Review Essay

The Prison-House of Modern Law

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Peter Fitzpatrick, *The Mythology of Modern Law*. New York: Routledge, Chapman & Hall, 1992. xv+235 pp. $72.50 cloth; $16.95 paper.

A critical relation to law and its domain may assume a variety of forms. Two contesting stances nevertheless stand out. The first concerns a critique *of* or *about* the law, a critical account of the ways in which law articulates power, of the force of law, of law's empire. The second concerns critique *through* the law, a critical analysis of the ways in which law makes it possible to express or advance—to know and represent—interests. The two stances seem for the most part to run up against each other, for the first insists, if it doesn't presuppose, that in representing interests law expresses power—its own power, the power of those who control legal definition and application, even the power of those whose interests are being advanced (or who through the law are managing to advance their own). In advancing interests, law regulates, and it regulates by definition even the regulators. The rule of law is supposed to work precisely by its rule over all, even those who have or assume the power of law. In its sense as mediator of power, as one of power's media, law on this conception ultimately cannot be finitely contested; it can only be rejected *tout court*. Yet the two senses may be thought on occasion to come together, for a critique of law's prevailing power may lead to a transformation, to the appropriation of exactly that power effectively to advance the interests of those ruled over or excluded by law's regulatory force. Here, law becomes—it is at least occasionally or it ought normatively always to be—a contested domain.

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In his ringing critique of law in modernity, Peter Fitzpatrick seems committed to the first sense of critical legal analysis to the exclusion of the second. Fitzpatrick's book represents in full force a critical account of law's force. This forceful critique seems to implicate Fitzpatrick, however, in a complete critical rejection of modern law as servicing, as expressing, power. This makes it seem impossible to work through *modern* law in the second sense to represent the (self-)interests of those otherwise disempowered. This is a point to which I will return in conclusion.

Peter Fitzpatrick once confessed to me that he prefers to write "simple" books. He meant by this that a book should have a single and clear theme or principle that the author returns to reiterate again and again. The rest, I suppose, is elaboration and illustration. I have since often wished I could write such a "simple" book, though I fear my mind is too caught up in the Jamesian swirl, a "blooming, buzzing confusion."

With *The Mythology of Modern Law*, however, Fitzpatrick has lived up to his self-imposed mandate. The centerpiece of the book's argument, the "simple" point to which it returns repeatedly, is that though myth is deemed dismissively a central feature of premodern conception and understanding, it is not overcome by the progressive rationality of modernity. Rather, it is replaced by a new narrative, a peculiarly modern mythology. And central to modern mythology is—as Fitzpatrick aptly names his book—"the mythology of modern law." But if *The Mythology of Modern Law* meets this imperative of simplicity, Fitzpatrick's intricate elaboration and illustration of the central argument appropriately reflects the complex detail of modernity's self-representation and of the importance of law to its mythical articulation.

I

Fitzpatrick enters into an "internal" critique of modern law, seeking to elaborate modern law's internal logic, the identity it undertakes to establish in and on its own terms and, by extension, the implosive contradictions, oppositions, inconsistencies, and tensions it necessarily licenses. Modernity marks itself, at least in substantial part, in terms of its commitment to law, conceiving itself in and through law. The limits of the modern are marked out conceptually and diachronically, epistemologically and sociopolitically, in terms of the law. Modernity takes itself to shed *myth*—the myth of premodernity—for *the law* of science and the science of *law*. Myth, as Fitzpatrick illustrates, is conceived in the tradition of modernity as the thought of the Other, of the Primitive and the primitive in us, of the pre-rational and the irrational, of those purportedly without or before History. By contrast, law—the law of Philosophy and Reason, Science and the State—is supposed to encapsulate the thought (the under-

standing and imperatives) of Modern, Historical Man. Law is articulated in the principled progression of modern thought, then, in terms of the Laws of Nature, laws at once conceived as a progression beyond and a break with medievalism's Natural Law. Hence the centrality of Hobbes to Fitzpatrick's analysis. Law so conceived supposedly resolves, by hiding, the tensions between fact and value, assertion and command, the particular and the putatively universal—that is, between knowledge and power. It resolves these tensions by silently privileging the universal and representing power.

