The Juridical Prism:
Modernity's Transmutation of the Religious, As Refracted Through Secularist Law

by

Andrew Michael Wender
B.A. (Honors), Western Washington University, 1994
J.D., Seattle University School of Law, 1997

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## ABSTRACT

Modern, Western, secularist legal systems are, in actuality, religious legal systems. The religious bedrock underlying secularist legal systems is the same as the transmuted, and therefore immanentist, faith and creed that underlies the essential mindset and spirit of modernity. Secularist legal systems may be conceived of as semeiotic prisms that refract modernity's relocation, within the phenomenal world, of the transcendence and divine presence of Ultimate Reality. As prisms that bring to light secularist law's customarily unrecognized and unacknowledged, immanentist religious foundation, secularist legal systems express modernity's faith. Further, secularist law acts to validate, enforce, and propagate modernity's religious orthodoxy. Among modernist polities, the United States functions as a bellwether in the modern, Western, civilizational drive to globally proselytize, through the bringing to bear of state power, modernity's worldly religious tradition. Secularist law's unspoken, religious import is powerfully intimated by two interdependent signs that are interwoven within the semeiotic texts comprised by secularist legal systems. Each of these signs embodies one in a pair of reciprocally reinforcing ideas that are avatars of the secularist juridical mind. First is secularist law's idea that all existents – corporeal and non–corporeal; biological and non–biological; human and non–human – are subject to one or another property holder's personal, proprietary claim. Second is the idea that humans, who are in their ontological essence proprietors, have a rightful, transactional power over all existents (inasmuch as all things

that exist can be conceived of as property). As these two ideas presuppose that all existing things are reducible to a tangible, proprietary form that is subject to human ownership, ordering, and exchange, they elevate to a presumed level of metaphysical absoluteness both the human proprietary claim and transactional power over existing things, and the things, themselves. The inquiry construes the underlying, religious significance of the two ideas – that is, it reads these two signs – as they occur within the following, ontologically all–encompassing, areas of secularist law: environmental jurisprudence; intellectual property law; and legal doctrine governing the ownership and alienation of human, biological property.

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# Chapter 1

## Introduction

## I. Overview of the Inquiry

### *A. The Ontological and Epistemological Nonseverability of Religion and Law*

This doctoral dissertation asserts that modern, Western, secularist legal systems, whether arising within the context of the common law tradition, the civil law tradition, or transnational legal regimes, are, in actuality, religious legal systems. The phrase, secularist legal systems, denotes those systems of law that derive from a purported, metaphysical and institutional severance between the supposedly distinct realms of the religious and the political (that is, between "church and state"). It follows from this that, on the secularist view, a separation between the religious life and the law of the modern, civil state is both possible and desirable. In characterizing secularist law in this way, I am chiefly concerned, as an historical consequence of the rise to global predominance of democratic liberalism and free–market capitalism, with present–day, Western systems of law that are imbued with one or another form of this ideological and political–economic doctrine.[1] Secularist legal systems presuppose that the role of the modern, civil state is to maintain a stance of staunch neutrality with respect to the question of whether any particular religious position is, or is not, valid and true. The dissertation maintains, however, that the seeming absence from modern, Western, secularist law of an underlying, religious orthodoxy that is both expressed and enforced by the law is illusory.

In so arguing, the dissertation disputes the basic possibility of ever severing a system of law, at any point in history and within the ambit of any civilization, from the religious bedrock which inexorably grounds a legal system. This is so, whatever the

content and form of such a bedrock faith. Further, I aver that the political structures and mechanisms which make it feasible for a system of law to operate upon a populace derive their claimed legitimacy, necessarily, from inherently religious, first principles.

The dissertation's line of analysis turns, in the first instance, on the metaphysical postulate that any given legal system, together with the matrix of political norms, factors, and conditions from within which the legal system springs forth and operates, constitutes a portion of contingent reality. In other words, the bare existence of a legal system and its actuating, political context is inescapably contingent upon the one, supra–phenomenal Ultimate Reality. Emanating from Ultimate Reality, through a process of continuous creation, is the remaining plenitude of reality, including (but not limited to) phenomenal being. The Ultimately Real, or, the Absolute, endlessly sustains and perfectly transcends contingent reality, and, as such, also imparts to contingent reality ontological hierarchy, as well as divine unity. As part of this relation to the created world, the Absolute manifests throughout creation, by means of a multiplicity of theophanies, an infinitely proximate, yet transcendent, divine presence.[2]

The human longing for and devotional response to Ultimate Reality is a timeless and universal, faith–based impulse that is rooted at the base of human consciousness, and involves the totality of the person as he or she exists both privately and within the social world. This impulse constitutes, in essence, the core of the religious life.[3] In keeping with this, the religious life of humankind is bound intimately together with all facets of knowledge and the process of knowing.[4] Human knowledge of contingent reality is shaped by the variant ways, dependant on historical and civilizational context, in which the human mind perceives and integrates the latent, intuitive awareness of the Absolute

that (whatever its earthly limitation) has been conferred, as a gift of divine creation, upon the human intellect and heart. Along with this, our knowledge of contingent reality is shaped by an experiential awareness of the Absolute, similarly dependant on historical and civilizational context, which results from theophanic manifestations of divine presence pervading the created world.[5] As such, the human conception and experiencing of Ultimate Reality informs in a religious way, at a fundamental, cognitive level, humankind's ascription of meaning and significance to the entirety of contingent reality, including law and politics. On this line of reasoning, it may be inferred that the Absolute not only is the originating font of contingent reality, but is, as well, the final referent, acknowledged or not, of humankind's cognitive engagement with contingent reality.[6]

The dissertation indicates, then, that the final meaning and significance of any type of legal system – whether, for instance, Judaic, Islamic, Christian (as in the sense of the canon law of the Catholic Church), Hindu, Buddhist, or modern, Western, secularist – derives from the predominating, religious tradition in which the law is rooted. This follows on the idea that a religious tradition encompasses a communally shared (while historically mutable and intrinsically variable) mode of responding to Ultimate Reality, which is ubiquitously manifested in the lives of adherents to the tradition. In sum, the modernly purported severance of the religious from the political, and of the religious life from the law of the modern, civil state, represents an ontological impossibility, because it denies the derivation of contingent reality from Ultimate Reality. Further, this purported severance represents an epistemological delusion, because it fails to capture the ineluctable, religious foundation grounding humankind's cognitive construal of the import of all aspects of existence.[7]

### *B. Modernity's Transmutation of the Religious, As Refracted Through Secularist Legal Systems*

In the light of the foregoing, the dissertation's line of analysis is premised on the assertion that the religious bedrock underlying secularist legal systems is the same as the intrinsically transmuted faith and creed that underlies the essential mindset and spirit of modernity. This modernist religious orthodoxy is transmuted, in the sense that it silently presupposes that the transcendence and divine presence of Ultimate Reality have been injected and confined within the phenomenal world. Hence, modernity's transmuted religious tradition is fundamentally immanentist; this is the case, inasmuch as the tradition effectively relocates the transcendent, divine referent of religious experience, practice, and doctrine within the world of space, time, and materiality.

Following on this assertion, I maintain that secularist legal systems may be conceived of as semeiotic prisms that refract modernity's relocation, within the phenomenal world, of the transcendence and divine presence of Ultimate Reality. On the train of reasoning that I present herein, the religious semeioticity of secularist legal systems is paralleled by the religious semeioticity of all other systems of law. As the final meaning and significance of any legal system derives from an underlying, religious tradition, every system of law constitutes a text that is composed of interwoven signs which, for a perceptive reader, intimate a source of religious meaning lying at the base of the law. Within the mind of an interpreter who seeks to construe the religious import of a legal system, the system and its constituent signs function as prisms. These "juridical prisms" display for the interpreter the principles and tenets of the religious worldview imbuing the law, while at the same time helping him or her to distinguish among the powerful, institutional outgrowths of the law's religious bedrock.

Conceiving of secularist legal systems as prisms that reveal religious meaning emanating from an effectively worldly, divine referent helps the interpreter to surmount the illusory, modernist, epistemic presupposition that the law of the modern, civil state is unfettered by the dictates of faith and religious belief. Upon depicting systems of secularist law as prisms that bring to light the law's customarily unrecognized and unacknowledged, religious foundation, the dissertation analyzes how secularist law acts to express modernity's canonical faith and creed. Further, the dissertation examines how secularist legal systems act also, by means of the authority, coercive power, and capacity for violence endowed to the law by the modern, civil state and transnational, political entities, to validate, enforce, and propagate ecumenically modernity's immanentist religious orthodoxy. In this connection, the dissertation suggests that, among modernist polities, the United States functions as a bellwether in the modern, Western, civilizational drive to globally proselytize, through the bringing to bear of state power, modernity's worldly, religious tradition.

### *C. Secularist Law's Dual Conceptions of a Human, Proprietary Claim and Transactional Power Over All Existents: Two Signs of Modernity's Transmutation of the Religious*

I focus my reading and construal of secularist law's unspoken, religious import on the interpretation of two interdependent signs that are interwoven within secularist legal systems, and that, as such, tell of the juridical imagination that is grounded in modernity's religious orthodoxy. Each of these signs embodies one in a pair of reciprocally reinforcing ideas that are avatars of the secularist juridical mind. The first of the signs embodies secularist law's idea that all existents – corporeal and non–corporeal; biological and non–biological; human and non–human – are subject to one or another

property holder's personal, proprietary claim. The second sign embodies the secularist, juridical idea that humans, who are in their ontological essence proprietors, have a rightful, transactional power over all existents (inasmuch as all things that exist can be conceived of as property). As these two ideas presuppose that all existing things are ontologically reducible to a tangible, proprietary form that is subject to human ownership, ordering, and exchange, they elevate to a presumed level of metaphysical absoluteness both the human, proprietary claim and transactional power over existing things, and the things, themselves.

In the dissertation, it is proposed that secularist law's tendency to ascribe metaphysical absoluteness, and, with this, religious ultimacy, to humans' asserted ownership of and transactional power over all existents, as well as to the existents, themselves, signifies in telling ways modernity's transmutation of the religious. Towards this end, I interpret the law's dual conceptions of ontologically all–encompassing, proprietorship and transactional power as they arise within selected legal contexts which draw within their ambits a multiplicity of existents. These contexts include environmental jurisprudence, intellectual property law, and legal doctrine governing the ownership and alienation of human, biological property. The latter two of these are treated in conjunction with one another, particularly with respect to how they intersect where the patenting of human life is concerned. In the final analysis, the dissertation suggests that secularist law's operative apotheosizing of human, proprietary control and transactional power over the full range of existents serves as a vehicle for, and a prime indicator of the self–ascribed universality, and missionary ambitions of modernity's religious orthodoxy.

## II. Theoretical Apparatus: The Two Chief Premises of the Dissertation

### *A. The First Premise of the Dissertation –*

### *Modernity's Transmutation of the Religious: An Immanentist, Epistemic Response to the Transcendence and Divine Presence of Ultimate Reality That Is Exemplified and Enforced by Secularist Legal Systems*

#### *1. Contours of the First Premise*

The theoretical apparatus underlying the dissertation consists of two chief premises pertaining to the essential constitution of the predominating, modern, Western, religious and epistemic worldview. The first premise, which is elaborated in Chapter Two, is that modernity, as a distinctly occidental, civilizational mindset, spirit, and form of historical self–consciousness, exhibits at its base an intrinsically transmuted mode of faith that is exemplified and enforced by secularist legal systems. This fundamentally immanentist faith and creed is distinguished by its unspoken, presupposed relocating, immanently within the phenomenal world, of the transcendence and divine presence of Ultimate Reality. Modernity's religious immanentism, as a quintessential element of the modernist worldview, pervades and effectively sacralizes the various types of ideological and political–economic doctrine that are grounded in this worldview. The presently prevailing, modern, Western ideological and political–economic credos tend to be globalist, neo–liberal democratic capitalism, and closely related doctrines, such as the messianic strain of liberal nationalism epitomized by the US.[8] These dominant, ideological and political–economic doctrines continually impart to the political structures and mechanisms, and juridical functions, of modern, civil states the operatively sacred sanction of the modernist orthodoxy's received truths and first principles.

*2. The Essence of Modernity's Transmutation of the Religious*

Pivotal to its elucidating modernity's transmutation of the religious, the dissertation calls into question a notion commonly advanced by some of those who critique modernity, namely, that modernity has sustained an utter loss of transcendence. An exemplar of this problematic reading of the modern, Western, civilizational worldview is Max Weber's (1864-1920) dictum that modernity is "characterized...by the 'disenchantment of the world'", whereby Weber means that public life no longer is informed by ultimate values that emanate from transcendence.[9] Following from its reliance on metaphysical principles consistent with those espoused by thinkers aligned with the Perennial Tradition (please look back to endnote 2 for what is meant by reference to perennialist thought), the dissertation maintains that modernity's immanentist faith and creed could not possibly represent the utter loss of transcendence, ontologically speaking. Nor could modernity's worldly, religious orthodoxy possibly represent the complete failure of human consciousness to respond, in some fashion, to transcendence. The absolute, noncontingent reality of divine transcendence hardly could be effaced, no matter how vigorous the historically anomalous, modernist declaration of its irrelevance or unreality! As is indicated by perennialist metaphysics, the one, supra–phenomenal Ultimate Reality theophanically manifests its divine presence throughout all of contingent being, which Ultimate Reality perfectly transcends and continually creates. As such, the Ultimately Real constitutes, further, the final, transcendent referent of human knowledge. Consequently, to speak of a modernist loss of transcendence is to misread the timeless structure of reality, including the innate responsiveness of human consciousness to its divine creator.

Counter to the notion of a modernist loss of transcendence, I argue that modernity's distinct mode of religiousness embodies a peculiar, if characteristically unspoken, manner of responding to the transcendent Absolute, that is, the necessary predicate of all existence. This modernist response to the Absolute is uniquely informed by an epistemic mindset presupposing that the entirety of reality is phenomenal in character. Hence, the phenomenalist presuppositions ingrained in the paradigmatic, modern mind result in Ultimate Reality's being conceived of and experienced as something that is fully immanent and observable within the phenomenal world. Thus, by contrast to the Weberian "disenchantment" thesis, I would maintain that modernity's transmutation of the religious represents nothing so much as the thoroughgoing enchantment of the world. Inasmuch as the entirety of contingent reality emanates from the transcendent Absolute, and is therefore derivatively sacred, it is misleading to suggest, as does Weber, that modern, Western public life could fail to be informed by some mode of response to transcendence. Rather, modernity's immanentist faith and creed is characterized precisely by its tendency to conceive of the infinitely transcendent, Divine Source of the world's sacredness as if this source were lodged inside the finitude of the phenomenal world, enchanting creation from within through a sort of modernist animism.[10]

Modernity's transmutation of the religious occurs at the foundational level of the cohering axioms and first principles that drive the mind of modernity. This set of epistemic presuppositions constitutes the cognitive filter through which the transcendence and divine presence of Ultimate Reality are conceptualized in the peculiarly immanentist, modern, Western fashion. These presuppositions, whose presumed validity is taken

ultimately on the basis of faith, encapsulate a worldview that is, at one and the same time, both epistemic and fundamentally religious.[11] They concern such inseparable matters as: the essence and origins of being; the essential, ontological status of the human, and, with that, of the individual, family, society, state, and law; the fundamental nature of knowledge and cognitive practices; and the ultimate source and essence of morality, ethics, values, and aesthetics. Construed in this light, the axioms and first principles function as faith–based, "absolute presuppositions" that sustain the phenomenalist metaphysics of modernity.[12]

Modernity's phenomenalist metaphysics rests, at its base, on the compression of hierarchical being. By contrast, the understanding of a hierarchy of being constitutes the eternal axis of perennialist metaphysics.[13] As a consequence of the modernist collapsing of ontological hierarchy, Ultimate Reality has been operatively transformed, at the epistemic level that sustains the mind of modernity, from the supernal font of all being, into the material substratum of all being. Hence, life, knowledge, nature, morality, beauty, law, human society and political community – in sum, all of the various facets of existence – have had their transcendent, originating source effectively reconstituted within the phenomenal world. This collapsing of the hierarchy of being has been accompanied, moreover, by the insertion of the transcendent source of final meaning, divine judgment, and human salvation, into the mundane realm of the human subject, society, state, temporal history, and materiality.

*3. The Historical Unfolding of Modernity's Immanentist Religious Orthodoxy, and the Exemplification and Enforcement of this Orthodoxy By Secularist Law*

Modernity's transmuted religious tradition is the product of highly complex and continuously ongoing historical forces. In further establishing the first premise of the dissertation, the analysis in Chapter Three underscores several genealogical leitmotifs that have made pivotal contributions to the emergence of modernity's immanentist faith and creed as the religious sine qua non of modern, Western, secularist law. Each of these leitmotifs tends to suggest that modernity's multiform attempts to carve and maintain a radical severance between transcendence and the phenomenal world actually have brought about, in the unfolding of a supreme, metaphysical irony, the relocation of transcendence within phenomena. Modernity's imagined, but ontologically futile, diremption of transcendence from the phenomenal world is perhaps the defining mark of secularist doctrine and its institutional outflows, including secularist law.

One emphasized leitmotif is the philosophical doctrine of nominalism. The late–medieval rise of nominalism, associated most prominently with the fourteenth–century Franciscan, William of Ockham, was a watershed moment in the advent of modernity.[14] Nominalism repudiated the Platonist (and, moreover, perennialist) metaphysical principle that the particular beings of the phenomenal world derive their reality by virtue of their participation in nonreducible, universal essences, existing in the form of ideas, which emanate from transcendent divinity. Instead, nominalism posited that reality inheres in particular, phenomenal beings, themselves. This doctrine effected a profound, metaphysical and theological severance, whereby the created world, including human thought and language, were rent apart from the divinely transcendent, creative source of existence and referent of final meaning. On the dissertation's line of reasoning, the

history of modernity has comprised, in a crucial sense, a sequence of efforts to grapple with the cataclysmic crisis of a seemingly vanished, transcendentally emanating ontological unity and its meaning that was in significant part catalyzed by nominalism. Many proffered resolutions to this crisis, from the philosophical, to the political, to the poetic, and beyond, have resorted to the worldly relocation of transcendence, as they seek to repair the sacred synthesis between transcendence and the phenomenal world that the modern, Western mind presumes to have been ruptured.

Another genealogical leitmotif that I underscore is the way in which Western Christendom has helped to spawn – indeed, the way in which Western Christendom has tended to undergo a metamorphosis into – a modernist, religious worldview that supplants a transcendent conception of Ultimate Reality with an immanentist conception of Ultimate Reality. The dissertation considers how the historically entrenched inclination of Western Christendom to imagine a radical division of the spiritual from the temporal realm has, in actuality, strongly contributed to the immuring of transcendence within temporality. The resulting, worldly relocation of transcendence has laid the religious foundation for modernist polities.

Drawn upon within this context are the singular insights of the twentieth–century political theoretician, intellectual historian, and critic of modernity, Eric Voegelin. Voegelin construes modernity's "immanentization" of transcendence as stemming, in significant measure, from the medieval–era pressures of tension and competition that arose between the Catholic Church and lay interests, that is, between the spiritual and temporal sources and executors of worldly power and authority. Voegelin suggests that, following from the crisis of political and epistemological authority that resulted from

these pressures was the perceived failure of Western Christendom to endow society with a spiritual meaning. The consequence of this, beginning in the twelfth century, has been a series of incarnations of the modernist reawakening of ancient Gnosticism. This reawakening has involved a sequence of social, philosophical, and political attempts to repair a perceived, stark dualism between God and world, between spirit and matter, and between good and evil, by drawing transcendence within the world.[15] The Gnostic political orders of modernity rely, for the foundation of their sovereign legitimacy, upon an immanentist religious worldview that relocates within the temporal world the transcendent end of days and source of salvation that are proclaimed by Christianity.[16]

In this connection, the inquiry integrates, as well, scholarly analyses of linkages between the thought of Voegelin, and that of Max Scheler, the twentieth–century German phenomenologist who postulated a philosophical anthropology hinging on the idea that "the religious act is an essential endowment of the human mind and soul".[17] Scheler maintained that human community, and therefore political order, are necessarily grounded in the religious act, which act centers on a response to transcendent divinity. Because Scheler observed, further, that the religious act may, or may not (as in the case of idolatry), involve the proper conceptualization of its true, transcendent referent, his thought helps to illustrate how a modernist, political order is rooted in an immanentist conception of transcendent, Ultimate Reality.

Also helping to amplify the first premise of the dissertation, in Chapter Four, is a demonstration of the chief indicia marking secularist law's exemplification and enforcement of modernity's immanentist religious orthodoxy. One such indicator is that enacted, secularist law springs from, or at least has its originating sources (such as

naturalistically formulated principles of natural law) given juridical force by, a model of state sovereignty that embodies the relocation of transcendence within the phenomenal world. This is the case, in that the secular sovereign of the modern, civil state, whether taking the form of, for example, a democratically governed mass and its political representatives, or, an individual, autocratic ruler, has emerged as the omnipotent, worldly recreation of the transcendent, divine lawgiver.[18]

A further such indicator is that secularist law inexorably expresses, through its guiding, ideological models of social, political, and economic ordering, the fundamentally religious conceptions of Ultimate Reality in which secularist legal systems and their entailed forms of ideological and political–economic doctrine are grounded. The dissertation maintains that the neo–liberal, democratic capitalist, ideological and political–economic doctrine which has come, in recent times, overwhelmingly to guide secularist legal systems may be conceived of as forming a denomination of modernity's worldly faith and creed. In this way, democratic capitalism imparts to secularist law an immanentist religious orthodoxy that, at the most fundamental, epistemic level, is shared with ideologies, such as communism, which contend for modernist supremacy with liberal democracy and free–market, global capitalism.

In addition, Chapter Four indicates that secularist law acts, by means of the authority, coercive power, and capacity for violence endowed to the law by the modern, civil state and transnational, political entities, to validate, enforce, and propagate modernity's religious orthodoxy. Specifically, secularist law places beyond dispute the validity of the phenomenalist, epistemic presuppositions, and concomitant forms of ideological and political–economic doctrine that drive the law. It achieves this by

employing its status as a privileged, modernist discourse that proclaims rationalistically discoverable and scientifically verifiable truth, which status is backed by the law's implicit ability to wield force in support of its proclamations.

### *B. The Second Premise of the Dissertation –*

### *Recognizing Legal Systems As Constituting Semeiotic Texts, and Conceiving of Them, Therefore, As "Juridical Prisms"*

The second premise forming the theoretical apparatus of the dissertation is elaborated in Chapter Five. This premise holds that any type of legal system – whether avowedly religious or secularist – constitutes a text composed of interwoven signs that must be read and construed, in order to construct the religious meaning conveyed by the signs. As a result, a legal system may be conceived of as a revealing prism that refracts the character of the religious bedrock in which the system of law is rooted.

A paramount teaching of perennialist metaphysics is the fallaciousness of the notion, so much associated with reductionist and empiricist, modern Western metaphysics, that the ultimate meaning and significance of phenomena inheres within the phenomena, themselves. This modernist metaphysics tends to presuppose that all phenomena may be classified essentially as quantifiable objects of scientific inquiry and experimentation, and, as such, may have their final meaning captured through rationalist and mathematical, analytic processes.[19] By contrast, perennialist metaphysics teaches that the final meaning of all phenomena derives from a divine source that transcends the phenomenal world.[20] Consistent with this, perennialist metaphysics suggests the entirety of creation to be a fundamentally semeiotic and textual medium that must be perceptively read and construed, if one is to understand the religious import that emanates, in the first instance, from the Absolute, and is thereupon conveyed by phenomena.[21]

Within the setting of this semeiotic and textual universe, a universe whose constituent phenomena, whether natural, social, cultural, or otherwise, all may be read as relating religious meaning, systems of law may be taken as texts whose integral signs serve necessarily to convey such meaning. On the dissertation's line of reasoning, a legal system denotes the cohering traits and patterns of thought and logic, discourse, ideas, procedural content, and custom and ritual, which mark a body of law specific to a civilization, or to a discrete polity based within that civilization. The various components of a legal system may be read as individuated signs composing the textual tapestry of signs that is embodied by it. These components include, for example, particular ideas; discursive traits; procedural regimes; institutionally embedded customs and rituals; and specific laws, both written and oral.

The signs composing a legal system refer the reader who seeks to interpret their religious import throughout a complex and intricate, signifying web that integrates other texts with which the system of law overlaps and exchanges meaning. Such texts include, for example, the bodies of ideological doctrine, cultural content, and historical memory that inform the legal system; and, as well, the religious tradition that, at the most foundational level, underlies the system of law. In this way, the signifying web of texts within which a legal system participates mediates meaning that emanates from the law's religious base. By reading a legal system as a text, an insightful interpreter can grasp how the components of that system of law bear an ultimate meaning and significance that derives from the ways in which the Absolute is conceived of and experienced within the horizons of the law's underlying, religious tradition.

Following from the inherently semeiotic and textual nature of a legal system, it can assume the status, within an interpreter's mind, of a "juridical prism" that draws forth and refracts the law's fundamental, religious significance. Each of the signs composing a system of law intimates a source of religious meaning lying anterior to the law, thereby making it possible for an interpreter who construes the signs to discern the law's manifestations of religious import. As such, these signs serve, in a cognitive sense, as prismatic refractors that display for the interpreter the elements of the religious tradition in which the legal system is rooted, as well as the ways in which this tradition pervades the juridical institutions to which it gives rise.

### III. Two Signs of Modernity's Transmutation of the Religious: Secularist Law's Reciprocally Reinforcing Ideas of a Human, Proprietary Claim and Transactional Power Over All Existents

In order to demonstrate that modern, Western, secularist law is rooted in modernity's transmuted religious tradition, the dissertation interprets two signs that are interwoven within secularist legal systems. Chapter Six elaborates on these two signs and the juridical idea that each of them embodies, including the historical processes through which the two signified ideas have emerged as pillars of the secularist juridical mind. To reiterate the content of these signs: the first sign embodies the idea that all existents are subject to one or another property holder's personal, proprietary claim. The second sign embodies the idea that humans, who are in their ontological essence proprietors, have a rightful, transactional power over all existents. These two avatars of the secularist juridical imagination, the one postulating an ontologically all–encompassing condition of human proprietorship, and the other humankind's ontologically all–encompassing transactional power, fundamentally reinforce one

another. The proprietary idea provides the beings – the raw materials, as it were – that are subjected to a transactional process of commodification, ordering, and exchange; while the transactional idea serves as a means whereby the proprietary idea is exercised, validated, and transformed into a ceaseless engine of market relations.

These two ideas are especially revealing because, within the ken of the secularist juridical imagination, the condition and experience of human proprietorship and transactional power over existents implicitly constitute sacred icons. It is key that these icons are of self–referential, religious significance. By referring to themselves as being the effective locus of divinity that is immanent within the phenomenal world, secularist law's sacred icons of proprietorship and transactional power indicate modernity's relocation of transcendence and divine presence within phenomena.

By confining Ultimate Reality within phenomenal beings, modernity's phenomenalist metaphysics reduces the whole of existence to bits and aggregations of matter that can be reified and held, as property, by humans. Moreover, modernity's injection and confinement of transcendence and divine presence within the world has had the effect of making absolute the autonomous, self–interested, human subject; that is, the individual subject has been transformed into the ultimate arbiter of valid knowledge and moral truth. The confluence of this reductionist, phenomenalist metaphysics with the construction of the absolute, human subject is crucial. In the wake of this confluence, and the economistic, ideological and political–economic doctrines that flow from it, the individual has been elevated atop the created world. Within this realm, all existing things have been reduced to a concrete form that can be owned and manipulatively controlled by humans, for material gain. Further, human proprietorship and transactional power over

existents have together emerged as the ultimate essence, the raison d'être, of the person. As such, Ultimate Reality, that is, the final referent of religious devotion, has become recreated within the proprietary, human subject, and the objects of his or her proprietorship and transactional control. Through the playing out of a modernist fetishism, the apotheosized, human proprietor derives ongoing re–enchantment, and sacred power and status, from the talismanic force emanating from the iconic existents which he or she holds and controls.

