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claims and the humanity of rights.**

*Human Rights & Human Welfare – Working Paper
57, February 2010*

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Citation for this version:

Fitzpatrick, Peter (2010) Necessary fictions: indigenous claims and the humanity of rights
London: Birkbeck ePrints. Available at: <http://eprints.bbk.ac.uk/959>

Citation for publisher's version:

Fitzpatrick, Peter (2010) Necessary fictions: indigenous claims and the humanity of rights
Human Rights & Human Welfare (2010) Working paper 57.

human rights & human welfare



a forum for works in progress

working paper no. 57

Necessary fictions: Indigenous claims and the humanity of rights

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Posted on 20 February 2010

<http://www.du.edu/korbel/hrhw/working/2010/57-fitzpatrick-2010.pdf>

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Introduction

To begin, not propitiously. When checking whether my title ‘Necessary Fictions’ was being used elsewhere, Google revealed that it was going to be used in a future talk, and by me. It transpired mercifully that this use was going to be quite different to the present which suggested the prospect of a new academic genre: same title, different paper; rather than the standard combination of same paper, different title. Fortuitously, that contrast gave me the leitmotiv for this talk – that things ostensibly the same can be different, and that things ostensibly different can be the same.

In a fit of responsibility, this talk will be oriented towards its significant setting by way of some literary pretensions. Almost incidentally, pre-tension, as its more obvious etymology suggests, can also mean tension generated prior to some process – an apt variation for someone who is about to address an audience more knowledgeable than he is in most relevant respects. When, however, the invitation to do so comes from so exciting a scholar as Dr Elizabeth Anker, it is difficult to decline.

So, my first literary pretension will be to follow a not unusual way of writing a three act play. The audience is settled into the play with the first act which depicts some settled and fairly recognizable scene, but which also intimates that all is not necessarily well. This is

often done by introducing something intrinsic to this settled scene but perhaps, just perhaps, profoundly disruptive of it. The second act then deeply disrupts that settled scene. Things fall apart. The third act, often set in a different location, puts them together again in a new and conclusory configuration. This may still leave us somewhere close to our starting point, wiser and a little older.

Act I, then, outlines what is a critique of human rights which, if well settled, does remain powerfully pertinent. Whilst summary at this stage is especially perilous, it could be said that this is a negative critique, one which counters the more common Panglossian takes on human rights. Yet there are minor characters in this Act who behave in resistant, even revolutionary, ways, in ways strikingly incompatible with this critique, and ways which would endow human rights with considerable virtue. Then Act II looks more closely and separably at human rights – at the human and at rights. This provides the pin that pricks through the castle wall, disrupting both the negative critique and the resistant avowal of human rights. Such disruption, however, is not terminal for it leads us to a conception of human rights as constitutently incorporating both these perceptions – the negative critique and the resistant. This orients us to the more resolving ethos of the third Act. It draws on Indigenous literatures and legal claims not only to provide a stark and monumental instance of negative critique in the denial of rights to Indigenous peoples but also to show that the resistant engagements of Indigenous peoples surpass their negative rendition. An epilogue glances at what this entails for a modern conception of rights.

So, if there is to be an epilogue, there should be a prologue. A prologue, I take it, is a promise of all that is to come in the rest of the play, but a prologue's connections to what follows should not be laboured.

Prologue

The *mise-en-scène* for the prologue is Cornell university as seen through the eyes of Derrida when he delivered a lecture here in 1983 ("Principle of Reason"). He later explained the lecture and its topology this way: 'The talk's structure has an essential relation with the architecture and site of Cornell: the heights of the hill, the bridge or "barriers" above a certain abyss..., the common site of so many uneasy discourses on history and rate of suicides' (290). More specifically, in the lecture he referred to a debate at Cornell over the erection of barriers, 'protective railings on the Collegetown Bridge and the Fall Creek suspension bridge...' (134) – barriers inhibiting descent into the abyss beyond. The argument against these, an argument invoking death-embracing pronouncements of Ezra Cornell, was that the outlook from the university onto the world beyond should be unrestricted. This for Derrida becomes something of a metaphor for the imperative of unrestricted, unconditional enquiry. Yet for Derrida there have also to be delimiting barriers within the university, a conditioning topographic embedded in the affairs of the world. As Derrida put it:

Beware of the abysses and the gorges, but also of the bridges and the barriers.

