

Legal Theology: Law, Modernity and the Sacred

Peter Fitzpatrick*

Introduction

I hope this is not getting monotonous, but as with the plenary session, when working on this talk I eventually found that the same title had been used in a piece already published.¹ Not that I expect this piece to be permanently on your bedside tables but for form's sake allow me to say here also that this present performance is markedly different to that published one. That oversight again helpfully suggests a new academic genre, different paper with the same title rather than the more usual academic variant of the same paper with different titles.

That latter thought is not entirely gratuitous since my guiding theme will revolve around things that are the same being different and things supposedly different being the

*Anniversary Professor of Law, Birkbeck, University of London, peter.fitzpatrick@clickvision.co.uk. My thanks to Maria Carolina Olarte Olarte, James Martel, Ben Golder and Richard Joyce for crucial references and translations.

¹ The sub-title in Peter Fitzpatrick, "The Triumph of a Departed World: Law, Modernity, and the Sacred," in eds Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, *Law and the Sacred* (Stanford: Stanford University Press, 2007). The title proper "Legal Theology" deliberately resonates with Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: The University of Chicago Press, 2005), especially chapter 3. If anyone were so inclined, this present paper can be read as a response to the two linked failures of *Political Theology*. One failure is the difficulty involved in creating something, the sovereign, in terms of what it creates, the decision on the exception. The other difficulty is Schmitt's inability to resolve the conundrum of the sovereign's generating a legal order that somehow exists and persists apart from the sovereign.

same. Of course, the epochal difference that must concern me here is that between the religious and the secular. It is still the predominant view that the two are intrinsically opposed. An enlightened or modernist secularism comes to relegate religion definitively to realms of the private, the residual, and the atavistic.² Or religious belief is revealed as a projection of a definitive reality essentially of this world.³ Yet we have of late a plethora of books, academic and popular, making out a revisionist, even a revanchist case. Often, but not always, prompted by the exaggerated perception of a religious revival, these tomes find that the very secular quality of modern political formation, or some variety of it, is derived from and sustained by the religious.⁴ This, to be more specific, is an occidental modernity and the religion invoked is Christianity. There is, however, an enigma here. If the religious and the secular are the same, what is to stop their fusing indistinguishably with each other? There seems to be (also) some difference to be observed. The revisionist premise itself confirms difference for it is set against the continued affirmation of a divide between the secular and the religious, even if it can find that divide to be phantasmal.

² E.g. Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, trans. Oscar Burge (Princeton: Princeton University Press, 1997).

³ E.g. classically Ludwig Feuerbach, *The Essence of Christianity*, trans. George Eliot (Amherst, NY: Prometheus Books, 1989); Sigmund Freud, *Totem and Taboo*, trans. James Strachey (London: Routledge & Kegan Paul, 1960), chapter 4. Perhaps much of the orientation of this present paper is captured in Marx's aperçu: "We do not turn secular questions into theological questions, we turn theological questions into secular questions:" "On the Jewish Question," in Karl Marx *Early Writings*, trans. Rodney Livingstone and Gregor Benton (London: Penguin Books, 1992), 211, at 217.

⁴ For an engaging and influential instance see John Gray, *Black Mass: Apocalyptic Religion and the Death of Utopia* (London: Allen Lane, 2007).

I will later have some regard for the phantasm but for now allow me to indicate more pointedly what this talk will be about. The argument overall will be that with the supposedly modern Occident there is both sameness *and* difference as between the secular and the religious, and that law, modern law, is constitutively enmeshed within this sameness and difference. That combination of sameness and difference, along with this integral part of law, is traced in a cumulation of three historicities, the first being the creation of the world's imperium, of the modern world-system, in the sixteenth century. Then with the second historicity we have the time of revolutions, seen here as almost revolutions, of the seventeenth and eighteenth centuries. And finally with the third historicity we have the time of high modernism and the death of God in the nineteenth and twentieth centuries. Each of these three phases is captured, as it were, in the work of a corresponding thinker who is taken to be a telling instance: Vitoria, Hobbes, Nietzsche.

Before amplifying, allow me to say more about what the talk will cover and to do so by way of describing the 'history' drawn on here, a history of the present. The phrase is often associated with Foucault and some of Foucault's meaning will be brought in.⁵ For present purposes, a history of the present can perhaps be most sharply delineated by saying what it is not. It is not, to borrow Foucault's account of Nietzschean history, "a history whose function

⁵ See Michael S. Roth, "History of the Present," *History and Theory* 20/1 (1981): 32-46.

is to compose the finely reduced diversity of time into a totality fully closed upon itself.”⁶ Put another way, it is not the more typical occidental historiography of the progressivist’s grand narrative. Such historiography, in Ricoeur’s terms, “consists in elevating as an absolute this historical present established as an observation point, even a tribunal, for all the formations...that have preceded it.”⁷ The instance of such retrospection that will jut out in the present setting is the tale of secularism’s graded triumph over a diminishing force of the religious.

This retrospective relegation raises yet another enigma. Whilst purporting to reject the past, that relegation would also purport to incorporate that past and to go beyond it. It is in this rejection that the achieved division between religion and the secular inheres. The dynamic here is encapsulated in what Charles Taylor calls “subtraction stories,” stories, grand narratives so to speak, that evoke a secular humanism, “an exclusive humanism,” as though it “were already there, just waiting to be invited in,” waiting to emerge into the light once the obscuring veil of religion was torn or worn away.⁸ “Against this kind of story,” writes Taylor, “I will steadily be arguing that Western modernity, including its secularity, is the fruit of new

⁶ Michel Foucault, “Nietzsche, Genealogy, History,” in Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, trans. Donald F. Bouchard and Sherry Simon (Ithaca, Cornell University Press, 1997), 139 at 152.

⁷ Paul Ricoeur, *Memory, History, Forgetting*, trans. Kathleen Blamey and David Pellauer (Chicago: The University of Chicago Press, 2004), 305.

⁸ Taylor, *A Secular Age*, 22, 26-7.

inventions, newly constructed self-understandings and related practices... .”⁹ I shall be arguing unsteadily to the same effect, but without Taylor’s resolution in religion. More pointedly, I will be concerned with the divide in modernity between (if the pleonasm can be tolerated) religious religion and political religion. To draw the distinction is not to say that this divide and the opposition in modernity between these two religions is not (only) because they are different. It is (also) because they are the same. Within the sheltering of the secular, salvation is proffered by deific substitutes – by modern empire or by the nation-state, for example. The deific substitute arrogates to itself a completeness in and of itself, a self-sufficing ipseity capable of “autopositioning.”¹⁰ Implicit in autopositioning as a continuous condition is the present ability to combine emplaced position with the infinity of all that could ever come to it. That combining requires an assumption of self-immanence by the deific substitute. It requires the absorption into its existent emplacement of illimitable being. This ‘historical,’ this mythic, surpassing by the deific substitute sustains its taking on the characters of the monotheistic god. To borrow Dante’s synopsis, such a god is “all-circumscribing and uncircumscribed,”¹¹ capable of encompassing all in a perfect determinacy yet being itself ever beyond any delimitation. To bring in law, only indicatively at this stage, the deific substitute becomes the impelling source of law, much like the monotheistic god’s being the ultimate originator of law, the law of the law.

