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Knowledge, Identity, and the Politics of Law

Margaret Davies and Nan Seuffert*

I. INTRODUCTION

Imagine that you are a white lesbian academic in law who has been asked to participate in a judicial education seminar for state court judges. One of your areas of specialization is contracts, with a focus on recent developments in the law of promissory estoppel, and you will address this topic. The materials sent to you include the statement that the state is committed to access to justice for all people. Each presenter is asked to consider the implications of the law in his or her topic for groups in society that have historically been the targets of discrimination. You ask yourself, what are the implications of promissory estoppel for lesbians? You suspect the “lesbian community” no longer exists, if it ever did. Who is a lesbian? What does promissory estoppel have to do with access to justice? You feel inadequate to discuss promissory estoppel and access to justice with judges; if you can’t imagine where to start with lesbians, what about gay men? Or Black women recipients of Aid to Families with Dependent Children (AFDC)? Or heterosexual white women?

Is it possible for a heterosexual reader of this article to imagine herself or himself as a white lesbian academic in law? Is it possible for a white

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woman to imagine herself as a black woman? What does identity mean and how is one's identity formed? How are politics constituted and what is the relationship between politics and identity? What are the implications of situating knowledges for identity politics? What are the relationships between situated knowledges, identity politics and law? Since law is central to a particular type of identity formation, exemplifies a particular type of knowledge and is a site of much feminist activism, the continuation of feminist legal analysis is absolutely vital. In this article we reconsider some of the recent feminist work on knowledge and identity, focusing especially on the interrelationships of knowledge, identity and law.

Traditionally, the relationship between the production of knowledge and power has been masked and legitimated by the concept of objectivity, which has been central to mainstream Western epistemology. Feminist and other critiques of the objectivity of knowledge have exposed this relationship, revealing that objectivity in its conventional sense is not logically possible, and that knowledge is political and contextual. Knowledge is therefore located in the particular cultural, linguistic, institutional, geographical and political contexts of the knower.

The feminist project of situating knowledge means considering the contexts of the knower. We are feminists and activists who were educated in the geographical centers of the first and second waves of feminism, and academics in some of the geographical margins of mainstream feminism. We live and work in Australia and Aotearoa/New Zealand, where colonization is an ongoing issue and the use of the term "postcolonial" is debated. Maori women in New Zealand have challenged the importation of North American feminist theories and insisted on the validity of the production of knowledges which are incommensurate and inconsistent with both mainstream and postmodern feminist epistemologies. Some

5. Michel Foucault's book, Power/Knowledge (1980), is often credited with the development of the idea that networks of power define truth. The idea was not, however, without its precedents, as de Beauvoir's thought illustrates. See Introduction to SIMONE DE BEAUVIOR, THE SECOND SEX (HM Parshley trans., 1953) (1949).
6. In part, this derives from the centrality of scientific positivism to mainstream Western thinking. Positivism, originally developed by Auguste Comte, is based on the idea that there are facts about the physical world which are ascertainable in a culturally-neutral fashion. See generally AUGUSTE COMTE, THE POSITIVE PHILOSOPHY (1974).
8. See Johnson & Pihama, supra note 7, at 84-85.
feminists in Australia and Aotearoa/New Zealand therefore question the utility of North American feminist theory, and critically recycle and recreate it into local tools. Situating knowledge also highlights the process of identity formation as integral to knowledge production. The concept of identity, like the concept of objectivity, has recently been the subject of much feminist theoretical debate. Many early mainstream feminists seem to have relied largely on the assumption that all women share an essential identity, or some common core of existence, while at the same time disputing the traditional dominant views of what was contained in that common core. Postmodern feminists, queer theorists and others have rejected the concept of essentialism and embraced radical social constructionist concepts of identity. Social constructionists in the postmodern tradition argue that subjects are constructed relationally through a variety of discursive practices. Our identities are culturally mapped by a series of discourses, some of which are more fluid than others. The dominant discourses are sometimes congealed, limiting our creative efforts at reconstruction. The resistant and subversive discourses, which operate in the gaps and interstices of the dominant discourses, are more fluid. Therefore our identity arises in response to a number of sometimes conflicting factors, including the identities imposed upon us by the dominant discourses, as well as those which are an attempt to mediate, resist or recreate those dominant discourses. The result is a complex identity situated sometimes on the fringes and sometimes closer to the center of mainstream productions.

This article explores both the dominant constructions and the critiques of the relationships between situated knowledges, identity politics and law. We also consider the strategic use of law to further specific political claims.

11. See, e.g., ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 185, 186-87 (1988).
In Part II of the article, we consider the situated aspects of knowledges and the implications of situating knowledge for the law. Discarding false claims of objectivity as legitimators of knowledge raises the issue of how to value knowledge. We have developed three analytical tools to evaluate knowledge claims in our project of carving out spaces from the dominant discourses in law. Situating knowledge focuses attention on the subject who produces the legal knowledge, which leads us to consideration of identity formation in Part III. We then consider the interrelationships of identity and politics, arguing that subjects constantly reproduce their identities and their politics in relation to contested dominant discourses and constructions of subversive discourses, simultaneously reproducing/recreating those dominant and subversive discourses and their identities and politics. We conclude by arguing that identity, politics, knowledge and law are all mutually reproductive.

While our geographical location may be seen as marginal to the centers of Western feminism, we are also white middle-class academics centrally placed and privileged in relation to knowledge production generally. Our conscious political stakes in the knowledge that we produce here include the attempt to carve out space from the dominant constructions of our identities and of knowledge, for our own creativity in constructing those identities and producing knowledge. At the same time, we hope to limit and circumscribe our privilege and leave space for the resistance and creativity projects of other women. One of the aims of this article is the consideration of how aspects of our identities, as variously constructed and imposed upon us by the dominant discourses, and as resisted, recreated and circumscribed by us, constitute identity politics and relate to knowledge production and law.

II. SITUATED KNOWLEDGES

Feminist theory has foregrounded the identity of the knowing subject in its analysis of knowledge, thus overturning the traditional scientific and liberal assumption that knowledge is not connected to any particular human identity. However, feminist epistemology has not been purely critical; it


16. See HARAWAY, supra note 13; SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM 145-46 (1986) [hereinafter THE SCIENCE QUESTION]; CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 120 (1989). See also JAGGAR, supra note 12, at ch. 11. See generally GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING (Alison M. Jaggar & Susan R. Bordo eds., 1989) [hereinafter GENDER/BODY/KNOWLEDGE]. In law, the 'identity' of the knower in knowledge production has been an important element of several challenges to mainstream law, starting with the legal realists. Realism draws on pragmatist philosophy which emphasizes that knowledge is based in experience rather than in universal abstractions. See JEROME FRANK, LAW AND THE MODERN MIND ch. 5 (1936).
also provides some guidance on how claims to knowledge can be valued. In addition to exploring these matters, in this section we will also consider further our own position in this framework, in particular emphasizing the limits and limitations of our experiences, perspectives and engagement with legal discourse.

A. THE CLAIM TO KNOWLEDGE AND FEMINIST CRITIQUES

Western knowledge has traditionally been built upon the premise that knowledge can be 'objective,' meaning that it emanates from the object, and that the identity of the human subject who knows is irrelevant to the knowledge itself. Knowledge is ideally non-political, a description of the way things are, which is not influenced by the knower's position in society or political beliefs. Feminist critiques have challenged this model of knowledge in a variety of ways, which we will outline in this section. In an effort to focus upon some of the more pragmatic political directions for feminist legal activism, we will first discuss standpoint theory. Our aim is not so much to defend its philosophical foundations, but rather to consider how it may provide a useful springboard in critiquing law and encouraging the law's progression toward multiple vision.

1. Feminist Epistemology: An Outline

In considering feminist epistemology, we will focus on the work of Sandra Harding and Donna Haraway, both of whom have written on the topic of scientific knowledge. Discussion of scientific knowledge is of relevance to law because of the insistence of both discourses on value-neutrality.

According to Harding, there have been three basic approaches to 'the science question in feminism': feminist empiricism, feminist standpoint theory, and feminist postmodernism. In Harding's taxonomy, "feminist empiricism" is the attempt by feminist scientists and social scientists to demonstrate that certain areas of traditional science have suffered from male bias, and therefore do not live up to the standards of neutrality and objectivity which science demands. Feminist empiricism can be compared to the liberal feminist approach, which accepts the basic premises of the prevailing ideology, but argues that its own standards need


18. See SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES ch. 5 (1991) [hereinafter WHOSE SCIENCE?]; HARDING, THE SCIENCE QUESTION, supra note 16. See also Katherine Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 867–880 (1990) (By adding "positionality" to this taxonomy, Bartlett creates her own synthesis to these approaches.).

