Book Reviews

Evaluation and Legal Theory

Julie Dickson
(Oxford: Hart Publishing 2001)

Evaluation and Legal Theory has qualities that tend to be rare in legal theory texts: it is clear, it is short, and it is largely right. It carries the additional important benefit of discussing an issue central to modern analytical jurisprudence.

Julie Dickson is a prominent member of a new generation of legal theorists, who are emphasising the importance of methodological questions in jurisprudential debates. (While the direction of the causal chain is not always clear, at the same time that this generation's work has come forward, the prominent senior figures in the field, eg, Joseph Raz[1] and Jules Coleman,[2] have also shown a greater interest in methodological questions than they had shown in their earliest works.) As Brian Tamanaha has pointed out,[3] the greater attention to questions of methodology within jurisprudence these days might be attributable to a change in who is doing legal theory. For much of the twentieth century, from the time of the American legal realists through the work of H L A Hart, most important works in legal theory were done by lawyers, though lawyers who had some interest in, and perhaps some basic training in, philosophy. More recently, many, perhaps most, of those working in English-language legal theory have doctorates in philosophy or other significant philosophical training. It may thus be unsurprising that more and more sophisticated theoretical machinery is being brought to bear on jurisprudential topics.

Dickson is occasionally a little too apologetic about the methodological project (eg, 12); there was, and is, no need for that. This is work crucial to legal philosophy, even if it does sometimes have the

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1 See, eg, Joseph Raz, 'On the Nature of Law' (1996) 82 *Archiv für Rechts- und Sozialphilosophie* 1-25.

2 See, eg, Jules L Coleman, *The Practice of Principle* (2001).

3 Brian Z Tamanaha, 'Rescuing Legal Positivism from Legal Positivists' (unpublished manuscript, on file with author).

unfortunate side-effect of making some jurisprudential work less accessible (or less interesting) to non-specialists.

While H L A Hart famously referred to his book, *The Concept of Law*, as an exercise in 'descriptive sociology',[4] he knew that his theory was hardly 'mere description' (and it warranted the term 'sociology' only in the broadest sense of that term, but that is another issue). He did not want to discuss what was common to all rule-guidance and dispute-resolution systems that we might call 'law'. He emphasised that his focus was on the more sophisticated or more mature legal systems,[5] and on systems 'accepted' by at least some of their members as giving reasons for action[6] (that is, as giving reasons for action beyond the fear of sanctions). This basic methodological point was elaborated and clarified by later theorists (eg, John Finnis[7] and Joseph Raz[8]): the construction of a theory of law is inevitably a matter of selection and evaluation. It is the nature of this process of evaluation that is the focus of Dickson's text.

Dickson's discussion of evaluation within legal theory is conducted in the course of explaining and defending the methodological aspects of Joseph Raz's theory of law, though she is clear that the book is not about defending the *substantive* content of Raz's theory, and that she does not think her methodological conclusions depend on accepting the entirety of Raz's theory (10). At the same time, she is forthright on the way that one cannot easily disentangle methodological questions from substantive theory (13-4, 139-40).

Dickson's analysis grows from three questions:

> (1) in order to understand law adequately, is it necessary to morally evaluate the law? ...
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> (2) in order to understand law adequately, is it necessary to hold the law to be a morally justified phenomenon? ...
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> (3) can value judgements concerning the beneficial moral consequences of espousing a certain view of law legitimately feature in the criteria of success of legal theories? (29)

Not to leave too much in suspense: Dickson believes that a theory about the nature of law should aim to show what is 'important' and 'significant' about that institution (what she calls 'indirect evaluation'), and that the moral evaluation ('direct evaluation') of the law is not a necessary step in constructing such a theory; that one need not assume that the law is morally valuable; and that the beneficial consequences of espousing one theory

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4 H L A Hart, *The Concept of Law* (2nd ed, 1994) v.

5 Ibid 14-17.

6 Ibid 116-17.

7 See, eg, John Finnis, *Natural Law and Natural Rights* (1980) 3-18.

8 Joseph Raz, *Ethics in the Public Domain* (1994) 219-21.

rather than another is not an appropriate criterion of theory selection or construction. These conclusions will be discussed in turn.

The central point of Dickson's text is that a theory of (the nature of) law should display what is 'significant and important' about law, those features 'which best reveal the distinctive character of law as a special method of social organisation' (58). That some feature makes the law morally good or legitimate *may* be what is significant and important about law, but it need not be (57-9). For example, Raz's claim that law purports to be a practical (moral) authority for citizen actions[9] is arguably a central feature of law, which explains a great deal about how it operates and the role it plays in citizens' lives, but the claim does not go to the moral merits of law (as it states only that law *purports* to be a practical (moral) authority, not that it necessarily or generally succeeds at so doing[10]). Dickson's claims here are in some ways just instantiations of the well-known point that there are criteria for theory-construction (eg, simplicity and clarity) that are selective or evaluative without being moral criteria (32-3, 38-9).

As a related point, Dickson argues that legal theory need not evaluate the law morally, or show the law to be morally legitimate (51-81). The important term in that summary sentence is 'need not': while it *might* turn out that a claim about law's moral value is central to understanding what is significant and important about law, it *need not* be the case (and the question should not be resolved at a preliminary or meta-theoretical level) (58-61). At the same time, Dickson observes that an 'indirectly evaluative' theory about the nature of law may be a useful, or even crucial, initial step if and when we move from creating a theory of law to evaluating the law morally (61-5, 135-7).

The third question, whether we should properly focus on the possible beneficial moral effects of holding a theory, is discussed in the context of one of Frederick Schauer's articles.[11] In that article, Schauer seems to argue that the choice between legal theories should be made at least in part on the basis that one might be superior to another in its effects. One argument along these lines that has been repeated from time to time is that natural law theory is better than legal positivism in helping its adherents resist evil laws (though H L A Hart ventured the contrary view, that legal positivism was in

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9 Ibid 199.

