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Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering

Ascanio Piomelli

This Article examines the considerable influence that French philosopher Michel Foucault’s conceptualization of power has had on U.S. theorists of lawyering for social change. Led by Professors Gerald López of New York University and Lucie White of Harvard, a substantial literature has emerged in the past two decades urging progressive lawyers to reshape their lawyering practices to collaborate more closely with clients and community groups. Proponents of this model of activist law practice have often invoked Foucault and acknowledged that his ideas about power underlie and inform their visions of lawyering. But until this Article, theorists of collaborative lawyering have not fully articulated, nor critically analyzed, the intellectual interconnections between Foucault’s views on power and this model of lawyering for social change.

Premised on a conviction that theoretical clarity and practical lawyering effectiveness go hand in hand, this Article provides an accessible exposition of Foucault’s complicated ideas about power, set in the larger context of his work, and a balanced assessment of their utility and limitations for social change lawyering. It uses an environmental justice scenario to help convey the collaborative approach to lawyering and the role that visions of power play in daily lawyering practice. It details the many ways in which Foucault’s view of power fits neatly with the projects of this model of collaborative lawyering and also reveals a number of areas in which his approach is unhelpful, areas in which these lawyers must part company with him and draw instead from other models of power and social change.

*Associate Clinical Professor, Civil Justice Clinic, Hastings College of the Law. I thank Jeremy Graham and Pragya Shukla for their research assistance and thoughtful discussions of Foucault’s ideas and Shauna Marshall, Miye Goishi, Mark Aaronson, Donna Ryu, Nancy Stuart, Jo Carrillo, Aaron Rappaport, Reuel Schiller, Vik Amar, Patti Chang, and Alan Chen for their wise suggestions. Joanne Lee’s extraordinary support and encouragement made this work possible.
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I. INTRODUCTION

In the words of Professor Lucie White, the French philosopher and social theorist Michel Foucault "was indisputably a genius, a paradigm smasher." Foucault argued that to understand and to change ourselves and our societies, we must fundamentally reshape the ways that we think about power and relationships—and where we search for this new understanding.\(^1\)

Influenced by Foucault's ideas on power, White and Professor Jerry López have engaged in paradigm smashing of their own. They have argued that to make real, lasting social change, lawyers dedicated to challenging economic, racial, cultural, environmental, and other forms of injustice must fundamentally reshape the ways that they think about themselves, their clients, and their clients' communities—and must expand the realms in which they operate.\(^3\) López and White have led a theoretical movement that urges lawyers interested in making social change to radically reconstruct their lawyering

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\(^2\) See infra Parts III and IV (discussing Foucault's distinctive approach to power).

practices. These theorists do not purport to have invented a new model of lawyering; rather they extol and carefully elucidate an approach to lawyering for social change, drawn from their practice and the work of others, that has not received the attention nor accolades that they believe it deserves.

Many labels have been attached to this approach to activist law practice, from “rebellious lawyering” or “community lawyering” to the most recent label: “law and organizing.” Situating my own work within this movement, I use the term “collaborative lawyering” because, in my view, the defining commitment is to lawyers’ engaged collaboration or partnership with clients and communities in joint efforts to change our society, culture, and polity. As I intend the term, collaborative lawyering is restricted to those who pursue broader social change by partnering with lower-income, working-class, and other marginalized clients and communities.

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5See, e.g., López, REBELLIOUS LAWYERING, supra note 3, at 5–9 (describing numerous lawyers and activists whose practices he sought to explore, emulate, and publicize); White, Mobilization on the Margins, supra note 3 (drawing from her work as legal services attorney and from public education efforts of theater troupe whose performances she attended); White, To Learn and Teach, supra note 3 (highlighting work of South African lawyer and organizer).

6Other labels used to describe this literature include: critical lawyering, the new poverty law scholarship, political lawyering, reconstructive poverty law, representational narrative scholarship, and the theories of practice movement. For my assessment of the drawbacks of these designations, see Piomelli, supra note 4, at 441–42 nn.61–67.


8See infra notes 238–332 and accompanying text. White uses the same label to describe this approach to activist practice. White, Collaborative Lawying, supra note 3, at 159.

9To be sure, some excellent examples of collaboration occur between lawyers and their corporate or upper-middle-class clients—in relationships untainted by conscious or unconscious assumptions of client incapacity or powerlessness.
The leading proponents of collaborative lawyering have acknowledged the influence of Foucault’s thinking about power on their model of lawyering, but they have not engaged in extended exploration of his ideas, nor in detailed analysis of the applicability and limits of those ideas for collaborative lawyering practice. Because of their importance and complexity, Foucault’s ideas about power warrant detailed exploration. Whatever one may think of him, he studied power elaborately and systematically. His ideas have circulated widely and now form part—a much-debated part—of our contemporary intellectual landscape.

For some theorists who criticize collaborative lawyering, Foucault is emblematic of the inaccessible, European, “postmodernist” social theory of which they believe proponents of these newer models of activist lawyering are too fond. Although experts on postmodernism do not categorize Foucault as a

Others use the term “collaborative lawyering” to describe an approach to family law practice in which lawyers work cooperatively and non-adversarially with attorneys for other parties to avoid the traumas of litigation. See Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce without Litigation 1 (2001) (noting why collaborative law should be applied to family law); James K.L. Lawrence, Collaborative Lawyering: A New Development in Conflict Resolution, 17 Ohio St. J. on Disp. Resol. 431, 432–33 (2002) (defining collaborative lawyering as a form of mediation advocacy in which all parties and attorneys sign agreement exclusively committing themselves to process of reaching negotiated settlement and arguing that such an approach “is especially well suited to the domestic relations context, in which children are often in the middle of the dispute, and where the two parties wish to create and maintain a working relationship after the dispute is settled”); id. at 432–37; D. Todd Sholar, Note, Collaborative Law—A Method for the Madness, 23 Memphis St. U. L. Rev. 667 (1993).

There are some similarities between the approaches of these family law practitioners and the work of the activist lawyers with whom I am concerned. As I thank Jo Carrillo for pointing out, they share, for example, an interest in extra-judicial channels for resolving disputes and an emphasis on involving clients in framing solutions that are consistent with their values. Nonetheless, my attention and comments are limited to attorneys engaged in what some refer to as “cause lawyering.” See, e.g., Carrie Menkel-Meadow, The Causes of Cause Lawyering: Toward An Understanding of the Motivation and Commitment of Social Justice Lawyers, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 37 (Austin Sarat & Stuart Scheingold eds., 1998) (defining cause lawyering as “any activity that seeks to use law-related means or seeks to change law or regulations to achieve greater social justice—both for particular individuals ... and for disadvantaged groups”). These lawyers consciously seek to change the world. Their primary collaborations are with their clients, their clients’ communities, and potential allies; they are not necessarily committed to avoiding or minimizing conflict with their client’s adversaries.

White explicitly acknowledges her indebtedness to Foucault’s conception of power, briefly sketching it and noting two of its limitations. See White, Faces of Otherness, supra note 1, at 1501–09. She also refers to López as the leading legal scholar applying Foucault’s insights on power to lawyering practice. Id. at 1502. López himself does not explicitly avow Foucault’s influence, but without attributing his thoughts to him, López describes power in ways quite similar to Foucault, see López, REBELLIOUS LAWYERING, supra note 3, at 41–42, and cites four works by Foucault in his bibliography. See id. at 397. For further discussion, see infra note 385. Alfieri explicitly acknowledges his adoption of Foucault’s approach to power. Alfieri, Reconstructive Practice, supra note 4, at 2120 n.43.

See Gary L. Blasi, What’s a Theory For?: Notes on Reconstructing Poverty Law
postmodernist, and he himself never adopted the label, the association of collaborative lawyering with postmodernism has provided an impetus or justification for some to dismiss these ideas on lawyering. The label and intellectual pedigree have unfortunately shed more heat than light, leading some to transpose their discomfort or disagreement with postmodernism onto the collaborative vision of lawyering.

Foucault's ideas warrant neither blanket veneration nor condemnation. What is needed is an accessible exposition of his ideas about power, a close examination of their relationship with collaborative lawyering, and a careful assessment of their utility and limits for activist lawyers. Such an exploration will illuminate ways in which Foucault's thought fits harmoniously with collaborative lawyering, realms in which collaborative theorists have presumed a better fit than actually exists, and areas in which collaborative lawyers part company with Foucault. It will also reveal ways in which collaborative lawyers already draw upon, and might fruitfully further investigate, other ideas about power and social change. In undertaking such an approach, I aim to enable readers to reach informed conclusions about one of collaborative lawyering's key intellectual foundations and to encourage those attracted to this model of practice to think even more deeply and search more widely for ideas about power.

Scholarship, 48 U. MIAMI L. REV. 1063, 1077–78 (1994); William H. Simon, The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era, 48 U. MIAMI L. REV. 1099, 1111–14 (1994). For an argument that these critics miss important aspects of the literature on collaborative lawyering, see Piomelli, supra note 4, at 446–86. There are other critiques of particular contributors to this literature. See, e.g., Cathy Lesser Mansfield, Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theories of Practice Movement, 61 BROOK. L. REV. 889, 897–925 (1995) (criticizing Alfieri's assumptions that clients are primarily interested in, or skilled at, telling their own stories and arguing that attorneys are far more likely to be able to craft effective stories); Peter H. Schuck, Public Law Litigation and Social Reform, 102 YALE L.J. 1763, 1766–69 (1993) (reviewing López, REBELLIOUS LAWYERING, supra note 3, and criticizing López's failure to articulate positive vision of social change that his rebellious lawyers seek to implement); Ann Southworth, Taking the Lawyer Out of Progressive Lawyering, 46 STAN. L. REV. 213, 226 (1994) (reviewing López, REBELLIOUS LAWYERING, supra note 3, and arguing López fails to appreciate technical legal expertise that pro bono attorneys provide to community organizations).

Leading expositors of postmodernism have noted that many aspects of Foucault's work are decidedly modernist and even premodernist. See STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 30–31 (1991); see also id. at 36 ("We do not read Foucault as a post-modernist tout court, but rather as a theorist who combines premodern, modern, and postmodern perspectives.").

Alfieri has most insistently affiliated these visions of lawyering practice with postmodernist thought. See, e.g., Alfieri, Reconstructive Practice, supra note 4, at 2121 (characterizing as "folly" any attempt to reject "postmodern criticism" of lawyerly neutrality); Alfieri, Stances, supra note 4, at 1235, 1248 (classifying lawyering models as either modernist or postmodernist). Although Alfieri affiliates his ideas with those of López and White, his approach is inconsistent with my vision of collaborative lawyering. For further discussion, see infra notes 299, 331, and 348.
Part II of this Article provides an orientation to Foucault’s general intellectual project in order to lay a foundation for comprehending his ideas about power. Part III details Foucault’s approach to understanding power as a process in which individuals and groups strategically manage the conduct of others and of themselves. Part IV explores the allure of Foucault’s vision of power and its influence on advocates of collaborative lawyering and details the connections between his approach and the ideas and practices of collaborative lawyers. Part V highlights some drawbacks of Foucault’s approach, ways in which it does not fit as well with collaborative practice as some might assume.

Of course, one might be skeptical from the outset of the notion that lawyers pursuing social change need a vision or theory of power at all—let alone need to analyze those ideas or consider alternative models. Perhaps the following scenario, a stylized account drawn from an amalgam of two real cases, can help reveal the importance of theories of power and the ways in which collaborative lawyers seek to reshape lawyering for social change.\(^{14}\)

San Francisco is an affluent, “postindustrial” city, but several of its neighborhoods do not share in the affluence. One such area is home to the city’s two electric power plants and most of its industrial facilities. Its residents are overwhelmingly people of color, whose incomes are much lower—and rates of respiratory illnesses are much higher—than those of other city residents. An out-of-state energy conglomerate is proposing to expand its existing power plant in the neighborhood. The new generator will produce much more electric power for the city (or for whomever else the conglomerate sells the power) and much more pollution for the neighborhood.

The conglomerate’s application is pending before the state energy commission, which forecasts the state’s energy needs and licenses the necessary plants to deliver that energy. The commission provides one-stop permitting for proposed power plants, providing all needed approvals without any separate land use or environmental review. Its staff of technical experts evaluates power generation and reliability issues and conducts an environmental review process. The commission holds informational hearings, accepts discovery requests, and allows interested groups to intervene. Its staff issues preliminary and final assessments, which are then the subject of a hearing before a committee of commissioners. The committee issues a proposed decision, which is voted on by the full commission.\(^{15}\)

The commission’s staff has identified three main issues of contention. The

\(^{14}\)I have not been directly involved in either of these cases, which arose from two adjacent neighborhoods in San Francisco, one in the mid-1990s and the other in the early 2000s. Two students from my Group Advocacy and Systemic Reform class worked on the early stages of the latter case. I have simplified some complexities involving which neighborhoods were involved and fictionalized the identities of the clients. As an outsider to the cases, what follows is not intended as a statement of what happened, but rather of how I might have thought and acted if I had been involved.

first concerns marine life, as the plant will take in large amounts of bay water for cooling and then discharge the heated water back into the bay. The second issue centers on visual impacts of the proposed plant and its vapor plume, which will be visible, not only locally, but also by more distant and affluent neighborhoods. The third issue, environmental justice/public health, arises from the disproportionate concentration of industrial uses in the neighborhood and its high rates of respiratory disease and cancers.

Several longtime residents of the affected neighborhood have contacted a nonprofit environmental law office in the city. One of the residents works as a janitor at the local middle school, another as an in-home health care aide, while a third is a retired bus driver. Blaming the existing plant for the cancer deaths of their spouses and the respiratory illnesses of their children and acquaintances, the clients want to stop the expansion of the plant.

If you were an attorney at this nonprofit environmental law office, what would you do? In large part, the answer would turn on your view of your role, your model of what it is that lawyers do. The understanding of your role is in turn affected by your vision of power. From among a myriad of potential role conceptions, I will focus on just two, a conventional view and a collaborative view, sketching what I might do and think if these were my visions of practice.

A Conventional View of an Attorney’s Role. If I were like many lawyers, I might view myself primarily as a legal expert, one who figures out how best to use my knowledge of the legal system to achieve the objectives that my clients set. Here, because the clients want to stop the power plant, or at least put up a good fight, I would figure out the substantive and procedural law and craft a strategy that maximizes the chances of legal victory. Because the issues are technical, I would work largely by myself and with other experts. I would lead the legal effort to thwart the conglomerate’s application.

Such an approach might lead me to pore through the conglomerate’s submissions to find gaps or inconsistencies, to search for any procedural requirements that either the conglomerate or the commission staff analysis fails to address, to look for scientific studies or other public data, and to enlist the assistance of scientific and engineering experts to review the conglomerate’s plans and the commission staff’s assessments. I would also research what options exist if the commission does approve the application, assessing the possible grounds for a subsequent court challenge, perhaps under Title VI of the Civil Rights Act or the Endangered Species Act. In crafting written

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comments, undertaking discovery, or hearing testimony, I would focus on persuading the commission, as well as a court reviewing the administrative record down the road.

I would look for the kind of evidence, likely expert and empirical, that the commission or a subsequent court would find compelling. I would likely plan to put my clients’ unfortunate personal losses into the record, but I would recognize that anecdotal evidence is not going to carry the day. These matters turn on complicated issues of technical fact. So, I would search for credentialed experts who have studied health data for the neighborhood, or would be willing to do so. Perhaps I would look for experts who might know of some form of marine life that might no longer survive in super-heated bay water. Or, if I could not find endangered guppies, maybe I could enlist inconvenienced yuppies, perhaps those whose views from a high-rise condominium would be marred by the long vapor plume from the new plant’s exhaust stack.

If someone pushed me to articulate how I view power, I would probably say that power is the capacity to achieve desired outcomes, to get one’s way over the opposition of others. It is the capacity to defeat others when an actual dispute arises. And, recalling some political science from college, power is also the capacity to get an issue on the agenda or to keep it off—by dissuading others from even trying to contest the outcomes that the powerful have engineered or desire. Some people and institutions have power; some do not. It is usually quite clear who has it and who does not. And, for the most part, that does not change much over time. Those on top have power and wield it over those below them. They use their institutional positions and economic, intellectual, and political resources to command or coerce the less powerful to accede. In this case, the commission and the conglomerate have power, a judge down the line would have it, and my clients do not. Neither does their neighborhood, which is essentially powerless because its residents lack the economic resources, education, and racial composition that policymakers and powerful actors respect. Indeed, if the neighborhood did have power, it would not be a dumping ground for undesirable land uses.20

Those without power need to find someone who has it. That is why clients visit lawyers. Lawyers have power. As lawyers, we can put issues onto the public agenda. We understand the complex processes and standards through which decisions like these are made. And we are not afraid to challenge

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19See Peter Bachrach & Morton S. Baratz, The Two Faces of Power, 56 AM. POL. SCI. REV. 947 (1962), reprinted in PETER BACHRACH & MORTON S. BARATZ, POWER AND POVERTY: THEORY AND PRACTICE 3–16 (1970); see also BACHRACH & BARATZ, supra, at 8 (“[T]o the extent that a person or group—consciously or unconsciously—creates or reinforces barriers to the public airing of policy conflicts, that person or group has power.”).


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commissions, conglomerates, or other powerful entities. If anything, we are energized by the prospect of battle. Indeed, it is our expert knowledge of the legal and administrative system and our ability to access and deploy other experts’ knowledge that give powerless clients a fighting chance. As public interest lawyers, working on behalf of less powerful and less fortunate clients, we can use our technical skills to balance the scales of power. By speaking truth and utilizing law, we can, at least sometimes, prevent the powerful from running roughshod over the powerless.

A Collaborative View of an Attorney’s Role. Under a collaborative vision of lawyering, the conventional approach would be too narrow—because it fails to meaningfully include the clients and community that it seeks to serve. Instead of working primarily on my own as a technical legal expert, I would see my role more expansively. I would build and use productive partnerships with my clients and other actors in the neighborhood or allies outside it to collectively fight the conglomerate’s plan. I would aim to win this particular struggle over the power plant and also to enhance the clients’ and neighborhood’s prospects in future struggles as well.

My approach would require and use all of the same technical legal skills and activities of the previous model: examining documents, searching for procedural traps, developing evidence, enlisting expert assistance, crafting arguments, planning strategy, and drafting responses. But I would engage in those activities with a different orientation—not just to work against the plant’s expansion, but also with my clients and their neighborhood and potential allies. Rather than simply having clients approve strategies that I develop and implement, in a collaborative approach my clients, other members of the neighborhood, and I would work together to frame strategies that all of us would implement. We would share the hard work and the limelight.

In addition to those traditionally recognized lawyering activities, my work would also require additional knowledge and skills. I would strive for fluency not just in the legal, administrative, and scientific worlds, but also in the lay world of my clients and their community, as well as the broader political world of the city, state, and nation. I would embrace, as central to my practice, understanding these worlds and translating between them. 21

To meet that challenge, I would confer more often and in more detail with my clients. I would not only seek to grasp their ultimate objectives, but also to draw out their ideas of how we might proceed. I might learn, for example, that they feel the neighborhood is being poisoned because government officials do not care about the lower-income people of color who live there. Defeating the

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21 Attention to the differences in these worlds would reveal, for example, the very different weight that evidence labeled merely “anecdotal” or “cumulative” in the legal arena would carry in the neighborhood, media, and larger political realm. Clark Cunningham has insightfully explored the applicability of the metaphor of translation to the work of lawyers. See Clark D. Cunningham, The Lawyer As Translator, Representation As Text: Towards An Ethnography of Legal Discourse, 77 CORNELL L. REV. 1298, 1331–39 (1992).
plant might be their highest priority and they might be fine with seeking out
guppies or yuppies with whom to join cause. But it is also possible that the
clients might feel emphatically that a win based on the impact on marine life or
distant condominium owners would precisely reinforce the problem: that
neighborhood residents are not seen as worth protecting, their lungs and lives
are not deemed as important as rich people's views or pet causes.

In addition to working with each other, my clients and I would need to
understand how others perceive what is happening. We would need to immerse
ourselves in the neighborhood to learn about community members, groups, and
other service providers with whom we might ally in tackling the problem, as
well as those with whom we might disagree or clash. It would mean many
meetings, formal and informal, to find out who else was interested, whom they
might know, and what each of them might be willing to do. We would not
always agree and I would not go along with every suggestion, but through a
process of give and take we would eventually develop a strategy that my
clients, a critical mass of other participants, and I could all embrace.

Our work might lead to a strategy in which residents help identify and
map every toxic and polluting site in the neighborhood. We—clients, other
residents, local and outside allies, and I—might publicize the map in the
neighborhood and present it to the city and to the commission. We might use
the map and publicity to pressure the city's department of health to perform a
community health assessment to document abnormally high rates of illness.
Even if the assessment reached no conclusions on causation, we could
publicize those results through the media and community to rally opposition to
the power plant. We might bring in people from other communities that have
faced similar situations. All these efforts might in turn bring out large numbers
of residents to testify at the commission hearing—to share their concerns about
unfair allocation of health risks and to tell story after story detailing the health
impacts on their families and neighbors. We might publicly pressure the city
government to hold hearings and privately encourage city officials not to
cooperate with the plant expansion and even to derail it by refusing to grant
necessary easements or accommodations.22

In all these efforts, I would play an important role, sharing legal expertise
and other ideas. But I would do so as a partner in a group effort, as more of a
co-equal than a dominant force. The result might even be a strategy of enlisting
outside conservationists and condominium owners concerned about marine life

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22A very similar set of strategies was utilized in Bayview-Hunters Point, a community in
San Francisco, to defeat a proposed power plant in 1996. See Clifford Rechtschaffen, Fighting
Back Against a Power Plant: Some Lessons From the Legal and Organizing Efforts of the
Bayview-Hunters Point Community, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 407, 412–24
(1996); Diane Schwartz, Environmental Racism: Using Legal and Social Means to Achieve
Environmental Justice, 12 J. ENVTL. L. & LITIG. 409, 422–29 (1997). While lawyers operating
under a conventional model might also seek to pressure politicians and public officials, they
would likely view the political realm as another one in which success would turn on their own
skills or contacts, rather than the participation of clients and other nonlegal allies.
or visual impacts, but they would be invited into an active coalition of engaged neighborhood residents and their allies.

If someone asked me about power, I would begin by rejecting a stark dichotomy between the “powerful” and “powerless.” Life and relationships are more complex: the powerful do not control things quite as much as they think they do and the powerless contest relationships and make more space for themselves to survive than is generally recognized. Everyone has power; there is no escaping it. We all try to persuade others to act in ways that meet our needs and desires: lawyers and janitors, conglomerates and neighbors.

If anyone expressed surprise that I had thought about power, I would be blunt: it is essential to doing this kind of work responsibly. How can one hope to make social change without an understanding of power? In any conception, power plays a central role in efforts either to maintain or to alter the status quo. Certainly to the extent that we as lawyers, or the people with whom we work, profess an interest in “empowerment,” we need to know what power means. Moreover, if I am concerned with means as well as ends, I need to recognize and monitor the power dynamics in my relationships with clients and communities. And finally, I need to understand power because that is what my clients, their neighbors, allies, and I are exercising when we try to manage and alter the conduct and ideas of others—be they the commission, the conglomerate, the media, the neighborhood, city officials, or the larger public.

I would add that because power is what we exercise and contest as we try slowly but steadily to change the world, I am always interested in different approaches to understanding power and making constructive use of it. One author who speaks to many issues that arise in this work is Michel Foucault. He is hardly the first, and certainly not the only, influence for anyone striving to make social change. Our formative life experiences, political ideas, and conversations in kitchens, cafes, parks, meetings, and rallies all see to that. Nonetheless, Foucault’s systematic, if sometimes elusive, thinking about power warrants careful examination.

II. AN ORIENTATION TO FOUCALUT’S THOUGHT

To facilitate an understanding of Foucault’s approach to power, I will first sketch the broader context of his intellectual concerns and projects. My goals are to provide a sense of his key aims at different points in his career and to

23White and Alfieri have identified client empowerment as the goal of their visions of lawyering. See Alfieri, Antinomies of Poverty Law, supra note 4, at 664; White, Paradox of Lawyering for the Poor, supra note 3, at 871–73. As I have elaborated elsewhere, I am not enamored of the term “empowerment” because of its ambiguity (regarding who is the active agent), widespread deployment (often paternalistic), and implicit assumption that some people lack power. See Piomelli, supra note 4, at 472 n.218.

24See infra notes 386–89 for a few of the other thinkers whose ideas about power influence collaborative lawyers or might warrant further exploration.
FOUCAULT’S APPROACH TO POWER

highlight some themes that help to explain his approach to power and his influence on U.S. theorists of activist lawyering.

The diversity and complexity of Foucault’s ideas make any attempt at a unitary summary or synthesis of a fool’s venture. Indeed, Foucault himself had trouble summarizing his project. That his work deliberately cut across the intellectual disciplines of philosophy, history, and sociology compounds the difficulty. Moreover, his work was distinctively French—not simply in its style, but fundamentally in its primary examples, concerns, and unspoken targets. But the biggest challenge—to summary or synthesis—is that his thought constantly changed. Any search for theoretical unity is likely doomed to failure because he refused to see himself as producing a unified body of theoretical work. Instead, he viewed his writings as a “toolkit,” in which he and others could rummage to find and use whatever they found useful for the immediate task at hand and ignore or discard anything unhelpful for the next project. Indeed, rather than striving for consistency, Foucault revealed in what detractors might view as inconsistencies or contradictions, but admirers would characterize as evolutions in his thought.

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25 See infra note 28.

26 As his leading expositors in the United States readily concede, “there is also a form of French provincialism in his theoretical claims . . . [T]he bulk of the historical material, its real frame of reference, and the theoretical opponents Foucault secretly jousts with are all French.” HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 127 (2d ed. 1983).

One of his biographers reports that Foucault “insisted that his texts were a toolkit to be used or discarded by anyone and not a catalogue of theoretical ideas implying some conceptual unity” and quotes Foucault in a 1975 interview, not yet translated into English: “I certainly do not see what I do as a body of work . . . , I sell tools.” DAVID MACHEY, THE LIVES OF MICHEL FOUCAULT: A BIOGRAPHY xx–xxi (1993). Indeed, one commentator has argued that Foucault’s work is distinctive precisely because it is “ad hoc, fragmentary, and incomplete.” Gary Gutting, Introduction to THE CAMBRIDGE COMPANION TO FOUCAULT 1, 2 (Gary Gutting ed., 1994) [hereinafter CAMBRIDGE COMPANION]. Gutting views the theories Foucault constructs as “not intended as permanent structures, enduring in virtue of their universal truth. They are temporary scaffolding, erected for a specific purpose, that Foucault is happy to abandon to whomever might find them useful, once he has finished the job.” Id. at 16.

28 Alan Hunt and Gary Wickham, in one of legal literature’s best introductions to Foucault’s thought, refer to a “complex self-scrutiny” that leads Foucault to “persistently revise[] and rework[]” his ideas. ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 3 (1994). If one sought to be true to Foucault’s thought, these changes in his ideas would be better characterized as mutations than evolutions, in order to avoid any connotation of a natural, teleological unfolding. See infra notes 75–76 and accompanying text.

Foucault’s attempts at summarizing his work were a common source, depending on one’s stance, of either contradictions or evolutions. In a 1977 interview, he stated that “[w]hen I think back now, I ask myself what else it was that I was talking about, in Madness and Civilization or The Birth of the Clinic, but power?” Michel Foucault, Truth and Power [hereinafter Foucault, Truth and Power], in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977, at 109, 115 (Colin Gordon ed., Colin Gordon et al. trans., 1980) [hereinafter POWER/KNOWLEDGE]. A year later, he stated: “My general theme . . . [is] the discourse of true and false, by which I mean the cumulative formation of domains and objects and of the
wrote to change himself. Commentators on his work consequently refer to the existence of many different Foucaults.

A. Foucault’s Chief Intellectual Projects

Among his most famous works are “histories” of madness, the medical clinic, the prison, and sexuality. A recurring topic of many of his works

for me intellectual work is related to what you could call aestheticism, meaning transforming yourself. . . . My problem is my own transformation. That’s the reason also why, when people say “Well, you thought this a few years ago and now you say something else,” my answer is, [Laughter] “Well, do you think I have worked like that all of those years to say the same thing and not to be changed?”


