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Dangerous Supplements: Resistance and Renewal in Jurisprudence, Peter Fitzpatrick, ed.

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Dangerous Supplements:

Resistance and Renewal in Jurisprudence

Peter Fitzpatrick, ed.
Durham, N.C.: Duke University Press, 1991, 207 pp.

Reviewed by C. Harrington Jones*

With such a title, *Dangerous Supplements*[1] makes a calculated appeal to the reader's sense of intellectual adventure. It provokes the armchair adventurer with an urge not unlike the impulse that drives a skater farther out into a bay, beyond everyone else, to the point where, at the peril of failing to heed the darker shades of ice, a glance shoreward can reveal the unfamiliar in the familiar.

The anthology's editor, Peter Fitzpatrick, plays with this conception from the outset. In his introduction, Fitzpatrick employs a metaphor that presents the study of contemporary critical theories of jurisprudence as voyages beyond the margins of convention. These confrontations are, however, intended to be intellectual sorties that encounter and assess the others; voices that challenge the *status quo* from beyond the limits it seeks to disavow. By their very existence, these others threaten the foundations of existing law. According to Fitzpatrick, the *status quo* has rallied with tactics that maintain hegemony through deft management of what are recognized as supplements that are dangerous to its body. "These voyages," he explains, "are never undertaken without the intention of returning more securely to the point of departure. Challenges from the surrounding context are thus either rejected or adjusted and absorbed."[2]

Assimilation and rejection are the tactics that silence these subversive voices. Fitzpatrick's goal is, accordingly, to expose and reject these tactics, thus avoiding "the protective and premature closure around law which jurisprudence continually seeks to effect."[3] In fact, more than that, he hopes to

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[1] P. Fitzpatrick ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham, N.C.: Duke University Press, 1991) [hereinafter *Dangerous Supplements*].
[2] *Ibid.* at 1.
[3] *Ibid.* at 2.

prevent the closure that jurisprudence effects within itself. In attempting to replace appropriation with acknowledgement, he seeks to establish a dialectic that provides not only resistance, but also renewal to received authority. The result would supplant rejection with an uncertain, unsettled process of re-formation; it is a conception that views the process itself not as the means to an end, but as the end of the means. The book explores new historicism, Marxism, neo-liberalism, feminism, semiotics and deconstruction in turn, and within one another. Jurisprudence, thereby, moves not only into the wider world of intellectual exploration, but also recognizes the full extent of its own landscape and, more importantly, acknowledges this process of recognition.

The anthology presents widely divergent and often incompatible perspectives. The editor's introduction contains an extensive essay that illustrates how traditional jurisprudence manages the marginalization of emerging voices. Linguistic philosophy's tenuous entry into jurisprudence provides Fitzpatrick with an excellent subject from which to draw out his theories of rejection and assimilation, thus setting the stage for what is to follow. Subsequently, David Sugarman mobilizes historic contextualism to explore the forces that have shaped the development of jurisprudence. Progress has, more often than not, required the resolution of tensions between competing factions of educators. In these struggles, political agendas are shown to have often outweighed logic. The New Right and Marxism, presented in essays by Alan Thomson and Alan Hunt respectively, are the two subjects that follow. In both essays, these familiar perspectives are applied to disclose the inherently political in the supposedly value-neutral project of traditional jurisprudence. Carol Smart's essay on feminist jurisprudence leads into less familiar territory. She rejects previous constructive efforts in favour of achieving renewal from beyond the borders of traditional jurisprudence. The final two essays introduce semiotics and deconstruction. Unfortunately, both focus their attentions specifically on British institutions. These chapters, by Peter Goodrich and Yifat Hachamovitch, and Anthony Carty, are nonetheless worth exploring.

The first essay, Fitzpatrick's, is a study of H.L.A. Hart's *The Concept of Law*. Fitzpatrick views Hart's attempt to redefine positivist jurisprudence as the failed integration of mutually incompatible positions. Like jurisprudence in general, Hart appropriates the other (in this case the linguistic philosophy of Wittgenstein) and applies it selectively so that the conclusions remain confined. In this process, the otherness introduced by linguistic philosophy is ultimately denied.

Fitzpatrick cites Wittgenstein's rejection of the concept of an externally observable, objective relationship between signifier and signified as the foundation of Hart's attempt to move beyond law's "siren call for definition, for

encapsulating what law is in some factual formula."[4] Linguistic philosophy suggests conceptualizing an individual's comprehension of rules as the product of the play between the external and internal elements. Moreover, this internal element fundamentally resists reduction. Reduction reforms by leaving something behind, so that any subsequent formulation shall be deficient. In a sense, the making of the formulation is its unmaking.

