

POST-PROPERTY?: A POSTMODERN CONCEPTION OF PRIVATE PROPERTY

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I. INTRODUCTION

The primary concern of the present when it is being lived as postmodern is that we are not living in the present, *we are not where we are but we are 'after'*.¹

This is Ferenc Feher's pithy summary of postmodernity. It will form the theme of this paper, for in temporal terms, it will be argued that we are 'after' the time when the discourse of private property had descriptive and prescriptive meaning. This claim might seem nonsensical in a thematic issue addressed to private property. Is there any more obvious proof that it is alive and kicking? The argument here is that, on the contrary, this notion of private property has outlived its usefulness in a number of respects. First, from the perspective of legal doctrine, its descriptive value has been greatly diminished by a wide range of economic and legal developments in the course of the last century. Secondly, from the perspective of political theory, a related set of historical changes have undermined its relevance as a tool of analysis. Thirdly, the moral dimensions of the currently prevailing concept of property are not only wholly unsatisfactory to address many contemporary social and economic issues, but are potentially quite destructive of the objectives they are often expressed to further. As the focus of this paper is to a significant degree historical, a useful starting point will be an examination of the emergence of the 'modern' concept of property. After detailing a number of critiques of this concept a 'post-modern' approach will

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1 F.Feher, "Being After", *The Age: Monthly Review*, September 1987, 8-9.

be outlined. Putting it rather crudely the argument here will suggest that whereas early modernity saw property as a bundle of things, late modernity embraced a notion of property as a bundle of rights. Post-modernity in its turn sees its eclipse by a bundle of 'posts', in particular, post-liberalism, post-structuralism, post-marxism, post-industrialism and post-modernism. Each of these concepts will be addressed in turn, though in a necessarily attenuated and oversimplified fashion. First, what is the modern concept of property?

II. PROPERTY AND MODERNITY

The concept of property assumed a central place for the first time in political and legal theory with the rise of modernity. One of the problems with the term is its variability; its meaning can only be understood by the context in which it is used and the eras or epochs with which the 'modern' period is being compared. For the purposes of this paper the meaning adopted is that of Agnes Heller and Ferenc Feher who see modernity as "the period (and the region) in which capitalism, industrialization and democracy appear *simultaneously*, reacting to, reinforcing, complementing and checking each other."² Accordingly, the meaning of property in modernity has been directly implicated in these simultaneous developments. This can be seen by examining the arguments propounded by John Locke.³ For Locke, the concept of property was the foundational principle of the modern polity. To the extent we are owners of our own bodies, he argued, we are by extension owners of everything we have appropriated from nature. Property, therefore, becomes individual in two senses. First, an individual act of appropriation creates it; secondly, the idea of undeveloped communal property is a contradiction in terms. Thus, in his discussion of nature, Locke points out that commons are "waste".⁴ In this argument the doctrine of *terra nullius* receives its modern expression; property is not so much legitimated by custom, tradition or the sacred, but rather is legitimated in terms of productivism, exclusivism and universalism. The points of contact with the three elements in Feher and Heller's demarcation of the emergence of modernity are obvious.

This 'modern' version has been subject to a range of modifications. Some one and a half centuries later continental European philosophers such as Kant and Hegel had their own idealist versions — idealist in the sense that property was seen to emanate from conceptualist rather than materialist origins. Kant perpetuated the individualist and exclusivist notion in his

2 F. Feher and A. Heller, "Class, Democracy, Modernity" (1983) 12 *Theory and Society* 211.

3 J. Locke, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus* by Peter Laslett (1967) Second Treatise, chap V.

4 *Id.*, paras 36-42.

formulation that the subjective act of appropriation, an act of individual will, established proprietary rights.⁵ Similarly for Hegel, property became an extension of one's individual personality.⁶

Notwithstanding their respective epistemological differences, these philosophers nonetheless demonstrate an irreducible consensus: that property is (a) exclusive; (b) commodifiable; (c) objective in the sense of being an *object of appropriation and consumption* and (d) individual. These characteristics can be seen as the *denotative* meaning of property. This is but one dimension of meaning. The other is its *connotative* meaning, that is, the messages — evaluative, ideological and political — that come with it. However, these two aspects are not connected by a natural bond, but like all meanings, are negotiated, influenced and modified by debate, struggle and power. Yet this modern concept of property with its connotative meaning that embraces the values of an exclusivist, productivist, individualist and capitalist culture, is nonetheless regularly portrayed as a timeless, Platonic form, above and beyond the grubby terrains of politics and economics. This belief lies at the heart of our legal culture. Thus, Blackburn J. in the case of *Milirrpum v. Nabalco*⁷, a dispute about the extent, if any, of traditional Aboriginal rights to land, after an extended review of the authorities, concluded as follows:

I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications. But by this standard I do not think that I can characterize the relationship of the clan to the land as proprietary.⁸

That this definition is not lacking a distinguished pedigree is demonstrated by the eminent eighteenth century jurist, Sir William Blackstone, who at the very beginning of Volume II of his *Commentaries on the Laws of England* pronounced that:

property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.⁹

Blackstone's "sole and despotic dominion over things to the exclusion of the entire universe" strikes perfectly the chords of exclusivity, individualism (in the sense of emphasising the de-socialised nature of property) and alienability found earlier in the political philosophy of Locke. Blackstone therefore, succeeds in harnessing Locke's *political* concept of property to his own *legal* one, and further he shares with Locke a natural lawyer's perspective. For Locke, the dictates of nature, and to a lesser extent, God, impelled men [sic] to individual appropriation. For Blackstone, too, nature operated as a network of impulses directing a system of private property in

5 I. Kant, *Philosophy of Law* tr. W. Hastie (1887) 81-84.

6 G. Hegel, *Philosophy of Right* tr. W.W. Dyde (1896) 65-68.

7 *Milirrpum v. Nabalco Pty Ltd and Commonwealth of Australia* (1971) 17 FLR 141.

8 *Id.*, 272.

9 Sir William Blackstone, *Commentaries on the Laws of England* (11th ed.) (1791) Vol. II, 2.

that private property was positively decreed by the law of nature. In the formulation of Blackburn J. above, this naturalism takes on a different form: it is 'natural' in the sense of being ahistorical, always there. In being so, a *status quo* is legitimated.

This 'modern' concept of property is seen by C.B. Macpherson as particularly at odds with feudal concepts of property, and simultaneously at odds with our 'contemporary' concept of property. Insofar as he identifies a recent shift in property discourse, his argument will be considered next.

III. C.B. MACPHERSON'S POST-PROPERTY

In an important sense C.B. Macpherson's work is a symptom of the emergence of post-property, despite his many and various discourses on property *per se*.¹⁰ But his redefinition of property as both a descriptive and a prescriptive concept renders it practically *meaningless*, for by reconstituting its semantic elements Macpherson draws its boundaries so wide and so all-encompassing that virtually every civil, political and economic right can come within its compass. This can be seen by examining some of Macpherson's central theses.

First, he suggests that the rise of capitalism was accompanied by a change in the meaning of property. It came to mean the thing itself rather than a social (and legal) relation. This *desocialisation* of property, clearly evident in John Locke's work, is seen to be quite at odds with the prevailing concepts of property throughout the span of feudalism when its essential elements were public access and inclusive participation rather than privacy and exclusivity.¹¹ Macpherson's characterisation of what he calls quasi-market society is the measure of how far he explodes the concept of property, emphasising that the concept of property "turns out to be more flexible than the classical liberals or their twentieth-century followers have allowed for".¹² In rather loose sociological terms he sees the definition of property as largely determined by "the positive support of any leading classes",¹³ and just as those "leading classes" during the period of a more free-market capitalism ensured that property was essentially *private* in character and a *thing* (common property at the time being seen, he says, as a contradiction in terms) likewise with the rise of the welfare state property comes to be defined as a right to revenue.

Macpherson's elucidation of the market concept of property is developed by him in a section entitled "Modern Property: a Product of Capitalist Society", where, like Feher and Heller, he makes the link between the rise of

10 See, for example, C.B. Macpherson, *Property: Mainstream and Critical Positions* (1978); C.B. Macpherson, *Democratic Theory: Essays in Retrieval* (1973) especially chapter VI.

11 C.B. Macpherson, *Democratic Theory id.*, 123-130.

12 *Id.*, 121.

