

FEMINISM, PSYCHOANALYSIS AND POSTMODERNISM:

BRIDGING THE DISCOURSES

by

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Abstract

This paper seeks to analyze the inter-relationship of three theories: feminism, psychoanalysis and postmodernism. It attempts to do this by focussing on the issue of sex crimes; how each theory provides an explanation for the phenomenon of sex crimes. It goes on to examine each theory in more detail, using their position on sex crimes as a starting point to a discussion of their theoretical foundations. It acknowledges the major writers in the field and notices the current trend of analysis to be that of merger between the theories. The paper examines both the feasibility and validity of such a merger.

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xx..yz

1 Introduction

"In short, no pattern is an isolated entity. Each pattern can exist in the world, only to the extent that is supported by other patterns: the larger patterns in which it is embedded, the patterns of the same size that surround it, and the smaller patterns which are embodied in it...This is a fundamental view of the world...." -Christopher Alexander, A *Pattern Language* p.xiii

Feminism, psychoanalysis and postmodernism are three theories which have flourished independently of each other during this century. They are, however, almost unknown theories in law school. Where they are known, they almost certainly lie at the borders of legitimacy and acceptance.

And yet the way law functions in a society reflects the way that society processes experience. ¹ Feminism, psychoanalysis and postmodernism are all at heart, theories concerned with the processing of experience and how this relates to power. Feminism recognizes a "male" way of viewing and structuring the world which

¹ See J.C.Smith and David N.Weisstub, *ed.*, *The Western Idea of Law* (1983), Scarborough, Ont.: Butterworths.

They claim Western law is based on individual rights. Ancient law focussed on the wrong done, rather than the wrongdoer. Sometimes the names of the parties involved were not even stipulated in the action. The focus of the law suit was to redress the deed, not the doer. In this sense, law was backward rather than forward looking. Modern Western law is used to construct and control the future. This is particularly true in property law, where the conceptual foundation slices time, rather than property. J.C.Smith also stresses the significance of the concept of the self in relation to law. In *Oedipus and Ajax: Ideas of the Self in Japanese and Western Legal Consciousness* 34 Osaka University Law Review (1987) also found in 20 University of British Columbia Law Review, (1986) at p.341-377 he contrasts the Japanese conception of the self with the Western self, and sees the difference directly reflected in the differences between the two legal systems. In Japan, he argues, law does not have a central position in conflict resolution as it does here, and the legal profession is much smaller in size and status than in North America. The role of law in Western culture has consisted of the *rule* of law and has occupied a central place. See also Richard B. Parker's article, *Law, Language, and the Individual in Japan and the United States* in the Wisconsin International Law Journal, 1988, Vol.7, No.1 p.179-203

alienates and oppresses women. Psychoanalysis takes as given, the dynamic unconscious as the primary shaper of individual and collective history. Postmodernism sees accepted methods of knowledge acquisition as techniques of tyrannous control.

The connection between law and epistemology is a growing concern within jurisprudence. The Realism movements of America and Scandanavia are perhaps the forerunners to the current development of epistemological jurisprudence. The feminist legal theorist Catharine MacKinnon is clear in her understanding of where the focus of feminist jurisprudence ought to lie.

She writes, "There is a relationship between how and what a theory sees...the fundamental task for theory is to explore the methods, the approaches to reality, that found and made these categories meaningful in the first place." ²

She claims radical feminism achieves this: "The key to feminist theory consists in its way of knowing." ³

Recognition of the common concerns of feminism, psychoanalysis and postmodernism has been sparse, though this is changing.

J.C.Smith is one of the few to acknowledge the need of each theory for the other. ⁴ Jane Flax acknowledges this need also, and reflects her understanding of the separate integrities of the three theories in her book title, *Thinking Fragments*. ⁵ Flax sees an overlap of method and concern despite the fact that feminist,

² Catharine A. MacKinnon in *Toward a Feminist Theory of the State*(1989) Harvard University Press at p.107

³ Catharine A. MacKinnon, supra note 2 at p.84

⁴ J.C.Smith, *The Neurotic Foundations of Social Order: Psychoanalytic Roots of Patriarchy*,(1990) New York University Press, p.383-86

⁵ Jane Flax, *Thinking Fragments, Psychoanalysis, Feminism and Postmodernism in the Contemporary West*. (1990) University of California Press

psychoanalytic and postmodern writers have only recently begun to acknowledge the legitimacy of the other theories.⁶

Despite Flax's work, there is still no satisfactory examination of the relationship between each of the theories; the extent to which they mesh, and the extent to which they diverge. This paper is an exploration of this tripartite relationship.

Let me explain my method.

I intend to examine the relationship between the theories. But I have moved away from a simple linear march through their principal concepts. I intend to use a different strategy which I hope will prove more vigorous in its analysis as well as more interesting in its reading. I want to focus the theories around a single issue and see what light they shed. I expect some rays of light to overlap and refract. At the points of refraction, we have a shared understanding of the issue. The focus issue I have chosen is sexual criminal behaviour and crimes: sex crimes.

Why? One reason is that sex crimes presents an opportunity for each theory to reveal its own approach. They can all contribute to the discussion. Feminism is obviously concerned with violence against women. Psychoanalysis is concerned with the implications of extreme behaviour, in this case, violence, for the psyches of less extreme individuals. Postmodernism regards the relegation of certain acts as criminal as indicative of ulterior power machinations.

⁶ Feminism and psychoanalysis excepted, for an established recognition has developed on the part of feminism for psychoanalysis even though its acceptance by other feminists is fraught with conflict. See Chapter 10

Another reason for choosing sex crimes as a focus for discussion is its relationship to law. I use the term "crime," as opposed to say, "violence," deliberately. Crime invokes law. The way the law deals with criminals, as with other offences, reflects the paradigm of selfhood upheld in our culture. Illegal acts are judged against this paradigm.

Smith and Weisstub claim that our system of law is based upon a unitary, rational, responsible and, above all, independent concept of the self.⁷ This has significant implications for the way illegal acts are defined - in terms that violate this paradigm of unitary selfhood. The standard of the "reasonable man" still prevails in areas where clearly reasonable men would fear to tread, let alone respond. The area of sexual criminal behaviour highlights most pertinently the theoretical assumptions underlying the law's approach.

What exactly do I mean by sexual criminal behaviour? sex crimes? In a sense *all* crimes are sex crimes: the vast majority are committed by men. Crime is a gendered activity. The crimes I refer to here are those committed by men, where the context of the crime involves some overt sexual expression. Violations against women are explicit examples of this. However the case of Pierre Riviere, which I discuss later actually includes the murder of a child. I will argue that its dynamic and background resembles that of a crime against "femaleness," justifying its categorization as a sex crime. The law begins with 'a presumption of separation. When two citizens interact, consent to the interaction becomes an affirmation of its legality. Thus rape is defined in relation to evidence of consent by

⁷ Smith and Weisstub, *supra* note 1

the victim. Penetration and active consent - when these two combine, no crime takes place, because to actively say yes, is to exercise one's rights as a responsible citizen. And **yet**, we do not live up to this model.

Our starting place is not of separation but of interrelation; we live with each other, we have relationships, we interact, sometimes destructively. Violent crimes, involving physical abuse, indicate that some individuals cannot satisfy themselves without inflicting pain on others. Yet, even these acts are a form of interaction. The traditional model is conceptually claustrophobic, for it can only label such crimes irrational, irresponsible or, at last resort and as an alternative to incomprehension, evil. Violent criminals are "dangerous offenders." High rates of recidivism indicate the failure of the criminal justice system to deal with these criminals, though I do not claim that these criminals can necessarily be "cured."

Feminism, psychoanalysis and postmodernism do not rely on the unquestioned positivist foundations which justify our present model; a combination of punishment, *retribution* and correction.

Though I will draw on as many sources as I can to put my position across, I intend to concentrate on Catharine MacKinnon's elaboration of feminism, and on Michel Foucault's elaboration of postmodernism. for reasons I will discuss later, (**See** chapters 6 and 8). My approach to psychoanalysis will be somewhat more diffuse since it *really* does comprise of the sum of all its parts. Relying on Freud alone, for example, when successive analysts have refined and positively modified his theories, would **be** foolish (See chapter 7).

My first objective is to demonstrate the approaches each theory takes toward, ~~sex~~ crime. I will go on to define each theory in order to ground the next step which will ~~be~~ to attempt a dialogue between them. This process should illustrate their differences and similarities. Ultimately, I want to explore the possibility of achieving a synthesis between all three. The result of this will implicitly comprise a forceful attack on traditional criminal jurisprudence and the way it is used in law school, by the police, by the courts and by the government. It will also throw light on the viability of the continued and growing attempt to combine the three theories. Is a tripartite theory more useful than various dual combinations? If not, this new trend in jurisprudence is lateral rather than forward. If it is, what will such a theory look like and what will be the implications for those who argue for their continued splendid isolation? ⁸

⁸ For example, Catharine Mackinnon in *Feminism Unmodified*, (1987), Harvard University Press at p.16: "Qualifying feminism by socialism and liberalism, while descriptively accurate to socialist feminism and liberal feminism, signals the limitation of feminism.....".

2 A Feminist Approach to Sex Crime

It seems particularly crucial for women, who are the main objects of sex crimes (others are children), to find an explanation for them. Feminists have attempted to do this. Though there are several forms of feminism (I will explore and clarify the differences in chapter 6), perhaps a starting point is the feminist challenge that crimes against women are the product of the inequality between the social status of men and women. The murder of women, the rape of women, the assault of women - they have a context: patriarchy. These crimes do not constitute aberrations from the norms of sexual behaviour - they are its ultimate unveiling. Andrea Dworkin articulates that norm:

...there is a hatred of women, unexplained, undiagnosed, mostly unacknowledged that pervades sexual practice and sexual passion....The passion for hurting women is sexual passion: and sexual hatred of women can be expressed without intercourse. ⁹

But what kinds of crimes in particular am I talking about? The crimes of Peter Sutcliffe are a good example. Over a period of six years, he murdered, mutilated and then masturbated over, thirteen women in the north of England. His pattern of attack was always the same; he would stun his victims, then remove clothing around the trunk area whereupon he would stab repeatedly with knives or screwdrivers, the abdomen, breasts, thighs and vagina. He would often leave one of the victim's shoes on top of the body. Sometimes he would masturbate over the bodies. I myself lived in the area at

⁹ Andrea Dworkin, *Intercourse*, (1987), Free Press at p.138

this time and remember the tangible dread spreading over the city every night as darkness approached. When finally, and accidentally, caught, Sutcliffe turned out to be a married man, living in a "respectable" part of town - in fact *my* part of town!

Years later, and I recall studying the case of Hill v. West Yorkshire Metropolitan Police, in which the mother of the Ripper's last victim, Jacqueline Hill, attempts (and fails) to sue the police for negligence in failing to catch the murderer earlier, preventing her daughter's death. The case simply held that the police do not owe a duty of care to the potential victims of criminals. It does not address the actual existence of negligence by the police. According to Joan Smith, they did make mistakes - both in the theory they constructed for the murders and in judgement as to what facts were relevant. The real murderer was interviewed nine times before he was eventually caught under totally separate circumstances. In her book chronicling various *Misogynies*,¹⁰ Joan Smith puts the failure of the West Yorkshire police force down to their inability to recognize the Ripper's hatred of women as the cornerstone to the unknown killer's profile. **She** argues that the police absolutely misinterpreted the nature of the murders, by assigning the killer a mythical identity, affirmed by the press and a hoax letter writer, of a sort of reincarnation of Jack the Ripper, the so-called prostitute-hating killer of Victorian London. Enmeshed in a one hundred year old myth, they failed to realize that here was an individual who loathed, denigrated and despised women - all women, be they prostitute or

¹⁰ Joan Smith, *Misogynies*, (1989) London(Eng); Boston, Faber & Faber

not. The real Jack the Ripper was never caught, so their chances of successfully using him as a model were rather low from the outset. Joan Smith argues that the police incapacity to find the murderer was hardly surprising:

How on earth, given their own attitudes to women and female sexuality, did the police expect to be able to recognize the killer if they came face to face with him? If, as they believed, the man was disgusted by prostitutes - well, so were they. If he expressed disapproval of married women going to pubs without their husbands, or said he couldn't stand women who drank too much, or remarked that women who went out alone late at night were no better than whores, would they really think something was wrong about this one and arrest him? Or would they dismiss him as the average bloke - the kind who can be found leaning on the bar in the local pub - not to mention the police club - any night of the week? ¹¹

In accordance with their preconceived Ripper theory, the police investigation divided the victims into "prostitutes or women of loose morals" and "innocent" women. They presumed the killer's initial target was prostitutes, as Jack the Ripper's was. When that became inconvenient, the killer changed his tactic, bating the police outraging the public by killing "respectable" women. This desire to somehow rationalize the early murders is evident from the remarks of police officers in charge of the investigation. Joan Smith quotes detective Jim Hobson:

He has made it clear he hates prostitutes. Many people do. We as a police force, will continue to arrest prostitutes. But the Ripper is now killing innocent girls. That indicates your mental state and that you are in urgent need of medical attention. You have made your point. Give yourself up before another innocent woman dies. ¹²

Their obvious distaste for prostitutes, Smith claims, not only

¹¹ Joan Smith, *supra* note 10 at p.128

¹² Joan Smith, *supra* note 10 at p.127

coloured the logic of the police investigation but fatally obscured the real logic of the murders. ¹³

The implication of such an attitude is deeply insidious - that the killer's real madness is manifested in the murder of "innocent" women, implying that violence against certain types of women is rational, albeit extreme. I hesitate to add that I am not targeting police attitudes to women per se, though I agree with the ideas of J.C.Smith on the type of individual attracted to largely single gender professions. ¹⁴ I suggest rather, that these are typical attitudes of members of authoritative institutions. The work of Suzanne E. Hatty in *Male Violence and The Police*, ¹⁵ illustrates similar attitudes of officers in the Sydney district of Australia in relation to wife battering. When asked why women decide to stay with violent men, police officers' responses ranged from the belief these women enjoyed the violence, to claims that they were lazy, stupid or crazy.¹⁶ And when asked why men were violent towards these

¹³ Joan Smith, supra note 10 at p.121 and p.129: Joan Smith points out that one of the very earliest Ripper victims, Tracey Browne, survived the attack and provided an excellent description of her attacker but failed to be identified as a Ripper victim because she did not fit into the police theory that early victims were prostitutes; Tracey Browne was a 14 year old school girl.

¹⁴ J.C.Smith, *Gods and Goddesses of the Quadrant: Some Further Thoughts on the Mythological Dimensions of the Law*, 7 International Journal of Law and Psychiatry, (1984), at p.219-247

¹⁵ Suzanne E. Hatty, *Male Violence and the Police: An Australian Experience*, (1990) School of Social Work, University of New South Wales

¹⁶ Hatty, supra note 15 at p.70-73:

"Emotional and financial security, and because they just like the violence. They get some sort of pleasure out of it."

"I think that deep down inside, they like it. Some will only have to be hit once and they leave. Others can be whipped, kicked, beaten and stabbed and they keep coming back for more. It must give them some sort of gratification."

"Because of sex. Maybe they like it rough."

"Well, I think there are two reasons ; first, they're crazy, and second, they enjoy it"

"They're too lazy to do anything about it, to make the effort to leave."

women, 25% attributed it to the wife's behaviour, with a further 17% regarding such violence as normal male behaviour.¹⁷ Virtually nobody came up with the more sympathetic feminist argument that women sometimes eroticize violence because they want to please men and men eroticize violence. Jessica Benjamin, a feminist psychoanalyst discusses the cultural and psychic development of the female sense of self and sexuality which lends itself to relationships of dependency.¹⁸ MacKinnon puts her explanation more bluntly: eroticizing dominance "...beats feeling forced."¹⁹ Michel Foucault brought out of French criminological obscurity the case of Pierre Riviere, a young man of twenty. One day in 1835, armed with a pruning bill, he brutally kills his mother, his younger sister and his younger brother.²⁰ He is later pursued and arrested. While awaiting trial, he wrote an elaborate memoir which is the focus of Foucault's discussion. Foucault's approach to the case will be examined later with more detailed facts. He gives, to say the least, a controversial interpretation of the murders.

Donning my feminist hat, I will give a rather different

"They're too stupid to get out, or perhaps too crazy."

"Because they're tools. They lack intelligence."

¹⁷ Hatty, *supra* note 15 at p.75:

"It's basically natural. Violence is instinctual to all men."

"It's just male animal instinct. They are just trying to protect their property and look after their territory."

of one female officer :

"They just don't have enough intelligence to resolve arguments through discussion. They experience frustration and resort to violence."

¹⁸ Jessica Benjamin, *The Bonds of Love*, (1988), Pantheon Books

¹⁹ Catharine A. MacKinnon, *supra* note 2 at p.177

²⁰ Michel Foucault, ed., *I, Pierre Riviere, Having Slaughtered My Mother, My Sister and My Brother....A Case of Parricide in the Nineteenth Century*, (1975), University of Nebraska Press

interpretation. No feminist writer has, to my knowledge, examined the case, so I will do it myself. Many of those who give statements to the court point out Pierre's horror of all things female, including female hens and cats. He himself links his complete sexual inexperience with his hatred of women, which extends to the political arena.

He declares that, "... it is the women who are in command now in this fine age which calls itself the age of enlightenment, this nation which seems to be so avid for liberty and glory obeys women..." ²¹ Pierre Rivière is obviously troubled. But the interesting aspect to consider from a feminist point of view, is the normality of such a stance, the acceptance that misogyny is a part of life, not a sign of distress or instability. So many of the statements made by witnesses and experts during his trial suggest his motives for killing his *mother* were somehow rational. His madness is evidenced by his murder of his younger brother. Few expressions of regret or sorrow were uttered for her. For someone brutally murdered, where are her sympathizers? There is no indication she did not care about her children. ²² And Pierre's memoir reveals the fact that his father would sometimes "slap" his mother during big quarrels. ²³

But the common refrain in the documents, sometimes by people who had never met Victoire Rivière, is that in the marital troubles with her husband, "she was in the wrong." ²⁴ One newspaper article

²¹ Supra note 20 at p.108

²² Supra note 20 at p.61: "My mother, therefore, seeing that my father did not want her to take me away that day, started screaming in the streets: I want my child back, and she went straight to the cantonal judge at Villers to ask him whether my father had the right to keep her child from her."

²³ Supra note 20 at p.66

²⁴ Supra note 20 at p.24 ; Michel Harson - property owner and mayor of

describes her as "something of a shrew who was unwilling to live with him."²⁵ And Dr. Vastel's report suggests her behaviour connotes madness in itself - Pierre simply inherited it.²⁶ Yet what evidence is there to distinguish her from simply a strong-minded woman, standing her ground in the face of community pressure? Perhaps the final insult, and one that correlates to Joan Smith's charges against the police investigation of the Yorkshire Ripper, is the statement of Dr. Vastel in which he seems to locate the madness of Pierre in the murder of his brother: "His insanity could not be more evident than it is in the manner in which he conceived his horrible project and in the motives which determined him to execute his younger brother."²⁷ What of his mother and sister? Classifying him as mad is a technique of separation that Michel Foucault discusses at length. Joan Smith also recognizes it as a mechanism for distancing ourselves from sex criminals and therefore their crimes - another barrier to seeing the context of misogyny in which these crimes take place.²⁸

Smith discusses the brutal world Peter Sutcliffe was brought up in -

the commune of Aunay, admits no personal knowledge but says "those who witnessed his many quarrels with his wife always said she was in the wrong." Similarly, Zephyr Theodore Morin at p.25 and Pierre Fortin at p.27.

²⁵ Supra note 20 at p.16.

²⁶ Supra note 20 at p.126

Dr.Vastel: "His mother's disposition was so irritable, her will so obstinate and simultaneously so unstable, she was continually ill-natured and so extravagant that her husband could not, despite all the torments she heaped upon him, hold them against her, for he had long realized that her brain was deranged and that she was not capable of controlling her actions."

²⁷ Supra note 20 p.135.

²⁸ Joan Smith, supra note 10, discusses the initial decision of both counsel in the Sutcliffe trial to accept a plea of insanity, though this was immediately rejected by the judge.

from the total power commanded by his father over the family to his friends, one of whom waited in the car while Sutcliffe beat up a prostitute. She discusses his fragile masculinity and his stereotypical view of women as either madonnas or whores. She rejects the role attributed to his wife in aggravating the murders (claimed by Sutcliffe's father and some of the newspapers). The marriage, she argues, probably contained rather than aggravated his fierce hatred of women. There seem to be significant similarities in the cases of Sutcliffe and Riviere, despite the fact that two hundred and fifty years divides their deeds.

The concept of the quadrant of male sexuality formulated by J.C.Smith corresponds to Joan Smith's conviction that a feminist understanding of the murderer's psyche would not have led to his initial classification as a simple prostitute-hater. J.C.Smith claims such men gravitate towards what he calls a Herculean complex in which a very powerful negative image of the female is maintained so that to be a woman is tantamount to being a whore. A very similar approach can be found in Suzanne Hatty's conclusion on the femininity complex in men. J.C.Smith's approach is openly psychoanalytic and I will refer to it more extensively when I discuss the psychoanalytic approach to sex crime.

The core of the feminist objection to the handling of sex crimes consists in the constant separation that takes place between the criminal and the significance of the crime. The focus is shifted from the meaning of the crime to the madness of the criminal.

Women and Law

The relationship between a woman-hating culture and its law is put into focus by Catharine MacKinnon. She uses the crime of rape almost as a metaphor for our society: "The fact that the state calls rape a crime opens an inquiry into the state's treatment of rape as an index to its stance on the status of the sexes."²⁹

All legal definitions of rape, she argues, reflect how male the law's perspective is - with its focus on penetration as the pivotal issue in determining whether sexual intercourse has taken place. The woman's sense of violation has no weight.³⁰ MacKinnon claims the fact that insufficient evidence of force can be a defence to rape, demonstrates that some force is acceptable.³¹ She makes an excellent point when she describes how rape became regarded as sexual **assault**, without the benefits of the assault offence - namely, that it can never be consented to outside of the regulated assault in sport. Sexual assault, however, can be consented to, and when it is, adds up to sexual intercourse, MacKinnon claims that, "The law of rape presents consent as free exercise of sexual power without exposing the underlying structure of constraint and disparity."³²

²⁹ MacKinnon, supra note 2 at p.172

³⁰ MacKinnon, supra note 8 at p.82 and p.87 : "Women who have been raped often do resent having been penetrated. But that is not all there is to what was intrusive or expropriative of a woman's sexual wholeness." of Andrea Dworkin, *Intercourse*, supra note 5 at p.64 on possession

³¹ MacKinnon supra note 8 at p.88 : "We get a very low conviction rate for rape. We also get many women who believe they have never been raped, although a lot of force was involved. They mean that they were not raped in a way that is legally provable. In other words, in all these situations, there was not **enough** violence against them to take it beyond the category of "sex" ; they were not coerced enough."

³² MacKinnon, supra note 2 at p.175

And yet consent to other physical assault is not regarded as the free exercise of power over one's body. Private fighting is legitimate. Could it be, as she asserts, that rape is simply regulated rather than outlawed, because those who administer the system can't quite tell the difference?

The legal system presents a scant and uneven understanding of the fact that these crimes take place in the context of a power imbalance. Instead of seeing the violence in sex, MacKinnon advocates recognizing the sex in violence.³³ She hopes other feminists will see this too:

Some feminists have interpreted rape as an act of violence, not sexuality.. The point of defining rape as "violence not sex" has been to claim an ungendered and non-sexual ground for affirming sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference.³⁴

MacKinnon suggests that if sexuality is violent, perhaps violence is sexual. This isn't an original point, but MacKinnon articulates it best. Sex and violence "... are mutually definitive rather than mutually exclusive."³⁵ Her explanation for why men rape accords with her belief in the blurred boundaries between sex and violence:

I think men rape women because they get off on it in a way that fuses dominance with sexuality...I think that when men sexually harass women it expresses male control over sexual access to us. It doesn't mean they all want to fuck us, they just want to hurt us, dominate us, and control us, and that is fucking us.³⁶

³³ MacKinnon, supra note 2 at p.174: "...where the legal system has seen the intercourse in rape, victims see the rape in intercourse."

³⁴ MacKinnon, supra note 2 at p.173

³⁵ MacKinnon, supra note 2 at p.174

³⁶ MacKinnon, supra note 2 at p.92

One of MacKinnon's most insightful arguments concerns the claim that certain groups, namely those most vulnerable such as young girls and boys, are assumed not to consent. This is fine,³⁷ except that a completely different standard is assumed and applied to others such as prostitutes, wives and girlfriends; they can "hardly say no."³⁸ Is it any coincidence that those least believed are also those who are regarded as most sexual - so female sexuality is confused with female desire for rape. If you can't say no to sex, you can't say no to rape - even if you only say yes to sex for money. Surely the opposite conclusion is more likely. This is why rape is treated so exceptionally:

...the male anxiety that rape is easy to charge and difficult to disprove, also widely believed in the face of overwhelming evidence to the contrary, arises because rape accusations express one thing men cannot seem to control; the meaning to women of sexual encounters...Thus do legal doctrines, incoherent or puzzling as syllogistic logic, become coherent as ideology.³⁹

How can we summarize a feminist approach to sex crime? I see four principal claims:

- i) Sex crime is indicative of a wider hatred of men for women.
- ii) This is fundamentally related to the inequality in the social status of men and women.
- iii) Law reflects these same prejudices - both in the attitude of police, and in the judicial treatment of sexual violence.

³⁷ Though MacKinnon doubts if the one-sided prohibition on sex with children is of any positive use. It may instead eroticize the category, children, subjecting it to further harm. See MacKinnon, note 2 at p.174

³⁸ MacKinnon, supra note 2 at p.175

³⁹ MacKinnon, supra note 2 at p.181

iv) It is a mistake to distinguish between sex and violence. Violence is an expression of sexuality. Violent men confuse sex for violence and violence for sex.