Beware of what opens the university to the outside and the bottomless, but also of

what, closing in on itself, ...would make the university available to any sort of interest, or else render it perfectly useless' (153).

More positively, the university has to combine these death-bound dimensions, the unconditional and the conditioned – to bind them in a virtual alternation yet to do this in a way that gives some ultimate force to each without subjecting one to another. For Derrida this process of alternating and combining went to constitute the forms of life, forms of 'what lets singular beings... "live together"' ("Autoimmunity" 130). Such forms will be instanced now as the drama unfolds.

Act I

It is not to be dismissive of it to say, with a hint of paradox, that the negative critique of human rights is well established. Indeed, to dismiss such a negative critique here would be contradictory since I will also be joining in with it. Even worse, dismissal would be ungracious, since I will rely initially on Elizabeth Anker's vivified rendition of the classic critique of human rights in her engagement with Coetzee's *Disgrace*. In bald summary, *Disgrace* engenders openings to social justice, openings which offer 'a pointed rebuke to prevailing accounts of human rights', and which do so by exposing 'human rights to be indebted to an individualist logic' ("Human Rights" 234). All of which entails a complicit acceptance of 'dominant Western legal and philosophical conceptions of individuality' (243). Such a constricted conception of 'human rights fails to account for notions of responsibility and interdependence' (251). Furthermore, and like the law generally, human rights depend

upon their being ‘unyielding, absolute, and authoritarian’ (259). This searing engagement is put within a national frame, a frame that retains point in the view, expressed perhaps most strikingly by Arendt and recently taken up by Agamben, that human rights have no effect if not enforced by a sovereign state.

Moving out of that terrain now, there is the more generically characteristic depiction of human rights in international, even global, terms. Pheng Chea’s moderated critique will be taken up in Act II, but I would just mention here his equation of the putatively universal inhuman rights with their ‘particular site of emergence’, whether the emergence is from the ‘economically hegemonic North’, or from Southern NGOs, or Asian governments (*Inhuman Conditions* 152, 159). Others would claim more comprehensive contents for international human rights, contents endowed by such as global capital or, in Agamben’s usage, biopower (see Bailey). This, in Upendra Baxi’s terms, is a typifying of human rights as unitary, even as monist and ‘universal’, at least as ‘paradigm’, and as such this conception of human rights can assume a ‘dominant or hegemonic’ position (xv, 23, 206). And of course supporting instances these days appear numberless. So, we have the claims of imperium to have some prime purchase on human rights, claims which do not sit well with the operative inability of the US to ratify international conventions on human rights. As well as being a proprietorial adornment of such documents as the National Security Strategy, human rights are given some direct force by the United States through being made conditions of trade and aid. Overlapping these efforts, and probably more extensive and certainly more tentacular, there is the insistence on human rights in programmes of ‘structural adjustment’ and ‘poverty reduction

strategies'. It is difficult to be at all exact about what would now seem to be the enormous resources devoted to this because provision for 'promoting' human rights tends to be mixed in budgets of, for example, the World Bank, the IMF and the US Agency for International Development with accompanying imperatives to do with promoting democracy, and the rule of law, and pursuing 'the war on terror'. These and other like endeavours, such as 'The Nine Principles' guiding 'The Global Compact' for co-operation between the United Nations and 'the private sector', are focussed on the promotion of 'market' relations and neo liberal orthodoxy generally. Going in another, or perhaps the same, direction we have the linking of human rights with war, sometimes by way of 'humanitarian intervention' – the Gulf War, one and two, the conflict over Kosovo, and the war in Afghanistan, all often dubbed wars for human rights and all instances of Gore Vidal's neo-Kantian squib, 'perpetual war for perpetual peace' (*Perpetual War* title).¹

There is, however, another side to all of this and I do have impeccable authority for it. In a discussion of human rights on BBC Radio 4 on 10 September 1998, Homi Bhabha said he wanted 'to light a small lamp in the darkness', the darkness largely of what I have called negative critique. This avowal was to do with human rights countering the oppressions of ascribed status, on race and gender. What I will now begin to do is add some fuel to that lamp, both to sustain its light, and to shine it in other directions as well.

