Fitzpatrick and the Feminine Law

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Abstract
This short commentary on the legacy and significance of Peter Fitzpatrick’s scholarship tells of the divergent approaches he and I take in relation to the “feminine” in the writings of French poet, playwright, fictional author, and theorist, Hélène Cixous. Peter, on his side, is ever reminding us of the constituent connection between law and its origin and the impossibility of the “feminine law” escaping a scheme fixated on a specific patriarchal content. I, on my side, am optimistically yearning for a Cixousian “feminine” who eludes a return to the origin and who fearlessly transgresses the law(s) of the patriarchal. Herein, I theorize the essential difference between Fitzpatrick’s “feminine law” and my reading of the law of the Cixousian “feminine” as relating back to our (differing?) approaches to creativity and originality. To my mind, on the question of law’s creativity, Peter aligns less with Cixous and more with Jacques Derrida, who many have accused of positing a negative conception of creation. Applied to Peter, while ever endeavoring to situate law in relation to creative undertakings, such as literature and poetry, following his determinate/responsiveness model, the persistence of the negative is inescapable and the “feminine” is always already integral to law.

Keywords
Peter Fitzpatrick, Hélène Cixous, Jacques Derrida, “feminine law”, origin, creativity, justice

I. Commentary
‘Not the origin: she doesn’t go back there’, Cixous directs. Not the origin, the origin as the delimited, appropriated place of secure return to which ‘he’ will go. She will go further, always beyond, ‘to the unknown’. Hence, his eternally straitened law as against, always against, her ‘wild’, her ‘savage’ heart. Yet, always yet, for Cixous there is also an illimitable wildness, a ‘femininity’, to the origin, and this origin, even in its wild dissipation, can still ‘suscitate’ distinct being — the being of the law for instance. Yet further: ‘The definition of the law can unfold only in relation to the question of the origin of the law’. That being so, how might the law be defined, or assume definition, in a way that does not simply set the law, thereby

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confirming it as invariant and ‘his’? How may we ask, as Cixous would want us to ask: ‘Where does the law come from? and not think that it has always been there’? And having asked this question of law’s origin, how could we thereafter avoid a constituent connection between law and ‘its’ origin — an origin which, like any other, is wild and suscitating?!

This introduction twice afore employed by Fitzpatrick. Once more here, further signifying that we are always before the origin:

No matter what its positioned realisation, there is always something of the origin before it and something carried on by it, and whatever comes after and ensues in relation to the origin will continually reconstitute it. The origin can neither emerge ex nihilo nor ‘in itself’ sustain a constant completeness. So, the event of origin will be ever attuned to ‘the surplus that overflows’ it.

This short commentary on the legacy and significance of Peter Fitzpatrick’s scholarship finds its inspiration in Fitzpatrick’s “feminine law.” My decision to so focus is deeply personal. Peter and I began working on a coauthored piece for a special issue of the Australian Feminist Law Journal (AFLJ) on “Divining the Source: Law’s Foundation and the Question of Authority,” edited by Jennifer Beard and Sundhya Pahuja, in 2002, when I was his PhD student at Birkbeck School of Law in London, England. Our piece was provisionally entitled “An Originary Given: The Epigenesis of Law” and relied heavily on the writings of French poet, playwright, fictional author, and theorist, Hélène Cixous, with whom I was a bit obsessed at the time (as only a graduate student can be). Ultimately, due to our opposing orientations to Cixous’s work (more on this below), Peter and I ended up writing separate pieces. This was the first time, to my knowledge, Peter had reflected on what he came to call the “feminine law” and, since then, he returned to this theme several times, most notably in “Totems” (2003), “Being Originary: Periodization and the Force of Feminine Law” (2013), and “Taking Place: Westphalia and the Poetics of Law” (2014).
This modest offering proceeds from the above tale of origin as follows. Upon providing some background as to the “law” of the “feminine” in the writings of Cixous, I will detail, in the limited space available, Fitzpatrick’s “feminine law,” followed by my thoughts as to the essential difference between Peter’s and my reading of the Cixousian “feminine,” which I am herein theorizing as divergent orientations to creation and originality. To my mind, on the question of law’s creativity, Peter aligns less with Cixous and more on the side of Jacques Derrida, who many have accused of positing a negative conception of creation,8 or what Cisney terms a “negative differential ontology.”9 While Derrida fought against this designation/accusation throughout his life,10 his formulation of various concepts, such as “undecidability,” in negative terms11 and his description of his own work as being on the side of death,12 undoubtedly amplified the impression of negativity. Applied to Peter, while ever endeavoring to situate law in relation to creative undertakings,13 such as literature14 and poetry,15 he simultaneously called for the “persistence and insistence of the negative”16 and, in so doing, ensured that the “feminine” was always already integral to law. But more on this below.