In elaborating the self–referential, religious iconicity of secularist law's conception of humans' proprietary claim to and transactional power over all existents, the dissertation contrasts this immanentist understanding of property's inhering sacredness with its diametric opposite, namely, a theistic conception of proprietary trusteeship over creation. For example, within the classical, Islamic juridical mind, the world of creation is understood as belonging, in the first instance, solely to God. Held in trust by humans, all of creation is God's property, and, as such, is of course eminently sacred.[22] However, by contrast with the immanentist mode of iconolatry that is directed towards property by secularist jurisprudence, the sacredness of property, within the context of classical Islamic jurisprudence, is taken as deriving from the transcendent, divine creator of all existence. Whereas *Shari'a* understands property, and humans' divine entrustment with its care, responsible enjoyment, and just alienation, as signs of God's transcendent glory, the secularist juridical mind implies that human proprietorship and proprietary existents are themselves the ultimate referents of religious veneration.

The dissertation's interpretation of the religious significance of secularist law's linked conceptions of proprietorship and transactional power draws primarily on

manifestations of the two ideas that arise within common law legal systems, especially that of the US. This is because the common law's notion of the right to private property, particularly insofar as the notion has been profoundly informed by seventeenth and eighteenth–century, Protestant–influenced formulations of the religious and philosophical basis for the right, epitomizes the iconolatry that secularist law directs towards property.

Set forth in Chapter Six is an historical analysis of the rise to ascendance of the two secularist juridical ideas, concentrating on how the seventeenth and eighteenth centuries proved a pivotal era for the establishment of secularist conceptions of proprietorship and transactional power within the common law tradition. During the seventeenth century, strongly Protestant influences led the ultimate, ontological basis for the common law property right to become thoroughly naturalistic. The postulating by deists of God's post–creational absence from the world, together with Protestant notions of the salvational import of property, jointly served to recreate within materiality, and within the human subject, the divine authority conferring the right to human proprietorship over all of the world's existents. Further, the seventeenth century saw the prospering of the contractarian theory of society that depicted social existence as consisting of an essentially transactional set of relations among self–interested individuals.

The nexus in the common law between the property right and transactional power tightened during the eighteenth century, as the philosophical anthropology of the self–interested individual became wedded to an emerging body of market–based, ideological and political–economic doctrine. As the eighteenth century unfolded, the tension within the common law between landed property interests, which long had constituted the

traditional base of political power and status, and burgeoning, capitalistic, commercial property interests, gradually resolved in favor of encouraging the ongoing expansion of the latter. This contributed to the modernist establishment of an economistic vision of the various dimensions of life and society, within the horizons of which all existents tend to be conceived of as exchangeable commodities, stocking the shelves of a boundless marketplace.

The dissertation also does take note of some manifestations of secularist law's immanentist, religious conceptions of proprietorship and transactional power that arise within civil law legal systems. Within the civil law tradition, the French Revolution, in particular, has laid an historical precedent for immanentist, juridical ideas of proprietorship and proprietary transactions, by imbuing private property ownership and contractual relations with strongly utopian and messianic significance.

**IV. Legal Contexts Within Which the Two Signs Are Read**

In Chapters Seven and Eight, the dissertation construes the underlying, religious significance of the secularist, juridical ideas of proprietorship and transactional power – that is, it reads these two signs – as they occur in select statutes, cases, protocols, policy pronouncements, and commentaries falling within the following areas of secularist law: environmental jurisprudence; intellectual property law; and legal doctrine governing the ownership and alienation of human, biological property. These legal contexts have been chosen because they draw within their ambits a multiplicity of existents, thereby underscoring secularist law's tendency to conceive of the full range of existing things as being subject to one or another property holder's personal, proprietary claim and transactional power.

### *A. Environmental Jurisprudence*

In Chapter Seven, select occurrences of the two signs within environmental jurisprudence are examined for how they intimate modernity's tendency to reduce the natural world to the form of commodified property. The two signs bespeak the modernist assumption that natural phenomena, as proprietary existents, can be fully known and instrumentally managed by means of rationalist, scientific inquiry, experimentation, and quantification; and are, accordingly, reducible to the sum of their economic value. Occurrences of the two signs are prevalent within environmental law regimes favoring a reliance on instrumentalist, scientistic, modes of risk assessment and benefit–cost analysis. In this section of the inquiry, I invoke the precautionary principle, a relatively recent juridical concept that acts as a current of resistance arising from within the modern West against secularist environmental law's instrumentalist conception of nature, as an illustrative contrast to secularist law's reification of the natural world as property and grist for transactions.

Continuing in this vein, selected appearances of the proprietary and transactional ideas are analyzed, further, for their indication of the modernist, epistemic trait whereby the ultimate source of nature's meaning and significance is taken as being embedded within the phenomenal world. This is as opposed to taking the sacred import of nature as deriving from a divine source of existence and meaning that transcends the phenomenal world, as is characteristic of the Perennial Tradition. I suggest that the self–referential, religious iconicity of secularist law's allied conceptions of proprietorship and transactional power is very much in keeping with the modernist presupposition that the natural world represents its own, fully inhering, ultimate meaning and significance.

Secularist environmental law's implicit understanding of nature as representing a source of final meaning that is wholly immanent within the phenomenal world is contrasted with the reading of nature that may be achieved in the light of the Islamic tradition. On the latter reading of the natural world, nature is taken as being filled with the signs (*ayat*) of God. Present throughout the winds, water, skies, animal life, and so forth, these semeiotic tokens both veil, and reveal to those who have understanding of the divine, the Transcendent Creator who gives rise to nature and its sacred import. Based upon this awareness of nature's transcendentally emanating, final meaning, *Shari'a* mandates that humankind should practice reverential stewardship of the natural world.[23]

*B. Intellectual Property Law, and Law Governing Human Biological Property*

In Chapter Eight, I analyze how intellectual property law, especially when read in conjunction with modernist legal doctrine governing human biological property, further reveals secularist law's tendency to reduce all of existence to commodified property, together with the way in which this tendency exemplifies modernity's immanentist faith.

*1. Intellectual Property Law*

Within the specific context of intellectual property law, I interpret selected occurrences of the two signs that emphasize secularist law's tendency towards reifying knowledge as property and commodity. I maintain that secularist law conceives of the various forms and manifestations of knowledge – from expressions of artistic creativity, to pharmaceutical formulas, to genetic information that is encoded within DNA, and so forth – as being uniformly reducible, in their ontological essence, to tangible, personal property. In this way, the analysis points to the modernist presupposition that the seemingly erstwhile, transcendent origin and final referent of knowledge has been

relocated within the phenomenal world. Indicated, further, is the economistic belief that knowledge is fundamentally reducible to a source of private, material gain.

Beyond this, I go on to contrast secularist law's immanentist conception of knowledge with alternative religious and civilizational perspectives on the character of knowledge. For one, I discuss the inappositeness of attempts to apply secularist intellectual property jurisprudence to indigenous knowledge arising from within worldviews where the notion of privatizing and commodifying knowledge is alien. Then, too, I contrast modern, Western intellectual property law with an Islamic conception of the supernal origin and final referent, and intrinsically communitarian ends, of human knowledge and creativity.

*2. Law Governing Human Biological Property*

Also within Chapter Eight, exemplars of the two signs are read within the context of legal doctrine governing the ownership and alienation of human, biological property, such as organs, body parts, reproductive material, and stem cells. By parallel to the foregoing intellectual property law analysis, I indicate in this section of the inquiry that secularist law presupposes the relocation within the phenomenal world of the transcendent origin and essence of human, biological life. Moreover, I suggest that the reduction of human, biological entities to property that can be manipulated and exchanged intimates a self–referentially iconic, religious conception of the human being. Following on this conception of the human being, human, biological existence is not taken as a sign of bodily life's participation in the unified existence that emanates from the Transcendent Creator (as would be, by contrast, characteristic of the outlook intrinsic to the Perennial Tradition). Rather, the self–referentially iconic conception of the human

being implicitly takes human, biological existence as the repository of its own, totally inhering, ultimate meaning and significance.

### *3. The Revealing Intersection of Intellectual Property Law with Law Governing Human Biological Property*

A vital element of the analysis in Chapter Eight centers on how intellectual property law and law governing human biological property tellingly intersect with one another where the patenting of human biological life is concerned. I discuss how, over the span of several decades, the expansion of patenting doctrine in the US, in particular – from initially allowing patents to be placed on rudimentary forms of living organisms, to subsequently making feasible the patenting of human genes – exemplifies a quasi–divine, modernist conception of the scientifically and technologically aided, anthropic power to control and commodify human life.

## V. Conclusion: State Power as a Vehicle for Modernity's Proselytizing Pursuit of Forced Conversions

In Chapter Nine, the dissertation concludes by considering how secularist law manifests the modern, Western, civilizational drive towards the global proselytization of modernity's worldly religious orthodoxy. Through the course of its inquiry, the dissertation demonstrates that secularist legal systems may be conceived of as constituting "juridical prisms" which refract the transmuted religious tradition underlying these systems of law. This religious tradition rests on a set of faith–based, epistemic presuppositions that effectively inject and confine within the phenomenal world the transcendence and divine presence of Ultimate Reality. Modernity's faith thus turns on a phenomenalist metaphysics whose validity the modern, Western mind assumes to be scientifically verifiable, and therefore unassailable. As such, modernity presupposes its

civilizational worldview to be universally valid. In exemplifying and enforcing modernity's fundamentally religious worldview, together with the ideological models of social, political, and economic ordering that depend upon this worldview, secularist law serves to propagate a faith that seeks the global spreading of its universalistic truth claims.

Juridical measures undertaken by the US domestically, as well as internationally, signify and bolster the vanguard role currently played by that nation in the forcible, global proselytizing of neo–liberal, democratic capitalist, ideological and political–economic doctrine, and the worldly faith in which this doctrine is rooted. Indeed, the "war on terrorism" that has been spearheaded by the US since 2001 has provided a paramount context within which the worldwide proselytizing of modernity's religious orthodoxy is facilitated through instruments of state power. In its concluding analysis, the dissertation argues that the arsenal of forcible, juridical mechanisms deployed by the US in the "war on terrorism" – most recently, the US's complex array of claimed efforts, following in the wake of its 2003 military ouster of Iraqi dictator Saddam Hussein, to convert Iraq from a socialist tyranny into a capitalist haven – serves as instrumentation for a modern, Western, civilizational crusade. Under the implicit banner of this crusade, the US conceives of itself as a worldly savior anointed to vanquish the embodied evil, "terrorism", that is mortally opposed to the incontrovertible good of a democratic capitalist form of social, political, and economic order. In this way, the US, as the most forceful exponent of the modern, Western worldview's "proselytising fury", seeks to effect the global spread and dominance of a modernist, religious and epistemic worldview.[24]

Running through secularist law, and confronting secularist law from outside of the religious and epistemic milieu within which its institutions are seated, are currents of resistance to modernity's religious orthodoxy, and to the law's role in enforcing and propagating this faith. Within the institutional frameworks of secularist law, such resistance is represented, for example, by equity jurisprudence. Then, too, this resistance is represented by recent juridical concepts within environmental jurisprudence, such as the precautionary principle, that eschew instrumentalist attempts to reduce the ultimate meaning and significance of the natural world to a set of economic variables. From outside of secularist legal institutions, this resistance is represented by a multiplicity of religious challenges to the secularist state's propagation of its unspoken, religious tradition. The events of September 11, 2001, that triggered the "war on terrorism" would appear simply to embody one of the most sensational such challenges, with exceptionally violent fallout. The very existence of these currents of resistance attests to the ongoing entrenchment of the modernist religious orthodoxy that secularist law serves to exemplify and enforce. Casting light on this religious orthodoxy and its juridical outgrowths, as the dissertation seeks to do, can aid in developing trenchant critiques of secularist law and its religious and epistemic foundation.

## 1. Endnotes

1. Given that the dissertation is the product of a predominantly post–communist era, it does not deal with the Marxist–Leninist legal systems that some analysts conceivably might have read, at a prior point in history, as representing the avatar of secularist law. The fact that the inquiry focuses on liberal, secularist legal systems is important for the basic way in which it delineates the category of secularist law. While liberal, secularist legal systems presuppose a fundamental division between the religious life, on the one hand, and legal and political affairs and institutions, on the other, secularist law in the liberal state does not necessarily imply the illegitimacy of the religious life, nor the unreality of a divine referent of religious beliefs. By contrast, Marxist–Leninist legal systems are premised on the atheistic notion that religion is an illusion which stems from such materialist factors as the person's alienation from his or her true self, a condition of alienation that is fostered by the forces of industrial capitalism. For a paradigmatic expression of the Marxian critique of religion, see, for example, Karl Marx's and Friedrich Engels's 1846 work, *The German Ideology, Part One* (London: Lawrence & Wishart, 1970). Therefore, the idea of a separation between church and state, or between religion and law, is moot within Marxist–Leninist law.

This being said, there are crucial parallels between liberalist and Marxist–Leninist legal systems that both foreshadow and underscore the central arguments that I employ as I depict the fundamental religiousness of secularist law. Chief among these, both liberalist and Marxist–Leninist legal systems turn on metaphysically naturalistic species of ideological and political–economic doctrine which tend to view all aspects of social and political existence through an economistic lens. As such, both liberalist and Marxist–Leninist law are rooted in a shared, modernist, religious and epistemic foundation that is characterized by its immanentist conception of Ultimate Reality. Accordingly, just as liberal, secularist legal systems are, in actuality, religious legal systems, so, too, are Marxist–Leninist legal systems. On the implicit religiousness of Marxist–Leninist law, see Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974), especially Chapter I; and Harold J. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law,* 2nd ed. (Cambridge, MA: Harvard Univ. Press, 1963). The pivotal, first chapter of *The Interaction of Law and Religion,* a key text authored by a seminal figure in the specialized research field that is dedicated to examining the interdependency of law and religion, is reprinted, along with other, related writings of Berman's, in Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Scholars Press, 1993).

2. The metaphysical posture adopted by the dissertation as a predicate of its analysis is deeply indebted to the teachings of the school of religious and metaphysical thought that centers on the exposition of what is variously referred to as the *philospohia perennis* ("perennial philosophy"), *sophia perennis* ("perennial wisdom"), and *religio perennis* ("perennial religion"). Those thinkers who represent this school shall generally be collectively referred to within the dissertation as "perennialists". In some sources, one will find them named "traditionalists"; this, for the reason that the religious and metaphysical principles they espouse are considered to belong to a unitary, Perennial (or,

Primordial) Tradition. On the distinctions between the designations, perennialist and traditionalist, see Alvin Moore, Jr., 'Two Outstanding Books From Sri Lanka: Reviews and Reflections', *Sophia: The Journal of Traditional Studies,* vol. 7, no. 1 (2001), pp. 168-88, and, as well, Phil Cousineau, ed., *The Way Things Are: Conversations with Huston Smith on the Spiritual Life* (Berkeley, CA and Los Angeles: Univ. of California Press, 2003), pp. xiii, 5-11.

The perennialists are steeped in the comparative study of the quintessential doctrines of great religious traditions of pre–modern origin, particularly the Abrahamic faiths, Hinduism, Buddhism, Chinese faiths, Shintoism, and Aboriginal faiths of various continents, as well as pre–modern wisdom traditions, most notably Neoplatonism. From this basis, they seek to understand the universal, primordial truths concerning the divine origin and essence of reality that are uniquely expressed in each among a multiplicity of tradition–specific, revelatory messages and theophanies. Thus, the perennialists are concerned with the sacred, metaphysical and theological truths that belong to one, Perennial Tradition, and that are, at the same time, shared among and uniquely revealed in distinct religious and wisdom traditions. A prime emphasis of the perennialist thinkers is their ongoing critique of modern, Western civilization's hubristic and futile attempt to supplant such sacred truths with first principles that, in a misguided fashion, ascribe metaphysical ultimacy to contingent reality. It is important to note that the Perennial Tradition does not represent a religious orthodoxy with the universalistic pretense of superseding the differences among religious traditions. Indeed, one finds within the perennialist school debates over how best to guard perennialist thought from the possible temptation of syncretism. See, for example, Patrick Ringgenberg, 'Frithjof Schuon: Paradoxes and Providence', *Sacred Web: A Journal of Tradition and Modernity,* no. 7 (2001), pp. 13-35.

Dating to the first half of the twentieth century, the perennialist school was inaugurated by such thinkers as René Guénon, Ananda Coomaraswamy, and Frithjof Schuon. During the present day, foremost among the perennialists, or among those whose thought is strongly sympathetic with the perennialist position, are, to name several, such figures as Seyyed Hossein Nasr, Martin Lings, Whitall Perry, Charles Le Gai Eaton, Rama Coomaraswamy, and Huston Smith. For a fine introduction to the perennialist school of thought, including biographical overviews of some of its key thinkers and a comprehensive bibliography, see Kenneth Oldmeadow, *Traditionalism: Religion in the Light of the Perennial Philosophy* (Colombo, Sri Lanka: Sri Lanka Institute of Traditional Studies, 2000).

3. An especially fine introduction to the central place occupied within the religious life by the human relationship with Ultimate Reality is provided by Moojan Momen, *The Phenomenon of Religion: A Thematic Approach* (Oxford, UK: Oneworld, 1999).

4. A magisterial treatment of this linkage may be found in Seyyed Hossein Nasr, *Knowledge and the Sacred* (Albany, NY: SUNY Press, 1989) [originally published in 1981].

5. *Cf.* the epistemology expounded in Frithjof Schuon, *From the Divine to the Human: Survey of Metaphysics and Epistemology,* Gustavo Polit and Deborah Lambert, trans. (Bloomington, IN: World Wisdom Books, 1982).

6. As Schuon states:

> All knowledge is by definition knowledge of absolute Reality; which is to say that Reality is the necessary, unique and essential object of all possible knowledge.

This, Schuon explains, is because "the very existence of the world" is the expression of Reality. "Knowledge of the world...is always a knowledge of [divine] Reality", because our ability to "know the world" as being real is contingent upon the world's derivation from divine Reality. Frithjof Schuon, *The Eye of the Heart: Metaphysics, Cosmology, Spiritual Life* (Bloomington, IN: World Wisdom Books, 1997), pp. 13-14.

7. Hence, the singular shallowness, imperceptiveness, and self–delusory nature of secularist law's characteristic presupposition that religious conviction, as an ostensibly nonessential dimension of human experience that is capable of being isolated, can and should be relegated and restricted to the private conscience of individual citizens. This dubious presupposition dovetails with the similarly flawed assumption of mainstream, liberal legal and political philosophy – and of secularist law – that religious conviction lacks a valid place in the deliberation and ordering of public affairs in the modern, civil state.

These two presumptions are motivated, in part, by the wish of classical liberalism to preserve, in the face of potential, state coercion, the individual's freedom to hold the religious beliefs of his or her choice. Nonetheless, inasmuch as the two presumptions betray a basic ignorance of humankind's religious essence, it might be maintained that liberal, secularist law, in resting on the illusory severability of religion from law, tends toward an implicit derogation of the religious life. Indeed, a principal means by which liberal, secularist law implicitly derogates the religious life is, ironically, by marginalizing those actors who seek to implement, or even to propound the belief that religious conviction is not severable from the public affairs of the polity and society. A provocative discussion of this process of marginalization is contained in Huston Smith, *Why Religion Matters: The Fate of the Human Spirit in an Age of Disbelief* (New York: HarperCollins, 2001), pp. 121-34.

8. The term, neo–liberal, is intended to refer to ideological and political–economic doctrine espousing the rightness of allowing free markets to function without the ostensible impediment of governmental intervention. An uncommonly insightful commentator on the nature of neo–liberalism, as well as an invaluable critic of the doctrine, is the scholar and journalist John Gray. See, for example, his following books: *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London and New York: Routledge, 1995); *False Dawn: The Delusions of Global Capitalism* (New York: The New Press, 1998); *Al Qaeda and What It Means to Be Modern* (London: Faber

and Faber, 2003); and *Heresies: Against Progress and Other Illusions* (London: Granta Books, 2004).

An indispensable resource for understanding the messianic ends of US nationalism is Robert N. Bellah, 'Civil Religion in America', pp. 168-89 in Robert Bellah, *Beyond Belief: Essays on Religion in a Post–Traditional World* (New York: Harper & Row, 1970). Nonetheless, Bellah's analysis will be critiqued later in the dissertation; this, for the reason that, while he appears to wish to maintain that the divine referent of sacral, American nationalism is a transcendent God, the implications of his research point, instead, to the religious immanentism of American, nationalist ideology.

9. Max Weber, 'Science as a Vocation', pp. 129-56 in H.H. Gerth and C. Wright Mills, trans. and eds., *From Max Weber: Essays in Sociology* (New York: Oxford Univ. Press, 1946), p. 155.

10. For an expression of the idea that an immanentist mode of religiousness is, indeed, indicated by modernity's pantheistic enchantment of the world, see S. Parvez Manzoor, 'Metaphysics or Politics?: The Clash Between Two Orthodoxies', *The Muslim World Book Review,* vol. 22, no. 1 (2001), pp. 3-13.

11. On the perennialist viewpoint helping to inform the dissertation, modernity's immanentist conception of the transcendence and divine presence of Ultimate Reality fails to recognize the true, supra–phenomenal essence of the Absolute and, as well, the transcendentally derived sacredness of contingent reality. Accordingly, one may infer that this modernist conception of reality is gravely erroneous. The normative ramifications of modernity's flawed understanding of Ultimate Reality are profound, for one is thereupon prompted to inquire whether the transmuted faith and creed of modernity is fundamentally false. Attention is devoted to this crucial matter a bit later in the dissertation, especially in Chapter Two. At present, the aim is solely to describe modernity's transmutation of the religious, as a phenomenon occurring at the epistemic level of modern, Western civilization.

12. This usage of the idea of "absolute presuppositions" is adapted from R.G. Collingwood, *An Essay on Metaphysics,* rev. ed., Rex Martin, ed. (Oxford, UK: Clarendon Press, 1998), pp. 34-48 and *passim* [originally published in 1940]. This masterful work, by the twentieth–century British philosopher, historian, and archaeologist who is better known for his 1946 book, *The Idea of History,* is, fortunately, becoming increasingly appreciated.

13. For a compelling diagnosis of modernity's collapsing of ontological hierarchy, which hierarchy is, conversely, properly understood by "the world's great religious traditions", see Huston Smith, 'Postmodernism's Impact on the Study of Religion', pp. 262-80 in M. Darrol Bryant, ed., *Huston Smith: Essays on World Religions* (New York: Paragon House, 1992).

14. This characterization of nominalism is inspired by Whitall N. Perry's book, *The Widening Breach: Evolutionism in the Mirror of Cosmology* (Cambridge, UK: Quinta Essentia, 1995), pp. 44-72.

15. The aptness of the parallels that Voegelin draws between the Gnosticism of the Hellenistic world, and modern Gnosticism, may by elucidated by a brief background consideration of early Gnostic thought. In sum, early Gnosticism was grounded in the salvational attempt to overcome the believed, radical dualism between God and world, spirit and matter, and good and evil, by experiencing transformational knowledge which makes the knower "a partaker in the divine existence". See Hans Jonas, *The Gnostic Religion: The Message of the Alien God and the Beginning of Christianity,* 2nd ed. (Boston: Beacon Press, 1963), p. 35.

16. See especially Voegelin's classic 1952 work, *The New Science of Politics,* which has been reprinted in Eric Voegelin, *The Collected Works of Eric Voegelin, vol. 5: Modernity Without Restraint: The Political Religions; The New Science of Politics; and Science, Politics, and Gnosticism,* Manfred Henningsen, ed. (Columbia, MO: Univ. of Missouri Press, 2000), pp. 75-241.

17. Max Scheler, *On the Eternal in Man,* Bernard Noble, trans. (London: SCM Press, 1960), p. 267 [original German edition published in 1921 as *Vom Ewigen im Menschen*]. Scheler understood the notion of philosophical anthropology as referring to that area of philosophical concern which addresses the query: "what is the human being, what is its position in being?" See Manfred S. Frings, *Max Scheler: A Concise Introduction into the World of a Great Thinker* (Milwaukee: Marquette Univ. Press, 1996), p. 2.

One of the prime, mentioned analyses of the connections between Voegelin's and Scheler's thought is located in William Petropulos, 'The Person as *Imago Dei*: Augustine and Max Scheler in Eric Voegelin's *Herrschaftslehre* and *Political Religions,* pp. 87-114 in Glenn Hughes, ed., *The Politics of the Soul: Eric Voegelin on Religious Experience* (Lanham, MD: Rowman & Littlefield, 1999).

18. In discussing this indicator, the inquiry relies strongly upon the insights of the provocative, twentieth–century German political and legal theoretician, Carl Schmitt, particularly as they are set forth in his 1922 book, *Political Theology: Four Chapters on the Concept of Sovereignty* [the edition used is the George Schwab translation (Cambridge, MA: MIT Press, 1985)]. Emphasized is how Schmitt's analysis points up the implicit, immanentist sacralizing of the prototypical, secular sovereign of the modern, civil state who is depicted in Thomas Hobbes's epoch–making 1651 text, *Leviathan* [the J.C.A. Gaskin edition is used (Oxford, UK: Oxford Univ. Press, 1996)].

19. Among perennialist thinkers, Guénon sets forth an exceptionally trenchant line of critique that is directed in this vein against modernist metaphysics. See especially his books, *East and West,* Martin Lings, trans. (Ghent, NY: Sophia Perennis et Universalis, 1995) [originally published in 1924 as *Orient et Occident*]; *The Crisis of the Modern World,* Marco Pallis and Richard Nicholson, trans. (London: Luzac, 1975) [originally

published in 1927 as *La Crise du Monde Moderne*]; and *The Reign of Quantity & The Signs of The Times,* Lord Northbourne, trans. (Ghent, NY: Sophia Perennis, 2001) [originally published in 1945 as *Le Règne de la Quantité et les Signes des Temps*].

20. A beautiful expression of this teaching lies at the heart of Martin Lings's book, *Symbol & Archetype: A Study of the Meaning of Existence* (Cambridge, UK: Quinta Essentia, 1997) [originally published in 1991].

21. As Nasr observes, "the cosmos…reveals its meaning as a vast book whose pages are replete with the words of the Author and possess multiple levels of meaning like the revealed book[s]" of the great scriptural traditions. Nasr, *Knowledge and the Sacred,* p. 191.

22. See Bernard Weiss, *The Spirit of Islamic Law* (Athens, GA and London: Univ. of Georgia Press, 1998), pp. 24-25, 158-63; and Majid Khadduri, *The Islamic Conception of Justice* (Baltimore and London: Johns Hopkins Univ. Press, 1984), pp. 217-18.

23. Especially valuable in this connection is the superb discussion in Charles Le Gai Eaton, *Remembering God: Reflections on Islam* (Chicago: Kazi, 2000), pp. 39-52.

24. The quoted phrase is borrowed from Ranjit Fernando, ed., *The Unanimous Tradition: Essays on the Essential Unity of All Religions* (Colombo, Sri Lanka: Sri Lanka Institute of Traditional Studies, 1991), preface.

