FEMINISM, FOUCAULT, AND LAW AS POWER/KNOWLEDGE

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In this article, Bunting critically assesses Michel Foucault's theses on power/knowledge, law and the state along with feminist writing engaging with Foucault. She explores tensions between Foucauldian and feminist theories while claiming that a constructive fusion of the two can lead to a rich analytical framework for women. Bunting concludes with a discussion of the implications of a Foucauldian approach for feminist legal strategies.

Dans le présent article, Bunting examine les thèses de Foucault sur le pouvoir et la connaissance, le droit et l'État ainsi que divers travaux féministes qui interpellent son œuvre. Elle explore les tensions qui existent entre les théories foucaldiennes et féministes tout en affirmant qu'une fusion constructive des deux peut conduire à l'élaboration d'un cadre analytique fructueux pour les femmes. Elle conclut en discutant des implications de l'approche de Foucault pour les stratégies juridiques féministes.

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I. INTRODUCTION

Feminist theorists have frequently interrogated, interrupted, and/or appropriated other schools of social thought; Marxism, liberalism, and psychoanalysis have been some of the objects of feminist scrutiny. Recently, this critical process has been taking place within feminist engagement with postmodern ideas in general and Michel Foucault's work in particular. There has been a proliferation of scholarship evaluating the utility of Foucault's methodology and concepts for feminist theorizing and political praxis. My goal in this paper is to review feminist writing engaging with Foucault as a way of evaluating one strand of the feminist post-structuralist project. I will also highlight the implications of a Foucauldian approach for feminist legal strategies.

While there is no settled definition of either postmodernism or post-structuralism, the challenges they pose have been quite clear. Metanarrative, reason, and truth are all associated with modernity which, it is argued, has exhausted itself. In the work of postmodernists there is a rejection of universalism, transcendental truth, and coherent subjectivity. Postmodernism, then, is both a description of the present historical moment and a critique of Enlightenment ideals.

For feminist legal scholars, postmodernism presents a number of far-reaching, substantive challenges. Its analyses of power, the state, and the self undermine some of

* LL.B., LL.M. The author would like to thank Brenda Cossman, Allan Hutchison, Marlee Kline, and Bruce Ryder for their comments on the earlier draft of this paper.

the premises in much feminist writing on law. One of the most influential post-structuralist theorists in this regard has been Michel Foucault with his theses on power/ knowledge, discourse, the subject, and genealogy. At the same time, many of Foucault's insights converge with those of feminist theorists. There is a certain level of abstraction involved in any discussion of feminist theories and Foucault, for each requires a measure of generalization: feminist writing is diverse and often conflictual; Foucault's body of work is vast and sometimes unclear. I will proceed attendant to the conflicts within feminism and within Foucault's work and explore the tensions between the two.

Most feminist theorists engaging with Foucault express some reservations about the political implications of his methodology of the micro-physics of power, his rejection of ideology in favour of discourse, his questioning of subjectivity, and his seeming decentralization of law. A few writers remain resolutely hostile while a few others apply his work without much modification. I will argue that Foucault's methodology can be fused constructively with feminist political praxis which includes the law as a site of struggle. The themes which will be discussed in this endeavour are power/ knowledge, law and the state and the politics of legal action. Within the sections on power/knowledge and law and the state, I will review Foucault's positions and various feminist analyses of his theories.

Any brief description of Foucault's theory of power/ knowledge cannot hope to do its complexities and ambiguities justice;[1] however, key features of his analysis will be sketched out to situate feminist interrogations of this part of his work. I have artificially separated his analysis of power from those of discourse, ideology, law and the state for they each pose distinct challenges for feminist theorists. Given the centrality of power relations to many feminist theories, this is a particularly important place to begin.

II. POWER / KNOWLEDGE MATRIX

Foucault's conception of power and how it is exercised directly affronted earlier theories of power. Unlike Marxist and liberal understandings, Foucault sought to show the productive and minute aspects of power in his exploration of its historical changes and contemporary deployments. In a manner which signals his more general reaction against Marxist problematics, he specifically challenged the notion that power is primarily the repressive maintenance and reproduction of economic relations.[2] Rather, Foucault argues

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1. For more thorough-going analyses of Foucault's theory of power see M. Cousins & A. Hussain, *Michel Foucault* (London: Macmillan, 1984); B. Fine, "Power Without People: Michel Foucault" in *Democracy and the Rule of Law: Liberal Ideas and Marxist Critiques* (London: Pluto Press, 1984) at 189-203; H. Couzens Hoy ed., *Foucault: A Critical Reader* (Oxford: Blackwell, 1986); J.D. Leonard, "Foucault: Genealogy, Law, Praxis" (1990) 14 Legal Studies Forum 3; J. Minson, "Strategies for Socialists? Foucault's Conception of Power" in M. Gane, ed. *Towards a Critique of Foucault* (London: Routledge & Kegan Paul, 1986) at 106-148; B. Smart, *Foucault, Marxism and Critique* (London: Routledge & Kegan Paul, 1983) Chapter 4; G. Turkel, "Michel Foucault: Law, Power and Knowledge" (1990) 17 J. Law and Society 170; and G. Wickham, "Power and Power Analysis: Beyond Foucault?" in *Towards a Critique*, op cit, at 149-179.

