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## Post-colonial attitudes and the relevance of incommensurability

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### Abstract

This paper reflects upon the enduring relevance of Peter Fitzpatrick's analysis of incommensurability in the context of post-colonialism and the lived experiences of Indigenous peoples in the US.

**Keywords:** post-colonial law; post-colonialism; settler states; incommensurability; Indigenous peoples; racism

In the late 1990s, when Peter Fitzpatrick and I were working on our co-edited volume, *Laws of the Postcolonial*, the fields of post-colonial studies and subaltern studies were gaining some traction in the Euro-American academy (Darian-Smith and Fitzpatrick, 1999). But, within law schools, the word 'post-colonial' was almost never uttered or heard. Peter was a transformative figure in this regard, changing the vocabulary and conceptual landscape of socio-legal theory and critical legal scholarship more generally. His ground-breaking book, *The Mythology of Modern Law* (Fitzpatrick, 1992), opened new lines of inquiry and theoretical investigation that impacted a whole generation of scholars from many fields and scholarly orientations. Peter's thinking was deepened and widened in a subsequent suite of essays, books and edited volumes, and his generative works led to wide-ranging conversations within post-colonial legal theory throughout the early decades of the twenty-first century. These conversations were encouraged and nurtured by Peter, whose extraordinary care as a scholarly mentor and collegial interlocutor are legendary. Today, works such as Denise Ferreira da Silva and Mark Harris's *Postcolonialism and the Law* (2018) (a majestic edited four-volume set) is, in part, a testimony to the power and impact of Peter's theoretical and community-building contributions.

Peter passed away in late May 2020, just weeks before the global eruption of solidarity surrounding the Black Lives Matter (BLM) movement in the wake of George Floyd's killing by police in Minneapolis, US. I think Peter would have been amazed and delighted as demonstrations erupted – despite pandemic conditions – across the US and around the world, calling attention to systemic racism and structural inequalities disproportionately impacting people of colour. In Britain, the statue of Edward Colston – a Bristol-born merchant who made a fortune by selling Black Africans in the Atlantic slave trade – was toppled and pushed into the harbour to cheering crowds on 7 June. A few days later, a statue of slaveholder Robert Milligan was taken down from the West India Quay in London Docklands in recognition of the wishes of the community – a removal very much supported by the Mayor of London, Sadiq Khan. And, at another anti-racism protest in Oxford, a large crowd gathered, demanding that the statue of Cecil Rhodes be removed from outside Oriel College. Cecil Rhodes was a British imperialist who made his fortune by mining in southern Africa, and whose beliefs in White supremacy and the superiority of the Anglo-Saxon race encapsulated the British empire's exploitative relationship with African peoples and natural resources. Students and councillors called upon Oxford to 'decolonise' and the demonstration was marked by a silence of 8 minutes 46 seconds – the same time as it took for George Floyd to die – with masked protesters kneeling or raising their fists in solidarity. Noticeably,



**Figure 1.** Black Lives Matter protesters outside Oriel College, Oxford, 9 June 2020.

Source: BBC News, available at <https://www.informationpalace.com/protesters-rally-in-oxford-for-removal-of-cecil-rhodes-statue/> (accessed 3 February 2021).

a large banner was spread out beneath the statue of Rhodes that read ‘#Post Colonial Attitudes Matter’ (Race and Briant, 2020) (Figure 1).

The banner was startling to see. Despite the enormous outpouring of anger and public protests surrounding BLM in the US, the word ‘post-colonial’ and reflections on the limits of post-coloniality are notably absent from political discussion of systemic racism. Of course, people talk about the legacies of slavery and Jim Crow, but the mainstream narrative features Jamestown as the receiving outpost of enslaved Africans brought to the New World by British merchants starting in 1619. There is little conversation about the US subsequently becoming in turn a colonising empire, deeply complicit in the logics of racial capitalism, land dispossession, and enslavement and exploitation of Indigenous peoples across the north, central and south Americas. Most people in the US do not think in terms of their country’s relationship with post-colonialism, empire, and the enduring legacies of ‘internal’ colonialism that are deeply connected with histories of conquered ‘external’ frontiers. When discussing racism, Black (and sometimes Brown) people feature but Indigenous peoples are typically forgotten or silenced in public discourse. Even among US scholars, Indigenous peoples are basically absent from legal scholarship, as is any discussion of the US legal system being deeply imbricated with (post-)colonial racialised logics.

