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Peter Fitzpatrick

Law as Resistance

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Modernism, Imperialism, Legalism

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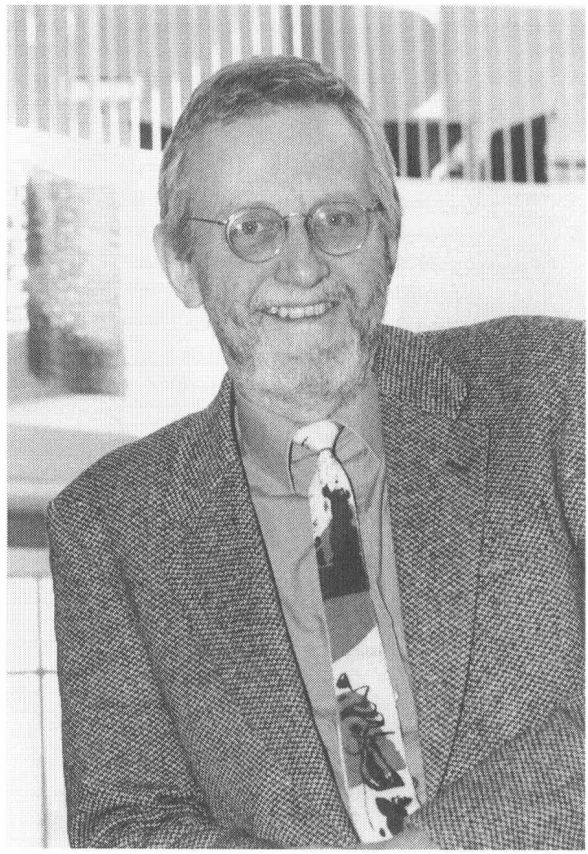
Series Editor's Preface

Collected Essays in Law makes available some of the most important work of scholars who have made a major contribution to the study of law. Each volume brings together a selection of writings by a leading authority on a particular subject. The series gives authors an opportunity to present and comment on what they regard as their most important work in a specific area. Within their chosen subject area, the collections aim to give a comprehensive coverage of the authors' research. Care is taken to include essays and articles which are less readily accessible and to give the reader a picture of the development of the authors' work and an indication of research in progress.



Peter Fitzpatrick

Introduction

> 'It's 4 A.M. Nasruddin leaves the tavern and walks the town aimlessly. A policeman stops him. "Why are you out wandering the streets in the middle of the night?" "Sir," replies Nasruddin, "if I knew the answer to that question, I would have been home hours ago!"' Rumi[1]

This introduction will offer a theory of resistance and then present law as its paradigm, invoking the chapters ensuing in support. The modest subtitle – *Modernism, Imperialism, Legalism* – is also accommodated in the process.

There is a convenient poverty to occidental conceptions of resistance in social and legal thought. The very etymology is compliant: *re*-back and *sistere* to stand, hence *resistere*, to stand back, to withstand.[2] The impoverished conceptions of resistance tend then to reflect the etymology. Resistance stands back in a position apart, a position from which it tends to affirm the integrity of what is resisted, a position from where it elevates what is resisted whilst itself becoming diminished and parasitic. So we find that even with finely observed and sympathetic accounts, the monumental solidity of what is resisted confronts a resistance rendered as local or quotidian, reactive or dependent, interstertial or evanescent.[3]

There are other conceptions of resistance that would rescue it from this abjection.[4] This is a more robust resistance that has a sustainedly effective

1 Rumi (1995), *The Essential Rumi*, trans. Coleman Barks, San Francisco: HarperSanFrancisco, p.2

2 Walter W. Skeat (1963), *A Concise Etymological Dictionary of the English Language*, New York: Capricorn Books, p.444.

3 For admirable instances see Elizabeth Mertz (1994), 'A New Social Constructionism for Sociolegal Studies', *Law & Society Review*, **28**, pp.1243-65; Jean Comaroff (1985), *Body of Power, Spirit of Resistance: The Culture and History of a South African People*, Chicago: University of Chicago Press; J. C. Scott (1985), *Weapons of the Weak: Everyday Forms of Peasant Resistance*, New Haven: Yale University Press.

