# Research Repository

## Governmentality as Reflexive Method: Excavating the Politics of Legal Research

www.essex.ac.uk

# Governmentality as Reflexive Method: Excavating the Politics of Legal Research

J.C. Lawrence[*]

## Abstract

This chapter argues that in addition to examining the politics of method in terms of how they impact our *results* we ought also to excavate, evaluate, and emphasize the background assumptions and discursive commitments that *produce* these results and cause us to ask the questions we do, in the way that we do. Researchers should be conscious of the impact that our ontological, epistemological, political, and normative commitments have on our work and maintain an awareness of the fact that these assumptions are contingent, constructed, and politically significant. There are many different means of attempting to excavate the framing narratives that lurk in the background of 'method' and to attempt to piece together their impact on the politics of (legal) research. This piece presents one such means, offering the 'toolbox' of post-Foucauldian governmentality studies as a useful reflexive starting point for legal academics seeking to uncover how methods serve to produce truths regarding the social world in line with their background assumptions.

## Keywords

EU law, research methods, governmentality, reflexivity, Foucault, European legal studies

---

## 1. Introduction

This chapter argues that in addition to examining the politics of method in terms of how it impacts our *results* or how it relates to our *audiences* we ought also to excavate, evaluate, and emphasize the background assumptions and discursive framings that produce these results, define our audiences, and cause us to ask the questions we do, in the way that we do.[1] As researchers, we should be conscious of the impact that our ontological, epistemological, political, and normative commitments have on our work, and maintain an awareness of the fact that these assumptions are contingent, constructed, and politically significant. Consciousness of these impacts is a tool we can use to better examine the forms of knowledge we (re)produce to determine what type of order, and what type of politics, we perpetuate as we define the subjects and objects of our scholarship and our methods of studying them.

In many scholarly circles, in particular international law and international relations, the preferred method of excavating these background assumptions has been a turn to reflexivity: calling on the researcher to reflect on the interests, biases, and social commitments that inform their work.[2] As Friedrich Kratochwil wrote, "a critical theory has to address the problem of how modes of knowledge and political practices interact positively and negatively."[3] Such reflexivity has ranged from the relatively simple (and perhaps not terribly useful) practice of articulating biases and subject-positions[4] to more well-developed methodological schemes such as those based on the work of

---

[1] This chapter understands the term 'method' in the broad sense of the methodologies or approaches that scholars apply when formulating questions, seeking answers, and situating their work such that it is legible to particular audiences and salient to particular debates.

[2] Reflexive method has a long intellectual history including the work of scholars such as Gaston Bachelard, *La formation de l'esprit scientifique: contribution à une psychanalyse de la connaissance objective* (1938) and Georges Canguilhem, *Idéologie et rationalité dans l'histoire des sciences de la vie* (1977). Modern applications in the context of international scholarship include Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 European Journal of International Relations 147; Vincent Pouliot, 'Subjectivisim—Toward a Constructivist Methodology' (2007) 51 International Studies Quarterly 359; Matthew Eagleton-Pierce, 'Advancing a Reflexive International Relations' (2011) 39 Millennium: Journal of International Studies 805; Inanna Hamati-Ataya, 'Transcending Objectivism, Subjectivisim, and the Knowledge In-Between: The Subject In/Of 'Strong Reflexivity' (2014) 40 Review of International Studies 153.

[3] Friedrich Kratochwil, 'Reflections on the "Critical" in Critical Theory' (2007) 33 Review of International Studies 25, 36.

[4] For a critique of the reflexive approaches focusing on the inability of the researcher to accurately identify his or her biases, *see* Samuel Knafo, 'Bourdieu and the Dead End of Reflexivity: On the Impossible Task of Locating the Subject' (2016) 42 Review of International Studies 25.

Pierre Bourdieu, with his efforts to develop a 'sociology of academia' that turns the tools of sociological study onto the researcher and research as well.[5]

Exploring the constitutive role of method and the productive power of discursive practices is similarly central to reflexivity in legal research. It is, however, difficult to do. There are many means of attempting to excavate the ontological, epistemological, political, and normative framings that lurk in the background of 'method' and to attempt to piece together their impact on the politics of (legal) research. This chapter presents one such means, offering the 'toolbox'[6] of post-Foucauldian governmentality studies[7] as a useful starting point for legal academics seeking to uncover how their approaches or methods serve to produce truths regarding the social world in line with their background assumptions.