# Chapter 2

## Modernity's Transmutation of the Religious

### I. Modernity and Its Unacknowledged Religious Essence

A defining trait of the mindset, spirit, and form of historical self–consciousness that may be termed "modernity" is the notion that modern, Western civilization has achieved a radical, epochal break separating itself from, and ensuring its normative progression beyond all preceding historical eras and forms of civilization.[1] Within the context of modernity's self–conception, this fissure characteristically is thought of as enabling an emancipation from the pervasively religious character of pre–modern metaphysical doctrines, and associated scientific, social, political, and economic tenets and institutions.[2]

The conviction that the modern West stands at the apogee of the inherently progressional trajectory of human history, and, as such, represents the most advanced stage of civilizational and cognitive development, is classically illustrated in the philosophy of history set forth by the Marquis de Condorcet (1743-94).[3] Condorcet, one of the *philosophes*[4] who occupied the vanguard of Enlightenment–era thought in France, perceived in modern, Western civilization the antidote to the "superstition", religious "absurdities", and religiously–driven tyranny that he held to be the barbarous scourge of pre–enlightened societies.[5] For Condorcet, the progress of all societies is to be judged by the extent to which they are brought into line with "that state of civilization [which has been attained by] the most enlightened, the freest and the least burdened by prejudices, such as the French and the Anglo–Americans."[6] Therefore, it is, from his eighteenth–century perspective, the solemn duty of the modern West to propagate its civilization

around the globe:

> Will the vast gulf that separates [the enlightened peoples] from the slavery of nations under the rule of monarchs, from the barbarism of African tribes, from the ignorance of savages, little by little disappear?...These vast lands [of Africa and Asia] are inhabited partly by large tribes who need only assistance from us to become civilized, who wait only to find brothers amongst the European nations to become their friends and pupils; partly by races oppressed by sacred despots or dull–witted conquerors, and who for so many centuries have cried out to be liberated; partly by tribes living in a condition of almost total savagery in a climate whose harshness repels the sweet blessings of civilization and deters those who would teach them its benefits; and finally, by conquering hordes who know no other law but force, no other profession but piracy.[7]

On Condorcet's view, modern, experimental, scientific inquiry is the key instrument by means of which the West may propel its program for the realization of human progress. This, he indicated, is because the ongoing advancement of scientific knowledge and praxis reveals and elaborates universal, natural principles (such as the existence of inalienable rights) that serve as lodestars for the betterment of the whole of humanity.[8] Condorcet stated:

> The sole foundation for belief in the natural sciences is this idea, that the general laws directing the phenomena of the universe, known or unknown, are necessary and constant. Why should this principle be any less true for the development of the intellectual and moral faculties of man than for the other operations of nature?[9]

Condorcet's philosophy of history demonstrates modernity's classical, yet fundamentally enduring, grasp of its own historical telos.[10] Indeed, his call for the global propagation of natural principles whose universal pertinence to the human condition is, he presumes, provable by the lights of modern, Western science, is strikingly echoed in present–day, US governmental discourse animating the "war on terrorism" and that nation's concomitant efforts (most immediately, in Iraq) to unseat and replace, or otherwise compel radical alterations in the policies of political regimes which it deems uncivilized.[11] In carrying forth a 2002 National Security Strategy whose aggressively

proactive, global stance and expansionist overtones are suggested to be warranted by a critical mass of "threats from terrorists and tyrants", President George W. Bush's administration claims as its imprimatur the recent, putatively climactic, history of modernity.[12] According to the text of the Strategy, "The great struggles of the twentieth century between liberty and totalitarianism ended with a decisive victory for the forces of freedom -- and a single sustainable model for national success: freedom, democracy, and free enterprise."[13] The "values of freedom", including the liberal, democratic capitalist, ideological and political–economic doctrine indicated as upholding them, "are right and true for every person, in every society".[14] Thus implied is that the ostensibly universal norms espoused and defended by the US are embedded in the incontrovertible order of nature, and are, therefore, scientifically verifiable.[15] Moreover, the Strategy maintains that, owing to the professed, unassailable validity of the "values of freedom", "the duty of protecting [them] against their enemies is the common calling of freedom–loving people across the globe and across the ages."[16]

On modernity's paradigmatic understanding of its place in history, the modern West has achieved for itself the freedom (and, therewith, been charged with the crucial responsibility) to construct an autonomous, system of knowledge and body of norms that are derived wholly from the exercising of human reason.[17] This understanding tends to presume that the world of phenomena represents the sole order of reality with which human reason can possibly engage. Given the modernist premise that the phenomenal world is the basic source of valid knowledge and norms, the further assumption follows that modern, Western science, as the supposedly authoritative means for explaining the significance of phenomena, makes possible the free flowing of this source.[18] In sum,

modernity, which typically claims not to rely on a transcendent, revelatory source of knowledge and norms, is steeped in a phenomenalist, or, to put it in more commonly voiced terms, a naturalistic worldview.[19] Characteristically, this worldview does not admit to the existence of an order of reality transcending the phenomenal world. Accordingly, the modernist worldview indicates, further, that universally applicable truths conducive to human progress are accessible basically through the scientific analysis of phenomena.

Consistent with its strongly naturalistic worldview, and its intent to oversee the universal realization of humankind's evolution (to put it in modernist terms) from an overall reliance on faith to an embrace of putative successors to faith, such as empiricism and rationalism, modernity may be interpreted as being profoundly secularist.[20] The secularist outlook of modernity is, in the first instance, a fundamental, epistemic trait concerning the way in which the modernist mind and spirit perceive the essence and structure of reality. Above all, secularist doctrine implies that there exists a radical, metaphysical division between sacred transcendence and the phenomenal world.[21] (Strictly speaking, secularist doctrine typically admits to the existence of the phenomenal world alone, and thus professes – at least within the context of the liberal state and society – to leave for individuals the freedom to believe or disbelieve in the existence of the Transcendent).[22]

The consequent, secularist conception of religion indicates that there exists a distinct, metaphysical and cognitive severance between religion, and all other aspects of human life and experience. This presumed severance relegates and restricts the religious dimension of humankind to what is believed to be the private realm of subjective

consciousness. In this way, religion is presupposed, on the secularist view, to be nonessential to human life and society, and capable of being isolated within its own, discrete sphere.[23]

Significant civilizational ramifications of secularist doctrine follow from modernity's epistemic premise that there exists an utter divide between transcendence and the phenomenal world, that is, a divide between the sacred realm believed by some to exist, and the secular, or worldly realm. What is the central thrust of these ramifications? To adapt Peter Berger's influential definition of the process of secularization, modernity typically presupposes that basic, communally shared, "sectors of society and culture" – science, politics, economics, law, and so forth – can and should be "removed from the domination of religious institutions and symbols."[24] A prime manifestation of this sought, "separation of all aspects of [public life] from religion or religious influence" is the basic premise of secularist law, namely, that the religious life (whether of individual citizens, or communities of believers) can and should be held completely apart from the political and legal dimensions of the modern, civil state.[25]

However, despite the characteristic, modernist profession to the contrary, one may construe modernity as being grounded in a distinct, religious tradition. While remaining hidden from public acknowledgement, this tradition nonetheless constitutes, necessarily, the religious base underlying modernity's legal and political spheres.[26] In historical terms, modernity's unspoken, worldly faith is the product of a gradual, pervasive, post–medieval transformation of the human response to the Divine. As a result of this "transmutation of the religious", Ultimate Reality has come to be silently conceived of and experienced as entirely immanent and observable within the world. This is as

opposed to Ultimate Reality's being conceived of and experienced in the manner of the Perennial Tradition, that is, as entirely transcendent, or as both transcendent and immanent.[27] In Chapter Three, I will draw upon analyses offered by some of the scholars who have helped to demonstrate modernity's intrinsic, religious immanentism; thus emphasized will be historical moments and figures key to the unfolding of modernity's immanentist religious tradition. At present, though, I would like to adapt the insights of perennialist thinkers as a basis for disclosing modernity's customarily concealed, religious orthodoxy.

## II. The Perennialist Critique of the Modern, Western Worldview: Its Implicit Revelation of Modernity's Hidden Religious Orthodoxy

### *A. Delineating Some "Absolute Presuppositions" of Modernity*

The perennialists' sustained critique of the modern, Western worldview and its manifold, deleterious consequences, in areas ranging from humankind's spiritual awareness to the condition of the natural environment, serves to underscore the set of epistemic presuppositions that drive the mind of modernity.[28] Accordingly, this critique effectively reveals, at the same time, the religious orthodoxy that is encapsulated by modernity's epistemic presuppositions. Ironically, however, the logical steps that are required to move from a critique of these postulates to a recognition that they reside at the core of an unacknowledged, immanentist religious tradition typically are not taken by the perennialists. Therefore, upon illustrating how the perennialist critique of the modern, Western worldview provides a compelling account of some "absolute presuppositions" essential to modernity, I will explain why these presuppositions may be interpreted as being fundamentally religious. In the process, I will call into question the dichotomy that the perennialists perceive as existing between "authentic religion" and the modernist

worldview.

As the Perennial Tradition embodies, above all, eternal truths concerning the transcendent source and divine essence of reality – that is, sacred "metaphysical axioms"[29] – it is appropriate that the perennialist critique of modernity should center on the deficiencies of modernist metaphysics. To be precise, the perennialists tend to resist conceding that the modernist worldview even rests on a metaphysics. This is because, from the perennialist standpoint, metaphysics is properly understood as a "sacred science" that knowingly deals with Ultimate Reality and manifestations of the Real.[30] The Perennial Tradition suggests that, because the modernist worldview typically acknowledges the existence only of phenomenal, relative reality, modernity lacks knowledge of the Real, and therefore lacks a metaphysics, as well. However, I would maintain that, in challenging modernity's idea that the entirety of reality is reducible to worldly phenomena, the perennialists assuredly are confronting a modern, Western, phenomenalist metaphysics. By applying R.G. Collingwood's understanding of metaphysics, one may recognize that modernity's outlook on reality in fact turns on the central requirement of metaphysical thought, namely, "absolute presuppositions". Modernity's "absolute presuppositions" are those that "lie at the root" of the modernist mind, and are presumed by this mind, on the basis of faith, to be incontrovertible.[31]

### *1. Modernity's Ontology*

Fundamental to the Perennial Tradition, and shared across (while uniquely expressed by) the distinct worldviews partaking in the Tradition, is the idea that existence is structured as a gradational hierarchy, with all orders of being emanating from, continually participating in, and deriving their final meaning from the Transcendent. However, as is

plaintively observed by Seyyed Hossein Nasr, the perennialist understanding of ontological hierarchy has become, within the context of modernity, "horizontalized and converted from a ladder to Heaven to an evolutionary stream moving toward God knows where".[32] Modernity's collapsing of the hierarchy of being is expressed in a prevalent ontology that "[treats]…the physical world as if it were an independent (indeed, the sole) order of reality."[33] As Huston Smith maintains: "…this is the final definition of modernity: an outlook in which this world, this ontological plane, is the only one that is genuinely countenanced and affirmed."[34]

The "systematic neglect of higher orders of existence" that typifies the modernist notion of the origin and essence of being is fed, the perennialists observe, by the scientistic doctrine that courses through the heart of the modern, Western worldview.[35] Scientism holds, in sum, that truthful knowledge concerning any facet of existence must be derived essentially by applying the methods and practices of modern, Western experimental inquiry into the natural sciences. Thus presupposed by scientism is that "the things [modern, Western] science deals with – material entities – are the most fundamental things that exist."[36]

By depicting modernity's idea that the entirety of existence has been compressed into a worldly plane, the perennialist critique indicates, crucially, that modernity has effectively reconstituted the ultimate source of all reality within the phenomenal realm. The perennialists emphasize the far–reaching consequences that this reconstitution has for specific aspects of reality. For example, consistent with the Darwinian metaphor invoked by Nasr to characterize modernity's collapsing of ontological hierarchy, Frithjof Schuon focuses on modernity's reduction of the source of all life to materiality. Schuon

portrays this reductionism as an utter inversion of the perennialist understanding that divine emanation is the origin of life.[37] Similarly, Nasr contends that the predominating, modernist conception of both the animate and inanimate elements of the natural world represents a collapsing of the perennialist model of transcendentally emanating, hierarchical nature. He explains that, instead, the scientistic mind has reduced the final origin of nature to a material substratum that gives rise to accidental aggregations of matter, which order themselves and function in a mechanistic fashion.[38]

The perennialist critique of the modern, Western worldview suggests, further, that nominalist doctrine has contributed significantly to the development of modernist ontology.[39] (Again, recall that nominalism refers to the principle holding that reality inheres in the particular beings of the phenomenal world; this, as opposed to the belief, basic to the Perennial Tradition, that particular beings derive their reality through their participation in universal, ideational essences). While the key, historical role of nominalism in the unfolding of modernity's worldly religious tradition shall be returned to in Chapter Three, it is illustrative to note at present the nominalist influences that are indicated by modernity's tendency to attribute reality solely, and inherently, to particular beings in the phenomenal world. Recall that this is as opposed to the perennialist understanding that particular, phenomenal beings derive their reality by participating in universals which emanate from the Transcendent. Following from its confinement of reality to particulars, modernist metaphysics is inclined to conceive of reality, at the elemental level, as if it were ground into the granular form of "atoms and their combinations".[40] This results in the effective distribution of existence, as if it were spread across a grid confined to space and time, such that all existents may be rationally

classified and quantified.[41]

### *2. Modernity's Epistemology*

Tightly interconnected with modernist ontology is an empiricist epistemology that privileges the ratiocinative analysis of sensory data. As is indicated by the perennialists' critique of the way in which scientism validates modernity's collapsing of ontological hierarchy, modernity's prevailing ontology and epistemology serve to reciprocally reinforce one another. At the core of modernist epistemology is the notion that valid knowledge is arrived at, necessarily, by means of experimentation, quantification, and rational scrutiny, carried out with respect to the elemental object of human knowing – namely, discrete bits and aggregations of matter. As such, modernist epistemology tends to take the view that the final meaning and significance of worldly matter inheres within matter. This meaning and significance is believed to be directly accessible to the human mind that seeks to extract it through an empirically–driven process of discovery.

Modernist epistemology stands in contradistinction to the perennialist understanding of the sacred origin and essence of knowledge and knowing. Perennialist epistemology is premised on the principle that some persons can come to truly know Ultimate Reality. This knowledge is attainable by those who are able to apply the intellect to cosmic manifestations of the Real, while at the same time maintaining an abiding openness to the intuitive awareness of Ultimate Reality that is written across the human intellect and heart.[42] By contrast, the "sensate" worldview of modernity, in adhering to the supposed primacy of empiricist cognition, purports to have freed itself of the intuitive forms of knowledge associated with such non–provable phenomena as "revelation, divine inspiration, and mystic experience."[43]

### *3. Modernity's Philosophical Anthropology*

Among modernity's "absolute presuppositions", the predominating ontology and epistemology are buttressed, further, by a philosophical anthropology that is connoted by Nasr's depiction of the "Promethean man" who, compelled by scientism, seeks to bend existence to his will.[44] Modernity's model of the human being postulates the continual extension of anthropic control over existence, with this control being enabled and justified by the discoveries flowing from knowledge that is induced through the senses. The modernist anthropological model turns on a conception of the rational, knowing subject that confers on the subject the status of an absolute. As such, the model may be contrasted to the perennialist idea of, as Schuon terms it, "a spiritual anthropology". The concept of "a spiritual anthropology" postulates that human subjectivity is utterly contingent on and ceaselessly indicative of Ultimate Reality, which is the subject's center of origin, as well as the final referent of human knowledge.[45]

Underpinning modernity's notion of the absolute subject are René Descartes's (1596-1650) theory of the divide separating the subject from the objects of his or her knowledge; and Immanuel Kant's (1724-1804) rendition of the transcendental subject, whose observational and epistemic perspective constitutes the ultimately authoritative vantage point on – indeed, determines the conditions of possibility for – reality.[46] Kant's effective extraction from out of the philosophical picture of any "God–like standpoint or point of reference outside of human experience from which the latter might be characterized and judged" serves to transform the finite individual into the infinite source of all that is knowable.[47]

Given the modernist elevation of the knowing subject to the position of an absolute,

the philosophical anthropology of modernity contributes to the exaltation of instrumental rationality; this, as the technological by-products of instrumental rationality serve as prime implements through which humans seek to manipulate and control the ordering of nature. Indeed, in the light of the Cartesian bifurcation of subjective consciousness from the naturalistically–conceived body (and, with that, the perceived power of subjectivity to control the body), a prime manifestation of modernity's "Promethean" philosophical anthropology is the modernist penchant for treating human bodies, themselves, as objects of technocratic domination.[48]

### *B. The Modernist Worldview: Does It Represent an "Authentic" Religious Tradition?*

#### *1. Evaluating the Perennialist Claim that Modernity Is Not Genuinely Religious*

The perennialists' trenchant critique of the modernist worldview notwithstanding, their line of reasoning is marked by what I believe is the dubious claim that this worldview is not in any genuine sense religious. For instance, the perennialist school situates the Perennial Tradition, or, as perennialist scholars tend simply to state, Tradition, as the epistemic counterposition vis-à-vis the "antitraditional", civilizational worldview of modernity.[49] In this way, the perennialists lend the (misleading, I would maintain) impression that the modernist worldview lacks the indicia of a distinct, religious tradition that asserts professed, incontrovertible claims about the nature of reality, and that seeks to validate and maintain its authority through official institutions. As Wilfred Cantwell Smith has suggested, what makes a "religious tradition" is, in large part, its embodiment of a faith–based mode of human responsiveness to the Transcendent that, while highly variable, is broadly shared by persons connected with one another through historical time.[50] As I will emphasize in the present section of the chapter,

modernity's immanentist mode of responding to the Transcendent fits this criterion.

Also problematic is the perennialists' opposition of the *religio perennis* ("perennial religion"), and thus, of "authentic religion", to the ostensibly irreligious, or, at most, pseudo–religious beliefs endemic to modernity.[51] Prime targets in this respect are "New Age" faiths and forms of "neo–spiritualism" which, while perhaps actually inspired by a dissatisfaction with the modernist worldview, unfortunately partake, nonetheless, in the phenomenalist conception of reality that is the hallmark of this worldview.[52] Indeed, René Guénon indicates that "neo–spiritualism" is typified by its tendency to treat phenomena as absolutes, thereby resulting in an "immanentism" that he decries as "an 'inversion' of spirituality".[53] Then, too, Guénon states that the "superstition[s]" of modern, Western science

> are veritable idols, the divinities of a sort of "lay religion," which is not clearly defined, no doubt, and which cannot be, but which has none the less a very real existence: it is not religion in the proper sense of the word, but it is what pretends to take its place, and what better deserves to be called "counter–religion."[54]

Overall, Schuon assumes a standpoint representative of the Perennial Tradition when he contends that, to be "orthodox", religion must discern between the Real and the illusory (the illusory being the impermanent realm of relative reality); and must maintain a "unifying and permanent concentration on the Real".[55] To this, he contrasts:

> hetero doxies [that] always tend to adulterate either the idea of the divine Principle or the manner of our attachment to it; they offer either a worldly, profane or, if you like, "humanist" counterfeit of religion, or else a mysticism with a content of nothing but the *ego* and its illusions…[56]

To be sure, the perennialist scholars may be justified in arguing, on normative grounds, that the modernist worldview is marked by a deeply flawed conception of reality, one which fails to recognize that phenomena are not absolute, but are utterly

dependent for their ephemeral existence upon the one, Transcendent Reality. However, in asserting that the modernist worldview is diametrically opposed to "authentic religion", the perennialists miss the opportunity to recognize that this worldview represents a genuine (if misguided) playing out of humankind's universal, religious impulse.

*2. Max Scheler on Humankind's Essential Responsiveness to the Transcendent*

One of the most effective explications both of the universality of religious belief and experience, and the ways in which the ubiquitous presence of the religious impulse is sometimes manifested in erroneous conclusions about the nature of divinity, remains Scheler's. Of especial pertinence is his elaboration of the claim that "[t]he religious act is necessarily accomplished by every human being".[57] In characterizing the religious act, Scheler provides a sense of its fullness that serves to emphasize, by contrast, the severe circumscription of the secularist conception of religion. Speaking on the one hand about the interior dimensions of the religious life, Scheler observes that religious acts "are…as *constitutive* a part of human consciousness as thought, judgment, perception and memory".[58] At the same time, he explains that "the religious act [does] not…confine itself within the human interior but…manifest[s] itself to the outside world…[through] purposive conduct and expressive action."[59] Consistent with this, "every religious act is simultaneously an *individual* and a *social* act."[60] Quintessential examples of "the religious act" would be "liturgical expression", and "forms of worship and…ritual representation", which, by providing an external "vehicle" for the springing forth of a believer's internally "rooted" "religious knowledge", embody an integral, "psycho-physical…unit."[61]

Scheler's phenomenological analysis of the religious life takes as its point of departure the investigation of humankind's religious acts, thereupon proceeding to ask whether "the *existence of God* [can] be *inferred* from the existence of religious acts within the mind of man".[62] His posited answer is crucial:

> Only a real being with the essential character of divinity can be the cause of man's religious propensity.... The *object* of religious acts is at the same time the *cause* of their existence. In other words, all knowledge of God is necessarily knowledge from God.[63]

Scheler thus indicates that the religious impulse basic to human consciousness inherently engages humankind in a relationship with the transcendent source and referent of the impulse, a source and referent whose reality is beyond question. In this respect, Scheler takes a position comparable to that of Mircea Eliade, a later, phenomenologically oriented scholar of religion whose work has been cited with some sympathy in perennialist literature.[64] As Eliade states, "the "sacred" is an element in the structure of consciousness"; and the broad corpus of Eliade's writing may be read as implying that, on his view, "the sacred is pre–eminently the *real*".[65]

In concert with an undercurrent critique directed by Scheler against the ailing, "moral and spiritual culture of [post–World War I] Europe",[66] he demonstrates the universality of religious acts in a way that is propitious to revealing the unspoken, religious character of the modern, Western worldview. As is indicated by the extended quotation in the preceding paragraph, God – that is, the Transcendent – is, from Scheler's standpoint, the true referent of humankind's religious acts. However, the failure of a human being to recognize that the Transcendent is the proper end of his or her religious devotion does not negate that person's status as a religious actor. Scheler states:

Since the religious act is an essential endowment of the human mind and soul, there

> can be no question of whether this or that man performs it. The question can only be of whether he finds its *adequate* object, the correlative idea to which it essentially *belongs,* or whether he envisages an object, acclaiming it as divine, as holy, as the absolute good, while it yet *conflicts* with the nature of the religious act because it belongs to the sphere of finite and contingent goods.[67]

Scheler thus goes on to proclaim: "This law stands: every finite spirit believes either in God or in idols."[68] In the case of idolatry, "[man] has installed a finite good in place of God, *i.e.*...within the objective sphere of the absolute, which he 'has' at all events as a sphere, he has...'deified' a particular good".[69] By providing examples of finite goods such as "the State", which are prone to being put "in the place of God, or *treat[ed]* 'as if' [they] were God",[70] Scheler's analysis suggests that the idolatrous phenomenon he describes tends to flourish within the context of modernity. In fact, for Scheler, the modernist infusion of idolatrous qualities into the nation–state exemplifies an erroneous – and, moreover, pernicious – conception of divinity that nonetheless bespeaks the religious basis necessarily underlying any human community.[71]

Scheler's account of humankind's inherently religious nature is not inconsistent with the perennialists' understanding that human consciousness is, in its essence, responsive to the Transcendent. Nor is it at odds, then, with the perennialists' illumination of the basic, human capacity for knowing the sacred meaning and significance that the Transcendent imparts to all of existence. As the perennialists grasp, these traits of consciousness remain, even under circumstances in which, due to factors of human frailty and historical context, neither the Absolute nor the sacredness It imparts to contingent reality is properly known.[72] Following Scheler, one may read the perennialists' critique of the modern, Western worldview as describing a religious outlook that, in conceiving of reality as reducible to worldly phenomena, has erroneously substituted finite, contingent

reality for infinite, Absolute Reality. The resulting deification of finite goods – for example, the absolute, human subject imagined by the modernist model of the human being; or the nation–state – represents a misapprehension of the Transcendent that is, withal, a religious act.

### *3. John Hick on the Cognitive Lens Through Which Ultimate Reality Is Conceived of and Experienced*

Given humankind's essential responsiveness to the Transcendent, modernity's unspoken mode of responding to transcendence is informed by the "absolute presuppositions" that the perennialists identify at the core of the modernist worldview. By constituting the cognitive lens through which Ultimate Reality is conceived of and experienced, these phenomenalist, axioms and first principles lead modernity to imagine that transcendence is entirely immanent within the world. To realize how this is the case, it is helpful to draw on the examination of humankind's religious dimension that is undertaken by the theologian and philosopher of religion, John Hick.

It is telling that there are significant parallels between the ways in which Hick and the perennialists conceive of Ultimate Reality and Its manifestations both in creation and humankind's religious life.[73] Like the perennialists, Hick regards "the Real" as at once transcending, sustaining, and manifesting its divine presence throughout contingent reality. As such, Hick indicates that humans are, in their essence, "either continuous with, or akin to and in tune with, the ultimate reality that underlies, interpenetrates and transcends the physical universe."[74] Following on this, Hick suggests, as do the perennialists, that humankind's religious life, as it is experienced within the full range of religious traditions, expresses in a multiplicity of unique forms the human relationship with the Transcendent.

A key difference, however, between Hick's position and the perennialists' (at least insofar as the latter position is represented by Nasr) centers on the question of what constitutes genuine manifestations of humankind's religious relationship with the Transcendent. On Nasr's view, "the various 'crystallisations' of religious truth" are "Divine formulation[s]" that the "Divine Itself" ordains as occurring "within the light of various human situations."[75] By contrast, Hick's stance, which does a good deal more to help reveal modernity's hidden religious orthodoxy, is that human responses to the Real form the crux of humankind's religious dimension. As Hick observes, human responses to the Real are deeply informed by the specific, historical and civilizational context within which they occur. Consequently, the way in which Ultimate Reality is conceived of and experienced within the context of a particular religious tradition and place in world history is contingent upon the "cognitive machinery and conceptual resources" that are in effect.[76] On my reading, the phenomenalist, "absolute presuppositions" of modernity constitute the "cognitive machinery and conceptual resources" that inform the modernist worldview's response to the Transcendent. As perceived through this lens, the Transcendent has been, as if by metaphysical magic, injected and confined within the world.

Therefore, while Hick himself does not categorize as implicitly religious that worldview which he indicates to be the "pervasive naturalistic outlook" of the present–day West,[77] I would maintain that his analysis helps pave the way to such a categorization. Indeed, in tempering the conceptual opposition that he sets forth between the naturalistic and religious outlooks, Hick intimates that "the universal presence of the Real" has an inexorable "impact" upon modernist civilization.[78] This impact is

manifested, for example, in secular measures taken in response to "the claim [that is placed upon persons by] the ultimately Real as encountered in the...moral and political needs of humanity."[79]

It should also be noted that, on Hick's view, the existence of a religious response to the Real requires that the response be voluntary. Significantly, one may rely on Scheler in inferring that this criterion is met by the modernist believer. Scheler indicates that the religious act, even when it remains unspoken, involves an intentional striving towards its referent.[80] In other words, with as basic as is the pull of the Transcendent on human consciousness, this pull must meet with some mode of active response. However, whether this response reads with true understanding what Hick terms "the 'signals of transcendence' that are everywhere around us"[81] is dependent on the cognitive lens through which the signals are perceived.

### *4. Modernity's Display of Basic Indicia of Religiousness*

#### *i. Faith*

The assertion that the "absolute presuppositions" of modernity frame the modernist worldview's response to transcendence is reinforced by the basic indicia of religiousness which the modernist presuppositions exhibit. For one, they are based on faith. Faith is that "essential human quality" which prompts a person to grant unconditional acceptance to specific postulates and truth claims.[82] This acceptance is conferred not on the basis of sensory proof or rational logic, but rather, on the grounds of a deeply intuitive "assent" to the validity of these presumed truths.[83] Earlier in the inquiry, it was maintained that modernity's metaphysical principles, as "absolute presuppositions", necessarily are rooted in faith. Further demonstration of this is made by the perennialist commentator

John Ahmed Herlihy, who offers one of the Perennial Tradition's most forthright intimations of modernity's religious essence. As he observes, the modernist worldview is no less faith–based than is the Perennial Tradition:

> The faith of both worldviews represents a leap of mind, and a willingness and an affirmation of what one believes to be the categorical imperative of the mind, whether that be the Transcendent Reality or a purely physical reality.[84]

*ii. A Conception of Ultimacy*

In addition, the modern, Western worldview provides ample evidence of what Huston Smith enumerates as "properties we tend spontaneously to recognize as religious". Some of these include: an ontology; the involvement of the individual believer's total self; a conception of ultimacy; and a communal nature, including cultic features.[85] The pertinence of the first two properties was discussed earlier in the chapter. With respect to the third attribute, the Protestant theologian Paul Tillich famously argued, "[r]eligion, in the largest and most basic sense of the word, is ultimate concern".[86] For Tillich, "ultimate concern" implies the human longing for that which ultimately is real, unconditional, and serves as the bedrock of all meaning and significance.[87] Further, to be concerned with ultimacy is to seek the basis of ontological truth, that is, "the ground and meaning of [human] existence and of existence generally."[88] As read in this light, modernity's idea that reality is reducible to worldly phenomena strongly bespeaks a conception of ultimacy. Moreover, the prevailing belief, especially within such a society as the US, that liberal democracy is "an almost unimpeachable doctrine" whose teachings are akin more to "an unacknowledged religion" than "a mere political system" indicates the conviction that the liberal democratic ideological embodiment of modernity's worldview is an effectively ultimate creed.[89]

### *iii. A Communal Nature*

The communal nature of modernity's religious tradition is implicit in the fact that the tradition embodies premises about the essence and structure of reality that are shared among adherents to the modernist worldview. Thus, the modernist worldview might be thought of as representing an "epistemic community" whose members are bound by "their shared belief or faith in the verity and the applicability of particular forms of knowledge or specific truths".[90] Inasmuch as it informs modernity's quintessential mode of response to the Transcendent, this "epistemic community" effectively functions, at the same time, as a religious community.

