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Facets of Power: A Few Thoughts in Light of Marco Brigaglia's Analysis of Foucault

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Abstract

There is a common distinction in the socio-philosophical literature between two kinds of power: normative and causal. According to a widespread and still dominant conception – normativistic legal positivism – law has to do with normative powers, not causal ones. I will try to argue that this rigid distinction between domains seriously undermines the possibility of having a comprehensive account of what institutions are. The ontology of legal institutions is based on a complex intertwining between normative and causal aspects; hence, an artificial split between these aspects cannot but lead to a seriously limited understanding of how institutions operate in regulating social behavior. This I will show by reflecting upon what I take to be the most thorough, well-argued, and analytically deep treatment of the concept of power recently provided in Italian legal theory, namely, Marco Brigaglia's analysis of Michel Foucault in his recent *Potere: Una rilettura di Michel Foucault* (2019). The conclusion of my argument is that Foucault's conception of power – as analysed by Brigaglia – finds significant support from institutional ontology in showing that legal theory and legal science should broaden their focus when selecting relevant instances of power. But I will also show that jurists can teach social scientists to put up some boundaries by reflecting on the concept of intention and on the risk of hypostatizing it; otherwise, the concept of power risks becoming too vague and opening the door for all manner of conspiracy theories and fallacies concerning intention.

I. Introduction

In this paper, I will deal with the concept of power. There is a common distinction in the socio-philosophical literature between two kinds of power: normative and causal. Normative power is the capacity to produce normative effects on the basis of rules. Causal power is the capacity to produce factual effects on the basis of causal mechanisms. According to a widespread and still dominant conception – normativistic legal positivism – law has to do with normative powers, not causal ones. It focuses on the existence of norms and normative entities in the realm of what 'ought to be,' not on social behavior and its determinants, the latter instead falling into the realm of sociology, not that of law. Only by restricting the scope of legal science to the normative domain, normativists argued, can we account for the specificity of the legal perspective.

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I will try to argue that this rigid distinction between domains seriously undermines the possibility of having a comprehensive account of what institutions are. The ontology of legal institutions is based on a complex intertwining between normative and causal aspects; hence, an artificial split between these aspects cannot but lead to a seriously limited understanding of how institutions operate in regulating social behavior. With power this problem becomes apparent, because normative and causal powers, though conceptually distinguishable, are often ontologically connected. This I will show by reflecting upon what I take to be the most thorough, well-argued, and analytically deep treatment of the concept of power recently provided in Italian legal theory, namely, Marco Brigaglia's analysis of Michel Foucault in his recent *Potere: Una rilettura di Michel Foucault* (Power: A New Reading of Michel Foucault).[1]

The paper is organised as follows. In Section II, I introduce the problem, arguing that an exclusively normative conception of power like the one maintained by the traditional, legal-positivistic description of legal science can severely limit the scope and impact of legal expertise in contemporary society. In Section III, I present Marco Brigaglia's discussion of Foucault's notion of power as a contribution toward analytically reconstructing a broadened conception of power and bringing it to bear on contemporary legal theory. In Section IV, I argue that this broadened conception can find support in contemporary social ontology because it is implied by a complete understanding of the structure of institutional facts. In Section V, I highlight some possible risks of overinclusion of an excessively broad conception of power, by showing that it can be vague and that it calls for a strict methodology to distinguish intentional power from nonintentional, unintended outcomes. Hence, although legal theory needs to be supplemented with the work that other social sciences do in their analysis of causal factors, the latter sciences stand to gain a lot from legal analyses of the concept of intention.

II. Legal Knowledge and Its Limits

There is a student of mine who graduated in law and who for several years has been a regular participant in a reading group I started as a way for students to dive deep into issues in the philosophy of law. On one recent occasion he shared with me a concern he had about the kind of training he had received at law school. I will relate his words as if I had recorded the conversation: 'I am now working with economists, statisticians, managers, and I realize I don't know how I can contribute to their problem-solving as a jurist. It seems to me that as jurists we are not equipped to understand the real forces that drive the world; we are all consumed with rules that have a marginal impact and are systematically obsolete,

[1] M. Brigaglia, *Potere: Una rilettura di Michel Foucault* (Napoli: Editoriale scientifica, 2019).

while the world around us is being shaped by macroeconomic dynamics and technological advancements. As a jurist, I feel like I am moving about in an abstract world, lacking the analytic tools needed to make a real contribution.' I was struck by his confession, to be honest, particularly given his qualities as a person and his capacity as a student: I had been meeting with him regularly since his first year at *Giurisprudenza*, and I knew him to be deeply curious and enthusiastic. At first, I set the problem down to the abstract remove of legal education in Italian universities, a point of endless debate at department meetings, or when institutional committees sit down to address the quality of teaching, or when public education interfaces with private business to see how best to redesign its own programmes. But here he was not pointing out a failure of law schools to adequately train students to practice law, as if a law degree did not provide the skillset needed to draw up a contract or, more generally, to enter the legal profession or work for a government legal service department. Rather, the problem was that even with a solid grounding in the practical workings of the law, this knowledge was mostly irrelevant when it comes to making 'real world' decisions – decisions involving the long-term strategies a company should pursue or the way to go about pursuing these strategies or, in the public sector, decisions about the policies that public administration agencies ought to fashion looking to the future. His point was not about the inadequacy of training in law: It was about the irrelevance of law itself. What, then, could I offer in reply as a philosopher of law with a background in philosophy?

