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Article 8

CRITICAL MODERNITIES: POLITICS AND LAW BEYOND THE
LIBERAL IMAGINATION

”What Are the Gods to Us Now?”: Secular Theology and the Modernity of Law

Peter Fitzpatrick*

*,

"What Are the Gods to Us Now?": Secular Theology and the Modernity of Law

*Peter Fitzpatrick***

Integrating responses of Nietzsche to the death of God with classic instances of modernist political theory, a constituent parallel is drawn between monotheistic religion and modern law — a parallel in that each matches the other, but a parallel also in that neither ever meets the other. This relation yet differentiation reveals an ontologically challenging modern law that conforms to, yet completely counters, its positivist and instrumental subordinations in modernity.

The way up, from here to there, may be closed,
But the way down, from there to here, still open

Carl Dennis, *A Priest of Hermes*

I. THUS SPOKE . . .

It may be risking some premonitory weariness, but the oft-repeated report of God's death given us by Nietzsche's supremely sane madman does provide my inescapable starting point.¹ In *The Gay Science*, we find the

* FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA (1883), *reprinted in* THE PORTABLE NIETZSCHE 103, 200 (Walter Kaufmann trans., 1954) (Second Part: "Upon the Blessed Isles"). Here, Zarathustra's self-centeredness is reined in with "us" being substituted for "me."

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1 FRIEDRICH NIETZSCHE, THE GAY SCIENCE 119-20, § 125 (Josefine Nauckhoff trans., Cambridge Univ. Press 2001) (1882).

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 then 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."² 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 realizes he has "come too early," realizes 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!*"³

What of Nietzsche's own response to the deed? That response could be rendered in three related dimensions, moving at times now beyond *The Gay Science*. And all three are compacted in one of the madman's questions: "What festivals of atonement, what sacred games will we have to invent for ourselves?"⁴ Nietzsche saw that deific substitutes were, for now, imperative. We "have to invent" them. This imperative can be discerned in his stricturing dear George Eliot for yet another English vice: the vacuous affirmation of Christian morality even though "[t]hey have got rid of the Christian God."⁵ And indeed, Nietzsche did mark and decry the emergence of such "new idols" as liberalism and the State, the State that would still act like "the ordering finger of God."⁶ There is, in short, a jostling pantheon of new idols involved in this first response of Nietzsche to the deicide.

2 *Id.*

3 *Id.* at 120.

4 *Id.* I have presumed to substitute "sacred" for the "holy" in Nauckhoff's translation. The German is *heilig*, but "holy" would seem to be altogether inadequate in describing a deific substitute, and my obliging German dictionary indicates that "sacred" is equally acceptable.

5 FRIEDRICH NIETZSCHE, *Twilight of the Idols, in TWILIGHT OF THE IDOLS/THE ANTI-CHRIST* 69 (R.J. Hollingdale trans., Penguin Books 1968) (1888) (Section 5 of Expeditions of an Untimely Man) [hereinafter NIETZSCHE, *Twilight*]. More generally, and contrary to reputation, Nietzsche did see "the religious significance of life" as having a positively sustaining place in contemporary existence, and saw this often in the same respects as he had just excoriated others for holding them. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 43, § 61 (Helen Zimmern trans., Dover Publications 1997) (1886); and most conspicuously, FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS, Third Essay* (Douglas Smith trans., Oxford Univ. Press 1996) (1887) [hereinafter NIETZSCHE, *GENEALOGY OF MORALS*].

6 NIETZSCHE, *supra* note *, at 160-61 (First Part: "On the New Idol"). For the "finger of God," see also *Exodus* 31:18.

A certain monism is, however, imported by Nietzsche's second response. The festivals that have to be invented are ones of atonement, at-one-ment, the recovering of a unity.⁷ "I fear we are not getting rid of God because we still believe in grammar . . ."⁸ Grammar, in this broad dispensation, enables us to act as if there were still a God-like "measure of reality" within which an entity, including a new idol, could be constituted as a "thing in itself," a thing that can carry a force of effective domination.⁹ Which leads, seamlessly enough, to Nietzsche's third deicidal response, to the coming of this "tremendous event . . . still on its way," and thence to overcoming the death of God. It is here that we come to a Nietzschean edge. With the death of God, there forebodes a "deep darkness," perhaps totalitarian comprehensions, conveyed by Nietzsche's prophecy for "the next century" of "the shadows that must soon envelop Europe."¹⁰ And in the same written breath, this dread is diminished by exaltation, by the incipience of overcoming, by a new openness, "a new dawn," in which "our heart overflows with gratitude, amazement, forebodings, expectation . . ."¹¹

Extravagant as it may seem in summary, and as it may prove still to be in elaboration, my argument will be that law in modernity, and law *as* modernity, is integrally related to these three responses, not just as they go to constitute law but also, and especially, as they are constituted or enabled by law. Somewhat more pointedly, the deific substitutes, so the argument will run, are critical for modernity, but modernity is in ways critical of, and incompatible with, them. The resulting epochal hiatus is moderated and

7 For at-one-ment, see WALTER W. SKEAT, A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 30 (1963).

8 NIETZSCHE, *Twilight*, *supra* note 5, at 38 (Section 5 of 'Reason' in Philosophy).

9 *Id.* at 50 (Section 3: The Four Great Errors); FRIEDRICH NIETZSCHE, THE WILL TO POWER 14, § 12 (Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1968) (1888) [hereinafter NIETZSCHE, WILL TO POWER]; *see generally id.* at 300-07, §§ 553-69. These points in the text are put together from different contexts in Nietzsche's work. At least one specific qualification: Nietzsche's "grammar" is probably not so much a sustaining of God in his absence as an evolutionary endowment. *E.g.*, FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN 18-19, § 11 (Marion Faber & Stephen Leyhmann trans., Penguin Books 1994) (1878).

10 NIETZSCHE, *supra* note 1, at 199, § 343. See also NIETZSCHE, GENEALOGY OF MORALS, *supra* note 5, at 134-35 (Third Essay § 27), for a broadly similar foreboding following on the coming of atheism and the end of morality, although the prophecy here is perhaps rather less pointed, the vista being one "for Europe over the next two thousand years." *Id.* at 135.

11 NIETZSCHE, *supra* note 1, at 199, § 343. Something of that overcoming "perhaps has already come," *id.* at 3 (*Preface* to the second edition), a claim that resonates with the culminating argument of this present Article.

filled by law — a law which, in so doing, finds its quintessence in and as modernity. The initial engagement that now follows will be with Nietzsche's first response, with the new idols in their seeming plurality. That leaves us with some alluring questions about the combining of deific substitutes with modernity and law. These questions find an answer in terms of law through engaging with Nietzsche's second and third responses, through engaging with the persistence of a deific monism in modernity and then with the overcoming, the rarefied overcoming, of the death of God.

II. FIRST RESPONSE: THE NEW IDOLS

Before all that, however, let me put in place two riders. These will be given their due later, but they need some airing at this stage lest overmuch weight gets placed on the potted description of deific substitutes in this present section. The first rider questions the modernity of secularism. The pretensions of secularism are, of course, now much challenged. Such enticing oxymorons as civil religion and political religion abound. Broadly, the point is that the secularism ushered in by certain modernist ruptures, the Enlightenment and the French Revolution being two common culprits, carries with it certain deific substitutes. There could be questions here about the genealogical depth of the modernity involved, but on venturing into periods prior to these ruptures one can find a seeming secularism already well ensconced. Which is not to deny, and this is the second rider, that there are differences insistently associated with modernity, or at least with the modernity that concerns me here — differences that would distinguish it from situations where religion had a specifically determinative effect on the political. There has, then, to be some necessary dissent from those revisionist rejections, now so numerous, of the standard equation between modernity and the decline of religious influence, rejections that would take impetus from a world-wide increase in religious adherence.¹² A garrulous

12 For the revisionist view and its extensive rebuttal, see PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE* (2004). Their rebuttal falls down in one respect: it does not account for the range of religious adherence sustained in the United States, *see id.* ch. 4, even though the U.S. should provide strong support for their thesis that religion declines with the increase in existential security. Their notion of existential security tends to be a materialist one, but religious adherence is sustained in the United States among strata of the population that are materially well-off. Perhaps existential security should extend to less tangible effects, such as politically induced fear.

God inhabiting the White House notwithstanding, for the occidental claim to the modern that concerns me here, an opposition between modernity and religion still holds.