19. HARDING, WHOSE SCIENCE?, supra note 18, at 111.
to be more rigorously followed. Both approaches have the strategic advantage of being readily understood and very persuasive in a social context which values neutrality.

Harding’s second feminist approach to epistemology is the standpoint approach. The argument of standpoint epistemology is essentially that an oppressed person is better able to understand the nature of oppression than the oppressor. Such an argument is indebted to, among other sources, Hegel’s “master-slave dialectic.” We will describe standpoint theory in more detail shortly, but it is important to note at this point that Harding’s claim is that rather than eliminating the standard of objectivity altogether, a standpoint provides “strong objectivity” rather than “weak objectivity.” “Weak objectivity” is the objectivity of conventional scientific empiricism: it is “weak” because it “encourages only a partial and distorted explanation” of the phenomena it is supposed to describe. Harding argues that a strengthened standard of objectivity can be obtained by making use of the “resource” of otherness, by looking “back at the self in all its cultural particularity from a more distant, critical, objectifying location.”

In Whose Science? Whose Knowledge? Harding also identifies postmodernist feminism as a third approach to epistemology utilized by feminist thinkers. Postmodernism is anti-foundationalist in the sense that it interrogates the foundations of theory: typically, for instance, a deconstruction of a theory would illustrate the ways in which its foundations are self-contradictory, or reliant upon some term allegedly excluded from the theory. Feminist postmodernism, which is the basis for the critique of conventional identity politics, has argued that the central terms upon which feminism itself is based—male and female, masculine and feminine—are relational, rather than absolute, and that this provides an opportunity for feminists to challenge at its very foundations the oppressiveness of sex relations. Because standpoint theory appears to accept the male/female dichotomy as fixed, seems to assume that experience and identity are unproblematic and argues for an epistemological grounding of knowledge, it seems to be fundamentally opposed to postmodernism. However, as Harding has pointed out, there

20. See JAGGAR, supra note 12, at ch. 7.
21. See HARDING, WHOSE SCIENCE?, supra note 18, at 113 (“The discourses of objectivity and of truth/falsity are ancient and powerful. It is a great strength of feminist empiricism that it can enter and use these widely respected languages and conceptual schemes.”).
23. HARDING, WHOSE SCIENCE?, supra note 18, at 143.
24. Id. at 151.
25. See id. at ch. 7.
27. Many of these criticisms are voiced in BROWN, supra note 4, at 39-43. Brown
are also some links between standpoint theory and postmodernism, notably that standpoint theory is not necessarily essentialist,\textsuperscript{28} it insists upon the locatedness of knowledge, does not hold out its results as absolute truth, does not assume that there are presocial individuals and attempts to use a particular discourse of ‘science’ progressively, without claiming that it is the only science.\textsuperscript{29}

Haraway has developed an approach to situated knowledge which attempts to take account of some of these postmodern themes. She argues that the goal of feminist knowledge is not transcendent or universal knowledge, but rather a way of understanding the world which allows connections to be drawn and translations to be made between differently situated knowledges.\textsuperscript{30} Haraway reclaims vision as a metaphor for knowing, emphasizing, however, that our eyes and thus our visions are embodied and active, not disembodied receptors, as assumed by the dominant discourse on vision as knowing.\textsuperscript{31} She also stresses the responsibility involved in knowing: science (like law) has traditionally attempted to escape any responsibility for its knowledge, in its arrogant assumption that individual people are detached from the vision produced. Situated knowledge, for Haraway, is responsible knowledge, because people are required to take into account their own position in the web of social constructions. Importantly for our purposes, Haraway refutes any suggestion that situated knowledge relies upon an ‘innocent’ or unmediated knowing agent: “The positionings of the subjugated are not exempt from critical re-examination, decoding, deconstruction, and interpretation.”\textsuperscript{32}

Interestingly, Haraway also argues for a feminist ‘objectivity’ but is perhaps more specific than Harding about what this might mean, and why her preferred knowledge is ‘objective.’ She speaks of “the joining of partial views and halting voices into a collective subject position”: her ‘objectivity’ is that of subjects who acknowledge that their views are partial and embodied and who attempt to build connections out of this recognition. Such a notion of objectivity attempts to bypass the traditional transcendent objectivity by grounding knowledge in its subjective context, rather than by appears to conflate standpoint theory with consciousness raising, arguing that both are based on a simple unmediated subject-position and identity. Although the two feminist approaches are clearly related, standpoint theory is undoubtedly a more sophisticated tool for achieving an alternative to mainstream knowledge, and one which has been sensitive to some degree to developments in postmodern thought. See Haraway, supra note 13; Harding, Whose Science?, supra note 18, at ch. 5–7.

28. See infra notes 62–65 and accompanying text.
29. This is a very brief and unsatisfactory catalogue of Harding’s thoughtful responses to postmodern ideas. See Harding, Whose Science?, supra note 18, at 181–86.
31. See id. at 188.
32. Id. at 191.
33. Id. at 196.
objectifying the object from a detached stance.\textsuperscript{34}

Both Harding and Haraway therefore retain the terminology of 'objectivity,' but criticize its traditional use. There are certainly some strategic advantages to retaining the goal of 'objectivity'—in particular that it appeals so strongly to liberal thinkers, and is therefore a compelling argumentative tool. However, 'objectivity' also carries with it the risk of connoting totalization, which may be dangerous in a climate which is currently questioning the constitution of identity in so many different ways.\textsuperscript{35} In our view it is preferable to discard the terminology of 'objectivity' both because it is simply impossible, and because it is too enmeshed in conventional notions of a truth which is antithetical to the subject-position.

2. Epistemology and Law

The traditional view of the objectivity of knowledge is very common in legal discourse, where an authoritative picture of law, not open to fundamental challenge, is considered crucial.\textsuperscript{36} Positivist legal theory has been based on the possibility of describing law as it is,\textsuperscript{37} while legal formalism presumes that there is an objective solution to legally-defined disputes.\textsuperscript{38} The dominant view of law is that it can be objectively identified and applied neutrally. Like traditional scientists, legal theorists and practitioners have assumed that there is a legal 'view from nowhere.' In law, as elsewhere, 'perspectives' which are from somewhere, rather than from the assumed 'nowhere' of the professional white male, are regarded as inherently biased.

Within this traditional framework, law may be open to appropriate sorts of challenges. The idea behind liberal law reform is that incremental changes to the legal system need to be made to keep pace with alterations in the social environment, but that the system itself is perfectly capable of overseeing such change in a neutral fashion.\textsuperscript{39} In other words, internal

\textsuperscript{34} See id. at 198 ("Situated knowledges require that the object of knowledge be pictured as an actor and agent, not a screen or a resource, [and] never finally as slave to the master that closes off the dialectic in his unique agency and authorship of 'objective' knowledge.").

\textsuperscript{35} See Richard Delgado, Shadowboxing: An Essay on Power, 77 CORNELL L. REV. 813, 817-18 (1992) (Delgado deconstructs the claim to power which is concealed in the discourse of 'objectivity').

\textsuperscript{36} Much legal theory in the Anglo-American tradition has started from the proposition that objective knowledge about law is both desirable and possible. So, while H.L.A. Hart and earlier positivists sought a fundamental principle which would justify or legitimate all law, Ronald Dworkin (while rejecting positivism) has argued that there is a single best answer to legal disputes. See H.L.A. HART, THE CONCEPT OF LAW ch. 6 (1961); RONALD DWORKIN, LAW'S EMPIRE 225-75 (1986).

\textsuperscript{37} See HART, supra note 36; HANS Kelsen, GENERAL THEORY OF LAW AND STATE 116, 163, 438 (1961).


\textsuperscript{39} It is this concept of benign liberalism which appears to underlie Ronald Dworkin's
criticism based on acceptance of fundamental legal ideals, including the ideal of objectivity, is generally acceptable within the system, while a challenge to the basic premises of law and legal objectivity is not.