The problem is connected with the methodology of legal science, and on a deeper level with the very concept of law. My student lamented the fact that he could not understand the deeper factors that are shaping the world: Powerful global economic actors make decisions that will impact our lives for decades; deep-learning algorithms guide the choices that we as consumers are constantly asked to make; geopolitics is shaped by economic variables that are not explicit and are not a matter of public debate. What can a jurist do in this context? What kind of expertise can he or she bring to the table to better understand these crucial dimensions of contemporary social life? The short answer is none. And the reason is that these factors are causal mechanisms. Causal mechanisms are the object of descriptive sentences, which in turn are the content of descriptive science. According to a widespread conception, law, on the other hand, is a normative domain: It has to do with rules, rights, duties. As Hans Kelsen would say, legal science deals not with what happens in point of fact, but rather with what should happen. Hence, the jurist's specific problem is not that of understanding the world but rather of regulating it. It may be conceded here that there *is* a descriptive element in legal science, an element that (again drawing from Kelsen) consists in formulating *Sollsätze* (ought statements) about the normative content of legal provisions that are binding and enforced. The point, however, is the extent to which this normative content is ultimately relevant in shaping the social

world, or whether it captures something about its essential dynamics. Formalistic legal positivism – a paradigm that has several shortcomings but is still dominant, being the only one that makes the case for law as a distinct and separate science – conceives legal normativity as inherently context-dependent. Jurists, from this perspective, reason not about what should happen *in abstracto* but rather about what should happen given the framework of the legal system. Their rationality is necessarily bounded: Jurists are not moral philosophers. Hence, jurists certainly have a role to play in advising people – including managers, economists, and engineers – about the current legal boundaries within which they must make their practical decisions. But if the solution the legal system provides to a given problem is obsolete, this is nevertheless the legal solution to that problem. In a sense, it is this problem that gives point to the whole antiformalist project in legal theory, whose central tenet can briefly be summarised thus: Let us make it so that, through free and creative judicial activity, the law can adapt to new social circumstances and their underlying causal mechanisms. But then the deep rationale of legal positivism comes back into play: If we espouse the antiformalistic perspective, what difference is there between legal science and an exercise in moral arbitrariness on the part of the judiciary? So my student's dilemma is in large part the dilemma that jurisprudence has faced since the second half of 19th century. Should a jurist run on naïve, untested intuitions about what is relevant or be a specialist in something that quickly becomes irrelevant or patently obsolete? This 'should,' incidentally, is somewhat ambiguous: It can point to a moral problem or to an epistemic one. Is a jurist morally entitled to apply the result of arbitrary assumptions? On the other hand, which alternative in the aforementioned dilemma should a jurist choose to offer worthwhile knowledge? Morally speaking, the answer of course depends on the moral paradigm that we assume: Perhaps in a deontological framework, obsolescence should be preferred over arbitrariness; in a consequentialist one, perhaps the inverse is the case. From an epistemic point of view, however, this is a genuine dilemma – one that seems to be crucial for the future of legal science.

One thing is certain, and this takes us back to legal education. Even if jurists will never be specialists in the causal factors shaping the social world - the economic, technological, and psycho-sociological factors - they should consider it an important part of their knowledge to at least acquaint themselves with these factors, so as to be able to understand how the law, both judge-made and statutory, ought to be adapted to changing circumstances and be updated accordingly. To be sure, jurists will never be economists, sociologists, psychologists, or computer scientists, but they should not neglect to consider these kinds of expertise. Rather, they should actively engage with them, familiarizing themselves with the problems at stake and the methodologies they use: In this sense, the future of legal studies and of legal training can be said to rest on the need for them to develop on a much more interdisciplinary basis than is currently the case. That is the basic

premise behind Marco Brigaglia's book *Potere* and where his investigation enters the picture.

III. Brigaglia on Foucault Concerning Power

In some recent work, Brigaglia offers valuable insights arguing for the need to reframe our theoretical analysis of legal reasoning in light of contemporary cognitive science.[2] Causality, he argues, is not separate from normativity. Rather, causal factors connected with our cognitive framework shape the way in which normativity, and legal normativity in particular, works. This is an important way to attack the jurist's dilemma at a very deep theoretical level: Not only is normative reasoning made possible by causal forces – as all reasoning and all cognitive processes are – but these forces play a role in determining its outcome, for which reason a jurist should be mindful of them.

In *Potere*, Brigaglia addresses all these questions by bringing Foucault's thinking to bear on the matter. Perhaps no one has been more perceptive and compelling than Foucault in highlighting the limits of the legal way of thinking, especially when it comes to understanding power. Jurists understand power as a rule-based notion – the result of a power-conferring norm, of authority in a normative sense. Foucault, on the other hand, shows that power is a much broader notion, and that its content depends on causality: It is the social phenomenon by which people's behavior is influenced by the intentions of others. Next to normative power, other kinds of power exist that are not normative in nature, spanning from charismatic power to behavioral manipulation. Explaining power is, therefore, a problem that specifically brings the jurist's dilemma back into the picture: Should I restrict my knowledge to normative, rule-bound power, or should I be cognizant that there are other, much more controlling kinds of power that are not normative in nature? As a jurist, should I ignore the impact of policing by design in computer interfaces or of neuro-marketing, and focus only on explicit and legitimate authority?

Brigaglia makes explicit the distinction between two conceptions of power in Foucault: an ultra-radical conception (*concezione ultra-radicale*) and a pragmatic one (*concezione pragmatica*).[3] On the ultra-radical conception, power is always the outcome of a strategy of domination: It follows that for a proper understanding of society, we need to unveil the strategic agenda that powerful, unseen actors advance in order to manipulate social behavior. The pragmatic conception, on

[2] See in particular, apart from *Potere*: M. Brigaglia, 'Genealogia della normatività: La normatività come controllo' *Diritto e Questioni Pubbliche*, 18, 1, 59-103 (2018); cf also B. Celano, 'Ragionamento giuridico, particolarismo: In difesa di un approccio psicologistico' *Rivista di Filosofia del diritto*, 2, 317-343 (2017); M. Brigaglia and B. Celano, 'Rivoluzione cognitivista e teoria del diritto: Un programma di ricerca' *Diritto e Questioni Pubbliche*, 17, 2, 523-535 (2017).