10 See ibid.

11 Frederick Schauer, 'Positivism as Pariah' in Robert P George (ed), *The Autonomy of Law* (1996) 31. Other articles discussing related claims include Neil MacCormick, 'A Moralistic Case for A-Moralistic Law?' (1985) 20 *Valparaiso University Law Review* 1; E Philip Soper, 'Choosing a Legal Theory on Moral Grounds', in Jules Coleman and Ellen Frankel Paul (eds), *Philosophy and Law* (1987) 31; Liam Murphy, 'The Political Question of the Concept of Law' in Jules L Coleman (ed), *Hart's Postscript* (2001) 371.

fact superior in this regard[12]). Dickson is clearly correct (84-93) in stating that if we assume, or have concluded, that there is a nature of law to be discovered, it is clearly improper to prefer one theory, which may describe this nature incorrectly, over another, which may give an accurate description, just because the first theory might have better consequences. Whether there *is* a nature of law to be discovered then becomes the basic question. Dickson's comment on the question is as follows:

> This is a baseline assumption which all legal theorists in the tradition under consideration here must share, for what else are we doing in legal theory, if not attempting to characterise that which is distinctive about a very powerful and pervasive kind of social institution which does much to shape us and our social world? (89).

Of course, consistency with one's assumption is a good thing, but begging the question is not so good, and there are moments in this section of the book when an uncharitable reader might think the author was doing more of the second than the first. While it may be true that

> [a] commitment to the basic point that law has a certain character which it is the job of legal theory to capture accurately and explain adequately is inherent in the work of all three of the legal theorists – John Finnis, Joseph Raz, and Ronald Dworkin – who can be considered as the main protagonists of the present work (90),

that is hardly a persuasive argument against those who might not share this commitment. Dickson points out that Schauer himself refers to the criterion of descriptive accuracy along with the argument of positive moral consequences, noting that it is not clear how the two criteria are to be merged (92). (A possible approach, one supposes, would be something very much like Dworkin's interpretive approach to law, where one chooses among theories of sufficient fit with the data, that theory which presents the object in the best possible light.[13])

How we should treat the claim that there is a nature of law to be discovered, takes us back to the threshold question in analytical legal philosophy – whether it makes sense to have a *general* theory of law (as contrasted to a theory of a particular legal system or group of legal systems, or sociological or historical investigations tied to a particular legal system or group of systems). This question is often equated with or transformed into a second – whether it makes sense to speak of 'the concept of law' or 'the ("essential") nature of law'. Dickson accepts Raz's references to elements as essential to the nature of law, but does not push that inquiry further (17 fn 24, 19 fn 26).

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12 H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 615-21.

13 Ronald Dworkin, *Law's Empire* (1986) 52.

Reference to 'necessary' or 'essential' elements is a traditional element of philosophical analysis, and discussions along similar lines can still be found in philosophical analyses of 'natural kinds' like gold and water. However, to modern sensibilities, references to 'necessity' and 'essential properties' seem out of place, at least when discussing a social practice or a social institution. Talk of necessity sounds of abstract and eternal Platonic Ideas; but if practices and institutions like law are human products, can we not define them as we like? At the same time, if 'law' just is whatever we say it is, there seems little room for the kind of conceptual analysis Raz and Hart, and most other prominent analytical legal theorists, purport to do. While it may well be unfair (or at least inappropriate) to complain of a good book that it does not do more, one might wonder whether a discussion of methodology in analytical jurisprudence today *can* skip over the question about the nature of necessity in law.[14]

As a related matter, it would have been helpful to have Dickson's response to Brian Leiter's recent work in this area.[15] Leiter has argued that conceptual analysis is inappropriate for analytical jurisprudence, and should be abandoned for a more naturalistic (that is, more empirical and scientific) methodology, as has occurred in other areas of philosophy.[16] This is a challenge to the whole idea of conceptual analysis in legal theory, and an argument against references to law having an 'essence' or a 'nature'.

Returning to the summary of the text, one of the most telling arguments the book raises is a challenge to Dworkin's work, claiming that Dworkin, in *Law's Empire*, begs important methodological questions. In an early stage in that book's argument, Dworkin claims to be setting up an analytical structure that is neutral between alternative possible theories (including legal positivism)[17] (107-108). However, as Dickson points out, Dworkin's analysis *assumes* that the purpose of law is to legitimate state

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14 Raz's most detailed discussions of claims of 'necessity' and the nature of conceptual analysis appear in Raz, above n 1, and in Joseph Raz, 'Legal Theory' in Martin P Golding and William A Edmundson (eds), *Blackwell Guide to The Philosophy of Law and Legal Theory* (forthcoming, 2004). I start exploring some of the same issues in 'Raz on Necessity' *Law and Philosophy* (forthcoming), but I confess that I have not made significant progress.

15 It appears that Leiter is not mentioned in *Evaluation in Legal Theory*.

16 See Brian Leiter, 'Naturalism in Legal Philosophy' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* http://plato.stanford.edu/entries/lawphil-naturalism/ (2002); Brian Leiter, 'Realism, Hard Positivism, and Conceptual Analysis' (1998) 4 *Legal Theory* 533; Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76 *Texas Law Review* 267.

17 Dworkin, above n 13, 90-96.

coercion,[18] which is an assumption that legal positivists need not, and do not, share. They do not share this starting point in part because this assumption entails a view that law must be understood in terms of a positive moral value (the *legitimation* of state coercion), while legal positivists deny any necessary or conceptual connection between law and moral value (111-28).