3 Psychoanalysis and Sex Crime

Discussing what a psychoanalytic explanation of sex crime entails requires some background into fundamental psychoanalytic concepts. Psychoanalysis is both a practice and a theory. It differs from psychiatry and psychology in fundamental and numerous ways. One of the most important differences in practice is the concept of transference. This is the process of recreating in the analyst, the most deeply significant relationships in an individual's life. The analyst's response, or counter-transference, is grounded in her own arrangement of these first fundamental relationships. Another difference, this time in theory, is the belief in the structured and dynamic unconscious and the important implications this has for psychic health.⁴⁰ Dreams are a manifestation in symbolic form of the contents of the unconscious. Melanie Klein compares psychoanalysis with psychology. She claims that psychology fundamentally differs from psychoanalysis in assuming that suffering in the adult is a product of the adult world. The world of childhood is relatively separate and secure. Of course very unhappy childhoods produce troubled adults, but even now, this position is not extended to a belief in the primacy of infant life. Klein maintains that:

...just the opposite is true. What we learn about the child and the adult through psychoanalysis shows that all the sufferings of later life are for the most part repetitions of these early ones and that every child in the

⁴⁰ | would say psychic health involves some understanding of one's own symbolic language and imagery, as well as the ability to think about one's reactions and feelings rather than being swept away by them. It does not entail controlling all feeling by thought.

first years of life goes through an immeasurable degree of suffering.⁴¹

But psychoanalysis is by no means uniform in either theory or practice. Psychoanalytic thinking has developed into a multitude of schools; some reinterpret Freud, some contradict him. It has also branched into and combined with other disciplines to form new ones. Norman O. Brown, for example, uses psychoanalytic concepts combined with myth, history and anthropology to establish a psychoanalytic social theory.⁴² J.C. Smith further explores the link between psychoanalysis and history, in particular the way law reflects the psychoanalytic underpinnings of history. It is not a reflection of the development of mankind from primitive chaos to order, but represents a systemization of neurotic impulses, including aggression.⁴³ Many feminists have utilized psychoanalysis' roots in myth to forge feminist theories of history, archeology and anthropology.⁴⁴ It was Freud who argued that by examining the extremes of behaviour, valid insights into so-called normal psyches could be obtained. Thus socially acceptable and criminal tendencies may only differ in matters of degree, not substance. The patterns of impulse and reaction to impulse which

41 Melanie Klein, *Criminal Tendencies in Normal Children*, in *Love, Guilt and Reparation*, (1988, c. 1927), Virago Press.

42 Norman O. Brown, *Life Against Death, The Psychoanalytic Meaning of History*, (1966, c.1959), Middletown, Wesleyan University Press.

43 J.C. Smith, *supra* note 4

44 eg Merlin Stone, *When God Was a Woman*, (1978), New York: Harcourt Brace Jovanovich; Adrienne Rich, *Of Woman Born: Motherhood As Experience and Institution*, (1977), New York: Bantam; Barbara Ehrenreich and Dierdre English, *Complaints and Disorders: The Sexual Politics of Sickness*, (1973), Old Westbury, New York: Feminist Press; Starhawk, *The Spiral Dance*, (1979), San Francisco: Harper & Row.

result in certain types of behaviour may be the same. This is an important element of our look at the phenomenon of sexually specific crimes. First, as Melanie Klein notes in her essay, *Criminal Tendencies in Normal Children*, "[W]e cannot apply any ethical standards to these impulses." ⁴⁵

This is not the same as refusing to apply ethical standards to the ensuing destructive act. Psychoanalysis, above all, seeks to understand the feelings and thoughts behind behaviour, not judge it. Klein uses the example of a little boy she analysed for a very brief period who showed destructive tendencies like raiding cupboards and attacking little girls. She believed he would go on to become a criminal and yet he was not without a guilty conscience in relation to the damage he committed:

...it is not (as is usually supposed), the weakness or lack of a super-ego, it is not in other words the lack of conscience, but the overpowering strictness of the super-ego which is responsible for the characteristic behaviour of asocial and criminal persons. ⁴⁶

Nor was the little boy without a very deep capacity to love. Thus, "[H]ate is often used as the most effective cover for love" ⁴⁷

Klein's theory involves the belief that children form objects of love and hate, in relation primarily to the mother's breast. Infants feel both loving and hateful feelings towards the breast, which at times satisfies them, at times deprives them. These feelings are projected onto the object. Thus in the infant psyche, a good breast and bad breast is created. When the realisation dawns that the same breast

⁴⁵ Klein, supra note 41 at p.176

⁴⁶ Klein, supra note 41 at p.258

⁴⁷ Klein, supra note 41 at p.260

is the cause of both good and bad feelings, a sense of contradiction, conflict and guilt accrues. This results in depression and anger, followed by guilt and love and the desire to repair the damage believed to have been inflicted by the aggressive impulses. A second element of the psychoanalytic approach to sex crimes is the possibility of sometimes analyzing the *victim's* behaviour as part of the explanation for the violator's action. This is particularly true in the case of wife battering. Some feminists find this idea offensive, but feminist psychoanalysts such as Jessica Benjamin and Nancy Chodorow recognize that some women are attracted to violent, domineering men. The abuse is simply a physical manifestation of the relationship of emotional dependency. So how does psychoanalysis explain the actions of the Yorkshire Ripper and Pierre Riviere?

Psychoanalysis and the Yorkshire Ripper

In a communication made, some years ago, to the Berlin Analytical Society, I pointed out an analogy between some very horrible crimes which had recently happened, and corresponding phantasies which I had found in the analysis of small children.⁴⁸

The key to the Ripper crimes lies in the childhood relationship of Sutcliffe to his parents. This echoes feminist approaches to such crimes, not surprisingly, since both psychoanalysis and feminism share a concern with the constructed nature of gender and expressions of sexuality. In her analysis of Peter Sutcliffe's background, Joan Smith discusses the misogyny that pervaded the

⁴⁸ Klein, *supra* note 41 at p.177

world in which he was raised. A psychoanalytic approach takes Sutcliffe's own perception and feeling towards his father and mother into account. It seems he reacted in contrasting ways towards his parents; being very anxious and needy of his mother,⁴⁹ while fearing his father. Peter Sutcliffe's brother Carl describes home life: "We were all frightened to death of me dad. He were like a monster."⁵⁰

I am not a psychoanalyst, but perhaps what happened to Sutcliffe happens to many little boys. As the ego differentiates from the mother, an ego-ideal is required to facilitate separation. The French psychoanalyst, Janine Chasseguet-Smirgel, explores and clarifies this concept.⁵¹ The father often becomes the object of both the little boy's and little girl's ego ideal, producing men who dominate and women who are dominated. The infant Sutcliffe may have felt too overwhelmed with fear of his father. Yet the desire to have his father as a hero to him, caused great guilt within him in relation to his mother; because of his father's intimidating personality, he could not afford to release his mother as the object of his love. In adult life, Sutcliffe felt compelled to pursue the hero male as an object of love in a very dramatic and destructive manner. His inability to build up a firm ego left his sense of self and sexuality with the constant fear of annihilation. In addition, the image of masculinity he was presented with in his home environment and in the outside world

⁴⁹ Joan Smith, *supra* note 10 at p.142, cites Gordon Burns' biography of the Ripper: "By the age of five, Peter still hadn't got out of the habit of clinging, limpet-like to his mother's hems."

⁵⁰ Joan Smith, *supra* note 10 at p.143; Carl Sutcliffe, Peter Sutcliffe's younger brother talking to Gordon Burns.

⁵¹ Janine Chasseguet-Smirgel, *The Ego-Ideal: An Essay on the Malady of the Ideal*, (1985), London: Free Association.

contributed to his view of what it is to be a real man. My interpretation is limited and open to criticism. However the point I make is that psychoanalysis interprets the decisions individuals make consciously in shaping their lives, as the unconscious pursuit of their ego-ideals.⁵² This is an argument for creating new kinds of ego-ideals and images of masculinity. How does this correspond to the way Melanie Klein deals with criminal tendencies? In the 'description of the child "criminal" already mentioned, Klein establishes several events she regards as influential:

Throughout his childhood this boy had shared the bedroom of his parents and obtained a very sadistic impression from their intercourse. As I pointed out earlier, this experience strengthened his own sadism....This boy, feeling overwhelmed and castrated, had to change the situation by proving to himself that he could be the *aggressor* himself. One important motive for these destructive tendencies was to prove to himself again and again that he *was still a man*, besides abreacting his hatred against his *sister* on other objects.⁵³

Surely this desire to "prove to himself again and again that he was still a man" could apply equally, if not identically, to the development of Peter Sutcliffe?

Klein construes the repetitive pattern of such destructive behaviour as illustrating a desire on the part of the individual's super-ego, to be punished. Psychoanalysis is nothing if not controversial.

This desire for punishment, which is a determining factor when the child constantly repeats naughty acts, finds an analogy in the repeated misdeeds of the criminal....⁵⁴

⁵² See J.C.Smith supra note 14.

⁵³ Klein supra note 41 at p.182

In complete contrast to the approach of the criminal justice system and public opinion, Klein claims to find a moral code in these criminals: "In my opinion everything seems to point to the conclusion that it is not the lack of a super-ego but a different development of the super-ego at a very early stage which will prove to be the main factor." 55

However understanding Klein is of the development of criminal behaviour, she is pessimistic about the likelihood of changing behaviour. She sees the early analysis of children, before the pattern of their psychic arrangements are settled, as the only direction for actually changing certain types of destructive behaviour.

Psychoanalysis and Pierre Riviere

The feelings Riviere had towards his mother are almost in complete contrast to those of the Yorkshire Ripper. A psychoanalytic approach to the actions of Pierre Riviere could hardly fail to ignore his own sense of a troubled childhood, evidenced in his memoir. The result of this sense of instability seems to have produced overwhelming antagonism towards his mother coupled with hero-worship of his father. The murders of his brother and sister, he rationalizes, stem from their traitorous allegiance to his/their mother. Pierre even admits to killing his brother because he was his father's favorite son. His father would see this murder as particularly heinous, and be unable to feel remorse for Pierre himself.

⁵⁴ Klein supra note 41 at p.179

⁵⁵ Klein supra note 41 at p.184

...I feared that if I only killed the other two, my father though greatly horrified by it might yet regret me when he knew that I was dying for him, I knew that he loved the child who was very intelligent, I thought to myself he will hold me in such abhorrence that he will rejoice in my death, and so he will live happier being free from regrets. ⁵⁶

Another interesting factor is the attention Pierre devotes in his memoir to the interchanges between his parents - *before* and after he himself had been born. He articulates their relationship, as he sees it, in passionate detail. For example, he tells us that when he was three years old and living with his father, his mother and grandmother came to fetch him and there was a dispute. What we see is a very troubled and confusing childhood atmosphere, in which his parents were constantly splitting up and reuniting again. His memoir indicates his own sense of being totally enmeshed in the relationship between his father and mother. His adult hatred of the female - even female cats, is an alarming precursor to his crimes. Pierre himself puts forward the fear of incest as the reason for his hatred: "Above all, I had a horror of incest, which caused me to shun approaching the women of my family." ⁵⁷

Dr Vastel's statement is more detailed on the question of his relationship to women. It suggests Riviere felt he himself was contaminated in some way:

...he imagined that a fecundating fluid incessantly flowed from his person and could thus, in his own despite, render him guilty of crimes of incest and of others yet more revolting. So he lived amid perpetual fears, he approached women only with great reserve, often recoiled with horror from the proximity of his mother, his grandmother, or his sister when he

⁵⁶ Supra note 20 at p.106

⁵⁷ Supra note 20 at p.102

thought he had come somewhat too near them. *In order to repair the harm he thought he had done and to prevent incest, he indulged in ridiculous motions in order to draw back into himself the supposed fecundating fluid which so greatly perturbed him.*⁵⁸ (my italics)

What we are told fits into Klein's theory. His sexual feelings towards women are interpreted by him as dangerous, polluting and overwhelming. And yet there is a great deal of ambiguous resentment towards the female which he ultimately gives vent to and justifies by identifying with the frustrated sexuality of his father.⁵⁹ This fear of his own sexuality, and his reaction to contemporaries whose sexuality would also be developing is interpreted by several reports as evidence of being anti-social. He admits he felt "...more at ease with children of nine or ten than with people my own age."⁶⁰ One curious feature is that he seems to mix up whether it is women in the person of his mother who is the sinner, the contaminated one, or himself with his vivid concept of his "fecundating fluid." His early years appear to have given him a sense of himself, the process of childbirth and its associations with sexual intercourse as dangerous to his mother. Yet coupled with a fear of hurting her, he feels a terrible anger with her, a rejection and lack of her love, due perhaps to frequent separations from her. There is no indication that he was especially favoured by his father - indeed Pierre tells us that the brother he killed was his father's favourite, killed for that reason. His father is described as being

⁵⁸ Supra note 20 at p.129

⁵⁹ Klaus Theweleit, ed., *Male Fantasies*, (1987), Polity Press. Theweleit describes a reverse phenomenon taking place - the men regard women as contaminating, dirty and insidious.

⁶⁰ Supra note 20 at p.103

aware of Pierre's strangeness and rather disappointed in him.⁶¹ At one place in the memoir, Pierre starts an elaborate discussion of a dispute involving a bed. His mother apparently wanted his father to buy it for her, but she then refuses it when it is bought. Immediately after this narration, we learn that he himself was born and that "the birth made her [his mother] very ill." Again he describes her as falling sick upon the birth of his sister two years later. It seems more than ironic that his mother was heavily pregnant when he killed her. He has already associated sex with death and violence. Is this the fear which leads to such a distorted view of his mother's badness and his father's goodness? His loving feelings are directed towards his father, while his mother takes on the entire burden of his hatefulness. Pierre sees his mission as one of sacrifice for his father with whom he identifies, because he thinks they have both been thwarted and trapped by their attachment to his mother. Both he and his father, in Pierre's view, want the love of his mother. He describes his mission in elegiac, mythically heroic terms.

I had read in Roman history, and I had found that the Romans' laws gave the husband the right of life over his wife and children. I wished to defy the laws, it seemed to me that it would be a glory to me that I should immortalize myself by dying for my father. I conjured up the warriors who died for their king and country, the valor of the students of the Polytechnic[sic] college at the taking of Paris in 1814, and I said to myself: these people died to uphold the cause of a man whom they did not know and who did not know them either, who had never given them a thought; and I, I would be dying to deliver a man who loves and cherishes me.⁶²

⁶¹ Supra note 20 at p.27. eg: The statement of Pierre Fortin, a carpenter: "I sometimes felt that his father was distressed at his character, he used to say that he would never be able to make anything of him...his father did tell me one day that the accused was more ill-disposed toward his wife than he was and that if he had his son Pierre's character, Victoire Brun would not be so easy in her mind."

⁶² Supra note 20 at p.105

In psychoanalytic terms, his father has become his ego-ideal with whom he seeks merger and consequent self-annihilation. Melanie Klein discusses the psychic process using her language of the feeding breast, mentioned earlier. I suggest it applies to Riviere even on the partial facts we have of his situation. The breast that satisfies the baby's needs is construed by the baby as a good object, the denying, absent breast as the bad object. The security of the infant's sense of love is determined by how securely established the sense of the good object is within him. Klein believes that the ego which divides objects into good and bad is itself divided to reflect this. Resentment of the bad breast and fear of losing the good breast result in sadistic envy which often "...blurs the distinction between good and bad."⁶³ This envy, says Klein, is construed as a persecuting super-ego, which gives rise to a tremendous sense of guilt and worthlessness. Thus a sense arises of the ego's need to be punished and purged. The processes Klein talks about refer to the first few months of an infant's life, but Klein regards the development of these first few moments as crucial and indicative of the personality and behaviour of the adult. Thus, Pierre's inability to resolve the conflict between his feelings of hatred and fear of hurting his mother are acted out in the most violent way.

The Mentality of the Victim

I have already mentioned that Catharine MacKinnon admits to the possibility that some women who become victims of physical,

⁶³ Melanie Klein, *Envy and Gratitude*, (1988), Virago Press at p.230 See also p.6

emotional and sexual abuse eroticize dominance. But that is as far as she goes. Of course, it is politically unpopular for feminism to acknowledge and stress as important the complicity of women in their own domination. Yet even her fleeting acknowledgement corresponds to some of the police remarks in Hatty's work, proffering explanations for male violence against women in the home - that these battered women somehow invite their abuse.⁶⁴

Why do some women "take" more than others?

Psychoanalysis takes the position that some victims of violence are enmeshed in a psychically satisfying union of abuse. But the police remark suggests these women make a conscious choice.

Psychoanalysis avoids any judgement of these neurotic, self-destructive situations because being in an abusive relationship is rarely a conscious decision, rather a response to a neurotic need.

These victims are not simply masochists. That image is clichéd and familiar. Freud describes masochism in *On Sexuality* as that,

passive attitude towards sexual life and the sexual object, the extreme instance of which appears to be that in which satisfaction is conditional upon suffering physical or mental pain at the hands of the sexual object...⁶⁵

He regards masochism as an indirect expression of sadism, remarking how frequently these two traits are present in the same individual. He goes on to say that sadism corresponds to an aggressive and exaggerated component of the sexual instinct. Later analysts have modified Freud's assumption that the tendency to

⁶⁴ See Suzanne E. Hatty, *supra* note 15 at p.70.

⁶⁵ Sigmund Freud, *On Sexuality*, (1977, c.1953), London: Penguin, at p.71.

develop a masochistic personality is inherently more likely in women. Jessica Benjamin, for example, describes such a development as symptomatic of masochism, not causal.⁶⁶ But Janine Chasseguet-Smirgel posits a totally alternative and, I think, more convincing explanation of the phenomenon of victims of sexual murder. She distinguishes the masochism of Freud's theory from what she calls *passivity* - which has little to do with the eroticization of suffering.⁶⁷ By passivity, she **does** not mean wimpiness or laziness. Indeed she points out that many women who display a psychically passive attitude have outwardly active lives. In her chapter entitled *Submissive Daughters: Hypotheses on Primary Passivity and Its Effects on Thought Mechanisms*,⁶⁸ she discusses the cases of three women, each prone to "succumbing to a deadly embrace."

The first, Charlotte, is a 30 year old woman in a relationship with a potentially violent man, yet she is apparently oblivious to any danger.

Chasseguet-Smirgel **recalls** an alarming incident:

One day, Charlotte, in his absence, went into the bedroom and found, pinned to the wall, photos of pieces of the bodies of naked women, cut from pornographic publications. There was not a single photograph of a complete

⁶⁶ Benjamin, *supra* note 18. Similarly Ethel Person in her commentary on Marie Bonaparte's essay, *Passivity, Masochism and Femininity in Women and Analysis*, (1974), Jean Strouse, ed., at p.255:

"From our current vantage point, it seems possible to say that in so far as masochism is predominant in women, it derives from the social role of women vis a vis men, not from intrinsic libidinal endowment or from the perception of the anatomic distinction or from the conception of coitus as aggressive."

⁶⁷ cf Mackinnon, *supra* note 2 at p.177

⁶⁸ Janine Chasseguet-Smirgel, *Sexuality and Mind, The Role of the Father and Mother in the Psyche*, (1986), New York University Press.

woman...Charlotte's companion several times threatened to kill her and her daughters.. These threats alarmed the analyst and me, when I was told about them. The patient did not seem anxious and at the time was formulating a desire to have a third child by this man. ⁶⁹

Then there is Caroline, who indiscriminately takes men home. Lastly, Chasseguet-Smirgel discusses Carla, a bright 40 year old mother and lawyer, who shows a lack of awareness of the possible harm she faces as a strange man offers to help her when her car breaks down one night.

According to Janine Chasseguet-Smirgel, these women lack a sense of internalization of the mother as protector against the danger of castration, which can be experienced by both male and female. In the absence of a childhood father, the common thread between the three women - the bad, hateful feelings towards the mother, experienced along with the good - could not be projected onto the father. The father, in the guise of strange men, is not perceived as threatening. Thus: "Discrimination between the good and bad objects is lacking...Paradoxically, the disinclination to feel distrust for Jack the Ripper, to allow oneself to be struck a mortal blow by him, would be linked to a very early need for survival..." ⁷⁰

That need is the need to deny the existence of the bad object. It seems ironic but logical that the inability on the part of these women to distinguish between good and bad objects should match so perfectly the exaggerated splitting of the world into good and bad by those who commit these crimes. The psychoanalytic approach may

⁶⁹ Chasseguet-Smirgel, supra note 68, (1986)

⁷⁰ Chasseguet-Smirgel, supra note 68 at p.52

seem politically antagonistic to the aims of feminism, but its exploration of the mentality of the victims of these crimes is hopeful in the sense that it takes some of the randomness out of these crimes and promotes change. I will discuss the viability of a union of theories later.

How can we conclude the psychoanalytic approach to sex crime?

- i) It views the development of the tendency to commit destructive acts as originating in infancy and childhood.
- ii) The drive to act out these violent fantasies is sexual.
- iii) Abhorrent behaviour springs from psychic patterns which may differ only in degree to those which promote acceptable behaviour.
- iv) The archetypes of a culture become the ego-ideals of its individual members. An unstable ego may act out its ego-ideals in extreme ways.
- v) Victims of violence may be satisfying a psychic self-preserving need which, ironically, proves life-threatening.

4 The Postmodern Approach to Sex Crime

I intend primarily to examine the postmodern ideas of Michel Foucault. For in *I, Pierre Riviere...*, he and the other contributors have dealt specifically with a particular criminal. Perhaps the most unusual element of the postmodern approach lies in its attitude to the killer himself. They have enormous respect for him, and his memoir. Foucault calls it outstandingly beautiful, producing in him and the other contributors, "utter astonishment."⁷¹ Jean-Pierre Peter and Jeanne Favret, in their essay, *The Animal, the Madman, and Death* grandly claim that, "If the peasants had a Plutarch, Pierre Riviere would have his chapter in the *Illustrious Lives*. And not he alone. His whole family falls into the rank of exemplary victims..."⁷² Why should these writers hold a murderer in such high esteem? Their position rests on several claims. The first is that Pierre's actions constitute a reaction to the political environment of the time. The second is that the way he is handled by the authorities reveals the whole machinery of power at work. Bitter disappointment that the then recent proclamation of the equality of all men translated into the same oppressive relationships economic hierarchy combined with extreme rural poverty, leading to a general sense of instability and fear of rebellion. The role of the contract, used to maintain power over serfs, simply replaced direct feudal power. The lives of the poor remained wretched.⁷³ Peter and Favret suggest Victoire

⁷¹ Foucault, supra note 20 at p.x

⁷² Supra note 20 at p.175

⁷³ Peter and Favret, supra note 20, mention the weighty taxation, these peasant communities were subjected to.

Riviere made a parody of the declaration of the equality and liberation of all citizens by demonstrating the ostensible act of free contract through marriage was in fact a sham. They claim Pierre modelled this by turning himself into a monster, thus opting out of the ideal of the equality of men. They point to the fascination with contracts evidenced in his memoir as a further confirmation of the conscious political motivations of his actions ⁷⁴

Foucault construes Riviere's actions as a political reaction, though he never clarifies whether he believes Riviere acted conscious or unconscious of the political symbol Foucault claims he created. The act of murder, says Foucault, reflects an interesting relationship to power:

On the surface the two sets were contraries, like crime and glory, illegality and patriotism, the scaffold and the annals of immortality. From the far side of the law the memorial of battles correspond to the shameful renown of murderers. But in fact they were such near neighbours that they were always on the point of intersection....Murder is where history and crime intersect....Murder establishes the ambiguity of the lawful and unlawful....Murder prowls the confines of the law, on or below it; it frequents power, sometimes against and sometimes with it. ⁷⁵

Peter and Favret thoroughly endorse this and regard Riviere's repeated stabbing of his victims as particularly and politically significant. They quote Frantz Fanon by way of confirmation:

⁷⁴ Peter and Favret, supra note 20 at p.192. Peter and Favret analyze Pierre's logic in detail and assume his voice: "In my family this tyrant is my mother; she renders every contract void of meaning; she makes my father forfeit his rights and loads him with duties. At the same time, she was a stumbling block to the son: I desire her constantly, perhaps because of the vacant place in her bed where, from the very first, she has not wanted my father, and he was not strong enough to take it. I hate her. By killing her I am selling an example so that the law may be restored, the contract honoured, and tyranny overthrown."

⁷⁵ Foucault, *Tales of Murder*, supra note 20 at p.205

"Autopsies establish one fact beyond a shadow of a doubt: The murderer gives the impression, by inflicting many wounds of equal deadliness, that he wished to kill an incalculable number of times."⁷⁶

This transports the murder, from a interaction between two individuals to a symbolic interaction between an individual and the world. Thus, Foucault describes it as a "historical murder."⁷⁷ But surely it is also symbolic murder? Chris Weedon, one of the few feminists to discuss the case describes it as "a bid to speak." But not only this. As a way to proclaim the existence of his class, to claim a social self, to seek:

...to change the social power relations in which the exclusion of the peasantry from the social nexus and the failure to grant them a positive position within liberal-humanist discourse, led them to occupying no social position at all.⁷⁸

Peter and Favret echo this view. They transfer of power over the peasantry, from the feudal system to a system of contracts with the church, or the landlords, effectively "annulled the human being."⁷⁹ Perhaps they do so unwisely, for their arguments are not nearly as sophisticated as Foucault. Peter and Favret seek to rationalize Riviere's brutality: "Only to those who are excluded from

⁷⁶ Supra note 20 at p.190 Quote from Frantz Fanon, *Les Damnés de la terre*, Paris, 1961, p.226. English trans., section on *Criminal Impulses found in North Africans*, in *The Wretched of the Earth*, London: Penguin Books, 1967, p.240.

⁷⁷ Foucault, supra note 20 at p.207

⁷⁸ Chris Weedon, *Feminist Practice and Poststructuralist Theory*, (1987), Basil Blackwell, at p.116

⁷⁹ Peter and Favret, supra note 20 at p.178

the social nexus comes the idea of raising a question about the limits of human nature."