The modern project accordingly emerges as and in terms of a web of socio-intellectual conditions initiating at the end of the 15th century and expanding out from 16th-century Europe. These conditions include the commodification and capital accumulation of market-based society, the legal formation of private property and systems of contract, the moral and political conception of rational self-interested subjects, and the increasing replacement of God and religious doctrine by Reason and Nature as the final arbiters of justificatory appeal in epistemology, metaphysics, and science, as well as in morality, legality, and politics. Fitzpatrick accordingly is correct to stress that the concern with order lies at the heart of the modern project. This concern is expressed through the domination of Nature by Reason; through the transparency of Nature to Reason in the Laws of Nature; through the classification of Nature in rational systems of thought; and through the mastery of Nature, physical and human, by way of managed order and engineered manipulation. Modernity manifests in the fixing of the political in terms of the law, of both the scientific and the moral in terms of the laws of nature, and of the economic in terms of the laws of the market, Smith's hidden hand of Reason. Opacity and obscurity, identified as they are with premodern myth, are projected to give way to the light of rational transparency and precision; the chaotic limits of indeterminacy and ambiguity give way to the perspicuity of definition; irrationality gives way to the intelligibility of logical regularity; and the contingency of inclination gives way to the absolute certainty of rational (self-)determination. Thus, the spirit of modernity is to be found most centrally in its commitment to continuous progress: to material, moral, physical, and political improvement and to the promotion and development of civilization. "The West" has taken the general standards for this assertively progressive improvement to be its own values universalized. In this context, modern law is driven to dismiss—to *deny*—both myth as such and its own reinstated myth. For modernity, for modern law, this denial—as Fitzpatrick presciently puts it—*is* the myth.

Fitzpatrick often uses the terms "myth" and "mythical" synonymously with "ideology" and "ideological." Yet in ordering the

book around the notion of the mythological, Fitzpatrick has chosen self-consciously to elevate the significance of the former terms over the latter. What, it may be asked, does the conception of mythology bring to an understanding of the social significance of modern law that ideology does not?

The concept of ideology emerges with the maturation of modernity—at the height of the Enlightenment, to be exact. And from its inception the concept is consistent with law's reason if only by virtue of law's central capacity to mediate and sustain economic relations. In this sense, law is ideological though it reserves at once to itself the capacity to service its own (at least relatively) autonomous interests. Law seemingly, then, is not irrational, qua ideology, in the way myth is assumed to be, at least from the point of view of a modern rationality that is the precise object of Fitzpatrick's critique. Fitzpatrick's provocative insistence on characterizing modern law as mythic is designed to tie law normatively to the very characterization modern law denies about itself. Accordingly, Fitzpatrick's invocation of modern law's mythological nature critically collapses the distinctive divide between modernity and premodernity that modern law, and the modern rationality it purports to embody, founds itself upon (this, it is perhaps to be insisted, is Fitzpatrick's principal legal transgression). And it collapses this distinction in a way that ideology conceptually is completely incapable of carrying off. So even though he often uses myth in the sense that ideology is often invoked to critical purposes in social theory, Fitzpatrick wants to retain the negative normativity associated with the mythic. Once directed at law's self-enthroned modernity and, indeed, at modernity's imperative to express itself in and through the law, the very distinction, that epistemic rupture—the modernity, precisely—of the purportedly modern is thrown in question. And it is thrown in question in terms no less than modernity's own.

Basic to modernity's self-conception and central to its mythic formulation, then, is a notion not of social subjects but of a Subject that is abstract and atomistic, general and universal, divorced from the contingencies of historicity as it is from the particularities of social and political relations and identities. This abstracted, universal Subject supposedly commanded only by the laws of Reason is guided accordingly by no more general principle than that of impartiality. Through law and its rational application and administration, this impartial and universal Subject purports to mediate the differences and tensions between particular social subjects in the domains of market and morality, polity and legality. This Modern self-governing Subject, philosophical and legal, is a site of power, a site for the legal production and administration of a "disciplined, self-responsible" agent. The modern law of progress is represented in and through the pro-

gressive rule of law, at once restraining and facilitative, antinomically dominating and liberating, commanding but creative, enabling through controlling not only the premodern Savage but also the savage desires within the modern subject. The myth of the Modern Subject underpinning but sustained by modern law's mythology licenses a Subject that is free because uncoerced by forces external to *him*self so long as *he* is rational and self-commanding—so long, that is, as *he* is ruled (and self-ruled) by rational law, by the commands of moral reason and moral law that are of his own making.