[3] M. Brigaglia, n 1 above, section 1.3.

the other hand, sees power as no more than an ordinary and inevitable social phenomenon: This means that strategies of power are not inherently bad, and we should strive to understand them, not necessarily to counteract them, but to be able to analyse social phenomena. As Brigaglia argues, if Foucault's power is properly analysed, it can serve as an important analytical tool for social science. Brigaglia defines power as intentional influence on the action of others.[4] Depending on how well the intention translates into actual influence, power can come in varying degrees of strength and can, therefore, be quantified. Moreover, since it takes knowledge to shape that context so as to make power more effective, power and knowledge are necessarily connected: The deeper the knowledge of how to effectively influence people's behavior, the stronger and more pervasive the resulting power. What Foucault shows is precisely that power and science are not distinct domains, such that if jurists ignore the relevant sciences, they will narrow their field of vision.

Brigaglia shows how the whole of society, in Foucault's view, can be analysed as a 'network of power' (*rete di poteri*, *réseau de pouvoir*) that consists of 'power circuits' (*circuiti di potere*, an expression used by Brigaglia as a 'unique translation' of the French *dispositifs de pouvoir*): These circuits are plans under which contextual factors are put in place that can cause people to behave in one way or another.[5] While networks of power are the normal machinery of social life, domination and subjection (*dominazione e assoggettamento*, *domination et assujettissement*) are specific cases of networks. Domination happens when power is used to the detriment of the interests of the targets of power and in support of the interests of power-holders: Domination, in other words, happens as a form of privilege. Subjection, on the other hand, is power used to shape the very identity of the targets of power and to inhibit their free will.[6] Even though free will conceived as a subject's complete independence from external influences is impossible, because every subject is built within a background that in large part depends on the social context, Brigaglia's interpretation of Foucault shows how we can still gain an awareness of the way in which we are moulded by context and experiment with new ways of behaving against the backdrop of those inevitable premises. This is what Brigaglia calls 'freedom as authorship' (*libertà-autorialità*): an attitude of nurturing a constant disposition to self-awareness and self-creation (or modification, re-creation) aimed not so much at achieving complete autonomy – which would in fact be impossible – as at reducing our inevitable subjection to power circuits.[7]

Brigaglia very clearly identifies three kinds of power circuits in Foucault: normative, disciplinary, and governmental. In this explanation, we can see at

[4] ibid, section 2.1.
[5] ibid, section 3.3.
[6] ibid, section 3.4.
[7] ibid, section 4.5.

work Brigaglia's effort to combine analytical clarity in defining concepts with explanatory tools drawn from contemporary cognitive psychology. In particular, in order to clarify the logic and cognition behind normative power, Brigaglia introduces the so-called 'dual process' theory of decision-making developed, among others, by Daniel Kahneman, who describes human decisions as the outcome of an interaction between a System 1 of fast, automatic, unconscious reaction and a System 2 of slow, rational, and explicit thinking and processing.[8] Normative power is the kind of power circuit in which jurists specialise - so much so that Foucault qualifies these circuits as 'legal' (calling them *dispositifs juridico-légaux*) – and this normative power, Brigaglia explains, is the ability to shape the behaviour of others by laying down rules that are communicated to them. These rules – stating how we should act – can have meta-rules stating how important and entrenched those direct rules are. But the important point is that they are all processed in the slow and deliberate manner of System 2: They engage our working memory, which inhibits automatic reaction. Brigaglia can accordingly explain on cognitive grounds the thesis that Foucault expounds about the 'weakness' or ineffectual nature of normative power: Slow and explicit processing of information is extremely demanding, requiring an intensive use of cognitive resources, and this cognitive load means that, under normal circumstances, we tend to respond by reverting to automatic patterns, rather than consciously processing the rules, all the more so since our disposition to reason decreases whenever stress, as well physical and mental effort, increases (a phenomenon called 'ego depletion').[9] In Brigaglia's reconstruction, if disciplinary and governmental power circuits are typically more effective than normative ones, the reason is that they depend not on System 2 but on System 1. In the case of disciplinary power, this latter system is formed by way of a sort of behavioral engineering, a process through which individuals are conditioned to behave in a blind and automatic way by repetition, imitation, monitoring, and constant reinforcement. Here, power does not go through the rational decision-making process but moulds the background against which the unconscious, automatic process works, thereby achieving the desired effect in a way that is easy for agents to repeat *ad libitum*.[10] Governmental power likewise rests on automatic processes but does so drawing on already existing behavioral dispositions rather than trying to influence them: Foucault argues that this kind of power emerged from the crisis of the discipline-centred government typical of the 16th – and mid-17th – century 'police state' and was at the core of the 'invisible hand market' ideology, thus revealing a deep connection that governmental (as opposed to disciplinary) power circuits bear to liberal views. Brigaglia elaborates on this analysis by conjecturing that governmental power is analogous to Richard Thaler and Cass Sunstein's 'nudging' which is indeed based on a 'gentle' manipulation

[8] See D. Kahneman, *Thinking, Fast and Slow* (London: Penguin, 2011).
[9] M. Brigaglia, n 1 above, 207-210.
[10] ibid, section 6.1.4.

of the already established architecture of individual choices.[11] The cognitive machinery that Brigaglia deploys here to analyze Foucault's view is also helpful in making sense of the somewhat allusive and mysterious notion of 'bio-power' (*bio-potere*, *bio-pouvoir*).[12] Bio-power, as Brigaglia analyses it, consists in the ability to influence people's behavior by shaping not their reflective rational choice-making under System 2 but their non-reflective, automatic System 1, through which an immediate reactive response is triggered.