Dickson has presented a strong case for an indirectly evaluative approach to legal theory, but it is not without some problems. If the construction of a theory comes down to judgments of 'importance' and 'significance', this hardly seems the most stable or objective basis for a discussion. 'Importance' and 'significance' seem like relative terms – 'important' for whom? 'significant' relative to which purpose? These evaluations seem likely to be matters over which reasonable observers could disagree – and disagree sharply.[19] One response would be that the possibility of reasonable disagreement need not affect Dickson's most basic point: that a theory about the nature of law need not turn on moral evaluation of the law. However, it is just the argument of theorists like Stephen Perry[20] that choices among different tenable theories about the nature of law can only be made on the basis of moral evaluation. While Dickson mentions Perry's views (34-7), summarising them fairly, she discusses them only briefly, and, as Dickson herself admits (127 fn 46), she does not fully engage his arguments.[21]

There is also a position about the nature of law and the disagreement between legal positivism and natural law theory that touches on Dickson's defense of 'indirectly evaluative' legal theory. One reason why natural law theorists and legal positivists frequently seem to be talking past one another is that they have quite different starting points about what law is, and what legal theory should be trying to do. Legal positivists (with the possible, though important, exception of Hans Kelsen) tend to focus on law as a kind of social system. This is well-phrased by H L A Hart:

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18 Ibid 93.

19 A related, but somewhat different critique of Dickson's discussion of 'importance' appears in Kenneth Einar Himma's review of this book. Kenneth Einar Himma, Book Review (2001) 11 *Law and Politics Book Review* 569, http://www.bsos.umd.edu/gvpt/lpbr/.

20 See, eg, Stephen R Perry, 'Interpretation and Methodology' in Andrei Marmor (ed), *Law and Interpretation* (1995) 97; Stephen R Perry, 'The Varieties of Legal Positivism' (1996) 9 *Canadian Journal of Law and Jurisprudence* 361.

21 For one effort to respond to Perry in terms that Dickson would likely approve (arguing that choices among tenable candidate theories about the nature of law can be made on conceptual grounds, requiring no moral evaluation), see Coleman, above n 2, 197-210.

> [T]here is a standing need for a form of legal theory or jurisprudence that is descriptive and general in scope, the perspective of which is ... that of an external observer of a form of social institution with a normative aspect, which in its recurrence in different societies and periods exhibits many common features of form, structure, and content.[22]

By contrast, natural law theorists focus on law as a kind of reason-giving practice.[23] Law gives reasons for action, at least (many would say) when it is consistent with higher moral standards. (Natural law theorists are here focusing on the *moral* reasons for action that law may (sometimes) offer, not on the prudential reasons that legal sanctions (like all threats of force or public shame) may entail.) This aspect of law points the attention of theorists to the congruence of particular laws, and particular legal systems, with moral criteria, to determine when law adds to the list of our moral reasons for action. However, it seems inevitable that a focus on law as a reason-giving activity, a focus on when or how legal systems create new moral reasons for action, will take us in a different direction from a study of law as a particular kind of social institution, and vice versa. Dickson seems clearly to favour a social-institution approach (58, 89, 141), and not to notice that there is any alternative.

In summary, Dickson writes of an important topic, raises many important issues, and seems to have the best of the argument on nearly every conclusion she reaches. Yet there are many issues that still need exploring within this topic (though most, though not all, of these further points for discussion are noted within *Evaluation and Legal Theory*, with the author, reasonably, indicating that one should not expect a single book to resolve every issue). In the end, I think it is more praise than criticism that every part of the book left me simultaneously impressed and wanting more.[24]

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22 H L A Hart, 'Comment' in Ruth Gavison (ed), *Issues in ContemporaryLegal Philosophy* (1987) 36.

23 See, eg, John Finnis, 'On the Incoherence of Legal Positivism' (2000) 75 *Notre Dame Law Review* 1602-4.

24 I am grateful to Leighton McDonald for his comments and suggestions.

A Theory of Freedom

Philip Pettit
(Polity Press, 2001)

In this brief but fascinating book, Philip Pettit has a number of ambitious aims. (1) To defend a general account of the concept of freedom based on the notion of responsibility. (2) To defend a specific conception of freedom based on the centrality of discourse. (3) To apply that account of freedom to political philosophy, defending democratic and republican ideas. An underlying theme of the book is that philosophers should seek a unified account of freedom covering both metaphysics and politics. Pettit concludes by saying that he 'would be particularly happy if the book served to persuade some others that the conversation about freedom took a wrong turn when, rejecting the classic precedent set by the likes of Hobbes and Kant, it broke up into isolated discussions of free will and political liberty'(179).

Pettit begins with three general connotations of the idea of freedom. To say that I freely performed an action implies that I am responsible, that the action somehow belongs to me, and that it was not fully determined by causes outside of myself. Pettit argues that the first step in constructing a philosophical account of freedom is to choose one of these three connotations as foundational.

Pettit favours an approach that prioritises the responsibility connotation, an approach that goes back to Peter Strawson's essay 'Freedom and Resentment'. The book develops the responsibility conception of freedom, and highlights its appeal, rather than 'entering into a sustained dialectic with the alternatives' (8).

The general idea behind the responsibility approach is this. 'We engage with other human beings in a distinctive manner that involves the spontaneous attribution of responsibility, and we conceive of freedom as that property of human beings, and of the actions performed by human beings, that makes such an attribution appropriate under the rules of the practice.' (13)

Pettit's approach starts from the intuition that 'there is no sense in the thought that while someone did something freely, still they cannot be held responsible for it' (18). Pettit argues that this connection is a priori. Such a connection is 'entirely unsurprising under the responsibility approach', yet it 'has to remain mysterious under other approaches' (19). If we analyse freedom in terms of causal determination or ownership, this opens a potential gap between freedom and responsibility.

This form of argument recurs throughout the book. Pettit argues that a certain connection between two concepts is a priori. He then rejects any account of freedom on which that connection would be merely contingent. In particular, he argues that freedom is necessarily connected with both responsibility and democracy. Not all readers will agree that such connections need to be a priori. However, the possibility of a theory on which freedom is so strongly connected to both responsibility and democracy should be of interest to all theorists of either freedom or politics.

The notion of responsibility draws our attention to the agent's relations with others. Pettit's choice of foundation pushes his discussion in an interpersonal direction. This plays a key role throughout the book, especially when we come to politics.

