



**Birkbeck ePrints: an open access repository of the
research output of Birkbeck College**

<http://eprints.bbk.ac.uk>

Fitzpatrick, Peter (2005). 'In God we trust' can
relieve us of trusting each other: Peter
Fitzpatrick interviewed by Jill Stauffer. *The
Believer* 3 (8) 63-72.

This is an author-produced version of a paper published in *The Believer*. This version has been peer-reviewed but does not include the final publisher proof corrections, published layout or pagination.

All articles available through Birkbeck ePrints are protected by intellectual property law, including copyright law. Any use made of the contents should comply with the relevant law. This interview originally appeared in the October 2005 issue of *The Believer* magazine www.believermag.com/

Citation for this version:

Fitzpatrick, Peter (2005). 'In God we trust' can relieve us of trusting each other: Peter Fitzpatrick interviewed by Jill Stauffer. *London: Birkbeck ePrints*. Available at: <http://eprints.bbk.ac.uk/archive/00000497>

Citation for the publisher's version:

Fitzpatrick, Peter (2005). 'In God we trust' can relieve us of trusting each other: Peter Fitzpatrick interviewed by Jill Stauffer. *The Believer* 3 (8) 63-72.

<http://eprints.bbk.ac.uk>

Contact Birkbeck ePrints at lib-eprints@bbk.ac.uk

"'In God We Trust' can relieve us of trusting each other."

Interview with Peter Fitzpatrick

Topics Covered, in Alphabetical Order:

Chairs, and the Philosophers who sit in them.

Determinate existence, and responsive regard for what is ever beyond it.

Law is not only power, and it is at least partly mythology.

Nationalism grows out of a secularism that isn't really secular.

Native Americans are caught in a terrible bind.

Nelson Mandela is amazing.

We need savages.

What does law do for us? What is it supposed to do for us? We might think its main job is to decide conflict and make proclamations of right and wrong, and then maybe help us order our personal lives according to civil procedures such as marriage and will-making. Peter Fitzpatrick argues that law's purpose is not so easy to pin down, and points out that theories of law are conspicuous in their collective inability to tell us what law is, and what it, definitively, is for.

Fitzpatrick, philosopher of law and author of *The Mythology of Modern Law* (Routledge 1992) and *Modernism and the Grounds of Law* (Cambridge U.P. 2001) alongside countless articles and edited collections, prompts us to ask why, for instance, Nelson Mandela could despair of law under apartheid and yet view it as perhaps the only chance a black South African had to see justice done. In turn, how can the law giving Native Americans certain rights be the same as the law that so oppresses them? How—philosophically and factually—can law be the agent of so much justice and injustice at the same time? That and related questions are the subject of this interview.

Fitzpatrick is Anniversary Professor of Law at Birkbeck School of Law in the University of London, UK. He has also taught at universities in Europe, North America and Papua New Guinea. —Jill Stauffer

I. Law is a Mythology.

THE BELIEVER: What would be the best place to begin, if we were to discuss why academic writing about law and legal philosophy matters to people who don't want to spend all their time studying law's history and intricacies?

PETER FITZPATRICK: The weariness of it all! And indeed so much time has been spent studying law's history and intricacies. But to what effect? Surely we could expect that after the numberless efforts to tell us what law is, there would be some generally accepted outcome. Yet there isn't. So, one unpromising response to the question of why academic writing about law and legal philosophy matters to the non-specialist is that it has failed to tell us what law is. But, I should quickly add, this is an important and a productive failure. Admittedly, such a failure should seem strange to us moderns, for does not law provide us with some certainty in an uncertain world? This to me looks like a good place to begin—with our reliance on something we do not seem able to know.

BLVR: You have said that there is a "mythology of modern law." What does that mean?

PF: This is another good place to begin, to begin with a beginning. My main concern with mythology has been with the myth of origin—in particular the origin of a nation or its form of law. What is significant for me about the myth of origin is that it somehow takes the "determinate existence" that an origin is said to originate—that solid foundation of a nation or its law, for instance—and combines it with a "responsive regard" for something boundless (and therefore indeterminate) from which the "determinate" existence is derived.

