Marking Time: Temporality and the Imperial Cast of Occidental Law

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The gist is that imperialism – rather than being exceptional, aberrational, over and done with – was and remains definitive of occidental political and legal formation. But there is, for legal formation, a twist. Whilst the constituent connection to the imperial can account for a primacy accorded law (in such guises as the rule of law), the terms of that same connection import an unbounded law resistant to imperium.

An instance and an origin of the pervasion of the imperial can be found in recent critical engagements with 'periodization' in history, especially with the putative transition from a medieval period to a modern along with its transcending of temporality. Propelled by this instance and origin, the story then expands 'in time' to absorb the saturation of the occidental polity in the imperial, and it does so in the perhaps unlikely company of Foucault, especially by way of his '*Society Must be Defended*'. Still in the company of Foucault, this imperial trajectory comes to be realized and resisted in and as law.

'… *to [law] alone, pure transcendence*' – Blanchot[1]

Le Clézio opens *Terra Amata* by remarking on the significance of having an epigraph, and without offering one himself he notes that

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[1] Maurice Blanchot, *The Step Not Beyond* (Lycette Nelson tr, State University of New York Press 1992) 25.

'it looks well and the author covers himself to a certain extent by referring to someone more important than he is'.[2] The additional reason for invoking Blanchot is that he provides a culminating point which orients this essay – that is, his finding that the law 'affirms itself as law and without reference to anything higher: to it alone, pure transcendence'.[3] That focal trajectory may now render the beginning of this investigation decidedly perverse. A claim that imperialism – rather than being exceptional, aberrational, over and done with – was and remains definitive of occidental legal formation does invoke a 'reference' to something 'higher' than law. What is more, and still in a perverse vein, the claim should surely have initial and extensive regard to the towering presence of James Whitman and especially to his 'Western Legal Imperialism: Thinking About the Deep Historical Roots'.[4] My concern here is oriented somewhat differently. Not that this in any sense involves a rejection of Whitman's account. I need all the help I can get. Rather, I would adopt Whitman's account in admiration – and will adopt it in that he finds and traces a constituent dynamic of 'Western law' that is imperial. My point will be that, whilst occidental law is comprehensively and instrumentally bound to the imperial, it is still and at the same time more than this, and has to be more than this.

To find both law's imperial cast (in a couple of senses of the word) and to unravel its being more than this, my search will not be for Whitman's 'deep historical roots', for roots found in antiquity, even as he brings them brilliantly to bear in modern colonialisms and in current forms of the 'new imperialism'. Rather, my concern will be with something like a history of the present, to borrow a phrase – a concern with how the constituent, the self-constituent, yet contradictory claims of modernity can be made out, and how law is of prime

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[2] Jean-Marie Gustave Le Clézio, *Terra Amata* (Barbara Bray tr, London: Penguin Books 2008) 1.

[3] Blanchot (n 1) 25.

[4] James Q Whitman, 'Western Legal Imperialism: Thinking About the Deep Historical Roots' (2009) 10 Theoretical Inquiries in Law 305.

significance in that making out. All of which is not to deny that strategic raids on Whitman will not be made en route.

One raid could be on the apt importance Whitman attributes to Christianity, but continuing in the vein of perversity for a little longer, let me start with the advent of a putatively secular occidental modernity, and do so initially in the company of Nietzsche's supremely sane madman.[5] In *The Gay Science*, we find the madman, 'having in the bright morning lit a lantern', proclaiming to a group of mocking moderns gathered in the marketplace that he is looking for God, only to fix them in his stare and announce that God is dead and, furthermore: '*We have killed him* – you and I! We are all his murderers'. The madman then puts a series of piercing questions to his audience. In muted summary: How could we possibly encompass this deed? How could we survive in the ultimate uncertainty that results from it? What substitutes will we have to invent to replace the murdered God? His audience is silent and disconcerted. He realises he has 'come too early', realises that news of this deicide, of this 'tremendous event', is still on its way, yet to reach 'the ears of men'. 'This deed,' he concludes, 'is still more remote to them than the remotest stars – *and yet they have done it themselves!*'.