Hunt and Wickham write: “[T]here is no ‘real Foucault’ . . . . Rather, we argue that it is a useful strategy to insist that there are many ‘Foucaults’ who coexist and interact with one another.” HUNT & WICKHAM, supra note 28, at 3. Similarly, another commentator notes that “[a]s he moves from one topic to another, . . . his methods and purposes seem to change. So there may not be a single ‘Foucault.’” David Couzens Hoy, Introduction to FOUCAULT: A CRITICAL READER 1, 2 (David Couzens Hoy ed., 1986) [hereinafter CRITICAL READER]. Because chronology is often at least a clue as to which Foucault one is encountering, I regularly note the date of interviews and essays cited.


See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 1979) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH],
was the birth and growth of the “human sciences,” by which he intended those fields—such as psychology, psychiatry, psychoanalysis, sociology, penology, and medicine—that sought to study and to shape humans and their behavior.\textsuperscript{35} In addition to his book-length investigations, he made prodigious use of interviews and essays\textsuperscript{36} to preview, defend, and attempt to clarify or synthesize his books.\textsuperscript{37}

From 1970 until his premature death in 1984, Foucault was a member of the Collège de France,\textsuperscript{38} France’s most prestigious intellectual institution,

originally published as \textit{Surveiller et punir: Naissance de la prison} (1975). As translator Alan Sheridan has noted, finding an appropriate English translation of the initial French infinitive and impersonal imperative “Surveiller” proved too challenging and Foucault himself suggested substituting “Discipline.” Alan Sheridan, \textit{Translator’s Note to Foucault, Discipline and Punish, supra}, at ix. Options that Sheridan considered but discarded were “supervise” and “observe.” \textit{Id}. In my opinion, “oversee” is an English translation of surveiller that has the expansive sweep of the French term as used by Foucault.

\textsuperscript{34}Foucault completed three volumes of what he initially conceptualized as a six-volume study of sexuality. The first volume in the series is a translation of \textit{Histoire de la sexualité, Vol. I: La volonté de savoir} (1976). \textit{See 1 Michel Foucault, The History of Sexuality: An Introduction} (Robert Hurley trans., Pantheon 1978) [hereinafter \textit{Foucault, The Will to Know}]. The English translation fails to include the French subtitle, which refers to “The Will to Knowledge” or “The Will to Know.” Foucault subsequently revised the project into an anticipated four volumes, the last of which was not published by the time he died. \textit{See 2 Michel Foucault, The History of Sexuality: The Use of Pleasure} (Robert Hurley trans., Pantheon Books 1990) (1984) [hereinafter \textit{Foucault, The Use of Pleasure}] ; \textit{3 Michel Foucault, The History of Sexuality: The Care of the Self} (Robert Hurley trans., Pantheon Books 1986) (1984) [hereinafter \textit{Foucault, The Care of the Self}].


\textsuperscript{37}He also published, with only brief comments, documents uncovered in the course of his historical investigations. \textit{E.g., Michel Foucault, Herculine Barbin, Being the Recently Discovered Memoirs of a Nineteenth-Century French Hermaphrodite} (Richard McDougall trans., Pantheon 1980) (1978); \textit{Michel Foucault, I, Pierre Riviere, Having Slaughtered My Mother, My Sister, and My Brother... A Case of Parricide in the Nineteenth Century} (Frank Jellinek trans., Pantheon 1975) (1973).

\textsuperscript{38}Members of the Collège elect their peers to lifetime appointments, which carry no teaching obligations, as the institution has no students and awards no degrees. Each member is simply required to present her or his original research through ten lectures a year that are open to
where he held the self-designated "Chair in the History of Systems of Thought." As one might not surmise from the title he gave his chair, Foucault was interested not just in how we think, but also in how we act. His work, with only a few exceptions in the 1960s, examined both ideas and practices. He was particularly interested in unraveling why, at different historical times, we in the West have thought and acted the way we have. He sought to uncover the "conditions of possibility" for a particular era's ideas and practices, the conditions that make ideas and practices "acceptable at a given moment." By the 1970s, Foucault's exploration of these conditions was not simply descriptive, but purposeful. Triggered by a conviction that certain aspects of the present were "intolerable," he went back into history to uncover the genesis of those ideas and practices. He tended to reject simple causal explanations and to sidestep either-or formulations. Instead he traced the convergence of many ideas and practices and the role of chance in bringing them together at a particular historical moment. In so doing, he sought to write the "history of the present," as a way of showing that the ways we think and act are not inevitable—they have changed over time and thus are changeable again.

the public. ALAN SHERIDAN, MICHEL FOUCAULT: THE WILL TO TRUTH 120 (1980).

There are two chief English-language biographies of Foucault. See DIDIER ERIBON, MICHEL FOUCAULT (Betsy Wing trans., 1991) (1989); MACEY, supra note 27. There is also a controversial work that seeks to interpret Foucault's ideas through an examination of some of the more titillating aspects of his personal life. See JAMES MILLER, THE PASSION OF MICHEL FOUCAULT (1993).

As Foucault stated: "There is always a little thought even in the most stupid institutions; there is always thought even in silent habits." Didier Eribon, Is It Really Important to Think?, LIBÉRATION (Paris), May 30–31, 1981, reprinted as Michael Foucault, Practicing Criticism, in POLITICS, PHILOSOPHY, CULTURE, supra note 29, at 152, 155 [hereinafter Foucault, Practicing Criticism]. In 1978, he defined "practices... as places where what is said and what is done, rules imposed and reasons given, the planned and the taken-for-granted meet and interconnect." Foucault, Questions of Method, supra note 28, at 225.

See, e.g., FOUCAULT, THE BIRTH OF THE CLINIC, supra note 32, at xix ("The research that I am undertaking here therefore involves... determining the conditions of possibility of medical experience in modern times."); FOUCAULT, THE ORDER OF THINGS, supra note 35, at xxii ("[W]hat I am attempting to bring to light is the epistemological field, the episteme in which knowledge... manifests a history which is not that of its growing perfection, but rather that of its conditions of possibility.").

See Foucault, Questions of Method, supra note 28, at 225.

See Gary Gutting, Introduction to CAMBRIDGE COMPANION, supra note 27, at 1, 10. For example, Discipline and Punish, supra note 33, can be understood as flowing from his finding imprisonment (not just prison conditions) as intolerable and The Will to Know, supra note 34, from his finding intolerable the compulsion to discover and confess—be it to a priest or a therapist—one’s sexuality as an expression of the truth about oneself.

He described his method in 1978 as "shaking... false self-evidence, ... demonstrating... precariousness, ... making visible not... arbitrariness but... [the] complex interconnection with a multiplicity of historical processes." Foucault, Questions of Method, supra note 28, at 225.


In a 1984 interview, Foucault explained that this sort of analysis "reveals the precariousness, the nonnecessity, and the instability of things." Interview with Actes, in
B. Stages of Foucault’s Work

When viewed as a whole, Foucault’s project can be seen as an exploration of how the ways in which we think, speak, act, and understand ourselves are shaped or governed by our times, by others, and by ourselves. At different stages in his career, he tackled different aspects of this project, fashioning different methodological tools and approaches.

Early in his work, he focused on thoughts and utterances and how they are shaped by their times. More specifically, he analyzed the role that accepted discourses play in setting the limits of what can and cannot be said or thought, how discourses change and interact, and he charted the underlying epistemes, or deep structures of thought, of different historical eras. To distinguish his method from traditional approaches to the history of ideas, he labeled this mode of analysis “archaeology”—in part because he ignored such surface issues as what people said and whether their thoughts were true in order to unearth the underlying regularities that unconsciously shaped the exposition of ideas within a particular discourse or era.

In the middle period of his work, during the 1970s, Foucault shifted his focus to actions, practices, and self-understandings and how they are shaped or

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Essential Works, supra note 28, at 394, 399 [hereinafter Interview with Aesctes].

The works that I place in his early period are: Michel Foucault, The Archeology of Knowledge (A.M. Sheridan trans., Harper & Row, 1976) [hereinafter Foucault, Archaeology of Knowledge] and Foucault, The Order of Things, supra note 35.

Brian Fitzgerald has defined discourse as:

[A] group of statements which provide a language for talking about—i.e., a way of representing—a particular kind of knowledge about a topic. When statements about a topic are made within a particular discourse, the discourse makes it possible to construct the topic in a certain way. It also limits other ways in which the topic can be constructed.


See Ian Hacking, The Archaeology of Foucault, in Critical Reader, supra note 30, at 27, 30–35 (describing Foucault’s concern as one for “depth knowledge” of era). In what was then the heyday of structuralism in France, Foucault’s approach to uncovering the deep structure of historical systems of thought led many to label him a structuralist—a label he later emphatically rejected. See, e.g., Foucault, Archaeology of Knowledge, supra note 47, at 15–16 (stating structuralist “kind of analysis is not specifically used”).

His objective was “to reveal a positive unconscious of knowledge: a level that eludes the consciousness of the scientist and yet is part of scientific discourse.” Foucault, The Order of Things, supra note 35, at xi. He was interested in “the rules that come into play in the very existence” of a particular discourse: the conditions that a participant had to fulfill in order “to give it, at the time when it was written and accepted, value and practical application as scientific discourse—or, more exactly, as naturalist, economic, or grammatical discourse.” Id. at xiv.
governed (albeit imperfectly) by a multiplicity of others.51 Aimed at a broader audience than his "archaeological" books,52 his first major work of this period was Discipline and Punish, which traced how imprisonment emerged as the dominant form of punishment contemporaneously with the refinement and spread of a number of techniques for watching, training, tracking, and managing people.53 His next book, The Will to Know, examined how human beings have been trained by experts to confess and analyze their sexuality in order to understand the truth about themselves.54 Using a new methodological tool that he labeled "genealogy,"55 Foucault expressly turned his attention to issues of power and its complex interconnection with knowledge. As a genealogist, he traced the "emergence" and "descent" of ideas and practices and placed them in the context of endemic struggles that result in domination and exclusion.56 These works, along with numerous interviews in the late 1970s, contain the key expositions of his approach to power that have influenced theorists of collaborative lawyering.

In the 1980s, during the final period of his work, Foucault switched focus again, turning to how and to what extent we ourselves govern our own practices and self-understandings.57 His genealogical quest to trace the descent and emergence of the notion of understanding oneself through one's sexual

51 The chief works that I regard as comprising his middle period are: Foucault, Discipline and Punish, supra note 33; Foucault, The Will to Know, supra note 34; Foucault, Power/Knowledge, supra note 28.

52 Although it was a French bestseller, Foucault intended The Order of Things, supra note 35, as "a very technical book . . . addressed, above all, to the technicians of the history of the sciences. [It was] meant . . . essentially for researchers." Trombadori, Interview with Foucault, supra note 29, at 267. He wrote Discipline and Punish, supra note 33, as "a history book that would make the present situation comprehensible and, possibly, lead to action"; thus he wanted it to be "read by a wider public than one made up of students, philosophers, or historians." Michel Foucault, On Power, in Politics, Philosophy, Culture, supra note 29, at 96, 101 (1978 interview) [hereinafter Foucault, On Power].

53 Foucault, Discipline and Punish, supra note 33 passim.

54 Foucault, The Will to Know, supra note 34 passim.

55 Foucault's most extensive discussion of the genealogical method is contained in his essay on Friedrich Nietzsche's methodology. See Michel Foucault, Nietzsche, Genealogy, History, in Hommage à Jean Hyppolite 145, 152–72 (1971), reprinted in 2 Essential Works, supra note 36, at 369–91 [hereinafter Foucault, Nietzsche, Genealogy, History]. Despite Nietzsche's significant impact on his thought, particularly on his works of the 1970s, this essay is the only extensive examination Foucault published on his intellectual mentor. At the heart of genealogy is the search to "record the singularity of events outside of any monotonous finality." Id. at 369.

56 Rather than seeking historical origins—rather than "pretend[ing] to go back in time to restore an unbroken continuity"—genealogy traces descent in order to "identify the accidents, the minute deviations—or conversely, the complete reversals—the errors, the false appraisals, and the faulty calculations that gave birth to those things which continue to exist and have value for us . . . ." Id. at 374. Moreover, genealogy locates the emergence of ideas and other phenomena in "the endlessly repeated play of dominations," in "a particular state of forces." Id. at 376.

57 The works I assign to this final period are: Foucault, The Care of the Self, supra note 34, and Foucault, The Use of Pleasure, supra note 34.
conduct led him back through Christian practices of confession and penance to Greek and Roman antiquity. Specifically, he focused on the Greco-Roman literature on sexual behavior that sought to guide elite men regarding how to exercise their freedom to optimally shape themselves and their lives.\textsuperscript{58} His examination of this literature focused on what he labeled “technologies of the self”—those techniques for understanding and acting on oneself that enable individuals to work “on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality.”\textsuperscript{59} In turning to ethics\textsuperscript{60} to how we shape ourselves, he consciously sought to correct what he and others saw as his overemphasis on how others shape us.\textsuperscript{61} An increased attention to freedom permeated many of his later works, and led, as we shall see, to important modifications to his views on power.\textsuperscript{62} Even as his primary attention shifted to how we actively form ourselves, he never lost sight of the roles that our times and others play.\textsuperscript{63}

\textsuperscript{58}Foucault analyzed the Greco-Roman literature that “proposed” rather than “imposed” austerity or moderation in sexual matters, noting the emphasis it placed on the relationship with the self that enabled a person to keep from being carried away by the appetites and pleasures, to maintain a mastery and superiority over them, to keep his senses in a state of tranquility, to remain free from interior bondage to the passions, and to achieve a mode of being that could be defined by . . . the perfect supremacy of oneself over oneself.

\textsuperscript{59}Michel Foucault, \textit{Technologies of the Self}, in \textit{1 ESSENTIAL WORKS}, supra note 28, at 223, 224–25. Other terms he used were “arts of existence” and “techniques of the self.” See FOUCAULT, \textit{THE USE OF PLEASURE}, supra note 34, at 10–11.

\textsuperscript{60}Foucault distinguished two different aspects or meanings of morality. The first entails following a moral code, “a set of values and rules of action” suggested or imposed by “prescriptive agencies such as the family . . . , educational institutions, churches, and so forth.” FOUCAULT, \textit{THE USE OF PLEASURE}, supra note 34, at 25. The second sense of morality is more inner-focused and self-generated, it is not so much obeying a set of prescriptions and interdictions formulated by others as it is shaping oneself into the subject of one’s own ethics, of shaping one’s conduct and turning oneself into an embodiment of one’s morality. Foucault referred to this second sense of morality as “ethics.” \textit{Id.} at 28–29. It was this ethics that he sought to analyze: the “modes of subjectivation” and the “practices of the self” through which humans seek to shape and transform themselves. \textit{Id.} at 28.

\textsuperscript{61}As Foucault ultimately conceded in a lecture in 1980:

[|]f one wants to analyse the genealogy of the subject in Western civilisation, one has to take into account not only techniques of domination but also techniques of the self. Let‘ssay: one has to take into account the interaction between those two types of techniques—techniques of domination and techniques of the self.

. . . When I was studying asylums, prisons and so on, I insisted, I think, too much on the techniques of domination. . . . [D]iscipline is . . . only . . . one aspect of the art of governing people in our society.


\textsuperscript{62}See infra notes 141–42, 234–37 and accompanying text (discussing Foucault’s emphasis in his later works on freedom of action and the imperative to “practice liberty”).

\textsuperscript{63}As he stated in an interview in 1984: “[|]f now I am interested . . . in the way in which
Foucault’s writings of the 1970s, which remain better known than his final works, brought him international celebrity and notoriety. They also engendered a critique that his vision is fundamentally pessimistic—depicting us as thoroughly trapped and dominated by supervisors and experts—and myopically focused on micro-practices and micro-relationships. The force of the latter criticism has been blunted by the posthumous publication of Foucault’s works in the late 1970s and early 1980s that examined government and its rationalities and the management of populations.

the subject constitutes himself in an active fashion, by the practices of self, these practices are . . . not something that the individual invents by himself. They are patterns . . . proposed, suggested and imposed . . . by his culture, . . . society and . . . social group.” Foucault, The Ethic of Care for the Self, supra note 28, at 11.

Part of Foucault’s notoriety may flow from his conscious use of his celebrity in a variety of activist, even militant, causes, such as those of prisoners (many of whom were self-proclaimed Maoists or other ultra-leftists), Eastern European dissidents, and international refugees. See ERIBON, supra note 39, at 225–69; MACEY, supra note 27, at 256–322, 378–414, 436–48.

The question of the pessimism or optimism of his work is a litmus test for response to his work. Critics, often citing his books, see pessimism. See, e.g., Nancy Hartsock, Foucault on Power: A Theory for Women?, in FEMINISM/POSTMODERNISM 157, 167–68 (Linda J. Nicholson ed., 1990) (discussing Foucault’s profound pessimism). Foucault, usually in interviews, and his admirers see optimism. As Foucault insisted in 1978:

[I] think there are a thousand things that can be done, invented, contrived by those who, recognizing the relations of power in which they are involved, have decided to resist them or escape them. From that viewpoint, all my research rests on a postulate of absolute optimism. I don’t construct my analyses in order to say, “This is the way things are, you are trapped.” I say these things only in so far as I believe it enables us to transform them.

Trombadori, Interview with Foucault, supra note 29, at 294–95 (emphasis added).

For examples in the lawyering literature of the critique of excessive attention to micro-practices and individual relationships, see Blasi, supra note 11, at 1089–90; Joel F. Handler, Postmodernism, Protest, and the New Social Movements, 26 LAW & SOC’Y REV. 697, 704–05 (1992); Simon, supra note 11, 1108–14. For a response to those criticisms, see Piomelli, supra note 4, at 443–86.


See, e.g., Michel Foucault, The Political Technology of Individuals, in 3 ESSENTIAL WORKS, supra note 28, at 403–17 [hereinafter Foucault, Political Technology of Individuals]. As Foucault stated in this 1982 lecture: “[T]he true object” of public policy becomes “the
Another way of approaching Foucault's project is to view it as a critical interrogation\(^{68}\) of our contemporary Western rationality.\(^{69}\) He sought to analyze who we are now—"the nature of the present" and of "ourselves in the present"—and how we got to be this way.\(^{70}\) His goal was to question ideas and practices in order to discover what it might mean to think and act differently.\(^{71}\) He strived to detach himself from received ways of thinking and acting—and he encouraged his readers to do the same.\(^{72}\) The key aim, in his view, "is not to

population, or, in other words, the state has essentially to take care of men as a population." \textit{Id.} at 411.

\(^{68}\) Given his typical reticence in proposing alternatives or in articulating his principal values, this interrogation can seem somewhat akin to a cross-examination that is never followed by a closing argument. \textit{See infra} notes 86–89 and accompanying text.

\(^{69}\) \textit{See Colin Gordon, Afteword to POWER/KNOWLEDGE, supra note 28, at 229, 231} (referring to Foucault's "underlying interrogation of a whole contemporary order of rationality").

As Foucault stated in a 1967 interview:

It is hard for me to classify a form of research like my own within philosophy or within the human sciences. I could define it as . . . something like an ethnology of the culture to which we belong. I do in fact seek to place myself outside the culture to which we belong, to analyse its formal conditions in order to make a critique of it, . . . in order to see how it was actually constituted. . . . [I am performing an ethnology] of our rationality, of our "discourse."

\textit{Who Are You, Professor Foucault?, in RELIGION AND CULTURE, supra note 61, at 91.}

\(^{70}\) As Foucault put it in 1983: "[T]he time we live in is very interesting; it needs to be analyzed and broken down, and . . . we would do well to ask ourselves, 'What is the nature of our present?' . . . the task of philosophy is to describe the nature of the present, and of 'ourselves in the present.'" \textit{Gerald Raulet, Structuralism and Post-Structuralism: An Interview with Michel Foucault, 55 TELOS 195, 206} (Spring 1983), \textit{reprinted as Critical Theory/Intellectual History, in POLITICS, PHILOSOPHY, CULTURE, supra note 29, at 17, 36} [hereinafter \textit{Critical Theory}].

In framing the philosophical task in this way, Foucault in his later years often paid homage to Immanuel Kant as the originator of this approach in his 1784 response to the \textit{Berlinerische Monatschrift} periodical's query, "What Is Enlightenment?" As Foucault elaborated in a 1982 essay: "Kant . . . meant, 'What's going on just now? What's happening to us? What is this world, this period, this precise moment in which we are living?' . . . What are we . . . as part of the Enlightenment? . . . Kant's question appears as an analysis of both us and our present."

\textit{Foucault, The Subject and Power, supra note 28, at 208.}

\(^{71}\) In 1984, Foucault declared:

There are times in life when the question of knowing if one can think differently than one thinks and perceive differently than one sees, is absolutely necessary . . .

In what does [philosophical activity] consist, if not in the endeavor to know how and to what extent it might be possible to think differently, instead of legitimating what is already known . . .

\textit{FOUCAULT, THE USE OF PLEASURE, supra note 34, at 8–9.}

\(^{72}\) In 1978, he stated: "The experience through which we grasp the intelligibility of certain mechanisms . . . and the way in which we are enabled to detach ourselves from them by perceiving them differently . . . is really the heart of what I do." \textit{Trombadori, Interview with Foucault, supra note 29, at 244.} In a rare autobiographical moment in the same interview, Foucault explained:

The experience of the war had shown us the urgent need of a society radically different from the one in which we were living, this society that had permitted

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recover our lost identity, or liberate our imprisoned nature, or discover our fundamental truth; rather, it is to move toward something altogether different." 73 As he put it:

My project is . . . [t]o give some assistance in wearing away certain self-evidences and commonplaces about madness, normality, illness, crime, and punishment; to bring it about . . . that certain phrases can no longer be spoken so lightly, certain acts . . . no longer so unhesitatingly . . . performed; to contribute to changing certain things in people’s ways of perceiving and doing things; to participate in this difficult displacement of forms of sensibility and thresholds of tolerance . . . . 74

To make sense of his interrogation of contemporary rationality, it helps to identify the ideas, conventions, and practices that he sought to displace.

Foucault wanted his readers to recognize that the orthodox approach to the history of ideas has a decided tilt. It recounts a fitful but continual march of progress toward truth by detailing the innovations of a series of intellectual heroes clearing the path towards the accuracy of our current ideas. 75 Foucault rejected the presumption that today’s knowledge is necessarily better or truer than the past’s; instead, he focused on the entire realm of past thoughts, not just those that successfully continue into or directly lead to our current ideas. 76

Nazism, that had laid down in front of it, and that had gone over en masse to de Gaulle. A large sector of French youth had a reaction of total disgust toward all that. We wanted a world and a society that were not only different but that would be an alternative version of ourselves: we wanted to be completely other in a completely different world.

Id. at 247–48.

74 Id. at 275. Foucault’s comment sought to differentiate his ideas from the Frankfurt School of thinkers who shared many of his interests in questioning modern forms of rationality, science, and expertise, but were grounded in a “Marxist humanism” that he could not share. Id. at 274.

75 As Alan Sheridan explains: “For Foucault, . . . the ‘history of ideas’ . . . is too deeply imbued with notions of continuity, causality and teleology, which stem from modern rationalism and ultimately from the Cartesian notion of the constitutive subject.” SHERIDAN, supra note 38, at 14. Foucault rejects the “evolutionist, teleological view of knowledge, which sees us standing at the threshold of a new scientific future, with the past stretching behind us as a kind of twilight zone of pre-history . . . .” Id. at 26.

76 As Foucault stated in a 1975 interview:

I adopt . . . the radical but unaggressive scepticism which makes it a principle not to
A key aim of his genealogical method was to uncover the “buried, subjugated knowledges” that were ultimately defeated in what he saw as the battlefield, not the marketplace, of ideas.\textsuperscript{77}

At the same time, he sought to displace the notion of objectively verifiable truth that he saw as pervading the human sciences. For Foucault, there is no outside viewpoint from which any of us can independently verify general statements about humans as true; we and our truths about our kind are all products of our times and dominant discourses.\textsuperscript{78}

His emphasis on how our ideas and understandings of ourselves are constantly remade led him to reject the notion of a fixed, unchanging human nature that transcends history and is the source for shaping or making sense of history.\textsuperscript{79} For Foucault nothing human is fixed, everything is a product of history, discourse, and other elements of the cultural environment.\textsuperscript{80} A recurring theme in his work is that “nothing is ever stable”—thoughts, practices, institutions, even human bodies, are always susceptible to dramatic change.\textsuperscript{81}

\begin{flushright}
regard the point in time where we are now standing as the outcome of a teleological progression which it would be one’s business to reconstruct historically: that scepticism regarding ourselves and what we are, our here and now, which prevents one from assuming that what we have is better than—or more than—in the past. . . . I don’t say that humanity doesn’t progress. I say that it is a bad method to pose the problem as: ‘How is it that we have progressed?’ The problem is: how do things happen? And what happens now is not necessarily better or more advanced, or better understood, than what happened in the past.

Michel Foucault, \textit{Prison Talk, in POWER/KNOWLEDGE}, \textit{supra} note 28, at 37, 49–50 [hereinafter Foucault, \textit{Prison Talk}].
\end{flushright}

\textsuperscript{77}\textit{See} Michel Foucault, \textit{Two Lectures, in POWER/KNOWLEDGE}, \textit{supra} note 28, at 78, 83 [hereinafter Foucault, \textit{Two Lectures}]. For a deliberately literal translation of the precise words Foucault spoke in these lectures, see MICHEL FOUCAULT, \textit{“SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE 1975–76}, at 1–41 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003) (1997).

\textsuperscript{78}Foucault’s ideas about truth are complex, see \textit{infra} notes 211–13 and accompanying text, but they will not be understandable without a deeper exploration of his ideas about power.

\textsuperscript{79}\textit{See} Michel Foucault, \textit{An Aesthetics of Existence, in POLITICS, PHILOSOPHY, CULTURE, supra} note 29, at 47, 50 (“[T]here is no sovereign, founding subject, a universal form of subject to be found everywhere. I am very sceptical of this view of the subject and very hostile to it.”) (quoting 1984 interview) [hereinafter Foucault, \textit{An Aesthetics of Existence}]; Foucault, \textit{Truth and Power, supra} note 28, at 117 (defining his genealogical method as rejection of “a subject which is either transcendental in relation to the field of events or runs in its empty sameness throughout the course of history”).

\textsuperscript{80}\textit{See} Foucault, \textit{An Aesthetics of Existence, supra} note 79, at 50–51 (“[T]he subject is constituted through practices of subjugation, or, in a more autonomous way, through practices of liberation, of liberty, as in Antiquity, on the basis . . . of a number of rules, styles, inventions to be found in the cultural environment.”); \textit{see also supra} note 63.

\textsuperscript{81}As Foucault stated in an interview in 1984:

[My] type of analysis reveals the precariousness, the nonnecessity, and the instability of things. All this is absolutely linked to a practice and to strategies that are themselves unstable and changing. I am flabbergasted that people are able to see in my historical studies the affirmation of a determinism from which one cannot escape
He urged intellectuals to focus on such changes, but to do so without playing the role of prophet. He rejected what he branded the “universal intellectual,” the intellectual who purports to speak “in the capacity of master of truth and justice,” proclaimer of “the ‘just-and-true-for-all.’” He argued instead for the “specific intellectual,” who analyzes the current moment, uncovers the central assumptions and bases of current thought and practice, and reveals the weak spots that are ripe for change. But he was adamant that the intellectual’s task ends there; it is not to propose what ought to be done, just to provide analysis for lay people to act upon as they see fit. He recognized that this refusal to provide normative prescriptions angered his critics, but justified this reticence on an unwillingness to speak for others—he

... Nothing is ever stable.

Interview with Actes, supra note 46, at 399–400. See also Foucault, Nietzsche, Genealogy, History, supra note 55, at 380 (“Nothing in man—not even his body—is sufficiently stable to serve as the basis for self-recognition or for understanding other men.”).

Foucault, Truth and Power, supra note 28, at 126.

Id.

See supra note 70 (noting philosophy must examine nature of present).

According to Foucault, “critique . . . is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest.” Foucault, Practicing Criticism, supra note 40, at 154.

Foucault argued in 1983 that the function of any diagnosis concerning the nature of the present . . . does not consist in a simple characterization of what we are but, instead—by following lines of fragility in the present—in managing to grasp why and how that-which-is might no longer be that-which-is. . . . [A]ny description must always be made in accordance with these kinds of virtual fracture which open up the space of freedom understood as a space of . . . possible transformation.

