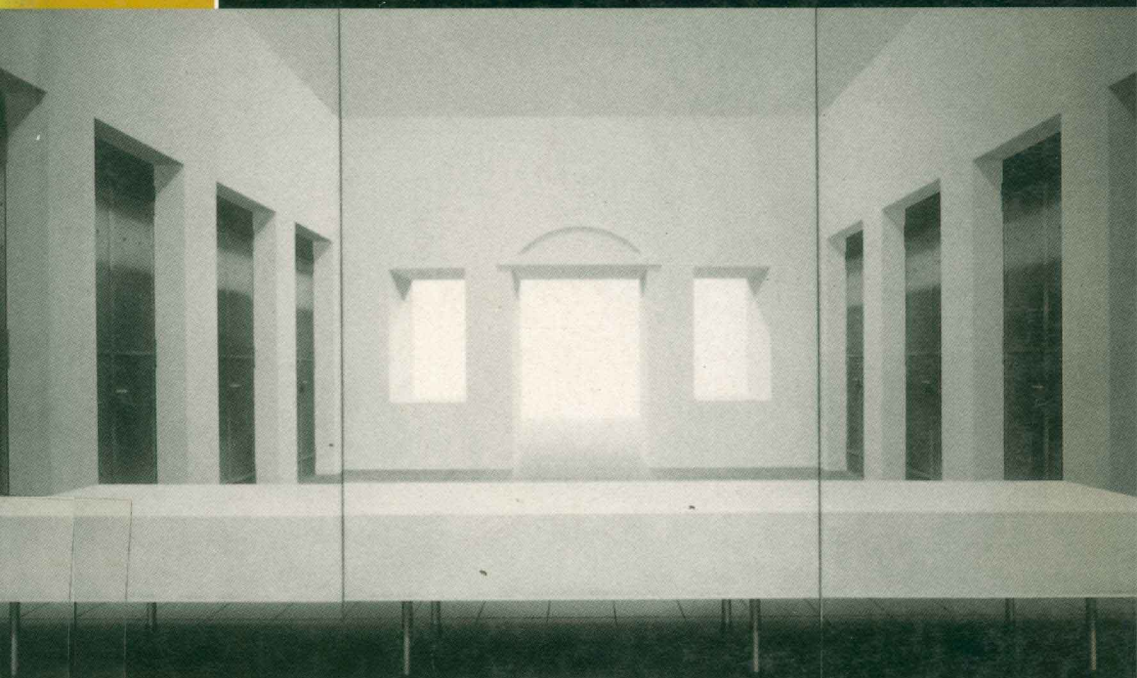


MODERNISM AND THE GROUNDS OF LAW



Peter Fitzpatrick

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Peter Fitzpatrick

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MODERNISM AND THE GROUNDS OF LAW

Existing approaches to the relation of law and society have for a long time seen law as either autonomous or grounded in society. Drawing on untapped resources in social theory, Fitzpatrick finds law pivotally placed in and beyond modernity. Being itself of the modern, law takes impetus and identity from modern society and, through incorporating 'pre-modern' elements of savagery and the sacred, it comes to constitute that very society. When placing law in such a crucial position for modernity, Fitzpatrick ranges widely from the colonizations of the Americas, through the thought of the European Enlightenment, and engages finally with contemporary arrogations of the 'global'. By extending his previous work on the origins of modernity, this book makes a significant contribution to continuing developments in law and society, legal philosophy, and jurisprudence.

PETER FITZPATRICK is Anniversary Professor of Law at Birkbeck in the University of London. He has also taught at universities in Europe, North America and Papua New Guinea, and served in the Prime Minister's Office in Papua New Guinea. His previous publications include *The Mythology of Modern Law* (1992) and *Il Diritto delle Nazioni e le Nazioni del Diritto* (1998).

For Teshar Ciaran Fitzpatrick



Quotation from opening of Beethoven String Quartet Op. 131

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INTRODUCTION

TERMINAL LEGALITY

Extravagant as it may seem, this whole work is initially encapsulated in Freud's attempt to locate the origin of society in the primal parricide of *Totem and Taboo* (Freud 1960). Here Freud turned to 'the originary question of grounds', to borrow the phrase (Derrida 1989a: 60). And what his effulgent myth of origins reveals are grounds of law within a social existence bereft of the transcendent variety. These grounds are possessively 'of' law in that they ground law yet law also grounds them. So, one argument will run, elements of modern society provide grounds of law but these elements become socially effective when brought together by law. In this introduction, then, Freud's alluring tale will be pressed into summary service in order to situate the analysis of law's grounds in a preliminary and graphic way. That analysis will then be more conventionally abbreviated.