BLVR: Whoa. Let me try to parse this. The myth of origin combines the existence—in this case "law" or "nation"—that is being originated with some sort of acknowledgement that whatever is being originated has to originate out of something beyond its own bare existence. So law is created out of something beyond itself, even though law often postures as if it is and always has been in charge of its whole world from the ground up, so to speak. So law's "determinate existence" is, in some ways, not so determinate, because law also has a "responsive regard" for what is beyond it. In other words, law is animated by and must respond to something beyond itself. Nation too.

PF: Right. And let's keep this relationship between what is determinate and what is responsive in mind, because I feel certain that it will resurface in this conversation.

BLVR: You mention "us moderns" and "modern law." What is modern law? And what is law if it is not modern?

PF: Yes, 'modern' is crucial to the correspondence I would want to draw between mythology and law since, with modernity, law takes mythology into itself. Law becomes, in a sense, mythology.

BLVR: How so?

PF: Well, modernity is supposed to have taken us away from the world of myth. The world of myth involves a resort to a realm of the sacred to give shape and direction to existence. Otherwise put, in the world of myth, existence has a responsive regard for what is beyond it. Now, supposedly, all of that becomes superfluous when a modernist reality becomes secular. But it is not quite superfluous if we believe, with Adorno and Horkheimer, that for 'us moderns' now "mythology has entered into the profane." Mythology has not gone away. It remains operative in various entities too readily labeled 'secular.' Law is one of those: law is one way in which we give recognition and effect to something about us that is both mundane *and* mysterious. That something is our ability to take our present existence and orient it beyond itself.

BLVR: How is that both mundane and mysterious?

PF: How is it not?

BLVR: Well... it is mundane: we orient our present existence beyond ourselves merely by existing in the world together, making plans for the future, having ideas about the past, and coming to have ideas about justice *because* we have to live together. But it is also mysterious: why or how do these mundane things combine to give us law, which must operate both as a determinate set of standards and as an indeterminate, responsive regard for what law can't

contain? How can something as seemingly rule-bound as law also be so very unruly in its possibilities?

PF: Precisely. If law did not have its responsive dimension, we would not be able to speak of how law adapts over time to suit new circumstances. And this is what, in terms of your question, the reduction of law as “modern” or secular leaves out.

BLVR: If law were determinate and not responsive, slavery would still be legal in the US, and only white male citizens would be voting!

PF: And, interestingly enough, that responsive regard law has is why, as your question also suggests, law cannot *be* modern.

BLVR: Wow. I must be smart. Why can't law be modern?

PF: Going back for a moment to that failure of efforts, of *modern* efforts we could now say, to tell us what law is, there have broadly been two types of failure. One is usually called “positivist.” It attempts to constitute law as what is simply ‘posited’ by human beings as law. Positivism would like us to have no doubts about what law is and no intimation of a ‘beyond’ to law. The other effort to say what law is tries to constitute it in terms of something else. The effort here is to render law as an instrument or effect of something else—of society, economy, class, the state of the judge’s digestion and so on. Both kinds of effort fail because they both would reduce the irreducible.

BLVR: OK. So positive law is law posited by human beings, without any acknowledged or explicit reliance on a beyond or a transcendent standard of right. Other forms of law claim to be able to figure out what law is by recourse to something else, like the human ability to reason, or, as you said, economy, class, judicial dining habits, etc. How do both of these forms reduce the irreducible?

PF: Both keep trying to contain the responsiveness of law—a responsiveness that I have called illimitable—in some delimited form or situation.

BLVR: But you are saying that there is an unlimited responsiveness in law. It has to be without limit if law is concerned with justice. Can you give me a concrete example of modern law's attempt to deny this responsiveness?

PF: Take the claim to sovereignty, for example. Nations and national courts cling futilely to some rigidified origin of law, an origin that is inescapably involved in, to take an instance, the colonial appropriation or 'discovery' of lands in the Americas.

BLVR: Right. The Americas were there, and inhabited, before they were discovered. So why should newcomers have a right to sovereign rule over 'discovered' territory? Any attempt of modern law to defend against claims made by indigenous peoples clings to a determinate foundation of law that, viewed objectively, is revealed as arbitrary at best.

PF: Right. So law tries to delimit its origin—and its legitimacy—but fails. Repeated failure is, then, inevitable—but very good for business.

BLVR: Ha! Because then legal philosophers, not to mention judges and lawyers, have a lot of work to do!

PF: Right. Though there's more to it than that. Reversing the perspective, if law could be cut off from its responsive dimension—if such a thing were possible—it would become so arbitrary and ultimately so irrelevant that it would cease to have effect. This doesn't keep legal philosophers and nation-states from making claims for law's determinacy.

