



Derrida's territorial knowledge of justice

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Introduction

Peter Fitzpatrick's writings prove once and for all that it is possible for a law professor to write in beautiful English. His work also proves once and for all that the dominating tradition of Anglo-American legal philosophy and of law teaching has been barking up the wrong tree: namely, that the philosopher and professional law teachers can understand justice as nested in empty forms, better known as rules, doctrines, principles, policies, and other standards. The more rigorous our analysis or decomposition of the forms, we have believed, the more closely do we access the identity of laws. Justice has been assumed to be a matter of intellectually accessing such analysed forms. Fitzpatrick's articles and books embody an implicit critique of the analytic view of law and of justice. My entry point into this critique is his preoccupation with Jacques Derrida's theory of laws as universals and with Derrida's theory of justice as an inaccessible immediacy or presence in context-specific or concrete experienced events. Each event is experienced in an official's decision. Such a decision represents what Derrida, Fitzpatrick, and Hegel call 'individuality'.

Derrida's theory of law presents a conundrum. Derrida misses the possibility that law may exist by virtue of its content rather than its form. Derrida misses this possibility because, heavily influenced by Kant (in Derrida's theory of law), Derrida associates law with universals. This is so because Kant (and Derrida) are preoccupied with the identity of what counts as a law (*lois*) rather than with a law's legitimacy. A universal cannot exist unless it is legitimate, and it is legitimate, I claim, by virtue of its content. In his association of law with universals, Derrida presupposes that legal knowledge exists with reference to a territorial-like boundary. The forms are represented or signified by signs (signifiers) within a boundary of the ultimate form (the state, the nation, or humanity). This ultimate form as a universal, like the discrete rules or forms, lacks socially contingent content. A boundary separates knowable universals from the unknowable world on the exteriority of the boundary. The unknowable world is





1 constituted by concrete events experienced in context-specific circum-
2 stances. In his legal theory Derrida hones in upon the decision as the
3 experienced event. In a decision, one is present or immediate with the
4 event. Derrida considers such immediacy as justice. The immediacy,
5 however, can only be represented as a sign (sometimes called a signifier).
6 The sign, in turn, represents an empty signified or form, according to
7 Derrida. Because the immediacy remains a representation rather than a
8 presentation of the experienced event, laws as universals cannot be just.
9 The rupture between the inaccessible immediacy of a decision on the one
10 hand and the represented empty forms on the other is critical to Derrida's
11 theory of law.

12 I claim that this rupture permeates Derrida's writings about law because
13 Derrida possesses a territorial-like sense of legal knowledge. I shall argue
14 to this effect as follows. In the first section I shall explain the importance
15 of Fitzpatrick's exposure of the vacuity of the foundation of the system or
16 structure of universals. In the second section I shall flesh out two elements
17 of Derrida's legal theory: law as form and the *ipseity* or concrete event that
18 the form excludes from law. This takes me to the third section, where I
19 shall elaborate how Derrida's legal theory presupposes knowledge as terri-
20 torial. I shall argue in the final section that this very sense of territorial
21 knowledge prevents justice from accessing law and law from accessing
22 justice. I conclude with the hint of a very different sense of law, one that
23 draws from experiential knowledge in contradistinction to territorial
24 knowledge.

25 26 **The vacuous foundation of law**

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28 Permit me to turn to Fitzpatrick's work as my entry point into Derrida's
29 theory of law. When Fitzpatrick seeks the foundation of law in various con-
30 texts, including judgments in Canada and Australia, access to justice, and
31 post-colonial thought, he invariably exposes the foundation as nothing-
32 ness. A foundation must radically differ from the ordinary forms as laws. If
33 the foundation were an ordinary analysable unit or form, there would be
34 no finality in the trace of one unit to another in search of a foundation.
35 So, the foundation, being knowable and yet external to laws as forms, is a
36 mere form without particular content. As Fitzpatrick puts it, the founda-
37 tion is 'empty', 'vacuous', 'nothingness', 'beleaguered' (2002: 242; 2005:
38 9–13; 2008a). Relying heavily upon Derrida's 'Force of law' (1990), Fitz-
39 patrick emphasizes that the foundation has a mystical character, in that
40 language (the signifier/signified relation) cannot access it. This mysticism
41 colours the foundation despite the rationalist pretensions of the profes-
42 sional knowers and despite the rhetoric of the rule of law.

43 I have described the foundation as invisible because of its inaccessibility
44 to legal language.¹ This inaccessibility of the foundation has led, ironically,





to its construction by legal officials and philosophers. We officials and pedagogues have done so by decomposing concepts into their features or elements on faith that by doing so we would access laws and justice. We have ironically done so in the name of the foundation. Because of this self-generating character of the system of forms and concepts, and because of the need for an externality to the analysis of forms, the ultimate form is not decomposable into further units. The state fulfils this quest for a finality to the analysis of forms.

Because of the emptiness of the ultimate form of the system of legal units, legal philosophers end up concealing the vacuous foundation of law as they analyse theories about the discrete analysable units. Fitzpatrick offers several contexts where such concealment permeates judicial reasoning. In the first context he quotes Kant's oft-forgotten assertion (oft-forgotten even in contemporary readings about ethics and political philosophy) that it is treasonous to question the foundation of the modern legal order (Fitzpatrick 2003b: 436, quoting Kant 1797/1996: 95; see also Fitzpatrick 2006b: 167, 175, 183). In a second context he recalls how the universal truth embedded in law was relied upon by European states in the process of colonizing much of the globe (see, for example, Fitzpatrick 2002: 242). In a third context the impact of the vacuity of the foundation of the system of legal units upon Anglo-American analytical jurisprudence is exposed. Law has been associated with an autonomous system of rules or a coherent narrative structure, both of which are said to depart from the behaviour and the beliefs that a founding rule or a background structure of conceptions represent. Once we are left with the autonomous system of rules or principles, there remains a forgotten 'sub-standard, abnormal case containing within it the threat that the legal system will dissolve' (Hart 1994: 123; Hart's original 1961 edition quoted in Fitzpatrick 1992: 210). In a fourth context, to be discussed later in the chapter as 'being with', the foundation of law is sometimes associated with social bonding. This concern with social bonding as the legitimizing source of the system of rules is also forgotten once officials begin to analyse the chains of rules. Finally, Fitzpatrick turns to the impact of the vacuity of the foundation to international law. Given the vacuity of the state's legitimacy and given that the state is the primary legal person of international law, the legal official needs to address the mystical foundation of the state's domestic legal order before that official can sustain the existence of international law (Fitzpatrick 2003b).

Against the above contexts, law is self-positing and self-determined (Fitzpatrick 2004: 122). The structure of concepts dissolves into the power of state officials. The rule of law becomes a mere rhetorical device to sustain the power of lawyers and judges. The critical aspect of this is that because the concepts themselves are not accessible – always being deferred by the trace of one sign, which represents a signified concept to

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1 another representing sign – the power of officials is entangled with their
2 knowledge of legal language. Since professional law schools introduce
3 and protect that language, professional legal education is instrumental
4 in sustaining the power relations of society (see further Conklin 1993,
5 1998). And legal education does so in the name of the law and access to
6 justice. The consequence is that the foundation is actually constructed
7 by officials as they search for more rigorous lower-levelled forms or concepts
8 in the metaphysical objectivity of higher-ordered forms. The foundation
9 is effectively constructed inside, not outside, the structure of
10 forms as officials aspire to access legal objectivity.