In a stark contrast, both the negative critique and the hegemonic utility of human rights are disturbed by Baxi's evocation of another human rights, human rights as plurality, a plurality

in which ‘human rights enunciations proliferate, becoming as specific as the networks from which they arise and, in turn, sustain’, networks embedded in ‘communities of resistance’ (26, 47, 144). Human rights of this kind exist along with the ‘hegemonic’ human rights but can never be ‘fully’ dominated by them (23). To take but two instances: one comes from the degradation of detention camps set up by the Australian government in remote locations to hold refugees, asylum seekers, and illegal immigrants, so-called. Spectacular resistances within the camps allied with legal action reliant on human rights led in July 2009 to a radical reversal of government policy and practice (Bailey). The other instance comes from the Womens’ Courts in and around Delhi, the Mahila Panchayats. These are courts established by women quite outside of the formal legal system. Typically, proceedings are taken against men for domestic violence or for maintenance. As well as drawing on “local idiom”, there is a general reliance on “Equitable notion of jurisprudence and women’s rights” (Magar 44, 55), and that reliance extends to the Convention on the Elimination of All Forms of Discrimination Against Women, a convention characteristically described as a bill of rights for women, and a convention ratified now by 185 states, not including the US.

In all, we end Act I with some apt unease, with at least a touch of irresolution, with some intimation of a divide that could prove to be intrinsically disruptive.

Act II

The dissolution which should now be visited on us in Act II hardly looks likely if its focal concern is going to be law – which it is. Law after all, in a certain exact sense, is supposed to

provide us with some security of expectation, some stability in an unstable world, some reliable determinacy. Law of this kind is commonly considered to reach its apotheosis in the modern 'rule of law'. As with law, so with rights, an artefact of law. To make a claim of right, what you are claiming has to have some determinate existence.

And yet, always yet, law, modern law, has (also) to be the opposite of all that. If law ceased to be responsive to the ever-changing conditions of being-together in and as its community, it would progressively cease to rule a situation changing around it. At least, this would be the fate of modern law, for such law can no longer resolve the divide between its determinate existence and its responsiveness by way of a transcendent reference, by way of divine right for instance. So already we can align modern law with human rights by amplifying Sarat and Kearns to say now that law, like human rights, has both to conserve and to revolutionize. In terms of Derrida's Cornelian topography, there have to be both the containing barriers of determinacy and the abyssal openness of the responsive. An ultimate commitment to either is death. They fuse yet remain distinct in an aporetic generation of a form of life, of law.

As the abyssal may suggest, dissolution goes further yet. A correlate of law's illimitable responsiveness is that it can have no enduring content of its own. It is a vacuity. 'Law itself', says Nancy, 'does not have a form for what would need to be its own sovereignty' (*Being Singular* 131). Law depends upon a power apart from it for determination, for its enforceable determinacy. Not that all this makes law's responsive dimension ultimately dependent on the

determinate. With law's illimitable responsiveness, with its unconditionality, it can never be contained, never be subjected to a conditioned determinacy. Law thence remains ever open to appropriation by any site of power, by the plurality – to borrow Baxi's term (47, 144).

So also, and yet again, with rights. Rights are normative claims on the futurity of a being-together in community. As such, a right has always to be able to transcend any delimitation, always able to become other than what it may presently be, what it may be 'at any one time'. A right, that is, generatively trajectories beyond any contained condition, whether temporally or spatially contained. That uncontainment is the impelling element of a right's being 'general and universal', of its surpassing any specificity. I will return to that formulation in the next Act.

The human, the humanity of rights, thoroughly embeds this responsiveness of rights. Coming from within the secular human, the posited community of the human, we are not able ultimately to occupy some comprehension beyond it, to encompass and contain it – to decree what its 'nature', its human nature, may 'universally' be. Such humanity, to adapt Nancy, is 'not subject to any authority; it does not have a sovereign' (*Being Singular* 185). And to echo Derrida, humanity is always and ever to come (e.g. "Force of Law" 256). We have never *been* human (cf. Latour).