II. The Nation is a Theology.

BLVR: What can the problem of nationalism tell us about the mythology of modern law?

PF: Well, I suppose nationalism must be one of the most telling instances of the poverty of secularism. Secularism would banish the authority of religion from the public sphere and substitute for it an authority purely of this world.

BLVR: Separation of church and state.

PF: In one instance. Nationalism was conceived of as secular, as entirely modern. It was both a product and an instrument of the modernizing of the world. As such, it was taken to encompass all of existence.

BLVR: That means no responsive regard for what is beyond it.

PF: And that means that it can displace the hold of religion on existence. Or, more exactly, to the extent that religion was still relevant, this was supposed to be a matter of personal preference, a private matter. There have been problems with that scenario. For one, attempts to establish the completeness of nation intellectually failed. For another, despite its secular pretensions, nationalism derived historically from religious systems. Even nationalism's occasional acknowledgement of that origin did not reveal how the originating influence of religion came to be eliminated. In addition, there is now much academic work on the abundant ways in which nation retains a sacred quality—on the ways in which, for example, it still imports the sacredness or holiness of the land, the chosen character of a people, the transcendent and intense commitment of its people, the sacred ethos of its rituals and monuments, and so on. More generally, there is a growing academic recognition that our secular conceptions are a transformed theology.

BLVR: What does it mean that so many of our secular conceptions are in fact secularized versions of theological forms? Is this a failure of “modern” human beings to conceptualize law and its demands? Or is it an unavoidable characteristic of law?

PF: The theology in such thought is ~~a~~-monotheistic-~~one~~. Now, if you will tolerate for a while another stark contradiction, this monotheism has involved two gods. One is a fully determinate god, omnipresent, perfectly ordered, named, and unable to be other than what 'he' is. The other god—as you might expect—is responsive. That god is one of possibility, an ineffable and unnamable god, a god of mystery, miracle and revelation. Monotheism would combine these gods into one. The impossible deity that results has predominantly been an elevation of the first god, the absolutely determinate god. The other god—the one who is responsive—has been instrumentally subordinated to this first one. We can see this kind of configuration with nationalism. Here, the nation becomes all-encompassing (determinate) and relates beyond itself only as a secondary matter and in the cause of its determinate self. Broadening the range, we could say that this same configuration characterizes the modern idea of "the sacred."

'Determinate' gets asserted over 'responsive.' What is sacred ultimately gets construed as fixed and inviolate, so "the sacred" is not only nation but also law and the constitution, property, life, stem cells. If these things are determinate, we need give no thought to how our ideas of them have to change over time. "In God we trust" can relieve us of trusting each other.

BLVR: Whereas a truly secular law would require that we give thought to the relationality underlying human law, and that we figure out how to trust each other without agreeing on a god.

PF: Yes, I should think. So, in answer to your other questions here, "yes" there is a failure to conceptualize law and its demands. There is a failure to link the dimensions of our being reflected by the two gods in a way that does not subordinate the second, responsive dimension to the first. And with your final question, "no," this is not just an unavoidable characteristic of law.

BLVR: If this isn't an unavoidable characteristic, what would it take to make law secular? If law can't be modern, can it at least be secular? Is that something we would want?

PF: Trying to be a bit more nuanced about it, then, I suppose in one way it is literally unavoidable. We have to construct some fixity, some determinateness in law, and elsewhere. But what *is* avoidable is the surpassing and blinkered force given to that determinate dimension of law.

BLVR: So we need fixity. But, as Octavio Paz has it, "fixity is always momentary." We need to be more responsive, as it were, to law's responsive dimension. Because a law caught up only in its determinate dimension would be incapable of responding to the changing demands of justice over time. It would be more like coercive force than a form of social order.

PF: That's so. And that *force* derives from the 'mono' in monotheism, from the claim made by a singular (Western) people for the universality of their concepts, and from the monadic domination that entails. Being truly secular, as you put it, must then involve at least the recognition of this barely covert monotheism and the recognition of the stark injustices that result. With law specifically, it must involve at least the recognition that the determinate dimension of law is inevitably arbitrary, and it must involve the recognition of responsibility for the exclusionary force of that law. The very fixity of law, the asserting of law's determinate presence, can only be partial. As partial, it brings with itself a relation to others—a plurality and not a mono-. Not so much, or not just, *e pluribus unum* (from the many, one) as 'from the one, many.'

