PETER FITZPATRICK, LAW AS RESISTANCE: MODERNISM, IMPERIALISM, LEGALISM (BURLINGTON, VT: ASHGATE; ALDERSHOT (UK): DARTMOUTH, 2008)

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Law as Resistance reprints fourteen previously published essays. Although one might question such an enterprise with respect to other books in this series, the essays in Law as Resistance have been published in the U.K. in anthologies which would likely be unavailable in the usual law school library. More importantly, when the essays are chronologically ordered, as they are here, the product is greater than the sum of its parts. Indeed, Law as Resistance is remarkable. It is remarkable for several reasons. First, the author, offering a rare example of the beauty of English as it could be, draws from an extraordinary breadth of research in the anthropology of traditional societies. Second, the author manifests a deep and systematic understanding of European legal theory, both during the Enlightenment and of recent years as read through some of the works of Jean-Luc Nancy, Maurice Blanchot, Slavoj Žižek, Giorgio Agamben, Carl Schmitt, Michel Foucault and Jacques Derrida. Most importantly, the author destabilizes assumptions long and deeply-held by Anglo-American legal scholars and philosophers. The thrust of his thesis is, first, that the authorizing origin of law rests in a vacuous theological myth despite the secularism of modernism. Second, law exists as a paradox: on the one hand, in order to be determinate, law must resist whatever is antithetical to law. On the other hand, law must respond to such antithetical phenomena precisely because of the need for law to be determinate. The consequence of the paradox is that law is dependent upon what law has heretofore excluded as savage, barbaric, feminine and the like. I shall endeavour to reconstruct Fitzpatrick’s arguments for these claims. I shall conclude with three largely intuitive queries.

The first prong of my reconstruction is Fitzpatrick’s claim that there has remained, as a carry-over from medieval times, a theological character to the state as the authorizing origin of law. He draws from Carl Schmitt to elaborate this theme, a theme that is especially pronounced in chapters nine (169-76), twelve (253-54), thirteen (279-84), and fourteen (296-308). The mark of pre-modernism, Fitzpatrick argues, was the divine. With the modernism of the Enlightenment, the belief in secularism took hold. The key manifestation of secularism, in turn, was the sovereign state as the ultimate foundation of the modern legal order. The problem has been, Fitzpatrick argues, that sovereignty lacks an ultimate form that justifies the sovereign state. As such, the sovereign state itself is a vacuous form. Accordingly, law, to be determinate, is separate from the empty form. Fitzpatrick links this vacuousness to explain why Kant claimed it treasonous to question the foundation of the legal order (174, 299, 307, 315). Interestingly, Fitzpatrick extends this analysis to describe how other “new idols” (the nation, nationalism, empire and humanism) also function as vacuous forms for the foundation of the modern legal order (69-86, 179-80, 279-84, 296-308). Such dominating idols have really functioned as racist ideologies (chapter five).

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Further, law has defined and sustained the very existence of the legal order. Even the rule of law itself has disguised the self-determination of law.

Before I proceed further with his argument, one needs to appreciate the ramification of Fitzpatrick’s effort for access to justice. The vacuity of the foundation of a modern legal order has offered two options for the access to justice student, scholar, lawyer, judge or law school, both options having been entertained by this journal. On the one hand, access to justice has been faced with an inaccessible challenge (the empty form of the state and of the “new idols” of nationalism, the nation and empire). This, in turn, has necessitated intellectual journeys into an idealized world estranged from social relationships. On the other hand, justice has functioned as an empty form without determinate content. In order to be determinate, law has had to define its own boundaries and its own existence. Since justice, as located in the mythological foundation, is inaccessible through language and context-specific empiricism, there has been no limit to the constraints upon the content of law. Justice, as the state, nation, or humanism, has dissolved into justice as self-generating and determinate forms. The forms, in effect, are posited by the very officials who appeal to the ultimate theological form of the state or one of the above mentioned idols. The forms are better known as rules, doctrines, principles, policies, values and the like. Access to justice thereby risks becoming an ideological rhetoric for a totalitarian legal order – totalitarian in the sense of the absence of any experiential space and time which cannot be enclosed and reduced by the empty form of the sovereign state or other idol. The authorizing empty form ultimately eliminates the possibility of distinctness and particularity of the context-specific circumstance of any being. The form, to maintain a universal character, lacks content. The universality requires an unlimited propensity to enclose what it lacks.

