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## Ultimate Legality: Reading the Community of Law

PETER FITZPATRICK,\* AS COMPLETED BY TARA MULQUEEN,\*\*  
ABDUL PALIWALA,\*\* AND ANASTASIA TATARYN\*\*\*

*This article is a contribution to the occasional series dealing with a major book that has influenced the author. Previous contributors include Stewart Macaulay, John Griffith, William Twining, Carol Harlow, Geoffrey Bindman, Harry Arthurs, André-Jean Arnaud, Alan Hunt, Michael Adler, Lawrence O. Gostin, John P. Heinz, Roger Brownsword, Roger Cotterrell, Nicola Lacey, Carol J. Greenhouse, and David Garland.*

*An initial twist: several acute observers would consider the way I read to be the most influential effect of reading on me – a way of reading that extends beyond the specificity of the text yet, in so doing, connects integrally with it. Salvation of specificity is at hand, however. That way of reading is intimately reflective of Derridean deconstruction and a hugely influential reading becomes his ‘Force of Law’. A problem ensues. Other influential reading came before my love of Derrida – influential reading to do with law and society (of course), with decolonization and imperialism, with engaged anthropology, and with critical legal studies. A retrospective revelation then follows. Derridean deconstruction is found to haunt and inform these other readings. They can be read in a way that inherently anticipates deconstruction. Some culminating coherence is offered by the inescapable insistence of community and the mutually intrinsic fusion of community and law.*

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## A NOTE ON COMPLETION

*Peter Fitzpatrick died on 20 May 2020. He completed the first part of this article before becoming indisposed. Working under Peter's instructions and with the kind consent of the editors, we have attempted to provide a biographical closure based on Peter's extensive notes and conversations. We felt it necessary to link Peter's 'love of' Derrida and Foucault, as well as of Nietzsche, Blanchot, Nancy, and others, as part of his influential readings. Equally significant is his concern to provide a coherence to his autobiographical exercise through, 'implausible as it may sound, the combining of law and society (of course) engaged anthropology, critical legal studies, post-structural philosophy, and the culminating coherence provided by community' while stressing 'the formative force of deconstruction'. Peter's notion of 'influential readings' encompassed not just those that passed his physical 'battered book test' but also the influences that had woven through his life including those of inspiring teachers, colleagues, and especially his most valued resource – his wonderful students. Our notes begin after Peter's own words in the section on alterity. Tara and Anastasia are two of his former students. Abdul is a long-term friend who has shared Peter's journey from Belfast to Papua New Guinea to his subsequent career in England.*

## READING

Here and later there is a happy dependence that provides a focal orientation for this article. The editors of, and several contributors to, *Reading Modern Law* have noted that the practice of my reading ranges well beyond the text in question yet constitutively connects that beyond to it.<sup>1</sup> Aptly, given his huge 'influence' on me, the editors place a generative emphasis on Nietzsche and his idea of 'slow reading'.<sup>2</sup> And that idea informs my own contribution to the book, 'Reading Slowly: The Law of Literature and the Literature of Law'.<sup>3</sup> Nietzsche would want us 'to read slowly, deeply, looking cautiously before and aft, with reservations, with doors left open, with delicate eyes and fingers', and in this way to resist 'an age of "work", that is to say, of hurry, of indecent and perspiring haste, which wants to "get everything done" at once'.<sup>4</sup> The reading cannot be left in a state of indulgent dissipation, however. While involving a necessary 'indecisiveness', it entails also a determinate resolution,

1 R. Buchanan et al. 'Introduction' in *Reading Modern Law: Critical Methodologies and Sovereign Formations*, eds. R. Buchanan et al. (2012) 1.

2 Id., p. 1, p. 12.

3 P. Fitzpatrick, 'Reading Slowly: The Law of Literature and the Literature of Law', in id., pp. 198–199.

4 F. Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality*, tr. R. J. Hollingdale (1982) 5.

something we ‘invent’.<sup>5</sup> In so doing, we will find, reassuringly, that ‘people are much more artistic than they think’.<sup>6</sup>

In their connective kindness, the editors of *Reading Modern Law* then emphasize the correspondence between this perception of reading and my ‘formulation of the dynamic conduct of law in terms of “determination and responsiveness”, a combination “pointed to” by “[a]lmost all the contributors to this volume”’.<sup>7</sup> My part in this, however, is little more than a gloss on Derrida. Given what eventually became for me his abundant provision of influential reading, Derrida will figure later, and do so along with other post-structural philosophers. For now, and relying on his own elevation of its significance for his philosophy, I will extract from his ‘Force of Law’ that which underlies the gloss.<sup>8</sup> Here, Derrida wants to

make explicit or perhaps produce a difficult and unstable distinction between justice and *droit*, between justice (infinite, incalculable, rebellious to rule and foreign to symmetry...), on the one hand and, on the other, the exercise of justice as law or right, legitimacy or legality, a ... calculable apparatus ...<sup>9</sup>

To become effective, to become operative, justice must be reductively ‘cut’ into, delimited, and rendered as a ‘calculable’ legality.<sup>10</sup> The ‘order’ of this imperative calculation

does not *properly* belong either to justice or to law. It only belongs to either realm by exceeding each one in the direction of the other – which means that, in their very heterogeneity, these two orders are undissociable [*sic*] *de facto* and *de jure*.<sup>11</sup>

With such heterogeneity, these two dimensions of law combine an illimitable openness with a resolved determinacy. The ‘force of law’ provides a mediative drive towards resolved content – for example, the judgement rendering a legal determination. Reading, in its creativity, does the same. More expansively, ‘[d]econstruction always finds itself and moves itself between these two poles’.<sup>12</sup> That, in a feat of what Derrida could call ‘fabulous retroactivity’, provides an orientation for the rest of this article.<sup>13</sup>

5 F. Nietzsche, *The Anti-Christ in Twilight of the Idols/The Anti-Christ*, F. Nietzsche, tr. R. J. Hollingdale (1968) 168–170.

6 F. Nietzsche, *Beyond Good and Evil*, tr. J. Norman (2002) 81–82.

7 Buchanan et al., op. cit., n. 1, p. 2, p. 12. The work to which they refer is P. Fitzpatrick, *Modernism and the Grounds of Law* (2001).

8 J. Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’, tr. M. Quaintance in *Acts of Religion*, ed. G. Anidjar (2002) 3. For the elevation, see J. Derrida, ‘I Have a Taste for the Secret’ in *I Have a Taste for the Secret*, J. Derrida and M. Ferraris, tr. G. Donis (2001) 59.