4 For a compendious account of conceptions of resistance relevant to what follows in the text see Gregor McLennan (2005), 'Resistance', in Tony Bennett, Lawrence Grossberg, and Meaghan Morris (eds), *New Keywords: A Revised Vocabulary of Culture and Society*, Oxford: Blackwell, pp.309-11. And for poststructrual varieties of resistance more extensively accounted for than my explicitly focused rendition here see David Couzens Hoy (2004), *Critical Resistance: From Poststructralism to Post-Critique*, Cambridge MA: The MIT Press.

force. It not only prevents, say, power or a power overwhelming it but is also integral to that power. Resistance in this conception is not, or not just, parasitic on power. Rather, power depends on resistance. Which, with a touch of inevitability, is where Foucault enters, but enters with what could be counted an instance of his self-congratulatory claims to inconsistency. Notoriously, the Foucault concerned with power saw it as having such an encompassing and all-pervasive reach as to preclude, one would have thought, the very possibility of resistance.[5] And indeed, Foucault does present resistance as having a subordinate 'role of adversary, target, support or handle in power relations'; it 'is never in a position of exteriority in relation to power'.[6] Yet this role of resistance is pressed by Foucault as one on which the 'existence' of 'power relationships' depends.[7] Not only that, the 'plurality of resistances' is not something 'doomed to perpetual defeat' but is, rather, 'inscribed in' relations of power 'as an irreducible opposite'.[8] Furthermore, it is not just the case that power for Foucault does not encompass resistance; power can also be encompassed by resistance. There can be a 'strategic codification of...points of resistance that makes a revolution possible'; and something always remains impelling resistance within power, thus making possible 'an insurrection of subjugated knowledges' and 'anti-authority struggles'.[9] Still, something does endure of the impoverished notion of resistance with which we started. Despite his famed insistence on power coming from below, its being an unencompassable multiplicity of powers, Foucault would still accord it 'dense' concentrations around which one finds a resistant plurality – 'the swarm of points of resistance'.[10] Yet, the inevitable contrary, Foucault would invert the primal emphasis on power and its concentrations by advancing 'a new economy of power relations' which 'consists in taking the forms of resistance against different forms of power as a starting point'.[11] So, and for example, 'to find out what our society means by "sanity," perhaps we should investigate

5 E.g. Michel Foucault (1980), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, trans. Colin Gordon et al., Brighton: The Harvester Press, p.142.

6 Michel Foucault (1981), *The History of Sexuality, Vol.1: An Introduction*, trans. Robert Hurley, Harmondsworth: Penguin, p.95.

7 *Ibid.*

8 *Ibid.*, p.96.

9 *Op. cit.* note 5, p.81; Michel Foucault (1982), 'Afterword: The Subject and Power', trans. Leslie Sawyer, in Hubert L. Dreyfus and Paul Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics*, Brighton: The Harvester Press, pp.208-26 at p.211.

10 Foucault *op. cit.* note 6, p.96.

11 Foucault *op. cit.* note 9 (1982), p.329.

what is happening in the field of insanity. And what we mean by "legality" in the field of illegality'.[12]

That advocacy resonates with Foucault's exalting 'transgression', an ontologically more consistent character than his 'resistance', and one which will be presumptuously taken here as fused with resistance. Transgression for Foucault goes to constitute the norm, the zone of the norm: it 'affirms limited being – affirms the limitlessness into which it [transgression] leaps as it opens this zone to existence for the first time'.[13] Yet even as it remains apart from and dangerous to the norm, and even as 'no content can bind it, since no limit can possibly restrict it', transgression derives from the norm: it is known, it appears, in its movement, in its constantly crossing the limit demarcating the norm.[14] Transgression may 'leap' into 'limitlessness' but it is always returned to what is 'interior and sovereign'.[15] There is, as between transgression and the norm, a mutually constituent surpassing. Transgression and the limit demarcating the norm 'depend on each other for whatever density of being they possess'.[16]

