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Introduction - Reading Modern Law: Critical Methodologies and Sovereign Formations

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Introduction

*Ruth Buchanan, Stewart Motha, and
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A book like this, a problem like this, is in no hurry; we both, I just as much as my book, are friends of *lento*. It is not for nothing that I have been a philologist, perhaps I am a philologist still, that is to say, a teacher of slow reading: – in the end I also write slowly. Nowadays it is not only my habit, it is also to my taste – a malicious taste, perhaps? – no longer to write anything which does not reduce to despair every sort of man who is ‘in a hurry’. For philology is that venerable art which demands of its votaries one thing above all: to go aside, to take time, to become still, to become slow – it is a goldsmith’s art and connoisseurship of the *word* which has nothing but delicate, cautious work to do and achieves nothing if it does not achieve it *lento*. But for precisely this reason it is more necessary than ever today, by precisely this means does it entice and enchant us the most, in the midst of an age of ‘work’, that is to say, of hurry, of indecent and perspiring haste, which wants to ‘get everything done’ at once, including every old or new book: – this art does not so easily get anything done, it teaches to read *well*, that is to say, to read slowly, deeply, looking cautiously before and aft, with reservations, with doors left open, with delicate eyes and fingers ... My patient friends, this book desires for itself only perfect readers and philologists: *learn* to read me well!

(Nietzsche 1881/1982: 5)

Modern western formulations of legal scholarship have been formed – and continue to circulate – around the question of the authority of the law of the sovereign state and the practices of government. Such concerns are central to the formation and maintenance of the European state in its national, imperial, and international guises. This book takes up these concerns, but ‘slantwise’,¹ addressing itself to the question of how to live with the law of modernity through the question of reading and, specifically, how to read the modernity of law. The essays in this volume arise out of a symposium focussed on the work of Professor Peter Fitzpatrick.

As late moderns, we inhabit a world that has been shaped by the demand for the security of both the sovereign territorial state and the

power and wealth of empire. Questions of sovereignty and domination and of subordination and freedom have driven these claims of security and protection, but have driven, too, the claims of right and of justice. In turn, such questions and claims have engendered the critical scrutiny of the practices of politics, law, and morality. And even as we live in an age of neo-colonialism, the over-consumption of resources and the destruction of the environment, our responses remain shaped by the forms of law by which we live. The various chapters of this book attend to the ways that critics from within and across the common law tradition have approached what we might think of as ‘sovereign formations’ and the origins or grounds of law – and through this our ‘situation’ as subjects of law.

The origins of law have long been a central concern of the ‘theoretical’ branch of the discipline. This book considers *reading* as central to developing a critical methodology capable of addressing that concern, and the persistence of, and limits to, a variety of sovereign formations. *Reading modern law* as we envisage it here is an attitude, posture, and style. In this book we advocate reading slowly, attentively, again and again,² in order to attend to the vanishing point (or limits) of what appears substantial in law’s extravagant claims. Such claims include the notions that law is autonomous, that it grounds itself, that it is ever responsive to the new, and that it carries universal values and aspirations. Here, we remind ourselves that the work of reading, like that of listening, is as much the work of the critic as is responding to injustice. Such reading, slow reading, also serves to join and re-join with the possibilities and potential law.

The strategies of reading and the styles of writing and argumentation explored in these essays draw inspiration from the work of Peter Fitzpatrick. Fitzpatrick’s work spans 30 years of patient reading of the origins and (authoritative) grounds of modern law. It is a body of work that might retroactively pass under the heading of the decolonization of law, and offers a style or ethos of slow reading which tries to do justice to law, and to a life lived with law. Fitzpatrick’s readings of law’s grounds are thus both a challenge to law and a form of care or love for law.

In this book we take Fitzpatrick’s complex formulation of the dynamic conduct of law in terms of ‘determination and responsiveness’ as a device for reading slowly – for undoing, resisting, and reformulating a variety of sovereign formations. In Fitzpatrick’s hands the endless relation between determinacy and responsiveness gives us a point of ordering of the relations of law. His work offers us at least two ways of reading (modern law) slowly. First is the patient work of the redescription of western legal relations as a tradition forever engaged in the task of shoring up and breaching its own boundaries. In its psychic and material states, the determination of law creates grounds, establishes territory, governs populations, and seeks security. At the same time, law must also be open to change and be able to respond to the realities of the world it engages. So,

second, Fitzpatrick's work calls on us, as critics, to read slowly to *recast* this dynamic, both to make visible its injustices and also to find new forms of responsiveness. The slow readings in this book also elaborate the patterns and styles created by such readings – their rhythm or tempo; the practices of re-inscription within and around the traditions of legal thought; the tracing of law as it moves; and an ethic of care that would ensure that law is not without response, or the possibility of justice.