BLVR: Law is, after all, about governing human relations. If you leave out the relationality (AKA its responsiveness to the passing of time, to situations it could not have foreseen, and to the indeterminacy of human relations in general), then what you have is not law but domination. So we should beware when we call property, nation, law, constitution, life, and... stem cells sacred.

PF: Right, because the name "sacred" disguises the plurality and the relationality involved in asserting that something is fixed.

BLVR: In order for something to be fixed, it has to respond constantly to what changes around it.

PF: Right.

BLVR: So... we shouldn't deny the role mythology plays in law, in part so we can beware the role a disguised theology plays in forms of law and power!

III. You'll Know It When You See It?

BLVR: You have said that “we find it difficult to challenge nation because we cannot say what it is so as to identify it explicitly and thence confront it.” So I'll ask you the impossible question: What is a nation? Or, more exactly, why is it not good enough to say that a nation is a sovereign territory inhabited by citizens and ruled by a government of that territory?

PF: A nicely timed question. Nation is like law in being one of those entities I mentioned that are too readily labeled ‘secular.’ So, it is no accident that the characteristic form of law in our times is taken to be national law. Now, in trying to answer your question, let me invoke Walter Bagehot where he poignantly says of nation that “we know what it is when you do not ask us, but we cannot very quickly explain or define it.” That quotation is from the nineteenth century and, despite constant academic efforts, we have not come up with anything more revealing since. Another intriguing failure. Of course, Bagehot's saying could characterize any attempt to signify something. All the things that a concept can be, all of its possible instantiations, can never be contained in any application of it. But with some things, we reduce or even eliminate the range of uncertainty involved.

BLVR: That is what gets done with 'law' and 'nation.'

PF: Yes. And that can usually be understood as a matter of practical necessity. Each time we use a chair, we cannot enter into long discussion or contemplation of just how adequate our conceptualization of it may be. Indeed a common example advanced here rather wearily by philosophers is the chair. They do quite a lot of sitting. Normally we would feel confident in the ability of the concept to convey customarily or comprehensively what a chair is. But in some ways that is a misplaced confidence. Let me abbreviate the argument by taking the instance of the throne—the throne of an operative monarchy, not one in a museum. How confident would

we be in our ability to “very quickly explain or define” the throne with its ethos of sovereignty and continuous rule—and along with that, with its not being tied to any present occupant but extending to all past and future rule?

This is going on too long before getting to the specifics of your question, but the point is that your apparently robust definition of nation (offered, I appreciate, to provoke) resorts to entities that, like nation, are accepted by us as existing finitely (having a determinate existence) yet accepted also as integrally extending beyond that existence (requiring a responsive regard for what is beyond). The ideas of sovereignty and rule that you mention do this, obviously. The citizen also has delineated existence yet the content of the citizenship is indefinitely extensive. And what underscores this incompleteness and failure of definition is that your definition itself does not mark nation distinctively. It would apply to many other types of political association.

BLVR: Indeed. And yet all the academic work of trying to say what a nation is, or what “nation” is, never solves the problem. What is the significance of that?

PF: Well, the immediate significance is that the failure points to something being left out. It draws our attention to that dimension of our being which was once accommodated by mythology, the sacred, and so on. It is not as if you can simply add this dimension on, as it were, by saying that nation involves people *believing* in nation. Or you cannot just say, as one famous definition has it, that nation is what people imagine as nation. These formulas convey something of nation, but as descriptive definitions they are simply tautologies. Nor are belief and imagination merely matters of subjective inclination, matters of private or individual concern. That is the standard modernist claim.

BLVR: Belief and imagination are also caught up in constructing nation.

PF: The ‘lost’ dimension of nation, the dimension extending beyond present existence and sustained by belief and imagination, this dimension is *necessary* for our conceiving of being with each other, and necessary for how we actually *are* with each other.

BLVR: That is why our belief in nation is not just subjectivist inclination. So, is the U.S. a different kind of a nation than, say, a European nation?