The obvious drama of offering law as resistance now comes into play. Law, and not least in Foucault's perception of it, is on the side of the norm. It is that which is transgressed and resisted. Its content and, in most perceptions of it, its very constitution are emanations of some predominant power – of a sovereign, a class, a disciplinary regime, of 'the already established, already stifling reign of society'.[17] Law, legalism, posits these emanations, makes them positive and determinate, endowing them with a referential certitude. Yet as Foucault has also and so vividly asserted, law is of 'the outside that envelops conduct, thereby removing it from all interiority; it is the darkness beyond its borders...'.[18] Foucault then goes on to ask of this 'space of transgression':

> How could one know the law and truly experience it, how could one force it to come into view, to exercise its powers clearly, to speak, without provoking it, without

12 *Ibid.*.

13 Michel Foucault (1977), 'A Preface to Transgression', in Michel Foucault, *Language, Counter-Memory, Practice*, trans. Donald F. Bouchard and Sherry Simon, Ithaca: Cornell University Press, p.35.

14 *Ibid.*, pp.32-6, with the quoted part at p.36.

15 *Ibid.*, p.32.

16 *Ibid.*, p.34.

17 Jean-Luc Nancy (1981), *The Inoperative Community*, trans. Peter Connor, Minneapolis: University of Minnesota Press, p.17.

18 Michel Foucault (1987), 'Maurice Blanchot: The Thought from Outside', trans. Brian Massumi, in Michel Foucault and Maurice Blanchot, *Foucault/Blanchot*, New York: Zone Books, p.34.

> pursuing it into its recesses, without resolutely going ever farther into the outside into which it is always receding?[19]

That comes from an engagement with Blanchot who would add in another setting:

> Law...exists only in regard to its transgression-infraction and through the rupture that this transgression, infraction believes it produces, while the infraction only justifies, renders just what it breaks or defies.[20]

And Blanchot would shed this further light on the darkness beyond:

> Let us grant that the law is obsessed with exteriority, by that which beleaguers it and from which it separates via the very separation that institutes it as form, in the very movement by which it formulates this exteriority as law.[21]

The very formulation of the law, its delimited content, is provoked and instituted by what is 'other' to it, by what continually, transgressively 'attempt[s] to attract the law to itself',[22] ever challenging law's determinacy. On the other side as it were, so as to accommodate its 'exteriority as law', law has to be responsive to alterity, has to be receptively formative. Caught between determinacy and alterity, law becomes self-resistant.

Now, in a feat of 'fabulous retroactivity',[23] I offer an overview of the collection lent coherence by this theorizing of resistance and of law as resistance. The opening chapter escapes that scheme. It is a recent interview with Jill Stauffer, really a joint work, which is meant to flesh out this somewhat schematic introduction by summarising some of the more engaged contexts of the collection. The rest of the collection is then arranged chronologically. Its trajectory can be readily summarised. Initially, and in its subordination to dominant power, law is allowed a resistance only of the impoverished or weak variety. The collection then proceeds cumulatively to reverse itself by inverting that position and finding that law subsists in a relation of independent or 'strong' resistance to erstwhile dominant power. That relation, however, is found also

19 *Ibid.*

20 Maurice Blanchot (1992), *The Step Not Beyond*, trans. Lycette Nelson, Albany: State University of New York Press, p.24.

21 Maurice Blanchot (1993), *The Infinite Conversation*, trans. Susan Hanson, Minneapolis: University of Minnesota Press, p.434.

22 Foucault *op. cit.* note 18, p.35.

23 The phrase is borrowed from Jacques Derrida (1986), 'Declarations of Independence', trans. Tom Keenan and Tom Pepper, *New Political Science*, **15**, pp.7-15 at p.10.

to be consistent with law's being but weakly resistant. The insinuate mystery of that disjunction will, I hope, be shown to characterise law appropriately. I will now amplify and illustrate this overview by drawing on the chapters in the collection.