13 *Ibid.*

industrialism, the market and modernity.¹⁴ However, while placing an important emphasis on the contingent social and political determinants of language, unlike Blackburn J., he nonetheless lapses into a form of linguistic essentialism and historicism. This linguistic essentialism is evidenced in his identification of a single dominant meaning of property coming to the fore at certain stages of economic development. Taking the term property as used today as an example, rather than having a single meaning, there are at least three in common legal currency. Expressions like “get off my property!” clearly indicate property means a thing.¹⁵ Yet to say that “tenants have limited property in the real estate” defines property as a specific right. Then again, the claim that “one’s reputation is property and should be afforded legal protection” implies any substantive valuable right. There is no reason to suppose that in earlier, pre-mass communication times, at least an equal or greater diversity of denotative meanings prevailed. However, Macpherson skates over this problem even in his introduction to a selection of Bentham’s writings on property, part of one section of which is devoted to criticising various incommensurable meanings of property current in *his* day.¹⁶ As Wittgenstein in his later work has shown, the ‘true’ meaning of words depends on the context in which they are uttered.¹⁷ Furthermore, Macpherson’s essentialism is not saved by his expressed focus on dominant meanings of property, the implication being that there are always a plurality of competing meanings, for little evidence is proffered to substantiate his argument, and as Kamenka and Tay have suggested, there is clear evidence to the contrary.¹⁸

Another weakness in Macpherson’s argument is his tendency of seeing economic forces in an unidimensional way. Thus, as far as the emergence of capitalism is concerned, he sees in quasi-Marxist fashion a straightforward, materialist, transition from feudalism. There are serious difficulties with this. Recent historical work has uncovered a remarkable complexity of property forms, particularly in relation to landholding, right up until the twentieth century. For instance, rights to commons and the dynastic-oriented structure of the law governing settled land with its concomitant restrictions on free alienation, starkly contradicts the image of a society remorselessly driven to embrace a system of *laissez-faire*. Thus, Patrick Atiyah points to the importance and pervasiveness of the entail whereby:

competing family rights necessarily meant that the freedom of the land ‘owner’ — who was often no more than a tenant for life, or tenant in tail, legally speaking — was limited. The freedom of one generation was limited by that of earlier and later generations.¹⁹

14 *Id.*, 123.

15 See D. Kennedy, “The Structure of Blackstone’s Commentaries” (1979) 28 *Buff L Rev* 205, 318.

16 C.B. Macpherson, *Democratic Theory*, note 10 *supra*, 39.

17 See generally L. Wittgenstein, *Philosophical Investigations* (1958).

18 E. Kamenka and A. Tay, *Law and Society: The Crisis in Legal Ideals* (1978); see also the discussion by R. Sackville, “Property, Rights and Social Security” (1978) 2 *UNSWLJ* 246.

19 P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 88.

One further aspect of this pattern of qualified property is that it becomes difficult to see eighteenth century England as a rationalised and homogeneous economic system. David Sugarman has argued that this suggests:

the loose fit between the idea of a legal concept such as 'property' and its operation in practice; the co-existence over long periods of competing conceptions and practices bearing the same name; and the manner in which a legal institution shaped with certain interests in mind, could be utilised to the benefits of different interests.²⁰

A related argument is put by Keith Tribe who identifies an ethnocentrism in Macpherson's position. The very notion of an *economy* in our sense of the term in eighteenth century England is misconceived, he argues, concluding that:

[f]ar from reflecting an emergent capitalist reality, the discourse turns obstinately on a patriarchal form of organisation that had been the currency of 'civil society' since the time of Plato.²¹

Further, Macpherson's conception of social change is dangerously historicist in orientation. Historicism is used here to denote a form of analysis which relies on notions of determinism and teleology to explain historical change. This comes out most clearly in his comments about emerging forms of property and wealth. He sees the growth of affluence in the post-war liberal democracies — "quasi-market societies" or, in Bowles and Gintis' terms, those marked by a Keynesian political and economic accommodation — as inexorably producing a range of demands for a more fully human life. Property for him is on the verge of being seen not only as a right to be guaranteed material well-being but also to be given access to all centres of power. He envisages, therefore, a property-owning democracy with a rather greater emphasis on the democratic than the ownership element, thus breaking with liberalism which he characterises as having always and irremediably seen, in both descriptive and prescriptive fashion, human beings as infinite appropriators and consumers at the expense of their capacity for civic and social virtue. Having delivered enrichment he predicts a fuller concept of property bringing with it empowerment too, driven by increasing productive efficiency and technological innovation and expertise.

However, the benefit of hindsight has dramatically exposed the simplicity of this analysis. First, the assumption that scarcity was in the process of being abolished once and for all — so pervasive in the fifties and early sixties when Macpherson developed his theory of property — could hardly be sustained in the light of the economic crises of the seventies and the rediscovery of poverty. Secondly, far from ushering in an expanded and more democratically sensitive concept of property, the periods of affluence have tended, in practice, at least in many liberal democracies over the last decade or so, to exhibit greater moves towards privatisation of state property and increasing reliance on market mechanisms at the expense of more expansive

20 D. Sugarman, "England 1750-1914", in David Sugarman ed., *Legality, Ideology and the State* (1983) 230.

21 K. Tribe, *Land, Labour and Economic Discourse*, (1978) 51, especially chap 3.

democratic control of the economy. Accordingly, Macpherson's theory seems to have seriously misunderstood the autonomy of politics from economics as well as the contradictory effects of technology and the uses to which it may be put. Increased efficiency of production has not reduced the length of the working week for all. On the contrary, we are witnessing economic policies which entail mass unemployment and mass impoverishment, while those with jobs prosper as never before. The 'New Property' of the early sixties has been transformed to be somewhat more consonant with 'Victorian values' than more egalitarian and redistributive policies.

A preferable form of analysis is that of Bowles and Gintis who theorise the post-war quasi-market societies in terms of a political and economic accommodation *between* property rights on the one hand and personal or civil rights on the other, directed at expanding the social wage, ensuring a large measure of industrial peace for capital while conferring on labour sufficient power to resist pressures to restructure in the face of crises of profitability.²² These crises increased dramatically in the seventies with the growing internationalisation of economic relations. Monetarism was one response to this. Thus, where this Keynesian accommodation contained the 'expansionary logics' of private property and personal civil rights, monetarism represents a sharp boost for the former at the expense of the latter. Even in countries which have not embraced monetarism, such as Australia, particularly under Labor administrations, wealth redistribution and economic democratisation have remained stubbornly elusive.²³ This question will be pursued later. At the very least, however, this theory more accurately identifies the way in which personal rights expanded in quasi-market societies by virtue of a political settlement rather than property itself transforming to encompass a range of social and democratic objectives.

None of this, however, is to deny that Macpherson has identified, though opaquely, a number of historical trends that have undermined the traditional discourse of private property. Nor is it to reject the goals of his philosophy. Quite the contrary, it is hard to disagree with his plea for a society where material security would be universal rather than selective, where a richer democratic ethos would counter-balance the lack of economic accountability and the obsessive consumerism so characteristic of capitalist societies today. Macpherson's property discourse, however, seems unsuited to this. In particular, given that property is still so steeped in liberal values, and if anything more so in the two decades or so since Macpherson wrote, an alternative discourse needs to be developed to achieve the goals he outlines. As a first step we shall need to examine another 'post', postliberalism, to assess the unsuitability of the discourse of property.

22 H. Bowles and S. Gintis, *Democracy and Capitalism: Property, Community and the Contradictions of Modern Social Thought* (1986) 55-63. This argument will be developed more fully below.

23 For a detailed analysis of this question see debate between C. Bulbeck and P. Beilharz, "A Review of the Accord's First Three Years" (1986) 14 *Thesis Eleven* 97-108.

IV. POST-LIBERALISM

In the analysis of Macpherson's work there was some focus on his historical framework, where the last stage of his social chronology was seen to be the emergence of 'quasi-market societies'. A more detailed examination of the major features of these societies suggests further 'post-property' tendencies but first, an examination of liberalism is needed. The essence of liberal society is the rule of law. The term 'rule of law' in this context refers to the principle that all laws are to apply equally to all, or in Hayek's terms, "the principle that in a free society coercion is permissible only to secure obedience to universal rules of just conduct."²⁴ Throughout this century this principle has been gradually modified by a wide range of social legislation, which can be broadly classed under two distinct headings: welfarism and corporatism. Welfarism embraces those forms of social legislation which attempt to redress results which advantage some groups at the expense of others. It also demands governmental provision of services for those unable to provide for themselves. The latter is not necessarily at odds with classical liberalism, at least if restricted to supplementing the role of private charity. Where, however, it assumes the dominant role and shades into the former, for instance by adjusting the results of independent economic transactions, then it runs counter to the belief central to liberalism:

that justice in this connection can mean only such wages or prices as have been determined in a free market without deception, fraud or violence; and that, in this one sense in which we can talk meaningfully about just wages or just prices, the result of a wholly just transaction may indeed be that one side gets very little out of it and the other a great deal. Classical liberalism rested on the belief that there existed discoverable principles of just conduct of universal applicability which could be recognised as just irrespective of the effects of their application on particular groups.²⁵

Corporatism is a rather different process. As private organisations grow they take on the power and form of small governments. A response to these vast accretions of private influence is a strategy of incorporation into governments' overall economic and social objectives. By contrast, the response of classical liberal doctrine is to allow the market and society itself to develop its own autonomous forms and patterns of regulation. Accordingly, with corporatism the very notion of the separation of state and civil society central to liberal doctrine starts to disappear. As Roberto Unger concludes, "[t]he state that has lost both the reality and the consciousness of its separation from society is a corporate state".²⁶

These changes have a dramatic effect on public and private law. Liberalism posits a clear separation of private and public law. Private law is the purpose-independent body of rules governing the interaction between private persons, typically instanced in property, contract and tort law. Public law is concerned

²⁴ F.A. Hayek, *Law, Legislation and Liberty*, (1973) Vol. 1, 141.