Freedom is whatever property of human beings makes the attribution of responsibility appropriate. Our next task is to identify that more specific property. (Pettit's approach here borrows from functionalist accounts in the philosophy of mind.) Pettit discusses three particular conceptions of freedom as responsibility: freedom as rational control, freedom as volitional control, and freedom as discursive control.

An agent exercises rational control whenever her actions are appropriately related to her beliefs and desires, whatever those beliefs and desires might be. An agent exercises volitional control when her actions fit with her second order desires, with what she wishes to desire. Consider an addict whose strongest desire is for a fix, but who does not want to desire the drug. If she takes the drug, this agent exercises rational control but not volitional control.

Pettit argues that the first two conceptions are too crude. They both fail to explain the impact on an agent's freedom of the behaviour of others. Under each of the first two theories, hostile coercion would not be an offence against a person's freedom. 'Your money or your life!' leaves my rational and volitional control unaffected, but it clearly reduces my freedom.

Pettit thus turns to the third option. The theory of freedom as discursive control says that 'a person is free so far as they enjoy discursive power ... in their dealings with other persons' (90). Because it deals directly in interpersonal relations, this account of freedom can avoid the previous objection. Hostile coercion is unfriendly to discourse, because it inevitably transforms the relationship between the parties in a way that restricts the range of discursive interactions between them. In general, anything that prevents people from participating in open discourse as equals compromises their freedom, as it limits their responsibility for their actions.

One of the most interesting, and potentially controversial, aspects of Pettit's discussion is his extension of the concept of freedom to cover

collective agents as well as individuals. Here we begin to see the potentially radical implications of privileging the notion of responsibility. To ask whether collective agents are free is not to ask whether they possess some mysterious metaphysical power of causation distinct from the powers of individual agents. It is merely to ask whether there are collective agents with responsibilities distinct from the responsibilities of individual agents.

Pettit argues that there are. The cornerstone of his argument is a 'discursive dilemma', a 'generalised version of the doctrinal paradox that has recently been identified in jurisprudential circles' (106). Suppose A, B, and C make up a university promotion committee. The requirement for promotion is satisfactory performance in each of three areas: research, teaching, and paper shuffling. A and B both believe that the candidate is satisfactory in research, while C does not. A and C both see satisfactory teaching, while B does not. B and C both recognise a good paper shuffler, while A disagrees. The committee have four issues to address. They must assess the candidate against each of the three criteria, and then ask if she should be promoted, using the rule that someone should be promoted if and only if they score appropriately under each criterion. If each member decides individually whether the candidates should be promoted, and then votes, they will unanimously reject the candidate. On the other hand, if they vote on each category separately, and *then* apply the promotion rule, then the candidate will be promoted. Pettit argues that, for many collective groups, this second ('collective') method of reasoning is preferable. When a group reasons at this collective level it reaches decisions for which individual members cannot be held responsible, but for which the group as a whole clearly is responsible. In our simple case, the promotion committee would reach a decision with which every one of its members disagrees.

The extension to collective agents highlights what is distinctive about the responsibility approach. Whether this counts in favour of the approach depends on one's willingness to countenance collective agents. In a later chapter, Pettit softens the potentially radical implications of this extension, by arguing that a just state should concern itself only with the freedom of individual agents, and may not promote the freedom of collective agents at the expense of individuals.

Pettit's discussion of collective agents leads to his account of political freedom. Pettit begins with a contrast between two political ideals of freedom: freedom as noninterference and freedom as non-domination. As Pettit notes, 'the ideal of freedom as noninterference is the dominant ideal in contemporary politics and political theory and has been in the ascendant since the early 19th century' (134). The ideal of non-domination contrasts with it in two ways. (1) It does not object to interference as such, but only to 'interference that is not forced to track the avowable interests of the interferee'. (2) It objects to 'any exposure to a power of arbitrary

interference, whether or not that power is exercised' (139). If I could interfere with you but choose not to, then I dominate you. This reduces your freedom, as it undermines your discursive control over our interactions.

Pettit's preference for freedom as non-domination is familiar from his earlier works.[1] Readers unfamiliar with this influential strand in contemporary political philosophy will find the present work an interesting, if somewhat brief, introduction. Readers already familiar with Pettit's work in this area will find a concise summary of the connections between his different discussions of freedom, together with some very brief sketches of their practical implications.

Pettit objects that the ideal of non-interference treats state interference on a par with interference by other agencies. Yet this is 'wholly counterintuitive' (135). This is because the state stands in a special relationship to the individual, especially in relation to her freedom. The state protects, and to some extent embodies, the agent's freedom in a way that other agencies do not. Obviously enough, this is only true of certain kinds of state. Pettit's intuition leads on to an argument why the state must take a certain kind of democratic form.

Interference is acceptable if it reliably tracks the interests of individuals in a way that respects their discursive control. The interference must be authorised by the agent through a process of public debate and deliberation: 'democratisation is the only feasible way of guarding against the state's being arbitrary and dominating in the way it treats its citizens' (156). The connection between freedom and democracy is thus a priori, rather than instrumental. This constitutes a significant advantage of the non-domination ideal over its rival.

The link with non-domination also has implications for the form that democracy should take. Democratic institutions must guard against two dangers: 'false negatives, the failure in certain cases to recognise genuine matters of common avowable interest, and false positives, the empowerment of factors other than common avowable interests in the realm of policy making' (173). To achieve this, 'democratic institutions must have a positive search and identify dimension, and a negative scrutinise and disallow dimension' (159). If it is to fulfil its purpose, democracy must include robust public debate, as well as periodic elections.