The orotund opening to the chronology, '"The Desperate Vacuum": Imperialism and Law in the Experience of Enlightenment', depicts a self-universalized occidental power fusing in and as itself the collection's sub-titled themes of modernism, imperialism and legalism. Although law here is instrumentally subordinated to such power, a reversal of that condition is intimated by the constituent dependence of that power on a negative reference, on the exclusion of certain others conceived of in such terms as savagery and barbarism. This power could arrogate the universal to itself only because the negative reference freed it from its delimited ipseity, and thence from the impossibility of being positively universal. Yet, if what is excluded in the negative reference were to enter the realm constituted in the exclusion, that realm would disintegrate. What is more, the universalized formation itself provokes that disintegration by having, in its terms, to extend incorporatively to the very elements it excludes. All of which would seem to provide a significant hold for resistance. For law, the turning worm emerges in the next chapter, 'Law as Resistance'. This law is itself intriguingly inconsistent. It is found to be abjectly subordinate to dominant power, ever emptied of its existent content when that power so requires, and thence only ever provisionally and weakly resistant. Thus far, the standard, weak notion of resistance departed from in the earlier theorizing of the concept. Yet this same chapter posits pockets of resistance in and as law and these are seen, albeit vaguely, as derived from something of an enduring quality of law.

The concerns of those two chapters are combined in the next, 'Law's Infamy'. Here modern occidental law, most conspicuously in its imperial utility, takes identity by way of a refined negation. As determinate order, this law constituently opposes the wild disorder of savagery. As dynamically responsive to change, such law opposes the static order of a torpid savagery. So, the dimensions of this savagery are a negative reflection of the dimensions of law that emerged from the earlier offerings of Foucault and Blanchot – law's determinacy and its responsiveness to alterity. And as 'Law's Infamy' would stress, along with such later chapters as 'Breaking the Unity of the World: Savage Sources and Feminine Law' (chapter 10),[24] the savagery involved here is a projected condition of the Occident itself.

24 This chapter comes from a special issue of *The Australian Feminist Law Journal*, **19**, edited by Jennifer Beard and Sundhya Pahuja, 'Divining the Source: Law's Foundation and the Question of Authority'.

The ensuing chapter 6, 'Tears of the Law: Colonial Resistance and Legal Determination', now becomes pivotal.[25] It is a theorized history of an unremarked revolution in colonial Papua New Guinea when resistance to the system of indentured labour transformed not only the labour relation but the entire legal system, rendering both in what could broadly be seen as liberal terms. Law and liberalism are things that, of course, can come only from the civilizing colonist. They are things intrinsically contrary to the colonized savages and to their ways. Yet it was the resistances of the colonized and not imperial importation that initiated a decolonized legal and economic order. This was done in part negatively through resistance against the authoritarian system of indentured labour. This resistance, through the cumulation of its 'everyday' forms and through extensive organization, created conditions in which that system could no longer operate. Positively, resistance involved, against great odds, sustained and effective demands on colonial law for it to honour its attenuated promise of liberal legality. No part of this resistance, no trace of such 'native' origins of liberal legality, mark its post-colonial presence in Papua New Guinea, nor does this resistance figure in the standard stories of national liberation.[26]

The immediate theoretical impetus of this history is that the resistance and its outcome sharply identify the responsive dimension of law, its self-resistant capacity. Colonial law concentrated the professedly universal 'civilizing mission' of the colonist.[27] The rule of that law was premised on the colonist's comprehensive superiority. From that exaltation, the colonist and colonial law could know and speak for the natives infinitely better than they could know and speak for themselves. Where the law or 'custom' of the colonized was allowed some effect, this was always limited and subject to an overriding colonial rule. Colonial law, then, was the apotheosis of legalism, of law isolated in its determinate dimension. The practical problem left by this isolation was poignantly put by the colonial governor of Bombay in the middle of the nineteenth century when he remarked on 'the perilous experiment of continuing to legislate for millions of people, with few means of knowing, except by a

25 The chapter comes from a festschrift for Brian Simpson, hence the celebration of his work there.

26 A not uncommon fate, of course, for effective 'popular' resistances: see e.g. Peter Linebaugh and Marcus Rediker (2000), *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic*, London: Verso. And cf. the force of 'forgetting' drawn on in chapter 13 of the present collection.