The news is indeed taking some time to get around. From the sixteenth century, and not unconnected to the coming of global colonization, God was decreed, if not exactly dead, then solidified in being bound to the workings of the world. The continuing delay in transmission would, for Nietzsche, be reflected in the constant resort to numerous 'sacred games' which with the death of God we will 'have to invent for ourselves'.[6] Such sacred games make up a collection of deific substitutes in what is by now a crowded pantheon – crowded even though, emulating the Greeks of antiquity, some inhabitants have come to be forced out by others. For Nietzsche, the most conspicuous 'new idol' was the State, a state that would still act like 'the

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[5] Friedrich Nietzsche, *The Gay Science* (Josefine Nauckhoff tr, Cambridge University Press 2001) 119-20, § 125 (emphasis original).
[6] ibid 120.

ordaining finger of God'.[7] Other contenders would include nature, giving way latterly to society – an entity which has no need of external reference, as Lefort says, because it is 'transparent to itself', or 'intelligible in itself'; there is 'an illusion which lies at the heart of modern society: namely, that the institution of the social can account for itself'.[8] There are many other instances but what they all share is a proprietary or exemplary claim to ontological completeness, a condition that is self-constituent and a claim that is made operative in varieties of an expansive imperium, and indistinguishably so in and as imperialism itself. Thence, Whitman confirms, an imperially embedded 'Western law' distinctively lays claim to a universal applicability, at least 'in principle', and in this it is accompanied, still distinctively, by 'missionary/colonizing tendencies'.[9]

Now for a spot of heresy. The law which Whitman traces from antiquity to now does end up being 'fit for purpose' – that is, for the purpose of an encompassing imperium. What is more, Aldo Schiavone's recent *The Invention of Law in the West* would firmly, very firmly, bind Western law constituently to a Roman and imperial origin.[10] Yet this was not the law on which modernity has, as it were, to work. Persisting with a history of the present, and taking a 'long present', the law that emerged and began to consolidate in Europe from the sixteenth century was not simply or only an inheritance from what went before, including in what went before the aptly vaunted and so-called revival of Roman law. There was doubtless inheritance, but it was not an inheritance of law, but of laws. At least in the earthly realm, there was a variety of contending laws, none of which secured, or even purported to secure, either an ultimacy of comprehensive determination or an overarching systemic inclusion. The taking on of these qualities comes, emerges, with the

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[7] Friedrich Nietzsche, 'On the New Idol' in Friedrich Nietzsche, *Thus Spoke Zarathustra* (Adrian Del Caro tr, Cambridge University Press 2006) 35.

[8] Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (Polity Press 1986) 184, 201, 207.

[9] Whitman (n 4) 310-11.

[10] Aldo Schiavone, *The Invention of Law in the West* (Jeremy Carden and Antony Shugaar trs, The Belknap Press of Harvard University Press 2012).

assumed ability to effect them arrogated by deific substitutes which were themselves then emergent. All of which still leaves much room, of course, for an inexorable inheritance.

And all of which also leaves us with a dual dependence that is contrary to received truth. The resulting law is in one perspective utterly dependent for its content and force on, variously and for example, nature, sovereign (*cuius regio, eius religio*), society, the state of the judge's digestion and other varieties of 'legal realism'. Yet the inheritance of the revived Roman law, at least, would import an independent, even autonomous law. Yet further, the very inexorability of inheritance, our inability – as Cromwell put it in the midst of revolution – our very inability to leap out of one condition and into another (Putney Debates), stands starkly incompatible with the characteristic claim of modernity to an ontological completeness that is *sui generis*. Clearly we have a few more issues to sort out. And we could perhaps begin to sort them out by staying where we are, at least implicitly: by staying with the issue of the origin. And we could thence ask how a self-suffing modernity could originate at all? Allow me now to plunge into the context of an answer.

This involves the intense concern of late with historical periodization, a concern which has been most conspicuous in scholarly resistance to the relegating of a medieval age which thence provides the constituent contrast to a modern age.[11] What is entailed in that relegation is the invention, an 'imposition', of an encapsulated age against which a modern age is putatively set – not just a supposedly status-ridden, oppressive medieval or feudal age but also the like attributions to various 'non-Christian', barbaric or savage peoples excluded from a universalized civility.[12] In the process these periodized oppositions, or strands of them, can become blended. The medieval and the religious will usually be packaged together for example. And periodized

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[11] cf Andrew Cole, and D Vance Smith, 'Introduction: Outside Modernity' in Andrew Cole and D Vance Smith (eds) *The Legitimacy of the Middle Ages: On the Unwritten History of Theory* (Duke University Press 2010).