The myth of modern law, consequently, is a gendered and racialized myth explicitly tying power to knowledge, and knowledge to subject formation. Epistemologically embedded in the foundational narrative of the scientific and political projects, the myth of modern law articulates as it sustains the whitened and masculinized discourse of colonialism. European—or Eurocentered—cultural, political, economic, and legal assumptions are "universalized" as rationally ordained. This universalizing of more or less local value is threaded so finely into the fabric of Western rationality that it serves silently to license a series of unchallenged implications: The state of nature, central in its negative dialectic to the "justification" of the civil(ized) state and the colonial condition in the liberal philosophical tradition of "the West" (Hobbes, Locke, Rousseau), is identified as/with the "savage" state, the "primitive mind" of racialized social science. The "laws of nature" are promoted as open only to and thus savior of the whitened rational mind from the otherwise inevitable mark of natural necessity. Liberated from nature—from his own nature, to press Fitzpatrick's point—European Man is free to rule nature and the world. (Whitemale) Reason rules, OK? The question mark indicates the uncertainty, the insecurity, the mythology that accompanies, in order to whitewash, White Man's awful burden. Only law, Fitzpatrick may be read to suggest, may save him from the world—and from himself. But for law's success as savior to do so, what must be hidden from view is the fact that this law is of his own making, is His law, for to acknowledge that fact, to tolerate even its suggestion, would be to destroy the very grounds of its claims to universality. Myth furnishes the subterfuge, the visage, through which law's rule, its claim to universality, its empire can be sustained.

Fitzpatrick unfolds these hidden presuppositions and implications of modernity's prevailing self-conception. He sets up as objects of analysis and then interrogates the variety of antinomies of and about the law. And he shows how dominant jurisprudential, sociological, and sociolegal discourse sets about resolving these paradoxes in the (re)production of social formation and order through the mediation of modern myth. Key in the conceptual formation of this modern mythic schema is the notion of

progress. Progression, Fitzpatrick argues, bridges the epistemic rupture that Enlightenment thought rends between itself and its past, masking that break as epistemic continuity, as linear development. In the 19th century, the sciences (natural and human) were reconfigured through the imposed unity of their positivistic commitments in terms of the doctrine of evolution. The myth of progression assumes the naturalized content of the evolutionary. The "social evolution of the West" is mirrored by, as it is (re)produced through, law's myth of progression. Thus, this mythical evolutionary narrative ties the relative social decline in influence of family from "primitive" to premodern society to the accompanying erosion of habit. Replacement of the force of family by status in the sociopolitical culture of premodernity is identified in this progressive schema with and by the emergence of customary law. Similarly, the emergence in modernity of the influence of individualism and individual obligation is associated with the rise of contract administered through formal law in the centralized state.

Fitzpatrick properly links this "progressive" emergence of the empire of Western law, conceptually and historically, to the imperialism licensed and administered by Western law. The myth of modern law, as Fitzpatrick puts it, furnishes the standards against which some societies (and by implication some in Western societies) are deemed less modern, less advanced, less progressive precisely, than the authors, bearers, or discoverers of the law. Once externalized through virtually literal universalization, law's empire becomes the empire administered by law. (It is the silent—because unspoken and silenced—presumption of the colonial condition that perhaps resolves the seeming antinomy that marks Kant's own corpus. This is the apparent antimony between the universalizability criterion of Kant's categorical imperative and his deeply racialized commitment to the hierarchy of national characteristics that he articulates as an implication of his thesis on the beautiful and sublime.) Democracy's greatest gift to the savage Other, as Maggie Thatcher once put it, is the law. For the law is projected as at once the instrument and arbiter of civilization—and order. In establishing colonial rule and under its force, the "nativism" of local customary law was subjected to "natural justice," to the naturalism of the "law of humanity" (the moral law)—to the imposition, that is, of the imperial Law for the Native. The Native, qua Native, was not only by definition Other, but deviant. Via "supervision, direction and correction," the Native would have to be brought before and under the law—would have, that is, to be made subject to (by being rendered a Subject of) law's order.

However, modern law's necessary commitment to general principles, its commitments to abstract universal rules and to developing objective laws through universalization, is at once exclu-

sive of subjectivities, identities, and particularities. The law discursively represents itself, indeed, there is a sense in which it must—to meet law's own demands, as universally applicable, as treating (in Aristotle's terms) equals equally *and* (so) unequals unequally. To meet these discursive demands, the law must be exclusive, in other words, of people's very being, erasing history—both one's own and others'. So, when the law in its application and interpretation invokes history, the reading is likely to be very partial, the more so the more politicized the process becomes. The more universal law's imperative, the more forceful the requirement (discursively and by implication in practice) to silence the particularities of politically forged and forced identities. In its claim to universality and objectivity, then, the law effaces the being of legal agents, of principals and their principles. It effaces agency itself, and so veils different agents' pleasures and sufferings, which are often causally, if silently, linked. In commanding anonymously, the law hides those in command and issuing command, just as it denies the violence it may perpetrate upon those commanded.

