TOWARD A FOUCAULDIAN LEGAL METHOD

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I. INTRODUCTION

Ever since Michel Foucault's death in 1984, scholars have struggled to define his theory of law and the extent to which his philosophy can be incorporated into legal policy.[1] It is difficult to incorporate into legal theory an intellectual body of work that contains no positive theory of jurisprudence and, to the extent the law is mentioned, subverts it as a distraction from the real powers at work. Yet a scholar as celebrated as Foucault, whose work deals primarily with power structures, their effect on the individual, critiques of the modern state, and the institutions that operate alongside it, must have some bearing on how the law evolves itself in the Twenty-First Century. This Note argues that it does not matter whether or not Foucault envisioned a positive jurisprudence. Legal theory's preoccupation with Foucault's evident subversion of the law obscures the more important realization that Foucault's vision of how power operates in modernity can aide in the crafting, and even be the basis of, legal policy.

An exhaustive review of Foucauldian theory from a legal perspective would be redundant[2] and beyond the scope of this work. Section II presents two of Foucault's most important critiques of modernity, his views on political activism, which will serve as the basis for developing a Foucauldian legal method, and a brief aside on his epistemological critique of knowledge institutions. This section merely serves as a survey that introduces readers to Foucault.[3] Section III surveys

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[1] *See* ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE, at vii (1994); Hugh Baxter, *Bringing Foucault into the Law*, 48 STAN. L. REV. 449, 473 (1996).

[2] *See* Victor Tadros, *Between Governance and Discipline: The Law of Michel Foucault*, 18 OXFORD J. LEGAL STUD. 75, 75–103 (1998), *reprinted in* FOUCAULT AND LAW 149, 149–78 (Ben Golder & Peter Fitzpatrick eds., 2010).

[3] More comprehensive summaries of his scholarship can be found in the citations.

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the academic treatment of Foucault's legal theory and analyzes how legal scholars use his theory. Section IV contrasts cultural anthropology's use of Foucault as a basis for a method of inquiry with the law's marginal treatment of Foucault.

II. FOUCAULT'S MODERNITY: A BRIEF SURVEY OF RELEVANT CONCEPTS

A. Bio-Power

The thrust of Michel Foucault's scholarship is the study of power and the effect it has upon the individual human subject.[4] One of his most famous turn of phrases comes from *The History of Sexuality Volume 1: The Will to Knowledge*, a work he would not complete before his life was tragically cut short by AIDS: "In thought and political discourse we have yet to cut off the head of the king."[5] What he meant is that when power is analyzed it tends to be reduced to the laws coming from the king, or the king in his modern form, the State. The State creates a legal system that divides practices into categories of "licit" and "illicit" and then punishes transgressions.[6] We confine our analysis of power to two questions: that of sovereignty, or who has the power to make laws, as well as what should be legal and what should not.[7] Stated another way in a lecture at the College de France: "[O]ne fact must never be forgotten: In Western societies, the elaboration of juridical thought has essentially centered around royal power ever since the Middle Ages."[8] We will see later on that Foucault's criticism of law—that it never really divorces itself from its royal roots—causes many legal theorists to discount Foucault entirely.[9] "Ultimately, I think all jurists try to do the same thing, as their problem is to discover how a multiplicity of individuals and wills can be shaped into a single will or even a single body that is supposedly animated by a soul known as sovereignty."[10] The jurist's strategy is fundamentally flawed because

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[4] *See* Paul Rabinow, *Introduction* to MICHEL FOUCAULT, THE FOUCAULT READER 3–23 (Paul Rabinow ed., 1984).

[5] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: THE WILL TO KNOWLEDGE VOLUME I, at 88–89 (Robert Hurley trans., Penguin Books 2008) (1976).

[6] *Id.* at 85.

[7] Arnold I. Davidson, *Introduction* to MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975–1976, at xv, xxi (David Macey trans., Picador 2003) (1997).

[8] FOUCAULT, *supra* note 7, at 25.

[9] *See* discussion *infra* Part III.

[10] FOUCAULT, *supra* note 7, at 28–29.

power is multifarious, it functions, it exercises itself through networks; individuals both submit and exercise power. Power should not be viewed as a "mass and homogenous domination."[11]

Furthermore, Foucault viewed the legal system as utilizing a negative conception of power because its primary enforcement mechanism is punishment for breaking the law.[12] Likewise, when people speak of political reform and the reorganizing of power structures they usually seek to change the law—to change what is licit or illicit. For Foucault, this negative juridical notion of power masks the actual function of power in modernity because the law is not the sole source of power.[13] Whereas the king ruled his realm with total sovereignty, the State operates alongside institutions and knowledge structures that have their own form of sovereignty—their own *raison d'etre*—which is a justification for being wholly different from medieval or Roman notions of sovereignty.[14] Starting in the Eighteenth Century, there is a more subversive bio-power, positive rather than negative in its operation, through which the basic biological features of the human species have become the object of political strategy.[15] Social institutions—such as the social sciences, psychiatry, the family, schools, and medicine—operate alongside and in conjunction with the State to control individuals in a much more subversive manner than the tyrant monarchies of old from which we have supposedly progressed.[16]

Bio-power is "the set of mechanisms through which the human body became an object of political strategy."[17] This strategy, starting in the late Eighteenth Century, took on the fundamental biological fact that human beings are a species.[18] Scientific discoveries of genetics and the basic biological make-up of the human

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[11] *Id.*

[12] FOUCAULT, *supra* note 4, at 84–86.