What does this mean exactly? Those with power exclude those without - the class Riviere belongs to, and this sense of alienation, of being worth nothing, produces in Riviere a desire to both claim an identity and accept utter alienation from humanity as the price to pay. But is this victory for Riviere? Surely this is an argument for all acts of violence? Another problem I have with this is that the postmodern position argues constantly that the threat of exclusion was and remains the punishment for these crimes. How can they be excluded further? I would modify this aspect of the theory by recognizing two types of exclusion - personal and political. Political exclusion is the punishment for crimes even now, reflected in the physical separation of criminals from the rest of the population. The sense of personal alienation can come from a variety of sources. Riviere may have felt self-alienated. He says as much himself. The Riviere case presents a fascinating demonstration of Foucault's theory of madness as a weapon of the technological state. The trial of Pierre Riviere demonstrates the exact manner in which individuals become controlled and excluded - by attributing their deeds to an infectious madness. But, Foucault argues, when we look at the documents, especially those of Riviere himself, described by the court as almost illiterate, we find that the evidence put forward as indicative of Pierre's madness is clumsy and flimsy. The statement of the parish priest of Aunay, whilst denying that Pierre is deranged, seems to suggest that should he be an "idiot," his

⁸⁰ Peter and Favret, *supra* note 20 at p.188

madness and therefore the right to exclude him is more likely: "The accused had always seemed to me a very gentle character, he was held to be an idiot in his village and even throughout the parish but having talked to him sometimes, I do not think he was."⁸¹ Looking at the individual documents, there does seem support for Foucault's position. There **do** seem to be several hidden agendas supporting the claim that various technologies of control can be seen in operation in the case. To begin with, a *local* doctor, Dr. Bouchard says no, Pierre is not mad.⁸² A consultation is sought with Dr. Vastel from one of the largest mental hospitals in France. The result: yes he is mad, indeed, his family have always shown signs of madness:

Riviere comes from a family in which mental deficiency is hereditary...*His mother's disposition was so irritable, her will so obstinate and simultaneously so unstable, she was continually ill-natured and so extravagant that her husband could not, despite all the torments she heaped upon him, hold them against her, for he had long realized that her brain was deranged and that she was not capable of controlling her actions..*Indeed, heredity is one of the most potent causes in the production of madness...It is not necessary, therefore to seek elsewhere the cause of the original defective organization of Riviere's brain...⁸³ {my italics}

Vastel describes Riviere's crimes as surely a result of "true mental alienation,"⁸⁴ a phrase that immediately seeks to justify the physical alienation Pierre will be threatened with. Robert Castel, in his essay, *The Doctors and Judges*,⁸⁵ reckons the case shows two

⁸¹ Foucault, supra note 20 at p.15

⁸² Supra note 20 at p.122 Dr. Bouchard: "Nothing in his answers indicates any derangement of the mental faculties."

⁸³ Dr. Vastel, supra note 20 at p.126

⁸⁴ Dr. Vastel, supra note 20 at p.125

⁸⁵ Robert Castel, supra note 20 at p.253

power groups at play, wanting Rivière for themselves - law and medicine. Medicine can be further divided into the old regime of fairly non-interventionist psychiatry, which supported a retributive model of punishment, and the new psychiatry, which would predominate to the point where asylums were being built and where madness spawned an industry. The interplay of these interest groups is fascinating. The experts reports correspond to three positions which arise from the interplay of law and medicine. Thus we have Dr. Bouchard's report. In refusing to believe in Pierre's madness, he represents the legal model - Pierre needs punishment. Dr. Vastel believes Pierre is and always has been, mad. Castel reckons that the report by leading Paris specialists represents a belief in maximum psychiatric and legal contr. namely, estrangement. And this report wins the day. Pierre's death sentence is commuted to life imprisonment on grounds of insanity, but he hangs himself anyway.

What conclusions can be drawn from looking at Foucault's approach to Rivière's crimes?

- i) These violent acts have a political context.
- ii) They are a product of a divided society in which power is exercised over others.
- iii) These criminals are a product of the society they attack, but they reject the image society imposes on them.

5 Feminism, Psychoanalysis and Postmodernism

We have three radical approaches to sex criminals and their crimes - the feminist, psychoanalytic and postmodern. They seem to have common features which lend themselves to an attempt at a three-way reconciliation. One similarity between feminism and psychoanalysis is their shared assumption that the behaviour of these murderers is simply a more extreme version of the norm of masculinity upheld by our culture. The corollary is that postmodernism seems to take the opposite view - that Riviere's actions connote a rejection of the view of himself imposed by society. However, the way Foucault talks about relations of power, in specifically non-class terms, is reminiscent of the psychoanalytic concept of the collective unconscious. Feminists would agree with Foucault's contention that Dr. Vastel's analysis of Victoire Riviere's madness is an establishment ruse. The two theories share a skepticism about the law's neutrality in general as well as in relation to sex crimes. MacKinnon has discussed the male-oriented legal definition and handling of the crime of rape. Foucault is critical of the law's adoption of the most interventionist psychiatric medical model to deal with these criminals.

All three theories agree that multiple murders acquire symbolic significance, and are not an attempt to escape from the confines of the individual's self but an attempt to regain it, and assert its boundaries which are experienced as fragile and fragmented. This applies to postmodern interpretations of the Riviere murders, even

though they are described as an attempt to exceed the limits of human nature. For Riviere, they are an attempt to be more true to himself. However, there are difficulties which need to be resolved. We cannot talk about an alternative theory of criminology if no sense of coherence exists. We can say that they operate at different levels - psychoanalysis does not *have* to conflict with the feminist agenda of political action. But postmodernism's analysis of murder as alienation contrasts with the psychoanalytic view of murder as an act of interaction. Another sticking point is the differing explanations for why murderers take action. The psychoanalytic perspective, gives little space for the political climate they take place in, though perhaps if murder were legalized, more people would give vent to their imaginings. Psychoanalysis takes the position that political acts are always inspired and driven by uniquely personal factors. *A Sexual Profile of Men in Power*⁸⁶ supports this in suggesting that the drive to political power is intertwined with and superimposed on the sex drive. The postmodern approach puts great emphasis on the political circumstances which make Riviere's crimes of such historical fascination. These writers take Riviere's references to the political situation at face value, as the *raison d'etre* of his actions. Witness the lofty rhetoric of Peter and Favret:

An explosion into a purple ceremony. By it and in it and after it he would be able to speak the truth and, as a monster, display in their monstrous light the rule of lies and the foul machine at whose whim his fellows, the disinherited of the earth, are and have always been crushed, each day, each life. So much patience and so much suffering armed one of them with the sudden trenchant lightning-gleam of the pruning bill: the divine impatience.⁸⁷

⁸⁶ Sam Janus, Barbara Bess and Carol Saltus, *A Sexual Profile of Men in Power*, (1977), Prentice Hall Inc.

But how do they resolve the question of how Riviere is further alienated by the system when his initial grievance is triggered by a sense of alienation, or why he chose to wreck his vengeance on his mother. I would agree with the analysis of why he was classified and dealt with in a particular way by the authorities, but to claim pure political motives for why he acted in the way he did is ridiculous and naive. The interesting thing about the case may be the coincidence of political and personal, but some recognition needs to be attributed to Riviere's initial fragmented and fragile sense of self. The postmodern loop hole, though they do not recognize it as such, is to hold this fragile sense of self as a product of the archetypes at the time for peasants - there were no positive images. Before I can adequately deal with these questions, a more secure grounding in the theories is necessary. Then we will see whether the points of difference are valid and, if so, are fundamental to the theories they belong to. Then I will seek to build bridges between each theory. Finally, I will take an overview of their common base, if one exists, which might also be a point of departure for the development of a new branch of jurisprudence.

⁸⁷ Supra note 20 at p.177

6 Feminism

I have already used the term "feminism" without questioning what feminism consists of. Do I mean liberal, socialist, radical or critical? Are there still more? As I have already stated, I have found Catharine MacKinnon's version of feminism, with its critical analysis of male power, particularly useful. Here I examine why and whether her theory requires modification when interlocked with the questions of other feminist theories. This will prove useful when I try to reconcile feminism with psychoanalysis and postmodernism, because some of these feminists have already formulated ideas on creating a triangular theory.

Is it desirable for feminists to condense their arguments into one "feminism" in order to facilitate its wider acceptance, or can variety be optimistically accepted as proof indeed of maturity, of establishment? The plurality of feminist theory may mesh together: Liberal feminism with its focus on legislative reform, could be regarded as the pragmatic side of the movement, while the radical feminism of Catherine MacKinnon is grounded in changing the general agenda of social theory. I think an acceptance of any action which materially benefits women is valid, if only in recognition of the historical origins of the feminist movement. In this sense, our present ability to theorize rests on, and is a luxury, of survival.

Yet, in a self-conscious way, we must know that delight in the toleration of different, sometimes conflicting theories is itself a

very liberal stance. Liberal tolerance rests on the separation of form and content. Liberalism allows any political theory to exist regardless of its content, because its form, that abstract shell, has been prospectively guaranteed a voice. When that form is betrayed, for example by brute violence, the liberal state, by responding with violence, reveals its own disguised brutality. Yet it is liberalism which determines when content becomes form and when form transgresses into content. It decides the shape of the shell.

H.L.A.Hart recognised this all too well when he defined law in terms of rules of recognition. These are social practices which become legitimized as law when an internal point of view is taken of them by the "officers" of the state. We could say they affirm law's content, while the rest of the population regard these social practices as law in form, taking what Hart calls an external point of view. In her new book, Judith Butler firmly categorizes such rules of recognition as gendered, more specifically, as masculine. She writes, " ...the masculine constitutes the closed circle of signifier and signified." ⁸⁸

Men recognize the law and prescribe its content. So a feminist theory which critiques the content but not the form of law becomes liberal in form; liberalism has incorporated feminism - surely a poignant metaphor for the incorporation of women's identities into men's.

Socialist feminism has successfully attacked the liberal model. It has also refined Marxism in three ways. First of all, it has pointed out that labour is also sexually divided, even primarily sexually

⁸⁸ Judith Butler, *Gender Trouble*, (1990), Routledge at p.11

divided. ⁸⁹

Varda Burstyn, on analogy with classical Marxist theory which envisions a time before private property, traces women's labour to a time before patriarchy when women still did most of the work but not under conditions of oppression. Under patriarchy, she asserts, this labour was somehow appropriated for the benefit of all men in all classes.

Secondly, feminists on the left have deconstructed the Marxist assumption that the state and the workplace are the primary arenas of oppression, leaving the family and the home as some sort of private haven. They have prevented Marxism from falling into the liberal public/private distinction. Jane Ursell, in her article, *The State and the Maintenance of Patriarchy*, confines this recognition to only working class women. However, Burstyn uses a broader conception of "oppression" to assert that there exists a "gender class" in which men as a group dominate women as a group across class lines. Other feminists on the left endorse this broader conception. M.Barrett discusses the roles all women are socialized to play, such as caring for children, the sick, the disabled, the old - they are, in effect, emotional supporters. At the same time women are expected to be financially dependent on men for some time, if only while having children, so they are socialized to be financially supported.

⁸⁹ See Varda Burstyn, *Masculine Dominance and The State in Women, Class, Family and the State*, by Burstyn and Smith, (1985), Toronto: Garamond Press: "I see the sexual division of labour, very much as a 'great social' division of labour, likely the first such division of labour and one which pre-sub- and co-structures the division of economic classes."

Finally feminists on the left have given "women's work" value. Burstyn translates it into Marxist terminology when she describes housework and home-making as reproductive labour. She suggests that the denigration of such activities by Marxist men arises from the degree of benefit they receive from such activities. The maintenance of the household, she claims, provides the stable environment which Marxist men, like other men, rely on as they endeavour to change the outside world.

Burstyn's attempt at valorizing traditionally feminine roles echoes those of Nancy Chodorow, Carol Gilligan and Dorothy Dinnerstein. But her continued loyalty to Marxist theory is open to criticism. MacKinnon's position is that the combination of marxism and feminism dilutes feminism while strengthening marxism and, for this reason needs to be assessed.

The relationship between the (feminist) sexual and the (Marxist) economic division of labour is unclear and problematic. Burstyn posits the view of a pre-patriarchal Nirvana preceeding the acquisition of women's labour which in turn preceeds other class divisions. "Gender class" is therefore the class paradigm. Yet she also accords each class an autonomy which seems inconsistent with the acknowledged deterministic position of gender.

She writes, "...class divisions of both kinds cut across one another, but this makes them no less real, just more complicated."⁹⁰

In this respect, Barrett is more consistent, for she attempts no explanation of the source of gender oppression, only an inquiry of who or what the sexual division of labour and the ideology of the

⁹⁰ Burstyn, *supra* note 89 at p.78

family might benefit. Her tentative conclusion concurs with J.K. Galbraith: "the privatized family maximizes consumption." Consumption, Barrett suggests, is the most plausible explanation for the construction of masculinity and femininity. Why else would the state actively encourage the ideal of the heterosexual family? Though she recognizes the "existence of occasional biological ambiguity and the lack of continuity between biological sex and social gender," no attempt is made to account for it or explain how her theory of privatized consumption sustains such "anomalies." Is homosexuality more "real" than conventional masculinity and femininity] or is it also a construct and if so, what is its function? Her explanation must be rejected. Burstyn tries to put a value on the "reproductive labour" of women but displays contradictory responses to it. For example she describes as progressive, the "dismantling of genderic arrangements" brought about by the mass availability of contraception, "...so that the life of the adult woman was no longer taken up exclusively with child-bearing, lactating and all the rest of it."

However, Burstyn accepts as one of the most valuable feminist contributions to Marxism, the critique of militarism and brute force as masculine concepts. She incorporates this into her prognosis for changing gender arrangements - gradual "displacement over time" rather than revolution. Does the same apply for economic class identity, and if not, why not? Burstyn seems to ignore is how the "masculinity" of militarism corresponds to the "femininity" of displacement. While displacement may be nicer than bloody

revolution, it remains a feminine way of dealing with problems, just as manufactured as militarism. Burstyn is advocating a contradiction similar to that of liberal feminists: get rid of gender by using the tools assigned to that gender class, thus conforming to and confirming that gender class. Such a contradiction is also true of those feminists, such as Carol Gilligan and Robin West, who advocate the "feminization" of political and social discourse. But can MacKinnon's arrogance in according radical feminism the accolade of "feminism on its own terms" be sustained?

"Radical feminism is feminism"

Two fundamental features of MacKinnon's analysis distinguish it from socialist feminism: its view of sex as central to an understanding of social power and its concern with the epistemological basis on which feminism rests.

MacKinnon moves away from the socialist feminist attempt to juggle sex with work. Instead, she starts with and takes to its conclusion, the determining characteristic of sex.

As sexuality in Marxism is part of the superstructure, so sexuality in feminism is base: " ...nature, law, the family and roles are consequences, not foundations."

MacKinnon reverses the Marxist presumption that economic power causes sexual dominance. Instead, "Male dominance is sexual. Meaning; men in particular if not men alone, sexualize hierarchy; gender is one."⁹¹

Such a starting point allows MacKinnon to explain not just the gap

⁹¹ MacKinnon, *supra* note 2 at p.127

between the private/personal world and the public/political world - it allows her to abolish the gap - sex shapes how we behave in the private sphere, and consequently how we interpret the world.

The second feature of MacKinnon's work which distinguishes radical from socialist feminism is actually hinted **at** in Burstyn's point that militaristic marxism is masculine. It is a recognition that the current way **of** viewing the world is male: "Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality."

Such a recognition produces tremendous skepticism and a self-consciousness about claims to truth and knowledge:

There is a relationship between *how* and *what* a theory sees...the more fundamental task for theory is to explore the methods, the approaches to reality that found and made these categories meaningful in the first place.⁹²
{my italics}

She maintains that feminism, or her version of it, avoids plugging into the illusion of observer/observed, by relying on the experience of women as the only method which accurately portrayed reality for women. Thus, "Women are presumed able to have access to society and its structure because they live in it and have been formed by it, not in spite of those facts."

This view of the deterministic and determined character of sex is one MacKinnon shares with psychoanalysis. Even though she rejects Freud for his sexism and the way this shaped his understanding of female sexuality, she shares this premise. The search for what is

⁹² MacKinnon, *supra* note 2 at p.107

and how we comprehend reality, echoes postmodern concerns. The implications of this connectedness will be discussed later.

Criticism of various kinds has been levelled at MacKinnon's work. It falls into two camps which can be regarded as representing two relatively new feminisms: feminists from the critical legal studies school of analysis, and those who have been influenced by postmodern questions.

1) The Critical Feminist Argument

According to MacKinnon, "...although a woman's specific race or class or physiology may define her among women, simply being a woman has a meaning that decisively defines all women socially, from their most intimate movements to their anonymous relations."⁹³

Such statements are regarded by critical feminists as intolerable on two counts - they not only marginalize women, for whom race is just as great, if not a greater lever of oppression, but they also indicate congruency with the totalizing features of the male system of power they all attack. While MacKinnon levels an attack on Marxism for leaving out sex, these feminists criticize her for ignoring race.

Marlœ Kline in her article, *Race, Racism and Feminist Legal Theory* has identified a tension in MacKinnon's analysis, "...between her acknowledgement that intersections between race, gender and class must be accounted for and the premises and tenets of the theory she develops."

While MacKinnon recognises the racial as well as sexual oppression

⁹³ MacKinnon, *supra* note 2 at p.90

of women, she has not, claims Kline, confronted the implications such a recognition draws out with respect to her general theory of male dominance, in particular what happens when women's interests conflict.

Mackinnon's focus on the experience of white women would not be so problematic if she did not present her views as inclusive of the experiences and interests of all women. Yet it is precisely in purporting to speak for the experiences of all women that Mackinnon gains legitimacy for her theory.

Similarly, Angela P. Harris attacks MacKinnon for what she terms, the "dream of essentialism" defined as "the notion that a unitary 'essential' women's experience can be isolated and described independently of race, class, sexual orientation and other realities of experience." MacKinnon's aim, she claims, is not to substitute race essentialism for gender essentialism. Her aim is to abolish the need to have a base (in the marxist sense) through which all other phenomenon must be explained.⁹⁴ Gender essentialism, says Harris, fails on two counts. First, it fails to account for the experience of women of colour for whom gender may not be the most immediate source of domination or may in fact be impossible to disentangle from other oppressions. Secondly, in its attempt to find the "essential" woman, gender essentialist theory seeks to describe the norm for women. The normal colour always seems to be white. In form, therefore, MacKinnon adopts the abstraction of the dominant theory under attack. Harris calls for feminist categories to be more "tentative, relational and unstable," echoing as we shall see,

⁹⁴ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory* in *Stanford Law Review*, vol.42 1990 at p.581

postmodernism. If Harris perceives MacKinnon to be attacking "only law's content" while leaving intact its abstract and unitary form, she has, I think, misconstrued MacKinnon. MacKinnon surely aims to point out not just the abstracted form of expressions of social order such as law, but its maleness as well.

MacKinnon is not totally oblivious of the mine field she treads in: "Authority of interpretation - here, the claim to speak for all women - is always fraught because authority is the issue male method intended to settle." ⁹⁵

When Harris calls for "...the recognition of a self that is multiplitious not unitary; the recognition differences are always relational rather than inherent," I suspect MacKinnon would agree.

In the context of Marxist theory, MacKinnon writes,

...to define women's status solely in class terms is entirely to miss their status as women defined through relations with men, which is a defining relational status they share even though the men through whom they acquire it differ. ⁹⁶

And earlier in the Preface of *Toward a Feminist Theory of The State*, she defines her limits: "To look for the place of gender in everything is not to reduce everything to gender."

The tenor of Harris' criticism is valuable. She chastising radical feminism for assuming for itself, the claim of being "feminism unmodified." MacKinnon is certainly arrogant in her own support. She talks about the commonality between women, and how sex oppresses

⁹⁵ MacKinnon, *supra* note 2 at p.115

⁹⁶ MacKinnon, *supra* note 2 at p.9

them as a group to create, as the socialist feminists maintain, a gender class. It is here I think that she invites criticism. MacKinnon tells women their sexual oppression overrides all other oppressions.

But women's experience is not the sum total of her theory. The most original part of her analysis is the assertion that male desire is determinist, and that it creates all other hierarchies.

In addition, although MacKinnon and Harris may disagree, I think there is a way to reconcile the two feminisms by distinguishing the levels at which each is operating. When the critical feminists talk of the conflicting allegiances black women feel between the group "all women" and their racial group, they are describing the personal identifications black women feel, on the same basis as "women workers" feel ties to women and to the working class. There is a difference between the creation of these personal identities and what MacKinnon is saying. I think the difference comes in at the level of consciousness. Black women and women workers become conscious of their non-sexual identities as members of the groups "black" and "workers," as an externally imposed characteristic. Therefore, the "family" may indeed be a kind of haven, at least with respect to racism and class prejudice. In a racially uniform or a classless society, if it could ever exist, such a sense of racial or class unity would not exist. I suggest that sexual identification operates both consciously and unconsciously. Consciously, when women (and men) do become aware of their sexual commonality. However, I think the dynamic, structuring quality of sex on our identities works at an unconscious level. This explains why sexuality looks and feels real (e.g. heterosexuality) in a way racial

hierarchy does not - its illusory quality disappears in the midst of racial homogeneity. In addition, sexual hierarchy survives without overt coercion, although overt coercion helps it to flourish, unlike racial hierarchy. This suggests that sexual inequalities operate at an unconscious level.

Gender socialization has its roots in the home, while racial conditioning emerges as a collective, public phenomenon.

Mackinnon's analysis shares much with psychoanalytic explanations for social behaviour and social structure. In both theories, **sex** and the mind are powerful factors, more socially constructing than economics. Furthermore, both sex and the mind can be deconstructed and revealed as constructed. I will discuss this question in greater detail later.

Alternative explanations of sexual behaviour deny this. The sociobiological stance of Donald Symons, for example, in *The Evolution of Human Sexuality*, agrees that nothing is necessarily "natural" about sex roles and sexuality. He does however, contend that they have been shaped by economic necessity. For example, he attributes the greater aggressiveness of males compared to females to the notion that historically, males had to compete with each other to gain access to females. His theory rests on the contention that humans are more a product of the last two million years than the last two thousand. Yes, sexuality is cultural, but culture is driven by dire economic circumstances, which have only recently changed - in the "Developed World" anyway. Symons' research is internally coherent, but it rests on shaky assumptions. First, he assumes a human

predisposition to reproduce - that at the level of our hormones, never mind our heads, the future propagation of the species is the aim. That, however, does not explain why particular forms of social and sexual behaviour developed in contrast to others. It would also suggest that reproduction would be widely valued, over and above economic production, which is not the case. Children are the least valued and most abused sector of our society.

2) Postmodern Feminists

The second strand of criticism levelled at MacKinnon's work comes from the recently pitched postmodern camp. This second strand can be regarded as a logical progression from the recognition of the diversity and multiplicity of women's identities asserted in the work of Audre Lorde, Angela Harris, and Marlee Kline. Judith Butler regards the recognition that women's identities are sometimes complex and fragmented, as a breakthrough. Rather than support the inclusion of every conceivable identifying characteristic which women might share other than sex, for "this horizontal trajectory of adjectives" can never be comprehensive enough. Butler sees, "this illimitable et cetera," as an opportunity to develop a different way of theorizing, one based on something other than the cohesion of the identities it refers to and seeks to liberate, which, she maintains, is an illusion.

Butler's position is supported by writers such as Jane Flax, Nancy Fraser, Linda Nicholson, Donna Haraway, Susan Bordo and Sandra Harding who aim to create at most, a synthesis and at least, a

dialogue between feminism and postmodernism. They see postmodernism as the ultimate commitment to deconstruction - a feature feminists criticize Freud for, in relation to male sexuality. A lengthier discussion of the intricacies of postmodernism is offered in chapter 8. Postmodern feminists do not deny that gender is extremely problematic. Butler and Flax even criticize mainstream postmodern writing for inadequately acknowledging gender in its theories of power. Both radical feminism and postmodern feminism agree on gender's social construction and its contingent relationship to power - it is its own product. But Donna Haraway accuses MacKinnon of "radical reductionism" rather than radical feminism. In her view, "Catharine MacKinnon's version of radical feminism is itself a caricature of the appropriating, incorporating, totalizing tendencies of Western theories of identity grounding action."

At one point MacKinnon regards the aim of feminism as the assertion of the "fullness of lack," echoing Simone De Beauvoir's position: women are the negative of men. MacKinnon claims to desire to put the world across from the women's point of view, yet she shuns theorists such as Chodorow, Gilligan, French, Dinnerstein, West and Benjamin for attempting to valorize "feminine" values. These writers all discuss the value of the female way of moralizing, relating and feeling compared to men. Butler makes a similar point to MacKinnon: "Is there some commonality among women that pre-exists their oppression, or do women have a bond by virtue of their oppression alone?"⁹⁷ Chodorow, Gilligan, French, Dinnerstein, West and Benjamin no doubt would say yes, there *is* some pre-existing

⁹⁷ Butler, *supra* note 88 at p.4

commonality. Robin West's thesis entails the assertion that women have essentially connected, dependent selves in contrast to a unitary, autonomous conception of the self, held up as the standard in this culture. **She** sees a union between the Critical Legal Studies response to the experience of separation causing class alienation and, as she calls them, the cultural feminist paradigm of womanhood. In this way, she sees more in common between mainstream Critical Legal Studies theory and cultural feminism than between cultural and radical feminism.

West claims that, "[A]ccording to radical feminism, women's connection with the 'other' is above all else invasive and intrusive; women's potential for maternal 'connection' invites invasion into the physical integrity of our bodies, and intrusion into the existential integrity of our lives."⁹⁸

Both Chodorow and West situate this difference primarily in the fact that women reproduce. The difference, they claim, is the lived experience of knowing how it feels to give up the illusion of a core, autonomous self and to willingly reject the rigidity of the boundary between self and other. As an Object-Relations psychoanalyst, Jessica Benjamin relates this political theory to that branch of psychoanalysis which places greater emphasis on the pre-Oedipal phase of development as the influential stage in an infant's development.