²⁵ *Ibid.*

²⁶ R. Unger, *Law in Modern Society* (1977) 193.

with the organisation of the state. Given the further liberal promise to locate all power in the state, public law is concerned with limiting that power to the state and shielding the individual from it. As a result, private law becomes the sphere of autonomous, in the sense of domination-free, interaction.

A post-liberal society, however, is based on rather different principles. Its prevailing ideology is just as likely to see power being exercised in contractual and property relations as in state/citizen relations. The two competing approaches are perhaps best shown in the differing perspectives of Barwick C.J. and Murphy J. in *Forbes v. N.S.W. Trotting Club*.²⁷ The case involved the issue of whether the defendant's proprietary rights allowed it to warn off, without showing cause, a professional (and very successful) punter. One line of argument put by the plaintiff's counsel was that the plaintiff had a right to work, which in law was 'akin to' property and could not be reasonably interfered with. This found little favour with the court. The question of the ambit of proprietary rights, however, became a matter of considerable disagreement between the Chief Justice and Murphy J. Their conclusions were in direct accordance with their broader political positions, having been Attorneys-General for Liberal/National Party and Labor governments respectively. The Chief Justice claimed that the defendants were perfectly entitled in law to use their property in whatever way they pleased. Private property rights were absolute unless they interfered with specific rights of the defendant. As they clearly did not do so in this case, the right to work being considered 'ability to work', the defendants had to succeed. Just as significantly, Barwick C.J. interpreted the relevant administrative law principle of natural justice narrowly in favour of the respondents. A political philosophy, operating with a totally inadequate sociology, which sees major power concentrated in government rather than private organisations (unless they happen to be unions, see below) is naturally drawn to limit the former in favour of the latter.

Murphy J., in obvious post-liberal style, while affirming the general principle of private property rights, added the proviso that where such rights conferred quasi-governmental power, then it was appropriate for courts to cast a critical eye on arguments asserting their absolute nature, so that:

[w]hen rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide, for the purposes for which it is conferred and with due regard to the persons affected by its exercise . . . There is a difference between public and private power but, of course, one may shade into the other.²⁸

He then went on to conclude that it was possible for the court to separate the club's public functions and power, confined to public meetings and such like, and its purely private activities. Neither of the judges' arguments on this point, however, were directly relevant to the final decision, for the court

²⁷ *Forbes v. N.S.W. Trotting Club* (1979) 143 CLR 242.

²⁸ *Id.*, 275.

upheld, Barwick C.J. dissenting, that principles of natural justice required that the plaintiff be given a hearing before such a decision was made. This latter aspect of the case is also pertinent to post-liberalism, for the increasing extension of public law principles to the private sphere both is a measure and recognition of the interpenetration of public and private spheres.

It is this transformation of state/individual, public/private relations that provoked the 'welfare rights as property' movement of the 1960's, led off in the United States by Charles Reich's influential article "The New Property".²⁹ He argued that to the extent that the state increasingly participates in the processes of production, consumption and exchange, legal redress should be available against arbitrary administrative action in the same way that private property is protected against arbitrary legislative acquisition by the U.S. Constitution's Fifth and Fourteenth Amendments. As one function of the post-liberal state is to operate as a huge syphon of funds, benefits and services, so does its power correspondingly increase. Only a new concept of property which adopts an ample sense of privacy, concluded Reich, would confer the same measure of autonomy in the post-liberal state as the property amendments traditionally secured in the liberal state.

It is worth noting that Reich falls some way short of advocating the expansive meaning of property advanced by Macpherson. For this he is criticised by Andrew Fraser who suggests that he does little more than move beyond the liberal concept of property:

[i]t is only by locating the experience of personal autonomy in a privatised sphere of life altogether distinct from the productive life of the community at large that Reich is able to equate the personal 'autonomy' of the welfare recipient with that presumably enjoyed by the property-owning capitalist.³⁰

Fraser acknowledges the changed nature of the production and distribution processes of advanced capitalist societies or 'corporate-welfare states', but seems to miss the consequence these changes have for property in political theory, since the partial socialisation of the production process attendant on the complexification of corporate organisation has a dramatically corrosive effect on traditional concepts of property. It will be necessary to examine this point in some detail.

As has been seen, the notion of property as thing-ownership, crystallising in the work of Blackstone, had important ideological functions. Now this meaning also coincided with, to use Karl Renner's expression, "the order of goods" of the time, for the preponderance of social wealth did actually consist of chattels and land. In other words, the means of early capitalist production were more owned by individuals and were *physical* things. (This is not the whole story, as the criticisms of Macpherson's work have suggested). The transformations set in train by advanced capitalism have led to the notion

²⁹ (1964) 73 *Yale L J* 733.

³⁰ A. Fraser, "Welfare Rights: The Search for a Theory". Paper delivered at A.U.L.S.A. Conference (1976).

of property being seen not as much as a bundle of things but as a 'bundle of rights'. How has this come about?

The first systematic assault on property as thing-ownership was mounted by Wesley Hohfeld. He attempted to sever property from things altogether. His central contention was that rights, including property rights, are never about things but rather are about legal *relations*. Property, howsoever owned, meant that one stood in a certain relationship to others, a relationship which could be broken down into powers, privileges, duties, rights, immunities and so on. Thus both the elements of physicalism (property as thing) and absolutism (property as exclusivity) in Blackstone's concept of property were subjected to attack, Hohfeld concluding that:

[s]ince all legal interests are 'incorporeal' — consisting, as they do, of more or less limited aggregates of abstract legal relations — such a supposed contrast as that sought to be drawn by Blackstone can but serve to mislead the unwary.³¹

Unfortunately, this dephysicalisation merely paved the way for intellectual creations — the elements of an emerging information based economy — to be classed automatically as *private* property.³² However, the realists lent their weight to the assault on this privatisation of intellectual creations as well as the classical definition of property. Morris Cohen, for example, suggested in his article "Property and Sovereignty", that it was misleading to see property as essentially part of private law, because property always entails state protection and a power to withhold from and exclude others.³³ This power is indeed analogous to and derivative of the sovereign power of the state. Foreshadowing trends in post-liberal theory outlined above, Cohen fused public and private spheres. Felix Cohen too emphasised the *active* role of the state in the creation and maintenance of property relations. Property for him was in essence a person-person relationship regulated by the state. By bringing property within the ambit of social relations the question of the sociological nature of those relations naturally followed. In a discussion about the extension of the concept of property to afford protection to trade names in cases of 'unfair competition' (the dephysicalisation process again) he emphasised that:

[w]hat courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language or air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people.³⁴

As was the case for Blackstone, the realists' definition of property as a contingent bundle of rights is inextricably bound up with a specific politics.

31 W. Hohfeld, "Some Fundamental Legal Conceptions As Applied in Judicial Reasoning" (1913) 23 *Yale L J* 16, 24.

32 K. Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 *Buff L Rev* 325.

33 M. Cohen, "Property and Sovereignty" (1927) 13 *Cornell L Q* 8.

34 F. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 *Col L Rev* 809, 816.

They were, by and large, staunch interventionists as far as the economy was concerned. Indeed, Felix Cohen himself was appointed by the Roosevelt administration to the Department of the Interior.³⁵ So the attack on the Blackstonian desocialised concept of property was also an attack on the anti-regulatory character of the U.S. Supreme Court's constitutional jurisprudence of the time. Since property was not self-defining, they argued its social consequences should be weighed up in cases where its ambit was being tested.

These are by no means the only factors contributing to the 'death of property'. In this context it is worth noting that there is no category of property in the index of the 1987 *Australian Law Journal*. Subjects that one might reasonably have assumed to come naturally *within* its ambit are listed in their own right, for instance: conveyancing; vendor and purchaser; trusts; choses in actions and copyright. Just as significantly, the singular reference to 'real property' relates to a historical study of the Property Law Reform Act 1928 (Vic.). What are the causes of this absence? An examination of the very dynamics of increasingly industrialised and de-industrialising societies will show how the traditional concept of private property is driven to the margins of political and economic discourse. First, the modern economy is now structured along increasingly complex corporate lines. Whereas in times past the means of production were in the main family farms, artisans' workshops and traders' personal effects, today the huge limited liability company is the definitive form of economic organisation. The legal nature of such organisations comes to resemble less and less thing-ownership. Ownership itself fragments by virtue of the separation of formal ownership of share capital by shareholders and the control of the day-to-day business operations by a managerial class. As a result company law effectively operates as a mechanism to allow for complex and variegated bundles of rights to be created and combined.³⁶ As well, the absolutely central role of essentially anonymous financial institutions in the economy further complicates the notion of ownership. These bundles of rights come to be even further removed from any determinate thing or things and it becomes progressively more difficult to identify a particular owner or owners. Moreover, an increasing share of economic wealth resides not in tangibles but in intangible intellectual property.