[13] *Id.* at 86.

[14] FOUCAULT, *supra* note 7, at 34–40.

[15] MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE 1977–1978, at 1 (Francois Ewald & Alessandro Fontana eds., Graham Burchell trans., Palgrave 2006). *But see id.* at 140–90 (tracing bio-power and governmentality's historical origin back to early Christian conceptions of shepherding the flock).

[16] FOUCAULT, *supra* note 4, at 144–45.

[17] FOUCAULT, *supra* note 7, at 1.

[18] *Id.*

species became an essential part of a Western worldview of progress. The wars of the Eighteenth Century, Foucault observed, are thought of as wars between the races or struggles for racial purity.[19] Today, the individual human is not merely a subject in the king's realm; he is a set of genetic material that reflects the progress of civilization. All the sciences of life can now operate on the individual subject to mold it into a scientific unit that can be easily categorized and controlled by the State.[20] Through this logic, Foucault sees psychiatry as the science of the failure of the family, and he views schools, hospitals, barracks, and asylums as spaces that are part of disciplinary mechanisms that mold individuals into normative social units.[21]

A paradigmatic example of the difference between sovereign power and the new disciplinary power of bio-power is embodied in the juxtaposition of the sovereign's power over death and the modern state's power over life.[22] "A sovereign's power to affect life is exercised only when the sovereign can kill."[23] The right to kill in the Nineteenth Century becomes complemented by an opposite right; a right to make live and let die.[24] Instead of deciding whether to execute a subject, the modern State now possesses the ability to reform that subject, discipline him, and place him back in society. The sovereign now has power over life, a power exercised through the operation of life sciences. Modernity is not a world of public executions, in their loud, boisterous displays of sovereign right over death; it is a world of subversive, private control where the individual's life is the object of concern, not their death.[25]

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[19] *Id.* at 239.

[20] *See, e.g.*, M ICHEL F OUCAULT , P SYCHIATRIC P OWER : L ECTURES AT THE C OLLEGE DE F RANCE 1973– 1974 (Jacques Lagrange et al. eds., Graham Burchell trans., 2006).

[21] *Id.* at 93–121; *see also id.* at 115–16 ("[T]he family becomes a micro-clinic which controls the normality and abnormality of the body. . . . Being a good son, a good husband, and so on, is really the outcome offered by all these disciplinary establishments, by schools, hospitals, reformatories, and the rest.").

[22] F OUCAULT , *supra* note 7, at 239–40; *see also* M ICHEL F OUCAULT , D ISCIPLINE AND P UNISH (Alan Sheridan trans., 2d ed. 1974) [hereinafter F OUCAULT , D ISCIPLINE AND P UNISH].

[23] F OUCAULT , *supra* note 7, at 240.

[24] *Id.*

[25] As an illustration of how Foucaultian theory can aid the law, consider how the concept of bio-power would flip on its head the entire modern debate over the death penalty. Through a Foucaultian lens, the decision to stay execution and attempt rehabilitation is actually more cruel than the alternative. The State declares dominion over the body and attempts to mold it into an acceptable social unit. The

B.   Governmentality

Bio-power over the individual does not make sense unless it is coupled with the concept of maintenance of the population, which provides the theoretical justification for disciplinary techniques directed at individuals.[26] Bio-power's operation over the species is termed "governmentality." It refers to the manner in which the art of government became meticulously concerned with the management of the population.[27] It is distinct from the concept of sovereignty in that power is justified not through a right of conquest, but a necessity to protect the species. From the middle-of the Sixteenth Century, treatises on the art of government began to appear that had a much wider scope than the traditional questions of sovereignty and the nature of the state.[28] These treatises covered the governing of households, souls, children, provinces, convents, and families.[29] Political theory had broadened somehow to encompass all forms of human activity.[30] The king only wanted subjects to swear fealty; nothing more. The modern State requires much more. The human body, from birth to death, is tied to the success of the State. Foucault realized that the difference in governing methods means society itself has become a political target.[31]

The Marxist connection needs to be made in this context; the concern in many of these early governmentality theories was over increasing the economic value of the State's assets.[32] All of a sudden, government meant maintaining a steady birth rate, taking a census of the population, increasing food production and minimizing scarcity, and connecting these aims to the operation of an efficient economy. In this manner, society will progress and the dream of Enlightenment utopia will be realized.

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question is not, should the king kill his subject, but can institutions rehabilitate him? From a Marxist perspective, there exists a motivation to not waste as many bodies of production as possible, to squeeze as much production out of the individual before the State disposes of him. *See id.* at 242 ("Attempts were made to increase their productive force through exercise, drill, and so on. There were techniques for rationalizing and strictly economizing. . . .").

[26] FOUCAULT, *supra* note 7, at 244–45.