Mackinnon's response is negative. She argues that "female" characteristics are nothing other than what men have characterized

⁹⁸ Robin West, *Jurisdiction and Gender* in The University of Chicago Law Review, Vol. 55, 1988 at p.15

them as. She is especially critical of Carol Gilligan, whom, she asserts, "...make(s) it seem as though women's moral reasoning is somehow women's, rather than what male supremacy has attributed to women for its own use."

MacKinnon rejects the Chodorow/Dinnerstein argument that patriarchy is founded on the uneven parenting of children, creating resentment of the female by men, and a desire to submit by women. Dorothy Dinnerstein, for example, advocates the greater participation of men in childrearing: "Woman is (now) the focus for our ambivalence to the flesh not because she gives birth but because she is in charge of it after it is born...Woman is the will's first adversary." ⁹⁹

Shared parenting is her solution to patriarchy. Her thesis rests on the perception every child has of its guardian - all powerful and limiting as well as loving. The concentration of all those qualities in women as primary care givers results in resentment and neurosis in men. Why in men? Because they overcome their hostility by controlling "woman" be she mother, wife or daughter. Women's hostility is resolved by becoming mothers themselves and by allowing men to dominate them.

MacKinnon's position is that the power relationship of mother and child is a product, not a cause of patriarchy.

Susan Bordo offers a reasonable explanation for the possible motivations of "cultural" feminists:

Contemporary feminism emerging out of that recognition has from the

⁹⁹ Dorothy Dinnerstein, *The Mermaid and The Minotaur: Sexual Arrangements and the Human Malaise*, (1977), New York: Harper & Row

beginning exhibited an interest in restoring to legitimacy that which has been marginalized, and disdained, an interest, I would suggest, that has affected our intellectual practice significantly.¹⁰⁰

Christine Di Stefano has pointed out that in revaluing the feminine, these theories often fail to criticize its intransigence. However, rooted as they are on a psychoanalytic conception of the self, they provide one important route to change - individual and social analysis of the causes of behaviour. Thus it may not be the "why" of male power, but it could usher in, albeit generation by generation, the "when" of female parity: slow but effective.

Butler sees a more immediate dilemma in the cultural feminist approach. They offer, she argues, "...a false stabilization of the category of women," with the result that feminism can hardly call for our sex no longer defining us, because they have been relying on sex, to define themselves. Instead, they should seek new forms of definition.

Both Butler and Flax see MacKinnon's desire to put across the woman's point of view as inconsistent with the recognition that what views a woman has are not necessarily hers but rather what she has been allowed: " ...is the construction of the category of women as a coherent and stable subject an unwitting regulation and reification of gender relations? Is not such a reification precisely contrary to feminist aims?"

To use and rely on "women" as a political, social and emotional category when it has been revealed as a product of "maleness" is to

¹⁰⁰ Susan Bordo in *Feminism/Postmodernism*, Linda Nicholson, ed., (1990), Routledge, supra note 87 at p.141

reinforce that maleness, making an illusion more real.¹⁰¹ In *Gender Trouble*, Butler writes,

...the feminist "we" is always and only a phantasmagoric construction I would suggest that the lines of coherency between sex, gender and desire, where they exist, tend to reinforce that conceptualization and to constitute its contemporary legacy.¹⁰²

If "gender coherence" operates not as a "ground of politics but as its effects," i.e. if the category "women" would not exist politically but for patriarchy, then utilizing that idea of coherence, whether it exists or not, reinforces reliance on the dominant discourse.

What is left of feminsim without a core conception of gender identity? The political side of feminism seems agenda-less. Butler acknowledges this in her article, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*: "...this set of moves raises a political problem: If it is not a female subject who provides the normative model for a feminist emancipatory politics, then what does...? If there is no subject, who is left to emancipate?"¹⁰³

We may still say the state, the law - oppression - originates from a dynamic which is male, but how do we change that? Nancy Hartsock points out the irony: "Why is it, just at the moment in Western history when previously silenced populations have begun to speak, ...the concept of the subject become(s) suspect?"

Jane Flax makes a similar point: "...women have just begun to re-member themselves and to claim an agentic subjectivity available always before only to a few privileged white men."

¹⁰¹ MacKinnon, supra note 2 at p.104: "Male power is a myth that makes itself true."

¹⁰² Butler, supra note 88 at p.142

¹⁰³ Supra note 100 at p.327

Is this theoretical barrier sufficiently important to effect the form political feminism takes? In relation to the problem of sex crime, what concrete conclusions does the feminist approach come up with? I think the first, is a recognition that sex crime is a part of our culture, rooted in the cultural legitimacy of men exercising their access to women, and indeed children. Perhaps children should be exposed, as they are beginning to be, to the subject of child sexual abuse - to a recognition what it is, for a start, and how to avoid it in the streets and in relationships. Hand in hand with this is the continued determination to change the archetypes of masculinity and femininity. Television commercials, which tap into images of the collective psyche, also shape them. Changes are afoot.

7 Psychoanalysis

We look at your history, and meet some people there whom you may know or perhaps you don't, but who are portions of yourself - we take a look at what you remember, and at some of the things you had forgotten. As that goes on we find we are going much deeper. And when that is satisfactorily explored, we decide whether to go deeper still, to that part of you which is beyond the unique, to the common heritage of mankind.

Robertson Davies, *The Manticore* p.67

When a theory offers a new view of the world, it often mints its own language. This is particularly true of psychoanalysis.

Though it may have aspired to this at one stage, psychoanalysis is hardly a monolithic institution. There have been countless derivations, modifications and digressions from the original theory of psychoanalysis posited in Freud's works. Defining it becomes a process of evaluation and perspective. There is no longer a desire on the part of the analytic movement to form a uniform theory, however there are divides.¹⁰⁴ The main area of disagreement today lies between drive theorists and Object-Relations theorists. In spite of this disagreement, it is possible to examine some common presuppositions, as well as the psychoanalytic influence on and difference from psychology and psychiatry. Psychoanalysis is a theory of mind; the mind creates its own reality.¹⁰⁵ This is not just an acknowledgement of individual subjectivity. In *Psychic Reality and Psychoanalytic Knowing*, Barnaby B. Barratt writes:

An understanding of the world is conditioned by the inner order and

¹⁰⁴ As discussed by Morris N. Eagle in *Recent Developments in Psychoanalysis*, (1984), Harvard University Press

¹⁰⁵ Barnaby B. Barratt, *Psychic Reality and Psychoanalytic Knowing*, (1984), Hillsdale, NJ: The Analytic Press

disorder of the one who understands..Accordingly we must relinquish the assumption that 'reality' is experienced or otherwise apprehended apart from the mind's representational activity. ¹⁰⁶

The collective psyche, which both influences and is influenced by individual psyches, also creates its own reality. Civilization is the product of the collective psyche. Its emotional underbelly consists of the metaphors and symbols of its mythology; the collective dream. Economic circumstances have a role in determining the degree to which individuals feel successful or excluded, but they are not the foundation for understanding behaviour, and they are certainly not an effective avenue of change. Behaviour is primarily a psychological, not an economic phenomenon. Changing behaviour is a psychological process. Psychoanalysis began by seeking to relieve distressing feelings and symptoms. As Freud did this, he came to realise that those symptoms which completely disrupted the lives of his patients were often manifested in a minor degree, and sometimes tolerated as normal, in others. The theory he developed, based on extreme forms of behaviour, is a general one. That theory involves the assertion that our minds are divided into a conscious and an unconscious part - the unconscious, just like the submerged part of an iceberg, is huge and is basic to the whole.

Jane Flax gives a good, simple description of the main structural concepts of the mind - id, ego, super-ego. ¹⁰⁷ The unconscious is not

¹⁰⁶ Barratt, supra note 105 at p.2

¹⁰⁷ Jane Flax, supra note 5 at p.6: The id is the reservoir of the libido, or primary drive. Each individual inherits the entire cultural development of the species. Freud claimed that the ego structures of previous generations, become incorporated into the id of successive generations. The ego is that part of the self which has been directly effected by the external world. The super-

Dreams

ego represents the sense of morality and controls the id independently of the ego.

The novelist, Salman Rushdie has described the technique of travelling story-tellers in rural India as an extremely complicated weaving of story within story and repetition. The reason for this is to hold the audience's attention and to enable it to remember the sense of the story more accurately. Can a similar phenomenon describe the story-telling technique of our unconscious, both individual and historic?

Drawing on the ideas of Erich Neumann, Jung has pointed out the ancient history of the psyche:

The psyche is not of today; its ancestry goes back many millions of years. Individual consciousness is only the flower and the fruit of a season, sprung from the perennial rhizome beneath the earth; and it would find itself in better accord with the truth if it took the existence of the rhizome into its calculations. ¹⁰⁸

Myth

According to the psychoanalytic approach, mythological images and symbols retain their vibrancy. Images, metaphors and symbols grow richer as they grow older and more established, so that their meaning becomes deeper than words can express. Jung discovered that the unconscious is structured into archetypes which operate to form complexes. Of these complexes, the Oedipal has the highest profile. But since the Oedipal stage of psychic development is not central to the Object-Relations branch of psychoanalysis, I confine it to a discussion of Freud who did regard it as central.

Transference

¹⁰⁸ C.J.Jung, *Symbols of Transformation*, (1956), Princeton University Press at p.xxiv

Finally, the setting in which analysis takes place is key to understanding its method. In the relationship of transference between the analyst and the analysand, the discovery and re-enactment of our emotional memory takes place. This may involve a return to our very earliest attachments as infants to our mothers. The analyst becomes a symbol of this relationship, and explores the anxieties and fears which such a relationship may have invoked. It is also a mutual relationship, with the analyst experiencing counter-transference, whereby the analyst's unconscious responds to the attachment of the transference relationship.

Donald Meltzer, a leading British Kleinian analyst, describes the process:

The reason that psychoanalytic activity may be placed on a footing with those of the virtuoso and the athlete is because they all rely absolutely, in the heat of the performance, upon the unconscious, rallied and observed by the organ of consciousness.¹⁰⁹

Transference indicates that individuals are capable of responding to each other in symbolic ways. The analyst serves as a blank sheet on which the analysand can create his/her most meaningful symbolic figure. In adult interactions, symbolic attraction also operates, especially in reference to an individual's ego-ideals, for these are his/her archetypes, gods, goddesses and heroes. The psychoanalytic perspective also recognizes that there is a relationship between the subject and object. This distinguishes psychoanalysis from the approach of psychology and psychiatry.

¹⁰⁹ Donald Meltzer, *The Psycho-analytical Process*, (1967), Clunie Press, at p.94

Dreams, myth, and transference - **these** ways of knowing become the epistemology of psychoanalysis.

Barry Protter endorses the epistemological approach of psychoanalysis: "...the clinical situation itself becomes the key attraction to anyone interested in understanding the nature, limits and conditions of psychoanalytic knowing and knowledge." ¹¹⁰

Sexuality

Psychoanalysis **has also** opened up the sexuality of adults and children as a subject of exploration, and abolished the divide between childhood and the adult world. Individual psychoanalysts have elaborated on this, producing whole theories of infant development and analysis in which childhood is regarded as the primary base for adult action, thought, and mental health. When Freud sketched the development of the sexuality of children, he effectively deconstructed the innateness of all sexuality, including heterosexuality. Though he **later** withdrew from this position and referred to sex roles as if they were inherent, the former assumption is integral to his theory, as Nancy Chodorow points out. Deconstructing female sexuality has been **a** great weapon for feminism.

The construction of gender

How does psychoanalysis differ from psychiatry and psychology? Freud himself did not think psychoanalysis and psychiatry were in

¹¹⁰ Barry Protter, *Towards an Emergent Psychoanalytic Epistemology* in *Contemporary Psychoanalysis*, Vol. 21, No.2 (1985) at p.209 Protter argues that psychoanalysis has shifted in the position it itself asserts, in line with the shift in theories such as Rorty's and other postmodernists.

contradiction.¹¹¹ But he was critical of the limits of psychiatry. It failed, he claimed, to question what he described as "the contents of the delusion," registering only that delusions take place and labelling this alone as evidence of sickness. The psychoanalytic view takes external manifestations such as visions, as a symptom rather than a sine qua non, of mental imbalance. Foucault would concur here.

Psychoanalysis takes a very different epistemological approach. Barry Protter describes psychoanalysis as a process of knowing.¹¹² The psychoanalytic approach is characterized by its awareness of the limits of conscious thought, not only in describing the experience of the patient, but in finding causes for these feelings and coming up with lasting emotional solutions. Psychoanalysts also recognize the existence of a common psychic history, for it does not materially differentiate between a psyche whose symptoms of distress are extreme and dangerous and one that seems normal. The struggle involves identical sides - a balance between impulse and thought. As Michel Foucault has discussed, the psychiatric community has, historically, been instrumental in dividing people into the categories "mentally ill" and "healthy." Psychoanalysis does not confine its sphere of application to "unhealthy" individuals, though it often finds itself alleviating problems for obvious reasons. On the contrary, psychoanalysis casts its net of application over everyone: we are all neurotic.

According to Barratt:

¹¹¹ Freud, *Introductory Lectures on Psychoanalysis*, (1976, c.1963) Penguin at p.293: "...What is opposed to psychoanalysis is not psychiatry but psychiatrists." at p.293

¹¹² Protter, *supra* note 110 at p.209

An understanding of the world is conditioned by the inner order and disorder of the one who understands....Accordingly, we must relinquish the assumption that 'reality' is experienced or otherwise apprehended apart from the mind's representational activity. ¹¹³

This highlights a second important difference between psychiatry and psychoanalysis - their views of mental health. Psychiatry is concerned with mental illness, while psychoanalysis has been described by Meltzer as, "freed from the burden to 'cure'." ¹¹⁴ Meltzer goes on to point out that what exactly "cure" means in psychoanalysis is uncertain. In psychiatry, the alleviation of symptoms is the only goal.

Psychology, as practised and taught, lacks a central concern with the unconscious. Conscious knowledge of one's psychic make-up is regarded as enough to instigate change - there is no sense of the psychoanalytic theory of the need to reexperience feelings. Because of this, the importance of dreams and myth is also diminished. Melanie Klein points out an important difference between psychoanalysis **and** psychology, which I think applies just as equally to psychiatry. Psychology, Klein asserts, assumes that infancy is a relatively carefree period. Problems emerge as the adult faces the "real" world. For psychoanalysis, not only is infancy the site of immense suffering, learning and anxiety, but the psychic life of the infant is and continues to be the "real" world for the individual. The stability of that core self, shaped in infancy, determines the emotional well-being of the adult. ¹¹⁵ Klein's work opens a

¹¹³ Barratt, *supra* note 105 at p.2

¹¹⁴ Meltzer, *supra* note 109 at p.xiv

discussion of analysts who challenge what Chasseguet-Smirgel has called Freud's sexual phallic monism. Karen Horney has achieved a similar effect. The infant's primary unconscious knowledge consists of the mother's vagina, but this awareness is repressed in the face of its sense of omnipotence: "Like her predecessors, Chasseguet-Smirgel argues that femininity is not a secondary construct, but rather is primary, existing from the moment of birth."¹¹⁶

Chasseguet-Smirgel suggests Freud construed female sexuality in the way he did, because he was approaching the end of his life, and he unconsciously associated the female with death, which he feared.¹¹⁷

Psychoanalytic Social Theory

Writers such as J.C. Smith and Norman O. Brown have successfully utilized psychoanalysis in social theory. Freud hinted, towards the end of his life, that historical explanation was perhaps the most valuable legacy psychoanalysis could leave. J.C. Smith's recent book, *The Neurotic Foundations of Social Order*, takes a psychoanalytic explanation of civilization as its starting point. Just as the individual psyche has stages of development, so the history of civilization has corresponding stages - pre-Oedipal, Oedipal and post-Oedipal. Smith advocates working towards a trans-Oedipal

¹¹⁵ Klein, supra note 41 at p.173: "What we learn about the child and the adult through psychoanalysis shows that all the sufferings of later life are for the most part repetitions of these early ones, and that every child in the first years of life goes through an immeasurable degree of suffering."

¹¹⁶ See Margaret Honey and John Broughton's article, *Female Sexuality: An Interview with Janine Chasseguet-Smirgel* in *Psychoanalytic Review*, 72(4) Winter 1985 at p.529-530

¹¹⁷ Supra note 116 at p.534

stage, in which the collective unconscious recognizes its tendency to cling to complexes and is self-conscious about the archetypes it upholds. Abandoning them would be impossible, since we are not in control of our psychic; need to identify with archetypes. However, there are some archetypes which are better than others. Returning to pre-Oedipal archetypes with trans-Oedipal skepticism would bring about a renewed value of women, children and the natural world, redressing the imbalance of the last four thousand years.

Crucial to Smith's approach is the belief in the energy of repression in the shaping of civilization. Eli Sagan, quoted by Smith, regards the struggle out of which civilization results as the conflict between the developmental drive and the drive of repression - of the Death drive and the Pleasure principle - Thanatos and Eros.

Nancy Chodorow sets drive theory in opposition to Object-Relations theory and prefers the latter as the most satisfactory exponent of a psychoanalytic social theory. She is critical of traditional drive theory for presuming that humans are primarily anti-social. Drive theory presumes this, she claims, when it characterizes the desire to socialize as a negative impulse made up of the repression of the sex drive, the fear of death and the fear of alienation. Chodorow claims the desire to socialize is energized by a more positive base, such as the desire to love and be loved.¹¹⁸

I think these different articulations of psychoanalytic social theory can be reconciled. Smith advocates the acceptance of the Eros complex - Dionysus over Perseus - which is the adoption of a model

¹¹⁸ Nancy Chodorow, *feminism and Psychoanalytic Theory*, (1989), New Haven (Conn.): Yale University Press at p.114

of union and merger, rather than separation. Object-Relationists are also drive-based, though theirs is not a drive to differentiate but a drive to secure the loved object in the form of the mother. The development of language and movement is spurred on, even necessitated, by this need to secure the mother **as** an object of **love**. Melanie Klein believed in the existence of psychic primary drives to secure the loved object. Janine Chasseguet-Smirgel also describes the starting point of psychoanalysis as **a** belief in the primary helplessness of the infant:

Primary helplessness increases tremendously the infant's need for the object, his need to love and be loved, as well as his dependence on the object. This has important psychological consequences...Although Klein went very far in this direction, in the end my views are more connected than hers to a type of unconscious and instinctual knowledge, to something that is first of all animality.¹⁹

¹¹⁹ Chasseguet-Smirgel, *supra* note 116 at p.535-537

8 Postmodernism

"Do you have the password?' was the question. And the answer, the key to knowledge was 'No' Not only does the magic word not exist, but we do not know that it does not exist..." - Umberto Eco, *Foucault's Pendulum*, (1989), p.623.

What it is to **know** - this is the rising new star in the universe of ideas, and it is the central project of postmodernism. But does postmodernism truly exist as a coherent movement? Same postmodern writers have been attributed an accolade they never intended. Writers such as Foucault, Derrida, Deleuze, Guatarri, Lyotard, Rorty, Cavell, and Barthes all, it is said, deny, negate, refute, trash, scorn the propositions they say lie at the foundations of Western civilization; propositions such as a belief in total truth and real values, a belief in the power and uniqueness of man, and a belief in the linear and meaningful patterns of recorded history.¹²⁰ Catharine MacKinnon parallels the central status of work in Marxist theory with sexuality in feminism.¹²¹ Does postmodernism have an equivalent pivot point? Is it a wholly negative theory?

I want to concentrate on the **work** of Michel Foucault, the French philosopher, even though he has displayed a marked wariness in receiving the postmodern label. His prolific and mammoth writings throw up such a rich assortment of innovative questioning that his work can stand on its own as a justification for a new category outside modernism.¹²² I will briefly outline the main tenets of

¹²⁰ Jane Flax has explored in more detail, the larger project of Postmodern writers. eg: Supra note 100 at p.229: "They seek to distance us from and make us skeptical about ideas concerning truth, knowledge, power, history and language that are often taken for granted within and serve as legitimations for contemporary Western culture."

¹²¹ MacKinnon, supra note 2 at p.3

Foucault's position as I see it, taking into consideration the fact his ideas changed and developed over time.

Foucault's ideas are premised in the acknowledgement of the contingent relationship between power and knowledge. Scientific knowledge, for example, gains its credibility from its insistence on objectivity and the certainty derived from multiple verification. Yet observation itself involves a subjective element. Tyranny, in the form of government or monarchy, uses the illusion of objectivity, obfuscating this subjectivity. Scientific knowledge as fact, which has served as the basis of the Western democratic model,¹²³ is thus delegitimated. Foucault argues that science is not the only knowledge claim - archeology, medicine and law come under his attack.

Foucault's project consists of smashing our windows onto the world, which, he asserts, have been regarded all this time as mirrors. He undertakes a most thorough analysis and elaboration of how bodies of knowledge impact on individual thinking and individual bodies. True to the tradition of redefining the world with new language, he calls these non-neutral bodies of knowledge, "disciplinary technologies," borrowing the scientific connotation of technology which he later turns on its head when he rejects the legitimacy of scientific methodology.

Foucault rests a great deal of weight on the idea of power as its own dynamic, as if it had a life of its own. What does exercising power

¹²² I would describe modernist theory as the retention of a separation between knowledge and the knower. Consequently, it maintains a belief in absolute values.

¹²³ Smith and Weisstub, *supra* note 1

mean in concrete terms? Foucault does not refer to a particular class or sex as holding the reigns of power as Marxist or feminist theory might. Rather, he talks sweepingly of power in the abstract, yet as all pervasive and with very specific material consequences. This aspect of his work is puzzling and inadequate, for in other respects, he denies the validity of determined drives, particularly in the Freudian context. Yet he talks of power as having an almost base-like quality, paralleling MacKinnon's analogy for marxism and feminism. His insistence that power is a positive, dynamic force pervades and characterizes his work: "We must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it abstracts,' it 'masks,' it conceals.' In fact power produces; it produces reality...." ¹²⁴

Foucault rejects the theory, expounded by writers such as J.C.Smith, that Western bourgeois, capitalist society has denied the reality of the body for the soul/consciousness/mind: "In fact nothing is more material, physical, corporeal than the exercise of power." ¹²⁵

Foucault sometimes puts himself in conflict when there is no conflict - the idea that the West takes soul over body is a different idea - it is an explanation for why other phenomena occur, such as value placed upon economic production over biological reproduction. Foucault starts with production over reproduction without explaining why. The material consequences of the exercise of power is also a different question from whether the West is driven to

¹²⁴ Foucault, *Discipline and Punish*, quoted from *The Foucault Reader*, Paul Rabinow, ed., (1984) Pantheon Books at p.205

¹²⁵ Foucault, *Power/Knowledge*, (1980), Pantheon Books at p.57

bifurcate and hierarchize body/mind. I think MacKinnon would agree with Foucault's quotation, but would recognize the difference. MacKinnon regards male power as a myth made real - real because it has real consequences. Foucault does also, but is less clear about this. His aim is not to prove that power is a myth, rather, its legitimacy is a myth which is dangerous, given its all pervasiveness. Ultimately, I think he agrees with MacKinnon.

Disciplinary Technologies

Foucault has spent entire books outlining the mechanics of specific disciplinary technologies. Disciplinary technologies are, he claims, essentially ideologies, parading as bodies of knowledge. For example, in *Madness and Civilization*, he talks of the rise of the category, "insane" as a historical event of eighteenth century Europe, simultaneous to, rather than preceding the massive increase in the number of asylums. Where the insane were previously accepted and incorporated into society, the notion that difference was dangerous and contaminating spread, legitimating their forced estrangement from society. This provided the government with a lever of control over those who both failed to comply and potential rebels. Foucault's point is not a charge against the inherently tyrannous nature of government. For him, the problem lies in the spawning of similar techniques, copied and utilized by successive governments, corporations, schools, the army, in effect, every institution where power lies. The rise of psychiatry attended this development since it provided scientific endorsement for the irreparable eccentricity of

these mad citizens. If deviancy exists, so must a norm. This was a time for the creation of norms in all fields of inquiry, and its legacy persists.

In *Discipline and Punish*, Foucault describes the way prisons changed to become regimented environments where visibility and scrutiny were and are the principles on which imprisonment is shaped, from the design of the prison itself to the notion that the justice system must seek to explain and correct the behaviour of prisoners. The death penalty, according to Foucault, was at least indifferent to the criminal mind - its main concern was revenge for the deed. Jeremy Bentham's vision of the Panoptican prison embodies for Foucault, the principles of ultimate power - to concern oneself with the criminal rather than the crime, and to seek to master control of the individual, even into his deepest thoughts.¹²⁶ The Panopticon model of prison life focussed on the need to keep each prisoner apart and isolated, as well as totally visible to a central watchtower. Foucault describes an Orwellian world. We should not be surprised that he is able to find a kind of admiration for the behaviour of certain individuals usually regarded as human mutants.

One of Foucault's most valuable deconstructions concerns the concept of sexuality, which he regards as one of the most devious and powerful technologies of control. He totally rejects those conceptions of sexuality which put it as a core and innate element of humanity repressed by power, whose ultimate liberation will either follow or foster political liberation. He insists that "saying yes to sex isn't saying no to power." The body, in his estimation, is an ideal

¹²⁶ Foucault, *supra* note 124 at p.18-20

site of intersection for different methods of control over the population, for example, the technologies of health and reproduction which are used to place constraints on individual behaviour. With this in mind, Foucault can claim that, "sex [then] is more a product of power than power is a product of sex." Foucault contrasts his position with Freud's position, which, he asserts, *sees* the desire for domination as a product of the repression of primary sexual drives, both at an individual and societal level. Foucault simply does not believe such basic drives exist. Sex is not the "truth of our being," as he believes psychoanalysis claims.