2. M. Foucault, "Two Lectures" in C. Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings, 1972-77* (Brighton: Harvester Press, 1980) 78 at 88-92.

that power is a force which circulates,[3] is exercised not possessed,[4] produces "ongoing subjugation,"[5] and does so throughout the whole "political 'anatomy'."[6] The whole social body, therefore, is the site of power struggles which form the "productive network" through which power moves.[7]

The twentieth century mechanisms of power, for Foucault, are associated with the growth of disciplinary society whereby the juridico-political form of power has been interpenetrated by a technical and individuated form of power. In its disciplinary form, power is exercised through mechanisms of surveillance, reporting, and classification which construct subjectivity. It is not a simple equation of repression and domination as found in its juridical form. While the latter has not been rendered obsolete, Foucault suggests a focus on the positive, productive, and local points of power.

Resistance, for Foucault, takes place at every juncture as power meets with spontaneous reaction within "force relations."[8] He suggests that there should be ascending analyses of power which focus on the historical and local aspects of power relations rather than deducing from an all-encompassing notion of domination. This leads to a "strategical model" of specific, unstable, and multiple force relations.[9]

In addition to Foucault's micro-physics of power, it is also imperative to understand the relationship between power and knowledge which he articulates: "power produces knowledge ... power and knowledge directly imply one another; there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations."[10] Foucault forwarded a view of power as producing discourses of knowledge and dependent upon those discursive realms.[11] Truth claims are, therefore, not universal but contingent claims which silence or exclude other forms of knowledge.

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3. *Ibid.* at 98.
4. *Ibid.* at 98. And see M. Foucault, *The History of Sexuality, Volume I: An Introduction* (New York: Vintage Books, 1980) at 94.
5. *Ibid.* at 97.
6. M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979) at 28.
7. M. Foucault, "Truth and Power" in *Power/ Knowledge*, reproduced in P. Rabinow, ed., *The Foucault Reader* (London: Penguin Books, 1984) 51 at 61.
8. "Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power ... These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal, no soul of revolt, source of all rebellious, or pure law of the revolutionary ... It is in this sphere of force relations that we must try to analyze the mechanics of power." M. Foucault, *History of Sexuality*, *supra*, note 4 at 95-97.
9. *Ibid.* at 102.
10. *Supra*, note 6 at 27.
11. *Supra*, note 2 at 94. Foucault's theory of discourse has been criticized for not addressing "how discourses are constituted and reproduced, nor how some discourses come to be more powerful and privileged than others.": S. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discource in Child Custody Law" (1991) 10(1) Can. J. Fam. Law 17 at 97. Some feminist authors find it necessary, therefore, to retain a Gramscian understanding of hegemony or a Althusserian notion of ideology interpellating the subject. See e.g., A. Assiter, *Althusser and Feminism* (London: Pluto Press, 1990).

Aspects of a Foucauldian analysis of power and knowledge can fit well within a feminist framework. For example, feminist theorists have challenged a reductionist analysis of power as exclusively economic.[12] They have insisted over the years, as well, on an examination of the oppressions of women including those encountered in the family, medical institutions, and the workplace. Further, feminists have argued that dominant discourses such as science and law have marginalized and silenced women in the guise of universal truth claims.[13] A theory of the local, micro-physics of power, in my mind, provides another vehicle through which to analyze the diverse dimensions of gender oppression and women's exclusion in societies.[14]

Foucault's analysis also challenges some tendencies in feminist theorizing. His criticism of grand theory and universalism can be directed at some strands of feminist scholarship. Over-generalization of women's experiences of gender discrimination and claims of women's true essence would be susceptible to Foucault's analysis of power/knowledge.[15] Some feminists see the value of his work in this insistence on heterogeneity and diversity.[16] Jana Sawicki advocates an application of Foucault's method and work to a "feminist politics of difference": "What Foucault offers to feminism is not a humanist theory, but rather a critical method which is thoroughly historical and a set of recommendations about how to look at our theories. The motivation for a politics of difference is the desire to avoid dogmatism in our categories as well as the elision of difference to which such dogmatism can lead."[17] Susan Hekman similarly adopts

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12. At the same time, there are Marxist and socialist feminists who challenge analyses of gender oppression which do not account for the role of capitalism. See e.g., M. Barrett, *Women's Oppression Today; Problems in Marxist Feminist Analysis* (London: Verso, 1980); Z.R. Eisenstein, ed., *Capitalist Patriarchy and the Case for Socialist Feminism* (New York: Monthly Review Press, 1979); and M. Mies, *Patriarchy and the Accumulation of Capital on a World Scale; Women and International Division of Labour* (London: Zed Books, 1986).

