Book Reviews

Alan Hunt and Gary Wickham, ***Foucault and Law. Towards a Sociology of Law as Governance***
London: Pluto Press, 1994.

David S. Caudill and Steven Jay Gold (eds) ***Radical Philosophy of Law. Contemporary Challenges to Mainstream Legal Theory and Practice***
New Jersey: Humanities Press, 1995.

The nineteen eighties were a far from peaceful decade. Hostages were, eventually, released from Teheran; body bags from Beirut contained US marines; Cuban troops were captured defending Grenada against US invasion, while in the South Atlantic the legacy of Nelsonian imperialism was given one last, pathetic, cheer. Meanwhile at the globe's northern end the Exxon Valdez spilled its oily guts, and not even a major dip in the stocks on Wall Street could stem the rise of authoritarian populism and economic libertarianism. In the offices of power Milton Friedman and Friderich von Hayek were the unacknowledged legislators of the world. Given such ongoing turbulence it is not altogether surprising that scepticism regarding the viability of structuralist accounts of society, and particularly the role of law in it, increased. This reaction was accompanied by a fascination with electronic globalism and its alleged power to undermine narratives of orthodoxy. Intellectual pessimism and political disintegration became, and have remained, dominant characteristics of our period. The intellectual shorthand descriptive of these developments is known as poststructuralism and postmodernism. Where literary theory and culture were its initial terrain, the two 'posties' now seek to colonise law and society.

Although poststructuralism and postmodernism have often been conceived as mutually interderpendent, they can be distinguished in terms of their focus on semiotics and society respectively. Drawing on elaborations and critiques of the structural linguistics of Ferdinand Sausurre, various recent, mostly French, writers have developed an

approach to language and meaning whereby the signifier is divided from the signified. For Roland Barthes, Paul de Man and Jacques Derrida meaning can be found in both what a sign is and what it is not. Language and meaning can be deconstructed. This view suggests that any previously assumed stability in meaning is false, and posits instead the idea that meaning is dispersed along a range of signifiers. Such a view courts the danger of detaching the study of signs from any extra linguistic reality thereby diminishing the importance of context for meaning. In this way the social, and thus the legal, could be reduced to nothing but the semiotic. Subverting the structures of language seems easier, and more preferable, than challenging the structures of state power.

Postmodernism, by contrast, can be seen as an epochal shift, or break, from modernity involving the emergence of a new social formation with its own organising principles. Some writers argue that Western culture is moving towards a postindustrial age, while others point to an end of history. Central to these debates are new forms of technology and information retrieval, making it possible, so the argument goes, to move from a productive to a reproductive social order. This is one where simulations and models increasingly constitute the world, erasing the difference between appearance and reality. A greater focus on procedures in the law, rather than on substantive issues of justice, could be seen as an instance of this phenomenon. More generally the postmodern turn in social theory carries with it intense suspicion, if not outright rejection, all previous historical narratives of social progress. Instead there is a concern with the ephemeral and contingent nature of the present. Playful deconstruction of these grand narratives has now become the norm of social analysis. Legal nihilism has arrived and it seems, with the politics of identity in the ascendant, far easier to initiate a discourse with the spectre of radical politics than engage in any messy collective struggle for human betterment.

Both the works under review could be regarded, in their differing ways, as exemplars of the postmodern moment in law. Both subscribe, again with varying emphasis, to the relativising tenor of legal theory and between them engage in the serious and valuable process of legal criticism. Likewise both exhibit a theoretical openness and self critical awareness that indicate a growing maturity in the theory and sociology of law. Yet there are, as postmodernists are wont to say, differences. *Radical Philosophy of Law* embraces an extraordinarily wide range of political allegiance, making indeed a virtue of its diversity. 'It is difficult to think', David Caudill writes, 'of the radical philosophy of law as a set of predictable positions on contemporary controversies. The boundaries of left legal theory are dynamic, and its proponents unfaithful to anything that might appear to them as doctrinaire'. (p xi) Quite so, heaven forbid. *Foucault and Law*, by contrast, overcomes its somewhat misleading title to provide a thorough going critique of Foucault's absence from law. It goes further and proffers the outline of a legal subgenre of law as governance. Where

contributors to *Radical Philosophy of Law* argue across some familiar tropes in US legal academe - critical legal studies, critical race theory, feminism, psychoanalysis and the familiar panoply of pleas for rights in sexual practice - *Foucault and Law* benefits from a more discrete focus and nuanced critical account. By contrast, Foucault is mentioned only twice in the Caudill and Gold collection: once, somewhat incongruously, in connection with the analytical defence of functional marxism and law; the other, perhaps more appropriately, in support for postmodern feminist jurisprudence.