⁹ *Ibid.*, 22.

¹⁰ For the use of the term here see Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford: Stanford University Press, 2005), 142.

¹¹ Dante (*Inferno?*).

In stark contrast to this grandest of grand narratives, the history of the present resorted to here would seek to put the present in question, to reveal a dissonance in it and thence to account for that dissonance in affines of the religious, most pointedly law. That accounting cannot be a resolved completion within a present that is always irresolvable. Rather, what it reveals, or attempts to reveal, is a persistent incompleteness in and as the present. Such revelation involves, in turn, a bringing forth of what had to be forgotten so as to affirm the putative completion that is, for example, the triumph of a modernist secularism. This is a forgetting that, in Nietzsche's terms now, is an "active forgetfulness": "Forgetfulness is no mere *vis inertiae* [force of inertia] as the superficial believe; it is rather an active – in the strictest sense, positive – inhibiting capacity... ." ¹² This forgetting is continuous with and constituent of what is remembered.

What is forgotten so that the present can be what it 'is' takes us to the second part of my guiding theme, moving now from what has been mainly a concern with things supposedly different being the same to things that are the same being yet different. The deific substitute and the monotheistic god differ in the substitute's finding itself within the world and in its

¹² Friedrich Nietzsche, *On the Genealogy of Morals*, trans. Douglas Smith (Oxford: Oxford University Press, 1996), 39 (Second Essay, section 1). Nietzsche is writing here of individual psychology but he proceeds to merge this dynamic into what could be called social or historical memory, fusing that into an anthropology of law that we will come to later. For Freud in a like vein, complete with an apt reference to Nietzsche, see Sigmund Freud, *The Psychopathology of Everyday Life*, trans. Anthea Bell (London: Penguin Books, 2002), 140, 152 n.5. For forgetfulness in the constitution of law see Joan Dayan, "Held In the Body of the State: Prisons and the Law," in eds Austin Sarat and Thomas R. Kearns, *History, Memory, and the Law* (Ann Arbor: The University of Michigan Press, 1999), 183. And for "collective" memory as "selected" see Maurice Halbwachs, *On Collective Memory*, trans. Lewis A. Coser (Chicago: The University of Chicago Press, 1992).

self-affirming denial of transcendent reference. What is forgotten in all this is that such a position, such an aut positioning, became possible through brining the characters of the monotheistic god within the world, and through making these immanent to the deific substitute. And, as Deleuze and Guattari would counsel, “whenever immanence is interpreted as immanent *to* Something, we can be sure this Something reintroduces the transcendent.”¹³ So we come to our culminating enigma: the deific substitute must assume a definitive existence in the world yet somehow take on transcendent being. The resolution of that enigma becomes modern law. And my endeavour now will be to trace how that resolution as law came to be.

Imperium

My first ethos-bearing author is Francisco de Vitoria whose teachings provide an occidental template accommodating both modern imperialism and modern political formation, and whilst this template is a religious one, it is one that Vitoria renders capable of taking effect, and of taking on affect, in the world. He does this, aptly enough, as an apologist for Spain’s imperial expansion into the Americas. With this expansion, Spain provided the enduring model of modern imperialism and, in conjunction with Portugal, generated the putative ability to conceive of the world entire. Borrowing the spirit of this from Rousseau’s libretto for one of his operas, Columbus had set out to “give laws to the Universe” and to

¹³ Gilles Deleuze and Félix Guattari, *What is Philosophy?* trans. Graham Birchell and Hugh Tomlinson (London: Verso, 1994), 45.

make “the new world...bear our chains.”¹⁴ Vitoria’s contribution to the process was set against the more resolutely genocidal of the Spanish colonists (and against papal directives) and in his *De Indis* he drew on the natural law of Aquinas and the *ius gentium* to find, broadly, that the Indians, so-called, were human and possessed of reason, and hence entitled to an equivalent regard. This did not prevent Vitoria’s providing a refined justification for their colonial subordination, however – a justification itself derived from natural law and the *ius gentium*. Before embarking upon the engagement with Vitoria, there will at this point be a reversal of the natural order with a reference from a footnote, the next one, to the text and this is done to explain the bracketed numbers that will appear in the text and notes from now on as references to works of Vitoria.¹⁵

Vitoria projects that resolution onto a wider world in which the tractable *ius gentium*, whilst extending to all people, is yet realised or fully realised only by some, by a marginally

¹⁴ Jean-Jacques Rousseau, “The Discovery of the New World,” trans. Christopher Kelly, in Jean-Jacques Rousseau, *Letter to D’Alembert and Writings for the Theater: The Collected Writings of Rousseau, Vol.10* (Hanover: Dartmouth College Press, 2004), 26 – which provides an intriguing echo of the more famed “Man was born free, and he is everywhere in chains. Those who think themselves the masters of others are indeed greater slaves than they:” Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (London: Penguin Books, 1968), 49 (Book I, chapter 1).

¹⁵ There is now a superb and readily available collection and translation of the works of Vitoria of particular relevance here, or of key extracts from them, edited by Anthony Pagden and Jeremy Lawrance: Francisco de Vitoria, *Political Writings*, trans. Jeremy Lawrance (Cambridge: Cambridge University Press 1991). To avoid a huge number of footnotes, references to the works of Vitoria will be to the apt pages of this collection, and those page numbers will be bracketed in the text and notes. This often has the added advantage of enabling a reference more precise than citation of the frequently lengthy numbered sections in which the renditions of Vitoria’s lectures or writings are divided. The works of Vitoria in the collection which are drawn on in this paper are “On Civil Power” (1-44), “On Law” (153-204), “On the American Indians” (231-92), and “On the Law of War” (293-327). There is a further work that will have a telling significance for this present essay which is not included in the collection, “On Homicide” – see note 19 *infra*.

flexible range of Christian and civilized nations. Here Vitoria adroitly adapted two types of *ius gentium* in Roman law. One was the law common to or shared by all civilized peoples. The other was the *ius inter gentes*, the law governing relations between peoples and latterly international law. Vitoria even provided an apt accompanying intimation of nation, the “perfect community” that is “complete in itself” (301). More on that shortly.