[27] Rabinow, *supra* note 4, at 15.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

An example, perhaps, best illustrates the point. Foucault studied treatises suggesting the layout for towns.[33] He observed that they were concerned with opening up the town as a space of circulation.[34] He noted:

> In a town like Richelieu, for example, there is a central street that divides the rectangle of the town into two rectangles, and then there are other streets, some parallel to and others at right angles to the central street, but at different distances to each other. . . . The biggest rectangles, that is to say, where the streets are furthest apart, are at the ends of one town, and the smallest, with the tighter grid are at the other. People must live on the side of the biggest rectangles, where the grid is widest and the roads are broad. Conversely, trade, artisans, and shops, as well as markets must be situated where the grid is much tighter.[35]

Note the marshaling of the population at a macro level to achieve certain results. In this example, the town is designed to maximize traffic on commercial streets, which will lead to the purchase of more goods, thereby improving the economy. Zoning that today seems like a basic function of municipal government—a perfectly logical realm of government—would have been nonsensical under the traditional conception of the King's sovereign power. The King did not *govern* in the sense that we use the term in modern parlance. The fixation, control, and rational distribution of populations is governmentality.[36] Economics and capitalism (and Marxism for that matter) would not have developed as theories unless this fundamental shift in the conception of the purpose of government had occurred.[37] It is through governmentality that the State began to record statistics, such as birth rate, death rate, and gross domestic product. The State measures success as a positive increase or decrease of these statistics.[38] The State improves these

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[33] FOUCAULT, *supra* note 7, at 12. This also illustrates Foucault's use of archeology and genealogy, which he describes as "[the] analysis of local discursivities" to uncover local "knowledges" discounted by histories that require scientificity. *Id.* at 10–11.

[34] FOUCAULT, *supra* note 7, at 13.

[35] *Id.* at 16.

[36] *See id.* at 17–20 (discussing a town planning project that addressed public health, economic, commercial, and security concerns and summarizing the planning methods of "sovereignty," "discipline," and "security").

[37] *See id.*

[38] *See* FOUCAULT, *supra* note 7, at 243.

statistics, not through punishment of illicit activity, but through policies that operate on an entire population. The modern state creates spaces, which mold society in a desirable manner.

To take the example from above, the State did not force citizens to buy goods from merchants, they constructed the town and the city in such a manner that traffic would be directed to merchants, and a corresponding increase in economic activity occurred. In contrast to the negative juridical power of the law, this new power is positive in operation.[39] It does not punish, it guides silently.[40]

It is interesting to note the loss of the individual in the formula. The policy solution never operates on an individual; the problem is always solved in the aggregate by asking how the population will react. This is how disciplinary techniques—bio-power directed at the individual—begin to make sense. Abnormal individuals now pose a threat to society. If someone, atypically, refuses to shop at stores located on corners, the town of Richelieu's strategy will not work on that individual because Richelieu designed commercial districts to have more corner storefronts with increased economic value. All of a sudden, this new form of bio-power needs to be able to predict the actions of individuals at the aggregate level. The State now requires knowledge of what a normal human subject does within every nook and cranny of existence. If an individual is abnormal, that individual needs to change. Sciences of life arise to fix the abnormality. Psychiatry studies the failure of the family to create a social individual.[41] Asylums are built to reform mad individuals. Previously allowed to roam the land free as an expression of God's knowledge on earth, they are now a threat to the basic logic of governmentality's operation because they are unpredictable.[42] Prisons become correctional facilities

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[39] One can find an analogue to this in the field of law and economics' distinction between *ex ante* and *ex post* regulation. The king's law is always *ex post*, while *ex ante* regulation can only be possible by shifting the conception of government's purpose towards maintenance of the population. *See* DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 74–83 (2000).

[40] This can be analogized to the distinction between hard and soft law, a topic familiar to legal theorists. In many ways, the law already knows Foucault, and this idea can be explored further.

[41] *See* FOUCAULT, *supra* note 20; *see also* GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA (Robert Hurley et al. trans., Viking Press 1977). The story of Oedipus was essential to Freud's psychoanalysis, and suggests that madness and abnormality can be traced back to the fundamental failure of the family. The modern inquiry into abnormality starts with, "What did your mom and dad do to you?" Hence, the failure of the family is still the root cause of abnormality.

[42] *See* MICHEL FOUCAULT, HISTORY OF MADNESS (Jean Khalfa ed., Jonathan Murphy & Jean Khalfa trans., Routledge 2006) (1961).

because there is utility in creating a system that reintroduces criminals into society.[43] Public education becomes highly important. Schools categorize and evaluate students. They identify, early on, abnormal individuals and subject them to disciplinary techniques.[44]

C. Politics

Foucault's vision of modernity starts with a political discourse that is blind to the operation of bio-power because it remains devoted to rhetoric of sovereignty and social contracts. Foucault's political activism focuses largely on exposing the subversive form of bio-power. Through the concepts of bio-power and governmentality, Foucault identified whole power structures of control that go largely unrecognized in political action and thought. So it comes as no surprise that Foucault is deeply interested in politics and effectuating change in the real world. However, Foucault's approach differs from the approaches of his contemporaries. Paul Rabinow highlights a famous, televised debate between Foucault and Noam Chomsky that encapsulated Foucault's radical approach to politics.[45] Chomsky's view of human nature—his Cartesian rationality[46]—is the cornerstone not only of his most famous academic achievement, universal grammar,[47] but also his political activism.[48] Chomsky has a vision of a future: just society guided by reason.[49] Politics for Chomsky is a slow progression to utopia. Foucault rejects Chomsky's politics as a typical expression of Western political philosophy.[50] This will to knowledge, this search for justice is itself a form of power that operates upon individuals in ways that are not always in their best interest.[51] Justice, for Foucault, is not a goal, but an instrument of power as well as a weapon that can be used against it.[52]

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[43] *See* F OUCAULT , D ISCIPLINE AND P UNISH , *supra* note 22.

[44] *Id.*

[45] Rabinow, *supra* note 4, at 3–7.

[46] *Id.* at 3.