Radical Philosophy of Law opens with a fascinating, if somewhat over ambitious, chapter by Raymond Belliotti. In less than thirty pages his brief is to provide a synopsis of marxism, highlight its critique of law, outline and evaluate marxist jurisprudence, and conclude by specifying its legacy. To handle such a challenge effectively, as Belliotti does, is no mean feat. Such efforts don't come without strain, particularly in the generous enlargement of 'marxism' to include the legal realism of Jerome Frank, the radical feminism of Catharine MacKinnon, and the superliberalism of Roberto Unger. Belliotti's enthusiasm for the view that we are all marxists now blinds him to the clear dissociation of Mackinnon and Unger from marxism (patriarchal residues for one, an instance of false necessity for the other); while from the grave Frank would doubtless bellow, 'who's this we, comrade?'

None of this should detract, however, from the sharp and lucid points Belliotti makes. Commenting on the ideological function of law, he says its role is to act as a surrogate for dominant interests by sanctifying the outcome of social conflict as the result of eminently fair procedures which become part of society's core commonsense beliefs. To the extent that citizens internalise the decrees of law then, marxists argue, the dominant ideology (capitalism) secures the 'consent' of the oppressed in their own subordination (p 14).

For Belliotti, marxism on the law faces two choices - servility or triviality. He reaches this conclusion by suggesting that it can downplay the link between the material base and the content of law, highlight law's relative autonomy in the social superstructure and soften its depiction of dominant ideology. This, he feels, makes marxism more plausible but deprives it of radical panache. Alternatively, marxism could make ad hoc analyses of specific laws showing the impact of the dominant ideology and its indirect linkage to the material base. While this, perhaps, preserves some integrity for marxism, it is at the cost of piecemeal explanations. On this account an unappealing choice indeed (p 20).

Moreover, on the seemingly endless discussion of law's radical contingency, Belliotti reminds us that acceptance of such a point does not imply ratification of a leftist political agenda. Such a claim may tend to eviscerate conservatism, for example, but it does not displace or replace it as a descriptive and prescriptive world vision. This is a point legal postmodernists would do well to remember (p 25).

Reluctant radicals is Patricia Smith's apt and appealing description of feminist legal critics. Here the work of Catharine MacKinnon on a feminist theory of the state, along with Deborah Rhode and Martha Minow's writing on the engendered nature of justice in the US legal system, loom large. Smith rightly makes the point that many of the problems a basically patriarchal society generates for the legal and social position of women remain unresolved. This is in spite of the common claim that issues relating to sexism, employment discrimination and sexual violence towards women have been solved. Discrimination that used to come in overtly through the front door now comes in covertly via the back. She supports this with reference to a 1986 case where the Equal Employment Opportunity Commission brought a Title VII class action against Sears Roebuck and Co. The case concerned the underrepresentation of women in higher paying commission sales positions, while lower paid jobs were predominantly filled by women. Under Title VII class action suits statistics are used as presumptive evidence of discrimination. The burden of proof in the case thus shifted to Sears Roebuck to provide nondiscriminatory reasons for the differences shown in their employment statistics. The company mounted a successful defence on the claim that women as a class are really not interested in high paying commission jobs. They argued that women dislike competition and value good relationships more than money, arguments with some basis in feminist scholarship. So the company was able to argue that women sacrifice money for less stressful working conditions. In effect, the employment disparity resulted from women's own choices, not discrimination. Sears Roebuck won its case on this basis, in spite of evidence from women who had actually applied for commission sales positions. Patricia Smith correctly observes that the distressing feature of this case lies in the reinstatement of sexist stereotypes into a law that was designed to counteract them. If all law is formulated from a perspective, then those in positions of power need to see that the norms they use are, in the end, the norms they choose. Such a claim sets up serious tensions with traditional presumptions of legal neutrality. (pp 82-83)

David Ingram pursues this challenge with a critical and historical overview of the emerging legitimation crisis in contract law. Drawing on the lengthy history of liberal contractualism, Ingram questions the economic rationalist and libertarian argument that judicial, executive and corporate interventions in the private sphere actually further public interests. He contends that such interests cannot be determined rationally apart from consensual democratic discussion. Ingram notes that the substantive provision of common goods requires the abolition of capitalist private property as well as the elimination of class stratification - goals that appear as utopian as they do desirable (p 141).