Fitzpatrick supports Hart's conclusion that, by its nature, "the conception of law must include the idea of a rule."[5] According to Fitzpatrick, however, this point marks Hart's departure from the strict conclusions of linguistic philosophy. Specifically, Hart attempts to reveal the foundations of law as a system of rules – a factual structure. This effort relies upon a reductive reformulation of the constituents. The very attempt conditions or determines the results. "As a linguistic philosopher," writes Fitzpatrick, "Hart would not seek the essence of law. He would not seek out what it is since for linguistic philosophy and for Hart that...was a misconceived quest. Yet it is a quest on which Hart now embarks. He bases the quest on the arbitrary and continuous reduction of law to rules."[6]

Fitzpatrick's analysis of Hart's conception of the essence of law works to reveal the extent to which linguistic philosophy has been abandoned. He effectively undermines Hart's conclusions by exposing the ethnocentric foundations of his inquiry into law's social foundations. Revealing how the answers must depend upon who formulates the questions marks a return to linguistic philosophy. Fitzpatrick proves his point by introducing the supplement that persists outside of the work, and forcing Hart's conclusions to self-destruct.

Undeniably, linguistic philosophy has provided Fitzpatrick with a powerful tool with which to attack Hart's conclusions. To this extent, the supplement has proven to be dangerous. Accompanying Fitzpatrick on his voyage, the reader has encountered an alternative reading of a text that undermines its fundamental conclusions. Fitzpatrick's essay serves well as an introduction to the anthology. The threat that linguistic philosophy presents to the integrity of Hart's text illustrates the greater danger which exists in the diverse voices that jurisprudence seeks to silence. Fitzpatrick concludes with a clear statement of purpose: "this volume is a collection of dangerous supplements. It explores the subversive implications of excluded knowledges for jurisprudence."[7] There is,

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[4] *Ibid.* at 6.
[5] *Ibid.* at 11.
[6] *Ibid.*
[7] *Ibid.* at 27.

however, an ironic difficulty that this statement overlooks.

Meaning is imported to any message by the bearer who presents it. While the ideas behind the essays in *Dangerous Supplements* may be subversive, any serious threat from their otherness has been neutralized in their re-presentation, largely because accommodations are made to facilitate the presentation of the volume's contents. While Fitzpatrick recognizes the necessity of compromises, he persists in supposing that they are merely structural shortcomings, for example, limitations upon scope and depth of coverage. They are not, in his mind, inherently fatal to the project. The problem is that, in an anthology, it is inevitable that the dangerous nature of the supplement is left behind, at the margin, while a safer presentation is induced. The result is that the anthology's voyages are more akin to sightseeing than exploring.

Dangerous Supplements is intended to be a vehicle for introducing the broad spectrum of work that has come to be collected under the heading 'critical theory' to the interested non-specialist. Any such effort is reductive in both scope and depth. Inevitably, the result is a strong reliance upon categorization and naming. These acts of containment mark a closure that is meant to facilitate introduction at the expense of the true nature of these others – the voices with which they speak are no longer their own. No anthology can attempt seriously to fully survey the many, diverse perspectives that comprise critical theory. *Dangerous Supplements* makes no claim to inclusivity. In fact, Fitzpatrick explains that the volume's contents have been kept to a minimum so that cost shall not discourage potential buyers. The inclusion of texts named as *agents provocateurs* from identified schools of criticism, however, unnaturally expands the scope of their individual responsibility. The result is a tension between the volume's ability to include, and its desire not to exclude. This effort to forestall closure only precipitates it. The voices within the text, burdened by the responsibility of presenting the voices without, often overreach themselves. A quick glance at some of the essays reveals not only these predictable weaknesses, but also some less predictable ones.

Carol Smart's "Feminist Jurisprudence" is plagued by one of the more predictable shortcomings inherent in this approach. "Feminist jurisprudence," she explains, "has not been taken seriously although...it poses a very real threat to the complacency of traditional jurisprudential thinking."[8] This threat, however, never really materializes in Smart's essay. Beginning with a thumbnail history of feminism, Smart arrives at a present that is reduced under four broad headings. This categorization, a conceptual aid for the reader, is an unfortunate compromise mandated by the nature of the anthology. The breadth

[8] *Ibid.* at 133.

of her subject is expansive and the underlying material suffers from this unnatural compression.

According to Smart, previous efforts to construct a feminist jurisprudence have met with limited success. They are, she explains, predisposed to failure because of their confinement within the context of traditional jurisprudence: "feminist jurisprudence tends to be limited by the very paradigm it seeks to judge."[9] Grounded in a body prone to acts of closure, projects to construct a feminist jurisprudence are, unavoidably, reductive and exclusive. They redefine rather than eliminate the marginalized.