13. C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989). For further elaboration of Smart's important contributions to feminist legal scholarship, see C. Smart, "Law's Power, the Sexed Body, and Feminist Discourse" (1990) 17 J. Law & Society 194; C. Smart, "Feminist Jurisprudence" in P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991).

14. There has been considerable feminist writing over the past decade which has emphasized the diversity of women's experiences of domination in society.

15. Feminists, too, have problematized an essentialist notion of women that lies within some feminist theories. See e.g., J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); and E. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988). I will not discuss this issue here as I have explored anti-essentialism and feminism elsewhere: see A. Bunting, "Cultural Relativism, Feminism, and International Human Rights Discourse," forthcoming J. Law and Society (1992).

16. Z.R. Eisenstein, for example, uses parts of Foucault's work to develop her "radical pluralist method" and concept of "heterogeneous unity." See Z.R. Eisenstein, *The Female Body and the Law* (London: University of California Press, 1988).

17. J. Sawicki, "Foucault and Feminism: Toward a Politics of Difference" in M. Lyndon Shanley and C. Pateman, eds., *Feminist Interpretations and Political Theory* (Cambridge: Polity Press, 1991) at 226; and see J. Sawicki, "Feminism and the Power of Foucauldian Discourse" in J. Arac, ed., *After Foucault: Humanistic Knowledge, Postmodern Challenges* (N.B.: Rutgers University Press, 1988); and J. Sawicki, "Identity Politics and Sexual Freedom: Foucault and Feminism" in Diamond & Quinby, eds., *Feminism and Foucault: Reflections on Resistance* (Boston: Northeastern University Press, 1988) at 177.

Foucault's thesis of a contingent and non-absolute analysis of power for feminist discourse.[18] Chris Weedon reiterates that "It is from [Foucault's] perspective that we can best address the specific forms of power exercised in society and attempt to contest them."[19] Irene Diamond and Lee Quinby have suggested that any apparent conflicts between feminist and Foucauldian analyses "are mutually corrective ... [and within which] one finds the potential for an ethics of activism that is particularly appropriate for challenging the Faustian impulses of the contemporary era."[20]

Notwithstanding these positive evaluations, there are clear tensions between the implications of feminist and Foucauldian analyses of power that need to be explored; Foucault's analysis of power begs a number of questions of concern to feminists. First, if, according to Foucault, power circulates through the whole political anatomy, how is it concentrated and exercised to the detriment of certain groups in society, including women?[21] In a related vein, is Foucault's framework one that obviates disparities of power between individuals and groups?[22] Secondly, does Foucault's notion of power foreclose the possibility of transformative politics?[23] Finally, is Foucault's own work a discursive practice which excludes an analysis of the importance of gender, as many feminists have queried?[24]

Since Nancy Hartsock remains the most critical of Foucault's theory of power for women, I will briefly discuss her concerns along the lines of the above questions. Hartsock acknowledges the contribution that Foucault has made with his concepts of domination/subjugation and disciplinary power but argues, following Albert Memmi's metaphor, that he "reproduces in his work the situation of the colonizer who resists [and in so doing renders his work inadequate and even irrelevant to the needs of the colonized

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18. S.J. Hekman, *Gender and Knowledge: Elements of a Post-Modern Feminism* (Cambridge: Polity Press, 1990) in particular 175-188.

19. C. Weedon, *Feminist Practice and Poststructuralist Theory* (Oxford: Basil Blackwell, 1987) at 125.

20. I.Diamond & L. Quinby, eds, *supra*, note 17 at xvii.

21. See N. Hartsock, "Foucault on Power: A Theory for Women?" in L. Nicholson, ed., *Feminism and Postmodernism* (London: Routledge, 1990) 157 at 168-169 and Z.R. Eisenstein, *supra*, note 16 at 10-13 and 16-19.

22. Nancy Hartsock argues that "systematically unequal relations of power ultimately vanish from Foucault's account of power — a strange and ironic charge to make against someone who is attempting to illuminate power relations." N. Hartsock, *Ibid.* at 165.

23. Charles Taylor argues that, "There has to be a place for revolt/resistance aided by unmasking in a position like Foucault's, and he allows for it. But the general relativity thesis will not allow for liberation through a transformation of power relations." C. Taylor, "Foucault on Freedom and Truth" in D.C. Hoy, *supra*, note 1 at 94. Alan Hunt also says: "Where I suggest Foucault is lacking is his complete failure to address the cumulative connections between the elements of micro-politics that are essential if a counter-hegemony is going to succeed in displacing an existing hegemonic bloc." A. Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17(3) Journal of Law and Society 309 at 315.