Before coming to the constitution of that community there has to be a putting in place of an epochal shift marked by Vitoria, a shift that provides the divine source of this constitution – provides what could be called the hidden constitution: “[t]he real constitution,” pronounced Heraclitus, “is accustomed to hide itself.”¹⁶ The bestowing god here was, in Vitoria’s Thomistic terms, a god who was the source of law, of natural law or the law of nature: “the rules of law are in God *as in a thing which is to rule*” (163 – his emphasis). That natural law has to be understood in a way infinitely more extensive than the constrained meaning that ‘law’ often came to take on later. Borrowing from Pagden and Lawrance: “For Vitoria, as for Aquinas, the law of nature was the efficient cause which underpinned man’s relationship with the world about him and governed every practice within human society.”¹⁷ It was then possible from the perspective of ‘man’ to know the rules of law that are in God as the thing which is to rule. This was a god amenable to Vitoria’s scholasticism, the god of

¹⁶ G. S. Kirk, J. E. Raven, and M. Schofield, *The Presocratic Philosophers: A Critical History with a Selection of Texts*, 2nd Edition (Cambridge: Cambridge University Press, 1957), 192..

¹⁷ Anthony Pagden and Jeremy Lawrance, “Introduction” to Vitoria, *Political Writings*, xv.

perfect order, of constancy, caught by ‘his’ own laws, by ‘nature’, much like the god later forbidden by Malebranche to “disturb the simplicity of his ways.”¹⁸

It has of course been an enduring issue with monotheism as to just how this bound god, this god caught by ‘his’ own creation, could endure integrally with the perfectly unbound god of revelation, the god of miracle and nature confounded, the god quite beyond us. For Vitoria, as with Thomist scholasticism, earthly natural law was derived from divine law. And whilst divine law remained of the godhead and ever beyond any comprehension or even manifestation, God’s law for us had to be made “externally manifest”(155). Thomist doctrine ascribed a causal force to divine law in its effecting natural law: “God cannot destroy the effect of the formal cause as long as the latter exists.”¹⁹ One could then project the effect that is natural law back on to divine law and thence to God and, as it were, bind both divine law and the deity to that effect, to natural law. And so Vitoria would “think that God could not have made the fire, which is hot by nature, cold, or that it were not warm by nature; nor the snow black; the soil, light; nor could God destroy or change in general the natural propensities of things”.²⁰ So, even if all this still left earthly natural law derivative of a transcendent divine law, access or attachment to that divine law was not necessary for either the integrity or the efficacy of natural law, or indeed for the ability to know it (164). It can be

¹⁸ See Patrick Riley, *The General Will Before Rousseau, The Transformation of the Divine into the Civil* (Princeton: Princeton University Press, 1986) , 40.

¹⁹ Francisco de Vitoria, “On Homicide,” in *Obras de Francisco de Vitoria: Relecciones teológicas*, trans. Teófilo Urdánoz (Madrid: Editorial Católica, Biblioteca de Autores Cristianos 198, 1960), 1100.

²⁰ *Ibid.*, 1099.

known comprehensively by human reason being brought to bear on nature (155, 164).

Bluntly, a determinable natural law can exist without divine revelation, and it can exist even if the godhead did not.²¹ And that natural law could be rendered as an earthly *ius gentium*.

This profanation accompanied and enabled the subjection of religious power to the political, and this was a political increasingly concentrated in the diversity of kingdoms and principalities, the catholic and universal cohesion of religious and political power, to the extent that it ever existed, becoming increasingly attenuated. Hence we have the adventitious association of Vitoria with the Reformation. The erstwhile tying of kingdoms and principalities, these proto-nations, to the universal *ius gentium* is broken and Grotius is taken as providing now the ‘true’ source of the *ius gentium*, the surpassing and singular nation. Such a nation can effect the impossibility of a complete, quasi-imperial control of the domain of its relation to others, including other nations, the domain of the international and of international law. This meant, in Vattel’s stark formulation from the eighteenth century, that the society of nations was to have no overarching commonalty, and this to such a complete

²¹ The constant effort in histories of international law to deny the originality of Vitoria in favour of Grotius extends to the latter’s *succès de scandale* when proclaiming that the discovering of natural law “would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God...” Hugo Grotius, *The Rights of War and Peace Book I* (Indianapolis: Liberty Fund, 2005), 89 (“The Preliminary Discourse,” XI). This is only the most notorious of numerous broadly similar assertions: see especially Hugo Grotius, *De Iure Praedae Commentarius*, trans. Gwladys L. Williams and Walter H. Zeydel (Carnegie Endowment for International Peace, Oxford University Press, 1950) [Yet to be checked].

extent that none of its members “yield...rights to the general body,” each sovereign state being “independent of all the others.”²²

Such an entity had already been envisaged by Vitoria as a “self-sufficient,” “a perfect community:”

What is a ‘perfect’ community? Let us begin by noting that a ‘perfect’ thing is one in which nothing is lacking, just as an ‘imperfect’ thing is one in which something is lacking: ‘perfect’ means, then, ‘complete in itself’ (*quod totum est, perfectum quid*). A perfect community or commonwealth is therefore one which is complete in itself; that is, one which is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrates. (301)

In this way Vitoria aptly and pointedly accommodated the already formed or forming ‘sovereign’ states of Europe that were, in varying ways, subordinating the so-called spiritual power of the papacy and the Holy Roman Empire to their own ‘temporal’ claims on power and authority.

The template which Vitoria provided for the unified dimensions of the transcendent deity to become effective within the world was that of imperialism. The carrier of this

²² Emer de Vattel, *The Law of Nations or the Principles of National Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, Vol. 3, trans. C.G. Fenwick (Washington: Carnegie Institute 1916/1758), 9. That standard perception of Vattel should be qualified by the refined engagement in Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice Since Vitoria* (Aldershot: Ashgate Publishing 2002), 306-17. The broad lines of that qualification would have Vattel according substance to the international.

immanence, the proto-nation, could not accommodate the dimensions of the deity within a positive constitution since, to use the language of a later time, the imperialism of its universal range could not be contained in its determinate particularity. The ‘solution’ came by way of a negative formation. In this scheme, identity could be found negatively by adopting the savage, or Vitoria’s *barbari*, as its constituting antithesis. But there can be no antithesis to the all-encompassing universal. The antithesis of the universal can only be utterly antithetical. It has to be totally different, totally excluding and apart. Still, the universal *has* to be all-inclusive. The negative constitution has somehow to include the antithesis within itself. So, the universalized constitution in its determinate essence assumes an exemplary status to which the excluded could or would come, even if this would take a conveniently long time.