As Eliade indicates, the ideologies that are concomitant to religious worldviews serve to translate foundational premises about the nature of reality into lived, communal experiences.[91] Consistent with this, the ideological models of social, political, and economic ordering that are rooted in modernity's religious tradition serve to carry the tradition into, and facilitate its expression within the public sphere. In this way, ideological and political–economic doctrines shape the cultic features of modernity's religious orthodoxy, such as customs, rituals, de facto, liturgical and catechistic practices guiding the public confession of faith, and patterns of discourse. One of the most powerful exemplars of this phenomenon – specifically, the expression of modernity's religious orthodoxy through ideologically driven, legal and political mechanisms and their associated customs, rituals, liturgies, and so forth – will be considered in Chapter Four.

Modernity's phenomenalist metaphysics provides a common, religious and epistemic foundation for varied, and in some instances, strongly conflicting, ideological and

political–economic doctrines. For example, in its presently predominating, neo–liberal, democratic capitalist form, no less than in its communist form, the modernist worldview suggests that the realm of economic activity exemplifies the worldly origination of final meaning and salvation. Along with this, both species of ideological and political–economic doctrine postulate the absolute, metaphysical primacy of the human being, who is imagined to be essentially naturalistic.[92] Therefore, I would differ somewhat from that line of thinking which evocatively characterizes various modernist ideologies as themselves constituting "secular religions".[93] My claim is that these ideologies, including those that have been in bitter, historical contestation with one another, may be more accurately regarded as differing denominations or sects of a shared, worldly faith.[94]

It also should be noted that modernist ideologies may serve as sites for the complex admixture of modernity's worldly faith together with other, religious traditions.[95] A prime example of this is the messianic variety of liberal nationalism epitomized by the US. As will be discussed in more detail in the conclusion to the dissertation, this form of nationalist ideology tends to conflate a Protestant conception of transcendent divinity with the historical trajectory of American nationhood.

*5. The Esoteric Dimension of Modernity's Religious Tradition*

One further matter should be addressed in defense of the claim that the modernist worldview indeed represents an "authentic" religious tradition. Basic to the perennialist conception of religion, especially as it is articulated by Schuon, "is the distinction…between the exoteric and esoteric dimensions of any [genuine] religious tradition."[96] The Perennial Tradition emphasizes the paramount nature of esoterism, which refers to the intellective process whereby select persons, by means of deep

contemplation, metaphysical knowledge, mystical experience, and so forth, are able to attain true understanding of the Absolute. Exoterism, as the complement to esoterism, refers to the outward manifestations of religious traditions, that is, the tradition–specific, revelatory messages and theophanies which express in unique, doctrinal forms one, transcendent Truth.[97] On Schuon's view, exoterism requires "the [vivifying] presence within it of the esoterism of which it is both the outward radiation and the veil."[98] Absent this presence, exoterism threatens to degenerate into "literalistic dogmatism".[99]

For the time being, let us set aside the question of whether the exoteric–esoteric distinction, as it is conceived of by the perennialists, is in fact a necessary element of a religious tradition. Assuming, then, that some form of esoteric dimension is basic to any given religion, the important point at present is that one may interpret modernity's immanentist religious tradition as demonstrating such a dimension. As will be underscored when Voegelin's thought is discussed more fully in Chapter Three, his analysis of a Gnostic element in the essential "nature of modernity" indicates the presence of a form of esoterism within the modernist worldview.[100] As Voegelin explains, included among the paradigmatic, modern "variants of Gnosticism" are revolutionary, social and political movements such as the progressivism of the *philosophes,* the positivism of Auguste Comte (1798-1857), which sought to radically reform society by applying to it the principles of scientific inquiry, and Marxism. What makes such movements Gnostic is that they are led by figures who seek to transform the worldly realm into the locus of human salvation by partaking in esoteric knowledge that reveals the ultimate meaning of existence.[101] In the instances of progressivism, positivism, and Marxism, this involves the attempt to attain, primarily through reliance

on the principles of natural science, "a direct grasp of the ultimate issues concerning human nature, human purpose, human meaning, and human destiny."[102]

Schuon would seem to be aware of, but in disagreement with the type of argument that is made by Voegelin. Consistent with Schuon's understanding of religion, as well as his critique of modernity, he suggests that supposed, modern Gnosticism is in fact antithetical to true, esoteric gnosis, or "the way of the intellect."[103] Once again, however, one is led to ask whether a misreading of the true nature of Ultimate Reality means that the resulting, erroneous conception of the Divine is not genuinely religious. In issuing his condemnation of the modern Gnostics' "fallacious" eschatology, Voegelin advances a critique of modernity that hardly is any less forceful than Schuon's. On Voegelin's view, the Gnostics' denial of the real nature of transcendence effects the "destruction of the soul," and thus presents a mortal threat to human civilization.[104] Nonetheless, he indicates, the Gnostics' "immanentization" of transcendence represents an unavoidably religious act that serves to establish "Gnosticism as a civil theology of Western society".[105] To be sure, the Gnostics have failed, one might argue, to find the adequate object of, and therefore properly consummate, the religious act.[106] This does not mean, however, that they have not affirmatively undertaken some manner of religious act, and thereupon founded their vision of community.

## 2. Endnotes

1. Support for this characterization of modernity's self–conception may be found in, for example: Hans Blumenberg, *The Legitimacy of the Modern Age,* Robert M. Wallace, trans. (Cambridge, MA: MIT Press, 1983); and Jürgen Habermas, *The Philosophical Discourse of Modernity,* Frederick G. Lawrence, trans. (Cambridge, MA: MIT Press, 1987) [see especially 'Modernity's Consciousness of Time and Its Need for Self–Reassurance', pp. 1-22].

An important question addressed both by Blumenberg and Habermas is whether modernity is justified in presupposing that it has, indeed, achieved a radical break separating itself from the preceding entirety of world history. Related to this, I assert, throughout the dissertation, that modernity is marked not by a historically unique, absence of the religious (which would, to be sure, represent a singular departure from the preceding history of humankind), but rather, by its transmutation of the religious. Thus, my own position is that modernity's implicit claim to represent an historical era that has successfully broken with the necessarily, religiously based thought processes of the pre–modern world is self–deluding. Indeed, the modern West's self–conceived separateness from the antecedent, unified sweep of human history is a pivotal element contributing to the very cast of mind that tends to blind modernity from recognizing its peculiar place within the overall, religious history of humankind. Contrast to this modernist misperception, Wilfred Cantwell Smith's notion of "critical corporate self–consciousness". Engaging in "critical corporate self–consciousness" can aid in illuminating for human beings their participation in humanity's universal, "religious awareness of transcendence", which is manifested in a multiplicity of historically specific ways. See the essays, 'Philosophia as One of the Religious Traditions of Humankind' and 'Objectivity and the Humane Sciences: A New Proposal', at pp. 19-49 and 121-46 respectively, in Wilfred Cantwell Smith, *Modern Culture from a Comparative Perspective,* John W. Burbidge, ed. (Albany, NY: SUNY Press, 1997).

2. In their critiques of the modern, Western worldview, thinkers from within the perennialist school of religious and metaphysical thought tend to be especially adept at exposing the modernist notion that modernity has progressed or evolved beyond, and thereby freed itself from, an ostensibly pre–modern reliance on faith. See, for example, Rama Coomaraswamy, 'The Fundamental Nature of the Conflicts Between Modern and Traditional Man: Often Called the Conflict Between Science and Faith', pp. 91-116 in Seyyed Hossein Nasr and Katherine O'Brien, eds., *In Quest of the Sacred: The Modern World in the Light of Tradition* (Oakton, VA: Foundation for Traditional Studies, 1994).

3. Given modernity's tendency to conceive of itself in this fixed, apogean sense, the perceptive commentator should keep in mind the dubiousness of trying to enclose the era within strict, chronological boundaries. As Voegelin observes:

> ...what we call modern is not a definite state of mind that all of a sudden spreads evenly over the West; modernity...is a historical process, extending over centuries, in which the medieval, spiritual–temporal order of Western mankind gradually

dissolves – earlier in some regions, later in others; faster in some regions (not necessarily the earlier ones), more slowly in others. Eric Voegelin, *The Collected Works of Eric Voegelin, vol. 23: History of Political Ideas, vol. V: Religion and the Rise of Modernity,* James L. Wiser, ed. (Columbia, MO: Univ. of Missouri Press, 1998), p. 183.

Further, it is important to observe that, while I share with the perennialist thinkers, and a broad variety of others, the belief that it is possible to identify an essential core of indicia marking the mindset and mythos of modernity, the genealogy of the era nonetheless encompasses a diversity of sometimes discordant, intellectual strands. For instance, one may contrast to Condorcet's progressional model of history the cyclical (helical arguably might be a more accurate term, depending on whether this enigmatic Italian thinker is read as a teleologist) historical model set forth by the Neapolitan philosopher of history and language, and seminal social theoretican, Giambattista Vico (1668-1744). See Giambattista Vico, *The New Science of Giambattista Vico, Abridged Translation of the 3rd ed. (1744),* Thomas Goddard Bergin and Max Harold Frisch, trans. (Ithaca, NY: Cornell Univ Press, 1970). Vico made landmark contributions to the development of the modernist conception of a universal history (and, with that, to the modern practice of universalizing historiography), as well as to the development of modern social theory and philology. However, he may be taken, at the same time, as having been strongly at odds with key aspects of what today is viewed, with the benefit of historical hindsight, as the emerging epoch of modernity.

Voegelin, whose own critiques of modernity demonstrate his sympathy with Vico's thought, argues that "Vico was the first of the great diagnosticians of the Western crisis." In supporting this contention, Voegelin points, in particular, to Vico's opposition to the "hubris of self–salvation," which hubristic trait, Voegelin suggests, was central to the emergence of the modernist theory of progress. On Voegelin's line of reasoning, it thus was possible for Vico to develop his "counterposition [to the theory of progress] in his [own] theory of the inevitable decadence of the civilizational course." Eric Voegelin, *The Collected Works of Eric Voegelin, vol. 24: History of Political Ideas, vol. VI: Revolution and the New Science,* Barry Cooper, ed. (Columbia, MO: Univ. of Missouri Press, 1998), p. 145.

4. By *philosophes,* I refer to the line of eighteenth–century French philosophers, including figures such as, besides Condorcet, Jean Le Rond d'Alembert, Denis Diderot, and Voltaire, who, one might maintain, exemplified the essence of Enlightenment thought. This essence, together with a detailed analysis of the French term, *philosophe* (including an argument for applying the term to non–French, Enlightenment contexts, as well) is admirably captured in Peter Gay's two–volume work, *The Enlightenment: An Interpretation* (New York and London: W.W. Norton & Co., 1977).

5. Marie Jean Antoine Nicolas Caritat, Marquis de Condorcet, *Sketch for a Historical Picture of the Human Mind,* June Barraclough, trans. (London: Weidenfield and Nicolson, 1955) [original edition published in 1795]. See especially 'The Ninth Stage: From Descartes to the foundation of the French Republic', pp. 124-72.

6. *Ibid.,* p. 173.

7. *Ibid.,* pp. 173-4, 177.

8. *Cf.* Ernst Cassirer, *The Philosophy of the Enlightenment,* Fritz C.A. Koelln and James P. Pettegrove, trans. (Boston: Beacon Press, 1951), p. 250.

9. Condorcet, *Sketch for a Historical Picture of the Human Mind,* p. 173.

10. I am in sympathy with the general line of argument which holds that the present, historical era is marked not by a condition of "postmodernity", but, rather, of "radicalized", or "high" (some might say "late", or "hyper") modernity. See, for example, Anthony Giddens, *The Consequences of Modernity* (Stanford, CA: Stanford Univ. Press, 1990). For a compelling critique exposing supposed "postmodernity" to be, in actuality, an extension and intensification of modernity's ongoing drive towards the universalization of the modern, Western, civilizational worldview, and the suffusion of this worldview throughout every element of global life and society, see Ziauddin Sardar, *Postmodernism and the Other: The New Imperialism of Western Culture* (London and Chicago: Pluto Press, 1998). Especially useful is Sardar's analysis of "postmodernity's" continuation both of the process of modern secularization, and of secularization's sought marginalization of religion, especially non–Western faiths. See *ibid.,* pp. 231-71, and *passim.*

11. *Cf.* 'Transcript: Confronting Iraq Threat 'Is Crucial To Winning War On Terror'', *The New York Times,* October 8, 2002, p. A12.

12. 'Full Text: Bush's National Security Strategy', <nytimes.com> (September 20, 2002), p. 1. The full title of this document is 'The National Security Strategy of the United States'.

13. *Ibid.*

14. *Ibid.*

15. *Cf.* Charles Taylor, *Varieities of Religion Today: William James Revisited* (Cambridge, MA: Harvard Univ. Press, 2002), p. 70.

16. 'Full Text: Bush's National Security Strategy', p. 1.

It might, at first, seem curious to draw parallels between the philosophy of history propounded by the ardently anti–religious Condorcet, and the peculiar brand of modernist, historical triumphalism which, as espoused by the Bush administration, would appear to be informed by the strands of evangelical Protestantism influencing the administration. Specifically, the administration effectively ascribes to the US a messianic role in achieving the historical telos of modernity, and in this way draws upon the deeply Protestant roots of American nationalism and historical exceptionalism. See, for

example, Rodney Blackhirst and Kenneth Oldmeadow, 'Shadows and Strife: Reflections on the Confrontation of Islam and the West', *Sacred Web: A Journal of Tradition and Modernity,* no. 8 (2001), pp. 121-36; and *cf.* Bellah, 'Civil Religion in America'.

However, I would maintain that Condorcet's and the Bush administration's respective renditions of the grand, historical role of modernity are crucially linked by the fact that each rendition serves to depict modernity as being imbued with salvational import. More than this, the salvational import of modernity effectively refers, in each case, to a divine referent that is immanent within the world. Condorcet's radically scientistic, epistemic stance, and the phenomenalist metaphysics that it implies, may be read, quite readily, as operatively relocating Ultimate Reality within phenomena. By comparison, the Bush administration's uniquely American, Protestant tendency to conflate transcendent divinity with such worldly phenomena as US nationalist symbolism, and the believed, natural principles of liberal, democratic capitalism, also has the effect of injecting transcendence into the world.

17. Habermas, *The Philosophical Discourse of Modernity,* pp. 1-22.

18. On the modernist claim that the human progress – across all areas of life and society – which is promised by modernity may be realized through the playing out of scientific inquiry, see Wolfgang Smith, *Cosmos and Transcendence: Breaking Through the Barrier of Scientistic Belief* (Peru, IL: Sherwood Sugden & Co., 1984), pp. 134-58. Smith is allied with the perennialist thinkers, whose analyses are especially helpful for grasping modernity's tendency to regard the human mind as being open to nothing other than the phenomenal world.

19. See John Hick, *The Fifth Dimension: An Exploration of the Spiritual Realm* (Oxford, UK: Oneworld, 1999), pp. 13-19; and H. Smith, *Why Religion Matters,* pp. 11-12, 20.

20. Secularism is a complex, multivalent, and sometimes contentious concept, as is indicated by the fervent, scholarly debate that has been bred by its sought application to the analysis and critiquing of the modern condition. This debate has focused largely on the question of whether or not secularist doctrine has, in fact, taken root with meaningful force and consequence throughout all spheres of modern, Western, life and society, and throughout all geographic corners of the modern, Western world and its non–Western epigones. See, for example, Steven Bruce, ed., *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis* (Oxford, UK: Clarendon Press, 1992); and Linda Woodhead, Paul Heelas, and David Martin, eds., *Peter Berger and the Study of Religion* (London and New York: Routledge, 2001), pp. 87-125.

The theoretical standpoint from which a researcher sets forth would appear significantly to shape the extent to which he or she interprets modernity as being secularist. For example, some sociologically oriented scholars, emphasizing empirically framed factors such as rising attendance at places of worship, and the heightening, worldwide influence, within the context of various societies and religious traditions, of overtly religious, political parties, argue that today's world demonstrates an open

resurgence of religious fervor. See, for instance, Peter L. Berger, ed., *The Desecularization of the World: Resurgent Religion and World Politics* (Grand Rapids, MI: William B. Eerdmans, 1999); and José Casanova, *Public Religions in the Modern World* (Chicago and London: Univ. of Chicago Press, 1994). In response to this particular line of analysis, it well might be argued that the very strength of modern, religious resistance to secularist influences is one of the indicators that makes it possible to disclose secularism as being a pervasive, orthodoxical, modern doctrine! Indeed, the existence of orthodoxical, modernist secularism and fervent, religious resistance to it would seem to be underscored by the events of September 11, 2001. See Wang Gungwu, 'State and Faith: Secular Values in Asia and the West', pp. 224-42 in Eric Hershberg and Kevin W. Moore, eds., *Critical Views of September 11: Analyses from Around the World* (New York: New Press, 2002), p. 242.

Further, it is crucial to note that Berger, an eminent sociologist of religion who is central to the debate surrounding "the secularization thesis", carves out a pivotal exception to the notion that secularism is on the wane in the modern world:

> There exists an international subculture composed of people with Western–type higher education, especially in the humanities and social sciences, that is indeed secularized. This subculture is the principal "carrier" of progressive, Enlightened beliefs and values. While its members are relatively thin on the ground, they are very influential, as they control the institutions that provide the "official" definitions of reality, notably the educational system, the media of mass communication, and the higher reaches of the legal system. They are remarkably similar all over the world today, as they have been for a long time (though, as we have seen, there are also defectors from this subculture, especially in the Muslim countries)....what we have here is a globalized *elite* culture. Berger, *Desecularization of the World,* p. 10.

Suggested here by Berger is the worldwide, axial role played by secularist law in validating, enforcing, and propagating modernity's epistemic (and, I would maintain, fundamentally religious) outlook on the basic nature of reality.

By comparison with the sociological perspectives noted above, my own position, which asserts that modernity is, indeed, profoundly secularist, draws significantly upon the insights of perennialist scholars. A prime strength enhancing the perennialists' analyses of what they generally suggest to be the intrinsic secularity of modernity is their emphasis on the epistemological and ontological premises which serve to entrench secularist doctrine in the modernist mind. Underscored, for instance, is the modernist, epistemic presupposition that the final meaning of all phenomena derives not from a transcendent, divine source (as would be, by contrast, the understanding of a perennialist, epistemic stance), but, rather, originates within the world. As such, the modernist mind does not, the perennialists indicate, admit to a sacred source and final referent of knowledge, and thus this mindset adheres to a basic, epistemic precondition of secularist doctrine. See, for example, Coomaraswamy, 'Fundamental Nature of the Conflicts Between Modern and Traditional Man'; Nasr, *Knowledge and the Sacred,* pp. 1-64 and *passim;* and Seyyed Hossein Nasr, *The Need for a Sacred Science* (Albany, NY: SUNY

Press, 1993).

21. It is in this way that secularist doctrine diverges so immensely, at the basic, epistemic level, from the Perennial Tradition's intrinsic understanding that the phenomenal world continually derives its existence and sacredness from, and is, therefore, unbreakably connected with the one, transcendent, Divine Reality. To draw this contrast into relief, see Nasr, *ibid.,* and Seyyed Hossein Nasr, *Religion and the Order of Nature: The 1994 Cadbury Lectures at the University of Birmingham* (New York: Oxford Univ. Press, 1996).

22. In this respect, one must contrast the liberal, state and society to, for instance, communist regimes that have sought to enforce atheism. On the official treatment of religion within European states and societies that have experienced relatively recent transitions from communism to liberalism, see András Sajó and Shlomo Avineri, *The Law of Religious Identity: Models for Post–Communism* (The Hague: Kluwer Law International, 1999).

23. As W.C. Smith further characterizes the secularist conception of religion:

> The secular *Weltanschauung* postulates, and then presupposes, a particular – indeed an odd – view of the human, and of the world: namely, the secularist view. It sees the universe, and human nature, as essentially secular, and sees "the religions" as addenda that human beings have tacked on here and there in various shapes and for various interesting, powerful, or fatuous reasons. It sees law, economics, philosophy (things that we got from Greece and Rome) as distinct from religion. And so on. Wilfred Cantwell Smith, 'Retrospective Thoughts on *The Meaning and End of Religion*', pp. 13-21 in Michel Despland and Gérard Vallée, eds., *Religion in History: The Word, the Idea, the Reality/La religion dans l'histoire: Le mot, l'idée, la réalité* (Waterloo, ON: Wilfrid Laurier Univ. Press, 1992), p. 16.

24. Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, NY: Doubleday and Co., 1969) [originally published in 1967], p. 107.

Or, as is cogently observed by Archbishop of Canterbury, Rowan Williams, the secularist mind imagines "that "the religious" is a limited territory which can be cordoned off from the genuinely public." Rowan Williams, 'What shakes us', *The Times Literary Supplement,* July 4, 2003, p. 10.

25. The quoted phrase is borrowed and adapted from Iain T. Benson, 'The Secular: Hidden and Express Meanings', *Sacred Web: A Journal of Tradition and Modernity,* no. 9 (2002), pp. 125-39. Benson's analysis is noteworthy for alluding to a matter of terminological nuance that is quite significant, as his account pertains to the implications of referring to "secularist" or "secularistic" law, rather than "secular" law. The former two terms, I would maintain, best capture the central thrust of modernity's conception of the proper relations between law and religion, because they indicate an alliance between secularist doctrine and the law of the modern, civil state. Hence, secularist law refers to

law that presupposes an utter divide between transcendence and the phenomenal world, and that, consistent with this, does not openly ascribe sacred significance to the law of the modern, civil state.

By contrast, secular law may be taken as referring to the sphere of temporal, legal jurisdiction that arose in medieval Europe as the province of worldly polities, and that, during the medieval era and for a significant time beyond, functioned concurrently (and in competition) with the ecclesiastical law of the Catholic Church. As understood in this, classical sense, secular law occupied a worldly realm that, while taken as being distinct from the spiritual realm governed by the Church's juridical authority, nonetheless was believed to be situated within an overarching, metaphysical and theological schema that ascribed sacred significance to the world. For a thorough treatment of this classical "concept of secular law", see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard Univ. Press, 1983), pp. 273-94.

Thus, as Benson states, "[t]he "secular" can be viewed in relation to the sacred, or in a manner that divorces the secular...from the sacred." Benson, 'The Secular: Hidden and Express Meanings', p. 131. The former outlook is typical of the worldview of medieval Catholicism, while the latter is typical of modern, secularist doctrine.

26. It would appear that modernity's general acceptance of secularist doctrine tends to hide the underlying, faith of modernity from those who adhere to this faith, as well as from many analysts of the modern condition. *Cf.* Stephen A. McKnight, 'Voegelin's Challenge to Modernity's Claim to Be Scientific and Secular: The Ancient Theology and the Dream of Innerworldly Fulfillment', pp. 185-205 in Hughes, *Politics of the Soul.* In explicating Voegelin's analysis of modernity's unacknowledged, religious base, McKnight indicates in compelling fashion that modernity's professed secularity serves as an ineffective denial of its actual, underlying religiousness. However, I would differ with McKnight's further suggestion that modernity's peculiar mode of religiousness means that the era is not also secularist. Rather, as the perennialist scholars indicate, modernity is rendered secularist, first and foremost, by the fact that it conceives of itself as being such.

27. The Perennial Tradition emphasizes that, where the manifestations of Ultimate Reality result in Its being experienced as both transcendent and immanent, this "does not at all negate the majesty of transcendence." Nasr, *Knowledge and the Sacred,* p. 137. However, as Nasr points out, the Real "can be experienced as immanent only after [It] has been experienced as transcendent." *Ibid.* In this connection, the perennialist understanding of divine immanence is antithetical to a modernist immanentism that, with its "abusive" notion of immanence, confines the Divine within the phenomenal world. Frithjof Schuon, *Survey of Metaphysics and Esoterism,* Gustavo Polit, trans. (Bloomington, IN: World Wisdom Books, 1986) [originally published as two books, *Résumé de Métaphysique Intégrale,* 1985; and *Sur les Traces de la Religion Pérenne,* 1982], p. 116, footnote 1.

28. Prime examples of perennialist texts that engage in this mode of critique, including its

attentiveness to the harmful, day–to–day ramifications of the modernist worldview, include: Guénon, *East and West; The Crisis of the Modern World;* and *The Reign of Quantity & The Signs of The Times;* Nasr, *Knowledge and the Sacred;* and *Religion and the Order of Nature;* Frithjof Schuon, *The Essential Writings of Frithjof Schuon,* Seyyed Hossein Nasr, ed. (Shaftesbury, UK and Rockport, MA: Element, 1991) [originally published in 1986], pp. 483-522; Huston Smith, *Forgotten Truth: The Common Vision of the World's Religions* (New York: HarperCollins, 1992) [originally published in 1976]; and Huston Smith, *Beyond the Post–Modern Mind* (New York: Crossroad, 1982).

So impassioned is the perennialists' critique of modernity, that some commentators who are at least generally sympathetic to their religious and metaphysical standpoint argue that the critique would benefit from seeking to come more to grips with those aspects of modernist civilization that are beneficial, not to mention unavoidable. See, for example, Hajj Muhammad Legenhausen, 'Why I Am Not a Traditionalist?', *Message of Thaqalayn: A Quarterly Journal of Islamic Studies,* vol. 7, no. 3 (2002), pp. 93-129.

29. Frithjof Schuon, 'The Perennial Philosophy', William Stoddart, trans., pp. 21-4 in Fernando, *The Unanimous Tradition,* p. 21.

30. See, for example, Nasr, *The Need for a Sacred Science,* pp. 1-2; and Oldmeadow, *Traditionalism,* p. 86. An exception to the perennialist aversion towards referring to modernist metaphysics is Huston Smith, who chooses instead to argue that modernity adheres to a metaphysics that is fundamentally flawed. H. Smith, *Forgotten Truth,* p. 16.

31. *Cf.* Collingwood, *An Essay on Metaphysics,* pp. 34-48, 197, 256.

32. Nasr, *Knowledge and the Sacred,* p. 197.

33. *Ibid.,* p. 207. The interposed, parenthetical phrase is mine, and is informed by, for example: John Ahmed Herlihy, 'The Light of Traditional Faith amid the Shadowlands of Modernity', *Sacred Web: A Journal of Tradition and Modernity,* no. 2 (1998), pp. 33-49, p. 37; and H. Smith, *Forgotten Truth,* pp. 1-18.

34. *Ibid.,* p. 6.

35. Nasr, *Knowledge and the Sacred,* p. 207.

36. H. Smith, *Why Religion Matters,* p. 60.

37. Schuon, *Essential Writings,* p. 503.

38. Nasr, *Religion and the Order of Nature,* pp. 144-5 and *passim.*

39. See, for example, Nasr, *The Need for a Sacred Science,* p. 7; and Perry, *The Widening Breach,* pp. 44-72.

40. Guénon, *The Reign of Quantity & The Signs of the Times,* p. 32, footnote 2.

41. See *ibid., passim.*

42. Exemplifying the perennialists' forceful critique of modernist epistemology, while also providing an illuminating contrast between this epistemology and the perennialist theory of knowledge, is Nasr, *Knowledge and the Sacred.*

43. I allude here to the social theoretician, Pitirim Sorokin's, classic critique of the "sensate", modern, Western mind – a critique that is quite consistent with much that the perennialists have to say about the modernist worldview. Pitirim A. Sorokin, *The Crisis of Our Age* (Oxford, UK: Oneworld, 1992) [originally published in 1941].