Brigaglia shows at length how the heuristic power of Foucault's view can be brought to bear on legal theory. In a discussion that provides much food for thought for anyone concerned about the limits of legal knowledge, Brigaglia identifies three limits of traditional legal theory.[13] The first lies in a fetishism of adjudication and a complete underestimation of administrative processes, which instead deserve to be examined theoretically in view of the key role they play in shaping the contexts in which decisions are made. The second lies in an exclusive focus on the rational aspect of decision-making, and hence on the justification of decisions rather than on their formation. In the consequences that flow from this exclusive focus lies the third limit of traditional legal theory: its overcommitment to logical methods of analysis and its disregard of psychological tools when it comes to understanding the way humans, and hence judges, make decisions. In this way, Brigaglia lays out a cognitive framework within which to understand Foucault, and, by way of Foucault, to show how cognitive science can provide valuable insights in solving political and legal problems.

IV. Three Layers of Institutional Power

Before elaborating on some of the themes and concepts introduced in Brigaglia's discussion of Foucault, I'd like to make explicit why I think this work deserves careful attention. Brigaglia's analysis is remarkably impressive in depth and breadth, coupling a thorough knowledge of legal theory with a broad, interdisciplinary understanding of the cognitive-psychological underpinnings of decision-making, while offering an encompassing account of Foucault that draws on the most authoritative secondary literature on his work. As befits a scholar formed in the tradition of the Palermo school of analytic legal philosophy, Brigaglia is so clear in singling out the most important conceptual elements of Foucault's work and in showing how they connect to form a larger picture that the outcome seems almost effortless, concealing the painstaking work that needs to go into

[11] ibid, section 6.2.2; see R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven and London: Yale University Press, 2008). Brigaglia very helpfully also makes the connection between governmental power and the area of study referred to as behavioral law and economics: M. Brigaglia, n 1 above, 292; see C. Sunstein, *Behavioural Law and Economics* (Cambridge: Cambridge University Press, 2000).

[12] M. Brigaglia, n 1 above, section 6.3.

[13] ibid, section 8.2.

any such enterprise. In systematizing the main elements of power in Foucault – the definition of power and its main conceptual elements; the concepts of network of power and power circuits; the relation between power, domination, and subjection – Brigaglia not only gives us a compelling account deserving a permanent place in the literature on Foucault, but also offers a useful conceptual reconstruction for social theory and legal theory in general. This is analytic jurisprudence at its best, and even more importantly this is the kind of analytic jurisprudence that is helpful for legal scholars and legal studies teachers.

Drawing on *Potere*, I saw how I might help my perplexed and disheartened student. Perhaps I could suggest that his faith in the ability of law to guide action is not misplaced, but that it is only one part of the overall picture. Power can take many forms, and some of these can be more effective than power in the strictly legal sense, since they are built on cognitive structures that run deeper than formal power and act mostly unseen. This is not a reason to lose heart, however, because even though we cannot exercise complete freedom of will and be in a mode where we are constantly reflecting on our own behavior, we can exercise freedom as a disposition to be self-aware and devoted to constructing our own selves – an attitude that is worth cultivating and a virtue that lawyers ought to defend and foster. Jurists should be alert to the biological and psychological determinants of human decision-making and how these forces can shape the institutional context, primarily in judicial decision-making and in framing the ideal human subjects for which they draft laws. To this end, jurists would profit from working with psychologists and behavioral economists, and the understanding they can derive from this kind of cross-disciplinary work ought to be recognised as an integral part of the jurist's education. The same understanding would also enable jurists to see freedom, self-awareness, reflection, and the transparency of power as virtues and as basic normative principles to be upheld and practiced. So, perhaps, I would suggest to my student that he should go deeper into a study of psychology and economics, but also that he should not shy away from being a little bit more of a philosopher.

However, I would also advise my student to exercise care and stay true to his rigorous legal education when inquiring into social power, because this notion can trade precision for an illusion of explanatory power. As mentioned, Brigaglia defines power as the ability to intentionally influence the behavior of other people, or as the exercise of such an ability, arguing that once Foucault's conception of power is understood in the 'pragmatic' sense previously discussed, it can serve as an important heuristic tool.[14] My thesis, which is meant to qualify Brigaglia's conclusion, will be that the heuristic value of such a pragmatic conception can be diminished by the vagueness of some phenomena that Foucault traces to circuits of power, and in particular to governmental power. My argument will proceed as follows: I will first distinguish three ontological layers of institutions – institutional,

[14] M. Brigaglia, n 1 above, 21, 311-318.

meta-institutional, and para-institutional – which map onto three corresponding kinds of power; I will then connect Foucault's (and Brigaglia's) governmental power to para-institutional power, showing that this kind of power partakes of an inherent vagueness; finally, I will conclude that this vagueness can dilute the heuristic value of the concept of governmental power.

I have argued in previous works that the ontology of an institution can be fruitfully analyzed as an interlocking play of three metaphysically connected layers: an institutional, a meta-institutional, and a para-institutional layer.[15] The institutional layer comprises all the rules an institution consists of, be they authoritative or customary, regulative or constitutive. The meta-institutional layer provides the conceptual background – the broader and deeper social practice in which the institution is embedded, giving it its overall purpose and meaning. The para-institutional layer includes all the features of the institution that depend not on its actual rules but on the way these rules are practiced in a given social context.