This magnanimous diapason has taken several programmatic forms, social evolution for example, but for this present setting we could instance the remnant role of religion as perfected by Vitoria.²³ Repeating somewhat, Vitoria found that the ‘Indians’ were humans and as such were included within a divine dispensation manifested in natural law. Yet they also were quite excluded from this dispensation because of various deviations from a European norm, also construed in terms of natural law but now as transgressing it. There were, then, surpassing ‘rights’ in natural law such as the rights of all people, including the Spanish, to travel, trade, ‘sojourn’ and, in the cause of Christianity, to proselytize; and if the

²³ Something engaged with more extensively in Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), 152-6.

assertion of such expansive rights were resisted by the Indians then these rights could be, and were, asserted to the full extent of conquest and dispossession (251-3, 278-85).

All of which leads to the crux of this paper. What had to be forgotten of Vitoria was not only the theological origin of modern, and ‘secular,’ political formation in the Occident but also its origin as imperial. The constituent dimensions of imperialism match those of the deity brought into the world. In one way, as we saw, this was a captive deity, a deity caught within its enduring determinacy. Yet for Vitoria political and imperial domination in terms of the religious still subsists in a reference to a divine source of authority, a source on which the political and the imperial depend so as to combine, like the god of monotheism, their determinate existence with an illimitable, an unconstrained efficacy. In combining these seemingly contrary imperatives, modern imperialism endows its determinacy with a surpassing ability to extend itself appropriatively within a dimension similar to the deity’s illimitable and unconstrained efficacy. Such a ‘sovereign’ combining of dimensions comes to characterize the deific substitute in general, including the nation-state.²⁴

²⁴ For this historical orientation see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005). By way of supporting this culmination of the story so far, Schmitt in *Der Nomos* moves beyond Vitoria as the expressive apotheosis of the law of the *Repubblica Christiana* by noting its supersession in the *ius publicum Europaeum*, a law based solely on secularizing European states. Theologians are thence told to depart the scene. As Schmitt sees the resulting situation, the acolytes of the new order offer no cohering basis for it, and he would make good this deficiency by showing how that order subsists on what can only be a sacral ground, somewhat literally: a *nomos* of the earth. This *nomos* entails two marvellous consequences. One is the combining of “concrete order” with “orientations” beyond any given or contained order. The other marvellous consequence is the ability of this *nomos* to provide a singular ground, a world-ground, generated in the imperial “land-appropriation of a new world” of the Americas, a ground for a “European international law” made up of state entities that are completely distinct yet related to each other in somehow sustaining this ground of their being with each other: see Carl Schmitt, *The*

There is a final combining which the godhead has to effect for Vitoria, one that will also prove central to my argument, and radically qualify the story so far. We can come to it by way of Ullmann's observation of the "stark contrast" in the Middle Ages and then beyond of "two contrasting themes which portray the creation of law:" with "the one called the ascending theme of government and law,...[i]ts main point is that law-creative power is located in the people itself... . Opposed to this ascending theme is the descending one according to which original power is located not in the broad base of the people but in an otherworldly being, in divinity itself...;" here "the office holders are not representatives: they are only delegates of the supreme Ruler."²⁵ In "On Civil Power" Vitoria incorporates both of these "themes" through the mediation of God (12, 14). The "commonwealth" formed from "the multitude," or the people, "has power by divine law," together with representatives "who take on themselves the responsibilities of the commonwealth..." (14). The monarch acts thus for the commonwealth since "[t]he commonwealth as such cannot frame laws, propose policies, judge disputes, punish transgressors, or generally impose its laws on the individual..." (14). Yet the monarchs also "*have their power by natural and divine law, not*

Nomos of the Earth in the International Law of the Jus Publicum Europaeum, trans. G. L. Ulmen (New York: Telos Press, 2003), 16, 69, 70, 82-3, 121, 127, 135.

²⁵ Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (Ithaca: Cornell University Press, 1975), 30-1, 63.

from the commonwealth or from men” (14 – his emphasis).²⁶ This lineament of political formation will now take on expansive significance in the account of revolution.

Revolution

The revolution impelling my next slice of historicity is the English revolution of the seventeenth century. It destroys the connection between monarch and the divine, but does so by way of destroying the monarch rather than the connection explicitly. Despite the gradualist gloss given to it in most historical accounts, this was a revolutionary rupture that soon saw the end of monarchical rule. The incipiently modernist apostle of that revolution, and my next epochal thinker, is Thomas Hobbes.

To many these could be puzzling accolades. Hobbes after all was concerned to affirm effective order and stable authority after one of the most uncivil of civil wars. Thence, and going for now with the grain of conventional scholarship, Hobbes takes us to a state of nature demonstratively posited in which the “life of man” is “solitary, poor, nasty, brutish and short,” a state in which “our natural passions” put us in opposition to each other in “a war as is of every man against every man.”²⁷ In this way Hobbes implants the savage within “man,” a location where it has attributively endured. Negative constitution of an ‘external’ kind also

²⁶ This entails something of a division of powers and functions between these sources: see the, as ever, nuanced account in Pagden and Lawrance, “Introduction,” xvii-xx.

²⁷ Thomas Hobbes, *Leviathan* (Chicago: Encyclopedia Britannica, 1952), 85, 87 (chapters 13 and 14). Even if one accepts Macpherson’s designating the state of nature as “hypothetical” (which my reading of Hobbes does not), that would not be incompatible with the ‘scientific’ quality of its observation: C. B. Macpherson, “Introduction,” to Thomas Hobbes, *Leviathan* (London: Penguin Books, 1985), 40.

endures, however, for Hobbes locates the savage state as well in “many places of America” which “live at this day in that brutish manner.”²⁸

So wholly are we pervaded by our bellicose passions that we must perforce transfer “all power and strength” to a sovereign Leviathan to whom I “give up my right of governing myself,” and to whom the subject is committed in all actions of Leviathan “as if they were his own;” subjects are thus inextricably bound to Leviathan, a sovereign “that beareth their person” – “none of his subjects...can be freed from his subjection.”²⁹ Anything less than this total commitment to Leviathan leaves scope for our recusant natural passions and for a reversion to the lawlessness of the savage state, “to the confusion of a disunited multitude.”³⁰ Thence it must be that “when the people claimeth anything otherwise than by the voice of the sovereign power, it is not the claim of the people” but, rather, only the claim of “those particular men” making it.³¹

Understandably enough, to have such a complete and continuing sway, this “great Leviathan” would have to be conceived of as a “mortal god.”³² Like any competent

²⁸ Hobbes, *Leviathan*, 86 (chapter 13). To leave matters at that subscribes to Hobbes as a mythic source – something I will touch on shortly. Hobbes himself was more intriguingly nuanced in writing of the savage state that “I believe it was never generally so, over all the world:” *ibid.*.