44. Nasr, *Knowledge and the Sacred,* especially pp. 198-214.

45. See Schuon, *From the Divine to the Human,* pp. 5-18, 75-86. For a superb, recent anthology of perennialist perspectives on "a spiritual anthropology", see Barry McDonald, ed., *Every Branch in Me: Essays on the Meaning of Man* (Bloomington, IN: World Wisdom, 2002).

46. For the original presentation of the Cartesian and Kantian accounts of the knowing subject, see respectively: René Descartes, *Discourse on Method and Meditations on First Philosophy,* Donald A. Cress, trans. (Indianapolis: Hackett, 1980) [*Discourse on Method* originally published in 1637, *Meditations on First Philosophy* in 1641]; and Immanuel Kant, *Critique of Pure Reason,* Norman Kemp Smith, trans. (New York: St. Martin's Press, 1965) [the second edition, which is utilized in this translation, was originally published in 1787].

47. The quoted material is borrowed from Simon Critchley, 'Introduction: What Is Continental Philosophy', pp. 1-17 in Simon Critchley and William R. Schroeder, eds., *A Companion to Continental Philosophy* (Malden, MA and Oxford, UK: Blackwell, 1998), p. 10.

To grasp the implications, within Kantian moral philosophy, of the absolutizing of the subject, consider especially Kant's *Critique of Practical Reason,* Lewis White Beck, trans. (Indianapolis: Bobbs-Merrill, 1956) [originally published in 1788]. Herein, Kant suggests that the autonomous, transcendental subject is responsible for providing content to the universal moral law; with the moral law allowing, in turn, for the existence of God to be conjectured.

48. In his own, exceptionally incisive critique of modernity, the social theoretician Zygmunt Bauman demonstrates one of the horrific consequences – namely, the mass genocide of the Holocaust, carried out as it was with hyper–rational, technocratic efficiency – that may be interpreted as flowing quite logically from modernity's instrumentalist, naturalistic model of the human being. See his book, *Modernity and the Holocaust* (Ithaca, NY: Cornell Univ. Press, 1989).

49. See, for example, Frithjof Schuon, 'Tradition and Modernity', *Sacred Web: A Journal of Tradition and Modernity,* no. 1 (1998), pp. 19-30 [essay originally written in 1961].

50. W.C. Smith, 'Philosophia as One of the Religious Traditions of Humankind'. In this essay, Wilfred Cantwell Smith utilizes his general understanding of what constitutes a religious tradition to argue that "the Greek rationalist tradition" and the "innovative and radical sect" flowing from it (specifically, "Western science") are basically religious.

51. The representative phrase, "authentic religion", is drawn from Wolfgang Smith, 'Science and Myth: The Hidden Connection', *Sophia: The Journal of Traditional Studies,* vol. 7, no. 1 (2001), pp. 5-24.

52. See *ibid.* and Guénon, *The Reign of Quantity & The Signs of the Times,* especially pp. 215-51.

53. *Ibid.,* p. 239.

54. Guénon, *East and West,* p. 47.

55. Schuon, *Essential Writings,* p. 68.

56. *Ibid.,* pp. 68-9.

57. Richard Schaeffler, *Reason and the Question of God: An Introduction to the Philosophy of Religion,* Robert R. Barr and Marlies Parent, trans. (New York: Crossroad, 1999), p. 66 [citing Scheler's book, *On the Eternal in Man,* according to Max Scheler, *Gesammelte Werke,* vol. 5, Maria Scheler, ed. (Bern: Francke Verlag, 1954)].

58. Scheler, *On the Eternal in Man,* p. 248.

59. *Ibid.,* p. 264.

60. *Ibid.,* p. 266.

61. *Ibid.,* pp. 265-6.

62. *Ibid.,* p. 260.

63. *Ibid.,* p. 261.

64. For an indication of the perennialists' view of Eliade, see Oldmeadow, *Traditionalism,* pp. 180-2, 190-4. Their evaluation of his work is not without certain reservations. These involve, for example, the perennialists' skepticism concerning Eliade's apparent aim of using phenomenological inquiry to achieve an objective, scientific basis for the analysis of humankind's religious life and the comparative study of religious traditions. As for Scheler, he is not, to my knowledge, much commented on in perennialist literature (cursory mention of him is made in *ibid.,* p. 188).

65. The quoted material is borrowed from, respectively: Mircea Eliade, *A History of Religious Ideas, vol. 1: From the Stone Age to the Eleusinian Mysteries,* Willard R.

Trask, trans. (Chicago: Univ. of Chicago Press, 1978) [originally published in 1976], p. xiii; and Mircea Eliade, *The Sacred and the Profane: The Nature of Religion,* Willard R. Trask, trans. (San Diego: Harcourt Brace Jovanovich, 1959) [originally published in 1957], p. 28. See also the helpful discussion in Daniel L. Pals, *Seven Theories of Religion* (New York: Oxford Univ. Press, 1996), pp. 158-97 [the chapter entitled, 'The Reality of the Sacred: Mircea Eliade'].

66. Scheler, *On the Eternal in Man,* p. 405.

67. *Ibid.,* p. 267.

68. *Ibid.*

69. *Ibid.*

70. *Ibid.,* p. 268.

71. See *ibid.,* especially pp. 359-402 and Petropulos, 'The Person as *Imago Dei*'.

72. See, for example, Nasr, *Knowledge and the Sacred,* pp. 1-64 and *passim.*

73. An examination of these parallels, together with the divergences between Hick's thought and the perennialist school, may be found in Adnan Aslan, *Religious Pluralism in Christian and Islamic Philosophy: The Thought of John Hick and Seyyed Hossein Nasr* (Richmond, UK: Curzon Press, 1998).

74. Hick, *The Fifth Dimension,* p. 2.

75. Aslan, *Religious Pluralism in Christian and Islamic Philosophy,* pp. 258, 265 [from 'Appendix: Religion and the Concept of the Ultimate', pp. 257-73, a 1994 interview conducted with Hick and Nasr simultaneously].

76. Hick, *The Fifth Dimension,* p. 41.

77. *Ibid.,* p. 14.

78. *Ibid.,* p. 170.

79. *Ibid.*

80. Schaeffler, *Reason and the Question of God,* p. 66.

81. Hick, *The Fifth Dimension,* p. 19.

82. See Wilfred Cantwell Smith, *Faith and Belief: The Difference Between Them* (Oxford, UK: Oneworld, 1998) [originally published in 1979], pp. 128-72.

83. *Ibid.,* p. 168.

84. Herlihy, 'The Light of Traditional Faith amid the Shadowlands of Modernity', p. 38.

85. Huston Smith, 'Western Philosophy as a Great Religion', pp. 205-23 in Bryant, *Huston Smith: Essays on World Religions.*

86. Paul Tillich, *Theology of Culture,* Robert C. Kimball, ed. (New York: Oxford Univ. Press, 1959), pp. 7-8.

87. See *ibid., passim. Cf.* Paul Tillich, *Dynamics of Faith* (New York: Harper & Row, 1957); and Paul Tillich, *Systematic Theology,* vol. 1 (Chicago: Univ. of Chicago Press, 1951).

88. Tillich, *Theology of Culture,* p. 50; and see also Tillich, *Dynamics of Faith.*

89. Loren J. Samons II, *What's Wrong with Democracy?: From Athenian Practice to American Worship* (Berkeley, CA, and Los Angeles: Berkeley Univ. Press, 2004), pp. 176-7.

90. *Cf.* Peter M. Haas, 'Introduction: epistemic communities and international policy coordination', pp. 1-35 in Peter M. Haas, ed., *Knowledge, Power, and International Policy Coordination* (Columbia, SC: Univ. of South Carolina Press, 1997), especially p. 3, footnote 4.

91. Eliade, *The Sacred & the Profane,* p. 212.

92. For support of the idea that free–market liberalism and Marxism are grounded in a shared, modernist worldview, see, for example: Tage Lindbom, *The Myth of Democracy* (Grand Rapids, MI and Cambridge, UK: William B. Eerdmans, 1996); and Klaus Nürnberger, *Beyond Marx and Market: Outcomes of a Century of Economic Experimentation* (London and New York: Zed Books, 1998).

Ironically, one might suggest that the atomistic "individualism of an acquisitive commercial republic", and consequent "egoism," that arguably typify societies such as the US, which have embraced neo–liberalism, belie the claim that an ideology shared among disparate individuals necessarily equates to a communal worldview. *Cf.,* for example, Jean Bethke Elshtain, *Democracy on Trial* (New York: BasicBooks, 1995), p. 11. Notwithstanding this compelling perspective, I would maintain – as I later develop in the dissertation, especially in Chapter Six's discussion of secularist law's idea of individual property rights – that atomistic individualism is, for all intents and purposes, part and parcel of modern liberalism's communal vision of society

93. Examples are: Raymond Aron, *Progress and Disillusion: The Dialectics of Modern Society* (New York: Frederick A. Praeger, 1968), pp. 194-208; Berman, *Interaction of Law and Religion,* pp. 67-76; and Christopher Dawson, *Dynamics of World History,* John J. Mulloy, ed. (Wilmington, DE: ISI Books, 2002) [originally published in 1958], pp. 103, 258-60. Dawson is singularly evocative in referring to those "apostles of the

religion of progress" – whether democratic, socialist, or nationalist ideologues – who have "denied the need for divine revelation and believed that man had only to follow the light of reason to discover the meaning of history in the law of progress which governs the life of civilization." *Ibid.,* pp. 258-9. For a helpful analysis of the concept of "secular religion", including observations on the history of the idea's usage, see Emilio Gentile, 'The Sacralisation of Politics: Definitions, Interpretations and Reflections on the Question of Secular Religion and Totalitarianism', Robert Mallett, trans., *Totalitarian Movements and Political Religions,* vol. 1, no. 1 (2000), pp. 18-55.

An exceptionally informative, alternative approach is taken by the scholar of comparative religion, Ninian Smart. Smart holds "secular worldviews" (also referred to in his writing as ideologies) such as nationalism and Marxism up for comparative analysis alongside worldviews that are commonly recognized as being religious. Detailed by Smart is how such ideologies exhibit the "dimensions" – narrative or mythic, doctrinal and philosophical, ritual, experiential and emotional, ethical and legal, social and institutional, and material – that mark religious worldviews, "and can thus be said to play in the same league" as these worldviews. See Ninian Smart, *Dimensions of the Sacred: An Anatomy of the World's Beliefs* (Berkeley, CA and Los Angeles: Univ. of California Press, 1996), pp. 1-14 and *passim;* and Ninian Smart, *The World's Religions,* 2nd ed. (Cambridge, UK: Cambridge Univ. Press, 1998), especially pp. 10-26. Related to this, Smart's analysis of the implicit, religious import of modernist ideologies, especially nationalism, has been influential to the development of the compelling research field examining "the implicit religion of contemporary society." See Edward Bailey, ''Implicit religion': what might that be?' and Ninian Smart, 'Implicit religion across culture', *Implicit Religion,* vol. 1 (1998), pp. 9-22 and 23-6, respectively.

For another, suggestive manner of grasping the religiousness of modernist ideology, see the analysis of the "secular salvation" promised by "the religion of the market" in David R. Loy, 'The Religion of the Market', *Journal of the American Academy of Religion,* vol. 65, no. 2 (1997), pp. 275-90.

94. For support of the claim that modernist ideologies represent different branches stemming from one religious tradition, see Gilbert Rist, *The History of Development: from Western Origins to Global Faith,* Patrick Camiller, trans. (London and New York: Zed Books, 1997), especially pp. 21-4. Rist argues that "the religion of modernity" embodies the "migration" of religiousness to within the secular realm. In this context, Rist emphasizes, further, that the religion of modernity – which he understands as hinging on a set of beliefs that are presupposed by their adherents to be beyond dispute – lies at a more fundamental, epistemic level than modern ideologies. Modern ideologies, Rist indicates, follow from modernity's foundational beliefs, and, therefore, "should not be confused with" these beliefs. *Ibid.,* p. 21.

Moreover, Dawson's use of the term "secular religions" notwithstanding, his implication that the ideologies which have functioned as the "main substitutes for religion in the modern age" constitute sects of one ersatz, "religion of progress" lends further

support to the idea that there is in fact a unitary, modernist religious tradition with various, ideological branches. *Cf.* Dawson, *Dynamics of World History,* pp. 103, 258-60.

95. *Cf.* Smart's characterization of ideologies as "mutual blenders". Smart, *World's Religions,* p. 26.

96. Oldmeadow, *Traditionalism,* p. 75.

97. See, for example: Schuon, *Essential Writings,* pp. 86-103; and Frithjof Schuon, *The Transcendent Unity of Religions,* rev. ed., Peter Townsend, trans. (New York: Harper & Row, 1975) [originally published in 1948 as *De l'Unité transcendante des religions*].

98. *Ibid.,* p. 9.

99. *Ibid.*

100. The quoted phrase is borrowed from Voegelin, *Collected Works, vol. 5,* p. 175. For elaboration of the line of argument indicating that the phenomenon of modern Gnosticism analyzed by Voegelin implies, at the same time, the existence of modernist esoterism, see McKnight, 'Voegelin's Challenge to Modernity's Claim to Be Scientific and Secular'.

101. See Voegelin, *Collected Works, vol. 5,* pp. 175-241 [chapters 4-6 from *The New Science of Politics*], as well as *ibid.,* pp. 243-313 [a reprint, including a newer 'Preface to the American Edition', of Voegelin's 1959 work, *Science, Politics, and Gnosticism*]. The phrase, "variants of Gnosticism", appears at *ibid.,* p. 247.

Voegelin identifies a number of other modern, Gnostic variants besides progressivism, positivism, and Marxism, a few of which will be mentioned in the next chapter, but these three most effectively illustrate the scientistic orientation of much modernist esoterism.

102. See McKnight, 'Voegelin's Challenge to Modernity's Claim to Be Scientific and Secular', pp. 186-7.

103. Frithjof Schuon, *Roots of the Human Condition* (Bloomington, IN: World Wisdom, 2002) [originally published in 1990 as *Racines de la condition humaine*], p. 10. As Schuon states, in terms that clearly register his disagreement with the line of analysis he outlines:

> For too many people the gnostic is someone who, feeling illumined from within rather than by Revelation, takes himself to be superhuman and believes that for him everything is permissible; one will accuse of gnosis any political monster who is superstitious or who has vague interests in the occult while believing himself to be invested with a mission in the name of some aberrant philosophy. *Ibid.,* p. 11.

104. Voegelin, *Collected Works, vol. 5,* pp. 220-41.

105. *Ibid.*, p. 229.

106. To make such an argument is to speak in terms reminiscent of Scheler, whom some scholarly research has shown to have informed Voegelin's understanding of modernist idolatry. For analysis of Scheler's influence on Voegelin, see especially Petropulos, 'The Person as *Imago Dei*'. Also informative are Jürgen Gebhardt, 'The Vocation of the Scholar', pp. 10-34 in Stephen A. McKnight and Geoffrey L. Price, eds., *International and Interdisciplinary Perspectives on Eric Voegelin* (Columbia, MO: Univ. of Missouri Press, 1997); and Peter J. Opitz, 'Voegelin's *Political Religions* in the Contemporary Political Order' and Sandro Chignola, 'The Experience of Limitation: Political Form and the Science of Law in the Early Writings of Eric Voegelin', Francesca Murphy, trans., pp. 48-60 and pp. 61-84, respectively, in Glenn Hughes, Stephen A. McKnight, and Geoffrey L. Price, eds., *Politics, Order and History: Essays on the Work of Eric Voegelin* (Sheffield, UK: Sheffield Academic Press, 2001).

# Chapter 3

## The History of Modernity's Immanentist Religious Tradition: Moments and Figures Crucial to the Analysis of Secularist Law

### I. Overview

The findings of a diverse number of scholars – from influential thinkers such as Voegelin, Carl Schmitt, and the twentieth–century philosopher and intellectual historian, Ernst Cassirer, to present–day commentators in fields ranging from philosophy to literary studies – together suggest that the modern, Western worldview represents a general shift from a transcendentalist to an immanentist conception of Ultimate Reality. These scholars' analyses indicate that modernity's "transmutation of the religious" has a highly complex, continuously ongoing genealogy. Included in this lineage are historical trends from the medieval era (and in some respects from before that period), the Renaissance, the Age of Reason, and the Enlightenment, as well as nineteenth–century intellectual currents such as positivism and Hegelian idealism, and twentieth and twenty–first century phenomena such as various forms of totalitarianism.

Providing a full account of the genealogy of modernity's transmuted religious tradition would fall outside the scope of this inquiry. Instead, I will emphasize two genealogical leitmotifs: nominalism; and the modernist tendency towards overcoming Western Christendom's imagined divide between the spiritual and the temporal by relocating the spiritual within the temporal. This analysis demonstrates how the severance between transcendence and phenomena that is presupposed by modernity gives way, in effect, to the immuring of transcendence within phenomena. Thereby underscored is the falsity of the believed, modernist separation between religion, on the one hand, and law and politics, on the other.

It is illustrative, however, to first consider a few historical moments and figures in the chronology of modernity's "general turn away from transcendentalism to immanentism"[1] that do not necessarily arise within the context of the above mentioned leitmotifs (although there are linkages), but which serve as telling indicators of the advent, and rise to ascendance of modernist immanentism. Towards this end, Cassirer's lucid account of philosophical thought between the Renaissance and the Enlightenment suggests that the historical path to modernity is distinguished by several points at which movement is made towards an immanentist conception of Ultimate Reality.

### *A. Nicholas Cusanus*

On Cassirer's view, the fifteenth century, especially the thought of the mystically–oriented, German churchman Nicholas Cusanus (sometimes referred to as Nicholas of Cusa) (1401-1464), "stands at a historical turning point" in this regard.[2] Cusanus postulated a religious metaphysics that, by drawing upon mathematical reasoning, positions God as "a spiritual center that unfolds itself in the cosmos."[3] In this way, he depicted the effective convergence, by means of the medium of Christ, of the finite with the infinite.[4] Cassirer stresses, though, that Cusanus was not a pantheist. Indeed, Cusanus was strongly informed by Neoplatonism, and thus maintained a rigorous differentiation between the Absolute and the world, even as he countered the medieval model of a hierarchical, spatial relation separating God from earthly existence.[5] As Cassirer explains:

> ...Cusanus no longer recognizes any such relationship of proximity and distance between the sensible and the supersensible....When compared to the divine origin of being, every element, every natural being is equally far and equally near to that origin.[6]

Therefore, what is crucial about Cusanus is not that he himself sought in any way to

confine the Divine to materiality, but that he appears to have influenced the naturalistic, logical manner of the Renaissance tendency, as is exemplified by the Italian philosopher, Giordano Bruno (1548-1600), to perceive "the divine immanence in nature".[7] It is ironic that Cusanus's thought, while perhaps consistent with some of what is understood by perennialist metaphysics, may also be read as a stepping stone towards modernist immanentism.

### *B. Immanentism in the Seventeenth and Eighteenth Centuries*

Moving forward in historical time, one finds in the seventeenth and eighteenth centuries several thought currents foreshadowing, or contributing to what Cassirer interprets as "the Enlightenment['s] [proclamation of] the pure principle of immanence".[8] By this interpretation, Cassirer points especially to the Enlightenment ideal that all of the mysteries of being are decipherable by means of experimental, scientific inquiry into natural phenomena; and, consistent with this, he alludes to the further, modernist notion that the essential meaning and significance of phenomena inheres within the world, where it is "perfectly accessible to the mind".[9]

#### *1. Benedictus de Spinoza*

Perhaps the quintessential, early modern exemplar of immanentism is the thought of Benedictus de Spinoza (1632-1677), whose well–known (or infamous, from the standpoint of the Amsterdam Jewish community that excommunicated him) dictum, "*deus sive natura*" ("God or nature"), represents his conviction that "God himself is identical with the totality of nature".[10] The backbone of Spinoza's philosophical system is formed by his postulating, on the basis of rationalist, geometrical reasoning, the ontological reality of God, who is eternally present as absolutely infinite substance.[11] As

such, God, on Spinoza's view, contains within himself all of being: "Whatever is, is in God, and nothing can be or be conceived without God."[12] Thus, while Spinoza, in prefiguring modern, secularist doctrine, maintains that "this–worldly existence [is] all there is", his peculiar conflation of finite materiality with infinite divinity could not be further from denying the existence of Ultimate Reality.[13] Rather, he unequivocally confines the Divine to the phenomenal world, in a signal anticipation of aspects of modernist immanentism as diverse as materialist metaphysics and nineteenth–century Romanticism.[14]

### *2. Immanuel Kant*

Kant, as a fundamental architect of the modernist mind and its notion of the absolute subject, along with G.W.F. Hegel (1770-1831), whose form of German Idealist philosophy sought to remedy what he regarded as the shortcomings of the antecedent, Kantian variety, provide two more crucial benchmarks in the growth of modernity's immanentist religious tradition.[15] For one, Kant's positioning of the transcendental subject as the ultimate judge of metaphysical reality and valid, moral norms has the profound effect of helping to create not merely an absolute subject, but an apotheosized subject whose finite being has been imbued with the qualities of infinite transcendence. As Yirmiyahu Yovel observes, "for Kant,...human reason takes over the role of God as legislator for both nature and morality."[16] Accordingly, Kant perceived that human reason offers the ultimately authoritative vantage point on reality. Thus, on Kant's estimation, human reason

> forbid[s] itself to rely upon external authorities and reaffirm[s] its power to produce of itself, as the explication of its own inherent structure, the metaphysical features of natural objects and the fundamental moral commands.[17]

Kant's theory of the subject thus has immense implications for the immanentist, religious significance of modernist conceptions of reality, and of social, political, and legal order. Continuing with Yovel's cogent interpretation of this theory:

> …the human mind—not God—determines the metaphysical substrate of nature, that is, the system of categories and logical–synthetic laws that make its objects possible. And it is as rational will that, again, human reason (and not divine legislation) lays down the supreme laws of ethics as well as the ultimate goals of politics and of moral history.[18]

In considering Kant's effective apotheosizing of human reason, it should be noted that even his understanding of how one can philosophically justify the existence of God is predicated on the power of reason: specifically, the power of reason to rationally infer the reality of the Divine from the existence of universal principles of moral law.[19] In response to the "rational Christianity" embodied in Kant's classically Enlightenment–oriented notion of "religion within the limits of reason alone", the early Romantic philosopher Friedrich Schleiermacher (1768-1834) set forth his contrary view that "Religion's essence is neither thinking nor acting, but intuition and feeling."[20] Yet, even as Schleiermacher called into question the way in which Kant and those of his ilk "[directed their wisdom] only…toward a lamentable empiricism," it is fascinating to realize that Schleiermacher can himself be read as fitting within the genealogy of modernist immanentism.[21] In fact, Schleiermacher, whose wish to "Let the universe be intuited and worshiped in all ways" was in keeping with his emotional and intellectual sympathy for Spinoza, was objected to, in his own day, for his articulation of "pantheistic and Spinozistic" ideas.[22]

### *3. G.W.F. Hegel*

From Schmitt's 1922 perspective, Hegel's philosophical system, which encompasses a pure form of idealism in which the very reality of being is understood to be dependent on the thought of the subject, is a prime exemplar of the modernist movement from transcendentalism to immanentism. On Schmitt's line of thinking, to which more attention will be devoted in the next chapter, immanentism was, by the nineteenth century, an increasingly pervasive element of the modernist consciousness, especially as this consciousness is manifested in prevailing conceptions of political and legal order.[23] Hegel, for his part, "draws God into the world" by postulating a schema of world history in which the "divine Being" of theism is sublated (that is, the "divine Being" passes over to, and is resolved) within historical time by "absolute Spirit"; with "absolute Spirit" being the divine self–realization that knows itself as not other than human self–consciousness.[24] Further, Hegel indicates, it is within the state and civil society that the movement of Spirit is actualized.[25]

## II. Nominalism

### *A. The Role of Nominalist Doctrine in the Development of Modernity's Immanentism*

From the standpoint of various commentators whose sympathies lie with the idea that there is a fundamental, metaphysical unity between transcendence and the created world, nominalism is regarded as a basic ingredient in the formation of the modernist mind that typically denies this unity.[26] This is understandable, because nominalism, as seminally articulated by William of Ockham (circa 1288-1347),

> delivers a telling blow against the conception of creation as a total unity, a macrocosm, by proclaiming that existence is a *multiversum:* that everything is individual, discrete, atomic, and separate from all else.[27]

Crucially, Ockham's formulation of nominalism, at the same time, "relegated [God] to a supernatural sphere separate from nature, with which [God] retained no more than [a] causal, external link."[28] Thus, late–medieval nominalism tore apart the "ontotheological synthesis" that had been most recently associated with the high Scholastic thought of figures such as St. Thomas Aquinas (circa 1225-1274).[29] In a related vein, the Scholastic "synthesis of faith and reason" was disrupted by the nominalist view that true knowledge of phenomena alone is accessible through reason, and, concomitantly, by Ockham's distrust of reason as a means by which to "pass judgment on the first principles of revealed theology."[30]

Nominalist doctrine hinges on its denial of the reality of universals, a rejection that is informed by Ockham's attempts to refute the arguments for universals that were put forth by the Scholastics.[31] The Scholastics' understanding of universals had, in turn, been fed by a line of thought extending back to Plato (circa 428-348 BCE).[32] As was indicated earlier in the inquiry, a belief in universals involves the assertion that worldly reality is entirely derivative of universal essences, existing in the form of ideas, that emanate from the Transcendent. By contrast, nominalist metaphysics postulates that reality inheres in particular, phenomenal beings that can be signified by specific names. Therefore, as conceived of by Ockham, reality is comprised basically of "things", including "individual substances, individual qualities, [and] a few theological relations".[33]

Nominalism's impact on the thrust of modernist ontology was commented on previously, and is, to be sure, manifest. In addition, Louis Dupré shows how nominalist doctrine has strongly affected the construction of modernity's epistemology and theory of

the subject. By removing the Divine as the final referent to which the meaning of nature would point, and instead investing phenomena with meaning that can be fully captured through empirical processes, nominalism endowed the knowing subject with the power to create the ultimate significance of phenomena. Further, these phenomena, as objects, stand apart from the subject's ability to conceive of and linguistically signify them. The logical endpoint of this philosophical process is modernity's notion of the absolute subject.[34] Related to this, the reverberations of nominalist metaphysics may be felt, as well, in the concept of individualism.[35]

According to Dupré's interpretation, the thought of Cusanus may be read as an historic attempt to "bridg[e] the gap that nominalist thought had opened between nature and its transcendent source."[36] As Dupré sees it, Cusanus's unique, theological mode of reestablishing connectivity between transcendence and the world represents the last, successful effort at "reunit[ing] the theocentric and anthropocentric forces that had begun to pull the medieval synthesis apart."[37] Dupré's analysis suggests that, subsequent to Cusanus, the nascent, epistemic outlook of modernity is marked by a line of multiform attempts – Renaissance humanism, and the Enlightenment, to take two examples – to repair the seeming rupture between transcendence and phenomena that is, in significant measure, traceable to the rise of nominalism.[38] However, he implies that such sought reunions of transcendence with phenomenality remain provisional and inadequate, in part because they verge towards immanentism.[39] By rending transcendence from the created world, nominalist doctrine not only provides ontological and epistemological building blocks for modernity's phenomenalist conception of reality, but also, ironically, gives an impetus for the emerging modernist mind to gravitate towards immanentism, as this mind

strives to reconstruct a linkage between creation and the Divine.