Many feminist critiques of law are essentially an applied feminist epistemology. Feminists have argued that legal ‘objectivity’ is neither a truly objective, nor apolitical. For instance, reasonableness is not an objective test because it presupposes a particular kind of legal subject, one modeled on the “benchmark man.” Some feminist critiques of legal objectivity have argued that changing the content of legal knowledge would result in standards which are more objective, a standard which is inclusive of women’s experience and knowledge as well as that of men. Such arguments are analogous to the feminist critiques of masculine bias in science and in the social sciences. Other critiques have focused on the artificiality of the objective/subjective distinction in law. Catharine MacKinnon, for instance, has argued very persuasively that the so-called ‘objective’ position is necessarily assumed by a subject and in reality only a method of protecting a privileged point of view.

B. Valuing Knowledge

Recognizing the situated aspects of knowledge dispels the illusion of objectivity, leaving us to focus on the question of how different claims to knowledge should be valued. The need to focus on the value of knowledge arises for the simple reason that the critique of objectivity often leads to the counterintuitive and apolitical assertion that logically no knowledge can be more valuable than any other. If knowledge is always located, never transcending its own context, then each perspective is as good as any other. And if that is the case, the argument goes, we have lost any hope of grounding our political action. Where Marxism and liberalism have each

view of law as “integrity.” See DWORKIN, supra note 36, at 95-96.

40. The literature on reasonableness as an ‘objective’ legal standard has become extensive in the past decade. Several works remain enormously influential. See, e.g., Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 20-25 (1988); Lucinda Finley, A Break in the Silence: Including Women’s Issues in a Torts Course, 1 YALE J. L. & FEMINISM 41, 57-65 (1989).

41. See the discussion in AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES (Mary Jeanne Larabee ed., 1993).

42. See CATHARINE MACKINNON, FEMINISM UNMODIFIED 55 (1987).

43. Or at least it dispels what Sandra Harding calls “weak objectivity,” in WHOSE SCIENCE?, supra note 18. Harding’s “strong objectivity” is the objectivity of situatedness. Id. As we have indicated, we would prefer for political reasons to abandon this terminology as far as possible.

44. For instance, see the comments made by Joseph Ellin in Liberalism, Radicalism, Muddlism: Comments on Some New Ways of Thinking About Legal Questions, in RADICAL CRITIQUES OF THE LAW 215 (S. Griffin & R. Moffat eds., 1997).

45. This has been one of the greatest anxieties about postmodern critical stances. Two points can be made about this claim. First, that the deconstruction of fundamental ethical concepts does not necessarily imply that they are politically or morally useless. This is only the case if it is assumed that a theory must have a solid and non-contradictory foundation
in their way given us a solid ideological ground upon which to base political action, contemporary critiques of knowledge appear to dispel any such possibility.

However, the assumption that valuing (false) claims of objectivity provides protection from relativism and/or nihilism is flawed. In the first place, all knowledge has always been situated and therefore valuing knowledge that falsely claims the objectivity of a 'view from nowhere' provides at best a deceptive protection against nihilism and relativism. Critiques of mainstream knowledge production expose the fact that in the end it is nothing but power which holds the dominant ideology in place.\textsuperscript{46} The argument which would reduce the critique of absolute knowledge to equal but competing 'perspectives' ignores the power relationships which underlie existing dominant knowledges, as well as the fact that in order to undermine these systems of power it is necessary in the first place to value knowledges which subvert them.\textsuperscript{47} Furthermore, insofar as it claims that there are no criteria for preferring one foundation for knowledge to any other, the relativist argument itself implies a view from nowhere. As Haraway argues, relativism "is a way of being nowhere while claiming to be everywhere equally. The 'equality' of positioning is a denial of responsibility and critical inquiry."\textsuperscript{48}

Bearing these comments in mind, we would like to outline three methods of valuing knowledge, two of which are drawn from existing feminist work in the area, and one of which is perhaps more novel, at least in this context. These three criteria for valuing an understanding of the world are: first, the acknowledgment of situatedness, second, the 'epistemic privilege' of the view from below, and third, consideration of the purely strategic value of knowledge. Our claim is not that these methods of evaluation are necessarily more logically grounded than any other, but rather that they are defensible on political grounds.\textsuperscript{49}

\begin{footnotesize}
\begin{itemize}
\item See Ellin, supra note 44.
\item Haraway, supra note 13, at 191.
\item Wendy Brown puts a challenge to feminists to be prepared to adopt political rather than truth-based grounds for assuming critical positions. Brown, supra note 4, at ch. 2. In some ways our work is one way of responding to that challenge.
\end{itemize}
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1. Valuing Situation

First, as Haraway suggests, we might value knowledge claims that explicitly acknowledge location, rather than valuing the traditional claims of unsituated objectivity. Recognizing knowledge which is explicitly situated includes recognition of the (inevitable) partiality of the perspective(s) from which the knowledge is produced, thus leaving space for knowledge produced from other perspectives. The point is not only that our experience is a basis for our knowledge. As Joan Scott and others have argued, we as individuals are also constructed by our experience, meaning that it is not possible simply to rely upon unmediated situatedness as the basis of knowledge. Rather, knowledge and identity are co-constructing. Our knowledge is based upon our situation, but our identity is also constructed through our social experience and positioning. Haraway emphasizes that acknowledgment of location is an acknowledgment of responsibility in knowledge; like an undeclared conflict of interest, unsituated knowledge-claims are irresponsible because they fail to recognize the political implications of any knowledge. This will be discussed later in more detail.

Mainstream legal knowledge has rarely acknowledged the fact that it emanates from a particular perspective. As we have indicated, one vital aspect of law’s self-conception is that the identity of legal knowers is supposedly irrelevant to the quality of the knowledge. Legal knowledge is supposed to be objectively static, regardless of whether the perceiver is a lesbian, a Black woman or a heterosexual middle-class white man. The fact that law and legal knowledge have been overwhelmingly produced by this last group of people is seen to be irrelevant to its quality as knowledge. In our view this insistence that legal knowledge is whole and objective, rather than partial and situated, results in a legal world-view which is completely incapable of acknowledging true differences in perspective. In our view, Western legal knowledge must be produced in full recognition of its history and context. Legal knowers must be educated to recognize the partiality of their own and the law’s perspective. It is not enough for legal knowers to simply absorb the perspectives of women or minorities. This approach leads merely to our assimilation into the larger legal world-view. Rather, legal knowledge itself must give way and recognize its own limitations and political context.

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50. Haraway, supra note 13, at 191.
51. Joan W. Scott, Experience, in Feminists Theorize the Political 22 (Judith Butler and Joan W. Scott eds., 1992).
53. See Haraway, supra note 13.
54. See discussion infra Part IV.
55. Such an acknowledgment would not necessarily lead to the destruction of legal
2. Valuing the View from Below

The second approach to valuing knowledge draws on feminist standpoint epistemology, which has been developed by both Harding and Haraway, among others.56 As we have indicated, feminist standpoint epistemology argues that members of oppressed groups who engage in struggles against oppressors produce 'truer' knowledge than members of the oppressor groups. This is because in order to survive, the oppressed group must understand the dimensions of the oppressive discourse and practices, as well as their own position in it.57 The oppressors need only understand the view from above. Harding says, "Thinking from the perspective of women’s lives makes strange what had appeared familiar, which is the beginning of any scientific inquiry."58 According to Terri Elliott, the 'epistemic privilege' of the standpoint is that the oppressed person has knowledge of the obstacles in her or his life which are created by the oppression, while the oppressors are ignorant of such matters.59

Unlike Harding and Haraway, we do not believe that valuing standpoint leads to a more ‘objective’ or more ‘scientific’ knowledge.60 Although the whole point of Haraway’s work is to reject the notion of a transcendent objectivity, the utilization of the terminology is difficult to justify and possibly difficult to confine to the altered standard of objectivity which she adopts. Instead, we would argue that a standpoint has the potential to produce knowledge which is more useful in specific contexts.

Feminist standpoint epistemology can appear to be essentialist (and sometimes is) insofar as it focuses primarily upon the division between women and men, and upon a common woman’s experience as the basis for knowledge, although its fundamental character would undoubtedly shift. Our position is not that legal knowledge is necessarily all wrong, or nonsense, as claimed in some of the more radical works of Critical Legal Studies adherents, including Alan Freeman’s Truth and Mystification in Legal Scholarship, 90 YALE L.J. 1229 (1981), Peter Gabel and Duncan Kennedy’s Roll Over Beethoven, 36 STAN. L. REV. 1 (1984) and Joseph William Singer’s The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1 (1984). Our argument is, rather, that the claim to universality is nonsense and that by abandoning this claim legal knowledge becomes much more capable of engaging with difference.