24. Many feminists point out Foucault's inattentiveness to gender. See e.g., F. Bartkowski, "Epistemic Drift in Foucault" in I. Diamond & L. Quinby, *supra*, note 17 at 43; S.L. Bartky, "Foucault, Femininity, and Patriarchal Power" in *op cit*, 61 at 64; S. Boyd, *supra*, note 11 at 3; I. Diamond & L. Quinby, "American Feminism and the Language of Control" in Diamond & Quinby, *supra*, note 17 at 197; N. Hartsock, *supra*, note 21; and B. Martin, "Feminism, Criticism, and Foucault" in Diamond & Quinby, *supra*, note 17 at 14.

or dominated]."[25] Specifically, Hartsock argues that Foucault's notion of power eclipses structural power relations[26] and the domination of actual as opposed to abstract individuals. Further, she states that Foucault's ascending analysis of power, by focusing on the "infinitesimal mechanisms" of power rather than those at the centre or the top, could lead to a "version of blaming the victim."[27] Finally, Hartsock asserts that Foucault's analogy of the network of power relations throughout the social body "comes to look very homogeneous. Power is everywhere, and so ultimately nowhere."[28] According to Hartsock, Foucault's is not a transformative theory of power and resistance useful for women.

I think that Hartsock is wrong to suggest that Foucault's analysis of power at the extremities and capillaries would lead to responsibility being placed on 'victims' of domination. His ascending analysis is an inversion of the traditional understandings of power as concentrated in the sovereign. It is a complication of the conventional depiction of power as binary relationships. This approach seems particularly consonant with feminist attention to the exercise of power in the "private" sphere and more generally throughout society; indeed there is a strong affinity between the feminist slogan that "the personal is political" and Foucault's analysis of the pervasiveness of power. In addition, Foucault's position presupposes resistance and struggle in those micro-force relations. This argument, too, seems to validate the view that women are resisting power in those experiences of violence in the home, harassment in the streets, and so on.

Foucault's notion of power has become equated, as Hartsock says, with the dictum "power is everywhere" and for her this means the negation of substantive analysis of, and resistance to, power. Foucault's theory, I would argue, is a displacement of the concepts of power which focus on the superstructural frameworks in which power operates and an advocacy of historically and culturally contextualized analyses of local power relations. As Susan Hekman argues, "A Foucauldian politics speaks to [the] peculiarity of the subordination of women. It suggests that we oppose those knowledge/power discourses that subordinate women everywhere throughout society. The result of such a strategy is not, as Foucault's critics argue, political acquiescence, but, rather, a broadly based political resistance."[29]

While I agree that his theory of micro-powers is relevant and useful for feminist theorists, I cannot share Susan Hekman's unequivocal defense of Foucault's analytics of power and resistance for he fails to illuminate the patterns and structures of concentrated power relations. Hartsock may be overstating the case by describing Foucault's theory

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25. N. Hartsock, *supra*, note 21 at 166. And see N. Hartsock, "Rethinking Modernism: Minority vs. Majority Theories" (1987) 7 *Cultural Critique* 187.

26. Eisenstein also makes this point: "I believe Foucault's focus on micro-practices carries deconstruction too far. It leaves us with the disconnections of power, but there are connections between sites of power, even if no center exists ... I criticize Foucault not for decentering the state but not for reconnecting the dispersions he illuminates to the hierarchical system(s) of power(s) represented through the discourses of the state." Z.R. Eisenstein, *supra*, note 16 at 19.

27. *Supra*, note 21 at 169.

28. *Ibid.* at 170.

29. *Supra*, note 18 at 186.

as approximating a "blame the victim" approach, but it is nevertheless true that his analytics are unconcerned with explaining the differences in people's abilities to exercise power that may be related to personal characteristics such as class, gender, race and sexuality. In Foucault's introductory volume of *The History of Sexuality* he argues as follows:

> We must not look for who has the power in the order of sexuality (men, adults, parents, doctors) and who is deprived of it (women, adolescents, children, patients); nor for who has the right to know and who is forced to remain ignorant. We must seek rather the pattern of the modifications which the relationships of force imply by the very nature of their process.[30]

Foucault is clearly not oblivious to forms of class and gender hegemony but is reticent to explore the agents of power relations and the convergences of those shifting relationships.[31] It is a tremendous irony in a three volume treatise devoted to the history of sexuality that Foucault barely acknowledges the gendered nature of Western discourse about sexuality and that he himself is participating in that long tradition of male dominated discourses.[32] What is missing is an explanation of why *male* voices have had greater power to speak, greater legitimacy when they do speak, and the power to silence "others." Why are the various mechanisms of exclusion and surveillance so often operating within gendered and other frameworks? Why have women's voices been condemned as irrational and hysterical? The kernel of truth in Hartsock's sweeping dismissal of Foucault is that his analysis could lead to the conclusion that women's subordination is the result of not having spoken enough or not loudly enough.