*B. Hobbes, Nominalism, and the Secular Sovereign As "Mortal God"*

The model of political order set forth by Thomas Hobbes (1588-1679) strongly prefigures basic aspects of various, modernist conceptions of sovereignty and political community, including secularist liberalism. As such, Hobbes's political theory offers an especially salient and compelling example of how nominalism's imagined separation of transcendence from creation contributes, in point of fact, to the relocation of transcendence within the world. Hobbes, who was memorably derided as a "super–nominalist" by the philosopher Gottfried Wilhelm Leibniz (1646-1716),[40] relied on a nominalist metaphysics to support his schema of a mechanistic, political organism that subordinates the atomistic wills of individual citizens to the supreme authority of a secular sovereign.[41]

On Hobbes's view, knowable reality is limited to finite, material things.[42] By virtue of their motion, these physical objects cause human sensations, and thus make themselves knowable to the human mind, which proceeds to signify the objects by particular names. While Hobbes believes that the human mind groups individual things into categories denoted by "universal name[s]" that reflect similarities among the things, he vigorously denies that there is anything "in the world universal but names".[43] In other words, the notion that phenomenal existence is derivative of real, transcendentally emanating universals, he dismisses as the fancy of "deceived philosophers, and deceived, or deceiving Schoolmen [that is, Scholastics]."[44]

Hobbes observes that, because the human mind cannot conceive of that which is infinite, it is not possible to conceive, above all, of God. Therefore, Hobbes asserts, we

use the name of God, "not to make us conceive him;...but that we may honour him."[45] How, then, one might ask, are persons to honor a God whose infinitude renders him absent from knowable reality? The essential answer, as set forth in *Leviathan,* is that citizens of a political commonwealth should honor God by devoting their absolute obedience to the secular sovereign. The sovereign is "that *Mortal God*" who, as worldly vicegerent to "the *Immortal God*", provides citizens with the "peace and defence" that it is their instinct to seek under the divinely written, law of nature.[46]

Various requirements of this divinely mandated, obedience to the sovereign underscore the centrality of Hobbes's nominalism to his political theory. For one, the citizen is compelled to obey the ethical maxims promulgated by the sovereign. This is because, in what Hobbes believes to be the absence of any universal, moral absolutes denoted by the terms good and evil, the failure to look to the sovereign for substitute, moral dictates would result in a chaotic clash among the particular notions of good and evil that stem from the "appetites", "desires", and "aversions" of individuals.[47] Then, too, under Hobbes's schema, the citizen is obligated to observe within the public arena the uniform mode of worship decreed by the sovereign. In the absence, once again, of divine commands that are communicated with universal sameness from the Transcendent to each individual, the word of the sovereign must mediate between the divine will and the individual; this, to ensure that individuals do not endanger the stability of the polity by acting on their peculiar readings of the divine will.[48]

In accordance with his nominalist metaphysics, Hobbes implies that God, having "in the beginning"[49] created a mechanistic universe, now is absent from His creation. In this way, Hobbes creates space for the establishment of a secular sovereign whose absolute,

divinely sanctioned power signifies the effective relocation of transcendent authority within the body of the sovereign. Put another way, one may read *Leviathan* as inexorably conflating the sovereign with the Divine, despite the seeming, sharp distinction drawn by Hobbes between the two. Thus, I suggest that Hobbes's determination that there is "no legitimate action in politics other than by the sovereign's will", as a "key moment in the invention of modern sovereignty",[50] demonstrates in a powerful manner how nominalism's postulated severance between transcendence and the world effectively leads to the immuring of the former within the latter. Most crucial for this dissertation's analysis of secularist law, Hobbes's political theory indicates how the modernist state and sovereign, as the ultimate source of such law, functions as a prime locus of immanent divinity.[51]

Moreover, it is imperative to keep in mind that Hobbes's nominalism helps to justify the modernist sovereign's establishment and enforcement of a state–sanctioned, religious orthodoxy. Consistent with this, I would argue that the modern, liberal, secularist state, in pursuing some of the very ends that were sought by Hobbes – for instance, allowing individuals to live their lives free from the harm or interference of others, and ensuring the stability of the state – imposes its own, implicitly religious orthodoxy.[52] Ironically, this unspoken, state creed seeks to enforce the notion of a severance between religion and public life, and, with that, effectively preaches the existence of a radical, metaphysical divide between transcendence and the world. Within domestic contexts, the hidden, religious dogma of the modern, liberal polity operates by such means as compelling the privatization of transcendent faiths, with such privatization often being inimical to the faith tradition specifically facing governmental regulation. A paradigmatic example of

this circumstance is when displays of belief such as a Muslim woman's wearing of a headscarf (*hijab*) are banned from public institutions in nations with ardently secularist state structures, like France and Turkey.[53] Such a restriction is acutely problematic, given that Islam, in its essence, "does not concede to the dichotomy of the sacred and the profane",[54] and accordingly regards religion and public life as inseparably interwoven. Within the international arena, the state–imposed, religious orthodoxy of modernity actually has come to serve as an instrument for the imperial effacement of certain nations' sovereignty. Here, I have in mind, especially, recent US attempts, in places such as Afghanistan and Iraq, to form client states and societies by "compell[ing] [them]" – in the wake of military conquest achieved in the "war on terrorism" – "to convert to the faith of modernity—human rights and the market economy."[55]

### III. Eric Voegelin: Understanding Modernity's Immanentism As a Response to the Spiritual Crisis of Western Christendom

Few thinkers have contributed as much to the disclosure of modernity's religious immanentism, or to the interpretation of how this orthodoxy is manifested in modern, Western law and politics, as Voegelin. On his view, modernity's "immanentization" of transcendence is a complicated historical process that has resulted, in essence, from a cataclysmic crisis marring the attempt of the Western spirit and consciousness to mediate the realm that "lies between…God and man."[56] Paralleling Scheler, Voegelin believed that the human being has an essential longing for the Transcendent, the manifestation of which "intention of the heart" forms the basis for political community.[57] Faced with an immense gap between God and man that the nascent, modernist consciousness perceived as being bequeathed to it by Western Christendom, the emerging, modernist mind embarked on a series of social, philosophical, and political attempts to close this gap, and

thereby ensure human salvation. Embodied in these endeavors, among which is the multifaceted, modern, Western effort to "[divinize]...intramundane political project[s]"[58] that formed perhaps the defining focus of Voegelin's scholarly career, has been the reawakening of ancient Gnosticism.

As I initially explained in Chapter One, ancient Gnosticism centered on the salvational pursuit of transformative knowledge in order to attempt and close a perceived, stark divide between divinity and the world. "[Standing] in competition with Christianity" during the period of late antiquity, the diverse "philosophic-religious" tradition of Gnosticism "reach[ed] its highest point in the latter part of the 2nd century A.D."[59] It "waned in the 3rd century", to be "replaced...in point of influence" by Manichaeism, a dualistic religion "originating in Babylonia in the 3rd century A.D."[60]

In unravelling modernity's Gnostic element, Voegelin points to a line of attempts, beginning with the twelfth–century apocalyptic prophet, Joachim of Flora, to "immanentiz[e] the meaning of existence" by "expand[ing] the soul to the point where God is drawn into the existence of man."[61] "This expansion", Voegelin explained, "engage[s] the various human faculties".[62] Therefore, as I alluded to previously in referring to the "variants of [modern] Gnosticism" identified by Voegelin, the "immanentization" of transcendence that marks the modernist soul has taken a diversity of forms:

> [it] may be primarily intellectual and assume the form of speculative penetration of the mystery of creation existence, as, for instance, in the contemplative Gnosis [that is, esoteric, spiritual knowledge] of Hegel or [the eighteenth– and nineteenth–century, German idealist philosopher, Friedrich] Schelling. Or it may be primarily emotional and assume the form of an indwelling of divine substance in the human soul, as, for instance, in paracletic sectarian leaders [that is, leaders who believe themselves to embody an indwelling of the Holy Spirit]. Or it may be primarily volitional and assume the form of activist redemption of man and society, as in the

instance of revolutionary activists like Comte, Marx, or Hitler.[63]

Each of these Gnostic variants is driven by the promise of a final end, and source of divine salvation, that occur within the bounds of space, time, and temporal history; that is, the various "gnostic experiences" form "the active core of immanentist eschatology".[64]

Voegelin suggests that the immanentist metamorphosis experienced by the emerging, modernist mind and spirit involved a believed, divinizing transformation of the human self, which also made possible the "re-divinization" of society, political order, and temporal history. He finds the doctrine of secularism to be an especially radical form of the "divinization of man", with secularist ideologies such as Marxism imparting to man the idea "that he himself is God".[65] What historical circumstances, then, made necessary, within the modern Gnostics' minds, the "re-divinization" of the temporal realm? In addressing this query, Voegelin draws attention, in the first instance, to the profoundly influential Christian thought of St. Augustine (354-430). Specifically, he is concerned with the Augustinian distinction – which was later to be maintained within the setting of Western Christendom – between the spiritual and temporal orders of power and authority, that is, between the heavenly and earthly cities. Along with this, Voegelin points to Augustine's distinction between sacred and profane history.[66] As Michael Federici argues, Voegelin reads modernity as being "defined, in part, by the confusion and melding of Augustine's two realms. Modern thinkers redivinize society by giving an eschatological meaning to profane history."[67]

Voegelin goes on to suggest that the trigger for the spiritual crisis which would come to afflict Western Christendom arose during the medieval era. It was during this period that "Western civilization", which "was strongly growing", proved unwilling to

"easily bear the Augustinian defeatism with regard to the mundane sphere of existence."[68] Consequently, a Gnostic tendency arose within the West in order to "attempt to endow the immanent course of history with a meaning that was not provided in the Augustinian conception."[69]

What is more, the pressures of tension and competition between the Catholic Church and lay interests were coming to a head at this time, with such epoch–making, historical developments as the papal investiture crisis, which between approximately 1075 and 1122 pitted the papacy against powerful political actors, especially the German King and Holy Roman Emperor Henry IV. Resulting from these pressures was a climactic fissure between the spiritual and temporal sources of worldly power and authority, a fissure which eventually would grow into the believed, modernist separation of church and state.[70] The more immediate aftermath, though, of this medieval–era unsettlement of political and epistemological authority was the perceived failure of Western Christendom to endow society with a spiritual meaning. Voegelin encapsulates the historical setting and its consequences in the following manner:

> Christianity had left in its wake the vacuum of a de-divinized natural sphere of political existence. In the concrete situation of the late Roman Empire and the early Western political foundations, this vacuum did not become a major source of troubles as long as the myth of the empire was not seriously disturbed by the consolidation of national realms and as long as the church was the predominant civilizing factor in the evolution of Western society, so that Christianity in fact could function as a civil theology. As soon, however, as a certain point of civilizational saturation was reached, when centers of lay culture formed at the courts and in the cities, when competent lay personnel increased in royal administrations and city governments, it became abundantly clear that the problems of a society in historical existence were not exhausted by waiting for the end of the world. The rise of Gnosticism at this critical juncture now appears in a new light as the incipient formation of a Western civil theology. The immanentization of the Christian eschaton [that is, the end of living days, and the arrival of final judgment] made it possible to endow society in its natural existence with a meaning that Christianity denied to it.[71]

Voegelin's analysis indicates that, once Western Christendom's crisis over the lost, sacred meaning of the temporal world had been initiated, the West's lengthy tradition of seeking to carve a divide between the spiritual and temporal realms metamorphized into a tradition in which the two realms were conflated. As a result of this conflation, the spiritual has come, within the context of modernity, to be effectively relocated within the temporal. The Gnostic polities that exemplify modernity's injection and confinement of the spiritual within the temporal derive their sovereign legitimacy from an immanentist religious worldview. This worldview inserts within the "natural sphere of political existence" the transcendent, end of days and source of salvation that are proclaimed by Christianity. Accordingly, the Gnostic polities seek to demonstrate their claim to divine truth and ultimate legitimacy by symbolically representing the relocation of transcendence within the world. Voegelin is therefore concerned with how these polities, which he has referred to as "immanentist church-states", represent themselves as, for example, utopias that promise to achieve salvational, social, and political perfection within the bounds of human history.[72]

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## 3. Endnotes

1. S. Parvez Manzoor, 'Desacralising Secularism', pp. 81-96 in Azzam Tamimi and John L. Esposito, eds., *Islam and Secularism in the Middle East* (New York: New York Univ. Press, 2000), p. 92. Another essay in this volume with a number of useful insights into modernist immanentism is Abdelwahab Elmessiri, 'Secularism, Immanence and Deconstruction', at pp. 52-80.

2. Ernst Cassirer, *The Individual and the Cosmos in Renaissance Philosophy,* Mario Domandi, trans. (Mineola, NY: Dover, 2000) [originally published in 1963], p. 15.

3. Louis Dupré, *Passage to Modernity: An Essay in the Hermeneutics of Nature and Culture* (New Haven, CT and London: Yale Univ. Press, 1993), p. 186.

4. See Cassirer, *The Individual and the Cosmos in Renaissance Philosophy,* especially pp. 7-45.

5. *Ibid.*

6. *Ibid.,* pp. 25-6.

7. Dupré, *Passage to Modernity,* pp. 185-6. See also Cassirer, *The Individual and the Cosmos in Renaissance Philosophy, passim.* For a creative, literary, artistic, and cultural analysis that positions Bruno within the historical development of the modern, Western urge to divinize the human, see Victoria Nelson, *The Secret Life of Puppets* (Cambridge, MA and London: Harvard Univ. Press, 2001).

8. Cassirer, *The Philosophy of the Enlightenment,* p. 45.

9. See *ibid.,* especially pp. 37-92.

10. *Ibid.,* p. 57; Yirmiyahu Yovel, *Spinoza and Other Heretics, vol. 1: The Marrano of Reason* (Princeton, NJ: Princeton Univ. Press, 1989), p. ix. Yovel's book, together with its companion volume, *Spinoza and Other Heretics, vol. 2: The Adventures of Immanence* (Princeton, NJ: Princeton Univ. Press, 1989), is one of the most illuminating sources for examining modernist immanentism and Spinoza's integral role in its development.

11. See *The Ethics,* pp. 85-265 in Benedict de Spinoza, *A Spinoza Reader: The Ethics and Other Works,* Edwin Curley, ed. and trans. (Princeton, NJ: Princeton Univ. Press, 1994), especially the first part, 'Of God', pp. 85-115. The *Ethics,* which was posthumously published in 1677, shortly following Spinoza's death, represents the most mature stage of his thought. See Etienne Balibar, *Spinoza and Politics,* Peter Snowdon, trans. (London: Verso, 1998), p. 76.

12. Spinoza, *A Spinoza Reader,* p. 94 (The *Ethics,* Part I, Proposition 15).

13. The quoted material is borrowed from Yovel, *Spinoza and Other Heretics, vol. 1,* p.

ix. A helpful discussion of "Spinoza's resolution of the relationship between the finite and the infinite" may be found in Richard Mason, *The God of Spinoza: A Philosophical Study* (Cambridge, UK: Cambridge Univ. Press, 1997), especially pp. 32-4.

14. See Yovel, *Spinoza and Other Heretics, vols. 1* and *2, passim;* Elmessiri, 'Secularism, Immanence and Deconstruction', p. 68; and M.H. Abrams, *Natural Supernaturalism: Tradition and Revolution in Romantic Literature* (New York and London: W.W. Norton & Co., 1971), p. 173.

15. For an argument linking Spinoza, Kant, and Hegel in a common lineage leading towards the establishment of modernist immanentism, see Elmessiri, 'Secularism, Immanence and Deconstruction', p. 75. *Cf.* Yovel, *Spinoza and Other Heretics, vol. 2,* pp. 3-50, which compares the three philosophers in more detail, with significant attention paid to the differences among them.

16. *Ibid.,* p. 7.

17. *Ibid.,* pp. 7-8.

18. *Ibid.,* p. 8.

For further analyses that situate Kant's theory of the subject within the context of broader discussions about modernity's immanentism, see: Phillip Blond, 'The primacy of theology and the question of perception', pp. 285-313 in Paul Heelas, ed., with the assistance of David Martin and Paul Morris, *Religion, Modernity and Postmodernity* (Oxford, UK and Malden, MA: Blackwell, 1998); and John Milbank, 'Problematizing the secular: the post–postmodern agenda', pp. 30-44 in Philippa Berry and Andrew Wernick, eds., *Shadow of Spirit: Postmodernism and Religion* (London and New York: Routledge, 1992). Also pertinent is David Loy, 'Transcendence East and West', *Man and World,* vol. 26 (1993), pp. 403-27, which points to the modernist internalization of transcendence within the human subject.

19. Immanuel Kant, *Religion Within the Limits of Reason Alone,* Theodore M. Greene and Hoyt H. Hudson, trans. (New York: Harper & Row, 1960) [originally published in 1793].

20. Friedrich Schleiermacher, *On Religion: Speeches to its Cultured Despisers,* Richard Crouter, ed. and trans. (Cambridge, UK: Cambridge Univ. Press, 1988) [originally published in 1799], p. 22.

21. *Ibid.,* p. 9.

22. *Ibid.,* p. 123; and Richard Crouter, 'Introduction', pp. xi-xxxix in *ibid.,* p. xiv.

23. Schmitt, *Political Theology,* pp. 49-50.

24. The first quoted phrase in this sentence is borrowed from *ibid.,* p. 50. Thereafter, see

G.W.F. Hegel, *Phenomenology of Spirit,* A.V. Miller, trans., with analysis of the text and foreward by J.N. Findlay (Oxford, UK: Oxford Univ. Press, 1977) [originally published in 1807], especially pp. 479-93. I am indebted to Raphael Foshay for assisting me in this reading of Hegel.

For an analysis that indicates the contrast between Hegel's immanentist philosophy of history, and an uncompromisingly transcendentalist, Islamic conception of worldly history as an "[expression] of God's will", see S. Parvez Manzoor, 'Modernity and Nihilism: Secular History and Loss of Meaning', *The Muslim World Book Review,* vol. 23, no. 2 (2003), pp. 5-15.

25. See G.W.F. Hegel, *Elements of the Philosophy of Right,* Allen W. Wood, ed., H.B. Nisbet, trans. (Cambridge, UK: Cambridge Univ. Press, 1991) [originally published in 1821].

26. See, for example: Dupré, *Passage to Modernity,* especially pp. 3-5, 174-8; Louis Dupré, *Religious Mystery and Rational Reflection: Excursions in the Phenomenology and Philosophy of Religion* (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1998), pp. 25-6, 69-70; Lindbom, *The Myth of Democracy,* pp. 20-1; Nasr, *The Need for a Sacred Science,* p. 7; and Perry, *The Widening Breach,* pp. 44-72.

27. Lindbom, p. 20. The source relied on for the dates of Ockham's life is Paul Vincent Spade, 'Introduction', pp. 1-16 in Paul Vincent Spade, ed., *The Cambridge Companion to Ockham* (Cambridge, UK: Cambridge Univ. Press, 1999), p. 1.

As Perry notes, although the rise of nominalism tends to be associated with Ockham, "already before [Ockham] the tendency to take the concrete fact for the final reality [was] manifested in a person like Roscellinus of Compiègne ([circa] 1050-1122)". Perry, *The Widening Breach,* p. 59. *Cf.* the discussion of Roscellinus's nominalism in Marcia L. Colish, *The Mirror of Language: A Study in the Medieval Theory of Knowledge,* rev. ed. (Lincoln, NB: Univ. of Nebraska Press, 1983), pp. 84-5.

28. Dupré, *Passage to Modernity,* p. 3.

29. *Ibid.* The term ontotheological gained currency through the German philosopher Martin Heidegger's (1889-1976) analysis and critique of the Western metaphysical tradition. As springing from within this context, it refers to the study of how the existence of God, that is, "the highest being[,]...is the necessary condition for the possibility and actuality of all other beings." Henry Ruf, 'The Origin of the Debate over Ontotheology and Deconstruction in the Texts of Wittgenstein and Derrida', pp. 3-42 in Henry Ruf, ed., *Religion, Ontotheology, and Deconstruction* (New York: Paragon House, 1989). I do not here enter into the apparent tensions between the ontotheological position, as thus characterized, and the belief, associated with Platonism, Neoplatonism, and various, religious exemplars of the Perennial Tradition, that the Absolute lies anterior to, and beyond being. For a formulation of the position that the Absolute is the "Beyond–Being", see Schuon, *Survey of Metaphysics and Esoterism,* pp. 15-35.

30. See Dupré, *Religious Mystery and Rational Reflection,* pp. 25-6; Lindbom, *The Myth of Democracy,* p. 20; and Alfred J. Freddoso, 'Ockham on Faith and Reason', pp. 326-49 in Spade, *The Cambridge Companion to Ockham,* p. 346.

31. A helpful discussion of Ockham's position on universals is provided in Paul Vincent Spade, 'Ockham's Nominalist Metaphysics: Some Main Themes', pp. 100-17 in *ibid.*

32. Perry, *The Widening Breach,* pp. 27, 59.

33. Spade, 'Ockham's Nominalist Metaphysics: Some Main Themes', pp. 109-11. Spade does contend that, although "Ockham probably thought of ontology as most modern interpreters do: purely in terms of "things"", his conception of reality unintentionally leaves room for certain "other factors" which "cannot be expressed nominally and cannot be signified". *Ibid.,* pp. 109, 111.

34. See Dupré, *Passage to Modernity,* pp. 3, 80-88; and Dupré, *Religious Mystery and Rational Reflection,* p. 69.

35. See Alain Renaut, *The Era of the Individual: A Contribution to a History of Subjectivity,* M.B. DeBevoise and Franklin Philip, trans. (Princeton, NJ: Princeton Univ. Press, 1997) [originally published in 1989 as *L'ère de l'individu: Contribution à une histoire de la subjectivité*], p. 52.

36. Dupré, *Passage to Modernity,* p. 186.

37. *Ibid.*

38. See *ibid.,* especially pp. 190-253.

39. See *ibid.,* pp. 252-3; *cf.* Louis Dupré, 'The Modern Idea of Culture: Its Opposition to Its Classical and Christian Origins', pp. 1-18 in Ralph McInerny, ed., *Modernity and Religion* (Notre Dame, IN: Univ. of Notre Dame Press, 1994), pp. 14-16.

40. Gottfried Wilhelm Leibniz, *Philosophical Papers and Letters,* vol. 1, Leroy E. Loemker, trans. (Chicago: Univ. of Chicago Press, 1956), p. 199 [from 'Preface to an Edition of Nizolius, 1670 (Selections)', pp. 186-202]. But see Noel Malcolm, *Aspects of Hobbes* (Oxford, UK: Clarendon Press, 2002), p. 152 [arguing that, while Hobbes indubitably "was a nominalist", "his nominalism was a good deal less extreme than is popularly supposed."].

41. See especially Hobbes, *Leviathan, passim.*

42. *Ibid.,* pp. 15-19 ['Chapter III: Of the Consequence or Train of Imaginations'].

43. *Ibid.,* pp. 20-27 ['Chapter IV: Of Speech'].

44. *Ibid.*, p. 19.

45. *Ibid.*

46. See *ibid.*, p. 114 [from 'Chapter XVII: Of the Causes, Generation, and Definition of a Commonwealth'].

47. See *ibid.*, pp. 33-42 ['Chapter VI: Of the Interior Beginnings of Voluntary Motions; Commonly Called the Passions. And the Speeches By Which They Are Expressed'] [sic].

48. See *ibid.*, especially pp. 235-45 ['Chapter XXXI: Of the Kingdom of God By Nature']. For an analysis that sheds further light on these two examples of how Hobbes's political theory is influenced by his nominalism, see J.W.N. Watkins, *Hobbes's System of Ideas: A Study in the Political Significance of Philosophical Theories* (London: Hutchinson University Library, 1965), pp. 150-7.

49. See Genesis 1:1. The version of the Bible that I use is *The Holy Bible, Revised Standard Version, Catholic Edition* (London: Catholic Truth Society, 1966).

50. Paul Hirst, *War and Power in the 21st Century: The State, Military Conflict and the International System* (Cambridge, UK: Polity Press, 2001), p. 58.

51. *Cf.* Schmitt, *Political Theology,* pp. 36-52; and Voegelin, *Collected Works, vol. 5,* pp. 238-41.

52. *Cf.* Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, Delaware: ISI Books, 2001).

53. One of the most pivotal recent developments in this connection has involved France's 2004 passage of a "law banning "conspicuous" religious symbols (read, headscarves) in French public schools", thereby "[casting] France as an intolerant and radically secular state hostile to the manifestation of difference, especially Muslim difference, in the public sphere." Mayanthi Fernando, 'The Republic's "Second Religion": Recognizing Islam in France', *Middle East Report,* no. 235 (2005), pp. 230-5, p. 230.

In addition, see the helpful discussions in: Michel Troper, 'The Problem of the Islamic Veil and the Principle of School Neutrality if France', pp. 89-102 in Sajó and Avineri, *The Law of Religious Identity;* Sebastian Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France', *Oxford Journal of Legal Studies,* vol. 17, no. 1 (1997), pp. 43-74; and John L. Esposito, 'Introduction: Islam and Secularism in the Twenty-First Century', pp. 1-12 in Tamimi and Esposito, *Islam and Secularism in the Middle East.*

54. Syed Muhammad Naquib al-Attas, *Prolegomena to the Metaphysics of Islam: An Exposition of the Fundamental Elements of the Worldview of Islam* (Kuala Lumpur: International Institute of Islamic Thought and Civilization, 1995), p. 1.

55. Alain Supiot, 'The Labyrinth of Human Rights: Credo or Common Resource?', *New Left Review,* no. 21 (2003), pp. 118-36.

56. Eric Voegelin, *The Collected Works of Eric Voegelin, vol. 6: Anamnesis: On the Theory of History and Politics,* M.J. Hanak, trans., David Walsh, ed. (Columbia, MO: Univ. of Missouri Press, 2002), p. 324 [originally published in 1966].

57. Petropulos, 'The Person as *Imago Dei*', p. 95. In addition, see especially Opitz, 'Voegelin's *Political Religions* in the Contemporary Political Order'.

58. Barry Cooper, *Eric Voegelin and the Foundations of Modern Political Science* (Columbia, MO: Univ. of Missouri Press, 1999), p. 9.

59. William L. Reese, *Dictionary of Philosophy and Religion: Eastern and Western Thought,* new and enlarged edition (Atlantic Highlands, NJ: Humanities Press, 1996), p. 260.

60. *Ibid.,* pp. 260, 445.

61. Voegelin, *Collected Works, vol. 5,* p. 189. The stress placed by Voegelin on Joachim's role as an initiator of modernist immanentism is supported by Karl Löwith's book, *Meaning in History,* which was published several years before *The New Science of Politics.* In his work, Löwith, paralleling Voegelin, depicts Joachim as a seminal figure who presages an eighteenth– and nineteenth–century Western pattern, typified by thinkers such as Marx and Hegel, of recreating within temporal history the transcendent, eschatological narrative of Christianity. On Löwith's understanding, this pattern substituted man's role for that of God within the unfolding trajectory of the history of salvation. See Karl Löwith, *Meaning and History* (Chicago: Univ. of Chicago Press, 1949). *Cf.* Blumenberg, *The Legitimacy of the Modern Age,* for an often–cited critique of Löwith's line of argument.

62. Voegelin, *Collected Works, vol. 5,* p. 189.

63. *Ibid.*

64. *Ibid.*

65. *Ibid.,* p. 190.

66. See *ibid.,* especially pp. 176-7, 181, 184-5; and Augustine, *The City of God Against the Pagans,* R.W. Dyson, ed. (Cambridge, UK: Cambridge Univ. Press, 1998).

67. Michael P. Federici, *Eric Voegelin: The Restoration of Order* (Wilmington, DE: ISI Books, 2002), p. 83.

68. Voegelin, *Collected Works, vol. 5,* p. 184.

69. *Ibid.*, pp. 184-5.

70. Voegelin's analysis is enriched when read alongside Berman's book, *Law and Revolution.* Therein, Berman shows how the investiture crisis served to precipitate a watershed era of pitched struggle for worldly influence between the ecclesiastical and laic orders, a struggle whose far–reaching and ongoing effects are attested by the very existence of secularist legal systems. In this connection, Berman's work illustrates how the investiture crisis set the stage for the systematization and rationalization of competing bodies of law: namely, canon law, on the one hand, and the laic law of emerging, secular polities, on the other. Considered in tandem, Voegelin's and Berman's insights provide a sense of how rising competition between the ecclesiastical and secular spheres of legal jurisdiction may have contributed to an erupting crisis of social, political, and juridical authority within the spiritual community of Western Christendom.

For a helpful selection of primary sources relating to the events surrounding the investiture crisis and later, medieval–era struggles between ecclesiastical and secular authorities, see Brian Tierney, *The Crisis of Church and State, 1050-1300* (Toronto: Univ. of Toronto Press, 1988), pp. 33-95.

71. Voegelin, *Collected Works, vol. 5,* pp. 220-1.

72. See *ibid.*, especially pp. 175-241; and Eric Voegelin, *The Collected Works of Eric Voegelin, vol. 27: The Nature of the Law and Related Legal Writings,* Robert Anthony Pascal, James Lee Babin, and John William Corrington, eds. (Baton Rouge, LA: Louisiana State Univ. Press, 1991), p. 72. The quoted phrase, borrowed from *ibid.*, appears in the outline of a jurisprudence course taught by Voegelin at the Louisiana State University Law School from 1954-57.