This latter point is but another aspect of the transformation of the economy from a mode of production to a 'mode of information', or *post-industrial* society. This point is made forcefully by Mark Poster³⁷ who argues

35 For details of this and other appointments of realists to Federal posts see, A. Hunt, *The Sociological Movement in Law* (1978) 157.

36 See T.C. Grey, "The Disintegration of Property" (1982) *Nomos* XXII, 69-84. There are many areas of agreement between Grey's account and the analysis here. A major point of departure, however, is that his argument is confined in the main to the effects of technological and economic changes on property discourse whereas the emphasis in this paper is as much on the transformation of ideological and political conditions.

37 M. Poster, *Foucault, Marxism and History* (1984).

that advanced capitalist societies are now in a third phase, with the 'service' element predominating. Workers, in numerical terms, are more likely to be employed in this sector than in both the primary (agricultural) and secondary (industrial) sectors. Put another way, this development marks the transformation from a Fordist to a post-Fordist division of labour. This is a further aspect of the information revolution detailed above, whereby the utilisation and manipulation of information becomes the dominant activity of increasing numbers of workers. Further, as advanced capitalism becomes an information society, the notion of *labour* as the central concept of critical theory comes to appear increasingly shaky. This is the next question for consideration.

V. POST-MARXISM

"Marxism is dead", pronounced a review article in a recent edition of a socialist journal. As perhaps might be expected by the end of some pages a resurrection was engineered, but the significance lay not so much in the conclusion but in that the argument was seriously entertained in the first place. The article in question involved a review of Chantal Mouffe and Ernesto Laclau's *Hegemony and Socialist Strategy: Towards Radical Democratic Politics*³⁸ which within the socialist tradition represents a decisive and influential break with both classical Marxism and various neo-Marxisms. It is also in certain respects definitively post-modernist. This section will draw heavily from their work. In the latter part its significance for Marxist approaches to property will be analysed. Why post-Marxism?

May 1968 was as much a watershed for Marxism as for many other 'isms', but above all it represented a body blow to traditional Marxism.³⁹ As events unfolded in the Parisian streets the authoritative voice of the Left — at least in Leninist terms — the French Communist Party (PCF), proved to be incapable of reacting constructively as new and disparate social elements participated in the uprising. The aftermath brought with it extensive re-examination of central Marxist concepts. Foremost among the new wave of radical theorists was Michel Foucault who, breaking with traditional Marxist concepts of class, state and revolution, devoted his researches to analysing "the micro-physics of power" and the way in which specific discourses (medicine, penology, sexuality) operate to entrench and enhance power relations.⁴⁰ This theoretical break brought with it, for him and others, a political break too. Marginalised social groups, such as prisoners, came to

38 C. Mouffe and E. Laclau, *Hegemony and Socialist Strategy Towards a Radical Democratic Politics* (1985). The review in question was D. Howard, "The Possibilities of a Post-Marxist Radicalism" (1987) 16 *Thesis Eleven* 69.

39 For an extended discussion of this intellectual background see note 37 *supra*, chap 1, and B. Smart, *Foucault, Marxism and Critique* (1983).

40 See M. Foucault, *The Birth of the Clinic An Archaeology of Medical Perception* (1975); *Discipline and Punish: The Birth of the Prison* (1977); *The History of Sexuality* (1984).

assume an importance that Marxist theory had traditionally reserved for the working-class, or more often, its vanguard. At the same time Foucault posed centrally the practical political question of the connection between the appearance of the Gulags and Marxist theory, concluding that Marxism offers no convincing argument as to why such repressive agencies were essentially at odds with Marxist principles.⁴¹

From another angle, a specifically epistemological one, came the critique of Hindess and Hirst.⁴² They subjected to devastating attack the totalising perspectives of Marxism. By “totalising perspectives” is meant a theory’s claim to be able to explain the totality of any social formation in terms of an organising principle, for instance, the accumulation of capital. They argued that there was no necessary correspondence between productive forces and relations of production and that any social formation:

should be conceived as consisting of a definite set of relations of production together with economic, political and cultural forms in which their conditions of existence are secured. But there is no necessity for these conditions of existence to be secured and no necessary structure of the social formation in which those relations and forms must be combined. As for classes . . . if they are conceived as economic classes as categories of economic agents occupying definite positions of possession of or separation from the means of production, then they cannot also be conceived as, or represented by, political forces and ideological forms.⁴³

It is the specifically problematic nature of class and its relationship to politics on the one hand and the economy on the other that has been the focus of the latest wave in post-Marxism. This is the core element of Laclau and Mouffe’s intervention. For them, the ontologically privileged position of a universal class as the decisive agent in historical change is a fatal flaw in Marxist theory. This is the case even with Gramsci’s Marxism which attempted to theorise the terrain of politics not as occupied by interests and subjects predetermined by the play of economic forces, but where new social relations are articulated and new collective wills are created. However, while Gramsci sought to move away from seeing politics in purely economic terms he is nonetheless, for Laclau and Mouffe, too wedded to Marxist concepts of class.⁴⁴ This has a distorting effect on his central concept, hegemony, which they wish to preserve and develop. It is this that makes them claim to be *post-Marxist* as well as *post-Marxist*, for their theory in breaking with Marxism at the same time acknowledges its indebtedness to it.⁴⁵

They attempt to rid the concept of hegemony of any essentially economic determination. This leads to a new conception of politics, where the working

41 “Interview” in C. Gordon (ed.), *Power/Knowledge* (1980) 134-37.

42 See B. Hindess and P. Hirst, *Mode of Production and Social Formation* (1977).

43 A. Cutler, B. Hindess, P. Hirst, and A. Hussein, *Marx’s ‘Capital’ and Capitalism Today* (1977) Vol. 1, 222.

44 Laclau and Mouffe, note 38 *supra*, chaps 1 & 2.

45 *Id.*, 4.

class is not seen as having any privileged place or role in socialist strategy. The key to the new politics are the new social movements, such as feminism and environmentalism which can and are formed independently of class allegiances. Accordingly, emancipation or universal human goals define the nature of the socialist project. With no single principle seen as more central or essential than any other, the struggle for socialism entails a multitude of democratic struggles. The process of democratisation of all institutions takes on greater priority given a theory which identifies a multidimensionality and diffuseness of power. Laclau and Mouffe conclude that:

[t]he tack of the Left therefore cannot be to renounce liberal-democratic ideology, but on the contrary, to deepen and expand it in the direction of a radical and plural democracy.⁴⁶

So what consequences does this have for property? First, as far as analysis of any social organisation is concerned, the ownership of economic means of production, that is property relations, cannot be seen as the source from which all forms of oppression flow. Not only therefore is there no guarantee that social ownership of the means of production will, of itself, lead to social emancipation but that it may not be a central objective of the socialist project in circumstances, say, where power is widely dispersed. Corresponding re-arrangements of political priorities would need to be considered.

Secondly, serious doubts arise as to the understandings Marxism is able to provide about various aspects of property law. As noted above, the thesis that the transition from feudalism to capitalism was marked by the triumph of absolute private property overlooks the continued persistence of flexible and limited property rights throughout the nineteenth century in England. Even variants of traditional Marxist accounts of the role and extent of private property, such as Karl Renner's, are seriously flawed in this sense.⁴⁷ Renner in his discussions of property law saw the content of norms remaining the same while their social functions change dramatically with transformations of the economic infrastructure. Thus, in conditions of advanced capitalism the appearance of co-operation embodied in the high division of labour in the manufacturing process comes to be seen as an illusion. Thereupon, society recognises the functional inadequacy of private property and related institutions and the 'power of command' contained therein. This leads to demands for the replacement of the institutions of private law by public law and state regulation to further more rational social and economic organisation: "[a]ll of a sudden it becomes apparent to us that property has developed into a public utility".⁴⁸

In contrast to this, however, not only has this prognosis proved quite inaccurate but also as a sociological analysis it is far wide of the mark.

46 *Id.*, 176.

47 K. Renner, *The Institutions of Private Law and their Social Functions* Otto Kahn-Freund (ed.) (1949).

48 *Id.*, 120.

Ernesto Laclau, for instance, has pointed to the forms of disillusionment progressively felt by socialists expecting the rational social and economic organisation advocated and predicted by Renner.⁴⁹ For them socialism was an inevitable stage of advance once capitalism basically ran out of steam. A second socialist perspective was less deterministic, seeing the necessity of alliances between the working class and other groups to stave off tendencies towards fascism. A third position saw imperialism as the key element in capitalist exploitation. Accordingly, the path to socialism lay in wars of national liberation which would progressively weaken capitalist power. The last scenario was social democracy, still a major force in Western Europe and Australia, where a form of socialism was seen to be achievable by a strategy of increasing public enterprise, welfare provision and tight regulation of the private sector. After decades of experimentation and practical historical experience all these perspectives have been shown to be seriously flawed, Laclau concludes, engendering a crisis of the Left. As a result, a broadening of the democratic part of liberal democratic theory becomes the essential element of a progressive political programme, to which the struggles of particular social groups must become subordinate.