For feminist theory, this is the fatal flaw in an unmodified Foucauldian approach criticized by Fine as imagining the exercise of "power without people."[33] Foucault's genealogy leads him to a contradiction: he argues for an emphasis on the "individuated" forms of power without an emphasis on the individual or groups effected by power. People are the effects of power, rather than those exercising or experiencing effects of power relations.[34] This is a complicated aspect of Foucault's theory for he rejects the enlightenment notion of subjectivity and puts forward a view of the subject as constructed through discourse. However, there is a crucial jump between recognizing multiply-constituted subjectivities and imagining agent-less matrices of power. Masculinity, for example, is constructed by discourse *and* deeply implicated in structural power relations.

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30. *Supra*, note 4 at 99.

31. Foucault sometimes refers to the hegemonic convergences of power but never uses his genealogical method to draw such conclusions. He states that there are cleavages in relationships of force that "then form a general line of force that traverses the local oppositions and links them together; to be sure, they also bring about redistributions, realignments, homogenizations, serial arrangements, and covergences of the force relations. Major dominations are the hegemonic effects that are sustained by all these confrontations." *Supra*, note 4 at 94.

32. "What Foucault has done is to reproduce and produce as history the patriarchal history of sexuality." F. Bartkowski, *supra*, note 20 at 47.

33. B. Fine, *supra*, note 1.

34. Fine argues that "Foucault's rejection of [private property, law and the state] deepens the mystification by abstracting power from its bearers altogether. In a situation where power is being concentrated in ever fewer hands, this approach is a dangerous delusion." *Ibid.* at 201.

Hekman, among others who follow Foucault,[35] presupposes a structural or materialist analysis of women's oppression. She uses terms such as "patriarchal structures" and "male domination" without acknowledging that using these concepts necessitates resort to tools drawn from outside of post-structuralism. While she implies that feminism can fill in the gendered aspects of Foucault's problematics, Hekman avoids confronting the deeper tension between the complete lack of concern for structural concentrations of power in Foucauldian analysis and the fundamental premise of women's domination that characterizes feminist politics. Theories of domination and oppression need not be universalistic and essentialist to be effective for feminism but (arguably) they do need to be grounded in some material appreciation of women's situation in societies.

In this regard, I would suggest that feminists will find useful concepts which are consistent with Foucault's emphasis on the construction of subjects by discourses and non-discursive practices, without losing sight of the fact that many effects of discourse are related to the maintenance of structural power relations in society - without losing sight, in short, of the concept of ideology. In this respect, feminists have drawn upon, and should continue to find fruitful in understanding the operation of male domination, concepts which emphasize the "lived" process of political domination, such as Gramsci's notion of hegemony,[36] Althusser's understanding of ideology interpellating the subject,[37] and Bourdieu's notion of the "habitus."[38]

In sum, Foucault's work on power/knowledge offers many useful approaches to feminist theorists precisely, I would argue, because their work is inspired by feminism. Without the complementary aspects of a feminist analysis, Foucault's work could be "an elaborate mystical shell"[39] without transformative political impact for women. But it is my contention that this fusion provides a very rich discourse for women. Foucault's insights about power producing knowledge, permeating the political anatomy, not being equated solely with the centralized sites of power in society, and resistance being ever-present in the power network, are worth integrating into a feminist analysis attentive to the structural nature of male domination. Similarly, his challenge to modernist notions

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35. Most feminist writing that I have encountered utilizes structural notions of oppression and domination of women, even those feminists advocating a postmodernist approach. Frequently, the tension between these competing paradigms or premises is left unexplored. See, for example, Carol Smart's use of the categories of women's experience, women's reality, and women's oppression. C. Smart, *supra*, note 13.

36. S. Boyd, *supra*, note 11; H.J. Maroney, "Using Gramsci for Women: Feminism and the Quebec State, 1960-1980" in (1980) 17(3) *Resources for Feminist Research* 26; and M. Valverde, "The Rhetoric of Reform" in (1990) 18 *Int. J. Sociology of Law* 61. For works incorporating Foucauldian and Gramscian insights see also, A. Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17(3) Journal of Law and Society 309; and B. Smart, "The Politics of Truth and the Problem of Hegemony" in H. Couzens Hoy, *supra*, note 1 at 157.

37. See e.g., A. Assiter, *supra*, note 11.

38. P. Bourdieu, *Outline of A Theory of Practice* (Cambridge: Cambridge University Press, 1977).

39. B. Fine, *supra*, note 1 at 191.

of subjectivity and political transformation are consistent with the recent feminist focus on interrogating essentialist assumptions within feminist theory.[40]

III. LAW AND THE STATE

Foucault's decentreing of sovereign power and his emphasis on the local exercises of power explicitly, though not unambiguously, shift focus away from state and law-based analyses. Some assert that Foucault advocates that power as concentrated in the law and the state has been eclipsed by disciplinary power. I would contend that regardless of his historical description of the transition to disciplinary power, Foucault does not negate, though nor does he adequately explore, the place of law in discursive power/knowledge relations. In this section I will discuss the competing understandings of Foucault's analysis of law and the state and the implications of this approach for feminist legal strategies. Since Carol Smart draws on Foucault to argue that feminists ought to displace the centrality of legal strategies, I will focus on her work in my discussion of feminist law reform.