The governmentality approach is interested in unpacking the logics or rationalities that undergird constellations of power, the forms of knowledge that guide the behavior of individuals, organizations, and governments, and the regimes of truth that structure our understandings of how and why our systems work as they do. As such, it is particularly suited to reflexive thinking in law, offering a mechanism for examining discourses and practices that does not necessarily privilege its own position, or make assumptions regarding the ultimate 'truth' of its own conclusions beyond the relative context in which they are drawn. Rather, it focuses on unearthing the shifting dynamics and logics of governance as they play out in historical and contemporary practice and highlighting the relationships between knowledge production and the exercise of power.

The objective of this practice is not to eliminate all subjectivity from research, or to force researchers to defend their "methodological, ontological, and epistemological assumptions at every turn."[8] Rather, awareness of these relationships is useful because it can provide researchers with insights into the discursive frameworks and conceptual

---

[5] Pierre Bourdieu, *Sketch for a Self-Analysis* (Richard Nice trans, University of Chicago Press 2008).

[6] Foucault famously described his books as "little toolboxes" that people could use as needed to "short circuit or disqualify systems of power." Didier Eribon, *Michel Foucault* (Betsy Wing trans, Harvard University Press 1991) 237 (quoting Michel Foucault, 'Des supplices aux cellules', *Le Monde*, 21 Feb 1975).

[7] The term 'Post-Foucauldian governmentality' refers to the body of subsequent work drawing on and diverging from Foucault's original texts that has arisen in recent years. Kim McKee, 'Post-Foucauldian Governmentality: What Does it Offer Critical Social Policy Analysis?' (2009) 29 Critical Social Policy 465.

[8] David Lake, 'Theory is Dead, Long Live Theory: The End of the Great Debates and the Rise of Eclecticism in International Relations' (2013) 19 European Journal of International Relations 567, 568.

boundaries on which their studies rely.[9] Attention to these frameworks is both practically and politically significant, and feeds into strategic engagement; prompting us to tread carefully in terms of deploying disfavored normative structures; and calling on us to engage in practices of active discursive (re)construction when we determine that our work is reproducing hierarchies or drawing boundaries in ways that have negative impacts on the social world.

This chapter explores the usefulness of a governmentality approach for uncovering what lies 'behind the method' in European legal research. Section 2 begins by exploring the ways in which different framings and political commitments can shape the knowledge produced by legal research. Section 3 then presents Foucault's work on governmentality as a potential method for 'excavating the political', in particular as it has been interpreted and applied by post-Foucauldian scholars. Section 4 explores the application of this approach in the specific context of European legal research, providing illustrations of how scholars have begun to use governmentality as a framework for evaluating the political and epistemological construction of different aspects of EU law. Finally, Section 5 returns to the question of reflexivity, drawing attention to its role in political strategy.

## 2. On Truth and Framings in Legal Research

In referring to the 'background assumptions' that undergird (European) (legal) method, this chapter, in the post-structuralist tradition, points toward the vast array of more or less conscious, historically and temporally contingent premises and presuppositions strung together via discursive fields and professional systems that construct our fields of vision and guide our research practices. To claim that these background assumptions and commitments influence research practice is not necessarily to argue that any given research or researcher is 'biased' or 'political' in the conventional sense, nor is it to refute the validity or possibility of making scientific claims. The argument is rather that how we perceive and define our objects of study, how we formulate questions about them, what means we use to go about answering those questions, and what frameworks and discourses we use to understand and explain our results, are all influenced by

---

[9] See also the Chapter in this volume by Alessandra Arcuri.

(though are not reducible to) the historically specific institutions, power structures, and systems of economic, social, and political relations within which we work.

To begin with, we might have widely differing assumptions about the nature of 'law' as an object of study and as a practice.[10] Different approaches to legal research reveal distinct theoretical commitments regarding the nature of law (Is it a discrete conceptual system? Embedded in social practice? Fossilized (class) politics?); distinct purposive ideas about what law ought to do (Promote justice? Maintain order?); and distinct ideas regarding the instrumentality of the law as a means for attaining particular ends (Is law the right tool for attaining this goal? Can law change people's behavior? Is it possible to legislate morality?).

Beyond this, each method also relies on and reflects underlying conceptual systems regarding the way the social order does or should work. These may include epistemological commitments about the production of knowledge, the nature of 'truth', and the value of different types of argumentation; political commitments about the legitimacy of power and authority, the appropriate means and ends of government, and the relationship between the individual and the collective; as well as normative commitments regarding 'human nature', 'the good', and 'justice', among many others.