11 This is the point where Fitzpatrick's work impacts upon the analytic
12 methodology of contemporary jurisprudence, legal teaching materials,
13 and scholarship about the law. What so many contemporary jurists
14 describe as the 'existence conditions' of the legal order – the social facts,
15 the law beyond law, the state of nature, the General Will, the People, the
16 *Grundnorm* – is a myth. In contemporary analytic parlance, concepts are
17 valid if they are reasons for action by officials of the state. The gist of Fitz-
18 patrick's originality might be framed in the language of analytical jurispru-
19 dence as follows. The 'existence conditions' of a legal order can be put to
20 the side as not binding reasons for action. Fitzpatrick insists that the philo-
21 sopher just cannot separate the particular rules of a legal order from the
22 existence conditions that the self-generating and self-defining *Recht*
23 excludes. Further, when one traces a reason for action to another reason
24 for action, one ultimately recognizes that the existence conditions of the
25 legal order are nested in the power relations of state officials. The conse-
26 quence is that legal forms, so much a part of contemporary legal educa-
27 tion in professional law schools, ultimately depend upon the self-defining
28 law itself. Again, the ultimate foundation of law is what Fitzpatrick
29 describes as 'vacuous', 'empty', and a 'layered irony'. The self-defining
30 system of rules and institutions is thereby violently imposed upon inhabit-
31 ants in the name of the rule of law and objectivity. Fitzpatrick draws from
32 Žižek's reading of Kant to the effect that the origins of the legitimate
33 order are 'lawless origins' that are cancelled by the historico-empirical cir-
34 cumstances that generate the legal order (Žižek 1991: 205). An explana-
35 tion of the origins of the legal order 'a priori puts us outside'. The myth
36 and mysticism of the origins remain a secret so long as contemporary legal
37 theorists, law teachers, and other officials colour their analyses as the rule
38 of law and objectivity. The secrecy is reinforced by disparaging rhetoric
39 directed towards anyone, whether inside or outside the chains of analysed
40 forms, who attempts to pierce the veil of the invisible foundation. Social
41 bonding among the non-expert knowers of legal forms remains an outside
42 possibility. The very existence of conditions of law – the 'social facts', 'the
43 People' and the like – only depends upon the officials of the territorial
44 state and the power relations internal to the state.





Contemporary Anglo-American legal philosophy, so much a part of and dependent upon the dominance of a state-centred legal order, misses law's inward self-determined and metaphysical construction of the foundation. The quest for the origin of laws in an external source, such as the social facts or a perfect coherent narrative, sustains legal philosophy in an air of naivety and denial. As Hart (1994) described from time to time, he was 'haunted' by the prospect that the existence conditions of the legal order were nested in a social bonding that the analysis of concepts could not access. Such conditions, he admitted, were unrecognized and unrecognizable because they were exterior to the self-conscious writing of the officials of the state. They were 'unstated', prior to the writing of officials. And yet, even that prospect of unstated unrecognized social behaviour remained excluded from legal philosophy. What mattered was power:

[O]nly officials might accept and use the system's criteria of validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.

(Hart 1994: 117)

But an inquiry beyond the positing and analysis of the elements of a form or concept of recognition or an intellectually coherent narrative in an effort to decompose concepts as reasons for action would amount to 'naïve' beliefs and 'emotion rather than truth', as Matthew Kramer puts it, 'folk theories', 'half-baked', 'intuition-mongering', and 'psychological facts', as Brian Leiter expresses it, or, as Hart asserts, a 'nightmare' that incidentally 'haunts' legal philosophy.²

The consequence of the vacuity of the foundation, then, is that power determines law's own legitimacy. Thrasymachus has won out over Socrates' inward voice of inquiry. Fitzpatrick (2006a) examines the ultimate power relations at the foundation of the modern legal order in several contexts. The most obvious one today is the imperial quest of the United States. Another is the failure of international lawyers to address the sovereign's mystical foundation, a mysticism that legitimizes the primary legal persons of international law (Fitzpatrick 2003b). Perhaps the most consistent context of his exposure of the vacuous foundation is his examination of the power of European states as they imposed their concepts upon Australian, African, and North American indigenous inhabitants (Fitzpatrick 1990, 1998, 2001b, 2002, 2008a; Mostert and Fitzpatrick 2004). The signs (or words if we use the latter metaphorically) represent such forms, and such sign/signified relations constitute a language. The language is violent. Raw power and violence, not the rule of law, explain the imposition of forms upon indigenous social life precisely because the origin of





1 the rule of law rests in vacuity. For Fitzpatrick, Derrida's theory of law
2 offers an important explanation as to why this is so.

3 Fitzpatrick's argument goes like this. When X resists Y, Y's integrity is
4 elevated at the very moment that Y is diminished and parasitic upon X
5 (2008b: xi). In order to maintain its determinacy, law, as form, must
6 *respond* to, as well as *resist*, the diminished and parasitic exteriority of the
7 structure of forms. The latter privileging of the supplemental alien-ness
8 poses an ironic twist. For, although law must resist the individual event,
9 law must also respond to the latter in order for law to be determinate. As a
10 consequence, law, to be law, requires a *relation* between the indeterminate
11 form on the one hand and the determinate particularity on the other. The
12 one cannot exist without the other, and yet the identity of each must
13 remain autonomous of the other. The indeterminacy of pre-legality is
14 'always' on the other side of the divide. And yet, law needs content – its
15 forms being universal – and this, in turn, requires that law *respond* to the
16 particularities of the indeterminate pre-legality. Pre-legality is indetermi-
17 nate because legal language, which represents analysed forms, cannot
18 access the non-cognitive determinate experiences. In order to be determi-
19 nate, law must 'extend beyond, exceed', or respond to what is determinate
20 in a judicial or legislative decision for the time being (ibid.: 440). This
21 responsive relation would lack the character of the 'violent word' or lan-
22 guage which is otherwise superimposed upon the concrete, context-
23 specific experiences. The universal forms are superimposed upon the
24 stranger as the voice of such experiences (Fitzpatrick 2001d: 145–6).

25 **Derrida's sense of law**

26 Now I shall take up the relation of universal forms to the individual pres-
27 ence of a particular experiential event, an event that Derrida claims is
28 inaccessible to the forms. This response of the forms to the experienced
29 event, described by Derrida as a decision, faces a formidable problem,
30 namely that so long as we presuppose what I shall call a territorial sense of
31 knowledge, instead of an experiential knowledge, there is an untranslata-
32 ble rupture between our legal knowledge of universals on the one hand
33 and the immediacy or presence of the identity of utterer and decision on
34 the other. This rupture between territorial knowledge and the outside and
35 pre-existing experiential world raises this prospect: law's response to its
36 antithetical other does not and cannot bring closure to the determinacy of
37 law. This is so because law's response occurs through the configurations of
38 signs with which officials and philosophers are familiar precisely because
39 they are situated in the legal space on the territorial side of the rupture.
40 The best that we can do is picture (or imagine) the identity of the stranger
41 on the other side of the territorial boundary, which defines the outer limit
42 of our knowledge of universals. The best that we can do is translate such
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an imagined identity into our own familiar language. Derrida especially emphasizes this inevitable need to translate the voice of the stranger into our own language. Again, Derrida understands language as the configuration of the interrelations of signifiers (see Derrida 1985). The consequence is that there is always an extra-ordinary or inaccessible remainder to legal language. Even the rupture between universals and the individuality of a decision cannot be reconciled within the paradigm of legal knowledge, which Derrida takes for granted. Let us gain a closer understanding of Derrida's theory of law in order to appreciate the presupposed rupture that contains law. First, what does Derrida signify by 'law'? Second, what does Derrida signify by 'individuality'?

Law as form

Derrida takes for granted that law is composed of a system of content-independent forms. It is important in this respect that although Derrida did write about Hegel's logic, Derrida takes Kant for his understanding of the identity of law.³ In this respect he is especially influenced by Kant's preoccupation with moral law as a conditional or categorical imperative or form (Derrida 1987: 32; 1990: 245, 275; 1992: 191). Conditional and the categorical imperatives intellectually transcend experience. Imperatives are universals because they are purged of social-cultural content. This is so because difference arises from the differentiation of the boundary of one form from the boundary of another. This preoccupation with the boundary of forms is reinforced by our own association of laws with doctrines, rules, principles, tests, and other forms. The consequence is that the interrelation of forms defers to a sameness. A form is important because of its utilitarian relation to another form. A form is stuck in acts of intellectualization. The differences are homogenous.

