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TOTEMS

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A suitable touch of the recondite to begin: in prefacing a recent edition of his *Empire of Honour: The Art of Government in the Roman World*, J. E. Lendon noted that the book's 'several critics were fairly evenly divided between those who found the argument preposterous and those who found it so obviously true that it did not need saying. The author is delighted, therefore, to refer the former to the reviews of the latter, and the latter to the former' (Lendon 2001: v). That would deal adequately with most reviews so far of *Modernism and the Grounds of Law* (Fitzpatrick 2001). It would however be ungracious and, even worse, impolitic not to be a little more nuanced than this about the beautiful and elegant reviews offered by Goodrich and by Norrie (Goodrich 2003; Norrie 2003). Yet insofar as Norrie would find me too wild and Goodrich would find me not wild enough, to refer one to the other is an obvious temptation. In succumbing to it, I will have to drain away the element of premature triumph because I want the alternation not only to be settled but also to remain unsettled. More pointedly, it is in the necessity yet impossibility of such settlement that law is iteratively impelled into existence. That is a thought provoked by the reviews and, by way of engaging with them, it is a thought I will now elaborate on, pretending it was all along the gist of the book.

But how to do this at all adequately? Brevity is at least advisable in responding to reviews. To protest too much is tiresome for all involved and deservedly self-defeating. Yet these two reviews are so intense, refined and diverse that they do call for a response that is carefully attuned and extensive. An advisable brevity has, however, been made imperative by gentle editorial direction. What I will try to do, then, is to focus a great many things through what seem to be my two more egregious sins of omission: the disregard of the feminine and of law's constituent dependence on the social. With so much having to be so severely accommodated, succinctness may come across as sharpness, but the idea behind this little piece is the same as that which Goodrich and others have generously discerned in the book: an avid openness, the continuance of non-closure.

As a prelude, I will condense the notion of law argued for in the book, that notion which others find either obvious or preposterous. It concerns the settlement in terms of a normative continuity of the existential divide between a determinate positioning and a responding to what is beyond position. Obviously and preposterously, these are different things yet also the same, since there can be neither enduring position without responsiveness to what is always beyond it, nor effective responsiveness without a position from which to respond. In their separation yet inexorable combining, these two dimensions could be taken as the horizon of law, as a moving horizon – the horizon both as a condition and quality of law's contained being, and the horizon as opening onto all that lies beyond this being. Law's position within that horizon cannot be at all irenically set. The assertion of determinate position has always to be made in relation to the infinitely responsive, and it was this responsive dimension of law

which the book was most concerned to advance. In so doing, it was, of course, setting itself against the epochal elevation of occidental law's determinate dimension over the responsive. That elevation involved a forgetting of the once-revolutionary dimension of modern law, its being unsettling of any fixed rule. Instead occidental law becomes oriented towards its dimension of determinate settlement in an acquisitive, even imperial mode. But that was not enough to secure a secular certainty and the monumental strategy containing the force of law in modernity has been its instrumental subordination, its being rendered as the instrument of a sovereign power, of society, and so on. With renditions coming out of 'critical' work and the politics of identity, the subordinating instrument becomes a dominant class, a dominant gender, and so on. All of which can hardly be to deny that, if law continually becomes itself and is sustained in its responsiveness to exteriority, there must nonetheless be a positioned place where this responsiveness can be made determinate. That which is purely beyond is merely inaccessible, and out of responsive range. So, law not only comes from but also returns to determinate position. And to sustain position there must be some shielding from an importunate responsiveness. There has, with any law, to be a constant, reductive effort to ensure that 'the aleatory margin...remains homogeneous with calculation, within the order of the calculable' (Derrida 1989: 55).

Yet, further, the very holding to a position requires a creatively accommodating responsiveness to what is beyond the constitution of that position 'at any one time', a responsiveness to '[a]ll things counter, original, spare, strange' that would impinge upon and affect it (Hopkins 1970: 70). Law's determinations cannot be conclusively predictable and ordered when it has to exceed all fixity of determination. It remains

pervaded by the relation to what is beyond, labile and protean to an illimitable extent. This impossibility of invariant positioning is what makes law possible. Even at its most settled, or especially at its most settled, law could not 'be' otherwise than in a responsiveness to what was beyond its determinate content 'for the time being'. If that content could be perfectly stilled, there could be no call for decision, for determination, for law. And it is in the very response to this call, in the making and sustaining of its distinct content, that law 'finds itself' integrally tied to, and incipiently encompassing of, its exteriority.