Critical Theory, supra note 70, at 36. As he stated in 1977, instead of proclaiming, “[s]ee what must be done, see what is good, follow me. In the turmoil that engulfs you all, here is the pivotal point, here is where I am,” he valued “the intellectual who destroys evidence and generalities, the one who, in the inertias and constraints of the present time, locates and marks the weak points, the openings, the lines of force . . . .” Michel Foucault, Power and Sex, 32 TELOS 152 (David J. Parent trans., 1977), reprinted in POLITICS, PHILOSOPHY, CULTURE, supra note 29, at 110, 124 [hereinafter Foucault, Power and Sex].

In 1977 he wrote: “[I]t is not up to us to propose. As soon as one ‘proposes’—one proposes a vocabulary, an ideology, which can only have effects of domination. What we have to present are instruments and tools that people might find useful.” Foucault, Confinement, Psychiatry, Prison, 32–33 CHANGE 76 (1977), reprinted in POLITICS, PHILOSOPHY, CULTURE, supra note 29, at 197. In a 1978 discussion, he insisted:

[I]t’s because of the need not to tie them down or immobilize [lay people] that there can be no question of trying to dictate “what is to be done.” . . . [T]he most important thing is not to bury them under the weight of prescriptive, prophetic discourse. . . . Critique doesn’t have to be the premise of a deduction that concludes, “this, then, is what needs to be done.” It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal.

Foucault, Questions of Method, supra note 28, at 236.

In the same discussion in 1978, he posited: “Perhaps the reason why my work irritates people is precisely the fact that I’m not interested in constructing a new schema or in validating
aimed to “silence the prophets and lawmakers, all those who speak for others or to others”—and his conviction that lay people would figure things out for themselves.  

Given how rankled he was by discourses that purport to reveal timeless truth or the one correct path, it is not surprising that Foucault also sought to set himself apart from Marxism.  He rejected its self-presentation as a science

one that already exists. Perhaps it’s because my objective isn’t to propose a global principle for analyzing society.” Id. at 237.


As Foucault insisted in 1978:

I take care not to dictate how things should be. I try instead to pose problems, to make them active, to display them in such a complexity that they can silence the prophets and lawmakers, all those who speak for others or to others. In this way, it will be possible for the complexity of the problem to appear in its connection with people’s lives; and, consequently, through concrete questions, . . . movements of rebellion, reflections, and testimonies, the legitimacy of a common creative action can also appear. . . . I’d like to be able to participate in this work myself without delegating responsibilities to any specialist, including myself. . . . In short, to be done with spokespersons.

Trombadori, Interview with Foucault, supra note 29, at 288–89 (emphasis added).

See Foucault, Practicing Criticism, supra note 40, at 155 (“[A]s soon as one can no longer think things as one formerly thought them, transformation becomes both very urgent, very difficult, and quite possible.”); see also supra note 65 (recognizing relations of power allows one to transform the way things are).

Indeed, the first sentence of his pseudonymous entry on himself in a French dictionary of philosophy frames his work as a “break” with “a philosophic landscape previously dominated by Sartre and by what Sartre called the unsurpassable philosophy of our time, Marxism.” Maurice Florence, Foucault, Michel 1926–, in CAMBRIDGE COMPANION, supra note 27, at 314, 314, reprinted (without the sentence in question) as Maurice Florence, Foucault, in 2 ESSENTIAL WORKS, supra note 36, at 459.

In a 1976 lecture, his response to such pretensions and aspirations was to rhetorically ask:

What types of knowledge do you want to disqualify in the very instant of your demand: ‘Is it a science?’ Which speaking, discoursing subjects . . . do you then want to ‘diminish’ when you say: ‘I who conduct this discourse am conducting a scientific discourse, and I am a scientist?’ Which theoretical-political avant garde do you want to enthrone in order to isolate it from all the discontinuous forms of knowledge that circulate about it? When I see you straining to establish the scientificity of Marxism I do not really think that you are demonstrating . . . that Marxism has a rational structure and that therefore its propositions are the outcome of verifiable procedures; for me you are doing something altogether different, you are investing Marxist discourses and those who uphold them with the effects of a power which the West since Medieval times has attributed to science and has reserved for those engaged in scientific discourse.

Foucault, Two Lectures, supra note 77, at 85.
and its claim or aspiration to explain everything in terms of the economy. He and his commentators have characterized Marxist domination of French intellectual circles as an impediment to the circulation and development of his ideas, which was only cleared by the discrediting on the left of Marxist orthodoxy after the events of May 1968 in France. He sought to practice a left politics that encouraged creative experiments and explorations, rather than proscribing deviations from a clear or true path.

As we will now explore in depth, another prevailing set of ideas from which he sought to detach himself and his readers was our received understanding of power.

III. FOUCAULT’S APPROACH TO POWER

Foucault repeatedly insisted that he was not developing a full-fledged theory of power. Instead, he sought to craft an approach to studying certain

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93In the same 1976 interview, Foucault denounced “the inhibiting effect of global, totalitarian theories” such as Marxism and psychoanalysis; while he acknowledged that those theories “provide in a fairly consistent fashion useful tools for local research,” he believed that on balance “the attempt to think in terms of a totality” imposes an unacceptable “hindrance to research.” Id. at 80–81.

94As Foucault stated in a 1977 interview:

[P]sychiatric internment, the mental normalisation of individuals, and penal institutions have no doubt a fairly limited importance if one is only looking for their economic significance. On the other hand, they are undoubtedly essential to the general functioning of the wheels of power. So long as the posing of the question of power was kept subordinate to the economic instance and the system of interests which this served, there was a tendency to regard these problems as of small importance.

Foucault, Truth and Power, supra note 28, at 116. See also id. at 109–11 (describing “refusal to pose the problem of internment, of the political use of psychiatry and, in a more general sense, of the disciplinary grid of society” as outgrowth of Marxist intellectuals’ hesitance to ask new or dangerous questions); Colin Gordon, Afterword to POWER/KNOWLEDGE, supra note 28, at 229, 231–33 (stating originality of Foucault’s work “was in inverse proportion to its utility for Marxism”).

95As Foucault stated in a 1983 interview, “The first thing that happened after ’68 was that Marxism as a dogmatic framework declined and new political, new cultural interests concerning personal life appeared. That’s why I think my work had nearly no echo, with the exception of a very small circle, before ’68.” Foucault, The Minimalist Self, supra note 29, at 8.

For accounts of the events of May 1968, in which student uprisings, violently confronted by police, were followed by spontaneous strikes by workers and then a general strike that was ultimately defused by de Gaulle with assistance from the French Communist Party, see DANIEL SINGER, PRELUDE TO REVOLUTION: FRANCE IN MAY 1968 (1970); ALAIN TOURAINE, THE MAY MOVEMENT: REVOLT AND REFORM: MAY 1968—THE STUDENT REBELLION AND WORKERS’ STRIKES—THE BIRTH OF A SOCIAL MOVEMENT (Leonard F.X. Mayhew trans., Random House, 1971) (1968). For a critical view of the events, see RAYMOND ARON, THE ELUSIVE REVOLUTION: ANATOMY OF A STUDENT REVOLT (Gordon Clough trans., Praeger Publishers 1969) (1968). For a study of the historical and intellectual impact that the events and leading figures of May 1968 have had in France in the ensuing decades, see KRISTIN ROSS, MAY ’68 AND ITS AFTERLIVES (2002).

96See, e.g., Critical Theory, supra note 70, at 38–39 (“I am in no way developing a theory
forms of it—what he called "an analytics of power" or a "grid of . . .
decipherment." In keeping with his characterization of his objective, I shall
refer to his "approach" to power (or way of thinking about it) rather than to his
"theory." References to his "model" or "vision" of power should be understood
as references to an approach rather than a theory.

Foucault's distinction between an approach and a theory stemmed from at
least three sources. First, it sprang from his view that a "theory" of power
would necessarily posit some unchanging, basic nature—that consistently
holds true across a variety of situations, problems, and eras—for a
phenomenon that Foucault, ever the historicizer, saw as taking different shapes
and forms in different times and settings. Second, the differentiation of his
approach from theory flowed from the different angle and objective from
which he approached his inquiry. Rather than starting with the questions of
what power is (and who exercises it), he instead asked how power is exercised,
what happens when power is exercised. In doing so, he sought to develop
tools for making sense of what one can observe about power relations from
such a vantage point, rather than seeking to explain power itself. In other
words, his primary focus was on relations and relationships rather than power
in and of itself. And finally, the refusal to characterize his approach as a
theory of power seems to have flowed from an emerging sense, the longer he
grappled with issues of power, that his ultimate goal was not to understand
power so much as it was to use an understanding of power to understand
ourselves in the present.

of power."). See also Michel Foucault, The Confrontation of the Flesh, in POWER/KNOWLEDGE,
supra note 28, at 194, 198–99 [hereinafter Foucault, Confession of the Flesh]. His approach is
consistent with his view of himself as an intellectual artisan who creates tools to accomplish
specific projects. See supra note 27 and accompanying text.

97 *FOUCAULT, THE WILL TO KNOW*, supra note 34, at 82.
98 *Id.* at 90.
99 As Dreyfus and Rabinow state: "Foucault's account of power is not intended as a theory.
That is, it is not meant as a context-free, ahistorical, objective description. Nor does it apply as a
generalization to all of history." DREYFUS & RABINOW, supra note 26, at 184.
100 See, e.g., Foucault, The Subject and Power, supra note 28, at 336–42 (exploring issue
most deeply in two segments entitled "How Is Power Exercised?" and "What Constitutes the
Specificity of Power Relations?"); Foucault, Two Lectures, supra note 77, at 92 ("The course of
study that I have been following . . . roughly since 1970/71 . . . has been concerned with the how
of power."). See also Foucault, On Power, supra note 52, at 103 ("I don't believe that this
question of 'who exercises power' can be resolved unless that other question 'how does it happen'
is resolved at the same time.").
101 See Foucault, The Subject and Power, supra note 28, at 339 ("To approach the theme of
power by an analysis of 'how' is . . . to give oneself as the object of analysis power relations and
not power itself . . . .")
102 See *id.* at 326 and supra note 70 (on imperative to critically analyze present). In 1982,
he wrote: "[T]he goal of my work . . . has not been to analyze the phenomena of power, nor to
elaborate the foundations of such an analysis." Foucault, The Subject and Power, supra note 28,
at 326 (emphasis added). As he elaborated in 1983: "[P]ower, as an autonomous question, does
not interest me. In many instances, I have been led to address the question of power only to the
extent that the political analysis of power . . . did not seem to me to account for the finer, more
A. The Understanding of Power that Foucault Sought to Supplant

In proposing a radically different approach to thinking about power, Foucault urged the abandonment of at least five elements of what he saw as the reigning view of power. Steven Winter has usefully characterized Foucault’s approach as a rejection or fundamental modification of almost all of the basic metaphors that shape our unexamined, traditional conception of power.\(^1\)\(^3\) In Foucault’s own words, he sought to displace the “ready made patterns” when one speaks of power: the images of “a political structure, a government, a dominant social class, the master facing the slave, and so on.”\(^1\)\(^4\) Those patterns were “not at all” what he meant by power, or his preferred formulation, “relationships of power.”\(^1\)\(^5\)

First and fundamentally, Foucault rejected the idea or metaphor that power is a thing. As Foucault approached it, power is neither a thing nor a possession—no one can hold it. Similarly, power is not a resource, nor is it a capacity. “Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away . . . .”\(^1\)\(^6\) As he approaches it, power does not belong to anyone; it is not a property of an individual or a group. In rejecting these fundamental images of power as a thing, possession, resource, or capacity, Foucault rejected the core ideas of both liberal and Marxist conceptions of power: in his view, power cannot be transferred or delegated through any social contract from the people to a sovereign or government, nor can it belong to one social class nor be seized by another.\(^1\)\(^7\)

Second, Foucault rejected the notion of a stable division between the detailed phenomena I wish to evoke . . . .” \textit{Critical Theory, supra} note 70, at 39.  
\(^{103}\)Steven L. Winter, \textit{The “Power” Thing}, 82 \textit{Va. L. Rev.} 721, 743–819 (1996). Winter’s article is the most thoughtful and detailed exposition of Foucault’s ideas about power in the legal literature. As will become evident, I do not share Winter’s conviction that Foucault’s view of power is the only correct or helpful understanding of power. \textit{See infra} notes 297–300, 333–89 and accompanying text. Our presentations also place Foucault’s ideas of power in different contexts. Winter presents Foucault’s ideas as a rejection of certain contemporary accounts of power and as a transcendent improvement of others. He mainly relies on Foucault’s books and principal essays. \textit{See Winter, supra}. My approach is instead to ground Foucault’s ideas on power in the context of his general ideas and intellectual projects. I also draw from a broader array of interviews and essays (some only recently published in English translation) for explications of his ideas and aims.  
\(^{104}\)Foucault, \textit{The Ethic of Care for the Self}, \textit{supra} note 28, at 11.  
\(^{105}\)\textit{id.}  
\(^{106}\)FOUCAULT, \textit{THE WILL TO KNOW, supra} note 34, at 94.  
\(^{107}\)As Foucault elaborated in a 1976 lecture, he saw liberal and Marxist views as sharing a common economism in their understanding of power. In the liberal model, “power is taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate . . . through . . . a contractual type of exchange . . . .” In the Marxist approach, political power’s “raison d’être” and “the principle of its concrete forms and actual functioning . . . is located in the economy.” Foucault, \textit{Two Lectures, supra} note 77, at 88–89.
powerful and the powerless or between the rulers and the ruled.\textsuperscript{108} He spurned the assumption of “a massive and primal condition of domination” and “a binary structure with ‘dominators’ on the one side and ‘dominated’ on the other.”\textsuperscript{109} He also refused to see power as all-or-nothing, as a capacity or tool of the dominant. As he put it, power is not a phenomenon of “consolidated and homogenous domination” by an individual, group, or class; nor is it “that which makes the difference between those who exclusively possess and retain it . . . and those who do not have it and submit to it.”\textsuperscript{110}

Third, Foucault declined to think of power as a location. For him, power does not reside in a particular place.\textsuperscript{111} It has no seat, bastion, pinnacle, or center. Nor is there any centralized source, such as law, the economy, or the State, from which it stems or flows.\textsuperscript{112} As he put it, the point of view that enables one to understand the exercise and effects of power “must not be sought in the primary existence of a central point.”\textsuperscript{113}

Fourth, he refused to see power as a force that is always exerted in essentially the same manner,\textsuperscript{114} from the top down or the center out.\textsuperscript{115} He rejected any notion of power “extending from the top down . . . to the very depths of the social body.”\textsuperscript{116} In Winter’s formulation, Foucault rejected the metaphor that power or control is necessarily “up.”\textsuperscript{117}

Fifth, and of special import given the intellectual currents that predominated in France in the early 1970s, Foucault emphatically rejected the notion that power is primarily a repressive force that forbids and silences. His intellectual targets were contemporary Marxists and “para-Marxists” such as Herbert Marcuse and Wilhelm Reich, who sought to synthesize the ideas of

\textsuperscript{108} He rejected any “binary and all-encompassing opposition between rulers and ruled at the root of power relations, and serving as a general matrix.” \textit{FOUCAULT, THE WILL TO KNOW, supra} note 34, at 94.

\textsuperscript{109} Michel Foucault, \textit{Powers and Strategies}, in \textit{POWER/KNOWLEDGE, supra} note 28, at 134, 142 [hereinafter Foucault, \textit{Powers and Strategies}]. At this point, in 1977, he was not making the distinction between power and domination that he subsequently would. \textit{See infra} note 135 and accompanying text.

\textsuperscript{110} Foucault, \textit{Two Lectures, supra} note 77, at 98.

\textsuperscript{111} In the same 1976 lecture, Foucault said that power is “never localised here or there, never in anybody’s hands, never appropriated as a commodity or piece of wealth.” \textit{Id}.

\textsuperscript{112} In 1977 he said: “The idea that there is either located at—or emanating from—a given point something which is a ‘power’ seems to be based on a misguided analysis, one which . . . fails to account for a considerable number of phenomena.” Foucault, \textit{Confession of the Flesh, supra} note 96, at 198.

\textsuperscript{113} \textit{FOUCAULT, THE WILL TO KNOW, supra} note 34, at 93.

\textsuperscript{114} \textit{See} Foucault, \textit{Powers and Strategies, supra} note 109, at 139 (rejecting “a schema of power which is homogenous for every level and domain—family or State, relations of education or production”).

\textsuperscript{115} \textit{See} Foucault, \textit{Power and Sex, supra} note 86, at 119 (describing in 1977 interview his initial skepticism that power “always move[s] from above to below and from the center to the periphery”).

\textsuperscript{116} \textit{FOUCAULT, THE WILL TO KNOW, supra} note 34, at 94.

\textsuperscript{117} Winter, \textit{supra} note 103, at 802.
Karl Marx and Sigmund Freud. According to Foucault, such an approach presented (capitalist) power’s sole function as repression and its sole mode of operation as “censorship, exclusion, blockage and repression, in the manner of a great Superego, exercising itself only in a negative way.”  

He urged that one should not look to political theory for the emblematic form of power; that is, one should not think of power in terms of sovereignty with a legislative authority that lays down or states the law to which obedient subjects must submit.  

Foucault labeled the set of conceptions of power that he sought to displace the “juridico-discursive” model of power.  

In this view, power is juridical because, like a sovereign, it states the law that its subjects must obey; it is discursive because the law or command that it announces is essentially an edict, a negative imperative, a “thou shalt not.”  

As he summarized it, this model presents power as “poor in resources, sparing of its methods, monotonous in the tactics it utilizes, incapable of invention, and seemingly doomed always to repeat itself” because it is essentially just “a power to say no; ... capable only of posting limits, it is basically anti-energy.”  

B. Foucault’s Alternative Approach  

1. Power as a Dynamic, Participatory Process  

Power as a Process. In place of the notion of power as a thing, a possession, a capacity, or a resource, Foucault understood power as an aspect of relationships, a process in which actors jointly participate. In early formulations, he stated that “power means relations, a more-or-less organised, hierarchical, co-ordinated cluster of relations” and that power is “the name that one attributes to a complex strategical situation in a particular society.”  

In part influenced by Friedrich Nietzsche, Foucault initially suggested that power relations were essentially warlike and thus best studied in terms of  

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118 Michel Foucault, Body/Power, in Power/Knowledge, supra note 28, at 55, 59 [hereinafter Foucault, Body/Power].  
119 As Hunt and Wickham insightfully note, Foucault’s view of law is rather constrained: he views law primarily in the context of penal law, as the enunciation by a sovereign of a prohibition backed by sanctions. See Hunt & Wickham, supra note 28, at 59–61.  
120 As Foucault indicated in a 1977 interview, one should not presuppose “on the one hand a sovereign whose role is to forbid and on the other a subject who must somehow effectively say yes to this prohibition.” Foucault, Powers and Strategies, supra note 109, at 140.  
121 See FOUGAULT, THE WILL TO KNOW, supra note 34, at 83.  
122 See, e.g., supra note 120; Foucault, Powers and Strategies, supra note 109, at 139–40 (“The manifestation of power takes on the pure form of ‘Thou shalt not.’”).  
123 FOUGAULT, THE WILL TO KNOW, supra note 34, at 85.  
124 Foucault, Confession of the Flesh, supra note 96, at 198.  
125 See FOUGAULT, THE WILL TO KNOW, supra note 34, at 93.
tactics and strategies.\textsuperscript{126} Later in his work, as Nietzsche’s influence waned, Foucault retained the notion of power as a strategic relationship, but characterized it more tranquilly as a “relationship between ‘partners’”—individual or collective—and “an ensemble of actions that induce others and follow from one another.”\textsuperscript{127} The defining aspect of such relations for the later Foucault was that they involved “a set of actions on [the] possible actions” of others, that is, relationships in which participants seek to manage or “conduct [the] conduct” of others.\textsuperscript{128} In other words, for Foucault, power means a set of relationships in which actors strategically seek to govern, shape, or manage the behavior of others by reacting to what others have done or might do in the future.\textsuperscript{129} In such a vision, power is a process that gets enacted, a process in which all participants strategically maneuver—improvising and modifying their roles—based on the actual or anticipated actions and reactions of others.\textsuperscript{130} Rather than belonging to one actor, rather than being a property or trait of an actor, power, in Foucault’s view, requires two or more actors; it is an ongoing process of actions and reactions.

Power as Dynamic. Rather than viewing power as essentially static and dichotomous—as what some people consistently have and others consistently

\begin{footnotesize}
\begin{enumerate}
\item In Discipline and Punish, Foucault characterized these relations as a “perpetual battle.” FOUCAULT, DISCIPLINE AND PUNISH, supra note 33, at 26. In a 1977 interview, he said: “As soon as one endeavours to detach power with its techniques and procedures from the form of law within which it has been theoretically confined up until now, one is driven to ask this basic question: isn’t power simply a form of warlike domination?” Foucault, Truth and Power, supra note 28, at 123. These notions of perpetual battle and warlike domination are deeply influenced by Nietzsche. See generally FRIEDRICH NIETZSCHE, On the Genealogy of Morals, in BASIC WRITINGS OF NIETZSCHE 460, 460–599 (Walter Kaufmann ed. & trans., 1992). Nietzsche stated that “the two opposing values ‘good and bad,’ ‘good and evil’ have been engaged in a fearful struggle on earth for thousands of years . . . .” Id. at 488.
\item Foucault, The Subject and Power, supra note 28, at 337. As he wrote in this 1982 essay, he now understood power relations as a “singular mode of action, neither warlike nor juridical . . . .” Id. at 341.
\item See id. at 341 (“Perhaps the equivocal nature of the term ‘conduct’ is one of the best aids for coming to terms with the specificity of power relations. To ‘conduct’ is at the same time to ‘lead’ others . . . and a way of behaving within a more or less open field of possibilities.”).
\item As Foucault explained in a 1982 essay, he intended the notion of “strategy” in three different senses:
First, to designate the means employed to attain a certain end . . . . Second, to designate the way in which a partner in a certain game acts with regard to what he thinks should be the action of the others and what he considers the others think to be his own . . . . Third, to designate the procedures used in a situation of confrontation to deprive the opponent of his means of combat and to reduce him to giving up the struggle . . . .
Id. at 346.
\item As Foucault stated in a 1977 interview: “When I speak of strategy, I am taking the term seriously: in order for a certain relation of forces not only to maintain itself, but to accentuate, stabilise, and broaden itself, a certain kind of manoeuvre is necessary.” Foucault, Confession of the Flesh, supra note 96, at 206. Winter has picked up on this sense in characterizing power as “an ongoing interplay of strategic maneuvering between partners.” Winter, supra note 103, at 818–19.
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lack—Foucault viewed power as dynamic. As one for whom “[n]othing is ever stable,” Foucault was consistent in this regard throughout his writings on power. Even though participants in power relations are usually in unequal positions, there is always some possibility of modification or reversal—even if just momentary—of the terms of the relationship. Foucault believed that “[w]e can never be ensnared by power: we can always modify its grip in determinate conditions and according to a precise strategy.” Because there are roles to be enacted, there is always the possibility of enacting the role in a new way. As he reiterated in one of his last interviews, relationships of power are “changeable, reversible, and unstable,” for “they can modify themselves, they are not given once and for all.” As an example he suggested to his interviewers: “[T]hat I am older and that at first you were intimidated can, in the course of the conversation, turn about and it is I who become intimidated before someone, precisely because he is younger.” Indeed, in his last writings, he definitionally ensured that power is dynamic by drawing a distinction between relations of power, which are changeable, and states (in the sense of conditions) of “domination,” which are static, and prevent any possibility of reversal.

Resistance as Intrinsic to Power. According to Foucault, a central reason for the dynamism, the changeability, of power relations is that resistance is part of every relation of power. As he put it in The Will to Know, “[w]here there is power, there is resistance,” a resistance which is “never in a position of exteriority in relation to power,” but rather is “inscribed . . . as an irreducible” part of the power relationship. He believed there is something in the social body and in each of us that resists efforts to shape us or manage our behavior, thus, in any such power relation “there is necessarily the

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131 Interview with Actes, supra note 46, at 400. See also supra note 81.
132 Foucault, Power and Sex, supra note 86, at 123.
133 Foucault, The Ethic of Care for the Self, supra note 28, at 12.
134 Id.
135 Id. at 3. In this 1984 interview, Foucault defined a “state of domination” as a situation in which “an individual or a social group manages to block a field of relations of power, to render them impassive and invariable and to prevent all reversibility of movement—by means of instruments which can be economic as well as political or military . . . .” Id. Foucault recognized that what he called states of domination, other people “ordinarily call power.” Id. at 19.
136 See, e.g., Foucault, Powers and Strategies, supra note 109, at 142 (noting “there are no relations of power without resistances; the latter are . . . formed right at the point where relations of power are exercised”).
137 Foucault, The Will to Know, supra note 34, at 95–96.
138 As he stated in a 1977 interview: “We all fight each other. And there is always within each of us something that fights something else.” Foucault, Confession of the Flesh, supra note 96, at 208. Colin Gordon makes a similar point, noting that for Foucault, “[t]here is always something in the social body, and in each person, which evades or wrestles with others’ attempt to act on our own ways of acting.” Colin Gordon, Introduction to 3 ESSENTIAL WORKS, supra note 28, at xi, xx [hereinafter Gordon, Introduction].
possibility of resistance[,] . . . of violent resistance, of escape, of ruse, of strategies that reverse the situation."\textsuperscript{139} The only requirement is an exercise of courage, a refusal to acquiesce.\textsuperscript{140} Thus, where others posit simple obedience or acquiescence, Foucault sees strategic maneuvering and resistance.

\textit{The Centrality of Freedom of Action.} In his later works, he made explicit that resistance is always possible because freedom is an indispensable aspect of power. As he wrote in 1982, "[p]ower is exercised only over free subjects, and only in so far as they are 'free,'" by which he meant "individual or collective subjects who are faced with a field of possibilities in which several kinds of conduct, several ways of reacting and modes of behavior are available."\textsuperscript{141} At the heart of his evolved understanding of the power relationship, Foucault insisted that even those on what one would traditionally call the receiving end of power are "active subjects"—they retain at least a capacity for action—and can take advantage of "a whole field of responses, reactions, results, and possible inventions."\textsuperscript{142} As Winter has elaborated, even in a hierarchical or asymmetrical relationship, a subordinate can "couch her performance anywhere along the broad spectrum that stretches from deferential compliance through shamming, grumbling, sulking, foot-dragging, 'working to rule,' limit-testing, and mocking all the way to outright defiance."\textsuperscript{143}

2. The Dispersion of Power

\textit{The Omnipresence of Power (and Resistance).} Foucault refused to view power as a location or as emanating from a location because in his approach power is everywhere. All human relations involve efforts to manage the conduct of others.\textsuperscript{144} Thus, in his view, there can be no escaping power.\textsuperscript{145} And

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\item[139]\textsuperscript{*} Foucault, \textit{The Ethic of Care for the Self}, \textit{supra} note 28, at 12. As Foucault stated in 1978: I try to conduct the most exact and differential analyses in order to indicate how things change, transform themselves, migrate . . . . I'm very careful to get a grip on the actual mechanisms of the exercise of power . . . because those who are enmeshed, involved, in these power relations can, in their actions, their resistance, their rebellion, escape them, transform them, in a word, cease being submissive. Trombadori, \textit{Interview with Foucault}, \textit{supra} note 29, at 294 (emphasis added). As discussed below, he says nothing about the differential risks and costs of such acts of resistance. \textit{See infra} notes 356–60 and accompanying text (noting Foucault’s failure to explore cost of resistance).
\item[140]\textsuperscript{*} \textit{See} Foucault, \textit{The Ethic of Care for the Self}, \textit{supra} note 28, at 12.
\item[141]\textsuperscript{*} Foucault, \textit{The Subject and Power}, \textit{supra} note 28, at 342.
\item[142]\textsuperscript{*} \textit{Id.} at 340.
\item[143]\textsuperscript{*} Winter, \textit{supra} note 103, at 809–10. Most literature and drama is premised upon just such an understanding of the world, demonstrating that Foucault’s view is not shockingly original.
\item[144]\textsuperscript{*} \textit{See, e.g.}, Foucault, \textit{Social Security}, in \textit{POLITICS, PHILOSOPHY, CULTURE}, \textit{supra} note 29, at 159, 168 (a 1983 interview), \textit{reprinted} (with an amended translation) in \textit{3 ESSENTIAL WORKS}, \textit{supra} note 28, at 365, 372 (stating every human relation is power relation of some sort);
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if power is everywhere, so too is the possibility of resistance. But just because power is everywhere does not mean it is omnipotent. In Foucault’s view, power is a process in which participants attempt to shape the conduct of others, but those attempts are not always successful—because of the omnipresence of resistance and “the inscrutability of freedom”—and they are certainly not always successful in the ways that participants intend.