Put another way, what might be considered 'difference' is a difference among signified forms in a given disciplinary language. Hegel describes such differentiation as *Verstand*.⁴ Although one might literally translate *Verstand* as 'understanding', *Verstand* misses the embodiment of meaning. Gadamer (as did Husserl and Merleau-Ponty) associates understanding with such meaning. Objects can be meant as well as perceived. Meant objects draw from the experiential body so that understanding is lived. Understanding thereby defers to the *prejudicia* or prejudgements and forestructures of the experiential body. *Verstand* lacks such an inquiry into such prejudgements and forestructures of meaning because *Verstand* lifts Gadamer's 'understanding' above lived experiences by distinguishing between the boundaries of signified (and empty) forms. Since law, for Derrida, is composed of signified forms, the justice of legal space – the justice being concrete or immediate (or present) acts of meaning – is inaccessible to such forms. Legal space is highly reified vis-à-vis the *ipseity* of





1 decisions – that is, reified as configurations of signifiers. Signifiers can be
2 intellectually used by officials without ever having to address the experiential
3 content of forms. So too, the intellectual differentiations of forms miss
4 the immersion of the officials and of the forms in the *prejudicia* of a shared
5 ethos.⁵

6 The consequence of this sense of a system of laws (*lois*) as forms is that
7 the forms are content independent. If the forms represent social relations
8 as they are or as they ought to be, this is a mere happenstance. And yet the
9 forms are said to be universally applied to all social relationships that fall
10 inside the boundary of the forms. Inhabitants, as subjects, fall ‘under’ and
11 ‘before’ the forms. They are ‘equal’ under and before the boundary within
12 which the familiar knowledge of forms exists. Because the forms are
13 content independent, the forms possess some surpassing *reductive* ability to
14 contain responsiveness, to ensure that ‘the aleatory *margin* ... remains
15 *homogenous* with *calculation*, within *the order of the calculable*’ (Derrida 1989:
16 55, quoted in Fitzpatrick 2005: 4, emphasis added). The forms, as univer-
17 sals, assimilate all threatening forms ‘out there’ beyond their boundaries.

18 All language is thereby written in the sense of being signifying relations
19 – that is, in the sense that signifiers represent signified forms in terms of
20 other signifiers without ever accessing the forms (see further Conklin
21 1996). Language, in this context, is thereby public rather than privately
22 thought out inside one’s intentional consciousness. Derrida takes Edmund
23 Husserl’s theory of meaning to represent a theory of language as private.
24 Husserl (2001: esp. 560–2) claims that a subject may be present or immedi-
25 ate with intended or meant objects. Derrida claims that such an immedi-
26 acy occurs through speech. Speech itself, however, is nested in the
27 configurations of signifiers, according to Derrida. For Derrida, concepts
28 just do not exist independent of chains of signifiers – that is, of writing.
29 One signifier defers to another signifier, not to the signified forms (see
30 especially Derrida 1974). Indeed, we can never access universals except as
31 signifiers. We are entrapped in the prison-house of language or, as Derrida
32 put it, of *differance*. Joining this early focus of signification to his later works
33 on law, universals (*lois*) are the never-ending configurations of signifiers
34 (or names). Signifiers re-present universals (which we associate with doc-
35 trines and rules). We believe that laws are forms but we can never access
36 the forms through language – at least, as Derrida understands language as
37 configurations of signifiers. The inaccessibility of the forms signified by
38 configurations of signifiers leads us to conclude, according to Derrida,
39 that law (*droit*) can never be ‘*presently* [and] *fully* just’ (1990: 253, as quoted
40 in Fitzpatrick 2005: 4). Presence, after all, returns us to Husserl’s or
41 embodied experiential language, something which is not possible, Derrida
42 had claimed in his earlier works. As Fitzpatrick emphasizes, the system of
43 forms (*droit*), to be universal (i.e. as forms), ‘cannot be contained in its
44 determinate presence’ (ibid.: 6).





The consequence for Derrida's own understanding of laws with universal forms is that the forms are nested inside chains of signifiers, not in the constitution of meaning by bodily experiences. Power relations, as a result, determine who is recognized as a legal person. The 'private domain' of the foreigner is recognized as a legal person by the act of officials 'choosing, electing, filtering, selecting their invitees, visitors, or guests, those to whom they [officials of the state] decide to grant asylum, the right of visiting, or hospitality' (Derrida and Dufourmantelle 2000: 55). As Fitzpatrick quotes affirmatively from Derrida, law is 'a system of regulated and coded prescriptions' (Derrida 1990: 250, quoted in Fitzpatrick 2005: 4). And again, law is understood as an 'existing, coded rule' that 'can ... guarantee absolutely' the ultimate decision by a judge or other official' (Derrida 1990: 251, quoted in Fitzpatrick 2005: 4). The boundaries of forms are 'coded' by configurations of signifiers. So, legal analysis, in its effort to access legal objectivity, differentiates one signifier in terms of another signifier. The problem is that the discrete laws are never determinate in human experience, at least as long as we assume that laws are content-independent forms. As Derrida (1973: 129–60) emphasizes, the signifier represents a universal (i.e. a form or concept), which in turn is always *deferred* from being accessed. So, the indeterminacy of forms arises from the never-ending trace of one signifier to another. The re-reading of signifiers never accesses the signified forms nor the individual context-specific experiences of meaning-constituting subjects.

This deferring of an immediacy or presence (or embodiment of meaning) to doctrines, rules, tests, and other forms is especially apparent when one re-reads Derrida's reading of Kafka's parable of 'the man from the country'. A castle represents or signifies the Law as a system of forms. The castle does have a door to the exteriority. A sentry, representing the legal official, stands on guard at the door. The guard gazes outward towards the man from the country. The man from the country waits and waits in order to access the Castle through the door. If officials deeper in the Castle decided to admit the man from the country, such a decision would be determinate. Until that moment, the Castle merely represents universals about rights and duties. Because the universals make claims without ever being opened for the man to enter into them, the Law remains indeterminate. The lived experiences of the man are excluded from the Law. The social relations that the man has experienced prior to his lifetime waiting before the Castle represents how the excluded man and his excluded lived experiences were 'before' the Law. They are phenomenologically and analytically before the law. The justice with which we legal officials are familiar – the justice of legal forms – is misdirected because justice rests in the experiential world that Kafka so powerfully describes of K. The universals, which the Castle represents, are inaccessible from the experiential world because an untranslatable rupture is believed to separate the language of the man from





1 the country from the language of the guards of the Castle of Law. The language of the Castle cannot be just:

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4 To address oneself to the other in the language of the other is both
5 the condition of all possible justice, it seems, but, in all rigor, it
6 appears not only impossible (since I cannot speak the language of the
7 other except to the extent that I appropriate it and assimilate it
8 according to the law [*loi*] of an implicit third) but even excluded by
9 justice as law, inasmuch as justice as law seems to imply an element of
10 universality; the appeal to a third party who suspends the unilaterality
11 or singularity of the idioms.

12 (Derrida 1990: 245)

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14 Since justice, according to Derrida, dwells in what Husserl describes as
15 lived or experiential meaning, and because such meaning is excluded
16 from writing, justice remains untranslated and untranslatable by the Castle's officials. This is the secret of the Law. This secret is 'an extremely painful thing' (Kafka 1988: 437, as quoted in Fitzpatrick 2005: 13).