56. See sources cited supra note 16.
57. Harding outlines no less than eight interrelated reasons for preferring a feminist standpoint to the “weak objective” standards of the view from above. WHOSE SCIENCE?, supra note 18. In her argument that knowledge-formation is a function of emotion as well as reason, Alison Jaggar says, “I would claim that the emotional responses of oppressed people in general, and often of women in particular, are more likely to be appropriate than the emotional responses of the dominant class.” Alison Jaggar, Love and Knowledge: Emotion in Feminist Epistemology, in GENDER/BODY/KNOWLEDGE, supra note 16, at 162 (Alison M. Jaggar & Susan R. Bordo eds., 1989).
58. HARDING, WHOSE SCIENCE?, supra note 18, at 150.
60. Supra note 43 and accompanying text.
“women’s knowledge.” Knowledge claims that assume that all women share one identity, especially when made by privileged white women, may reproduce the problems with objectivity that feminists originally set out to critique—i.e., a privileged perspective is imposed upon oppressed groups. For instance, Hartsock’s influential work presupposed a particular content which could be attributed to a women’s standpoint, based on experiences such as childbearing and women’s “contribution to subsistence.” Harding’s response to the charge of essentialism is that “the logic of standpoint approaches contains within it both an essentializing tendency and also resources to combat such a tendency.” Although standpoint theory can be used to essentialize groups of people, its logic is also that no one group has an absolute privilege of perspective.

In our view, it is the existence of the standpoint which is important, but it is vital that any standpoint be limited to its actual context, and not taken as universal. Attributing a broad content of knowledge to any one group without appreciation of the range of power differences will result in empirically unsatisfying and potentially dangerous re-stereotyping. Feminist standpoint epistemology remains useful if we recognize that the knowledge produced by oppressed people is not better than knowledge produced by oppressors because it is more ‘objective.’ Rather, we are making a value judgment that the position from which the knowledge is produced provides the knowledge producers with a different and often more complete understanding of the oppression.

Again, there is a very clear legal application of this approach to valuing knowledge. The traditional legal approach to knowledge has been that by taking a distanced, appropriately detached position, all points of view can be measured and given suitable weight in formulating an understanding of

61. Nancy Hartsock, The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism, in DISCOVERING REALITY 290 (Sandra Harding & Merrill B. Hintikka eds., 1983) (“My effort here [is] an attempt to move toward a theory of the extraction and appropriation of women’s activity and women themselves. Still, I adopt this strategy with some reluctance, since it contains the danger of making invisible the experience of Lesbians or women of color. At the same time, I recognize that the effort to uncover a feminist standpoint assumes that there are some things common to all women’s lives in Western class societies.” (citations omitted)).


64. See Hartsock, supra note 61. See the very different critiques of Hartsock’s views in Harriet Baber, The Market for Feminist Epistemology, 77 THE MONIST 403 (1994); Elliott, supra note 59.

65. HARDING, WHOSE SCIENCE?, supra note 18, at 180.

the world. However, as we have indicated, the flaw in this reasoning is that the position which has historically been adopted is not distanced at all, but firmly grounded in a White, male, middle-class perspective. This perspective only parades as detachment. In reality it is a ‘view from above,’ not a ‘view from nowhere.’ It is true that in its search for the objective understanding of the world, law has sometimes listened to a certain degree to the stories and perspectives of minority groups and women. However, because it insists upon adopting the view from above, law can never properly comprehend minority and marginalized knowledge. It can only filter and assimilate such knowledge. Only when legal actors, in the form of particular judges and policy makers, are able to relinquish the objective/authoritative position will law be able to deal with non-mainstream knowledge.

Valuation of expert testimony is one of many possible examples of the ‘view from above’. It is still the case that the evidence of psychologists is preferred to the evidence of battered women and children, that the evidence of anthropologists is preferred to that of indigenous people and that the evidence of medical practitioners is preferred to that of victims of rape. In this way, law actively erases the views of those who according to standpoint theory may have an ‘epistemic privilege’ in relation to a particular matter.

3. Valuing Strategy

The recognition that all knowledge is situated and political creates a third possibility for valuing knowledge. The political dimension of the feminist critique of objectivity asserts that the claims of objectivity and universality of knowledge have historically, in Western society, masked the particular perspective of educated white men, and have thereby generally furthered the interests of this group. As all knowledge is situated in a particular location, in an unequal society all knowledge will be implicated in challenging or upholding inequalities. We would argue that knowledge

67. This is known as the “god-trick” in HARAWAY, supra note 13, at 189.
68. See HARDING, supra note 18, at 111.
73. See FREIRE, supra note 22, ch. 1.
that challenges existing inequalities, or oppressions, should be valued over knowledge that perpetuates inequalities, or knowledge that assumes there are no existing inequalities. This valuing does not pretend to arise from an epistemological ground, but from political and ethical motivations.  

Wendy Brown criticizes standpoint theory for its reliance on an alleged moral superiority, arising from the position of the oppressed. She asks what it would take for us to live "without such myths... [and] without insisting that our truths are less partial and more moral than ‘theirs.’" Her argument is that feminism needs to develop an independently persuasive vision. For us, part of that persuasive vision is not the moral superiority of the oppressed, nor the greater ‘objectivity’ of a standpoint. Rather, it is the practical and strategic effects of different kinds of knowledge when measured against our social goal of true equality.

Therefore, valuing knowledge which explicitly acknowledges location or standpoint epistemology is valuable as a strategy. We value located knowledge and the ‘view from below’ partly because we believe that these approaches currently provide more rational criteria for judging knowledge than the spurious claims to objectivity of traditional legal knowledge. Additionally, these approaches have the elementary political and ethical values of recognition and respect for others. Such an ethic requires us—as middle-class, White feminists—to take a position of reflective ignorance in relation to others, admitting that our understanding of the world might be completely useless in another context, even while we are attempting to claim space from a mainstream discourse like law. In contrast to a universally ‘grounded’ knowledge, therefore, knowledge valued for its strategic benefits explicitly recognizes the connection between politics and knowledge.

Such a view may appear to move too far away from the traditional concept of epistemology—i.e., the search for the grounds of knowledge. However, surely the whole point of epistemological justification is that theories be advanced which make sense of the world in a pragmatic world-view. Of course, ‘make sense of’ does not simply mean ‘describe faithfully,’ but also ‘construct realistically’ or ‘construct usefully.’ Advancing a new theory about the physical properties of time, for instance, would not be much good if it explained less than previous theories. To say it explains more does not necessarily mean that it is not a construction of reality, just that it is a more useful one for present purposes. Similarly, the

74. See Elizabeth Grosz, Contemporary Theories of Power and Subjectivity, in FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT 59 (Sneja Gunew ed., 1990).
75. BROWN, supra note 4, at 46-47.
76. As we have indicated, Sandra Harding continues to argue that standpoint epistemology is more objective and more scientific than traditional universalist knowledge. See supra note 43.
77. Cf. HARAWAY, supra note 13, at 188.
whole point of theorizing oppression and situating knowledge is so that sense is made of the world for particular people in particular contexts, which can advance the project of eliminating power differentials. It is not truth which matters, but utility. As Mary Hesse comments, “Acceptable theories do not need to be put forward as true in order to be pragmatically useful.”

C. FALSE UNIVERSALISM

It is very important to recognize that, notwithstanding the universalsounding nature of what we have said about knowledge, our observations apply only within the context of Western epistemology. For us, theories about situated knowledges comprise a critical tool which aids in combating the absolutism and paternalism of Western knowledge. The point for us is to highlight the forced, imperialist, nature of Western ‘knowledge’ and its oppressive products, not to argue a universal position regarding knowledge for all cultural situations. The idea of situated knowledge is a critique of current Western-influenced discourse, wherever it arises; it remains a way of understanding the world which can only be measured for its ‘truth’ within the context which produced it. This is an extremely important point. It would constitute an “arrogant perception” to insist that all people must recognize the contingent foundations of their knowledge. To say that an Aboriginal or Maori belief is as contingent as Western ‘objectivity’ would be once again to force a particular interpretation of the world onto a cultural group and show extreme disrespect for its members. To argue otherwise would be to impose what we in the West understand as cultural relativism on all people, even when their view of things may be what we would see as cultural absolutism.