The historical rupture usually taken as generating modern secularism looks itself, when closely observed, rather more like continuity. Burleigh's irresistible account of religion and politics in the French Revolution reveals an intense reliance on substituted religious practices — reliance on, for example, massive religious festivals worshiping a plethora of "deified abstractions."¹³ The very "discourse of the Revolution was saturated with religious terminology": Mirabeau, for example, wrote in 1792 that "the Declaration of the Rights of Man has become a political Gospel and the French Constitution a religion for which people are prepared to die."¹⁴ The diversity of these resorts to the religious did not detract from the neo-monotheistic thrust of the Revolution. In one crucial respect, the demands of this monotheism on adherence and belief were even more extravagant than those of the monotheism it would replace. Before the Revolution, the sacral combining of the god's terrestrial dimension, "his" chosenness for a people and such, was combined with the god's illimitable efficacy by way of a transcendent reference. With the new monotheism, however, illimitable efficacy is now fixed, or fixed also, to an earthly domain. So, in one of the mass festivals, a "supreme intelligence" could be hymned as filling "all the worlds/Which cannot contain you," at the same time as it is deemed accessible to those "who built your altars."¹⁵

Of course it could readily be said that these were evanescent gods whose fleeting emergence in such a transitional period is thoroughly explicable. Countless thousands of people no longer gather to worship Robespierre's "Supreme Being" on the Champ de Mars, and so on. Certain contemporary attitudes to law could, as well, be seen as fitting this scenario of transience. So, to take one significant clarion, in place of "kings and priests," the regenerate people not only bring with them "a God, virtue, law," but they also present themselves as "a people ready to sacrifice itself wholly for law"¹⁶ With such a founding of "the single universal religion . . . our law-makers are the preachers, the magistrates, the pontiffs"¹⁷ All of which may explain the confidence of the revolutionary regime in law's almost

13 MICHAEL BURLEIGH, *EARTHLY POWERS: RELIGION & POLITICS IN EUROPE FROM THE FRENCH REVOLUTION TO THE GREAT WAR* 81 (2005).

14 *Id.*

15 *Id.* at 103.

16 *Id.* at 94-95.

17 *Id.* at 81.

self-sufficient effectiveness when that regime, in 1790, enacted the restrictive *référé législatif* forbidding the interpretation of the law by judges; where interpretation was unavoidable it had to be referred to the legislature.¹⁸ Understandably, the enactment did not last long. That these elevations of law were not just a matter of a passing and misplaced confidence is intimated by the monumentally enduring legacy of the Napoleonic period and its lapidary codes under which the "empire of liberty" was to be fixed forever in what Kelley describes as "an almost totalitarian effort of social control."¹⁹

All of which cannot be reduced to mere continuity, however:

It is while . . . [the Revolution] is still a living memory that there arises a feeling that a break has occurred, but that it did not occur within time, that it establishes a relationship between human beings and time itself, that it makes history a mystery; that it cannot be circumscribed within the field of what are termed political, social or economic institutions; that it establishes a relationship between human beings and the institution itself; that it makes society a mystery. The religious meaning of this break haunts the minds of the men of the period²⁰

It is the break itself that is generative of the religious, of a new religion with new deities, even if the resemblance to the old religion can be close. So we find still a century later that Jules Ferry, as minister for public instruction and later prime minister, promoted secular public education "as a means of creating national unity through a 'religion of the fatherland,'" a Comtean religion of "Progress and Humanity" imbued by, in Ferry's words, "the great Being which cannot perish."²¹ Despite hysterical French protestations ever since, it is not because this secular, this civil religion is so different to denominational religion that the two have to be so assiduously kept apart. It is, rather, because they are in significant ways the same.

Enlightenment had already contributed to broadly similar effect. Even if it did not have the iconic impact on the revolution of his advocacy of a "civil religion" subjected to the purposes of state, Rousseau's equation of law and deific capacity in *The Social Contract* has been of a more

18 JULIUS STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 213 (1964).

19 DONALD R. KELLEY, *HISTORY, LAW AND THE HUMAN SCIENCES: MEDIEVAL AND RENAISSANCE PERSPECTIVES* 42-43 (1984).

20 CLAUDE LEFORT, *DEMOCRACY AND POLITICAL THEORY* 213 (1988).

21 BURLEIGH, *supra* note 13, at 342-43.

persistent significance.²² For laws to be effective and lasting, they had to come from a quasi-divine lawgiver possessed of a "great soul," always selflessly attuned to possibility and able "to make the Gods speak."²³ These qualities of Rousseau's lawgiver will be returned to later. Persisting for now in the search for preliminary enlightenment, Kant offers an imperatively sacral law broadly, and eventually, similar to Rousseau's. In *The Metaphysics of Morals* we find it is the "free" members of society coming together "in a civil condition" who are "united for giving law." This unified affect of the members of society is "a rightful condition" concomitant with "a will uniting them, a *constitution (constitutio)*, so that they may enjoy what is laid down as right."²⁴ That scheme, however, is soon deftly inverted by way of an injunction that a "people should not inquire with any practical aim in view into the origin of the supreme authority to which it is subject." The injunction is advanced as necessary: "since a people must be regarded as already united under a general legislative will in order to judge with rightful force about the supreme authority (*summum imperium*), it cannot and may not judge otherwise than as the present head of state (*summus imperans*) wills it to."²⁵ Kant then proceeds to associate that authority with a law described thus:

A law that is so holy (inviolable) that it is already a crime even to call it in doubt *in a practical way*, and so to suspend its effect for a moment, is thought as if it must have arisen not from human beings but from some highest, flawless lawgiver; and that is what the saying "All authority is from God" means. This saying is not an assertion about the *historical basis* of the civil constitution; it instead sets forth an idea as a practical principle of reason; the principle that the presently existing legislative authority ought to be obeyed, whatever its origin.²⁶

As with Rousseau's quasi-deific source of the law, I will return also to Kant's constitution of this sacred law.

From the tortuously derived "principle" of ultimate obedience to authority, Kant extracts the qualities of that most potent of the new idols of modernity, the sovereign, the national sovereign — a determinate entity, yet one of

22 JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 84-88 (Maurice Cranston trans., Penguin 1968) (1762) (bk. II, ch. 7); *cf. id.* at 176-87 (bk. IV, ch. 8).

23 *Id.* at 87 (bk. II, ch. 7).

24 IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 89, 91, 93 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797) (6:311, 6:314, 6:316); *see generally id.* at 30-31 (6:237-38).

25 *Id.* at 95 (6:318).

26 *Id.* (6:319).

illimitable power.²⁷ Likewise, broadly, for Rousseau "the sovereign power" is "wholly absolute, wholly sacred, wholly inviolable": "The sovereign by the mere fact that it is, is always all that it ought to be."²⁸ As with Kant, if more notoriously, Rousseau arrived at such a sovereign dominance by way of an initiating concern with how a free, unchained people can come together in civil society, a concern sustained in Rousseau's case to the point of an enforcedly "free" submission.²⁹

We have, however, to look elsewhere for the dubious honor of being the standard source for the modern idea of sovereignty, to Bodin. "Sovereignty is that absolute and perpetual power vested in a commonwealth" and not vested in or determined by some transcendent entity.³⁰ Yet the common attribution of a secularized sovereignty to Bodin is only possible, as Bartelson points out, if the "epistemic underpinnings" of Bodin's sovereignty remain "commonly neglected, since they represent disturbing traces of a different age."³¹ Indeed, for Bodin sovereignty mediated between and combined the "this worldly purpose" of the state and "a divinely ordained universe."³² Such sovereignty also assumed the monotheistic quality of "indivisibility," an enfolding unity in which determinateness and transcendence are fused.³³ The considerable claims of Hobbes as an originator of modern sovereignty should also be advanced here. His sovereign Leviathan is both the worldly creation of freely covenanting "men" and a manifestation of God's tremendous power — a "mortal god" says Hobbes — and the primal covenant creating Leviathan is found to resemble "that *fiat*, or *Let us make man*, pronounced by God in the Creation."³⁴

"So here," says Derrida of sovereignty, "you have a concept which is in principle secularized, but for which the very secularization means the inheritance of a theological memory," and here also we have also a concept

27 *Id.* at 95-97 (6:319-20). There is some qualification of this on the score of private property as necessary for freedom, a point that will be taken up shortly. *Id.* at 99 (6:323). In relation to the trajectory of Kant's argument, compare IMMANUEL KANT, *TO PERPETUAL PEACE* 12 (Ted Humphrey trans., Hackett Publishing 2003) (1795) (8:354) ("it is absurd to speak of the majesty [sovereignty] of a people").

28 ROUSSEAU, *supra* note 22, at 63, 77 (bk. I, ch. 7, bk. II, ch. 4). Some qualification is necessary here also, but more on that shortly.

29 *Id.* at 49, 69-74, 151-54 (bk. I, ch. 1, bk. II, chs. 1-4, bk. IV, ch. 2).

30 JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 25 (M.J. Tooley trans., Basil Blackwell n.d.) (1576) (bk. 1, ch. 8).