The universalism inculcated by the Enlightenment and followed through to the surrogate idols of the sovereign state just had to enclose all antithetical content in order to remain universal. Indeed, as Hart asserts, the legal officials of the modern state are “haunted” by the possibility that it has not enclosed all context-specific felt social experiences. Imperialism, both the old and the new, is threatened by the possibility of the antithesis of law (a traditional society, for example) which law has not enclosed. (69-81, 258-69, 284-91) Fitzpatrick addresses the inevitable colonial and imperial propensity of law in chapters 2 (especially 17-23) and 11. Fitzpatrick also links the unrelenting desire to enclose all that is antithetical to the empty form of the state to American foreign policy under the Bush Presidents (chapter 9). War, as a struggle between legal orders claiming universality over all that they do not enclose, too inevitably follows. Law invariably is an unhappy consciousness, I would add.

This takes us to the second prong of Fitzpatrick’s argument. If one recognizes

1 Fitzpatrick directly addresses access to justice in “Justice as Access” (2005) 23 Windsor Y. B. Access Just. 3.
the mythological foundation of the law, then justice must be left to the self-defining law. Law just cannot recognize aboriginal peoples that might be left outside the self-defining law. Conversely, law can recognize such peoples by including them inside the familiar law as self-positing forms. The self-defining law (or, in the more familiar term, “the dominion”) is what seems to be left if the foundation of law is a vacuous theological form. With this in mind, Fitzpatrick challenges Kant’s moral claim, so critical to contemporary human rights law, of the universal moral imperative of respect for persons (299-300, 307, 315-16).

As such, a legitimacy of imperialism permeated domestic and international law in the Enlightenment (17-30) and contemporary America (195-204). Further, he addresses how the international law doctrines of *ius gentium* and *jus cogens* fail to provide the universalism that human rights scholars and lawyers attribute to the doctrines (184-95, 279-84). In a further context, although his essays do not address the prolific recent studies of the nature of legal reasoning in analytical jurisprudence, he extends his argument at one point to the nature of a rule, so critical as the unit of legal existence (chapter 6, 106-07). As a form, a rule is distinguishable from the indeterminate chaos that law as form resists. The chaos and savagery of pre- legality characterizes the feminine, as Fitzpatrick recounts of Freud and Cixious in chapter ten. Racism, in the form of the modern idol of the nation, has also been a consequence of the production of a belief in law as universal (chapters one, five and nine). Such a consequence of racism to the universal character of law as form has accompanied Fitzpatrick’s previous reading of Hart’s work.\(^4\)

Most importantly for our purposes, the all-inclusive autonomy of law impacts upon what is access to justice. At the same moment that scholars assume that justice is nested in the rules, doctrines and other forms, something antithetical to form is inescapably excluded from the access to justice analysis. Access to justice becomes an access to the rationally cohesive, complete, autonomous totality of the structure of forms. But if the access to justice pedagogue or scholar describes law as access to such universals as represented by the autonomous or sovereign legal order, without considering the necessary chaos and savagery on the other side of the rupture, the pedagogue or scholar once again risks succumbing to a colonial perspective towards access to justice.

This takes us to the third prong of Fitzpatrick’s argument. There is an untranslatable gulf between the self-defining law on the one hand and the unenclosed, unformed and indeterminate chaos on the other. The postulate of a civilized society, represented by a state and the rule of law, is believed to be radically different from the chaos and savagery. There is a radical untranslatable rupture between law on the one hand and what Hegel and Hart describe as “pre- legality” and “pre-history” on the other.\(^5\) Hegel begins history, for example, where individuals begin to become self-conscious. This self-consciousness requires a “leap” from the unconscious traditional societies to the self-defining law justified as the state. Hart begins the concept of law after the philosopher has “stepped” from

