

in the realm of public policy. Pettit himself concedes that, while ‘the proper step at this point would be to try and outline a list of reforms that ought to be made in the actual institutions of democracy’, ‘it is not possible in the compass available, to say anything in this vein on where democracy should go from here’ (172). However, by advancing our understanding of the rationale for democratic institutions, Pettit provides a standard against which any proposed reform to those institutions could be measured.

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Modernism and the Grounds of Law

Peter Fitzpatrick
(Cambridge, Cambridge University Press, 2001)

I think it would be fair to say that when modern legal theorists think of myth in the context of law, the work which immediately comes to mind is Peter Fitzpatrick’s *The Mythology of Modern Law*.¹ This book broke new ground in its illustration of the ways in which law, presenting itself as an enlightened negation of the concept of myth as a principle of social order, is in fact founded upon myth, and finds myths embedded in own identity.² Law has its own ‘modern mythology’ – fundamentally this consists in the paradoxical myth that law has superseded myth, but it also exists in modernist myths such as that which tells of the movement from primitive life to civilised life, and that which elevates the nation to the rational endpoint of legal and social order. It is myths such as these which give law its coherence and its identity.

Modernism and the Grounds of Law continues Fitzpatrick’s own tradition in the scholarship of legal mythology. It does so in a way which extends and complicates some of the arguments and themes made in the original work. Like *The Mythology of Modern Law*, Fitzpatrick’s latest work draws upon an extensive range of scholarship. It is ambitious in its scale, eclectic in its sources and detailed in its analysis. It is a work composed on many layers, making it both challenging and engaging to read. In the ways outlined in this review, it contributes an original dimension to theoretical scholarship in law, without laying down yet another ‘law of law’ or finite theory of law. Thus, *Modernism and the Grounds of Law* will help to open up a widely defined dialogue in legal scholarship, rather than intervening in a closed debate. Before explaining what I see to be the

¹ Peter Fitzpatrick, *The Mythology of Modern Law* (1992).

² Ibid 1.

central dimensions of this new text however, I will take a short diversion into a linguistic myth which I use as a point of comparison and explanation for the mythical premise of Fitzpatrick's book.

In an early piece, 'Des Tours de Babel'³, Derrida recounts the biblical story of the tower of Babel built by the people of Shem as a myth which figures the collapse of language in its determinate state. The destruction of the tower by god created a fissure between name and referent⁴, it dispersed language and created the need for translation. It also resulted in a kind of yearning after the original condition of meaning, a time when meaning was assured, single, authoritative. Thus, the Babel myth

tells of the need for figuration, for myth, for tropes, for twists and turns, for translation inadequate to compensate for that which multiplicity denies us. In this sense it would be the myth of the origin of myth, the metaphor of metaphor, the narrative of narrative, the translation of translation, and so on.⁵

In the Babel narrative, we have two moments: the original state of linguistic perfection and determinacy, and the subsequent disordered and indeterminate condition of language. The second of these moments does not, however, tell simply of chaos or linguistic anarchy. Rather, it is a paradoxical state in which the subjects of language are compelled to translate, and yet cannot do so adequately.⁶ As Foucault remarked in *The Order of Things*, also commenting on the myth of Babel, '[a]ll the languages known to us are now spoken only against the background of this lost similitude, and in the space that it left vacant.'⁷ The desire for the perfection it represents is necessarily left unfulfilled.

Babel is a myth of the origin of languages as a multiplicity of forms, as indeterminate in themselves, and as flexible and responsive to the demands of translation and communication. It is a myth of the need for

³ Jacques Derrida, 'Des Tours de Babel' in Joseph Graham (ed), *Difference in Translation* (1985) 165-207. The title of the article is left untranslated because, in recognition of the subject matter of the piece, it is itself untranslatable. The translator (Graham) explains: 'Des means "some"; but it also means "of the", "from the", or "about the". *Tours* could be towers, twists, tricks, turns, or tropes, as in a 'turn' of phrase. Taken together, *des* and *tours* have the same sound as *détour*, the word for detour.'

⁴ See also Michel Foucault, *The Order of Things* (1970) 36: 'In its original form, when it was given to men by God himself, language was an absolutely certain and transparent sign for things ... The names of things were lodged in the things they designated. ... This transparency was destroyed at Babel as a punishment for men.'

⁵ Derrida, above n 3, 165.

⁶ Ibid 170.