9 Id. (2002), p. 250.

10 Id.

11 Id., p. 257, emphasis in original.

12 Id., p. 251.

13 J. Derrida, *Negotiations: Interventions and Interviews 1971–2001*, tr. E. Rottenberg (2002) 50.

Community as another impelling (ir)resolution will now take on increasing significance in the present story, and that will include the community of reading and the community of law. Reading is always a reading-with even if the resulting community of reading is not always highly explicate. Academic reading will be more so than most. Taking up that self-provided cue, I will now adhere to the autobiographical component of this series and resort to conventional chronology by providing located accounts of influential reading – the locations being those where I did academic work for extensive periods, work informed by a combination of the location and the reading. And in case too much of a note of sterling self-reliance intrudes, I must stress that in what follows so much is owed to the generosity of colleagues and of PhD students.

## BEGINNINGS

The attachment to reading came early. In the 1960s, maternal insistence led me to give up my job as a roller driver for a road-building company and to take up an articulated clerkship offered by a law firm in the town where we lived – a small country town in Queensland. Fortunately, the University of Queensland, anticipating England's Open University and others, offered part-time courses effected through correspondence, with lectures arriving and essays being sent in the post. Although my coming to the study of law was quite fortuitous, the whole experience proved to be a delight. Perhaps it was the relative remoteness from the joys of university life that prompted me to acquire and rely on a large collection of books. The present problem, having acquired so many and so long ago, becomes how to find the especially influential, a problem set to replicate itself with what became the continuing practice of excessive book buying. The solution hit upon could be called the 'battered book test': the book showing distinctly excessive signs of wear, marking, and annotation. For work on my degree, the clear winners would be the monumental trio by Julius Stone: *Legal System and Lawyers' Reasonings*, *Human Law and Human Justice*, and especially the massive *Social Dimensions of Law and Justice*.<sup>14</sup> My regard for Stone survived a lecture that I gave years later in the University of New South Wales, where he sat in the front row reading a newspaper. He was entirely redeemed when we had dinner afterwards and it was evident that he remembered everything I had said. The other candidacy for the battered book test would be H. L. A. Hart's *The Concept of Law*.<sup>15</sup> Its large and conflictual influence will be accommodated in the next section.

My reading for the degree, in all, generated an obsession with law and society as a restless field, and that obsession flowed readily into my first academic appointment in the School of Law at Queen's University, Belfast.

14 J. Stone, *Legal System and Lawyers' Reasonings* (1964); J. Stone, *Human Law and Human Justice* (1965); J. Stone, *Social Dimensions of Law and Justice* (1966).

15 H. L. A. Hart, *The Concept of Law* (1961).

My entry into the academic world was greatly facilitated by William Twining who, with constant dedication, enabled me to produce ‘catch-up’ academic work – work that I may have done had I not been in legal practice for several years. The concern with law and society at Queen’s was aptly amplified in Twining’s engagement with legal realism culminating, for then, in *Karl Llewellyn and the Realist Movement*.<sup>16</sup> Although I had already had the privilege of reading it as a manuscript, the published product qualified for the battered book test. It not only amplified the concern with law and society but also proved to be an alluring prelude to my involvement with critical legal studies, something considered later in this piece.

There was a further dimension to sociality at Queen’s, which involved ‘Social Action Groups’. These were groups formed at the time of the ‘Troubles’ by academics in the School of Law and School of Social Sciences, Education and Social Work. Each week, we visited different communities in Belfast and offered help in dealing with legal and social issues. The readings involved in advising and representing members of the community would obviously have been much more diverse and transitory in their influence, but they were especially effective in integrating my time in legal practice with the academic present.

The pointedly influenced project emerging from this period came to be the relation between law and society. The immediate focus was how that played out in the field of law and society, a concern that has since endured conspicuously.<sup>17</sup> Fusing a diversity of positions taken within that field, the challenge posed for law is its being constitutively dependent on society while retaining an autonomy distinct from that dependence, and even being itself constituent of society. This evokes the earlier elevation of Derrida’s deconstruction and will be returned to later.

There was yet another social dimension to what was already a full life at Queen’s. What may have been its originating influential reading now escapes me but I came to Queen’s with an intense interest in anthropology and legal anthropology in particular. This was heightened by close connections with the School of Anthropology which generated friendships that remain active to this day. And that chimes now with the next section.

## ALTERITY

With multiple regrets, I left Queen’s in 1971 and spent most of the 1970s in Papua New Guinea, impelled by an irresistible request. Over lunch in a suitably elevated London club, Sir John Minogue, the Chief Justice of the Papua New Guinean Supreme Court, asked me to undertake research

16 W. Twining, *Karl Llewellyn and the Realist Movement* (1973).

17 P. Fitzpatrick, ‘Being Social in “Law and Society”’ in *Being Social: Ontology, Law, Politics*, eds. T. Mulqueen and D. Matthews (2015) 33.

into communal economic organizations with a view to facilitating their legal recognition and thence participation in the wider economy, and to do so more in their own terms. He had secured a generous grant from the Commonwealth Foundation for the purpose. Since I had been teaching corporate law at Queen's and had also extended my interest in anthropology there, the combination looked ideal. As a preliminary to locating the reading that influenced this adventure, and beyond, I need to provide the setting for it.

The research focused initially on the type of societies taken to be characteristic of Papua New Guinean peoples: broadly acephalous societies. These were usually seen as small scale and communally based, although constraints on scale often came from colonial regulation. Ways were explored of enabling the legal recognition of such groups, but this left legally unrecognized the large cohesions of these groups into what were often called clans. These cohesions were held together through material exchanges, marital relationship, ritual, and much more, even if not always amicably. The Mae Enga from the New Guinea Highlands have a marvellously synoptic saying, 'We marry those whom we fight', and this is not a reflection on the state of their marriages.<sup>18</sup> Something of a solution came after I joined the Department of the Prime Minister in the first national government.

This position fused research with exploring the feasibility of policies and programmes of decolonization. One overlap with research involved the legal recognition of large-scale groupings such as clans. These came to be incorporated by way of the standard Companies Act but their constitutions emerged from a variety of meetings settling on those of their own laws, customs, and practices that were to be included. After some persuasion by the Prime Minister, the Registrar of Companies accepted what came to be called development corporations. The result was inevitably mixed. Some members of the corporations profited disproportionately from a more effective relation to the wider capitalist economy, while other effects remained notably contrary, such as those enabled by voting being on the basis of the equality of the members rather than on the standard match between voting value and the size of the shareholdings. Several years with the Prime Minister were followed by two years in the University of Papua New Guinea conducting Jurisprudence classes with us all sitting under a tree.

The influential reading most encompassing of that abundance is another retrospective revelation, Abdul Paliwala's 'Writing by Firelight: Constructing an Enduring Consciousness of Post-Coloniality'.<sup>19</sup> 'This chapter', writes Paliwala, 'suggests that our intimacy in sharing the fireside with Papua New Guineans, working socially, culturally, politically with them, has remained

18 For an extensive description of the Mae Enga, see encyclopedia.com at <<https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/mae-enga>>.