This may on one level appear contradictory: how can we possibly say that knowledge is contingent and political, yet concede that the experience of absolute foundations is nonetheless a viable option? In a paradoxical fashion, however, this can be our only conclusion. The recognition that knowledge is not, for us, absolutely founded, cannot be extended to all cultures because to do so is to repeat the traditional insistence on universal foundations and to disregard questions of power which have disenfranchised non-Western approaches to knowledge. The question is


81. See Seuffert, supra note 10 at 119-25.

82. See Johnston & Pihama, supra note 7.

83. See Seuffert, supra note 10, at 147; Larner, supra note 10; Dorothy E. Smith, Telling
not what applies in every context, but what is useful for making sense of the context itself.

III. IDENTITY, POLITICS, KNOWLEDGE, AND LAW

Situating knowledge focuses attention on the integration of subject, knowledge and politics. In this Part we will identify and analyze three, often overlapping, types of identity politics in relation to law. The first is resistance to the subordinate traits imposed by the dominant liberal discourses. The second is a politics assumed to flow in a linear fashion from assumptions of weak essentialism about an identity. Third, we would like to consider the possibilities for strategic struggles that recognize that subjectivity is a composite of culturally mapped identities. We agree with other commentators that identity formation is a complex and ongoing process which takes place within both largely determined dominant discourses and more fluid resistant discourses over which we have some control. Identity formation is therefore always political, and identity and politics are co-constructing and mutually reproductive.

A. IDENTITY POLITICS AS RESISTANCE

Liberal feminists’ resistance to the coding of women with traits that have historically been constructed as inferior to the traits mapped as male represents the first type of identity politics. According to many strands of liberal theory, the essential, universal characteristics of the subject of law include rationality, autonomy, independence, individualism and sovereignty. These essential characteristics are used by each rational subject to form his individual identity; the subject is assumed to be self-
The subject and the world external to it are two mutually exclusive concepts. The subject may be acted upon by the external world, but social conditioning is seen to overlay the 'true' self-determined identity like the layers of skin on an onion. One of the aims of the subject is therefore to be as free of social conditioning as possible.

Feminists have thoroughly deconstructed the supposed universality of law to reveal its embodiment of an educated, aggressive white male. Feminists further critiqued the traditional notion of gender that the different essential identities of women and men made up humanity. Maintenance of the self-determining male subject of liberal theory within binary logic required determining the female as the opposite and inferior object to the male. The female was seen as irrational, passive, dependent and emotional. Many early liberal feminists argued for formal equality for women in the law, seemingly based on a more inclusive conception of the subject of the law through recognition of women as endowed with the same essential characteristics as men: rationality, self-interest and self-determination. This logic formed the basis for arguments for equality of treatment by the law; women were just as intelligent and rational as men and therefore should be subject to the same legal rights, privileges and duties as men. These political arguments, based on claims to a specific identity by women, facilitated changes in the law to achieve formal equality, eliminating explicit distinctions in the law between the treatment of men and women.

This liberal approach to identity politics has been circumscribed by the dominant discourses; by its own terms, it requires arguments for "special

89. See BROWN, supra note 4, at 67.
90. See RENE DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (Bobbs-Merill, 2d ed. 1960); MARGARET DAVIES, ASKING THE LAW QUESTION 222, 241 (1994).
91. See DAVIES, supra note 90, at 241.
93. See generally THOMAS LAQUEUR, MAKING SEX (1990); Thomas Laqueur, Orgasm, Generation, and the Politics of Reproductive Biology, in THE MAKING OF THE MODERN BODY (Catherine Gallagher & Thomas Laqueur eds., 1987).
96. See BROWN, supra note 4, at 152; CORNELL, supra note 45, at 137; DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE 2-4 (1989); Ngaire Naffine, Sexing the Subject (of Law), in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 18-20, 24, 27-36 (Margaret Thornton ed., 1995). See also Cornell, supra note 86, at 310.
97. See DE BEAUVIOR, supra note 5, at xxxiii-xxxiv; BROWN, supra note 4, at 155.
98. See NAFFINE, supra note 92, at 3-6.
99. See id. at 6.
treatment” where women are “different” from men.\textsuperscript{100} Other problems with this approach include that it leaves unchallenged at the center the liberal conception of the subject, liberalisms’ ‘constitutive dualisms’ and the marginalization of politicized identities.\textsuperscript{101} For example, claims to the right to marry by gays and lesbians\textsuperscript{102} are problematic as claims to inclusion in that the liberal conception of the subject is still central. These types of normalizing claims, like liberal feminists’ claims that women are the same as men, are successful to the extent that gays and lesbians can claim to be the same as heterosexuals, but different treatment based on constructions of ‘real’ differences will still be justified.

B. IDENTITY POLITICS BASED ON WEAK ESSENTIALISM

The second type of identity politics challenges the existence of the essential characteristics of the liberal subject assumed by many strands of liberal theory. Feminists and others have debated both the existence and the content of an essential core of universal human, or female, nature. For purposes of our discussion, we distinguish between ‘strong’ and ‘weak’ essentialism. Essentialism in its strong or metaphysical sense is often taken to refer to the characteristics seen to be universal to the human subject; it is the “God-given or otherwise immutable nature” of the subject.\textsuperscript{103} In the traditional philosophical theories discussed above, these characteristics are rationality and self-determination. A ‘weak’ conception of essentialism retains the notion of an essential core, but may debate what is in that core, and whether the core is fixed, gendered or determined by culture.\textsuperscript{104}

While there are a few feminist theorists who currently ascribe to essentialism in its strong or metaphysical sense,\textsuperscript{105} many feminists have profoundly challenged the idea of strong essentialism,\textsuperscript{106} adopting instead Simone de Beauvoir’s statement that, “One is not born, but rather becomes, a woman.”\textsuperscript{107} Feminist essentialism for many of these feminists is therefore ‘weak’ or strategic essentialism.\textsuperscript{108} Other liberal, cultural, radical, Marxist and postmodern feminists make arguments which seemingly combine weak essentialism and social constructionism. Some feminists

\begin{itemize}
  \item \textsuperscript{100} BROWN, supra note 4, at 158; MACKINNON, supra note 16, at 8-9.
  \item \textsuperscript{101} BROWN, supra note 4, at 152; MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW 54-55 (1997).
  \item \textsuperscript{102} Quilter v. Attorney Gen. [1996] N.Z.L.R. 481.
  \item \textsuperscript{103} De Lauretis, supra note 86, at 1, 3.
  \item \textsuperscript{104} See Fuss, supra note 96, at 1-5; De Lauretis, supra note 86.
  \item \textsuperscript{105} See generally TANIA MODLESKI, FEMINISM WITHOUT WOMEN: CULTURE AND CRITICISM IN A “POSTFEMINIST” AGE (1991); Rosi Braidotti, On the Female Feminist Subject, or: From ‘She-self’ to ‘She-Other’, in BEYOND EQUALITY AND DIFFERENCE: CITIZENSHIP, FEMINIST POLITICS AND FEMALE SUBJECTIVITY ch. 10 (Gisela Bock & Susan James eds., 1992).
  \item \textsuperscript{106} See De Lauretis, supra note 86, at 3.
  \item \textsuperscript{107} DE BEAUVOIR, supra note 5, at 295.
  \item \textsuperscript{108} See De Lauretis, supra note 86, at 3-4.
\end{itemize}
have argued that the traits ascribed to women in a patriarchal culture, while masquerading as biological or natural traits that are fixed and essentialist in the strong metaphysical sense, are actually socially determined or conditioned. Feminists have used the concept of social conditioning to argue that women are not naturally irrational, passive, dependent and emotional care givers, but rather have been socially conditioned to conform to a feminine model that exhibits these traits. For example, Catherine MacKinnon has argued that the category ‘women’ is socially constructed by men, in their interests. In more recent years, debate over whether MacKinnon’s work is essentialist, in the sense that it has been based on assumptions about what it means to live as a woman, has raged. This essentialism is not essentialism in the strong or metaphysical sense, but rather weak essentialism as it refers to social conditions which are imposed upon women.

Other feminists have maintained an explicit or implicit reference to what has been called a weak or nominal form of essentialism. This nominal essence can be recognition of a set of traits that have been imposed upon all women, or that are specific to a culture and historical period or that a particular feminist or feminists argue women should embrace or aspire to. Some feminists have argued that these essences are important ones that should be valued in women and others. For example, Carol Gilligan identified a moral ethic of care shared by many of the women that she interviewed. She explicitly acknowledged that the characteristics on which she based this ethic of care were due to social conditioning rather than biological destiny.