Allow me now, with inexcusable brevity, to pull these points together by considering Pheng Cheah's revelatory engagements with human rights. My initial focus will be on his *Inhuman Conditions: On Cosmopolitanism and Human Rights*. His engagement there with

human rights would accord with both their negative critique and with the confirmation of that critique I offered by way of identifying the vacuous susceptibility of rights to appropriation. So, and for example, he finds human rights bound ‘to the instrumentalization of human relations’ and thence ‘rooted in the very nature of economic development within the structure of capitalist accumulation’ (259). There is much else cogently in that vein. Yet Pheng Cheah also finds that human rights can extend beyond this delimited existence and ‘enable...the actualization of humanity’ (265). He is also inclined, along with Derrida, to affirm the ‘unconditional normativity’ of human rights (174). Yet I tend to agree with Elizabeth Anker’s view that ‘[f]or Cheah, there is no outside to the force field of global capital’ (“Contaminations” 2). And even if this ‘force field’ for Pheng Cheah may not be a totality, it would seem nonetheless to have a totalizing ability (176). In other words, in going beyond their existent determinacy, human rights would still be committed to return to the encompassing fold of hegemonic determination.

Since that conclusion would counter my argument that human rights are illimitable and unconditional, let me now offer a borrowed self-correction. When engaging with democracy in his contribution to *Derrida and the Time of the Political*, Pheng Cheah fulsomely accommodates the unconditional in and as democracy (78), accommodates its ‘constitutive exposure to the wholly other’ (79), accommodates its ‘incalculable’ quality (85). My argument would be that this illimitable, this abyssal dimension of democracy pertains, in Derrida’s terms, to ‘what lets singular beings...“live together”’, and that would include a living of human rights, albeit a living tenuously.

In sum, the parting position we are left with now in Act II is that human rights constitutively and inseparably entail both their conditioned appropriation as the negative critique would so poignantly reveal *and* the ability ever to go unconditionally, illimitably beyond any such appropriation.

Act III

This opening scene tells an old story but one not often enough told. The oppression and dispossession of Indigenous peoples in both the assertion and the denial of rights matches a genealogy of human rights that can be traced back through natural rights and thence to natural law (Fitzpatrick “Latin Roots”). Allow me, for now, to join this particular grand narrative at a fairly late stage in 1823 with the case of *Johnson v. M’Intosh* decided by the Supreme Court of the United States. For a great many national legal systems this decision remains what the lawyers call ‘a leading case’, a formative legal authority, on Indigenous rights (e.g. Bartlett 182-3). This is an elevation freighted with obvious irony since the case deprived Indigenous peoples of their rights.

Still in an ironic vein, some nuance has to be brought to that abrupt conclusion. The judgement in that case invariably invoked when referring to it as authority is that of Chief Justice Marshall. In that judgement we find that, with some regard perhaps to a recent revolution based on universal or natural rights or on the rights of all ‘men’, Marshall *did* recognize that Indian peoples had ‘natural rights’ in their land, including the right to transfer ownership (563). To deny them that right, which the case did, was for Marshall indefensible,

but ‘may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them’ (588). It may not be incidental to add that to have done otherwise could well have proved disastrous for the fledgling union of the United States (Williams 1990: 231, 306-8). But returning to the lamentable character and habits of Indian peoples, what these amounted to was ‘the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct entity’ (590). This indefinite mixture of separation with subordination has of course endured ever since. Marshall then resorted to Realpolitik to drive the point home: ‘[h]owever this restriction [on a right of property] may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice’ (591-2). Even more pointedly, the court had to go along with ‘the government’ since it was the government that has ‘given us...the rule for our decision’ (572). Yet even this elevation of a surpassing power of government over law could not end matters because in one vital respect there simply was no ‘given...rule for...decision’ (572). The standard legal grounds used in modern times to found imperial settlement did not, in Marshall’s view, apply to the United States. Its colonial settlement was, therefore, illegitimate. This is a quandary that has faced courts in other settler states. For example, with the Mabo case, decided by the High Court of Australia in 1992, the realization that settlement was based on at best dubious legal grounds impelled the court to declare that this was simply a matter that should not be enquired into (31).

This could hardly provide a less promising prospect for the cases brought of late by Indigenous peoples to affirm their rights, and their human rights – cases where they have relied on law’s responsiveness, no matter how attenuated that responsiveness may become through sovereign arrogations. As the Mabo case has just instanced, these actions have fittingly and radically unsettled a self-sufficing sovereignty. The assertion of rights presents, to borrow the phrase, a clear and present danger to sovereign settlement. Repeating somewhat, rights are normative claims on the illimitable futurity of a being-with each other in community. Hence a constituent imperative of rights, of being-in-right, is the autonomy of that being – a stark counter to an all-surpassing sovereignty that would seek to limit them. The reaction of the courts to this challenge has been revealing, the Canadian cases especially so.