The reason these background commitments, assumptions, or framing narratives are important is that they lead those adopting each method or approach to focus on distinct sets of actors, sources, events, and relationships, and to examine these subjects and objects in light of particular political and normative schemata. In the process, they filter the world through their own pre-existing discursive and conceptual frameworks, causing the researcher to see things slightly differently when adopting each method's vocabulary, practices, and preoccupations.

It is simple enough to imagine that two legal researchers—or indeed, two researchers in any discipline—presented with the same set of issues may, though the application of different methods or approaches, and drawing on different theories with distinct underlying assumptions about the social and political order they study, produce very different interpretations of questions that lead to diverging conclusions about the law.

---

[10] Anne-Marie Slaughter and Steven R. Ratner, 'The Method is the Message' (1999) 93 American Journal of International Law 410.

Take, as an example, a case of fisheries regulation. Faced with the problem of safeguarding the resources in a particular waterway, two researchers from different traditions seek to identify the causes of and suggest legal responses to curb overfishing. Researcher A believes that this is best achieved by properly balancing the costs and benefits of harvesting fish. She conducts interviews with stakeholders to determine the gain that accrues to fishing vessels for each additional marginal unit harvested, the obstacles to effective policing of catch limits, and the carrying capacity of the waterway; and then proposes a regulatory intervention based on increasing the costs of illegal and unpermitted fishing (via regular patrols, fines, etc.). Her method (stakeholder interviews to gather data relating to limits, costs, and benefits) reflects her theory (that overfishing results from a market failure); leads her to investigate a particular question (where is the market failure?); causes her to reach a particular conclusion (the market failure results from fishing vessels externalizing costs); and ultimately suggests a particular legal response (designing legislation to force the internalization of costs). Behind this method lies an ocean of pre-conceptions. Researcher A believes that human behavior—at least in the aggregate—is governed by rational choice and the quest to maximize benefits while minimizing costs. She believes that it is an appropriate task of government to manage markets and to correct for 'market failures', and that government can do so via the means of increasing the costs of non-compliance with regulatory mechanisms. She believes that it is possible to quantify more or less accurately the impact of human behavior on waterways, to measure the benefits accruing to the fishing vessels in economic terms, and to deduce a correct 'level' of intervention as a result. This is a worldview that is written in the language of liberal economics, and that views individuals, markets, governments, and the interactions between them through that lens.

Meanwhile, Researcher B believes that the problem relates to a failure of republican virtue within the fishing community. She examines the curricula of local schools, speaks with spiritual leaders, and consults with respected members of the community in order to determine where the values problem lies. She then proposes a response based on the twin prongs of better educating local children so that they understand how overfishing harms society; and making examples of those caught with more fish than have been allotted to them through public shaming and service requirements, with criminal

sanctions for repeat violations. Her method (looking to key community contacts and socialization processes) reflects her theory (that overfishing results from either a failure to understand the harm of one's actions, or else willful unsocial behavior); leads her to investigate a particular question (where is the unsocial behavior coming from, and how can it be reduced?); causes her to reach a particular conclusion (anti-social behavior results from a lack of education and a lack of effective penalties for violation); and suggests a regulatory response (the enactment of legislation requiring education or meting out punishment). The background political and normative commitments that underlie Researcher B's method are quite distinct from her colleague's: she believes that human behavior is governed by socialization according to community values, and fear of shame, exclusion, and punishment. She believes that it is an appropriate task of government to promote virtuous behavior and instill good morals, and that governments can do so through properly training individual citizens and wielding the corrective rod of discipline when necessary. She does not attempt to calculate, quantify, or measure, and she has no interest in markets—her focus is on the individual and their republican virtue.

The point is not that the knowledge produced by either of these methods is *true or untrue*, *correct or incorrect*, or any more or less *coherent* or *systematic* from the perspective of the legal order—the point is that it is *contingent*. Whatever a particular method tells us about the law—whichever answers it provides to the descriptive, hermeneutic, normative, explanatory, evaluative, and other questions we pose—will necessarily reflect a particular historical and political context, and a particular set of background assumptions like the ones outlined above.