Perhaps predictably this has been subjected to, at times, venomous criticism from some Marxists. The most comprehensive critique is Ellen Meiksins Wood's *The Retreat from Class* where the "new revisionism" is rejected for having abandoned anything that remotely resembles socialism on the basis, she concludes, that it is liberalism *rather than* Marxism that is above all Laclau and Mouffe's lodestar.⁵⁰ This criticism seems particularly misdirected given Mouffe and Laclau's clear admission of their indebtedness to Marxism as well as their emphasis on the democratisation of *all* institutions, public and private, something that traditional liberalism has tended to ignore. Their central argument revolves around power, while for Marxists such as Meiksins Wood, it is *ownership* of the means of production that is the privileged site of socialist strategy, precisely because in reductionist fashion all significant power is seen to reside there. Adopting Laclau and Mouffe's arguments, the traditional slogan of 'abolish private property' comes to appear an inappropriate guide for socialist strategy. This point will be pursued in the final section.

VI. POST-STRUCTURALISM

As has been the case with the discussion of the other 'posts', to understand what post-structuralism is it is necessary to undertake a brief examination of its precursor, structuralism. The generally accepted source of modern structuralism is the structural linguistics of Ferdinand de Saussure.⁵¹ The

49 E. Laclau, "Class War and After" *Marxism Today*, April 1987, 30-33.

50 E.M. Wood, *The Retreat from Class* (1986).

51 F. de Saussure, *Course in General Linguistics* tr. Roy Harris, (1983).

particular novelty of Saussure's linguistics lay in his emphasis on the synchronic, as opposed to the diachronic, study of language. The synchronic study of language concentrates on the constant features, the systemic elements of language, examining it in freeze frame so to speak. Diachronic studies by contrast, look at the origins and historical transformations of language. Pre-Saussurean linguistics scholars were therefore rather more concerned with change than what was actually changing. Saussure's additional major conceptual advance was the distinction between language and speech, or *langue* and *parole*, the former being the entire system of language or its structure, the latter a specific individual utterance, dependent for its meaning on that pre-existent structure.

Now these principles were quickly transferred into the social sciences, most notably and expressly by the social anthropologist Claude Levi-Strauss.⁵² In examining alien societies, he saw structuralism as particularly apposite, in that a social structure's similarities to and dissimilarities from the anthropologist's own society are the key to its intelligibility. Also, a society is a synchronic system in Saussure's terms, best understood in its present formation, as opposed to its genetic or historical origins, and further that events or actions within those societies are but evidence explicable only in terms of the structure which gives them meaning. Structuralism in social science, therefore, is characterised by an over-arching objective to *explain* phenomena, rather than in empiricist fashion to catalogue and describe. This explanatory focus led Levi-Strauss to draw connections between more and more seemingly disparate elements of social practice, embracing increasingly broader fields of inquiry. Structuralism came to be, therefore, a *totalising* theory of social formations, at odds with the former anthropology for which "structure was, for instance, whom one could marry; culture was what the bride wore."⁵³

In its emphasis on synchronic rather than diachronic study, structuralism has pertinent lessons for historians too. Rather than seeing history in terms of Great Men, or crucial events, it sees synchronic systems as the determining factors which in turn make persons 'great' and events happen. Structuralism is therefore 'anti-humanist' which, as Terry Eagleton points out, "means not that its devotees rob children of their sweets but that they reject the myth that meaning begins and ends with the individual's 'experience'".⁵⁴ Likewise chronology, a diachronic exercise, is rejected as producing a seriously mistaken teleological historiography, whereby certain events are explained as the latest effect of some originating, underlying cause. Structuralist historiography, on the other hand, emphasises the conditions of existence of

52 See generally C. Levi-Strauss, *Structural Anthropology* tr. C. Jacobson and B. Grundfest (1968).

53 F. Gellner, *Relativism and the Social Sciences*, 136, cited in John Sturrock, *Structuralism* (1986). I have found this latter overview of the subject most helpful.

54 T. Eagleton, *Literary Theory: An Introduction* (1983) 113. This work is as relevant to legal as it is to literary theory.

certain phenomena and the structures into which they and human subjects are inserted and warns about the tendencies of historians to attribute causes informed by their own system of thought and interests. Further, the emphasis on identifying deep structures involves persistent attempts to show how the apparently uneventful suggests at least as much about an age as dramatic events. Structuralist historiography consequently tends to identify the *persistence* and *continuity* of social forms, systems of thought and group consciousnesses. At the other extreme, a history devoted to individuals and events focuses on constant change and regular discontinuities.

Like structuralism, language forms the basis of the post-structuralist project. However, whereas structuralism was based on the idea that the individual speech act (parole) could be understood in terms of a generally determinate system (langue), post-structuralism places emphasis on parole and the way in which meaning is not so much *present* in signs but can only be identified by the context in which they are used. As contexts vary infinitely, meaning itself becomes immeasurably elastic. A sign's identity therefore is subject to endless mutations. The stability of language posited by the structuralists, following Saussure, is thus held to be illusory and correlatively the 'logocentric' impulse — the search for a 'transcendental signified' which would give meaning to, would form the foundational basis of all others in a perfect system — is derided.⁵⁵ "In the Beginning was the Word" thus becomes the antithesis of the post-structuralist message.⁵⁶ Jacques Derrida, post-structuralism's leading exponent, has developed from these dramatically over-simplified ideas, the technique of deconstruction, which attempts to show how texts subvert their own logical structure by means of identifying seemingly irrelevant details which expose how self-contradictory and incoherent they 'really' are, how the oppositional concepts of a text are based on misguided metaphysical thinking or essentialism. This is demonstrated at its clearest in Derrida's analysis of the very process of writing, for as soon as words are committed to paper, the author loses control of them and they become subject to an endless play of signification; the author can never be fully present in them. Whereas for the structuralists there was a neat correspondence between one signifier (symbol) and signified (concept) by virtue of the structure of langue, the post-structuralist seeks to subvert this by revealing how each signifier contains 'traces' of other signifiers and likewise with signifieds. For instance, when reading a sentence a reader does not capture its meaning by piling its words on top of one another. Rather, its meaning is *deferred* in the sense that each word contains traces of earlier words and holds itself open to traces from the words which follow it and so

55 J. Derrida, *Writing and Difference* (1978) 280.

56 See the Gospel According to St John, Ch. 1 vs. 1. There is hardly a clearer example of Western logocentrism in Derrida's sense. For a challenging discussion of related questions, see G. Rose, *Dialectic of Nihilism* (1984).

on infinitely with the sentence as a whole. Meaning is never complete, pure or fully *present*, nor consequently can authors attain such presence in their works.

When applied to literature or philosophical texts, post-structuralism exhibits a corresponding scepticism towards their attempts to ground key concepts which form nodal points which situate all others. In a patriarchal world for instance, there is a persistent and prevailing desire to establish a secure theoretical foundation for male supremacy, which as Derrida points out, may be appropriately termed “phallogocentrism”. Eagleton just as pointedly translates this concept as “cocksureness”.⁵⁷ Post-structuralist scepticism employs a critical technique to undermine such concepts, largely by identifying traces of an opposite *within* the concept itself. This technique — of ‘deconstruction’ — would reveal that the category ‘man’ is not so much propped up by the outside world but is suffused with his opposite ‘woman’, no-man, as his very negation. Rather than being autonomous, man’s being is inextricably dependant on woman’s. Indeed this identity is based on the renunciation and discrediting of what may be his own potentialities. The rigidity of this binary opposition amounts to a form of policing. In the same way the ideological function of all other major belief systems, regularly based on similar oppositions — black/white, civilised/barbarian, nature/culture, form a collective target for the deconstructionist. In this there are clear affinities with the post-Marxist currents identified above. Post-structuralism also appeared out of the disillusionment of the aftermath of 1968. Somewhat unfairly, Eagleton has seen this as conscious evasion of any political activity:

unable to break the structures of state power, post-structuralism found it possible instead to subvert the structures of language. Nobody, at least, was likely to beat you over the head for doing so.⁵⁸

On the contrary, to the extent that deconstruction entails unmasking texts, its function is inherently political, even when denying it. This can perhaps best be illustrated by an examination of some of the work of Michel Foucault who, it should be added, occupies an ambiguous position somewhere between and across structuralism and post-structuralism.

Foucault himself has more than hinted at structuralist currents in his work. In the preface to *The Birth of The Clinic*, he claimed that:

[t]his book has not been written in favour of one kind of medicine as against another kind of medicine, or against medicine and in favour of an absence of medicine. It is a structural study that sets out to disentangle the conditions of its history from the density of discourse, as do others of my works.⁵⁹

His reference to a consciously prescription-free history is, as has been seen, a characteristic of structuralism, but so too is his focus on the *conditions* of the history of medicine. Likewise, in *The Order of Things*, his concern to

⁵⁷ Note 54 *supra*, 189. For a critical survey of the relevance of Derrida’s post-structuralism for feminism, see E. Gross, “Derrida and the Limits of Philosophy” (1986) 14 *Thesis Eleven* 26.

⁵⁸ Eagleton, *id.*, 142.