The Examination of the Extremities of the Social Body. In refusing to think of power as emanating from or located in a central place, Foucault urged his audience not to look to politics to understand power, but to everyday life and everyday relationships. He argued that power is best studied at the

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Foucault, The Subject and Power, supra note 28, at 345 (noting “possibility of action on the action of others... is coextensive with every social relationship...”).

145. See, e.g., Foucault, Powers and Strategies, supra note 109, at 141 (“It seems to me that power is ‘always already there’... one is never ‘outside’ it...”); Foucault, The Ethic of Care for the Self, supra note 28, at 18 (“I don’t believe there can be a society without relations of power, if you understand them as means by which individuals try to conduct, to determine the behavior of others.”).

146. See FOUCAULT, THE WILL TO KNOW, supra note 34, at 95 (“[P]oints of resistance are present everywhere in the power network.”).

147. See, e.g., BEST & KELLNER, supra note 12, at 55 (“Misinterpretations of Foucault turn on a conflation between power as omnipresent and as omnipotent.”); Colin Gordon, Afterword to POWER/KNOWLEDGE, supra note 28, at 246–47 (stating Foucault’s works should not be taken to attribute an absolute omnipotence to apparatuses of power); Winter, supra note 103, at 809 (“[A]s a practical matter, power can never be total.”).

148. Foucault, The Subject and Power, supra note 28, at 342. As he stressed in 1982: “The power relationship and freedom’s refusal to submit cannot... be separated... At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the inscrutability of freedom.” Id.

149. Thus, for example, one of the points that Foucault makes about the prison is that it utterly failed in its initial goal of transforming or rehabilitating criminals, but nonetheless proved useful for other purposes. As he elaborated in an interview in 1975:

The failure of the project was immediate, and was realised virtually from the start. In 1820, it was already understood that the prisons, far from transforming criminals into honest citizens, serve only to manufacture new criminals and to drive existing criminals even deeper into criminality. It was then that there took place, as always in the mechanics of power, a strategic utilisation of what had been experienced as a drawback. Prisons manufactured delinquents, but delinquents turned out to be useful, in the economic domain as much as the political.

Foucault, Prison Talk, supra note 76, at 40. Those other purposes or programs for which Foucault believed that delinquents or hardened criminals proved useful were as a check against the working class: “as agents of surveillance and infiltration, preventing and breaking strikes, and so forth,” id., and to justify the existence of the recently formed police. See id. at 47. How else, he asked, would we tolerate “the presence in our midst of these uniformed men, who have the exclusive right to carry arms, who demand our papers, who come and prowl on our doorsteps,” if there were no criminals to fear? Id.

150. See Foucault, Power and Sex, supra note 86, at 118.

[Power in the West is what displays itself the most, and thus what hides itself the best: what we have called ‘political life’ since the 19th century is the manner in which power presents its image (a little like the court in the monarchic era). Power is neither there, nor is how it functions. The relations of power are perhaps among the best hidden things in the social body.
“extremities” of the social body.\footnote{In a 1976 lecture, Foucault urged that power should be explored “at its extremities, in its ultimate destinations, . . . those points where it becomes capillary, that is, in its more regional and local forms and institutions . . . [where it] invests itself in institutions, becomes embodied in techniques . . . .” Foucault, \textit{Two Lectures}, supra note 77, at 96.} Thus he explored relationships such as those between teachers and students, supervisors and workers, parents and children, doctors and patients, military trainers and conscripts, and intimate partners. The farther one gets from an analysis of the State’s power, the easier Foucault believed it would be to abandon the juridical model of power—of a law-enacting sovereign imposing its will on subjects who must obey—and to recognize power as a process in which people and groups continuously struggle to shape, but can never fully determine, each other’s conduct.\footnote{As he stated in a 1976 lecture, “one should try to locate power at the extreme points of its exercise, where it is always less legal in character.” \textit{Id.} at 97.} In these ongoing relationships, the terms are constantly (but generally tacitly) negotiated and renegotiated; neither the “commands” nor the “obedience” are as straightforward as connoted by the image of a sovereign and a subject.

\textit{The Significance of Diffuse, Extra-State Power.} In rejecting the notion of power as a location and urging this examination of power in its “capillary” manifestations, far from central State power, Foucault often stressed that his intent was not to dismiss the significance of the State. Rather, he argued that he merely sought to avoid missing a number of other important phenomena upon which the State relies and which play central roles in shaping us.\footnote{In 1976, Foucault stated: 
I do not mean in any way to minimize the importance and effectiveness of State power. I simply feel that excessive insistence on its playing an exclusive role leads to the risk of overlooking all the mechanisms and effects of power which don’t pass directly via the State apparatus, yet often sustain the State more effectively than its own institutions . . . . Michel Foucault, \textit{Questions on Geography, in \textit{Power/Knowledge}}, supra note 28, at 63, 72–73 [hereinafter Foucault, \textit{Questions on Geography}]. In an interview in 1977, after denying any intent to claim “that the State isn’t important,” Foucault proclaimed that “relations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the State” because the state cannot occupy the whole field of power relations and because “the State can only operate on the basis of other, already existing power relations . . . that invest the body, sexuality, the family, kinship, knowledge, technology and so forth.” Foucault, \textit{Truth and Power}, supra note 28, at 122.} Attention to extra-State power was necessary, in his view, because “nothing in society will be changed if the mechanisms of power that function outside, below and alongside the State apparatuses, on a much more minute and everyday level, are not also changed.”\footnote{Foucault, \textit{Body/Power}, supra note 118, at 60.} Thus he focused much of his attention on power relations involving doctors, therapists, counselors, other learned professionals, philanthropists, educators, supervisors, parents, spouses, intimate partners, and the like.\footnote{As Best and Kellner insightfully indicate, given his interest in understanding our present and who we are now, Foucault curiously omits any examination of journalism, advertising, and...} In the wake of the events of May 1968 and the growth of “the new
social movements” of feminists, students, environmentalists, patients, gays and lesbians, Foucault found a receptive audience for his call to examine the manifold sites of power diffused throughout the social body. Indeed, his analysis of those social movements is that they are revolts against certain forms of extra-State power that seek to shape conduct, behavior, and identities. These movements reject imposed roles and constrained identities that do not emanate from the State.

3. The Modalities and Techniques of Power

As part of his focus on the “how” of power relations, the phenomena that Foucault sought to illuminate were the specific tactics, techniques, and mechanisms of power. He believed that, rather than relentlessly operating in the same fashion throughout history, power is exercised in different ways in different times. Given his interest in writing the history of the present and in interpreting who we are now, Foucault focused his attention on forms of power that continue to exist today and emerged in the late seventeenth century or later. These modern forms of power were innovations that dramatically enhanced the ability to manage the conduct of others.

Discipline. Historically the first modern modality of power, and that which Foucault is best known for exploring, is what he called discipline or disciplinary power. Discipline was the collective term that he gave to a set of other forms of mass communication, information technology, or electronic media. See BEST & KELLNER, supra note 12, at 52–53, 123. For a rare acknowledgment of the role of the media, see Trombadori, Interview with Foucault, supra note 29, at 283 (including “the media” among agents of diffused government “who orient our daily lives . . . through direct or indirect influences”).

Thus, in his 1982 essay, he wrote that these new social movements—the “opposition to the power of men over women, of parents over children, of psychiatry over the mentally ill, of medicine over the population, of administration over the ways people live”—are struggles against a “form of power that applies itself to immediate everyday life . . . .” Foucault, The Subject and Power, supra note 28, at 329, 331. As discussed below, Foucault was referring to what he called the pastoral form of power, which creates and ties people to identities. See infra notes 222–33 and accompanying text (discussing pastoral power).

See, e.g., Foucault, On Power, supra note 52, at 104 (arguing one cannot study power without “the strategies, the networks, the mechanisms, all those techniques” of power). As he explained in a 1975 interview, “in thinking of the mechanisms of power, I am thinking . . . of its capillary form of existence, the point where power reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives.” Foucault, Prison Talk, supra note 76, at 39.

See supra notes 45, 68–70 and accompanying text.

Foucault understood discipline as “neither . . . an institution nor . . . an apparatus; it is a type of power, a modality for its exercise, comprising a whole set of instruments, techniques, procedures, levels of application, targets . . . .” FOUCAULT, DISCIPLINE AND PUNISH, supra note 33, at 215. Foucault also called it “panopticism” or “panoptism” after the Panopticon that Jeremy Bentham invented and whose wonders he proselytized. See, e.g., Foucault, Questions on Geography, supra note 153, at 71 (“Panoptism was a technological invention in the order of
techniques and procedures designed to track, transform, and optimally utilize humans. These techniques arose in monasteries, schools, barracks, and hospitals and then spread throughout the rest of the social body, from the late seventeenth century through the eighteenth century.\footnote{As Foucault wrote, “[m]any disciplinary methods had long been in existence—in monasteries, armies, workshops. But in the course of the seventeenth and eighteenth centuries the disciplines became general formulas of domination.” \textit{FOUCAULT, DISCIPLINE AND PUNISH, supra} note 33, at 137. At this point in his career, Foucault was using “power” and “domination” interchangeably; he would subsequently draw a significant distinction between these terms. \textit{See supra} note 135 and accompanying text (noting Foucault’s distinction between relations of power and states of domination). On the spread of these tactics, he added:}

The “invention” of this new political anatomy must not be seen as a sudden discovery. It is rather a multiplicity of often minor processes, of different origin and scattered location, which overlap, repeat, or imitate one another, support one another, distinguish themselves from one another . . . converge and gradually produce the blueprint of a general method . . . .

I simply intend to map . . . some of the essential techniques that most easily spread from one to another. These were always meticulous, often minute, techniques . . . [that] since the seventeenth century . . . constantly reached out to ever broader domains . . . .

\textit{FOUCAULT, DISCIPLINE AND PUNISH, supra} note 33, at 138–39.

\footnote{As Foucault explained, “the notion of ‘docility’. . . joins the analysable body to the manipulable body. A body is docile that may be subjected, used, transformed and improved.” \textit{Id.} at 136. As he elaborated:}

A ‘political anatomy’, which was also a ‘mechanics of power’, was being born; it defined how one may have a hold over others’ bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, the speed, and the efficiency that one determines. Thus discipline produces subjected and practised bodies, ‘docile’ bodies.

\textit{Id.} at 138.

\footnote{In Foucault’s analysis, disciplinary power “separates, analyses, differentiates, . . . to the point of necessary and sufficient single units. It ‘trains’ the moving, confused, useless multitudes of bodies and forces into a multiplicity of individual elements . . . .” \textit{Id.} at 170.}

\footnote{\textit{FOUCAULT, THE WILL TO KNOW, supra} note 34, at 139. These “power relations have an immediate hold upon [the body]; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs.” \textit{FOUCAULT, DISCIPLINE AND PUNISH, supra} note 33, at 25. Disciplinary power treated “the body as object and target of power . . . the body that is manipulated, shaped, trained, which obeys, responds, becomes skilful and increases its forces.” \textit{Id.} at 136. His emphasis (in this period of his work) on power’s hold over the body has been much discussed by feminists. \textit{See generally} LOIS MCNAY, \textit{FOUCAULT AND FEMINISM: POWER,}}
doing, discipline acted concomitantly on human souls as well, impacting minds and spirits by inculcating values of productivity and efficiency.\textsuperscript{164}

Among the specific innovations were the development of record-keeping systems, constant surveillance, normalizing judgment, and the examination. Each of these techniques contributed to the ability to track, watch, and shape individuals and ushered in what Foucault called the modern era of "social orthopedics" or "the age of social control."\textsuperscript{165} The development of dossiers and other written records helped to turn individuals into "cases," to be followed, understood, and managed.\textsuperscript{166} The spread of sustained, hierarchical observation, the culmination of which was typified by Jeremy Bentham’s Panopticon,\textsuperscript{167} enhanced the ability of supervisors across a myriad of social settings to constantly monitor and timely correct the activity and comportment of their charges.\textsuperscript{168} And this expansion led to supervisors too being supervised.\textsuperscript{169}

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\bibitem{discipline-and-punish}\textit{Discipline and Punish}, \textit{ supra note 33}, at 23.

\bibitem{essential-works}See Michel Foucault, \textit{Truth and Juridical Forms}, in \textit{3 Essential Works}, \textit{ supra note 28}, at 1, 57 [hereinafter Foucault, \textit{Truth and Juridical Forms}].

\bibitem{bentham}"[T]he case is . . . the individual as he may be described, judged, measured, compared with others, in his very individuality; and it is also the individual who has to be trained or corrected, classified, normalized, excluded, etc."

\bibitem{panopticon}Michel Foucault described Bentham’s invention in his lectures in Brazil in 1973:
The Panopticon is a ring-shaped building in the middle of which there is a yard with a tower at the center. The ring is divided into little cells that face the interior and the exterior alike. In each of these cells there is, depending on the purpose of the institution, a child learning to write, a worker at work, a prisoner correcting himself, a madman living his madness. In the central tower there is an observer. Since each cell faces both the inside and the outside, the observer’s gaze can traverse the whole cell; there is no dimly lit space, so everything the individual does is exposed to the gaze of an observer who watches through shuttered windows or spy holes in such a way as to be able to see everything without anyone being able to see him.

\bibitem{truth-and-juridical-forms}Michel Foucault, \textit{Truth and Juridical Forms}, \textit{ supra note 165}, at 58.

\bibitem{power-and-knowledge}Settings in which Foucault noted this disciplinary device’s application included efforts “to reform prisoners, . . . to treat patients, to instruct schoolchildren, to confine the insane, to supervise workers, to put beggars and idlers to work.”


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the heart of disciplinary techniques was what Foucault called normalizing judgment, the interrelated practices of defining appropriate and inappropriate behavior or conduct (the normal and abnormal), of establishing gradations between the former and latter, and of imposing micro-penalties to discourage nonconformity as well as system of reward to encourage internalization of the norms.\footnote{As Foucault elaborated, "[t]he workshop, the school, the army were subject to a whole micro-penalty of time (lateness, absences, interruptions of tasks), of activity (inattention, negligence, lack of zeal), of behaviour (impoliteness, disobedience), of speech (idle chatter, insolence), of the body (‘incorrect’ attitudes, irregular gestures, lack of cleanliness), of sexuality (impurity, indecency)." \textsc{Foucault, Discipline and Punish, supra} note 33, at 178. Because disciplinary punishment aims to "reduc[e] gaps" and is "essentially corrective," "[i]n addition to punishments borrowed directly from the judicial model (fines, flogging, solitary confinement), the disciplinary systems favour punishments that are exercise—intensified, multiplied forms of training, several times repeated . . . ." \textit{Id.} at 179.} Hierarchical supervision and normalizing judgment were fused, for Foucault, in the mechanism of the examination, which assesses performance and progress and marks the individual’s place along a continuum from defective to acceptable to exemplary behavior.\footnote{He wrote: “The examination combines the techniques of an observing hierarchy and those of a normalizing judgement. It is a normalizing gaze, a surveillance that makes it possible to qualify, to classify and to punish. It establishes over individuals a visibility through which one differentiates them and judges them.” \textit{Id.} at 184. It “pin[s] down . . . each individual in his own particularity . . . .” and assigns to “each individual . . . as his status his own individuality,” which is linked “to the features, the measurements, the gaps, the ‘marks’ that characterize him and make him a ‘case.’” \textit{Id.} at 192.} This labeling of normal and abnormal assigns and ties people to identities. The enhanced capacity to normalize humans is the great innovation and, for this iconoclast who sought to think and act differently, the great danger of modern society.

Each of these mechanisms entails making individuals better known—more visible, identifiable, trackable—and their conduct and progress more measurable and manageable. At their heart, disciplinary techniques are individualizing efforts.\footnote{Foucault noted: In a sense, the power of normalization imposes homogeneity; but it also individualizes by making it possible to measure gaps, to determine levels, to fix specialities and to render the differences useful by fitting them one to another. It is easy to understand how the power of the norm functions within a system of formal equality, since within a homogeneity that is the rule, the norm introduces, as a useful imperative and as a result of measurement, all the shading of individual differences. \textit{Id.} at 184.} They seek to forestall or neutralize any efforts to “establish horizontal conjunctions” by deploying “procedures of partitioning and verticality, that . . . introduce, between the different elements at the same level, as solid separations as possible.”\footnote{\textit{Id.} at 219–20.} Disciplinary mechanisms, in short, seek to divide and control.

Despite Foucault’s detailed and gloomy account of the growth and spread of these techniques of coercion and control, it is vitally important to bear in
mind the earlier point that all of these techniques are resisted. They are never completely successful.

Bio-power. While disciplinary techniques focused on understanding and controlling individual bodies, a second modern form of power, which Foucault called “bio-power,” sought to understand and shape the social body. Also emerging in the “classical era” (i.e. from the mid-seventeenth century through the eighteenth century) and taking off in the nineteenth century, bio-power focused on the population. In Foucault’s words, bio-power “is situated and exercised at the level of life, the species, the race, and the large-scale phenomena of population.” Bio-power is the counterpart to discipline; where discipline is an “anatomo-politics of the human body,” bio-power is “a biopolitics of the population” and is focused on “the species body.” This bio-power focused on “the calculated management of life,” concerning itself with assessing and controlling, or at least intervening, to shape birth and death rates, standards of living, public health, hygiene, and housing. The emerging human sciences—of demography, statistics, medicine, psychiatry, etc.—played a central role in these efforts. One of the reasons Foucault turned his attention to sex, and to nineteenth century efforts to analyze and regulate it, was that sex lay at the intersection of concern for the individual body and the species body. As will be elaborated, the modern state—along with a myriad of non-state actors—came to understand its raison d’être as the wise management and improvement of populations (and the individuals that comprise them).

The Transposition and Appropriation of Techniques of Power. Foucault believed that it was important to study the specific techniques of power, because these techniques migrate from their initial settings and get used or appropriated elsewhere once they demonstrate their utility. Thus, he explained the emergence of imprisonment as the dominant form of punishment in the early nineteenth century as the transposition to the arena of penalty of disciplinary techniques for training and correcting individuals that were

174 See supra notes 146–48 and accompanying text (discussing omnipresence of resistance).
175 FOUCALUT, THE WILL TO KNOW, supra note 34, at 139–41 (describing bio-power).
176 Id. at 137.
177 Id. at 139.
178 Id. at 140.
179 In a 1977 interview, Foucault stated that “the political significance of the problem of sex is due to the fact that sex is located at the point of intersection of the discipline of the body and the control of the population.” FOUCALUT, TRUTH AND POWER, supra note 28, at 125.
180 See infra notes 228–33 and accompanying text (discussing modern mentality of government as focused on productivity and welfare of population).
181 In Discipline and Punish, he referred to the “swarming” of disciplinary techniques, by which he meant, their “tendency to become ‘de-institutionalized’, to emerge from the closed fortresses in which they once functioned and to circulate in a ‘free’ state . . . .” FOUCALUT, DISCIPLINE AND PUNISH, supra note 33, at 211. In a 1978 interview, he referred to Britain’s invention of concentration camps, which were then used by totalitarian regimes as an example of the “transposition of a technique of power.” Trombadori, Interview with Foucault, supra note 29, at 293.
proving their efficacy in schools, workshops, hospitals, and the military.\footnote{As Foucault rhetorically asked in \textit{Discipline and Punish}: Is it surprising that the cellular prison, with its regular chronologies, forced labour, its authorities of surveillance and registration, its experts in normality, who continue and multiply the functions of the judge, should have become the modern instrument of penalty? Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons? \textit{Foucault, Discipline and Punish}, supra note 33, at 227–28. He elaborated in a 1978 interview: [It] was after all a long elaboration of various techniques that made it possible to locate people, to fix them in precise places, to constrict them to a certain number of gestures and habits . . . . What developed, then, was a whole technique of . . . [assigned] location, confinement, surveillance, the perpetual supervision of behavior and tasks, in short, a whole technique of ‘management’ of which the prison was merely one manifestation of its transposition into the penal domain. \textit{Foucault, On Power}, supra note 52, at 104–05. \footnote{FOUCAULT, THE WILL TO KNOW, supra note 34, at 94. This was also his motivation for conducting “an ascending analysis of power, starting . . . from its infinitesimal mechanisms” and then exploring “how these mechanisms of power have been—and continue to be—invested, colonised, utilised, involuted, transformed, displaced, extended etc., by ever more general mechanisms and by forms of global domination.” \textit{Foucault, Two Lectures}, supra note 77, at 99. His discussion of the infamous \textit{lettres de cachet}, by which French kings compelled individual subjects to perform certain acts (like marrying), to go into exile, or to be imprisoned, illustrates another way in which he saw power as coming from below. According to his study of tens of thousands of such \textit{lettres}, the vast majority were solicited—by “husbands outraged by their wives, fathers dissatisfied with their children, families wanting to get rid of an individual, religious communities disturbed by someone, parishes unhappy with their priests.” \textit{Foucault, Truth and Juridical Forms}, supra note 165, at 65. He characterized these \textit{lettres} as “a power that came from below, enabling groups, communities, families, or individuals to exercise power over someone. They were instruments of a control that was voluntary in a sense, a control from below which society and the community exercised on itself” in an attempt to “regulat[e] the everyday morality of social life.” \textit{Id.} at 65–66. \footnote{As he stated in a 1977 interview, “one needs to look . . . at how the great strategies of power encrust themselves and depend for their conditions of exercise on the level of the micro-relations of power.” \textit{Foucault, Confession of the Flesh}, supra note 96, at 199. Thus, for Foucault, [b]etween every point of a social body, between a man and a woman, between the members of a family, between a master and his pupil, between every one who knows and every one who does not, there exist relations of power which are not purely and simply a projection of the sovereign’s great power over the individual; they are rather the concrete, changing soil in which the sovereign’s power is grounded, the conditions which make it possible for it to function. . . . For the State to function in the way that it does, there must be, between male and female or adult and child, quite specific relations of domination which have their own configuration and relative autonomy. \textit{Michel Foucault, The History of Sexuality, in Power/Knowledge, supra note 28, at 183, 187–88} (translation of 1977 interview with Lucette Finas). Again, at this point in his career, Foucault was using “power” and “domination” interchangeably; his subsequent stark distinction between these terms was still seven years away. See supra text accompanying note 135 (discussing distinction between relations of power and states of domination).}}
Discipline and Punish\textsuperscript{185} can be read as Foucault’s attempt to demonstrate that capitalism and the bourgeoisie did not invent the primary modes of modern social control, so much as they made use of recently invented devices and integrated those techniques into a global system of power or domination.\textsuperscript{186}

4. The Productivity of Power

In rejecting the notion of power as a primarily repressive and negative force, Foucault insisted instead that power is fundamentally productive.\textsuperscript{187} The relationships in which people and groups shape the behavior and conduct of others do not just thwart or prevent behavior, but often affirmatively create or incite it. As he approaches it, power teaches; it molds conduct; it trains; it creates and instills aptitudes, habits, and identities; it stimulates; it incites desires.\textsuperscript{188} Our superiors, peers, and situations do not just prevent us from doing things, they encourage us (and through our interactions, we encourage ourselves) to think, act, and understand ourselves in particular ways. In all of

\textsuperscript{185}FOUCAULT, DISCIPLINE AND PUNISH, supra note 33.

\textsuperscript{186}As Foucault stated in a 1976 lecture:

[W]hat the bourgeoisie needed, or that in which its system discovered its real interests, was not the exclusion of the mad or the surveillance and prohibition of infantile masturbation . . . but rather, the techniques and procedures themselves of such an exclusion. It is the mechanisms of that exclusion that are necessary, the apparatuses of surveillance, the medicalisation of sexuality, of madness, of delinquency, all the micro-mechanisms of power, that came, from a certain moment in time, to represent the interests of the bourgeoisie.

Foucault, Two Lectures, supra note 77, at 101. He made a similar point in a 1973 lecture:

[C]apitalism . . . as it was established in the nineteenth century, was obliged to elaborate a set of political techniques, techniques of power, by which man was tied to something like labor . . . . But in order for there to be hyperprofit, there had to be an infra-power . . . . A web of microscopic, capillary political power had to be established at the level of man’s very existence, attaching men to the production apparatus, while making them into agents of production, into workers. . . . There is no hyperprofit without an infrapower . . . . I’m referring . . . to the whole set of little powers, of little institutions situated at the lowest level. What I meant to do was analyze this infrapower as a condition of possibility of hyperprofit.

Foucault, Truth and Juridical Forms, supra note 165, at 86–87.

\textsuperscript{187}See FOUCAULT, THE WILL TO KNOW, supra note 34, at 94 (noting relations of power have a directly productive role). See also Foucault, Power and Sex, supra note 86, at 118 (“[T]he interdiction, the refusal, the prohibition, far from being essential forms of power, are only its limits, power in its frustrated or extreme forms. The relations of power are, above all, productive.”).

\textsuperscript{188}As Foucault put it in 1977, power “doesn’t only weigh on us as a force that says no; it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body . . . .” Foucault, Truth and Power, supra note 28, at 119. As he explained in 1982, power “incites, it induces, it seduces, it makes easier or more difficult; it releases or contrives, makes more probable or less . . . .” Foucault, The Subject and Power, supra note 28, at 341. See also Gordon, Introduction, supra note 138, at xix (discussing Foucault’s power as seeking “to teach, to mold conduct, to instill forms of self-awareness and identities”).
these ways, power is productive: it produces behavior, traits, values, and desires, etc. Thus a central theme of The Will to Know\textsuperscript{189} is that rather than simply repressing sex, Western society since the nineteenth century has actually stimulated extensive discourse about sexuality and endowed that discourse with the promise of revealing the truth about ourselves.\textsuperscript{190}

It is important to recognize that “productive,” for Foucault, does not necessarily mean constructive or beneficial; in his view, modern forms of power have often produced misery.\textsuperscript{191} Nonetheless, when Foucault spoke of power as productive he deliberately sought to detach it from negative connotations of power as evil. For Foucault, power is always dangerous; it can result in either good or evil—neither is guaranteed.\textsuperscript{192}

**Power Produces Subjects.** In Foucault’s view, some of the most important things that power produces are *subjects*. Foucault intended this term in at least three different senses. First, in what one might think of as the grammatical sense, power produces subjects who act, rather than simply objects upon whom others act. The distinction is between an active agent rather than a passive victim. Second, as an echo of the sovereign-subject relationship, power produces subjects who are tied to others by modifiable bonds of obligation or control\textsuperscript{193} (in ways that Foucault explored in *Discipline and Punish*\textsuperscript{194}). And third, power creates subjects as in the philosophical term for a self: a person (or group) with an identity and self-understanding—in Foucault’s more pejorative

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\textsuperscript{189}FOUCAULT, THE WILL TO KNOW, supra note 34.
\textsuperscript{190}See id. at 12–13, 17, 23, 35.
\textsuperscript{191}In a 1977 interview shortly after the release of *The Will to Know*, he described the “positive mechanisms” which “produced [sexual] identity in this or that fashion” as having caused “misery,” just as the capitalist economic system produced misery for its workers. Foucault, *Power and Sex*, supra note 86, at 112–13. Winter provides a good example of a productive, but not salutary, power:

[Patriarchal power is, in fact, quite productive: It instills compulsive concern with one’s attractiveness; it inculcates a need to please; it instructs in the habits of deference. One might even say that the whole point of this aspect of gender power is to produce particular kinds of subjects capable of acting creatively and vivaciously in exciting, pleasing, and feeding the egos of men.]

Winter, supra note 103, at 807.

\textsuperscript{192}As Foucault stated in a 1984 interview:

Whenever an institution of power in a society is involved, everything is dangerous. Power is neither good nor bad in itself. It is something perilous. It is not evil one has to do with in exercising power but an extremely dangerous material, that is, something that can always be misused, with relatively serious negative consequences.

*Interview with Actes*, supra note 46, at 400. See also Foucault, *The Ethic of Care for the Self*, supra note 28, at 18 (“Power is not an evil.”); Michel Foucault, *The Risks of Security*, in *3 ESSENTIAL WORKS*, supra note 28, at 365 (“All power relations are not bad in and of themselves, but it is a fact that they always entail certain risks.”).