This distinction, so stated, is quite abstract and may even seem obscure, but an example will clarify. Consider a game, such as chess or football. This game could be said to consist of – and be conceptually constituted by – rules. In the case of chess, there are constitutive rules that dictate how the chess pieces are to be arranged on the chessboard, how they can be moved, and what their role is in the game. In the case of football, the rules define the number of players, what the players can do, the way a goal is scored, and so on. Legal institutions are similarly defined by rules. Rules define, for example, how a specific tax is to be assessed, when it is due, who is subject to it, and so on, and in so doing, these rules constitute a specific institutional concept, say, the concept 'IRPEF' (short for *Imposta sul Reddito delle Persone Fisiche*) – Italy's personal income tax.

It would be pointless to abide by the rules of chess or football without knowing what competitive game-playing is, and impossible to understand IRPEF if we did not know what a tax is for, or what function taxation serves in our political community. The overall institution constituted by rules presupposes a deeper background, which clarifies its teleology and basic values. Some of this background can be made explicit (the duty to pay taxes in proportion to income is codified in Art 53 of the Italian Constitution), some is simply taken for granted (the very notion of a tax is presupposed by Art 53, just as no rulebook explains what game-playing is in laying out the basic rules of the game). Some concepts that are highly relevant for the institution are not constituted by the rules but rather presupposed: the rules of chess define how you can checkmate but do not explain what it means to win in a competitive game, just as Art 2 of Decreto del Presidente della Repubblica no 917 of 22 December 1986 defines who is subject

[15] See C. Roversi, 'Conceptualizing Institutions' *Phenomenology and the Cognitive Sciences*, 13, 1, 201-215; Id, 'Constitutive Rules and the Internal Point of View' *Argumenta: Journal of Analytic Philosophy*, 4, 139-156; Id, 'A Three-dimensional Ontology of Customs', in E. Frezet, M. Goetzmann, and L. Mason eds., *Spaces of Law and Custom* (London: Routledge, 2021).

to IRPEF but does not define what it is to be subject to duties under the law. These concepts – the overall conceptual background the institution presupposes to have a meaning – make up the meta-institutional layer: They are 'meta' in the sense that they define what might be described as the basic grammar of our social context and legal practice.[16]

Also distinct from the institutional layer is the para-institutional layer, which includes phenomena that are made possible not by an institution's structural features but by the way an institution is practiced. Consider, for example, the fact that in chess there is a slight first-move advantage or that the queen's gambit falls into two main types depending on the opponent's response, or again that football teams in a 5-3-2 formation typically rely on a counterattack strategy to win: these facts of course require the games' rules to be in place, and would not be possible but for these rules, but they are not constituted by these rules, as is the case with the rule that in chess bishops can move only diagonally or that in football a point is scored when the ball passes a goal line completely. So, because these distinctive facts are not constituted by rules but still depend on its institutional layer as adjuncts, I call them para-institutional, using the prefix para- in the same sense as it is used in terms such as paramedic, paralegal, or paralanguage, namely, as qualifying predicates or entities which in a sense attach to more fundamental entities, and which thereby become relevant for the concrete practice revolving around those foundational entities. Phenomena of this kind are relevant for law as well, and particularly for legal sociology. Consider the fact that (1) there are parliamentary strategies like filibustering, or that (2) there have been governmental practices like reiteration of decrees, or that (3) a perfect two-chamber system can lead to legislative gridlock, or that (4) tax efficiency is easier when a business is based on intangible assets, or that (5) a receipt-lottery scheme reduces tax evasion: These facts are all made possible by rules but not strictly constituted by them, and so are para-institutional rather than strictly institutional.

Para-institutional facts are all an effect of the institution's rules governing social behavior but can be explained in different ways depending on how they fit into the institutional scheme. Let us consider the examples just given. Examples (1) and (2) are strategies, and so are behavioral regularities based on prudential reasoning, but in a sense these strategies are not intended effects of the rules but, quite the contrary, are a distortion of the kind of behavior the rules are meant to foster. Let us, therefore, classify these ill or adverse effects as 'bad.' Examples (3), (4), and (5) are features of an institutional practice, but like (1) and (2), (3) and

[16] The distinction between an institution conceived as a system of constitutive rules and its broader meaning as a practice was first introduced by Hubert Schwyzer: see H. Schwyzer, 'Rules and Practices' *The Philosophical Review*, 78, 451-467 (1969). On this distinction see also G. Lorini, *Dimensioni giuridiche dell'istituzionale* (Padova: CEDAM, 2000), 263; A. Marmor, *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009). On meta-institutional concepts see also G. Lorini, 'Meta-institutional Concepts: A New Category for Social Ontology' *Rivista di Estetica*, 54, 127-139 (2014).

(4) are based on strategic or prudential reasoning and are associated with behavioral regularities: The strategic behavior of parliamentarians in a perfect two-chamber system will frequently lead to an impasse, and the strategic behavior of businesspeople leads to a financialization of assets. One could question whether these, too, are 'bad' strategies or 'good' ones, so I will simply qualify them as strategies whose effect is 'neutral.' Example (5) is peculiar: The fact that a receipt-lottery scheme reduces tax evasion is the outcome of a behavioral regularity, but this is certainly a 'good' effect, namely, part of the reason the institution was framed in this way: Joseph Raz would place (5) – but not (1) through (4) – among the indirect functions of legal norms.[17] Moreover, one could question whether this effect depends on prudential reasoning: It seems to be instead based on behavioral dispositions and statistical illusions, because people will request receipt in view of a payoff that is highly unlikely.