In his article, *The Foucaultian Impasse: No Sex, No Self, No Revolution*, Gad Horowitz criticizes Foucault's position.¹²⁷ He regards Foucault's interpretation of Freud's understanding of sexuality as far too narrow and inaccurate. I would agree. In addition, I would say that the concept of "bodily pleasures" Foucault advocates instead of sex resembles the description of sexuality Freud labelled Eros; a much broader idea than biological intercourse. Freud construed Eros as the drive for life, surpassing Foucault's "bodily pleasures." Horowitz also levels criticism at Foucault's understanding of Freud's concept of repression. It is, he argues, simplistic and certainly not a valid basis on which to ground an attack on psychoanalysis. Foucault's position is that the concept of repression indicates a purely negative understanding of power on the part of Freud. Again, Horowitz argues, this is a very narrow and literal interpretation of Freud's concept of repression.

¹²⁷ Gad Horowitz, *The Foucaultian Impasse: No Sex, No Self, No Revolution*, Political Theory, Vol.15, 1987 at p.61-80

I have briefly skimmed through the tenets of Foucault's theory. Foucault himself makes an interesting rejoinder to his ideas when he admits that life is not totally and uniformly immersed in the mire of disciplinary control. Obviously, such a position would delegitimize Foucault's position, since his own text would find itself trapped in its context. He clarifies the scope of his theory:

...what might be called a society's "threshold of modernity" has been reached when the life of the species is wagered on its own political strategies. For millenia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question.¹²⁸

A more detailed elaboration of Foucault's theory should be exposed when we look at some of the primary products of these technologies of control. The very fact that Foucault regards them as products, constitutes an assault on their legitimacy. In this sense, postmodernism is a negative theory. But in many other ways, its method is positive. These ways will be examined after I look at the products of power:

- i) truth/knowledge
- ii) history
- iii) law
- iv) subjects
- v) sexuality

¹²⁸ Supra note 124 at p.265

i) truth

Outlining the postmodern approach to knowledge and truth seems repetitive, given the approaches of feminism and psychoanalysis, which provide similar quotes. But the question of the fragility of knowledge/truth is really a very significant aspect of postmodern theory. In the traditional model, knowledge is observable fact - we say that these facts are "true." But the postmodern position sees knowledge as observable fact *plus* experience. Foucault puts his position simplest when he states that, "[T]here is no experience which is not a way of thinking and which cannot be analysed from the point of view of the history of thought." ¹²⁹

Experience is the means by which we distinguish the relevant from the irrelevant. It is the creating of a context in which connections can be drawn. And the process whereby we distinguish the relevant is exclusion. In order to have achieved coherent stories to explain history, the natural world, science - in short, *the truth* - traditional knowledge **makers** used a conceptual framework to exclude inconsistencies, hiccups and all other evidence of chaos. Power and knowledge have never *not* been related:

We should admit, rather, that power produces knowledge...that power and knowledge directly imply one another...in short, it is not the activity of the subject of knowledge that produces a corpus of knowledge, useful or resistant to power, but power-knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge.¹³⁰

Ann Kaplan editor of *Postmodernism and Its Discontents*, echoes

¹²⁹ Supra note 124 at p.335

¹³⁰ Supra note 124 at p.175

this sentiment: "There is no outside, no space to mount a critical perspective." ¹³¹

In rejecting one version of the truth, Foucault also opens up the validity of all claims to truth. rejecting not just the prevailing ideology of Western civilization, but also the validity of **all** one-version philosophies and political theories. In this sense, he is postmodern. He has effectively politicized truth. ¹³²

If there is to be no truth, then what? Foucault's concern is not centred on the problem of truth and whether it exists or not. His project centres on recognizing what remains of legitimate power enforcement when truth goes - nothing. So there is a purpose in the manufacture of truth - the forbidding of change. In his latest novel, *Immortality*, Milan Kundera voices Foucault's concerns:

Do you realize what is the eternal precondition of tragedy? The existence of ideals which are considered more valuable than human life. And what is the precondition of wars? The same thing.....The age of tragedy can only be ended by the age of frivolity. ¹³³

J.C.Smith reckons that certain fundamental patterns of value will be left after truth is de-politicized. He reaches a similar conclusion to Gad Horowitz who points out that, "relativism stops at the baby."

But are we not trapped inside the same old circle? Instead of absolute truth, there is relative truth vying for dominance.

Postmodernism has shattered the mirror we thought was truth,

¹³¹ *Postmodernism and Its Discontents*. E. Ann Kaplan, ed., (1988), Verso at p.4

¹³¹ Foucault: *Power, Truth, Strategy*, M. Morris and P. Patten, ed., (1979), Sydney at p.47: "The political question istruth itself."

¹³³ Milan Kundera, *Immortality*, (1991), Faber & Faber at p.134-5

creating as it destroys, terrible distortions of vaguely familiar phenomenon, such as our bodies. The resolution comes, I think, in recognizing that we will always have a mirror, reflecting our own view of truth. But we cannot keep believing that we are staring out of the window. Feminism also shatters the illusion that the model of our world is real. Like vampires, women are not reflected in the mirror. Like vampires, whole mythologies about womanhood have developed. Feminism demonstrates that women have been holding up the looking glass all this time. Is it not time for both men and women to join hands and jump through it?

ii) History

The recording of history is yet another example of perspective being masqueraded as knowledge. Jane Flax describes the postmodern position on history: "The real is flux. History is a series of random events with no intrinsic order and no necessary laws that produce causality or even continuity."¹³⁴

But Foucault's project is not simply to delegitimize history. He actually puts forward a positive approach to studying historical events. Foucault argues in favour of an "effective" history, one guided by the recognition that:

Nothing in man...not even his body - is sufficiently stable to serve as a basis for self-recognition or for understanding other men. The traditional devices for constructing a comprehensive view of history and for retracing the past as a patient and continuous development must be systematically dismantled ...¹³⁵

He adopts Nietzsche's concept of genealogy: a genealogical as opposed

¹³⁴ Flax, *supra* note 5 at p.33

¹³⁵ *Supra* note 124 at p.87

to traditional, analysis of history involves isolating events rather than trying to build connections between them. Foucault points out that to isolate events, vast amounts of information must be waded through indiscriminately, with as few preconceptions as possible.¹³⁶

Geneology, says Foucault,

... must seek to record the singularity of events outside of any monotonous finality; it must seek them in the most unpromising places, in what we tend to feel is without history - in sentiments, love, conscience, instincts: it must be sensitive to their recurrence, not in order to trace the gradual curve of their evolution but to isolate the different scenes where they engage in different roles.¹³⁷

According to Foucault, geneological analysis of history differs fundamentally from a traditional analysis because geneology is not preoccupied as traditional history is, with the search for the origins of all historical events. The traditional approach, it is argued, is problematic in three respects. First, the search for the origin of a historical event assumes such a moment of fixity exists. In fact, "(w)hat is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity."¹³⁸ Secondly, the idea of an origin elevates

¹³⁶ Supra note 123 at p.76: "Geneology consequently requires patience and knowledge of details and it depends on a vast accumulation of source material."

¹³⁷ Supra note 124. Also Barry Smart at p.75: "The conception of geneological analysis is differentiated from traditional forms of historical analysis on several counts. For example, whereas 'traditional' or 'total' history inserts events into grand explanatory systems and linear processes, celebrates great moments and individuals...geneological analysis...attempts to establish and preserve the singularity of events, turn away from the spectacular in favour of the discredited the neglected and a whole range of phenomena which has been denied a history. (eg, reason, punishment, sexuality)."

the whole of history into some grand investigation, as if there is a solution to a puzzle. Thirdly, the idea of an origin "makes possible a field of knowledge whose function is to recover it." ¹³⁹ Origins are a prerequisite to linear, exclusive history.

Two conclusions are produced when Foucault uses a genealogical analysis. First, phenomenon previously excluded from the realms of important history must be explored. We must seek the history of "sentiments, love, conscience, instincts." ¹⁴⁰ Secondly, Foucault offers a different interpretation of the rise of mental institutions, psychiatry and new prison regimes. He puts a new slant on all kinds of phenomenon, usually regarded as signs of progress. Thus, the development of human sciences concerned with the health and well-being of the individual and the population as a social body spells, for Foucault, the beginning of an era of "bio-power" from which we have yet to emerge. ¹⁴¹ Bio-power is the cotemporary medical model of society, parading as an increase in social conscience while all the time keeping individuals socially unconscious and alienated. The state's right to take life becomes increasingly difficult to justify as it is replaced by power over life and the power to foster a better quality of life. Individuals in turn acquire an obligation to look after themselves, buying into a contract where consideration amounts to an agreement not to kill yourself. The Welfare State epitomizes the ultimate endorsement of this position. Some might construe it as a

¹³⁸ Supra note 124 at p.79

¹³⁹ Supra note 124 at p.79

¹⁴⁰ Supra note 124 at p.76

¹⁴¹ See Foucault, supra note 124 at p.260-261

safety net, but Foucault would describe it as a spider's web.

iii) Law

Knowledge systems, as J.C. Smith has discussed, utilize the authority of the law. Law legitimates social order by claiming to reflect the natural order.¹⁴² Destroying the validity of that reflection delegitimizes the theoretical justification for social order (leaving only perhaps the pragmatic).¹⁴³ For Foucault, the legitimacy of the law is an illusion with real effects. It is an illusion for three reasons.

First, law is the language of power, rather than a sign of civilization and civility. Foucault states that:

The desire for peace, the serenity of compromise, and the tacit acceptance of the law, far from representing a major moral conversion or a utilitarian calculation that gave rise to the law, are but its result and, in point of fact, its perversion.....Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare: humanity installs each of its violences in a system of **rules** and thus proceeds from domination to domination.¹⁴⁴

Secondly, the whole premise of the legal system consists of norms and standards against which deviation can be measured. One of these standards is the concept of the reasonable man and his predicted

¹⁴² *The Western Idea of Law*, supra note 1, for the key role of paradigms and world views

¹⁴³ eg. Flax, supra note 5 at p.40: "For example, Foucault argues the modern state must appeal to principles of reason and norms of 'human nature' in order to have its laws considered legitimate and just. However, if human nature, and reason are not inherently orderly and regular, the grounding of such laws would itself be unstable and constantly open to challenge by other interpretations and interpreters. The modern state thus depends on the creation and widespread acceptance of a fictive but persuasive account of 'human nature' and on the emergence of a group of 'experts' whose story about such questions will be considered authoritative and final."

¹⁴⁴ Supra note 124 at p.85

reactions. Barry Smart explains the phenomenon:

The entry of medicine, psychiatry and some social sciences into legal deliberations in the 19th Century led in the direction of what Foucault calls a systematic "normalization" of the law, that is, towards an increasing appeal to statistical measures and judgements about what is normal and what is not in a given population rather than an adherence to absolute measures of right and wrong. ¹⁴⁵

Finally, law not only implies norms of personality and thinking, but has positively encroached on the lives of individuals. It has adopted the medical model of the state - taking upon itself the role of structuring every aspect of our lives. It regulates rather than restricts: "The old power of death that symbolised sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life."¹⁴⁶ Foucault claims that regulation is infinitely more insidious than restriction. Rights-discourse belongs to regulatory power strategies, for it supports the law's authority to define what a human being is. ¹⁴⁷

¹⁴⁵ Supra note 124 at p.21

¹⁴⁶ Foucault, *The Order of Things: An Archaeology of The Human Sciences*, (1970), Random House

¹⁴⁷ Foucault, supra note 124 at p.266: "The law always refers to the sword. But a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms. It is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility. I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses, (medical, administrative, and so on), whose functions are for the most part regulatory. A normalizing society is the historical outcome of a technology of power centred on life."

iv) Man *as* a Subject of Discourse

Even the existence of Man does not escape Foucault's fillet knife. Foucault's position is that the idea of man emerged quite deliberately *as* a topic around which history congregates. We learn about great men impacting history and changing the course of events. At the same time, claims Foucault, man becomes, a focus for biological investigation. Power over the physical nature of man corresponds to man's metaphysical relationship to the tide of history. Historical progress comes to rely on the actions of men. Men begin to yearn to make history. The promise that one individual can change history has the effect of dividing people into units of one. This, claims Foucault allows direct control from the authorities of power to each person in their singularity. Paul Rabinow classifies Foucault's method for reducing people to subjects into three processes:

First, dividing practices involving the isolation of lepers, the rise of modern psychiatry and the stigmatization of sexual deviance in modern Europe all enforced the idea that individuals have a social and a personal identity.

Second, scientific classification consisted of the development of human sciences where the focus of scrutiny was how man acted and reacted in his society. Rabinow points out that " ...Foucault shows how the discourses of life, labour and language were structured into disciplines; how in this manner they achieved a high degree of internal autonomy and coherence." ¹⁴⁸

Thirdly, a process of subjectification was, and is, encouraged. 'We

¹⁴⁸ Rabinow, *supra* note 124 at p.9

see a growing obsession with sexuality, the health of the individual and the race, culminating in Freud. According to Foucault, Freud simply reflects the prevailing fascination and ubiquitous interest in sex: "...we find a new mode of investment which presents itself no longer in the form of control by repression but that of control by stimulation. 'Get undressed - but be slim, good-looking, tanned!'" ¹⁴⁹ Sexuality earned its place, says Foucault, in the definition of selfhood. Homosexuals are attacked by traditional theorists for what they are - not what they do. Public demands on the imperative of normal sex grew into a technology of its own.

v) sexuality

When Foucault asserts that sexuality was created in the eighteenth century and sex in the nineteenth century, what does he mean? He is not referring to a simple increase in interest in sexuality and sex. Foucault claims sex arose out of the notion of sexuality as a real thing to be scrutinized. Both are fabrications. He rejects the drive theory of civilization - that the sexual impulse is so rampant and strong that repression and domination are massive defense mechanisms put into place to harness their strength, which is feared by some and accepted by others told to fear it.

According to Foucault, no such primary drive exists, and even if it did, it would not explain why sexuality is regarded as central to our essence - "the truth of our being". Indeed, Foucault wants to know why it has been accorded such a privileged place, and suggests a

¹⁴⁹ Foucault, *supra* note 124 at p.56

reason:

.... it constitutes a point of intersection between other technologies of power- that of control over the body and control over the population....sexuality is far more a positive product of power than power was ever repression of sexuality.¹⁵⁰

How was this technology of sex imposed? Rather than repressing sexuality, its control was ensured, says Foucault, by the development of various bodies of knowledge which packaged and sold sexuality as a uniform commodity. He cites among these discourses, biology, medicine, psychopathology, sociology and ethnology. Education, medicine and justice, as institutions, adopted and imposed these sexual ideologies.

It is interesting to note here how different the approaches of Foucault and J.C.Smith are. While Smith would endorse the disfigured handling of sexuality by these discourses, he regards this as reflective of a norm of sexuality set by a power outside itself not by itself. Foucault seems to suggest these institutions themselves impose a view of sexuality, even the family: "via the medium of families, though not at their initiative, a system of control of sexuality, an objectification of sexuality allied to corporeal persecutions is established over the bodies of children."¹⁵¹

This is significantly different than the Freudian position, which Smith endorses in this regard, that the family is a central site for the development of the sex drive. One of the things that can be said about Freud is that he opened up the private world of the family and found sexuality as its, and society's, central dynamic. Foucault

¹⁵⁰ Supra note 124 at p.37

¹⁵¹ Foucault, supra note 124 at p. 56

totally rejects this approach. First of all, he denies that Freud discovered sexuality: "the problem of sexuality was manifestly inscribed in the medicine and psychiatry of the 19th Century."¹⁵² This explains Foucault's impatience with the political stance of sexual liberation. In typical fashion, he advocates moving towards desexualization which entails a real rejection of those disciplinary products. Some feminists, he admits, have already seen recognized this:

A movement is taking shape today which seems to me to be reversing the trend of 'always more sex' and 'always more truth in sex' - which has enthralled us for centuries: it is a matter - I don't say of 'rediscovering' - but rather of inventing other forms of pleasures, of relationships, coexistences, attachments, loves, intensities....It is perhaps the end of this dreary desert of sexuality, the end of the monarchy of sex.¹⁵³

Foucault calls for a return to "bodily pleasures," by which he means any experiencing of the body that is not conditioned by technological imperatives. I think he may want to call it sex but cannot since that word has been over used. I think it is also a call for sexual liberation, but again, that word is used up by other associations.

Foucault claims that he is not particularly interested in solutions - his aim is to problematize. But clearly, he does indicate possible forward developments. Amongst these is the desire for a new kind of sexuality. In one of the few statements in which Foucault envisions an ideal society, he admits the need for restrictions, even for laws, governments and bureaucracy. But avenues need to be readily available

¹⁵² Supra note 124 at p.212

¹⁵³ Foucault, *Politics, Philosophy, Culture*, Lawrence D. Kritzman, ed., (1988), Routledge at p.118

so that "the system of constraints in which a society functions leaves individuals the liberty to transform the system."¹⁵⁴ To the charge that postmodernism is simply a negative methodology, lacking the motivation to dismantle our modernist outlook, he makes perhaps his most postmodern statement:

You see what I want to do is not the history of solutions....I would like to do the genealogy of problems, of problematiques. My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper and pessimistic activism.¹⁵⁵

Conclusions on Foucault's postmodernism

- i) Power is a positive, productive force.
- ii) Its products include knowledge, truth, law, sex and sexuality, the idea of man.
- iii) Its methods are disciplinary technologies which are knowledge systems.

¹⁵⁴ Foucault, supra note 124 at p.295

¹⁵⁵ Foucault, supra note 124 p.343

9 Interactions

As I have gone through the three theories, interesting similarities and differences emerge. The acknowledgement on the part of both radical feminism and postmodernism that epistemology is related to power deserves closer inspection. On the other hand, feminism relies on the stability of the category of women to found a movement. It calls on women to raise a collective voice. Some feminists, namely those of the Critical school see this collective voice as a diverse plethora of issues, of which sexual oppression is one item on the agenda. Others, such as MacKinnon, demand the focus of that collective voice to be sex and the way sex is used against women. Postmodernism raises doubts about the development of sexuality. It claims sexuality and sex are cogs in a machinery of control. Identities based on sexual difference are theoretically troubled. Whether such discrepancies sabotage an attempt to bridge the discourses, will be evaluated in chapter 13.

10 Feminism and Psychoanalysis

Attempts to couple psychoanalysis with feminism, whether successfully or otherwise, have been extensive enough to generate a history of literature. According to Teresa Brennan, however, this literature is presently deadlocked.¹⁵⁶ Paul Smith agrees with her when he describes it as "a double-edged affair."¹⁵⁷ Rachel Bowlby regards the debate as ".....fixed into what seems to have become a virtually interminable relationship, marked repeatedly by expressions of violent feeling on both sides."¹⁵⁸

Nor has the enthusiasm to explicitly connect feminism with psychoanalysis been mutual. It seems to concern mainly feminists who are also psychoanalysts using their clinical experience to modify psychoanalytic theory, for example, Nancy Chodorow, Jessica Benjamin and Jane Flax. They have sought to incorporate psychoanalysis into feminism. There is little evidence of mainstream psychoanalysis demonstrating a willingness to incorporate feminism - no doubt due in part to Freud's legacy of viewing psychoanalysis as a value-free science. Feminism, of course, has no such aspirations. However, early analysts such as Karen Horney recognized that aspects of Freud's theories were actually male perspective masquerading as physiological givens. She sought to modify Freud's theory by diminishing the importance of those elements. Freud's view of the importance of the Oedipal stage

¹⁵⁶ Teresa Brennan in *Between Feminism and Psychoanalysis*, Teresa Brennan ed., (1989) Routledge at p.8

¹⁵⁷ Paul Smith in *Feminism and Psychoanalysis*, Feldstein and Roof, ed., at p.85

¹⁵⁸ Rachel Bowlby, *supra* note 156 at p.42

for an individual's development, for example, is matched in Horney's view with the importance of an infant's sense of inadequacy in relation to the powers of the mother, not simply envy of the penis.¹⁵⁹ Chris Weedon, speaking as a literary academic, Jessica Benjamin, as a feminist psychoanalyst, and Morris Eagle, an academic psychologist, all note this development and go on to describe more recent feminist-psychoanalytic writing with its focus on the importance of the pre-Oedipal stage of development as an extension of these ideas.¹⁶⁰ Benjamin regards this shift in focus as one from inner drives to a look at the relationship between the self/ego and other/mother.

The French psychoanalyst, Janine Chasseguet-Smirgel confirms the new direction psychoanalysis is taking. She describes penis-envy, one of the pillar concepts on which Freud built his theory of sexual development, as a reaction against the mother. There is thus a primary and powerful female attachment.¹⁶¹ Benjamin echoes this when she rejects the presumption of danger expressed in the traditional psychoanalytic view of the irresistible drive for union between the self and m/other, what Freud describes as the "oceanic

¹⁵⁹ This is endorsed by Chasseguet-Smirgel, *supra* note 68 at p.27-28: "My experience with women patients has shown me that penis-envy is not an end in itself, but rather the expression of a desire to triumph over the omnipotent primal mother through the possession of the organ the mother lacks, ie the penis. Penis envy seems to be as proportionately intense as the maternal imago is powerful."

¹⁶⁰ Benjamin, *supra* note 18 at p.11-12: Weedon, *supra* note 78 at p.55: Morris N.Eagle, *supra* note 104 at p.18

¹⁶¹ Janine Chasseguet-Smirgel, *supra* note 116 at p.531: "I see penis envy not as 'a virility claim' to something one wants for its own sake, but as a revolt against the person who caused the narcissistic wound: the omnipotent mother."

feeling." ¹⁶² Such a fear for the loss and engulfment of the self is unfounded, and should indeed be expressed in more socially acceptable ways. J.C.Smith has endorsed the validity of playing between the boundaries of self and other, after the metaphor of Dionysus. ¹⁶³

Benjamin and Weedon seem to forget the work of Melanie Klein, which singularly represents the centrality of the pre-oedipal stage of psychic development. Nancy Chodorow, at least, recognizes the debt feminist-psychoanalysis owes to her work: "Klein turned psychoanalysis from a psychology of the boy to a psychology of the relation to the mother in children (people) of both sexes."¹⁶⁴

Other analysts whose work has facilitated a coming together of feminism and psychoanalysis include Robert Stoller, who claims male identity is a secondary phenomenon, rather than a primary state.¹⁶⁵ The work of Janine Chasseguet-Smirgel also accords with the more pre-Oedipal direction in psychoanalysis. In an interview in *The Psychoanalytic Review*, she states quite categorically: "...I do not agree with Freud's statements on female sexuality."

Like Klein, she believes the infant has an unconscious knowledge of the mother's vagina but represses this as too overwhelming and powerful. The biological imperative of the infant's utter helplessness from birth magnifies this sense of dependence and

¹⁶² Benjamin, supra note 18 at p.47

¹⁶³ J.C.Smith, supra note 14

¹⁶⁴ Chodorow, supra note 118 at p.3

¹⁶⁵ As discussed in Benjamin, supra note 18 at p.75

fear.¹⁶⁶ Thus the infant turns a desire for the mother into a desire for the father's penis, as punishment for the initial sense of powerlessness, inflicted by the mother. Penis-envy is a product of womb envy.

This development is important to feminists who view psychoanalysis as centred on the concept of penis-envy. But some feminists, notably Catharine MacKinnon, take the position that feminism stands on its own and should not be diverted by forms of patriarchy such as psychoanalysis. Others, such as Rachel Bowlby, believe feminism rejects an amalgamation at its peril:

.....Psychoanalytic feminism claims that feminism needs an extra edge of questioning that only psychoanalysis can supply, while non-psychoanalytic feminism argues in its turn that feminism is quite radical enough on its own and would only fall back into the very traps from which it is trying to free women by taking up with a psychoanalysis irretrievably tainted with conservative, masculine norms.....Psychoanalytic feminism takes non-psychoanalytic feminism to be too simple in its notion of subjectivity for it to be capable of achieving the very political goals it sets itself... 167

According to Teresa Brennan, one of the most valuable contributions psychoanalysis can make to feminism lies in contributing to an understanding of why women do not seize the power denied them: "In the first instance psychoanalysis was harnessed to the feminist project to comprehend how patriarchal sexual identities go as deep as they do, why the masquerade of femininity is such a strong act."¹⁶⁸

Another similarity lies in their respective theoretical positions.

¹⁶⁶ See supra note 116 at p.527

¹⁶⁷ Brennan, supra note 156 at p.42

¹⁶⁸ Brennan, supra note 156 at p.8

Psychoanalysis is a theory of mental construction - it assumes the mind is constructed and constructs the only meaningful reality, including gender. MacKinnon repeats this when she rejects the Cartesian distinction between subject and object which makes that which can be objectively known "real." She writes: "Objectivity, as the epistemological stance of which objectification is the social process, creates the reality it apprehends by defining as knowledge, the reality it creates through its way of apprehending it."¹⁶⁹

MacKinnon is happy to admit that feminism is a subjective theory in which experience is relied upon as a truer measure of the real. This view of the deterministic and determined character of sex is one she shares with psychoanalysis. Even though MacKinnon rejects psychoanalysis for its sexist content, she shares its premise. It is an important juncture. Chris Weedon regards the psychoanalytic approach to sexuality as the most significant justification for a union of theory.¹⁷⁰ The search for how we comprehend reality echoes postmodernist concerns and may even be a foundation for a combined theory.

Nancy Chodorow thoroughly discusses the relationship between psychoanalysis and feminism. She too argues that psychoanalysis and feminism are unquestionably linked by their shared perspective on gender. Indeed, she goes as far as to describe psychoanalysis as "a theory of the development of heterosexuality."¹⁷¹ Psychoanalytic

¹⁶⁹ MacKinnon, *supra* note 2 at p.114

¹⁷⁰ Chris Weedon, *supra* note 78 at p.46: "... the stress in Freudian theory on the initial bisexuality of the child and the precarious psychic rather than biological nature of gender identity [which] has encouraged many feminists to attempt to appropriate psychoanalysis for their interests."