19 A. Paliwala, 'Writing by Firelight: Constructing an Enduring Consciousness of Post-Coloniality' in Buchanan et al., op. cit., n. 1, p. 178.

an enduring basis for intellectual and political responses to post-coloniality through various theoretical avatars'.<sup>20</sup> More specifically, an editorial synopsis of Paliwala's chapter has it that what he sees as my transgressive form of participatory engagement 'has shaped his practices of reading and writing, and living with, law ever since'.<sup>21</sup> And even more specifically, Paliwala has it that '[h]is is a transgressive voice of a deconstructor of the culture of the West; his immersive experience of New Guinea gives him the opportunity to gaze from the South'.<sup>22</sup> My hope is that this will be evident in much that follows and especially so, as Paliwala puts it, 'in speaking' or attempting to speak 'from the broader compass of the other'.<sup>23</sup>

That orientation came at an opportune time when the continue imperialist of 'development' was being thoroughly called into question from such perspectives as the postcolonial and the neo-Marxist.<sup>24</sup> While invaluable and drawn upon in my research, that orientation was predominantly one based on intellectual systems emanating from 'the West'. Without more, this could be seen as a 'new imperialism', to borrow the term from Marianne Constable's bringing it to bear so acutely on an occidental espousal of law.<sup>25</sup> A return to Paliwala's perspective on alterity is called for. From the fireside, he anticipated what became known as decolonization or the decolonial turn. As Quijano's seminal sketch described it:

First of all, epistemological decolonization, as decoloniality, is needed to clear the way for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality. Nothing is less rational ... than the pretension that the specific cosmic vision of a particular ethnic [sic] should be taken as universal rationality, even if such an ethnic is called Western Europe because this is actually [to] pretend to impose a provincialism as universalism.<sup>26</sup>

In terms of Mignolo's pointed advocacy, this entails a 'delinking',<sup>27</sup> a setting apart from the universalizing pretension of an Occident that would encompass and represent the other, not only to determine the conditions of relation to the other but also to determine the other's very being and, in the process, to contain it within certain delimiting categories. The delinking from this is not complete, and it could hardly be so. What is involved is said to be, rather,

20 Id.

21 Buchanan et al., 'Introduction', op. cit., n. 1, p. 11.

22 Paliwala, op. cit., n. 19, p. 183.

23 Id., p. 190.

24 An influential instance was A. G. Frank, *Capitalism and Underdevelopment in Latin America* (1971).

25 M. Constable, 'Incitement to Justice: Fitzpatrick's Citations as Counter-Imperialism' in Buchanan et al., op. cit., n. 1, p. 15.

26 A. Quijano, 'Coloniality and Modernity/Rationality' (2007) 21 *Cultural Studies* 168, at 177.

27 W. Mignolo, 'Delinking' (2007) 21–22 *Cultural Studies* 449, at 453.

a relation of plurality involving a ‘provincializing [of] Europe’, to borrow Chakrabarty’s stunning title.<sup>28</sup>

The jurisprudential antithesis to all of which brings us to Hart’s *The Concept of Law*.<sup>29</sup> It was influentially, if uneasily, read because of its significance in the course on Jurisprudence when I was an external student with the University of Queensland. Its aversive influence was progressively heightened and its pointed significance in this present setting was probably triggered by Jurisprudence under a tree. Its rather more extensive significance is reflected at the outset of Brian Simpson’s Oxfordian voyage through and around *The Concept of Law*, published in 2011, where he notes that ‘[i]t has sold over 150,000 copies’, and describes it as ‘the most successful work of analytical jurisprudence ever to appear in the common law world’.<sup>30</sup> An ‘Editors’ Note’ to the second edition published in 1994, 33 years after the first, would amplify matters: ‘[w]ithin a few years of its publication *The Concept of Law* transformed the way jurisprudence was understood and studied in the English-speaking world and beyond’.<sup>31</sup>

The constituent impetus for Hart’s thesis is both derivative and fictive. The ‘advanced social systems’, together with their distinct and ‘developed legal system’, are generated by negation – by being cast in opposition to ‘primitive’ societies that are incapable of effecting legal determination.<sup>32</sup> Such societies subsist by relying on ‘primary rules of obligation’, which are dependent on wide acceptance and which are lacking in ‘secondary rules’ endowing the means to create, assert, and change legal provisions.<sup>33</sup> These could ‘only’ be ‘a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment’, even to the extent of being ‘static’.<sup>34</sup> Hart’s great discovery consists in discerning a surpassing of this torpid scene through the coming of rules enabling legal determination. This coming is embedded in an invoked history marking the achievement of ‘what is indisputably a legal system’, ‘a step from the pre-legal into the legal world’, ‘a step forward as important to society as the invention of the wheel’.<sup>35</sup>

28 D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000).

29 Hart, op. cit., n. 15.

30 A. W. B. Simpson, *Reflections on The Concept of Law* (2011) 1.

31 P. A. Bulloch and J. Raz, ‘Editors’ Note’ in *The Concept of Law*, H. L. A. Hart (1994, 2<sup>nd</sup> edn) xvii. There is much more. Perhaps the ultimate elevation comes from the cover of Simpson, op. cit., n. 30: ‘H. L. A. Hart’s *The Concept of Law* is one of the most influential works of philosophy of the twentieth century, redefining the field of legal philosophy and introducing generations of students to philosophical reflection on the nature of law’. The references to the book that follow in this present piece will be from the first edition. On the same page of the Note referenced here, the editors add that ‘in accordance with [Hart’s] wishes’ the text is ‘unchanged, except for minor corrections’.

32 Hart, op. cit., n. 15, p. 209, p. 229.

33 Id., pp. 89–94.

34 Id., p. 189, p. 221.

35 Id., p. 41, pp. 90–92.

Qualification and contradiction soon effortlessly intervene, however. First, we learn that ‘there are many studies of primitive communities which ... depict in detail the life of a society’ regulated solely by ‘primary rules of obligation’.<sup>36</sup> Next, the linked footnote drastically scales this down by noting that ‘few societies have existed without secondary rules’, and adds references to a few antique ‘studies of the nearest approximations’ to such societies.<sup>37</sup> We shall return to these. Then, and finally, the seminal absence of secondary rules is pushed to the point of extinction as being ‘never perhaps fully realized in any actual community’, even as its absence ‘is worth considering because the remedy for it is something very characteristic of law’.<sup>38</sup>