What's more, the methods that scholars employ to study the law also play a role in *constructing* the legal world by narrating it in accordance with their framing discourses, reinforcing not only the particular results of each study but also all of the underlying assumptions that came with the method's application. Accepting Researcher A's idea that the fisheries problem can be resolved by government regulation designed to correct a market failure requires accepting all of her related background assumptions: that at least in the aggregate, human behavior is governed by rational choice; that it is the role of government to create, maintain, and perfect markets; that it is possible to quantify and assign values to social phenomena and deduce correct legal interventions

on this basis. The more normalized such methods become, the more 'natural' these other ideas begin to seem.

Unpacking the 'background assumptions' that are associated with our research is a critical practice that can help to 'denaturalize' the framing discourses and practices through which we understand our objects of study, thereby providing space for reflection and critique. As Foucault put it, this practice invites us to ask whether we want "to be governed *like that*, by that, in the name of those principles, with such and such an objective in mind and by means of such procedures."[11]

Not all legal scholars will be interested in (or see the relevance of) pursuing this path—European legal research may have very different ends in mind, and may see such pursuits as 'extra-legal' at best.[12] But for those that are interested, and do see the relevance, the question becomes how a legal scholar might begin to excavate the background assumptions lying behind their own or others' chosen methods or approaches, and to think about how these assumptions impact the formulation of research questions, the designation of subjects and objects of research, and the identification of salient relationships among them. One possible way is to employ tools drawn from Foucault's work on 'governmentality'.

## 3. Governmentality as Reflexive Method

To fully set out the contours of the governmentality approach would require a book-length work. And indeed, there are many such works that interested scholars can consult.[13] However, a brief account will be given here in order to illustrate the ways in which governmentality can serve as a reflexive method for European legal scholars; one that can assist in the process of excavating the underlying assumptions that lead us to ask the questions we do, in the way we do.[14]

---

[11] Michel Foucault, 'What is Critique?' in Sylvère Lotringer (ed), *The Politics of Truth* (Lysa Hochroth and Catherine Porter trans, Semiotext(e) 1997) 44.
[12] See in this volume the Chapter by Siniša Rodin.
[13] See Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, Sage 2010); Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Cultural* Life (CUP 2008); Owen Parker, *Cosmopolitan Government in Europe* (Routledge 2012); William Walters and Jens Henrik Haahr, *Governing Europe: Discourse, Governmentality and European Integration* (Routledge 2005); William Walters, *Governmentality: Critical Encounters* (Routledge 2012).
[14] The discussion in this section draws on the work in Jessica C. Lawrence, 'Governmentality Approaches' in Didier Bigo et al., *The Routledge Handbook of Critical European Studies* (Routledge 2021).

Michel Foucault's work on discourse, power, knowledge, and subjectivity has had a huge impact—in particular in the social sciences—over the past 50 years. While his work has been highly influential in fields ranging from media studies to sociology to criminology, however, Foucault's lack of attention to specifically 'legal' matters has meant that legal scholarship has seen much less infiltration by his ideas than other disciplines.[15] Until the mid-1990s, there were only a few scattered legal analyses that incorporated Foucauldian theory in any significant way,[16] and it was not until the late 1990s and early 2000s that Foucauldian concepts like biopower, discipline, and genealogy began increasingly to be applied in legal scholarship.[17]

Most recently, a new strain of Foucauldian thinking has begun to make an impact in legal academia. Beginning in the early 2000s, Foucault's lectures from the late 1970s and early 1980s at the Collège de France have been translated into English and made widely available in the non-Francophone world for the first time.[18] These lectures contain, among much else, discussion of a theoretical concept that Foucault called 'governmentality': the study of the government of human behavior—how government operates, what its means and ends might be, and how it acts upon and through its subjects.

Foucault described 'governmentality' as the study of the 'art of government' or the 'conduct of conduct'. As Foucault explains, in his typical style:

> [T]he word "conduct" refers to two things. Conduct is the activity of conducting (conduire), of conduction (la conduction) if you like, but it is equally the way in which one conducts oneself (se conduit), lets oneself be conducted (se laisse conduire), is conducted (est conduit), and finally, in

---

[15] For a discussion of 'the law' as it appears (or does not appear) in Foucault's work, see Ben Golder (ed), *Re-Reading Foucault: On Law, Power and Rights* (Routledge 2012); Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge 2009); Alan Hunt and Gary Wickham, *Foucault and Law: Toward a Sociology of Law as Governance* (Pluto Press 1994).

[16] For a few examples, see Hugh Baxter, 'Bringing Foucault into the Law' (1996) 48 Stanford Law Review 449, 473-476.