\textsuperscript{193}As Foucault defined this sense of the term in his important 1982 essay, he meant “subject to someone else by control and dependence . . . .” Foucault, *The Subject and Power*, supra note 28, at 331.

\textsuperscript{194}FOUCAULT, DISCIPLINE AND PUNISH, supra note 33.
formulation, a subject “tied to his own identity by a conscience or self-knowledge.”

Thus, who we are, how we relate to ourselves, even our very identities and actions are all products of power—products of our interactions in human relationships.

For Foucault, the notion that power produces subjects grew out of his view that nothing about humans is fixed, that instead we are formed and form ourselves through our interactions and cultures. We are not like billiard balls, moving in one direction, deflected by the application of power, but otherwise unchanged by the contact. Individuals and groups are neither preformed before they engage in power relations, nor unchanged by those relations; in Foucault’s view our participation in power relations literally makes us who we are. For him, it is the push and pull of human relationships that shape us as individuals and groups—as others seek to manage us, we succumb to and resist those efforts, and in turn we seek to steer the conduct of others, as well as to mold ourselves. In the flux and ferment of these relations, our thoughts, identities, and actions are developed, reconsidered, refined, jettisoned and/or solidified. This concept is another manifestation of his dynamic view of power: not only are the terms of the relations changeable or modifiable, but so too are the participants, through their own conduct and the conduct of others.

In addition to being understood as a process, power, as

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195 Foucault, The Subject and Power, supra note 28, at 331. He also used the term in a fourth sense as a “type” of person, such as the “docile” subject (that discipline produces) or the “knowable” subject (that pastoral techniques and the human sciences produce).
196 See supra notes 80–81 and accompanying text (discussing Foucault’s view on the instability of all things human).
197 As Foucault stated in a 1976 lecture:

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike . . . . In fact it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals.

Foucault, Two Lectures, supra note 77, at 98.
198 See, e.g., Foucault, Questions on Geography, supra note 153, at 73–74 ("[T]he individual is not a pre-given entity which is seized on by the exercise of power. The individual, with his identity and characteristics, is the product of a relation of power exercised over bodies, multiplicities, movements, desires, forces.").
199 Bernice Johnson Reagon provides an excellent explanation of this process of group identity formation and reformation. See Bernice Johnson Reagon, Coalition Politics: Turning the Century, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 356 (Barbara Smith ed., 1983). As she explains, an initial group of apparently like-minded or like-situated individuals is inevitably forced to change or refine its identity as new members enter (bringing different understandings of why they fit in) and as members discuss and act on their understandings of the group’s nature, purpose, and agenda. Id. at 356–68.
200 As he indicated in a 1978 interview, “in the course of their history, men have never ceased to construct themselves, that is, to continually displace their subjectivity, to constitute themselves in an infinite, multiple series of different subjectivities that will never have an end . . . .” Trombadori, Interview with Foucault, supra note 29, at 276.
Foucault approaches it, is also a force that animates our actions and shapes our very selves.201

The Interconnections Between Power and Knowledge. In addition to producing subjects, a second essential product of power relationships is knowledge. Foucault rejected the notion that power and knowledge (or truth) are diametrically opposed to each other.202 He was deeply suspicious of experts purporting to speak from a stance of detached neutrality either against power or without power.203 Instead, he stressed that power and knowledge are related; indeed they are intertwined in complicated ways. In a famous passage, he wrote:

[P]ower produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); . . . power and knowledge directly imply one another; . . . there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.204

It is important to emphasize that Foucault did not equate power and knowledge. As he stated in an interview in 1983:

[W]hen I read—and I know it has been attributed to me—the thesis ‘Knowledge is power,’ or ‘Power is knowledge,’ I begin to laugh, since studying their relation is precisely my problem. If they were identical, I would not have to study them and I would be spared a lot of fatigue as a result. The very fact that I pose the question of their relation proves clearly that I do not identify them.205

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201 As Winter has stated, Foucault presents power as “a productive force internal to the person that animates behavior, perception, perspective, and knowledge” and as “a life-giving force that is as constitutive of the subject as the blood that pumps in one’s veins.” Winter, supra note 103, at 803. Winter summarizes this image of power as “[t]he productive force that flows through the very grain of individuals [and] extends throughout the social body to animate even the most . . . [everyday] social relations.” Id. at 804. Miller characterizes Foucault’s conception of power “as a stream of energy flowing through every living organism and every human society, its formless flux harnessed in various patterns of behavior, habits of introspection, and systems of knowledge.” Miller, supra note 39, at 15.

202 Foucault viewed this severing of knowledge and power as a fundamental error of Greek philosophy, which he traced back to Sophocles’ Oedipus. See Foucault, Truth and Juridical Forms, supra note 165, at 16–32.

203 Foucault was deeply disdainful of the assumption, which he attributed to humanism, that “only those who keep their distance from power, who are in no way implicated in tyranny, shut up in . . . their room, their meditations, only can discover the truth.” Foucault, Prison Talk, supra note 76, at 51.

204 Foucault, Discipline and Punish, supra note 33, at 27.

205 Critical Theory, supra note 70, at 43.
Another theme of *Discipline and Punish*\textsuperscript{206} was that the growth of the human sciences and of the techniques for controlling behavior were interconnected.\textsuperscript{207} Knowledge of individuals (and groups) contributes to shaping them and in the process of shaping humans, knowledge is both produced and used.\textsuperscript{208}

Just as power is not necessarily evil,\textsuperscript{209} for Foucault, knowledge is not necessarily salutary; it too is bivalent, depending on the uses to which it is put and the effects that it creates.\textsuperscript{210} He also spoke of truth (again in the realm of the human sciences) as both a product of power and as having effects of power—of having been bestowed with a certain force to exclude or invalidate other knowledges.\textsuperscript{211} As Foucault elaborated in another famous passage from a 1977 interview:

[T]ruth isn’t outside power, or lacking in power: ... truth isn’t the reward of free spirits, the child of protracted solitude, nor the

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  \item \textsuperscript{206}FOUCAULT, DISCIPLINE AND PUNISH, supra note 33.
  \item \textsuperscript{207}For Foucault, the “moment when the sciences of man became possible is the moment when a new technology of power and a new political anatomy of the body were implemented.” Id. at 193. See also Foucault, Body/Power, supra note 118, at 61 (identifying “the great nineteenth-century effort in discipline and normalisation” as “one of the conditions of the emergence of the human sciences”).
  \item \textsuperscript{208}As Foucault elaborated in a 1978 interview:
    \begin{quote}
    [I]ntellectuals justify and mark out their identity by trying to establish an almost uncrossable line between the domain of knowledge, seen as that of truth and freedom, and the domain of the exercise of power. What struck me, in observing the human sciences, was that the development of all these branches of knowledge can in no way be dissociated from the exercise of power. ... [T]he fact that societies can become the object of scientific observation, that human behavior became, from a certain point on, a problem to be analyzed and resolved, all that is bound up, I believe, with mechanisms of power—which, at a given moment, indeed, analyzed that object (society, man, etc.) and presented it as a problem to be resolved. So the birth of the human sciences goes hand in hand with the installation of new mechanisms of power.
    \end{quote}
  \item \textsuperscript{209}See supra notes 189–90 and accompanying text (discussing how Foucault sought to avoid negative connotations of power as evil).
  \item \textsuperscript{210}As Foucault stated in 1978:
    \begin{quote}
    Since the sixteenth century, people have always considered the development of the forms and contents of knowledge to be one of the greatest guarantees of liberation for humanity. That’s one of the postulates of our civilization, one that has been extended throughout the world. Now, it’s a fact already established by the Frankfurt School that the formation of the great systems of knowledge has also had effects and functions of enslavement and domination. Which leads one to thoroughly reexamine the postulate according to which the development of knowledge constitutes a guarantee of liberation.
    \end{quote}
    Trombadori, *Interview with Foucault*, supra note 29, at 291 (emphasis added).
  \item \textsuperscript{211}The excluded or invalidated knowledges are the “subjugated knowledges” that Foucault’s genealogical method was designed to identify. See supra note 77 and accompanying text (discussing knowledges defeated in battlefield of ideas).
\end{itemize}
privilege of those who have succeeded in liberating themselves. Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms . . . which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.\footnote{212}

In discussing truth as a product of power, Foucault was not claiming that power (nor those we traditionally call the powerful) improperly installs falsity—or ideology, in the Marxist sense of the term—in truth's rightful place.\footnote{213} Rather his point was that knowledge, even—or perhaps especially—true knowledge, needs to be questioned in terms of the role it plays in shaping or undergirding our practices, institutions, and our very selves. For Foucault, the appropriate standpoint for such an interrogation is the acceptability of the practices, institutions, and identities, not whether the thought or knowledge that underlies them is true. Knowledge or truth must be judged by its effects.

*Power as Intentional but Nonsubjective.* One of the initially most enigmatic elements of Foucault’s approach to power is his pronouncement that “[p]ower relations” are “both intentional and nonsubjective.”\footnote{214} The notion flows from his conception of power as a participatory process. Power is intentional because all of the participants have their own aims and objectives, their own intentions, in seeking to shape the conduct of others. By nonsubjective, he meant that there is no single subject—not a class, a caste, or a decision-making center—that completely controls the outcomes\footnote{215} or designs the process.\footnote{216} Outcomes depend upon all participants' enactments of their roles and the system as a whole has no single architect or inventor. His expression is a rather more abstruse reformulation of his earlier statement that modern power is “a machine in which everyone is caught, those who exercise

\footnote{212}Foucault, *Truth and Power,* supra note 28, at 131.
\footnote{213}As Gordon puts it, Foucault’s interest “is not the detection of false or spurious knowledge . . . but, rather, the role of knowledges that are valued and effective because of their reliable instrumental efficacy.” Gordon, *Introduction,* supra note 138, at xviii.
\footnote{214}FOUCAULT, THE WILL TO KNOW, supra note 34, at 94.
\footnote{215}As Foucault elaborated, power does not result from the choice or decision of an individual subject; let us not look for the headquarters that presides over its rationality; neither the caste which governs, nor the groups which control the state apparatus, nor those who make the most important economic decisions *direct* the entire network of power that functions in a society. . . . *Id.* at 95 (emphasis added).
\footnote{216}As Foucault wrote, even though there can be “comprehensive systems” whose “logic is perfectly clear . . . [and] aims decipherable, . . . it is often the case that no one is there to have invented them, and few who can be said to have formulated” those systems. *Id.*
power as much as those over whom it is exercised. . . . [I]t becomes a machinery that no one owns.”

5. Government, Pastoral Power, and the Practice of Liberty

Government. Late in his work, Foucault modified his terminology, tending to speak less of power relations and more of techniques of government. In using the latter term, he intended the expansive meaning attached to the term in the sixteenth century: the notion of governing oneself, one’s children, a family, a farm, an institution, souls and lives, as well as a locality, province, or state. His definitions of government—“the way in which the conduct of individuals or of groups might be directed” and the structuring of “the possible field of action of others”—were essentially the same as his evolved definition of a power relation. Indeed, by 1982 he was writing that power is “a question of government.” His championing of an expansive meaning of the term government was another manifestation of his point about the dispersion of power throughout society rather than its residence in a central location, such as the State.

Pastoral Power. Also late in his work, Foucault discussed another modality or form of power, “pastoral power.” The role of pastoral power is “to constantly ensure, sustain, and improve the lives of each and every one” by “treating the vast majority of men as a flock with a few as shepherds.” In order to accomplish its mission, pastoral power requires a detailed knowledge of each individual, not simply of actions but also of inner thoughts. Pastoral power “cannot be exercised without knowing the inside of people’s minds, without exploring their souls, without making them reveal their innermost secrets. It implies a knowledge of the conscience and an ability to direct it.”

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217 Foucault, The Eye of Power, supra note 169, at 156. Walzer suggests that Foucault’s contradictory words—intentional and nonsubjective—apply to “different levels” of power. As he explains: “[E]very disciplinary act is planned and calculated; power is intentional at the tactical level where guard confronts prisoner; doctor, patient; lecturer, audience. But the set of power relations, the strategic connections, the deep functionalism of power has no subject and is the product of no one’s plan.” Walzer, supra note 88, at 63.
218 See, e.g., Foucault, Governmentality, supra note 66, at 205 (characterizing sixteenth century authors of “art of governing” as constantly recalling that one could speak of “governing a household, souls, children, a province, a convent, a religious order, a family”).
219 Foucault, The Subject and Power, supra note 28, at 341. Cf. supra text accompanying note 128 (discussing power as action on actions of others and as conducting the conduct of others). In an interview in 1978, Foucault had proffered a similar definition: “By ‘government’ I mean the set of institutions and practices, from administration to education, through which people’s conduct is guided.” Trombadori, Interview with Foucault, supra note 29, at 295.
220 Id., supra note 28, at 341.
221 See supra notes 144–55 and accompanying text (discussing dispersion of power throughout society).
223 Id. at 303.
224 Foucault, The Subject and Power, supra note 28, at 333.
That guidance of conscience is accomplished by encouraging individuals to confess their thoughts and then assisting in interpreting them. Historically, this interpretation was facilitated by clergy, but increasingly from the nineteenth century on, the role of encouraging individuals to reflect upon and speak their truths about themselves increasingly spread to a series of interpretive experts: doctors, psychologists, therapists, counselors. By pushing individuals to seek and speak the truth about themselves, this pastoral power produced subjects in Foucault's third sense: a subject "tied to his own identity by a conscience or self-knowledge."²²⁵ Like disciplinary power, pastoral power is an individualizing power, but rather than primarily seeking to shape the individual's conduct, pastoral power seeks to shape individual self-identity. While disciplinary techniques objectify or objectivize, pastoral techniques subjectify or subjectivize.²²⁶ And like their disciplinary counterparts, pastoral methods are also diffused throughout modern society. Indeed Foucault's analysis of the social movements of the late 1960s and the 1970s is that they were an attack on widely dispersed forms of pastoral power and a rejection of the identities that they imposed.²²⁷

Foucault's thoughts on bio-power, pastoral power, and government converged in his late writings. In his view, the modern State has increasingly fused bio-power's concern for the population and pastoral power's concern for reaching and shaping each member of the flock. As the goal of pastoral power shifted from spiritual salvation to the more secular spheres of health, economic standard of living, security, and protection from accidents, pastoral power was transposed; it "suddenly spread out into the whole social body."²²⁸ And its "officials" came to include both private ones, such as social welfare associations, philanthropists, psychiatrists, and doctors, and also public ones such as the police—whose domain extended far further than it does in our contemporary understanding of the term²²⁹—and other branches of the State.²³⁰

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²²⁵ Id. at 331. Clinical law professors—in pushing students to reflect on their experiences and to share those reflections with us—are also exercising pastoral power.

²²⁶ See, e.g., DREYFUS & RABINOW, supra note 26, at 169 ("In the genealogy of the modern subject Foucault is juxtaposing the technologies of the subject and subjectification to his earlier analysis of the technologies of the object and objectification.").

²²⁷ In 1982, he described those movements as attacks on a "form of power that applies itself to immediate everyday life [and] categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him that he must recognize and others have to recognize in him." Foucault, The Subject and Power, supra note 28, at 331.

²²⁸ See id. at 335.

²²⁹ Foucault's examination of numerous texts of the era reveal that in the eighteenth century, "police" matters concerned not just "the repression of disorder, but an ordered maximization of collective and individual forces." FOUCALUT, THE WILL TO KNOW, supra note 34, at 24–25. During the seventeenth and eighteenth centuries, especially in continental Europe, "police" were administrators who ensured "[t]hat people survive, that people live, that people do even better than just survive or live . . . ." Foucault, Political Technology of Individuals, supra note 67, at 413. Police were civil servants who saw to "a live, active, and productive man," they dealt with individuals "as working, trading, living beings," to be improved so that they can enhance the strength of the State. Id. at 412.
Unlike his earlier writings on power, his last works focused less on techniques and more on underlying rationalities. In his view, the State and its public officials became interested in these pastoral issues because, since the sixteenth century, the mentality of government—what Foucault labeled “governmentality”—shifted from ruling a territory to ruling a population and to the notion of improving the strength, productivity, welfare, and well-being of the entire population and of each individual member of it. From the tone of his comments, it is clear that he saw the emergence of this rationale of government as problematic—because it encourages a therapeutic humanism, a drive to improve others for their own good and the collective good, that threatens liberty. Indeed, in these last writings, Foucault speaks of liberalism as a monumental advance in governmentality because of its understanding that to govern less is to govern better.

The Practice of Liberty. In his last works, Foucault hints at the path he would encourage us to take. Recognizing that we are all governed, this last Foucault (still without prescribing the form or content that such an endeavor should take) urged his readers to refuse or resist being governed in the ways we currently are, to reject the identity and subjectivity—“the manner in which we behave and in which we become conscious of ourselves”—that is presented to and imposed on us. He encouraged us, by applying techniques of the self, to practice our liberty to invent new forms of subjectivity; that is, he urged us to think, act, and relate to ourselves differently than in the ways we are programmed or managed. As he wrote in 1982: “We have to promote new forms of subjectivity through the refusal of . . . [the] kind of individuality that has been imposed on us for several centuries.” In his words, “[l]iberty is a practice. . . . ‘Liberty’ is what must be exercised.”

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230 See Foucault, The Subject and Power, supra note 28, at 334–35 (describing “officials of pastoral power” as including both public and private institutions).

231 "Omnes et Singulatim," the title of the Tanner Lectures that Foucault delivered at Stanford University in 1979, is the Latin motto that Foucault ascribes to our modern governmentality: “of all and of each.” Foucault, "Omnes et Singulatim," supra note 66; Gordon, Introduction, supra note 138, at xxvii.

232 Foucault often identified his thought as a fundamental rejection of humanism. The tone of his references to those engaged in “social orthopedics,” see supra note 165 and accompanying text, and pastoral power communicate clear disdain for or discomfort with such efforts. The term “therapeutic humanism” is, however, mine.

233 See, e.g., Foucault, Space, Knowledge, and Power, in 3 ESSENTIAL WORKS, supra note 28, at 349, 349–52 [hereinafter Foucault, Space, Power, Knowledge] (arguing “if one governed too much, one did not govern at all”).

234 Gordon refers to an unpublished talk in 1978 in which Foucault described the critical attitude that one should take from Enlightenment thought as “the will not to be governed—or, at any rate, as ‘the will not to be governed thus.’” Gordon, Introduction, supra note 138, at xxxix.


236 Foucault, The Subject and Power, supra note 28, at 336.

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IV. THE ALLURE AND UTILITY OF FOUCAULT’S IDEAS FOR COLLABORATIVE LAWYERING

At the heart of collaborative lawyering is the idea that lawyers are more effective if they learn to work open-mindedly and constructively with others.\(^{238}\) Discarding any notions of solitary, heroic individualism, collaborative lawyers are always on the lookout for people, ideas, groups, and institutions that can be resources or allies in struggles to reshape the world. In this search, collaborative lawyers sometimes run against cognitive or cultural conditioning that views the places investigated as unlikely sources of insight or assistance. Nonetheless, collaborative lawyers continue to forage for ideas and allies, undaunted by their critics’ likely dismissal of this exploration as misguided scavenging. Rather than searching for all-knowing guidance, these lawyers simply strive to remain curious and open-minded, convinced that one never knows where one will find powerful assistance.

It is in this spirit that the best collaborative theorists have explored Foucault’s ideas. They have not looked to Foucault as an intellectual master to be followed, but as a source of potentially useful ideas, a purveyor, to use Foucault’s own image, of potentially useful tools.\(^{239}\) I thus now turn to examine the ways that Foucault’s approach to power meshes with collaborative lawyers’ approach to their work. I seek to explore the attractions that his ideas have held for collaborative lawyers and the ways in which his ideas fit, or have been seen to fit, with the projects that this approach to lawyering for social change undertakes and champions.

In focusing on areas of fit and utility, I do not argue that reading Foucault causes collaborative lawyers to hold the ideas that they do or to structure their work in the ways they do. These lawyers are not blank slates. Instead, Foucault’s thinking about power is an influence—a significant one, but one of many\(^{240}\) on theorists of collaborative lawyering and it is a tool collaborative lawyers can and do use to make sense of situations that arise in efforts to lawyer for social change.

\(^{238}\)Although I shall frequently attribute particular activities, beliefs, and approaches to collaborative lawyers, I do not intend to convey a view of collaborative lawyering as monolithic. As with any general movement, individuals have their own takes on what collaboration means and how to practice it. In seeking to assess the utility and limits of Foucault’s ideas for this broad approach to lawyering, I shall endeavor to present the ideas of those within the large tent of collaborative lawyering and to indicate when my own views are at odds with other theorists of collaboration. Despite these efforts, I shall inevitably be presenting my own interpretation of collaborative practice.

\(^{239}\)As discussed below, Alfieri has, in at least one regard, followed Foucault too closely, truncating the lawyer’s role so fundamentally that I do not view his vision of practice as a true collaboration with clients. See infra note 299 and accompanying text (discussing Alfieri’s insistence that lawyers must silence themselves so that clients’ authentic voice can be heard).

\(^{240}\)In a subsequent work I shall examine some of the other strains of democratic and civic republican theory that also underlie and influence this approach to activist lawyering.
A. The Recasting of Clients as Active Participants

A Collaborative View. Collaborative lawyers are convinced that attorneys and clients should collaborate—that is, work together as partners—in resolving the problems that lower-income clients and communities face. Rather than viewing clients simply as people with problems that the lawyer must solve (primarily on her own through her expertise) collaborative lawyers strive to work with, not just for, their clients. Collaborative lawyers reject any assumption that their clients are helpless victims in need of rescue.\(^{241}\) In this model, clients do not just present “fact patterns” or legal issues for the lawyer and the law to resolve. Nor is the client’s role simply to make informed decisions selecting which among a number of alternate courses of action the lawyer will implement.\(^{242}\) Instead, lawyers and clients are encouraged to work together as partners to decide strategy, to implement it, and to assess its effectiveness.

What this means in practice is that sometimes lawyers will speak or act for clients, sometimes clients will speak or act for themselves, and sometimes each will speak and act.\(^{243}\) The location for such action may be within the legal system (in the context of litigation or negotiation) or outside it, in other social or political settings. In López’s terminology, instead of the lawyer being the “preeminent” problem-solver in the relationship, collaborative lawyers and their clients are “co- eminent” problem-solvers.\(^{244}\)

A fundamental assumption of this approach to lawyering is that lawyers and clients each have skills and knowledge to teach to and to learn from one

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\(^{241}\) The rejection is of a starting presumption of incapacity. There may, of course, be some clients whose youth, mental impairment, or emotional state precludes their ability to collaborate fully.


\(^{243}\) As White has noted, the etymology of the term “client” refers to one who is spoken for by another and thus “hears oneself named.” See White, Paradox of Lawyering for the Poor, supra note 3, at 861 n.2 (citing Eric Partridge, Origins: A Short Etymological Dictionary of Modern English 366 (1958)). Collaborative lawyers reject the assumption implicit in the terminology that lawyers will always necessarily speak for their clients. See López, Rebellious Lawyering, supra note 3, at 24 (referring to assumption that lawyers will always “formally represent” their clients as aspect of regnant model of practice against which lawyers should rebel).

\(^{244}\) López, Rebellious Lawyering, supra note 3, at 24, 53.
another. Lawyers have useful expertise in the law, in the types of persuasive strategies and tactics to which legal actors generally respond, and in the types of outcomes that the legal system can and cannot deliver. Clients have useful knowledge of those who purport to be their "superiors," of how they think and react, of how and to what extent they can be maneuvered around, and of who else might be able to influence them. López refers to this latter knowledge as "practical know-how" which is "inevitably at work in each and every person's effort to get by day to day."

Returning to the environmental justice scenario of the Introduction to this Article, a collaborative lawyering approach centers around noticing, learning about, and fostering clients' active participation. It begins by recognizing the clients' actions in coming together to discuss the plant's expansion, deciding to challenge it, and seeking out legal assistance—actions which belie passivity or helplessness. Client participation is then encouraged to continue in fact-gathering, in framing issues (is it about stopping the expansion of the power plant by any available means, or is it about forcing policymakers to value and protect neighborhood health), in identifying possible targets and strategies of persuasion, in implementing those persuasive strategies, and in assessing their effectiveness.

Clients' active engagement potentially entails gathering and presenting data on existing polluting sites, identifying and recruiting additional participants, helping to shape the stories told and arguments made, and speaking to neighbors, the media, the commission, and city officials and politicians. Rather than relying exclusively on the attorney and her expert knowledge, rather than simply being represented by their attorney, clients participate in an overall campaign to persuade the conglomerate, commission, and city not to expand the plant. Of course, any particular client's participation is not full-blown all the time; there is no expectation of a superhero without a job or a life. But when key decisions need to be made or assessed, or high-profile meetings or hearings attended, clients and allies are actively involved.

Foucault's Allure. First and fundamentally, Foucault's approach to power has allure for collaborative lawyers because it casts their clients as actors (or "subjects" in Foucault's first sense of the term) with whom it makes sense to collaborate. In Foucault's view, collaborative lawyers' clients are not "powerless." As a process in which everyone participates, rather than as a thing, capacity, or resource that anyone can hold, Foucault's model of power does not even allow one to speak in terms of powerful and powerless.

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245 Hence the title of White's article. See White, To Learn and Teach, supra note 3. See also López, REBELLIOUS LAWYERING, supra note 3, at 52–53 ("Like the client, the lawyer always teaches and always learns.").

246 López, REBELLIOUS LAWYERING, supra note 3, at 50–51.

247 Id. at 29.

248 See supra text following note 192 (discussing Foucault's view that power produces subjects, in the grammatical sense of subject that acts).

249 Because power is not a thing, resource, or capacity that can be possessed, in Foucault's
more important than its different terminology, Foucault’s approach resonates with collaborative lawyers because it rejects the notion that those individuals and groups traditionally characterized as “powerless” are passive victims, incapable of meaningful action on their own behalf.250

Foucault’s dynamic view of power emphasizes that all participants in power relations have agency, that some freedom of action is inherent in every power relation, and that resistance is an integral aspect of every power relation.251 Foucault’s approach to power invites (and maybe even demands) a search for forms and tactics of resistance—the ways in which those in subordinate positions block or elude efforts to control, constrain, or shape their behavior and the ways in which they seek in turn to control, constrain, or shape the actions and beliefs of their “superiors.” Such a search also encourages a strategic assessment of how clients might best maneuver within the realm of action available to them.252 These are precisely the explorations and assessments that collaborative lawyering urges on its practitioners.

Moreover, in treating knowledge as a joint product of every power relationship, Foucault’s approach explicitly posits that clients have knowledge—even if it’s a “subjugated knowledge” accorded scant attention or weight by the dominant forms of thought. López’s notion of “practical know-how” is what Foucault means by a “subjugated knowledge.”253 And one of the insights that López adds is that this knowledge or know-how is denigrated not only by dominant forms of knowledge, i.e., not only by lawyers, but also by “subordinated” people themselves.254 Thus a central task of those who believe in collaborative lawyering is to help clients appreciate the worth and utility of

conception there are not people who have it and are powerful and others who lack it and are powerless. See supra notes 106–10 and accompanying text (discussing Foucault’s rejection of power as a thing to be possessed). But his rejection of a powerful/powerless dichotomy does not mean that Foucault thinks relationships are equal. He explicitly and repeatedly stated that relationships are asymmetrical and uneven. See, e.g., FOUCAL, THE WILL TO KNOW, supra note 34, at 94 (referring to “divisions, inequalities, and disequilibriums” of relationships).

250White believes “Foucault’s picture of power . . . has opened up new possibilities in the political practice of relatively disempowered groups.” White, Faces of Otherness, supra note 1, at 1503.

251See supra notes 124–43 and accompanying text (discussing ubiquitousness of freedom of action and resistance in power relations).

252As White has elaborated, “Foucault’s picture of power disrupts . . . [the] closed circle of domination. By showing that the dominators do not ‘possess’ power, his picture makes possible a politics of resistance. It opens up space for a self-directed, democratic politics among subordinated groups, a politics that is neither vanguard-driven nor co-opted . . .” White, Faces of Otherness, supra note 1, at 1504.

253Indeed, the very idea of collaborative lawyering can also be seen as a subjugated knowledge that was largely excluded from the dominant discourse of lawyering for social change until López and White rescued or uncovered it.