Diverse as they may be, all these para-institutional facts depend on what Amedeo G. Conte calls 'nomotropic behavior,' namely, behavior that is not an instance of rule-following but is carried out in light of the rule, that is, given the context created by the rule. An example of 'nomotropism' given by Conte is that of the thief described by Max Weber – someone who does not abide by the law of property but nonetheless acts in light of that law when concealing the goods they have stolen.[18] Another example, drawn from the literature on urban planning, is unauthorized settlements 'built in one night' to make demolition less likely in some legal contexts.[19] As is clear, neither of these behaviors is an instance of rule-following, but both are carried out bearing the institution's rules in mind: They emerge from institutional practice as side effects. Like (1) and (2), these are 'bad effects'; but the concept of nomotropism applies just as well to (3) and (4) as 'neutral' effects and to (5) as 'good' ones, thereby capturing the basic phenomenon on which para-institutional facts depend. What I am proposing is that this nomotropic behavior – be it 'good,' 'neutral,' or 'bad' – is part of the ontology of an institution, that is, part of what that is in a given social context. To summarize: an institution is explained not simply by its rules but also by its axiological and teleological background and by its social effects depending on nomotropic behaviors, whether or not these are coherent with the institution's purpose. The ontology of an institution is the outcome of three, interlocking layers: meta-institutional, institutional, and para-institutional.

With that as background, we can now go back to the main question of power. For, as I will argue, those three interlocking layers provide the foundation on which rest three corresponding kinds of institutional power. Power can be exercised at

[17] See J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), chapter 9.

[18] See A.G. Conte, *Sociologia filosofica del diritto* (Torino: Giappichelli, 2011), 47

[19] See F. Chiodelli and S. Moroni, 'The Complex Nexus between Informality and the Law: Reconsidering Unauthorised Settlements in Light of the Concept of Nomotropism' *Geoforum* 51, 161, 164 (2014).

each of the three levels of institutional ontology. Institutional power is typically rule-constituted. Examples of institutional power are the power to enact, apply, and enforce laws or to appoint senators for life. These powers come with institutional duties and other rights, as well as with specific roles and statuses created by the institution in question. Meta-institutional power, for its part, depends not on the institution's rules but on an axiological and teleological background, that is, the broader practice in which that particular institution is embedded. When games are played in informal contexts, a player or a team has the power to quit whenever they want: This is an activity that people essentially engage in as leisure. Another example of meta-institutional power is the power a player has to propose changing, adapting, or simplifying the rules or even to propose 'house rules,' such as time limits in given contexts: if the players agree, this house rule can become part of the game in that context. Unlike institutional power, meta-institutional power can be applied to different institutions, provided that they all belong to the same meta-institutional background: In informal contexts, I can quit any match – chess, football, baseball, tic-tac-toe, or what have you. One interesting question is what meta-institutional powers, if any, there are in law. This is a difficult question that cannot be dealt with here.

What is most interesting for us in this connection, and what I will be dealing with in what follows, is the question of para-institutional power. Given that para-institutional facts depend on the way an institution affects nomotropic behavior, para-institutional power can be understood as the capacity to prompt a specific kind of nomotropic behavior in light of an institution's rule-constituted powers or statuses. Just like the category of para-institutional facts, that of para-institutional power encompasses different kinds of phenomena. Let me give some examples. Professors have several para-institutional powers connected with their institutional status, among which are (1) the power to have students work with them on the activities they introduce in class (particularly before an exam) or (2) the power to influence their students' beliefs in virtue of their role. Examples of para-institutional power in the legal domain include (3) policemen on duty influencing people's behavior by their mere presence; (4) tax deductions for home improvements prompting homeowners to make earthquake-safety upgrades to their homes; (5), once more, receipt lotteries having a role in reducing tax evasion; and (6) safer driving as a result of regulations requiring that zebra crossings be painted three-dimensionally. All these are instances of causal capacities to influence human behavior in virtue of institutional legal roles. A first, necessary clarification regards the causal mechanism that underlies the capacity. In some cases, para-institutional power is based on reasoning, and in particular prudential reasoning, as in cases (1), (3), (4), and (5): Here, it is assumed that people take account of the institutional powers connected with a given status and that they behave accordingly to maximize their benefits and minimize their costs. In other cases, the mechanism is less reflective and more automatic, as in case (2) or (6), where behavioral dispositions

are elicited by way of a sort of cognitive or perceptive suggestion. Let us then introduce a distinction between transparent and opaque para-institutional power, but it bears mentioning from the outset that this is more a matter of degree than a dichotomy: Is fear of sanction, as in (3), a prudential calculus or a behavioral reflex attitude? Is hope for a reward in a lottery, as in (5), rational or merely reactive, a kind of compulsion? Rather than positing a clear-cut distinction between transparent and opaque para-institutional powers, it makes more sense to speak of these powers as being more or less transparent or opaque.

Another distinction worth making is that between direct vs indirect para-institutional power. In (1), (2), and (3), causal influence on people's behavior is exercised directly, simply in virtue of someone having a given status endowed with normative powers and the factual capacity to exercise these powers. On the other hand, (4), (5), and (6) all involve influence by way of lawmaking power: A legislature can influence people's behavior not directly, by virtue of its being a lawmaking body, but indirectly, by way of its enacted laws. If we are to capture this distinction between direct vs. indirect para-institutional power, we need to appreciate that nomotropic behavior can be twofold: it can be explained in light of a status's constitutive rules or in light of the regulative rules enacted by people with that status. For example, when students work collaboratively in class activities, they are acting in light of the rules constituting the status of professors and giving them the power to give grades at exams. This is, therefore, a case of direct para-institutional power. On the other hand, when students attend classes regularly, they may well be acting in light of a rule the professor has introduced requiring extended reading lists for nonattending students: This is indirect para-institutional power.