Now, race necessarily politicizes the processes it brackets and colors, covering (up) by artificially filling in the anonymity that follows from modern law's demands of universality and universalization. Race, a fabrication of modernity, frames and imparts specificity to the polity, defining capacity for self-ownership and self-direction: It establishes who can be imported and who exported, who are immigrants and who indigenous, who may be property and who citizens. Among citizens, race defines who gets to vote and who does not, who is protected by the law and who is its object, who is employable and who is more or less permanently unemployable, who has access and privilege and who is (to be) marginalized.

Just as race artificially fills the anonymous silences prompted by modern law, so too does the modern nationalizing of law. *Nation* has both a conceptual and social history intersecting with that of *race*. The popular Enlightenment concern with national characteristics often explicitly identified national characterizations racially. Hume and Kant, representatives of moral and political theories grounded respectively in national tradition and rationalistically established "universals," best exemplify the slide from racially defined national characteristics to racist nationalisms. Similarly, the nationalist drives of the late 19th century, at once unifying and exclusionary, as well as their imperialist counterparts, commonly invoked the banner of race as a conceptual rallying cry; and legislation restricting immigration this century in Australia, Europe, and the United States—legislation imposed in the name of national self-consciousness—was and remains in each case explicitly or implicitly racialized. (Proposition 187 reiterates a long history of attempted or threatened whitened self-

encasement.) That this should have seemed so "natural" a conflation is attested to by the intersection of nation with native: Those properly of the nation are native to it, born and bred at its breast; Natives, by contrast, are those natural in racial kind—in history, culture, and geography (empirically or at least normatively) to foreign, hostile, dominated lands. The latter are, in this mythical manufacture, *naive*, simple, lacking the capacity for rational self-determination and so for the rule of modern law. They are, in short, to be kept in their place, politically or geographically, an undertaking *ironically* effected largely in and through the law: ironically, because the law administers this racial-national mediation of the very anonymity that law's universality itself is instrumental in promoting.

Fitzpatrick pushes this logic still further. Like race and indeed intersecting with it, the discourse of nation mediates as it (re)produces the anonymity prompted in good part by modern law. Nation (like race) furnishes the political, economic, cultural, and legal fora through and in the names of which population groups may be invented, interpreted, and imagined as communities or societies. Modern law assumes national identity; the laws of nature, to express it in Hobbesian terms, are transformed via the authority of the sovereign at once into the particularity of the law of the nation and universalized as the laws of nations. This particularizing of the (purportedly) universal in national law, in turn, becomes at once the universalizing of the particular by the generalizing of national law (the law of particular nations) into the "progressive" law of nations. Cutting across national boundaries, this racialized law (whitened by modern law's mythology, as Fitzpatrick puts it) represents, in Zygmunt Bauman's (1989:52) compelling phrase, "non-national nations." It is truly *inter*national, or better—to use Etienne Balibar's (1990:283) terms—"*supra*-national." At the same time, however, modern law magnifies particularity by administering both the boundaries and space of the nation, lending thereby specificity to the spirit of the nation and magnifying it into a "*super*-nationalism."

This administrative management of the national body is effected through, as it at once enables, law's application. National administration limits, as it is limited by, the force of law. Yet, law and administration, Fitzpatrick insists, promote the claims of each other to transcend their respective limits. The governmentality of law and order with which the history of liberalism is tied up is identical with that of judicial administration. Law intersects and is integrated with administration, not (as the dominant mythology suggests) at odds with it. The purported universality of law's rule is not to be contrasted with the delimiting and subjective power of administrative discretion. Law's rule, as represented by judicial review, and like administration's power, is confined in the Hobbesian sense by parameters socially determined.

The limits of both law and administration are established external to either, and the tensions that arise between them are resolved by a form of discretion taken to be representative of "natural justice" purportedly inherent in law's natural rule and of the fictive capacity of administrative power to restrict the cases subject to the rule of law. The science of administration, concludes Fitzpatrick, is at one with the force of law's reason. Their governmentality articulates not simply a set of externally imposed constraints upon power but a set of disciplinary norms fashioning the constitution of subjectivity and individuality. The formalism of liberal law's equality is rendered mythically consistent with the discretionary inequality of administration by deeming the latter to be "in the nature of things," inevitable because disciplinarily necessary, a law—it could be said—of nature.

II

In articulating the myths of modern law, then, Fitzpatrick has sought to enter, to get inside, to re-present the (govern)mentality—the mind, the logic—of modern law (Foucault 1991:87–104). Law is both imperious in its insistent governance of the order of things (natural and social, constitutive and administrative) and colonizing in its osmotic insinuation into and insistent control over the totality of modernity. The discipline of law begets discipline through law; the subject of law enables subjection to law; law's uniformity produces uniform normalization; the domination of law becomes domination through law. This, in its comprehensive articulation and denial, is what Fitzpatrick deems law's myth.