[47] N OAM C HOMSKY , S YNTACTIC S TRUCTURES (Cornelish H. Van Schooneveld ed., 5th prtg. 1965).

[48] Rabinow, *supra* note 4, at 3.

[49] *Id.* at 5.

[50] *Id.*

[51] *Id.* at 6.

[52] *Id.*

One of the ways Foucault and his contemporaries (who many today would place under the amorphous umbrella term of post-modernists) reacted to a century dominated by two horrific world wars[53] was to disparage the utopian theories that had in many ways justified them.[54] Two German campaigns for world dominance found their intellectual roots in Western philosophy all the way up through to the Nineteenth Century German philosopher Hegel's idea of the world-spirit.[55] The Enlightenment was supposed to free mankind from despotism. Instead, it created a fetishization of science whose ultimate futility culminated in the explosion of two atomic bombs. Science was not our savior. In fact, it seemed bent on our destruction.[56] In speaking of fascism and Stalinism for example, Foucault stated:

> One of the numerous reasons why they are, for us, so puzzling is that in spite of their historical uniqueness they are not quite original. The used and extended mechanisms already present in society . . . they used to a large extent the ideas and the devices of our political rationality.[57]

The solution for Foucault was to view politics as war. He inverted Clausewitz's aphorism[58] and stated, "Politics is war, the continuation of war by other means."[59] Instead of a slow progression to utopia aided by reason and justice, Foucault, in a nod to Nietzsche's *The Birth of Tragedy*,[60] sees humanity as

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[53] *See* FOUCAULT, *supra* note 7, at 259 (arguing the Nazi regime is the paroxysmal development of the new power mechanisms).

[54] *See* DOUGLAS E. LITOWITZ, POSTMODERN PHILOSOPHY AND LAW 10–17 (1997).

[55] GEORG WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT (A.V. Miller trans., Oxford University Press 1977) (1807); *see also* FOUCAULT, *supra* note 7, at 258 ("At the end of the nineteenth century, we have then a new racism modeled on war. It was, I think, required because a bio-power that wished to wage war had to articulate the will to destroy the adversary with the risk that it might kill those whose lives it had, by definition, to protect, manage, and multiply.").

[56] *See* ELIZABETH K. ROSEN, APOCALYPTIC TRANSFORMATION: APOCALYPSE AND THE POSTMODERN IMAGINATION (2008) (explaining the effect nuclear warfare had on the postmodern movement).

[57] Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 779 (1982).

[58] *See* CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds., trans., Princeton Univ. Press 1984) (1832). Clauzewitz famously quipped in his treatise on the strategy of war that war is a continuation of politics by other means.

[59] FOUCAULT, *supra* note 7, at 15.

[60] FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY, *in* BASIC WRITINGS OF NIETZSCHE 33 (2000); *see also* RABINOW, *supra* note 4, at 6 ("'I will be a little bit Nietzschean about this. . . .'") (quoting Foucault in *Human Nature: Justice Versus Power*, *in* REFLEXIVE WATER: THE BASIC CONCERNS OF MANKIND

permanently making and remaking power structures in political battles from which truth and justice cannot escape. Utopian theories embedded in this tragic comedy are often the source of injustice, not a road to salvation. Foucault's debate with Chomsky is a microcosm of the larger division between Enlightenment and post-modern political theory. It is no surprise, then, that Foucault is heavily critical of the knowledge systems that Chomsky views as the vehicle of human progress.

D. Knowledge

Foucault stated late in his career that the central aim of his work was to analyze how human beings are made into subjects.[61] One way subjects are created is by modes of inquiry that try to give themselves the status of science.[62] The individual human becomes a speaking subject in linguistics or a laboring subject in economics.[63] They become objective scientific units. The individual is categorized, attached to an identity, and has a truth imposed on him.[64] Foucault notes that others have made this connection, but suggests another way of investigating the links between rationalization and power.[65] It is here that the epistemological critique of knowledge systems becomes relevant to the operation of power.

Arnold I. Davidson summarizes how Foucault's theory of power necessitates an epistemological critique: "Foucault wanted to rid us of a juridical representation of power, conceived of in terms of law, prohibition, and sovereignty, a clearing away that raises the question of how we are to analyze what has taken place without the use of a system of representation."[66] One of the most disturbing facts for Foucault and his contemporaries was that the processes of bio-power were being justified by studies of humans referred to as "sciences."[67] Foucault studied the life sciences, but did not adopt them as his method. "Although he traced with

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171 (Fons Elders 1974)). Nietzsche argues that it is Western culture's loss of the tragic sense, embodied in Aeschylus and Sophocles plays that portray humanity as stuck in a permanent dance of tragic destiny and corrupted by Euripedes and Socrates' visions of human progress, that represents our biggest failure.

[61] Foucault, *supra* note 57, at 777.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 781.

[65] *Id.* at 779.

[66] Davidson, *supra* note 7, at xxi.

[67] Rabinow, *supra* note 4, at 51 ("[O]ne of the great problems that arose was that of the political status of science.").

great patience the discursive systems of the science of life, language, and labor, his aim was not to unveil the truths they had discovered or the falsities they had propounded."[68] What struck Foucault as odd was the difference between a typical scientific discourse, such as chemistry, and a pseudoscientific discourse, like psychiatry.[69] If we take the relationship that each discourse has with the political and economic structure of society, they seem completely different, as though they should not even be classified together.[70] Chemistry surely has political and economic value, but it does not seem like it was created for those purposes. It rather seems like a method of inquiry that would exist no matter what the political or economic context. In contrast, psychiatry seems dependent on its place in history. There is a lot of guess work in psychiatry; it has a low epistemological profile;[71] yet, if we connect it to political and economic purposes, that does not matter, because the need for this kind of knowledge is essential.[72] It seems as if it was created exactly for those purposes.