[17] For a collection of studies in this vein, see Ben Golder and Peter Fitzpatrick, *Foucault and Law* (Routledge 2010).

[18] See especially Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-1976* (David Macey trans, Picador 2003); Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978* (Graham Burchell trans, Palgrave Macmillan 2007); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 19758-1979* (Graham Burchell trans, Palgrave Macmillan 2008).

which one behaves (se comporter) as an effect of a form of conduct (une conduite) as the action of conducting or of conduction (conduction).[19]

As described here, the (admittedly somewhat nebulous) study of governmentality involves examining not only the governmental activity of the state, but also the disaggregated and diffuse exercise of 'governmental' power by various types of actors, working at various levels, and through various mechanisms—including, significantly, self-government by individuals. In this model, the state—and the legal structures, courts, bureaucracies and agencies through which it exercises power and enacts particular knowledge regimes—remains a privileged 'coordinating point' for government.[20] However, governmental activity is not limited to the behavior of the state, but also takes place through the broader dispersal of norms and ideologies throughout the social order. As Mitchell Dean put it:

> Governmentality is any more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seeks to shape conduct by working through the desires, aspirations, interests and beliefs of various actors, for definite but shifting ends and with a diverse set of relatively unpredictable consequences, effects and outcomes.[21]

Governmentality thus examines the multifaceted ways in which individuals and groups are induced to behave in accordance with political rationalities. These rationalities are the framing discourses or "intellectual machinery"[22] on which government is grounded—historically contingent systems of knowledge that bring with them assumptions about how and why power works the way it does, with respect to which subjects and objects power should be deployed, and to what ends or purposes social behavior can be and ought to be directed. The production of scientific, scholarly, and statistical data is an important part of this system, as the 'knowledge' that is generated both produces and reproduces the political rationalities (and their associated

---

[19] Foucault, *Security, Territory, Population* (n 18) 193.
[20] Dean (n 13) 36.
[21] Ibid at 18.
[22] Nikolas Rose and Peter Miller, 'Political power Beyond the State: Problematics of Government' (1992) 43 British Journal of Sociology 173, 179.

techniques of government and subjectivation) that underlie the exercise of power and make "reality thinkable in such a way that it is amenable to political deliberations."[23]

Political rationalities also imply corresponding sets of practices, techniques, or technologies through which government is enacted. Nikolas Rose and Peter Miller described these governmental technologies as "the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions."[24] It is through these techniques that political rationalities act upon individuals and guide them to enact desired behaviors. The production of knowledge is key to this branch of the analysis as well: statistical data, impact assessments, and even the law itself all serve as tools for the operationalization of political rationalities by making certain subjects, objects, and relationships visible and relevant while obscuring others. These techniques are the 'method' of government and reflect the political rationalities that they enact. For example, governance tools such as 'stakeholder consultations' make sense from within a frame that conceives of political legitimacy in terms of input and output criteria or the efficiency and effectiveness of policy, and much less sense from within a frame that conceives of political legitimacy in terms of democratic control or communitarianism.

Finally, political rationalities also conceive of subjects in distinct ways. Individuals and groups may be conceived of and understood through different frameworks in order to make them legible to government. As Rose and Miller explain:

> [T]hose to be governed can be conceived of as children to be educated, members of a flock to be led, souls to be saved, or, we can now add, social subjects to be accorded their rights and obligations, autonomous individuals to be assisted in realizing their potential through their own free choice, or potential threats to be analysed in logics of risk and security.[25]

The framing narratives through which government understands its subjects impacts the way that power is deployed with respect to them: the type of governmental actions that

---

[23] Ibid.

[24] Rose and Miller (n 22) 175.

[25] Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Cultural Life* (Polity Press 2008) 9.

appear reasonable and necessary, the type of behavior that is expected from them, and the type of techniques that will be deployed to influence their behavior will all differ depending on the framework through which subjects are inscribed. These discourses of the subject are also key to extending governmentality through self-government, 'subjectivizing' individuals by asking them to think of themselves and others in the ways suggested by dominant political rationalities. As individuals come to understand themselves and evaluate their own and others' behavior in line with these narratives, they too come to reproduce the political rationalities that underlie these conceptions of the self.