109. See Davies, supra note 90, at 167-68.
112. See Fuss, supra note 96 at 4-5; De Lauretis, supra note 86, at 3.
117. Gilligan, supra note 113 (interviewing mostly White, middle-class women). See also An Ethic of Care: Feminist and Interdisciplinary Perspectives, supra note 41 (contributing to the extensive debate surrounding Gilligan’s work).
118. See Gilligan, supra note 113.
make arguments ranging from gender-related legal ethics to a focus on relationships in resolving contract disputes.¹¹⁹

Ruthann Robson’s discussion of lesbian identity politics¹²⁰ provides an example of theorizing identity politics based on weak essentialism.¹²¹ These types of identity politics have been based on two assumptions: that lesbians (or women generally) share an essential identity in that the group identities are part of the social structure and not innate, God-given or natural and that a particular set of politics flows from this identity.¹²² Robson’s description suggests an underlying assumption of linear progression from identity to experiences to thinking to politics. There are three points worth making here about the limitations of this conception of identity politics. First, the identity, even if socially constructed, precedes the experiences, thinking and politics; there is no suggestion that experiences or politics reshape identity or influence each other.¹²³ These assumptions also often underlie feminist identity politics more generally.¹²⁴

Second, the on-going debates about who is a lesbian (or what constitutes lesbian identity) and what set of politics flow from this identity¹²⁵ have highlighted the dangers of identity politics based on even ‘weak’ essentialism. Identity politics based on a fixed, totalizing identity are likely to replicate problems with liberal theory.¹²⁶ The creation of ‘other’ lesbians¹²⁷ (or women)¹²⁸ is necessary to maintain the status of


¹²¹. See Diana Majury, Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context, 7 CAN. J. WOMEN & L. 286, 303, n.54 (1993). See also Eaton, supra note 120, at 186.

¹²². See Robson, supra note 120, at 435. See also Yeatman, supra note 84, at 48-51; Zaretsky, supra note 84, at 19-21.

¹²³. See Robson, supra note 120, at 456.

¹²⁴. See Steven Angelides, Rethinking the Political: Poststructuralism and the Economy of (Hetero)Sexuality, 1 CRITICAL INQUIERIES 27, 27 (1995).

¹²⁵. See, e.g., Allison Jones & Camille Guy, Radical Feminism in New Zealand: From Piha to Newton, in FEMINIST VOICES 300-16 (Rosemary DuPliessis et al. eds., 1992).


subject identity. As Shane Phelan comments, the "'second wave' of identity politics involves a recognition that the differences within a group are as important as the similarities. This means that any a priori ideas about justice, about equality and about our location in social space must be reexamined, not once, but continuously." 129

Third, this conception of identity politics is similar to the resistance based conception, in the sense that it assumes that the commonalities on which identity is based are due to experiences of oppression resulting from the imposition of negative aspects of those identities. However, this conception also, at least potentially, opens space for politics that are not limited to resistance.

For example, the dominant liberal conception of the subject excludes lesbians from the category of women 130 and fails to provide any other subject positioning for lesbians. It has been argued that lesbians are peripheral and extraneous to these discourses, surrounded by a discourse of silence, a "discourse-which-is-not-a-discourse", 131 resulting in lesbians as (un)subjects. 132 However, discourses of criminality and female perversion prohibited such activities as women wearing more than three pieces of men's clothing. 133 While resistance to the construction of (heterosexual) women as irrational and emotional resulted in claims to value as rational subjects, resistance by lesbians focused in part on making the invisible visible and on countering the imposition of criminality through the politics of 'coming out.' 134 Coming out assumes at least that one's sexual orientation is an important part of one's identity or that it constitutes identity in some essential manner. 135 However, coming out can mean an on-going, daily and even hourly effort; its dangers include harassment and anti-lesbian violence, as well as, everyday prejudice and discrimination. 136 Lesbians may therefore choose strategic invisibility by coming out where safety is relatively assured, to select groups of trusted people. 137 Invisibility is challenged by coming out and deviance is challenged by status as someone's daughter, friend, co-worker, etc. However, 'strategic'

130. See Mason, supra note 126, at 73-74 (citing MONIQUE WITTIIG, THE STRAIGHT MIND AND OTHER ESSAYS 40 (1992)).
131. Id. at 79.
133. Lesbians in different jurisdictions and across historical periods have been punished for engaging in sexual relations with other women, and for crossing gender lines. See Ruthann Robson, Lesbianism in Anglo and European Legal History, 5 Wis. Women's L.J. 1, 3 (1990). See also Phelan, supra note 129, at 25.
134. See Phelan, supra note 129, at 103.
135. See id. at 103-04.
136. See Mason, supra note 126, at 81. See also Robson, supra note 120, at 448.
137. See Mason, supra note 126, at 79.
visibility may simultaneously reinforce invisibility, leave lesbian 'deviance' unchallenged and reconstruct the central liberal subject as normal. Simultaneously, as this politics gains momentum, the challenge to invisibility builds, by carving more space out of the dominant discourses and reshaping those discourses. Resistance may be largely configured within the dominant discourses by appropriating of marginal categories or aspiring to the center; it may also serve to reconfigure those categories and discourses. For example, at the same time that claims for gay and lesbian marriage are claims to normalization, it seems likely that this extension of the institution of marriage would also reconfigure it. Same sex marriage highlights and extends fissures in a monolithically patriarchal paradigm.

C. POSTMODERN IDENTITY POLITICS

Anti-essentialists, or postmodern social constructionists, reject essentialism in any of its forms, arguing instead that identity is constructed relationally through complex and sometimes contradictory discursive practices. As subjects, we can only know ourselves through interaction and contrast with other subjects. "The body is 'always already' culturally mapped; it never exists in a pure or uncoded state." "Cultural mapping" refers to the ways in which messages produced by the culture in which we live constitute who we are. All identities are socially constructed in complex interactions played out through various discourses including law, the media, the arts and politics.

The mapping of traits onto the female body suggests a totalizing passivity of her identity. However, constructionism does not require discarding the possibility of agency, "Subjects are constituted discursively, but there are conflicts among discursive systems, contradictions within any one of them, multiple meanings possible for the concepts they deploy." Women have had statuses that deny agency conferred upon them and have acted to contest these statuses and to create identities taking advantage of the contradictions and gaps in the discourses. Women act, constantly creating and re-creating their identities, the dominant discursive systems, and the statuses conferred upon them. This agency does not mean that women are all equally capable of re-creating themselves and the world around them in any manner that they choose at any time. Despite

138. See Davies, supra note 90, at 242.
139. See id. at 242-43.
140. Fuss, supra note 96, at 5-6.
143. Scott, supra note 51, at 34 (citations omitted).
144. See Minow, supra note 101, at 45, 52 (1997). See also Lucie E White, Seeking '...The Faces of Otherness': A Response to Professors Sarat, Feistiner, and Cahn, 77
agency, women’s conferred statuses configure their actions. This more complex and fluid conception of identity challenges some feminists’ assumptions of weak essentialism and of a linear progression from identity to politics. Identities, as well as experiences, thinking and politics are constituted discursively. Women act to create and re-create their identities, influencing the discursive systems within which they are constituted, and thereby influencing the construction of experiences, thinking and politics. For example, each time a group of women takes action that they name ‘feminist’ they recreate feminism and themselves as feminists; “[F]eminists, and feminism as the movement they constitute, do not precede but are constituted within feminist acts of contestation and politicization.”

This is not to suggest that feminists should refuse to adopt any categories of identities. The categories ‘lesbian’ and ‘women’ are not universal, absolute or ‘real’: they are given to us by the dominant culture, which also determines to a large extent the focus and nature of our political struggles. To recognize this is simply to place an emphasis on the constructed nature of identity, and to acknowledge that the configuration within which we are constructed is not separable from the oppression which we experience. It is not as though lesbians as a category of people exist prior to the oppressive system, but rather that the category ‘lesbian’ is one of the products of a system which institutionalizes heterosexuality, and excludes those who do not live according to dominant norms.

A refusal to adopt categories of identity would be counterproductive for it would leave no space, not even a strategically constructed one, in which to engage in political struggle. Instead of rejecting categories of identities, we should adopt “coalitions that are based not on stable identities but on the recognition that some social signifiers presently embody and transmit relations of oppression.” What is needed are “cultivated political spaces for posing and questioning feminist political norms, for discussing the nature of ‘the good’ for women.”