One of Pettit's underlying aims is to show that the concept of freedom, even as analysed by philosophers, is of great practical significance. Some readers may find it disappointing that, due to the book's brevity and focus on philosophical rather than practical issues, he provides few indications of precisely how this practical significance might play out

[1] Especially *Republicanism: A Theory of Freedom and Government* (1997).

in the realm of public policy. Pettit himself concedes that, while 'the proper step at this point would be to try and outline a list of reforms that ought to be made in the actual institutions of democracy', 'it is not possible in the compass available, to say anything in this vein on where democracy should go from here' (172). However, by advancing our understanding of the rationale for democratic institutions, Pettit provides a standard against which any proposed reform to those institutions could be measured.

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Modernism and the Grounds of Law

Peter Fitzpatrick
(Cambridge, Cambridge University Press, 2001)

I think it would be fair to say that when modern legal theorists think of myth in the context of law, the work which immediately comes to mind is Peter Fitzpatrick's *The Mythology of Modern Law*.[1] This book broke new ground in its illustration of the ways in which law, presenting itself as an enlightened negation of the concept of myth as a principle of social order, is in fact founded upon myth, and finds myths embedded in own identity.[2] Law has its own 'modern mythology' – fundamentally this consists in the paradoxical myth that law has superseded myth, but it also exists in modernist myths such as that which tells of the movement from primitive life to civilised life, and that which elevates the nation to the rational end-point of legal and social order. It is myths such as these which give law its coherence and its identity.

Modernism and the Grounds of Law continues Fitzpatrick's own tradition in the scholarship of legal mythology. It does so in a way which extends and complicates some of the arguments and themes made in the original work. Like *The Mythology of Modern Law*, Fitzpatrick's latest work draws upon an extensive range of scholarship. It is ambitious in its scale, eclectic in its sources and detailed in its analysis. It is a work composed on many layers, making it both challenging and engaging to read. In the ways outlined in this review, it contributes an original dimension to theoretical scholarship in law, without laying down yet another 'law of law' or finite theory of law. Thus, *Modernism and the Grounds of Law* will help to open up a widely defined dialogue in legal scholarship, rather than intervening in a closed debate. Before explaining what I see to be the

1 Peter Fitzpatrick, *The Mythology of Modern Law* (1992).
2 Ibid 1.

central dimensions of this new text however, I will take a short diversion into a linguistic myth which I use as a point of comparison and explanation for the mythical premise of Fitzpatrick's book.

In an early piece, 'Des Tours de Babel'[3], Derrida recounts the biblical story of the tower of Babel built by the people of Shem as a myth which figures the collapse of language in its determinate state. The destruction of the tower by god created a fissure between name and referent[4], it dispersed language and created the need for translation. It also resulted in a kind of yearning after the original condition of meaning, a time when meaning was assured, single, authoritative. Thus, the Babel myth

> tells of the need for figuration, for myth, for tropes, for twists and turns, for translation inadequate to compensate for that which multiplicity denies us. In this sense it would be the myth of the origin of myth, the metaphor of metaphor, the narrative of narrative, the translation of translation, and so on.[5]

In the Babel narrative, we have two moments: the original state of linguistic perfection and determinacy, and the subsequent disordered and indeterminate condition of language. The second of these moments does not, however, tell simply of chaos or linguistic anarchy. Rather, it is a paradoxical state in which the subjects of language are compelled to translate, and yet cannot do so adequately.[6] As Foucault remarked in *The Order of Things*, also commenting on the myth of Babel, '[a]ll the languages known to us are now spoken only against the background of this lost similitude, and in the space that it left vacant.'[7] The desire for the perfection it represents is necessarily left unfulfilled.

Babel is a myth of the origin of languages as a multiplicity of forms, as indeterminate in themselves, and as flexible and responsive to the demands of translation and communication. It is a myth of the need for

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3 Jacques Derrida, 'Des Tours de Babel' in Joseph Graham (ed), *Difference in Translation* (1985) 165-207. The title of the article is left untranslated because, in recognition of the subject matter of the piece, it is itself untranslatable. The translator (Graham) explains: '*Des* means "some"; but it also means "of the", "from the", or "about the". *Tours* could be towers twists, tricks, turns, or tropes, as in a 'turn' of phrase. Taken together, *des* and *tours* have the same sound as *détour*, the word for detour.'

4 See also Michel Foucault, *The Order of Things* (1970) 36: 'In its original form, when it was given to men by God himself, language was an absolutely certain and transparent sign for things ... The names of things were lodged in the things they designated. ... This transparency was destroyed at Babel as a punishment for men.'

5 Derrida, above n 3, 165.

6 Ibid 170.

7 Foucault, above n 4, 36.

authorised meaning, yet of the absence of such authorisation. The entire myth is conflated in the name 'Babel' which designates both the name of god, and the confusion sown by him – god gives his name to the Shem, and he thereby gives confusion. Derrida's point in retelling the myth is not to determine whether or not it is historically true, but rather to show something significant (indeed the most significant thing) about language, that is its indeterminacy, and the modernist desire to compensate for the lack of an absolute.

In *Modernism and the Grounds of Law*, Peter Fitzpatrick presents another myth of origin, in this case, of the origin of society and law. It is a myth which is reminiscent of the Babel story in its emphasis on original ordered position and an enforced change which becomes symptomatic and systemic. The similarity is not co-incidental, for both myths speak of a lost authority which modernism seeks, unsuccessfully, to restore. Both myths are loaded with ambivalence and anxiety about the large epistemological and moral questions of postmodernism. Fitzpatrick's myth is the Freudian myth of parricide from *Totem and Taboo*, explained briefly by Fitzpatrick in the introduction 'Terminal Legality'. The myth[8]

> begins with a desolate stasis in which the savage 'primal horde' somehow exists under the complete sway of the father. This is a place of utter fixity where nothing can be other than what it is. Somehow, in this stilled scene, action erupts and the father is killed and consumed by his sons. That is the first origin. Possibility can now enter the world and it impels the second origin. ... Wearying of the ensuing disorder and 'war of all against all', and realizing they have internalized the authority of the father, the sons enter into a social contract and thence into ordered sociality with its accomplished law.