⁷ Foucault, above n 4, 36.

authorised meaning, yet of the absence of such authorisation. The entire myth is conflated in the name 'Babel' which designates both the name of god, and the confusion sown by him – god gives his name to the Shem, and he thereby gives confusion. Derrida's point in retelling the myth is not to determine whether or not it is historically true, but rather to show something significant (indeed the most significant thing) about language, that is its indeterminacy, and the modernist desire to compensate for the lack of an absolute.

In *Modernism and the Grounds of Law*, Peter Fitzpatrick presents another myth of origin, in this case, of the origin of society and law. It is a myth which is reminiscent of the Babel story in its emphasis on original ordered position and an enforced change which becomes symptomatic and systemic. The similarity is not co-incidental, for both myths speak of a lost authority which modernism seeks, unsuccessfully, to restore. Both myths are loaded with ambivalence and anxiety about the large epistemological and moral questions of postmodernism. Fitzpatrick's myth is the Freudian myth of parricide from *Totem and Taboo*, explained briefly by Fitzpatrick in the introduction 'Terminal Legality'. The myth⁸

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. ... 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.

Like the Babel narrative (as interpreted by Derrida), Freud's myth of parricide posits an original position of fixed authority, and a response to the chaos caused by the loss of that position. While the Babel myth tells of a lost similitude in language, replaced by multiplicity and compensated by translation, the myth of parricide tells of a lost authority replaced by contract and compensated by law. In each case, the compensation is inadequate to its task, and violence intrudes to secure the operation of both law and language. (A somewhat simplistic rendition, but I think it captures the main point.) Law and language share a desire for authoritative meanings, but suffer from an inability to identify the sources of such meaning.

Modernism and the Grounds of Law is framed around this myth of parricide, and its scenario of the collapse of primal authority followed by the necessity of social authority in the form of law. While this is not a book which accepts the entire psychoanalytical mythology or even a substantial

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Modernism and the Grounds of Law, 1.

part of it,⁹ Fitzpatrick's restatement of this one myth prefigures a number of significant themes.¹⁰ Understanding Fitzpatrick's reading of the myth is central to an understanding of *Modernism* so I will now lay out some of the themes condensed in this Freudian premise. (My description is very mechanical and should not be taken as indicative of Fitzpatrick's subtle and multidimensional working of the mythical narrative.)

First, the myth speaks of an origin or ground of law and the modernist desire to identify that ground, and to secure the structural position of law through resolving any conflict or uncertainty integral to it. In this way the work responds to the preoccupation, or more accurately obsession, with foundations which has characterised modernist legal theory and makes a strong contribution to the growing body of work which problematises the notions of foundational certainty and structural stability.

Second, the 'law' constructed in response to loss carries with it both the *determinateness* of the original position and the *responsiveness* to chaos and conflict represented by the parricide and subsequent social contract. This theme, which informs much of the book, is elaborated at length in Chapter 3. Here, Fitzpatrick situates the determinateness of concepts such as the rule of law against their own embedded need to be able to respond – to emerging social imperatives and to the particular and always novel circumstances which confront decision-makers. Thus law cannot be either one thing or the other, but is 'in-between', a point articulated in detail by reference to texts such as Derrida's 'Force of Law' and technical devices such as the legal fiction or the method of precedent.

Third, the myth raises the prospect of the 'savagery within' the order of civilised society and its law. Law posits itself as the negation of savagery, and as a means of securing civilisation against the perceived disorder of uncivilised society, but in doing so, this 'other' is retained as the underside of law, or its unconscious. Savagery threatens to disrupt law at every point, which is why law cannot be understood as a simple mechanism of order – its resistance to the 'savage within' necessitates that it operates by violence and therefore can never transcend the other which it seeks desperately to exclude. Again, this is a theme which reappears throughout the work. For instance, in Chapter 4, Fitzpatrick considers the modernist concept of the nation as constituted by the exclusion of its 'other' – often cast as 'savage', 'primitive', underdeveloped, or otherwise differentiated

⁹ Though see Peter Goodrich, 'The Grounds of Law' (2003) 12 *Social and Legal Studies* 109.