254As López writes: “Clients tend to denigrate what they know how to do, often by describing it pejoratively as common sense, more often still by treating it as irrelevant once they actually seek help from a lawyer.” LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 48.
their knowledge and its transferability to new situations. For Foucault, because power (and the resistance that is always part of it) both deploys and creates knowledge, subjugated knowledge warrants exploration, for it can be put to use in strategies or counter-strategies of resistance. Collaborative lawyers seek to do precisely that: to jointly use their clients’ knowledge and their own to attempt to change the circumstances of clients’ everyday lives. Foucault’s thoughts on power and collaborative lawyers’ views of their clients thus converge to characterize these clients as thinking, active agents capable of working to change their situations.

This emphasis on clients’ agency and problem-solving skills also stems from a diagnosis of contemporary techniques of subordination or marginalization. One of the ways in which many lower-income people and people of color are marginalized is by disregarding them, by treating them as unlikely or unable to act or think effectively on their own behalf; rather than seeking to mold their consciousness, contemporary society tacitly dismisses its very existence or at least its significance. In a society that perceives itself as meritocratic, and measures merit largely through educational attainment and occupational status, those without higher education or supervisory positions are not regularly embraced as thinking, active agents—nor as at-all-effective problem-solvers. In seeking to challenge this mode of marginalization or subordination, all those who support collaborative lawyering emphasize and act on the conviction that these clients can think and act effectively. They refuse to marginalize such clients. In so doing, collaborative lawyers act consistently with Foucault’s call to study and resist the specific techniques of power at play in a particular historical moment.

B. The Significance of Clients’ Communities

A Collaborative View. There is also a second dimension to collaboration. Attorneys and clients do not simply partner with each other. They are always on the lookout for opportunities to learn from and partner with other community members, groups, and institutions. The larger community is seen as a rich source of information and potential allies in efforts to make change. Collaborative lawyers start from the presumption that if they look hard they are likely to find some individual, group, or institution that is working toward, or could be persuaded to work toward, the type of change that their clients seek. What is true of individual clients is also true of their communities:

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255 This notion of the transferability of tactics from one social setting to another is an example of what Foucault referred to as the transposition of techniques of power. See supra text accompanying notes 181–86 (discussing how techniques migrate from their initial settings and get used or appropriated elsewhere once they demonstrate their utility).

collaborative lawyers reject the assumption, either tacit or explicit, that communities are quiescent, passive, or helpless. Thus these lawyers make it a priority to be attentive and attuned to the myriad efforts in different communities to contest the terms of everyday life. Rather than viewing themselves as uniquely and exclusively qualified to make social change, collaborative lawyers view themselves and their clients as having a broad array of potential partners in such efforts. In López’s terminology, collaborative lawyers seek to integrate themselves and their clients into “a larger network of cooperating problem-solvers.” Among the sources of information and potential allies with whom collaborative lawyers are alert to opportunities for partnership are clients’ family, friends and neighbors, community activists and organizers, educators, entrepreneurs, funders, journalists, nonprofit agencies and staff, public officials, researchers, religious organizations, social workers, tenants’ groups, and unions.

A fundamental strategy of collaborative lawyers is to look for opportunities to connect (both their clients and themselves) with group activity to make social change. Supporting and nurturing such collective efforts is a central priority; failure to do so is a serious omission. The recent trend to characterize collaborative lawyering as “law and organizing” is in part a reflection of the value placed on facilitating group efforts. Collaborating

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257 There is consequently a similarity of approach and an affinity between collaborative lawyering and the work of James C. Scott, in which he looks below surface expressions and behaviors to detect a “hidden transcript” of resistance. See JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 184–92 (1990).

258 Thus “Sophie” and “Amos,” the two fictional “rebellious lawyers” that López describes in the first chapter of his book, stand out from other “regnant lawyers” in large part because of their attentiveness to and probing inquisitiveness about any and all initiatives in the communities in which they work. LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 30–82.

259 Id. at 55.

260 See id. at 53–54.

261 See id. at 24.

262 For works attaching such a label, see supra note 7. I believe this label obscures important differences between collaborative lawyers and organizers. For example, collaborative lawyers are generally more focused on mobilizing action around particular issues than they are on organizing—if the latter term is understood, as most organizers intend it to be, as building an organization and structure intended to last for the long term. Moreover, collaborative lawyers are interested in all forms of group activity—even “support groups” and other less-confrontational or seemingly non-advocacy groups—many of which organizers would dismiss as reformist, ineffective, or even counterproductive. For these lawyers, much of orthodox community organizing can be just as “regnant” as conventional lawyering. See LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 331–79. And finally, the “law and organizing” label is so broad that it applies to some theorists who argue that organizing should be privileged over all other strategies. See, e.g., Steven Bachmann, Lawyers, Law and Social Change, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984–85) (arguing that lawyers’ primary purpose is to facilitate organizing); Stephen Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049 (1970) (suggesting that organizing and teaching poor clients is only appropriate method of help). Such a presumption, to my mind, clashes with collaborative lawyers’ fundamental emphasis on drawing contextually from a myriad of approaches. See infra note 316.
with groups is seen as beneficial for clients, for lawyers, and consequently for effectiveness. Collaboration in group efforts benefits clients because it combats the atomization or isolation that can make existing conditions seem unchangeable and can make individuals doubt themselves and their capacities. It also presents opportunities for clients to speak and act in settings that are culturally more familiar than lawyers’ offices, courtrooms, and administrative agencies—in fora that are open to a wider variety of presentations and forms of action.\(^{263}\) Group work benefits everyone because it exposes each participant to a broad array of ideas (that they would not necessarily identify on their own) about how to frame and combat a given situation. It also presents opportunities to employ multidimensional approaches that involve multiple actors and diverse tactics, which can complement, supplement, or sometimes supplant traditional efforts in the judicial arena.\(^{264}\) And consequently, group efforts enhance overall effectiveness because they employ the talents and energies of a multiplicity, in a broad array of tactics and strategies, and thus are more likely to successfully effect (and preserve) social change.\(^{265}\)

Returning to the environmental justice scenario, a collaborative lawyer would strive to appreciate all of the neighborhood’s assets, even while noting its deficits. Instead of assuming that its residents are defeated and unsophisticated, passively waiting and watching while outsiders decide their fate, a collaborative lawyer would treat the neighborhood as a potential source of insight, and of engaged or engage-able activists or activists-to-be. Formal education would be far less of a prerequisite than would the willingness to pitch in and join efforts to defeat the plant. Of interest would be anyone who demonstrates potential to illuminate the situation or to act to change it. Participants and allies might be sought in local schools, healthcare centers,

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\(^{263}\)See, e.g., White, *Mobilization on the Margins*, supra note 3, at 546–63 (describing public speak-outs against Reagan Administration’s attack on Social Security rolls in which people with disabilities shared their personal narratives in “culturally familiar” setting akin to Protestant evangelical revival meeting, as well as “culturally accessible” theater performance group in Los Angeles in which homeless people were able to weave their personal experiences into open, improvisational format).

\(^{264}\)See Piomelli, *supra* note 4, at 503–13 (analyzing such an approach to contest “packing” of East Palo Alto Rent Stabilization Board).

\(^{265}\)Collaborative lawyers are not alone in valuing group mobilization as a necessary partner to law reform litigation. Over the past thirty years, a number of political scientists have criticized as a “myth of rights” the notion that litigation and courts alone—without broader political mobilization—can achieve the lasting social change that progressive lawyers seek. See, e.g., JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978) (reviewing thirty-five cases and examining how social movements use legal system to achieve concrete changes); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION* (1994) (arguing that although law sustains existing hierarchical order, it can still be used as tool for social reordering); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (exploring limited role of judicial system in second half of twentieth century in bringing about major social and political change); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974) (examining interplay between law and politics).
newspapers, churches, senior centers, nonprofits, youth centers, community centers, political clubs, tenants’ groups, home-owners associations, businesses, political officials, volunteer groups, and the like. In addition to what they bring individually to the fight over the plant’s expansion, clients would also be seen as potential links to these community assets. A collaborative lawyer would not be at all surprised to find individuals and groups who have been long concerned, and perhaps even active around, issues of environmental health or environmental justice—even if they had not used such labels.

Reaching out to all of these neighborhood actors would open opportunities to appreciate different ways of framing the issues, to recognize unexpected strategic possibilities, and to engage in different avenues of persuasion. In the latter regard, involving and turning out dozens or scores of neighbors and allies enhances the odds of successfully persuading the commission and city politicians through public hearings, the media, and private lobbying efforts—rather than relying on legal submissions alone. When more people speak, a broader spectrum of ideas are expressed, framed and shaded in different ways that increase the likelihood of persuasion. Even when people do not speak, their very presence can carry weight. Sometimes it is what is said that persuades, sometimes it is who says it that matters, and sometimes it is how many people say it or appear to back it. Collaborative lawyers focus on all three of these dimensions of persuasion.

*Foucault’s Apparent Utility.* As deployed by collaborative lawyers, Foucault’s notion of the omnipresence of resistance—that there is widespread resistance to efforts to manage behavior, including efforts to keep people “in their place”—supports the starting presumption about the existence of groups and institutions with whom lawyers and clients might join in efforts to make social change. One reason that Foucault refers to “subjects” is that the term applies both to individuals and to groups. The centrality that Foucault’s model of power assigns to resistance seems to dovetail with collaborative lawyers’ view of lower-income or marginalized communities as fertile sources of ideas, energy, and collective action for contesting the status quo.

Collaborative theorists have also read their commitment to fostering collective action as consistent with several additional elements of Foucault’s approach to power. As we have seen, Foucault understood disciplinary power as a set of techniques that tend to atomize individuals and to forestall the development of “horizontal conjunctions”—in other words, to divide people and groups from allies who might make control more difficult. He also saw

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266 The janitor at the local school, for example, would potentially know, or know how to reach, teachers, administrators, other parents, and youth. The in-home health aide would have potential contacts with patients or families who might feel strongly about the health impacts of plant expansion. The retired bus driver might have contacts with senior centers or with city employees or unions. Each of them would also bring a lifetime of experiences, problem-solving skills, and connections with others.

267 See *supra* notes 144–49.

268 See *supra* notes 172–73 and accompanying text.
pastoral power as tending to individualize, as tying individuals to an imposed identity. To the extent that these two primary modern modalities of power isolate individuals, Foucault’s ideas can inform, or support, a counter-strategy of resisting such atomizing or individualizing tactics by promoting group affiliations. Indeed, one way of characterizing collaborative lawyers’ work is as a deliberate nurturing or knitting together of horizontal relationships, of relationships between clients and their peers or other community members. These efforts are precisely the sort of “horizontal conjunctions” that Foucault saw modern forms of power as striving to forestall.

Collaborative lawyers’ fostering of group efforts can also be read to fit Foucault’s view that another aspect of modern forms of power is that they operate to make their subjects more visible. One advantage of group efforts to persuade is that individual members are usually less visible, and thus less vulnerable, to being singled out for possible retaliation. Be it at a public comment period before a governmental agency, at a speak-out or demonstration, as one of many signatories to a letter or one of many letter-writers, individuals stand out less and blend in more when persuasive strategies involve a group or multiple groups. The less is known about any individual member, and the more broadly the public limelight is shared by a constantly changing set of “new faces,” echoing complementary stories and arguments, the more difficult it can be for the targets of persuasion to exercise power over any particular individual participant.

Similarly, Foucault’s exhortation to his audience to develop “new forms of subjectivity”—that is, to reject the identities that society imposes on individuals and groups—seems to fit neatly with collaborative lawyers’ extolling of collective group efforts to effect change. One of the reasons that collaborative lawyers encourage clients to join and work with groups is the belief that such efforts can change participants’ self-perceptions, their relationships with themselves and others, their identities—in a word, their “subjectivities.” Involvement in a group can make participants feel like part of a community rather than isolated. It can validate perceptions that a current state of affairs is unjust (or “intolerable” as Foucault would say), replacing doubts that one is imagining things, or overstating their significance, or somehow to

\footnote{See supra notes 222–26 and accompanying text.}

\footnote{See supra notes 165–73 and accompanying text (discussing mechanisms of record-keeping, constant surveillance, and normalizing judgment that make subjects more visible).}

\footnote{In public relations, message “echo”—the repeating of the same central message by numerous sources from a variety of angles—is valued as an effective persuasive technique. See, e.g., ROBERT BRAY, SPIN WORKS! A MEDIA GUIDEBOOK FOR COMMUNICATING VALUES AND SHAPING OPINION 26 (2000).}

\footnote{See supra notes 234–37 and accompanying text (discussing Foucault’s exhortation to resist being governed in manner we are currently governed and to practice our own liberty).}

\footnote{See supra note 43 and accompanying text (discussing Foucault’s view of importance of uncovering genesis of intolerable ideas).}
blame for one's own predicament.\textsuperscript{274} Group participation can also help people to appreciate (and to practice and refine) the problem-solving skills that they, their peers, and their allies bring to situations, thereby contesting societal messages that deny those abilities.\textsuperscript{275}

These societal messages of individual and collective deficit—pervasive images of the "subordinated" as downtrodden, defeated, dysfunctional, and even dumb—are examples of what Foucault would characterize as dispersed, subjectivizing power. The images and their repetitive reenactment (in diverse forms) potentially produce subjects who believe and act on them. They provide a context for understanding what Foucault meant by power being nonsubjective: it is impossible to identify an initial architect or author of the idea of emphasizing the defects of the "subordinated," but it is possible to diagnose the approach as a pervasive strategy deployed by a multitude of actors in our society. Collaborative lawyers use the lens that Foucault provides to inform their efforts to resist—and to work with clients and communities to resist—what a contemporary social scientist might label the "(re)production of the defeated subject."

C. The Critical Attention to the Lawyer-Client Relationship

A Collaborative View. Collaborative lawyering grows in significant part out of a critique of the conventional relationship between many progressive lawyers and their clients. Advocates of collaborative lawyering view the traditional attorney-client relationship as a bad fit for lower-income clients and their communities. In part, the critique parallels that leveled by client-centered theorists against lawyer-centered practice: such an approach to lawyering overlooks important nonlegal dimensions and consequences of issues and also deprives clients of autonomy to make informed choices on questions that will have a significant impact on their lives.\textsuperscript{276} But the collaborative lawyering critique goes deeper, arguing that there are additional problems with a lawyer-centered model when applied to lower-income or "subordinated" clients and communities. The problem is that a model in which lawyers play the dominant

\textsuperscript{274}Here collaborative lawyers have been influenced by feminist consciousness-raising, see, e.g., Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. Rev. 589, 601–03 (1986) (describing feminist consciousness-raising practices as validating technique), and theories of popular education, see, e.g., PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (Myra Bergman Ramos trans., 1970); PAULO FREIRE, THE POLITICS OF EDUCATION: CULTURE, POWER, AND LIBERATION (Donald Macedo trans., 1985) (describing Paulo Freire's ideas about popular education); MYLES HORTON & PAULO FREIRE, WE MAKE THE ROAD BY WALKING: CONVERSATIONS ON EDUCATION AND SOCIAL CHANGE (Brenda Bell et al. eds., 1990). Collaborative lawyers share with both of these traditions a commitment to identifying, studying, discussing, and discarding internalized forms of oppression.

\textsuperscript{275}The notion of lay problem-solving skills is central to López's vision, as is the idea of practicing story/argument strategies. See López, REBELLIOUS LAWYERING, supra note 3, at 11–82.

\textsuperscript{276}See Binder et al., supra note 242, at 16–24.
role unquestioningly perpetuates (and is perhaps unconsciously fueled by) societal stereotypes that these particular clients and communities are helpless dependents in need of rescue by more knowledgeable and able outsiders.277 The overlay of educational, class, gender, and racial differences between lawyers and clients can make the application of even widely engaged in lawyering practices another enactment or reinforcement of those forms of inequality.278 By acting as if they view their clients as helpless, progressive lawyers can create a self-fulfilling prophecy. To serve lower-income clients well, to work with those clients and communities, collaborative lawyers believe that they must, to use López’s term, rebel against—or, in Foucault’s usage, detach themselves from—the ingrained habits, attitudes, and behaviors that present themselves as standard professional practice.

Collaborative theorists pay close attention, for example, to how lawyers interact with their clients and how they depict them. They scrutinize specific techniques: how lawyers interview their clients, how they investigate facts, how they develop case theories,279 how those case theories depict clients, and how lawyers interact with others in the presence of their clients.280 Such an

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278 For the intriguing suggestion that the pejorative connotations Western culture attributes to “dependence” flow from discomfort with acknowledging need or interdependence, see Maiwán Clech Lâm, Feeling Foreign in Feminism, 19 SIGNS: J. WOMEN IN CULTURE & SOC’Y 865, 875–79 (1994).

279 For a powerful articulation of the notion that treating all clients the same way does not ensure that an individual client will not experience the treatment as a manifestation of class, race, gender, or educational bias, see Cunningham, supra note 21, at 1329–31, 1381–82 (describing client’s reaction to being expected to sit in back seat of car and back rows of courtroom and to being reminded of importance of attending court dates).

279A “case theory” or “theory of the case” is the central unifying story around which the presentation of a case revolves; it ties the facts, law, and the audiences’ experiences and understanding of how the world works into a core capsulization of what the case is about. See, e.g., Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 MICH. L. REV. 485, 490–91 (1994); Binny Miller, Teaching Case Theory, 9 CLINICAL L. REV. 293 (2002).

280 See, e.g., LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 11–263 (discussing impact of various lawyering activities on clients of non-profit community law office and small private firm); White, The Hearing of Mrs. G., supra note 3, at 19–57 (exploring impact of legal aid attorney’s routine lawyering practices on lower-income client).
examination reveals that many conventional practitioners (in legal services offices, impact litigation outfits, and small or solo practices) often do not really listen to clients, do not strategize with them, and do not expect much from them. This scrutiny also reveals that lawyers often depict these clients as helpless and in need of rescue by benign intervention. In all of these arenas, unquestioned, conventional modes of practice can lead to attorneys exercising unhealthy power over their clients. By failing to heed or inquire into clients’ ideas about how to proceed, by failing to involve clients in joint strategizing efforts, by failing to share responsibilities, by treating clients and their community members and institutions as having little or nothing to offer—in short by expecting little from clients but passivity and mystification—lawyers can unwittingly create a situation in which clients do in fact withdraw into mystified passivity.

Collaborative lawyers view all of these specific elements of legal practice as an opportunity to recreate the status quo or to rebel against it by acting consistently with the different world which they seek to create.281 Thus these lawyers make conscious efforts to interact with clients in ways that encourage them to speak and share their thoughts; to involve clients in the definition and investigation of facts; to refine their own abilities to translate between the legal and lay cultures, so as to jointly strategize with clients about how to frame stories and arguments; to pay attention to how stories and arguments depict clients and their communities; and to look for opportunities to boost the status and role of clients when they interact with other parties and counsel.282 If collaborative lawyers seek a world in which their clients and clients’ communities are treated as fully human equals entitled to participate fully in society, those lawyers believe they must engage with their clients and their communities on exactly such a basis. In the words of López, the practice of collaborative lawyers “must itself reflect and occasionally even usher in the world we hope to create.”283 Rather than simply viewing an egalitarian, participatory democracy as the ultimate end, supporters of collaborative lawyering believe that egalitarian, participatory democracy is the necessary means to attaining that end.284

Thus, in the environmental justice scenario, a collaborative lawyer

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281 White refers to a collective project by a number of theorists (including herself, López, Alfieri, and others) to reflectively reconstruct “day-to-day lawyering routines [to] make our practice, as progressive lawyers, more consistent with our aspirations of greater social justice.” White, Faces of Otherness, supra note 1, at 1503. As López puts it, “lawyering itself [must] . . . be remade as part of any effort to transform the world.” LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 3.

282 See LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 11–263. In the latter regard, López refers to “practical moments” in which lawyers can alter the dynamics of interactions with others just by having clients make initial introductions, carry and use legal notepads, or call meetings. Id. at 62–65.

283 Id. at 382.

284 See Piomelli, supra note 4, at 486.
engages with clients and neighborhood residents as partners in a joint effort: partners in fact investigation (locating and mapping toxic and polluting sites, as well as identifying residents with respiratory health problems); partners in identifying people from whom they can learn; partners in recruiting potential allies (to join the collective effort to stop the plant expansion); partners in “encouraging” city officials to conduct a formal health assessment; partners in framing persuasive stories and arguments; partners in presenting their neighborhood—not just in words, but through their actions—as unwilling to accept additional unfair health burdens; partners in speaking to the media and the neighborhood and the commission; partners in monitoring the success of these efforts; and partners in learning from similar efforts elsewhere to combat undesirable land uses. In all of these efforts, a collaborative lawyer would seek to reshape the orientation of her lawyering practice: striving not simply to win “the case,” but also to facilitate the clients’ and neighborhood’s active, informed exercise of their democratic liberties.

Foucault’s Allure and Fit. Collaborative lawyers’ investigation of the details of the lawyer-client relationship accords with Foucault’s call to examine the specific mechanisms of power—285—in this setting, the particular ways in which lawyers manage their clients’ conduct and behavior.286 This examination of everyday lawyering practices also fits well with his call to question taken-for-granted assumptions about human nature and everyday practices, and to discard those practices that prove “intolerable.”287 It is similarly consistent with his insistence on detaching oneself from the roles and identities that society seeks to impose.288 Moreover, the investigation is conducted at the sort of social location that Foucault would approvingly view as one of the extremities of the social body, far from the State.289

Collaborative lawyers’ attention to the details of the attorney-client relationship is also consistent with Foucault’s notion of the interconnection between everyday practices and larger patterns of control in society.290 In Foucault’s and collaborative lawyers’ visions, dealing with “little” or “local” instances and practices of power is important political work. Calling attention to—and rejecting—these counterproductive exercises of power over clients is consistent with the notion of resisting power wherever it is encountered. It is

285See supra note 157 and accompanying text.
286Indeed, “client management” is often perceived as a skill that lawyers and judges value and expect other lawyers to develop and exercise. That even collaborative lawyers would engage in it sometimes (albeit with qualms) mirrors Foucault’s comment that exercises of power are not necessarily bad, but they are dangerous. See supra note 192 and accompanying text.
287See supra notes 43, 71–74 and accompanying text (questioning ideas and practices to explore what it would mean to think and act differently).
288See supra notes 71–74, 234–37 and accompanying text (arguing we should not be governed either in ways we currently are, or in ways that are imposed on us).
289See supra notes 150–55 and accompanying text (explaining power should be studied in everyday life and relationships, not simply in formal political realm).
290See supra notes 153–54 and accompanying text (arguing society will not change unless everyday mechanisms of power that underlie and support larger State mechanism also change).
also an example of what Foucault called “ethical” conduct or self-shaping: identifying one’s moral, political, and aesthetic vision of how to comport oneself, including how to behave in power relationships, and reshaping one’s practices and self-conception to conform to that vision. And perhaps most importantly for collaborative lawyering, there is a connection between what occurs in the legal representation and how the client and community engage in the larger world: lawyers can unwittingly recreate larger societal patterns that perpetuate or reinforce clients’ docility and isolation or they can instead deliberately nurture efforts by clients and communities to form engaged “horizontal conjunctions.”

Foucault’s notion of power as productive harmonizes with collaborative lawyers’ attention to how their behavior can affect their clients’ conduct and mindset. That lawyers’ traditional practices can create or reinforce docility, disengagement, and atomization is an example of disciplinary power that is productive—shaping behavior, aspirations, knowledge, and self-conceptions—but not salutary. That collaborative lawyers’ counter-practices can nurture and reinforce clients’ resistance, engagement, integration into collective activity, and view of themselves and their skills is an example of power that is both productive and constructive.

It is interesting, however, that in decrying lawyers’ power over, and even domination of, their clients, some collaborative lawyering theorists seem to forget Foucault’s more nuanced view of power as less-than-completely successful, as always resisted. Professor Alfieri, for example, has argued that legal aid lawyers thoroughly dominate and silence their clients. And White has argued that any advocate “inevitably replays the drama of subordination in her own work.” This talk of lawyers silencing and completely dominating their clients is oddly uninformed by Foucault’s analysis of the instability, the constant negotiation and renegotiation, of the terms of relationships; it also seems inconsistent with works in which these theorists detail clients’ resistance.

Collaborative lawyers’ qualms about speaking for clients are also

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291 See supra note 60 (defining ethics as self-generated and self-enforced sense of morality); see also Foucault, The Ethic of Care for the Self, supra note 28, at 18 (discussing how to comport oneself in power relationship, such as teacher-student, to avoid domination).

292 According to Foucault, disciplinary power mechanisms prevent precisely such “horizontal conjunctions.” See supra text accompanying note 173.

293 See supra note 191 and accompanying text (discussing Foucault’s distinction between productive and beneficial).


295 White, Paradox of Lawyering for the Poor, supra note 3, at 861.

296 White’s story of Mrs. G. provides an example of a client resisting her lawyer’s effort to control her testimony and voice. See White, The Hearing of Mrs. G., supra note 3, at 19–32.
consistent with—albeit more tempered than—Foucault’s ideas about the appropriate constraints on the specific intellectual.\textsuperscript{297} Foucault was an absolutist in this regard; he sought to “silence . . . all those who speak for others,” insisting that such a practice is an affront to those on whose behalf one might speak.\textsuperscript{298} At least as I understand and seek to implement the approach, collaborative lawyers do not go as far as Foucault.\textsuperscript{299} They strive to create opportunities for clients and communities to speak for themselves, or to speak alongside them, but these lawyers do not always hold their tongues and pens. While recognizing that speaking for others is always dangerous, collaborative lawyers sometimes do exactly that—after having worked hard to understand how their clients view the situation and having explored possible avenues for the clients to participate as well.\textsuperscript{300}

D. The Questioning of Lawyerly Expertise

A Collaborative View. Theorists of collaborative lawyering question the privilege and status that we all accord to lawyers’ professional expertise. In doing so, collaborative lawyers do not argue that lawyers’ expert knowledge is “untrue” or “false” or by any means useless. Instead, they argue that lawyering expertise has far more in common with everyday problem-solving and persuasion, practices in which everyone engages, than lawyers and non-lawyers assume or purport.\textsuperscript{301} These theorists seek to cut the image of lawyers’ skills down to size; not to deny them, but to put them into context, to make them one potentially relevant set of skills among many. There will, of course, be situations where professional lawyering expertise will be the optimal and perhaps only viable solution available; but collaborative lawyers seek to make that assessment contextually, rather than a priori. Collaborative lawyers stress the continuities between the problem-solving efforts of professional lawyers and lay people because they believe that overvaluing lawyers’ knowledge and

\textsuperscript{297}See supra notes 82–89 and accompanying text (discussing Foucault’s aversion to anyone purporting to speak for others or from standpoint of master of truth and right).

\textsuperscript{298}See supra text accompanying note 89.

\textsuperscript{299} Alfieri, who associates his ideas on civil practice with those of the leading proponents of collaborative lawyering, has, however, gone as far as Foucault. He has sought to discourage lawyers from ever speaking for their clients and urged them instead simply to make space for their clients to tell their own stories. See Piomelli, supra note 4, at 467–70. I view his stance as a fundamental error. See infra notes 331, 348 and accompanying text.

\textsuperscript{300}See infra note 348 and accompanying text (discussing consequences of lawyers’ self-censorship).

\textsuperscript{301}For López, whenever “problem-solving requires persuading others to act in a compelling way, we can call it lawyering, whether the problem-solver is representing herself (self-help), a friend (lay lawyering), or a client (professional lawyering).” LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 39. All persuasive problem-solving involves identifying the sorts of change one desires, the appropriate audiences that might deliver (or convince others to deliver) such change, the appropriate setting(s) in which to approach the audience(s), and then crafting stories and making arguments that will persuade the audience(s) to act as desired. See id.
skills often leads to the denigration of the knowledge and skills that clients and communities possess. And just as they think that clients can learn from them, collaborative lawyers think there is much to learn from the practical know-how of clients and communities.\footnote{Examples that López gives of practical know-how are the resources that secretaries, janitors, and farm workers draw upon in knowing how to make space for themselves in their work without challenging the formal terms of the relationship, but changing its actual day-to-day embodiment. \textit{Id.} at 57–59. Anyone who has had a supervisor should be able to appreciate the ways in which someone in a subordinate position must figure out what is really expected or demanded and how those expectations can be navigated or shaped so as to provide a degree of “breathing space.” The ability to size up a situation or superior, to figure out what is really going on, and then to use that insight to inform one’s conduct is at the core of this practical know-how.}

The desire to recover and to value the problem-solving approaches and skills of clients and communities should not be read as an assumption that those approaches and know-how are necessarily better or truer than those of lawyers—it does not reflect any sense of the infallibility or innate wisdom or purity of lower-income, of-color, or otherwise marginalized people.\footnote{See \textit{Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals} 60, 508–12 (1960).} Rather, the attempt is to foster an engaged collaboration in which neither legal nor lay knowledge is presumptively privileged, but instead both are explored and interrogated as possible sources of successful social change. Neither lawyers nor clients are treated as having a monopoly on insight and strategic acumen; collaborative lawyers seek to draw from both pools.

