolent Child

Parrhesia coincides with human rights insofar as the subjects who engage in human rights are resisting a power relation in engaging with rights. Resisting a power relation would in many cases lead to an unpredicted change and will need courage. Rights can be considered to have an emancipatory or empowering effect in that the subject has resisted the domination imposed on him. So when Foucault coins this *right to be governed*, it must be the right to struggle against the power relation the subject finds himself currently in. However, this view seems intuitively inapplicable to the more rudimentary or culturally accepted power relations. The master orders his slave: "Finish the work I have assigned you", and the slave says: "No, you have no right to demand me to do this." I think we can all agree that this is a warranted claim. If we take the relationship between the parent and the child, the parent will say: "You must finish your chores" to which the child answers: "I do not want to." In this instance, we would think it poor parenting if the child were not coerced to finish his chores. In the two first examples, the observer would think the resistance against the dominant part as fair and even brave, while in the case of the child, the subject resisting would be judged to be insolent and disrespectful.

I think there are two issues we can extract from the comparison between these cases. Firstly, there is the question that illuminates the socially constructed character of human rights. These examples of power relations could be argued to describe exactly the same situation; one person orders something and the other person disobeys. However, we consider the parent-child relationship to be justified. This view would argue that because we judge the examples from our subjective perspective, which is conditioned on our self and environment, we categorise the first example to concern human rights, while the example of the difficult child does not. Our social predisposition would have us regard the child as less autonomous than the adult. The child is not categorised as a person who is yet rational and responsible, and therefore we are warranted in directing his conduct. We take for granted the claim: "We, the adults, know best." Imagine the case where then the child is thirty years old; we would immediately question the authority of the parent. We are no longer talking about the same

[87] Gros, *Michel Foucault,* 10.

power relation that is accredited by social norms, and thus, this power relation becomes unacceptable. Additionally, if the parent is abusive and goes beyond what is considered the acceptable power relation between a parent and a child, it would also be considered unacceptable and a human rights issue.

This first issue points straight back to Foucault's critique of human rights. When we evoke human rights, there is a problem in that we prescribe a number of qualities and attributes to the subject whose rights are threatened. One imposes self-knowledge on the rights-holder or the non-rights-holder. Rights, then, sustain a system of exclusion and inclusion. In our society, the persons of fewer rights are generally criminals and people who do not satisfy the criteria of an accountable and rational person. In the latter category, we have children and persons with mental disabilities. Would Foucault argue that one should still resist any power relation? Let us treat these systematically.

In his investigation of the penal system, Foucault criticises the juridical system to justify the maltreatment of prisoners. The justification of imprisonment is that the criminal suspends his own rights when he violates the laws. In this view, the penal system has a societal function. The person who violates the norms of society demonstrates that he does not play by the same rules. If the person does not want to play by the same rules as the rest of the group, one could argue that he does not want to be part of the group or society. In Greek and feudal law, it was common to exile the criminal. In our modern society, exile and, in most cases, death penalty is not an option. There is therefore put in place mechanisms that take care of the prisoner who is not trustworthy, to either contain him or rehabilitate him. Modern penal codes could be said to assure that citizens will not be a threat to the society's norms. It is natural that society must demand atonement in order to repair the mistrust that has been created. If I trusted you with a large sum of money for safekeeping and you took the money for yourself, our relationship would be dysfunctional until you atoned for your wrongdoing and proved to me that I could trust you again. I think the case of the criminal is similar; the criminal will violate the laws, which means that society cannot trust him and some of his rights will be suspended until he can prove that he is trustworthy to follow the rules. The procedures to reinstate this trust ought to be constructive and proportional to the crime, and I believe Foucault's criticism consists in the unwarranted exploitation of prisoners. The criminal administration in France, in the 1970s and 1980s, can be argued to have given unfair disadvantage to the prisoners. The prison institutions could be said to abuse its position in the

power relation. This illuminates a disproportion of the power relation, where the prisoner was left with little to no freedom.

The other category consists of children, persons with mental disabilities and other people who are being patronised. In many cases, these people may have legal guardians with the authorisation to make decisions for them. Still, the subordinate position of the ward does not necessarily give us reason to conclude that these power relations are not beneficial to him. In many cases, one could argue that the role of the guardian enhances the agency of the ward. The guardian can prove to be useful when he makes the necessary sound and rational decisions in place of the ward's irresponsible wishes. If a child is left with a large sum of money, we could argue that allowing the child's free access to the money will result in bad management of the account. The need for a guardian is warranted to secure sensible management of the inheritance. On the other hand, this argument would support the proposal that any person, either adult or child, should have a person in charge of their economic affairs if they displayed poor management of their finances. In the question of guardianship, it is difficult to ascertain when it is justified that another person makes decisions for them.

If we look at Foucault's examples of hysteria, homosexuality and the clinical practice, the conditions of agency are fabricated by knowledge. Psychiatric experts observe children and persons with mental disabilities, and determine their level of agency, and how much freedom should they be allowed. If the person's decisions coincide with our own, they are judged to be able to make their own decisions. If they have a wish that goes against normality, it will be shut down, because it is irresponsible and irrational. If the parents punished the child for expressing homosexual feelings, we would praise the child for speaking up. If the child starved him- or herself in resistance to the parents, the child would be sent to a doctor. The child's rebellion would not be taken seriously. These examples illustrate that in the cases we agree with the child's resistance, it is because the situation corresponds with our own reasoning. What if our intuition and rationality are wrong? Not long ago, parents were allowed to hit their children, while today it is considered abusive. The judgement of an acceptable or abusive power relation is dependent on concurrent social culture. It is, therefore, a difficulty in distinguishing between when the governed person must be directed and when they should be given room to make their own decisions. Human rights issues are arguably not only relevant to political disputes, but can be traced down to the fibres of social life, although what qualifies as a human rights violation is decided by culture.

The second issue is that we must manage to distinguish what are considered human rights issues and what are everyday resistance in power relations. I think we can agree that human rights do not involve all power struggles, as they do not involve that of the insolent child and the parent. Foucault states that wherever there are social relations there are power relations, but it would be an amplification to claim that wherever there are power relations, there are human rights issues. Human rights are only involved when there is a power relation that is considered abusive. As explained in the previous issue, the judgment of what is abusive is dependent on social culture. Unacceptable relationships are made illegal through law. Similarly, rights are ensured through the sphere of law, and why we choose to engage with rights is solely because of the executive power they gain as legal rights. In this case, we must investigate the nature of legal rights and the legal institution to know whether these legal rights are empowering in the way that *parrhesia* justifies its commitment. This chapter looked at *parrhesia* as an ethical incentive to engage in activism, but *parrhesia* cannot account for the legal institution where rights are embedded, enshrined, realised and guaranteed. I shall now turn to the study of rights in its juridical context.

4 On the Question of Law

In the last chapter, we looked at *parrhesia* as a form of activism that could possibly restore and re-establish the importance of rights. If we understand the merit of rights activism in terms of *parrhesia* and the ethical practice of self*,* we manage to account for the elements that would otherwise have forced us to reject rights altogether.

Parrhesia can, firstly, solve the issue of rights' emancipatory potential. A person claiming rights can be demonstrated to take a *parrhesiastic* attitude. If we reconceptualise rights in terms of *parrhesia,* instead of liberation from oppressive power, we can retain the empowering merit of human rights. The activity of *parrhesia* is in itself an empowering practice. Within this framework, rights become empowering when the individual resists dominating power relations and takes charge of his own subjection. This means that to fight for the rights of others will not necessarily lead to their emancipation. In this view, the person fighting for the rights of others may limit the dominating powers on the other persons. These solidary efforts will then enable the subjugated persons to more easily practice their freedom. Still, *parrhesia* is foremost an ethical and personal commitment that one must undertake oneself. The saviour may remove the slave's chains. Without the chains, the possibility to practice one's freedom is certainly more accessible. However, if the slave subsequently follows the orders of his saviour, it could be argued that he is now, just as he was before he was freed from his chains, equally incapable of practicing his freedom. Whilst the old master dominated with physical coercion and fear, the new master entices with words. The risk of dominating persons by other means than physical power is related to Foucault's critique of disciplinary power, whereby he states that disciplined individuals internalise and subject themselves to the truths that are imposed on them. If rights have merit only insofar they embody *parrhesia*, it can account for why rights movements tend to have a paternalistic element. *Parrhesia* can only guarantee empowerment of the person who undergoes this practice. When activists fight for the rights of others, they also tend to direct their conduct.