The chapters thus open appropriately enough with the question of justice, and specifically reading justice and the archive. Marianne Constable in Chapter 1 observes that Fitzpatrick's 'insistent and persistent' citations of the writings of others 'incite us to (consider) what might otherwise remain outside of writings of and about law: possibilities of justice'. Constable is concerned with the question of authorship, and specifically Fitzpatrick's authorial style, as a key dimension of his practice of reading. The tension between an avowed willingness to be attentive to (or determined by) the specificity of the text, and the willingness to be open to that which those texts cannot contain, is an integral aspect of Fitzpatrick's work. His layered, difficult philological writing invites us to engage in the project of reading modern law differently. Fitzpatrick's work 'challenges not only the imperialism of the state and its law, but also the imperialism of a particular sort of scholarship about law – in particular, that of the empirical social sciences', as Constable puts it. Constable's chapter elucidates both challenges.

Linking Fitzpatrick's mode of reading to his approach to the question of sovereign formations, Constable begins by tracing the arc of Fitzpatrick's arguments about the United States' sovereign assertion and its arrogation to itself a style of settled determinacy that transforms the nation from one which was once (reflexively) identified with the 'revolutionary dimension of the rule of law' to a 'carrier of imperialism'. In contrast with the usual (critical) formulation, international law becomes the locus of a potential challenge to imperialism through an 'imperative and counter-imperial ethics' which is encompassed (though not contained) within it. Constable notes that, for Fitzpatrick, international law is 'both dissipated *and* state-centred'. The second, methodologically oriented challenge is developed by setting Fitzpatrick's view of the role of custom in international law alongside Sally Merry's account of the role of culture in the translation of international human rights norms to local contexts. For Merry and Fitzpatrick, culture and custom respectively are both 'fluid' and 'promiscuous', and in this respect are transgressive of legal norms. Yet for Fitzpatrick these transgressions have a constitutive dimension; indeed, it is precisely 'the effects of active opposition, disregard and violations' that 'merge to challenge law to become just'.

For Constable, Fitzpatrick's profound attention to texts is unapologetically symptomatic of 'archive fever'. This attentiveness is held in constant

tension with his equally unapologetic responsiveness to that which always exceeds the capacity of those texts, and that archive. Made visible in this tension are ‘unsettled silences and possibilities of response’ within which Constable locates the impossible fecundity of Fitzpatrick’s work. We are cautioned to be ‘wary of global visions and sovereign systems, both as claims and as facts’, yet the very failures of those visions and systems in relation to the ‘insatiable’ demands of justice are revealed as leaving spaces open for something else.

Worrying and revisiting what is ‘settled’, whether territorially or in text, is the subject of Chapter 2, by James Martel. Martel offers us a double account of reading, presenting some uncanny parallels between the reading styles of Peter Fitzpatrick and Thomas Hobbes. Both Fitzpatrick and Hobbes (and, by implication, Martel) offer us ways of thinking about power and authority anew through reading. Both Fitzpatrick and Hobbes are concerned with the theological remnants in putatively secular formations. In Fitzpatrick’s case these remnants are made visible through practices of attentive reading. In Hobbes’ case the revelation is connected to his rhetorical sensibility, which manifests a certain ‘urge to truth’. As Martel points out, this urge becomes clear in Hobbes’ own comments on reading texts:

[I]t is not the bare Words, but the Scope of the writer that giveth the true light, by which any writing is to bee interpreted; and they that insist upon single Texts, without considering the main Designe, can derive no thing from them cleerly; but rather by casting atomes of Scripture, as dust before mens eyes, make every thing more obscure than it is; an ordinary artifice of those that seek not the truth, but their own advantage.