27 See e.g. Robert A. Huttenback (1976), *Racism and Empire: White Settlers and Colored Immigrants in the British Self-Governing Colonies*, 1830-1910, Ithaca: Cornell University Press, pp.13-21.

rebellion, whether the laws suited them or not'.[28] More to the present point, the colonized, both in Papua New Guinea and elsewhere, also resisted through law's responsive dimension, using it to infiltrate, transform and, in effect, take over the erstwhile colonial system.[29] That entry of the colonized presages the end of a rule based on their exclusion.

The matching theory in this chapter renders law as something of an ontological osmosis. There is a manifest antimony between law's determinacy and its responsiveness to alterity, its self-transgression. Yet, the chapter goes on to argue, these two dimensions of law are not only opposed, and necessarily opposed, they are also essential to each other. The next chapter – chapter 7 'Why the Law is Also Nonviolent' – amplifies this generative antinomy by setting it against Robert Cover's lauded theorizing of law. And the rest of the collection could be read as elaborations of the antinomy in various settings such as feminism, international law, and 'American empire'. These elaborations not only expand the purchase of the antinomy but also seek to identify what it is 'in' law that is resistant and, as part of that endeavour, to explore the relation between the force of that resistance and the powers that it resists, such as the power concentrated in the nation-state and in modern empire.

That prospectus is bridged to the story so far in the next chapter, chapter 8 on '"No higher duty": *Mabo* and the Failure of Legal Foundation'. Here the resistance through law and as law comes from an indigenous people radically marginalized in the constitution of national power, yet their resistance disintegrates that power. The chapter focuses on the *Mabo* case in the High Court of Australia, a case in which the plaintiffs sought declarations as against the State of Queensland that they had certain rights in their ancestral lands.[30] They sought to establish this in the face of a colonial settlement founded on the assertion that the land appropriated was *terra nullius*, a not uncommon legal claim putatively founding colonies but one no more justifiable in this case than in any other. Advisedly, given existing legal authority, the plaintiffs did not seek to expose the factual falsity of this 'prerogative' claim. Such restraint enabled the case to be considered and decided in terms of a conflict between the parties over proprietary entitlement to the land, the court having 'no...

28 See A. P. Thornton (1965), *Doctrines of Imperialism*, New York: John Wiley & Sons, p.181.

29 See e.g. Partha Chatterjee (2002), *A Princely Imposter? The Strange and Universal History of the Kumar of Bhawal*, Princeton: Princeton University Press, pp.xiii, 376-9; Peter Fitzpatrick (1989), 'Crime as Resistance: The Colonial Situation', *The Howard Journal*, **28**, pp.272-81.

30 *Mabo v The State of Queensland (No.2)* (1992) 175 Commonwealth Law Reports 1. The chapter comes from a special issue of *Law and Critique*, **13**, devoted to *Mabo* and edited by Stewart Motha and Colin Perrin, 'Deposing Sovereignty After *Mabo*'.

higher duty' than this.[31] Such a sanitized containment would keep the conflict within the terms of the settlers' legal system. That would avoid the question of the founding validity of settlement and, it could be added, the question of the court's own authority. However, given the nature of the plaintiffs' 'original' claim to title in their lands, some consideration of the quality of colonial settlement was inevitable, but the judgements went further than that would require and, exemplifying the tribute that bad faith pays to responsibility, the judgements considered the question of founding validity obsessively. That consideration went so far as to acknowledge the invalidity of the 'doctrine' of *terra nullius* but the annihilation of the nation's and the court's foundation was avoided by something just as arbitrary, by a self-denying ordinance against the courts challenging the 'prerogative' power of colonial acquisition and its founding effect.