Like the Babel narrative (as interpreted by Derrida), Freud's myth of parricide posits an original position of fixed authority, and a response to the chaos caused by the loss of that position. While the Babel myth tells of a lost similitude in language, replaced by multiplicity and compensated by translation, the myth of parricide tells of a lost authority replaced by contract and compensated by law. In each case, the compensation is inadequate to its task, and violence intrudes to secure the operation of both law and language. (A somewhat simplistic rendition, but I think it captures the main point.) Law and language share a desire for authoritative meanings, but suffer from an inability to identify the sources of such meaning.

Modernism and the Grounds of Law is framed around this myth of parricide, and its scenario of the collapse of primal authority followed by the necessity of social authority in the form of law. While this is not a book which accepts the entire psychoanalytical mythology or even a substantial

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8 *Modernism and the Grounds of Law*, 1.

part of it,[9] Fitzpatrick's restatement of this one myth prefigures a number of significant themes.[10] Understanding Fitzpatrick's reading of the myth is central to an understanding of *Modernism* so I will now lay out some of the themes condensed in this Freudian premise. (My description is very mechanical and should not be taken as indicative of Fitzpatrick's subtle and multidimensional working of the mythical narrative.)

First, the myth speaks of an origin or ground of law and the modernist desire to identify that ground, and to secure the structural position of law through resolving any conflict or uncertainty integral to it. In this way the work responds to the preoccupation, or more accurately obsession, with foundations which has characterised modernist legal theory and makes a strong contribution to the growing body of work which problematises the notions of foundational certainty and structural stability.

Second, the 'law' constructed in response to loss carries with it both the *determinateness* of the original position and the *responsiveness* to chaos and conflict represented by the parricide and subsequent social contract. This theme, which informs much of the book, is elaborated at length in Chapter 3. Here, Fitzpatrick situates the determinateness of concepts such as the rule of law against their own embedded need to be able to respond – to emerging social imperatives and to the particular and always novel circumstances which confront decision-makers. Thus law cannot be either one thing or the other, but is 'in-between', a point articulated in detail by reference to texts such as Derrida's 'Force of Law' and technical devices such as the legal fiction or the method of precedent.

Third, the myth raises the prospect of the 'savagery within' the order of civilised society and its law. Law posits itself as the negation of savagery, and as a means of securing civilisation against the perceived disorder of uncivilised society, but in doing so, this 'other' is retained as the underside of law, or its unconscious. Savagery threatens to disrupt law at every point, which is why law cannot be understood as a simple mechanism of order – its resistance to the 'savage within' necessitates that it operates by violence and therefore can never transcend the other which it seeks desperately to exclude. Again, this is a theme which reappears throughout the work. For instance, in Chapter 4, Fitzpatrick considers the modernist concept of the nation as constituted by the exclusion of its 'other' – often cast as 'savage', 'primitive', underdeveloped, or otherwise differentiated

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9 Though see Peter Goodrich, 'The Grounds of Law' (2003) 12 *Social and Legal Studies* 109.

10 This is an approach which may appear incomplete or unmethodical to some theorists of psychoanalysis, but (like Fitzpatrick) I have myself always been happy to adopt the heretical stance of selecting those aspects of the system of psychoanalysis which are revealing of some structural or symbolic point, while disengaging from the rest.

from the 'First World' nations of Europe and its (developed) former colonies.[11] Even the 'supra-national' state of Europe does not escape or transcend the concept of the nation thus understood, because it is constituted from the same basis as a different order of nation, existing on a different level.[12]

Fourth, Freud's myth serves as an instantiation of Fitzpatrick's method in *Modernism and the Grounds of Law*: that is, the method of the 'telling instance'. The work is neither a purely philosophical argument, or a sociological enquiry based on systematic evidence. The work is a narrative – itself an intervention in a range of discourses – rather than a statement of truth or a theory. The 'telling instance' is 'at one and the same time evidence and authority'[13] – in other words, the telling texts as Fitzpatrick appears to conceive of them are both example and exemplar, norm and instantiation, original and double. Like Derrida's discussion of Mallarme's *Mimique*, the story of a mime 'imitating nothing ... a double that doubles no simple',[14] Fitzpatrick's book is no simple discussion of a universalist position, of which there might be instantiations, but rather an effort to enliven the contradictions and lack of resolution in his texts. (I say this with some confidence, but the division of the text into 'Orientation' and 'Instantiation' may suggest another reading.) Like the law which is its primary subject, the book itself is 'in-between' the determinate legal philosophical position which aims to provide a static analysis of law and a narrative which constructs law from its own instantiations. The temporal paradoxes of law are reproduced in the methodology of the work. To this end (or rather in the interests of this performance), Fitzpatrick draws upon a vast and impressive range of philosophical, sociological, legal and other sources.

I have dwelt on these few points (from a potential multitude of points) emerging from the myth of parricide because I think they are central to an appreciation of *Modernism and the Grounds of Law* (and because it remains a habit of exposition to focus on the centre rather than the margins). However, the work consists of many layers, and those few themes I have raised provide merely an insight into the structure and process of the work: they are certainly not definitive of it.

I think it ought to be reasonably clear from this brief outline that this is not a work which can be reduced to a glib theme or argument: instead, within the configuration of ideas raised by Fitzpatrick it offers readers

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11 *Modernism and the Grounds of Law*, 125.

12 Ibid 136ff.

13 Ibid 4. For further discussion of this aspect of *Modernism and the Grounds of Law*, see Alan Norrie, 'A Fateful Inversion' (2003) 12 *Social and Legal Studies* 121.

14 Jacques Derrida, 'The Double Session' in *Dissemination* (1980) 206.

different experiences or possibilities. In other words, this is a book which is self-consciously open-textured and which invites the reader to interpret, construe, respond. As Peter Goodrich comments, the suspension of judgement, the 'not yet' which is the substance of Fitzpatrick's account of law is also reflected in his own writing. Goodrich sees the stylistic ambivalence of *Modernism* as symptomatic of a scholarly 'melancholia' or 'anxiety' born of the tension of working between disciplines.[15] It is also surely an invitation to the reader, enabling us to find ourselves and our own theoretical preoccupations in the text. This is not to say that there are not some very solid and compelling arguments advanced (for instance those outlined above): the style is, however, often exploratory and questioning rather than merely expositional.