31 JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* 141 (1995).

32 *Id.*

33 For indivisibility, see *id.*

34 THOMAS HOBBS, *LEVIATHAN* 47, 100 (Encyclopedia Britannica 1952) (1651).

still not "put into question."³⁵ That "the value of sovereignty can be completely secularized or detheologized" is a prospect Derrida "doubts."³⁶ This, in turn, provokes the question of what is entailed in being partially "secularized or detheologized." The short answer to such a question would be that, with modernity, sovereignty is not constituted in a transcendent reference. Rather, it is entirely self-constituted in what Derrida would call an "autopositioning," in a complete ipseity.³⁷ That, of course, goes to confirm sovereignty as neo-deific, the outcome being that the very "sovereign" claim to subsist specifically yet illimitably in the world becomes the assertion of an ontotheology.³⁸

In the light of that ontotheology, it becomes less surprisingly unsurprising that the modern avatars of sovereignty conspicuously accommodate the sacred. The defining character of one such avatar was revealed in Article 3 of the Declaration of the Rights of Man and of the Citizen, of August 26, 1789: "The principle of all sovereignty resides essentially in the nation. No body nor authority may exercise any authority that does not proceed directly from the nation." As the first "universal nation," France provided the template not only for a monodynamic transformation within the national territory, but also for the aggressive and universal extraversion of that same transformation. Perhaps, then, the revolutionary espousal of ersatz monotheisms had more of an imperative than a transitory quality.

So, we find no less extravagant a reliance on religion and the sacred persisting in the lives of nations, something Anthony Smith has recently and richly illustrated in his *Chosen Peoples: Sacred Sources of National*

35 Jacques Derrida, *A Discussion with Jacques Derrida*, 5 *THEORY & EVENT*, para. 47 (2001); Jacques Derrida, *A Dialogue with Jacques Derrida*, in GIOVANNA BORRADORI, *PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA* 111 (2003) [hereinafter Derrida, *A Dialogue*]. In the first reference, Derrida evokes, rather too broadly, Schmitt's famous assertion that

[a]ll significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development — in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver — but also because of their systematic structure

CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS IN THE CONCEPT OF SOVEREIGNTY* 36 (George Schwab trans., MIT Press 1985) (1922). *See also* CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 42 (George Schwab trans., Univ. of Chi. Press 1996) (1932): "The juridic formulas of the omnipotence of the state are . . . only superficial secularizations of the theological formulas of the omnipotence of God."

36 Derrida, *A Dialogue*, *supra* note 35, at 113.

37 JACQUES DERRIDA, *ROGUES: TWO ESSAYS ON REASON* 142 (Pascale-Anne Brault & Michael Maas trans., 2005).

38 *Id.* at 28.

Identity.³⁹ There he shows abundantly how the supposedly secular nation still imports the sacredness or holiness of its territory, still generates a sacred ethos in its rituals and monuments, and still affirms the transcendently chosen character of its people. In the same vein, and borrowing Smith's summary, we find nations assuming "a unique role in the moral economy of global salvation," a role filled in terms of a redemptive "mission" or a portentous "destiny."⁴⁰ It remains important for the rest of my argument, however, to stress what is in one sense obvious: that secularism would banish the authority of religion, at least from a "public" sphere, substituting for it an authority purely of this world. Nationalism itself was conceived of as secular, as entirely modern, as both a product and an instrument of the modernizing of the world. As such, the nation of modern nationalism was taken to encompass existence. That meant that it could displace the hold of religion on existence. Or, more exactly, to the extent that religion remained relevant, this was supposed to be a matter of personal preference, a "private" matter. Yet, the persistence of both the failures and the attempts to conceive of nation in secular terms is testament to the integral quality of its religious dimension.⁴¹

Much of the increasingly attenuated plausibility of nation's universal and messianic thrust was taken on by modern imperialism. This was, and remains, an imperialism of national sovereignty. The neo-deific abilities of the modern sovereign nation manifestly accommodate empire — the ability to subsist finitely yet extend infinitely, the ability to be both an emplaced entity and a universal extraversion. That wondrous combination of abilities has enabled nation not just to extend as a force of imperial domination but also to cohere as imperial concentrations of "leading" nations, such as "the great powers" or the "legalized hegemony" of certain predominant nations.⁴² Even seemingly singular and pervasive imperialisms can operate as a focus for the conjoint power of several nations. Spanish imperialism provides an example from the early-modern period, and "American" imperialism provides a current one.

The United States can also provide a case of the enfolding, the sovereign completeness marking the imperial mission. The penultimate National Security Strategy of the United States is striking and significant enough to exemplify

39 ANTHONY D. SMITH, *CHOSEN PEOPLES: SACRED SOURCES OF NATIONAL IDENTITY* (2003).

40 *Id.* at 48-49, 66, 91, 203.

41 This over-large point is extended in Peter Fitzpatrick, "We Know What It Is When You Do Not Ask Us": *The Unchallengable Nation*, 8 L. TEXT. CULTURE 263 (2004).

42 GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 68 (2004).

that mission. The document, presented in September 2002 in the name of a then putative President Bush, initially elevates an *imperium* comprising "a single sustainable model for national success," a model made up of "political and economic liberty," of "free and open societies," and, more particularly, of the market, human rights, and the rule of law.⁴³ This vaunted freedom and openness are, however, ultimately constrained by the imperial pall since, to maintain this openness and "to defend freedom," "[o]ur forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States."⁴⁴

The religious proclivity of President Bush can be contrasted with, and thence clarify, the type of religion embedded in this secular national imperialism. That contrast would be one with the Presidential claim of direct access to the deity along with the claim to be pursuing "a calling from beyond the stars."⁴⁵ Such conceits could be seen as residues of once significant complicities between monotheism and imperialism, but with modernity the religion of imperialism is contained within its sovereign being. Often equated with that "American civil religion" of the non-denominational kind incessantly invoked by political leaders, it remains *civil* in contrast to the purely religious incantations of President Bush.⁴⁶ This "empire of right," borrowing the label from Stephanson, is a righteous empire within which, still borrowing from Stephanson, Manifest Destiny advanced by Wilson was a religious asseveration — as was, it could be added, Lincoln's conceiving of the United States as "the last best hope of earth": even the Puritan "city set upon a hill" could be claimed for a civil religion — and they all make manifest "the providentially assigned role of the United States to lead the world to new and better things."⁴⁷

This has already been a rather extended response to Nietzsche's first

43 THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, at iv-vi (2002) (introductory remarks of George Bush) [hereinafter NATIONAL SECURITY STRATEGY 2002]. The latest National Security Strategy is less bluntly focused but to the same effect: *cf.* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, at ii (2006) (introductory remarks of George Bush); *id.* at 6-7, 22, 44, 49.

44 NATIONAL SECURITY STRATEGY 2002, *supra* note 43, at 30.

45 Ron Suskind, *God's President*, OBSERVER REV., Oct. 31, 2004, at 1; Jonathan Raban, *Pastor Bush*, GUARDIAN, Oct. 6, 2004, Tabloid Section, at 8. And see generally JIM WALLIS, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT, ch. 9 (2005).

46 See Peter Fitzpatrick, *Righteous Empire*, 2 UNBOUND: HARV. J. LEGAL LEFT 1 (2006), <http://www.law.harvard.edu/students/orgs/unbound/>.

47 ANDERS STEPHANSON, MANIFEST DESTINY: AMERICAN EXCEPTIONALISM AND THE EMPIRE OF RIGHT, at xii (1995).

response to the death of God, and I will now draw it together as questions that it does not answer but that provide the focus for the rest of the Article in its concern with law in and as modernity. The question most spectacularly unaddressed involves the plurality of the deific substitutes and that question will be accommodated more generally when we consider shortly the monism of Nietzsche's second response to the death of God. More immediately, that plurality offers a considerable challenge to the neo-monotheistic claim of sovereignty, including the claim of its manifestations in nation and empire — the claim, in sum, to combine in itself determinate existence with illimitable being. The challenge to such a sovereignty would come from a law made commensurate in modernity with the sacred and even with the deific.⁴⁸ An abrupt answer to the ensuing question of which is to win is that sovereignty is exalted over law by making law constitutively dependent on it. So, says Bodin, not without ambivalence on this score, "[t]he first attribute of the sovereign prince . . . is the power to make law binding on all his subjects"; or "the principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent"; and, eliminating some of the ambivalence, "it is expedient that if he is to govern his state well, a sovereign prince must be above the law."⁴⁹ Although Hobbes qualified broadly similar sentiments, as we will see shortly, he is usually taken to be the originator of a modernist legal positivism in such terms as: a law is "the command of him, or them, that have the sovereign power."⁵⁰ With Rousseau, and to repeat somewhat, the sovereign has an encapsulated hold on the normative — "[t]he sovereign by the mere fact that it is, is always all that it ought to be," and it is an act of the sovereign will that "constitutes law."⁵¹ For Kant, the supreme authority that we have already seen him secure by way of a stern prohibition against enquiry is rendered as "the sovereign [who] has only rights against his subjects and no duties"; a sovereign who is not "subject to the law."⁵²

There has to be, then, a challenge to sovereignty imported by the

48 These qualities were much illustrated earlier and will be returned to shortly. They are more extensively analyzed in Peter Fitzpatrick, *The Triumph of a Departed World: Law, Modernity, and the Sacred*, in *LAW AND THE SACRED* (Martha Merrill Umphrey et al. eds., forthcoming Nov. 2006). The "law" involved here is obviously of a paradigm positivist kind. As will become evident, it is undermined as the Article proceeds.