8. See, for example, Michael Gallope, “Is Improvisation Present?” in The Oxford Handbook of Critical Improvisation Studies, vol. 1 (G. E. Lewis and B. Piekut, eds) (New York: Oxford University Press, 2016) 143–59, p. 148 and 150.
9. According to Cisney, Derrida’s thought is characterized as “negative” in that key deconstructive concepts are “understood as a ‘not’”: as oppositional and contradictory/paradoxical in the case of différences; and constituted in negative terms, or what it is not, as in the “trace” or “spectre”: Vernon W. Cisney, Derrida and Deleuze: Difference and the Power of the Negative (Edinburgh: Edinburgh University Press, 2018), p. 259. Cf Martin Hägglund, Radical Atheism: Derrida and the Time of Life (Stanford: Stanford University Press, 2008).
10. Cisney, p. 256.
11. Op cit.
12. See, for example, Sara Ramshaw, “Time Out of Time: Derrida, Cixous, Improvisation,” New Sound 32 (2008), 162–75, pp. 171–174; Jacques Derrida, H.C. for Life. That Is to Say. . . (Stanford, CA: Stanford University Press, 2006), p. xiii and 158; and Hélène Cixous and Jacques Derrida, “From the Word to Life: A Dialogue between Jacques Derrida and Hélène Cixous,” New Literary History 37 (2005), 1–13, p. 7. See also Peter Salmon, An Event Perhaps: A Biography of Jacques Derrida (London and New York: Verso, 2020), p. 269: “For Derrida, death was a constant preoccupation, haunting his work from the beginning.”
13. As Buchanan, Motha, and Pahuja note, “[a]n attentiveness to the event of newness or happening is a consistent theme in Fitzpatrick’s work”: Ruth Buchanan, Stewart Motha, and Sundhya Pahuja, “Introduction” in Ruth Buchanan, Stewart Motha, and Sundhya Pahuja, eds, Reading Modern Law: Critical Methodologies and Sovereign Formations (Routledge, 2012) 1–14, p. 12.
14. See, for example, Peter Fitzpatrick, “Reading Slowly: The Law of Literature and the Literature of Law” in Reading Modern Law: Critical Methodologies and Sovereign Formations (Ruth Buchanan, Stewart Motha, and Sundhya Pahuja, eds) (Routledge, 2012) 193–210; Peter Fitzpatrick, “Dominions: law, literature and the right to death,” Journal of Law and Society (2004) 31(1), 142–48 [also published in Patrick Hanafin, Adam Gearey and Joseph Brooker, eds, Law and Literature (Blackwell, 2004)]; and Fitzpatrick, “Juris-fiction.”
15. Fitzpatrick, “Taking Place”; and Peter Fitzpatrick, “Law like Poetry – Burnt Norton,” Liverpool Law Review: A Journal of Contemporary Legal and Social Policy 23(3) (2001), 285–88.
16. Buchanan, Motha, and Pahuja, 12 (emphasis added).
II. Cixous’ Law of the “Feminine”\textsuperscript{17}

Writing as a fledgling graduate student, I took the position in “Nearing the ‘Wild Heart’: The Cixousian ‘Feminine’ and the Quest for Law’s Origin”\textsuperscript{18} that poststructural accounts of legal authority, such as those posited by Fitzpatrick and Derrida, “remain forever ‘masculinist’ in their approach,”\textsuperscript{19} especially in their obsession with law’s origin:

Throughout history. The same story. ‘It all comes back to man - to his torment, his desire to be (at) the origin. Back to the father. Back to the father’. Back to Freud and his ‘primal horde’. Enter: Hélène Cixous. For Cixous, the question of origin is always a question of the ‘origin of the gesture of writing’, of the origin of the ‘very drive to write’; it is always a question of the ‘wild heart’: for one must have a ‘touch of something savage, uncultured, in order to let it happen.’ This ‘wild heart’, this ‘drive to write’, is, in the Cixousian lexicon, closer to the ‘feminine’; and the texts it produces constitute what she calls ‘feminine writing’ or écriture féminine – that is, ‘writing, freed from law, unencumbered by moderation, [which] exceeds phallic authority.’\textsuperscript{20}