¹⁷¹ Chodorow, *supra* note 118 at p.174

theories on gender, she argues, accord with feminist accounts of women's experience, that sex and gender are cultural impositions.¹⁷²

Chodorow, in an allusion to Simone De Beauvoir's famous uttering, reckons that "..... psychoanalysis makes a feminist argument that women (and men) are made and not born, that biology is not enough to explain sexual orientation or gender personality." 173

Chodorow points to another feature which binds psychoanalysis and feminism, namely their shared belief in the contingent relationship between the private and public world: "..... psychoanalysis demonstrates the internal mechanism of the socio-cultural organization of gender and sexuality and confirms the early feminist argument that the 'personal is political.' " 174

The mechanism of the archetype aptly demonstrates the interconnectedness of the public and private worlds. Feminism focuses on the dominant archetypes and calls them stereotypes. But the meaning is the same - individuals are reflected in and affected by the mythic models which epitomize and separate certain qualities present in all of us to some degree.

Difficulties

Despite these commonalities which have the potential to furnish a common theory of analytic-feminism, feminists have objected to the incorporation of psychoanalysis. In addition, the psychoanalytic approach itself presents a critique of some aspects of feminist methodology.

¹⁷² Chodorow, supra note 118 at p.168

¹⁷³ Chodorow, supra note 118 at p.174

¹⁷⁴ Chodorow, supra note 118 at p.177

Three Feminist Objections to Psychoanalysis

Perhaps the first level of criticism, and the most highly charged, is the accusation that psychoanalysis, from the writings of Freud to his followers, is sexist. He makes several sustained and derogatory remarks about women, some of which he incorporates as evidence for his theories. ¹⁷⁵ Freud is openly dismissive of feminism: "We must not allow ourselves to be deflected from such conclusions by the denials of the feminists, who are anxious to force us to regard the two sexes as completely equal in position and worth." ¹⁷⁶

Though he recognizes that civilization is largely a male preoccupation, he makes no connection between the forward progression of civilization and the backward position of women as feminists do. *A Sexual Profile of Men in Power* is only one of many works which link the male sex drive and denigration of women to the drive for political power. ¹⁷⁷ Freud's explanation of the social inequality rests on a shallow analysis of biological difference:

Since a man does not have unlimited quantities of psychical energy at his disposal, he has to accomplish his tasks by making an expedient distribution of his libido. What he employs for cultural aims he to a great extent withdraws from women and sexual life. His constant association with men, and his dependence on his relations with them, even estrange him from his duties as a husband and father. Thus the woman finds herself forced into the background by the claims of civilization and she adopts a hostile attitude to it. ¹⁷⁸

¹⁷⁵ I am thinking here of the episode with Freud, Sabina X and Fliess.

According to Jeffrey Masson, Freud chose to ignore recollections of sexual abuse by his female patients and construe them as fantasy.

¹⁷⁶ Freud, quoted in Weedon, supra note 78 at p.42

¹⁷⁷ Janus, Bess and Saltus, supra note 86.

¹⁷⁸ Freud, *Civilization and Its Discontents*, (1961), Norton & Co., at p.50-

How can feminism rely on a body of knowledge whose principal enunciator displays his own antagonism towards women?

As Rachel Bowlby points out, "... feminists see in psychoanalysis an endorsement rather than a critique, of just what makes patriarchal society unbearable for women."¹⁷⁹

One way out of this dilemma is to separate theory from prejudice, as Nancy Chodorow advocates. She claims Freud resorts to his sexist bias to legitimate his observations - that men and women are socialized in a different way producing norms of sexuality which elevate the male at the expense of the female. What is nauseating is his endorsement of such a state of affairs. The observations remain valid. Chodorow goes on to argue that Freud himself undercuts his sexism. For example, one of Freud's principal contentions is that there is nothing inevitable about the development of sexual choice. Without noticing the value-laden contradiction, he goes on to state that heterosexuality is a necessary formula for procreation (described, incidentally, in male terms), instead of qualifying the assertion; heterosexuality is the *dominant* formula for the reproduction of the species. Freud also fails to recognize the inconsistency between his belief in the history of all psychic conflict and phenomenon, and his acceptance of the self-evidence of penis-envy.¹⁸⁰ Freud's misogyny also wavers confusingly.

In *Civilization and Its Discontents*, he makes this comment:

p.50-51

¹⁷⁹ Rachel Bowlby in Brennan, *supra* note 156 at p.42

¹⁸⁰ For Chodorow's description see p.172-3, *supra* note 118

For psychology the contrast between the sexes fades away into one between activity and passivity, in which we far too readily identify activity with maleness and passivity with femaleness, a view which is by no means universally confirmed in the animal kingdom."¹⁸¹

Even Karen Horney, who always retained great support for Freud, admits traditional psychoanalysis may be "the expression of a one-sidedness in our observations, due to their being made from the man's point of view."¹⁸²

A second feminist indictment lies in the charge that psychoanalysis is sexist in its phallocentrism. Some feminists have, rather unconvincingly, attempted a collaboration between phallocentric psychoanalysis and feminism.¹⁸³ But the attempt is unnecessary because pre-oedipal theories which are not phallocentric and which do not regard the oedipal phase as the primary stage of a child's development, are well established. Morris N. Eagle points out that psychoanalysis is no longer exclusively comprised of one method based on instinct theory.¹⁸⁴ Indeed, Janine Chasseguet-Smirgel seems to construe Freudian instinct theory and pre-oedipal theories as part of the struggle between paternal and maternal law.¹⁸⁵ There seems to be an assumption that Object-Relations theory, placed as it is in opposition to instinct theory

¹⁸¹ Freud, supra note 178 at p.53 n3

¹⁸² Karen Horney, supra note 66

¹⁸³ Juliet Mitchell, *Psychoanalysis and Feminism*, (1974), Penguin

¹⁸⁴ Morris N. Eagle, supra note 104 at p.6

¹⁸⁵ Janine Chasseguet-Smirgel, supra note 116 at p.28: "Psychoanalytic theory does not escape this struggle between maternal and paternal law. If we underestimate the importance of our earliest relations and our cathexis of the maternal imago, this means we allow paternal law to predominate and are in flight from our infantile dependence."

does not believe in primary drives. Eagle puts the question directly; does the rejection of instinct theory constitute a rejection of the belief in the ultimate biological basis of the human mind? How does this bear on feminism? I think feminism has simply shied away from such a belief, because it has been used to justify patriarchy.¹⁸⁶ Before I go any further, perhaps I should outline what Freudian instinct theory involves. Eagle puts it well:

Freudian instinct theory is one of those all-embracing motivational theories of human behaviour in which all behaviour- the cognitive, interpersonal, social, etc.-is seen to be, directly or indirectly, in the service of and an expression of presumably basic or primary drives.¹⁸⁷

In Freud's view, civilization is the result of the inability of these drives to discharge themselves immediately - and this has enormous consequences for personality development. Interacting with the world around us is a response to the frustration of repression. These "objects" (anything which is not the subject/"I") give drive gratification and become the motive for social contact.

Chodorow and others, such as Jane Flax, are extremely critical of this position. Despite all human social interaction, it assumes the human psyche is inherently anti-social. Eagle too puts forward Harlow's work to refute instinct theory. Her experiment suggests that baby monkeys need "contact comfort," more than food, and will prefer the presence of a comforting towel or cloth to a bare feeder:

¹⁸⁶ eg Chris Weedon, *supra* note 78 at p.49

"Freudian theory uses visible anatomical difference as its guarantee of psychic difference and women's inferiority. Yet it does not explain why social relations should take this form. It assumes that they are a manifestation of the nature of man."

¹⁸⁷ Morris N. Eagle, *supra* note 104 at p.7

"In short, rather than being secondary or 'anaclitic,' there is an independent genetic basis for the development of attachment and object relations." ¹⁸⁸

Eagle himself regards Balint's concept of primary object love as the base instinct rather than Freud's primary narcissism. So although we reject drive theory, which posits a primary anti-social conception of humans, rejecting instinct theory does not equal a rejection of the belief in the biological reductiveness of humankind. Indeed, Chasseguet-Smirgel regards Freud's views as a reflection of the ambivalence of the psyche towards its mother, because the biological imperative consists of the infant's utter dependency on the mother:

...I believe that there is instinctual knowledge from the beginning. In my opinion, it manifests itself first of all in the man's inability to bear his condition. That is, he has knowledge of something that is not available to him, namely the possession of his mother. Incest, especially in boys, is something that is feared not only because of the presence of the father, but because of the boy's inability to achieve it. ¹⁸⁹

Her last comments imitate Pierre Riviere and will be returned to later.

It seems that psychoanalysis is not as internally fragmented as is sometimes thought. We have Object-Relations psychoanalysis, drive-derived from a different primary base. Even Freud, in his later work, follows this approach:

¹⁸⁸ Morris N. Eagle, *supra* note 1037 at p.10-13
He cites by way of human example, the story of six children who had been in concentration camps as infants and who developed a very strong attachment to each other, treating each other with a tenderness usually reserved for parents.

¹⁸⁹ Chasseguet-Smirgel, *supra* note 116 at p.536

Before we go to inquire from what **quarter** an interference might arise, this recognition of love as one of the foundations of civilization may serve as an excuse for a digression which will enable us to fill in a gap which we left in an earlier discussion.....On the one hand love comes into opposition to the interests of civilization; on the other, civilization threatens love with substantial restrictions. 190

But MacKinnon is very wary of asserting any biological base, and is critical of Dinnerstein and Chodorow for doing so: "...taking women's biology as the basis of women's liberation only negates biological justifications for women's subordination without questioning their basis..." 191

This is quite a significant theoretical division - the incompatibility between radical feminists and Object-Relations psychoanalysts.

A final difference lies in Freud's vision of psychoanalysis as a *value-free science* and a clinical practice, *not a political movement*. Yet Freud's contention that civilization is a collective response to individual psychic frustration rather than a totally separate sphere would seem to lend itself to politics.

Ultimately, feminists such as Rosi Braidotti reject the importance of psychoanalysis' role. She acknowledges its use in deconstructing sexuality and agrees with the claim that, "...I' rests on the presence of an-other." 192 She regards its failure, as she sees it, to change or desire to change social conditions as irretrievably alienating:

...feminism is neither about feminine sexuality, nor about desire - it has to do with change. This is the single most important difference between the

190 Freud, supra note 178 at p.48-50

191 MacKinnon, supra note 2 at p.58

192 Braidotti, supra note 156 at p.95

psychoanalytic and the feminist movements : the definition of change and how to go about achieving it. Psychoanalysis and feminism seem to tackle the issue of political transformation from radically different and ultimately incompatible angles. ¹⁹³

The political cost to feminism of adopting psychoanalysis is too high. How are these conflicts to be resolved?

Psychoanalytic Criticisms of Feminism

From a psychoanalytic perspective, one of the most glaringly naive aspects of feminism in its liberal and socialist forms (psychoanalysis does not make this distinction - another problem), is the assumption that we can fundamentally change social order by calling to attention a different version of the ideal - where women are not oppressed by men. Though the last generation has seen a huge increase in the number of choices available to a certain group of women, continued abuse of women, whether physical, economic or mental, indicates slow progress. The prevailing view of what a woman is continues to be dictated by men. While feminism recognizes that the personal is political, it is still primarily focussed on the political arena to instigate change. Yet women having greater access to the work place does not necessarily produce women sympathetic to feminist goals. Indeed, it may further divide women into those who are active in the "public" world and those who perceive themselves as excluded. This suggests that archetypes of powerful women alone cannot change established psyches, though it may influence developing psyches.

¹⁹³ Braidotti, supra note 156 at p.98

Chodorow makes the argument for incorporating psychoanalysis into the feminist approach:

First, we need to explain and understand the tenacity of people's commitment to our social organization of gender and sex.... Psychoanalysis helps here because it shows us that we live out our past in our present. We do not just react to our contemporary situation and conscious wishes, nor can we easily change values, feelings, and behaviour simply if we have an encouraging social setting.' ⁹⁴

Melanie Klein comes up with a brilliantly simple exposition of why psychoanalysis, with its concern for childhood development, takes the more valid line:

A group - whether small or large - consists of individuals in a relationship to one another; and therefore the understanding of personality is the foundation for the development for the understanding of social life. An exploration of the individual's development takes the psychoanalyst back, by gradual stages, to infancy. ¹⁹⁵

Catharine MacKinnon's contention that the personal is political leads to a position on the need for consciousness raising. She describes consciousness-raising in eulogistic terms, and yet admits she is at a loss to explain why some women remain supportive of an ideology which dominates them:

Why some women take the step of identifying their situation with their status as women, transforming their discontents into grievances, is a crucial unanswered question of feminism (or for that matter marxism). ¹⁹⁶

Brilliant though I believe she is, this displays remarkable ignorance

¹⁹⁴ Chodorow, supra note 118 at p.171

¹⁹⁵ Melanie Klein, supra note 63 at p.247

¹⁹⁶ MacKinnon, supra note 2 at p.86

of what psychoanalysis offers. For psychoanalysis, consciousness raising is not enough. The idea of it already presumes a degree of awareness or consciousness. Only unconsciousness raising will change how people behave. MacKinnon seems to ignore this distinction. For psychoanalysis, sexuality is not a commodity slapped onto the real core person from which we have to free ourselves. It is the primary avenue through which the psyche expresses itself. So we find people, often women, behaving in ways that seem self-destructive, yet satisfying and addictive.

Jessica Benjamin makes a convincing study of the intricacies of relationships of submission and domination. The stability of the self and how it survives without or with others is, she claims, the key feature of these relationships. She makes her point by referring to "The Story of O."

As *O* demonstrates, the masochist's pleasure cannot be understood as a direct, unmediated enjoyment of pain....The pain of violation serves to protect the self by substituting physical pain for the psychic pain of loss and abandonment.¹⁹⁷

We have to look at how a woman's sense of self is shaped. This is not simply a question of low self-esteem, but a look of how the experiences of individuals at certain key moments in their development, shape the consequent pattern of their psyches.

A second psychoanalytic criticism of feminism centres on the feminist belief that psychoanalysis is not interested in change. Psychoanalysis is committed to change on an individual level because

¹⁹⁷ Benjamin, *supra* note 18 at p.61

it sees individual energy as fragments of the collective, enmeshed in the collective will rather than a consequence of collective power dominating individual wills. And yet psychoanalysis does not want to change the world. Some might say its concern is to help people deal with the world **as** it is. Is this position incompatible with feminism? Not necessarily, since psychoanalysis is concerned with the creation in the individual of a solid sense of self. In fact, it sees **as** dangerous, individuals who seek a sense of **self** through politics. MacKinnon is wrong to seek to unite all women into one consciousness. Critical feminists recognize that this marginalizes other groups, especially on the issue of race. MacKinnon tries to claim that difference between women contributes to a sense of collectivity but does not explain why,¹⁹⁸ and relies for the thrust of her theory, on the collectivity of women's gender oppression alone.

A third psychoanalytic criticism of feminism centres on the place feminism accords children and childhood. Psychoanalysis places children in a unique position - the centre. While feminism recognizes that the socialization of children is important, it does not go far enough in recognizing childhood as the primary site where dominating and submissive characters are formed. Children are either referred to in feminist writing as the burden patriarchy imposes on them, or as evidence of the contrasting ways male and female interact.¹⁹⁹ Nancy Chodorow believes feminists have tried to develop a theory of mothering without first developing a theory of

¹⁹⁸ MacKinnon, *supra* note 2 at p.80: "The particularities become facets of the collective understanding within which differences constitute rather than undermine differences."

¹⁹⁹ See Carol Gilligan, *In a Different Voice*, (1982), Harvard University Press

childhood. 200

A fourth point is that psychoanalysis comes towards an explanation of the submission of women through the analysis of women. A parallel understanding is gleaned about why men dominate - feminism seems to treat men as somehow unworthy of understanding. Jessica Benjamin discusses the problem of domination extensively in *The Bonds of Love*. She contrues dominating personalities as suffering from an absolute separation between self and other, to the degradation of that other. To be prone to domination involves an absolute merger of the self into the other's identity - a role women often find themselves in. Feminists have rejected what psychoanalysis has to say about the participation of women in their own subjugation - it is, of course, a political problem. For psychoanalysis, the ultimate goal is not the social equality of men and women, but individual equilibrium - helping to foster in each individual a sense of self that is responsive and thoughtful rather than reactive. If equality is a by-product, well and good: Its primary task ".....is to make conscious everything that is pathologically unconscious." 201

Attempts at Union

i) There are several feminist-psychoanalysts who deny the neutrality of psychoanalysis. Nancy Chodorow, for one believes the clinical method of psychoanalysis is in total contradiction to the

²⁰⁰ Chodorow, supra note 118 at p.95

²⁰¹ Freud *Introductory Lectures* at p.323

standard of neutrality posited as neutral in science. Psychoanalysis does not assume the observer and the observed are separate entities. Indeed, it regards the interaction between the analyst and analysand as a therapeutic process.²⁰² The important part to note for feminists is its technique: a non-reliance on conscious reason as a source of information and a deconstructive method.

Luce Irigaray, writing from a postmodern perspective, reckons psychoanalysis wants to be regarded as neutral because the technologization of all bodies of knowledge is one of the principle ways to gain legitimacy. Teresa Brennan states her position simply: "....psychoanalysis is a thoroughly political entity."²⁰³

It seems strange that a position of political neutrality should be maintained. Freud came to regard the role of psychoanalysis as a tool to explain history and civilization as superior to its role as a therapeutic technique. In any case, the statements MacKinnon makes about the role of women's subjective experience as a method to verify what feminists say women's reality is, accords with the psychoanalytic principle of faith in psychic reality.

ii) Feminism needs to accept that psychoanalysis offers a valuable

²⁰² Chodorow, *supra* note 118 at p.175: "Rather it is an interpretive theory of mental processes, and with an interpretive theory we can only say that an interpretation makes better or worse sense, not that it is true or false, right or wrong. Similarly, psychoanalysis is not founded on the objective description of someone out there about to be studied. It comes out of the transference situation, a mutually created interpersonal situation which in its turn reflexively informs the processes of free association, interpretation, and further working through of the transference. 'Observer' and 'observed' together create psychoanalytic theory and clinical practice, through their interaction and the interpretation of that interaction."

²⁰³ Brennan, *supra* note 156 at p.1

tool for analyzing gender. While misogyny and sexism pervade the original works, I ultimately agree with Juliet Mitchell's comment that "....psychoanalysis is not a recommendation for a patriarchal society, but an analysis of one." ²⁰⁴

iii) On the other hand, psychoanalysis should accept that social conditions have a bearing on the sense of self produced by gender model;. MacKinnon makes an ambitious assertion: "Sex in nature is not a bipolarity, it is a continuum; society makes it into a bipolarity." ²⁰⁵ Perhaps psychoanalysis should have more to say on how the psyche's sex drive is socialized by the society around it.

iv) How do we resolve the chasm between the Object-Relations school and the stance of MacKinnon? The former believes in the primary object love of the infant for its mother as the beginning of the chain of psychic development, the latter refuses to accept any inherently female, even human characteristics. Chodorow herself distinguishes Object-Relations psychoanalysis from what she calls neo-Freudian and Lacanian. Object-Relations analysts posit a different development of self for male and female, due to the one-sided female rearing of children. The development of masculinity, Chodorow argues, is particularly problematic. The classical psychoanalytic position regards the mother as the object of the psychic life of the infant. Object-Relationists take the mother's subjectivity into account. Elizabeth Wright, citing the work of Susan

²⁰⁴ Mitchell, *supra* note 183 at p.xv

²⁰⁵ MacKinnon, *supra* note 2 at p.233

Rubin Suleiman, claims that: "The notion that the mother may be in conflict regarding her child and her work, or the idea that the mother might be the subject of artistic creation rather than its object, is a relatively new one." ²⁰⁶

In the Neo-Freudian category, Wright includes Carol Gilligan as one of those who aim to revalorise feminine qualities, such as nurturance, connectedness, dependency and empathy. Robin West, in her article, *Jurisprudence and Gender*, talks of the more diffuse sense of self women have, and advocates this as a model for the standard sense of self, to replace the unitary, separate one of science. Chodorow admits this stance is less concerned with the inner dynamics of the unconscious than Object-Relationists.

Finally, the Lacanian school of feminist analysts discusses the very abstract sense of the patriarchal order of language, centred upon a symbolic law which is in turn centred upon the phallus. Language takes the place of the father as a kind of collective super-ego. There is a difference between a belief that the psyche makes its first moves out of a positive feeling of need and love, and a desire to value what is characteristically female. MacKinnon's assertion that we cannot rely on the definition of womanhood allotted to us is a valuable one. The recognition that gender is a construct is incompatible both with the notion that female traits should be promoted and with the notion that feminism seeks to change those gender stereotypes/archetypes. MacKinnon is not always consistent with her own rejection of the Gilligan/Chodorow/Dinnerstein school for she talks about female ways of knowing and puts great emphasis

²⁰⁶ Elizabeth Wright in Brennan, supra note 156 at p.145

on the collectivity of women as a group, as if this transcended their shared experience of oppression.

The biological base of psychoanalysis is irrefutable. Chodorow has advanced the notion that the infant's initial helplessness is the primary motivating spur in its development of communication skills such as language and motion. Feminists have rejected the biological justification for women's oppression, but in so doing, they have shaken its own *raison d'être*. Object-Relations feminist-psychoanalysis offers a way back to biology.

v) The issue of sexuality in psychoanalytic feminism is not confined to questions of female sexuality alone - it also involves an analysis of homosexuality. J.C.Smith's quadrant of sexuality isolates the source of some forms of male homosexuality with misogyny and links other forms of male homosexuality and all female homosexuality with a rejection of the stereotype of what it is to be a man and a woman in this society.²⁰⁷

Psychoanalytic feminism takes as no coincidence the fact that certain forms of homosexuality take on what can be regarded as stereotypical imitations of either same sex norms or opposite sex norms. A change in sexual archetypes may well lead to different combinations at the edges of heterosexuality.

vi) Feminists have on the whole rejected what psychoanalysis has to say about the participation of women in their own subjugation - it is

²⁰⁷ J.C.Smith, *supra* note 4

a political problem. But in doing so it is left with an incoherent theoretical foundation to explain the prevalence, tenacity and invisibility of patriarchy, even, maybe even especially, to women.

11 Psychoanalysis and Postmodernism

"The analyst role changes from essential interpreter to existential contextualizer. ...The view of analysis that emerges in this approach is one of an ever widening process of shared participant contextualization, interweaving through past-present-future perspectives and cohering over time into consensually recognizable patterns." - Barry Protter, *Toward An Emergent Psychoanalytic Epistemology*.²⁰⁸

Few writers have attempted a serious dialogue between psychoanalysis and postmodern theories. This contrasts with the abundance of material examining the relationship between psychoanalysis and feminism and, though **less** established, the relationship between postmodernism and feminism. Jane Flax is one of the few writers to note the similarities of approach. Henry Kariel also recognizes a need to intertwine disciplines and hopes for a union of all theories concerned with the issue of cognition. 209

Foucault refutes the legitimacy of knowledge by construing knowledge as subjective opinion. One of the cornerstones of psychoanalysis is a rejection of the privacy of the mind from scrutiny. Both theories seek to deconstruct sex though sex is also an issue on which they fundamentally disagree. Psychoanalysis, says Foucault, treats sex as if it were the "truth of our being," and he is

208 Protter in *Contemporary Psychoanalysis*, Vol. 21, No.2 (1985) at p.209

209 Henry Kariel, *The Desperate Politics of Postmodernism*, (1989), Amherst: University of Massachusetts Press at p.151: "To remain in action while accepting an irrevocable pessimism is to subscribe to the politics which disciplines the desperate manoeuvres of postmodernism. Elaborately formulated by philosophers from Schiller to Dewey, this politics permeates activities to which I would wish to call attention - the reality-constructing practice of psychoanalysis, the meaning of ordinary conversation, the gyrations of feminist inquiry and the self-reflective praxis of anthropological narratives."

critical of it for this reason. Flax also notes that Lacanian psychoanalysis shares the postmodern idea of signifying practices, Lacanians believe language is the principal signifier of reality; Foucault regards all knowledge claims as divisions into the relevant and irrelevant. Flax reckons Freud, in his later writing, comes closer to a postmodern position.²¹⁰ However, she fails to give a convincing explanation for how we should reconcile differences in the theoretical positions and goals of psychoanalysis and postmodernism.

In his latest book, J.C.Smith elaborates on his psychoanalytic social theory and supports the union of psychoanalytic, postmodern and feminist theories, but does not himself forge one. His project has been to establish a psychoanalytic jurisprudence, relating psychoanalysis and feminism to law. He acknowledges the relevance of postmodernism but as yet has not discussed how a jurisprudence encompassing all these elements would function.

What then are the commonalities between psychoanalytic theory and postmodernism? I think there are three main meeting points.

ij Deconstructing the mind

As Jane Flax notes, both psychoanalysis and postmodernism reject the immunity of the mind from deconstruction.

²¹⁰ Flax, *supra* note 5 at p.60-63: "His later theories incorporate the qualities postmodernists prefer - heterogeneity, flux and alterity. The distinction between inner and outer determinants of experience breaks down.Freud's work thus does anticipate and support the critiques of traditional theories of mind currently articulated by postmodern philosophers. The mind loses its privileged status as a private internal space."