The force of Fitzpatrick's sweeping argument, however, is cause at once for concern, and for two related reasons. First, the mythic totalization Fitzpatrick identifies as enacted in the name of the law seems not just to limit resistance to the local—where else, after all, is resistance most effective?—but to disable any resistance at all. Change in the law appears on his argument to be driven inherently by and appropriated for law's own interests and those it serves. The totalizing logic Fitzpatrick ascribes to modern law implies that any resistant stance from within the law, one that invokes the law locally as a mode of resistant transformation or as representing disempowered and marginalized interests, is doomed to law's web. And the force of law's expansive and expansionary imperative leaves virtually no space beyond the law for advancing emancipatory projects. Second, having insinuated himself into law's logic to reveal its inner workings, Fitzpatrick's own text begins to resemble in its introspective totalization exactly what it is he identifies as confining about the law. *The Mythology of Modern Law* increasingly assumes the totalized quality of the mythic text of modern law. In seeking to map out the tightly

closed hermeneutic circle of modern law, Fitzpatrick's text comes close to mirroring law's own insularity. Fitzpatrick, I think, is deeply aware of these conjoint constraints. One way he responds to the dilemma is to write in part through others, to weave an intertextuality that nevertheless in its seamlessness reduces to the confinements of law's logic. The effect is not so much to advance a resistant solidarity as to reveal law's powers of accommodation.

The myth of modern law, then, hegemonically services the material interests of law's empire to produce a world for which there appears to be no outside. But that would make the critical commitments of *The Mythology of Modern Law* literally unthinkable. What sustains these critical commitments is precisely the ultimately mythic failure of law's megalomaniacal drive to hegemony, the gaps and cracks in law's force, the paradoxes and contradictions Fitzpatrick reveals in its logic. This suggests that there are not only limits *in* the law, silences it is unable to fill, but also limits *to* the law, a space beyond law where it is not agents or actors or bodies or minds but people—individuals and groups—who are able in small or larger ways to evade law's imperial and confining grasp.

Fitzpatrick, it seems to me, can respond to the totalizing nature of the law in either of at least two ways: He can seek to articulate a conception of law that is not quite so mythically totalizing, that is itself predicated on an openness to revision and transformation; and he can seek to develop a conception of social engagement outside—before or beyond—the confines of law. Fitzpatrick identifies the limits of the latter recourse, or the powerful constraints and delimitations of formalism, in his critical remarks concerning the mythical presumptions upon which the "popular justice" movement is silently encoded. Thus the forms of alternative dispute resolution invoked to represent popular justice outside of state regulation come to presuppose and instantiate formal regulative constraints and delimitations mirroring those of the State. Predicated upon idealized, romantic, indeed, utopian conceptions of individual and community, the notion of popular justice silently reinstates the distinction between public and private so central to liberal legality. Fitzpatrick concludes that the myth of law's rule, rather than being challenged, is sustained by the effectiveness, by the almost equally mythic "success," of popular justice. Popular justice, while assuming an oppositional identity, is not so much a mode of resistance as a complement to law's rule, delivering where the rule of law is of necessity silent. Nevertheless, a more anarchic oppositionality to law's power, while risking greater marginalization, at once throws in question both the justifiability and the comprehensiveness, the universality and the power, of the force of law.

This recalls the distinction I drew at the outset of my remarks between a critique of the law, of law's project, and a critical advancement of emancipatory interests through the law. Peter Fitzpatrick seems to embrace in full a critique of the law the implication of which is a vigorous and relentless resistance to the law. This, however, presupposes that there *is* a space, conceptually, epistemologically, and as a matter of political economy, before or beyond or outside the law capable of sustaining a persistent critical response to the law—a space at once political in its drive to render the private public. The possibility of this space entails the necessary limits of law's hegemony but perhaps holds open also the possibility of identifying when to resist through the law, by invoking it to emancipatory ends, and when to reject the law *tout court*. Resistance to the law accordingly might be total: a complete rejection, in the spirit of anarchism, of law's rule.[1] It might take the more partial form of reform, the limits of which are indicated by Peter Fitzpatrick's cutting critique of the modern myth of progress. But it might more modestly and perhaps "pragmatically" (in the Critical Race sense) commit itself to a course of redirection, to assuming law's terms so as to challenge the *given* terms of the law. It seems, then, and I think Peter Fitzpatrick would agree, that critiques of and through law are in the final analysis mutually implicated.

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[1] Cf. Goodway 1989, and especially the article by Alan Carter; and Nancy (1993).