(Hobbes 1651/1996: 415)

Martel shows that Hobbes wants us to be attentive to the scope and design of a text, and ‘how we are to interpret and interact with (or read) the text overall’. The point is quilted when Martel guides us to read Fitzpatrick as a reader of Hobbes. Through his careful re-reading of Hobbes, and his refusal of received wisdom, Fitzpatrick seeks – and finds – a certain kind of lawfulness where others find only savagery and darkness. This reading, and rereading, enables Fitzpatrick, Martel argues, to find a ‘tender’ side to *Leviathan*, one that displaces the usual characterization of Hobbes as an authoritarian positivist, enabling the emergence of a different genealogy of liberal law and politics and engendering a call to a different kind of responsibility.

From author and authority we turn our gaze to sovereignty, yet still ‘slantwise’, not directly. The chapters by George Pavlich (Chapter 3) and Paul Passavant (Chapter 4) both share the sense that neither law nor its

subjects can live without the ‘enchantment’ of the stories that sustain law as sovereignty and self-knowledge, judgement, and understanding. And each of them takes up the problem of how we are to read the variety of sovereign determinations through which power and authority are constituted and sustained, through which biopolitical life is administered and how critical beings resist, refuse, and rebel.

A sovereign determination, Pavlich argues with Fitzpatrick, is at once decisive and responsive to that which is beyond the determination. This is as consistent with the ungrounded ground of medieval sovereignty as it is with a biopolitical power that posits itself through law. Drawing on Fitzpatrick’s account of ‘the law of the law’, Pavlich offers a way to read both law and sovereignty which reveals their mutuality: the law in a given instance posits itself, and in that process an associated sovereignty emerges. But the law of sovereignty is then forever caught, produced, and read between determination and responsiveness.

Like Martel, Pavlich insists on the radical potential of reading carefully, using Fitzpatrick as an exemplar of such practices of ‘radical reading’. Hobbes, for example, is sometimes thought to offer a form of law and politics delimited by territory, and a form of sovereign power that is illimitable and ungovernable. For Pavlich, though, a different register of questioning sovereign power is in order: ‘Can the political logic (theology?) of an ungovernable sovereign be understood as an historical event? And have new “governmentalized” forms of sovereignty transformed this logic? If so, what might the laws of such governmental sovereignty be?’ Drawing on Foucault, Butler, and Fitzpatrick, Pavlich argues that sovereignty produces ungovernability as a mode of governance, and point of reading. We have seen the emergence of a ‘governmentalized sovereign’, a sovereign who ‘becomes’ through governing. These questions, which emerge through a careful re-reading of sovereign formations, enable us to ‘refus[e] the ungovernable sovereign as definitive of all sovereignties’. Such refusal opens up the ‘unconditional’ aspect of sovereignty, drawing on Fitzpatrick again, to signal the unknown senses of a ‘governable’, or at least ‘governed’, sovereign, and open them to the possibility of other promises, including democracy.

Paul Passavant’s chapter too picks up on these themes, avowedly locating his consideration of the relation between sovereignty and democracy from within ‘democracy’s ruins’ – the United States after the torture memos. Passavant too counterposes Fitzpatrick to Agamben’s work on sovereign power. In contrast with Agamben’s anti-judicial, messianic view of the transition from an ‘absolute sovereignty’ to the ‘coming community’, Fitzpatrick, in Passavant’s reading, mediates the relation between sovereignty and democracy within his conception of sovereignty itself. Modern sovereignty must ‘“marvellously combine” being enclosed, one, corporate, and determining with also ... being illimitable, plural,

responsive, determinate, and dissipating'. And it must 'combine these contradictory dimensions without recourse to a transcendental reference'. For Fitzpatrick, and for Passavant, this impossibly paradoxical combining is accomplished by the peculiar alchemy of modern law. Law, for Passavant, 'is where we take a position on democracy'. Returning us to the ethical possibilities of (re-)reading the archive, Passavant's chapter compellingly argues for the reclamation of law as 'democracy's archive' – the site within which we may 'recall principles of democracy and justice to ourselves, and send, again, this legacy to the future'.