Freud is so often advanced as the parent of a self-conscious modernism, and in *Totem and Taboo* he was particularly concerned to account for the emergence and quality of society in its modern, self-sufficient mode, and for Freud law was central to such a society. His fantastic story is really one of two origins. It begins with a desolate stasis in which the savage 'primal horde' somehow exists under the complete sway of the father. This is a place of utter fixity where nothing can be other than what it is. Somehow, in this stilled scene, action erupts and the father is killed and consumed by his sons. That is the first origin. Possibility can now enter the world and it impels the second origin. Since the position of the omnipotent father is destroyed along with him, it can no longer be occupied, and no longer can infinite possibility be stifled in an encompassing determination. Wearying of the ensuing disorder and 'war of all against all', and realizing they have internalized

the authority of the father, the sons enter into a social contract and thence into ordered sociality with its accomplished law. That order subsists in the prospect and fear of returning to savagery – to a condition which Freud variously locates in the primal horde or in the vertiginous possibility following it.

Initially this new-created world does not seem a promising place in which to find law. It comes about in a responsive relation to change and creativity. The modern rule of law, with its avowal of assured stability and ultimacy of determination, seems closer to the condition of the primal horde. For law to rule, however, it must also embrace the opposite attributes. Law, as the rule of law, has to be ever-responsive and indeterminate, capable of extending to the infinite variety which constantly confronts it. This division with-in law is reflected readily enough in the plangent indecision of debates in jurisprudence, philosophy and the social sciences over what law may be – debates which divide implacably between law's quality of autonomous determination and its dependence on such forces as society and social change – forces to which it must ever relate and give way. And so law can be seen as matching that double demand of modernity which *Totem and Taboo* serves to identify: the demand for assured position integrated with a responsiveness to all that is beyond position, a demand to be met now without resort to erstwhile solutions of a transcendent kind.

The antecedent quality of the opposition between these demands is evidenced by Freud's obsessive uncertainty, in *Totem and Taboo* as well as in many later works, over whether the primal parricide actually happened. Again and again, he stridently asserts in scientific terms that it must have happened, only then to doubt it, before usually returning to its affirmation, if still uneasily. The terms in which Freud's uncertainty is played out themselves correspond to the antinomy of an origin which endowed the contrary demands 'in the first place'. Such an origin would, unexceptionally, seek to combine the determinant scene originated with what comes ever unknowably 'before' or from beyond it. It is in the combining of these 'original' dimensions that law can be placed at the origin. For himself, Freud silences the dissonance by resort to the capacious savage. This happens in labyrinthine ways outlined in my first chapter, but the brief point to extract here is that Freud constitutively grounds his own epistemological position and the civilized order which he discovers in a savagery set specularly against both.

Secured as it may be in rejection of this savagery, there is yet, to borrow a famous title, a discontent to civilization (Freud 1985c). The savage is also and always within. Firm order and its securing law have to be sustained lest we revert to a primal savagery which still sounds its

siren call. But Freud truncates the genealogy of society here. In his own accounting for it, achieved society did not emanate in denying the savagery of the primal horde but in the denial of that savage liberty, that perilous time of endless possibility, which followed the destruction of the father's completeness of power. Freud's problem then, if it may be so attributed to him, is that he cannot simply reject this immediately anterior condition of wild liberty since it carries with it that responsive possibility which shattered the inertia of the primal horde and eventually created society. Yet neither can Freud simply accept this anterior condition into the society it creates because that would undermine his conception of society as predominate order.

It is in this dilemma that we can identify Freud as the mythmaker of modernity with a little more accuracy than is usual. Freud is normally lumped into a long tradition of occidental myth in which civilized sociality can always relapse into the dissipating savagery whence it came. And Freud does fit into this tradition readily enough through his conceiving society in its radical difference to the disorder preceding it. Yet this society is also, and has to be, the same as what went before. Simple order is the condition of the primal horde. This is order without responsiveness and possibility. And it is the presence of these qualities and their infinite promise within ordered civilization which makes for its discontent. Put more strictly in Freud's terms, this discontent is a 'disease', one which is ineradicable and which ever attends the ordered norm, denying it ease. Freud, in short, produces an allegory of law. He situates law's two extremities, one in the completely determined position of the primal horde and the other in the ensuing chaos where anything can responsively be other than what it is, and he intimates how they are to be combined. This he does in his quasi-ethnographic elevation of the totem.