49 BODIN, *supra* note 30, at 32, 43 (bk. I, chs. 8, 10).

50 THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 26 (Univ. of Chi. Press 1971) (1681).

51 ROUSSEAU, *supra* note 22, at 63, 70 (bk. I, ch. 7, bk. II, ch. 2).

52 KANT, *supra* note 24, at 94, 95 (6:317, 6:319).

sovereign's subordinating a law no less deifically endowed than itself. That is a challenge that, in various ways, continually breaks through such received renditions of a surpassing sovereignty as those we have just looked at. Revisiting them in turn, we find that the relation between Bodin's sovereign and the deity is one that subjects the prince to "divine and natural law," the latter ultimately emanating from God also.⁵³ To this scaling-down of sovereign conceit by a divinity and its laws, Bodin would add another limiting element in the sovereign being bound by "covenants" made with the subject, covenants not to be "confused" with law since law is the creation of the sovereign and does not bind him, whereas covenants with the subject do so bind him.⁵⁴ The abjection of law itself is countered by according some primacy to some types of law, and that abjection is sharply qualified towards the end of *The Six Books of the Commonwealth*, where it is, in turn, accorded a practical primacy. For if the commonwealth, no matter of what kind, "is governed without law and all is left to the discretion of the magistrates to distribute pains and penalties according to the importance and status of each individual, such estate could be neither stable nor durable . . . There would be no bond of union between the great and the humble, and therefore no harmony between them."⁵⁵

The resonances between Bodin and Hobbes are striking.⁵⁶ There is, of course, much warrant for the received view of the sovereign Leviathan, that "mortal god," with its complete and terrifying power.⁵⁷ Yet closer acquaintance with Leviathan reveals an unexpectedly tender side. Leviathan remains bound by the covenants that brought it into existence. These were covenants between a people whose life was not so unrelievedly dire as Hobbes at times takes it to be, and from that life the people retain a primal efficacy, which Leviathan must accommodate if it is not to lose the right of sovereign rule. So, from that restriction on Leviathan, Hobbes derives an extensive list of "liberties," and from Leviathan's constituent duty to secure "the safety of the people," Hobbes derives even more since "by *safety* here is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry,

53 BODIN, *supra* note 30, at 29 (bk. I, ch. 8).

54 *Id.* at 29-30, 34 (bk. I, ch. 8).

55 *Id.* at 28, 30 (bk. 1, ch. 8): for present purposes the most significant laws accorded primacy in *id.* are "certain human laws common to all nations," *id.* at 28, and some laws that the prince "may override" only "when the purpose of their enactment no longer holds," *id.* at 30, 206 (bk. 6, ch. 6).

56 This account of Hobbes summarizes the more detailed illustration and analysis in PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 93-97, 105-07 (2001).

57 HOBBS, *supra* note 34, at 100 (ch. 17).

without danger or hurt to the commonwealth, shall acquire to himself."⁵⁸ In a like vein of empathic engagement with its subjects, the very commands of Leviathan, the laws, must be "good," equal in their application, impartially administered, knowable, and few.⁵⁹ Even more startling, just 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."⁶⁰

Uncertain as they may yet be, we seem to be repeatedly coming on a quartet of generative affinities between the deific, the sovereign, the law, and the people. With Rousseau it becomes impossible to avoid questions about the nature of these affinities. One reason why this cannot be avoided is the outrage influentially felt at Rousseau's reducing the affinities between a free people and the sovereign to a totalitarian pervasion of the latter.⁶¹ Some qualification can, however, be derived from Rousseau's insisting that "sovereign power" is limited by the "covenants constituting the social bond," covenants to do with an equality of citizens and a generality of rule secured by laws: "Laws are really nothing other than the conditions on which civil society exists."⁶² The consolations of the law extend also to that bastion of the individual faced with a sovereign supremacy, the citizen's secured "legal right of property in what he possesses."⁶³

The other reason why at least the intimation of generative affinities cannot be avoided here lies in the spectacularly impossible attributes Rousseau endows on the lawgiver. These were touched on earlier and could be summarized in Rousseau's dictum "Gods would be needed to give men laws."⁶⁴ Yet, even though the lawgiver's "task . . . is beyond human powers," it is a task the achievement of which Rousseau sees as necessary in the world.⁶⁵ It is also a task that Rousseau configures to the qualities of the lawgiver. In bestowing the laws of the constitution, the lawgiver has to create a social

58 *Id.* at 153 (ch. 30).

59 *Id.* at 139, 156-57 (ch. 27, 30).

60 *Id.* at 113 (ch. 21). The imagery is especially telling in that the all-powerful Leviathan being evoked comes from *Job*, where we find that this creature of the sea cannot be "draw[n] out . . . with a hook . . . or his tongue with a cord which thou lettest down." *Job* 41:1.

61 *E.g.*, ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY*, ch. III (1969).

62 ROUSSEAU, *supra* note 22, at 77, 81-83 (bk. II, chs. 4, 6).

63 *Id.* at 65 (bk. I, ch. 8). *See also id.* at 77 (bk. II, ch. 4).

64 *Id.* at 84 (bk. II, ch. 7).

65 *Id.* at 86 (bk. II, ch. 7).

bond that integrates individuals into it, a bond believed in by those individuals and one that is "lasting."⁶⁶ To perform these tasks, the god-like lawgiver has to be quite apart from the "nation" being so endowed, lacking in any authority, right, force, or interest to create the laws. From that position apart, the lawgiver has to exhibit "a superior intelligence" and assume something like perfect knowledge.⁶⁷ The practical impossibility of all this Rousseau absorbs into invocations of the actual lawgiver's "genius," the "miracle" of his "great soul," and such.⁶⁸ With Rousseau, then, it would seem that between the emplaced imperatives of the lawgiver's task and the deific qualities needed to perform them, there is a hiatus filled by the giving of the law.

Similarity with Kant's scheme would suggest that Rousseau's influence on him extended to the nature of the lawgiver.⁶⁹ There is an initial difference in that for Kant it is a free people coming together who are "united for giving law."⁷⁰ A tendential air soon supervenes, however. The unified affect of the people coming together was rendered as a "civil" or "a rightful condition" and, as such, it assumed effective existence as a coercive and sovereign authority.⁷¹ Somewhat like Rousseau, this irresistible sovereign rule still left a bastion of the individual, a protected domain within which people could freely hold land.⁷² And again somewhat like Rousseau, Kant posited a founding law that had, "as a practical principle of reason," to be thought of as coming "not from human beings but from some highest, flawless lawgiver; and that is what the saying 'All authority is from God' means."⁷³ This law is "so holy," so existentially vital, that it is ever and "already a crime even to call it in doubt *in a practical way*, and so to suspend its effect for a moment . . ."⁷⁴ Kant posits this law as necessary for the supremacy of (sovereign) legislative authority the origin of which, again as we saw, must not be inquired into. Pointedly, "subtle reasonings" about whether "law" or "power" came first "are altogether pointless and, moreover, threaten a state with danger."⁷⁵

Kant leaves us then with an occluded relation between law and supreme

66 *Id.* at 84-85, 87, 99 (bk. II, chs. 7, 12).

67 *Id.* at 84 (bk. II, ch. 7).

68 *Id.* at 85, 87 (bk. II, ch. 7).

69 The specific reference to Rousseau in this setting is confined to an aspect of the state of nature. KANT, *supra* note 24, at 95 (6:318).

70 *Id.* at 91 (6:314).

71 *Id.* at 25-26, 89 (6:231-33, 6:311).

72 *Id.* at 99-100 (6:323-25).

73 *Id.* at 95 (6:319).

74 *Id.*

75 *Id.* at 95 (6:318).

authority/power/the state, an occlusion that has to be sustained if the latter is to endure. Disobeying Kant's injunction, we could now inquire into this occlusion and maintain the engagement with the uneasy quartet of law, sovereignty, God, and the people, by leaving the plurality of deific substitutes in Nietzsche's first response to the death of God and engaging with his second, monist response. *Sapere aude*.