It should be noted that, inasmuch as Voegelin conducted his basic analysis of modernist Gnosticism amid the aftermath of the Second World War, he understandably envisioned the paradigmatic, Gnostic polities of his day as being of the blatantly totalitarian, Fascist, National Socialist, and Russian Communist varieties. In fact, he regarded "the American and English democracies" as a bulwark against the "fallacious" eschatology represented by these Gnostics. See *ibid.* and Voegelin, *Collected Works, vol. 5,* pp. 220-41. However, in the concluding chapter of the dissertation, I will suggest that the "war on terrorism" – marked as it is by the US's messianic, symbolic representation of itself as the national incarnation of goodness and light – underscores the need for new readings of Voegelin that test whether he may have been too sanguine in identifying such ostensible nemeses of modern Gnosticism.

# Chapter 4

## Secularist Law's Exemplification and Enforcement of Modernity's Faith: Three Chief Indicia

### I. Relocating Transcendence Within the Foundation of Modernist, State Sovereignty

#### *A. Carl Schmitt on Modernity's Immanentist Model of Sovereignty*

In this chapter, I would like to examine three chief indicia signalling secularist law's exemplification and enforcement of modernity's worldly religious orthodoxy. The first of these indicators is the immanentist model of state sovereignty from which the law originates, and derives its juridical force. Schmitt's theory of sovereignty is an indispensable resource for recognizing this indicator. Particularly illuminating is the way in which his theory builds on the critical engagement with Hobbes that was – both implicitly and explicitly – a constant motif of Schmitt's analyses concerning the inexorable intertwining of theology, politics, and law within modernity. Schmitt, whose thought underwent formative development during the turbulent years of the Weimar Republic that led up to the rise of Nazism, is a controversial figure whose critique of liberal democracy often is read as providing an unapologetic defense of authoritarianism; hence, his having been dubbed "the German Hobbes of the twentieth century."[1] This being said, Schmitt's prominent observation that "[a]ll significant concepts of the modern theory of the state are secularized theological concepts"[2] reflects his keen understanding of how modernity's immanentism is embodied in the modernist idea of sovereignty, and in the notions of legal order that are dependent on this idea.

In portraying the modernist model of sovereignty, Schmitt implies that Hobbes's influence on this model has been indelible. Reasoning that "[t]he idea of the modern

constitutional state triumphed together with deism, a theology and metaphysics that banished the miracle from the world",[3] Schmitt suggests that Hobbes's having removed God from his theorized, mechanistic universe indeed created a power vacuum that was free to be filled by a divinized, secular sovereign. Within a naturalistic universe whose banishment of "the miracle" had threatened to pull away the religious bonds that are indispensable for maintaining the stability and cohesion of society and the polity, it has become incumbent on the sovereign to operate as a quasi–sacred miracle worker.

Specifically, the power of the sovereign that is "analogous to the miracle in theology" is that which Schmitt identifies as the sine qua non of sovereignty: namely, the sovereign's capacity for "[deciding] on the exception."[4] This capacity means that the sovereign stands free, in times of state emergency (which it is his authority to declare), to step outside the constitutionally mandated legal order, and instead act "by means of a personal decision".[5] Schmitt envisioned, for example, "a case of extreme peril," or "a danger to the existence of the state" as the sorts of "exceptions" that would justify the sovereign's suspension of the existing legal order.[6] By transcending, in a metaphorical sense, the "normally valid legal order",[7] the sovereign comes effectively to embody, as if by metaphysical magic, the real transcendence of divinity.

For present purposes, the most crucial implication of Schmitt's "decisionist" depiction of the paradigmatic, modern sovereign is that in "the modern theory of the state", "the omnipotent God [has become] the omnipotent lawgiver".[8] On Schmitt's explanation, "decisionism" refers to the characteristically modern form of juridical command in which the ancient Christian idea that "We are obligated to do something not because it is good, but because God commands it" has been transformed into the notion

that the secular sovereign's "[no] less "eternal"" decision–making authority "is the source of…all ensuing norms and orders."[9] Consequently, the modernist model of sovereignty, as it is characterized by Schmitt, represents a complete inversion of the quintessential, theistic idea (held, above all, in classical Judaism and Islam) that God, as the ultimate font of political sovereignty, is, as well, the supreme lawgiver. As the scholar of Islamic law Bernard Weiss explains:

> [In monotheistic religion,] [the] world's sole creator is necessarily by right its sole ultimate ruler, legislator, and judge. All law worthy of the name must therefore originate with him. The human lawgiver is, despite his exalted position within the monotheistic scheme of things, only the mediator of the divine law to mankind.[10]

I would argue that modernity, while running directly counter to the position described by Weiss, has not succeeded in erasing the ineradicable presence of a transcendent lawgiver; instead, it silently perceives the secular sovereign as having internalized the lawgiving power of the Transcendent.

*B. The Quasi–Divine Absolutism of the Democratic, Secular Sovereign*

Another pivotal ramification of Schmitt's line of reasoning is that the quasi–divine absolutism embodied in his notion of the modernist sovereign need not be thought of as being restricted to typical, authoritarian regimes where political power is centralized in the hands of a dictator. Rather, it is quite logical for the sovereign of the democratic state also to be conceived of as the omnipotent, worldly recreation of the transcendent lawgiver; this, as the democratic sovereign takes the form of a massive, tentacular bureaucracy headed by political representatives which, with the inferred consent of a mass electorate, has a monopoly on "legitimate coercion".[11] Schmitt explains that, at the most fundamental level of democratic politics, there is an identity between the will of the populace and the elected sovereign. Hence, the absolutism of the democratic, secular

sovereign may be said to be, in effect, validly executed in the name of the people.[12]

As I will comment on further in the conclusion to the dissertation, the "war on terrorism" has brought to the fore a set of historical circumstances in which the self–arrogated, quasi–divine absolutism of the Bush administration exemplifies the potential applicability of Schmitt's thesis to a liberal democratic form of government.[13] Schmitt demonstrates that the not unnatural progression from democracy to dictatorship is expedited when, "in the actual circumstances of parliamentary business, openness and discussion have become an empty and trivial formality".[14] It would indeed appear that, within the present–day US, the Bush administration's assumption of virtually imperial authority would not have been possible without being aided and abetted by a Congress which has effectively ceded to the executive its constitutionally mandated power to authorize the waging of war.[15] Congress has achieved this by engaging in a style of debate concerning the "war on terrorism" that has, to borrow an inimitable metaphor of Schmitt's, "function[ed]...like a superfluous decoration, useless and even embarrassing, as though someone had painted the radiator of a modern central heating system with red flames in order to give the appearance of a blazing fire."[16]

To be sure, Schmitt might not have disapproved of the Bush administration's efforts to overcome what it seems to regard as the hindrance that the democratic, political process would otherwise place on its waging of a divinely sanctioned war. To illustrate, Schmitt regarded the distinction between "friend and enemy" as an indispensable dimension of "political actions and motives" that liberalism threatens to elide.[17] He feared that, absent the rigorous maintenance of this distinction, we would be left "a world without politics", and, presumably, a world without a workable "concept of the state".[18]

One might therefore imagine that the US government – relying as it presently does on the rallying principle that "the enemies of America plot against us"[19] – has, on a Schmittian view, worked to reassert the very sanctity of the properly authoritarian, modernist conception of sovereignty.

## II. Secularist Law's Inexorable Expression of Religious Conceptions of Ultimate Reality

### *A. Harold Berman and the "Dialectical Interdependence of Law and Religion"*

In the introduction to the dissertation, I illustrated how, on the basis of a perennialist metaphysics, one might read humankind's conception and experiencing of Ultimate Reality – in other words, the religious dimension of humankind – as necessarily underlying any form of legal system. A corresponding line of analysis has been developed by Harold Berman, who speaks of the essential, "dialectical interdependence of law and religion".[20] As Berman argues, "the legal order of any given society" is connected "to that society's beliefs in an ultimate, transcendent reality":

> Once law is understood as an active, living human process, then it is seen to involve—just as religion involves—man's whole being, including his dreams, his passions, his ultimate concerns.[21]

In therefore observing that "all law depends for its vitality upon religion, whether secular or theistic",[22] Berman helps to demonstrate a second indicator of secularist law's hidden, religious significance: namely, that such law cannot help but express some form of underlying, religious worldview.

Berman advances his thesis on the "dialectical interdependence of law and religion" at the same time as he critiques the hyper–rationalist, non–religious tenor that the modern, Western, secularist mind and ethos have sought to impart to law. Accordingly, he indicates that the modernist attempt to radically sever law from religion

is not only misguided, but futile.[23] All systems of law, from those that are secularist and rationalistic, to those that profess to mediate the commands of a transcendent lawgiver, are ceaselessly engaged in addressing questions that turn upon one or another manifestation of humankind's timeless responsiveness to Ultimate Reality. The diverse architects, interpreters, and executors of humanly enacted law are continuously involved in deliberations and actions which presuppose foundational (and largely unspoken) premises pertaining to the essential nature of being, knowledge, philosophical anthropology, and the proper ordering of human relations within society and political community. Thereby implied is that legal questions are, at a basic level, contingent on religious conceptions both of Ultimate Reality, and the character of humankind's relationship with the Real, that are inseparable from the epistemic presuppositions animating law. This is the case, whether the pertinent question is, for example, the very source and essence of justice, or, to take a more mundane issue, the epistemological reliability and judicial admissibility of a particular piece of courtroom evidence.

*B. Law's Four "Principal Ways" of Expressing Its Underlying, Religious Significance*

On Berman's analysis, there are four "principal ways" in which a system of law expresses the predominating, religious worldview in which it is grounded.[24] Each of these ways, one finds, is quite prominently manifested within secularist law. The first is "[t]he [collective] rituals of law (including those of legislation, administration, and negotiation, as well as of adjudication)", "that is, ceremonial procedures which symbolize the objectivity of law".[25] To illustrate: a hallmark of secularist jurisprudence is its strict observance of rational, formalistic, legal processes and procedures. If one understands this trait as being encompassed within the category of legal ritual, it may be further

grasped that secularist law's overriding concern with formalist processes themselves, rather than the moral and ethical desirability of such processes' specific outcomes, is indicative of a profoundly rationalist, epistemic outlook.[26]

The second means by which "law channels and communicates" religious conceptions of Ultimate Reality is "through *tradition*, that is, language and practices handed down from the past which symbolize the ongoingness of law".[27] The applicability of this point to secularist law is especially apparent within the context of the precedent–based, common law tradition. This is because the common law, in its modernist incarnation, may be read as the heir to the historic, self–reflexive, English conception of the common law as a timeless, quasi–divine body of jurisprudence which, with its precedential foundation, has a strongly mythic quality making the law appear to be a continuum whose beginning is "embedded in the time of origins."[28] As viewed in this light, it stands to reason that, for example, the classic self–conception of American nationhood postulates the "sanctity [of] basic legal norms and procedures", as well as the effective sacredness of "the effort to make predictable the legal consequences of individual actions".[29]

Third, and inextricably linked with the phenomenon of legal tradition discussed above, law's expression of its underlying, religious significance occurs "through *authority*, that is, the reliance upon written or spoken sources of law which are considered to be decisive in themselves and which symbolize the binding power of law".[30] Indicative of this mode of expression is the American jurisprudential notion that the Constitution, as the foundational text representing "the sanctity [of]...the state"[31] and its legal system, is an inviolable, self–justifying source of law. In a manner directly parallel

to a sacred scripture, the Constitution promulgates legal principles which must be followed for the sole, "compelling or controlling reason that 'the Constitution'…so requires."[32] Further, as was indicated earlier in the chapter, the immanentist religious significance of legal authority in secularist legal systems is exemplified by the fact that, in civil law as well as common law embodiments of such legal systems, "ultimate lawmaking power [lies] in the state," with the "glorification of the secular state" being in part justified by its possession of this power.[33]

Not least, law's religious meaning also is manifested in its "*universality*, that is, the claim to embody universally valid concepts or insights which symbolize the law's connection with an all-embracing truth."[34] There scarcely could be a way in which secularist law more patently betrays its unspoken, religious orthodoxy than through its implicit claim to represent universal, scientifically verifiable truths about the very essence of reality that the modernist worldview presupposes itself to have discovered. Especially significant is secularist law's characteristic presupposition that its modern, Western conception of naturally given, individual rights – including the sacrosanct right to private property to which I will return later in the dissertation – is of unassailable, universal validity.

*C. Ideology As the Medium Through Which Secularist Law Derives Its Religious Import*

Of singular value within Berman's analysis is his suggestion that, within the historical setting of modernity, law's fundamental, religious import is imparted to it through ideological and political–economic doctrines such as liberal democracy and communism (and, following Voegelin, one might add fascism). These ideologies, which have, within their respective spheres of influence, pervaded every fiber of modernist

civilization as they have taken very divergent paths towards the shared end of worldly salvation, are the most immediate force driving secularist legal systems, as well as the political frameworks in which secularist law is seated. In this way, modernist ideologies convey to secularist law the immanentist, religious qualities of the phenomenalist worldview in which they are commonly rooted.

In examining the legal manifestations of "secular religions (ideologies, "isms")", Berman presciently emphasizes today's ideological standard-bearer for modernist immanentism, and "the first great secular religion in Western history": liberal, democratic capitalism.[35] As he explains:

> Individualism, rationalism, nationalism—the triune deity of democracy—found legal expression in the exaltation of the role of the legislature…; in the freeing of individual actions from public controls, especially in the economic sphere; in the demand for codification of criminal and civil law…. These "jural postulates"…were considered to be…part of the natural order of the universe. Life itself was thought to derive its meaning and purpose from these and related principles of legal rationality….[36]

Drawing on Robert Bellah's celebrated, 1967 essay, 'Civil Religion in America', Berman implies that "the American way of life", as a "secular religion" inseparable from the broader, "secular religion" of liberal democracy, offers a prime context within which one may observe how the sacred significance of liberalism finds expression through law.[37] Specifically, the American legal system, with its "explicit reliance on divine guidance and divine [sanction]" as means of accessing natural, "universal standards of justice",[38] actively partakes of a cultural milieu whose pervasive, ritualistic and symbolic representations of American, national glory depict the US as a messianic deliverer of salvational, liberalist values.

## III. Secularist Law's Validation, Enforcement, and Propagation of Modernity's Religious Orthodoxy

### *A. Secularist Law As a "Producer" and "Sustainer" of Modernity's "Absolute Presuppositions"*

In his exposition of "the science of absolute presuppositions", Collingwood avers as follows:

> The result of simply presupposing our presuppositions, clinging to them by a sheer act of faith, whether or not we know what they are, whether or not we work out their consequences, is the creation of a religion; and the institutions of a religion have this as their object, to consolidate in believers and perpetuate in their posterity the absolute presuppositions which lie at the root of their thought.
>
> It is because absolute presuppositions are not 'derived from experience', but are catalytic agents which the mind must bring out of its own resources to the manipulation of what is called 'experience' and the conversion of it into science and civilization, that there must be institutions for perpetuating them.[39]

With this explanation, Collingwood sets forth two observations that are key to the present inquiry. For one, he confirms the notion, indispensable to recognizing the fundamentally religious nature of the modernist worldview, that the set of faith–based, epistemic presuppositions on which a given worldview rests may be understood as comprising the heart of one or another religious orthodoxy. Beyond this, Collingwood makes the further point that "[i]n any civilization", there exist "religious institutions that refresh in [man] from time to time the will…to retain [his "absolute presuppositions"].[40] Reflecting on Collingwood's observations in the light of ideas drawn from another provocative thinker, the twentieth–century French philosopher Michel Foucault, I would propose that, within the context of modernity, secularist law has come to assume some of the truth–creating role of traditionally "religious institutions" (such as the Church). In other words, secularist law has emerged as a prime "produce[r] and sustain[er]"[41] of modernity's "absolute presuppositions". This trait of secularist law's is, then, a third indicator

pointing to the law's exemplification and enforcement of modernity's immanentist faith.

*B. Michel Foucault on Law As a Privileged Source of Truth Within Modernity*

Throughout Foucault's scholarly career, he was preoccupied with examining how, at various points within the history of modernity, specific material factors and conditions – historical, social, political, economic, cultural – have contributed to the production and legitimization of knowledge that is, in those historical contexts, assumed to be valid. In his formative, 1960s works such as *The Order of Things: An Archaeology of the Human Sciences* and *The Archaeology of Knowledge,* he was especially concerned with the post–sixteenth century development of foundational, epistemic premises upon which the formulation of modern, scientific knowledge and practice was based.[42] Within this context, some of his most vital insights have to do with how modernity has constructed the human subject as being, in its essence, an object of scientific investigation. As Foucault would go on to suggest where his body of work focuses more closely on modernist, juridical and political structures, it is modernity's construction of the subject in this fashion that informs and enables the secularist state's subsequent impulse towards regulating, controlling, and manipulating the lives of its citizens by bureaucratic and technocratic means.[43]

On Foucault's view, the dynamic by which supposedly valid knowledge is created centers on the operation of complex sets of power relations. Specifically, as power plays out – and meets and counters resistance – within various sectors of material civilization at a given time in history, it takes discursive forms whose expression serves to establish the legitimate bases for knowledge at that historical moment. Thus, as Foucault states in his inimitable, enigmatic style:

> "Truth" is to be understood as a system of ordered procedures for the production, regulation, distribution, circulation, and operation of statements.
>
> "Truth" is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extends it.[44]

In the 1970s, Foucault undertook a sustained engagement with the matter of how modernist law and the state act as conduits for power relations that, by employing juridical and political discourse as well as instrumental "strategies" and "tactics", validate and enforce the epistemic premises that underpin and justify the polity's regulation of the subject. On his understanding, law and the state are not monolithic entities whose aim is to referee between competing actors within society.[45] Rather, as he explains, the modern 'body politic' is itself:

> a set of material elements and techniques that serve as weapons, relays, communication routes and supports for the power and knowledge relations that invest human bodies and subjugate them by turning them into objects of knowledge.[46]

To illustrate, consider the example posed by Foucault in *Discpline & Punish,* namely, the development of modern, highly systematized and codified penal systems in eighteenth– and nineteenth–century Europe and the US. In the book, Foucault indicates how juridical discourse defining criminality and the state's "power to punish", together with the harsh, technical modalities by which the state executes this power, help to produce and validate the rationalist, philosophical anthropology and model of political order on which modern penal systems are grounded.

On the basis of this line of thinking, it became apparent to Foucault that the discourses and instrumentalities of modernist law, as embodiments of the law's political authority, coercive power, and capacity for violence, have indeed emerged as a prime agent for the validation and enforcement of pivotal, epistemic premises of modernity. As

he asserts, "It's the characteristic of our Western societies that the language of power is law, not magic, religion, or anything else."[47] More than this, he grasped also how the discourses and practices of modernist law demonstrate an especially close "entangle[ment]" with the discourses and practices of modernist science.[48] Modern, experimental scientific inquiry helps to construct the prevailing, naturalistic model of the individual upon which the state relies as it undertakes "administrative/juridical, all-encompassing"[49] modes of intervention in the life of the individual. (These interventionist practices are, for their part, also justified on the basis of rationalist, scientific theories of social welfare, order, and control). The upshot is that "in modernity law, along with science, provides the privileged source of truth".[50]

One need not be in agreement with Foucault's line of reasoning all the way to the logical endpoint of his understanding of jurisprudence – that is, the notion that law is little other than coercion carried out through instruments of power – to appreciate the unique value of his analysis for understanding law's central role in reinforcing the modernist worldview. An understanding of this aspect of his thought can help to provide a broader purview within which to read, for instance, Marxist–influenced legal and social historiography concerning the development of the common law in England. This scholarship has suggested that power dynamics in which members of the propertied classes sought to subjugate persons without property within society's juridical order did much to help establish and enforce the emerging, sacrosanct modernist conception of private property rights.[51]

In a related vein, consider the far–reaching applicability of a Foucauldian analysis to the present–day "war on terrorism", a connection to which I will pay further attention

in the conclusion to the dissertation. Playing out through the war is a vast power dynamic, whereby an American government driven in significant measure by its ideological commitment to – and the perceived, material and strategic benefits of – neo–liberal, democratic capitalism employs discursive and instrumental embodiments of state force in seeking to impose this naturalistic ideology worldwide. This being said, events such as the US's post–September 11 construction of client territories in Afghanistan and Iraq lend the distinct impression that its propagation of neo–liberalist ideology to ostensibly sovereign locales is nonetheless envisioned as occurring under the overarching control of American empire.[52]

With the "war on terrorism" in mind, then, let us revisit the connection between Collingwood and Foucault. Utilized in the war are, on the one hand, domestic juridical measures such as the massive, October 2001 work of legislation, the USA PATRIOT Act, which provides for a panoply of invasive governmental measures 'required to intercept and obstruct terrorism' (and whose legislative renewal is, as I finalize this dissertation, being debated in the US Congress).[53] The Act establishes a regime of governmental control that reaches into multiple areas of the public and private lives of American citizens and resident aliens, while starkly evoking the discourse and mythical symbolism of American nationalism and historical exceptionalism. One might infer that this enhances the Act's role as a legal instrument that "consolidate[s] in believers and perpetuate[s] in their posterity the absolute [ideological, and by implication, epistemic and religious] presuppositions which lie at the root of their thought."[54]

On the other hand, at the same time as the "war on terrorism" demonstrates US law's domestic validation and enforcement of modernity's worldly faith, it also illustrates

how international extensions of US state power function as "[institutional apparatuses] for perpetuating [this faith]"[55] globally. Such instruments of state power have included, to name but a few: unilateral decisions asserting the inapplicability of the Geneva Conventions to "unlawful combatants" captured in the war; efforts at attaining extraterritorial jurisdiction over suspected "terrorists"; attempts to compel states (such as Pakistan), would–be states (such as Palestine), and international organizations (such as the United Nations) to accede to the US's manner of prosecuting the war; and the sought, wholesale formation of client states and societies in the wake of military conquest (again, as in the cases of Afghanistan and Iraq). In each instance, the US acts on a policy regime whereby it seeks worldwide converts to the universal, salvational doctrine of American–style, liberal, democratic capitalism, together with the unchallenged, economic and geostrategic advantages suggested as being due to a nation that "welcomes [its] responsibility to lead in [the] great mission" of "[furthering] freedom's triumph over [its] foes."[56] In sum, US state power acts as a vehicle for the forcible propagation of modernity's worldly religious tradition, while seeking to secure the US's role as the high priesthood of the tradition.

**IV. Recapitulating the Development of the Dissertation's First Chief Premise**

Over the past three chapters, I have been elaborating the first chief premise of the dissertation, namely, that modernity is characterized by an immanentist religious tradition which is exemplified and enforced by secularist legal systems. Before moving on, in Chapter Five, to develop the second chief premise of the inquiry, concerning the religious semeioticity of all legal systems, let us briefly recapitulate where we have travelled thus far.

Modernity's perception of transcendence as being compressed within the material world is predicated on the naturalistic "absolute presuppositions", to borrow Collingwood's phrase, that frame the modernist worldview's response to the Divine. In other words, given the modern, Western mind's paradigmatic belief in the phenomenalist character of the origin and essence of being, the source of valid knowledge, and the essence of the human, this mindset's unavoidable apprehension of transcendence peculiarly relocates the Absolute within the mundane world. The resulting, immanentist religious orthodoxy is marked by its basis in faith, its distinct conception of ultimacy as being grounded within the world of space, time, and materiality, and its communal nature, especially as exemplified by the various ideologies which represent differing denominations of modernity's worldly faith.

In considering how modernity's religious tradition is embodied in secularist law, it is crucial to hone in on several historical landmarks within the genealogy of modernist immanentism. First, we have located Cusanus, Spinoza, Kant, and Hegel as exceptionally influential and emblematic figures in the unfolding of modernity's transmutation of the religious. Thereafter, I pointed to nominalism's attempt at bridging the perceived gap between transcendence and the world as being a vital moment in the history of modernist immanetism, not least for the way in which it informed Hobbes's articulation of the secular sovereign as "*Mortal God*". Then, too, I emphasized how Voegelin can help us to understand modern systems of juridical and political order as pivotal elements in modernity's long–running effort at resolving the chasm between transcendence and the world with which nominalist doctrine likewise grappled. On Voegelin's explanation, it is important for us to realize the way in which Western

Christendom's inherent divide between the spiritual and the temporal realms helped to give rise to this chasm, because it is the subsequent immuring of the former realm within the latter that typifies modernity and its salvational "immanentist church-states".

In the current chapter, we focused on three chief indicia of how secularist law exemplifies and enforces modernity's faith. One indicator is the way in which modernity's model of state sovereignty embodies the relocation of transcendence within the secular sovereign, a phenomenon powerfully demonstrated in Schmitt's thought. Second, we built on Berman's understanding of the necessary interrelation between law and religion to illustrate how this interrelation manifests in modernist law, from the quasi–divine, mythical self–conception of the common law, to the American notion, steeped in civil religion, of a sacrosanct US Constitution. Third, we linked back to our prior discussion of modernity's "absolute presuppositions", to appreciate how the thought of Foucault underscores secularist law's role in validating, enforcing, and propagating these first principles.

## 4. Endnotes

1. See Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction Between Political Theology and Political Philosophy,* Marcus Brainard, trans. (Chicago and London: Univ. of Chicago Press, 1998), p. 100. Meier's book offers a nuanced examination of Hobbes's influence on Schmitt, including the important ways in which Schmitt's own understanding of right, political order diverged from that of his sometimes–supposed predecessor.

For two good introductions to some of the relevant issues concerning Schmitt's reputed authoritarianism, see Renato Cristi, *Carl Schmitt and Authoritarian Liberalism,* (Cardiff: Univ. of Wales Press, 1998); and Chantal Mouffe, ed., *The Challenge of Carl Schmitt,* London and New York: Verso, 1999).

2. Schmitt, *Political Theology,* p. 36.

3. *Ibid.*

4. See *ibid.,* pp. 36 and 5, respectively.

5. *Ibid.,* p. 3 [from the preface to the second, 1934 edition of *Political Theology*].

6. *Ibid.,* p. 6.

7. *Ibid.,* pp. xvii-xviii [from George Schwab, 'Introduction', pp. xi-xxvi].

8. *Ibid.,* p. 36.

9. Carl Schmitt, *On the Three Types of Juristic Thought,* Joseph W. Bendersky, trans. (Westport, CT: Praeger, 2004) [a translation stemming from Schmitt's 1934 book, *Über die drei Arten des rechtswissenschaftlichen Denkens*], pp. 59-60.

10. Weiss, *The Spirit of Islamic Law,* p. 1.

11. The quoted phrase is borrowed from Gordon Graham, *The Case Against the Democratic State: An Essay in Cultural Criticism* (Thorverton, UK and Charlottesville, VA: Imprint Academic, 2002), p. 7 [the book as a whole offers an interesting analysis of the potentially tyrannical implications of the democratic state]. *Cf.* Weber's observation that, "[t]oday...we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory." Max Weber, 'Politics as a Vocation', pp. 77-128 in Gerth and Mills, *From Max Weber,* p. 78 [essay originally published in 1919 as 'Politik als Beruf'].

12. *Cf.,* for example, Carl Schmitt, *The Crisis of Parliamentary Democracy,* Ellen Kennedy, trans. (Cambridge, MA: MIT Press, 1985), pp. 25-6 [the second edition, on which this translation is based, was originally published in 1926 as *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*].

Also in this connection, see the very helpful line of analysis offered by J.L. Talmon, who explored how "the secular religion" preached by the *philosophes* gave rise to the "political messianism" first embodied in the French Revolution and its dictatorial, Jacobinic outcome. J.L. Talmon, *The Origins of Totalitarian Democracy* (New York, W.W. Norton & Co., 1970) [originally published in 1952], *passim.* Central to what Talmon understood as the consequent phenomenon of "totalitarian democracy" is the idea advanced by the philosopher Jean-Jacques Rousseau (1712-1778) that, within the political community, the individual will properly should be subsumed by the general will, with the general will manifesting as the sovereign. *Ibid.,* pp. 38-49; and Jean-Jacques Rousseau, *The Social Contract,* Maurice Cranston, trans. (London: Penguin Books, 1968) [originally published in 1762].