The totem is for Freud the first form of law. The killing of the father initiated law, and the killing of the father-surrogate, the totem animal, wondrously concentrates its dimensions. Here is a force to law's deathly claim to determine finally, to fix and hold life, denying its protean possibility. Yet death also dissolves the determinant and opens to what is unknowably beyond. So, the totemic death determines, yet it also clears the ground of existing determination and invites newness into the world. With the savage totem, these two dimensions are quite unmediated, but with civilization the prospect of a return to savagery is advanced to sustain a predominance of the determinant – and Freud's project all along had been to account for the social *order*. It is law which would ensure such order and enshrine in itself the predominance of determination. Here also the savage obliges with a ground. Law finds its apotheosis in the determinant because it is imperatively set against

a savage chaos, yet in the violence of its determination law remains also of the savage.

In case there is life beyond Freud, and since he preoccupies only my first chapter, it may be as well to offer some more direct indication of what the rest of the book is about; but before doing that, Freud's generosity can be tapped further so as to introduce and illustrate what could be called tendentiously the book's method. There is much implicit history throughout, but the content of that is evident enough. What may be more opaque is the device of the telling instance. The telling instance is a text or situation embedding a reiterative concern of the modern period. It manifests not only a persistent irresolution but also a constant demand for resolution, and indeed it can be most revealing when what is offered is an anfractuous resolution, like Freud's. To borrow the terminology, nonetheless, the telling instance is the symptom of an obsession. All of which places texts dealt with like this in a somewhat ambivalent position. They are at one and the same time evidence and authority. As cogent evidence, the telling text has to be one which has assumed a significant purchase, a palpable authority, and my concern is not to undermine it but to see its failures as happy ones extending it beyond its confining resolution. The telling situation, likewise, is one which productively combines the evidentiary with authoritative assertion, such as the apodixis of the origin.

Another stratagem enwraps a movement extracted from telling instances, from their unsettlement, into the presentation of the work. Chapter 2 is an engagement with the movement of 'position' or of positioning in modernity. This is a movement fusing the determinantly assured with a responsiveness to what is 'for the time being' beyond the determinant. A little more pointedly, with its not settling on one side of this divide or the other, the movement in-between them is a tensile arena of apposition in which they become proximate and applied to each other whilst still being parallel and opposed. It is the existence and the exigency of this arena which focuses my argument throughout the book. Here we no longer find simple assurance, but assurance despite; not a clear correspondence or a nice subordination between things but rather what is isomorphic and mutually prehensive; not what is either compatible or contrary but compatible *and* contrary. Above all, in a sense, these lines of resolution and irresolution assume the lineaments of law.

This movement, then, shapes the second chapter in two ways. One should prove to be obvious. In its alternation, the movement affirms telling instances yet disconcerts them. The instance of the Freudian myth itself endures as a touchstone throughout this chapter. The myth also proves to be a source of telling instances commonly taken to

ground modern law in various ways – the instances of the origin, society, transgression and a savage alterity. The other shaping effect of this focal movement may not be so conspicuous. This is an alternation within the chapter as a whole. The chapter begins with a beginning, with the origin, and then moves onto a modern sociality, showing how the assumed solidity of both is ever dependent on responsiveness beyond their constitution ‘for the time being’. To take society as an illustration, social existence, so the argument will go, could only assume individuated or specific being and yet be-with others if there were an authority able to effect determinant position yet itself be responsively illimitable. That authority is law. The chapter then alternates back towards the determinant and towards its pronounced predominance within an occidental modernity and its law. Here the neo-sacral instance of transgression proves pivotal, and law is shown to assume dimensions of the sacred and to subsist and take form in an integral relation to a self-transgressive ‘outside’ or ‘exteriority’ (Blanchot 1992: 434; Foucault 1987: 34). However, the chapter continues, this transgressive orientation is captured in modernity by a savage alterity which, in its negative relation to the law, would elevate the legal to a determinant fixity, much as we saw in the Freudian myth. Yet that dismal capture, in turn, cannot provide an abiding resolution. It involves making certain savage ‘others’ carriers of such extreme manifestations of determination and responsiveness that no integrating movement between these is possible. A putatively resolved legal, and social, identity is then secured in the negation of such unresolved others. But, of course, the unquiet movement still remains within the identity itself. The demand for resolution and resolving law remains insistent. In all, with chapter 2 we find law deriving grounds from dynamics of modernity, yet in so doing law in itself, as it were, has ever to go beyond, to exceed modernity and these dynamics.