III. SECOND RESPONSE: MONISM AND MODERNITY

There is certainly no shortage of new idols of an all-encompassing, monist orientation. Their very multiplicity and diversity intimate inadequacy. Modern philosophy offers instances ranging from the obvious idolatry of "world spirit" to a more oblique "realism," the "devotion" to which Rorty sees "as the Enlightenment's version of the religious urge to bow down before a non-human power," with "Reality" being "just another of the obsequious Names of God."⁷⁶ That surpassing reality arrogated by the Occident through various deific substitutes is sustainable, in Nancy's view, because it is a legacy of monotheism.⁷⁷ Somewhat similarly, Connolly, in good company, would see the maintenance of a secular and "self-sufficient public realm" as possible only because this realm remains grounded in a covertly continuing Christianity.⁷⁸

Whilst my account in this Article so far must share such an assumption of continuity, that assumption has also to be extended, yet qualified. Putting matters too simply, the revisionist scenario instanced in the preceding paragraph would have it that a world once religiously pervaded purports now to be entirely different, but is nonetheless not so. That scenario is considerably complicated by a further dimension of continuity, a dimension that can be introduced by a work perhaps conspicuous by its absence so far, Machiavelli's *The Prince*.⁷⁹ If custom had been followed, *The Prince* would already have figured prominently in my account of sovereignty. Although Machiavelli does not engage there with sovereignty as such, *The Prince* is of course notorious for its constituting the ruler as self-contained — neither

⁷⁶ Richard Rorty, A Pragmatist View of Contemporary Analytic Philosophy (June 24, 1999), <http://www.stanford.edu/~rrorty/pragmatistview.htm>.

⁷⁷ Jean-Luc Nancy, *Deconstruction of Monotheism*, 6 POSTCOLONIAL STUD. 37, 38 (2003).

⁷⁸ WILLIAM E. CONNOLLY, WHY I AM NOT A SECULARIST 21-24 (1999).

⁷⁹ NICCOLÒ MACHIAVELLI, THE PRINCE (Peter Bondanella trans., Oxford Univ. Press 2005) (1532).

reliant on, nor required to have any primal regard to, religion or morality. Hence we find *The Prince* so often advanced as a, or the, seminal account of modernist, secular rule. Yet Machiavelli does not explicitly constitute the prince in such terms. These terms can only be deduced from what is an account of the art of the political. And, that is an art that does, after all, have some necessary regard to God, but with a key qualification. In Machiavelli's concluding "exhortation to seize Italy and to free her from the barbarians," such as the French, Lorenzo de Medici is told, by way of parallels with *Exodus*, that God has created favorable circumstances for such an enterprise, but that God, having done his bit, "[t]he rest you must do yourself. God does not wish to do everything, in order to not take from us our free will and part of the glory that is ours."⁸⁰ Within this domain left to the prince, religion should be comprehensively subordinated. This is evident from the following exchange: "When the Cardinal of Rouen told me that Italians understood little about warfare, I replied to him that the French understood little about statecraft, for if they had some understanding, they would not have permitted the Church to gain so much power."⁸¹ This, for Machiavelli, is not some proto-modernist point but the illustration of an imperative that had always been thus — something, again, to be deduced and deduced this time from Machiavelli's vertiginous alternations between his "long experience in modern affairs and a continuous study of antiquity."⁸² Updating and generalizing this scheme, it can be said that, with the advent of the modern period, princes throughout Western Europe, the predecessors of the modern sovereign, had assumed ascendancy over an increasingly contained religious power.⁸³

There is, in the result, a combination of two continuities, both of which run counter to modernity's self-presentation: the continuity from pre-modernity of religion and the continuity of the distinctly political. All of which is not to deny a divide in modernity between (if the pleonasm can be tolerated) religious religion and political religion,⁸⁴ and that is a divide I now come to. But it is to say, and to repeat somewhat, that the divide and opposition in modernity between these two religions is not (just) because they are different

80 *Id.* at 87-88 (ch. XXVI).

81 *Id.* at 15 (ch. III).

82 *Id.* at 5 (Dedicatory Letter).

83 *See, e.g.,* BURLEIGH, *supra* note 13, at 20, 28-29, 31. Which is not to deny some instituted dominance of the political by the Church in an earlier period of European history, nor to deny the content endowed by religion on the political in the formation of "secular" rule.

84 For the term "political religion," see *id.* at 3-12.

but because they are the same. It is that similarity between the two, and the inclusive tendencies of each, that calls forth the explicit and intense effort that has for so long been put into enforcing their heterogeneity. As the United States currently illustrates, the divide is becoming more permeable. Nonetheless, my continuing concern will be with a distinct civil religion.⁸⁵

To return, then, to a precariously pristine political religion, we can first contrast it with the world we have supposedly lost, a world in which, as Kant concentrates it, "the whole system of possible experience . . . form[ed] an absolute, but dependent and sensibly-conditioned unity, and at the same time . . . [was] based upon a sole, supreme, and all-sufficient ground existing apart from the world itself."⁸⁶ In the absence of such "systematic exteriority,"⁸⁷ "the world itself" is left to its own devices. "All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind," relations made at least difficult by the "uninterrupted disturbance of all social conditions."⁸⁸ Aptly enough, Nancy would accord Hegel some precedence in the perception of such "a movement and a restlessness":

Hegel is the witness of the world's entry into a history in which it is no longer just a matter of changing form, of replacing one vision and one order by some other vision and some other order, but in which the one and only point — of view and of order — is that of transformation itself. It is thus not a point; it is the passage, the negativity in which the cutting edge of sense gets experienced as never before.⁸⁹

Salvation is proffered of course by the deific substitutes. The deific

85 Which means that another alluring connection has also to be resisted for now, namely, the connection involved in claims that religious religion is a projection or function of social or political or psychic conditions. A seminal sampling would be LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (George Eliot trans., Prometheus Books 1989) (1841); ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Haus trans., Free Press 1984) (1893); SIGMUND FREUD, *TOTEM AND TABOO*, ch. IV (James Strachey trans., Routledge & Kegan Paul 1960) (1913).

86 IMMANUEL KANT, *CRITIQUE OF PURE REASON* 450 (A672/B700) (J.M.D. Meiklejohn trans., J.M. Dent 1993) (1781).

87 The phrase is Gauchet's. MARCEL GAUCHET, *THE DISENCHANTMENT OF THE WORLD: A POLITICAL HISTORY OF RELIGION* 103 (Oscar Burge trans., 1997) (1985).

88 KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 83 (Samuel Moore trans., Penguin Books 1985) (1848).

89 JEAN-LUC NANCY, *HEGEL: THE RESTLESSNESS OF THE NEGATIVE* 6-7 (Jason Smith & Steven Miller trans., Univ. of Minn. Press 2002) (1997).

substitute arrogates to itself a completeness in and of itself, a self-sufficing ipseity capable of "autopositioning."⁹⁰ Implicit in autopositioning as a continuous condition is the present ability to combine emplaced position with 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.⁹¹ But, as Deleuze and Guattari counsel, "whenever immanence is interpreted as immanent *to* Something, we can be sure that this Something reintroduces a transcendent."⁹² So that it can continue to be its instantiated self yet incorporatively open to what is ever beyond that self, this Something, here the deific substitute, must subsist transcendentally: "Every religion states in its own way that human society can only open on to itself by being held in an opening it did not create. Philosophy says the same thing, but religion said it first . . ."⁹³ The openness of this transcendent cannot in modernity be encompassed by a higher reference. True, the deific substitute makes a self-constituting monist claim to the universal, a claim that it is the one to which all should turn, but this oxymoronic particular universality subsists in its incipient prevalence over all. There can thence in modernity, and combining now Nietzsche's first and second responses to the death of God, be a diversity of deific substitutes each in monist communion with the universal. From that exaltation, and subject to the small qualification of efficacy, the demands of a restless world can be held apart from the deific substitute and made dependent on it for their realization, a consummation notably advanced by Rousseau and Kant, as we saw. Or at least that would be the other side, as it were, of the self-constituting claim of these deific substitutes, these "shadows of god," returning again to Nietzsche, a claim now to being a thing-in-itself, to being ultimately immune to the "chaos" that is "the total character of the world," and a claim to transcend the struggle, the relations of force, the dominations, the perspectives, and politics that go to make it.⁹⁴ Despite this claim to a determinate thingness, the deific substitute, being unable either to espouse transcendence explicitly or to absorb immanence into its delimited identity, repeatedly resists any comprehension of what it is and thus sustains an insinuate mystery.

90 Borrowing again what Derrida says in *Rogues*. DERRIDA, *supra* note 37, at 142.

91 A self-immanence often rendered as exemplarity or as illimitable progression.

92 GILLES DELEUZE & FÉLIX GUATTARI, *WHAT IS PHILOSOPHY?* 45 (Graham Burchell & Hugh Tomlinson trans., Columbia Univ. Press 1996) (1991).

93 LEFORT, *supra* note 20, at 222-23.

94 NIETZSCHE, *supra* note 1, at 109-10, § 109; *see, e.g., id.* at 185-86, § 333. For a pointed summary of Nietzsche's thought here, see MICHEL FOUCAULT, *Truth and Juridical Forms*, in *POWER* 1, 9-15 (Robert Hurley et al. trans., 2001).