Smart seeks a solution that avoids this premature closure. In pursuit of this end, her conclusion remains open, an inquiry. "The question," she writes, "is whether feminist jurisprudence can overcome these conceptual and political problems or whether we need to start from somewhere else fundamentally to challenge the power of law and the heritage of traditional jurisprudence."[10] The efficacy of this approach is, however, limited in an essay that resorts to quartering the body of feminist jurisprudential projects. The essay's reductive conceptualization of feminist constructions is an act antithetical to Smart's proposed openness. Juxtaposed against these constructions, Smart's open-ended conclusion does not appear to threaten traditional jurisprudence as much as it does feminist efforts to confront it. In distinguishing her perspective, Smart confronts and rejects her predecessor's constructions. The tension inherent in this constructed deconstruction undermines the potency of Smart's conclusion.

Alan Thomson's chapter, "Taking the Right Seriously: The Case of F.A. Hayek," presents a very different critical voice with a very different, and unexpected, shortcoming. The subject of Thomson's inquiry has, he explains, suffered marginalization not because his values radically conflict with those of traditional jurisprudence, but rather, because of their similarity. Hayek's overtly politicized inquiries produce results similar to those of the supposedly value-neutral inquiries of traditional jurisprudence. Thomson portrays Hayek's exclusion from the mainstream as the product of traditional jurisprudence's struggle to ensure that its inherent biases remain concealed.

Hayek's work is grounded in a deep skepticism of the power of reason. The positivist efforts of what he terms Constructivist Rationalism are, he believes, destined always to fail due to our specie's fundamental inability to predictably manipulate social order. Instead, Hayek favours a more modest approach which he terms Evolutionary Rationalism. This, Thomson explains, results from Hayek's deep respect for the mechanism of the market. Since his early exposure

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[9] *Ibid.* at 156.
[10] *Ibid.*

to economics, Hayek has always regarded the market as an instrument that was far greater than the sum of its parts. The best humanity can do is to recognize and adapt to market signals. Attempting to lead or overcome the market will only reduce its efficacy at our expense.

Thomson clearly explains how Hayek's doubt attacks positivist jurisprudence by undermining the possibility of any universality grounded in reasoned inquiry. This skepticism, he explains, demands an inquiry into the true foundations of jurisprudence. Deprived of the facade of value-neutral reasoning, traditional jurisprudence must be seen as a politicized construction. Hayek's steadfast assertion that the market must prevail is an overtly political orientation. The problem for traditional jurisprudence is that Hayek's message applies to it as well.

Disappointingly, Thomson concludes by dismissing his subject in favour of another approach. Having surveyed the most common criticisms of Hayek's work, the author rejects not only Hayek but also the entire movement. The New Right, explains Thomson, silences the voices that proclaim the objective nature of human experience. Its concentration upon the subjective ignores the dualistic nature of human experience – of being both actors and acted upon. This denial is, however, accommodated by socialism. From this conclusion, Thomson swings across the political spectrum, abandoning neo-liberalism in favour of the left. Confusing as this abrupt change is in itself, Thomson proceeds to acknowledge that this alternative is itself fraught with serious weaknesses: "although socialism itself... makes silencing claims to universal truth, it nevertheless in my view gives valid expression to another crucial aspect of our experience: our experience of ourselves as objects."[11]

Thomson concludes by clearly favouring the voice from the left over the voice from the right. Regardless of the various arguments for and against these two approaches, Thomson's conclusion is no less than bizarre. His mandate was to introduce a marginalized voice and to undermine the forces that work against it. He carries out this project, however, only to conclude by asserting his own mode of rejection. In effect Thomson sends Hayek back to the margins from where he emerged.

Whatever threat the anthology's underlying conceptions may constitute, their presentation is an accommodation that leaves what is dangerous on the outside. Fitzpatrick argues that the *status quo* assimilates or rejects the voices that challenge it from beyond. It is a mistake, however, to believe that anthologizing the supplements into a supplement does anything to undermine this process. Fitzpatrick relies upon Wittgenstein in this regard: "it can never be

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[11] *Ibid.* at 95.

our job to reduce anything to anything."[12] Although it facilitates the process of inquiry, the selection and compression of a diversity of perspectives into a thin volume is an accommodation of the *status quo*. The very manageability of the text undermines the danger of its contents. The anthology imports an unwanted harmlessness, even novelty, to its contents. In doing so it demonstrates all too clearly the insidious means by which the *status quo* appropriates from other voices for its own purpose.

Dangerous Supplements serves adequately as a point from which to mount further explorations into areas that are emerging to challenge the traditional body of jurisprudence. As an effort to confront the assimilation and rejection of excluded voices, however, it fails due to the complicity inherent in its presentation. Fitzpatrick's metaphor holds inasmuch as the essays represent voyages to encounter other perspectives. As the texts advance to meet the reader, however, the perspectives alter. Ultimately, the voyager remains close to shore and on pretty thick ice.

[12] *Ibid.* at 16.