The interweaving of power with science can be grasped much more easily if it is connected to bio-power. Foucault's profound conclusion is that science itself is subjected to politics; there exists a politics of the scientific statement.[73] Each period of history has its own condition of truth that defines what is scientific and what is not.[74] It is through this process of creating what can be considered truth that the sciences of life were developed to aid in the purpose of bio-politics. As Foucault puts it:

> Now I believe that the problem does not consist in drawing the line in between that in a discourse which falls in the category of scientificity or truth, and that which comes under some other category, but in seeing historically how effects of truth are produced within discourses which in themselves are not true or false.[75]

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[68] *Id.* at 12.

[69] *Id.* at 51–52.

[70] *Id.* at 51.

[71] *Id.*

[72] *Id.* at 51–52.

[73] *Id.* at 54.

[74] *See* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES (1970).

[75] Rabinow, *supra* note 4, at 60.

It is essential to Foucault's vision of power to remember that science and knowledge do not dominate political discourse, but are in many ways a product of discourse.[76]

III. THE STATE OF FOUCAULDIAN LEGAL THEORY

Foucault's work has had a profound effect on the social sciences on both sides of the Atlantic.[77] Until recently, legal discourse largely discounted Foucault.[78] The lack of Foucauldian theories of law puzzled Alan Hunt and Gary Wickham, who wrote a sociological theory of Foucault's view of the law in 1994.[79] They opined that it is Foucault's criticism of society's over-emphasis on the power of the law (noted in Section II), as well as his failure to put forth his own legal theory, that caused legal scholars to discount Foucault.[80] This expulsion theory characterized the legal community as timidly rejecting Foucault before he could reject them. Hunt and Wickham's sociology of law led Hugh Baxter to argue that continued ignorance of Foucault is a profound mistake.[81] Though he observed that Hunt and Wickham were generally correct in characterizing the legal attention given to Foucault as marginal, he also noted that some legal scholars had not merely relegated Foucault to footnote status.[82] Regardless, Foucauldian legal theory was not prevalent in the mid-1990's. Baxter claimed that if Foucault said little of the law then we must "bring the law into Foucault."[83] Indeed Baxter's call seems to have been heeded. From the late 1990's through the beginning of the Twenty-First Century until the present, there has been a substantial increase in legal Foucauldian

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[76] It could be argued that Foucault's view of the interaction of knowledge and power interestingly mirrors basic features of the American legal system: the common law and the adversarial system. Alas, that is a project for another paper, the kind of paper this Note advocates for.

[77] Ben Golder & Peter Fitzpatrick, *Introduction* to FOUCAULT AND LAW, at xi (Ben Golder & Peter Fitzpatrick eds., 2010) (citing JEFFERY T. NEALON, FOUCAULT BEYOND FOUCAULT: POWER AND ITS INTENSIFICATION SINCE 19841 (2008)).

[78] *See* HUNT & WICKHAM, *supra* note 1; *see also* Baxter, *supra* note 1.

[79] HUNT & WICKHAM, *supra* note 1.

[80] *Id.* at vii.

[81] Baxter, *supra* note 1.

[82] *Id.* at 473.

[83] *Id.* at 479.

scholarship.[84] Yet, as discussed below, a Foucauldian legal method of analysis has yet to be developed.

Hunt and Wickham's *Foucault and Law* is a sociology of law, so it is not legal theory *per se*, in the sense that actual lawyers are implementing it.[85] Yet, it is a good starting point because it represents an early attempt to grasp Foucault's general legal theory. Hunt and Wickham start their analysis of Foucault's legal theory by asking, "Is there a connection between modernity and law?"[86] They observe that consistently through Foucault's work, "law is itself a dangerous and problematic manifestation of power."[87] They conclude that, generally, Foucault envisioned an expulsion of the law from modernity.[88] Indeed if this were true, his expulsion of the law is in strong contrast to most important Twentieth Century thinkers.[89] In putting forth their own theory of governance that "can adequately take[] into account both of the diffusion of micro-powers and the aggregation of such powers at the level of the state and other institutional levels,"[90] Hunt and Wickham do note that Foucault offered suggestions as to the destiny of the law.[91] Foucault indicates in both *Discipline & Punish* and *The History of Sexuality* that the law lives on in a subordinate role.[92] It is with this background that Hunt and Wickham propose their own theory of modern governance that is "inspired by Foucault,"[93] yet critical of his placement of the law generally.[94]

Hunt and Wickham also argue that it is not only Foucault's expulsion or subversion of the law that is to blame for the lack of legal attention given to

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[84] A Westlaw search brings up 2,798 law review and journal articles mentioning "Michel Foucault" of which only 389 were published before 1995 and only 83 before 1990. *See also* LITOWITZ, *supra* note 54, at 65 ("Over the last five years or so, legal scholars have become increasingly interested in Foucault's work.").

[85] HUNT & WICKHAM, *supra* note 1, at viii ("[W]e present our framework for the sociology of law.").

[86] *Id.* at 39.

[87] *Id.* at 43.