Concerned that consensus and collective choice are seen to be abnormal in plesbiscitary democracy, such consensus as does exist being organised by political and technical elites, Ingram bases his alternative on a

conception of rationality that is dialogical and democratic. This conception accepts the collapse of the public/private distinction and draws on the work of Karl-Otto Apel and Jurgen Habermas in showing the importance of consensual communication. Noting that the democratic process of decision making often simply aggregates preferences, and if there are enough it is called a mandate, Ingram reminds us that the quality of a preference is at least as important as its quantity. For Ingram democracy consists of more than just the passive registration and representation of given interest positions; it also consists in the discursive formation of public opinion (p 159). This last point has acute pertinence for Australia, particularly given the near monopolistic control of our electronic, televisual and print media - a control which continually undermines educative attempts to enlarge and enlighten public understanding.

While the essays remarked upon here represent the more stimulating and challenging of contributions to *Radical Philosophy of Law*, the anthology as a whole is akin to the curate's egg - good in parts. Unmistakable is the tone of moral earnestness, for here we have souls whose intentions are good - their plea is not to be misunderstood. To the extent that these essays evince a sympathetic affinity with postmodern relativism, and many do, then to that extent normative standpoints from which to comprehend the distortions, perversions and exploitative uses of legal power are erased. The postmodern and deconstructive critique of law must move beyond rhetorical analysis, to an account of the knowledge - constitutive interests that define the liberal tradition in jurisprudence. Wherever the plaints of postmodernist politics are heard, there too will be the fateful siren sounds of political fragmentation, the deceptive solace of contingent self limitation. All that the rhetoric of plurality and difference manages to achieve is that familiar retreat into the cultivation of private virtues, regarding any attempt to match these with public responsibilities as the merest folly and vanity.

Curious though it is that two legal scholars should undertake a study of a major late twentieth century thinker who not only expels law from the corpus of his theory, but whose ruminations on history and society are initially met via the amber light of 'cautionary comments', yet that is exactly what Hunt and Wickham do in *Foucault and Law*. They are right to protest the long standing intellectual insularity of Anglo-American legal scholarship, although it must be said that the work of Alan Hunt, in particular covering legal sociology, critical legal studies and marxism, has done much to dispel legal ignorance. Still they are justified in their caution, since there are many in the law whose response to the name Michel Foucault is likely to echo Horace Rumpole's denunciation of foreign flannel and tomfoolery. Such a reaction merely underlines their point.

For Hunt and Wickham the main reason for engaging with Foucault lies in the feeling 'that his writings capture a deep and pervasive disenchantment with the modern condition' (p 35). To this they add the observation that as the twentieth century ends there is an escalating sense of

rupture, that politics are sterile, uncertainty is everywhere, and earlier optimisms have been jettisoned. They note as well that Foucault is hostile to all myths and utopias, short on policy and prescription, but apparently his writing can still be seen to hover between an enthusiasm for emancipatory projects and a fatalistic pessimism regarding the ways in which knowledge generates mechanisms for domination. However, since *Foucault and Law* goes on to elaborate a conception of law as governance, deriving from Foucauldian principles, it is clear that Hunt and Wickham don't fully subscribe, fortunately, to their guru's bleaker than black outlook.

The writing of Michel Foucault is decidedly heterodox with regard to conventional disciplinary boundaries, and unorthodox in its studied disavowal of intellectual debate with other major figures. While fully sensitive to the difficulties these characteristics pose for a critical treatment of Foucault, Hunt and Wickham suggest that if there is an abiding theme in his work it is the conditions of possibility of the forms of social knowledge and practice. Rejecting historical causality, because it presumes linear and evolutionary change, Foucault focuses on the unique specificity of historical phenomena.