This openness of style is not, of course, to everyone's taste, especially given (as Goodrich also implies) the legal professional context framing the university discipline of law, in which clarity is demanded and judgement is inevitable. It has been said of this book at least once,[16] and I am sure it will be said again, that it is written in an unnecessarily complex and obscure postmodernist idiom. It is certainly a difficult book to read, and I will not pretend to have comprehended it in its entirety. The language adopted by many contemporary theorists is self-consciously obscure, and this can be challenging even for readers well-versed in the conventions of postmodernism or deconstruction. Fitzpatrick does not often go out of his way to offer transparent explanations of his argument. I have myself sometimes deliberately adopted this stance, with varied results.

Of course it is possible to criticise work which is obscure on the grounds that the author did not sufficiently work out their argument to be able to state it clearly and without equivocation. Such doubts do not arise in relation to Fitzpatrick's work because, as I have said, the style is self-consciously reflective and deliberately open-textured. In my view the close reading and re-reading which is demanded by this text is rewarded by an ever-increasing nuanced and layered understanding of the issues it raises. This is a book of considerable scope and scholarship, offering significant insight into some very important legal philosophical questions.

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15 Goodrich, above n 9, 117.

16 Tim Murphy, 'Include Me Out' (2002) 29 *Journal of Law and Society* 342, 342-343.

The Mental Basis of Responsibility

Walter Glannon
(Aldershot, Ashgate, 2002)

Given the apparently never-ending stream of publications on responsibility and free will, any new book on the subject must do something to distinguish itself. Glannon seeks to develop a distinctive 'capacity' theory of moral responsibility, according to which moral responsibility depends on the possession of certain relevant capacities that together give us the capacity for 'reflective self-control' (and does not require that we have genuinely 'alternative possibilities of choice and action' (5)). He tell us that there are 'six features of the book that distinguish it from other works on moral responsibility', including other capacity-based theories –

> (1) attention to the agent's epistemic capacities, especially beliefs about the foreseeable consequences of his actions and omissions; (2) attention to the essential role of emotions in prudential and moral reasoning, and the idea that emotion and cognition are interdependent, interacting mental faculties necessary for rational and moral agency; (3) a conception of personal identity that can justify holding persons responsible at later times for actions they performed at earlier times, a conception that accords with and is shaped by our normative practices; (4) a compatibilist theory of responsibility for actions, omissions and consequences whose requirements are less strict and broader than those in standard compatibilist theories; (5) an emphasis on neurobiology rather than physics as the science that should inform our thinking about free will and responsibility; and (6) the melding of literature on free will and responsibility in contemporary analytic philosophy with legal cases, abnormal psychology, neurology, and psychiatry, which gives greater nuance and a richer texture to the general debate on the relevant issues (5-6, 144).

To do all this, in a mere 144 pages of text, would indeed be a significant achievement. I fear, however, that the book falls well short of fulfilling this promise.

The general outlines of a capacity theory of responsibility are by now familiar enough. We explain what it is to be a morally responsible agent, or to have 'free will', in terms of the various capacities that characterise responsible agents. We might talk initially of capacities for autonomous action or, as Glannon talks, for 'reflective self-control'; but we must then go on to identify the more specific capacities on which these general capacities depend. Glannon identifies six such capacities: the ability to 'form and respond to desires'; the abilities 'to form and respond to beliefs about the circumstances and consequences of action' (theoretical reason) and 'to form and respond to reasons for or against actions, and to form intentions to act' (practical reason); 'the ability to have and respond to emotions'; the 'ability to execute desires, reasons and intentions in choices and actions'; and 'the

ability to perform voluntary bodily movements' (14-5). Much of the book consists in the more detailed analysis of these capacities and of their significance for moral responsibility. Whilst Glannon's account is clearly, as he notes, a close relative to other capacity-based theories, in particular those that emphasise the importance of the agent's responsiveness to reasons, he argues that others have paid insufficient attention to the roles of the capacity for theoretical reason and of emotion – two of the features that make his book distinctive. However, both these charges seem at least overstated.

Theorists have typically included the capacity to form and respond to reasonable beliefs about the circumstances and consequences of my actions as a necessary condition of moral responsibility: that is why ignorance of relevant facts, or lack of foresight of consequences, is typically an excuse – at least if it was not reasonably avoidable; and that is why someone in whom that capacity is seriously lacking or impaired is not treated as a responsible agent. The failure that most concerns Glannon is, it seems the failure of those who defend some kind of principle of alternative possibilities to recognise the ways in which an agent who foresaw the situation in which he would lack alternative possibilities could properly be held responsible for what he does, or fails to do, in that situation (ch 5).

What Glannon appeals to here (and makes rather heavy weather of explaining) is the familiar doctrine that conditions that could otherwise exculpate an agent will not do so if he culpably brought them about, or culpably failed to prevent them arising. If, before going to an exhibition of fragile glass, I take a drug that I know will (or suspect might) cause me to have a violent fit during the exhibition, I can hardly excuse myself for the damage I cause by pointing out that my violent movements were involuntary; if I take a sleep-inducing drug knowing (or even intending) that it will cause me to be asleep at the time that I should be attending a meeting, I can hardly excuse my failure to attend the meeting by pleading that I was asleep and thus unable to attend. Glannon offers us more complicated examples than these, but that seems to be the essential point. However, it is not clear that they do constitute counter-examples to the principles he is attacking. The first is PAP': 'A person is not morally responsible for what he has done if he did it only because he could not have done otherwise' (97). But it is not clear that, in my example, I damage the exhibits '*only* because I could not have done otherwise'; it seems natural to say that I damage them because I took the drug – and a similar point applies, I think, to Glannon's examples.