I placed myself alongside Cixous and seemingly contra, perhaps naively so, Peter (the Father?), arguing: “It is my contention that . . . the Cixousian ‘feminine’ journeys ‘farther – to the unknown, to invent’. Forever thirsting after the further-than-herself within herself, she eludes a return to the origin: ‘she doesn’t go back there’. . . .”\textsuperscript{21} Instead, I claimed, “the Cixousian ‘feminine’ dedicates herself to ‘heterogeneity, alterity, and the suspension of law’. She spends her day vigorously shaking apple trees and greedily – guiltlessly! – devouring the ripe fruit that falls from the branch.”\textsuperscript{22}

In contrast, Fitzpatrick’s Cixous is always already before words, or within (phallogocentric) language. She may shake those apple trees with all her might and greedily devour the ripe fruit that falls from the branch, but, following Fitzpatrick’s “logic,” Cixous can never be anything except near to the “‘wild’ heart,” as the following details.

III. Fitzpatrick’s “Feminine Law”

Peter’s most detailed exposition of the “feminine law” can be found in “Breaking the Unity of the World: Savage Sources and Feminine Law” (2003).\textsuperscript{23} In this piece, he deliberately remains close to Cixous “in her prescriptive mode” and looks for “femininity . . . in texts that are still close to sources, springs, to myth.”\textsuperscript{24} In particular, Fitzpatrick looks

\begin{itemize}
\item 17. Fitzpatrick, “Being,” 23, 24.
\item 18. Ramshaw, “Nearing.”
\item 19. Op. cit., 24.
\item 20. Op. cit., 24–25 (emphasis in original) [citations removed]. See also Hélène Cixous, “Sorties: Out and Out: Attacks/Ways Out/Forays” in The Newly Born Woman, trans. B. Wing (London: I.B. Tauris, 1996) 63–132; and Hélène Cixous, “Writing and the Law: Blanchot, Joyce, Kafka, and Lispector” in Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva, (H. Cixous and C. Clément, eds., trans. V.A. Conley) (Minneapolis: University of Minnesota Press, 1991) 1–27.
\item 21. Ramshaw, “Nearing,” 24–25 [citations removed].
\item 22. Op. cit., 26 [citations removed].
\item 23. Fitzpatrick, “Breaking.”
\item 24. Op. cit., 47, citing Cixous, “Writing,” 3.
\end{itemize}
to the primal patricidal scene in Freud’s *Totem and Taboo*,\textsuperscript{25} as a “telling instance”\textsuperscript{26} in modern law’s (mythic) narration of its own origin.\textsuperscript{27} This scene announces the birth of the modern legal subject, seemingly created in relation to a savagery left behind. However, as Fitzpatrick makes clear, both savage and civilized subject are created at the same moment of origin. Beard and Pahuja explain:

. . . modernity narrates the savage as chronologically prior to it, as integral to the primordial chaos from which the origin emerges, but the savage, like the legal subject, also comes into being through the story of origin, and therefore this posited limit cannot lie beyond the order which posits it. Rather, the aim and effect of the savage limit is to close the body of law and in closing that body, produce a sense of completion and authoritative determination. Without closure, the body of law threatens to burst forth from its original cover at once spilling its content and destroying the integrity of the legal subject. So this origin, beyond which we need not enquire, and which would seem to mark the boundary between ‘now’ and ‘before’, marks the limit between subject and other – between presence and past – the living and the dead. Thus in its constitution of the limit, the savage is not other than law but a-part of law that can never be entirely denied or transferred.\textsuperscript{28}

Linking the feminine to the savage by way of the Cixousian “‘wild’ heart,” Fitzpatrick charts what he views as Cixous’ position on (patriarchal) law:

For Cixous, the enduringly determinate origin is the place of set and secure return to which ‘he’ will resort, but ‘she’ will go further, always moving ‘to the unknown’, dissipating the masculinised origin yet still being of the origin—of a labile ‘origin which always deals with some kind of femininity’.\textsuperscript{29}

Fitzpatrick counters this divestment of the feminine from law by shifting the “implacable divide which for Cixous separates law and the savage feminine towards a position where the feminine becomes integral to law.”\textsuperscript{30} Writes Fitzpatrick:

There cannot, in short, be recognition of a feminine law that denies any fixity of content within a scheme fixated on a specific patriarchal content. We could now return resonantly to Cixous and her ‘equation of women and nothingness’, along with the ‘possibility of refusal, of transgression, of moving beyond the Law’, beyond the irredeemable masculine law which ‘has to do with inhibition, with the staging of a limit’, with ‘closure’, as against, still against, a wild, a savage feminine and with it ‘another logic’, ‘a creation’. Yet, still yet, the feminine puts ‘herself at the origin of what could be the law’, that same law the definition of which ‘can unfold only in relation to the question of the origin of the law’, that same law which is always in the place of the origin, ‘opening’ as well as ‘closing’, having itself ‘no material inside’.\textsuperscript{31}

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  \item \textsuperscript{25} Sigmund Freud, *Totem and Taboo: Resemblances between the Psychic Lives of Savages and Neurotics*, trans. A.A. Brill (New York: Vintage Books, 1918).
  \item \textsuperscript{26} Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press Cambridge, 2001), p. 4.
  \item \textsuperscript{27} Jenny Beard and Sundhya Pahuja, “Before the Beginning: A Disclosure of Law’s Foundation” *Australian Feminist Law Journal* 19 (2003) 1–10, p. 2.
  \item \textsuperscript{28} Op. cit., 3 (footnotes omitted).
  \item \textsuperscript{29} Fitzpatrick, “Taking,” 158 (footnotes omitted; italics in the original).
  \item \textsuperscript{30} Fitzpatrick, “Breaking,” 50 (emphasis added).
  \item \textsuperscript{31} Fitzpatrick, “Breaking,” 59–60, citing Cixous, “Sorties,” 18–19, 24, 27.
\end{itemize}
Ultimately, for Fitzpatrick, like the savage of Freud’s mythic tale, the “originary dimension of law impels the feminine law.”

Fitzpatrick’s feminine law shares a similar “logic” to his ground-breaking work on the “responsive” and “determinate” dimensions of modern law. Building upon the aporetic relation established by Derrida as between law and justice, Fitzpatrick posits that “justice” which Derrida advances in terms of an entirely open responsiveness to the other is to be found, more specifically, “within law, and seen to generate the operative quality of law.” Justice, in other words, is “necessary for law.” According to Fitzpatrick, “law cannot be . . . enduringly ordered and predictable.” If it were, “there could be no call for decision, for determination, for law.” Instead, for law to endure, it requires a simultaneous “responsiveness,” an “attunement and attentiveness to what is beyond.” Law, argues Fitzpatrick, must be able to “change and adapt to such other things as ‘society’, or ‘history’.” And this responsiveness to the other of law is “essential for law.”

So, too, for Fitzpatrick, the “feminine” is necessary for (patriarchal) law. While Cixous would seemingly wish to deny or fearlessly transgress all law, for Fitzpatrick, the aporetic positioning of the feminine law, or the “wildness” at law’s heart, “protects the possibility of radical transformation within an existing legal system” and enables law to remain “responsive to historical change, or to the needs of the nation, or to the development of society.” In this wildness, we open to the feminine, to the other, in the hope that “there is a chance of something happening.” However, any creation of newness is always already constrained by an origin that is both “wild and suscitating.”

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32. Fitzpatrick, “Being,” 40.
33. Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority,’” trans. by Mary Quaintance, in J. Derrida, Acts of Religion (New York: Routledge, 2002) 230–98.
34. Peter Fitzpatrick, “Access as Justice,” Windsor Yearbook of Access to Justice 23(1) (2005) 3–16, p. 3.
35. Op. cit. (emphasis added).
36. Op. cit., 4.
37. Op. cit., 8.
38. Op. cit., 9.
39. Op. cit.
40. Op. cit. See also, Peter Fitzpatrick, “In the End, or the Cause of Law” in The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice (Austin Sarat and Stuart Scheingold, eds) (Stanford, CA: Stanford University Press, 2005) 463–68., p. 464.
41. Fitzpatrick, “Access,” 9 (emphasis added).
42. See, for example, Cixous, “Writing,” 1; and Cixous, “Sorties,” 86.
43. Drucilla Cornell, The Philosophy of the Limit (New York and London: Routledge, 1992), 167.
44. Peter Fitzpatrick, “‘No Higher Duty’: Mabo and the Failure of Legal Foundation,” Law and Critique 13 (2002), 233–252, p. 236.
45. Op. cit., 14–15 (emphasis added). See also Sara Ramshaw, “Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event,” Critical Studies in Improvisation 2(1) (2006), 19. DOI: https://doi.org/10.21083/csieci.v2i1.81.
46. Fitzpatrick, “Breaking,” 47 (emphasis in original).
III. Yet, Still Yet . . .