[12] Constantin Fasolt, *The Limits of History* (University of Chicago Press 2004) 18-19, 219.

oppositions can also be part of or fused with other venerable expedients. So, progressivist and teleological histories will typically operate as sequenced or streamed periodizations.

In all and to borrow from Kathleen Davis's searing analysis, periodization 'results from a double movement: the first, a contestatory process of identification *with* an epoch, the categories of which it simultaneously constitutes …; and the second a rejection of that epoch identified in this reduced, condensed form …'.[13] In this way, and for example, modernity is 'defined … *toward* the Middle Ages', a period it 'will never let go'.[14] In sum, the definition entails the invention of an encapsulated age as modernity's constituent alterity. And that invention, Kathleen Davis again, does not involve 'simply the drawing of an arbitrary line through time, but a complex process of conceptualizing categories which are posited as homogenous and retroactively validated by the designation of a period divide'.[15] The division is not simply found. It is made.

To effect such homogeneity periodization assumes an all-encompassing ontological comprehension, one which relegates other conditions to a contained historical specificity. So, for Davis, the 'secularization' conceived in opposition to the 'religious' Middle Ages 'turns political difference into temporal distance' thereby setting apart the religious as 'spiritual' and relegating anything political about it to a terminal past.[16] This manoeuvre enables 'the sublimation of theology in the "world"' – what Derrida would call an 'ontotheology'.[17] That theology, in turn, mediates connection with a sovereignty which Derrida often found, in its 'unlimited and uncon-

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[13] Kathleen Davis, *Periodization & Sovereignty: How Ideas of Feudalism & Secularization Govern the Politics of Time* (University of Pennsylvania Press 2008) 30-1 (emphasis original).

[14] Cole and Vance Smith (n 11) 24 (emphasis original).

[15] Davis (n 13) 3.

[16] ibid 133.

[17] ibid 84; and Jacques Derrida, 'The Ends of Man' in Jacques Derrida, *Margins of Philosophy* (Alan Bass tr, Harvester Wheatsheaf 1982) 116.

ditional powers', to be a 'theo-logic', something that 'remains a theo-logical inheritance that has not really been secularized'.[18]

What is often referred to nowadays, with some precision, as the 'myth' of Westphalia, a myth of origin, can instance this arrogating periodization. As Lesaffer tells us: 'historians and international law-yers alike have for a long time been quite unanimous in calling the Peace Treaties of Westphalia of 1648 the very birth certificates of the modern European states system and the modern law of nations'.[19] Or as Inayatullah and Blaney would put it, 'the predominant view of the Peace of Westphalia' sees it 'as signalling the move from a reli-gious to a modern, secular world and from the accepted, if some-what vaporous, goal of united Christendom to a system, or perhaps society, of independent states'.[20] This was a supposedly secular state system in which spatially demarcated entities can marvellously as-sume the capacity of universal determination. And just as marvel-lously, and according now to Koskenniemi, the society of these inde-pendent states would 'arise from itself and not from any religious, moral or political notions of the good given externally to it'.[21] Indeed such a society was to have no commonality at all, and this to such a complete extent that, according to Vattel, none of its members 'yield … rights to the general body', each sovereign state being somehow 'independent of all the others'.[22] Mercifully, Lesaffer also references several 'scholars from various countries and disciplines' who by now 'have gone a long way to challenging this Westphalian

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[18] Jacques Derrida, *Paper Machine (*Rachel Bowlby tr, Stanford University Press 2005) 105, 107, 118.

[19] Randall Lesaffer, 'Peace treaties from Lodi to Westphalia' in Randall Lesaffer (ed) *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (CUP 2004) 9.

[20] Naeem Inayatullah, and David L Blaney, *International Relations and the Problem of Difference* (Routledge 2004) 23-4.

[21] Martti Koskenniemi, 'What Is International Law For?' in Malcolm Evans (ed) *International Law Third Edition* (OUP 2006) 58.