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18 Fitzpatrick exemplifies this painful consequence of law with reference
19 to the civilizing mission of the colonialist on the one hand and the indigenous experiences of the aboriginal peoples in North America and Australia on the other. So long as we remain in the illusion that the system (*droit*) of laws (*lois*) has a foundation, we will pursue the colonizing project. Fitzpatrick brilliantly exposes how Chief Justice Lamer of the Canadian Supreme Court defined aboriginality in a way that aboriginal rights could not be defined except within the Enlightenment (i.e. Kantian) philosophical precepts of 'general and universal' (*R. v. van der Peet* [1996] 2 Supreme Court Reports 507, paras 17–19). And Fitzpatrick (2002) explains how the Australian High Court held the concept of *terra nullius* invalid only by the Court's refusal to challenge the concept of colonial acquisition. By inference, indigenous rights are not rights unless they are guided by the universal sameness inside the form(al) legal language of the Europeanized state. Rights are thereby distinguished from each other without addressing the social relations presupposed in the content of the rights as forms. But it is not surprising that Derrida would consider the law, as *Recht*, to be indeterminate. By associating laws (*lois*) with empty forms, Derrida finds it easy to represent justice as the unrepresentable and unsignifiable immediacy of utterer with intended objects, an immediacy that Derrida associates with a decision.

41 **Individuality**

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43 Given that laws are understood as forms (or universals), we have to ask,
44 'What is the exteriority to the system of forms?' Derrida uses the terms





ipseity and ‘individuality’ to describe the exteriority to the forms. What does he signify by individuality?

One might respond to this question by returning to the embodiment of meaning by the subject. We have seen, however, that in Derrida’s theory of language, all there is is writing, and, as such, there is no subject except as constructed from the configurations of signs. The being is recognized as a legal person with rights and duties. The being is given a place with a name (Derrida and Dufourmantelle 2000: 35). That said, Derrida not infrequently describes the exteriority to law as a heterology of experienced events. Such events crystallize as a decision. There is no doubt, that is, that, in contrast to his early work (*Speech and Phenomena* and *Of Grammatology*), Derrida in later writings recognizes that the experiential meanings *do exist*, *but* his legal theory claims that they are excluded from the chains of signifiers which represent forms. Indeed, Derrida describes such experienced meanings as justice. Fitzpatrick too associates individuality or *ipseity* with ‘the determinate presence’ or immediacy upon which ‘the universals are dependent’ (2005: 4). The experiential meanings become an object of consciousness in a decision. These intended objects render the forms determinate. That is, the forms gain content. Yet the presence or immediacy of author with a decision is only a moment in experiential time. As such, it cannot be signified as a universal inside the border of *Recht* – so long as we understand *Recht* as empty universals or forms.

With this in mind, this may be what the guard of the doorway to the Castle of law meant when he ended the parable with the explanation that the doorway is only for the man from the country and no one else. If the man had been called to enter a doorway, some individual official would have had to make a determinate decision (Derrida and Dufourmantelle 2000: 61). The possibility arises that law would be other than form at that moment of decision (Fitzpatrick 2005: 6). The decision would determine the particular content of the form. Meaning-constituting acts of experiential knowledge would give body to such a determinacy. The determinate decision is lived. A decision about the forms depends upon this experiential event for its content. This being so, law – as a system of forms – needs to *respond* to the experienced exteriority in order to have determinacy. The experiential meanings of the man from the country incorporate that determinacy. Without the response of codified forms to the context-specific experienced event, we are left with a self-generating and self-defining system of signifiers which construct the deific state and then claim legitimacy by tracing the signifiers to the state as an empty form.

This is the point where Fitzpatrick departs from Derrida. If officials, like the guard of the Castle, can never cross the boundary of the system of forms, the determinate legal decision is an unaccessed remainder to the system of laws as forms. For Fitzpatrick, the remainder is constituted from

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1 the individuality of a decision. The individuality, being a determinate
 2 decision, concerns a social being-with others (Fitzpatrick 2005: 14–15). It
 3 involves *being* because the exterior pre-legality is unreified by the chains of
 4 legal signs. It involves being *with*, because the beings only exist with other
 5 strangers to the chains of signs. It seems that Fitzpatrick leaves this social
 6 relationship as a 'given' in his argument. He is thereby able to locate social
 7 relationships in the very justice that is experienced *before* the content-
 8 independent forms are analysed (that is, decomposed). But because the
 9 forms are so dependent upon the pre-legal social relationships that law
 10 craves to enclose in determinate decisions – if only for a fleeting experi-
 11 enced moment – law must respond to unreified social relationships,
 12 according to Fitzpatrick. This is difficult for Derrida, because Derrida pre-
 13 supposes a territorial-like boundary that excludes the individuality of a
 14 decision (or intuition) as a remainder to laws as a system of forms. Such a
 15 boundary stands in the way of Law and of its discrete laws becoming Good.
 16 The Good, as a remainder, thereby exceeds the Law and laws (Derrida
 17 1990: 257, quoted in Fitzpatrick 2005: 4).

18 **The territorial sense of legal knowledge**

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 21 I now wish to ask why it is that violence is considered part and parcel of
 22 Derrida's theory of law as a structure of forms. I wish to do so by claiming
 23 that the self-defining and self-sustaining system of forms presupposes a
 24 special sense of legal knowledge.

25 Legal knowledge (about *lois*) and knowledge about law (as *droit*) pre-
 26 suppose a territorial-like boundary that separates familiar concepts from
 27 an unrecognizable chaos. This territorial knowledge is presupposed about
 28 the analysis of laws as empty forms. Such knowledge is ironically pre-
 29 conceptual. It is a priori, or prior to the positivity of concepts, facts, and
 30 values. The territorial knowledge assumes a special sense of space and of
 31 time. Territorial (as opposed to experiential) space exists as the enclosure
 32 of a wild territory by a border. A physical thing exists if it can be located
 33 and measured inside the boundary of the space. A thing can be located by
 34 objective standards of longitude and latitude. The thing can be measured
 35 by a land survey. The thing can be perceived as a physical-chemical mass
 36 in territorial space. Even the actions of a human being can be perceived as
 37 if locatable on a measurable space within the boundary.

38 Now, it is a short step from such a sense of space as territorial or phys-
 39 ical to a likened knowledge as possessing a territorial-like character. A ter-
 40 ritorial boundary demarcates an inside and from an outside. As Derrida
 41 describes the territorial-like knowledge, which pre-censors the foreigner,
 42 'what is at issue ... is once again the trace of a frontier between the public
 43 and the non-public, between public or political space and individual or
 44 familial home' (Derrida and Dufourmantelle 2000: 49–51). The foreigner





on the other side of the frontier of legal knowledge is neither a subject nor an object. Derrida describes this *aporia* in this manner:

What is a foreigner? What would a foreign woman be?

It is not only the man or woman who keeps abroad of the outside of society, the family, the city. It is not the other, the completely other who is relegated to an absolute outside, savage, barbaric, precultural, and prejudicial, outside and prior to the family, the community, the city, the nation, or the State. The relationship to the foreigner is regulated by law, by the becoming-law of justice. This step would take us back to Greece, close to Oedipus and Socrates, if it wasn't already too late.

(ibid.: 73)

The frontier of legal knowledge dwells in a twilight between the familiar forms inside the boundary of territorial knowledge and the chaos that remains unrecognized beyond the boundary. Subjectivity is believed to be situated in such a chaos. Law must be and remains objective so long as officials analyse the boundaries of forms.

Permit me to suggest several contexts where the common law presupposes territorial knowledge. First, constitutional law is preoccupied with the study of the boundary of legal knowledge. So too, federalism law has accepted territorial knowledge as the key to constitutionality. When constitutional bills of rights address whether to recognize the foreigner, the bills of rights presuppose just such a boundary between the language of rights on the one hand and pre-conceptual experiential knowledge on the other. If legal officials picture the being as outside the boundary of constitutional rights, the being remains nameless and her or his or its voice silent.