Secondly, Foucault's ethical aspect of *parrhesia* has the possibility to fill the void left by rejecting natural rights. This void can be described as nihilistic. Without a normative theory that grounds them, rights appear to have no merit or function. By turning to theories of the ethical formation of self, Foucault allows the subject a reason to engage in rights activism. In challenging power structures, the subject participates in Foucault's "game of truth" and takes an active role in forming discourses. By participating in forming discourses, the subject

takes care of his self. The practice of care of self (*le souci de soi*) can be argued to constitute a form of the subject's authentic self. This new image authenticity can possibly replace the depiction of natural man.

Lastly, the third critique to the discourse of human rights was that disciplinary power undermines the role of law. Foucault argues that juridical models do not grasp how power operates in modern society and that one has to rethink power in terms of disciplinary power. One could assert that if we follow this line of argument, it would mean that in order to change the existing power structures, human rights have to be embedded and formulated in terms of discipline and not law. If we look at rights in terms of *parrhesia*, rights become a personal struggle that takes place in the ethical, rather than the political sphere. *Parrhesia* can be seen as an ethical activity that resists disciplinary mechanisms, and therefore, is independent of the political and juridical sphere. It would appear that we evade this challenge to human rights, because *parrhesia* addresses power relations and is not coded in law. However, in the end of chapter three, by turning to different examples of power struggles, I demonstrated that not every uneven power relation qualifies as a human rights issue. The legal implementation and legislation of rights is partly what gives rights their force and merit. Rights are assured and managed through a juridical apparatus, and without this, one could argue that they are just empty wishes. We cannot ignore the evident fact that human rights are embedded in a system of law. *Parrhesia* cannot account for the juridical practice of rights, which is why this thesis turns to the question of what shape law takes in disciplinary society.

Foucault has been criticised for marginalising the role of law. However, my interpretation is that he mainly criticises natural law and social contract theories, and I will argue that by looking at legal positivism, we evade Foucault's alleged criticisms of law. I shall show that, by looking at Herbert L. A. Hart's legal theory, jurisprudence is rather a natural consequence of society. Law is a ratification of norms. It is a mechanism that formalises power and takes different shapes depending on the current power structures and discourses. From this point of view, human rights that become inscribed in law are the formalised effect of a dominating discourse.

I) Revising the Rejection of Law as the Rejections of Social Contract Theories and Natural Law Theories

Gary Wickham and Alan Hunt's *expulsion thesis*[1] argues that Foucault has given a marginalised place of law in his theories of power relations. Hunt has pointed out that Foucault's central work on disciplinary power depicts law as marginal and secondary to disciplinary technologies. Ben Golder and Peter Fitzpatrick, on the other hand, state that Hunt and Wickham's *expulsion thesis* is a critical, if not incorrect, interpretation of Foucault's thought.[2] This is supported by Hunt's remark, that due to the fact that Foucault's lecture "Truth and Juridical Forms" was inaccessible in English at the time he developed the *expulsion thesis*, "the nature and role of the 'juridical' did not receive the attention it deserved."[3] Even though Golder and Fitzpatrick develop a different interpretation of Foucault's thought on law, there are several sections in Foucault's central work on disciplinary power that sustain the e*xpulsion thesis*. Foucault writes:

> We must eschew the model of Leviathan in the study of power. We must escape from the limited field of juridical sovereignty and state institutions, and instead base our analysis of power on the study of the techniques and tactics of domination.[4]

The model of *Leviathan* refers to Hobbes political thought, and he is considered one of the first philosophers to write about social contract theories. *Leviathan* tells the story about savage man in a state of nature, and how he enters society to avoid a "war of every man against every man."[5] One could argue that Foucault encourages the reader to either reject law in general or to let go of the conception of law as a single contract between a sovereign power and an individual. Hunt claims that Foucault "ignores the significance of the state and other forms of centralized and institutionalized power."[6] The *expulsion thesis* interprets Foucault to reject law in general. Hunt claims, firstly, that Foucault's "project of redirecting the study of

[1] Alan Hunt, "Foucault's Expulsion of Law: Toward a Retrieval," in *Law & Social Inquiry* 17, no. 1 (Winter, 1992): 1-38; Hunt and Wickham, *Foucault and Law.*
[2] Golder and Fitzpatrick, *Foucault's Law*, 12-13.
[3] Alan Hunt, "Encounters with Juridical Assemblages: Reflections on Foucault, Law and the Juridical" in Golder, *Re-reading Foucault: On Law, Power and Rights* (Oxon: Routledge, 2013), 64.
[4] Michel Foucault, *Power/ Knowledge: Selected Interviews and Other Writings 1972-1977,* ed. Colin Gorden (Brighton: Harvester Press, 1980), 102, quoted in Hunt, "Foucault's Expulsion of Law" 8.
[5] Foucault, *Society Must Be Defended,* 89.
[6] Hunt, "Foucault's Expulsion of Law,"11.

power has the effect of displacing law."[7] Foucault describes law the major form of power in pre-modern society, but as "displaced" in modern society by the arrival of disciplines. Secondly, Hunt argues that Foucault's perspective places discipline in opposition to law,[8] and that they cannot be conceived as two equal modalities of power that coexist to strengthen or limit each other. Thirdly, Hunt claims that Foucault gives "law an increasingly subordinate or support role."[9] Hunt interprets law to be secondary to disciplinary mechanisms in Foucault's modern society, as Foucault reasons in *Discipline and Punish* and *History of Sexuality* that disciplinary power has infiltrated and undermines the legal institution.

In sum, Hunt argues that Foucault's account has the effect of displacing law, making law in conflict with the disciplines and lastly, undermining the function of law. These points result in Hunt's conclusion that Foucault's account is "inadequate to grasp the complex trajectory of both pre-modern and modern law."[10] It is, here, evident that Hunt assumes an optimistic conception of law; as a system that has the potential to limit excessive use of power and to ensure just and legitimate exertions of power. He argues that one should be cautious "in assuming that there is a necessary linkage between the role of legal norms and processes of normalization."[11] It is evident that Hunt prescribes a greater role to law then what Foucault appears to do in his works. Despite Hunt's reasoning, the juridical institution and the establishment of laws cannot be isolated from the versatility of disciplinary power.

In the citation above, when Foucault states that we must avoid Hobbes' model of power, he claims that this model is inadequate to analyse power in modern society. Foucault criticises Hobbes' theory of how savage man enters society by means of a hypothetical contract where he gives up his natural rights in exchange for protection. Foucault has also in his works questioned the political theories of Rousseau and Locke. Foucault is critical of the model of power that is assumed by Locke, Rousseau and Hobbes, where power is so roughly depicted that it can be coded into law. Foucault would arguably insist on a model where knowledge is recognised as constituent of power relations. Moreover, the criticism of the *juridical model of sovereignty* can also be argued to direct itself towards normative theories. Instead of looking at theories of law that prescribes normative standards, a purely descriptive account of law might be compatible with Foucault's thought.

---

[7] Hunt, "Encounters with Juridical Assemblages," 74.
[8] Hunt, 74.
[9] Hunt, "Foucault's Expulsion of Law," 11.
[10] Hunt, 18.
[11] Hunt, "Encounters with Juridical Assemblages", 74.