²⁹ *Ibid.*, 100-1 (chapters 17 and 18).

³⁰ *Ibid.*, 101 (chapter 18).

³¹ Thomas Hobbes, *The Elements Of Law Natural And Politic* (Whitefish: Kessinger Publishing, nd), 119 (chapter 27, para. 9).

³² Hobbes, *Leviathan*, 100 (chapter 17).

monotheistic deity, this god would have marvellously to combine being determinate with an illimitable efficacy. Unlike the “immortal God,” however, the sovereign Leviathan has to do this without recourse to a transcendental reference fusing these contrary dimensions of its being. Hobbes offers no resolved way in which the being-in-the world of this mortal god could be positively comprehended. He does offer a seeming alternative in that, cling as we must to this mortal god, we remain “under the immortal God.”³³ This subjection, however, hardly challenges the pervasive hold, and the surpassing determinacy of the mortal god. Being under the sway of the immortal God would only enable the subject to disobey a sovereign denial of the Christian faith or of the lordship of Christ; otherwise and unreservedly God “speaketh by his vice-gods or lieutenants here on earth,” by those who have sovereign power.³⁴

“Law” in this setting is constitutently contained as the “command” of the sovereign Leviathan “addressed to one...obliged to obey him,” the sovereign being “the sole legislator,” the “common power” necessary for there to be law.³⁵ Yet the authority which Vitoria’s sovereign derives from God is now enwrapped within the mortal god of Leviathan. Still, more resonant with Vitoria, Hobbes decrees that “none can make laws but the Commonwealth, because our subjection is to the Commonwealth only,” and since the

³³ *Ibid.*

³⁴ Hobbes, *Elements*, 101, 114-15 (chapter 25 para. 5, chapter 26 paras 10-11). The ‘ascending’ thrust of this is qualified later.

³⁵ Hobbes, *Leviathan*, 88 and 130 (chapters 15 and 26).

sovereign is the representative of the Commonwealth “the sovereign is the sole legislator.”³⁶ It is the “authority of the legislator” which gives to laws a persistence, which enables them to “continue to be laws.”³⁷

There is, however, a comparatively unremarked and contrary God and law integral to Leviathan. In a work that will, or should, transform the study of Hobbes, James Martel has revealed a very different Leviathan, one in which a people can be-together and generate authority in “horizontal” relations as opposed to the vertical or descending subjugation to Leviathan.³⁸ This comes about in two linked ways. With one, it is in our creative ability of reading that Hobbes finds a generative capacity transposed to political formation.³⁹ With the other, Martel ‘takes seriously’ Hobbes’s engagement with religion and scriptural interpretation and in so doing he finds that for the Hobbes of *Leviathan* we exist in an “in-between time”, a time between what was once and will again be rule by God, but a time in which for now we as a people are left to our own devices even as we are impelled in the realization of our being-together by the “pure and empty hypostatization” that is the Holy Spirit.⁴⁰

³⁶ *Ibid.*, 130 – his emphasis (chapter 26).

³⁷ *Ibid.*, 131 (chapter 26).

³⁸ James R. Martel, *Subverting the Leviathan: Reading Thomas Hobbes as a Radical Democrat* (New York: Columbia University Press, 2007), 135.

³⁹ *Ibid.*, chapter 2.

⁴⁰ *Ibid.*, 102, 184. All of which does infinitely less than justice to the nuance of Martel’s “reading.”

As well as this sacral infusion, and empathetic with creative reading, there are other forces formative of a people, and these often connect generatively to, and qualify, the power of the sovereign Leviathan. For a start, in a certain literal sense, the sovereign is the creation of people covenanting with each other. That entails something of a threshold, and classic, problem in that for Hobbes “when there is no civil power erected over the parties promising...such promises are no covenants:” “the validity of covenants begins...with the constitution of a civil power sufficient to compel men to keep them.”⁴¹ Clearly an exception has to be found and Hobbes also affirms that “covenant[s] entered into by fear, in the condition of mere nature are obligatory,”⁴² even if they otherwise would not be. Despite this compelling element and the dismal condition of the state of nature, Hobbes does recognise that some restraints, some sociability and normative cohesion do exist in the state of nature.⁴³ Then nature also comes with an abundance of “natural laws,” “the first and fundamental of which is: *to seek peace and follow it.*”⁴⁴ Hobbes’s fifth natural law would impel “*every man [to] strive to accommodate himself to the rest,*” an imperative founded “in man’s aptness to

⁴¹ Hobbes, *Leviathan*, 91 (chapter 15).

⁴² *Ibid.*, 89 (chapter 14). Hobbes was often to counter, for the state of nature, the argument that a covenant entered into out of fear was not valid: “for then it would follow that those promises which reduc’d men to civill life, and by which Lawes were made, might likewise be of none effect.” Thomas Hobbes, *De Cive* (Whitefish: Kessinger Publishing, nd), 25 (chapter 2, para. XVI).

⁴³ Hobbes, *Leviathan*, 90, 99 (chapters 14 and 17).

⁴⁴ *Ibid.*, 86 – his emphasis (chapter 14). And for the abundance see *ibid.*, chapters 14 and 15 generally. Here there is now the indispensable Samantha Frost, *Lessons from a Materialist Thinker: Hobbesian Reflections on Ethics and Politics* (Stanford: Stanford University Press, 2008), e.g. 116-25.

society.”⁴⁵ In the same vein, and even more pointedly, “reason suggesteth convenient articles of peace upon which men may be drawn to agreement. These articles are they which otherwise are called the *laws of nature*.”⁴⁶ Furthermore we find that justice itself is an “inclination of nature.”⁴⁷ Above all, in another resort to literal sense, the natural law “is also wont to be called Divine,” a law “given by God to every man for the rule of his actions,”⁴⁸ but, much as with Vitoria, such law is discernible by human reason.

As one would expect from such a substantial people and “man,” they are not simply supine before an all-demanding Leviathan. The same law of nature impelling men to enter into the primal covenant by which they created Leviathan does not “command any divesting of other rights, than those only which cannot be retained without the loss of peace,” and indeed “many rights are retained, when we enter into peace one with another... .”⁴⁹ Hobbes also propounds an extensive list of “liberties” secured to the subject of Leviathan.⁵⁰ What is more, Leviathan remains bound by the primal terms of the covenant and thence cannot act in a way contrary to the preservation and protection of the life of its subjects.⁵¹ More

⁴⁵ Hobbes, *Leviathan*, 93 – his emphasis (chapter 15).

⁴⁶ *Ibid.*, 86 – his emphasis (chapter 13).

⁴⁷ Hobbes, *Elements*, 58 (chapter 16, para. 4).

⁴⁸ Hobbes, *De Cive*, 41 (chapter 4 Part I); see also Hobbes, *Elements*, chapter 18.