If we overlay the distinctions between transparent vs. opaque and direct vs. indirect para-institutional power, we can introduce a taxonomy under which to impart some order among the previous examples. Case (1) exemplifies direct and transparent para-institutional power: Students are collaborative and kind to the professor because they are acting prudentially in light of the professor's institutional power to give grades (of course, this is a rather gloomy view of students, and I trust it is inaccurate). Case (2) exemplifies direct and opaque para-institutional power, because students here do not make a rational calculus but fall under the professor's aura of authority. Case (3) can be interpreted as exemplifying a direct para-institutional power falling somewhere between transparent and opaque: people adjust their behavior nomotropically in view of the policemen' capacity to react and enforce the law, and this can be seen both as a rational calculus or simply as a fear-induced gut reaction. Cases (4), (5), and (6) are all instances of indirect para-institutional power, because here people act nomotropically not in light of the institutionally empowered status but in light of the rules enacted by officials under that status. Case (4) is transparent, because people make a cost-efficiency calculus about tax deductions, whereas (6) is opaque, because car

drivers react to three-dimensional zebra crossings differently than to ordinary, flat ones. Case (5), like case (3), falls midway between transparent and opaque para-institutional power, because, as noted, it is not clear whether hoping to win a lottery is a rational calculus or simply an automatic, reflex attitude. An interesting question, though one I cannot deal with here, would be where in this framework we might locate 'nudge-like' regulations.

Let me come back now to Brigaglia's distinction between normative, disciplinary, and governmental power, a distinction Brigaglia builds in light of Foucault. I should more precisely trace out the relation between these three kinds and those I have identified (institutional, meta-institutional, and para-institutional). Normative power can be naturally mapped onto institutional, rule-based power, and in this sense it is a small wonder that Foucault should have called it 'juridico-legal'. But even disciplinary power can be institutional: A teacher's power to compel students to behave as instructed is certainly constituted by institutional rules, as is a military officer's power to shape the conduct of his rank and file under duty. Normative power could also be classified as meta-institutional if it hinges on customary rules entrenched in the deeper conventions of society. Thus, for example, Kelsen's idea that a constituent assembly's legitimate power must be presupposed can be seen as a way to construe a legal system's meta-institutional power as a kind of normative power. On a different construal, meta-institutional power can also be disciplinary, as is suggested by John Austin's concept of a 'habit of obedience' as the background against which sovereignty is exercised: This concept points to a disciplinary understanding of the meta-institutional background of law. Para-institutional power is instead by its very nature governmental. As discussed, Foucault argued that governmental power manifests as an ability to influence people's behavior, to which end it is necessary to know in advance how people are 'naturally' inclined to behave, for it is on the basis of this knowledge that they can be manipulated: This is very much the stuff of para-institutional power as the capacity to predict nomotropic behavior and frame the institution's rules accordingly. In example (5) above (the receipt-lottery example) para-institutional power is the power to motivate people to ask for receipts at checkout when they go to a coffee shop, thereby forcing these establishments to keep an accurate record of their transactions, and consequently making it more difficult for them to evade taxes. This is a power that seizes on the statistical illusion that predisposes people to hope in an unlikely outcome (here, winning a lottery) and to act accordingly: It is, therefore, a motivational power grounded in knowledge, because predicting nomotropic behavior requires a working knowledge of sociological factors, psychological motives, and statistical generalizations, and this very closely resembles Foucault's knowledge-based power as described by Brigaglia. As Brigaglia notes, governmental power in its soft form is based on nudging, and that goes for the receipt-lottery case as well.

V. The Vagueness of Social Power (and the Revenge of Legal Theory)

I can now state my point, that will focus in particular on governmental/para-institutional power. If the connection between governmental power and para-institutional power holds, then we will have to reassess the heuristic value of Foucault's notion of power, or at least this value comes out diminished relative to what Brigaglia argues it to be. That is because, whereas institutional power is a clearly defined entity – it is constituted by rules, and these rules are the explicit, formal rules of the institution – meta-institutional and para-institutional power are inherently vague. Meta-institutional power is vague because the rules, conventions, and presuppositions on which it is based are themselves vague, implicit, and nontransparent: They are part of the background, and for the most part they are taken for granted. Para-institutional power, for its part, is vague because the domain of nomotropic behavior is very broad, and it is not always clear whether or not a given institution's effects on nomotropic behavior are intentional, particularly when these effects are considered retrospectively (as they are in Foucault).

Let me elaborate on the receipt-lottery example and put some fiction into it to explain what I have in mind. Suppose that receipt lotteries prove to be highly motivating: The idea of participating in lotteries by sipping a morning coffee becomes a trend, supported by social-media hype, and people who would previously have had their coffee at home now begin to have it at their local coffee shop instead. There are two effects of this behavioral trend: (a) The income earned by coffee shops surges to a record high, while (b) tax evasion on that income drops to zero. Both are para-institutional facts, in that they are not contained in the institution's rules on social behavior but are nonetheless incident to those rules as an effect. But do they both involve power? In both cases, rules certainly had an essential role to play in getting people to behave as they did: Their behavior was in this sense nomotropic relative to the institution in question, for it came as a consequence of an institutional setup. But then we have to ask: Was that effect or influence deliberate and intended? As mentioned, Brigaglia provides a bare-bones notion of Foucault's power in terms of 'intentional influence.' Receipt lotteries were explicitly introduced to reduce tax evasion, so it is reasonable to assume that (b) depends on a kind of power. But it is equally reasonable to argue that increasing income from morning breakfast was not an intended effect – or at least it was not the primary intention – such that (a) seems not to be the effect of a kind of power. But the question is: How do we know this? Effect (a) is something a crafty politician could claim for themselves when elections come, or, more imaginatively, it could be framed as the intended effect of a conspiracy:

> 'What the government really wanted to do was to get people to drink more coffee at the coffee shop so as to support makers of professional espresso machines!'