As demonstrated in chapter one, Foucault's notion of disciplinary power refutes natural right theories and social contract theories, but that does not necessarily mean that he refutes law altogether. Foucault's methodology is to situate notions in their historical circumstance, which should apply to the question of law as well. Chevallier underscores that one has "to recognise that the guarantees offered by law are always produced within a historical and strategic setting."[12] Paul Patton reiterates Chevallier's observation when he proposes to "treat rights as a consequence of the social relations that obtain between individual and collective agents."[13] Foucault argues that concepts come into being through history, and legal concepts and ideas must also be a result of social relations. If we turn to other legal theories, we might better illuminate how law operates in relation to Foucault's notion of power. Legal positivism is a branch of legal theory that defines what law is, based on what is treated and recognised as law. It does not look for *a priori* and theoretical justifications for the validity of law, but generally argues that what makes law is because we treat it as law. Legal positivism would, therefore, not seem *prima facie* to be in opposition with Foucault's main theories.

Furthermore, Foucault was once asked by René-Jean Duprey to present a philosopher's perspective on the topic of the future of international law in a multicultural environment.[14] As Foucault was in the United States at that time, his assistant François Ewald was given the opportunity to present his own view with reference to Foucault's thought. In his presentation, Ewald points out that we have observed a transformation of the legal system from having a contract-based function to a consensus-based function. In light of this transformation, he argues that we can no longer perceive laws as to rely on morality or natural rights, and as such: "we are condemned to positivism."[15] Ewald situates Foucault within positivism and identifies three elements of Foucault's philosophy that would contribute to this topic. Firstly, Foucault's historical analysis shows that knowledge is not absolute, but becomes true within the structure it is formulated. Secondly, Foucault's philosophical approach could be considered critical positivism, because it illuminates the relation between knowledge and power. Laws must also be created by power relations, and allows the possibility to engage with and change law. Thirdly, Foucault's philosophy addresses

[12] Chevallier, "Michel Foucault and the Question of Right," 177.
[13] Paul Patton, "Historical Normativity and the Basis of Rights" in *Re-reading Foucault: On Law, Power and Rights*, ed. Ben Golder (Oxon: Routledge, 2013), 190.
[14] François Ewald, "Droit: Systèmes et Stratégies", *Le Débat* 4, no. 41 (1986): 63-69.
[15] Ewald, "Droit: Systèmes et Stratégies," 2. My translation: "nous sommes condamnées au positivism."

strategies of power, which is useful to understand juridical issues and transformations.[16] Ewald concludes that the transformations we are observing in law might make the foundation of a new juridical organisation. The seminar was brief, but it nonetheless opens up the possibility to read Foucault's works in conjunction with legal positivist thought.

II) Towards Contemporary Theories of Legal Positivism

Although Foucault's work on law cannot compare to his extensive work on power, his lecture series "Truth and Juridical Forms"[17] sheds light on the topic of law. Here Foucault presents a historical evolution of juridical institutions from the sixteenth century to the eighteenth century as well as its evolution in Ancient Greece. These lectures provide a "sociological approach to conceptualizing juridical forms,"[18] according to Chevallier. One could argue that Foucault takes a similar approach to laws as positivism, as he describes how they appear through history and as social practices.

In comparison to social contract theories and natural law theories, legal positivism is a descriptive account of law. While social contract theories and natural law theories tend to propose a theoretical, and sometimes normative, foundation for what law is, legal positivism only attempts to describe what can be observed. According to legal positivism, a rule is a law as long as the citizens recognise it as law. Whether the law is righteous or good is irrelevant to the question of its validity. John Gardner argues that a law is valid based on the fact "that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it."[19] This theory would uphold that a dictatorship, where its laws legitimise the dictator to murder his citizens without reason; is still a system of law. Legal positivism argues that laws are separated from morality and do not depend on normative justifications for its validity.

According to legal positivism, laws are thus source-based and not merit-based. This being said, a system of law is indirectly based on morality or public opinion. Morality might not be a necessary or sufficient condition for valid laws, but it is practically necessary that enough members of society endorse the laws, in order to enforce the coercive orders and to assure the functions of the legal system. Hart writes that law must respect what is "considered

[16] Ewald, "Droit: Systèmes et Stratégies," 4.
[17] Foucault, "Truth and Juridical Forms."
[18] Chevallier, "Michel Foucault and the Question of Right," 172.
[19] John Gardner, "Legal Positivism: 5 1/2 Myths," *American Journal of Jurisprudence* 46, no. 1 (2001), 199-227.

the minimum content of natural law."[20] This minimum standard is decided upon the culture of a society, and only refers to the fact that citizens must personally have more reason to follow laws than to break them, or it would result in a rebellion or uprising, as seen in the French Revolution. While some legal positivist theories argue that laws are merely coercive orders, Hart argues that the legal system must entail more than coercive orders. There must be enough people to ensure the enactment of a given law, and it would be practically impossible for them to be coerced to do so. If people are merely coerced to follow laws, then there must be someone who is coercing, and the people in charge of coercing must either endorse the laws or be themselves coerced to coerce laws. If laws were only about coercion, it would imply an infinite regression of persons coercing each other to follow the laws. It is therefore necessary for a number of people of a society to accept and endorse the laws.

I believe that Hart's assertion, that laws cannot merely be coercive but also affect people's behaviour, can contribute to a better understanding of the interplay between law and Foucault's disciplinary power. Hart prescribes law a normalising function that would seem comparable to Foucault's disciplinary power, as it is a normalising power. I do not intend to claim that Foucault describes himself as a legal positivist or that if he were to formulate a theory of law, that it would bear an unmistakable resemblance to Herbert L. A. Hart's legal positivism. What I will, however, argue is that Hart's theory is surprisingly compatible with Foucault's theory. By merging these two different philosophical thoughts, and by looking at another descriptive and primarily non-normative theory of law, it can be demonstrated that Foucault's work is not a complete rejection of the juridical institution.

III) H. L. A. Hart's System of Laws

Legal positivism aims for a sociological and descriptive approach to law and argues that every community has established rules that are differentiated from morality. Hart argues that in small groups, there is no need for a complex legal system, as individuals act on the same norms. Hart describes what pre-legal society would look like if the legal system would solely consist of primary rules. By "primary rules," he describes rules that impose duties.[21] These rules, or norms, would regulate the conduct of the community's members according to Hart. Furthermore, in small communities the legal norms could be considered indistinguishable to moral norms. In these small-scale situations, legal systems would not be

[20] Herbert L A Hart, *The concept of Law,* 2nd ed. (Oxford: Clarendon Press, 1994), 193.
[21] Hart, *The Concept of Law,* 80-81.

necessary, as the group has the ability to collectively and instantaneously decide on which rules to follow and how to punish rule-breakers.

When a community becomes larger, the impossibility of frequent interactions between individuals necessitates a system that formalises what the given norms are, so that the individuals may know what to expect and how to act. One might even say it becomes necessary to write down the rules the group decides on, in order for everyone to remember, or the community might end up in recurrent disputes on which norms they agreed on in the first place. When a small community becomes a large society, Hart argues that the selection of collective norms encounters three problems that make it necessary to create a secondary set of laws – he names these "secondary rules."[22] The primary rules still imposes duties to refrain from or perform certain actions, but then the creation of secondary rules prescribes how to carry out the primary rules. Hart identifies three secondary rules.

Firstly, in a larger society, if different groups may disagree on what the given rules are, and when there is little interaction between members, and the members also create subgroups, it can create *uncertainty* about which rules to follow.[23] Without a formal agreement on what rules are, it is difficult to achieve consistent rule-obedience. Imagine if we did not have a law that made it legal to drive on the right side of the road and illegal to drive on the left side of the road. This would probably result in serious and recurring traffic accidents. If it were a community of fifty people, it might not be necessary to write down the rules, as driving on one specific side of the road might be followed as a norm. The first secondary rule is therefore a *rule of recognition.*[24] The rule of recognition decides what a legally valid rule or a law is. This rule is best demonstrated in the state's constitution or laws. This rule makes it clear that when a person drives on the left side of the road within the jurisdiction of the current legal system, that person is breaking the law.

Secondly, laws have a *static* character, which means that society cannot sporadically adjust "rules to changing circumstances."[25] In pre-legal communities, one could say that norms would naturally change to adapt to the circumstances, but in a legal system, laws have to hold a static character in order to solve the previously mentioned problem of uncertainty. At the same time, society has to take into account that the culture might change, and subsequently; so must the laws. Hart consequently argues that it is necessary to establish a

[22] Hart, *The concept of Law*, 94
[23] Hart, 92.
[24] Hart, 94
[25] Hart, 92.

secondary *rule of change*.[26] This rule must identify the conditions and requirements to change and eliminate existing laws, as well as to introduce new laws.