⁴⁹ Hobbes, *Elements*, 61 (chapter 17, para. 2).

⁵⁰ Hobbes, *Leviathan*, chapter 20.

⁵¹ *Ibid.*, 115 (chapter 21).

expansively, Hobbes finds that “the duty of the sovereign consisteth in the good government of the people,” something which involves securing “the safety of the people,” and “by *safety* here is not meant a bare preservation, but also all the contentments of life which every man by lawful industry, without danger or hurt to the commonwealth, shall acquire to himself.”⁵² Leviathan is thence set about by the most extensive “duties,” as well as practical dictates of rule and pedagogic responsibilities, all for ensuring the well-being and improvement of the people.⁵³

And so also with law, one finds the like restraints and constituent impact on the sovereign. Although, as we saw, law is the command of the sovereign, not only are there intrinsic qualities of law which the sovereign must conform to but laws also depend on their reception by his subjects, depend on their knowing the law and on their interpretation of it.⁵⁴ And in the *Dialogue* between the lawyer and the philosopher, the philosopher, who is of course always right, proffers the hard-headed view that it is “in their own interest” for Kings “to make Laws as the people can endure, and may keep them without impatience, and live in strength and courage to defend their King and Countrey... .”⁵⁵ Most remarkably, perhaps, the very laws made by Leviathan, the civil laws, are found in a sense to bind Leviathan for, just

⁵² Hobbes, *Elements*, 122 (chapter 28, para. 1); Hobbes, *Leviathan*, 153 – his emphasis (chapter 30).

⁵³ Hobbes, *Leviathan*, chapter 30.

⁵⁴ *Ibid.*, 134, 139, 156-7 (chapters 26, 27, and 30).

⁵⁵ Thomas Hobbes, *A Dialogue Between a Philosopher And a Student of the Common Laws of England* (Chicago: The University of Chicago Press, 1971), 166 [204].

as men have been able to create a sovereign Leviathan, “so also have they made artificial chains, called *civil laws*, which they themselves, by mutual covenants, have fastened at one end to the lips of that man, or assembly, to whom they have given the sovereign power, and at the other end to their own ears.”⁵⁶

In all, whilst Hobbes’s scheme reflects the Vitorian template remarkably, and especially so given Hobbes’s opposition to scholasticism, it also departs from that template in its proto-modernity. Hobbes is not infrequently seen as providing an origin myth of modern political and legal formation.⁵⁷ Like all good myths of origin, Hobbes’s speaks not just to what we were but to what we are now. And like all good myths of origin, the one Hobbes gives us embeds the insuperable yet constituent contradictions of our being-together. Generically, the myth will usually ‘resolve’ the contradiction by some reference to or intervention from beyond, a reference or intervention that combines a sacred and enacting transcendent with a profane actuality. More pointedly, the question of the origin figures the condition of our being-together, a condition that must combine the infinite possibility of being (what is before the origin) with its existent determinacy (what is originated). One combining was instanced by Vitoria in the reference to a monotheistic deity fusing these dimensions of being in and as itself. Hobbes, Hobbes the modernist, eschews that resort and

⁵⁶ Hobbes, *Leviathan*, 113 – his emphasis (chapter 21). The binding of Leviathan here is reinforced in the obvious reference to and contrast with *Job* 41:1, 3, 5. And see Hobbes, *Leviathan*, 148 (chapter 28) and chapters 29-31.

⁵⁷ For a recent instance see J. M. Coetzee, *Diary of a Bad Year* (London: Harvill Secker, 2007), 3-4.

resituates the deity by way of advancing two other combinatory forces also found in the Vitorian template – law and the people.

Somewhat like Vitoria, the worlded deity of Hobbes endows a people by way of natural law and the Holy Spirit. This process intermingles with the force of a “nature” demonstratively asserted. Natural propensities are formative also of Leviathan, but here the worlding of the deity proceeds to the point of near-effective rupture with the transcendent. Leviathan is a “mortal god” whose subordination “under the immortal God” is reduced to near-insignificance.⁵⁸ In the very comparison of the human creation of Leviathan with “that *fiat*, or the *Let us make man*, pronounced by God in the Creation,” Leviathan is confirmed as being of the world, “that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin CIVITAS), which is but an artificial man, though of greater stature and strength than the natural... .”⁵⁹

So, going back to the beginning of our conversation with Hobbes, whilst in *Leviathan* he was concerned with the affirmation of stable rule and persistent order, it was not the old rule or the old order. As his contemporaries appreciated, Hobbes was putting in place a new foundation for order, one in which the monarch played no necessary part and one in which a transcendent reference by way of “divine right” had no place, “[f]or God made Kings for the

⁵⁸ Hobbes, *Leviathan*, 100 (chapter 17).

⁵⁹ *Ibid.*, 47—his emphasis (Introduction).

People, and not People for the Kings.”⁶⁰ True, the neo-imperial dimensions of the deific are reproduced in the “mortal god” that is Leviathan. And whilst that left only an extremely marginal role for the immortal God in this sovereign sphere, yet this God played a more significant role in the political formation of a people and as a source of their natural laws of sociality. Yet these roles are not comprehensively determining. As well, the deity of this dispensation is different to the mortal god that is the sovereign Leviathan. In all, the now divided deities cede the cohering place of the erstwhile monotheistic god to an imbrication of law and the people. Each of these takes on the dimensions of the superseded deity. The people determinately bound to Leviathan are also the people of illimitable formative ability. The law determinately conditioned by the sovereign Leviathan is also the law of the unconditional creativity of the people.

Cavalier as it may seem, I will for now leave as footnotes to Hobbes the further refinements in the eighteenth and early nineteenth centuries of these generative affinities between the deific, the sovereign, the law and the people. Although such refinements at times would reinstate a comprehensive deity, that deity remains a bound god, one subsisting “within the limits of reason alone,” or within some other ethos of the human; or within varieties of deism or of civil religion; or simply within a state of supposition – we have to act for example, or not act, “as if” the law came from some highest, “flawless lawgiver” that is as

⁶⁰ Hobbes, *Dialogue*, 61 [15]. And for the general point see Jeffrey R. Collins, *The Allegiance of Thomas Hobbes* (Oxford: Oxford University Press, 2005).

if it came “from God.”⁶¹ Racing on now to my third and final historical tranche, we come to a self-elevated occidental modernism.