As discussed above, Foucault saw analyses of power as conceptualized in its juridical form as wholly inadequate. He further posited that power as repression had been overemphasized in Western thought.[41] With respect to the state and the law, Foucault stated:

> To pose the problem in terms of the state means to continue posing it in terms of sovereign and sovereignty, that is to say in terms of law ... I don't want to say that the state isn't important; what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extend beyond the state.[42]

Thus, it is fundamental to Foucault's analysis of power in society that state power ("metapower")[43] be seen as complemented and dependent upon the other multiple relations of force throughout the social body: "this metapower with its prohibitions can only take hold and secure its footing where it is rooted in a whole series of multiple and indefinite power relations that supply the necessary basis for the great negative forms of power."[44] The law, therefore, stands in a symbiotic relationship[45] to other forms of

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40. In this regard, it must be conceded that there are significant strands of feminist theory that are inconsistent with Foucauldian assumptions. For example, radical and cultural feminists who posit an essential or universal female nature or sexuality, as well as psychoanalytic theories founded on humanist conceptions of the self, are undermined by a Foucauldian analysis. For a discussion, see L. Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory" (1988) 13 Signs 405. It is not surprising then that some scholars working within these feminist traditions have dismissed Foucault outright (e.g., Sheila Jeffreys, *Anticlimax: A Feminist Perspective on the Sexual Revolution* (London: Women's Press, 1990)) or accused him of "disciplining women." I. Balbus, "Disciplining Women: Michel Foucault and the Power of Feminist Discourse", in J. Arac, ed., *supra*, note 17 and in S. Benhabib & D. Cornell, eds., *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1987) at 110.

41. *Supra*, note 7 at 62.

42. *Ibid.* at 63-64.

43. *Ibid.* at 64.

44. *Ibid.*

disciplinary power relations.[46] This is not an always obvious interpretation of Foucault's theory of the law. As we will see, there are conflicting statements in Foucault's writing which can lead to confusion. Further, since it is the local and productive sites of power that interest Foucault in his genealogical studies, he devotes little time to the law as a site of concentrated power relations.

The symbiotic relationship between law and other disciplines is not always made clear in Foucault's work. Part of this ambivalence is attributable, I believe, to Foucault's rhetorical equation of law with sovereignty, or with repressive aspects of power, which leads him to make statements that deny the disciplinary aspects of the contemporary exercise of legal power. For example, he has stated that:

> The discourse of discipline has nothing in common with that of law, rule, or sovereign will.[47]

However, a careful reading of Foucault's work as a whole indicates that, far from seeing law as irrelevant to the disciplinary society, he saw its importance increasing. He did say that the *form* of law as sovereign right is dying. Thus, the repressive elements of law as sovereign right ought to be de-emphasised in favour of an analysis of its constructive functions as discipline, surveillance, normalization, and a discourse of power/knowledge. This latter position is implied in Foucault's closing paragraph of *Two Lectures*:

> If one wants to look for a non-disciplinary form of power, or rather, to struggle against disciplines and disciplinary power, it is not towards the ancient right of sovereignty that one should turn, but towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty.[48]

Another ambiguity in Foucault's writing on law is whether disciplinary power is colonizing the law or being colonized by the law. If the former is the case in modern society, then the place of law as a site of struggle would be correspondingly decreasing. If it is the latter, which Foucault is arguing, then the importance of law would be increasing as a place of resistance to disciplinary power. Again it is difficult to be clear on his arguments in this area. For example, the following statement was written in 1976 and supports the position that other disciplinary powers are superseding the law:

> ... in our times power is exercised simultaneously through this right [that invests sovereignty] and these techniques and that these techniques and these discourses, to which disciplines give rise invade the area

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45. *Supra*, note 13 at 165.

46. I agree with Jerry Leonard's reading of Foucault's comments on the relationship of law and other disciplines: "Foucault maintains that political power is none other than the continuation of war by other means; that is to say, the 'other means' of a vast and proliferating array of institutional structures and apparati, the language and imagery of (post)modern science, technology and mass media, and the knowledge(able) discourses made possible by the subtle intermixing and linkage of psychiatry, medicine and law." J.D. Leonard, *supra*, note 1 at 7.

47. *Supra*, note 2 at 106. And see "Truth and Power", *supra*, note 7 at 63.

48. *Ibid.* at 108.