Thirdly and lastly, when pre-legal society becomes a large society, it creates a problem of who should implement and enforce the laws. Without any appointed legal authority, it would inevitably result in rule breaking. In pre-legal society, the community would carry out the punishment collectively, but in a large society the right to punish must be clarified, or else there could be uncertainty of whether one is correctly punishing a rule-breaker or breaking a law. The last secondary rule Hart proposes, is therefore, a *rule of adjudication*; a rule that gives ground for the legal institution and enforcement.[27] In order for laws to function efficiently, society needs the police and the judiciary to; respectively, police and adjudicate people's actions. In sum, the secondary laws "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[28] According to Hart, the union between primary and secondary rules stands in the "centre of the legal system."[29]

Hart's distinction between pre-legal and legal society seems to coincide with Foucault's historical account of the evolution of law from feudal society to monarchic society. Foucault has stated that law developed in ancient Greece, was forgotten, and then resurfaced to become what we conceive of it today.[30] In "Truth and Juridical Forms", Foucault describes juridical disputes of Archaic Greek Law, which needed "neither judge, nor sentence, nor truth, nor investigation, nor testimony"[31] to establish who was right. Disputes were settled through a challenge, and the winner had the right of truth. Foucault turns to Oedipus to demonstrate the development of juridical inquiry in Ancient Greece. In Oedipus, the procedure of truth is no longer decided by ordeal but determined by trial and the presence of a witness. In similarity to Archaic Greek law, Germanic societies settled righteousness through ordeals. These ordeals were private, with the exception of what was considered crimes against the whole community. In these crimes, the community would collectively demanded reparations. Otherwise, "a penal case was always a type of duel, whether opposition between individuals, families, or groups."[32] Germanic law was a "regulated way of fighting a war"[33]

[26] Hart, *The concept of Law*, 95
[27] Hart, 97
[28] Hart, 94.
[29] Hart, 99.
[30] Foucault, "Truth and Juridical Forms," 328.
[31] Foucault, 327.
[32] Foucault, 329.

and needed no authority to overlook the procedures. According to Foucault, Feudal law was alike to Germanic law, and the establishment of guilt was more of a test of skill or position rather than an inquiry of the truth (whether the accused actually committed the crime). Trials could be conducted as physical ordeals, or they could be verbal, in which the accused lost the trial if he failed to say a certain oath correctly. An example of the determination of guilt in feudal society can be observed in old Burgundy law. This penal practice required twelve witnesses, whom the accused had to be related to, to prove a person's innocence. In this juridical procedure, innocence was thus proved through the demonstration of "social relationship of kinship."[34]

According to Foucault, the change in societal structures led to the introduction of a new discourse where individuals no longer had "the right – regularly or irregularly – to resolve their litigation; they will have to submit themselves to an exterior power, which is imposed as judicial power and political power."[35] The structure of law as we know it today has, its origins in Roman society, but is also the result of a development from Germanic law to modern law in the second half of the middle ages.[36]

This evolution from archaic Greece to democratic Greece, as well the evolution from feudal society to modern society is similar to Hart's distinction of pre-legal and legal society. Before further pointing out the resemblances, it is important to take note that these philosopher's points of analysis are different: while Foucault identifies discourse and domination, Hart aims to identify what qualifies a legal system. Foucault description of the evolution of law resembles that of Hart's pre-legal and legal society in two ways. First: by the fact that Hart's three secondary rules are absent in archaic Greek society, and Germanic and feudal societies. The question of which person violated which norm is settled between the two persons involved, so the formal *rule of recognition* is inapplicable. There is no *rule of change;* since the primary rules are changed by the winner of the conquest, and "primary rules" are thus decided sporadically. Furthermore, as the law is taken into own hands and not upheld through an intermediary, there seems to lack a *rule of adjunction*. The second way Hart's account resembles that of Foucault is that they both provide a descriptive and non-normative account of a legal system. What is problematic is that if laws are source-based and not based on merits, and rights are part of the legal system, it would mean that rights must also be

[33] Foucault, "Truth and Juridical Forms," 329.
[34] Foucault, 331.
[35] Foucault, 334.
[36] Foucault, 332.

source-based and not merit-based. In this view, human rights could be deemed either an accidental or an inevitable consequence of society.

So far in this chapter, I have argued for a legal theory that renders laws to be only based on sources, not on merits. This would consequently mean that rights inscribed in law are also only based on sources. The inquiry asks whether human rights can have merit in Foucault's disciplinary society. When legal positivism defends a position where laws, and subsequently human rights, cannot have merits, we seem to have answered our inquiry negatively. However, this negative conclusion only affects human rights when they are inscribed in law. By looking at the interplay between the legal institution and its discourse, we might still find room for parrhesiastic activity and retain the emancipating potential of human rights.

IV) The Internal Point of View and Disciplinary Technologies

Hart makes a distinction between an external and internal point of view. This distinction is useful to us, because it opens up for power-knowledge relations and it holds a normalising element. Hart argues that laws, as coercive commands, do not entirely capture the legal system. Hart argues that if we regard "law as the sovereign's coercive orders [, it] fails to reproduce some salient features of a legal system."[37] If we only think of the legal system as a collection of coercive orders enacted by the king on his subjects, Hart believes that we fail to analyse what a system of laws consists of.

Hart's starting point in defining what a legal system entails, is to identify an external and an internal point of view. According to Hart, regarding laws as coercive is to take the external point of view, while the internal point of view captures the element of laws that makes citizens respect laws out of a feeling of duty rather than fear. Hart argues that purely looking at the coercive aspect of laws cannot explain how citizen abide by laws out of duty. To illustrate his argument, Hart provides an example of a gunman.[38] A gunman is pointing his gun at a victim and gives the victim the option to hand over his money or be shot. In this case, the victim would give up his money out of the fear of being shot. The case of the gunman shows a coercive situation. The victim is threatened and, as a result, he complies with the command. He does not give away his money because he believes he has a duty or obligation. If laws were merely coercive orders, it would mean that in every instance we

[37] Hart, *The Concept of Law,* 79.
[38] Hart, 82-83.

followed the law; it would be to avoid of punishment. This would mean, furthermore, that if the individual knew he would not be convicted, he would in every instance break the law if possible. If fear of punishment is the reason for following laws, and the individual knows he will not be punished, then he will always break the law. However, we know that citizens do mostly follow laws, even though they are in a situation where they would not get caught. Sanction-centered theories presume that law has no authority if the threat of punishment is absent. According to Hart, the external point of view functions to limit oneself "to the observable regularities of behaviour."[39] The external point of view is thus to look into society and observe the citizens' obedience or disobedience to the laws. When the outsider observes that disobedience results in punishment, he would infer that they obey the laws to avoid punishment.

The internal point of view is understood as the attitude of the citizen who acts out of obligation. This would be the citizen who follows laws even though he would get away with breaking it. By accepting laws, they "become a standard of behaviour and obligation, and individuals who take the internal perspective uses them as guides to evaluate their own as well as the conduct of others."[40] Foucault cites Plato when he argues that an authority is necessary, "which is willingly exercised over people who willingly accept it, an authority of a kind that the citizens can obey and actually want to obey."[41] He continues that "the citizens must be personally persuaded of the validity of the law which is imposed on them and which they take up as it were on their own account."[42] According to Plato, and possibly also Foucault, citizen takes an attitude of acceptance towards the society's laws. Even though Foucault never developed a complete and extensive theory of law, there are similarities between some of Foucault and Hart's descriptions.