The epochal transition from the primitive to the advanced, its generating the emergence of a law proper, begins to look at least uncertain. The diversity and disparity between the versions of primitive societies begins to match Simpson’s view that Hart’s account of such societies is wildly inaccurate even as it is professed to be ‘empirical’.<sup>39</sup> Hart came to undermine his pivotal proposition even more thoroughly in a Postscript to the second edition, where he describes ‘the secondary rules ... as remedies for the defects of an imagined simple regime consisting only of primary rules of obligation...’, and refers shortly thereafter to ‘curing, among other defects, the uncertainty of the imagined pre-legal regime of custom-type primary rules of obligation’.<sup>40</sup> In a somewhat similar vein, Leslie Green, in his introduction to the third edition, finds that Hart ‘famously introduces his main argument through a fictional history of social development’.<sup>41</sup> So, this main argument ends up being fictive and it is, of course, an old fiction. To take one ‘influential’ instance, Hart’s depiction of a primitive society and of the decisive terms of transition to ‘secondary rules’ and legality is barely distinguishable from Locke’s in *The Second Treatise of Government*.<sup>42</sup> And Hart’s aim of countering Austin’s depiction of law as a sovereign creation does not sit well with Austin’s own resort to ‘natural society’ and ‘savage societies’ as negatively constituting an origin for their opposite – for civilized ‘political society’ in which an elevated sovereignty is the source of law.<sup>43</sup>

The vaporous, the ‘imagined’, quality of Hart’s foundational assertion is amplified by the three references that he makes to ‘studies of the nearest approximation to societies ... in which legislative and adjudicative organs and centrally organized sanctions were all entirely lacking’.<sup>44</sup> His reliance

36 *Id.*, p. 89.

37 *Id.*, p. 244.

38 *Id.*, p. 90.

39 Simpson, *op. cit.*, n. 30, p. 176.

40 H. L. A. Hart, *The Concept of Law* (2012, 3<sup>rd</sup> edn) 238, 249, 251.

41 L. Green, ‘Introduction’ in *id.*, p. xlix.

42 J. Locke, ‘The Second Treatise of Government’ in *Two Treatises of Government*, J. Locke (1965) 396 (paras. 124–126).

43 J. Austin, *The Problems of Jurisprudence Determined* (1861–1863, 2<sup>nd</sup> edn, vol. I) 179, 184, and (vol. II) 258.

44 Hart, *op. cit.*, n. 15, p. 244.

on all three could be questioned but I will only, and briefly, consider the most academically influential, which was also influential in terms of my reading: Malinowski's *Crime and Custom in Savage Society*, one of the most notable contributions to anthropology and to legal anthropology in particular.<sup>45</sup> Enticing as the title may have been, Malinowski's 'Introduction' should not have been promising because it sets the book against the 'primitive jurisprudence' that propounds a version of primitive society that would correspond closely to Hart's.<sup>46</sup> In stark contrast, Malinowski finds that among the Trobriand Islanders in what is now Papua New Guinea

civil law – or its savage equivalent – is extremely well developed, and that it rules all aspects of social organization. We also found that it is clearly distinguishable, and distinguished by the natives, from the other types of norm, whether morals or manners, rules of art or commands of religion.<sup>47</sup>

And in a further contrast, Hart's 'pre-legal regime of custom-type' rules would be countered by Malinowski's finding law clearly set apart from custom even as it can be fused into it.<sup>48</sup> Repeatedly, he finds that the equivalents to 'criminal' as well as 'civil' law have specific mechanisms for definition and enforcement.<sup>49</sup> Admittedly, Malinowski discusses the existence of a distinct corpus juris, yet he still refers to 'the body of tribal law', and Epstein did discern something like it in 'Melanesian societies'.<sup>50</sup> This picture that Malinowski presents is more akin to legal pluralism: '[t]he law of these natives consists ... of a number of more or less independent systems, only partially adjusted to one another', and these 'distinct systems ... together form the body of tribal law'.<sup>51</sup> While law remains attached to these distinct systems and is adaptably integrated into communal relations of reciprocity and mutuality, still 'the rules of law stand out', 'sanctioned' as they are 'by a definite social machinery of binding force' – a binding force added to by '[t]he ceremonial manner in which most transactions are carried out'.<sup>52</sup>

Much of Malinowski's fame flowed from his insistence on 'a new line of anthropological field-work' founded in 'direct observation' so as to obtain 'a grasp of the native's point of view, *his* relation to life, to realize *his* vision of *his* world'.<sup>53</sup> My supplementary contribution came with helping to form

45 B. Malinowski, *Crime and Custom in Savage Society* (1926) and reprinted many times after.

46 *Id.*, p. 2. This must have been from Malinowski a self-correction. The 'Introduction' as well as the whole book contrasts with his *Argonauts of the Western Pacific* (1961) 83–84. It was first published in 1922.

47 Malinowski, *op. cit.*, n. 45, p. 73.

48 Hart, *op. cit.*, n. 40, p. 238; Malinowski, *op. cit.*, n. 45, p. 6, p. 54, p. 101, p. 119 for example.

49 Malinowski, *op. cit.*, n. 45, pp. 54–55, p. 58, p. 62 for example.

50 *Id.*, p. 124; A. L. Epstein, 'Introduction' in *Intention and Dispute: Aspects of Law and Social Control in Melanesia*, ed. A. L. Epstein (1974) 5.

51 Malinowski, *op. cit.*, n. 45, p. 100, p. 124.

52 *Id.*, p. 55.

53 *Id.*, p. 125; Malinowski, *op. cit.*, n. 46, p. 25, emphasis in original.

a development corporation bringing together the numerous groups of the Trobriand ‘clan’. In helping to draw up the constitution of the corporation, I realized that Malinowski was right in observing the distinctiveness of law and its modes of assertion. What was also significant was an historically informed ability to distinguish this law from the re-shaping effects of colonial intrusion. In all, the Trobriand Islanders involved in creating the corporation were able to bring to bear a nuanced knowledge beyond the range of Occidentalism constituted in negative opposition to certain ‘others’. To take one example, the occidental perception cannot accommodate its mythic dimensions because that perception is constituted in opposition to those who are committed to myth, and there is a resulting confusion between myth and history. However, Trobriand Islanders, Malinowski tells us, ‘distinguish definitely between myth and historic account’.<sup>54</sup>

\* \* \*

## FIDELITY

Peter’s written account stops in Papua New Guinea. An advantage of completing the article on his behalf is that we do not have to be overly modest in celebrating Peter’s achievements.<sup>55</sup> The privilege of looking at Peter’s work retrospectively is that one can clearly discern that he was preoccupied with the same questions throughout most of his career. While these questions were subject to many different articulations, Peter was always concerned with the constitutive claims of modern law – such that law can appear to be at once thoroughly responsive, and yet entirely distinct and determinate. These claims were considered within the overall context of the relationship between law and society in ways that illuminated the intimate connections between imperialism, colonialism, nation, sovereignty, racism, and patriarchy, and the scope for resistance. The analysis was grounded in forms of exclusion that he would ultimately come to frame in terms of a ‘negative universal reference’.<sup>56</sup> This is not to suggest that Peter’s work did not evolve and change over the course of his career, but rather, in a way that should be resonant and

54 Malinowski, *op. cit.*, n. 46, p. 299.

55 Peter was the author of nine books and over 160 journal articles and book chapters. At the time of his death, he was Honorary Professor of Law at the University of Kent, following a varied and distinguished non-academic and academic career as described by him above. He was a globally eminent scholar whose contributions have been recognized through invitations to guest lectureships, keynote presentations (especially festschrifts), and conferences worldwide, and in celebrations of his work and tributes upon his death. *Eminent Scholars*, ‘Peter Fitzpatrick’, at <<https://eminent-scholars.org/peter-fitzpatrick/>>. For tributes upon his death, see *Critical Legal Thinking*, ‘Remembering Peter Fitzpatrick’, at <<https://criticallegalthinking.com/2020/05/27/remembering-peter-fitzpatrick/>>.