Governmentality is an innovative approach for the study of politics, law, and governance due to its emphasis on the ways in which governmental activity acts not only to organize or constrain individual behavior, but also to actively construct its subjects and objects through the dissemination of ideas and norms. It is also particularly useful to studies of method, as a central theme in governmentality analysis is the relationship between knowledge, discourse, and power. The question of 'truth' plays a central role in Foucault's work from *The Birth of the Clinic* onward.[26] As a 'historian of truth', Foucault used genealogy to uncover the discourses and practices that contributed to the production of fields of knowledge such as 'sexuality' and 'madness' and to analyze their changing contours over time. Similarly, denaturalizing and tracing the creation and maintenance of concepts key to European legal scholarship—such as 'the state', 'Europe', 'the citizen' and 'legitimacy'—in this way prompts us to reconsider our assumptions about the world around us and emphasizes the impact that the political rationalities we inhabit have on the way that we perceive and research the world around us.

Questioning the assumptions that underlie our 'knowledge' about the purpose of government, human behavior, and the social order; the mechanisms (legal, regulatory, and otherwise) through which government comes to 'conduct conduct'; and the relationship between subjects and power is a good starting point for a reflexive examination of the way in which political rationalities guide the production of European legal scholarship, and to explore which power relations and which discourses our work is reproducing and facilitating.

---

[26] Michel Foucault, *Birth of the Clinic* (Alan M. Sheridan Smith trans. Vintage Books 1973 [1963]).

As with any other methodology or approach, however, the governmentality 'toolbox' has its own partialities and limitations.

To begin with, from a practical standpoint, there is no single or well-defined 'method' of conducting an analysis of governmentality. Foucault's work, while innovative and thought-provoking, is not always conceptually clear or rigorous, and this is even truer in the case of his governmentality lectures, which were never developed into a formal publication. His historical oversights,[27] lack of terminological precision,[28] and the absence of any roadmap for undertaking a governmentality analysis have also led to inconsistencies in contemporary work, as different scholars take up different portions of the 'toolbox' and apply them in their own ways. Even the word 'governmentality' is used in ambiguously in the literature: sometimes as referring to the 'art of government' generally (as in this chapter) and sometimes as referring to the *neoliberal* 'art of government' in particular. As a result, scholars taking up these approaches should be attentive to their own use of terms and concepts, and define them as explicitly as possible.

Second, governmentality approaches can tend to reinforce structuralist and hegemonic discourses (rather than countering them) by focusing too intently on the role or effects of particular actors or constructs.[29] For example, a researcher investigating the ways in which political rationalities drawn from the market have impacted governmental behavior may myopically ignore counter-currents and resistances that muddy this narrative, 'enthroning the market' as a new singular concept of power, as Derek Kerr once put it.[30] Fighting against the gravity of the single narrative can be difficult. But as Thomas Lemke warns: 'studies of governmentality not only have to assume a plurality of rationalities and technologies, they also have to conceive of them as plural, messy, and contradictory.'[31]

Some have also charged Foucauldian work with being insufficiently political, either because, on the one hand, it is too structuralist, does not set out a theory of resistance,

---

[27] Gary Gutting, *Michel Foucault's Archaeology of Scientific Reason* (CUP 1989).

[28] Thomas Lemke, *Foucault, Governmentality, and Critique* (Paradigm 2012).

[29] Mark Bevir, 'Governmentality after Neoliberalism' in Mark Bevir (ed), *Governmentality after Neoliberalism* (Routledge 2016).

[30] Derek Kerr, 'Beheading the King and Enthroning the Market: A Critique of Foucauldian Governmentality' (1999) 63 Science and Society 173.

[31] Lemke (n 28) 91.

and can seem to leave little space for revolutionary change;[32] or because, on the other hand, it is too relativist, treats all 'truths' as contingent, and therefore fails to take an ethical or political stand. To the former claim, as Foucault wrote: 'Where there is power, there is resistance'.[33] Total subordination is not achievable: there will always be multiple, messy, contradictory streams of resistance and knowledge interacting with, alongside, and against flows of power. And to the latter claim, I would simply note that arguing that concepts are historically and socially constructed is a far cry from claiming that all interpretations or approaches or political hierarchies are 'equally valid'.[34] Rather, uncovering the political rationalities, modes of subjectivation, and governmental technologies and discourses that structure our understanding of the world can be an emancipatory technique—in particular when paired with tools drawn from other critical traditions, such as Gramscian analyses of hegemony,[35] Bourdieusian analyses of political fields,[36] and Marxian work.[37]

## 4. Governmentality in European Legal Scholarship

As noted above, Foucauldian theory generally was not much used in legal academia prior to the late 1990s, and governmentality did not begin to make significant appearances in the legal literature for some time afterwards. When it did, it often entered into law after crossing disciplinary boundaries from related fields in the social sciences. For example, the growing literature applying governmentality to public international law draws heavily on earlier international relations work, and the Special Issue of the *Leiden Journal of International Law* 'On the Uses of Foucault for International Law', which was a milestone event in bringing Foucault to public

---

[32] See, e.g., Nancy Fraser, 'Foucault on Modern Power: Empirical Insights and Normative Confusions' (1981) 1 PRAXIS International 272.