In *R v Van der Peet*, Chief Justice Lamer in the Supreme Court cautioned, with emphasis, that the rights being claimed by the Indigenous group ‘are *aboriginal*’, and this ‘aboriginality’ meant that the ‘rights cannot...be defined on the basis of philosophical precepts of the liberal enlightenment’, on the basis of their being ‘general and universal’ (paras 17-18). This generality and universality are not of the kind associated earlier with the illimitable responsiveness of rights. Indeed, and in *Delgamuukw v. British Columbia*, the Canadian Supreme Court held that aboriginal title to land existed and entered into contention only because it ‘crystallized at the time [colonial] sovereignty was asserted’ (para 145) That sovereign claim is of the standard transcendent variety, a claim for sovereign power being

able to enclose itself yet extend indefinitely, being able to subsist finitely yet encompass the general and the universal within its determinate existence.

This in itself is not sufficient to counter the challenge of right, of a right that is illimitable. It must then be limited. The ‘crystallized’ right has to retain its ‘original’ hardness; or, in the common idiom, the rights are ‘frozen’ (Van der Peet paras 165, 170, 172). Such rights are so specifically tied to temporal and spatial determinants that they can be proved as a matter of ‘fact’, and so integrally tied that if the determinants changed the rights disappear. Such rights, that is, cannot be creatively oriented beyond an unchanging determinate existence. Since this generative orientation is necessary for being-in-right, the rights so ‘recognized’ (the standard term) are not rights at all. More starkly, this is a domain of non-being – either a stasis that denies being, denies the motility of being, or a dissipation, an unfreezing, that denies existence to being. In the Cornelian topography this is either a containment within barriers or a fall into the abyss.

To illustrate this farrago more concretely, I will take one of its more egregious contributions, the case of *Mashpee Tribe v. Town of Mashpee*. This was a decision by a Federal District Court and obliquely affirmed by the Supreme Court. It involved an action brought by the Indian community at Mashpee on Cape Cod to recover land. To succeed the Mashpee had to establish that they were a ‘tribe’ in terms of the relevant legislation. Despite an abundance of evidence showing that the Mashpee as a community had persisted for upwards of three hundred years, they failed to establish that they were a ‘tribe’. This is

because in crucial respects the Mashpee failed to meet the fixed criteria of 'tribal' identity. Their most lamentable failure lay in being a generous and gregarious people who welcomed into their midst and inter-married with a diversity of others, with settlers, deserters from the mercenary ranks of the British Army, and runaway slaves. Because these people coming in were not sufficiently subordinated to an enduringly set identity, because the responsive regard to their presence at times altered some supposed original identity of the community, the Mashpee failed to show that they had sustained an invariant identity, and so their claim to the land failed.

If we are dealing with a relation here, if we are dealing even with the recognition so-called of Indigenous peoples and their rights, then this is a relation and process of recognition lopsided to the point of absurdity. In short, it is a relation in which one side can not only influence but also determine what the other is, something that this 'other' cannot do, reciprocally or otherwise. Indigenous peoples remain 'encapsulated societies', to borrow the term from Geertz (3). Putting this non-relation in the context of the Canadian cases, in dealing with evidence of Indigenous rights, courts have at times accepted testimony which 'took the form of symbolic dress, mythologies, masks and totem poles as well as the legends, stories, poems, songs and other forms of interpretation that such art and mythology implied' (Goodrich 182-3), only to have this testimony comprehensively relegated in the judgement. As Goodrich puts it for one such case:

The court would not compare mythologies, *it refused even to countenance the question of the 'other'*, because to do so would raise questions of its 'self', of the social and mythic construction of its own body, its social role and actions, its own clothes. (Goodrich 183 – his emphasis – cf. Borrows e.g. 58-9).