Where should we draw the line between a researched, empirically grounded

explanation of what happened and a retrospective reconstruction in light of personal interests and a strong confirmation bias? And if it is not possible to draw this line in a reliable way, how can this notion of power be said to have genuine heuristic value? Nomotropism and para-institutional behavior are very broad phenomena: If there is no reliable way to avoid collapsing the effects of governmental power into simple nomotropic behavior, the very idea of power offers no analytic gain here.

Brigaglia concedes that Foucault can often be misinterpreted as falling into various kinds of fallacies concerning intentions. This is how an enthusiastic Foucauldian might read all nomotropic, para-institutional effects: In the receipt-lottery scenario, the dual effect of reducing tax evasion while increasing income from morning breakfasters might thus be understood as intentional. However, Brigaglia also cautions us against falling into the pitfall of ascribing an overly crude intentionalism to Foucault: This would be 'an uncharitable interpretation of him'.[20] In reality, he argues, Foucault assumes 'an objectivistic concept of circuits of power used with an intentionalistic focus'.[21] This, in his view, is helpful because in this way we do not assume that when Foucault describes crucial power circuits, he was thinking of these as intentional strategies (ibid). In this way, we can 'recalibrate' Foucault's boldest hypotheses by arguing that intentional strategies may have played a contributing role in power circuits without being a *conditio sine qua non* of their existence.[22]

Although this no doubt offers a deep and powerful interpretation of Foucault, it is not clear to me how it solves the problem of vagueness. Did the lawmakers intend to increase income from the morning-breakfast crowd? Was this part of a broad governmental power circuit to increase gross national product in order to bring down public debt? According to Brigaglia's analysis, Foucault would argue that this was an objective power circuit: These policies made it possible to reduce public debt by getting people to ask for receipts at the cash register. And he could avoid the intentionalistic fallacy by stating that intentionality played a contributing role in this mechanism. But the problem is, intentionality to what end? Are we talking about an intention to motivate people to ask for receipts or an intention to get them to flock to their local café for breakfast, or both?

The problem of vagueness here is in the first place epistemic: Under this reading, it would not be clear by what method we should identify real power circuits as distinguished from mere collateral effects. Brigaglia draws a distinction between analysis and genealogy in Foucault's methodology, arguing that the genealogical method plays the more important role in his work. Hence, identifying a power circuit means reconstructing it historically and formulating hypotheses – these will of course be liable to falsification – that can also play a

[20] M. Brigaglia, n 1 above, 114. My translation.
[21] ibid, 113. My translation.
[22] ibid, 116.

role in placing contemporary social mechanisms under critical scrutiny.[23] It seems to me that the genealogical method is particularly prone to intentionalistic fallacies, because the interpreter is always arguing *ex post* and much later in time: On a genealogical approach, it becomes even more difficult to distinguish the kind of nomotropic behavior that is useful for power structures but unintended from deliberately devised strategies.

However, para-institutional governmental power can also entail a vagueness that is not just epistemic but also ontological. Jurists are very much aware of the problem of identifying the intentionality that drives the lawmaking process, so much so that some legal theorists altogether deny the concept of legislative intent.[24] Moreover, given Foucault's focus on administrative processes – a field that Brigaglia rightly identifies as being particularly neglected by legal theorists, but whose deliberative processes are much more obscure – the problem of assessing intentionality can become even more difficult to solve. And in any case, even if it were possible to identify all of the intentions that went into drafting provisions and regulations, the very content of those intentions could prove to be vague. It could be argued that the most fundamental intention behind receipt lotteries is that of reducing public debt, and that this objective is pursued by both reducing tax evasion and increasing taxes on coffee shops, such that the increased income can be seen as an intentional effect, even if it forms part of a larger strategy. I intend to lower the public debt by reducing tax evasion on income from morning breakfasting; I therefore intentionally motivate people to ask for receipts when paying for their breakfast; in so doing, I am motivating the same people to have breakfast out and hence to bring more business to coffee shops, such that the latter will bring in more income. Did I intend to raise the income of coffee shops owners? Perhaps this was not part of the original strategy, but it is certainly coherent with the general intention of reducing public debt, and it is an outcome of the strategy that I, the legislator, intentionally devised.

Of course this example is for the most part fictitious, but it should be sufficient to show what the problem is with Foucauldian *ex post* reconstructions of power circuits. Para-institutional governmental power gives rise to a problem of ontological vagueness to the extent that the idea of the legislator's intention does. My point is that when intention is worked into a Foucauldian notion of power, the slippery nature of intention can become a dangerous slippery slope for any kind of social theory, which in seeking a genuine explanation may in this way end up finding it in a conspiracy theory. Now, jurists and legal theorists are very familiar with the risk of hypostatizing intentions, and so it seems that legal theory in the end has something to teach Foucault (and social theory in general). I am quite confident that Brigaglia would agree with me on this point, given that

[23] ibid, 147–148.

[24] For example, thinkers as diverse as Ronald Dworkin and Jeremy Waldron: see on this R. Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), chapter 2.

in his book he has shown how the methodological attitude of a rigorous and insightful analytic jurisprudence can illuminate the pages of a great thinker.

VII. Conclusion

We started out with the distinction between normative and causal power, and with the traditional, legal-positivistic, and normativistic conception of jurists as masters of the former but not of the latter. In this paper, I have tried to show that this distinction, though conceptually useful, may hide the fact that in the real life of institutions normative powers have causal effects, and hence that the two kinds of power are inherently intertwined. The conclusion of my argument is that Foucault's conception of power – as analysed by Brigaglia – finds significant support from institutional ontology in showing that legal theory and legal science should broaden their focus when selecting relevant instances of power. When broadening this focus, however, jurists can teach social scientists to put up some boundaries by reflecting on the concept of intention and on the risk of hypostatizing it; otherwise the concept of power risks becoming too vague and opening the door for all manner of conspiracy theories and intentionalistic fallacies.