

BREAKING UP THE UNITY OF THE WORLD

Peter Fitzpatrick's conception of Responsive Law

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Key Words

Responsive law, Sacrifice, Totem, Imminence, Immanence, Non-violent law, Freud, Psychoanalysis

Abstract

This short article on Peter Fitzpatrick's conception of "responsive law" analyses the ambiguous temporality that Fitzpatrick discerned in modern law. On the one hand, law makes the claim of being fully present and therefore already and completely contained in itself. This aspect of law reflects the law's claim to "immanence," that is, its claim of always being able to rely strictly on its own operational terms without having to take recourse to any consideration not already contained within itself. It is this aspect of law that renders the ideal of the "rule of law" feasible. On the other hand, the law's claim to doing justice to every unique and therefore every new case also demands that it takes leave of that which is already settled within it. This aspect of law can be called its "imminence." The imminence of the law concerns the reality that law always finds itself on the threshold of that which has not yet been said and must still be said. The article shows how Fitzpatrick relied on Freud's concept of the totem to explain the "wondrous" unity of its immanence and imminence.

I. Introduction

The following passage provides one with a concise statement of Peter Fitzpatrick's understanding of responsive law or the responsiveness of law:

“Even at its most settled, or especially at its most settled, law could not ‘be’ otherwise than in a responsiveness to what was beyond its determinate content ‘for the time being’. If that content could be perfectly stilled, there could be no call for decision, for determination, for law. And it is in the very response to this call, in the making and sustaining of its distinct content, that law ‘finds itself’ integrally tied to, and incipiently encompassing of, its exteriority.”¹

Of concern in this concept of law’s responsiveness, is not that which is always excluded by the law such as typical considerations of compassion with the unique plight of an accused or defendant, etc. Of concern is the way legal concepts, even though being concepts and therefore adequately defined, exclusive and closed (covering only some cases and not others), cannot avoid being turned “out of themselves” and entering a relation with that to which they “apply” or “do not apply”. Legal concepts would be of no use were they not bound to be stretched out of any condition that one may wish to describe as “folded onto and into itself” or “rolled up into itself” like a hedgehog might role itself up to shield it from the world. The law, even in its most *settled* and defined form, because of its fundamental applicability (the basic fact that it is meant to be applied from which non-application in a particular case does not detract anything), is always stretched out beyond itself. Its “outside” is intrinsic to it. As Fitzpatrick puts it: “law has somehow to be conceived of, not just in a potential relation to what is outside what it may be ‘for the time being’, but as having that outside with-in itself”.²

In what follows, I shall take a closer look at this intrinsic responsiveness of law that Fitzpatrick contemplated by relating it to a number of key concerns in his work, namely: *the totem; sacrifice; breaking up the unity of the world, non-violent law.*

II. Totem, Sacrifice and the Unity of the World

Fitzpatrick's *Modernism and the Grounds of Law*³ provides one with an extensive engagement with Freud's narrative regarding the origin of human society in *Totem and Taboo*. The essential elements of the narrative are these:

- 1) A primordial state of group existence – the primal horde - in which the father enjoys exclusive possession and sexual enjoyment of the women in the group.
- 2) An intermediary phase in which the brothers in the group revolt against the father, kill him and consume him in a meal and subsequently have free access to and enjoyment of the women in the horde.
- 3) A third stage during which the brothers, ridden by guilt, identify and institutionalize an animal that may not be killed and consumed, the totem, except in specific ritual re-enactments of the original killing of the father, the totemic feast. Concomitant to the institution of the totem, the brothers also impose on themselves the sexual repression formerly imposed on them by the father. They develop laws that prohibit incest.

The three phases of the narrative, but especially the second and third ones, reflect Freud's view of the origin of society. The first stage is one of "utter fixity",⁴ the fixity of the absolute order imposed by the father on the horde. The second stage ushers in a non-state of boundless freedom among the brothers to compete for the possession of the women through which new possibilities of social co-existence or order constantly and savagely replace those already established. Constant "[p]ossibility [thus] enter[s] the world".⁵ But