Furthermore, Hart argues that social pressure is the primary factor that creates the obligation to follow the laws. The individual who takes the internal point of view of law acceptance makes "the rules as standards for the appraisal of their own and others' behaviour."[43] The internal point of view is similar to the normalising behaviour of Foucault, but it is only normalising insofar the individual accepts the laws. Hart's system of laws manages to account for the different nature of the legal systems in both totalitarian and

[39] Hart, *The Concept of Law, 90*.
[40] Hart, *90*.
[41] Foucault, *The Government of Self and Others*, 204.
[42] Foucault, 204.
[43] Hart, *The Concept of Law,* 98.

democratic states, as well as the connection between public morality and the legal system. One could argue that in a monarchy, the poorest class would follow law out of fear, and that the nobility would accept the laws as they benefitted from them. The royalists would sustain the legal system and they would be the ones taking the internal point of view, while the other citizen, who refused to accept the political structure, still obeyed the rules to avoid sanctions. The external point of view can be considered the perspective of the *juridical model of sovereignty,* as it looks at the system externally and observes the consequential connection between an order and its physical threat that makes the person obey. Our legal system today consists of prohibitive laws as well as rights. The external point of view is, therefore, to obey the laws from fear of punishment and to claim one's rights solely for self-serving reasons. A person who holds the external point of view might be argued to exploit the system and adhere to laws only insofar as these laws beget him beneficial and profitable results. More importantly, in accordance with the external point of view, he would not judge others in whether they choose to follow or break laws, and claim or neglect their rights.

Now, Foucault illustrates, in *Society Must be Defended,* that citizens can be made to support and accept the monarchy by means of a glorified discourse of the king's greatness. Accepting laws does not necessarily mean that it benefits the persons who choose to accept them, but as Foucault suggests here, a dominant discourse or culture may have the power to make a whole society accept and respect laws. It is therefore fully possible that the legal institution displays a disciplining function and operates to normalise laws.

The internal point of view could be argued to correlate with disciplinary technologies, as citizens who take the internal point of view, consider the laws as standards of behaviour. Democratic electoral rights do not only prescribe an "if you want to"- option, but they also create a moral duty to vote. I think the average citizen finds it intuitive that voting in elections is to do one's civic duty, and that the average citizen unintentionally, but negatively, judges others who do not vote. Now, a person taking the external point of view would probably not care either way. A person who takes the internal point of view would, on the other hand, encourage others to vote as their civic duty commends it, and judge those who do not vote as lesser citizens. Claiming a right to education constitutes a claim that every person in society ought to have a certain level of schooling. As such, there is always a normalising aspect behind rights, where one envisions the optimal citizen in his optimal situation. Whenever rights are invoked, this ideal shines greater. Again, we here come across the normalising element of rights.

V) Parrhesia Revisited

It has become clear that one can practice *parrhesia* privately and in non-political situations, but it is uncertain what shape *parrhesia* can take in a political space. The conditions of *parrhesia* are; first, to speak the truth; second, that it will lead to an unpredictable change; and third, that the person is taking a risk. Claiming a right can be argued to assert what one believes to be true. However, this assertion does not necessarily carry with it a risk and will lead to unspecified change. Let us consider two scenarios.

The first scenario would be when the activist tries to fight for a right that is not inscribed in law. In the first scenario, demanding new rights seems unproblematic in terms of *parrhesia* as one is attempting to change the discourse. Chevallier draws attention to the tension between political resistance and law, and remarks that it seems that "resistance to oppression always comes up against positive law which at once grounds and limits it, in a double, unbreakable constraint."[44] Ideally, law should limit oppression, injury and abusive power. Whenever a rights activist attempts to resist the government on the grounds that it abuses and oppresses its citizens, laws will restrict him and he might find himself breaking these same laws in his resistance. Disturbing the peace, obstructing criminal procedures or endangering oneself or others, are punishable acts that the rights activist might commit. By not adhering to laws, he could be said to disqualify himself from receiving rights, as he now becomes a criminal. Or rather, why should the state respect the individual's rights if the individual does not want to respect the laws of the state? However, if he does not make a spectacle of himself, it is not likely his rights might even be considered.

One could, on the contrary, argue that there are several channels the right activist can go through which would not result in breaking the law. I would agree with this especially with relation to democracies, but the fact of the matter is that whenever there is actual resistance to the government, it usually plays out in a deadlock where the rights-claimer has tried every other possibility to modify the law, but because of fierce opposition from the government, he sees himself forced to demonstrate or otherwise make his case heard.

If a person is claiming a right and receives it without struggle, one would not call it resistance in the first place. One could even say that the right did not alter the current power structure. Nevertheless, when the introduction of a right or a law receives opposition, it draws light on the power relations that will be affected by the right. Whenever there is a resistance, law seems to always take the side of the oppressor. The exception would be where the

[44] Chevallier, "Michel Foucault and the Question of Right," 180.

activist turns to international law, but then he might still find himself in conflict with national laws. In the first scenario, the action can be deemed as an invocation of *parrhesia* as it criticises and struggles against the dominant power. The rights-claimer risks in some cases criminal punishment, in other cases to be socially ostracised by society or some part of society. If one is claiming a new right it is often because the majority would not yet recognise the right as a norm.

If we look back at the cases of the legal sex changes that were brought to the European Court of Human Rights, the first cases were concluded not to be violations of the claimants' rights. Then some years later, in *Christine Goodwin v. United Kingdom*, the same court decided that the claimant's rights had been violated. This case marked a change in how European societies have evolved their views on the topic. Another example is the right to voluntary abortion, which has historically received immense opposition. Even though abortions are becoming more acceptable, still today, people who advocate this right are judged by some to be immoral. One could say that they are taking a risk in fighting for this right. When talking specifically about rights that have not yet been legally inscribed and socially accepted, human rights can be considered to have some *parrhesiastic* merit.

In the second scenario, a person is claiming a right that is already written and recognised in the legal system. If a right is already prescribed in law, one can often easily secure this right without difficulty. This means that the rights-claimer has the law on their side, which further means that the rights-claimer does not need criticise or fight against the legal institution. If we compare it to the first scenario, where the fight is between the individual and the law, in this scenario, the law supports the demand of the rights-claimer. The European Union (EU) directive on consumer rights gives a two-year guarantee on all products bought in the EU,[45] which means that a person could claim his right and change the faulty product he bought. If the provider does not respect the right, the rights-claimer can take it to court. If his case is substantively supported, he is almost guaranteed to win. This would apply to most rights inscribed in law. Firstly, it is clear that these rights do not pose a risk to the one who is claiming the right. Secondly, the person claiming a right will predict the outcome. It would be absurd to say that the person, who claims consumer rights, is practising *parrhesia* or engaging in some virtuous activity. Legally inscribed rights does not

[45] European Union, "Guarantees, cancelling and returning your purchases," accessed November 20, 2018, https://europa.eu/youreurope/citizens/consumers/shopping/guarantees-returns/index_en.htm.

satisfy the conditions for *parrhesia,* as there is neither risk nor unspecified eventuality involved.

Another issue is the question of Hart's internal point of view. By demanding rights, it seems that the person is taking the internal point of view and he must necessarily accept the right. Whenever a person is claiming a legal right, he must necessarily take internal point of view. The external view is, as stated, to act out of fear from punishment, but there is nothing coercive in claiming rights. If the person does not claim his right to a two-year guarantee, there would, as such, be no consequence. Arguably, by invoking a right, he is accepting the right in question. On the contrary, one could argue that the external point of view, with concern to rights, could be understood as a person who chooses to do something only because it benefits him. In a similar sense that a dog only does tricks because he knows he will get a treat. I think that we must admit that it is possible to only invoke one's legal right because of the benefits one gains from it. If rights were claimed because of the benefits they leads to, it would be impossible to determine if a certain person has taken an internal or external point of view. This demonstrates that claiming a right for oneself, which is already embedded in legal documents, will always carry with it some benefits. If, however, a person fought for the legally inscribed rights of others, we could distinguish between the internal and external point of view. This person, then, would not gain any personal benefits, so the only reason he would invoke those rights, were if he believed them to be righteous and have merit. The person who fights for the rights of others must necessarily take the internal point of view. As pointed out in the previous section, the internal point of view has a normalising effect, and thus, it shows that legally inscribed rights become part of disciplinary power.