On the creation of newness and the possibility of origin(ality), Peter and I appear to orient ourselves otherwise. Peter, on his side, is ever reminding us of the constituent connection between law and its origin and the impossibility of the “feminine law” escaping “a scheme fixated on a specific patriarchal content.”48 I, on my side, am optimistically yearning for a Cixousian “feminine” who eludes a return to the origin and who fearlessly transgresses the law(s) of patriarchy.

I am not the first to note Peter’s more negative theoretical orientation.49 However, on this issue, I would like to locate Peter on his side with Derrida, and me on my side with Cixous, thereby making our incomplete collaboration perhaps more understandable. The philosophical differences between Derrida and Cixous are often theorized (by themselves and others50) in relation to negativity and “death,” or “what death has in store deep within life itself, before the end.” The topic of death was a source of an “interminable ‘argument’” between Derrida and Cixous, the latter standing “on the side of life whereas the former feels drawn to the side of death.”51 Cixous is for life, says Derrida. And he, on his side, has to “forever keep reminding her each time . . . that we die in the end, too quickly.”52

“We cannot prove anything,” writes Cixous. “We can only affirm or decide. Derrida is going to decide on the undecideable”; he is “going to decide on the side of an impossibility of deciding.”53 Cixous, on her side, is going to “decide on the side of a decidable that is not taken in any type of philosophical discourse”; she is going to decide on a decidable “where knowledge no longer lays down the law, where not-knowing takes over, not an ignorant non knowing but an open knowing, which lets things happen.”54

On her side, for life, Cixous insists on the fictional and the poetic.55 She insists on the dream. Derrida says of Cixous: “. . .she writes to the dream . . . Hélène, as for her, lets the gift of the dream breathe in her writing. It is as if her dream were at home there.”56 Derrida, on his side and in his own words: “I stride to the interruption of the dream or rather to a certain separation/reparation of the dream: I strangle the dream, the dream strangles itself in me . . .”57 Writing to the dream gives Cixous a slightly different
relationship to “originary given[s],” to “the law of the law: I exist.”58 When Cixous dreams, she dreams not of origins, nor of the past, but of the present. Her dream is always one of “writ[ing] in the present”—which in truth is an impossible dream for “one cannot write in the present because one writes after the present.”59 In her view, the possibility of this impossible dream of writing the present is what leads to “transformations of writing,” to transformations of language and world.60

Perhaps (always perhaps), I find myself on my side with Cixous for this very reason. Even in his most poetic texts, Fitzpatrick appears to side with Derrida,61 in his seemingly negative conception of origins and creativity. Thus, for Fitzpatrick, law, including the feminine law, “leaps towards and retreats from illimitable possibility in the partial success, but inextricable failure, of its ‘doing’ justice.”62 In contrast, Cixous, on her side, gives herself “a poet’s right, otherwise [she] would not dare to speak”: “The right of poets is to say something and then to say, believe it if you want to, but believe it weeping; or else erase it, as Genet does, by saying that all truths are false, that only false truths are true, etc.”63 On balance, Fitzpatrick’s feminine law and his determinate/responsiveness “model” guides most of my academic writing and thinking, and I am eternally grateful for all Peter has given and taught me. Yet, still yet, sometimes, just sometimes, I give myself a poet’s right and side with Cixous for life.

Authors’ note
This title intentionally mirrors that of a talk given by Peter Fitzpatrick, entitled “Freud and the Feminine Law,” on March 25, 2004 for the UBC Law and Society interdisciplinary seminar series in Vancouver, Canada.

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58. Cixous, “Writing,” 19.
59. Hélène Cixous and Mireille Calle-Gruber, “We are Already in the Jaws of the Book: InterViews” in Rootprints: Memory and Life Writing (Hélène Cixous and Mireille Calle-Gruber, eds) (London and New York: Routledge, 1997), 1–115, p. 78 (emphasis in original).
60. Op. cit.
61. “Derrida does not understand the instant of lived time to be an instance of creativity”: Gallope, p. 151. See also Edgar Landgraf, Improvisation as Art: Conceptual Challenges, Historical Perspectives (New York and London: Continuum, 2011), ch. 1.
62. Peter Fitzpatrick, “Law Like Poetry.”
63. Hélène Cixous, “Extreme fidelity” in Writing Differences: Readings from the Seminar of Hélène Cixous (Susan Sellers, ed.), (Milton Keyes: Open University Press, 1988), 9–36, p. 15.