56 See section on Imperial/Postcolonial below.

even reassuring for those of us who find ourselves wending our way back time and again to the very same concerns with which we began, that Peter was committed to a set of questions that were uniquely his – never entirely subsumed by those theorists who engaged him most, but always serving as the frame through which he encountered those theories, and through which he read so carefully. It was a matter of ‘difference and repetition’, as Sundhya Pahuja put it when interviewing Peter in 2017, to which Peter laughed. It was a form of fidelity, not only to scholarship, but also to law as a vocation, in Peter’s own way.<sup>57</sup>

He also practised, and imparted to his students, another form of fidelity: a fidelity to the text. As others have observed, Peter’s characteristic approach was to read slowly and carefully.<sup>58</sup> Nowhere was this more apparent than in the bi-weekly reading groups that Peter convened with his postgraduate students. Peter always offered the grace of time, as someone who was not bound to the confines of the academy and who had a keen, genuine interest in life and the trials, tribulations, and journeys of others. The reading groups provided a haven for those interested in the nexus of post-structuralism, postcolonial texts, and critical theory. More than this, however, the reading groups were a meeting point for students of Peter’s from around the world, and across the ‘generations’ of PhD students – a community, or, more carefully, a form of ‘literary communism’.<sup>59</sup> Peter approached these sessions with an openness, a readiness to engage, and an attentiveness to the insights that his students would offer. Those who participated in the reading groups remember that Peter always came to the texts as though he had never seen them before, and he treated all of his students’ questions, arguments, and outrages as completely novel and compelling, when they almost certainly were not. His familiarity with the texts was only ever given away by conspicuously well-remembered page references. This practice, both of repetition and slow reading, was living proof that for Peter the text was much more than what was written.

From Peter’s earliest work to his most recent, there is a persistent suggestion that law, like the text, is ‘something more’ – more, certainly, than what it appeared to be; more than just an instrument of oppression, but also much more than its meagre offerings of justice. Peter’s reading in the subtext and margins of law traced the complex relationship between law and justice, finding a form of resistance and justice that only slow reading, with and beyond the text, can bring.<sup>60</sup>

57 *Eminent Scholars*, op. cit., n. 55.

58 See section on Reading above; Fitzpatrick, op. cit., n. 3; Buchanan et al., op. cit., n. 1, various chapters.

59 As Nancy describes, ‘this means: thinking, the practice of a sharing of voices and of an articulation according to which there is not singularity but that exposed in common, and no community but that offered to the limit of singularities’. J.-L. Nancy, ‘Literary Communism’ in *The Inoperative Community*, J.-L. Nancy (1991) 80.

60 Peter’s notes suggest a desire to illuminate ‘the constituent affinity between, of course, law and society and post-structural philosophy. But in case that appears too

Peter returned from Papua New Guinea to Britain in 1977 to take up a lectureship in Law and Interdisciplinary Studies and later a chair in Law and Social Theory at the University of Kent. It is not difficult to see the deeply formative influence that his time in Papua New Guinea had on his subsequent scholarship. This period is represented in his first book, *Law and State in Papua New Guinea*, which was completed after his arrival in Kent.<sup>61</sup> In this text, Peter worked with a broadly neo-Marxist form of political economy, but seen from the perspective of the Papua New Guinean ‘fireside’.<sup>62</sup> His observations through living and working with Papua New Guineans convinced him to question Global North-centric approaches to the nature of colonial capitalist encroachment into existing modes of production. He adopted a perspective that most closely coincided with a Global South perspective, but also one that pre-figured and motivated his complex approach to modern law. In particular, Peter objected to the assertion that the onset of capitalism wiped out pre-existing modes of production, agreeing with French anthropologists such as Meillassoux that what resulted was in fact an articulation of capitalist modes of production with traditional modes.<sup>63</sup> However, his nuanced position was that ‘the two modes can co-exist and combine with one occupying a dominant, integrative position’.<sup>64</sup> It was this perspective that motivated his early critiques of and dissatisfaction with legal pluralism and Marxist theories of law, and that subsequently led him to his own critique and thorough interrogation of modern law.

The period in Kent involved a new flourishing without complete abandonment of his earlier concerns with political economy, colonialism, imperialism, and anthropology, but with the additional engagement with nationalism and race that Peter attributed to his interdisciplinary appointment at the university.<sup>65</sup> Kent Law School became the UK stronghold for critical legal studies with the organization of the first Critical Legal Conference (CLC) in 1984, which involved discussion of radical theory and practice based in Marxism, post-structuralism, and post-modernism to explore arenas including racism, imperialism, and feminism.<sup>66</sup> Peter was actively involved in the CLC conferences and engaged constructively with the CLC’s broad compass especially as co-editor with Colin Perrin, his PhD student, of

straightforward there is also the ever-haunting influence of anthropology, including legal anthropology.’

61 P. Fitzpatrick, *Law and State in Papua New Guinea* (1980).

62 See text at n. 19 above.

63 Fitzpatrick, op. cit., n. 61, p. 6, p. 15; C. Meillassoux, ‘From Reproduction to Production: A Marxist Approach to Economic Anthropology’ (1972) 1 *Economy and Society* 93.