Taken as a practice of reading and writing which both challenges law and evinces a form of care or love for law – a fecund law, pregnant with possibility – Fitzpatrick's work reminds us again and again that 'the medium is the message', or that the medium is there to be read. Yet as we see in Chapter 5, by Fleur Johns, and Chapter 10, by Carrol Clarkson, the message resonates differently within different disciplinary idioms. In her poetic chapter, Johns identifies the 'possibility' that Fitzpatrick locates within international law with the distinctive 'rhythm' of his scholarly engagements with it, and yet concludes that it is a possibility that will provide little reassurance to international lawyers.

Johns approaches Fitzpatrick's rhythm or method of reading and writing in terms of a critical practice, a way of living *in* or *with* international law, rather than the production of knowledge about it. Yet she locates her reading of Fitzpatrick both within and outside of the discipline of international law. While his 'insistence upon what he calls a "sociologic"' in international law can be related to 'recurring attempts to restore to international law an imperative if paradoxical sociality', Johns notes that Fitzpatrick's call to imbue international law with 'positive content' may strike 'the international lawyer on the street' as risky, even retrogressive. More importantly, the critique may miss its mark, either because it is too easily accommodated within international law's 'comfortable, elastic cosmopolitanism' or because it underestimates the utility of the pragmatic anti-formalism that is the critical international lawyer's stock in trade. For an international lawyer, while the distinctive tempo of Fitzpatrick's work can be understood in terms of a refreshing, if resolutely discordant, critical ethos in respect of much that is taken for granted within the field, it also defies the pragmatic impulse so deeply embedded in the psyche of the discipline: 'nothing emerges that may be applied readily elsewhere'.

Staying with international law, and bringing together the themes of reading slowly, creatively, and collaboratively is the similarly poetic account offered by Fiona Macmillan in Chapter 6 of the 'tapestry' of the intellectual endeavour in which she understands herself to be engaged. This effort, of weaving together (in both senses), understands scholarship as a (communal) process rather than an (individualized) product. Macmillan is concerned with the 'new constitutionalisms' of both the national

and the international, and the attempts to integrate and ‘harmonize’, at both levels, the economic and the political. Macmillan’s chapter draws on the first of Fitzpatrick’s lessons about reading modern law, and specifically the possibilities of critical redescription. Here that redescription is Fitzpatrick’s reversal of the typical depiction of the international as being constituted by the national, and his account of the mutually constitutive relationship between the national and the international which offers us new ways of reading domestic political processes as being shaped by the international. As Macmillan compellingly shows us, the effect of this in general, and of the international trading regime in particular, is that the political has become subordinated to the economic.

Moving from the international to the universal, William Conklin in Chapter 7 engages with the question of law’s forms, and in particular the understanding of those forms as universals. Conklin’s chapter is a lovely illustration of what may be gained by a practice of reading slowly in contrast to more forensic styles of critique. Reading slowly has the potential to draw open a text, revealing the unexplored and unexamined possibilities that lie within it. Taking Fitzpatrick’s critique of analytical jurisprudence as his starting point, Conklin reminds us that another corollary of reading slowly is *teaching* slowly, and implied in slowness in that context is an approach to the question of knowledge that resonates with the decolonization of law. Placing Fitzpatrick’s constant concern with the irresolution of law’s origins against the analytic tradition’s equally obsessive concern to pin it down, Conklin reminds us that

[a]n explanation of the origins of the legal order ‘a priori puts us outside’. The myth and mysticism of the origins remain a secret so long as contemporary legal theorists, law teachers, and other officials colour their analyses as the rule of law and objectivity. The secrecy is reinforced by disparaging rhetoric directed towards anyone, whether inside or outside the chains of analysed forms, who attempts to pierce the veil of the invisible foundation. Social bonding among the non-expert knowers of legal forms [therefore] remains an outside possibility.

Through Fitzpatrick and Derrida, Conklin reminds us that the ‘painful consequence’ of this secrecy, and the asserted universality of forms, is violence and exclusion. Fitzpatrick has been especially concerned with this ‘painful consequence of law with reference 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’. Following Fitzpatrick into a concern with foundations, we understand that as ‘long as we remain in the illusion that the system (*droit*) of laws (*lois*) has a foundation, we will pursue the colonizing project’. And yet Conklin shows us that