In the environmental justice scenario, rather than proceeding as if only lawyers and other technical experts can explain why permitting the expansion of the power plant is a bad idea, collaborative lawyers seek to encourage clients and neighborhood residents to realize that they too can speak to the central issue. Echoing one strain of legal realism,\footnote{See, \textit{e.g.}, \textit{Steven Lubet, Modern Trial Advocacy} 1–2 (2d ed. 1997) (discussing case analysis and storytelling).} and a key insight of the better practitioners and theorists of trial advocacy,\footnote{See \textit{generally} Gerald P. López, \textit{Lay Lawyering}, 32 UCLA L. REV. 1 (1984–85) (arguing that all people engage in persuasive activities, often through appeals to common sense). For a similar view by thinkers who do not align themselves with collaborative lawyering, see \textit{Anthony G. Amsterdam & Jerome Bruner, Minding the Law} (2000).} collaborative lawyers seek to emphasize that underneath and alongside almost every legal decision is also an issue of conformity with the decision-maker’s common sense understanding of the situation. Collaborative lawyers seek to underscore that the process of seeking to persuade others that common sense supports our desires is something in which we all engage and for which we all have talents.\footnote{See Simon, \textit{supra} note 11, at 1104.}

\textit{Foucault’s Fit.} The notion that everyone has persuasive skills, that everyone seeks to manage and shape the conduct of others, is another way of
expressing Foucault’s basic point that power—the management of the conduct of others—is everywhere and inescapable, that all social relationships are power relationships. Collaborative lawyers’ skepticism of lawyerly expertise is consonant with Foucault’s suspicion of expert discourse, especially his discomfort with the “power effects” of discourses perceived to be erudite and true. Collaborative theorists’ concern that societal valuation of lawyers’ technical expertise can lead to the denigration of lay people’s everyday problem-solving skills is also an example of the dynamic that Foucault believed continually replays itself, in which certain (privileged) discourses exclude others.

E. Attention to Everyday Life

A Collaborative View. Another aspect of collaborative lawyering is that it urges its practitioners to operate, monitor their effectiveness, and to understand life close to the ground, at a grassroots level. One of its critiques of much impact litigation is that many of the lawyers and organizations who engage in crafting lawsuits to win or preserve rights fail to examine whether and how those rights will translate into real changes in peoples’ lives. Such an examination fails to occur because often the ideas for impact litigation stem from lawyers’ assessments of what formal changes in the law might be winnable or from their guesses about what problems people are likely experiencing. Collaborative lawyers believe that close interaction with clients (and the groups and institutions in their communities) is essential to ensuring that efforts and gains are not simply formal or abstract, but real—touching and changing identifiable people’s lives. Such interaction also enables collaborative lawyers to observe, draw upon, and validate clients’ and communities’ everyday tactics and strategies of resistance.

In the environmental justice scenario, a collaborative lawyer would, through numerous interactions with clients and neighborhood members, necessarily get to know how these actors understand the situation, how they frame the story, what particularly troubles and moves them, and how they react to stories and arguments that the lawyer and other actors make or might make. This information does not dictate what the lawyer or client or anyone else necessarily does, but it informs and grounds it. By listening to, engaging with, strategizing with, and even challenging clients and allies, collaboration brings the lawyer into proximity with everyday life. That proximity provides a

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307 See supra notes 144–45 and accompanying text.
308 See supra notes 92, 211–13 and accompanying text.
309 See supra note 77 and accompanying text.
310 See, e.g., LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 13–17 (describing and criticizing “Teresa,” director of public interest impact litigation firm).
311 For a defense of impact litigators designing litigation without client participation, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 317–40 (1988).
detailed understanding of the impacts of the plant, the health problems that flow from it, and how they affect the neighborhood. It may even provide the telling detail that proves decisive for successful persuasion.

Foucault’s Allure. Foucault’s approach to power resonates with collaborative lawyers in this regard because of his strong emphasis on people’s everyday lives. His insistence that power should be explored at the extremities of the social body\(^\text{312}\)—that one needs to attend to relationships between intimate partners, family members, teachers and students, doctors and patients, bosses and employees, landlords and tenants—dovetails with collaborative lawyers’ emphasis on their clients’ everyday lives. His notion that “power comes from below”\(^\text{313}\) has great appeal for lawyers who believe in working and fostering mobilization at a grassroots level. For Foucault and collaborative lawyers, important action occurs in the everyday relationships in which people and groups experience, utilize, contest, and resist power. Collaborative lawyers strive to get in on this action—to observe it, encourage it, learn from it, assist it, and ally with it.

F. The Strategic Use of Multiple Sites of Contest

A Collaborative View. Collaborative lawyers’ emphasis on achieving impacts on clients’ everyday lives, and these lawyers’ affinity for collective approaches to persuasion, leads them to more broadly define the fora in which lawyers must be adept. While collaborative lawyers do not by any means reject the importance of the court system or administrative adjudication, they insist that lawyers must recognize both the strengths and limitations of such institutions. Lawyers need to understand and convey the remedies the law can provide, the norms and mechanisms it will use in doing so, and also the ways in which a legal framing of a situation can change the nature and contours of a dispute.\(^\text{314}\) Collaborative lawyers must be adept at helping clients to successfully navigate these judicial and administrative arenas. But they also strive to be alert to, and skilled in taking advantage of, opportunities to engage in other arenas of persuasion: in other public and political settings, in the media, and in networks of relationships within and between communities.

Collaborative lawyers search for strategies that address collective issues through collective means, means in which a number of potential audiences are targeted by a number of actors. In such disputes, these lawyers investigate a full panoply of devices, such as legal pressure, political pressure, publicity,

\(^{312}\)See supra notes 150–55 and accompanying text.

\(^{313}\)See supra notes 183–84 and accompanying text.

\(^{314}\)For example, lawsuits can tend to individualize and narrow disputes, limiting the parties to those immediately involved, making decisions based exclusively on evidence presented in court (thus often removing them from a larger historical or social context), and preferring monetary compensation to broader prospective changes in conduct. See William L.F. Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . , 15 LAW & SOC’Y REV. 631 (1980–81); Piomelli, supra note 4, at 490–92, 499–503.
direct action, and formal and informal lobbying of public and private decision-makers. Even in more individualized disputes, collaborative lawyers look for opportunities to expand the number of storytellers and argument-makers, for ways to facilitate persuasion by lawyers and clients and other community members or institutions that might weigh in to add additional influence over targeted audiences.\(^{315}\) In all these efforts, collaborative lawyers seek to use the law to solve the problems that it can, but they strive not to rely exclusively on the remedies and mechanisms that formal judicial and administrative processes offer. They seek, in short, to expand the sites, means, and agents of persuasion.\(^{316}\)

Thus, in the environmental justice scenario, the commission and the court are not the only sites of contest. The neighborhood, the media, and the city—including its health department, politicians, public officials, and general public—are all potential targets and agents of persuasion.

**Foucault's Appeal.** Foucault rejected the primacy of the formal political realm as the exclusive or paradigmatic setting in which the operation of power is best observed; he sought to displace the juridical model of power that identifies power with sovereignty.\(^{317}\) He also insisted that power is broadly dispersed throughout the social body and thus must be resisted and constructively exercised at a multitude of locations.\(^{318}\) These ideas fit nicely with collaborative lawyers' notions of broadening the realm of appropriate persuasive efforts, of going beyond the "juridical" domain of court cases and administrative hearings to a host of other social and political settings. Agreeing with Foucault that "power is everywhere," collaborative lawyers and their clients work to contest, enact, negotiate, participate in, and resist power everywhere, not just in courtrooms and administrative hearings—and not just when the judiciary is dominated by proactive adversaries.

**G. Hope and Vigilance**

*A Collaborative View.* Collaborative lawyers believe that partnership with clients and communities can bring about important social change. They see

\(^{315}\) This is not to say that collaborative lawyers always invoke such an approach or ever impose it. But it is an opportunity that these lawyers are always alert to suggesting and implementing.

\(^{316}\) As López puts it, collaborative lawyers "refuse to privilege any particular strategy or category of strategies. They focus on what might work—through assessments that regularly feel ad hoc, concrete and provisional . . . ." López, REBELLIOUS LAWYERING, supra note 3, at 69. As White adds, collaborative lawyers challenge the rigid line that separates the work of lawyers from the work of other social justice practitioners. They . . . use their skills and training to do what the situation calls for, regardless of whether an organizer, social worker, therapist, counselor, neighbor or friend might do that work . . . in a neatly role-segregated world.

White, Power Beyond Borders, supra note 3, at 875.

\(^{317}\) See supra notes 121–23 and accompanying text (describing juridical model of power).

\(^{318}\) See supra notes 111–13, 144–56 and accompanying text.
mobilized clients, groups, and communities as potentially able to contest and win issues, changing in the process both their material circumstances and their "subjectivities"—their beliefs, feelings, views of themselves, and ways of relating to others. Indeed, collaborative lawyers see in such efforts the possibility of restructuring and reinvigorating what we mean by democratic politics, market economies, and the very nature we call our own. They really are that ambitious.

Moreover, these lawyers believe that mobilized clients and communities are the most reliable way of ensuring that formal legal victories—be they newly won rights, resources, or other commitments—have real or lasting effects. Such victories are only real when they penetrate social life. Thus vigilant attention must be focused on monitoring their implementation and continually reassessing the original aims and means. Collaborative lawyers believe that victories are optimally realized and adapted to changing times the same way that they were initially won: through active partnerships and constant reevaluation.

Foucault's Allure. Foucault's notion that power is dynamic rather than static, that power relations can be changed and reversed, is alluring to collaborative lawyers because it offers hope of success. It offers hope that even in difficult times, the status quo does not and will not endure indefinitely.

319 White, for example, defines mobilization as a transformation of consciousness and behavior on two levels. On the first level, the dominant ideology, 'the system,' loses its legitimacy. Subsequently, participants lose their fatalistic sense that they are trapped within the system; they come to believe that they . . . can change their situation. On the second level, participants violate traditions, discount sources of cultural authority, and act collectively, rather than as isolated individuals.

White, Mobilization on the Margins, supra note 3, at 551–52 n.66.

320 Collaborative lawyers' views on this issue are not novel in this regard. In 1970, Gary Bellow, a leading practitioner and theorist of legal services for the poor, and soon to become one of the key shapers of clinical legal education, argued, using more traditional metaphors of power:

The problem of unjust laws is almost invariably a problem of distribution of political and economic power; the rules merely reflect a series of choices made in response to these distributions. If a major goal of the unorganized poor is to redistribute power, it is debatable whether judicial process is a very effective means toward that end. . . . "[R]ule" change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism.

Robert Borosage et al., Comment, The New Public Interest Lawyers, 79 YALE L.J. 1069, 1077 (1970). Even if some rules are self-executing—mandatory cost-of-living adjustments for recipients of governmental income maintenance payments, for example—their continued existence "on the books" is always vulnerable if their constituency's political strength wanes or is perceived to be waning.

321 In the words of White: "The Foucaultian picture of power makes insurgent politics interesting again; it brings possibility back into focus, even in apparently quiescent times when resistance is visible only in the microdynamics of everyday life." White, Faces of Otherness, supra note 1, at 1504.
Through courageous refusal, clever tactics and strategies, and successful "oppositional groupings,” Foucault believed it was always possible to change power relations—and thus life circumstances.\textsuperscript{322}

The promise of potential reversal not only offers hope, but it also encourages vigilance. For just as collaborative lawyers and their clients have the possibility of turning the tables through effective tactics and strategies, so too do their adversaries. For Foucault, as for collaborative lawyers, the instability at the heart of all power relationships means that all victories are temporary and need to be reenacted and renegotiated. Thus participants need to vigilantly and strategically focus on defending tomorrow what is secured today. As Foucault said, formal rules, mechanisms, and institutions do not guarantee freedom (nor, one can add, equality or democracy):

[T]here may, in fact, always be a certain number of projects whose aim is to modify some constraints . . ., but none of these projects can, simply by its nature, assure that people will have liberty automatically, that it will be established by the project itself. The liberty of men is never assured by the institutions and laws intended to guarantee them. This is why almost all of these laws and institutions are quite capable of being turned around—not because they are ambiguous, but simply because ‘liberty’ is what must be exercised.\textsuperscript{323}

Foucault’s ideas dovetail with collaborative lawyers’ view that law reform alone, unaccompanied by active participation by clients and communities, is unlikely to lead to sustainable and defendable gains. Because power is everywhere, because it cannot be escaped, because it cannot be held, all struggles are endlessly fought and re-fought. For Foucault and for collaborative lawyers, those struggles cannot long be maintained by a handful of experts, they must be daily enacted and reenacted by the engaged participation of individuals and groups. That engaged participation is the liberty that must be exercised.

\textit{H. The Caution Against Social Engineering}

\textit{Foucault’s Insight.} Foucault’s notion that power—efforts to change, shape, or manage the conduct and self-conceptions of others—is always dangerous sounds an important cautionary note for those inclined to heed it. Foucault’s view is not that such efforts are necessarily evil, but that they are

\textsuperscript{322}See Foucault, \textit{Space, Knowledge, and Power}, supra note 233, at 354 ("[N]o matter how terrifying a given system may be, there always remain the possibilities of resistance, disobedience, and oppositional groupings.").

\textsuperscript{323}Id. at 354–55 (emphasis added).
fraught with danger.\textsuperscript{324} This danger is not alleviated by humanitarian or therapeutic intentions of helping or improving people; if anything it is exacerbated.\textsuperscript{325} Those who seek to improve others or enable others to improve themselves—psychologists, psychiatrists, doctors, therapists, penologists, philanthropists, public hygienists—are precisely the ones whose actions and agendas Foucault believed must be scrutinized. These agents of pastoral power are engaged, in his view, in dangerous activity. The dangers are overreaching, imposition of new and better “subjectivities” (i.e., “healthier,” “wiser,” “sounder” conduct and self-conceptions), and domination.\textsuperscript{326} The widely dispersed projects of pastoral power have become increasingly (and, for Foucault, appropriately) resented and resisted.\textsuperscript{327}

Foucault, it will come as no surprise, offers little guidance on what to do. He says nothing on how to avoid overreaching, imposition, or domination. But another aspect of his thought plants a helpful suggestion. Here too the answer, at least to my mind, is another sort of vigilance: consciously pushing oneself to become “the subject” of one’s ethics, morality, politics, and aesthetics and repeatedly examining the kind of subject that one’s ideas and practices have made one.\textsuperscript{328} Such self-scrutiny must be genuine, and searching, without becoming paralyzing. Beyond introspection, alertness to how others respond to one’s conduct is necessary. As Foucault points out, there is no avoiding or escaping power relationships,\textsuperscript{329} so the only option is to participate in such relationships consciously, acting consistently with one’s goals and aspirations. The aim is mindful engagement, not paranoia nor paralysis.

Because a respectful and engaged collaboration—in which one both learns and teaches, respects and challenges—is at the heart of collaborative

\textsuperscript{324}See supra note 192 and accompanying text.

\textsuperscript{325}See supra notes 222–33 and accompanying text (discussing pastoral power and its threat to liberty). As Winter has stated, “quite a lot of oppression happens in the name of abstract humanist values such as democracy, autonomy, and equality.” Steven L. Winter, Cursing the Darkness, 48 U. MIAMI L. REV. 1115, 1129 (1994).

\textsuperscript{326}Foucault is only explicit about the last of these. See supra notes 135, 222–33 and accompanying text (discussing “domination” and therapeutic humanism).

\textsuperscript{327}See supra notes 156, 227 and accompanying text (describing social movements of 1960s and 1970s as attacks on pastoral power).

\textsuperscript{328}See supra note 60 (describing Foucault’s notion of self-generated and self-monitored ethics). Although I am deliberately echoing Foucault’s terminology to highlight the applicability of his ideas, this notion of introspective reflection on one’s own practice is the foundational method of clinical legal education in the United States. See, e.g., Anthony G. Amsterdam, Clinical Legal Education—A 21st-Century Perspective, 34 J. LEGAL EDUC. 612, 616 (1984) (stating essential aspect of clinical education is “to teach students how to learn systematically from experience”); Gary Bellow, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374 (Council on Legal Education for Professional Responsibility, Working Papers prepared for CLEPR National Conference, 1973) (highlighting students’ introspective interrogation of lawyering practices in which they engage and their conception of roles they enact).

\textsuperscript{329}See supra notes 144–45 and accompanying text.
lawyering, two central questions to ask ourselves are: (1) whether we are seeking to change and improve our clients and allies, and (2) whether we are genuinely open to being changed and improved by them. As Foucault's ideas illustrate, an affirmative answer to the first question is cause for careful monitoring, because shaping others is always dangerous. For collaborative lawyers, the urgency of that monitoring may be diminished, but is not eliminated, by an affirmative response to the second question. The concern is twofold: a desire to change and improve others can be a manifestation of the therapeutic humanism that Foucault sought to combat; it can also indicate a sense, which collaborative lawyers are keen to eliminate, that clients and communities are deficient and need to be rescued or led by wiser outsiders. An aversion to hubris is at the root of both concerns.

Although the line is not always clear, there is an important difference between working with people and groups to help them exercise, recognize, value, and augment the skills and knowledge that one believes they already possess and working instead to instill or inculcate basic skills and knowledge that one believes they lack. For collaborative lawyers, the first approach is dangerous but potentially, if not inevitably, worth the risks; the second can be deadly. So too is a negative response to the second question of openness to being changed by clients and allies.

V. THE LIMITS OF FOUCALT'S APPROACH TO POWER

Foucault's approach to power holds real allure for collaborative lawyers, informing or congenially fitting many of their projects. But even in his enormous body of work, he does not address, or provides unhelpful answers to, many of the issues that collaborative lawyers face. There are a number of ways in which his work does not fit as well as it might at first glance appear. These limitations warrant close attention. Collaborative theorists have noted some of them, but not all of them.

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330 As López puts it, lawyers "must open themselves to being educated by all those with whom they come in contact, particularly about the traditions and experiences of life on the bottom and at the margins." López, REBELLIOUS LAWYERING, supra note 3, at 37. But a collaborative lawyer also has an "obligation to challenge her client—to critique as well as appreciate his understanding of his situation, the legal culture, and the strategies he pursues." Id. at 53. As White has concurred, "[b]oth lawyer and client must accept, indeed invite, repeated challenge from the other." White, To Learn and Teach, supra note 3, at 768.

331 Alfieri's vision, in stark contrast, calls for lawyers always to defer to, rather than to challenge or truly work together with, their clients. See supra note 299 and accompanying text; infra note 348 and accompanying text. For this reason, I do not view his ideas as truly representative of collaborative lawyering, as I understand and intend the term. I intend collaboration as a two-way process of give and take, in which all participants contribute their thoughts and reactions on how best to proceed; if lawyers are discouraged or prohibited from doing so, I do not view the relationship as collaborative.

332 See supra note 232 and accompanying text (discussing Foucault's assertion that humanism threatened liberty).
A. Difficulty Envisioning Collaboration

Given collaborative lawyering theorists’ attraction to his work, it is rather ironic that Foucault’s view of relationships and society seems unable to fully comprehend the very notion of human collaboration. As we have seen, Foucault believed that there is no escaping power: all social relations are power relations. At his Nietzschean pinnacle, when Foucault characterized these relations as “perpetual struggles” and “warlike domination,” his rhetoric and approach implicitly ruled out the very possibility of cooperative human relationships in which participants genuinely seek to collaborate with each other and to harmonize their conduct. In this period of his work, he viewed relationships as contests of will and strength in which participants always seek to win; to his mind, everyone seeks to control, constrain, or somehow shape or reshape others.

Even in Foucault’s later writings, in which relationships are inhabited by mutually engaged partners, rather than by antagonists eternally bent on martial domination, he still conceived of power as a process in which actors seek to govern, shape, or manage the behavior and ideas of others. By characterizing all human interpersonal interactions as directed at managing others, his vision seems unable to imagine relationships in which one seeks to bring one’s own behavior and practice into line with the ideas and practices of others. His conception of power has difficulty explaining instances where we willingly temper or subordinate our ideas and inclinations, where we allow and even encourage, rather than resist, the efforts of others to shape us. This deliberate opening of one’s ideas and conduct to being changed by others is, as we have just seen, central to collaborative lawyers’ understanding of the sort of partnership they seek with clients and communities. And thus Foucault’s approach to power appears at first blush to be fundamentally at odds with the essential practice that collaborative lawyers propose.

Of course, Foucault’s supporters could argue that a closer examination of his last works on the techniques of the self can explain and illuminate collaboration. In those works, he examined self-mastery as essential to avoid

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333 See supra notes 144–45 and accompanying text.
334 See supra note 126.
335 The principal statements of his ultimate view of power are, to my mind, Foucault, The Ethic of Care for the Self, supra note 28, and Foucault, The Subject and Power, supra note 28.
336 See supra notes 127–30 and accompanying text (explaining Foucault’s definition of power as set of relationships in which actors seek to manage others).
337 As White has written, “Foucault’s theory is ultimately—and indeed, inevitably—incomplete . . . . It does not make sense of our yearning for, or our occasional movement toward, a more fully and freely interconnected human world.” White, Faces of Otherness, supra note 1, at 1507. White criticizes Foucault’s inability to illuminate not only “our zeal for contest” but also “our longing for connection,” his failure to recognize our interest in “feeling with people” rather than just “winning against them.” Id. at 1506–07.
338 See supra notes 330–31 and accompanying text (discussing how lawyers should allow themselves to be educated by all those with whom they come in contact).
succeeding to one's passions and appetites. For Foucault, as for the Greeks and Romans, there is a connection between one's ability to govern oneself and one's ability to govern others: domination\textsuperscript{339} of others results from a failure to properly control oneself, to keep one's appetites and passions in check.\textsuperscript{340} Thus collaboration can be understood as a technique of the self, as an exercise of self-control that tempers a predisposition or temptation to dominate.\textsuperscript{341} In such a view, opening oneself to truly working with others, rather than simply to strategically managing them, requires a deliberate self-shaping. It entails vigilantly ensuring that one maintains others' freedom of action, refraining from efforts to vanquish their liberty or resistance.\textsuperscript{342} To this extent, Foucault's study of these techniques of the self can explain collaborative behavior as an effort to shape oneself and one's conduct to correspond with one's own aesthetic or politics. But in this explanation, the driving force is always the satisfaction of one's own agenda; his approach does not recognize any genuine desire for service, connection, or community that is not primarily about oneself.

Foucault's supporters might also point to his numerous comments on the importance of intellectuals' limiting the scope of their work and rejecting the universal intellectual's role of prescriptive spokesperson.\textsuperscript{343} Foucault urged intellectuals to forego proffering prescriptions or blueprints for action precisely because he believed that solutions to societal problems should be worked out "collaboratively" by the people most directly affected.\textsuperscript{344} The limited, non-

\textsuperscript{339}I am relying on the distinction that Foucault drew in his later works between relations of power (in which participants have a range of freedom within which they can act and reverse certain terms of the relationship) and relations of domination (which leave no meaningful freedom and possibility of reversal). See supra note 135 and accompanying text.

\textsuperscript{340}See supra note 58. As Foucault elaborated in an interview in 1984, the two primary dangers that Greek doctrines of the care of the self (or the practice of liberty) sought to avoid were slavery and the abuse of power. With regards to the latter, power is abused when "one goes beyond what is legitimately the exercise of power and one imposes on others one's whims, one's appetites, one's desires." Foucault, The Ethic of Care for the Self, supra note 28, at 8. For the Greeks (and seemingly for Foucault as well), in order to avoid unethical domination, one must master one's passions and appetites: "[I]t is the power over self which will regulate the power over others." Id.

\textsuperscript{341}Of course, the notion of a predisposition to dominate, like a predisposition to resist, is precisely the sort of statement of a fixed human nature transcending history that Foucault believed he was rejecting. See supra notes 79–80 and accompanying text.

\textsuperscript{342}As Foucault noted in his 1982 essay, all strategies desire to become the winning strategy, the one that vanquishes the opponent. Foucault, The Subject and Power, supra note 28, at 346–47.

\textsuperscript{343}See supra notes 82–89 and accompanying text.

\textsuperscript{344}As he stated in 1984: "A collaborative effort would be required" to conceive of a tolerable system of punishment. Interview with Actes, supra note 46, at 398. In 1978, he indicated:

The problems I try to pose—those tangled things that crime, madness, and sex are, and that concern everyday life—cannot easily be resolved. Years, decades, of work and political imagination will be necessary, work at the grassroots, with the people directly affected, restoring their right to speak. Only then will we succeed, perhaps,
directive role that he prescribed for intellectuals rested on his faith in the creativity of non-experts. On closer examination, then, Foucault's later writings do not have as much difficulty explaining collaboration as his earlier formulations did.

But even this later Foucault, to the extent his ideas are elucidated by his personal political practice, has a rather truncated vision of what collaboration entails. For Foucault, the task of the intellectual or activist is to highlight an issue, to uncover its history, to suggest that things need not be as they are, and then to encourage those most directly affected to hash out possible solutions on their own.345 After convening or calling attention to the formation of the group, Foucault’s next step, however, is retreat from, rather than engagement with, the group.346 In his view, the intellectual’s work is complete once she has revealed the fractured foundations of current ideas or practices and those most affected have been brought together. Foucault offers us no glimpse of what the ensuing discussion and deliberation by the affected might look like, nor of how one might participate constructively in that process of deliberation and action.347

The conclusion that some, following Foucault too closely, have drawn is that retreat and silence is the appropriate role for the intellectual, or in our context, the lawyer, to play. Alfieri, for example, has urged lawyers to limit themselves to enabling clients to tell their own stories, without trying to shape

\[\text{in changing a situation . . . .}
\]
Trombadori, *Interview with Foucault*, supra note 29, at 288 (emphasis added).

345 See supra notes 83–90 and accompanying text (explaining Foucault’s view that “specific intellectual” should only point out problems and help others understand them rather than speaking as “prophet” or “lawgiver”).

346 The history of Foucault’s involvement with the Groupe d’Information sur les Prisons (“GIP”), or Prison Information Group, provides an example. See ERIBON, supra note 39, at 224–34, MACEY, supra note 27, at 257–89. Foucault helped found the GIP and declared its mission as gathering information about prisons from those with firsthand knowledge (prisoners, their families, ex-prisoners, social workers, magistrates, and prison staff) and disseminating that information through pamphlets and press releases. Macey summarizes the GIP’s fundamental axiom: “the ‘investigators-investigated’ should . . . speak for themselves . . . .” MACEY, supra note 27, at 269. Thus the GIP distributed questionnaires widely, publicized responses to those questionnaires, and used the celebrity of its intellectual members to draw press coverage. Once the burgeoning prisoners movement was able to attract its own publicity and develop its own leaders, the GIP simply disbanded. The GIP acted as a catalyst and publicist, but not as a collaborator or co-strategist. As Foucault stated in an interview in 1973 in another context:

An intellectual, for me, is a guy hooked into the system of information . . . . He is able to make himself heard . . . . His role, consequently, is not to form the workers’ consciousness, since that already exists, but to allow this consciousness, this workers’ knowledge, to enter the information system and be circulated.


347 In speaking of the GIP in an interview in 1984, Foucault stated that the problem of creating a tolerable system of punishment “cannot be solved by a few theoretical proposals. It requires many debates, many experiments, many hesitations, attempts, and reconsiderations.” *Interview with Actes*, supra note 46, at 395. But he never discussed how an intellectual might participate in those debates, experiments, and reconsiderations.
or improve those stories. But this is not what I understand collaboration to mean. Collaboration is not just listening to others, encouraging them to speak or act, and watching or deferring to them. An essential aspect of collaboration is fully engaging with clients and groups: listening, but also challenging; learning, but also teaching; allowing others to reach different conclusions, but sometimes voicing disagreement; in short, it is not just delegating responsibility and selflessly deferring to all ideas and decisions, but rather acting as no more and no less than a co-eminent partner. Such a relationship of co-eminent partnership is a power relation as Foucault uses the term—each of the participants seeks to manage the ideas and actions of her or his partners—but it is one with implicit ground rules that circumscribe or limit the intensity or vehemence with which one seeks to shape those with whom one collaborates. The desire to prevail is tempered or checked by goals of listening, learning, respecting, and cooperating and by the refusal to presume that one’s knowledge is so unassailable as to warrant imposing its insights onto others.