While genealogical describes the type of inquiry Foucault favours, it is his association with the term 'discourse' that many would regard as distinctive. Indeed Foucault could be said to have licensed the outbreak of 'discourse fever' in the halls of academe. It rests on an understanding of the way in which language constitutes the subjectivities and identities of persons within a context of institutional practices. In a common poststructuralist move, Foucault argues that discourses put in place a set of linked signs, that they have real effects in that they structure the possibility of what gets included and excluded by authorising some to speak and be taken seriously, while others are marginalised in a culture of silence. In effect discourses produce what it is possible to think, speak and do (pp. 8-9). An easily observable example of discursive change would be Australian higher education which has all but lost the long embedded language of liberal classicism in favour of the babarous neologisms of market economics. Its practices have followed its language.

For Foucault discourses generate truth - claims, and since such claims are linked to knowledge and power, it is not difficult for him to argue the centrality of regimes of truth for institutional practices. In a manner rhetorically reminiscent of Francis Bacon, Foucault links knowledge to power through a focus on the sites of knowledge production in the learned disciplines and professions. Too often power has been simply equated with repression, and Foucault believes he has detected the 'micro-physics of power' (p 20). By focusing on localised sites, and on the techniques and tactics of power - on, in effect, the inscription of power on the body - he takes a major step away from structural accounts of social struggle. Although keen to evacuate the political terrain occupied by marxism, Foucault wishes to retain a modicum of conflict with his claim that power always involves and engenders resistance. However, such resistance is

not located in a primary site, like the working class, but is dispersed through a plurality of local resistances.

Hunt and Wickham correctly point out that the weakness of this is that Foucault tends to ignore the processes that aggregate or condense power in centralised sites. Moreover, the micro-physics of power tends to impede the development of adequate, collective political strategies. One is reminded of the wonderful satire by Jonathan Swift relating the travels of Lemuel Gulliver. Swift tells us that the good and fearful Lilliputians were able to tie the giant Gulliver down when he was asleep. On waking the great Gulliver broke his bonds easily, terrified the locals by standing up, and outraged them by urinating from his great height. This, as Swift - a man every bit as pessimistic as Foucault - well knew, is the abiding experience of power encountered by the wretched of the earth everywhere.

A further characteristic of Foucault is his preoccupation with techniques of power that do not rely on force and coercion, on what he calls 'technologies of the body' (p 20). This allows him to talk of the emergence of disciplinary power, even of a disciplinary society. Such arrangements exhibit three features: a hierarchy of observation, or surveillance, whereby a detailed monitoring of performance and practice occurs; the operation of normalising judgments which define the desired attributes and behaviours of individuals; and finally, the deployment of a mixture of micro-penalties and rewards (p 21).

Hunt and Wickham highlight Foucault's persistent association of law in a disciplinary society with a negative conception of power from which to he seeks to escape. Law is seen as specifying prohibitions. Foucault uses law illustratively in his texts, rather than making it an object of inquiry or developing a more adequate conception of law. They point to two impulses which lead Foucault to marginalise the role played by law. In his historical analysis of the emergence of disciplinary modernity Foucault assigns to law the role of constituting the pre-modern complex of monarchy-law-sovereignty. Moreover, his genealogical methodology involves a shift in emphasis from state power to local or 'capillary' power - a metaphor designed to suggest the numerous small intersecting mechanisms through which power passes (p 49).

In his marginalising of law Foucault's work contrasts sharply with Max Weber and Ronald Dworkin who have given law an increasingly central role in modern society. Unlike them Foucault believes we must escape the model of Leviathan in the study of power and look more closely at the techniques and tactics of domination. Yet the central deficiency in his treatment of the ensuing disciplines is the lack of any explanatory mechanism whereby their dispersal can be aggregated into his negative utopia of a 'disciplinary society' (p 69). Nor is it sufficient to merely recycle Jeremy Bentham's ill-fated Panopticon as an instance of the essence of disciplinary power. What we have here in Foucault is discipline without disciplinarians, strategy without strategists. And, in an important corollary regarding the deployment of power, all he offers is resistance without

agency. Those who are concerned about the pervasive intrusion of authority in all its forms into every part of their lives will find comfort in Foucault's pessimism. What they won't find are the political tools necessary to escape powerlessness.