a slow reading of Fitzpatrick and, with Fitzpatrick, of Derrida may also reveal a continuation of what Conklin calls a 'territorial' knowledge which presupposes that concepts are valid if they can be situated within familiar territorial and metaphysical boundaries. Territorial knowledge raises the prospect of power and violence as an inevitable feature of a modern state-centric legal order and of the imperial and colonial condition of modern European and common law. And yet reading slowly shows us that Fitzpatrick himself is haunted by the intuition that there might be another sense of knowledge. Conklin, like Macmillan, is concerned to 'weave together', treating scholarship as a communal practice rather than individualized product. And he pushes Fitzpatrick's own concern along, to outline a different sense: of 'experiential' knowledge. For Conklin, this radically different sense of knowledge is also nested in European legal thought, and opens a question as to whether even Fitzpatrick's sophisticated account of territorial knowledge tells the whole story about contemporary legal thought. Teasing these threads out from within Fitzpatrick's texts enacts the lessons of slow reading Fitzpatrick's own writing has taught us.

The thought of the territorial and of the occupation of territory is taken up from within the tradition in another way. Like Conklin, Judith Grbich in Chapter 8 questions the inheritance of the form of law. She takes up the experience of the form of modern law and links it to Peter Fitzpatrick's work of 'internal decolonization'. Drawing on the work of Ian Duncanson in delineating relations between law, modernity, gender, and race, Grbich draws out the sense in which Fitzpatrick's project joins a long engagement with the experience and affective form of law: with Christian spirit and with the gendered and sexed understanding of the story of debt, economy, and authority. For Grbich this is a story read best in terms of Lutheran theology and Lacanian psychoanalysis. Grbich asks, what is the character of the God which dwells as a colonizer within, and who or what aspect of ourselves has this God colonized? How else should this story be told except as biography, tradition, and law? How else can this be told except as the story of the Christianization, or at least the Lutheran Christianization, of the Law of Moses?

In a sharp delineation of the Christian structure of modernity, Grbich links Martin Luther's anti-Semitic characterization of the expropriation of labour and life by gluttony and drunkenness, the cost of clothing, and usurious buying of rent charges with Freud's story of the killing of God in *Moses and Monotheism*. Economy, and the exchange of economy, is structured around the desire of brothers for access to women. Authority, life, and exchange point both to the ways in which we kill God and to the ways in which we enter into cultural life and language. For Freud this was a story to be told in terms of a family romance. For Lacan it is one told in Aristotelian terms of the making of knowledge like 'a procreation in which

the masculine is the activating of a life'. Both accounts point to the ways in which 'the sexed and theologically loaded fantasies embedded in the jurisprudential archive have a central place in the ways the subject in modernity is conceived'.

Grbich draws Lacan's accounts of authority and language into law by pointing to the ways in which Lacan reveals the continuities between Martin Luther's onto-theological concerns with the discourses of trade, economy, and exchange, and contemporary forms of thinking. The New Testament and Lutheran teaching of 'love thy neighbour as thyself' transform the meaning of the Eucharist from Catholic sacrifice to the sealing of a gift from God. However, as Grbich and Lacan note, in Luther's telling of the New Testament this is a gift that turns out to be a debt – the gift of a financier and the sign of financial property. This gives us the dialectic of the Master and the Slave. It is these fantasies that put women into circulation as the creation and property of men. While Luther's interpretation of the Mass as a gift that overcomes the Mosaic law of prohibition gives us the entitlement of freedom (this is the gift of Christ), it also gives us the injunction to follow the life of Christ and give up life for the neighbour.

Johan van der Walt in Chapter 9 too is concerned with reading the modern imaginary, returning us to the question of origins or grounds in his exploration of Fitzpatrick's reading of Freud in *Modernism and the Grounds of Law* (2001). As is well known, Fitzpatrick turns to Freud in exploring the origins of human society, and the question of the grounds of law. In the quasi-ethnographic account of the primal horde in Freud's *Totem and Taboo*, we find the origin myth that serves as an allegory of the origin of law. In what seems like a completely determined fixity, the father imposes order on the primal horde and has monopoly over the women. In the face of this order and fixity another sociality emerges: that of the sons who band together to kill and consume the father. The rupture ushers in a sense that possibility and newness can enter the world. But 'taking leave' of this order, as van der Walt puts it, does not offer 'a stable abode'. The brothers find themselves

split by two seemingly irreconcilable concerns, the concern with a stability reminiscent to some degree of the fixity formerly imposed by the father, on the one hand, and a freedom to take leave of this order when the exigencies of desire and circumstance require this leave-taking.