When Foucault writes that "a right is nothing unless it comes to life in the defence, which occasions its invocation,"[46] he grasps a general problem of the legal system, namely, the question of who corrects rights infringements. The state takes care of the law, but often when rights are not respected; they are not brought attention to. For rights to have a value, it is necessary that the injured person stands up and claims his right. Foucault elaborates on this default of rights, and states that they:

[46] Chevallier, "Michel Foucault and the Question of Right," 180.

> Only become effective for an individual to the extent that they are concretely seeking to defend themselves and engage their existence in that effort. It is this act of assuming one's rights, in the widest sense, which gives right its amplitude and effective universality.[47]

This rather points towards a default of the legal system and the enactment of laws, which necessitates that the subject stands up and asserts his rights. Foucault explains that the practices of self are not activities and ideas unconnected from the person's environment, instead "they are models that he finds in his culture and which are proposed, suggested, imposed upon him by his culture, his society and his social group."[48] Foucault clarifies that the "game of truth" produces a result that "on the basis of its principles and rules of procedure, may be considered valid or not, winning or losing."[49] What is important is for the societal structure to make the ideal conditions for the practice of the self and Foucault argues that this is primarily to minimise domination. The right to abortion minimises domination as it allows the subject to make a choice, and thus one could consider the situation better for the practice of self. If one had a law that prohibits abortion, it would repress a choice, and such a law would regulate a norm to keep the baby. However, one cannot call claiming an already established legal right *parrhesia,* as it does not entail any risk or criticism towards the dominant power structure and the dominant discourse. One could say, instead, that these rights are already part of the dominant strategy. However, because the form of rights is the opposite of prohibitive laws, they specify possibilities and freedom for the legal subject. Claiming one's rights might in many cases enable the practice of care of self.

On another note, if someone has violated the rights of another, it often means that someone is abusing their power in the power structure. In such a way, the person claiming a right is criticising someone in a position of power, and it follows that there is a risk in criticising someone powerful. Considering how legal institutions function, the powerful entities one is trying to resist, will equip themselves with the best of lawyers, to the point that the person claiming his legal rights might not be sure that he will win the lawsuit. If the right is already inscribed in law, it must be considered true: it is both a legal fact and the belief of the claimant. In this case, we see the truth-condition, the change-condition and the courage-condition satisfied. We see here the possibility for *parrhesia* within the legal system.

---

[47] Michel Foucault "Le Vrai Sexe" in *Dits et Ecrits II, 1976*-1988, eds. Daniel Defert and François Ewald (Paris: Gallimard, 1980), quoted in Chevallier, "Michel Foucault and the Question of Right," 177.
[48] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 291.
[49] Foucault, 297.

Still, we must not forget the normalising aspect of the legal institution, and that persons claiming rights might constitute themselves as a result of the normalising powers. Hart claims that when community enters into a system of primary and secondary rules:

> The range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole new set of concepts and they demand a reference to the internal point of view for their analysis.[50]

Taking the internal point of view is necessary to properly participate in the legal practice, but as this quote also implies, only lawyers can take the internal point of view. From his quote, it reasonable to assume that Hart's jurists are similar to Foucault's experts, and we thus encounter the problem of the technocratic element of the human rights institution. The person, who knows his way around the law, is already in a dominant position in the power relation. In this system of laws, only the jurists can actually make a change. For what is a lawyer, but an expert that will tell you what to say and how to act? When a person claims a right and has to fight in court, he is dependent on the counsel of the lawyer, meaning that by resisting one power relation he is already deep into another power relation.

However, even though jurists may have the dominant position in power relations between the defendant or the offended and their lawyers, Foucault opens up to that it is nothing bad in wanting to "control the conduct of the other."[51] On the contrary, he claims that it is part of social relations and thus inescapable. Foucault also encourages "a guide, a counsellor, a friend, someone who will be truthful with you."[52] In the case of the German lawyer Klaus Croissant, Foucault defended "the right to be defended in juridical procedure by a lawyer."[53] I think we here encounter Foucault's complex and intricate web of power relations, and what he ultimately asks us to be cautious about. While a lawyer is helpful in renegotiating one's position in the power relation with the law, one is also susceptible to be dominated by the lawyer in the power relation between oneself and the lawyer. We have all heard cases where the lawyer advises the person on trial to settle for a poor deal.

Furthermore, in claiming rights the subject might reinforce the very power relation he or she is trying to resist. I think women rights illuminate this double effect. Many modern societies have made particular laws for women, such as laws that target discrimination against

[50] Hart, *The Concept of Law,* 98.
[51] Foucault, "The Ethics of the Concern for Self as a Practice of Freedom," 292.
[52] Foucault, 287.
[53] Chevallier, "Michel Foucault and the Question of Right," 181.

women or laws that provide special accommodation for women. On the one hand, the discourse tries to change the dichotomy of women as the weaker sex; on the other hand, the discourse calls for special arrangements that will give women the equal possibilities to men. One could argue against this point as well though; that the societal structures are made to benefit men, and to counterweight the inherently discriminating system, laws need to formulate special arrangements. However, the female subject who claims these special rights, could be argued to reinforce her own self-knowledge as a subject who needs additional help to prosper, and as such, assert herself as inferior to the male subject she compares herself to. Another example would be children with learning disabilities. If they are diagnosed with some disorder or special needs, they are given additional rights to that of the average child, but on the other hand, the subject might constitute himself as a child who is not as smart as the other children. Established rights have an effect on the formation of the self that can be either positive or negative. In these cases, I do not think it makes a lot of difference whether one finds oneself in a just or unjust society, except maybe what the degree the individual is disciplined. What is at stake is the tension between the disciplining and normalising function of the legal institution and individual's possibility to practice care of self.

VI) The Legal System and Rights

By turning to Hart's legal positivism, the thesis has developed a model of a legal system where rights and laws take the ratified shape of social norms, which then prescribe what the society's members are allowed to do and not to do. The thesis questioned whether there is room for *parrhesia* in this model, and concluded that *parrhesia* could take place when persons are fighting for a right to be legally recognised. *Parrhesia* is also possible when the act of securing one's rights entails challenging a powerful person or institution in society. However, there is never the guarantee that the right will prove to be empowering, and the individual might find himself disciplined in another shape.

Law defines the borders between admissible and inadmissible behaviour, and any right that is claimed and recognised, pushes these borders back and forth. Several official positions have rights linked to their role: a police officer has a right to arrest you if he or she believes you have broken the law. The normal civilian, on the other hand, cannot arrest another civilian, even though he was witness to the crime. Only a judge has the right to persecute. When a citizen gets his driver's licence, he gets the right to drive; if he does not have the licence, he is then driving illegally. Only a licensed doctor can practice medicine and

prescribe pharmaceuticals. We see here that the notion of rights is applied in terms of being licensed to do something. While laws are usually thought of as prohibitive, in other words, what one cannot do; rights define what one is allowed to do. If we were to trace the historical evolution of the notion of rights, we would most likely see that it is used as a juridical notion. Prohibitive laws state what one cannot do; whilst rights state what one is allowed to do. Human rights then define what everyone should be allowed to do within the legal system. Human rights discourse creates the vocabulary to demand to do more.

Norms and customs become formalised into a system of law if they gain the recognition of the majority in society. Laws are not the passé elements of a monarchy, but rather a system of formalised laws necessary for any big society to function. The normalising and disciplining effect of law comes into being when the administrative practices start producing knowledge and an institution. One might say that the legal institution has an output and an input; the input being the social culture and the morality that influences which laws should stay or be removed, and the output being the citizens who "express in normative terms their shared acceptance of the law as a guide to conduct."[54] Paul Patton points out that the "recent history of particular rights supports the idea that rights are inescapably social in character and product of the relations of power, beliefs, attitudes and practices, including legal practices, of the relevant communities in which they exist."[55] As Patton points to here, rights have a social element. They have become inscribed into the legal system because someone fought for them and made them part of the dominant strategy. If the legal system does not correspond with the dominant strategy, it would lead to revolt and a dismantling of the legal institution, meaning that in a functional legal system the dominant strategy and discourses will always correspond. Because law is a consequence of social relations; what the law prescribes will reflect social norms. However, even though a secondary *rule of change* allows for the incompletion and evolution of legal principles, the inherently static character of norms means that laws themselves will always be conservative. Moreover, just as laws hold normalising effects, it becomes an inescapable consequence that laws are predominantly hostile to new discourses. This implies that the legal system, and the rights therein, is justified, sustained and influenced by society's dominant discourse, but the normalising effect of the legal system also has the power to impact, restrain, slow down and even reduce a discourse's progress.