constant possibility offers no stable abode and the brothers, on the eve of society, find themselves split by two seemingly irreconcilable concerns, the concern with a stability reminiscent to some degree of the fixity formerly imposed by the father, on the one hand, and a freedom to take leave of this order when the exigencies of desire and circumstance require this leave-taking, on the other. Driven by the need to reconcile these irreconcilable concerns, or by their guilt trip (Freud does not make it clear which economy of these two economies – mere practicality or existential remorse – is the essential force here), the brothers institute an order that allows for fixed law that exacts general compliance as well as the freedom of occasional non-compliance with the fixed demands of law. They do so by the institution of the totem, the killing of which the law generally proscribes, but occasionally allows in the form of the ritual feast. The totem thus reconciles or at least connects or combines the diverging concerns with fixity and freedom from fixity that mark the minds of the brothers after the killing of the father. Thus ensues the “first form of law” that is, *at least in aspiration*, neither a mere function of forceful repression regardless of circumstance, nor one of boundless or savage circumstantial freedom. Fitzpatrick writes:

“The totem is for Freud the first form of law. The killing of the father initiates 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 unknowable 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....”⁶

“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.”⁷

In view of these passages, the core of the totem’s characteristics can be described in terms of a *wondrous* and *unmediated concentration* and *combination* of its two *dimensions* or *extremities*. The two terms that Fitzpatrick employs to denote the two dimensions or extremities at issue here are *determination* and *responsiveness*.⁸

It is clear from the passage quoted above that Fitzpatrick seeks to scrutinize the “wondrous” and “unmediated concentration” and “combination” of determination and responsiveness of the law to which Freud’s analysis of the totem points. Modern law, claims Fitzpatrick, does not seem to reflect this “wondrous” and “unmediated concentration” and “combination” that Freud’s analysis of the totem allows one to contemplate. The last line of the second last passage quoted above makes clear that civilization is burdened by a concern that inclines it to avoid this wondrous combination of fixity and responsiveness: “[W]ith civilization the prospect of a return to savagery is advanced to sustain a predominance of the determinant.” This predominance of the determinant and thus of “immanence” (a term that will receive more attention presently), reaches its apex with modern law and modern legal thought, contends Fitzpatrick. As he puts it:

“The modern rule of law, with its avowal of assured stability and ultimacy of determination, seems closer to the condition of the primal horde.”⁹

With modern rule of law, in other words, we come close to returning to the utterly fixed and unitary world of the primal horde. High civilization thus appears to revert to primitive barbarism. It is but a different kind of savagery that is coming to our attention here. The “savage” is indeed also subject to a certain slippage and reversal in Freud and Fitzpatrick. It not only refers to its primary or preferred manifestation of “breaking up the unity of the world” and allowing for the new and the possible to enter it. It also sometimes refers to the savagery of the primal father’s relentless rule.¹⁰ If there is something to be learned from this crossing of signals it is surely that utter fixity and utter responsiveness are interchangeable savage responses, both of which return us to a unitary world.

The foundation and sustenance of law are always caught up in this slippage between utter fixity and utter responsiveness. The threshold of the law – the critical crystallization in space and time that distinguishes it from non-law – would appear to be impossible in view of this slippage that wrecks its essential aspiration to sustain fixity and responsiveness as separate “moments” of law that condition one another “dialectically” (reciprocally and symbiotically). The felicitous manifestation of law that effectively embodies this impossible combination of fixity and responsiveness is a key and perhaps the key concern in Fitzpatrick’s work.

The totemic concentration of fixity and responsiveness can also be described in terms of a concentration of immanence (containing its defining concepts within and not outside itself) and imminence (being exposed to an eventfulness or historicity that confronts it

with its outside and with that which its fixed and fixing concepts have not yet fixed).

Considering the wondrous concentration of these two elements or temporal modes of law, one may wish to experimentally graft the two terms “immanence” and “imminence” on to one another in order to turn them into one “wondrous” phenomenon. In an earlier engagement with Fitzpatrick work I resorted to the neologistic term “immimance” to describe this wondrous concentration.¹¹ Be it as it may, the wondrous concentration of fixity and responsiveness or immanence and imminence at stake here evidently points to a feat that is impossible to pull off at any particular moment in time. Or, to be more precise, the “moment” of this feat only becomes possible to the extent that it suspends itself and gives way to an infinite repetition – a ceaseless restaging – of this “moment.” The crime from which society originates therefore has to be repeated without end.¹² This originating crime may sometimes be accompanied by moral failure, but it does not have moral failure as an essential ingredient. *Essentially* at issue in this crime is much rather the fate of having to constitute a *more* or *less* convincing engagement with the Sisyphean task of traversing the aporetic split between immanence and imminence. Law’s persuasiveness – the degree to which the passage from what it was to what it is to what it should become remains persuasively consistent – does not consist in appeals to “smooth” transitions or “switches.” Nor does it consist, as we shall see shortly, in anonymous “agency shifts” that somehow extracts the bitter sting (or blunt stab) from the essential “non-passage” or “aporia” that lies at the core of these temporal passages. The distinction between the agency of law-making and the agency of law-enforcement does not resolve the aporia. The separation of these two agencies can be invoked to explain the irreducible gap between the “word” and the “violence” of the law. The traversal of the “then”, the