Driven by the need to reconcile this tension, the 'totem' is instituted. The killing of the totem is generally prohibited but occasionally allowed. This combines both order and the possibility of an occasional ecstatic overcoming of that order. As Fitzpatrick (2001: 2–3) puts it, the 'two extremities' of determinate order and what is unknowably beyond are combined in the

killing of the totem. The two extremities – determination and responsiveness – characterize totemic law. Van der Walt describes these dimensions or extremities of law ‘in terms of two homonyms that allow us to contemplate and trace further their *wondrous* and *unmediated* concentration and *combination*. The homonyms at issue here are *immanence* and *imminence* – where determination corresponds to immanence, and responsiveness to imminence. Following a discussion that distinguishes ‘immanence’ in the work of Deleuze and Guattari on the one hand, and Jean-Luc Nancy on the other, van der Walt suggests that the determinative aspect of law involves a claim that law is ‘immanent to itself’. An imminent or responsive law, on the other hand, ‘is never fixed but always to come’.

For van der Walt, a law that is immanent to itself fails to be hospitable or open to a law that is never fixed and always to come. In terms of the orientation to slow reading which positions this volume, van der Walt’s chapter reminds us of another dimension of attentiveness – that of listening – that corresponds to the slowness in reading:

the misleading homonymic play between immanence and imminence can in fact lead us to hear imminence when we hear immanence and vice versa, or lead us to hear both simultaneously and leave us to first think and *listen to* what is to be heard before we can respond aptly.

Modern law advances the dominance of the determinate (immanent). Or, as Fitzpatrick puts it, ‘[t]he modern rule of law, with its avowal of assured stability and ultimacy of determination, seems closer to the condition of the primal horde’ (2001: 2). This is not to suggest that ‘utter responsiveness’ would be an alternative posture, as that would also return us to another totalized world. Immanence and imminence becomes dangerously fused – a condition that we experience in our mishearing and confusing of the two terms. For van der Walt,

Between immanence and imminence is an infinitesimally small but always hugely impossible step, namely the step between the now and not-now, the step between time that is still for a moment and time that is always gone. The totem was devised to traverse this impossible step and embody this impossible threshold. And it is the consistent focus on this impossible step or threshold between the here and there and the now and then of law that renders Fitzpatrick’s work so relentlessly liminal.

This liminality of law takes the place of what would otherwise be an alchemy or reliance on a transcendental reference.

But if Fitzpatrick’s work of reading – and the work of reading Fitzpatrick – reminds us of the intimacy between medium and message – and between

the medium and its reading – the chapter by Carrol Clarkson (Chapter 10) finds in Fitzpatrick a model of how responsiveness to law might be enacted. Writing from within the discipline of literary and aesthetic theory, Clarkson is oriented by an attention to the expressive and aesthetic forms taken up in response to the limits of law. In this, Clarkson (like Constable) attends to Fitzpatrick’s own citational practices. For Clarkson, this practice itself enacts, perhaps even constitutes, a relation between what is beyond law and what is interior to law. One task undertaken in Fitzpatrick’s *Modernism and the Grounds of Law* (2001), for example, is a form of responsiveness to the too literal grounding of law. For Clarkson, Fitzpatrick’s work is exemplary in the way it holds on to and elaborates the gesture of responding to the limits of law. Fitzpatrick writes in response to and against the enclosed space of Carl Schmitt’s European *nomos*, ‘whilst determination can never be completely spatially formed, responsiveness cannot be ever completely unformed’ (Fitzpatrick 2001: 91). Clarkson herself responds, with Heidegger, that what is important is not so much earth or world but the relation that is called forth or disclosed by art, or by law. The world of art is ‘responsive to the earthly forms in nature ... it neither excludes them, nor does it abstract or reduce them to the supposedly determinate limits of its own world’. Rephrased in the language of limit, art and law do not simply exclude, they make possible. Fitzpatrick, argues Clarkson, identifies such a relation in terms of a response – a creative reaching out to a possibility beyond determinate existence – where law finds itself bound to its exterior. The limit or *aporia* that keeps law and justice apart also allows for the possibility of a relation – of a justice, law, or ground yet to come.