Yet no matter what is encompassed, law's responsiveness, its generative incompleteness and its refusal of any primal attachment, makes law intrinsically dependent and derivative, quite lacking in any content of its own. As one jurisprudential tradition would require, law must ever and constitutively respond to 'society' and such. This same imperative for law to derive its contents from elsewhere resonates with a contrary jurisprudential tradition elevating law's autonomy. An insistent responsiveness, an intrinsic inability to be bound to any pre-existent, would require that law remain 'pure form' and surpass any of its contents, modifying or rejecting them. Here law 'affirms itself as law and without reference to anything higher: to it alone, pure transcendence' (Blanchot 1992: 25). Before the law, before this force of utter origination, its contents 'for the time being' become entirely contingent on its assertion. Law itself becomes 'absolute and detached from any origin' anterior to itself (Derrida 1992: 194). With its vacuous purity, with the incipience of its always being other and exterior to itself, with 'the very movement by which it formulates this exteriority as law' (Blanchot 1993: 434), law has somehow to

be conceived of, not just in a potential relation to what is outside what it is 'for the time being', but as having that outside with-in itself.

In the book, this conception of law was drawn out of various entities with which it seemed constitutively complicit. One such entity, the first, was the origin, the origin as that creative combining of what lies ever beyond yet corresponds determinately to that which is originated – a combining which always 'manages' to be the origin of what we are now. The origin also provided apt relief from exordial agony and the book began with a modern myth of origin in which, as it transpired, law and the origin were found to be homologous. I would now like to find in the margins of this myth a counter to Goodrich's charge, fervently laid, that I quite ignore the feminine, although it should be admitted at the outset that this counter will be almost as overplayed as the charge itself. As Goodrich so poignantly revealed, in a way that for me was both confirming and challenging, in the book's insistent openness there was an enwrapping of its style, its theory and its approach to law. The book could hardly, then, accommodate a primal or resolving feminine, any more than it could the totemic trio of given excitations which Goodrich would associate with this feminine: the psyche, desire, and the body.

The telling of the opening myth came from Freud's renditions of the killing of the primal father, the main one being in *Totem and Taboo* (Freud 1960: chapter IV). The initial scene takes place in the desolate stasis of a 'primal horde' gripped in the unlimited power of the father, a power extending to the monopoly of access to the women of the horde. Finding a 'chief motive' in their exclusion from the women, the sons band together, kill and eat the father (Freud 1960: 144). The father's place of

complete determination disappears with him and for 'mankind' there has since never been any settled 'rest' (Freud 1960: 145). In the vertiginous possibility that ensues, the sons realise eventually that there has to be an ordering of access to women and, so, an attendant social compact comes to elevate a refined paternal authority. The animate quality of that compact was concentrated in the totem. The totem was, in combination, the surrogate of the father and the first manifestation of human law. And the first laws to emerge were prohibitions on incest and on the killing of the totem animal. Thence, the women 'had been set free' – although, as I sensitively observe, it has apparently taken some time for the news to get around (Freud 1960: 143; Fitzpatrick 2001: 15). This putative freedom of the women is not just from the domination of the primal father but also from the claims on them of the sons. Yet there is no effective emplacement of this freedom in a world made by the sons and pervaded by paternal authority. The making of that world now assumes continuance normatively in 'a duty to repeat the crime of parricide again and again in the sacrifice of the totem animal, whenever, as a result of the changing conditions of life, the cherished fruit of the crime – appropriation of the paternal attributes – threatened to disappear' (Freud 1960: 145). Paternal rule endures in its seeming solidity only through its own repeated extinction and renewal. And in terms of the myth, and in terms of my book's 'obsession', it is the figure of the savage that in itself unites law's solidity within with its transgressive exteriority, and for this purpose the savage has to be found both within determinate law and beyond it (cf. Goodrich 2003: 111).

Freud joins a great many others in equating the savage and the feminine (e.g. Freud n.d.: 145-6; and more generally see Fitzpatrick 2001: 64, 223). As we have just

observed, the dubious freedom of the women in Freud's founding myth meant that they were contained within an ordered sociality yet they were not of it, and as such they were also beyond it. That same mix can be extracted from Freud's following Bachofen and finding that 'matriarchy' was replaced by 'the patriarchal organization of the family' (Freud 1960: 144; Fitzpatrick 2001: 220; and see Bachofen 1967). Here, in the synchrony of myth, the feminine is of an ordered sociality yet absent from and beyond it. Like the savage, then, the feminine can negatively unite the determinate and the self-transgressive dimensions of law, can combine its being within with its exteriority, and it can do so in a way which makes possible the predominance of the determinate in conceptions of occidental/civilized/patriarchal law. Since that law takes its coherence in negation of the savage/feminine, it can 'be' determinate yet responsively absorb its transgressive exteriority without 'positively' or markedly being disrupted by that responsiveness. The force of law dissimulated in this manner can be discerned in Blanchot's *The Madness of the Day* in which the feminine becomes the law – in which it comes to be and is becoming to the law (Blanchot 1981; Fitzpatrick 2001: 83-4). Blanchot's feminine law emanates from 'me': she 'is born of the one for whom she becomes the law', and she is abjectly dependent on this all-powerful, determinate one (Blanchot 1981: 14-15). But that dependence is also inverted by the law herself. Having become the law, she then comes from beyond me and denies me a place anywhere and the ability to do anything: 'she exalted me, but only to raise herself up in her turn' (Blanchot 1981: 16). In the evanescent interval between my being determinate and what is ever and

incipiently beyond that being, all the law will allow is a fleeting touch of her body (Blanchot 1981: 16).