In modernist terms, the deific substitutes of sovereignty and nation formed as realizations of their antithesis. Both Rousseau and Kant came to a surpassing sovereign as an effect of the combining of individuals in a body politic or as an endowing of such combined individuals with operative right.⁹⁵ The explicit intent was not to suppress but, rather, to give collective effect to what could be called a modern conception or a modern creation of the individual "as a necessarily singular entity," a singularity freighted with the imperative "that individuals alone are the ultimate social reality and that they are ends in themselves."⁹⁶ In the liberal variant, "the supreme value of the individual" means that "[s]ociety, state, and nation have no independent existence and value of their own. They are simply the outcomes of individuals related to each other in certain ways"⁹⁷ And lest it be thought that there could be a hyper-disciplined individual, a subject formed only in its subjection, the individual remains essential to the modernist, and to the liberal, scheme.⁹⁸ Thence we have that fissure characterizing the modern, and the liberal, polity — a fissure between the generative ultimacy of the individual and the neo-deific domination effected in the name of a nation, a state, or of a sovereign having a marked similarity with the *ancienne* kind.

There is, then, an intriguing irresolution in that prospectus and paradigm of the new order where Rousseau's scheme is played out, the *Declaration of the Rights of Man and of the Citizen* of 1789. Borrowing Mirabeau's description again, the Declaration had "become a political Gospel," and indeed the National Assembly did explicitly "recognise and proclaim" the rights "in the presence and under the auspices of the Supreme Being."⁹⁹ And, as we saw, Article 3 proclaimed that "[t]he principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation." Yet, Rousseau tells us,

95 See text accompanying *supra* notes 22-29.

96 Bhikhu Parekh, *Individual*, in *NEW KEYWORDS: A REVISED VOCABULARY OF CULTURE AND SOCIETY* 183 (Tony Bennett et al. eds., 2005).

97 Bhikhu Parekh, *Liberalism*, in *NEW KEYWORDS: A REVISED VOCABULARY OF CULTURE AND SOCIETY*, *supra* note 96, at 199.

98 The way the contrary is put here is obviously derived from Foucault, but for Foucault also the resistant individual remains central to the generating and efficacy of disciplinary power. See, e.g., Michel Foucault, *Afterword* to HUBERT L. DREYFUS & PAUL RABINOW, *BEYOND STRUCTURALISM AND HERMENEUTICS* 208, 208-26 (1982); Michel Foucault, *The Political Technology of Individuals*, in *TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT* 145 (Luther H. Martin et al. eds., 1988).

99 BURLEIGH, *supra* note 13, at 81.

sovereignty is "nothing other than the general will."¹⁰⁰ Seemingly freeing itself from Rousseau's perverse elevation of an absolute sovereign power, the Declaration further proclaims in Article 6, "Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation," the citizen poised now in solitary relation to the nation state, all "intermediate ranks" having been abolished.¹⁰¹ In short, the Declaration leaves unresolved what Rousseau and Kant would anfractuously resolve in the supercession of a generative people by sovereignty, and resolve further by way of a constituent dependence of law on that same sovereign power. I will now adopt the failure of resolution in the Declaration as a productive failure — productive of the nature or natures of modern law — and, in the process, accommodate the contributions of Rousseau and Kant, which will turn out to be seminal after all.

We could approach this modest agenda by questioning, or at least refining, the standard view of the modern (liberal) individual touched on earlier, the view of the individual "as a necessarily singular entity," and "the view that individuals alone are the ultimate social reality and that they are ends in themselves"¹⁰² Now, it is neither to truncate nor to avoid long-persistent debates over the primacy of the individual as against the social if, for present purposes, the matter is confined to a simple logic, a sociologic. Borrowing terminologies of belonging that will be accounted for shortly, for individuality in the sense of our each being existently singular, this being is imperatively a being together. If, without more, we were simply and distinctly singular yet we were still within a social bond with its necessary element of commonality, the only available commonality would be one in which we were completely the same as each other. The individuality, the existent or operative singularity of each, depends upon a being together, which is neither reducible to its component singularities nor capable of absorbing them completely in some total or totalitarian comprehension. If then such being together is to "serve" as a constituent focus for the individual, it must have a determinate, and delimited, and enforceable, presence. Hence this sociologic could support that national sovereign authority proclaimed by the Declaration in that, as a deific substitute, this authority assumes a transcendent determinateness. Yet if this being together is to "serve" also that participative law announced by the Declaration, if it is to accommodate the infinity of ever-changing relation

100 ROUSSEAU, *supra* note 22, at 69 (bk. II, ch. 1).

101 The phrase "intermediate ranks" comes from BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. III, para. 4 (Thomas Nugent trans., G. Bell & Sons rev. ed. 1914) (1748).

102 Parekh, *supra* note 96, at 183.

among "citizens" and provide the continue yet generative terms of their being together, it must as well be illimitable and illimitably responsive. It must provide that transcendent opening apart from itself and on to itself that is, in Lefort's terms, stated by religion.¹⁰³

Amplifying that, and to advance the argument, some further sources now. Firstly Nancy:

Being-*in*-common means that being is nothing that we would have as common property, even though we *are*, or even though being is not common to us except in the mode of *being shared*. Not that a common and general substance would be distributed to us. But rather, being is *only* shared between existents and in existents¹⁰⁴

It is to avoid the imputation of some common, contained, or containing substance that Derrida would object to Nancy's use of the term "community" to accommodate being-in-common, or the variation I am using here of being together,¹⁰⁵ Derrida preferring the more "abstract" term "bond," a "bond between singularities," a bond that "cannot be made into a community; the promise of the bond forms neither a national, linguistic, or cultural community, nor does it anticipate a cosmopolitan constitution. It exceeds all cultures, all languages, it even exceeds the concept of humanity."¹⁰⁶ But Nancy, it must be added, would place community in a broadly similar dimension.¹⁰⁷ Returning to Derrida, such a bond is illimitably inclusive and cannot be realized in the existent. It is always "to come," but as such it is insistently present in the existent.¹⁰⁸ I will return to this bond and its presence, and its promise, later, noting for now its "presence" in that determinate being together that I have just argued is necessary for individuality — which indeed goes to constitute different types of individuality. This being together, to be effective in its own relation to the infinite demands of the participative, has to extend in a

103 LEFORT, *supra* note 20, at 222-23, and see text accompanying *supra* note 93.

104 JEAN-LUC NANCY, THE EXPERIENCE OF FREEDOM 69 (Bridget McDonald trans., Stanford Univ. Press 1993) (1988).

105 "Being together" is being preferred to Nancy's "in-common" because it is difficult, it seems to me, to resist readily the reification of the common.

106 JACQUES DERRIDA, *Nietzsche and the Machine*, in NEGOTIATIONS: INTERVENTIONS AND INTERVIEWS 1971-2001, at 240-41 (Elizabeth Rottenberg trans., 2002).

107 JEAN-LUC NANCY, THE INOPERATIVE COMMUNITY 24-26 (Peter Connor trans., Univ. of Minn. Press 1991) (1986).

108 *E.g.*, JACQUES DERRIDA, *Force of Law: The "Mystical Foundation of Authority,"* in ACTS OF RELIGION 228, 256-57 (Mary Quaintance trans., 2002).

protean and incorporative responsiveness to these demands. It has to be what it determinately is, yet it also and ever has to become other than what it is.

Turning now to the condign qualities of modern law, the usual conception of such law, especially in its relation to the individual, would claim it for the commonality as determinate — as providing a haven of certainty in a now uncertain world. The expectation embedded in the *référé législatif* of 1790 and in the Napoleonic codes was an expectation of almost secure predictability, but only almost. True, the rule of law is characteristically tied to security, predictability and such, but if law were comprehensively tied to a fixity in this way, it would cease to rule the situation inexorably changing around it. In an apt interrogation, Oswald de Andrade "asked a man what Law was. He replied it was the guarantee of the exercise of possibility."¹⁰⁹ Law's being involves a constant and constituent regard, an attunement and attentiveness, to what is ever beyond its determinate existence. If seen solely in this responsive dimension, such law would have to be a law of what Agamben calls "absolute mutability," a description he extracts from a debate questioning "the state of the Torah as it existed in the sight of god," an answer to this questioning being that the Torah must have been "a medley of letters without any order — that is, *without meaning*."¹¹⁰

This "god of the unreadable book,"¹¹¹ a god of pure possibility, a god not tied to any determinate formation, such a god finds its avatar in Rousseau's lawgiver who, as we saw, "needs" to occupy the space of an unattached god in order to endow "men" with laws — laws which would secure "bonds" that are "lasting."¹¹² Yet, in order to be adequate recipients of laws, a people must have a determinate, an autarkic completeness, a condition Rousseau ultimately and inevitably fails to establish.¹¹³ Kant's contribution is somewhat different. He does, as we also saw, posit "a law so holy," so vitally continue, that its "effect" could not be suspended even "for a moment," a law that had to be "thought of as if it must have arisen not from human beings but from some

109 Oswald de Andrade, *Anthropophagite Manifesto* (Adriano Pedrosa & Veronica Cordeiro trans., 1928), *available at* <http://www.391.org/manifestos/1928anthropophagite.htm> (last visited Nov. 16, 2005).