[54] Hart, *The Concept of Law,* 138.
[55] Patton, "Historical Normativity and the Basis of Rights," 190.

Conclusion

This thesis' inquiry started off by addressing the apparent inconsistency between Foucault's notion of disciplinary power and his engagement in human rights issues. His older works depict, on the one hand, the human person as a subject that is entrenched in power relations without any possibility to break free. On the other hand, Foucault's later work on the ethical formation of the self, together with his human rights activism, allows for empowering actions. It appears that Foucault's approach to power and the idea of universal and inalienable human rights are irreconcilable. With the presumption that both Foucault's notion of power and the notion of human rights have some value to our society, the thesis set out to investigate whether, if we reconceptualise human rights, we might evade this apparent conflict. This philosophical inquiry has attempted to redeem the merit of human rights in Foucault's disciplinary society.

The first chapter addressed current challenges to human rights, and explored how Foucault's notion of disciplinary power can account for them. The challenges consist of: a) a growing number of contestations concerning the content of human rights; b) an increasingly expanding scope, as well as the uncertainty, of recognising beneficiaries, guarantors and offenders of human rights; c) technocratic characteristics of the human rights institution; and lastly d) double emancipating and oppressive effects of human right struggles. The first chapter addressed Foucault's argument that a *juridical model of sovereignty*, which includes the main premises of social contract and natural rights theories, fails to explain the inadequacies of human rights initiatives. By re-conceptualising power as disciplinary, he illuminates why these challenges are raised. In this endeavour, Foucault does not envision himself to provide a normative theory, but rather, a descriptive theory, in order to reveal why and how rights become problematic in practice.

If we, however, adopt this new notion of power, we run into the problem that Foucault's proposed theory discredits the idea of human rights altogether. The second chapter looked further into material that touches on the topic of human rights in the contexts of disciplinary power. From this perspective, human rights become an inversed concept of the king's right. This form of rights would secretly reinforce the power structures, rather than resist them. Foucault's disciplinary and versatile power infiltrates all levels of society, which means that is must infiltrate the human rights institution and discourse. The second chapter identified three rejections. Firstly, it becomes ineffective to believe that rights are

emancipatory because power does not take a unitary form in opposition to freedom. Power in disciplinary society is polymorphous, which implies that it cannot be coded into a system of rights that guarantee more freedom. The second rejection states that if we reject the normative basis of rights, it is unclear how we can decide what rights should entail and why we ought to respect them. The third rejection demonstrates that Foucault's notion of disciplinary power undermines the juridical institution. He argues both, that law cannot grasp how disciplinary power functions, and that disciplinary power has infiltrated the legal institution. Foucault's observations lead to a supposition that if rights can even be considered useful, then they must be independent of the legal institution. From this, we are left with three arguments that would make us reject the idea that human rights have merit. In the attempt to redeem human rights, the thesis then attempted to respond to these three arguments.

By turning to the notion of *parrhesia,* I have attempted to embed rights in the ethical sphere. The third chapter investigated the similarity of *parrhesia* and rights when they take the form of activism. According to the Greeks, *parrhesia* is a truth-claim that leads to an unpredictable change and involves a risk of the claimant. Foucault has identified a political, ethical and modern use of *parrhesia*. In this chapter, I argued that the ethical notion of *parrhesia,* which is also described as a philosophical *parrhesia,* can best justify rights activism. If we consider rights activism as a practice akin to philosophical *parrhesia,* human rights can be proven to have merit and emancipating effects. When claiming a right, for instance, the subject can resist the power relations imposed on him, and by resisting, the person will thus constitute a reflective form of subjectivity and practice his freedom. This perspective of rights activism, as a practice of *parrhesia,* evades the first and second rejection of chapter two: of emancipatory rights and the indeterminacy of what a right should entail. The third chapter compared two different power relations: the first between a slave and his master, and the second between the parent and the child. With this comparison, the chapter illustrated the necessity to differentiate between power relations that qualify as human rights issues and power relations that do not. In doing this, we return to the question of the relationship between human rights and the legal institution that secures them.

The fourth chapter addressed the question of law. In this chapter, I argued that Foucault's criticisms are mainly directed towards modern philosophers, such as Hobbes, Rousseau and Locke, who rely on theories where law is either founded on nature or a hypothetical social contract. It is, however, quite evident that Foucault never presented a comprehensive and complete theory of law. This means that to prescribe a specific theory of

law to Foucault or to argue that he expelled law from modern society, could be considered unsubstantiated conclusions. Even though Foucault's thought might be incompatible with social contract theories and natural law theories, it does not necessarily mean that his thought is inapplicable to law in general. His work can be applied to other theories of law without making uncompromising changes to his core arguments. The thesis demonstrated that positivist theories allow Foucault to stay critical to normative values, as these theories also claim to provide a descriptive account. By turning to H. L. A. Hart's account of a legal system, this thesis outlined that legal power does not go against Foucault's notion of power, but becomes an extension of it. It is important, nonetheless, to point out that I do not claim that Foucault would uncritically accept Hart's theory. The purpose of this chapter was to show that it is possible to combine Foucault's theories with those of Hart, and by applying the observations of both philosophers; one can better understand the role and value of human rights. From this position, laws are argued to be formalised norms necessitated by an expanding community. In small communities, formal rules would not be necessary, as people interact daily, and have the same moral and cultural norms. Citizens would, consequently, follow a set of rules without the need to officially recognise and enforce them. In such small communities, ensuring that norms are respected would be a collective task.

In larger communities, however, people would not interact closely enough to ensure a natural societal order, and to avoid the resultant uncertainties, formal laws and procedures have to be put in place. In legal societies, laws are still sustained by popular morality, or rather, the dominant discourse. There is a mutually reinforcing relationship between the dominant discourse and the legal discourse. The dominant discourse must provide support to the legal system, because the dominant discourse has the power to direct the conduct of society's citizens. If the dominant discourse places itself against the legal system, there would be no legal order and no one would respect the laws. The legal discourse displays, at the same time, a normalising character. When citizens respect laws, they make the laws prescriptive for themselves and others. The laws will direct the citizen in how to act and how not to act, and in return, the citizens will judge themselves and others in how well they respect the laws. In such a system, rights have merit only as long as they take the shape of *parrhesia*. When a right becomes inscribed in law, it gains the position as affiliated to the dominant discourse. Even though the now legal right has the ability to dissolve a dominant power relation, it might just result in sustaining the current dominant structures. Legal human rights protect the person from abusive power relations, but we have to remember that it is the dominant discourse that

defines what makes a power relation abusive. This view is illustrated in the end of chapter three, by the examples of a child and its parent, a mentally ill and its psychiatrist, and a criminal and the prison guard. There is a substantial difference between what a person in a dominant position could do a century ago to his subordinate or ward and was considered normal, and what would today be deemed as unacceptable and abusive. In the end, when a proposed right becomes a legal right, it becomes both part of a society's legal institution and its dominant discourse. This thesis has shown that the legal institution has a normalising function when citizens make the laws prescriptive and use them to evaluate the conduct of themselves and others. The dominant discourse, which also can be called popular morality, is part of Foucault's disciplinary machinery that controls what is considered true. In short, when rights become legal, they cannot guarantee empowerment and may instead have disciplining effects.

Can human rights have merit? When we attempt to look at human rights struggles in terms of *parrhesia,* which is in itself an empowering practice, rights can be argued to have merit. *Parrhesia*, arguably, takes place when the individual attempts to resist and modify dominant power relations, and this may include cases where a person fights for his or others' human rights. However, this does not mean that human rights in themselves are inherently empowering, only that they can be employed in such a way that they will either give rise to empowering effects or enhance a person's ability to practice care of self.