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pre- legality to legality. Even traditional societies in Australia, North America, Africa and Asia have been objects of the total enclosure within the law. With an enviable rich appeal to anthropological studies, Fitzpatrick documents this gulf in indigenous societies (23-30, 44-63, 212-215). Fitzpatrick recounts how this gulf characterized the 1774 Lord Mansfield judgement of Campbell v. Hall (160-664), Chief Justice Marshall’s early 19th judgements (164-66, 242-43) and more recent land title cases in Australia and Canada (155-57, 162-64, xix-xx). Fitzpatrick also devotes chapter 8 (160-66) to establishing why aboriginal title resists a relation of law to aboriginality. The gulf, though, is not peculiar to aboriginal law for Fitzpatrick picks up how it even characterized Homer’s description of the Cyclops (44-5). He extends his exposure of the gulf to early Enlightenment figures such as John Locke, Montaigne, Hobbes, Rousseau, John Austin, de Vattel, Blackstone, Montesquieu and Kant. The pre- legality marks the state of nature of Hobbes, Locke and Rousseau for example. One might add that the very idea in the ‘development of law’, so common in North American law faculties, presupposes this rupture between the undeveloped law in Africa and Asia on the one hand and the universals of civilization as represented by the developed law on the other. Fitzpatrick is concerned that the foreign side of the rupture is insufficiently recognized in Michel Hardt and Antonio’s Negri’s Empire (chapter eleven) and in Giorgio Agamben’s ‘Homo Sacer’: Sovereign Power and Bare Life (chapter twelve).6

Fourth, given the untranslatable rupture, the best that the access to justice scholar can do is to imagine the strangeness on the other side of the rupture. Knowledge of the stranger is an ontic knowledge. This is so because anything that does not come within the universal has to be “utterly antithetical” or a “totally different existence” (11). The well-intentioned judge or scholar can, at best, picture the state as a mythic empty form. So too, one has to picture or imagine the stranger that the self-defining law has failed to enclose. The picture re-presents the stranger in terms that are familiar to law. The legal order of forms, without a picture of the stranger outside the boundary of the form, cannot be known. One cannot know civilization without imagining the savage without such a picture. Nor can one know the rule of law, as a form, without picturing its opposite: rational chaos. Lawyers and judges have to imagine what it would be like without private property, without rights and duties, without a secular state, and without centralized institutions (41-59). Thus, the radical stranger, as antithetical to law, is an optic product because the stranger cannot be known by the familiar forms. Early common law judgements and authorities (e.g. Blackstone, Adam Smith), contemporary judges (Brennan and Lamer) and legal philosophers (John Austin and Hart) are said to share such an optic vision of the stranger. So, given the theological origin of law in a secularized ideology, as privileged in my first point, and given the self-defined totality of law, as necessitated by a form (the sovereign state and other idols such as the nation), anything outside the form has to be included. What is excluded remains alien to

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law. The excluded is a remainder to law.

We are finally faced with the title of Fitzpatrick’s book: the resistance of law. Here, the resistance is not to law nor against law but of law. Modern law must resist the haunting antithetical pre-legality. Because of the vacuity of the foundation, the function of legal officials is to render law determinate in the name of an inaccessible justice. Such a determinacy, if one presupposes the mythic universal such as the state or nationalism, is posited within self-generating and self-regulative forms. The latter requires that law must resist the possibility of the radically strange pre- legality (10-16, 176-84, 219-21, 288-91, 313-18). As a consequence, the access to justice scholar risks slipping into the presupposition, accepted by Hobbes and Locke, that justice is only possible in the self-defining structure of rules posited by the theological state that parades itself as secular.

Put differently, in order to understand the resistance of law, there has to be a referent against which law resists (1). And that referent, we have seen, is the radical strangeness to law. Forms must enclose and yet, can never fully enclose. Fitzpatrick explains the necessary resistance as follows:

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\text{[i]f it [law] were not coherent but contradictory, something else could resolve the contradiction. If it were not closed but open, then something else could enter and rule instead of or along with law. If it were incomplete and not a whole corpus juris and thence necessarily related to something else, then that something else could share in the ruling with law. Finally, a law which in any of these situations is not going to be dependent upon something else must also be self-originating and self-regulating. (170).}
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Accordingly, law must resist first, the radical strangeness on the other side of the boundary between law and the chaos and second, the indeterminacy of its antithesis. An indeterminate pre-legality becomes radically antithetical to law. Law must resist such an antithetical world.

And so, here, we find another paradox. On the one hand, law must resist the radical strangeness of the pre-legal world in order to sustain its universal form of the sovereign state. On the other hand, law must respond to this radically antithetical strangeness in order to become determinate in content. The stranger, as such content, fulfils the empty forms. Without such a response or fulfillment, there remains something unrecognized ‘out there’ far beyond the boundary of the universal legal forms. But this remainder contradicts and undermines the very nature of law as an empty form.