In contrast, Peter Fitzpatrick’s theoretical contributions position Indigenous peoples at the centre of our understanding of contemporary law. For Peter, it was the complex tension between ‘civilised’ Europeans and ‘savage’ Indians that created the conditions for modern Western law to emerge in the first place. In his essay, ‘Passions out of place: law, incommensurability, and resistance’, Peter examined through the writings of Diderot and Herder the impossibility of relations between the noble Enlightened European and the Indian. This impossibility – or incommensurability – presents a great divide that he argued was ‘integral’ to the universal claims of modern law. The savage stands outside occidental civilisation, occupying an ambiguous positionality as both monstrously deficient and less than European, and at other times wondrously noble and more than. Against this ‘outsider’ status, occidental law asserts authority and a universalist claim. In Peter’s eloquent words:

‘So, although savagery and civil society are incommensurable, that very incommensurability, that impossibility of relating, is what sets them in relation. Yet that same incommensurability ensures

that the relation is never fully achievable. It is never resolved. In a seeming paradox, the incommensurable and the relation are integral to each other.’ (Fitzpatrick, 1999, p. 48)

The ‘lawless’ and ‘uncivilised’ savage functions as the antithesis of modern Western law that is necessarily always changing, developing and progressing. This oppositional relation is key: ‘It is the savage that thence becomes the site of essential irresolution and serves to constitute civilized law as its resolved and resolving opposite’ (Fitzpatrick, 1999, p. 50). Significantly, the savage, with no understanding of property relations and no desire for progress, becomes the justification for colonialism and underpinning rationale of Western law’s claim to superiority. In this way, Peter argued, ‘incommensurability was to become not just a prime justification for Europe’s colonial extraversion but also a foundation for the identity of the European as exemplary of modernity’ (Fitzpatrick, 1999, p. 40; Otto, 1996). This meant that at the core of modern law is racism. Wrote Maureen Cain and Carol Smart in their editorial preface:

‘Fitzpatrick reveals how law depends on racism for its own theory of its being, not only for its self-justification (though for that too) but for its very identity, which is achieved in negation, by the distinction between a legal way of doing coercion and all other ways.’ (Fitzpatrick, 1992, p. xiii)

Peter engaged with the theme of incommensurability throughout his career. As the underpinning thesis of his book *The Mythology of Modern Law*, Peter returned to it again and again, expanding and playing and examining its theoretical implications as an integral building block of secular occidental legality. In his analysis of the so-called doctrine of discovery, be it in the US or Australia, it is this element of incommensurability that justified, and continues to justify, the expropriation of Indigenous lands by settler colonial states (Fitzpatrick, 2002; 2010). The US Supreme Court case of *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the first of a trilogy of Indian cases in the first half of the nineteenth century, affirmed the doctrine of discovery that ultimately deprived Native Americans of their rights. The judgment, passed down by Chief Justice Marshall, recognised that Indigenous peoples held ‘natural rights’ in their lands. However, these rights were not granted because of the ‘character and habits’ of Indians ‘with whom it was impossible to mix, and who could not be governed as a distinct entity’. In short, it was the ‘uncivilised’ nature of Indigenous peoples that justified the negation of their sovereignty and required the abrogation of their land rights to the US colonial authority. As noted by the legal historian Stuart Banner, Marshall’s opinion embodied a Eurocentric view of Indian peoples’ racial inferiority (Banner, 2005, pp. 11–12).