Bibliography

The American Law Institute. *Model Penal Code: Official Draft and Explanatory Notes.* Philadelphia: The American Law Institute, 1985. http://www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf.

Blackburn, Simon. *The Oxford Dictionary of Philosophy.* Oxford: Oxford University Press, 2008.

Chevallier, Philippe. "Michel Foucault and the Question of Right." Translated by Colin Gordon. In *Re-reading Foucault: On Law, Power and Rights,* edited by Ben Golder, 171-187. Oxon: Routledge, 2013.

European Court of Human Rights, "Gender Identity Issues." Accessed November 12, 2018. www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf.

European Court of Human Rights, "Grand Chamber Judgment Goodwin v. United Kingdom." Accessed November 12, 2018. https://hudoc.echr.coe.int/eng-press#{"itemid":["003-585597-589247"]}.

European Union. "Guarantees, cancelling and returning your purchases." Accessed November 20, 2018. https://europa.eu/youreurope/citizens/consumers/shopping/guarantees-returns/index_en.htm.

Ewald, François. "Droit: Systèmes et Stratégies." *Le Débat* 4, no. 41 (1986): 63-69. Cairn.info.

Fraser, Nancy. "Foucault on Modern Power: Empirical Insights and Normative Confusions" In *Michel Foucault: Critical Assessment, Volume five, Section 2*, edited by Barry Smart, 133-148. London: Routledge, 1995.

Foucault, Michel. *The Courage of Truth (the Government of Self and Others II): Lectures at the Collège De France, 1983-1984*, edited by Frédéric Gros, François Ewald, Alessandra Fontana and Arnold I. Davidson, translated by Graham Burchell. New York: Palgrave Macmillan, 2011.

———. *Discipline and Punish: The Birth of the Prison.* Translated by Alan Sheridan. London: Penguin, 1991.

———. "Discourse and Truth: the Problematization of Parrhesia." Six lectures at University of California at Berkeley, California, October-November, 1983. https://foucault.info/parrhesia/.

———. *The Essential Works of Michel Foucault, 1954-1984: Vol. 3: Power*, edited by James D. Faubion, London: Allen Lane, 2001.

———. “The Ethics of the Concern for Self as a Practice of Freedom.” In *The Essential Works of Michel Foucault, 1954-1984: Vol. 1: Ethics: Subjectivity and Truth*, edited by Paul Rabinow, 281 –302. London: Allen Lane, 1997.

———. *The Government of Self and Others: Lectures at the College De France,* edited by Frédéric Gros, François Ewald, Alessandra Fontana and Arnold I. Davidson, translated by Graham Burchell. New York: Palgrave Macmillan, 2011.

———. *The History of Sexuality; the Will to Knowledge, Vol. 1*. Translated by Robert Hurley. London: Allan Lane, 1998.

———. *‘Society Must Be Defended’: Lectures at the Collège de France, 1975-76,* edited by Mauro Bertani, Alessandro Fontana, François Ewald and Arnold I. Davidson, translated by David Macay. London: Allen Lane, 2003.

———. “The Subject and Power.” In *Critical Inquiry* 8, no. 4 (1982): 777-795. JSTOR.

———. *Subjectivité et Verité: Cours au College de France, 1980-81.* Paris: EHESS, 2014.

———. “Truth and Juridical Forms.” Translated by Lawrence Williams and Catherine Merlen. *Social Identities* 2, no. 3 (1996): 327-342. http://dx.doi.org/10.1080/13504649652213.

———. “Va-t-on Extrader Klaus Croissant? ” In *Dits et Ecrits III, 1978-1979*, edited by Daniel Defert and François Ewald, 361-365. Paris: Gallimard, 1994.

Gardner, John. “Legal Positivism: 5 1/2 Myths.” *American Journal of Jurisprudence* 46, no. 1 (2001): 199-227. https://doi.org/10.1093/ajj/46.1.199.

Gutting, Gary and Johanna Oksala. “Michel Foucault,” *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), edited by Edward N. Zalta. Accessed November 15, 2018, https://plato.stanford.edu/archives/sum2018/entries/foucault/.

Golder, Ben. “Foucault and the Incompletion of Law.” *Leiden Journal of International Law* 21 (2008): 747-763. https://doi.org/10.1017/S09221508005293.

———. *Foucault and the Politics of Rights.* Stanford: Stanford University Press, 2015.

———. “Foucault’s Critical (Yet Ambivalent) Affirmation: Three Figures of Rights.” *Social and Legal studies* 20, no. 3. (2011): 283-312. https://doi.org/10.1177/0964663911404857.

———. “What is an Anti-Humanist Human Right?” *Social Identities* 16, no. 5 (2010): 651-668. https://doi.org/10.1080/13504630.2010.509570.

Golder, Ben and Patrick Fitzpatrick. *Foucault’s Law*. Oxon: Routledge, 2007.

Gros, Frédéric. *Michel Foucault.* Paris: Presses Universitaires de France, 1996.

———, “Sujet Moral et Soi Étique chez Foucault.” *Archives de Philosophie* 65 (2002): 229-237. Cairn.info.

Habermas, Jürgen. “Some Questions Concerning the Theory of Power: Foucault Again,” in *Michel Foucault: Critical Assessment*, *Volume five*, *Section 2*, edited by Barry Smart, 260-280 London: Routledge, 1995.

Hart, Herbert Lionel Adolphus. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994.

Hobbes, Thomas. *Leviathan.* Baltimore: Penguin Books, 1968.

Hunt, Alan. “Encounters with Juridical Assemblages: Reflections on Foucault, Law and the Juridical.” In *Re-reading Foucault: On Law, Power and Rights,* edited by Ben Golder, 64-84. Oxon: Routledge, 2013.

———. “Foucault's Expulsion of Law: Toward a Retrieval.” *Law & Social Inquiry* 17, no. 1 (Winter, 1992): 1-38. JSTOR.

Hunt, Alan and Gary Wickham. *Foucault and Law: Towards a Sociology of Law as Governance*. London: Pluto Press, 1994.

Locke, John. *The Second Treatise of Government; and a Letter Concerning Toleration*. New York: Dover Publications, 2002.

National Assembly of France. *“*The Declaration of the Rights of Man and of the Citizen, 1798.” *American Bar Association.* Accessed November 10, 2018. https://www.americanbar.org/content/dam/aba/migrated/2011_build/human_rights/french_dec_rightsofman.authcheckdam.pdf

———. “LOI n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle.” *Légifrance, Le Service Public De L'accès Au Droit.* Accessed November 15, 2018. https://www.legifrance.gouv.fr/eli/loi/2011/1/27/MTSX1001906L/jo/texte

Muižnieks, Nils. *Report of the Commissioner for Human Rights of the Council of Europe Following his Visit to Norway from 19 to 23 January 2015*. Strasbourg: Council of Europe, 2015. https://rm.coe.int/ref/CommDH(2015)9.

Patton, Paul. “Historical Normativity and the Basis of Rights.” In *Re-reading Foucault: On Law, Power and Rights,* edited by Ben Golder, 188-106. Oxon: Routledge, 2013.

Rousseau, Jean-Jacques. *The Social Contract.* Harmondsworth: Penguin, 1968.

Said, Edward W. *Orientalism.* London: Penguin Books, 1985.

Spivak, Gayatri Chakravorty, “Can the Subaltern Speak?” In *Colonial Discourse and Post-Colonial Theory A Reader*, edited by Patrick Williams and Laura Chrisman, 66-111, New York: Colombia University Press, 2015.

Stammers, Neil. ”A Critique of Social Approaches to Human Rights.” *Human Rights Quarterly* 17, no. 4 (August 1995): 488-508. JSTOR.

Taylor, Charles. “Foucault on Freedom and Truth,” in *Michel Foucault: Critical Assessment, Volume five, Section 2*, edited by Barry Smart, 326-351. London: Routledge, 1995.

UN General Assembly. *Universal Declaration of Human Rights*. Paris: 1948. https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

The U.S. National Archives and Records Administration, “Declaration of Independence: A Transcription.” Accessed December 10, 2018. https://www.archives.gov/founding-docs/declaration-transcript.