PF: Clinging to abstraction a little longer, we can tell much about the differences between nations by the different ways in which they combine their determinate and responsive dimensions. Take Kagan's *Of Paradise and Power: America and Europe in the New World Order*. Despite being hailed for its eternal verities, the book barely goes beyond national self-perceptions and self-justifications. But these are important. Going on Kagan's account, the US is obliged to be a noble thug. It has to be strong and assert its determinate national self so as to secure a place within which "the weak" can inhabit a paradise—a paradise in which they can indulge in a responsive relation to each other in terms of law.

BLVR: The US provides a baseline of security, so the story goes, that allows weaker nations the freedom to pursue goals beyond security. This makes of the determinate dimension of law a priority, responsiveness secondary.

PF: Indeed. The weak here would include European nations—"old Europe," to borrow a phrase. So there you have something of a difference between the US and Europe. The US was invented as an imperial nation. True, Jefferson's "imperial republic" did not fit the conventional colonizing mold, but it did not take long for the US to adopt the nationalist imperialism advanced by 'the great powers' in the nineteenth century. But now, and for now, the US remains the only place, apart from the inside of Tony Blair's head, where this type of imperialism can still be found. It was simply refined and not rejected in President Wilson's committing the US to anti-colonial or liberation struggles—so long as they were not struggles against the US. Freedom, enduring freedom, remains a dubious export.

IV. Who is the Savage Now?

BLVR: It seems that, traditionally, whenever there has been a supposed ease of defining nation, the definers have had to proceed in terms of negative definition—saying what the nation is by

listing off what it definitely is not. I guess this is a symptom of trying to, as you say, reduce the irreducible. So, in the history of political theory, the commonwealth is what we get when we aren't in the savage state of nature, or some such fictional construction of noncivilized conditions. Do you think there is still a hidden "state of nature" somewhere, enabling current constructions of nation?

PF: Indeed. The impossibility of nation's assuming an identity positively did impel this kind of negative formation. There was also a related logic at work here. Nationalist imperialism laid claim to the universal, even though it was the product of particular nations.

BLVR: By "laying claim to the universal," you mean that particular nations began to call their version of "how the world is" the only truth about how the world is, or something like that, and to spread that truth worldwide, often forcefully, right?

PF: Fair enough. It was an assertion of an absolute truth, a truth exemplified in the particular imperial nation. This had two monumental—and contradictory—consequences. A nation's identity was formed negatively by constituting, for example, the savages you mention as its antithesis.

BLVR: But if something is universal it can't have an antithesis! It is supposed to encompass everything.

PF: You are with me, I see. The antithesis of the universal can only be utterly antithetical. It has to be of a totally different kind of existence.

BLVR: Or perhaps something 'lower' than existence.

PF: And hence you have racism. This is the further consequence and where the contradiction comes in: the universal has to be all-inclusive. So the universal creates an antithesis but then has to be able to include that antithesis within itself. As such, the universalized existence exemplified

by the imperial nations was one that all peoples would come to, including the colonized, even if that would take a conveniently long time. Hence you have social evolution.

BLVR: In other words, the savage state of nature is something that has to be left behind, grown out of. And any people who have not yet attained ‘civilization’ are lower than—rather than simply different from—‘western civilization.’

PF: Right. And the final installment of this saga is that the savage condition is now, as you put it, hidden—although it still remains overt as well. It is hidden, that is, within ourselves, within our occidental selves. With social evolution, the idea is that ‘we’ once were what ‘they’ still are. That savage origin persists in ‘us’ with its siren call to regress, or at least to relapse. And it was Freud who gave this domain its supreme definition.

BLVR: In Trinh Min-ha’s film *Reassemblage*, she says that “scarcely twenty years were enough to make two billion people define themselves as underdeveloped.” What does this say about modern ideas of law and nation?

PF: Yes, of course, the old location of savagery ‘out there’ is still with us, and underdevelopment is one of its more comprehensive equivalents. Underdevelopment is a category that was very rapidly put in place in the middle of the last century. Perhaps one should bring to Trinh Min-ha’s assessment a little of the deliberate indeterminacy of her film itself, with its jumpy editing and uncertain narrative. There are cracks in the universality of the claims made within the film. No universality is seamless.

V. The Universal Is Not Universal. But It *Is* Powerful.

BLVR: What is beyond the nation? Or: what is the “outside” of nation, if the whole world is made up of states and there is no longer any uninhabited *terra incognita* ready for outcasts or adventurers to colonize, or for princes and philosophers to call savage? What happens to negative definitions? What gets excluded now? I’ll ask this even though it is already apparent

that there never was an uninhabited piece of land just there “free” for the taking. Maybe then we can discuss some of your work on the history of indigenous claims on land as well. What is outside of the nation?