64 Fitzpatrick, op. cit., n. 61, p. 7. See also Paliwala, op. cit., n. 19.

65 Peter’s notes.

66 C. Douzinas, ‘Oubliez Critique’ (2005) 16 *Law and Critique* 47.

the Pluto Law and Social Theory series. Thus, *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, which he edited, involved the broad CLC church.<sup>67</sup> However, his own post-structuralist leanings were apparent in the book's exploration of the 'subversive implications of excluded knowledges for jurisprudence', including a strong critique of Hart's *The Concept of Law*.<sup>68</sup>

It was also during his time at Kent that Peter wrote *The Mythology of Modern Law* (hereinafter *Mythology*), arguably his best-known work, offering a thorough interrogation of legal imperialism.<sup>69</sup> In *Mythology*, Peter departed from a neo-Marxist political economy (albeit a departure that never fully abandoned Marx), taking instead a decidedly Foucauldian approach. Peter had already been reading Foucault for some years before *Mythology* appeared. One of his earliest engagements with Foucault came in an article from 1983, 'Marxism and Legal Pluralism', in which he linked together law and disciplinary power to show the possibility of an integral, mutual constitution between law and society.<sup>70</sup> It seems that it was from this fundamentally Foucauldian insight that Peter developed his understanding of the historicity of modern law, always defined in a contrived and mutually constitutive opposition to that which it is not – that is, in negation. This dynamic of constitution through negation that characterizes modern law subsequently structured his exposure of the origin of modern law in a mythic past. Early in his argument in *Mythology*, Peter drew on Foucault's *The Order of Things* to show how the transcendence figured as lost by the death of God in Nietzsche becomes integral to the constitution of the individual, and our very way of knowing in modernity, which must at least notionally disavow myth.<sup>71</sup> As he wrote, '[i]t is the individual who now mediates between the transcendent and the real, who now weds truths to times. The displacement of myth is completed when "man" comes to be subjected to "the sciences of man and society".'<sup>72</sup> However, *Mythology* exposed the persistence of myth in spite of its disavowal, showing how 'Enlightenment creates the very monsters against which it so assiduously sets itself', in its obsession with teleological origins.<sup>73</sup> These 'monsters' are race and nature, which stand in putative opposition to the rationality and order of modern law, producing an identity for modern law in the negation:

The monsters of race and nature mark the outer limits, the intractable 'other' against which Enlightenment pits the vacuity of the universal and in this

67 P. Fitzpatrick (ed.), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (1991).

68 P. Fitzpatrick, 'Hart's *Concept of Law*' in id., ch. 1.

69 P. Fitzpatrick, *The Mythology of Modern Law* (1992).

70 P. Fitzpatrick, 'Marxism and Legal Pluralism' (1983) 1 *Aus. J. of Law and Society* 45.

71 M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (2002); F. Nietzsche, 'Thus Spake Zarathustra' in *The Portable Nietzsche*, F. Nietzsche, tr. W. Kaufmann (1976); F. Nietzsche, *The Gay Science* (2001).

72 Fitzpatrick, op. cit., n. 69, p. 32.

73 Id., p. 45.

opposition gives its own project a palpable content. Enlightened being is what the other is not. Modern law is created in this disjunction.<sup>74</sup>

The book culminated with a scathing critique of Hart, intimated by Peter above, which showed that legal positivism, with its pretence to rationality, order, and autogeneity, is in itself the epitome of legal imperialism.

## RETROSPECTIVE REVELATION

In 1996, Peter left Kent for the University of London, first for a chair at Queen Mary, before becoming Anniversary Professor of Law at Birkbeck College in 1999. Before leaving Kent, Peter had already begun work on *Modernism and the Grounds of Law* (2001) (hereinafter *Modernism*), a work that would take up some of the central themes of *Mythology*, but with the undeniable influence of Jacques Derrida.<sup>75</sup> From the mid-1990s onward, this influence had become apparent in Peter's work and thought. In his interview with Sundhya Pahuja, Peter suggested that it was a 'revolutionary thrust' that drew him to Derrida's writing.<sup>76</sup> 'Force of Law' in particular offered a 'rich and productive, antimodernist' way to 'undercut the post-Enlightenment supremacism' that he had so meticulously excavated in *Mythology*.<sup>77</sup> One can see why Peter suggested in his notes that this article should emphasize 'the formative force of Derrida' as a 'retrospective revelation'. This was not, however, a 'Damascene revelation',<sup>78</sup> but a quiet appreciation that through Derrida, he was able to give voice to his persistent sense of law as 'something more'.

Of particular importance in Peter's reading of Derrida was the aporetic relationship between law and justice. As Derrida wrote in 'Force of Law', '[d]econstruction is justice', signalling the illimitable responsiveness of justice in inextricable relation to a calculable, determinate law.<sup>79</sup> 'Law', as Peter explained, 'must ever potentially respond to an uncontainable justice'.<sup>80</sup> In this relation is an imperative (*il faut*) to calculate and effect justice that belongs neither to law nor justice:

74 Id.

75 Fitzpatrick, op. cit., n. 7. In spite of Peter himself identifying *Modernism* as his first real monograph testifying to his engagement with Derrida's work, prior to this he had been reading 'Force of Law', to which he had been introduced, anecdotally, by his then student Colin Perrin, in reading groups at Kent. In 1995, Derrida was part of a panel organized by Peter at Birkbeck.

76 *Eminent Scholars*, op. cit., n. 55.

77 Id.

78 Peter's notes.

79 Derrida, op. cit. (2002), n. 8, p. 243, emphasis in original.

80 P. Fitzpatrick, "'Gods Would Be Needed...': Derrida on Law and Religion" in *Research Handbook on Interdisciplinary Approaches to Law and Religion*, eds. R. Sandberg et al. (2019) 194.

The order of this *il faut* does not *properly* belong either to justice or to law. It only belongs to either realm by exceeding each one in the direction of the other – which means that, in their very heterogeneity, these two orders are undissociable *de facto* and *de jure*.<sup>81</sup>

In Peter's work, this aporetic relationship was often expressed as two dimensions of law, the responsive and the determinate. These combine to form the basis of any legal decision, which immediately results in a cutting off from responsiveness and alterity, resulting in the creation of a 'mystical foundation' that appears impermeable to change, but that is always dependent on and troubled by that very responsiveness.<sup>82</sup>

In *Modernism*, Peter was concerned with unveiling the unstable 'origins' of modern law, or the 'mystical foundation' of its authority, at the precise moment of the mutual surpassing of determination and responsiveness in the founding of a new order. In this case, reflecting on Freud's *Totem and Taboo*, the origin is an act of parricide that he argued 'would, unexceptionally, seek to combine the determinant scene originated with what comes ever unknowably "before" or from beyond it'.<sup>83</sup> The two dimensions of law come together in this mythical origin, and persist in modern accounts of the rule of law:

The modern rule of law, with its avowal of assured stability and ultimacy of determination, seems closer to the condition of the primal horde. For law to rule, however, it must also embrace the opposite attributes. Law, as the rule of law, has to be ever-responsive and indeterminate, capable of extending to the infinite variety which constantly confronts it.<sup>84</sup>

However, the aporetic structure of law not only serves to maintain dubious myths of origin and the oppressive orders that flow from them, but also gives rise to the possibility of resistance. This possibility was very clearly expressed by Peter in his reflections on Nelson Mandela:

In both his analysis and his practice, Mandela exemplified the distinction I have been trying to make in relation to law. For Mandela, one law was the delimited kind of law we have just been talking about, a law that he saw as instrumentally subordinated to a power set apart from it, to the apartheid regime (the apartness in its name being, of course, pointedly apt here). But Mandela also finds the law laudable, especially as it operated within the courts. Indeed, he did see the courts as perhaps the only place within the apartheid system where there was a prospect of some justice for African people. This was the law to which he explicitly and magnanimously dedicated himself.<sup>85</sup>

This distinction was echoed by Derrida, who wrote that Mandela

presents himself, himself in his people, before the law. Before a law that he challenges, no doubt, but that he challenges in the name of a superior law,

81 Derrida, *op. cit.* (2002), n. 8, p. 157, emphasis in original.

82 *Id.*, p. 242.