Second, territorial knowledge is also manifested in the radical title of the state to territory. Property is private to the state because, as a legal claim, the form of property represents all territory which is possessed and controlled within a territorial boundary. So too, private property is recognized as legal knowledge because the property is believed to possess a territorial-like boundary, which mirrors the territorial boundary that physically demarcates myself from yourself. Third, even custom is juridified if it can be pinpointed as located on a territorial space and on the calendar date. If so pinpointed, custom is existent with a name (signifier). Both the custom and the culture with which it is identified must have a recognizable name. Interestingly, indigenous cultures began to take on names and on the distinct recognition of a 'tribe' after the Europeans pressed North American inhabitants further and further west, at least to the Rocky Mountains (Albers 1996: 90–118). Territorial knowledge recognizes the identity of beings. As Anne Dufourmantelle writes, '[T]his geography leads throughout the seminar to the revelation of the question

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1 'Where?' as being the question of man' (Derrida and Dufourmantelle
2 2000: 52). The point that needs emphasis is that time only begins when
3 the claim to knowledge inside a territorial boundary is established and
4 space only exists as a legal condition once there is such a claim to territo-
5 rial knowledge. Without such a boundary it is difficult for a legal official to
6 speak of knowing the stranger.

7 The consequence of this territorial sense of time and space is that one
8 knows something if that thing has a name which is recognized inside the
9 'known' boundary of knowledge. Knowledge is territorial. Officials recog-
10 nize concepts, including the rule (i.e. concept) of recognition, from inside
11 the territorial-like boundary of knowledge. The official's or philosopher's
12 personal opinion about the content of a concept matters little. Such a per-
13 sonal opinion is something external to the boundary of knowledge. What
14 matters is whether a form is recognizable inside the territorial-like bound-
15 ary of knowledge. A concept itself is also territorial-like *intra vires* or *ultra*
16 *vires*. And yet the boundary, being humanly constructed, presupposes a
17 rupture or gap between the inside of legal knowledge and outside the wall.
18 Territorial knowledge is prior to the possibility of the vacuous foundation
19 (*droit*) of the system of forms (*lois*) as a whole.

20 There is another consequence of the territorial sense of knowledge. If a
21 being inhabits a territory on the other side of territorial space, that being
22 is a foreigner, a stranger, an alien (Conklin 2006a). The being is unrecog-
23 nized and unrecognizable as a legal person with rights and duties. The
24 being is undefined by statutory or common law rights and duties. Territo-
25 rial knowledge needs this unrecognizable foreigner in order to maintain
26 the boundary and frontier of legal knowledge. For there to be an inside
27 and an outside, an *intra vires* and *ultra vires*, legal persons and aliens, cit-
28 izens and non-citizens, familiar rules and unfamiliar rules, law and justice
29 – for there to be such dichotomies, there has to be a territorial-like bound-
30 ary that severs the inside from the outside. This boundary is so steadfast
31 in our thinking that Derrida describes it and accepts it as 'the law of the law'
32 (Derrida and Dufourmantelle 2000: 65). Derrida ironically seems to
33 accept the boundary as an uncontrollable law – as a natural law, that is.

34 These two consequences of territorial knowledge are most obviously
35 highlighted in the doctrine of *terra nullius* or 'vacant land', for example.
36 When the Europeans began to settle in Australia, New Zealand, North and
37 South America, and Africa, they brought with them this territorial-like
38 sense of knowledge. Concepts such as the concepts of territorial control
39 and entitlement to property required a fixity in a structure of knowledge.
40 Since the indigenous societies were predominantly nomadic to the west of
41 present-day south-western Ontario and James Bay and east of the Rockies
42 (Albers 1996: 116), it is difficult to invariably describe an indigenous sense
43 of territoriality as associated with a geographical fixity on land. Exclusivity,
44 let alone title to property, hardly characterizes the sense of knowledge of





nomadic groups. And yet, without a sense of the fixed and exclusive possession of territory it is difficult to understand how indigenous nomadic societies possessed private property, individual rights, and autonomous nations. Along similar lines, if the indigenous community lacked a semblance of a centrally organized government whose single leader the European military officials could identify with as an equal, treaties with such a community tended to lack a binding character upon the European party to the treaty. Such a territorial view of legal knowledge confers title to territory. The state owns 'ultimate title' or 'underlying title', as property, of all territory that it possesses and symbolically controls. States even extend this knowledge claim, of recent days, to the territorial space of the Arctic Ocean and the moon. The entitlement to the territory includes all resources, land, plants, and animals on, under, and above the territory. The best that strangers, unrecognized inside the territorial-like structure of forms, can claim is an 'inchoate' *usufructory* right to property. Interestingly, the *usufructory* right is a term adopted by Roman lawyers to describe the rights of slaves to possess, but not own, things.⁶

If space can only exist if there is a boundary surrounding a territory, and if indigenous societies did not share such a sense of space or institutionalize their life-worlds in terms of territorial knowledge, the European states could consider the settled lands as *terra nullius* or vacant even though many millions inhabited the territory prior to the transmission of disease and killing by Europeans. With the belief that legal knowledge was constrained by territorial-like boundaries, legal reasoning could even generate what the foreigners looked like as 'social fact'. Legal reasoning could also generate the foundation of the territorial knowledge. This construction of foreigner and of foundation could be maintained as objective fact and as consistent with the rule of law because officials only claimed knowledge within the territorial-like boundary. The boundary of territorial knowledge required that officials imagine the foreigner and the foundation as the inversion of their self-image as officials in a legal order. This inversion underlies Fitzpatrick's comment that civilization imagined itself as 'the kind of society which no longer recognizes any alternative to itself' (2004: 122, quoting Bauman 2001: 99). The consequence is that violence threatens a legal order from within legal language, not from without (Fitzpatrick 2001a: 292). The rule by laws unknowingly disguises violence against the pre-conceptual experiential knowledge as well as against the strangers whom the laws will not recognize with a name. Valid laws are *intra* the *vires*. Invalid laws are *ultra vires*.

This territorial-like knowledge impacts upon contemporary legal reasoning. Like the Law (*droit*) as a whole, each discrete form has a boundary within which the form has a universal scope. The unknowable is pre-conceptual. What extends beyond the form's boundary is the unknowable world. Each discipline has its own territorial-like boundary. Legal reasoning

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1 excludes bodily intuitions, feelings, attitudes, and other 'subjectivist' phe-
2 nomena as extra-legal, political or moral. Being outside legal knowledge,
3 such extra-legal experiential phenomena are considered arbitrary and
4 chaotic for the legal professional. Such non-legal factors in legal reasoning
5 represent an absence of the possibility of law and of practical reason. We
6 lack names for such a pre-conceptual world. More correctly, we do confer a
7 name on the pre-conceptual world, and that is the name 'power'. Power is
8 juxtaposed with law; the pre-conceptual pre-legal world on the other side
9 of the threshold of knowledge is juxtaposed with the acts of intellectualiza-
10 tion inside the threshold. We officials must protect the possibility of a pre-
11 legal world. It is our secret: this has been the social function of the
12 professional North American law school. Officials can, at best, attempt to
13 escape from the prison-house of language by picturing the unreified world
14 on the other side of the frontier by a metaphor. Professional knowers of
15 the familiar signifying relations take the standpoint of the knowable struc-
16 ture, not of the heterology of the voices of strangers on the other side of
17 the border, when picturing the unreified world. The heterologous voices of
18 the stranger, as Derrida (and Merleau-Ponty) emphasize, are silent
19 (Derrida and Dufourmantelle 2000: 25–35). The analysis of forms as laws
20 forgets the language of the foreigner on the other side of the rupture
21 between the familiar and the unknowable, in advance. This pre-censorship
22 of the heterology of voices, as Hart hints in his legal theory and in his
23 private life, causes an 'indefinable anxiety' (Hart 1994: 87; Lacey 2004: 26).
24 The silent voice of the stranger exterior to the threshold of territorial
25 knowledge is 'that terrible thing which opens language to its own beyond'
26 (Derrida 1985: 76).