Foucault’s model, however, provides little illumination or guidance for this sort of relationship. No doubt Foucault opted for retreat because he feared the historical pattern of domination by experts, which he saw as replicating itself so easily. While collaborative lawyers appreciate the risk, they opt nonetheless for fuller engagement with their clients, believing that its difficulty warrants redoubled effort, rather than abandonment.

Yet even as Foucault’s ideas about power have difficulty explaining the very notion of collaboration—and certainly the fully engaged version to which collaborative lawyers aspire—his approach does help to temper any notion that collaboration is easy to implement. The line between healthy relations of power and unacceptable relations of domination is not always clear or easily maintained. Without constant self-shaping and self-monitoring, the possibility of falling into conversations that one monopolizes, and relationships that one dominates, is real. Thus, despite their difficulty with collaboration, Foucault’s ideas about power do helpfully caution collaborative practitioners

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348 In his works on civil practice with lower-income clients, see supra note 4, Alfieri calls for such extreme deference and silence by lawyers that I do not include him as an advocate of collaborative lawyering. See Piomelli, supra note 4, at 467–70. Simply repeating the stories that clients tell limits attorneys to a mimetic repetition that strikes me as an abdication of responsibility. As I understand it, collaboration means truly partnering with clients to jointly contribute to an approach that incorporates the insights that both clients and lawyers can bring to resolving a problem.

As I have noted before, some of my first efforts to lawyer collaboratively led me to completely shun the spotlight and microphones during public hearings, until I realized that my silence was perceived—by clients and allies, and perhaps even by adversaries—as a lack of commitment, interest, or willingness to carry my own weight in joint discussions and actions. See id. at 509–10.

349 See LÓPEZ, REBELLIOUS LAWYERING, supra note 3, at 53 (stating lawyers need to “combat monopolized conversations without abandoning [the] obligation to challenge [the] client”).
not to get too comfortable with themselves or their practices— for the power relations in which collaborative lawyers engage with clients and allies are fraught with danger and the possibility of domination lurks at every turn.

B. Inattention to the Details and Costs of Resistance

Another irony of Foucault’s approach to power is that despite its imperative to study how power is exercised (i.e., what happens when power is exercised) and its insistence that resistance is everywhere, Foucault did not examine resistance in any depth. Unlike his detailed scrutiny of the mechanisms and techniques of power, he never extensively studied the tactics and mechanisms that people and groups use to resist efforts to shape their behavior and ideas. Consequently, his ideas on power offer little, if any, guidance on how to resist effectively. His work treats resistance more as an article of faith than as a practice (or set of practices) worthy of detailed analysis. Because collaborative lawyers invest significant efforts engaging in just such an examination with the clients and communities with whom they work, Foucault’s failure here does not hinder collaborative lawyering practice.

Moreover, Foucault’s vision of power pays little attention to the differential costs and risks of resistance. He often notes that relationships are unequal and asymmetrical and that the consequences of resistance fall heavily on those in subordinate positions. But besides noting these inequalities, he does not focus any more attention on them. His insistence that resistance is always possible, that it simply requires courage, would likely strike many of the individuals and groups with whom collaborative lawyers work as glib and out-of-touch, if not off-putting.

To work effectively with such individuals and groups, one needs a far deeper and more nuanced appreciation of the potential costs and risks of resistance than Foucault provides. While the theoretical possibility of resistance may be comforting and even energizing, the real, everyday issue for most people and groups is what cost they will, or can afford to, bear for any

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350 As López has noted, collaborative lawyers “disserve their work to the degree they come to believe their own “press.”” *Id.* at 81.
351 *Supra* note 100 and accompanying text.
352 *Supra* note 146 and accompanying text.
353 *Supra* notes 157–73, 175–80, 218–33 and accompanying text (describing Foucault’s explorations of discipline, bio-power, pastoral power, and government).
354 Of course, Foucault would have argued that it is not his role to posit ideas about how people should act, to do so would be to play the role of the universal intellectual. *See supra* notes 82–90 and accompanying text. As he saw it, his job was to develop analytical tools that would enable his readers to decide for themselves how to optimally plot their own conduct.
355 Given his untimely death, it is certainly possible that Foucault intended to pursue a more detailed analysis of resistance, but none of his biographers or supporters have referred to such a work.
356 *See supra* note 249.
357 *Supra* notes 139–40 and accompanying text.
particular form of resistance—and how to minimize the toll actually exacted.\textsuperscript{358} One needs to recognize, discuss, and jointly strategize about the possible ramifications of different acts of resistance.\textsuperscript{359} Facile exhortations to courage are insufficient; real discussions are imperative. (In such discussions, a responsible collaborator will not presuppose that people or groups can or should pay the price that resistance will require, nor will she unintentionally dissuade those willing to pay that price or to raise their threshold of tolerance.) Any theory or practice that fails to attend to the potential costs of resistance, and to focus on minimizing them, risks irrelevance. Thus, collaborative lawyers must—and do—explore the complex reality of resistance, its methods and its costs, in far greater detail than Foucault did.\textsuperscript{360}

C. Excessive Insistence on Rejecting All Aspects of the Present

Despite his refusal to specify the precise ways in which others should think and act—his laissez-faire stance of detachment as the only alternative to domination by the universal intellectual\textsuperscript{361}—Foucault was quite insistent that we must reinvent ourselves and our entire world.\textsuperscript{362} In exhorting the creation of “new forms of subjectivity,” his emphasis was on radically breaking from the

\textsuperscript{358} Foucault recognized the point with regard to exercises of power. As he wrote in 1977: “[I]n reality power is only exercised at a cost . . . [T]here is also a specifically political cost. If you are too violent, you risk provoking revolts. Again, if you intervene in too discontinuous a manner, you risk allowing politically costly phenomena of resistance and disobedience to develop in the interstices.” Foucault, The Eye of Power, supra note 169, at 154–55. Indeed one of the advantages of liberalism that Foucault appreciated was that it engendered the economic use of power. It is interesting that Foucault failed then to explore the costs of resistance.

\textsuperscript{359} In White’s famous article on her representation of Mrs. G., one of the failures in the representation was her failure to discuss potential costs of the various alternative approaches to responding to her client’s alleged overpayment and of the different stories that might be told at the hearing. See White, The Hearing of Mrs. G., supra note 3, at 19–52.

\textsuperscript{360} Although Foucault failed to conduct detailed studies of resistance, a number of sociologists—some clearly influenced by his work—have done so. See, e.g., Patricia Ewick & Susan S. Sibley, Conformity, Contestation, and Resistance: An Account of Legal Consciousness, 26 NEW ENG. L. REV. 731 (1992) (analyzing African-American housekeeper’s experience in criminal court); Felstiner & Sarat, supra note 294 (study of interactions between clients and their divorce attorneys); Sally E. Merry, Resistance and the Cultural Power of Law, 29 L. & SOC’Y REV. 11 (1995); SCOTT, supra note 257 (describing radically different discourses that subordinated engage in when they interact with superiors or other outsiders and when they are truly amongst their own); JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE 29 (1985) (study of Malaysian village recounting peasants’ use of “foot dragging, dissimulation, false compliance, pilfering, feigned ignorance, slander, arson, sabotage” and other techniques to protect their interests without directly clashing with elites’ authority or norms).

\textsuperscript{361} See supra notes 82–90 and accompanying text.

\textsuperscript{362} Thus, as previously quoted, he longed “to be completely other in a completely different world.” Supra note 72.
present and starting afresh.\textsuperscript{363} He sought to resist, and to encourage his readers to resist, everything that presents itself as necessary or inevitable or normal, everything that is imposed or inculcated.\textsuperscript{364}

Pervading his work is a perpetual restlessness that valorizes, even fetishizes, change. The precise nature or content of the change is open to each subject, but the imperative to change—to reject the present and the given—is absolute. His exhortation to practice liberty calls upon his readers to act upon and change themselves and their world, to create something entirely different.\textsuperscript{365} Underlying this imperative to start afresh is an anarchist’s condemnation of everything—that is as thoroughly corrupt or corrupting.

The risk of such a stance is that it can lead to unthinkingly rejecting as tainted everything and everyone that one encounters. It can lead one to assume that everything and everyone must be remade, encouraging tendencies toward social engineering. Foucault himself was disciplined enough to avoid succumbing to the temptation to draw up the blueprints of how people and institutions should remake themselves, but his self-control in this regard was exceptional. If collaborative lawyers were to adopt and act upon his predisposition that everyone and everything must be remade (or, more precisely, that subjects must actively remake themselves), these lawyers would likely miss existing resources (be they people, values, attitudes, or knowledge) that can be profitably joined and harnessed.

Following Foucault too closely in this regard can lead to overlooking those aspects of the present that can and should be drawn upon and nurtured, rather than rejected and uprooted. Thus, for example, existing individual and collective identities and self-understandings as “people of color,” or “working people,” or “immigrants,” or “poor people,” or members of a particular religious tradition might be quite helpful in mobilizing and building solidarity—even though they are not at all “new” and are largely inculcated. Collaborative lawyers and those with whom they work are best served by carefully assessing themselves, their contexts, and allies without a blanket presumption that each must be thoroughly remade. Rather than pursuing change simply for the sake of change, collaborative lawyers need to be able to recognize, and work effectively with, what is valuable in the present, jettisoning or remaking only those aspects that are counterproductive.

\textsuperscript{363}Foucault, The Subject and Power, supra note 28, at 336. I thank Jeremy Graham, my research assistant, for pointing out how intense was Foucault’s emphasis on the first word of the phrase, that is, on \textit{new} forms of subjectivity. Recall as well Foucault’s formulation of his ultimate aim: “[T]o move to something altogether different.” See supra text accompanying notes 73 and 236.

\textsuperscript{364}See supra notes 159–74, 187–201, 222–27 and accompanying text. It is for this reason that Foucault sought to elucidate disciplinary power and pastoral power and the subjects that they produce.

\textsuperscript{365}See supra notes 234–37 and accompanying text.
D. Inattention to Peripheral Actors

While Foucault’s approach conceives of power as a multidirectional process in which everyone participates, his attention generally focuses on the individual participants in one-on-one relationships. Despite his metaphorical references to power as a network or a web of relationships, his writings and interviews direct little explicit attention to other actors outside of the primary one-on-one relationships. Indeed, in his last writings, he likens those relationships to competitive games like chess, which have their own rules, procedures, and winners and losers. By limiting his attention to the seemingly central participants to relationships—to the contestants themselves in the game or struggle—he misses outside actors whose intervention (or nonintervention) can play crucial roles in changing outcomes.

Collaborative lawyers, by contrast, focus significant efforts on identifying potential outside actors who might beneficially intervene in the central relationship. The search is for people, groups, or institutions that might influence or persuade the target to change its conduct. Thus, in the environmental justice scenario, in addition to targeting the conglomerate, commission, and the court, a collaborative approach would also target the neighborhood, the media, the public, and city and state officials, because each could potentially bring pressure on the seemingly principal actors. This search for potential allies and for additional sites of contest grows out of the insight, which Foucault’s work posited but did not fully pursue, that relationships are not simply two-sided struggles (or games), that people and groups are interconnected into complex networks that can be productively mined. Targets of potential persuasion or resistance are broader than just the individual, group, or institution that seems to pose the direct challenge or impediment. And thus again, collaborative lawyers must go beyond Foucault—or at least do as he said, rather than as he did.

E. Difficulty with Institutionalized Power and Attenuated Relationships

As many commentators and critics have noted, Foucault’s vision of power relations as mobile, dynamic, and constantly shifting, fails to illuminate situations where the terms of relationships are more static. In White’s formulation, Foucault’s approach “does not show how power can become

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366 In a 1976 lecture, Foucault referred to power as “employed and exercised through a net-like organisation.” Foucault, Two Lectures, supra note 77, at 98. Also in 1976, he referred to a “network of power relations” that forms “a dense web.” FOUCAL, THE WILL TO KNOW, supra note 34, at 96.

367 Thus in a 1984 interview he defined a “game of truth” as “an ensemble of procedures which lead to a certain result, which can be considered in function of its principles and its rules of procedures, as valid or not, as winner or loser.” Foucault, The Ethic of Care for the Self, supra note 28, at 16.
congealed in social institutions.\(^{368}\) Nor, I would add, does it inform situations that are not reversible through a different enactment of roles.

The focus and strength of Foucault’s approach lies in its reformulation of the nature of relationships, in the added complexity and opportunity for agency or freedom of action that his conception attributes to participants whom others often simply dismiss as powerless. This agency or freedom of action relies on the possibility of resistance, understood as a creative enactment of a role that requires other participants to react and enact their roles differently too. The key requirement, for Foucault, is a relationship in which participants can perceive and be affected by other participants’ conduct (or enactments of their role). Foucault focused on such relationships—between parents and children, intimate partners, teachers and students, doctors and patients, supervisors and employees. Collaborative lawyers have extended his approach to relationships between lawyers and clients, landlords and tenants, caseworkers and welfare recipients, and so forth.

While his ideas brightly illuminate these interpersonal or directly interactive relationships, Foucault’s approach does not shed light on attenuated relationships. He does not offer guidance or insight into relationships with distant or absent actors. He does not deal with influence that is exerted by institutions that are not present to be resisted. His analytic tools do not have much utility in such situations where the actors are so distant as to be able to ignore those whose resistance will have no meaningful impact on them (or where the costs of meaningful resistance are too high to bear). Consequently, Foucault’s approach to power tells us little about the people and institutions whom we consider, in our everyday parlance, the most “powerful”—those who are able to impact the lives of those with whom they do not have a relationship.

In the environmental justice example, the Federal Reserve Board and the Federal Energy Regulatory Commission are two actors who shape the market for electricity everywhere, including San Francisco. They thus play an important role in shaping the context of the local plant expansion. But they are also so distant that it is difficult to envision how any conduct by the clients, the neighborhood, or even the city could register an impact on them. Consequently Foucault’s vision of power and resistance as a strategic dance of step and counter-step, action and reaction, does not seem to apply to these distant actors who clearly are shaping the conduct of the local actors.

Foucault did recognize the limited applicability of his approach to power; it was, after all, a temporary scaffolding erected for a particular purpose.\(^{369}\) He was usually careful to note that his target was explaining relationships (and the subjects that they create) rather than power itself. In his last works, he also defined away those less-mobile situations which his approach failed to

\(^{368}\) White, Faces of Otherness, supra note 1, at 1505 (citing Nancy Fraser, Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory 17–34 (1989); Robin West, Feminism, Social Theory and Law, 1989 U. Chi. L. Rev. 59).

\(^{369}\) See supra note 27.
illuminate by giving them a different name: "domination" rather than "power." As noted at the outset of the explication of his approach to power, Foucault was careful to state that he was not seeking to create a theory of power, but simply a set of tools to analyze certain forms of power that existing models of power ignored or poorly captured.

As a philosopher or social theorist, Foucault is certainly entitled to limit the scope of the situations he seeks to explain. But unlike philosophers, lawyers and activists seeking to make social change do not have the luxury of defining away important social realities as beyond the scope of their work. Collaborative lawyers need to be able to address and confront all the forms of power that shape and constrain their clients and communities. And thus they must draw upon other conceptions of power as well.

As I have explored elsewhere, collaborative lawyers do attend to what might be characterized as issues of structural power. It is a central aspect of these lawyers' commitment to contextualized problem-solving to look for the influence of race, gender, culture, class, and other macro-economic or macro-political factors. As López puts it, it is essential to understand "how large structures—regional, national, and international, political, economic, and cultural—shape and respond to challenges to the status quo." In attending to these issues, collaborative lawyers necessarily go beyond Foucault.

F. Elision of Moral Responsibility

Foucault's notion of power as "intentional, but non-subjective," his notion that we are all participants in a process that no one invented or controls, has an unfortunate side effect: it tends to excuse from responsibility those we commonly think of as powerful or privileged. A common component of traditional models that conceive of power as a quantifiable thing, as a capacity of individuals or groups, is the notion that those with the most power bear some responsibility not only for their own actions, but also for the status quo. Foucault's approach, in characterizing power as a process that is beyond the control of any particular subject (even that of a class, caste, or other elite), seems to detach power from responsibility. Because everyone engages in power—everyone tries to shape the behavior of others—and no one controls the process, those traditionally labeled powerful are no different than those labeled powerless. So there is no basis for asking anything more of anyone, nor

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370 See supra note 135 and accompanying text.
371 See supra notes 96–102 and accompanying text.
372 See Piomelli, supra note 4, at 475–76, 484–85, 488–90.
373 See id. at 488–90.
374 See López, Rebellious Lawyering, supra note 3, at 24.
375 See supra notes 214–17 and accompanying text.
376 As Steven Lukes has noted, one common reason that we seek to examine "where power lies" is that "[w]e want to know whom to hold responsible." STEVEN LUKES, INTRODUCTION TO POWER 1, 13 (Steven Lukes ed., 1986).
for blaming anyone for a failure to act differently, on account of the power, or the amount of power, that they wield.\textsuperscript{377}

For many people on the left, there is something a little off-putting about such an approach. The notion that in systems without architects \textit{everyone} is trapped, those in superior positions just as much as those in subordinate positions, rings as out-of-touch formalism. It does not highlight the everyday inequalities as starkly or critically as most of us on the left generally seek to do. Foucault’s explication of power as nonsubjective bears a resemblance to contemporary arguments in the United States against affirmative action. The notion that everyone is trapped resembles the argument that racial classifications diminish everyone; while arguably true, it obscures the differential impacts that seem far more important to many of us on the left. The attention paid to whether the privileged are the architects of the system from which they benefit resembles the argument that because contemporary white people did not design the educational or employment system or engage in historical acts of discrimination, the fact that they enjoy certain privileges today, which people of color do not, does not mean that any particular white person should be disadvantaged or held responsible in any way. Where many of us on the left want to focus on the fact that certain people are beneficiaries of a system, or privileged within it, Foucault’s approach to power—like opponents of affirmative action—directs attention and responsibility away from the question of who benefits from the status quo.

The discomfort with Foucault’s approach stems from the loss of normative connotations that typically accompany explorations and attributions of power. Common rhetorical conventions of exhorting the powerful to exercise their power beneficently, or of assailing them for failing to do so, lose their cogency in Foucault’s approach. His rejection of power as a location\textsuperscript{378} and as a thing or capacity that can be accumulated\textsuperscript{379} means that no one is “in” power, nor is anyone particularly (or excessively) “powerful.” Consequently, Foucault’s approach to power makes it harder to point fingers at those whom one might argue have a responsibility—perhaps a distant echo of concepts of \textit{noblesse oblige}—to change their conduct.\textsuperscript{380}

The loss of such rhetorical formulations is troubling to many on the left, not only because it makes it harder to target one’s enemies, but also because it makes it more difficult to build solidarity and connection between those one

\textsuperscript{377}Here again, Foucault’s last works on ethical self-shaping may solve part of the difficulty through their tacit exhortation to \textit{everyone} that self-mastery is necessary to avoid the domination of others (by controlling one’s own passions and appetites). \textit{See supra} notes 58, 339–42 and accompanying text (discussing Greco-Roman view shared by Foucault that there is interconnection between ability to govern oneself and ability to govern others).

\textsuperscript{378}\textit{Supra} notes 111–13, 144–52 and accompanying text.

\textsuperscript{379}\textit{See supra} notes 106–07, 124–30 and accompanying text.

\textsuperscript{380}Of course, one can certainly doubt the rhetorical effectiveness of such calls to responsibility, rather than to self-interest.
might seek to unite as relatively powerless allies. In a traditional conception of power as hierarchical or pyramidal, it is common to urge solidarity between those at the bottom or base and to seek to unite them in opposition to those at the top. If there is no “top” or “bottom,” fostering solidarity becomes more challenging.

Thus even if one imagines power as Foucault does, one cannot always talk about it the way he does. There are important advantages, when dealing with adversaries and with allies, to treating power as a quantifiable trait or capacity to which actors have differential degrees of access.

G. Inattention to Sustaining Efficacy

Foucault’s emphasis on the temporary nature of power and his rejection of power as a capacity make it harder to think about how to adopt specific tactics and an overall strategy designed to “manage the conduct of others” not just in specific instances, but with increasing effectiveness over time. An important aspect of treating power as a capacity that is exercised, is the notion that, like a muscle, exercising a capacity repeatedly can enhance and even amplify the capacity. There is a cumulative effect of each individual instance of exercising power successfully.

Much of collaborative lawyering’s approach is about selecting tactics and strategies that are designed to shape the conduct of targeted others, not only in specific instances, but also to enhance one’s own and especially one’s clients’ and allies’ capacity to shape conduct in the future. Collaborative lawyers are interested in creating both continuity and growth in this capacity through time. In the environmental justice scenario, a collaborative lawyering approach aims not only to stop the proposed plant, but also to enhance the clients’ and neighborhood’s capacity to oppose future undesirable land uses and to get their way (or at least effectively voice their interests) in other struggles in the future. Collaborative lawyers seek to build the long-term capacity of individuals and groups to improve their lives and communities. And there they clash with Foucault’s interest in establishing the temporary nature of power and with his

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381 See, e.g., Handler, supra note 65 (criticizing postmodernists’ emphasis on micropRACTICES and individual relationships and their failure to strive to build large-scale solidarity).
382 See supra notes 131–35 and accompanying text. Winter, for example, sees the ascension of power to an actor as “a reification into a property or trait of what may only be a temporary ability.” Winter, supra note 103, at 730 (emphasis added).
383 Supra notes 106–07, 124–30 and accompanying text.
384 Paul Tremblay has interpreted collaborative lawyering as a future-oriented approach. See Paul R. Tremblay, Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy, 43 HASTINGS L.J. 947, 954–59 (1992) (arguing that collaborative approaches “generally defer[] present benefits in return for promises of long-term reward”). I see collaborative lawyering as oriented toward both the present and the future—to enhancing the odds of success in current struggles and to building capacity for future ones.
rejection of power as a capacity. His approach to power makes it difficult to think of building or increasing the power of an individual or a group—an objective which is central for collaborative lawyers.\footnote{Indeed, López adopts most aspects of Foucault’s conception of power: rejecting any powerful/powerless dichotomy, treating power as omnipresent and “run[ning] in all directions within relationships,” emphasizing the omnipresence of resistance and the possibility of reversal, noting power’s productive role in “form[ing] our individual, group, and institutional identities,” and depicting social life as a “network[] of power strategies.” But unlike Foucault, he defines power as a capacity: “[T]he capacity to make things the way we want them.” López, Rebellious Lawyering, supra note 3, at 41–42.} In engaging in such efforts, collaborative lawyers are necessarily drawing upon other approaches to power to guide their efforts.

VI. CONCLUSION

As we have seen, Foucault, as part of his larger project of understanding who we are in the present and encouraging us to change ourselves and our ways of thinking, proffered a novel tool for understanding power. Rather than viewing power as a static trait or property that some have and others lack, or a command that is obeyed, or a repressive force that simply constrains, Foucault reconceptualized power as a dynamic, productive, and participatory aspect of relationships in which individuals and groups simultaneously implement, resist, and are changed by strategic efforts to manage the conduct of others and of themselves. His approach revealed that we in the West have both more freedom and less freedom than we typically realize.

Foucault’s framework for analyzing power recasts the clients with whom collaborative lawyers seek to collaborate as acting, knowledgeable partners, rather than “powerless” and passive victims. As collaborative lawyers have adapted it, Foucault’s perspective also presents clients’ communities as sites of resistance and informs efforts to combat the atomization of individuals by fostering “horizontal conjunctions.” His approach invites critical attention to the relationships between lawyers and clients, the nature and role of lawyerly expertise, the everyday lives of clients and communities, and the multiplicity of potential locations at which to engage in strategic efforts to make social change. While offering hope that things can change and an impetus to protect vigilantly gains already won, Foucault’s approach also counsels a salutary caution against the wisdom of trying to “improve” clients. In all of these ways, Foucault’s ideas about power influence and fit well with collaborative lawyering practice.

Foucault’s approach to power does not, however, take collaborative lawyers everywhere they need to go. Ironically, his conception of power and social relationships has real difficulty envisioning collaboration—as a mutually enlightening and challenging, but genuinely cooperative endeavor. Foucault himself did not attend to the details of the resistance that collaborative lawyers
seek to study, join, facilitate, and amplify; nor did he focus, to the extent that collaborative lawyers do, on actors and institutions outside of primary relationships. He is so anxious to encourage the creation of new ways of understanding and relating to ourselves that he may prematurely dismiss the usefulness of existing identities and social understandings. His approach offers only limited assistance in understanding and combating the power of distant or absent actors. And by emphasizing the fluid and temporary nature of power, Foucault’s analytical approach makes it difficult to explore one of collaborative lawyers’ primary concerns: how to enhance clients’ and communities’ long-term capacity to manage the conduct of others.

Where do Foucault’s shortcomings leave collaborative lawyers? In large part, they leave these lawyers where they always are: on the lookout for additional insights and resources. Noting the areas where Foucault offers little help highlights how collaborative lawyers already draw from other ideas about power and must continue to explore other approaches to understanding and exercising it. Mastery—or, more realistically, a working understanding—of Foucault’s ideas on power is not enough. Collaborative lawyers and theorists need to continue their foraging. They must continue to search for other models of power and to integrate those insights into their practice.

A number of theorists of activist lawyering have suggested that Steven Lukes can offer valuable assistance, particularly in explaining the persistence of power.\(^{386}\) The theory and practice of community organizing is also an important influence and aid, because it focuses attention on building long-term capacity to change conduct.\(^{387}\) I would suggest at least two other thinkers whose ideas on power have not yet been explored in the collaborative lawyering literature, but might also be of assistance. Thomas Wartenberg’s “situated approach” to power can shed important light on structural power and on the alignments of peripheral actors that need to be targeted or replaced to

\(^{386}\)See Steven Lukes, Power: A Radical View (1974); see also John Gaventa, Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley (1980) (using Lukes’ model of power to analyze mining company’s impact on local community). White discussed Lukes’ work favorably in White, To Learn and Teach, supra note 3, at 747–54. Bill Simon has argued that Lukes’ conception of power is preferable to Foucault’s. Simon, supra note 11, at 1113. See also Dean Hill Rivkin, Lawyerism, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed, 66 Tenn. L. Rev. 467 (1999) (applying Lukes’ model of power to analyze law reform effort). Without dismissing the utility of Lukes’ ideas, I believe their adoption poses a serious danger of opening a chasm between collaborative lawyers and their clients. But his ideas and my reservations warrant fuller exploration in another work.

\(^{387}\)Although I have sought to highlight some of the important differences between collaborative lawyering and community organizing, supra note 262, the aim of building long-term capacity, of attending to what organizers refer to as “organizational mileage,” is an important shared concern. See, e.g., Lee Staples, Roots to Power: A Manual for Grassroots Organizing 4–7 (1984) (discussing Warren Hagststrom’s concept of “organizational mileage”).
successfully alter a situation. 388 Hannah Arendt’s emphasis on the centrality of cooperation and concerted action helps explain collaboration, placing it at the heart of productive power, 389 and suggests important connections to the theory and practice of democracy. Each of these alternative approaches to power warrants further scrutiny by collaborative theorists.

If one shares his stance toward the use of intellectual constructs, these other models need not replace Foucault’s theoretical tools; any of them can be used to the extent helpful and discarded or ignored when not. Given his interest in encouraging us to think and act differently, Foucault would have no problem with our changing our conceptual tools or theoretical screens 390 as necessary. The ultimate goal, after all, as he put it, is to practice our liberty 391 and transform our “thoughts, conduct, and way of being” 392 so that we might usher in an “altogether different” world. 393

390 In her essay on Foucault’s approach to power, White, borrowing an image from anthropologist Clifford Geertz, warned against treating any meta-theory as the “ultimate screen,” the one true lens or filter through which to view and understand social reality. See White, Faces of Otherness, supra note 1, at 1500, 1504–05.
391 Supra notes 234–37 and accompanying text.
392 Supra note 59 and accompanying text.
393 Supra note 73 and accompanying text.