Psychoanalysis does this implicitly, since it is a theory of the deconstruction of the mind. Both psychoanalysis and postmodernism deconstruct, in different ways, given assumptions about not only the mind, but the family, sex and society. For psychoanalysis, the individual mind is one part of the collective; they are fed by and feed into each other. For Foucault, each element - mind, family, sex, society - is a separate site for the exercise of power through control. Foucault considers psychoanalysis' contention that the unconscious exists and has a logic and structure of its own, as its most valuable contribution.²¹¹ Our conscious motives for actions and feelings are at the tip of the iceberg - their foundations in the unconscious are deeper, greater and submerged. Dreams are doors into the unconscious of individuals. Mythology is a door to the collective unconscious. Foucault takes the subjectivity of knowledge as a starting point; what we know is a product of our minds rather than a reflection of the world. This corresponds to Freud's concept of psychic reality.²¹² With this understanding, it seems strange that Foucault does not think a more focused study of the mind is warranted. It is equally curious why he does not display a more open acceptance of psychoanalytic interpretations of the psyche.

ii) Sexuality is a construct

A second common feature is the shared assertion that sexuality is

²¹¹ See J.C.Smith, *supra* note 14

²¹² Barnaby B.Barratt, *supra* note 105 at p.3: "If experience in the world is conditioned by mental structures and functions, and understanding of the world is similarly formed by the mind's representational activity, then these structures and functions of the mind effectively determine the 'reality' in which we live."

constructed. I hesitate to say sex, for Foucault argues that sex is also constructed. Psychoanalysis rests on a view of sex as biologically given, though it differs in its description of how that sex drive is expressed.²¹³ It recognizes that sexuality is a process of development, indeed Chodorow has described psychoanalysis as a theory of the development of heterosexuality. Foucault's position is that sexuality is a technology of control because it is ideally located at a point of intersection between the private world and the public world through the concept of population. The state controls individual bodies by promoting the idea that each body makes up the population. This encourages sex and the development of sexuality.

iii) There is no autonomy of the public and private realms

Neither theory makes a distinction between public and private worlds. Psychoanalysis does this by linking the family structure to the development of heterosexuality and all adult behaviour. Civilization consists of the collective acting out of collective human childhood - so we should look for its dynamic in pre-historic humankind. For Freud, civilization is the product of the inability to adequately discharge primary sexual drives. For Object-Relationists, there is a more primary need to socialize. Either way, there is no division of realms. Foucault talks about the need to find the history of previously ignored phenomena that have not been considered worthy of a history - phenomena psychoanalysis has already given space to such as sentiments, love etc..

²¹³ Freudian Instinct Theory v. Object-Relations. see Eagle, *supra* note 104

'These are the common positions between the theories. Where do they diverge?

i) Perhaps the most significant difference between the psychoanalytic position and that of Foucault are the views they have on the determinacy and primacy of sex and sexuality. Foucault rejects the concept of primary sexual drives (as discussed, for example, by Norman Brown), the repression of which, at both an individual and group level, creates the energy which drives civilization. J.C.Smith is also quite firm in his drive theory:

Repression arises out of the conflict between the primary drives, the roots of which lie in the nature of the human condition, and the defences we build against them.....Psychoanalytic social theory **seeks** the common patterns to be found in the structure of society, the family and the psyche. Behind society, the family and the individual psyche, stands human biology as a given and major determinant. ²¹⁴

Such a position accords with his view of history as the externalization of the Oedipal passage and his work on gender and the construction of reality. The conclusions derived from the belief in psychoanalytic social theory demonstrate from another direction, that the line between knowledge and not-knowledge cannot be maintained. Foucault quite simply refuses to believe primary drives exist:

Sexual behaviour is not, as is too often assumed, a superimposition of, on the one hand, desires which derive from natural instincts and, on the other hand, of permissive or restrictive laws which tell us what we should or shouldn't do. ²¹⁵

²¹⁴ J.C.Smith, *Law, Myth and The Oedipal Conflict*, University of British Columbia, Faculty of Law. at p.2-4

²¹⁵ Foucault, *supra* note 125 at p.287

Sex, he claims, comes out of the notion of sexuality, which in turn is a product of power:

But I said to myself, basically couldn't it be that sex, which seems to be an instance having its own laws and constraints, on the basis of which the masculine and feminine sexes are defined - be something which on the contrary is produced by the apparatus of sexuality? ²¹⁶

Sex and sexuality, according to Foucault, emerged because they are strategically useful. ²¹⁷ This contrasts with psychoanalysis where sexuality is regarded as a cultural edifice on top of a pre-given biological determinant - the need to have sex and propagate.

Foucault's antagonism towards the notion and promotion of sexual liberation rests on the assertion of the falsehood of sex. At face value, Foucault's rejection of sexual liberation is wildly controversial, but he does distinguish between sexual choice and freedom of sexual acts. Sexual choice must always be encouraged. But he regards the secrecy of sex and its taboo status as a sham, a deliberate device to intensify interest in sex. And he denies that Freud somehow discovered sex - instead, he popularized sex.

....the problem of sexuality was massively and manifestly inscribed in the medicine and psychiatry of the nineteenth century, and that basically Freud was only taking literally what he heard Charcot say one evening: it is indeed all a question of sexuality. ²¹⁸

²¹⁶ Foucault, supra note 124 at p 210

²¹⁷ Foucault: "Sexuality is not the most intractable element in power relations, but rather one of those endowed with the greatest instrumentality; useful for the greatest number of manoeuvres and capable of serving as a point of support, as a linchpin, for the most varied strategies." (*The History of Sexuality* p.103) Quoted by Carol Thomas Neely, supra note 156 at p.228

²¹⁸ Foucault, supra note 124 at p.212 See also p.120

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which has involved the abuse of women. Freud took the position that psychoanalysis is a science, and the analyst's role is of central importance. But Karen Horney ameliorates this arrogance with her contention that analysis is simply an aid to the individual. Analysts are not indispensable. Foucault admits that in comparison to psychiatry, psychoanalysis has played a liberating role and describes its strength as the discovery of the logic of the unconscious.²²⁰ Nevertheless, "[C]ertain of its activities have effects which fall within the function of control and normalization."

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iv) Another difference is the approach to mental illness the theories maintain. Foucault's *Mental Illness and Psychology* is an attempt to outline some of the ideas he goes on to discuss in more detail in later works, such as *Madness and Civilization*.

Though he comes to denounce the earlier work, the ideas he puts forward are merely simplified statements elaborated in his other writing. I do not see a difference in stance or analysis. Perhaps the very simplicity of the work causes him to reject it.

His main charge against the way mental illness is handled is contained in the following assertion: "It was at a relatively recent date that the West accorded madness the status of mental illness."²²²

Dreyfus, who writes the Preface to *Mental Illness and Psychology*,

²²⁰ Foucault, *supra* note 124 at p.213

²²¹ Foucault, *supra* note 124 at p.60

²²² Foucault, *Mental Illness and Psychology*, (1987), University of California Press at p.64

fleshes out this statement:

For Foucault, Influenced by later Heidegger, it is no longer possible to speak of mental illness, personality, and psychology as if these notions had an objective reference independent of the practices that give them meaning. What counts as personality and mental illness is itself a function of historical interpretation. The task thus changes from situating personal existence in a concrete social situation to studying the historical and discursive practices that define a 'psychology' in which the notion of mental illness becomes thinkable as something that can be the object of scientific study. ²²³

Madness and Civilization is a natural extension of this idea: "For a long time now, one fact has become the commonplace of sociology and mental pathology: mental illness has its reality and its value qua illness only within a culture that recognizes it as such." ²²⁴ He is referring here, no doubt, to the once commonplace presence and acceptance of "village idiots" and "fools," mystics and visionaries who would now be classified as retards and schizophrenics. His conclusion on psychology can be summed up in this simple but rather sinister statement: "Psychology can never tell the truth about madness because it is madness that holds the truth of

Though he has, in his later writing, recognized psychoanalysis as slightly more liberating in practice than psychiatry, Dreyfus claims that Foucault accords psychoanalysis an especially dangerous role because, in theory, it advocates continuous life-long self-analysis

²²³ Dreyfus, *supra* note 222 preface at p.xxx

²²⁴ Foucault, *supra* note 222 at p.60

²²⁵ Foucault, *supra* note 222 at p.73

even after a period of therapy is over. Foucault translates this as life-long control because he rejects the assumption that a state of normal functioning is possible. He sees this as simply the modern equivalent of the confessional, obliging us to spill the contents of our minds.²²⁶

Foucault rails against everything that asserts a standard. He interprets psychoanalysis' concern with the relationship between the abnormal and the normal as exclusive of the abnormal and therefore divisive and tyrannous. But surely psychoanalysis makes the division between the normal and the abnormal obsolete. The psychic arrangement of dangerous and pathological individuals are likely to be mirrored in the quiet, calm one. So I reject Foucault's following statement:

The analyses of our psychologists and sociologists, which turn the patient into the deviant and which seek the origin of the morbid in the abnormal, are, therefore, above all a projection of cultural themes. In fact a society expresses itself positively in the mental illnesses manifested by its members; and this is so whatever status it gives to these morbid forms: whether it places them at the center of its religious life, as is often the case among primitive peoples; or whether it seeks to expatriate them by placing them outside social life, as does our own culture.²²⁷

I think Foucault makes some interesting and valid points in relation to the development of the social category of madness - but I think he is mistaken in regarding the whole thing as a technique of control. Psychoanalysis is not concerned with madness or even mental illness, but rather neurosis, and because everyone is neurotic to some degree, it does not endorse the institutional separation of mad

²²⁶ Dreyfus, *supra* note 222 at p.xxxviii

²²⁷ Foucault, *supra* note 222 at p.63

and sane. It does not believe in these categories. Foucault, of course, regards the concept of neurosis as a device to ensure total control.

v) Psychoanalysis and postmodernism have different conceptions of reality. Psychoanalysis maintains the concept of psychic reality.

Barnaby B. Barratt, writing as a psychoanalyst, states:

If experience in the world is conditioned by mental structures and functions, and understanding of the world is similarly formed by the mind's representational activity, then these structures and functions of the mind effectively determine the "reality" in which we live. ²²⁸

Postmodernism upholds the notion of relative realities, whose comparative worth must be proven on pragmatic terms. But is it totally relative? Gad Horowitz makes the interesting point, and one which psychoanalysis would support, that "relativism stops at the baby." The certainty of infancy is not a reality to be dismissed. The psychoanalytic approach of Melanie Klein is definitely value-orientated around the primary needs and concerns of the baby.

Relative reality is a difficult pill for feminists to swallow, since one of their primary tasks is to describe reality for women. However, the feminist position also supports the relativity of reality, as MacKinnon has pointed out. Women experience the unreality of male superiority because they are oppressed by its real effects. Foucault's position on reality is an extension of his thoughts on the productivity of power: "In fact, power produces; it produces reality... The individual and the knowledge that may be gained of him belong to this production." ²²⁹

²²⁸ Barratt, *supra* note 105 at p.3

vi) Other psychoanalytic criticisms of postmodernism include the postmodern rejection of the possibility of any self at all, underneath or amongst the self that is subject to societal demands. Jane Flax points this out:

From a psychoanalytic viewpoint postmodernist discourses on subjectivity are naive and self-deceptive. Postmodernists seem unaware of the possible differences between a core self and a unitary one.....Paradoxically, although appearing to critique and reject any form of 'deep' or non-social subjectivity, certain elements of each writer's theory in fact presuppose it. 230

Flax contends that a core self does exist, apart from the concept of the self formulated by Enlightenment ideology. This would accord with the object-relations position on a primary object love, which would constitute the bare cells of this self. Horowitz makes an excellent point which perhaps is more pertinent to feminist arguments against postmodernism, but also involves psychoanalytic views on the ability to examine the self:

Is it possible, as Foucault sometimes seems to want to argue, to just say "no" to insist only on no-truth at the centre of our existence? Does the great refusal not inevitably entail a great affirmation that is not simply the affirmation of the identity now given to us?

Psychoanalysis is concerned with changing our selves, the first step to this may include accepting our current selves.

Attempts at Union

²²⁹ Foucault, note 124 at p.204-5

²³⁰ Flax, supra note 5 at p.210

As psychoanalysis is seemingly reducible to sex, so Foucault seems to reduce himself to power. But what is power? Foucault talks about power as if it had an inherent dynamic of its own. Yet Foucault has already rejected Freudian drive theory. When he does try to explain power, he does so badly, and in such a way as to indicate he doesn't really understand it. When he asks why power is exercised, he refers to Nietzsche and Reich in a vague way so that we do not know whether he agrees with them or not. He mentions the Nietzschean concept of the will-to-power and the Reichean concept of repression. But the will-to-power is not a source of power and repression is repression of sex, according to psychoanalysis.

Jane Flax reckons Foucault's theory is implicitly psychoanalytic;

Foucault believes that power is exercised as thousands of individual choices or acts of will, not as the massive external imposition of repression on the part of a police state. It is thus hard to make sense of his theory without imputing the existence of a mental quality similar to Freud's superego. 231

Foucault is critical of what he thinks is the psychoanalytic belief that power only operates negatively through the concept of repression - his tenet is that power acts positively and productively. But Gad Horowitz points out that this is a very narrow view of what psychoanalysis means by repression. Foucault needs to clarify his concepts.

Both postmodernism and psychoanalysis believe that both the body and mind have a history. Compare the similar sentiments of Foucault and Jung:

231 Flax, supra note 5 at p.231

The body and everything that touches it: diet, climate and soil - is the domain of the Herkunft. The body manifests the stigmata of past experience...The body is the inscribed surface of events...the locus of a dissociated self...and a volume of perpetual disintegration...Its (geneology) task is to expose a body totally imprinted by history and the process of history's destruction of the body. ²³²

While Jung writes in *Man and His Symbols*:

Just as the human body represents a whole museum of organs, each with a long evolutionary history behind it, so we should expect to find that the mind is organized in a similar way. It can no more be a product without history than the body in which it exists. ²³³

Similarly, Erich Neumann, in *The Origins and History of Consciousness* writes that: "The individual has in his own life to follow the road that humanity has trod before him, leaving traces of its journey in the archetypal sequence of the mythological images we are now about to examine." ²³⁴

So psychoanalysis and postmodernism share a view of power, and a view of the history of the body and the mind.

²³² Supra note 124 at p.83

²³³ C.G.Jung and others, *Man and His Symbols*, (1964), Garden City, New York: Doubleday at p.57

²³⁴ Neumann, *The Origins and History of Consciousness*, (1954), Princeton University Press at p. xvi

42 Postmodernism and Feminism

There is a growing body of literature, linking feminism with postmodernism. Linda Nicholson, editor of one of the first books of this literature, regards postmodernism as "a natural ally" to feminism. It offers, in her opinion, a useful argument against generalizing, totalizing theories.²³⁵ For the same reason, Chris Weedon is also in favour of the dialogue. She believes Foucault's method of discourse analysis "expands the field of potential political activity in ways that are extremely important for feminism, avoiding, as it does, the reductionism of single-cause analyses."²³⁶ Why is postmodernism relevant to feminism? I believe they share significant presumptions which I here examine.

i) Power

Postmodernism according to Foucault and feminism as expressed by MacKinnon, are both concerned with power and the very material effect this has on bodies. MacKinnon talks only of the effect of male power on female bodies - as that which produces the female gender. Foucault does not discuss the area in gendered terms, though he agrees with the radical feminist claim that sexuality is a construction. In MacKinnon's review of J.C.Smith, she comes very close to a postmodernist position, albeit at the expense of psychoanalysis: "Smith argues that the social order is determined more by the unconscious than the conscious. Fine. what determines

²³⁵ Linda J. Nicholson, *supra* note 100 at p.5

²³⁶ Chris Weedon, *supra* note 78 at p.122

this unconscious, if not these social relations of power, albeit in unconscious ways?"

For MacKinnon, sexuality is the product of power. In this sense she would agree with Foucault that power is positive. MacKinnon writes: "Sexual meaning is not made only, or even primarily, by words and in texts. It is made in social relations of power in the world, through which process gender is also produced."²³⁷

Just prior to this statement, she argues that Foucault, Derrida and Lacan ignore what she terms the "experienced empirical existence" of sexuality, thus failing to notice its gendered form. Though they differ as to the effects of power, their approach to power is the same.

ii) Knowledge

For Foucault, knowledge is the corollary of power. He writes extensively on how control over the contents of discourse has secured power over the entire Western population, as well as the populations of other nations and specific groups singled out for discipline. In a similar vein, Catharine MacKinnon has described feminism as an epistemological theory: "The key to feminist theory consists in its way of knowing."²³⁸

In her Preface to *Toward a Feminist Theory of The State*, she states her aim:

(t)his book analyzes how social power shapes the way we know and how the way we know shapes social power in terms of the social inequality between women and men. In broadest terms, it explores the relation

²³⁷ MacKinnon, *supra* note 2 at p.129

²³⁸ MacKinnon, *supra* note 2 at p.86

between knowledge and politics. In other words, it engages sexual politics on the level of epistemology. ²³⁹

Foucault and MacKinnon share the idea that knowledge has a contingent relationship to power. Knowledge is powerful when it creates excluded categories, but the definition of knowledge entails some form of differentiation, inclusion and, inevitably exclusion. So all knowledge is some form of exclusion.

An epistemology decisively controls not only the form of knowing but also its content by defining how to proceed, the process of knowing, and by confining what is worth knowing to that which can be known in this way. ²⁴⁰

Foucault's point, and one that MacKinnon would share, is that knowledge has been used to prescribe the world. When MacKinnon describes her undertaking as spelling out "what is," ²⁴¹ she does so from outside the bubble that our knowledge system calls reality - wary that recognition of the existence of a bubble pops it and reality with it.

In these sentiments MacKinnon matches Foucault. The difference is that MacKinnon identifies women as the primary excluded category and men as the sifters of knowledge:

As Carolyn Porter has observed of Heisenbergian uncertainty, a contemporary form of this anxiety, "indeterminacy constitutes a scandal for science precisely because it reconstitutes the objective world as one including the subject." Feminism is surely that kind of scandal for a reality constituted by men as they apprehend it. ²⁴²

²³⁹ MacKinnon, supra note 2 at p.vi

²⁴⁰ MacKinnon, supra note 2 at p.97

²⁴¹ MacKinnon, supra note 2 at p.xii

²⁴² MacKinnon, supra note 2 at p.122. MacKinnon also echoes J.C.Smith and

iii) Sexuality is Constructed

MacKinnon acknowledges, albeit disparagingly, the method feminism shares with postmodernism:

his recognition of the importance of Heisenberg's principle of uncertainty.

²⁴⁴ MacKinnon, *supra* note 2 at p.128

²⁴⁴ MacKinnon, *supra* note 2 at p.128

They also share a similar view on the liberation of sexuality.

Foucault recognizes the connection:

The real strength of the women's liberation movement is not that of having laid claim to the specificity of their sexuality and the rights pertaining to it, **but that** they have actually departed from the discourse conducted within the apparatuses of sexuality. ²⁴⁶

The initial call for female emancipation from the home has expanded into a broader questioning of forms of discourse, life, culture, and language.

Sexuality, in feminist light, is not a discrete sphere of interaction or feeling or sensation or behaviour in which preexisting social divisions may or may not play themselves out. It is a pervasive dimension of social life, one that permeates the whole, a dimension along which gender occurs and through which gender is socially constituted.... ²⁴⁷

In this sense, feminism is less about sex and more about how we justify knowledge claims. However, as in the question of power, MacKinnon is critical of Foucault for not being thorough enough:

Although he purports to grasp sexuality, including desire itself, as social, he does not see the content of its determination as a sexist social order that eroticizes potency as male and victimization as female. Women are simply beneath significant notice. ²⁴⁸

²⁴⁵ MacKinnon, supra note 2 at p.131

²⁴⁶ Foucault; supra note 123 at p.219-220

²⁴⁷ MacKinnon, supra note 2 at p.130

²⁴⁸ MacKinnon, supra note 2 at p.288n80

iv) Silence

Foucault shares with MacKinnon an understanding of the meaning of silence in relation to oppressed groups:

Silence itself, the things one declines to say or is forbidden to name; the discretion that is required between different speakers - is less the absolute limit of discourse, the other side from which it is separated by a strict boundary, than an element that functions alongside the things said, with them and in relation to them within over all strategies. ²⁴⁹

But Foucault contradicts this understanding through his ideas on control through ultimate visibility, exemplified in the Panopticon model of society and the belief that criminals in particular as part of the confessional sciences were obliged to make themselves understood. He does not talk often of silencing voices as a means of control.

MacKinnon implicitly accepts Foucault's approach to silence when she denounces his failure to notice that silence *is* sexually divided:

Gender, however, eludes him. So he cannot distinguish between the silence about sexuality that Victorianism has made into a noisy discourse and the silence that has been women's sexuality under conditions of subordination by and to men. ²⁵⁰

²⁴⁹ Foucault, *supra* note 124 at p.309

²⁵⁰ MacKinnon, *supra* note 2 at p.288n80

Feminist ²⁵¹ Objections to Postmodernism

The marriage between feminism and postmodernism is by no means consummated and has received a mixed reception.

i) Christine Di Stefano writes cogently against it. First, she argues, postmodernism expresses the concerns of a group (white, male, Western), that has already enjoyed the luxury of being heard and is accustomed to it. Postmodernists can, therefore, afford to give up the concept of a coherent self. Feminists cannot. The Postmodernist rejection of the unitary self affirms the existence of a unitary self, keeping the notion of one alive within current discourse. Henry Kariel articulates the same sentiment in his article, *The Feminist Subject Spinning in the Postmodern Project*: "Conversation...is no free-for-all...it is the opiate of the privileged." ²⁵²

ii) Secondly, postmodernists seem only to attack groups that look very much **like** themselves, eg. Socrates, Aristotle, Plato, Christianity. Their theories are only directed against certain

²⁵¹ Of course, I have already demonstrated how various and diverse "feminism/s" is/are, therefore, when I call this section a feminist critique of postmodernism I speak of feminism on a number of levels - I do hesitate to say all its levels because I am not going to use the liberal feminist critique of postmodernism, nor the socialist-feminist since postmodernism itself is in direct conflict with both liberal political theory and socialist theory. The aspects of their feminist branch which conflict with postmodernism will be the same as the aspects of their main theories which conflict. This constitutes as well a fundamental criticism of both liberal-feminist and socialist-feminist theories; they are what MacKinnon would call "feminism modified." Critical feminism is probably a little different since one of its tenets is a recognition of the diversity of interests excluded by orthodox political theory - Critical Legal Studies in its feminist aspect is therefore integral to the original theory, rather than an adjunct.

²⁵² Henry Kariel *The Feminist subject spinning in the Postmodern Project*, Political Theory, Vol. 18, 1990 at p.255-272

philosophical agendas. The Enlightenment, which they attack is the status quo - they are not attacking theories which seek change, though they include all theories in their attack.

iii) Thirdly, mainstream postmodernism is blind to gender. Foucault talks about various discourses exercising power - they were, and still are, to a large extent (the police and army for example), all male-dominated - yet he fails to make a connection between the sex of those exercising power and what kind of power they are exercising.

iv) Fourthly, "the Postmodern project, if seriously adopted by feminists, would make any semblance of a feminist politics impossible." Nancy Hartsock elaborates on this issue. She presents another assault on postmodernism's relevance to feminism in her essay, *Foucault on Power*. While she does acknowledge the value of Foucault's concept of disciplinary power, she accuses him of failing to provide a theory of power for women. I have chosen to examine her position because I think the main tenets of her argument reflect the chief tension between feminism as a movement historically committed to social change and feminism as a political theory. These problems are that women have only recently begun to find a collective public voice and a group identity. Feminists also have a political agenda with its recognition of the bifurcation of power so that women and men correspond to powerless and powerful.

Her first point is simple - just when women are beginning to

discover themselves as subjects, when feminism is gaining credibility, postmodernism questions the validity of the concepts of subject and theory. Christina Di Stefano, already referred to, makes a similar point. In her opinion, men can afford to talk of a de-centred self. She goes so far as to suggest that postmodernism is almost as limiting as the Enlightenment philosophy it renounces - apathy is the postmodern pit into which she fears feminism will fall: "Either one must adopt the perspective of the transcendental or disembodied voice of 'reason' - or one must abandon the goal of accurate and systematic knowledge of the world. Other possibilities exist...." ²⁵³ Linda Nicholson in her introduction to *Feminism/Postmodernism*, articulates Di Stefano's concern when she cites Hartsock and Rordo, both contributors to the book. She writes that they "argue that theorizing needs some stopping points and that for feminists an important theoretical stopping point is gender." Without it, as Christina Di Stefano points out, there might be no feminism, since the stability of the category "woman" guarantees a "constituency." ²⁵⁴ Similarly Rosi Braidotti points out that:

Feminist theory and practice at the end of this century is a double-edged project involving both the critique of existing definitions, representations, and theorizations of women and also the creation of new images for female subjectivity and suitable social representations of ithow can 'we feminists' affirm the positivity of female subjectivity at a time in history and in the philosophy of the West where our acquired perceptions of the subject are being radically questioned? ...I am in profound agreement with Gayatri Spivak that essentialism may be a necessary strategy. ²⁵⁵

v) Hartsock also rejects Foucault's idea that there are "manifold

²⁵³ Nancy Hartsock, supra note 100 at p.170

²⁵⁴ Christina Di Stefano, supra note 100 at p.76

²⁵⁵ Braidotti, supra note 156 at p.90-93

relations of force," as she puts it, rather than the conviction that there are those who force and those who are forced upon. This, I think, is a misinterpretation of Foucault, since he acknowledges how various groups are made into abnormal subjects thereby reinforcing the concept of the normal subject. He also acknowledges that power is exercised over these groups and singles prisoners out as an example. Foucault however, would say that all are players, including the played upon. Hartstock interprets this as a version of blaming the victim - but I doubt if Foucault would even acknowledge the division of victim/victimizer - he blames no one. No doubt this aspect of Hartstock's criticism would also be levelled at psychoanalysis. Hartstock's ultimate position is clear. "We need to recognize," she writes, "that we can be the makers of history as well as the objects of those who have made history." While acknowledging the extent this resembles the totalizing discourses women have been victimized by, she puts forward the rather dubious justification that "marginalized groups are far less likely to mistake themselves for the universal 'man.'" Her response to the postmodern assault on the legitimacy of knowledge is openly practical rather than theoretically pure. She warns of the consequence: no new society: "...we need to be assured that some systematic knowledge about our world and ourselves is possible."

However, she fails to answer who provides that assurance - perhaps those who formulate that knowledge? We return to another self-referring system of power. Hartstock admits she is a materialist like Marx and, like Marx, reckons a theory of power for women will

inevitably lead to action. I quote the last line of her essay: "To paraphrase Marx, the point is to change the world, not simply to redescribe ourselves or reinterpret the world yet again."

Rosi Braidotti makes a similar compromise, for the sake of changing concrete social conditions.