When the more adventurous faced a similarly terminal encounter, they have been driven to an uneasy ipse dixit. So, Chief Justice Marshall of the Supreme Court of the United States, in what is still considered the 'leading case' of *Johnson v M'Intosh* decided in 1823, found that to deny Indian peoples effective title to their lands was not justified, or not entirely justified, by acquisitive colonial claims such as those to 'discovery' of the land, and even though he also considered that this denial 'may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual conditions of the two people [the Indian people and the settlers], it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice', courts which have in the end to obey 'the government' which has 'given us the rule of our decision'.[32]

Which restless resolution brings us to the crunch issue introduced by this chapter, an issue on which the rest of the collection turns. It comes by way of a contradiction in Kant. As a modern of mythic proportions, Kant aptly sees that we – we modern, surpassing subjects – come together to generate law and to constitute the sovereign but, by way of an interdiction opening this chapter 8 on *Mabo*, he subjects these abilities to an implicit and inarticulate temporality which carries a prohibition against enquiry into the origin of such authority. Thus, he tells us with emphasis, '[a] people should not *inquire* with any practical aim in view into the origin of the supreme authority to which it

31 See *ibid.* pp.183-4.

32 (1823) 21 United States Reports 543, at pp.572, 591-2. For this and other unquiet forays see Peter Fitzpatrick (2004), '"We know what it is when you do not ask us": The Unchallengable Nation', *Law.Text.Culture*, **8**, pp.263-86, and Hanri Mostert and Peter Fitzpatrick (2004), '"Living in the margins of history on the edge of the country" – Legal foundation and the Richtersveld community's title to land', *Journal for South African Law*, **2004**, pp.309-23, 498-510.

is subject'.[33] To support this attenuation of the Enlightenment injunction that we must dare to know, Kant offers this legerdemain as imperative: if a people are 'to judge with rightful force about the supreme authority' that people must be 'already united under a general legislative will' and thence it cannot 'judge otherwise than as the present head of state...wills it to do', a head of state having 'every right'.[34] Kant then goes on to affirm the pointlessness of 'subtle reasonings' about the state beginning with a social contract, or about 'whether power came first and law arrived only afterwards, or even whether they should have followed in this order'.[35]

There is much to be accommodated here, but returning to chapter 8 and the resistances of indigenous peoples, what these resistances go to undermine is the monist claim to supreme and exclusive authority. Staying close for now to the Kantian source, we could focus immediately on that authority's constituent claim to right. That claim would appear to be denied its monist completeness or even integrity with indigenous peoples having achieved in *Mabo,* and elsewhere, a 'recognition' that they have rights as indigenous people, a recognition meant to rectify in some measure the 'original' denial to them of any rights in the founding of national authority. Such recognition, as Shakespeare might have it, is the 'little pin' that '[b]ores through his castle wall, and farewell king!'.[36] The recognition of rights as inherent to indigenous people as indigenous, and not as derived from the erstwhile monist and 'supreme authority' having 'every right' in Kant's terms, opens that authority to an apposite right of the indigenous and embroils it in a plurality. Understandably enough, then, indigenous rights in *Mabo* and elsewhere are made subordinate to the 'national' legal system but, without more, that would still leave an indigenous right which could develop in its own terms, a development enabled by right being a generative response to, and normative hold on, futurity.

Inevitably there is more. The rights are not only subordinated to the 'national' legal system, they are also contained within a distinctly neo-colonial frame, one in which indigenous rights are set by the national legal system as invariant or only marginally varying 'custom' or 'culture'. Should these talismans change, they disappear along with the rights made dependent on them. The reason for confining indigenous rights in this condition of stasis is revealed by Chief Justice Lamer in a leading Canadian case of *R v van der Peet* where he cautions, with emphasis, that the recognized rights 'are *aboriginal*', and that

33 Immanuel Kant (1996), *The Metaphysics of Morals*, trans. Mary Gregor, Cambridge: Cambridge University Press, p.95 (*No.6: 318*) his emphasis.

34 *Ibid.*. Only 'attentuated' because, presumably, inquiry without any practical aim in view would remain exempt.

35 *Ibid.*

36 *Richard II,* Act 3 Scene 2.

this 'aboriginality' means that 'the rights cannot...be defined on the basis of the philosophical precepts of the liberal enlightenment', on the basis of their being 'general and universal'.[37] In other words, such rights could not adaptively and universally extend to the infinitely changing future condition of indigenous society but had to remain the same, or much the same, as they supposedly ever were. Since that extensive capacity is essential to rights, we are left with the absurdum that the 'rights' recognized cannot be rights. If, in sum, they were so recognized, the ultimately exclusive hold of the nation-state on right and authority would be broken, and broken in a way that would fragment the colonizing foundation and continuate determinacy created in the 'original' denial of rights to indigenous peoples.