27 And so, to take one example, and only as an example, international law
28 presupposes territorial knowledge as a legal space that pre-exists the lawyer
29 and legal critic. The boundary that makes this space possible legitimates
30 the space as well as the rules, doctrines, and other forms, such as the state,
31 which are locatable inside the boundary of legal space as knowable things.
32 This territorial boundary of legal and moral knowledge remains mani-
33 fested in the international law doctrine of *domaine réserve* whereby the ter-
34 ritorial state alone has legitimacy to decide who is a citizen, who may enter
35 its territorial borders, and whom it may expel from its borders. Unless cat-
36 egorized within the boundary of legal knowledge, a being is excluded
37 from legal entitlement of certain rights and duties. One is an 'alien'. This
38 is even so in many judicial decisions if one is habitually resident in the ter-
39 ritory of the state for a long period of time. Indeed, the state officials
40 enclose legal space within a structure of concepts such as the concept of
41 property. This prior legitimizing territorial-like boundary was taken for
42 granted in the early modern view of international law: international law
43 existed, according to Fitzpatrick, 'from an already-encompassing scheme
44 of things within which the nations found their existence' (2008a: 279).





This already-existing scheme was attributed to natural law, in the early modern period. Fitzpatrick (ibid.: 289) rightly quotes from Zygmunt Bauman (1989: 53) to describe the more recent colonial world as ‘fully and exhaustively divided into national domains ... [with] no space left for internationalism’. This pre-existing division of the globe into legal spaces whose territorial-like boundaries set the limit to legal knowledge continues to the present day. Territorial knowledge prevents any transcendent commonality between the inside and the exteriority. Boundaries have separated legal persons (and therefore legal knowledge) throughout the globe. The boundaries render legal knowledge possible. And human beings invariably fail to be recognized as legal persons inside and outside the territorial boundary of many states.

Aside from the legal recognition of foreigners, territorial knowledge provides the background to our usual sense of freedom as negative. John Stuart Mill recognized this point in the context of his social philosophy as well as in his international legal theory. A boundary protected the territorial-like ‘inner sphere of life’ of an individual (Mill 1848/1970: 306). Inside the boundary the individual was free to choose and to act unless the individual caused harm by crossing the boundary of familiarity to the incomprehensible world of foreigners. At that point, one’s acts were ‘other-regarding’ and, therefore, open to social scrutiny of the harm caused to other beings (Mill 1859/1962: 129). Mill (1984: 111–24) extended this image of territorial knowledge to the interrelations of the territorial state.

My point for raising this example of territorial knowledge in international law is to emphasize how territorial knowledge reinforces the disguised violence of discrete forms as well as of the ultimate foundation of the forms. The universalist claim of the ultimate foundation of a secular legal order – the state – absorbed the universalism of the medieval Christendom (see especially Fitzpatrick 2006b). Legal philosophers from Bodin to Hart have acknowledged the need both to ground law in something external to knowable legal rules (the state of nature, the general will, the People, social facts) and, at the same time, to describe the system of rules as ‘autonomous, enclosed in itself, coherent in itself, and, in a sense above all, self-generating’ (Fitzpatrick 2009: 5).

To this end, the rule of law (the rule by law) is an all-or-nothing matter: either self-contained forms or, alternatively, externalized unknowable chaos. In either case, power relations determine the outcome of disputes. Law is juxtaposed to power and power to law. If I am right that territorial knowledge is presupposed in the argument that the foundation of law (*droit*) and the forms (*lois*) of law are vacuous, then violence is part and parcel of the rule by laws – so long, that is, as we retain territoriality as the paradigm of knowledge.

And so, the best that we can do within the boundary of territorial knowledge is to *imagine* the strangeness on the other side of the boundary of

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1 familiar concepts. Knowledge of the stranger is a territorial knowledge. The
2 stranger is pictured. And the picture offers a typified form rather than a
3 crossing of the form's boundary to the concrete experienced events of a
4 concrete context-specific being, to the particularity of a decision by an official her- or himself. This ontic character of legal reasoning about strangers
5 is necessary once we accept that knowledge exists within a territorial-like
6 boundary. Anything that does not come within the universal has to be
7 'utterly antithetical' or of a 'totally different existence' (Fitzpatrick 2003c:
8 11). One has to *picture* or *imagine* the totally different existence that the self-
9 defining law has failed to enclose. The picture re-presents the stranger in
10 terms that are familiar to officials of the state. One cannot know the non-
11 form, this being the individuality of an experienced event by the stranger or
12 even by the official. The interrelated system of forms, better known as
13 primary and secondary rules, without a picture of the stranger outside the
14 boundary of the system, cannot be known. One cannot know the stranger's
15 language except through our own configurations of signifier and form
16 inside the make-believe wall of territorial knowledge. Nor can one know the
17 rule of law, as a form, without picturing its opposite: rational chaos. Lawyers
18 and judges have to imagine what it would be like without private property,
19 the association of morality with legal rights, the juridification of lived experiences,
20 a secular state, and centralized institutions. Thus, the radical
21 stranger, as antithetical to law, is an optic product because the officials 'per-
22 ceive' the stranger as inverted to their own self-image as professional
23 knowers of forms. Early common law judgements and authorities (e.g.
24 Blackstone, Adam Smith), contemporary judges (Brennan and Lamer), and
25 legal philosophers (John Austin and Hart) share such an optic vision of the
26 stranger. They are 'undeveloped' or 'primitive'. So, given the theological
27 origin of law in a secularized ideology and given the self-defined universal-
28 ism of a form, anything outside the boundary of the form has to be
29 included. The universalist aspiration of the form is undermined if the exterior
30 is not included. What is not included within the boundary of knowledge
31 remains alien to the system of forms. The outside offers a challenge for
32 assimilation or conquest. The consequence is that laws are invariably violent
33 against groups and individuals who do not share the content of the forms.
34

35 The self-generating and self-regulative legal forms require that law must
36 resist the very possibility of something or someone radically strange to the
37 forms (see Fitzpatrick 2003a: 219–21; 2003b: 438–46; 2003c: 10–16; 2008a:
38 181–6). Forms enclose everything, and yet can never fully enclose every-
39 thing. The remainder resists the forms. The latter remainder resists the
40 forms. Fitzpatrick explains the necessary resistance as follows:

41
42 If it [law] were not coherent but contradictory, something else could
43 resolve the contradiction. If it were not closed but open, then some-
44 thing 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 of self-originating and self-regulating.

(2003b: 432)

Accordingly, law must either resist or conquer the ‘utterly antithetical’ chaos and indeterminacy on the other side of law (Fitzpatrick 2003c: 11).⁷

And so, here, we find a paradox. On the one hand, law must *resist* the radical strangeness of individuality in order to sustain its universality. On the other hand, law must *respond* to this radically antithetical strangeness for law to be determinate in content. In the absence of such a response there remains something unrecognized ‘out there’, far beyond the boundary of the universal legal forms. But this remainder contradicts and undermines the very identity of law as empty forms. The radical strangeness to forms is, drawing from well-known Kafka’s parable, *before* the law – ‘before’ because particular experiences, such as K’s, are, as I read Kafka, unreified by the territorial knowledge of the decisions of professional knowers.

The territorial knowledge of justice

Now, once we entertain that forms attempt to assimilate yet forms need the exteriorized justice (as the heterology of meant or embodied objects) in order to be determinate, we must ask whether Derrida’s theory of law is well taken. In order to respond to this issue, let us gain a better idea of what is the justice that Derrida considers external to territorial knowledge. To this end, Fitzpatrick offers four contexts.