Blanchot's feminine law not only concentrates the counter to my first supposed sin of omission, it also contains the response to my second, the disregard of law's constituent dependence on the social. Indeed, the story so far could be read as preliminary to an engagement with 'a fateful inversion' which Norrie discovers in my extracting a rarefied version of law from Freud and only then moving on to something like Norrie's own totemic trio of the social, the political, and the historical – and in this way I disregard the imperative of deriving law's 'essence' from them (Norrie 2003: 121, 127). Agreement of a kind can now readily ensue. In its vacuity, law finds content in an abject dependence on the social, and such. It is this vacuity of modern law that has facilitated its subordination in the instrumental. But this same law in its very vacuity, and expanding on Blanchot for a while now, would challenge and deny the plenitude, the completeness of the social, the historical, and the political. In so doing, it would be at one with the Derridean groove along which Norrie would propel my argument, aptly enough. That argument is set against, to take an example and borrowing from Lefort, 'an illusion which lies at the heart of modern society: namely, that the institution of the social can account for itself' – an illusion engendered in the claim of society, in the absence of any reference beyond it, to have become 'transparent to itself' or 'intelligible in itself' (Lefort 1986: 184, 201, 207). Or it would be set against a self-validating history, against historicism. Or it would be set against the sedimented politics of sovereignty. Still inveterately borrowing, Derrida's description of sovereignty as 'a secularized theological concept' could be applied to

all of the trio (Derrida 2001: 49). Each would assume the deific ability to combine in itself being determinate with an illimitable efficacy, combine a self-subsistent presence with the capacity ever to extend incorporatively beyond itself. These are characteristics which resonate with those I have extracted from law. If law is to connect to society and such, there has to be some recognizable similarity between them. As I tried to show in the book, society did not simply affect law from afar. Rather, it was a matter of society being suffused by law in a reciprocal relation with it (Fitzpatrick 2001: e.g. chapter 4). Reciprocity could still be compatible with law's ultimate dependence, but this was countered, I hope, by an initial account of society's constituent dependence on law for its cohering and for its commonality, and this was a dependence on law as vacuity (Fitzpatrick 2001: 45-54). That account of society was derived from my opening engagement with Freud. Hence, I provided a boringly monadic trajectory rather than a fateful inversion, something which does sound much more interesting.

There is one final reversal I would like to indulge in. The exquisite cadence of Goodrich's title, 'Tristes Juristes', attunes us to a pervasive theme of his article, the seductiveness of which I would want to resist (Goodrich 2003: 109). That theme mixes the elegiac with resentment at the life I have spent, or misspent, in the law, my book being then a rather long goodbye, a goodbye to all that. Before fading into the crepuscular gloom, I would want to evoke some of the joy in the work, especially in that openness which Goodrich also discovers there, that 'delirious' resistance to what is enclosed and complete (Goodrich 2003: 118). This insistent openness of the style and theory of the work merges with law's liberatory promise, with its ability always

to traject beyond the existent. As with *Tristes Tropiques*, the titular inspiration, *tristesse* is more in the situation depicted than in the author (Lévi-Strauss 1992). This is the sadness of the obvious. As both Goodrich and Norrie note, my general rendition of law does not strain originality. Norrie confirms this in telling of how MacCormick, as a legal positivist, ‘is able to formulate a theory of legal interpretation which accommodates determination and openness without recourse to a Derridean understanding’ (Norrie 2003: 128). But I do locate repeatedly some such accommodation, as a peremptory resolution, in the common course of both the practice and the theorization of law (e.g. Fitzpatrick 2001: 86-9). The sadness here is that of the obvious as a denial and the obvious as what is denied. Occidental law’s resolving accommodation lies in its denial, in its enfolding and darkening of law’s responsive radiance. Perhaps then my concern with Freud as social theorist, and with Freud of the ‘forever unfinished’ *Totem and Taboo* (Cixous 1991: 24), should have embraced the concept of repression and brought it to bear on our ability to deny or attenuate the obvious. And perhaps also that concern should have embraced more the ‘impossible’ Freud who would enhance the contrary ability to render creatively, rather than to ‘resolve’, conflicts that are irresolvable ‘in any case’ (Castoriadis 1994: 3; and generally Phillips 2002).

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