PF: Well, we have to remember the other part of the contradiction between ‘savage’ and ‘civilized’. The claim to the universal constitutes what is beyond it as wholly apart. And since the claim depends on that savage condition apart from ‘us,’ the savage condition must stay always apart if ‘our’ claim to who we are is to stay in existence. The savage has to remain quite unredeemable.

BLVR: There have to be savages in order for 'us' to be civilized; underdeveloped nations in order for 'us' to be developed. Negative definition. But at the same time the impulse of the universalizing order is to *make* the savage civilized. The universalist claim undermines its own universality, and also needs to destroy the savage.

PF: Put another way, the claim to the universal can never be achieved in its own terms. It can never be ‘truly’ universal and thence all-inclusive. All it can do is repeat itself interminably. Good for business again. So, there is always the good native who is within range of redemption, and the bad native who is not. And now we have whole peoples and states that, drawing on the repertoire of Bushisms, are evil, bad guys, outlaws, failed. As such, they are fit only to be eliminated.

BLVR: ...Or converted with the power of our universalist freedoms!

PF: But the point is they can't be converted. They must be excluded.

BLVR: Yeah. You're right. I guess I was trying to be ‘funny’ in that irony-laden way too common to my generation. So let's talk about the claims indigenous peoples have to lands that have been taken from them. In the cases you've reviewed, is there a trend in how these cases get conceived, judged and settled? Or does it differ radically from place to place?

PF: Let me hang onto the implied connection you make in the question before this one between negative definition and indigenous peoples. And let me, if you would, bring to this present question that contradictory inclusion and exclusion involved in the claim to the universal.

BLVR: Let me make sure I've got this. The claim to the universal includes a contradictory inclusion and exclusion because: 1) in order to define itself as universal, it needs to exclude what it is not, and 2) in order to define itself as universal, it *needs* to include that thing it excludes so that the universal it can *be* universal. And therefore it can never truly *be* universal. Right?

PF: Yes. Indigenous peoples are carriers of that contradiction. Is it not striking that in settler nation-states the 'policy' towards indigenous peoples alternates vertiginously between their being assimilated and their being separated out? Coming to the cases you mention, the necessity for law to provide some resolution or some determination brings us to a point where the contradiction carried by indigenous peoples becomes clearer in practice. The cases you refer to come from many countries, including the US. And, yes, there is a trend, or sameness, to these cases. They treat indigenous peoples as distinct and apart, yet also as utterly contained within the nation and its law.

BLVR: So, in the US context, Native Americans are given "sovereignty" but if they have complaints about how that sovereignty is treated or interpreted by the US, their only recourse is to US courts and power structures. Native Americans are apart in terms of their sovereignty, but contained within the US as a nation, with its laws.

PF: An apt example. Containment is effected by confining indigenous peoples in certain ways which are taken to define them, such as their 'customs.' These defining ways are seen in the legal cases basically as static. If, for example, the customs change, they disappear. They cannot be creatively oriented beyond an unchanging determinate existence.

BLVR: This denies to their determinate existence its responsive regard for what is beyond. Look who's speaking your language.

PF: Ha! Yes, and since such a responsive orientation is necessary for their continued existence, all of this means that indigenous peoples are bidden to exist distinctly ...and yet are denied this orientation necessary for existence.

BLVR: Given the entrenched power of “nations” cohabiting with indigenous peoples, what, really, can indigenous peoples expect? That is, I suppose, a different question from ‘what ought they to expect?’.

PF: Really, realistically expect? Well, in one way: nothing. The cases resolutely refuse to question the colonial appropriation that initiated nation, an appropriation that simultaneously dispossessed indigenous peoples and founded the nation-state. Many of the cases simply reject any inquiry into foundation. Others obfuscate inquiry. Either way, a limit is placed on law, on what it is and could be. What I mean is that it is well within law's power to inquire into foundation and find that justice demands rethinking what is owed to indigenous peoples—that would be law's responsive regard for what is beyond it. And yet this is not what law within nations tends to do. Law is then left, as it were, as an instrument of a power, a nation-state.

BLVR: That's what positive law is, I guess, for modern nation-states. But that is not all of what 'law' is....