[22] Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Charles G. Fenwick tr, vol 3, Carnegie Institute 1916) 9.

myth'.[23] Most would question whether there was a qualitative break from the medieval into the 'modern' state system, and in so doing they would emphasise key elements of continuity between the two such as the fact that cohesive 'independent' states pre-existed West-phalia, and close observation of its 'complex territorial settlement reveals Westphalia did not establish or consolidate a principle that states constitute their own authority in and of themselves'.[24]

A helpful qualification: such revisionism does vary. Some scholars, whilst finding that Westphalia does not mark quite as complete or quite as sudden a shift as the myth would import, also find that eventually and overall what flows from it is a scene that assumes the same mythic content. It is a matter of a 'fabulous retroactivity' – borrowing the term from Derrida.[25] What is needed to create the fa-ble, says Latour of a broadly similar scene, is '[a] whole supplemen-tary work of sorting out, cleaning up and dividing up … [so as] to obtain the impression of a modernization that goes in step with time'.[26] The 'beautiful order' that is supposed to ensue 'is disturbed' when its creation is, accurately, 'seen as mixing up different periods, ontologies or genres. Then a historical period will give the impres-sion of a great hotchpotch. Instead of a fine laminary flow, we will most often get a turbulent flow of whirlpools and rapids'.[27]

So, there had and has to be a distanced enfolding of the point, the event of origin – '[t]he origin is distancing'[28] – a distance necessary to allow for an encompassing mythic invention which evoked some el-

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[23] Lesaffer (n 19) 9.

[24] Richard Joyce, 'Westphalia: event, memory, myth' in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds) *Events: The Force of International Law* (Routledge 2011) 61.

[25] Jacques Derrida, 'Declarations of Independence' in *Negotiations: Interventions and Interviews 1971-2001* (Elizabeth Rottenberg tr, Stanford University Press 2002) 50.

[26] Bruno Latour, *We Have Never Been Modern* (Catherine Porter tr, Harvester Wheatsheaf 1993) 72.

[27] ibid 73.

[28] Jean-Luc Nancy, *Being Singular Plural* (Robert Richardson and Anne O'Byrne trs, Stanford University Press 2000) 16.

ements of the originated and ignored those others which would ob-viate it. Thence, in summary and with a touch of tautology, when closely observed the originated entity produced as all-surpassing proved to be integrally tied to what went before it. This tie is to more than evanescent elements that eventually diminish and disap-pear. So, for example, the insistent element of the religious is not simply a remnant fading in its antithetical ether. It is a symptom of more, infinitely more.

The assumed ability of a periodized modernity to encompass a mani-fold and cognitively illimitable 'age' and relegate it as entirely and constituently 'other' calls for a universalized efficacy – an efficacy that emanates from modernity to include the process of periodization itself. The challenge confronting this periodization, then, becomes but an instance of that confronting the modern claim to ontological completeness. That claim in its various manifestations as Nietzsche's 'sacred games', as deific substitutes, has to subsist apart from and determinatively encompass anything that may ever affect it, and in this it must account entirely for itself. Such an artefact, then, must be able to draw all immanence and all potentiality into its bounded self. Crucially, this imports a self-constituent claim to transcendence, a claim made in what is now a supposedly secular world that cannot explicitly accommodate it.

In an occidental modernity that impasse is evaded by resort to a neg-ative universal reference – to a reference which does not itself, in it-self, take on positive, explicate content but, rather, derives its con-tent negatively. In short, the entity thus elevated becomes what cer-tain alterities are not or it becomes not what certain alterities are. There are numerous routes available in engaging with this negative universal reference and in seeking to endow its negativity with deci-sive content. The route followed here weaves through Foucault's '*So-ciety Must Be Defended*'.[29]

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[29] Michel Foucault, '*Society Must be Defended*': *Lectures at the Collège de France 1975-76* (David Macey tr, Penguin Press 2003) 80-81, 255.

Starting with Foucault's expansive paradigm, that of racism, we find, in opposition to a preceding division between races, a racism that is 'biologically monist', encompassing, as it does, a single 'species' and protecting, as it does, the 'racial purity' of that species. This, more expansively, is a protection of 'the integrity, the superiority, and the purity of the race'.[30] Such superiority imports division within the unity, and a division as somehow primary: '[t]hat is the first function of racism: to fragment, to create caesuras within the biological continuum addressed by biopower'.[31] It may reveal more of that seeming contradiction if this racism is now situated.