110 GIORGIO AGAMBEN, *POTENTIALITIES: COLLECTED ESSAYS IN PHILOSOPHY* 165 (Daniel Heller-Roazen trans., 1999).

111 *Id.*

112 ROUSSEAU, *supra* note 22, at 84, 87 (bk. II, ch. 7). Of its disputed etymologies, the one now preferred for "religion" would derive it from *religare* to bind: OXFORD ENGLISH DICTIONARY *Religion*: etymology (2d CD-ROM ed. 2004).

113 *E.g., id.* at 95 (bk. II, ch. 10). For a description and analysis of Rousseau's attempt and failure, see FITZPATRICK, *supra* note 56, at 148-49.

highest, flawless lawgiver; and that is what the saying 'All authority is from God' means."¹¹⁴ Yet for Kant that law is derived, as "a practical principle of reason," from the imperative that determinate, "presently existing," authority be obeyed and its origin not enquired into.¹¹⁵

At this point, Rousseau emerges as more true to the dictates of modernity than does Kant. To repeat somewhat, Kant would enable and protect the modernist autopositioning of a sovereign authority whereby the sovereign could absorb the illimitable into its existent determinateness and determination. The sovereign was thence impelled into a position of transcendence. That neo-deific condition could be compared to the no more remarkable achievement of monotheism in which the illimitable fuses with a determinate transcendent. Such a "*coincidentia oppositorum*" would be sought out by Nicholas de Cusa "where impossibility appears" and found in a god that is, crucially, "*unitas complicans* or Enfolding Oneness."¹¹⁶ As with Kant, Rousseau likewise sought to realize a unitary supremacy, but when it came to confronting law solely, he sought to realize law's dimensions separately. On the one side was the detached amplitude of the deific lawgiver and on the other the contained emplacement of a people receiving laws. That separation, or some such, is the crux for the modernity of law, and for law as modernity. Yet that same separation is also the structuring of the unity of such law, as I will now try to show.

This is a separation that, as Derrida would put it, is "im-possible, and yet necessary."¹¹⁷ It is necessary in the obvious way that law in its responsive dimension accommodates the unsettlement, the "movement and . . . restlessness" of modernity.¹¹⁸ And the separation is necessary in the related but perhaps less obvious way that the merging of this responsive dimension with the claim to the enduringly determinate would render law as a modernist deific substitute, caught in a transcendent fixity and unable to subsist in its full responsiveness. As for its impossibility, the separation

114 KANT, *supra* note 24, at 95 (6:318).

115 *Id.*

116 See JASPER HOPKINS, NICHOLAS OF CUSA'S DIALECTICAL MYSTICISM: TEXT, TRANSLATION, AND INTERPRETIVE STUDY OF DE VISIONE DEI 159 (2d ed. 1988); HENRY BETT, NICHOLAS OF CUSA 122 (1932); JASPER HOPKINS, A CONCISE INTRODUCTION TO THE PHILOSOPHY OF NICHOLAS OF CUSA [DE POSSEST] 4 (3d ed. 1986).

117 DERRIDA, *supra* note 37, at 85. Derrida is here dealing with, among other things, law and justice, but, as his more extensive engagement with this duo would abundantly reveal, he is doing so in terms that inform my division here between two dimensions of law. DERRIDA, *supra* note 108.

118 See NANCY, *supra* note 89, at 6.

would leave a pure evanescence on the responsive side and a pure stasis on the determinate. So, even though determinate positioning and a responding to what is beyond position are different things, there can be neither enduring position without responsiveness to what is always beyond it nor effective responsiveness without a position from which to respond. However, it is the impossibility of invariant positioning that makes law possible. Even at its most settled, or especially at its most settled, law could not "be" otherwise than in a responsiveness to what was beyond its determinate content "for the time being." If that content could be perfectly stilled, there could be no call for decision, for determination, for law. And it is in the very response to this call, in the making and sustaining of its distinct content, that law "finds itself" integrally tied to a bringing of what is beyond into the determinate.¹¹⁹

The constituent force of law's responsive dimension leaves law with a vacuity of enduring content, a vacuity that will now require us to be more amenable to Rousseau's and Kant's exaltation of the sovereign. "Law itself," says Nancy, "does not have a form for what would need to be its own sovereignty."¹²⁰ Before precipitately concluding that modern law has, after all, to concede supremacy to a sovereign endowing it with force, it would be as well to stress that this vacuity results from the illimitability of that law — a law that must, says Derrida, "be without history, genesis, *or any possible derivation*" of any enduring kind.¹²¹ Since sovereignty will be a sign of a certain predominance in certain types of social formation, it will, in that situation, endow law with content and force, but even in that situation it cannot comprehensively contain or saturate the limitless sources of possible content and affect. In its ever incipient responsiveness and with its inability to be bound definitively to any pre-existent, law is continually oriented to, continually opening to, the possibility of its being otherwise. Law thence moves beyond the assertion of any singular, even predominant power and, in some ultimate sense, receives content and force in its, in law's, own terms. Law receptively responds to possibility, uncertainty, plurality, assembly, and division — to an absence of monadic power.

Now, and at last, it is evident why Kant had to so sternly prohibit

119 All of which does not run counter to the modernist espousal of the rule of law as providing an imperative certainty and predictability. The obdurate clinging to the determinate in law is hardly conducive to certainty and predictability in a restless world.

120 JEAN-LUC NANCY, *BEING SINGULAR PLURAL* 131 (Robert D. Richardson & Anne E. O'Byrne trans., Stanford Univ. Press 2000) (1996).

121 JACQUES DERRIDA, *Before the Law*, in *ACTS OF LITERATURE* 191 (Derek Attridge ed., Avital Ronell trans., 1992) (emphasis added).

enquiry into the origin of the supreme, sovereign authority, and why the law had to be so abruptly subordinated to it, since enquiry would reveal that the law, although amenable in part to sovereign affirmation, could not be contained by it. What an insistent enquiry would also reveal is an "original" and continuing dependence of the supposedly supreme authority on law. This is intimated, as we saw, in Bodin's robust observation that "without law" an "estate could be neither stable nor durable."¹²² Hobbes likewise tied Leviathan to laws. From its transcendent fastness, from its self-elevation as the Something of Deleuze and Guattari, or as Nietzsche's thing-in-itself, the sovereign has still to preserve its being in the importunate world. There it would have to confront, borrowing from Beardsworth, "the *essential* lack of identity to all human organizations."¹²³ What is involved here is not simply an occasional and marginal challenge to the otherwise unchanging identity of the organization as it faces the infinity ever beyond it. Rather the lack is inevitable, and it is integral to the organization itself. What the organization is "for the time being" will always lack in relation to the world's constant dissolvent demands. And that lack is not something supervening on an originary and pristine stability. "All stability in a place," says Derrida, is "but a stabilization or sedentarization": "displacement" or "the process of dislocation is no less arch-originary, that is, just as 'archaic' as the archaism that is always dislodged."¹²⁴ So, the "original" and continuing existence of the sovereign will depend on its ability to form existentially in a constituent combining of "itself" with its lack. To do this, even taking account of resort to "Acts of State" and such, the sovereign has only one continuously projected, amenable, and generally enforceable means, and that means is called "law."

So much is implied by the embedding of *right* in sovereign being. For Bodin, again, "the right to impose laws" is "the principal mark of sovereign majesty."¹²⁵ Or, from the other end of our spectrum of sources, with Kant "the

122 BODIN, *supra* note 30, at 206 (bk. 6, ch. 6).

123 RICHARD BEARDSWORTH, DERRIDA & THE POLITICAL 146 (1996) (emphasis added).

124 JACQUES DERRIDA, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING & THE NEW INTERNATIONAL 82-83 (Peggy Kamuf trans., Routledge 1994) (1993). This need always to re-burnish the sovereign "finish" arises from such an integral and operative openness. For such "finish," see NANCY, *supra* note 120, at 118-19. If that finish were ever successfully set in, say, some totality, the sovereign would eventually be finished in another sense. The seeds of failure of the totalitarian state: "The dimension of law and the dimension of knowledge tend to be effaced . . . insofar as they establish the very condition of human sociability:" CLAUDE LEFORT, THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DEMOCRACY, TOTALITARIANISM 299.

125 BODIN, *supra* note 30, at 32 (bk. I, ch. 8).

sovereign has only rights against his subjects and no duties."¹²⁶ Of course, it could be objected that the sovereign gives itself the right or those rights, but that would be to return us to the aut positioning and the complete ipseity of the sovereign that my argument has for too long now been at pains to undermine. More explicitly, the contrary is the case: the sovereign depends on right not just to institute action but to endow and to continue its very being.