[88] *Id.* at 56.

[89] *Id.* at 59.

[90] *Id.* at 56.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 75.

[94] *Id.*

Foucault, but also the arrogance of the legal academy. They claim that legal scholarship generally, and Anglo-American legal scholarship specifically, "exhibits a long-standing intellectual insularity."[95] There is a narrow range of writing that is regarded as relevant, and information generated outside of law schools is only respected after some time has passed.[96] Whether or not this is true perhaps deserves response from the legal academy. They are certainly right that to reduce Foucault to a mere historian of prisons and asylums is to miss the most important ideas behind these analyses.[97]

In the late 1990s and early Twenty-First Century, legal theory began paying more (but not enough) attention to one of post-modernity's greatest thinkers. Hugh Baxter's review of Hunt and Wickham's book can be read as a response to the jab Hunt and Wickham took at the legal academy.[98] *Bringing Foucault into Law and Law into Foucault*, published in the *Stanford Law Review* in 1996, seeks to use Hunt and Wickham's work to call on legal theorists to begin incorporating Foucault into legal theory.[99] Baxter agrees with Hunt and Wickham that legal attention to Foucault has been marginal, his name appearing more in footnotes than in subject lines.[100] Some legal scholars have appropriated Foucauldian ideas,[101] but end up reverting back to the discourse of sovereignty that Foucault criticized.[102] Baxter suggests that rather than injecting Foucault into legal arguments as support, legal theorists should invert their analysis and develop some of the themes Foucault suggested.[103]

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[95] *Id.* at vii.

[96] *Id.*

[97] *Id.*

[98] Baxter, *supra* note 1, at 471 ("Does the authors' outline of law as governance explain how Foucault's work is, or may be made, useful to legal academics? In my view, it does not.").

[99] *Id.* at 479.

[100] *Id.* at 473.

[101] *Id.* at 474 (discussing Mark Barenberg, *Democracy and Domination in the Law of the Workplace*, 94 COLUM. L. REV. 753 (1994) (analyzing the disciplinary power of company unions) and Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM L. REV. 1431 (1992) (analyzing political violence against homosexuality in sodomy laws)).

[102] Baxter, *supra* note 1, at 474.

[103] *Id.* at 476.

Curiously, Baxter finds an illustrative example of Foucault's concept of bio-power and his historical archeological method[104] in Reva Siegel's *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, which traces the development of abortion regulation but does not even mention Foucault.[105] This is surprising because showing how a woman's body became the object of regulation is exactly the kind of bio-power inquiry Foucault would have made. The very fact that Baxter finds Foucault to be pervasive in an article that is unaware of it simultaneously illustrates, first, the necessity of a Foucauldian critique to contemporary legal theory and, second, the evident fact that most legal theorists are not intimately familiar with his work. Siegel calls the regulation of women's bodies "power over life" and connects it to "populationist purposes," which, as Baxter points out, could easily be synonyms for bio-power and governmentality, respectively.[106] Siegel's analysis of history blames the medical profession's asserted knowledge of scientific fact, another Foucauldian theme.[107] Baxter suggests a strategy for appropriating Foucauldian insights.[108]

Shortly after Baxter's article, Doug Litowitz published "Postmodern Philosophy and Law" in 1998, which contains a chapter on Foucault. Litowitz states that, "[o]ver the last five years or so legal scholars have become increasingly interested in Foucault's work."[109] Some see him as a legal historian, a proponent of legal feminism, or a Neo-Marxist, and some have applied his theories directly to particular legal issues such as privacy, intellectual property, and punishment.[110] Yet, all these works, as Professor Baxter noted,[111] are injecting Foucault into already existing legal arguments; they do not begin with an understanding of his central critique regarding the nature of power.

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[104] *See* MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE 138–40 (Rupert Swyer trans., Vintage Books 2010) (1972) (outlining the archeological method).

[105] Baxter, *supra* note 1, at 476–77 (discussing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and questions of Equal Protection*, 44 STAN. L. REV. 261 (1992)).

[106] *Id.* at 477 (discussing Siegel, *supra* note 105, at 262–80, 347–81).

[107] *Id.* (discussing Siegel, *supra* note 105, at 287–92).

[108] *Id.* (quoting FOUCAULT, *supra* note 4, at 96) (discussing Siegel, *supra* note 105).

[109] LITOWITZ, *supra* note 53, at 65.

[110] *Id.*

[111] Baxter, *supra* note 1, at 473.

Litowitz asked himself, does Foucault offer a positive jurisprudence?[112] For Litowitz, Foucault's vision of the law mirrors his historical perspective of punishment in *Discipline & Punish*.[113] Medieval punishment involved excessive displays of sovereign power, such as public executions.[114] The modern system of punishment, in contrast, involves isolation, normalization, regimentation, confession, and moral reeducation.[115] This is analogous to the law because the law has become less repressive and coercive, yet more regulatory and administrative.[116] The problem for Foucault was that, "power is now so diffuse, there is nothing against which to rebel." In the end, all Foucault can offer the law is a modern critique.[117] He does not offer a modern program for reform of the law.[118] It is of no surprise then that Litowitz seems satisfied with the amount of legal scholarship Foucault has generated.