Overwhelmingly, Foucault identified racism with a 'State racism'.[32] This was and is a racism the 'activation' of which stems from the persistence of 'the old sovereign power' in its 'national universality' together with 'the way biopower functions through it'.[33] Although Foucault did see 'the science of government' with its incorporation of biopower as oriented towards 'pre-eminence over all other types of power', including a weakened sovereignty, still for him sovereignty has a sustained, even heightened significance.[34] This significance can be discerned in the mutual dependence of state sovereignty and a biopower which, pervasive as it may be, is not self-enforcing ultimately. And it is in this equation that racism provides for Foucault the cohering element. So it is, Foucault finds, 'the emergence of ... biopower that inscribes [racism] in the mechanisms of the State', and '[i]t is at this moment that racism is inscribed as the basic mechanism of power, as it is exercised in modern States'.[35] Such power, along with its sustaining scientism, is self-endowed with the means to encompass life by way of the mediation of racism, to encompass determi-

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[30] ibid 81.

[31] ibid 255.

[32] ibid 239.

[33] ibid 239, 258.

[34] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978* (Graham Burchell tr, Palgrave Macmillan 2007) 104, 108-9.

[35] Foucault, *'Society Must be Defended'* (n 29) 254.

nately what is illimitable. This feat is achieved in the negative universal reference.

The negative universal reference forms in four fused stages. The first has already been observed in the unity of the species. This makes possible the comparison of the 'superior element' and the inferior.[36] For present purposes, the second stage is intimated in Foucault's finding in that fertile nineteenth century a new 'knowledge of man', 'a knowledge of individuality, of the normal or abnormal, conforming or nonconforming individual ...'.[37] This normal individual inhabiting a 'normalizing society' is constituently distinguished from the 'abnormal', 'the evil, ... the non-normal'.[38] More pointedly, the abnormal is ascribed a positive content in the negation of which the normal acquires its content. And this negative assumption of content absorptivity accommodates the illimitability of the constituent coverage of bio- and disciplinary powers.

The third and, finally, fourth stages in constituting the negative universal reference are the seeming obverse of the second. With its putatively pervasive control of life and the living, '[t]he universally disciplinary and regulatory society' of racial exclusion would exclude completely.[39] What is excluded from the universal can only be utterly excluded. Yet the universal has to be all-inclusive. So the universal negative reference generates an antithesis but then has to be able to include that antithesis within itself, within its integral self. That imperative has two consequences. With one, and this is the third stage, the utterly excluded are nonetheless bidden to progress, or reform, or in some other way achieve inclusion. With the other and the fourth stage, along with its potential now to enter the universal, the antithesis resides always potentially within the bearers of the universal. 'We' were once savages and may regress, or 'we' may fail a constantly

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[36] ibid 258.

[37] Michel Foucault, 'Truth and Juridical Forms' in Michel Foucault, *Power: Essential Works of Foucault 1954: 1984* (Robert Hurley and Others trs, Penguin 2001) 2.

[38] Michel Foucault, *Abnormal: Lectures at the Collège de France 1974-1975* (Graham Burchill tr, Picador 2003) 316-7.

[39] Foucault, *'Society Must be Defended'* (n 29) 259.

demanding disciplinary norm of 'our' society. Or 'we' may simply and of necessity be incorporated within some biopolitical determination.

The negative universal reference provides, then, a bridge to the further reaches that make up Foucault's expansive idea of racism. The initial expansion is not exceptional. The biological has at times been regulated through biopower in explicitly racist terms, such as with eugenics. And for Foucault eclipsing all else, there is 'the paroxysmal development' of biopower in 'the Nazi regime'.[40] Also, in the overlapping periods during which Foucault traced the emergence of biopower and of disciplinary power and for some time after, racist discourse was used to incorporate and regulate the insane, the working class, women, sexuality, children and criminals.[41] And it is not unusual to find with Foucault that various sites of power have generated racism, such as sexuality, medicine, class and psychiatry.[42] As with the negative universal reference and racism 'proper', these sites of biopower and discipline create the 'abnormal' and the 'anomaly' as the formative force of their created content. An instance: '[t]he gesture that divides madness is', for Foucault, 'the constitutive one, not the science that grows up in the calm that returns after the division has been made. The caesura that establishes the distance between reason and non-reason is the origin …'.[43] Thence 'Reason and Madness' become 'foreign to each other, deaf to any exchange, almost

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[40] Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction* (Robert Hurley tr, Penguin 1981) 54,148-50; Foucault, '*Society Must be Defended*' (n 29) 255-6, 260.