The implications of this dénouement for occidental assertions of a surpassing monism will be taken up shortly when considering the remaining chapters in the collection, but to introduce that consideration, and by way of a final borrowing from chapter 8 on *Mabo,* there we find Kant's injunction against inquiry followed by another that shores up supreme authority through a 'law' he advances as necessary for it:

> 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.[38]

At which point one may perhaps be forgiven for wondering if there ever was Enlightenment. Most of the remaining chapters in the collection would now take this wonderment further by emplacing within modernism the very theologic it would ostentatiously displace, the opposition between them having more to do with their similarity than with their vaunted difference. That emplacing of the theologic in the modern is not a matter of pre-modern and aberrant 'survivals', neither is it the effect of some transitional adaptation. Rather, so the chapters argue, occidental modernism is commensurate with a pre-modern theologic, although that modernism is not without its own distinct contributions, contributions in which law, law as resistant, proves to be central – as we shall see. And departing from the story so far, the quest from now becomes a search for the terms in which law's disparate yet mutually constituent dimensions, its determinacy and its responsiveness to alterity, can be combined. This is a seemingly perverse search for the transcendent in the modern. And here we

37 [1996] 2 Supreme Court Reports 507, paras 17-19.

38 *Kant* op. cit. note 33, p.95 (*6: 318*) – his emphasis.

have to depart from Foucault and his generous endowment of these dimensions of law, including law's self-resistance, even if Foucault has provided some passing provocations on the significance of the transcendent.[39]

Such an ostensible retrogression follows and links two trajectories. With one, modern law as the combining of its two dimensions is found to have a quasi-theological origin and role in such pieces as chapter 9, '"Gods would be needed...": American Empire and the Rule of (International) Law', and chapter 13 'Latin Roots: Imperialism and the Making of Modern Law'. With the other trajectory, there is an account of the 'secular theology' or 'political theology' constituting the 'new idols' of modernism, to borrow Nietzsche's term,[40] such deific substitutes as the nation, sovereignty and modern empire. This account of the new idols is found most extensively in chapter 14, '"What are the gods to us now?": Secular Theology and the Modernity of Law', along with the exemplum provided by that most idolatrous of new idols, the nation, in chapter 5 '"We know what it is when you do not ask us": Nationalism as Racism'. As well, these chapters attempt to theorize the mutual formation of modern law and the new idols, but before coming to that mutual formation something should be said about the new idols themselves. Following current academic fashion, sovereignty will be taken as an instance.

Like its exhausted predecessors, most pointedly the monotheistic deity, modern sovereignty must marvellously combine being determinate with an unconstrained efficacy. Unlike those predecessors, it has to do this without recourse to a transcendental reference fusing these two contrary dimensions. Rather, this sovereignty can enclose itself yet extend indefinitely, subsist finitely yet encompass what is ever beyond it, qualities further explored in chapter 12, 'Bare Sovereignty: *Homo Sacer* and the Insistence of Law'. Clearly, sovereignty cannot be adequately rendered in simple objectness. Its determinacy has to be a process of continual constitution, of 'totalizing itself', of 'gathering itself by tending toward simultaneity'.[41] Yet this very effort at sovereignty's self-generating supremacy ensues from the necessity for sovereignty to responsively incorporate and assemble the multitude of

39 Foucault discerns that in modernity transgression 'prescribes not only the sole manner of discovering the sacred in its unmediated substance, but [is] also a way of recomposing its empty form': Foucault *op. cit.* note 13, p.30. And more generally for Foucault's intriguingly mixed relation to 'the transcendental' see Michel Foucault (1989), *Foucault Live*, trans. John Johnston, New York: Semiotext(e), p.79.

40 Friedrich Nietzsche (1954), *Thus Spoke Zarathustra*, trans. Walter Kaufmann, as reprinted in Walter Kaufmann (ed), *The Portable Nietzsche*, New York: The Viking Press, p.160 (First Part 'On the new Idol').

41 Jacques Derrida (2005), *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas, Stanford: Stanford University Press, p.39.