83 Fitzpatrick, *op. cit.*, n. 7, p. 2.

84 *Id.*

85 J. Stauffer, 'An Interview with Peter Fitzpatrick' (2005) 3 *The Believer*, at <<https://believermag.com/an-interview-with-peter-fitzpatrick/>>.

the same one that he claims to admire and before which he agrees to present himself.<sup>86</sup>

This is the ‘movement of justice’ that plays on the aporetic structure of law, to call beyond the confines of any given calculation of law to demand a justice that perpetually exceeds it.<sup>87</sup>

In spite of Peter himself claiming that ‘Foucault wins in *Mythology*, Derrida wins in *Modernism*’,<sup>88</sup> we can also see that in *Modernism*, Peter began to develop the distinctive reading of Foucault that would appear throughout his work over the next 20 years. In Foucault, as with Derrida, Peter found support for the idea of law as constitutively responsive and determinate. This reading was explained in *Foucault’s Law*, written with Ben Golder in 2009:

Far from being simply the blunt tool of a sovereign, or the pliable instrument of disciplinary power, this law, we intimated, could well be something more ... the movement of Foucault’s law, that shifting of positions from the determinate to the beyond, from a confined law to a surpassing law which incessantly displaces itself, actually corresponds to an identifiable ‘logic’ of the law, itself.<sup>89</sup>

This sense of ‘movement’ in Foucault’s various writings on law is not unlike the ‘movement of justice’ found in Derrida. This is certainly no coincidence, as this reading of Foucault relied heavily on Foucault’s early ‘literary’ work and enigmatic engagements with Georges Bataille and Maurice Blanchot, whose writings provided much of the inspiration for the underlying preoccupations of post-structuralist thought. In these essays, Foucault related law to the idea of the limit and to the dynamic of transgression. ‘Transgression’, as Peter wrote in *Modernism*, ‘creates and secures the normalized world it supposedly confounds. And even if transgression may yet “leap” into “limitlessness”, it is always returned to what is “interior and sovereign” through an enveloping “spiral which no simple infraction can exhaust”.’<sup>90</sup> This spiral reflects the dynamic that Peter elaborated through the aporetic structure of law, in which the fixity and ‘origin’ of law recedes from view when it is too closely examined. As Foucault asked,

How could one know the law and truly experience it, how could one force it to come into view, to exercise its powers clearly, to speak, without provoking it, without pursuing it into its recesses, without resolutely going ever farther into the outside into which it is always receding?<sup>91</sup>

86 J. Derrida, ‘Admiration of Nelson Mandela, or the Laws of Reflection’ (2014) 26 *Law & Literature* 19.

87 Id.

88 *Eminent Scholars*, op. cit., n. 55.

89 B. Golder and P. Fitzpatrick, *Foucault’s Law* (2009) 53.

90 Fitzpatrick, op. cit., n. 7, p. 60, with reference to M. Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (1977) 32, 35.

91 M. Foucault, ‘Maurice Blanchot: The Thought from Outside’ in *Foucault/Blanchot*, M. Foucault and M. Blanchot (1987) 7, at 34.

This is a law that, while vulnerable to appropriation as a mechanism of disciplinary power or bio-power, also ‘cannot be contained by power’.<sup>92</sup> It *must*, as Golder and Fitzpatrick wrote, ‘remain incipiently responsive to the advent of alterity, and to the ineradicable and importunate demands of resistance and transgression’.<sup>93</sup>

## IMPERIAL/POSTCOLONIAL

While the influence of Foucault and Derrida became more significant in *Mythology*, the gaze from the perspective of the Global South remained a powerful influence, and Edward Said’s critique of orientalism fitted naturally into the development of Peter’s analysis of the construction of modern law on the basis of the othering of the Global South.<sup>94</sup> The Marxist influence in Peter’s work did not disappear. He continued to cite Marx in his work, including in *Mythology*, taking his cue from Derrida’s *Specters of Marx*, seeing the fall of Soviet communism not as an end of Marxism but a revisionist renewal of Marxist approaches to counter the ten plagues of global capitalism.<sup>95</sup> This approach as integrated into a Foucauldian perspective on governmentality became apparent in his final completed work on ‘unseen empires’.<sup>96</sup>

Peter had an abiding concern with the oppressive relationships of colonialism, imperialism, racism, nationalism, and patriarchy as challenged by the possibility and nature of resistance. This was illustrated in *Law as Resistance: Modernism, Imperialism, Legalism* in 2008 and in edited and collaborative works including *Nationalism, Racism and the Rule of Law* (1995), *Europe’s Other: European Law between Modernity and Postmodernity* (1998), *Laws of the Postcolonial* (1999), and *Critical Beings: Law, Nation and the Global Subject* (2003), as well as numerous essays and book chapters.<sup>97</sup> Peter’s analysis involved an intimate interrelationship between imperialism/colonialism, nation and sovereignty, racism, and patriarchy grounded in forms of exclusion and ultimately framed in negative universal

92 Golder and Fitzpatrick, op. cit., n. 89, p. 54.

93 Id.

94 E. Said, *Orientalism* (2003).

95 J. Derrida, *Specters of Marx* (1993). The reference to *Specters* is in his notes and also in Fitzpatrick, op. cit., n. 7.

96 P. Fitzpatrick, ‘In Search of Nothing: Unseen Empires and the Law Beyond Development’ in *The Limits of Law and Development*, eds. S. Adelman and A. Paliwala (forthcoming).