⁵⁹ M. Foucault, *The Birth of the Clinic* note 40 *supra*, xix.

identify *epistemes*, the specific world-views operating in different epochs which organise and arrange data of different disciplines along similar lines, has clear structuralist resonances.⁶⁰ Foucault, however, has resisted the label structuralist and significantly, as Peter Dews has pointed out, the word 'structural' in the quotation above has been removed from more recent French editions of the book.⁶¹ Moreover, his methodological and historical works do break decisively with structuralism at a number of points. For a start, there is a profound philosophical and methodological skepticism at the heart of his work. Again in *The Order of Things* he shows how the historian is constantly beset by the problem of getting information second-hand, refracted through the lenses of earlier generations. These lenses, or discursive formations, as he calls them, are expressions of power. Knowledges are therefore inextricably implicated in grids of power relations. For Foucault this should force historians to lower their ambitions. Rather than embarking on grand, totalising 'philosophies of history', historians should be questioning such totalisations: "the true historical sense confirms our existence among countless lost events, without a landmark or point of reference."⁶² This assertion of the limitless diversity of history and an emphasis on discontinuity and the haphazard and differentiated nature of social change is a distinctive feature, a break with structuralism in favour of post-structuralism. This, of course, is related to the post-structuralist attack on the principle of philosophical foundationalism.⁶³

A related element of post-structuralism is the priority given to dispersion in historical and sociological writing over the structuralist tendency to unify. This is clearly shown in Foucault's historical works where specific institutions such as prisons and asylums are examined. Indeed his analysis of medicine, *The Birth of the Clinic*, runs directly counter to Marxist theorisations of the emergence of the bourgeois state which see it as the triumph of an autonomous sphere of economic activity and, thereby, private property, with the state acting as guardian of order. Foucault's history shows the liberal state directly and actively constructing a comprehensive network of administrative control from its very beginnings. Clearly such a history also contradicts liberal accounts of capitalism which sees it as ushering in emancipation from feudal domination. Here then can be seen the connections between post-structuralist methodology and its substantive break with totalising historical, political and sociological theories. This break constitutes a major area of overlap with the more recent 'postmodernism'.

60 M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1974).

61 Peter Dews, "Power and Subjectivity" (1984) 144 *New Left Review* 72.

62 M. Foucault, *Language, Counter-Memory, Practice*, D. Bouchard (ed.) (1977) 155, cited in M. Dean, "Foucault's Obsession with Western Modernity" (1986) 14 *Thesis Eleven* 44.

63 See Dean, *ibid.*

VII. POSTMODERNISM

Postmodernism is a term that is difficult to pin down, as much as anything due to the fact that it seems to assume a different blend of connotative and denotative elements both in each context and with each user. One leading commentator, Frederic Jameson, has recently claimed that “the concept of postmodernism is not widely accepted or even understood today”.⁶⁴ Perhaps it is best, therefore, to try to identify the ‘family resemblance’ that the plurality of uses of the term demonstrates, a family resemblance that is most concisely outlined by the leading theorist of postmodernism, Jean-Francois Lyotard, in the introduction to his *The Postmodern Condition: A Report on Knowledge*.⁶⁵ He begins as follows:

[t]he object of this study is the condition of knowledge in the most highly developed societies. I have decided to use the work *post-modern* to describe that condition. The word is in current use on the American continent among sociologists and critics; it designates the state of our culture following the transformations which, since the end of the nineteenth century, have altered the game rules for science, literature, and the arts. The present study will place these transformations in the context of the crisis of narratives.⁶⁶

More specifically he adds: “[s]implifying to the extreme, I define *postmodern* as incredulity toward metanarratives”.⁶⁷ These quotes call forth more definitions: “narrative and metanarrative” and an examination of how they are implicated in modernity. Narratives are, for Lyotard, contrasted with science. The essence of scientific discourse is that it legitimates itself by an appeal to a set of foundational philosophical principles. This is the intellectual legacy of the Enlightenment when for the first time universal reason became the litmus test for the validity of knowledge claims. So too, insofar as it eschews *narratives*, scientific discourse is definitively *modern*. As Lyotard puts it:

I will use the term *modern* to designate any science that legitimates itself with reference to a metadiscourse of this kind making an explicit appeal to some grand narrative, such as the dialectics of Spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth.⁶⁸

All science, therefore, is inextricably bound up with one or other form of metanarrative (grand narrative, metadiscourse). Narratives on the other hand are characteristic of pre-modern societies where descriptive and prescriptive statements are interwoven to legitimate those societies and to induct individuals into them. Examples of such narratives would be religious discourse, myths and legends.

64 F. Jameson “Postmodernism and Consumer Society” in H. Foster (ed.), *Postmodern Culture* (1985).

65 J. Lyotard, *The Postmodern Condition: A Report on Knowledge* (1986).

66 *Id.*, xxiii.

67 *Id.*, xxiv.

68 *Id.*, xxiii.

Postmodernism's attack on modern 'science' consists of a two-fold anti-foundationalism. First, it rejects as we have seen the possibility of any absolute epistemological bedrock for the sciences, natural and social and second, as is suggested by the above quote, it gives up hope of any overarching ethico-political logic in history.⁶⁹ This latter aspect has been an equally significant part of the Enlightenment project, to which postmodernism is equally opposed. Additionally, postmodernism offers a sociological analysis of knowledge in contemporary 'highly developed societies'. It sees the modern industrial age as having undergone a qualitative transformation; 'postindustrial society' has engendered a postmodern culture which exhibits a crisis in metanarratives:

[t]he grand narrative has lost its credibility, regardless of what mode of unification it uses, regardless of whether it is a speculative narrative or a narrative of emancipation.⁷⁰

This event marks the end of the modern era and the beginning of postmodernity. It might well be asked 'what is the evidence for this ruptural break with the, albeit modern, past?' First, in academia there are many instances of the dissolution of old disciplinary boundaries inducing in the area of pedagogy moves towards inter-disciplinarity; and in the area of scholarship itself there is the appearance of a form of writing known as 'theory', neither political science, social theory, philosophy or literary criticism, which almost defies categorisation.⁷¹ These developments are at least to some extent a result of perceived dissatisfactions with the theories which erected the boundaries in the first place. Secondly, philosophies of science which preach an epistemological nihilism (Feyerabend) or an acute relativism (Kuhn) or mild relativism (Foucault), have gained a wide measure of acclaim.⁷² Further, post-structuralism's disavowal of a 'transcendental signified' and rejection of any absolute philosophical principles, noted above, clearly demonstrates its affinities with postmodernism so much so that the terms are sometimes used interchangeably. This is far from suggesting we are all postmodernists; rather, traditional verities are losing some of their former legitimacy. In their own small way debates on the nature and direction of law curricula demonstrate this, particularly the increasing range of critiques of the theory and practice of 'scientific' legal positivism. In sum, the postmodern era has heralded the questioning of the equation between modernity, progress and rationality.

Postmodernism's break with the Enlightenment project involves it simultaneously in a rejection of both traditional and radical political philosophies for their metanarrative taint. So what ethico-political vision is

69 For an excellent analysis of this aspect of postmodernism see P. Redding, "Habermas, Lyotard, Wittgenstein: Philosophy at the Limits of Modernity" (1986) 14 *Thesis Eleven* 9.

70 Note 65 *supra*, 37.

71 On this point see note 64 *supra*.

72 See, for example, P. Feyerabend, *Against Method* (1975); Paul Kuhn, *The Structure of Scientific Revolutions* (1970).

proposed in its stead? Lyotard turns to Wittgenstein's later philosophy and his concept of language-games. For Wittgenstein, words and concepts were to be understood not in terms of *standing for* objects but in terms of their use in particular contexts.⁷³ This approach inevitably led to a form of relativism since the truth-value of statements was seen to depend on whether they were 'correctly' used or, put another way, whether they accorded with the rules of the language game in question. Indeed, scientific statements themselves are seen to be part of a particular language-game. It follows from this, adopting a Wittgensteinian epistemology, that narratives can claim a validity equal to that of scientific discourse or, put another way, scientific discourse can claim no truth-value greater than other discourses. Thus Lyotard concludes that:

[i]t is therefore impossible to judge the existence or validity of narrative knowledge on the basis of scientific knowledge and vice versa: the relevant criteria are different. All we can do is gaze in wonderment at the diversity of discursive species, just as we do at the diversity of plant or animal species.⁷⁴

He adds that the scientist's contempt for narratives as "fables, myths, legends, fit only for women and children" is the mark of "the entire history of cultural imperialism from the dawn of Western civilization."⁷⁵ But rather than return to pre-modernity, Lyotard wants to affirm the creative potentialities of the heteromorphous nature of language games to produce new vocabularies and different knowledges as against the technocratic ideology of the scientific community. Postmodernism in its rejection of the Enlightenment project challenges scientific orthodoxy as well as advocating a cultural and intellectual pluralism.