[33] Michel Foucault, *The History of Sexuality: Volume I* (Robert Hurley trans, Pantheon 1978).

[34] On the problematic nature of opposing 'truth' and 'history', see e,g, Pierre Bourdieu, 'Les Juristes: Gardiens de l'Hypocrisie Collective' in François Chazel and Jacques Commaille (eds), *Normes Juridiques et Régulation Sociale* (Librairie Générale de Droit et de Jurisprudence 1991).

[35] See, e.g., Jonathan Joseph, 'The Hegemony of Governmentality: Towards a Research Agenda' (2017) 6 All Azimuth 5.

[36] See, e.g., Ann Zimmerman and Adrian Favell, 'Governmentality, Political Field or Sphere? Theoretical Alternatives in the Political Sociology of the EU' (2011) 14 European Journal of Social Theory 489.

[37] See, e.g., Jacques Bidet, *Foucault with Marx* (Zed Books 2015); Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books 2015).

international law, was organised jointly by a legal scholar and an international relations scholar.[38]

In the field of European law, too, the early works applying governmentality studies came primarily from outside the legal discipline. To give a few examples: Andrew Barry, an early adopter of governmentality approaches in the context of European harmonization policy, is a social geographer[39]; William Walters, a significant figure in developing European governmentality studies, is a political sociologist[40]; and Didier Bigo and Ole Wæver, who have applied governmentality approaches to European security studies, both come from international relations faculties.[41] This trend continues today: publications on European governmentality from the worlds of international relations, political geography, anthropology, and political sociology are much more common than those from law, and even the articles that appear in law journals are often written by academics from political science or international relations departments, or by legal academics with interdisciplinary training.

As these studies have proliferated, however, they have begun to make tentative inroads into the legal imagination. Articles applying governmentality approaches have appeared in the *European Law Journal*,[42] *European Constitutional Law Review*,[43] and the *European Journal of International Law*,[44] amongst other venues (though to date no such piece has graced the venerable pages of the *Common Market Law Review*).

As suggested above, the usefulness of governmentality analysis stems from how it can help to reveal the ways in which our underlying political commitments and discursive frameworks impact the subjects we study, the questions we ask about those subjects,

---

[38] Tanja Aalberts and Ben Golder, 'On the Uses of Foucault for International Law' (2012) 25 Leiden Journal of International Law 603.

[39] See, e.g., Andrew Barry, 'The European Community and European Government: Harmonization, Mobility and Space' (1993) 22 Economy and Society 314.

[40] See, e.g., Walters and Haahr (n 13).

[41] See, e.g., Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 Alternatives: Global, Local, Political 63; Ole Wæver, 'The EU as a Security Actor: Reflections from a Pessimistic Constructivist on Post-Sovereign Security Orders' in M Kelstrup and MC Williams (eds) *International Relations Theory and the Politics of European Integration* (Routledge 2000).

[42] See, e.g., Muhammad Ali Nasir, 'Negative Governmentality through Fundamental Rights: The Far Side of the European Convention on Human Rights' (2018) 24 European Law Journal 297.

[43] Luca De Lucia 'The Rationale of Economics and Law in the Aftermath of the Crisis: a Lesson from Michel Foucault' (2016) European Constitutional Law Review 445.