> of the right so that the procedures of normalization come to be ever more constantly engaged in the colonization of those of law ...
>
> It is precisely in the extension of medicine that we see, in some sense, not so much the linking as the perpetual exchange or encounter of mechanisms with the principle of right.[49]

Compare the above words with those in *Discipline and Punish* written only three years later concerning the modern penal system's colonization of psychiatric expertise:

> what is odd about modern criminal justice is that, although it has taken on so many extra-judicial elements, it has done so not in order to be able to define them juridically and gradually to integrate them into the actual power to punish; on the contrary, it has done so in order to make them function within the penal operation as non-juridical elements.[50]

This apparent contradiction in Foucault's writing could be explained by the differing meanings of law which he uses, as discussed above.

Given the lack of clarity and focus in Foucault's writing on law, it is not surprising that legal scholarship relying on Foucault has mirrored some of these tensions. Many authors read in Foucault a dismissal of the importance of law as a site for the exercise of power in modern society. For example, in Carol Smart's work *Feminism and the Power of Law* she states that Foucault sees "the old power (and hence the significance of law) as diminishing."[51] To conclude from Foucault's critique of the ancient regime of repressive power that the significance of law, in its broader sense, is retreating is to miss the subtlety of his argument: it is a confusion of a form of power for the social spaces in which power is exercised. While Foucault suggests that sovereignty as a form of power is diminishing, he does not suggest that the legal system, with its multifarious forms and mechanisms of power, is declining in importance as a site for the exercise of power.

In contrast to what she views as Foucault's position, Smart argues that "juridical power remains a formidable obstacle to feminism and that whilst other mechanisms of discipline develop, law itself can deploy these mechanisms to enhance its own power."[52] She persuasively argues that "law is extending its terrain in every direction"[53] and incorporating new discourses of discipline and science. I doubt, for the reasons stated above, that Foucault himself would disagree with this thesis as Smart implies.[54]

Zillah Eisenstein also takes issue with Foucault's decentreing of the state and the law:

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49. *Ibid.* at 106-107.
50. *Supra*, note 6 at 22.
51. *Supra*, note 13 at 8.
52. *Ibid.* at 6. This is consistent with Leonard's analysis of Foucault's own position, *supra*, note 1.
53. *Supra*, note 13 at 20.
54. See Foucault's comments quoted above at notes 43-50.

> Instead of focusing on what he terms 'weak continuities', Foucault instead chooses to emphasize the 'intensity of difference'. The problem with this emphasis on disparate power is that it privileges diversity, discontinuity, and difference while it silences unity, continuity, and similarly.[55]

Eisenstein proposes to focus on the privileged place of law as state language: "To the extent that laws and the law operate as authorized discourses for the state, we must examine how powers within the state articulate differing and conflicting views of sex equality and sexual 'difference'."[56] Eisenstein retains a notion of the state as a constellation ("condensation") of forces and the law as a privileged, if contradictory and heterogeneous, language of the state. Further, influenced by Foucault, she studies law as discourse which "occupies a space between the 'real' and 'ideal' that is a continuum. Law reflects and impacts on the world. It is constitutive of and derivative of social and political change."[57]

It is interesting to note that two feminist scholars who have engaged with Foucault's work come to very different conclusions concerning the place of legal strategies in feminist politics. Eisenstein posits a "radical transformation of the present interpretation of sex equality"[58] and explores legal policy changes implicated in her analysis. By contrast, Carol Smart strongly maintains that since the law systematically excludes women's accounts of sexuality and feminist discourse, the law ought to be cautiously resorted to as a strategy of feminist resistance. She goes so far as to argue that feminism has "conceded too much"[59] to the law and that feminist jurisprudence "encourages a 'turning to the law' for solutions, it fetishizes rather than deconstructing it."[60]

Smart presents an extremely thorough and thoughtful challenge to feminist law reform strategies. A number of problems seem to exist, however, in her thesis that feminism ought to decentre the law's overinflated view of itself by reducing the reliance on law. First, Smart consciously avoids defining law. At the outset, she notes that law is a fictitious unity but proceeds nonetheless with the singular term since she wants to explore this aspect of the law's power to define: "the usage of the term 'law' operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses which by comparison fail to promote such a unified appearance."[61] Like Foucault's analysis, which frequently collapses "law" with the form of juridical power, Smart's analysis of the penetration of legal discourses in new areas of social life could benefit from the insights of those scholars who have analyzed the existence and circulation in society of a plurality of different legal systems.[62]

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55. *Supra*, note 16 at 18.
56. *Ibid.* at 20.
57. *Ibid.* at 46.
58. *Ibid.* at 116.
59. *Supra*, note 13 at 5.
60. *Ibid.* at 89.
61. *Ibid.* at 4.
62. See, e.g., B. de Sousa Santos, "Law: A Map of Misreading: Toward a Postmodern Conception of Law" (1987) 14 Journal of Law & Society 279; J. Griffiths, "What is Legal Pluralism?" (1986) 24 Journal of Legal Pluralism 1.