Modernism

The broadcast to an uncomprehending audience of God’s death by one of Nietzsche’s seers, “the madman” of *The Gay Science*, was soon followed by this pronouncement by another, Zarathustra: “[d]ead are all the gods.”⁶² For the sake of completeness, Blanchot would confirm that “God means God, but also everything that in rapid succession, has sought to take his place.”⁶³ In that most religious of irreligious tracts, *Thus Spoke Zarathustra*, we find a significant successor, the “new idol” that is the state, the state arrogating “the ordaining finger of God,” the clear reference being to Moses bringing down to the world the tablets “written with the finger of God.”⁶⁴ For this equivalent of Hobbes’s mortal god, and for its

⁶¹ The “as if” quotations come from Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 95 (6:319). The other reference to Kant is manifestly and generally to Immanuel Kant, *Religion Within the Limits of Reason Alone*, trans. Theodore M. Greene and Hoyt H. Hudson (New York: Harper & Row, 1960). Rousseau offers seminal accounts of incorporating God within and through sentiment as well as of civil religion: Jean-Jacques Rousseau, *Émile*, trans. Barbara Foxley (London: J. M. Dent, 1993), 274-332; and Rousseau, *Social Contract*, 186-7 (Book IV, chapter 8).

⁶² Friedrich Nietzsche, *The Gay Science*, trans. Josefine Nauckhoff (Cambridge: Cambridge University Press, 2001), 119-20 (para. 125); Friedrich Nietzsche, *Thus Spoke Zarathustra*, trans. Adrian del Caro (Cambridge: Cambridge University Press, 2006), 59 – his emphasis (“On the Bestowing Virtue,” section 3).

⁶³ Maurice Blanchot, *The Infinite Conversation*, trans. Susan Hanson (Minneapolis: University of Minnesota Press, 1993), 144.

⁶⁴ *Exodus* 31:18 and *Deuteronomy* 9:10.

surpassing determinacy, the ever-immediate problem is that it also is of the world. Whilst the state's incipient arrogation of all that could be ramps this deific substitute up to a transcendent status, there is no transcendence for it to occupy, as it were. Its inescapable determinacy renders it a terminal entity. So, for Zarathustra, "the sign of the state...signifies the will to death."⁶⁵ There is more in that vein, but one poignant rendition will suffice here, the one in which the state is described as "a death-horse clattering in the regalia of divine honors."⁶⁶ The other marked character of this state is that "[e]verything about it is false, ...and whatever it may tell you, it lies."⁶⁷ A determinacy constituted or 'telling' in terms of an illimitable efficacy cannot help but be false.

Returning to the hardly less heady reaches of *The Gay Science*, Nietzsche unleashes two visions consequent on the death of God – consequent on the denial of a transcendent determinacy. The first vision comes with the "collapse" that ensues from the loss of "this faith,...the belief in the Christian God," and it forebodes for "the next century" a "deep darkness," – "the shadows that soon must envelop Europe."⁶⁸ This could be read as one of several instances of Nietzsche's percipience of disasters to come, including totalitarian comprehensions.⁶⁹ Whilst the totalitarian state has as its truth "the truth of death" and thence

⁶⁵ Nietzsche, *Zarathustra*, 35 ("On the New Idol").

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, 34-5 ("On the New Idol").

⁶⁸ Nietzsche, *Gay Science*, 199 (para. 343).

⁶⁹ See also and e.g. Friedrich Nietzsche, *Genealogy of Morals*, 134-5 (Third Essay section 27).

cannot endure in its appropriation of “life” within an enduring determinacy,⁷⁰ even with the state’s claiming ‘at any one time’ to hold “life” in part, in enduringly determinate part, there is still an impossibly total comprehending entailed in securing the part both in itself and in relation to everything that would ever come to it.⁷¹

From this first dark vision Nietzsche proceeds seamlessly to the exaltation of a second vision, a vision of light, a vision of “a new dawn” in which “our heart overflows with gratitude, amazement, forebodings, expectation... .”⁷² This is a vision rendered in imagery that had already radiated throughout *Zarathustra*,⁷³ images such as the “clear...horizon,” the “open sea.”⁷⁴ These, in terms of *Zarathustra*, are images of “overcoming” the oppressively existent – an overcoming not in terms of a messianism disconnected from the existent but one which is “bridged” from the present condition, a condition inclusive of and going beyond the “new idol” of the state, and an overcoming that is the outcome of a long development.⁷⁵ Put in the context of these two contrary visions, what all this amounts to is a connection between

⁷⁰ See Jean-Luc Nancy, *The Inoperative Community*, trans. Peter Connor (Minneapolis: University of Minnesota Press, 1991), 12; and Nietzsche, *Zarathustra*, 35 (“On the New Idol”).

⁷¹ Cf. Jacques Derrida, *Spurs: Nietzsche’s Styles*, trans. Barbara Harlow (Chicago: University of Chicago Press, 1979), 125. Also Philippe Lacoue-Labarthe and Jean-Luc Nancy, “The Nazi Myth,” trans. Brian Holmes, *Critical Inquiry* 16 (1990): 291, 312.

⁷²Nietzsche, *Gay Science*, 199 (para. 343).

⁷³The relevant part of *The Gay Science*, Book Five, was added after the publication of *Thus Spoke Zarathustra*.

⁷⁴ Nietzsche, *Gay Science*, 199 (para. 343).

⁷⁵ See Generally, Nietzsche, *Zarathustra*, 56 and 58 (“On the Bestowing Virtue”), 65 (“On the Blessed Isles”), and 110 (“On Redemption”); and on the bridge from the state, 36 (“On the New Idol”). And as for development specifically see e.g. Nietzsche, *Genealogy of Morals*, 134-5 (Third Essay, section 27).

them in which the time of the first is overcome in the world. Transposed to the now-defunct deity, the two visions can be seen as corresponding to the constituent dimensions of monotheism, the dimensions of perfect determinacy and of an ever-surpassing illimitability. With the transcendent capacity to combine these dimensions gone, they are, short of the overcoming, divided in the world and incapable of being rendered by any enduring combination of them. Such a combination would fall prey to that impossibility of holding life ‘in part’ touched on at the end of the previous paragraph.

If we are not to be consigned either to the terminal stasis of the first dimension of determinacy or to the infinite possibility of the second, there must be some way of bringing these dimensions together in the world. Nietzsche laid out a means that could do this, and that means was law. His conception of law is more usually associated with the first dimension, yet Nietzsche elevates creativity as a breaking of the “old tablets” of the law – the creator as “lawbreaker.”⁷⁶ A constant creativity requires as well the breaking of any “new tablet.”⁷⁷ And we find that there are various creative types of a rather assertive kind, philosophers whose “creating is a law-giving,” a legislating, and this would import not only that law was their instrument but also that it was integral to the creation itself.⁷⁸ Furthermore, Nietzsche writing

⁷⁶ Nietzsche, *Zarathustra*, 164, 171 (“On Old and New Tablets,” sections 15 and 26).