[44] Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' (2018) 29 European Journal of International Law 1173.

and the results we achieve. To provide just one example, scholars adopting governmentality approaches have raised important questions about the field of 'European migration law': When we uncritically employ concepts such as 'the citizen' and 'the migrant' in our work, are we using language that reproduces liberal political rationalities and subjectivities that equate 'citizenship' with 'rights'?[45] How does this reinforce the idea of the 'state' as provider of 'security', or legitimate the governmental techniques that are deployed to ensure that security?[46] What are the effects of centering 'borders' as privileged sites for the exercise of governmental power and conceptualizing power in terms of control over geographical space and movement?[47] What is left out or excluded from the analysis when we conceive of spatiality in this way?[48] What must be made visible or invisible, what surveillance mechanisms must be deployed, in order to assess refugee status claims?[49] How do the requirements of border control correspond with the use of empirical methods and data-driven analyses?[50]

Other European legal scholars have begun to apply governmentality work in fields from EU human rights policy[51] to EU trade policy[52] to migration[53] to the decision-making processes of the European Commission.[54] And this is to say nothing of the ever-growing body of work on European foreign relations from researchers working in the fields of international relations and European studies.[55]

---

[45] Bal Sokhi-Bulley 'Countering the Changing Genealogies of Migration in the EU' in Mark Bevir (ed), *Governmentality after Neoliberalism* (Routledge 2016).
[46] Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' 27 Alternatives: Global, Local, Political 63.
[47] William Walters, 'Reflections on Migration and Governmentality' (2015) 1 Movements Journal for Critical Migration and Border Regime Studies < https://movements-journal.org/issues/01.grenzregime/04.walters--migration.governmentality.html>
[48] Marina Tazzioli, *Spaces of Governmentality: Autonomous Migration and the Arab Uprisings* (Rowman and Littlefield 2014).
[49] Matthias Leese, 'Exploring the Security/Facilitation Nexus: Foucault at the "Smart" Border' (2016) 30 Global Society 412; Marina Tazzioli and William Walters, 'The Sight of Migration: Governmentality, Visibility and Europe's Contested Borders' (2016) 30 Global Society 445.
[50] Sabine Hess, 'We Are Facilitating States! An Ethnographic Analysis of the ICMPD' in Martin Geiger and Antoine Pécoud, *The Politics of International Migration Management* (Palgrave Macmillan 2010).
[51] Bal Sokhi-Bully, 'Governing (through) Rights: Statistics as Technologies of Governmentality' (2011) 20 Social & Legal Studies 139.
[52] Jessica Lawrence, *Governmentality in EU External Trade and Environment Policy: Between Rights and Market* (Routledge 2018).
[53] See infra (n 45 - 50).
[54] Cris Shore, '"European Governance" or Governmentality? The European Commission and the Future of Democratic Government' (2011) 17 European Law Journal 287.
[55] For representative examples, see Beste Işleyen, 'The European Union and Neoliberal Governmentality: Twinning in Tunisia and Egypt' (2015) 21 European Journal of International Relations 672; Milja Kurki, 'Governmentality and EU Democracy Promotion: The European Instrument for Democracy and Human

The purpose of such analyses is to encourage European scholars to think reflexively about the theoretical scaffolding within which we work, and how that background structure prompts us to ask certain questions and not others, to see certain connections and not others, to employ certain methods and not others, and, ultimately, to produce certain types of knowledge about the law.

## 5. Conclusion

The final question is perhaps the most salient: once a legal scholar has engaged in reflexive practices and excavated the political in their research, what do they do with this information? I would argue that rather than ignoring the relationship between knowledge and power and the productive force of method, we should acknowledge and critically engage with it.

Just as failing to interrogate received knowledge and background assumptions regarding society, government, and individuals entails accepting the limits they impose; defining heterodox fields of knowledge, bringing different subjects and objects to the fore, and highlighting alternate relationships among them can be a force of resistance and political action. Uncovering the ways that our framing narratives provide answers to questions like 'what is the law?' 'what is Europe?' 'who counts as a citizen?' or 'what counts as valid research?' can provide space to engage with the legitimacy of those answers. Counter-discourses and counter-practices can be deployed to challenge those narratives when we determine that they are not aligned with our own commitments to fairness, egalitarianism, pluralism, or political change.

Identifying the rationalities and knowledge systems that support particular configurations of power can help us to see from what histories and within what social, political, and economic contexts our framings or 'truths' originate; and which structures, discourses, or hierarchies our choices of method or approach are helping to reinscribe within the social order. This, in turn, can be a useful first step in determining whether, to return to Foucault, we want "to be governed *like that*."[56]

---

Rights and the Construction of Democratic Civil Societies' (2010) 12 International Studies Review 362; Sandra Lavenex and Frank Schimmelfennig, 'EU Rules beyond EU Borders: Theorizing External Governance in European Politics' (2009) 16 Journal of European Public Policy 791.
[56] Foucault (n 11).