¹⁰ This is an approach which may appear incomplete or unmethodical to some theorists of psychoanalysis, but (like Fitzpatrick) I have myself always been happy to adopt the heretical stance of selecting those aspects of the system of psychoanalysis which are revealing of some structural or symbolic point, while disengaging from the rest.

from the 'First World' nations of Europe and its (developed) former colonies.¹¹ Even the 'supra-national' state of Europe does not escape or transcend the concept of the nation thus understood, because it is constituted from the same basis as a different order of nation, existing on a different level.¹²

Fourth, Freud's myth serves as an instantiation of Fitzpatrick's method in *Modernism and the Grounds of Law*: that is, the method of the 'telling instance'. The work is neither a purely philosophical argument, or a sociological enquiry based on systematic evidence. The work is a narrative – itself an intervention in a range of discourses – rather than a statement of truth or a theory. The 'telling instance' is 'at one and the same time evidence and authority'¹³ – in other words, the telling texts as Fitzpatrick appears to conceive of them are both example and exemplar, norm and instantiation, original and double. Like Derrida's discussion of Mallarmé's *Mimique*, the story of a mime 'imitating nothing ... a double that doubles no simple',¹⁴ Fitzpatrick's book is no simple discussion of a universalist position, of which there might be instantiations, but rather an effort to enliven the contradictions and lack of resolution in his texts. (I say this with some confidence, but the division of the text into 'Orientation' and 'Instantiation' may suggest another reading.) Like the law which is its primary subject, the book itself is 'in-between' the determinate legal philosophical position which aims to provide a static analysis of law and a narrative which constructs law from its own instantiations. The temporal paradoxes of law are reproduced in the methodology of the work. To this end (or rather in the interests of this performance), Fitzpatrick draws upon a vast and impressive range of philosophical, sociological, legal and other sources.

I have dwelt on these few points (from a potential multitude of points) emerging from the myth of parricide because I think they are central to an appreciation of *Modernism and the Grounds of Law* (and because it remains a habit of exposition to focus on the centre rather than the margins). However, the work consists of many layers, and those few themes I have raised provide merely an insight into the structure and process of the work: they are certainly not definitive of it.

I think it ought to be reasonably clear from this brief outline that this is not a work which can be reduced to a glib theme or argument: instead, within the configuration of ideas raised by Fitzpatrick it offers readers

¹¹ *Modernism and the Grounds of Law*, 125.

¹² *Ibid* 136ff.

¹³ *Ibid* 4. For further discussion of this aspect of *Modernism and the Grounds of Law*, see Alan Norrie, 'A Fateful Inversion' (2003) 12 *Social and Legal Studies* 121.

¹⁴ Jacques Derrida, 'The Double Session' in *Dissemination* (1980) 206.

different experiences or possibilities. In other words, this is a book which is self-consciously open-textured and which invites the reader to interpret, construe, respond. As Peter Goodrich comments, the suspension of judgement, the 'not yet' which is the substance of Fitzpatrick's account of law is also reflected in his own writing. Goodrich sees the stylistic ambivalence of *Modernism* as symptomatic of a scholarly 'melancholia' or 'anxiety' born of the tension of working between disciplines.¹⁵ It is also surely an invitation to the reader, enabling us to find ourselves and our own theoretical preoccupations in the text. This is not to say that there are not some very solid and compelling arguments advanced (for instance those outlined above): the style is, however, often exploratory and questioning rather than merely expositional.

This openness of style is not, of course, to everyone's taste, especially given (as Goodrich also implies) the legal professional context framing the university discipline of law, in which clarity is demanded and judgement is inevitable. It has been said of this book at least once,¹⁶ and I am sure it will be said again, that it is written in an unnecessarily complex and obscure postmodernist idiom. It is certainly a difficult book to read, and I will not pretend to have comprehended it in its entirety. The language adopted by many contemporary theorists is self-consciously obscure, and this can be challenging even for readers well-versed in the conventions of postmodernism or deconstruction. Fitzpatrick does not often go out of his way to offer transparent explanations of his argument. I have myself sometimes deliberately adopted this stance, with varied results.

Of course it is possible to criticise work which is obscure on the grounds that the author did not sufficiently work out their argument to be able to state it clearly and without equivocation. Such doubts do not arise in relation to Fitzpatrick's work because, as I have said, the style is self-consciously reflective and deliberately open-textured. In my view the close reading and re-reading which is demanded by this text is rewarded by an ever-increasing nuanced and layered understanding of the issues it raises. This is a book of considerable scope and scholarship, offering significant insight into some very important legal philosophical questions.

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¹⁵ Goodrich, above n 9, 117.

¹⁶ Tim Murphy, 'Include Me Out' (2002) 29 *Journal of Law and Society* 342, 342-343.