⁷⁷ *Ibid.*, 165 (“On Old and New Tablets,” section 16).

⁷⁸ Friedrich Nietzsche, *Beyond Good and Evil*, trans. Helen Zimmern (Mineola, NY: Dover Publications, 1997), 83, para. 211). Nietzsche’s anthropology of law in the Second Essay of Nietzsche, *Genealogy of Morals*, although concerned with the emergence of the calculable as and in law, is also a story of a creative going beyond difference stages of legal formation; see e.g. 55-7 (Second Essay, section 11).

on art would take the relation between creation and law more distinctly into the second dimension. To draw on Heidegger's admirably pointed rendition:

Art is not only subject to rules, must not only obey laws, but is in itself legislation. Only as legislation is it truly art. What is inexhaustible, what is to be created, is the law. Art that dissolves style in mere ebullition of feelings misses the mark, in that its discovery of law is essentially disturbed; such discovery can become actual in art only when the law drapes itself in freedom of form, in order in that way to come openly into play.⁷⁹

Whilst it is dangerous to say what Nietzsche did *not* do, it seems we should now resort to the tradition of Nietzsche, broadly conceived, to find a more resolute combining of the two dimensions in and as law.⁸⁰ This is a law, Blanchot tells us, that “affirms itself as law...without reference to anything higher: to it alone, pure transcendence.”⁸¹ Although it masquerades as mundane, it is law as the neo-sacral, an illimitable law that has always to come from beyond, self-separating from that beyond. That is a separation, Blanchot again, which “institutes it [law] as form, in the very movement by which it formulates this

⁷⁹ Martin Heidegger, *Nietzsche Volumes I and II: The Will to Power as Art and the Eternal Recurrence of the Same*, trans. David Farrell Krell, 130-1 (Volume I).

⁸⁰ Most notably perhaps in Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority’,” trans. Mary Quaintance, in Jacques Derrida, *Acts of Religion*, (New York: Routledge, 2002).

⁸¹ Maurice Blanchot, *The Step Not Beyond*, trans. Lycette Nelson (Albany: State University of New York Press, 1992), 25.

exteriority as law.”⁸² All of which seems counter to a modern law, a rule of law, as the guarantee of some determinate order. Yet for law to rule it must be of the beyond, capable of a complete responsiveness to alterity, otherwise it would cease to rule what is and will be an ever-changing world around it. In this ultimacy of responsive rule, and in a seeming paradox, law becomes a vacuity. Law must, says Derrida, “be without history, genesis, or any possible derivation.”⁸³

I will return to law shortly informed by another of our main players, the people – decidedly not one of Nietzsche’s favourite entities, but I will continue to draw summarily on what can be broadly seen as his tradition. From that tradition we can extract a primal fusion of the people and the law, at least the transcendent law, the illimitable law always coming from beyond. Derrida would equate this law with an “originary sociability:”

...we are caught up, one and another, in a sort of heteronomic and dissymmetrical curving of social space – more precisely, a curving of the relation to the other: prior to all organized *socius*, all *políteia*, all determined ‘government’, *before* all ‘law’. Prior to and before all law... .

⁸² Blanchot, *Infinite Conversation*, 434.

⁸³ Jacques Derrida, “Before the Law,” trans. Avital Ronell in Jacques Derrida, *Acts of Literature* (New York: Routledge, 1992), 191.

Let's get this right: prior to all *determined* law, *qua* natural law or positive law, but not prior to law *in general*. For the heteronomic and dissymmetrical curving of a law of originary sociability is also a law, perhaps the very essence of law.⁸⁴

This law is the generative source of laws; it is “the law of the law.”⁸⁵ In this mutual belonging between the law of the law and the social bond, the bond “cannot be made into a community,” into a determinate, conditioned people.⁸⁶ Such a bond and its commensurate people are essentially unresolved and, like its law, a continuously “performative” and Protean entity, one which Derrida would see, along with law, in “theological” or “religious” terms – but not in terms of *a* theology or *a* religion.⁸⁷

It is by way of returning now to the law, the law which we left with no enduring content of its own, that we come to the final member of the quartet of generative affinities, and having connected modernism to the deific, to law and to the people, there now remains the sovereign. In its vacuity, law always depends for its very content and for much of its force on some power apart from itself. “Law itself,” says Nancy, “does not have a form for what

⁸⁴ Jacques Derrida, *Politics of Friendship*, trans. George Collins (London: Verso, 1997), 231 – his emphasis.

⁸⁵ Derrida, “Force of Law”: The ‘Mystical Foundation of Authority’,” 233 and 257.

⁸⁶ Jacques Derrida, “Nietzsche and the Machine,” in Jacques Derrida, *Negotiations: Interventions and Interviews 1971-2001*, trans. Elizabeth Rottenberg (Stanford: Stanford University Press, 2002), 241.

⁸⁷ Derrida, “Force of Law,” 270; Jacques Derrida, “Faith and Knowledge: The Two Sources of ‘Religion’ at the Limits of Reason Alone,” trans. Samuel Weber, in Derrida *Acts of Religion*, 57, 80.

would need to be its own sovereignty.”⁸⁸ With occidental political formation, the paradigm of law is the law ‘of’ the ‘sovereign’ nation-state. Thence law is a dependent creation of this particular “new idol,” this “theological phantasm.”⁸⁹ Yet the opposite is also the case. The law is the vicarious carrier of the nation-state’s necessary receptivity to what could ever be. Should the enduringly determinate nation-state be so receptive in and as itself, it would deliquesce.

In that and in other external ways, then, law is endowed with determinate existence, an existence combined with its illimitable responsiveness. Each of these dimensions of law is necessary for the effectiveness of the other, yet neither can be resolved nor rendered in terms of the other.⁹⁰ The appreciation of this quasi-deific division that is the “inexhaustible” law⁹¹ may still leave us uncomprehending the death of God, leave us with “the magnitude of the deed...too great for us.”⁹² Hence, perhaps, law’s involving mystery.

⁸⁸ Jean-Luc Nancy, *Being Singular Plural*, trans. Robert D. Richardson and Anne E. O’Byrne (Stanford: Stanford University Press, 2000), 131.

⁸⁹ Jacques Derrida, “A Discussion with Jacques Derrida,” *Theory and Event* 5 (2001): at 49.
http://muse.jhu.edu/journals/theory_and_event/v005/5.1derrida.html

⁹⁰ Derrida, “Force of Law,” 233 and 257, Jacques Derrida, *Of Hospitality*, trans. Rachel Bowlby (Stanford: Stanford University Press, 2000), 79, 81.

⁹¹ Returning to Heidegger, *Nietzsche*, 130.

⁹² Nietzsche, *Gay Science*, 120 (para. 125).