Baxter and Litowitz placed Foucauldian legal scholarship at somewhat of a crossroads. On one hand, we could recognize that Foucault never put forth a comprehensive theory of the law, subverted it in his worldview, and never saw it as a legitimate source of reform. Under Litowitz's logic, Foucault's critique of power is a mere repetition of Nietzsche,[119] and what is really important about Foucault are his historical studies. Consequently, legal theory's treatment of Foucault should remain marginal. On the other hand, legal theory could heed Baxter's point and realize that the lack of a positive jurisprudence in Foucault's work does not destroy the utility of a Foucauldian power structure critique directed at legal issues. This Note takes up Baxter's side of the argument and seeks to bring Foucault into the law.

A decade or so later, in 2010, Ben Golder and Ryan Fitzpatrick have recently compiled essays written by scholars of multiple disciplines into a work titled *Foucault and Law* that includes a number of law review and journal articles.[120] In a

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[112] LITOWITZ, *supra* note 54, at 80–86.

[113] *Id.* at 81 (discussing FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 22).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] FOUCAULT AND LAW, *supra* note 77.

book that the pair published a year earlier in 2009, *Foucault's Law*, they took issue with Hunt and Wickham's reading of Foucault, claiming that Foucault's discounting of the law was overstated.[121] He was rejecting a Leviathan model of the law, but not law per se.[122]

While Golder and Fitzpatrick seek to downplay Foucault's subversion of the law as Baxter did, their collection of essays falls short of displaying a greater than marginal treatment of Foucault. There are only a handful of traditional legal journals presented in the collection, the majority of the works consisting of sociological and political journals.[123] The law review articles, much as Baxter discovered, are more concerned with specific applications of Foucault's historical findings, or they use Foucault in a mere biographical sense. One of the most interesting articles is Victor Tadros' *Between Governance and Discipline: The Law and Michel Foucault* which is reprinted from the *Oxford Journal of Legal Studies*.[124] Tadros makes an excellent case for a more comprehensive Foucauldian legal theory. He certainly falls on the Baxter side of the argument. "I believe that [Foucault's] account *encourages* rather than *precludes* an account of law which directs rather than forces."[125] Yet this piece does not offer a glimpse of what a Foucauldian legal critique would look like.

Ultimately, while much progress has been made in creating a Foucauldian legal theory, the academy has not realized Foucault's full potential for revolutionizing how legal theory views the operation of power in modernity. It seems odd for legal scholars to discount Foucault because his work, in the end, is all about the exposure of power structures. This implicates the legal system because good legal policy demands the identification of sources of power so that they can be regulated. Furthermore, in calling for reform, Foucault was not as radical as many of his contemporaries.[126] His work was not an attempt to establish a Marxist

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[121] BEN GOLDER & RYAN FITZPATRICK, FOUCAULT'S LAW 2 (2009).

[122] Max Rosenkrantz, *Ben Golder and Peter Fitzpatrick, Foucault's Law*, 8 FOUCAULT STUD. 146 (2010) (book review).

[123] FOUCAULT AND LAW, *supra* note 77, at v–vi.

[124] Tadros, *supra* note 2.

[125] *Id.* at 102.

[126] *See* Thomas McCarthy, *The Critique of Impure Reason: Foucault and the Frankfurt School*, 18 POL. THEORY 437, 437 (1990) ("It is not surprising that a thinker of his originality, having come intellectually of age in postwar France, would eventually come to assert his intellectual identity in opposition to the varieties of Marxism present there.").

utopia or to dismantle the modern state (i.e., anarchic utopia). It would be easier to believe that proponents of those theories would completely discount the law, but it is hard to imagine Foucault's relative political moderation and general disdain of polemics[127] counseling for the same.

Additionally, Foucault stated that the main point of his work was to pinpoint the institutions that have masked power:

> It seems to me that the real political task in a society such as ours is to criticize the workings of institutions which appear both neutral and independent; to criticize them in such a manner that the political violence which has always exercised itself obscurely through them will be unmasked, so that we can fight them.[128]

Embodied in this strong language is all the impetus legal theorists need to explore Foucault's theories in the fullest. Who better to fight political violence than the law, which is simultaneously a source and a cure. When read in this manner, the phrase, "[w]e have yet to cut off the head of the king," becomes not a call to ignore the juridical form of power, but a call for the juridical form of power to evolve itself into an institution that has the right concepts and apparatuses to properly identify, regulate, morph, penalize, and gain dominion over other power sources.

IV. ADOPTING FOUCAULT AS A METHOD OF INQUIRY: A LESSON FROM ANTHROPOLOGY

While legal theorists sit on their hands, social scientists are thoroughly enamored with Foucault.[129] One of the largest fields in modern cultural anthropology is the study of governmentality.[130] William Walters' study of unemployment derived from an anthropological perspective using Foucault's genealogical approach illustrates a typical approach:

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[127] Rabinow, *supra* note 4, at 381.

[128] *Id.* at 6.

[129] *See* Jonathan Xavier Inda, *Introduction* to ANTHROPOLOGIES OF MODERNITY: FOUCAULT, GOVERNMENTALITY, AND LIFE POLITICS 1, 6–7 (2005).

[130] *Id.*

> One must rather conduct an ascending analysis of power, starting, that is, from its infinitesimal mechanisms, which each have their own history, their own trajectory, their own techniques and tactics, and then see how these mechanisms of power have been—and continue to be—invested, colonized, utilized, involuted, transformed, displaced, extended, etc., by ever more general mechanisms and by forms of global domination.[131]

Cultural anthropology emerged from its colonialist roots[132] to reinvent itself as a discipline whose political activism is at the very core of how the discipline defines itself.[133] In many ways, its grassroots activism and concentration on the struggles of individuals in the face of larger global phenomena, whether it be the State, the lingering effects of de-colonialism, or other forms of institutional power, embodies the rejection of the negative juridical form of power criticized by Foucault. It serves as recognition that space and resistance can change power structures, often without the law, or with the law as an end stage, a signal that the change has already occurred.