D. IDENTITY POLITICS AND KNOWLEDGE PRODUCTION IN LAW

The implications of radical social constructionist ideas of identity and identity politics have rarely been considered in relation to knowledge production in law. The law’s assumptions of an essentially unified, rational, autonomous, aggressive white male actor are still firmly congealed

145. See Davies, supra note 90, at 253.
146. See Eaton, supra note 120, at 187.
147. Yeatman, supra note 84, at 39.
148. See Wittig, supra note 130.
149. Phelan, supra note 129, at 782; Cf Phelan, supra note 127.
150. Brown, supra note 4, at 49.
in its dominant discourses. Feminists and others with a vision of justice that includes the reflection of diverse and fluid identities in the law must also recognize that these discourses are not as easily displaced as the term ‘fluid’ often implies. Like quicksand, dominant discourses present a deceptively harmless and tranquil surface, yet are always ready to swallow up and cover efforts at resistance and transformation. This is not to suggest that feminists’ often heroic efforts to change the law and legal discourses have all failed. In Aotearoa/New Zealand, for example, feminists have recently been successful in advocating for changes to domestic violence laws that reflect a feminist analysis of domestic violence as a range of abusive tactics used to gain and maintain power and control over women. However, feminist arguments that most confine women to the traditional essentialized notions of women and motherhood are likely to prove more successful in the legal system.

It has been suggested that rethinking approaches to the marginal identities of ‘bisexual’ and ‘femme’ might provide one vehicle for the recognition and reflection of the complexities of identity formation resulting from cultural mapping in the congealed dominant discourses of the legal system. The underlying assumptions of autonomous liberal conceptions of identity and feminist critiques which assume fixed identities and focus on patriarchy tend to dismiss both ‘bisexuals’ and ‘femmes’.

People who adopt these identity categories are critiqued as “sitting on the fence” and continuing to benefit from the privilege of heterosexual identity. Focusing theoretical attention on the complex constructions of marginal identities that do not fit into the dominant dichotomous, hierarchical ordering of sexuality, reveals a multiplicity of categories and identities. However, a danger of focusing on a multiplicity of marginal categories is that of leaving the dominant categories and the violence that reinforces them unchallenged.

Shifting attention to constructed identities highlights the law’s

151. See SMART, supra note 128, at 25, 37; See also Cheah, supra note 88; Cathy A. Harris, Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights, 65 GEO. WASH. L. REV. 248, 266 (1997).
152. See Angelides, supra note 124, at 42.
153. See SMART, supra note 128.
155. See SMART, supra note 128, at 25.
156. See id. at 28.
158. See SMART, supra note 128; WHISMAN, supra note 158, at 28; Morgan, supra note 128, at 36-37.
159. See PHELAN, supra note 127, at 71-72.
160. See WHISMAN, supra note 157, at 21; Margaret Davies, Taking the Inside Out, in SEXING THE SUBJECT OF LAW, supra note 94, at 45.
161. See Davies, supra note 160, at 45.
assumption of a unified identity. The use of battered woman’s syndrome evidence is one example of how this affects women. Although feminists intend to use this syndrome to highlight the reasonableness of women’s actions, it has been interpreted through the dominant lenses to view women as irrational and slightly mad. It has also been argued persuasively that use of this expert evidence is most likely to benefit women who fit the dominant stereotype of the ‘good victim’.162 Good victims have generally been almost completely passive in the face of horrific abuse, have often made heroic efforts to maintain an otherwise stable family environment for their children and have usually expressed deep remorse for killing the abuser. This image of the ‘good victim’ is consistent with the ‘feminine’ traits ascribed to women by liberal theory’s construction of the unified, essential subject as male.163 When a woman strays from a dominant conception of the good victim, even in matters that are technically irrelevant to her case, she is much less likely to be acquitted.164 For example, if she is an alcoholic, lesbian,165 an assertive Black woman, buries the abuser in the garden,166 otherwise fails to exhibit remorse or is a competent professional, she is less likely to be aided by battered woman syndrome evidence. Law’s assumption of a unified subject limits its ability to recognize personhood as complex and culturally mapped.

Complex personhood means that all people (albeit in specific forms whose specificity is sometimes everything) remember and forget, are beset by contradiction, and recognize and misrecognize themselves and others. Complex personhood means that people suffer graciously and selfishly too, get stuck in the symptoms of their troubles, and also transform themselves.167

Recognition of complex personhood allows the law to see these women’s compliance with the dominant discourses construction of their gender as passive reflected in their passivity in the public sphere and in relation to their male abusers. The courage and strength required for


domestic violence victims to resist these dominant discourses is visible in their refusal to remain passive or to deny their own strength or anger. Their agency in acknowledging responsibility for the relationships (and their breakdown), and in their attempts to maintain their families provides another level of complexity. The enormous strain imposed by the contradictions in these positions which sometimes results in, for example, substance abuse, might then be understandable. Deconstructing these dominant and resistant discourses allows a more complete analysis of why women may fight back and kill their male abusers.

One remarkable Canadian decision recognizes some of the complexities of identity formation for a formerly battered woman:

The tapes spoke volumes of the abuse reaped on this accused by Shaw [the abuser whom she killed]. They also revealed the accused to be verbally aggressive and abusive and "one tough woman" by most people's standards. One does not negate the other, in my opinion....Those who would disregard or mock her portrayal as a victim in her intimate relationships, given her subsequent and violent criminal behaviour for which she is being severely punished, suffer, in my opinion, from a rather myopic view of what is a victim and fail fully to appreciate the 'battered wife' syndrome....All victims of abuse, not only those who are sweet, meek and conform to the stereotyped acceptable behaviour for a female, are deserving of some compassion and the opportunity to break the cycle through rehabilitation and counselling.168

This passage recognizes the complexities of identity. It refuses to assume that victim status is negated by aggression, opening possibilities for recognition of identity as both victim and agent.169 In the last sentence it disaggregates victim and "sweet, meek" and "female," suggesting that these categories are not necessarily inexorably linked, and that Bennett is a victim as a result of acts perpetrated against her, rather than as a lifetime status. However, the Court still employs a victim/agent dichotomy by confining compassion to the victim aspects of identity.

Postmodern social constructionist conceptions of identity recognize complexities of identity formation. Our gloss on these conceptions requires recognition also of the congealed aspects of the dominant discourses, which highlight that while these discourses are malleable, they are not subject to whimsical reconstruction equally by all subjects. Identity formation and politics are thus always mutually reproductive. Recognition of this mutual

169. See Callahan, supra note 163. See also Alice Walker & Pratibha Parmar, Warrior Marks: Female Genital Mutilation and the Sexual Blinding of Women 251-52 (1993).
reproduction in law is a complex project, but this is not an argument against it; the production of justice has always been a complex project.

IV. THEORY AND POLITICS

What then, is the relationship between the arguments we have presented in Part II about valuing knowledge, and the reconstructed identity politics we outlined in Part III? How can an idea of knowledge based upon the identity of a person in a particular social position survive the recognition that there is no unitary identity as such but rather identities that are mapped, fragmented and overlapping many of the categories of “difference” laid down by the canonical discourses?

Wendy Brown identifies a variant of this question as grounding some contradictory tendencies in feminist theory, in particular the tension between recognition that identity as a woman is a constructed identity, and the idea that this constructed identity contains some truth about the world not available elsewhere.170 ‘The world from women’s point of view’ and ‘the feminist standpoint’ attempt resolution of the post-foundational epistemology problem by deriving from within women’s experience the grounding for women’s accounts. But this resolution requires suspending recognition that women’s ‘experience’ is thoroughly constructed, historically and culturally varied, and interpreted without end.

That which Brown appears to regard as a weakness in feminist standpoint theory—that it at some point means suspending our interrogation of identity construction—we would regard as a necessary moment in any political action. ‘We’ (whoever that is) also need to suspend our interrogation of ourselves and our justification for our knowledge if we are to say anything at all with certainty. Suspension is indeed required, especially in law where there is an imperative to make decisions.171 However, the fact that it is necessary at some stage to stop, take stock, and proceed as if the world were much simpler than we know it to be, does not mean that all questions will stop forever, or that any decision made will exclude further future examination. Nor does this suspending of questioning necessarily invalidate our action: that would only be the case if we assumed, like traditional ethical approaches, that we require some non-contradictory grounding for our approach. As Brown herself argues, the “postmodern condition” does not require that we are caught forever in an infinitely complex process of interpretation, specificity and contestable meanings or subject-positions.172 It does mean that we must take responsibility for ourselves and our knowledge. We cannot

170. BROWN, supra, note 4, at 41.
172. BROWN, supra note 4.
disown knowledge on the ground that it is unethical: at its core it is ethical. As white women, we cannot disclaim responsibility for the privilege which a racist society and legal system confers upon us. Perhaps unfortunately, we can never expect our thoughts and actions always to be perfectly synthesized in an unchallengeable relationship, but to be always open to question, alteration and revision. In particular, we have a responsibility continually to revise our understanding of the world and our engagement with it in response to non-mainstream cultural information.