“now” and the “not yet” of the law, in other words, must pass through this non-passage between the language and the violence of the law. This traversal must therefore remain impossible. The “passages” that connect the “then”, the “now”, and the “not yet” of the law are not real passages. They are instances of “muddling through” in the absence of passable passages. Their persuasiveness can therefore not pertain to any claim that the connection between the past, present and future of the law has been sustained “successfully”. Such an ideological claim – represented par excellence by Dworkinian notions of “law’s integrity” – is no longer convincing against this background. The persuasiveness or “integrity” of law must therefore rather be understood in terms of adequate – adequately candid and adequately perplexed – engagements with the absence of passages, let alone smooth passages.

That the law invariably muddles through instead of passing through is evident from the blood stains that adorn its records and registers. The persuasiveness of any assessment that the law has “muddled through” again is conditioned by the extent that the blood that is shed in the process of “muddling through” actually receives time to dry before new blood is shed. The “muddling through” through of the law is nothing less than “butchering through,” Robert Cover suggested dramatically in a famous essay. The phrase “butchering through” is not his, but according to Cover, the law operates in a “field of pain and death ... and violence.”¹³ The suggestion is clearly that the law “hacks through” where it cannot “pass through.” Only to the extent that the blood on its records has dried does the word of the law appear to extract itself from the violence in which it inevitably remains engaged. Dried-up blood stains thus function as a camouflage for the

fresh blood that is flowing ever-again when the “non-violent” word of the law does not find a passage through the obstructions that the singularities of human existence pose to general legal concepts.

An element of “histrionics” may well be at work in this description of the impossible passage between the “then”, the “now” and the “should be” of the law, as Fitzpatrick indeed suggests with reference to Cover, but Fitzpatrick himself surely never loses sight of the essential “psychoanalytic” task that is at stake here. The deep disturbances of the law must be brought to consciousness if they are not to become pathogenic fixtures or fixations that will come to ruin whatever responsiveness might be expected from the law.¹⁴ The persuasiveness of the claim that responsiveness to otherness (or exposure to imminence) truly frees the law from its fixity (established or articulated immanence) pivots on the conscious realization that this is never quite the case. The traversal of the split between fixity and responsiveness and immanence and imminence consists of a spillage, not a passage. It consists in a spillage of blood, opportunities, chances and lives. Consciousness of the irreducible link between the *split* and the *spilt* is the only gateway available to a passage that never takes place. Of concern here is the ancient regard for the inevitability of sacrifice in the affairs of mankind. All human *facere* is *sacer facere*, as Agamben reminds us poignantly.¹⁵ The engagement with the irreducible and repetitive totemic origin (or lack of origin) of the social in Fitzpatrick’s *Modernism and the Grounds of Law* provides us with another consistent reminder in this regard.¹⁶ Respect for the responsiveness of the law, writes Fitzpatrick, “could orient and even impel” us towards the recognition of the legal decision as “the denial and sacrifice of the other”.¹⁷

III. Non-Violent Law?

It is against the background of this clear regard for the sacrificial essence of law in Fitzpatrick's writings that one must scrutinize his suggestion that the law can also be non-violent. Having masterfully deconstructed the separation between the non-violence of the word and the violence of law enforcement that Robert Cover seeks to effect with the notion of an "agency shift" and having thus masterfully exposed the violence of the law to inhere also in its very words or wording, Fitzpatrick nevertheless suggests, "in sympathy with Cover now", that the law is or can also be non-violent. And this non-violence of the law, he suggests, relates to the very responsiveness of law that in *Modernism and the Grounds of Law* guides us to the sacrificial essence of law. The essay on Cover makes the point as follows:

"In stark contrast [with Cover], my analysis held violence and non-violence joined and integral to each other; but, in sympathy with Cover now, that very connectedness required that they also be apart. This entailed a different conception of violence – not one confined to the painful infliction of physical force, and not one which destroyed the word, but instead one constituent of the word itself. Such a violence also provided force and sustained focus as the word moved, as it always had to move, beyond the confines of its determined "completeness". This movement meant that the word had to be not just violently determining but also non-violently responsive to what lay beyond it "for the time being," and that non-violent responsiveness in its turn could not have effect except in the violence of determination. On these voyages, the word is never simply destroyed or simply conserved but is ever being destroyed and conserved – destroyed in its responsiveness and conserved in its being repeatedly determined. This was not a matter of "compromise" or of any other encompassing combining of these two imperatives. They were instead distinctly co-existent, existing in apposition, yet integral to each other – "neither one nor two."¹⁸

The “non-violent responsiveness” of law that can only have effect in the “violence of determination,” not as a compromise but as an essential condition, takes one all the way back to the slippage between fixity and responsiveness effected by the divergent references to the savage in *Modernism and the Grounds of Law*.¹⁹ This, I believe, is one of the essential conundrums with which Peter Fitzpatrick’s scholarship engaged.

* Professor of Philosophy of Law, University of Luxembourg. Professor Extraordinarius, University of the Free State, South Africa. This article is a shortened and slightly reworked version of an essay of a collection of essays dedicated to Peter Fitzpatrick’s work published by Routledge in 2012 (see fn. 11 below). I thank Routledge as well as the editors of the volume – Ruth Buchanan, Stewart Motha and Sundhya Pahuja – for permission to use large parts of this earlier essay again.

¹ See Peter Fitzpatrick, *Law as Resistance* (Burlington, Ashgate, 2008) p. 219.

² Ibid 220.

³ Cf. Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, Cambridge University Press, 1997) p. 40 and *Law as Resistance*, p. 208, both referring to Sigmund Freud, *Totem and Taboo*, trans. James Strachey (London: Routledge & Kegan Paul, 1960) p. 153.

⁴ Fitzpatrick, *Modernism and the Grounds of Law*, p. 1.

⁵ Ibid, p. 2.

⁶ Ibid, p. 3.

⁷ Ibid.

⁸ Ibid, pp. 2-3

⁹ Ibid, p. 2.

¹⁰ Ibid, pp. 1, 24-32: The “savage holds the place of irresolution” and thus of a “protean” non-fixity in society (see pp. 28, 30) that allows newness or “circumstance and possibility into the world” (p. 32) and thus breaks up the “brute savagery” (p. 24) and “‘sameness’ of savagery” (p. 32) and “utter fixity” (p. 1) of the father’s rule. But the slippages and reversals go further: The savagery of the brothers not only brings circumstance and possibility into the world. It ultimately also repeats the utter fixity of the father’s rule in the different format of utter un-fixity. Where the father “eliminate[d] individuality” (p. 28) and therefore

“all circumstance and possibility”, the brothers, “unceasingly pitted against each another” in a “world without determination” (p. 32), produce “nothing but individuality” (p. 28), a world determined or fixed by individuality, one might say. Thus do the rebellious brothers represent in Freud’s myth the wild and savage or ur-savage heart of the feminine in Cixous (see Fitzpatrick, *Law as Resistance*, pp. 205, 210, 214, 220) and repeat the masculine fixity or sameness of the father’s savagery.

¹¹ See Van der Walt ‘Totemic Immanence’ in Ruth Buchanan et al, eds, *Reading Modern Law* (Oxon, Routledge, 2012) pp. 146 – 164.

¹² Fitzpatrick, *Modernism and the Grounds of Law*, p. 25.

¹³ See Robert Cover, ‘Violence and the Word’, *Yale Law Journal* 95 (1986), p. 1601.

¹⁴ See Fitzpatrick, *Law as Resistance*, 115.

¹⁵ See Giorgio Agamben, *Potentialities* (Stanford: Stanford UP, 1999) p. 135.

¹⁶ Fitzpatrick, *Modernism and the Grounds of Law*, pp. 23-25.

¹⁷ Ibid, p. 105. Cf. also p. 57 with reference to Eliade: “[B]ringing into being involves the sacrifice, the making sacred, of what is rejected in so doing.”

¹⁸ Fitzpatrick, *Law as Resistance*, p. 140.

¹⁹ See again fn. 10 above.