The second principle, as specified by Glannon, is that 'A person is morally responsible for failing to perform some act A at some time T' only if he could at some time T not later than T' have performed A at T'' (107): I find this somewhat opaque, since it seems to suggest that I could 'perform

A at T'' at some time earlier than T'; but it is meant to capture the thought in van Inwagen's clearer principle that 'An agent cannot be blamed for a state of affairs unless there was a time at which he could have arranged matters such that that state of affairs not obtain' (108).[1] Now this clearly allows me to be blamed for missing the meeting when I do so because I took a soporific knowing that this would be its effect: but Glannon thinks it cannot deal with the case of a non-swimmer who impersonates a lifeguard, and who is then unable to save a swimmer who gets into difficulties from drowning. He is, Glannon argues, not only 'morally responsible ... for impersonating a lifeguard and for the consequence of the swimmer drowning', but also 'for failing to perform the lifesaving act, even though at no time is he physically able to perform that act' (108).

There are various problems with this argument, which I think are symptomatic of more general problems with the book. First, the example is too sketchy: in particular, it is not clear whether others (other lifeguards, the swimmer) rely on this supposed lifeguard (he persuades the other lifeguards that he is qualified, and sits in the lifeguard's chair, which suggests that others might be relying on him; but '[h]is presence or absence makes no difference to what occurs within the causal sequence once it is underway' (108)). If others did rely on him, he could be held responsible for the swimmer's death insofar as it is likely that the swimmer would not have entered the water, or that other lifeguards would have been on watch there, had it not been for the impersonator's deception. If they did not rely on him, it is hard to see how the swimmer drowning is a 'consequence' of his impersonation, or how he is responsible for *that* (despite Glannon's comments at 110). Second, suppose he had not impersonated a lifeguard, but had just been innocently on the beach, and had watched with helpless horror as the swimmer drowned. We presumably would not in that case say that he 'failed to perform the lifesaving act' – in which case he could have so arranged matters that he did not fail to perform the lifesaving act, by not engaging in the impersonation (or by leaving the beach, for that matter). Thus the example does not threaten van Inwagen's principle, once we get clear about what the relevant 'state of affairs' is.

I have spent some time on this argument because I think it exemplifies the way in which Glannon is too often prone to over-complicate matters, and to argue too hastily and sketchily (a result, no doubt, of trying to fit so much material into so short a book). The latter defect is also evident in his comments on the role of emotion in practical reasoning – another aspect of the book that is supposed to distinguish it from others, by correcting other theorists' failure to pay enough attention to that role. That charge seems strange, given the rich literature on the emotions of the last

[1] Quoting van Inwagen, 'When Is the Will Free?' in *Philosophical Perspectives III* (1989) 399, 419.

few decades – a literature that has included quite a lot of attention both to the character of emotions (in particular the extent to which they involve a cognitive aspect), and to their role in moral thought and action. It is also strange to be told, twice, that we need to look to neurobiology to discover the role that emotions play in practical reasoning (33, 38): there is of course room for serious discussion about the relationship between philosophy and such sciences as neurobiology, but philosophers from Aristotle onwards have managed to say quite a lot that is useful and illuminating on this topic (as well as, inevitably, a lot that is confused or misleading) without the benefit of expertise in neurobiology. The real problem with Glannon's discussion, however, is that whilst he often tells us that the emotions play a crucial role in practical reasoning, he never tells us in enough detail either how we should understand and analyse emotions (beyond making clear that he rejects accounts that portray emotions in overly cognitive terms), or what their role is – beyond a number of rather sketchy examples, and a discussion of the by now well worn example of psychopathy. The discussion of psychopathy is puzzling. Glannon argues that psychopaths are partly responsible for their actions since they have 'the capacity to recognise moral reasons for and against performing certain actions', though they lack 'the capacity to respond to these reasons in the appropriate way' (61). But, first, it seems strange to hold a person even partly responsible for wrongful actions if he lacked the capacity to respond to or be moved by the moral reasons against such actions – unless we could claim that he was responsible for that lack of capacity. Second, it is not clear that one who lacks the capacity to respond to reasons, and the emotional capacities that psychopaths are said to lack, can really have the capacity to recognise them *as reasons*: for surely to recognise something as a reason involves at the least an understanding of how people could be moved to act by it, if not seeing it as something that could move me; and in virtue of the role that emotions play in such understanding, it is not clear that it is available to the psychopath as Glannon describes him. Perhaps Glannon could say more to explain and defend his claim: but he does not say nearly enough here to render it plausible.

I have focused on some (though not all) of the features of this book that Glannon claims makes it distinctive. The book is useful as a detailed statement of a capacity-based theory of moral responsibility, and as bringing together themes from contemporary discussions of the conditions of responsibility, of free will, and of personal identity: but its arguments are too often sketchy and underdeveloped, and its claims too often insufficiently explained to render them clear or plausible.

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Australian Journal of Legal Philosophy

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Within the text, use automatic footnotes with the footnote number placed after the punctuation.[1] Reference styles are as follows:

Book:

1 Andrei Marmor, *Interpretation and Legal Theory* (1992) 171.

Edited collection:

2 Judith Shklar, ‘The Liberalism of Fear’ in Nancy L Rosenblum (ed), *Liberalism and the Moral Life* (1984) 5.

Article:

3 Paul F Campos, ‘A Text is Just a Text’ (1996) 19 *Harvard Journal of Law and Public Policy* 327.

4 Ibid 328—same as immediately preceding footnote but from a different page.

5 Ibid—reference exactly the same place as the immediately-preceding footnote.

6 author’s name, above n note number—not immediately preceding footnote, eg: Campos, above n 3, 330.

Case:

7 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Lonrho v Fayed* (No 5) [1994] 1 All ER 188, 190.

Statute:

8 *Health Insurance Act 1973* (Cth), s 61(2)

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