What implications does this approach have for understanding law? This question has been addressed by Boaventura de Souza Santos.⁷⁶ He sees postmodernism as suggesting two distinctive yet related concepts for the purpose of legal analysis: legal pluralism and interlegality. Legal pluralism, however, is defined in a novel way. Rather than meaning a plurality of legal orders as in traditional legal anthropology, it is meant to signify the existence of a connected range of different sorts of legal orders. Interlegality is the extent of interpenetration of these "multiple networks of legal orders forcing us to constant transitions and trespassings . . . Interlegality is the phenomenological counterpart of legal pluralism".⁷⁷ Clearly these concepts are at odds with the scientific metanarrative of legal positivism which since Hobbes has been obsessed with identifying a unitary state legal order by means of some master test. So, examining property law, for instance, it can be seen how a number of legal orders co-exist. Take the example of a factory owned by a multinational corporation. The case of *Langston v. A.U.E.W.*

73 See note 15 *supra*.

74 Note 65 *supra*, 26.

75 *Id.*, 27.

76 B. de Souza Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 *J Law & Soc* 279.

77 *Id.*, 298.

was precisely of this nature.⁷⁸ The court dealt with the case as a simple matter of the common law of England. Yet there are, in actuality, *three* legal orders in operation here. First, there is the local law of the factory — a set of institutional practices which regulates the day-to-day interactions between managers, owners and labour. This for Santos, is a large-scale legality whereby the relations of production are ordered down to the last detail, focusing in on labour disputes, shop-floor injustice and workplace discipline. This concept of scale is central to Santos' account for it is meant to capture the way in which a form of legal order operates:

[s]ince scale creates the phenomenon, the different forms of law create different legal objects upon eventually the same social objects. They use different criteria to determine the meaningful details and the relevant features of the activity to be regulated. They establish different networks of facts. In sum they create different legal realities.⁷⁹

Secondly, there is national law, which deals with, say, a labour dispute as part of a network of labour relations whereby the question of government, business and union power is at issue, where incomes and economic policy arise, and where political questions such as unemployment are integral to the overall *legal* equation. Finally, there is world law, or the supra-state legality created by transnational capital. Though it is based on dominant *practices*, "it does not make much sense", Santos adds, "to consider it unofficial, since this world legality develops forms of immunity *vis-a-vis* both the national state law and the public international law".⁸⁰

This supra-state legality is a small-scale legality, while state legality is medium-scale. Small-scale legality would view a labour dispute as a mere blip in a range of global calculations, bringing with it a form of regulation based on movement. In the last resort, this movement is capital flight or, to use Bowles and Gintis' term, capital *strike*. For national legality, however, the pattern of regulation is more orientated to direct intervention, or at least modulation, of the relationship between the actors in question. From the phenomenological dimension of interlegality, the actors at each level have different perspectives. Thus, in the labour dispute, the workers will tend to have, in Santos' terms, a large-scale view of the conflict fostered by a local legality. Union leaders, employers and the government will be motivated by rather different concerns, principally how this event relates to an ongoing pattern of industrial relations. Again, this is medium-scale legality at work. Transnational executives differ again. An analysis operating exclusively with concepts of conflicting interests or degrees of class consciousness is ill-suited to the task of identifying these interwoven legalities since "socio-legal life is constituted by different legal spaces operating simultaneously on different scales from different interpretive standpoints."⁸¹

78 [1974] 1 WLR 185.

79 Note 76 *supra*, 287.

80 *Ibid.*

81 *Id.*, 288.

All the above issues presented themselves in *Langston v. A.U.E.W.* The court adopted the approach of traditional liberalism. The fact that Langston was being paid a full wage *not* to work so as to avoid a strike in accordance with the closed shop agreement between the A.U.E.W. and the Chrysler Motor Company was seen as an illegitimate use of power. As the court considered that private property is supposed to operate to guarantee individual autonomy, so the plaintiff's 'right to work' had to be protected in the same way. It is not as if the court in this instance were merely engaged in straightforward interpretation. There is a clear sociological sub-text too, that of the embattled individual in a world dominated by a union bureaucracy which is sufficiently powerful to pressure companies into signing closed-shop agreements. This is precisely the 'conflicting interests' approach to the question, but a moment's reflection suggests a whole range of other issues were present: the decision of the trade unions to boycott the novel arbitration system set up under the Industrial Relations Act 1971 (U.K.) (they did not defend this action); a widespread but exaggerated belief that Britain was strike-prone; the interests of the organised, collective union membership; the issue of workers benefiting from union activities without contributing to their expenses; and the role of multinational capital in this particular conflict. However, the striking extension of the right to work, on the analogy of property rights, to specifically enforce a contract of employment shows how, in practice, the discourse of private property glosses over these complexities. Born of an outdated and democratically insensitive liberalism, it invariably tends to obscure real questions of power and inequality.

This was even more clearly demonstrated in the earlier case of *Hill v. C.A. Parsons Co. Ltd.*⁸² where Sachs L.J. suggested that legislation passed in the previous two decades indicated:

a marked trend towards shielding the employee, where practicable, from undue hardships he may suffer at the hands of those who may have power over his livelihood — employers and trade unions. So far has this now progressed and such is the security granted to an employee under the Industrial Relations Act 1971 that some have suggested that he may now be said to acquire something akin to a property in his employment.⁸³

Here, once again, liberalism's concept of private property distorts any sociological understanding of the legislation. Certainly employees were given greater protection in their employment against unfair dismissal, redundancy payments became compulsory, but also, most importantly, trade unions were given a greater, more institutionalised role in the whole process of industrial relations. This pattern of legislative intervention had the effect of *limiting* the traditional private property prerogatives of employers by means of *strengthening the power of organised labour*, not as Sachs L.J. suggests by making the contract of employment a quasi-proprietary right. Indeed, the

⁸² *Hill v. C.A. Parsons & Co Ltd* [1971] 3 All ER 1345.

⁸³ *Id.*, 1355.

successive Labour Governments' industrial policy pre-*Hill v. C.A. Parsons Co. Ltd.* was inextricably bound up with its support for the trade union movement's collective identity and thereby acceptance of closed shop agreements, recognising that concepts of private property would ultimately weaken the movement as a whole by fragmenting the membership. This was one obvious dimension to these cases. By contrast, and inconsistently, liberalism sees unions wielding power in civil society while corporations do not. Furthermore, the liberalism of Sachs L.J. glosses over the fact that the Industrial Relations Act 1971 (U.K.) was an attempt by the Conservative Government to reduce trade union power. It perhaps should be added that unions will always be at a disadvantage in the context of private property discourse since they are not held to *own*. As the cases suggest they are more easily seen as infringers of property rights.⁸⁴

A postmodern approach would break with the attachment to private property as an unqualified good, as in liberalism's metanarrative, or indeed as an unqualified bad as in the Marxist version, focusing instead on the interwoven legalities and the plurality of interpretative standpoints, measuring them all in terms of power relations and imbalances. The approach of Murphy J. in the case of *Forbes* is an example, in albeit embryonic form, of how this approach might operate. Another instance of this was the case of *Clunies-Ross v. Commonwealth*⁸⁵ which concerned the legality of an acquisition by the Commonwealth under the Lands Acquisition Act 1955 (Cth.) of land in the Cocos (Keeling) Islands. The majority of the High Court, Murphy J. dissenting, saw the question in classic liberal terms as the individual versus the State. Accordingly, the Act was to be construed restrictively. As the Chief Justice, Sir Harry Gibbs, put it:

[t]hat general question, translated into human terms, is whether a Commonwealth Act conferring a power to acquire land for a public purpose entitles the Executive to deprive any citizen of his home not because of a need of it for any active or passive purpose but so as to achieve some more remote purpose of the Commonwealth by forcing him to leave the locality in which he lives.⁸⁶

The approach of Murphy J. was quite different. Referring to reports of successive United Nations delegations to the Cocos (Keeling) Islands, he pointed to the feudal dominion exercised by Mr. Clunies-Ross over the local inhabitants. Accordingly, he concluded, the Act allowed acquisitions of land for the purpose of empowering citizens to exercise democratic rights in addition to acquisitions of land for specific use of the Commonwealth. As the United Nations delegations had found that Mr Clunies-Ross' very presence on the island could lead to undue influence on the electorate, he held that the

84 For a liberalism more sensitive to the concerns of the disadvantaged, see R. Dworkin, "Why liberals should care about Equality", in *A Matter of Principle* (1985) 211, where he relies on the concept of "active citizenship". Much of what he says is consonant with the arguments in the concluding section of this paper.

85 *Clunies-Ross v. Commonwealth* 155 CLR 193.

86 *Id.*, 204.

acquisition was lawful. Where the majority's liberalism saw Mr Clunies-Ross as an abstract bearer of rights, a citizen owning a home, Murphy J. identified a concrete bearer of power, recognising a heterogeneity of subjectivity, the plaintiff being seen as having a specific social identity, living on a 'feudal manor' and having a 'feudal relationship' with the Islanders.⁸⁷ These are suggestive elements of a postmodern approach to property: first, an examination of the actual effects of a particular type of ownership on a pattern of social relations and practices in preference to relying on a metanarrative discourse; secondly, a politics of empowerment in preference to the rights of private property; thirdly, a deconstructive approach to the legal texts (authorities) relevant to the case. Murphy J. in the course of determining the ambit of the Lands Acquisition Act makes no claim of finding an objective, immanent meaning in the Act, but concludes by examining what anthropological evidence and analysis U.N. delegations have unearthed, and how U.S. courts have defined the State's powers in such circumstances, in other words asserting how interpretation is an *active* process. This activation of the different possible meanings suppressed in the texts is at the heart of a deconstructive approach. This is in direct contrast to the majority who proclaimed that "[a]s a matter of constitutional duty, that question must be considered objectively" concluding that "[w]e have so considered and determined it".⁸⁸ The logocentric nature of this reasoning, the confidence in identifying the *presence* of meaning in the Act is striking. Indeed in one sense it is as if the protection given to private property given by the majority is extended to the Act itself: they believe its meaning belongs to it *as part of its private property* and is not to be interfered with.