With chapter 3 the movement and alternation in and between determination and responsiveness are brought within law. The story so far has law assuming something of a parasitic existence through its taking its impetus and elements from different telling instances and their demand for law. Even though law returns the impetus and elements to these instances in a cohering relation, still they have accounted for law solely in the diversity of their own demands. The only singular place law has taken, again in the story so far, was one ‘before’ these same instances in the Freudian myth. Now the scene is extended and law is related to the exigencies of action, time and space, and in the process its conventional contents will be shown to cohere in that relation. If then, ‘the defining feature of legal modernity lies in the attempt to make law self-founding’ (Goodrich 1993: 116), the

constitution of this self has conventionally relied on some solitary point of closure that either fails to cohere or assumes a deific transcendence substituting for the previous variety which has, variously, absconded, been exhausted or disposed of. Famed expedients of these kinds provide telling instances for this chapter and these, contrary to their own conclusion, reveal the movement between determination and responsiveness as constituent of law. What then becomes convergent in and as law is this movement combined with that demand for some enforceable resolution of it emanating from society, alterity, and so on.

Such a line of argument is most evidently set against positivist and other assertions of law's stability, fixity, implacability, finality. Even at its more settled, or especially at its most settled, law cannot 'be' otherwise than responsive to what is beyond its determinate content 'for the time being'. Neither, however, can law dissipate in a pure responsiveness. If it is to be brought to bear, it has to assume some assurance beyond life's ephemera: 'law, justice, is more reliable than all our forgetful loves, our tears so quickly dried' (Michelet 1982: 268). Yet law appears only in the failure, the ineffectiveness of pre-existent determination or lapidary anticipation, for if these ever *were* fully and effectively, we would simply and utterly *be* without any 'call' for prescription or decision – a reversion to the primal horde. Taking two illustrations from the instances ranged over in this chapter, one has already been touched on in Freud's company, the rule of law. For there to be a rule of law, for law to rule, it 'itself' must have determinant force. Yet if it were merely or fixedly determinant, if it were not responsive, it would cease being able to rule a situation which had inexorably changed around it. The other instance is one in which law's movement assumes its determinant effect, and that is in the decision – the decision of the subject, the judge, and the legislator. The legal decision is ever responsive. It can neither be rendered beforehand nor sustained simply in terms of some empirical reality or simply in terms of a previous decision. If it could be reduced in either of those ways, there would be no 'call' for decision, no demand for 'fresh judgment' (Derrida 1992a: 23). Put another way, the responsibility – or in an old usage, the responsibility – involved in judgment cannot be accommodated within the determinant or the known. There is always 'in' the legal judgment a 'secret', a mystery, a 'madness' (Derrida 1992a: 23; 1995: 65). What this uncontainment also imports is that the scene of legal judgment in its determinant form is inevitably arbitrary. It does not, and cannot, cognitively extend to all that may make the decision what it is. The decision is always a choice and involves a denial and a sacrifice, a 'cutting' into the infinite variety of inclination, fact and circumstance that could possibly inform it (Derrida 1992a: 26).

All of which leaves a conundrum which could be seen as orienting the second, 'applied' half of the book, where a considerable 'case' not only continues but also extensively illustrates the first. If law is to 'be', to 'take place' at all, it cannot subsist as ineffably responsive but must come to a place of determination. This place, in turn, must not just contain law's responsiveness but must also habitably sustain it. In chapter 4, then, law finds a matric ground in the nation of modern nationalism. This is not, to adopt the idiom, only the particular nation of blood and soil but also nation as universally inclined beyond its territorially bounded plot. In making this impossible combination possible, both in itself and as law, nation – the national society – resorts to law in the cause of its own cohering; and, in their mutual making, law and nation share certain dynamics of formation, such as the negating resort to savagery and its 'barely reworked variants' (Balibar 1991: 25). This configuring of law and nation, along with the particularly determinant and the universally responsive, is one which is neither confined nor confinable to the singular nation but takes on a formal and effectual density in such terms as the comity or community of nations. These are terms which still depend on a predominant particularity of elect nations. And it is in such terms – abruptly summarizing now – that imperialism and globalism are found, in the remaining chapters 5 and 6, to be extraventions of nation.

The indulgent assumption reconciling occidental law to its currently prevalent history is that its imperial manifestations were an aberration from its liberal *telos*, whereas in chapter 5 the opposite is shown to have been the case, but with one portentous difference. What distinguishes modern imperialism and its law is a terminal and intrinsic disjunction between their effective responsiveness and their would-be encompassing force of determination. Globalism and global law are revealed in chapter 6 as operating in the same way, as a neo-imperialism, yet they also operate in quite a different register. Globalism asserts an existent factuality in itself. It is the consummate achieving of the social, of 'global society'. As such, it allows of a direct claim on the global and its equivalents, such as the 'human' of globalized human rights. Such claims can be made without the mediation and constriction of nation or *imperium*. Globalism, in short, is set in a particularity of exclusion, yet it would offer a palpable place for the universally inclusive. The hope denied in the first condition is enlivened by the second.