First, the rule by law conceals the violence that the legal structure perpetuates against infinite individualities that Derrida has associated with justice. Second, so long as professional knowers believe in the deific foundation, the legal structure cannot possibly represent or manifest a social bonding (Fitzpatrick 2001c: 6; 2005: 14). After all, the legal structure is constituted from empty universals and the determinate decision is an individuated decision. There might be ‘Being with’, as Heidegger and Ben-Dor (Ben-Dor 2007) claim, but such a Being is inexpressible and inaccessible if we are limited to our ontic picture of the Being on the other side of the territorial boundary between law and the stranger. Such an idealized ‘Being-with’, however, is hardly what Fitzpatrick has in mind when he uses the term ‘being with’ as the remainder of law. Third, forms, as universals, lack an incorporation of the pre-conceptual objects, which the third (the judge) means (in Husserl’s sense of meant objects in his *Logical Investigations*).⁸ This absence of meant objects also characterizes the languages of beings who lack legal recognition. Although the Greeks used the term





1 *nomos* to represent the drawing of a territorial boundary in the sand, *nomos*
 2 also represented the emotions and beliefs experienced by a group (Fitz-
 3 patrick 2001c: 211–12, 221). In a fourth context, Kafka's parable of the
 4 man from the country raises the prospect of the individuality of the one's
 5 experiences and the inability of the guard to the castle of law to allow the
 6 man to enter the universals of law through the doorway especially made
 7 for him (see Derrida 1992: 191, discussed in Fitzpatrick 2005: 9). Further,
 8 as I have already observed of H. L. A. Hart (1994: 87), a dread overcomes
 9 the jurist and philosopher who faces the prospect that concepts do not
 10 control decisions (see also Lacey 2004). Today, philosophers describe this
 11 dread of individuality as idiosyncratic, subjective, arbitrary, and the like.

12 Now, what is interesting is that for Derrida, justice is the very presence
 13 or immediacy, which in his earlier works he had argued was inaccessible to
 14 language (Derrida 1973). For Derrida, forms lack an immediate bonding
 15 or presence of the individual with the forms (see especially Fitzpatrick
 16 2005: 6). Yet Husserl had claimed that just such a bonding of utterer with
 17 signifiers characterizes acts of embodied meaning. The bonding is mani-
 18 fested in an intuition. This intuition characterizes a decision. Because
 19 experience, expressed as meaning rather than as signification (the signifier/
 20 signified relation), determines a decision, law, as signified forms, excludes
 21 the 'distinctiveness' of 'the singularity of lived experience' (Fitzpatrick
 22 2009). This excluded, yet necessary, determinacy ironically begs that we
 23 study the role of phenomenology in *le droit* as well as in *des lois*. We cannot
 24 know law without knowing the experiential pre-conceptual world that ter-
 25 ritorial knowledge has excluded as unknowable. Fitzpatrick has a different
 26 name for this phenomenology: the 'sociologic' or 'meta-ethics' (2003b:
 27 444).⁹ Territorial knowledge has so far presupposed a rupture between the
 28 forms of territorial knowledge and the experiential meanings best mani-
 29 fested in intuition or a decision. The question I raise is whether there is
 30 another sense of legal knowledge, one that does not require a leap from
 31 *Verstand* to phenomena or from phenomena to *Verstand*. After all, as von
 32 Uexküll urged, 'the secret of the world is to be sought not behind objects
 33 [such as indeterminate forms], but behind subjects' (1926: 29). Such
 34 subjects embody determinate meant objects.

35 My point bears repeating. As legal officials we tend to recognize the
 36 stranger by assimilating the stranger into the metaphysical boundaries of
 37 concepts, the concepts being rights, duties, and rules. This act of juridifi-
 38 cation leaves the language of the stranger unassimilated. The sociability of
 39 the stranger remains uncodified. I have elaborated the complexity of this
 40 uncodified sociability elsewhere (Conklin 1998: 222–48).¹⁰ This social
 41 bonding is experienced as immediacy without the intervention of concep-
 42 ts. A determinate decision cannot represent what is not enclosed
 43 within its concepts. Accordingly, sociability characterizes the presence of
 44 unreified beings that the coded rules, representing forms, do not and





cannot access inside the boundary of territorial knowledge. Legality depends upon this sociability because, contrary to the whole thrust of contemporary analytical jurisprudence that concepts can be and are reasons for action, ‘in law’ “no existing, coded rule can or ought to guarantee absolutely” in advance [of] the outcome of any decision’ (Derrida 1990: 251, quoted in Fitzpatrick 2009: 17). That Derrida even acknowledges presence or immediacy as important for an understanding of law is interesting, given his claim that just such a presence lies at the core to the philosophy of metaphysics. One needs to be mindful of Derrida’s critique of presence throughout his works about language. The unrepresented presence of sociability is really ‘a law of originary sociability, prior to all *determined* law, *qua* natural law or positive law, but not prior to law *in general*’ (Derrida 1997: 231, quoted in Fitzpatrick 2005: 7, emphasis in original). The ‘law in general’, of course, is composed of the empty universals. Of course, once the foundation is exposed as vacuous, we are left with the social belonging that is other than transcendent, content-independent forms. Derrida understands justice as otherwise than content-independent forms. Justice, for Derrida, is excised from the metaphysics of forms (Fitzpatrick 2005: 6).

Fitzpatrick makes an analytic argument as to why law must respond to justice in Derrida’s sense of justice. First, Fitzpatrick restates Nancy’s point that an excluded singularity cannot be *with* another singularity without the pre-existence of both the included and excluded singularities. An ontological community thereby exists in a far deeper sense than ‘man as a social being’ (Nancy 1991: 28).¹¹ Next, Fitzpatrick draws from Davidson, who explains that different entities can only be distinct and yet have a relation with each other ‘if there is a common coordinate system on which to plot them’ (Davidson 1985: 130, quoted in Fitzpatrick 2008a: 289). Fitzpatrick reverses this idea by suggesting that if different entities are things-in-themselves and yet are being-with each other, then the only commonality possible is external to sameness. Thus, a community ‘as a continue being-with cannot be contained within any existent realization of it ... it must ever extend receptively beyond present existence, otherwise it will not be able to continue “in being”’ (ibid.: 289). So, law forever responds to the excluded ‘being-with’ that remains unrealized in empty universals at any one determinate moment. A law, considered an empty form, depends upon what is excluded from it for its determinate content. For example, both the universal and general laws of the colonial states and the universal *ius gentium* of international law are empty of content by virtue of their claim to universality. And yet they are dependent upon the absent infinite individualities of aboriginal peoples and of the particular *ethé* of nations for their content. This being so, ‘this vertiginous alternation’ between the (posited formal) law on the one hand and then its determinate response to the ‘existently singular’ of ‘being-with’ on the other is the ‘pointed place for [justice as] access’ (Fitzpatrick 2005: 14).

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1 This argument holds only so long as we share Derrida's sense of laws as
 2 empty forms, however. Given the universal as a metaphysical construct,
 3 given the emptiness of such a universal, and given that the universal is sig-
 4 nified in writing, these three conditions necessitate that singularity be
 5 excluded upon the positing of the legal decision. Justice is thereby derived
 6 from the exteriority on the other side of the territorial-like boundary of
 7 law. But such formalist law presupposes the territorial sense of knowledge.
 8 What is recognized as a universal is signified *inside* the territorial boundary
 9 of the familiar. The walled construction is signified in writing vis-à-vis
 10 speech. Such a view of legal knowledge reinforces the territorial sense of
 11 law and, accordingly, of justice. What remains unrecognized is excluded as
 12 non-law. The experiential body of the third is also excluded. But if lived
 13 experiences remain untouched by legal forms, does not this raise the need
 14 to reconsider the identity of laws as discrete, content-independent univer-
 15 sals? Is not experiential knowledge important in understanding 'what is a
 16 determinate law'? And if this is so, is there some sense of law otherwise
 17 than universal forms?

18 Regrettably, space (territorial space) prevents me from elaborating a
 19 theory of law as social content (see Conklin 2008). Derrida, it bears
 20 reminding, relies heavily upon Kant's moral and legal works for Derrida's
 21 own understanding of the identity of law. For Kant, again, a universal tran-
 22 scends social phenomena by virtue of its emptiness of social-cultural
 23 content. A universal, however, is a norm whose content is shared in an
 24 ethos. The function of the decision-maker is to identify the presupposed
 25 reciprocal social relations in the content of a form and then to address
 26 whether those reciprocal relations are coherent with the said relations in
 27 the ethos of which formal laws are only one element (see Conklin 2008:
 28 83–112, 156–87). Hegel argues, rightly, that the critical issue is not 'what is
 29 law?' but 'what identified form is legitimate?' A determinate decision does
 30 not exist as a legally binding decision unless the meant, as opposed to sig-
 31 nified, objects of its content manifests a reciprocal recognition of beings.
 32 This view of the legitimacy of law undermines Derrida's legal formalism.
 33 More, this view of the legitimacy of Law and of laws explains on my terms
 34 (rather than Fitzpatrick's) why Law and laws must respond to justice as
 35 Derrida (and Fitzpatrick) understand justice.