IV. THIRD RESPONSE — OVERCOMING

To return then to the beginning: with the death of God and the existential and moral vacuum that must ensue, Nietzsche's devotees of a gay science are sustained by "a new and hardly discernable type of light" and sustained even in the "deep darkness," "the shadows that must soon envelop Europe."¹²⁷ Luminous expectation, the prospect of an "open sea," endure beyond that clausure of overcoming that many would extract from Nietzsche's most extensive response to the madman's announcing God's death, the discourses of the garrulous Zarathustra with his anticipation of the "superman," or the over-man, the overcoming man — an entirely new condition messianically conceived.¹²⁸ And could we not, uneasily, take Nietzsche as still enlightening us in his madness with the infinitely sad discovery by Overbeck, his best friend, of a Nietzsche "inordinately excited at the piano, singing loudly and raving . . . about himself as the successor of the dead God, the whole thing punctuated, as it were, on the piano"?¹²⁹

The rendition here of Nietzsche's "open" response to the death of God would have to be doubly disappointing for him in that the openness will now be filtered through law and its effect, and Nietzsche's view of law was rather more positivist than this would allow.¹³⁰ Yet to bring its self-generated

126 KANT, *supra* note 24, at 95 (6:319).

127 NIETZSCHE, *supra* note 1, at 199, § 343; on the gay science, see *id.* at 182-83, § 327.

128 *Id.* at 199, § 343. The section just referred to begins Book 5 of *The Gay Science*, NIETZSCHE, *supra* note 1, which was written after *Zarathustra*, NIETZSCHE, *supra* note *.

129 *Déjà vu*, GUARDIAN REV., Nov. 12, 2005, at 23. More expansively, but not necessarily consistently, see LESLEY CHAMBERLAIN, NIETZSCHE IN TURIN: THE END OF THE FUTURE 216-18 (Quartet Books 1996) (1996).

130 This is a difficult generalization since for Nietzsche there were different "laws." In this present setting, the striking difference would be one between the creator who destroys law in its containing fixity — *e.g.*, NIETZSCHE, *supra* note *, at 135-36 (First Part: "Zarathustra's Speeches" § 9) and NIETZSCHE, WILL TO POWER, *supra* note 9, at 282 (§ 521) — and the creator for whom law gives effect to

effects "into being," the law must remain in a responsive range incipiently matching all of life — or at least modern law must do so, since effect can no longer come from some determinative reference apart which produces effect in or through the law. No matter how constrained, how seemingly settled, a law may be, what remains somehow intrinsic to it is an always unsettling, restless appetency for what is illimitably beyond its existent realization. And no matter how difficult it may be to conceive of the force that this illimitable opening-beyond brings to bear in constituting law — a difficulty I will come to in concluding — given the inescapable efficacy of this beyond, it must have some perceptible part within the law.

That part is usually put as values or ideals associated with law, but here I will try to designate that part more exactly and try to render it more integrally to the law. The designation will be one of an extreme ethics — adapting Ghetti's term "the extreme limit of all ethics."¹³¹ There are two extremes involved here, and they can be intimated by way of Hegel's division of the ethical, borrowing Taylor's summary, between the solidity of "moral obligations I have to an ongoing community of which I am part . . . based on established norms and usages" and "an obligation to realise something which does not exist."¹³² As to the first, the ethics proposed here is more extreme than this morality in that it is tied to an existent, to the actual and singular effect produced by the law. As such, the ethics may instantiate and sustain a normative standard but in its singular effect, in the specific case or determination, it is separated from that standard. The second type of ethics, with its realizing of "something which does not exist," corresponds more closely to the other extreme, but this extreme also would go further in being something that cannot exist, a "pure ethics" as Derrida may have put it.¹³³ Allow me now briefly to indicate how the extremes of this extreme ethics combine in a situated overcoming by taking conventionally perceived values or ideals associated with law.

Operatively, impartiality demands "disinterested-interest," borrowing the

unconstrained "life" — *e.g.*, NIETZSCHE, *GENEALOGY OF MORALS*, *supra* note 5, at 53-57 (Second Essay §§ 10-11). But even this latter law is the object of a positivist instrumentalism.

131 Pablo Sanges Ghetti, *Laws of Deliberation: From Audaciousness to Prudence and Back*, 16 *L. & CRITIQUE* 255, 264 (2005).

132 Charles Taylor, *Hegel, History and Politics*, in *LIBERALISM AND ITS CRITICS* 177 (Michael J. Sandel ed., 1984).

133 See DERRIDA, *supra* note 37, at 60.

term from Badiou.¹³⁴ As for interest, and as we saw, law depended for its content on power, and such, apart from itself. So, law will always give effect to particular interest. Yet, as we also saw, law cannot be ultimately beholden to that which endows it with content, and its capacity to give effect can never be confined to particular interest. As for disinterest, the lack of containing ties to particular interest that goes with law's ever responsive dimension orients law towards an absence of attachment to interest. Yet the "pure" impartiality this entails is not finally feasible, and it becomes inevitably compromised in the interest-ridden production of effect, in the judicial decision for example. Such inexorable diminishing does not utterly counter the quality of impartiality. This much can be discerned negatively in that it would not be an answer to a failure of impartiality to say that one was impartial in part. And within any law, for it to be law, there must subsist the possibility of its opening to being otherwise — the possibility of its being without the partiality of its present, determinate existence. This possibility always remains anterior to the law iterably made determinate. The incipience of impartiality remains within that law. So positioned, impartiality is a "manner of being" in law.¹³⁵

Likewise, broadly, with law's generality. If taken to a "pure" extreme, the generality of law in its being oriented beyond any specificity ends in vacuity. In having thence to take on content so as to produce specific effect, or so as to offer the expectation of such effect, the generality of law is pulled to the other extreme. A generality of content then forms appositively in and between the two extremes.

The final example taken here is equality before the law. In the production of its effects, law cannot draw on any social differentiation not ordained by itself. Yet each bringing into effect by the law, and borrowing from Derrida now, "is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely."¹³⁶ Each bringing into effect will call for a "new freshness" in the "interpretation" of coded, general differentiations.¹³⁷ There is, then, an opening, at one extreme, to Melville's "divine equality," to a clearing of all existing differentiation.¹³⁸ In this "pure" dimension equality can only be "before" the bringing to effect by the law. With this bringing to effect, less or more differentiation will

134 ALAIN BADIOU, *ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL* 54 (Peter Hallward trans., Verso 2002) (1998).

135 Cf. JACQUES DERRIDA, *Negotiations, in* NEGOTIATIONS: INTERVENTIONS AND INTERVIEWS 1971-2001, *supra* note 106, at 13.

136 Derrida, *supra* note 108, at 251.

137 *Id.*

138 HERMAN MELVILLE, *MOBY DICK* 124 (Penguin 1994) (1851) (ch. 26).

be (re)instituted. Seen in this more sinuous way, the standard nostrum of equality before the law assumes the same constituent combination as those other instances of extreme ethics, impartiality, and generality.

Like the law itself in modernity, if its condign artefacts just instanced are to remain efficacious, they cannot combine their extremes in some set domain. How then might we conceive of their extremes in combination? The beginnings of an answer could lie in that modernist sociologic outlined earlier,¹³⁹ which, in its "extreme" dimensions, maps onto the ethics just considered. From this sociologic emerged a social bond that, like the concomitant law, combined determinate existence with a protean responsiveness to the infinite demands of the participative. This being together carries a history and a promise both of which could be illustrated by the three instances of extreme ethics, with each being constituted in emphatic opposition to juridical abuses in pre-Revolutionary France and then projected forward in the Declaration of the Rights of Man and of the Citizen. When it comes to combining this history and this promise with the "restlessness" of modernity, with "the uninterrupted disturbance of all social conditions," then the "sense" of this has to be one of "movement," an unabated passing and shifting and reformation.¹⁴⁰ We are left, in all, with no repletion but with a generative inadequacy and "those obstinate questionings/Of sense and outward things,/Fallings from us, vanishings;/Blank misgivings of a Creature/Moving about in worlds not realised . . ."¹⁴¹ For Wordsworth here this lack of realization is something generative, an "intimation of immortality."¹⁴² In this Article the intimation becomes an attenuate messianism, the opening "to come" that is here and now, in and of law — not an overcoming, but an infinite coming.¹⁴³

139 See text accompanying *supra* note 102.

140 Returning to MARX AND ENGELS, *supra* note 88, and to NANCY, *supra* note 89.

141 WILLIAM WORDSWORTH, *Ode: Intimations of Immortality from Recollections of Early Childhood*, in WORDSWORTH POETICAL WORKS 461 (1936).

142 *Id.* at 460.

143 For a congregation of these themes, minus law, see Jacques Derrida, *Remarks on Deconstruction and Pragmatism*, in DECONSTRUCTION AND PRAGMATISM 77, 82-83 (Chantal Mouffe ed., 1996). Nietzsche can have something of a last word in that with his so-called perspectivism this infinity would be one that is apparent in the perspective of the here and now: "The 'apparent' world is the only one: the 'real' world has only been *lyingly added*." NIETZSCHE, *Twilight*, *supra* note 5, at 36 (Section 2 of 'Reason' in Philosophy).