Foucault and Law succeeds most convincingly in its incisive and original critique of Foucault's positions. Indeed, as a critical introduction to his work it would be hard to find a more judicious and searching account. While they are clearly aware of his strengths and deficiencies, Hunt and Wickham nonetheless remain inspired by what might be termed the effect of Foucault.

This is made clear in the final part of their study, its most original part, which is concerned to advance a conception of law as governance. Deriving from Foucault's interest in the growth of disciplinary mechanisms in modern government they develop a sociology of law as governance complete with principles and a slogan the law is what the law does' (p 99). Now there's a slogan that could soothe the savage breasts of silks everywhere.

For Hunt and Wickham governance has a broad provenance. It is any attempt to control or manage any 'known object', while by the latter they mean an event, a relationship, any phenomen which human beings try to control or manage. Of the four principles which animate law as governance, the first, referring to elements of attempt and elements of incompleteness, is relatively uncontroversial since it reinforces the idea that the law is always chasing at least one objective it cannot catch (p 103).

However, with the second principle we enter a more contestable arena since this involves power, politics and resistance. What seems disappointing here, especially given the volatilities involved, is their emphasis on the technical relation between legal politics and governance. Similarly, it is all very well to talk of 'the imperative to resist' (p 107), but again where's the agency, what's the point? Of course resistance to law is a counter stroke to power, but how effective? If modern power was thoroughly reconstituted along fully egalitarian lines then resistance would become revolution, an outcome our authors neither intend nor desire. Unlike David Ingram's argument, mentioned earlier, Hunt and Wickham express serious doubts about the potential for modern democracies to become more fully participatory (p 62).

The final two principles include a recognition that legal knowledge is not always rational, and lastly that law as governance is social, binding societies together. By this point is meant both that law is part of that which pre-exists individuals who are its subjects, and that law was invented as a definite category of the government of nation-states (pp 108-112). To these Hunt and Wickham add four methodological principles, or guidelines, which effectively derive from the sociologist Emile Durkheim. Consequently, early and late twentieth century strands of French social thought are drawn together. In so doing the impression is inevitably conveyed that the work of Michel Foucault could do with supplements. It is as if

they cannot feel comfortable with his studious avoidance of intellectual location, and must have their Foucault with additives. Weber for law, Durkheim for method, a pinch of the always-already Althusser and, lurking beneath the surface, the residues of Marx.

While this move gives Foucault some neighbours in an intellectual pantheon, it firmly relocates him at the centre of modernism, implicitly clipping the wings of those that fly with Michel as the high priest of postmodern. Considering that their book is largely aimed at the legal academy, it was doubtless prudent and wise of Hunt and Wickham to elide any mention of Foucault and postmodernism from their text, including their index. It's an omission conspicuously out of joint with his otherwise quite regular conjunction with that term. Whether Hunt and Wickham wish to acknowledge it or not, Foucault is at the heart of debates and postmodernity.

Moreover, what neither they nor Caudill and Gold seem prepared to engage with is the extensive literature critical of postmodernism, and that which has emerged sharing some Foucaultian affinities but wanting to reinstate radical political action. Our discussion though will briefly touch on 'resistance postmodernism', as it has been called, by way of suggesting fruitful lines for future discussion.

Emerging as a response to the overwhelming fragmentation of reality in late capitalism, and to the perceived crisis in transformative politics, resistance postmodernism seeks to reinscribe the political. In contrast to the detotalizing micropolitics of Foucault, a transformative politics reasserts the necessity of totality. This is not seen as a form of Hegelian expressive unity, rather totality is seen as both a system of relations and an overdetermined structure of difference. In turn such difference is viewed as difference within a system of power and the social struggle it engenders. Basically, resistance postmodernism is concerned with the economy of relations of difference within historically specific totalities, and, by intervening in power relations to end oppression and exploitation grounded on them, makes clear its distance from Foucault. If totalities are structures of differences, and so unstable and changeable arenas of contradiction and struggle, then they are open to intervention, contestation and transformation.

No doubt there are some who would see in such a development a clear example of a late twentieth century infantile fantasy. But they would be mistaken, for it is abundantly clear that postmodern posturings have brought western societies to a particularly noxious nodal point. It is one where the culture of narcissism meets the politics of nihilism, with the odious result that anything goes and thus everything stays. Surely we deserve better than that.

Robert Mackie