97 P. Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (2008); P. Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law* (1995); P. Fitzpatrick and J. H. Bergeron (eds), *Europe’s Other: European Law between Modernity and Postmodernity* (1998); E. Darian-Smith and P. Fitzpatrick (eds), *Laws of the Postcolonial* (1999); P. Fitzpatrick and P. Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (2003).

reference. The underlying notion derived from Foucault was the contradiction between modernism's apparent embrace of universality and its need to justify forms of exclusion. This was justified in four stages. The first acknowledged that the unity of the species nevertheless allows for distinctions; the second, that this is based on a recognition of different individualities permitting the negative of exclusion. The contradiction was resolved thus:

So the universal negative reference generates an antithesis but then has to be able to include that antithesis within itself, within its integral self. That imperative has two consequences. With one, and this is the third stage, the utterly excluded are nonetheless bidden to progress, or reform, or in some other way achieve inclusion. With the other and the fourth stage, along with its potential now to enter the universal, the antithesis resides always potentially within the bearers of the universal. 'We' were once savages and may regress, or 'we' may fail a constantly demanding disciplinary norm of 'our' society. Or 'we' may simply and of necessity be incorporated within some biopolitical determination.<sup>98</sup>

Thus, imperialism/colonialism justified a racist analysis of nation by constituting the nation negatively through exclusion of savages and others 'beyond the range of the universal', but could seek inclusion through the civilizing mission. Peter located the role of law through intimate 'slow reading' of various texts especially including Vitoria<sup>99</sup> but also judicial decisions involving indigenous peoples in the United States, Canada, Australia, and South Africa justifying imperial sovereignty in one form or another – judgements that ought to be included in his 'battered book' test.<sup>100</sup> After excluded peoples were given the imprimatur of nation in post-colonial times, the racism was continued through new definitions of development and state failure that defined nations in terms of progress towards universal attributes of nationhood. Peter used Anghie's analysis of differential treatment in human rights in the colonial origins of international law.<sup>101</sup> The imperialism of the colonial period translates itself into the postcolonial in the form of 'unseen empires', a term borrowed in Peter's last complete work from Pope Francis.<sup>102</sup> Foucauldian notions of governmentality as elaborated by Quijano provided the underlying framework in which a law beyond development enshrines new intimate forms of power and control to produce Jean-Luc Nancy's inoperative community.<sup>103</sup>

98 P. Fitzpatrick, 'Foucault's Other Law' in *Re-Reading Foucault: On Law, Power and Rights*, ed. B. Golder (2013) 48.

99 F. de Vitoria, *De Indis* (1934).

100 P. Fitzpatrick, 'Terminal Legality' in *Law, History, Colonialism: The Reach of Empire*, eds. D. Kirkby and C. Coleborne (2017) 9.

101 Fitzpatrick, op. cit., n. 7, p. 155; A. Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' in Darian-Smith and Fitzpatrick (eds.), op. cit., n. 97, p. 89.

102 Fitzpatrick, op. cit., n. 98.

103 Peter used especially M. Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (2007); M. Foucault, *The Birth of Biopolitics*:

There were three dimensions of resistance for Peter. The first, taking its cue from Derrida's *Specters of Marx* as reinforced by Pope Francis' call for resistance to 'unseen empires', was the idea of political resistance. The second was his analysis of the constraints and possibilities of resistance, especially in its interaction with law, for which he had developed an incisive and complex approach based on his interpretation of Foucault.<sup>104</sup> Resistant voices tend to be absorbed either by the determinate particularity of law's power or by law's survival strategy of limitless responsiveness. However, he suggested a stronger third dimension in which resistance is an integral irreducible opposite of power which for Foucault is not doomed to perpetual defeat.<sup>105</sup>

## RESOLUTION AND/OR SUPPLEMENT

Peter never formally retired. He resigned from Birkbeck in 2017 on a matter of principle involving the college administration's treatment of the then Head of School. Towards the end of his life, Peter's focus was increasingly on deepening his account of the secular theology of law and his own theoretical construct of the negative universal reference. These were two of the main themes of his unfinished work *Legal Theology: Law, Modernity and the Sacred*. Modern law, in Peter's accounts of secular theology, is a form of 'deific substitute'.<sup>106</sup> It arrives auspiciously following the death of God, as one among many in 'a jostling pantheon of new idols involved in this first response of Nietzsche to the deicide'.<sup>107</sup> More than this, modern law recovers the resolved unity that a transcendent God once provided, but no longer can in modernity, while also maintaining the openness or responsiveness required for modern formations, such as sovereignty, to exist and persist.

These observations followed on directly from his engagements with the idea of community, drawing on Nancy and Blanchot, or what might be referred to as a 'bond' by Derrida. The great insight that Peter seems to have derived from his engagement with the post-structuralist idea of community as inoperative or unavowable is that in order for a determined community to exist at all, it must have a constituent responsiveness. In modernity, it is law that gives this responsiveness to community, as 'the law ... affirms itself as law and without reference to anything higher: to it alone, pure transcendence'.<sup>108</sup> Law provides the reintegration of transcendence into an ostensibly secular world, the very fact of our being-together, which deconstructs all forms of positive law in the

*Lectures at the Collège de France 1978–1979* (2008); J.-L. Nancy, 'The Inoperative Community', tr. P. Connor et al. in Nancy, op. cit., n. 59, p. 1.

104 Fitzpatrick, op. cit. (2008), n. 97, p. xii.

105 Id.

106 P. Fitzpatrick, 'What Are the Gods to Us Now? Secular Theology and the Modernity of Law' (2007) 8 *Theoretical Inquiries in Law* 161.

107 Id., p. 162.

108 M. Blanchot, *The Step Not Beyond* (1992) 25.

very moment of their determination. Not only does it work in the service of the oppressive structures of the modern state, but it also offers the genuine possibility of resistance by reference to a law ‘beyond’ that of the determined community. Law, in this sense *is* community. Notably for Derrida, there is a law of ‘originary sociability’.<sup>109</sup> This law exists ‘prior to all organized *socius*, all *politeia*, all determined “government”, *before* all “law”’.<sup>110</sup> This law, he suggested, may even be ‘the very essence of law’.<sup>111</sup> Similarly, Nancy would conceive of the inoperative community as also being a law. He, too, referred to an ‘originary or ontological “sociality” that in its principle extends far beyond the simple theme of man as a social being (the *zoon politikon* is secondary to this community)’.<sup>112</sup> This is the ‘law of community’, or ‘community as law’.<sup>113</sup>

Peter had wanted to finish this article with the idea of community, as a ‘culminating coherence’ and presumptive ‘resolution’ to the ‘challenge’ that he had set himself to explore, ‘implausible as it may sound, the combining of law and society (of course) engaged anthropology, critical legal studies, [and] post-structural philosophy’. He took the relationship between law and society as his intellectual domain. The methodology was deconstruction, but in his own brief summary for his unfinished book project, he suggested that underlying all this was how ‘the pivotal position of law in and as the modern and the hyper-positive fits law in the imperial situation’. His notes left the conclusion to this article as a blank space. This was integral to his notion of ‘slow reading’—involving the belief sometimes communicated to his editors that determinacy left insufficient room for the reader’s responsiveness.

109 J. Derrida, *The Politics of Friendship* (2005) 231.

110 *Id.*

111 *Id.*

112 Nancy, *op. cit.*, n. 103, p. 28.

113 *Id.*