PF: Right. I am not saying that it is possible to constitute the nation-state apart from law. That is the way in which the nation-state is set up, as it were. But this limit on what law can do within nations is contrary to law itself. It is contrary to that illimitably responsive dimension of law without which there cannot be justice. As such, the imposition or embrace of such a limit does not give us the rule of law.

BLVR: It gives us the rule of a *power* that marks—or is shielded by—the limit it has imposed on law's possibilities.

PF: So on the one hand, indigenous peoples can expect nothing. Yet, in that very same situation, indigenous peoples should expect not nothing but *anything*. Clearly, with the courageous

optimism of their constant resort to the courts, indigenous peoples are relying on law's uncontainable responsiveness, and on law's very capacity to challenge any foundational claim.

BLVR: So there's room for hope here?

PF: Yes, but only if we are ready to challenge our foundational mythologies. Interestingly enough, Kant—the same 'enlightened' Kant for whom no inquiry was barred—this same Kant told us we *could not inquire* into these matters of foundation. To do so would be “a menace to the state.” It would disrupt an authority that presented itself as both complete and secular. Kant realized that this was an impossible combination. There could only be complete, all-encompassing sovereign authority combined with some determinate entity if that entity were seen as mythical or sacred, and hence no longer seen as secular.

BLVR: Kant thought it best to leave some antitheses untroubled.

PF: Yes. But the impertinent challenges indigenous peoples present to nation reveal a dimension of nation that its secular pretension would hide. What is more, any recognition of that responsive dimension of nation would inevitably lead to a questioning of how the dimension was and then managed to remain *limited* in the settler's sovereign arrogation, the latecomer's claim to an unquestioned right to land. And one answer to that questioning of the limit would be that there was and remains a sacrificing of indigenous peoples—they are sacrificed in order to keep the limit in place.

BLVR: Law's mythology is built on a sacrifice of claims to justice made by indigenous peoples. Determinate justice is built on injustice. So law's responsiveness is a necessary component to any just form of law.

Let's talk about South Africa and Nelson Mandela. Mandela has, in the past, both declared that law in South Africa under apartheid was incapable of providing justice, and that a law court might be the only place in South Africa under apartheid where justice might be served. How can he claim both these things?

PF: An opportune moment to signal my awed interest in 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.

BLVR: Because law is responsive it can take what is not yet part of law and make it part of law. So even when it seems hopeless, justice can prevail. Law's responsiveness can intervene in law's determinate dimension, making it expand to accommodate demands of justice. Sometimes.

PF: That is one way to think of it. Now, if law is to be able to do this, it must be quite unrestrained. It cannot be attached to a past, to the past of apartheid, or to any other past. It cannot even be attached to its own past. So Mandela—and civil rights activists in the US, to take another remarkable instance—could work with a law the current content of which was almost completely oppressive. Yet, and here is where the element of contradiction comes in, law's unrestrained responsiveness, its lack of any confining ties to the past or to anything else, results in its not having any enduring content of its own.

BLVR: OK. But we tend to think of law as linked to the past by means of statute and precedent. You can't just decide anything, so the story goes. You have to follow statute and precedent. So how does law's responsiveness escape such constraint?

PF: Well, simply, it does and must. You cannot have responsiveness without a determinate position from which to respond. But you cannot have a purely static determinate position. Any determinate position depends on its being responsive. The very effort to contain change and to appear constant requires responsiveness.

BLVR: I like the sound of that. Last question: Does power alone make law 'law,' or is something else required?

PF: The crunch question for law, really. There does seem to be something making law besides power, something to do with law itself. Take the political trial, a case brought before a court where the outcome has basically already been decreed politically. We often do not consider such a trial 'legal' precisely because some power apart from law determines the outcome. We tend to see this as a subterfuge, as something being presented as law that is not law. What is it about law that this offends? After all, I have just said that law depends utterly on power. Yet at the same time law cannot be ultimately beholden to a power like a nation's sovereignty, or political pressures. Much of that is conveyed by the standard claim that law must be impartial. But the counter-claim would be that law is always wedded to particular power—a nation's sovereignty, for example—and so it must inevitably be partial. Yet even if in its determinate existence law is inevitably partial, this still leaves its responsive dimension. This is the dimension that makes for law's impartiality. That impartiality is what allows us to believe that justice might prevail *this time*....