What this example of a modern anthropological study illustrates is that anthropology, as a field, has fully internalized Foucault's critique of power. It is used as a basis for their analysis of culture. This is precisely what legal theory has not done. While it incorporates Foucault in the margins, like when legal theorists need a critique of prisons or a history of the treatment of the insane, they fail to use his theory of power as a basis for analyzing legal issues.

However, the ease with which Foucault's view of power meshes with the political activism of the social sciences aside, he still seemed to downplay the importance of the law. How can legal theory justify placing him in a central role? Foucault, himself, answers this question for us. Foucault, in quite a post-modern manner, always rejected the idea of putting forth a systematic worldview. In fact, he downplayed the significance of his own ideas. In addressing his theory of power at the College de France, Foucault stated:

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[131] WILLIAM WALTERS, UNEMPLOYMENT AND THE GOVERNMENT: GENEALOGIES OF THE SOCIAL 19 (2000).

[132] *See* Talal Asad, *Afterword: From the History of Colonial Anthropology to the Anthropology of Western Hegemony*, *in* COLONIAL SITUATIONS: ESSAYS ON THE CONTEXTUALIZATION OF ETHNOGRAPHIC KNOWLEDGE 314, 314–24 (George W. Stocking ed., 1991).

[133] *Id.*

> First, the analysis of these mechanisms of power that we began some years ago, and are continuing with now, is not in any way a general theory of what power is. It is not part or even the start of such a theory. This analysis simply involves accessing where and how, between whom, between what points, according to what processes, and with what effects, power is applied. If we accept that power is not a substance, fluid, or something that derives from a particular source, then this analysis could and would only be at most a beginning of a theory, not a theory of what power is, but simply of power in the terms of a set of mechanisms and procedures that have the role or function and theme, even when they are unsuccessful, of securing power. It is a set of procedures, and it is as such, that the analysis of mechanisms of power could be understood as the beginning of something like a theory of power.[134]

It seems clear that Foucault's vision of power was never meant to be a total theory of power. He was pointing out that other theories and effects of power existed, but he was not contemplating the entire system. One of the main points is that because power is not homogenous, the door is wide open for any idea, institution, or system to change the world. It does not matter, then, that he said little of the law or seemed to downplay its importance. He was merely making the point that to see the law as being the sole expression of power relations is not only highly reductive, but exactly what those institutions that hold veiled powers wish us to do. A positive jurisprudence that reforms power relations is certainly left open as a possibility.

If we really want to get Foucauldian, we must ignore Foucault's agency in the whole equation. The real question is whether the legal profession can make use of Foucault's intellectual contributions. Are they important, or perhaps indispensable, to navigating a postmodern, globalized world? We must answer these questions in the affirmative. Much as anthropology can use the concept of governmentality as a basis for analyzing power and resistance in cultures, a legal method molded from Foucauldian concepts will expose and identify power relations in a modern world.

V. CONCLUSION

The first step in crafting a Foucauldian legal method is to recognize the shortcomings of the preceding work. Legal theory has made two mistakes that have led to marginal treatment of Foucault. First, legal theory has overemphasized Foucault's negative juridical concept of power. While Foucault's subversion of the

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[134] FOUCAULT, *supra* note 7, at 1–2.

law may come as a slight to the legal tradition, it can ultimately strengthen legal theory because it will remove it from a fixation on sovereignty and simplistic binaries of transgression and punishment, licit and illicit. By recognizing that both bio-power and governmentality have modern sources of power that still operate, the law can identify, expose, and gain dominion over them. Moreover, the law can cease to be an instrument of these powers. The broadening of the law's conception of power will result in stronger legal policy.

Secondly, rather than starting with a Foucauldian method and applying it to a legal issue, legal scholars have imported Foucault to fit their arguments. This is not necessarily bad, as any use of Foucault should be viewed as a step in the right direction. However, it misses what is truly great about Foucault's work. The greatness of his scholarship does not come merely from his historical studies of asylums, hospitals, and schools, or his advocacy for atypical sexuality, it comes from his reorientation of how we view power, knowledge, and government in modernity. If we take Foucault's vision of power and apply it to the debate over hard and soft law; the common law conception of truth and knowledge in the courtroom and adversarial system; the privacy debate on the internet; the National Security Agency wire-tapping and security debate; or to critical race theory and the post-Civil Rights era legal debate over race in the legal system, legal theory can find novel solutions to uniquely Twenty-First Century problems. Each one of these projects could be its own article or book.

It would be a profound mistake on the part of legal scholars to allow Foucault's observation that theories of power overemphasize sovereignty and punishment to distract them from Foucault's larger vision of reform, which certainly involved the legal system. Hunt and Wickham's portrayal of legal scholars as insular and hubristic[135] would turn out to be self-fulfilling. Rather, the law must recognize that a society where power operates in such a subtle and multifarious manner requires legal policy that understands and recognizes that power. Adopting a new method of inquiry that utilizes Foucault's theory of power to analyze legal issues and craft policy properly equips legal scholars with a useful tool in a postmodern world.

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[135] HUNT & WICKHAM, *supra* note 1.