Secondly, I would argue that Smart concedes too much to the law in her contentions regarding the resilience of the law in the face of feminist discourses. In this respect she herself may overinflate the law and its powers. Feminist and other critiques have affected popular understandings of the law and undermined its self-image as impartial and apolitical. Feminists have been successful in explicitly challenging the neutrality of legislation which on its face does not present formal discrimination. Indeed changing definitions of equality have been legitimated by the courts in some jurisdictions. Further, mediation techniques have been introduced into the legal system in part as a reaction against the adversarial model as the optimal manner to resolve disputes for participants in the legal system. The law is not a static entity impervious to change, but a discourse in a dialectical relationship with other discourses on which it relies and impacts. To treat the law as particularly resilient to feminist demands is to prioritize the power of law's exclusionary mechanisms over those of other discourse such as psychiatry, medicine, and science.

Thirdly, her analysis of feminist jurisprudence seems to overlook other complementary feminist strategies outside legal discourse. With little recognition of these non-judicial strategies, feminist law reform can easily look very complicitous. Using the example of rape, there are active rape shelter movements which work parallel with strategies to address the criminal law's deficiency in validating women's accounts of rape. Shelter workers may have very different perspectives on the law and its utility for rape survivors than the perspectives of legal advocates; these tensions are endemic to feminist politics. I do not disagree with Smart's characterization of the law's power to delegitimize women's accounts of rape and its celebration of this silencing; I take issue with the presentation of feminist legal strategies operating in a vacuum and ignorant of the possible injurious impact of law reform on women. I am not as convinced as Smart that all feminists using the law have seen the law as an unproblematic tool and need to "resist the temptation" to see solutions in the law.[63]

Finally, Smart's advocacy of the creation of feminist discourses rather than feminist legal policies in order to challenge legal definitions and the power of the law is a fine and perhaps unproductive line to draw. There is also some problem in ascertaining exactly what Smart means by her decentreing of the law. She states, for example, that law reform ought to continue in the area of rape because it is already in the domain of the law.[64] However, on her own analysis, the domain of law is ever-extending and, therefore, ever-increasing the issues of concern to feminists. I would argue that law as a discourse ought not to be given special treatment by feminists by ignoring possible strategies relevant to women. To leave policies unexamined and static presents more risks than participating in an exclusionary discourse. There can be deconstructive effects of such legal strategies, if only small displacements of legal discourse. And law reform strategies can be combined with other feminist movements outside the legal field. That does not mean that feminist legal strategies should present themselves as without risks; on the contrary, these strategies should imply their own contradictions and limitations.

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63. *Supra*, note 13 at 165.
64. *Ibid.* at 49.

Smart shows with precision and insight that the law, in a number of specific areas, has excluded feminist knowledges and women's accounts. This is a very valuable contribution to feminist jurisprudence. However, because she does not explore how other discourses such as psychiatry and psychology have similarly delegitimized feminist knowledges, Smart's account leaves the reader with the sense that other discourses would be more susceptible to feminist challenges. I am quite certain that Smart does not wish to make this argument. Nonetheless it is important to highlight that feminists engaging with any number of discursive realms in the 'modern episteme' will face obstacles in legitimating alternative knowledges. The "'psy' professions"[65] are no exception in the disqualifying of feminist discourses. Indeed feminist theorists are constantly dealing with the contradictions of participating in discourses which exclude women's voices and of risking complicity in these discourses. As Alan Hunt has argued in the context of rights struggles; "there is no doubt co-optation is always a possibility. But this is only one of the practical manifestations of the social consequences of the real world of hegemony. What needs to be stressed is that **all struggles commence on old ground.**"[66]

In sum, I find ambiguities in both Foucault's writing on law and feminist engagement with Foucauldian notions. It is more useful, I think, to apply his thesis of disciplinary power in society to all discursive practices including the law and to challenge the claims to truth that those discourses make. Feminist legal strategies, then, would attempt to decentre the law from both within and beyond the discourse. This is the paradox of working against a structure which has no equally legitimate counterpart. Until the time that such competing structures are put in place, multifarious modes of resistance ought to be pursued.

IV. CONCLUSIONS

The critical process of evaluating Michel Foucault's work and feminist interpretations and appropriations of his work is one dialogue within the feminist post-structuralist project — one which I believe can lead to provocative results. Foucault's theories of power and power/knowledge offer feminist theorists a way in which to conceptualize and contest power relations in societies, including those local, minute and pervasive power relations which characterize contemporary cultures. A Foucauldian approach seems particularly adept at addressing the simultaneity of public and private aspects of women's oppression which we see in such issues as abortion, rape and wife assault. Further, in such a theoretical framework, law is a site of struggle, a discourse to be displaced, and a mechanism of power to be challenged.

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65. *Ibid.* at 15.

66. A. Hunt, *supra*, note 36 at 324.