How then, can these complex issues of identity and knowledge be negotiated? Before returning to the three methods of valuing knowledge which we sketched in Part II, it is important to re-emphasize that, in our view, identity and knowledge are interrelated and mutually constituting dimensions of a complex political environment. Clearly, from our discussion, it is recognized in current theory that neither identity nor knowledge can be politically innocent, meaning that traditional notions of epistemology and ontology (the study of knowing and being) have been recast as political rather than purely philosophical. Mapping of identity carries with it political implications, and our response to identities which we are given or which we adopt will of necessity be political. Any knowledge formation takes place within a tradition, in our case the White tradition or ‘white mythology’ of the liberal West. We do not escape this tradition by challenging it, but we may develop a more reflective and strategically useful understanding of it and of ourselves.

We would now like to make some brief additional comments about the relationship between knowledge and identity in the context of law, trying to draw together the threads of Parts II and III. First, we said that knowledge can be valued when the ‘knower’ explicitly acknowledges and attempts to come to terms with her or his position within systems of oppression. In light of the arguments presented in Part III of this article, such an acknowledgment cannot be based naively upon any of the social categories given to us, but must be presented in recognition that these categories and therefore our knowledge are the effects of a social configuration of power which is also implicated as the oppressive system which we wish to transform. Our “situatedness” must continually be revised, understood as complex, and conditional. The fact that at some point questioning of identity must be suspended in order to assume a position as a speaking subject does not invalidate the need to revisit questions of identity construction.

This can be a very difficult matter, especially given that the law, through its agents, presents such a fixed and unsituated face to the world space. Is it not counter-productive to confront such a seemingly rigid structure with a knowledge which is itself a terrain of struggle between

173. See Phelan, supra note 129.
dominant stereotypes and the continually contested meanings of those who identify with the position? Won’t the fixed position win out every time, as it has done in the past? However, to look at this question of rigidity in the law from a different angle, feminist theory, lesbian theory, race theory, critical legal studies and other critical movements have all exposed many cracks in the facade and basic construction of law. Law is increasingly recognized by critical scholars as lacking the ‘objectivity’ it loves. Even in the community, law has lost its once certain authority and claim to truth. In our view, those who are legally powerful—policy makers, practitioners, judges, legislators—can regain some authority by learning to position their own understanding of the world, and by recognizing the limitations of their own perspective. The consequence, of course, is an appreciation that mainstream legal knowledge is just as partial as perspectives defined by their otherness to the mainstream.

Several consequences may flow from this recognition of the fallibility and partiality of legal institutions, legal doctrines and legal officers—in particular, the realization that law is a function of cultural and human systems of meaning, not of inherent, natural, necessary or rational structures. We should not regard ‘Law’ as an insurmountable obstacle or monolith which is too fixed to undergo fundamental change: reifying law so that it takes on the all-powerful symbolism of an authoritarian dictator will not increase our morale about achieving a widespread change in the legal conscience. Moreover, it may be time to begin to question the supposed singularity of law, especially in light of increasing claims by indigenous peoples to have their own legal systems recognized. Are we able to develop and work with a concept of law which is capable of recognizing, not merely assimilating, multiple visions and distinct identities in a political setting?

Secondly, we stated that primarily for political and secondarily for logical reasons (if any are needed), there is a value in the view from below. As we have emphasized, no standpoint can be regarded as politically neutral, and no standpoint achieves epistemic privilege because of its innocent or unconstructed identity. Politically aware adoption of identity-positions and critical reflection on the norms which govern our socially mapped identities ought to lead to knowledge-claims which are neither absolute nor innocent. Knowledge claims must have a strategic and transformative potential, indeed are necessary to any substantial social and/or legal transformation. Having said this, the critique of epistemology which arises within our Western cultural and philosophical framework cannot—at the risk of further imperialism—be claimed to have a universal application. It ought to aid us in our project of challenging that imperialism and not be used to recreate it in another form. We have provisionally rejected the terminology of ‘objectivity,’ because at the very least it implies some unmediated foundation of knowledge, and at most
carries with it the danger that a perspective presented as partial will expand to silence other minority views.

There is clearly a danger of misunderstanding here. Having appreciated that law is not 'objective,' the tendency of some theory is to attempt to improve the objectivity of law; to make it more inclusive, more representative and force it to take in and assimilate stereotyped 'Others.' While the goal of diversifying law and legal representatives is an important one, it may only result in assimilation and compromise, and a further empowerment of a discourse which has no need to prove its adaptability, but every reason to prove its capacity to listen rather than silence, and to maintain and encourage, rather than suppress otherness. Understanding a situated approach to knowledge as based on identities, contexts and political positions which are contingent, changing and always complex, makes the legal task more difficult but not impossible. We are faced with the strategic choice between complying in the legal preference for a single approach or policy, or attempting to reflect situations in all of their difficulty, complexity, and non-rationality (which may appear to be less effective in the short term). As feminist legal thinkers are only too well aware, there is no easy solution to this dilemma, leaving us to work simultaneously on many fronts. Thus while law may itself become more diverse and open, the project of resistance to its totalizing tendencies is an ongoing and essential one—until legal ideology renounces the view from above.

These reflections lead us into the third aspect of valuing knowledge which we outlined, the appreciation of the political and strategic direction of our knowledge. As we have indicated identity, like knowledge, presents us with politically loaded issues which must be in the foreground, not on the sideline, in our engagement with law. Only in this way can the importance of identity to knowledge be operational in a legal context. It is not necessary to add a great deal more on this topic at this stage: we would only comment that it requires an ongoing effort at self-reflection and resistance to the slow creep of conservatism, normality and assumptions of epistemological certainty, as well as a ceaseless and multi-faceted critique of legal institutions.

V. CONCLUSION

The point of this paper has been to indicate some of the more practical issues which arise in any consideration of the relationship between power, identity, knowledge and law. Throughout the paper we have attempted to do two things: to situate ourselves continually in relation to the questions of

knowledge and identity construction which have arisen, and to connect our observations to specific legal problems. But how do you—the white lesbian academic who tomorrow must speak to the judicial education seminar on promissory estoppel—feel at this point? Probably not very different from how you felt at the beginning of the article. You are, after all, still going to be confronted by a resistant world: the largely male, white and middle-class group of judges, whatever their own personal qualities, who still benefit from an ideology and an institutional power which privileges their word. No amount of theory will change the fact that they are the ones to decide what gets heard, and if heard, what gets believed, and if believed, what gets taken into account. They will listen, hopefully openly, and then they will continue to make the decisions. As yet, we do not have the means of eliminating, minimizing or making heterogeneous this power of decision-making held by those who (like judges) make crucial determinations about social relations. The law and its agents are still what appear to be a series of brick walls. If we are to engage at all now, as well as working on the project of imagining an alternative concept and practice of law for the future, then something needs to be done even though we may compromise our theory in the process. This is not to suggest either that we have no agency, or that our agency will always lead to reproducing an oppressive system. As we have tried to suggest, resistance may reproduce, but always with a difference. It is this difference that may be exploited. As both Angela Harris and Shane Phelan suggest in other contexts, we may have to hold both modernist and postmodernist approaches to identity, both essentialism and anti-essentialism, in tension.\(^1\) Our political action must be fully cognizant of the risks that we take at the same time as we venture into new territory.

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Hopefully in this article we have given some indication of the magnitude of the issues faced in attempting to reconcile the need for practical political action with current theorizing on partial knowledge and fragmented, constructed identities. In the legal arena the need for this reconciliation is as intense as anywhere because of the very practical and focused nature of feminist legal theory. We have, however, also attempted to think through some of the practical possibilities of current theory, and indicate some methods and values which we have found helpful in attempting to negotiate this difficult terrain.

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175. Harris, supra note 62; Phelan, supra note 129, at 768-69.