So, segueing now to Indigenous literature, the Indian protagonist, Abel, in Scott Momaday's *House Made of Dawn* observes of his trial for murder: 'Word by word by word these men were disposing of him in language, *their* language, and they were making a bad job of it. They were strangely uneasy, full of hesitation, reluctance' (95 – original emphasis). No such hesitation or reluctance, characterises the trial in Sherman Alexie's *The Lone Ranger and Tonto Fistfight in Heaven*. Here the accused, Thomas Builds-the-Fire, asserts his own narrative and in so doing rouses the support of his people (cf. Mandela 384-5). The court can accommodate neither the narrative nor the people and is driven to violence and obscenity to assert its own encapsulated reality (93-103).

So much, in terms of the Cornelian topography, for the barriers. What of the abyss? Here I want to participate vicariously and briefly, too briefly, in the kind of process pursued by José Rabasa, the process in which 'the philosophical and political tradition of the West would be considered in indigenous terms' ("Negri by Zapata" 197). This will not, cannot, be done by my resorting to 'indigenous terms' perceived in some assuredly 'authentic' way (cf. Kuper). The terms here will, I hope, be clearly consonant with the shreds of the philosophical and the political drawn on so far. And what generates these terms here is the *literary* quality of

Indigenous literature, an abyssal literary quality of illimitable receptivity: the poet, says Rilke, is ‘he or she who is ready for everything’ (Fenton 248). That literary choice or evasion also helps avoid the over-strict assertion that the first of my two instances was not Indigenous: José María Arguedas, and likewise his novel *Deep Rivers* (Murra ix-xiii).

What is most telling about *Deep Rivers* for present purposes can be found in the first chapter set in Cusco, once the capital of the Inca Empire. What, in a sense, embeds the whole novel are the stones, the stones of what were once Inca buildings and walls in Cusco but which have now been built on by the colonists. The stones are both foundational of yet subordinate to imperial structures. Yet the same stones are radiant. They seethe, they move, talk, frolic. Their streets flow like rivers, deep rivers, rivers akin to primordial serpents. This foundational fusion with movement and change is later aligned in the novel with Indigenous rebellions, with a primal or abyssal capacity to sweep away the existent, to sweep it away in a flood, a flood of rivers (chapter 7 and 11).

Given ‘world enough and time’, these same motifs, these same forces, can be found abundant in Alexis Wright’s *Carpentaria*. These forces are concentrated in the Law, in the Aboriginal conception of the Law (e.g. 2). This, reverting to occidental philosophy and to Derrida, could be a ‘law of originary sociability’ (*Politics of Friendship* 231), a law which can be rendered neither as nature nor as culture. It is these forces which, in the novel’s culmination, sweep away in a cyclonic flood the artefacts of imperial exploitation along with the ‘Law-breakers’ (404).

Epilogue

An epilogue should have a comforting touch of the superfluous, and this could be offered by way of a belated justification for the title of my talk. In Roman law the legal fiction served to accommodate change in a law whilst that law remained evidently the same. So, to make some claims in law, you had to be a Roman citizen, but eventually for this purpose foreigners were simply deemed to be citizens whilst ‘the letter of the law’ remained unchanged (Maine 21-2). Somewhat more expansively, Derrida would see the law, the determinate law, as ‘fictional’, as ‘artifice’ (“Force of Law” 240). For Derrida, ‘narrativity and fiction’ inhabit ‘the very core of legal thought’ (“Before the Law” 190). With Nancy’s ‘juris-fiction’ the law is that which is ‘modeled or sculpted (*fictum*) in terms of right’, with right having to constitutively combine the abyssal ‘unforeseen’ with a posited determinacy (*Finite Thinking* 156-7). The persistence of Indigenous claims through law and right may yet lend transforming force to the realization of law as fiction, the realization of its constantly created quality. This, to borrow Derrida’s ‘reflecting’ Nelson Mandela, would be ‘a law that has not yet presented itself in the West, at the Western border, expect briefly, before immediately disappearing’ (“Laws of Reflection” 38).

Acknowledgements

This paper was a presentation at the conference “Human Rights: Theory, Narrative, Postcoloniality” held at Cornell University on 16-17 October 2009. Looked at another way, the paper would not exist without the generosity and guidance of Elizabeth Anker in

involving me with the conference. Another essential ingredient was the intellectual companionship of Kathleen Birrell, Chris Lloyd, and Maria Carolina Olarte Olarte.

Notes

¹ These and other uses of human rights are considered in Fitzpatrick “Terminal Legality”.

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