The force of Hartsock's criticisms are marred by her open striving for one goal - social change at all costs - and in one form - material change. She would probably accept my description of her as a neo-socialist-feminist. She says "other possibilities exist," yet the possibility she puts forward indicates only one possibility - a theory of power for women which results in a certain kind of change. In doing this, she ignores the complexity of the postmodern position - the illigitimizing of reason which is used to reflect its own version of the natural world closes off that avenue for new totalizing theories. Hartstock seems to be doing the same - creating a different knowledge system to reflect a different "natural order." Her new natural order may well be better but has no claim to legitimacy outside of its own referents.

vi) Postmodernism shows remarkable ignorance in regard to questions of gender. This line of criticism comes from writers such as Jane Flax, who speak with one foot firmly planted in postmodernism. She takes a very different position to that of Hartstock: "If we do our work well, reality will appear even more unstable, complex and disorderly than it does now."²⁵⁶

²⁵⁶ Flax, supra note 5

She is decidedly pro-postmodernism and pro-Foucault, and thinks they are both necessary to the survival and future development of feminism: "Postmodern philosophies, especially Foucault's, also offer a radical rethinking of the meanings and operation of power that is particularly appropriate to transitional states."²⁵⁷

The focus of her criticism lies in the quality of Foucault's analysis of gender - as if its existence emerged alongside the concept of bio-power. Rather, Flax asserts, feminism has claimed that "... women's bodies have always, although in different ways, been 'colonized' by the intersection of knowledge and power."

When Foucault is asked what sexuality and gender consisted of before the eighteenth century, he seems to talk glowingly of the open, social sex of Greece.²⁵⁸

vii) Flax is also critical of how postmodernism handles the issue of the self. Like Hartstock, she questions the approach postmodernism takes towards issues of subjectivity:

...I am deeply suspicious of the motives of those who would counsel such a position at the same time as women have just begun to re-member their selves and to claim an agentic subjectivity available always before only to a few privileged white men.²⁵⁹

At the same time she is critical of Foucault's suggestion that we ought to replace the technologies 'of the self' with the ideal of

²⁵⁷ Flax, supra note 5 at p 29

²⁵⁸ of J.C.Smith, *The Sword and Shield of Perseus: Some Mythological Dimensions of the Law*, 6 International Journal of Law and Psychiatry, (1983) at p.235-261. The society of classical Greece, he argues, is the model of patriarchy we still follow.

²⁵⁹ Flax, supra note 5 at p.22

making one's own life a work of art." ²⁶⁰ She points out how "deeply antithetical to feminist views of self-in-relation to others," ²⁶¹ such a self-centred standpoint involves. Flax attempts to resolve the problem by suggesting postmodernists have confused two concepts of the self: the unitary self at the heart of the Enlightenment, which is a fantasy and the core self which is real and valid. Her ideal for the core self resembles Chodorow's self-in-relationship, ie., a social self:

Our choice is not limited to either a "masculine," overly differentiated, and unitary self or no self at all...by retrieving or reconstructing repressed aspects of the self together - over anger, our connections with, attractions to, 2nd fear of other women, our self-hate - women in feminism's "second wave" have begun to remember memory - as differentiated yet collective experience (history). This 'new' memory provided many women with a powerful impulse toward action (politics) and the need for more just social relations. ²⁶²

The thrust of her position is that postmodernism presents valuable insights but does not adequately deconstruct gender. It fails to acknowledge that the oppression of women is older than the eighteenth century. Postmodernism also rejects the self as real, but is amoral selfishness viable? Flax calls for the continued existence of a core self which needs to relate for its own sake.

viii) Foucault raises innovative issues about the question of silence in a trial - how it offends the heart of the system because the criminal, not the crime, is the focus for the exercise of power.

²⁶⁰ Flax, *supra* note 5 at p.217

²⁶¹ Flax, *supra* note 5 at p.217

²⁶² Flax, *supra* note 5 at p.220

However, he brings no convincing analysis of the Riviere crime or its reasons, except perhaps the faintest suggestion that it was committed in order to contravene the relationships held most highly in that society. Riviere's and the other crimes he discusses are, he notes, inter-generational and therefore offend the laws of nature. Foucault makes an odd connection between violence and domination. He suggests that when people are dominated, most comply without violence. So the actions of Riviere show a spark of defiance - his violent acts **are** a refusal to be dominated. In my opinion, Foucault's position takes a male view of domination and violence. It is not that Foucault fails to label such crimes deviant - his failure lies in identifying the object of domination as the women Riviere murders. The feminist, and perhaps psychoanalytic view too, involves the belief that those who exercise dominance are violent.

ix) When Foucault is talking about the technology of sexuality, he fails to gender its effects. He asserts that control of the body is one of the purposes of sexuality and, yes, he recognizes that this affects women's bodies when he discusses the hysterization of women. Yet he fails to distinguish the different sexualities that are produced, that what it means to be a woman and a man in this society differ on a hierarchical plane. Why would there be a difference if all bodies were equally targets for control?

x) Finally, the core of Foucault's theory is power - yet he talks only, and not very deeply, about Nietzsche's will-to-power - which

resembles Dworkins' Selfish Gene concept of life's dynamic. This contrasts with Chodorow and others who conceive of the self as inherently social. Foucault makes a fleeting reference to Reich's concept of repression as a source of power but fails to recognize that at the core of repression lies sex. So we come back to the determinacy of sex afterall.

Postmodern Objections to Feminism

Postmodernist writers largely ignore feminists, though Foucault does mention them once without antagonism. The imbalance in the amount of postmodern criticisms of feminism is not reflective of a greater willingness on the part of postmodernists to reconcile the theories. On the contrary, Linda Nicholson claims that "...many feminist theories of the late 1960s to the mid-1980s have been susceptible to the same kinds of criticism as postmodernists make against philosophy." 263

i) One postmodern accusation that can be levelled at feminist theory refers to its implicit belief in a starting point of patriarchy. its concern with the origin of tyranny, is of course a politically optimistic one - what has a beginning has an end. As Judith Butler puts it, an origin.

"...would provide an imaginary perspective from which to establish the contingency of the history of women's oppression." 264

J.C.Smith, for one, places this origin in the Classical Greek era, when the Sky God Apollo makes his appearance and secures his

263 Nicholson, supra note 100 at p.5

264 Judith Butler, supra note 88 at p.35

predominance over women.

ii) Feminism has a different conception of the self. J.C.Smith has pointed out the tendency of emancipatory movements to succumb to the methods of the dominant ideology they attack.²⁶⁵ He singles out radical feminism as going some way to recognizing this. But has it gone far enough? Judith Butler is critical of the radical feminist insistence on the stable category of "woman" as a grounding for feminist theory because:

the feminist subject turns out to be discursively constituted by the very political system that is supposed to facilitate its emancipation....feminist critique ought also to understand how the category of 'women,' the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought. ²⁶⁶

Butler asks an interesting question: "Is there some commonality among 'women' that preexists their oppression, or do 'women' have a bond by virtue of their oppression alone?"²⁶⁷

Butler calls insistence on the former stance, "gender fixity," or, as Donna Haraway refers to it, "radical reductionism."²⁶⁸ Foucault has pointed out, and Butler seems to endorse this, that the importance of sex and gender lies simply in its position as an intersection for two types of control: that of the population, and that of the family, which explains his statement, "no system of power can do without recourse to sex.". Butler argues that if women have a bond by virtue of their

²⁶⁵ J.C.Smith, *supra* note 258 at p.235

²⁶⁶ Judith Butler, *supra* note 88 at p.2

²⁶⁷ Judith Butler, *supra* note 88 at p.4

²⁶⁸ Donna Haraway, *supra* note 100 at p.142

oppression alone, then it is not their womanhood that serves as a basis for collectivity, but their experience of oppression. This comes very close to the Critical Legal Studies approach to feminism - they attack the totalizing, white, female middle-class theorizing which marginalizes issues such as race. Butler concludes that, "[T]he feminist 'we' is always and only a phantasmagoric construction..."²⁶⁹ Julia Kristeva argues in a similar vein. Chris Weedon articulates that approach:

Kristeva's use of the signifier "woman" is deconstructive in the sense that she argues that there is no essential womanhood, not even a repressed one and that feminist practice cannot be directed at achieving or recovering some sort of essential state. It can only be defined in terms of what it rejects and what it is not. *Politically the notion of being a woman is at best a useful, temporary strategy for organizing campaigns on behalf of women's interests as they are currently defined within patriarchy.*²⁷⁰ {my italics}

But Butler sees a vicious circle:

To be sexed for Foucault is to be subjected to a set of social regulations, to have the law that directs those regulations reside both as the formative principle of one's sex, gender, pleasures and desires and as the hermeneutic principle of self-interpretation. *The category of sex is thus inevitably regulative, and any analysis which makes that category presuppositional uncritically extends and further legitimates that regulative strategy as a power/knowledge regime.*²⁷¹ {my italics}

She clearly sees even a temporary endorsement of the category of sex for feminism as simple legitimation of the old categories.

Foucault makes a suggestion which could surely be the starting point for a postmodern feminism: "Maybe the target nowadays is not to

²⁶⁹ Judith Butler, supra note 88 at p.142

²⁷⁰ Chris Weedon, supra note 78 at p.68-69

²⁷¹ Judith Butler, supra note 88 at p.96

discover what we are but to refuse what we are."²⁷²

Resolutions

i) Resolving the problem of power

The power Foucault talks about is also what feminism talks about, but feminism genders it as male power. Foucault talks about a multitude of pervasive power relations. This fits in well with the feminist view on the pervasiveness of sexual power. MacKinnon describes male power as a myth made real, therefore, feminism can be regarded as a refinement of postmodernism. As psychoanalysis is seemingly reducible to sex, so Foucault seems to reduce himself to power. But what is power? In the section resolving postmodernism with psychoanalysis, I concluded that Foucault's explanation of where power comes from is actually quite underdeveloped.

ii) Resolving the problem of sex

The feminist position regards power as a product of sex. Foucault views sex as a product of power. I actually don't think they disagree. Foucault does acknowledge sex in the form of bodily pleasures, where expressing sexuality without the rigours of disciplinary technologies is envisaged. Sex, for all functional purposes, is constructed. Sex has been constructed into a function of society. We presume the state should have a vested interest in regulating the sex lives of its population, such as imposing age limits on heterosexual and homosexual intercourse. This role goes largely unquestioned. It

²⁷² Foucault, supra note 124 p.22

is the same for MacKinnon. She rejects the Chodorow school because she is reluctant to accept any quality of femaleness as inherent when so much of it has been imposed. At one point, however, she admits to the possibility of a different kind of sexuality: "Sex in nature is not a bipolarity, it is a continuum."²⁷³

iii) Resolving the problem of "we" - the stability of the category "women"

Judith Butler explains what this means:

The foundationalist reasoning of identity politics tends to assume that an identity must first be in place in order for political interests to be elaborated and, subsequently, political action to be taken. My argument is that there need not be a 'doer' behind the deed," but that the "doer" is invariably constructed in and through the deed.²⁷⁴

She makes a valuable point in her criticisms of MacKinnon's treatment of issues such as race, disability etc., concerns that Crit-Fems voice. But Butler argues that simply including every facet of women's non-sexual characteristics is not enough: "The theories of feminist identity that elaborate predicates of color, sexuality, ethnicity, class and able-bodiedness invariably close with an embarrassed "etc." at the end of the list."²⁷⁵

Butler advocates instead that we politicize identity. She recommends moving away from identity-based theories, a move Nancy Fraser and Linda J. Nicholson reckon the Critical feminists, in their critique of gender essentialism, foreshadow. They are "already

²⁷³ MacKinnon, *supra* note 2 at p.234

²⁷⁴ Judith Butler, *supra* note 88 at p.142

²⁷⁵ Judith Butler, *supra* note 88 at p.143

implicitly postmodern."

iv) The problem of purpose

Horowitz points out the product of Foucault's reluctance to advocate a positive strategy for development as an unwitting acceptance of our present identities. Horowitz asks:

Is it possible, as Foucault seems to want to argue, to just say 'no,' to insist only on no-truth at the centre of our existence? Does the great refusal not inevitably entail a great affirmation that is not simply the affirmation of the identity now given to us?

This has particular relevance for feminism. Postmodernism does strive for better "stories," or "patterns of coherence" as J.C. Smith puts it. It is simply very self-conscious about such a position. In places, Foucault alludes to what he wants a postmodern outlook on life to look like, though it offends his position on grand theorizing. Postmodernism rejects "grand theorizing" - it rejects the coherence of history. Yet does it escape the implications of its own theorizing? Surely the rejection of the category "women" as a stable enough concept for what Julia Kristeva calls "strategic purposes," itself reveals a dependence on abstract and universal theory. Surely postmodernism permits a large element of pragmatism? Or have I taken the postmodern play too far? But who is to draw the line? Postmodern feminism seems to encourage a total critique of given limitations. In the sphere of literature, the effect seems to be invigorating. However, how is inertia and depression to be staved off in feminism? One resolution lies, I think, in a point Sandra

Harding makes:

...the postmodern critics of feminist science, like the most positivist of Enlightenment thinkers, appear to assume that if one gives up the goal of telling one true story about reality, one must also give up trying to tell less false stories.²⁷⁶

²⁷⁶ Harding, *supra* note 100 at p.83

13 Discord and Reconciliation

So where **does** all this lead us? How has the feminist, psychoanalytic and postmodern approach to sex crimes helped in viewing the viability of a conjunction of the theories?

Before I discuss this issue, I will outline a few conclusions on the practical applications of a combined approach to sex crime.

i) Law is the last gate through which sex criminals pass. Changing deeply ingrained behaviour at this point is, for the most part, fruitless. Law is ineffective in anything but a retributive, punishment model. Postmodernism, feminism and psychoanalysis shift the focus of any inquiry into what produces sex criminals, outside law in such areas as understanding social power, appreciating the vulnerability of childhood, and recognizing the influence of archetypes.

ii) If the retributive model is the only legitimate form of punishment, arguments about the reduction or extension of sentences to reduce and regulate crime, are **obsolete**. If the reduction of crime rates were the top priority, **all** offenders would be taken out of society permanently. **Instead**, a cost-benefit analysis of the harm in total incarceration versus the harm inflicted on the populace takes place. Punishment becomes a clinical exercise of regulatory control, rather than the redress of wrong done. The 1989 White Paper put out by the UK Sentences Review Committee recommended that prisoners should serve the total length of the sentences passed upon them, in some form or another. Even when released before the end of the specified term of confinement, if, for example it were a life

sentence, then life would be the duration of the surveillance. From the postmodern perspective, the threat of constant surveillance is a harm which outweighs all others.

iii) Attempts to order prisoners into psychotherapy or psychiatry undermine the whole premise of the voluntariness of the psychoanalytic relationship. Psychoanalysts would give this freedom to seek therapeutic help to the criminal. The early analysis of children with criminal tendencies would be useful but is, with current attitudes towards psychoanalysis, unlikely on a scale which will influence criminal conduct. I would prefer a shift of theoretical emphasis away from the problem of the sex criminal and back onto the crime. This is to see the illegality in its social context.

vi) The dominant archetypes of our culture support the view of masculinity expressed by the deeds of the sex criminal. J.C.Smith has discussed the sexuality of those attracted to all male institutions, the army, for example, which embodies in its structure and ethics the Herculean quarter of his quadrant of sexuality, with its psychic urge to destroy women. Those who end up in prison seek this too at an unconscious level. This is especially true of sex criminals. It may be argued that if sex criminals represent the epitome of what a male-dominated environment produces, why are sex criminals notoriously rejected inside prisons? I would argue that only the most heinous crimes are the subject of abuse within prison. Prisoners, like the rest of us, succumb to the technique of distancing to differentiate. The most excluded category of offenders are child sex abusers. One reason for their rejection must be the fact

that many, if not most criminals are likely to have experienced some form of abuse.

Foucault suggests the execution of criminals is less tyrannical than their life long confinement. I am not advocating this as a proposal for law reform, not least because it puts more power in the hands of the state, which is anti-postmodern. Postmodernists regard the state as the primary vehicle through which individuals exercise power over others. However, I think we should be aware of the dangers we fall into when we try to impose anything but a retributive model of punishment onto criminal conduct. We should not look to the law for solutions to the harm done, nor the wrongdoer. Law is ultimately not the instigator of social change but a reflection of it.

What does this analysis of alternative ways of approaching sex crime reveal about the three theory approach? Is it better than a specific approach, such as feminism? What advantages does a general approach have? Jane Flax has gone as far as to devote a book to set up a "trialogue" between the theories. She achieves this but does not satisfactorily reconcile their differences in goal and foundation. Judith Butler has, I think, been more successful. She puts forward the idea of rejecting altogether the concept of identity-based theories, though I am unsure of what such a theory would actually look like.

A three theory approach is justified in that it is clear there are common threads. It is also clear that separate, specific approaches

suffer from certain flaws. Feminism needs psychoanalysis because it needs to explain why current gender arrangements seem, to some at least, including women, completely natural and unchangeable. Psychoanalysis also explains why women are sometimes reluctant to relinquish their subordinate status. This includes accepting the psychoanalytic implication that women may be participants in their own subjugation. It is a political decision to ignore it. Even MacKinnon briefly acknowledges the phenomenon.²⁷⁷

In addition, feminism needs psychoanalysis to ameliorate its attitude towards politics - that of changing the "system," patriarchy, as its first and last task. Chodorow has mentioned the very different approach of psychoanalysis - that of building a coherent self which can deal with the vicissitudes of psychic pain. Feminism's desire to change the world is not, of course, in the same vein as theories such as Marxism, which seek to replace one class in power for another. Radical feminism does not simply want to exchange women in power for men, though it supports women in positions of authority as a starting point to changing cultural archetypes, which in turn might change the boundaries of what a woman is and what sex in relation to her means. However, feminism's political platform cannot rely on the sameness of women, as the Crit-fems have demonstrated. MacKinnon's response to women's differences is hardly satisfactory. Besides, the psychoanalytically grounded ideas of J.C. Smith have suggested that those likely to become attracted to political ideologies of sameness

²⁷⁷ MacKinnon, *supra* note 2 at p.177: "Some women eroticize dominance and submission; it beats feeling forced."

and uniformity have a tendency to lose their identities into the leader's ego. Surely women have been doing this for ~~far~~ too long already to do it one last time in the name of feminism.

A broader conception of the scope of psychoanalysis is necessary. It is not a recipe for political apathy. Its task is to help women draw together the fragmented aspects of their undominated parts, and for men to question the masculinity imposed on them - to start building new kinds of marriages, role-models for raising children and conducting business. MacKinnon has argued that these actions would simply constitute a valorizing of the sexual stereotypes imposed on women. But there is also the argument that these qualities have been excised from the definition of maleness in this culture. Valorizing contrived femininity may redress a male-structured imbalance. In any case what alternative do we have? The only choices we have been conditioned to seek are maleness or femaleness. Foucault would probably say homosexuality is indicative of a liberation from sexual stereotyping, but feminists and psychoanalysts know that some forms of homosexuality are anchored in a stereotypical view of male and female, and are its product, just as male and female are themselves products. Vestiges of ancient Mycean Goddess civilization still linger in the psyches of men and women. According to J.C.Smith, the strength of the Dionysian element in the collective psyche manifests itself in the reactive strength of patriarchy. The ecology movement started with individuals who accepted a positive image of the Earth, a traditionally female metaphor. One argument might suggest that this political movement, like all others, relies on the abandonment of its members' identities. Janine Chasseguet-

Smirgel regards the popularity of the ecology movement in Germany as a manifestation of unconscious collective guilt. But the difference lies in the ecological rejection of hierarchy. In Nazi Germany, everyone, from the top to the bottom was labelled "Führer," and all had authority over someone beneath them, necessitating the status of the Jews as the group that even the lowest Aryan German could be Führer over.

It is difficult to engage in politics as we know it and be psychoanalytic. Psychoanalysis encourages introspection and views political ideology as projection. But the corollary is that psychoanalysis itself raises new questions for what counts as political - children, reproduction, dreams, thoughts: in short, an infinite variety of possibilities.

Psychoanalysis needs postmodernism because Foucault discusses the abusive way psychoanalysis has been used to control people. Freud exploited his position as analyst to create a hierarchy. Psychoanalysis needs to recognize that the process of analysis is the foundation of analysis, not the technique of the psychoanalyst. Nevertheless, psychoanalysis shares postmodernism's epistemological position. The transference situation, with its concept of counter-transference, is a metaphor for the relationship between the observed and the observer - it is contingent and intertwined. Thus, psychoanalysis is mentalist, not materialist, even though it talks about primary drives.

Postmodernism needs feminism because postmodernism fails to adequately deconstruct gender. Though it believes sexuality is

constructed, it does not distinguish between the significance of that construction for male and female arrangements. Foucault reduces everything to power, but power is not an end in itself. Feminism gives Foucault's power a purpose.

Feminism needs postmodernism because it asks interesting questions about the viability of using the category of women as the turning point for feminist collectivity - questions feminism itself has been indirectly addressing in the form of Critical feminist arguments against the exclusivity of radical feminism and its alleged, white, middle-class perspective.

Postmodernism needs psychoanalysis because it gives a name to all those multiple power relations: the ego's drive to differentiate or merge, depending on which satisfies its sense of survival, produces those who obey and those who control. Psychoanalysis is also a theory of mind, an issue Foucault does not explore, even though he acknowledges the mental component in knowledge.

Psychoanalysis needs feminism because it furnishes a social explanation for the kind of psychic difficulties women have, for example, securing their own ego boundaries. It also provides a context for why men need to dominate and control women and other men. MacKinnon argues that social relations of power determine the unconscious. What the psyche incorporates into the unconscious has a direct bearing on what society sanctions. Female sexuality for example, may be one of these repressed elements, repressed by social, male sanction, causing psychic pain to women. This links feminism with postmodernism.

Jane Flax reckons Foucault's theory is implicitly psychoanalytic:

Foucault believes that power is exercised as thousands of individual choices or acts of will, not as the massive external imposition of repression on the part of a police state. It is thus hard to make sense of his theory without imputing the existence of a mental quality similar to Freud's superego. ²⁷⁸

Resolving the postmodern perspectiva on power resolves the feminist perspective also, for these power relations are, according to psychoanalysis, unconscious and collectively endorsed.

Postmodernists believe in the existence of power. Control of knowledge is power's method. Feminists claim that that power is male. Psychoanalysts explain why that power is male and why females submit.

MacKinnon has already defined feminism as a way of knowing. ²⁷⁹ Her emphasis on consciousness raising sounds rather similar to the psychoanalytic setting. This approach to knowledge is echoed by Barratt and Foucault. Psychoanalysis is not a science. It shares the feminist claim of having access to a different reality through women's experience of the world. Thus, Barratt writes:

Psychic reality is necessarily defined in terms of the particular person's psychological processes; it comprises all that is real for the individual subject. It is an interiority of personal experiences and understandings...It is the private sense of reality, in which the person effectively lives. ²⁸⁰

Barratt later refers to Foucault as one of the new breed of

²⁷⁸ Flax, *supra* note 5

²⁷⁹ MacKinnon, *supra* note 2 at p.84

²⁸⁰ Barratt, *supra* note 105 at p.3-4

philosophers who recognize "the complicity of fact and theory, of observation and conception."²⁸¹ For Foucault knowledge is a way of thinking, so that the primary task is to question everything we regard as true.

All three theories have questioned the traditional idea of the self to the point where the existence of the self is a political concept. Feminism comes to this conclusion through the experience of losing the self. Psychoanalysis reaches this point by experiencing fragmented selves. Postmodernism has recognized that the relationship between knowledge and the knower creates knowledge in the image of the knower. The image of the knower for feminism is male.

We have many reasons for uniting the three theories. They all share the same concerns with the question of power, knowledge and their respective deconstruction.

But there are differences. Feminism and psychoanalysis would both object to the postmodern rejection of the concept of a self.

Postmodernism denies the need for the concept of the self as a basis for politics. This is surely an idea bred from the belief that the self can only exist in a relationship of domination because it is always looking outside itself for definition. Sexuality is a phenomenon which highlights this. It is a construct determined by the archetypes of the culture. Foucault calls for a sexuality that is not so determined but the psychoanalytic and feminist approach reject the viability of such an approach. Its premise is that the psyche must always seek definition from its environment. The theory of Object-

²⁸¹ Barratt, *supra* note 105 at p.36

Relations is rests on the idea that the psyche secures its boundaries by projecting itself onto outside objects. Feminism accepts the consequence of this when it acknowledges the difference in structure between dominated and domineering psyches. Feminism and psychoanalysis seek to maintain that struggle, which is the struggle of the psyche in its environment. But both call for a greater understanding that such a struggle takes place and encourage the introduction of better archetypes.

Do the theories mesh together well or do they drastically diverge? They da both. A combined theory which incorporates an understanding on all three areas - feminist, psychoanalytic and postmodern, would, I believe be timely and powerful. The British analyst, Andrew Samuels offers an avenue of understanding which acknowledges that conflict in theory is useful. In his recent book, *The Plural Psyche*, he raises the question of whether it is necessary to have a unitary merged theory in the first place. He focuses instead on pluralistic approaches to theory which echo the postmodern preoccupation with turning theory inside out. He advocates holding theories which share common threads, as well as conflicting ones, in balance after the model of the psyche itself, where psychic conflict is recognized as not only the main dynamic for creativity as well as pain, but as the human condition. Whilst he confines himself to the psychoanalytic context - that the discord and harmony within the psychoanalytic establishment is an allegory for the inner state of the collective psyches of the psychoanalytic establishment - I think such a theory could suit the tripartite relationship between

feminism, psychoanalysis and postmodernism. Samuels coins the term, "synchronic thought", to describe the necessary predisposition required to deal with the world pluralistically. He contrasts synchronicity with interpretation, which, he asserts, inherently involves the hierarchization of information since it consists of the deletion and separation of knowledge.²⁸²

The gaps in the discourses have not been completely bridged. The material I used for this paper were, in large part, works of writers whose focus of inquiry lay elsewhere. Given this scenario, a great deal of overlap exists between feminism, psychoanalysis and postmodernism. It is, I think, enough to justify more *self-conscious* attempts to produce a theory which takes the three theories as a foundation and point of departure.

²⁸² Andrew Samuels, *The Plural Psyche: Personality, Morality and The Father*, (1989), Routledge at p.25

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