[41] Foucault, *The History of Sexuality* (n 40) 119, 124-5, 147-50; and Foucault, '*Society Must be Defended*' (n 29) 258.

[42] Foucault, *The History of Sexuality* (n 40) 147-50; Foucault, '*Society Must be Defended*' (n 29) 83, 252, 272; and Foucault, *Abnormal* (n 38) 317.

[43] Michel Foucault, *History of Madness* (Jonathan Murphy and Jean Khalfa trs, Routledge 2009) xxviii.

dead to each other'.[44] And so, 'men … communicate and recognise each other in the merciless language of non-madness'.[45]

The abnormal generalized thence becomes 'another people within the same people'.[46] They are both 'interior and foreign', subjected to 'an inclusion through exclusion'.[47] That condition is then inflected towards and inhabits an uneasy normality:

> … the child is more individualized than the adult, the patient more than the healthy man, the madman and the delinquent more than the normal and the non-delinquent … [W]hen one wishes to individualize the healthy, normal and law-abiding adult, it is always by asking him how much of the child he has in him, what secret madness lies within him, what fundamental crime he has dreamt of committing.[48]

Of course such sites of power, as well as the state, come to rely less on racism explicitly, yet the generative structuring of power in terms of the negative universal reference remains pervasive.

My culminating concern will now be with what this infra-imperialism imports for law – for how we understand law. And it may orient matters here to resort summarily to a persistent jurisprudential divide. One side of the divide would picture an abject law, a law dependent for its content and force on something apart from it – nature or the natural, variations of imperium, society, and much more. On the other side of the divide, law is seen as autonomous and as a rule of law capable of providing an ultimate normative determi-

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[44] ibid xxvii.

[45] ibid; and cf Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Tavistock 1970) 379.

[46] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Penguin Books 1979) 253.

[47] Foucault, *The Order of Things* (n 45) xxiv; and Michel Foucault, 'Truth and Juridical Forms' in Michel Foucault (ed) *Power: Essential Works of Foucault 1954: 1984* (Robert Hurley and Others trs, Penguin 2001) 78.

[48] Foucault, *Discipline and Punish* (n 46) 193.

nacy. The argument would be, in sum, that the divide reflects an aporetic quality of law which ensues from the negative universal reference, and that aporetic quality is generative of what law 'is'.

The negative universal reference ensued in turn, and as we saw, from the necessity of a transcendent reference in and as an occidental modernity. That reference cannot be rendered positively because this modernity was founded on an immanent secularity, one in which the transcendent was relegated to the entirely incidental and dispensable. Yet with such modernity neither sovereignty nor society (for example) can subsist without a positive transcendent reference that is normatively determining. The very claim to an ontological completeness depends on a transcendent reference, and what goes to generate modern law is the inability of a negative universal reference to effect, assuredly and pointedly, a positive determinacy.

Such law when in the service of imperium and society has to assume a normative determinacy across a universal range, and to do this it has itself to be illimitable. Yet such an illimitable law would be a vacuity free of any constraining content of its own. So, although able thence to provide a positive determinacy, such law would not itself be tied to any positivity. And in its illimitability, it stands apart from the delimited entities which in its instrumental subordination it otherwise serves. And it is in such standing apart that law provides the transcendent point from which positive determination can flow – a singular and ultimate point at which law can determinately cohere yet otherwise be incipiently vacuous. Such vacuity, the inability to be fixed to any positivity, enables law to effect a transcendence that is 'pure' in its not being implicate with a transcendence that is enduringly positive. Here then we find with Blanchot a law that 'affirms itself as law and without reference to anything higher: to it alone, pure transcendence'.[49]

Such law becomes perhaps the most elegant instance of Foucault's notion of resistance. Notoriously, the Foucault concerned with power saw it as having such an encompassing and all-pervasive reach as

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[49] Blanchot (n 1) 25.

to preclude, one would have thought, the very possibility of resistance. And Foucault does present resistance as having a subordinate 'role of adversary, target, support or handle in power relations'.[50] Yet this role of resistance is pressed by Foucault as one on which the 'existence' of 'power relationships' depends.[51] Not only that, resistance is not something 'doomed to perpetual defeat' but is, rather, 'inscribed in' relations of power 'as an irreducible opposite'.[52] As an irreducible opposite, law ever awaits radical realization.

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[50] Foucault, *The History of Sexuality* (n 40) 95.
[51] ibid.
[52] ibid 96.

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