However, that a postmodern approach might point to favourable results in particular cases hardly amounts to a convincing argument in its favour generally. That will be the concern of the final section.

VIII. THE WITHERING AWAY OF PRIVATE PROPERTY?

The arguments above have only hinted at a preferable alternative to the discourse of private property. Such an alternative needs to be based on a better historical understanding of the various dimensions of private property discourse. Both Marxism, Macpherson's post-liberalism and liberalism have all been found wanting in their different emphases on property, both in their analysis of it and, relatedly, their metanarrative character. So how might such a history proceed? An answer to this question will suggest a preferable alternative.

87 *Id.*, 207-208. For an illuminating comparison of liberalism's conception of the subject abstract, (formally equal) and postmodernism's (concrete, many selves in one) see A. Barron, "Just Postmodernism", paper presented at U.K. Critical Legal Studies Conference, University of Cardiff, September 1988.

88 *Id.*, 204.

In 1960 a group of black students entered a restaurant in Greensboro, North Carolina. Denied service on the basis of their colour, they refused to move. This act marked the beginning of the civil rights movement. How does one interpret it in terms of private property? The students were not asserting a novel property right, a right not to be excluded, as Macpherson would have it, nor was their action an articulation in embryonic form of the class struggle, as some Marxists might have it. More accurately they were claiming a civil right, or a right of citizenship *against* property rights. This example is taken from Samuel Bowles and Herbert Gintis' *Democracy and Capitalism; Property, Community and the Contradictions of Modern Social Thought*.⁸⁹ The following remarks in this section draw heavily from their text. That collision of rights was but one instance in a long history of the contradictory rights talk of liberalism being used to challenge the prerogatives of property, from the time when the Levellers challenged Cromwell in the Putney debates of 1647, through the French Revolution and the struggles for universal suffrage. Identifying clashes of rights provides a very different understanding of historical development. Eric Hobsbawm discussing working class struggles of the nineteenth century notes that:

insofar as they were politically active as movements, most nineteenth century labour movements still operated in the framework of the American and French revolutions and their type of the Rights of Man.⁹⁰

This view, that democratic rights and property rights have been fundamentally at odds, leads the historian to stress how the growth of democratic rights resulted from struggles among groups in the emergent economic order rather than a general democratic movement against feudalism, royal prerogative, the church or the absolutist state. For Bowles and Gintis the rise of democracy can be periodised into a number of historic accommodations.⁹¹ Thus they identify the first *modus vivendi* of civil and property rights as the Lockean accommodation whereby the franchise was limited to those who held property on the basis that only property holders had a real stake in society. The next phase they see, excluding America which they see as having an intermediate Jeffersonian accommodation, is a Madisonian accommodation whereby modern government is seen only to be able to succeed if some form of regulation of the competing interests of those with and without property is achieved. While no such explicit programme has been adopted in Europe or Australia, this picture of political activity clearly characterises much of the post-universal suffrage period in most advanced capitalist countries. Finally, they identify the Keynesian accommodation, referred to in the discussion of Macpherson's work above, which was a direct response to the political crises created by the boom/slump tendencies of the capitalist economy, concluding

89 Note 22 *supra*, 27.

90 E. Hobsbawm, *Workers* (1984) 305, cited in *id.*, 169.

91 Note 22 *supra*, especially chap 2.

that “the collision of property rights and personal rights could no longer be averted by the liberal walls that separated a private economy from a quarantined public space”.⁹²

As it stands, Bowles and Gintis’ picture of modern history as a remorseless struggle between property rights and civil or democratic rights seems dangerously like the metanarratives outlined and criticised above. Indeed, at one point they suggest that “the present and future trajectories of liberal democratic capitalism will be etched in large measure by the collision of these two expansionary tendencies [i.e. personal rights and property rights]”.⁹³ A closer examination of their argument, however, reveals a rather more tentative history. First, they operate with a polycentric conception of power in a manner not dissimilar to Foucault, but add the important corrective that it is vital to distinguish between different types of power and oppression. Secondly, their analysis of the liberal lexicon of rights suggests a multivalent, indeterminate and contradictory discourse, capable of furthering the aims of conflicting groups, classes and interests. Thirdly, their valorisation of democratic and personal rights as against the prerogatives of property resonate with a politics of *becoming* rather than a politics of *getting*. This is part of the radical democratic tradition for which personal, moral and cultural aims are at least as important as distributional ones, where sexual and racial equality, the right to control one’s body, the right to a safe and clean environment rank alongside the question of who owns what. In this respect the “time worn claims” of liberalism’s and Marxism’s property metanarratives “ring hollow to many modern ears”.⁹⁴ The politics of *becoming* are precisely the postmodernist’s call: to create new vocabularies in order to create new selves, new identities, new communities in the face of economic orders controlled by multinational corporations under the banner of private property or state-socialist systems extolling a bureaucratized public ownership.

In more concrete terms, what would this shift from the discourse of private property to a discourse of personal, democratic rights entail in the Australian context? For a start, in Lyotard’s terms, the *paralogic* language of Aboriginal land rights, that is, an oppositional language, noted even by Blackburn J. in *Milirrpum*, of ecocentrism rather than anthropocentrism, would be given substantive recognition in a richer legal pluralistic environment, not in the sense of merely enshrining their pre-modernity as the “Land Rights not Mining” slogan suggests, but affirming, as Tim Rowse has shown is possible in a study on Aboriginal tribes in the Northern Territory, their democratic rights to determine the future of their environment, a future which might involve a sensitive reconciliation between developmental and traditional

92 *Id.*, 56.

93 *Id.*, 29.

94 *Id.*, 11.

objectives.⁹⁵ In the privatisation debate, argument might take the form of examining how the consumers of services can have a greater say in the provision, development and formulation of public services. Obviously the traditional alternative metadiscourses of state/market distribution occlude these questions, denying in their separate ways the inadequacies of Morrisonian versions of nationalisation and the exploitative and undemocratic character of multinational capital.⁹⁶ In the context of environmentalism, the polarities of pre-modern nostalgia and unbridled modernist developmentalism might be tempered by accepting the fact that a responsive democratic ethos might recognise that a local community might be as concerned about unemployment and thereby the integrity of that community as much as the integrity of the environment, and that in order to make that choice in a rational rather than coerced way, meaningful options would need to be available.⁹⁷ Finally, in the post-industrial “society of the spectacle” or “mode of information”,⁹⁸ principles of democracy and public accountability, or to use the phrase of Murphy J. in the context of a discussion of copyright and monopolisation in *Interstate Parcel Express v. Time-Life International*, “public equities”⁹⁹ would open up access to intellectual property to ever-wider sections of the community. Moreover, this would not be in terms simply of abolishing private property in intellectual creations, but an imaginative facilitation of production and intellectual exchange in ways similar to those suggested by the software liberation group.¹⁰⁰ Then, as Lyotard concludes:

the stakes would be knowledge (or information, if you will), and the reserve of knowledge — language’s reserve of possible utterances — as inexhaustible. This sketches the outline of a politics that would respect both the desire for justice and the desire for the unknown.¹⁰¹

95 T. Rowse, “Aboriginal Land Rights”, paper presented to the Second Australian Law and Society Conference, Macquarie University (1984). “Paralogy” is the term used by Lyotard to refer to languages and vocabularies that are repressed in the name of scientific metanarratives.

96 For a perceptive analysis and critique of this model see R. Murray, “Ownership, Control and the Market” (1987) 164 *New Left Review* 87. The literature on the role of multinational corporations in the world economy is legion. For an early prophetic analysis see J.M. Keynes, “National Self-Sufficiency” *Yale Rev* (1932-33) 761-763.

97 The Tasmanian Dam affair was a case in point: the local population’s general support for the building of the dam was made in the coercive conditions of high unemployment and poor social services. For the preconditions for a rational resolution of environmental issues see T. Prosser, “Towards a Critical Public Law” (1982) 9 *J Law & Soc* 1.

98 See G. Debord, *La Societe du Spectacle* (1968); note 37 *supra*.

99 *Interstate-Parcel Express Co. Pty Ltd. v. Time Life International (Nederlands) B.V.* 138 CLR 534, 560.

100 See, for instance, A. Langer, “Behind our Backs: Computer Software Copyright”; B. Taylor, “King Canute’s Copyright Law”, Papers for the National Symposium on Legal Protection for Computer Software, 16 March 1984.

101 Note 65 *supra*, 67.