Thus, there are two origins to the modern legal order, according to Fitzpatrick. First, there is the sovereign state’s theological foundation that claims no other form as superior to its empty universality. Second, there is the remainder of antithetical particularities which we have heretofore accepted as chaos, savage, feminine or aboriginal. There will inevitably be such a remainder once we understand law as synonymous with content-independent forms. The Enlightenment inculcated the belief in such forms, universal human rights being a contemporary example. A universal, to be all-inclusive, cannot possess an exception. But the
universal, to be a universal, paradoxically requires something “utterly antithetical” (11) to have an identity as a universal form. Thus, law, as legitimized in a mythological and theological origin that lacks a form, and laws as universal content-independent forms, must acquire determinate content to be complete. This determinacy is accessed by responding to the multiplicity of formless chaos. Law must respond to the chaos in order to represent particular determinate content to its forms. This effort, though, will always be incomplete precisely because the chaos is indeterminate, it being radically antithetical to law.

The consequence of the paradox is that law, as form, depends upon the very exterior pre- legality that it resists. When X resists Y, Y’s integrity is elevated at the very moment that Y is diminished and parasitic upon X (xi). In order to maintain its determinacy, law, as form, must respond, as well as resist, the diminished and parasitic pre- legality. The latter privileging of the supplemental pre- legality poses an ironic twist. For, although law must resist the radical strangeness of pre- legality, law must also respond to the latter in order for law to be determinate. After all, Fitzpatrick associates law – at least the law grounded in mythology – as a matter of the content-independent form of the state. As a consequence, law, to be law, requires a relation between the content-independent form on the one hand and the indeterminate (because it is radically antithetical to the determinate, self-defining law) pre- legality on the other. Fitzpatrick explains this paradoxical need of law to respond or relate to the radical other of law – the savage, the barbarian, the feminine, the traditional society – in several of his essays. The one cannot exist without the other and yet, the identity of each must remain autonomous of the other. The indeterminacy of pre- legality is “always” on the other side of the divide. And yet, law needs content – its forms being universal – and this, in turn, requires that law respond to the particularities of the indeterminate pre- legality. In order to be determinate, law must “extend beyond, exceed” what is determinate for the time being (178).

Now, this need of law to respond to something antithetical to its own identity effectively requires that law take a determinate position from which to respond (170). Thus, despite its imperial claim to universality, law originates from the indeterminate antithetical strangeness of pre- legality. Law returns from the radical strangeness of law in order to gain determinate content. Law’s response to its antithetical other, though, does not bring closure to law. There is always an extra-ordinary remainder that remains unaccessed. Even the horizon between law and pre- legality cannot be reduced to the familiar legal forms. The strained effort of contemporary Anglo-American analytical jurisprudence to root law in objectivity is counter-intuitive, given the power of Fitzpatrick’s argument.

This is the point where Fitzpatrick offers the prospect of hope. The need of law to respond to the particularities of pre- legality raises the possibility of access to justice as a dialogic relation not unlike Mikhail Bakhtin’s. The latter reading of

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Fitzpatrick’s *Resistance of Law* is my own, there being no allusion to Bakhtin in the book. “Something has to give”, Fitzpatrick writes (178). A response by law to the chaos that is heretofore antithetical remainder to law is the consequence. This responsive relation lacks the character of the “violent word” because it is a response rather than the former imposition of universals onto the stranger (118-9).

With such a “protean combining”, one might think that determinacy is lost in the “liquidity of the responsive” (178). This is not so, Fitzpatrick argues. His argument is that law, as empty form, must cross over the twilight of a groundless “horizon” to the unknown radically different existence that heretofore has been excluded from law as savage, a state of nature, chaos or feminine. Maurice Merleau-Ponty described the horizon as the *chiasm*, Bernhard Waldenfels describes the horizon as a cloudy “twilight.” Derrida describes the horizon as an “interspace.” I once described it as an inter-textuality.

Why must law even respond to the horizon? Law as grounded in an empty mythic form cannot recognize, let alone measure, the remainder excluded from legality. As such, it is indeterminate. If the pre- legality is indeterminate – it not being knowable within the boundary of the familiar forms – the horizon or boundary must separate the determinate laws from the indeterminate chaos of pre- legality. Law must include this boundary in order to retain its universality. Because the indeterminate pre-legality remains exterior to law (for otherwise, law would not exist as a rationally coherent and complete structure of forms), legal forms depend upon the something that they cannot contain. The chaos of the antithetical pre- legality provides determinate content to the empty form of law. This determinacy becomes even necessary for the very self-origination and self-perpetuation of universality. The indeterminacy of the antithetical strange possesses competing languages and, therefore, of forms. Even after law’s response to the indeterminacy for its content, heterologous voices remain. This is so no matter how determinate a decision or action of the judge or lawyer. There will always be a non-accessed remainder of a multiplicity. The rupture between the universal forms and the hitherto unrecognizable indeterminate heterologic voices of pre-legality remains unreduced to the totality of the autonomous structure of forms.