Reading, relationality, and limit are themes that take us full circle, (back) to Abdul Paliwala’s evocative chapter (Chapter 11), which provides us with a fireside resting place before Fitzpatrick’s own contribution to this volume. In what is the most avowedly biographical chapter in the book, Paliwala takes us back to Fitzpatrick’s early engagements with law and politics in Papua New Guinea, hinting at the ways in which Fitzpatrick’s ‘reflexive transgressive form of participatory engagement with people who were being subordinated’ has shaped his practices of reading and writing, and living with, law ever since. Paliwala uses the metaphor of reading and writing by firelight to consider the particular demands and possibilities – and limitations – of decolonizing law. ‘Firelight’, he observes, ‘is both warmly seductive and in its flickering quality not a great medium for readers or writers’, and yet the particular ethical commitments it evinces are well captured by the implicit contrast to the electric glare of modern law. This contrast becomes contradiction in the form of Fitzpatrick as a ‘carrier’ of modern law in Papua New Guinea, but a carrier as jurist, as reader, who speaks not as a jurist ‘of the South’³ but as a critical reader of his own traditions. Thus emplaced, Fitzpatrick, according to Paliwala, tried

always to enact the resistant and transgressive possibilities of the law in a society putatively 'in rapid transition' from tradition to modernity, from colony to post-colony, while always also aware of the inescapable tension between the imperial and counter-imperial dimensions of law. In his subsequent practice, Fitzpatrick has held on to something of that emplacement, reading and writing against the grain, and teaching us to read and write in a similar vein, of critique and care, for both law and its 'critical beings' (Fitzpatrick and Tuitt 2004).

Fitzpatrick's own contribution concludes this volume, bringing together modern law's mythopoetic quality with its characteristic duality of determinacy and responsiveness, combined and made visible through the practice of reading – and writing – slowly. Here Fitzpatrick suggests that law and literature share a creative and fictive quality. But saying what this fictive quality may be is no easy matter. Almost all the contributors to this volume have pointed to Fitzpatrick's characterization of law as combining a determinate and responsive quality. In Chapter 12 he extends this to the 'receptive creativity' that both law and literature share. But he also insists on the persistence and insistence of the negative – the sense that 'poetry makes nothing happen' (Auden 1979). But as Fitzpatrick makes clear, with a citational practice we have drawn attention to, what happens is far from 'nothing':

What Auden means with 'poetry makes nothing happen' is that it brings nothingness into happening. In the same poem he describes poetry as '[a] way of happening, a mouth' (1979: 82). Or as Blanchot puts it even more expansively: 'Nothingness is the creator of the world in man' (1999: 398–9). Or we have nothing as our 'flowering' in Celan's 'Psalm' (2002: 153). (The evocation of nothing can make the academic feel the need of copious reference.)

An attentiveness to the event of newness or happening is a consistent theme in Fitzpatrick's work. After Nietzsche, he urges us to read and write slowly – partly as a way of countering this 'age of work', but also in order to leave some doors open. This is the injunction with which we began, 'to read slowly, deeply, looking cautiously before and aft, with reservations, with doors left open, with delicate eyes and fingers' (Nietzsche 1982: 5; and see Goodrich 2005: 189–97).

As a volume, *Reading Modern Law* gathers together a collection of essays that pay close attention to a critical approach to sovereign formations and the grounds of law. The character of modern law is approached through an emphasis on the rhetorical and discursive practices which we regard as constitutive of what law is. As we have suggested, we approach the task of studying law by privileging an attitude to reading texts. This is not especially new. There are several excellent studies that have examined the

nature and character of law from a critical and interdisciplinary perspective which emphasizes the ethical importance of reading (slowly), and we take our bearings from Goodrich (1986), Fitzpatrick (1992, 2001), Constable (2005), Douzinas and Geary (2008), and Pavlich (2010).

But if an attention to reading – and slow reading in particular – is not new, the study of the ‘grounds’ of law – understood broadly as authorization, foundation, arche, and memory of legal decisions and institutions – owes much to Peter Fitzpatrick, the leading theorist of modern law’s grounding and groundlessness. From his early, path-breaking work on myth and modernity which characterized the irresolution of modern law’s expulsion of mythic structures and narratives (Fitzpatrick 1992) to his later work directly on the grounds of law, what emerges crucially is the ambivalence at the core of what characterizes law and the legal decision – an irresolute combination of law’s determinate and responsive qualities (Fitzpatrick 2001).