Unfortunately, the case of *Johnson v. M’Intosh* remains to this day the leading authority determining the federal government’s supreme authority to acquire title over Indigenous lands (Banner, 2005). The subsequent case in the trilogy, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), further affirmed that indigenous tribes were ‘domestic’ nations and not equivalent to modern states or foreign nations, occupying a relationship similar to that of ‘a ward to its guardian’. These early legal precedents created uncertainty for nearly two centuries over whether an Indigenous community could prove it was a ‘tribe’ for the purposes of being recognised as holding land title (Clifford, 1988, chapter 12). And only since the 1960s and 1970s has the Supreme Court affirmed some elements of Indigenous self-determination, such as the right to collect taxes on reservation land. But, in the past twenty years, as the court has increasingly become more conservative; it has taken an overtly negative view of Native American sovereignty and self-determination arguments (Fletcher, 2009). I have argued that this backward trajectory is happening precisely at a time when some Native Americans have been able to more fully participate in mainstream political and social life, largely due to the economic success of tribal-owned casinos (Darian-Smith, 2002; 2004). The Supreme Court’s institutional bias against tribal interests can be understood as part of a ‘backlash’ by an increasingly reactionary White power block.

Returning to Peter's thesis of incommensurability, the lack of affinity between occidental law and the legal practices of Indigenous peoples is fully on display in the national swing against recognition of Indigenous peoples' rights and interests. On the one hand, the US legal system can claim to be always developing and progressing in its embrace of legal plurality within its national borders – hence at times recognising tribal courts and their limited jurisdictional claims. On the other hand, as soon as these claims transcend the spatial and legal boundaries of the reservation and translate into political power on a national stage, they are met with aggressive resistance and disavowal. This is happening at the level of the Supreme Court but also in the everyday experiences of many Indigenous people who are constantly confronted by their 'barbaric' non-equivalence.

The recent crisis around the Covid-19 pandemic is a telling case in point. During March and April 2020, as infection spread and the number of deaths soared across southern and rural US, some of the hardest hit were tribal communities on reservations. For example, the Navajo Nation had a per-capita infection rate that was much higher than that in New York City at the height of its crisis. Compounding the tribal emergency were limited health facilities, further aggravated by the federal government's failure to distribute to tribes \$8 billion in aid scheduled to be paid under the stimulus law. In response, a group of tribes sued the Trump administration for disbursement. Against this backdrop of death, discrimination and inadequate emergency response by state officials, the Oglala Sioux and the Cheyenne River Sioux tribes from South Dakota put up roadblocks to stop non-Indigenous visitors coming onto tribal parks and lands. Governor Kristi Noem asserted state sovereignty over the tribes and threatened them with legal action, whereupon Julian Bear Runner, president of the Oglala Sioux Tribe, countered: 'We must adopt serious measures to proactively deal with the serious public health crisis. We demand you to respect our sovereignty' (Anderson and Parker, 2020). First Nations in Canada and Maori groups in New Zealand similarly asserted their rights to protect their own communities in light of failures by settler nations to enact suitable emergency responses.

Underscoring all the confusion about whose law prevails – federal, state or tribal – is the enduring legacy of incommensurability. Modern law needs Native Americans to remain 'uncivilised' and 'lawless', far away on distant reservations, quietly performing their 'savagery'. But, when tribes call out the government's inability to implement the law that it itself has enacted, they also call into question the government's claim of authority over them. Tribes demanding a right to govern themselves 'as a distinct entity' more responsive to the pandemic than the 'guardian' who ostensibly manages them violates the paradoxical relationship of incommensurability that Peter so powerfully articulated. In fact, Peter's theoretical insights are arguably more important today than ever before. As the US and other settler states descend into far-right authoritarianism, we can assume that a national shift against the interests of Indigenous peoples will quicken alongside a reassertion of racial incommensurability. Distressingly, the BLM poster reading 'Postcolonial Attitudes Matter' is more than correct, especially for some people.

In loving memory of Peter, whose warmth, generosity, sense of fun and imaginative roaming intellect will always be an inspiration.

**Conflicts of Interest.** None

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