(The form of) space prevents me from continuing with Fitzpatrick’s rich
work. I am left with three queries, though. First, what is the character of the relation between the determinate law and the indeterminate pre- legality to which law must respond? Law’s identity depends upon its non-identity in the indeterminate pre- legality. The difference between law and pre- legality, however, is an intellectual difference (207). Hegel describes this form of understanding as Verstand. Fitzpatrick understands law, it seems, as a cognitive enterprise. One consequence, we have seen, is that the best that the legal official can do is to picture or imagine the stranger on the other side of the horizon (178n39). This ontic perspective offers hope (14). The spectral vision of the stranger rests upon one’s readiness “to challenge our foundational mythologies” (14).

When Fitzpatrick addresses the possibility of “being-with” or community as the consequence of the responsive character of law, however, he opens his inquiry to phenomenology. This phenomenology, unmentioned as such, is what he calls a “sociologic” or “meta-ethics” (182). The ethic is nested in a “bonding” or “belonging”. Law depends upon its parasitic antithesis (178n39, 313-14). Such a bonding suggests a necessary reciprocal recognition of individuals in the content of the hitherto content-independent concepts of law. Fitzpatrick’s sociologic takes him from a fundamentally important intellectual differentiation to experiential meaning. The question I raise is whether this leap from Verstand to phenomenology is possible. After all, as von Uexküll urged, “the secret of the world is to be sought not behind objects [such as indeterminate forms], but behind subjects.” And Fitzpatrick returns us to the subject in the form of a phenomenology of the dialogic relation between officials and such strangers.

This leads to a more serious query. Fitzpatrick complains that “academic writing about law and legal philosophy … has failed to tell us what law is” (2). His effort to do so, however, presupposes an association of “law” with a content-independent universal: the state or some other idol. In this respect, Fitzpatrick is heavily indebted to Kant (e.g. xix, 174, 299, 307, 315) and Derrida (219, 101, 126-140, 171-73). Once he has set up the law as a mythological universal form (the sovereign state or the nation, for example) that lacks a further form, the need for determinacy follows. But Kant and Derrida are preoccupied with das Recht or le droit as opposed to die Gesetze or les lois. Fitzpatrick seems to follow suit by continually examining ‘the law’ or ‘law,’ although he does raise the issue of the universality of a rule at one point (106-07). Is his argument only confined to ‘the law’ in the sense of Recht or droit? Or does it also address the nature of a discrete particular law – die Gesetze, les lois or laws?

Third, when one attends to discrete laws as opposed to ‘the law’ (or das Recht and le droit), Hegel has offered a very different understanding to the nature of discrete laws than that offered by Kant and Derrida. Discrete determinate laws (including Derrida’s concern for determinacy in a decision) cannot exist without

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13 The possibility of understanding law as such ethicity in the content of legal forms is addressed in further detail in Conklin, Hegel’s Laws, supra note 5, 169-87.
15 I am grateful to Tom Denholm for raising this point with me.
the legitimacy of that determinate law, Hegel argues. And the legitimacy of a law, in turn, depends upon the reciprocal recognition of individuals as presupposed in the content of a discrete law. Laws do not exist, that is, without the very content that Kant excludes from the universal form of *das Recht* and that Derrida believes only arrives on the scene in decidability. If Hegel’s understanding of discrete laws is compelling, then the antithetical chaos, savagery and femininity – the locus of experiential time and space – is not dependent upon the universal form of the sovereign state as Fitzpatrick has argued. Rather, determinate laws are nested in the experiential and shared meanings of a pre-legality that exists independently of ‘the law.’ This would be so both analytically and phenomenologically before universal forms are ever posited as the starting point of the philosophy about the nature of law. Accordingly, the secret of determinate laws lies in the subject’s constitution and fulfillment of meanings. The exposure of such a secret, though, begs that one inquire into the legitimacy of the allegedly determinate posited forms as laws. If inquiry proceeds behind such forms to the subject’s constitution and fulfillment of embodied meanings, it may be that such meanings provides the determinacy that Fitzpatrick has sought external to ‘the law.’ If so, it may also be that access to justice scholars need to begin where Peter Fitzpatrick’s rich and deep argument ends.