Following Fitzpatrick, we learn that treating a combination of the determinant and responsive qualities – of law, and of sovereignty – as the object of study can serve to reveal the dynamism and potential in a law that is too often regarded as radically over-determined, whether by something called the ‘social’, or by the sovereign exception. And so the fact that scholars and critics disagree about how to define sovereignty is less our concern here than the idea that different ways of reading sovereign formations suggest different engagements between writer, reader, and sovereign, as well as with justice and law.

Accordingly, many of the chapters of this volume can also be seen as taking a sideways glance at sovereignty, thinking about sovereignty ‘slantwise’ through cognate concepts such as democracy, governance, international law, constitutionalism, theology, imperialism, the force of literature, psyche, and sacrifice, each addressed here to a greater or lesser extent as sovereign formations. And although we are far from suggesting that the multiple, situated, and persistent sovereign disasters can be reduced to a text, or resisted by strategies of reading alone, we take inspiration from Fitzpatrick to think about what practices of re-reading both legal texts and sovereign events with slowness, or a kind of ‘radical care’, might offer.

But if the irresolution between determinacy and responsiveness, and the practices of reading that it engenders, demands, and sustains, can help us to live with modern law, the legality to be encountered through Fitzpatrick’s work is a ‘terminal’ one (Fitzpatrick 2001: 100, 148, 175, 184). It is terminal not only because modern law has been a reliable companion of imperial death-dealing and colonial appropriations of various kinds; it is terminal, too, not in the sense of finality, but in the sense that it makes something possible – beyond. *Terminus* is the Roman god of boundaries; his temple is open to the sky. Holding open a place between forms of dissolution – the work of irresolution – is one of the tasks of the reader of law.

Notes

- 1 See Emily Dickinson, 'Tell all the Truth but tell it slant' (1960: 506 [1128]).
- 2 On slowness and law's time, see the lovely essay by Karin van Marle (2003).
- 3 See generally Black *et al.* (2007).

References

- Auden, W. H. (1979) 'In memory of W. B. Yeats', in W. H. Auden, *Selected Poems*, London: Faber & Faber.
- Black, C., McVeigh, S., and Johnstone, R. (2007) 'Of the South', *Griffith Law Review* 16: 299–309.
- Blanchot, M. (1999) 'Literature and the right to death', trans. L. Davis, in M. Blanchot, *The Station Hill Blanchot Reader: Fiction and Literary Essays*, Barrytown, NY: Station Hill Press.
- Celan, P. (2002) *Poems of Paul Celan*, trans. M. Hamburger, New York: Persea Books.
- Constable, M. (2005) *Just Silences: The Limits and Possibilities of Modern Law*, Princeton, NJ: Princeton University Press.
- Dickinson, E. (1960) *The Complete Poems of Emily Dickinson*, ed. T. H. Johnson, Boston: Little, Brown.
- Douzinas, C. and Geary, A. (2005) *Critical Jurisprudence: The Political Philosophy of Justice*, Oxford: Hart Publishing.
- Fitzpatrick, P. (1992) *The Mythology of Modern Law*, London: Routledge.
- Fitzpatrick, P. (2001) *Modernism and the Grounds of Law*, Cambridge: Cambridge University Press.
- Fitzpatrick, P. and Tuitt, P. (2004) *Critical Beings: Law, Nation and the Global Subject*, Farnham, UK: Ashgate.
- Goodrich, P. (1986) *Reading the Law: Critical Introduction to Legal Method and Techniques*, Oxford: Basil Blackwell.
- Goodrich, P. (2005) 'Slow reading', in P. Goodrich and M. Valverde (eds) *Nietzsche and Legal Theory: Half-Written Laws*, New York: Routledge.
- Hobbes, T. (1651/1996) *Leviathan*, ed. R. Tuck, New York: Cambridge University Press.
- Nietzsche, F. (1982) *Daybreak*, trans. R. J. Hollingdale, Cambridge: Cambridge University Press.
- Pavlich, G. (2010) *Law and Society Redefined*, Toronto: Oxford University Press.
- van Marle, K. (2003) 'Law's time, particularity and slowness', *South African Journal on Human Rights* 19: 239–55.