36 Discrete determinate decisions (including Derrida's concern for deter-
 37 minacy in a decision) cannot exist without such a determinate decision
 38 being legitimate. And the legitimacy of a law, in turn, depends upon the
 39 reciprocal recognition of individuals as presupposed in the content of a
 40 discrete form. Laws do not exist, that is, without the very content that Kant
 41 excludes from the universal form of *das Recht* and that Derrida believes
 42 only arrives on the scene in the decidability of an official's reasoning about
 43 empty forms. If Hegel's understanding of discrete laws is compelling, then
 44 the antithetical chaos, savagery, and feminine – the locus of experiential



time and space – is not dependent upon the universal form of the foundation such as the state or humanism. Rather, determinate laws are nested in the experiential and shared meanings of a pre-legality. This pre-legality has heretofore been excluded from ‘the law’ and from the study of law in the analytic tradition. This is 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 fulfilment of meanings. The exposure of such a secret, though, begs that one inquire into the legitimacy of universals. If inquiry proceeds behind such forms to the subject’s constitution and fulfilment of embodied meaning, it may be that such meaning provides the determinacy that has heretofore been excluded from law.

Once we reconsider Derrida’s understanding of law and of laws as empty forms, a whole series of issues is begged. Most importantly, ‘does the judge as “the third” address justice, as lived experiences, when the third makes a determinate decision?’ And if so, ‘are determinate decisions rendered with reference to standards that are not posited but rather are constituted from the intentional acts of the third (that is, of the lived acts of meaning according to Husserl)?’ A phenomenology of the pre-legal world undermines Derrida’s theory of law. As a consequence, the phenomenology of the pre-legal world is the call for justice.

The contemporary professional knower of ‘legal’ signs has been satisfied with the positing of social facts or with the justification of forms nested in posited beliefs and values. Until the rich writings of Fitzpatrick are recognized, jurists and philosophers will continue to bury their heads in the sand and to close their eyes as if blind to the vacuity of the foundation of a legal structure. The problem is especially critical because of the risk that we forget that we have even forgotten the vacuity of the foundation of a modern legal order and thereby the excision of the pre-legality from legal recognition. If one forgets an experience, one can remember it (sometimes with the aid of a therapist). But if one forgets that one ever forgot the experience, one can never remember it. We have claimed to be lawyers and legal philosophers who know how to imagine the outside but we do not know what we have been talking about. We have been content with the decomposition of concepts as signified by the analytic methodology. And yet, ‘There is still here a primary assertion of the bounded to which a ranging beyond remains tethered. There has to be yet more. Nomos cannot be positioned only in the bounded but must somehow extend intrinsically to an “outside”’ (Fitzpatrick 2001c: 221). The outside is inside – that is, the officials and philosophers of the state themselves posit who is outside, a foreigner, to a legal order, and the outside is derived from the inside of territorial knowledge.

A phenomenology of the pre-legal world has been introduced elsewhere (Conklin 1998, 2006a, b, 2008). What I need to emphasize at this

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1 point is that experiential knowledge raises the prospect that the identity of
 2 law radically differs from the empty forms with which Derrida derives his
 3 understanding of laws. For just as lived meanings embody the stranger's,
 4 as K's, individuality upon which legal forms depend, so too the profes-
 5 sional knower incorporates meant or experienced objects that determine
 6 one's decisions. Such meant objects radically differ from the posited deter-
 7 minate standards that officials and legal philosophers have heretofore
 8 taken for granted as objectivity. Such determinate standards are meant.
 9 And meant objects are shared in the collective memories of an ethos.
 10 Meant objects are not the same as perceived or posited objects. Meant
 11 objects are concealed inside the forms that Derrida takes for granted as
 12 the essence of law. Such meant objects draw from bodily experiences
 13 rather than from the objectivity of the signifier/form relations with which
 14 Derrida identifies *le droit* and *les lois*.

15 The issue is whether embodied meanings in an ethos play a role in the
 16 identity of law and of laws. Are the objects of experiential knowledge
 17 shared in such a deep and self-conscious way that one can speak about
 18 social bonding and a social ethos as integral parts of laws? And if a form's
 19 content is determinate – that is, if the phenomenology of meaning consti-
 20 tutes determinate forms – does sociability still dwell exterior to the law?
 21 Justice is access, just as Fitzpatrick claimed. But the access is directed
 22 towards the intentional acts of the official, just as access also addresses the
 23 intentional acts of non-officials. Shared intentional meanings constitute
 24 the social bonding that legitimizes the content of determinate decisions.
 25 Derrida's sense of law sets out such bonding as somehow another law that
 26 differs from the Kantian empty universals. But such formalism is hardly
 27 recognizable as a system of laws precisely because forms are not legal units
 28 if their content lacks legitimacy and if legitimacy addresses the reciprocal
 29 relations of individuals in an ethos presupposed by the content of a form's
 30 boundaries. Territorial knowledge fails to address such a possibility
 31 because territorial knowledge posits a boundary between the inside and
 32 outside, formalism and social-cultural ethos, universal and individuality,
 33 law and justice. Without an inquiry into the content of the inside – of the
 34 forms and universals – the territorial-like boundary misdirects what is law
 35 and, therefore, of law's call for justice.

Notes

1 I explain this point in more detail in Conklin (2001: 37–55).

2 See, for example, Kramer (2007: 16, 75) and Leiter (2007: 55, 101, 133, 258).
 For Hart's view, see Hart (1977: 969). According to Hart, the pre-legal experi-
 ence of social bonding 'haunts much legal thought' (1994: 87) as if it were 'a
 chain binding those who have obligations so that they are not free to do what
 they want'. Hart acknowledged that pre-theoretical differences might well have
 explained why Hart and Fuller saw the world so differently: 'I am haunted by





- the fear that our starting-points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work' (1983: 343). Nicola Lacey (2004) describes how Hart dreaded the intervention of experience into rationality in his day-to-day life.
- 3 On this point, see, for example, Derrida (1990: 233, 245, 254, 275; 1992: 191, 194; 1994: 28, 190; 2002: 3–18) and Derrida and Dufourmantelle (2000: 69–73, 147–51). Fitzpatrick incorporates the problematic as Kant's in many of his writings (see, for example, Fitzpatrick 2005: 11).
 - 4 This notion is generally explained in Conklin (2008: 95–9).
 - 5 This is explained in more detail in Conklin (2008: 99–112, 162–87).
 - 6 Although the slave could use the *peculium* as a source of capital income and, over time, could amass sufficient funds, the slave could not own property (see Borkowski and du Plessis 2005: 96–7).
 - 7 Here, the resistance is not *to* law nor *against* law but *of* law. Modern law must *resist* its antithetical alien, the experience of individuality.
 - 8 A meant object is generated from the act of meaning of the individual's experiential body. This contrasts with an object that is posited by a source external to such an act of meaning. Edmund Husserl explains this distinction in his *Logical Investigations* (1970), and the distinction is elaborated in Conklin (1998: 30, 103, 207).
 - 9 The possibility of understanding law as such ethicality in the content of legal forms is addressed in further detail in Conklin (2008: 169–87).
 - 10 This sociability arises because an individual, by her- or himself, does not exist unless she or he relates to other beings, according to Fitzpatrick (2006b: 82).
 - 11 Fitzpatrick cites Nancy's analysis on several occasions.

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