Nonetheless, a basic point on which I would differ from Talmon concerns his attempt to draw a strict divide between liberal democracy, on the one hand, and, on the other, the current of totalitarian democracy that he sees as the precursor to such messianic forms of political order as Marxism. See Talmon, *The Origins of Totalitarian Democracy,* pp. 1-13, 249-55; together with the companion volume, J.L. Talmon, *Political Messianism: The Romantic Phase* (London: Secker & Warburg, 1960). The Israeli–based Talmon – like Voegelin, who had in 1938 fled Austria for the US in the wake of the Nazis' invasion – wrote within a cultural and historical milieu in which the line between totalitarianism and the supposed benignity of liberalism seemed quite clear (in fact, as I have indicated, *The New Science of Politics* and *The Origins of Totalitarian Democracy* each first appeared during the same year). However, this same clarity does not exist within what I suggest to be, at various points throughout the dissertation (including the remainder of the discussion on Schmitt) the present, post–communist era of authoritarian, imperial, and distinctly messianic embodiments of liberalism, such as the "war on terrorism."

Finally, a further, uncommonly creative thinker lending credence to the notion that the liberal democratic state and society embodies a "secularization of transcendence [that] leads back to immanence" is the legal scholar Roberto Mangabeira Unger. See his book, *Knowledge and Politics* (New York: Free Press, 1984) [originally published in 1975], p. 162. Therein, Unger suggests that the "ruling liberal consciousness" leads to a modernist reformulation of ancient pantheism, a form of immanentism whose emerging revivification had been signalled by Spinoza. Specifically, this modernist immanentism results from liberalism's compelling of human beings living within secular society to "try to get from one another what they had previously gotten from [God]." *Ibid.,* pp. 158-64.

13. The applicability to the US, post–September 11, of Schmitt's reading of an absolutist, modernist model of sovereignty has been notably developed in Giorgio Agamben, *State of Exception,* Kevin Attell, trans. (Chicago and London: Univ. of Chicago Press, 2005) [originally published in 2003 as *Stato di eccezione*]. *State of Exception* forms the sequel to Agamben's book, *Homo Sacer: Sovereign Power and Bare Life,* Daniel Heller-Roazen, trans. (Stanford, CA: Stanford Univ. Press, 1998). I am singularly indebted to Professor Rob Walker for having introduced me to Schmitt's thought, and for helping me to recognize its acute insight into the powerful, juridical and political ramifications of

modernity's immanentism; the work of Agamben, as Professor Walker further led me to see, also serves to enhance this reading of Schmitt.

14. Schmitt, *The Crisis of Parliamentary Democracy,* p. 50.

15. See, for example, Roger Morris, 'From republic to empire', *The Globe and Mail,* April 14, 2003, p. A11. *Cf.,* especially, 'Resolution That Congress Approved on the Right to Use Force in Iraq', *The New York Times,* October 12, 2002, p. A10.

16. Schmitt, *The Crisis of Parliamentary Democracy,* p. 6.

17. Carl Schmitt, *The Concept of the Political,* George Schwab, trans. (Chicago and London: Univ. of Chicago Press, 1996), p. 26 and *passim.*

18. *Ibid.,* pp. 35 and 19, respectively.

19. This phrase was uttered by President Bush in an Independence Day, 2003, address at Wright-Patterson Air Force Base in Ohio. Raymond Hernandez, 'Bush Says 'Much Depends' on Troops' Success', *The New York Times,* July 5, 2003, p. A6.

20. Berman, *Interaction of Law and Religion,* p. 40.

21. *Ibid.,* pp. 25, 31. For a helpful overview of Berman's thinking on the interdependency of law and religion, including an analysis of some of the sources that have influenced him, see John Witte, Jr., 'A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion', pp. 99-135 in Howard O. Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO: Westview Press, 1996).

22. Harold J. Berman, 'Religious Foundations of Law in the West: An Historical Perspective', *The Journal of Law and Religion,* vol. 1, no. 1 (1983), pp. 3-43, p. 39. Observe Berman's use in this quote of the concept of "secular religion" to characterize modernist ideologies such as "liberal democracy [and its] rival: revolutionary socialism." *Ibid.,* p. 38. Berman's usage of this idea, which would appear to bespeak his indebtedness to Dawson, among others (see, for instance, Berman, *Interaction of Law and Religion,* pp. 38, 152, 174; and Witte, 'A New Concordance of Discordant Canons', p. 102), points up his sensitivity to the way in which, within the context of modernity, ideology serves as a vehicle through which religious principles attain juridical expression. This matter will be revisited a bit later in the present section of the chapter.

One further observation is in order here: while acknowledging that there are certain points in Berman's analysis with which I might differ, I choose not to engage in a lengthy treatment of these, as the differences between our positions are not sufficient to alter my belief in the overall strength and validity of his line of reasoning. This being said, note my earlier critique of the idea of "secular religion" (*supra,* pp. 54, 69-70). Then, too, I find inadequate Berman's implication, within the quote that gives rise to the present endnote, that religion must be either "secular or theistic." Finally, as concerns Berman's notably sympathetic treatment of theistic religion throughout his writing on law

and religion, especially in *The Interaction of Law and Religion:* his preoccupation with ostensibly Western, religious traditions such as Christianity and Judaism would seem to lead him largely to ignore some legal systems, such as Islamic jurisprudence, that would have very forcefully underscored his central motif of the essential interdependency between law and religion.

23. Berman, *Interaction of Law and Religion,* pp. 21-47 and *passim.*

24. *Ibid.,* p. 31.

25. *Ibid.,* pp. 31-2.

26. *Cf.* Max Weber, *Max Weber on Law in Economy and Society,* Max Rheinstein, ed., Edward Shils and Max Rheinstein, trans. (New York: Simon and Schuster, 1967) [originally published in 1954], pp. 224-55.

27. Berman, *Interaction of Law and Religion,* p. 31.

28. See Peter Goodrich, 'Poor Illiterate Reason: History, Nationalism and Common Law", pp. 75-96 in David Sugarman, ed., *Law in History: Histories of Law and Society, 2 Vols.,* vol. II (New York: New York Univ. Press, 1996).

29. Berman, *Interaction of Law and Religion,* pp. 45-6; and Berman, 'Religious Foundations of Law in the West', p. 38.

In a related vein, see Clifford Longley, *Chosen People: the big idea that shaped England and America* (London: Hodder & Stoughton, 2002) for an analysis of the intimate connections between the historic, British and American tendencies to ascribe sacredness to their respective national identities.

30. Berman, *Interaction of Law and Religion,* p. 31.

31. *Ibid.,* p. 36.

32. Steven D. Smith, 'Law As a Religious Enterprise: Legal Interpretation and Scriptural Interpretation', pp. 83-99 in Richard O'Dair and Andrew Lewis, eds., *Law and Religion: Current Legal Issues 2001, Vol. 4* (Oxford, UK: Oxford Univ. Press, 2001), p. 91.

33. John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, CA: Stanford Univ. Press, 1969), pp. 18-21.

34. Berman, *Interaction of Law and Religion,* p. 31.

35. Berman, 'Religious Foundations of Law in the West', pp. 37-8.

36. *Ibid.,* p. 38.

37. See Berman, *Interaction of Law and Religion,* p. 45; *cf.* Bellah, 'Civil Religion in America'.

38. *Ibid.,* p. 46.

39. Collingwood, *An Essay on Metaphysics,* pp. 196-7.

40. *Ibid.,* p. 198.

41. *Cf.* 'Truth and Power' [an interview conducted with Foucault by Alessandro Fontana and Pasquale Pasquino], pp. 51-75 in Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon, 1984), p. 74.

42. See Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage Books, 1994) [the original, 1970 English edition is a translation of Foucault's 1966 book, *Les Mots et les choses*]; and Michel Foucault, *The Archaeology of Knowledge & The Discourse on Language,* A.M. Sheridan Smith, trans. (New York: Pantheon Books, 1972) [*The Archaeology of Knowledge* was originally published in 1969 as *L'Archéologie du Savoir*; and *The Discourse on Language* in 1971 as *L'ordre du discours*].

43. See, for example, Michel Foucault, *Discipline & Punish: The Birth of the Prison,* Alan Sheridan, trans. (New York: Vintage Books, 1979) [originally published in 1975 as *Surveiller et Punir; Naissance de la prison*]; and Michel Foucault, *The History of Sexuality, Volume I: An Introduction,* Robert Hurley, trans. (New York: Pantheon, 1978) [originally published in 1976 as *La Volenté de savoir*]. Foucault already was exploring some of this specific terrain in the 1960's, as where he analyzed the role of the state and the law in constructing the radical, social alienation, and believed, fundamental clinical irrationality of insane persons. See Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason,* Richard Howard, trans. (New York: Pantheon, 1965) [originally published in 1961 as *Histoire de la Folie*].

44. 'Truth and Power', p. 74.

45. See, for instance, *ibid.,* p. 63.

46. Foucault, *Discipline & Punish,* p. 28.

47. Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977,* Colin Gordon, ed., Colin Gordon et al., trans. (New York: Pantheon, 1980).

48. Foucault, *Discipline & Punish,* p. 23.

49. See Nancy J. Holland, '"Truth As Force": Michel Foucault on Religion, State Power, and the Law', *The Journal of Law and Religion,* vol. 18, no. 1 (2002), pp. 79-97, p. 87.

50. Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law As*

*Governance* (London and Boulder, CO: Pluto Press, 1994), p. 42.

51. See, for example, Douglas Hay, 'Property, Authority and the Criminal Law', pp. 17-63 in Douglas Hay, et al., eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975); and E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London: Allen Lane, 1975).

52. For a very useful, related, recent discussion, see Andrew J. Bacevich, ed., *The Imperial Tense: Prospects and Problems of American Empire* (Chicago: Ivan R. Dee, 2003), especially John Milbank's essay, 'Sovereignty, Empire, Capital, and Terror', at pp. 159-71.

53. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law No. 107-56.

54. *Cf.* Collingwood, *An Essay on Metaphysics,* p. 197.

For intimations of the applicability of Foucauldian thought to the post–September 11, domestic scene in the US, see Holland, '"Truth As Force', pp. 91-7.

55. *Cf.* Collingwood, *An Essay on Metaphysics,* p. 197.

56. 'Full Text: Bush's National Security Strategy', p. 3.

# Chapter 5

## The Significance of the "Juridical Prism": On Legal Systems As Semeiotic Texts

### I. What Is Meant By the "Juridical Prism"?

In this portion of the inquiry, I would like to suggest how the theoretical analysis undertaken in Chapters Two through Four can inform a hermeneutic methodology that allows for revealing interpretations of the multifarious, institutional components through which secularist legal systems signify their underlying, religious foundation. By understanding that law, in its essence, "is a text" composed of interwoven signs that intimate the most fundamental "values which are represented by [the law]",[1] one may grasp that any system of law necessarily will convey the religious foundation in which it is ultimately rooted. As has been indicated by the scholar of legal semeiotics Roberta Kevelson, applying a probing, interpretative scheme to the "signs and sign relationships" that serve to construct "the law" can help to cast light on the modes of knowledge, cognitive practice, and belief, and the ideologically informed dynamics of human interrelation that animate the law.[2] Consistent with, and extending from Kevelson's line of reasoning, one may infer that such a hermeneutic would promise to draw forth, as well, the religious significance pervading these juridically embodied phenomena.

Continuing in this vein, I propose that the semeiotic text constituted by a legal system may be usefully conceived of as a "juridical prism". This presupposes, as I initially explained in the introduction to the dissertation, that a legal system denotes the cohering traits and patterns of thought and logic, discourse, ideas, procedural content, and custom and ritual, which mark a body of law specific to a civilization, or to a discrete polity based within that civilization.[3] For an interpreter who understands that law cannot

be other than grounded in a religious base, any type of legal system – whether avowedly religious or secularist – may be read for the spectral diversity of ideas, practices, and principles through which it displays institutional manifestations of an underlying, religious tradition. Contrast this manner of construing law's religious significance with the hermeneutic posture of an analyst of law who preconceives that it is possible for law to be severed from religion. For the latter interpreter, the worldly religious orthodoxy that, from its foundational but unseen epistemic location, imbues secularist law with immanentist religious meaning likely will remain hidden from view, without being refracted into its manifold, juridical forms.[4]

Therefore, the notion of a juridical prism emphasizes that the commentator who engages with the semeiotic text that equates to a legal system does not simply have the fundamental, religious import of the law given to him or her, as if this meaning arrived in a fully constructed and patent form. This is especially important to keep in mind in the case of secularist law, which is typified by the concealed character of its religious significance. In point of fact, one who approaches law as a text composed of signs becomes an active reader and interpreter of the interwoven signs, thereby participating in the production of the text's meaning.[5] Hence, the present inquiry postulates that it is possible – indeed, imperative – to adopt an interpretative stance vis-à-vis secularist law that is informed by a keen awareness of the unspoken, epistemic presuppositions that underpin the law. This stance, even though undertaken from within a modern, Western civilizational milieu, seeks to attain enough epistemic distance from, and insight into the modernist worldview (as aided, for instance, by the perennialist critique of modernity) to help disclose how the epoch's unspoken religious orthodoxy is betrayed by law.[6]

## II. Reading Law As Interwoven Within a Semeiotic and Textual Universe

### *A. The Perennial Tradition on the Universe's Pervasive Signification of Religious Meaning*

As is touched on at various points throughout the dissertation, the far–reaching, modernist legacy of nominalism is demonstrated, among other ways, in the modern, Western, epistemic tendency to regard the ultimate meaning and significance of phenomena as inhering in the phenomena, themselves. Modernist epistemology indicates that, because the final source and referent of the universe's meaning is contained in the universe itself – rather than transcending the cosmos – this meaning is, so to speak, directly given by the universe to the person who extracts it through rationalist and mathematical, analytic processes. Thus, one might say that this epistemology presupposes rationalist, human thought and language as being capable of adequately representing both the reality and ultimate import of phenomena. Supposedly, phenomena provide to the observer who analyzes them a full, self–representation of their inhering reality and meaning, which the observer is then able to replicate by means of his or her cognitive and linguistic faculties.[7] However, as the perennialist critique of modernity has asserted, this modernist fashion of seeking to know the universe is both epistemologically deficient and spiritually bereft. In contrasting modern scientism to his grasp of the essential, perennialist idea that "the cosmos *is* an icon…which reveals a divine reality beyond itself", Nasr explains as follows:

> The modern sciences…know nature but no longer as an icon. They are able to tell us about the size, weight, and shape of the icon and even the composition of the various colors of paint used in painting it, but they can tell us nothing of its *meaning* in reference to a reality beyond itself. What they tell us about the size, composition of the paints, and so on of the icon are not false on their own level, but they do not exhaust knowledge of the icon and it would be both ignorance and *hubris* to claim that this type of knowledge is the only knowledge possible of the icon.[8]

Nasr's line of understanding leads him to expound on a teaching that could not be more essential to the perennialist view of how the Transcendent manifests Its divine presence throughout creation. On his view, the cosmos is, on the one hand, an icon that acts "as the theophany of...Reality".[9] Consistent with this, the cosmos may equally be regarded as a fundamentally semeiotic and textual medium that conveys to receptive minds the universe's plenitude of religious meaning and significance. Nasr states:

> In traditions based upon a sacred scripture the cosmos...reveals its meaning as a vast book whose pages are replete with the words of the Author and possess multiple levels of meaning like the revealed book of the religion in question. This perspective is to be found in Judaism and Islam where the eternal Torah and the Quran...are seen as prototypes of both the revealed book and that other grand book or virgin nature which reflects God's primordial revelation. In Christianity also...the vision of the universe as the book of God is not only present but has been repeated through the ages especially in the utterance of those who have belonged to the sapiential perspective.[10]

Nasr's depiction of a textual universe whose ultimate source of meaning is the Sacred draws on the Islamic tradition's basic, Quranic doctrine that the "cosmos is replete with the signs and portents (*ayat*) of God".[11] He portrays the universe as being composed of interwoven signs that, on the classical Islamic perception, "manifest themselves [to those "having understanding"] in the Holy Book, the horizons...or the heavens and the earth and the soul of man".[12] Further, Nasr explains how, on the Islamic worldview, "deciphering the text of the cosmic Quran" acts as a "complement" to "the reading of the written Quran".[13] In other words, "the traveler upon the [Islamic] spiritual path" can look to "an Islamic cosmic ambience" "adorn[ed]" "with the signs of God" as an aid to taking in "The Quranic Revelation".[14] The Quran proclaims as follows, in an exemplary passage that will resonate later in the inquiry, where I contrast the Islamic conception of nature as a semeiotic manifestation of Transcendent Reality with modernity's implicit

notion that nature itself embodies a wholly immanent source of divinity:

> Lo! in the creation of the heavens and the earth, and the difference of night and day, and the ships which run upon the sea with that which is of use to men, and the water which Allah sendeth down from the sky, thereby reviving the earth after its death, and dispersing all kinds of beasts therein, and (in) the ordinance of the winds, and the clouds obedient between heaven and earth: are signs (of Allah's sovereignty) for people who have sense.[15]

Thus, within the "immense book" that is the phenomenal world, "[e]verything can become an *aya,* a sign".[16] Especially prominent, though, among the signs of God (*ayat allah*) are "the verses of the [Quran]" which, as the recitation of the divine speech, "are called by this very name [viz., *ayat*]."[17] Indeed, the doctrinal tenet holding that Quranic verses epitomize the signs of God renders Islamic jurisprudence a quintessential example for the claim that law is a semeiotic text which conveys religious meaning. This is because the Quran, as the pre-eminent source of Islamic law, semeiotically conveys (to all humankind potentially, as the message of the Islamic tradition is a universal one) the indispensable, religious basis of such law: namely, that God "has given commandments, and human beings are under obligation to obey them."[18]

In sum, by calling on the Perennial Tradition's insight into the universe's pervasive signification of religious meaning, one may realize that all phenomena, whether natural, human, social, cultural, or otherwise, may be read as semeiotic mediums conveying one or another expression of such meaning. Consequently, within the context of the present inquiry, "we are", to adapt the provocative words of Guénon, "unable to attribute to [modernist, legal and] political [factors]...any significance other than that of...outward signs of the mentality of [modernity]".[19] That is to say, we are prompted to read these factors as signifying the implicit mode of conceptualizing, responding to, and experiencing Ultimate Reality that serves to imbue the mentality of modernity with a

religious outlook.

### *B. Salient Facets of the Dynamics of Textuality and Semeioticity*

Keeping near to mind the perennialists' understanding of the way in which the universe and its constituent phenomena act as textual and semeiotic manifestations of religious meaning, let us consider some facets of textuality and semeioticity that help to demonstrate the importance of regarding legal systems as semeiotic texts.

#### *1. Thinking of Legal Systems As Semeiotic Texts*

The term, text, is derived from the Latin *texere,* that is, "to weave".[20] Thus suggested by the word is that the ontological condition of textuality may be understood as hinging on the cohering interweaving of signs. The resulting network of signs is engaged with by a reader, who endeavors to interpret the interdependent signs, and thereby construe the meaning conveyed by the text as a whole. As was indicated by the perennialist notion that the entire universe may be read as a text, one cannot stress too strongly the richly multiform nature of textuality. In particular, the existence of a text is by no means predicated on the presence of written or otherwise printed material. As the scholar of semeiotics John Deely suggests, any phenomena ordered in such a way as to impart cohering meaning can conceivably comprise a semeiotic text, or texts:

> Texts are not only literary. They can be any physical structure at all made to embody ideas in the semiotic sense. Indeed, the whole of culture, in this…sense, is a text.[21]

Following a parallel path of reasoning, one may infer that societies, bodies of ideological doctrine, narrative repositories of historical memory, and entire worldviews all can be construed as constituting texts.[22] As I will return to shortly in discussing intertextuality, the text that is constituted by a legal system, enmeshed as it is within the broader matrix of a textual universe, is built upon, and has its meaning deeply informed by further texts

of precisely the nature pointed to by Deely's observation.

Deely's comment also is useful for its indication that texts, as orderings of signs, function as the site at which the relation between a sign and the idea that stands ontologically distinct from, and is the referent of the sign, is negotiated. Thinking of texts as being networks of semeiotically represented ideas provides a useful way to illustrate the diverse range of signs that are interconnected within the text that is a legal system. To be sure, many of these signs are manifested in the words and printed arrangements of written materials, whether, for example, books of statutory law codes and state rules and regulations; bound volumes of judicial decisions; treaties and accords; pleading forms; scholarly legal commentary and historiography, and so forth. But the textuality of a legal system no less encompasses a panoply of signs that embody ideas through such unwritten mediums as: the spoken word, as it is uttered in, for instance, testimony, oath–taking, or a judge's proclamation; pictorial images displayed by an expert witness; courtroom conduct and gestures; procedural regimes; juridical customs and rituals; and, crucially, the law's explicit and implicit expression of a communally shared, institutionally embedded idea that acts as a lodestar for the legal system (for example, the modernist legal conception of the sacrosanct nature of individual property rights).[23]

Moreover – and this point is key – it is not only the case that signs may be thought of as embodying ideas that stand distinct from them; indeed, at the same time, ideas can themselves be read as signs.[24] Thus, when I argue in the dissertation (as I do in more detail over the remaining chapters) that secularist law's reciprocally reinforcing ideas of a human, proprietary claim and transactional power over all existents together signify the

law's underlying, immanentist religious orthodoxy, there are two complementary ways in which one may think of these paired ideas as semeiotic tokens. In one sense, a commentator may read secularist law as semeiotically embodying these two religiously significant ideas, by virtue of the law's pervasive allusiveness to the presupposed, proprietary and transactional nature of all the world's beings. In a further sense, the two ideas are in and of themselves telling signs of modernity's transmutation of the religious.

*2. The Role of Intertextuality*

Once one recognizes the intrinsically semeiotic and textual nature of legal systems, it may additionally be realized that, as texts, legal systems participate in an ongoing interplay with other texts that help to construct both the law's very textuality, and the meaning that is thereby conveyed. Hence, the law is, so to speak, a compound text that is produced by the intertextual merger and interchange of other texts. The concept of intertextuality, as viewed in the light of its present relevance, "denotes [the] transposition of one (or several) sign-system(s) into another".[25]

Indicated, in one respect, by the intertextual nature of a legal system is the way in which a system of law is constructed from within by the merging together of distinct juridical texts that clearly fall within its ambit – for example, statutory codes, bodies of case law, and a tradition of legal rituals. However, most significant for the present inquiry is the way in which the legal system as a whole overlaps and exchanges meaning with the sorts of expansive, non–literary texts to which I referred at the bottom of page 120: culture, ideology, historical memory, religious tradition, and so forth. Vivified by its intertextuality, the legal system constantly refers to these other texts with which it intersects, and by which it is informed, reinforced, and altered, in much the way that a

scholarly book points throughout to the sources that have been integrated by its author. Likewise, in the way that a scholarly book has the power to alter the research field to which it belongs, and thus affect the significance of the sources upon which the book is built, the legal system acts to alter and renew the texts with which it is linked.[26] (In this connection, notice how a theoretical examination of textuality buttresses the notion, expanded on in the prior chapter, that secularist law not only expresses, but also acts to validate, enforce, and propagate modernity's religious orthodoxy).[27]

Thus, the idea of intertextuality demonstrates how a system of law, given its intertwining within the web of signs[28] that envelops it, points the percipient reader down a "signifying chain" leading to the further texts that are the source of the law's fundamental meaning and significance. Especially in the light of the Perennial Tradition's understanding both of metaphysics, and the manner in which the transcendent font of reality is semeiotically manifested throughout creation, one may infer that the foundational meaning to which the "signifying chain" ultimately leads is religious in character.[29]

### *C. The Aptness of Peircean, Rather Than Saussurean Sign Theory*

#### *1. Two Distinct Currents of Semeiotic Doctrine*

In this section of the chapter, I will elaborate on why an endeavor to construe the hidden religious meaning signified by secularist law may most fruitfully be informed by C. S. Peirce's understanding of how signs function and are read, rather than the semeiotic doctrine associated with Ferdinand de Saussure and like–minded Continental thinkers. As was initially observed in endnote 2 of the chapter, modern sign theory is broadly divisible into two currents of thought: the Saussurean tradition, which draws in large

measure on structuralist linguistics;[30] and Peirce's "transcendental semiotics",[31] which emphasizes that each and every sign represents an ontologically real object, standing distinct from it, whose import is conveyed by the sign to a human interpreter.[32] As I will explain, Peirce's theory of signs is preferable for the present inquiry precisely because it postulates the fundamental reality of that which transcends, so to speak, and is represented by the sign – an attribute of his "semeiotic" that makes it especially well–suited to the interpretation of signs that point to a real, religious referent.

Following from this binary division in semeiotic theory, the application of semeiotics to the interpretation of legal texts and language has, as I also earlier noted, branched into two general (albeit not rigidly fixed nor mutually antagonistic) camps of scholars, who respectively privilege the Saussurean and Peircean traditions. Prominent among the first group, which also draws on the work of structuralist semeioticians such as Algirdas Julian Greimas, is, for example, the British law professor (and, intriguingly, specialist in Judaic and biblical law) Bernard Jackson.[33] As for the Peircean camp, its doyenne was, up until her 1998 death, Kevelson; at present, her contributions continue to be carried forth by scholars of legal semeiotics such as William Pencak.

### *2. The Saussurean Current*

Building on Saussure's seminal (and posthumously published) 1916 work, *Cours de linguistique générale* (*Course in General Linguistics*), the Saussurean tradition of semeiotic inquiry utilizes a science of signs, termed *semiologie* (translated into English as semiology), that focuses on "the life of signs within society".[34] Theorizing that the activity of signs hinges on the sign's function as a mediator between a linguistic "signifier" and its conceptual referent, the "signified", Saussurean semeiotics stresses the

fundamentally linguistic, socially embedded character of signs and sign relations. Basic concepts linked with a structuralist approach to semeiotics, particularly the idea of a paired signifier and signified, have been taken up and recontextualized within an intriguing field of recent scholarship exploring the nexus between language, theology, and metaphysics.[35]

However, insofar as it has been brought to bear within legal semeiotics, the Saussurean tradition has not tended, on my reading, to yield notable insights into how one might decipher law's underlying, religious significance. Rather, structuralist semeiotics has chiefly inspired a functionalist focus on the multiple, practical meanings of, and the social relations stemming from the dynamics of legal discourse. In this vein, Jackson has maintained, for instance, that communicative practices constituting "legal worlds" act, in and of themselves, to construct a reality. As such, the semeiotic activity at work in the construction of both this independent, juridical reality and its meaning seemingly refers to no further reality lying outside of the legal realm.[36] In thereby implying that the fundamental meaning of law is produced essentially within the bounds of legal discourse itself, this line of analysis demonstrates a prime trait of the Saussurean tradition that renders it less than apt, for present purposes. This trait is the lack of emphasis on sources of meaning semeiotically conveyed by the law which (as in the case of a religious tradition, body of ideological doctrine, and so forth) lie separate from, and at a deeper epistemic level than the law.

### *3. The Peircean Current*

By contrast, the singular aptness of Peircean sign theory for the line of inquiry pursued in this dissertation is underscored by the striking parallel between his

understanding of the universe's intrinsically semeiotic character, and the Perennial Tradition's view of the cosmos as a semeiotic medium. As Peirce observed:

> It seems a strange thing, when one comes to ponder over it, that a sign should leave its interpreter to supply a part of its meaning; but the explanation of the phenomenon lies in the fact that the entire universe – not merely the universe of existents, but all that wider universe, embracing the universe of existents as a part, the universe which we are all accustomed to refer to as "the truth" – that all this universe is perfused with signs, if it is not composed exclusively of signs.[37]

Let us set aside recurrent, theological and metaphysical conundrums that are evoked by Peirce's observation, such as the question of whether there exists any aspect of reality (in particular, the Transcendent) which is not a sign.[38] The crucial point is that Peirce shares with the perennialists an understanding of a semeiotic universe whose constituent signs convey to a reader meaning that, as I will go on to detail, emanates from beyond each sign.

*i. Peirce's Triadic Model of Sign Activity*

Peirce's semeiotic theory hinges on what may be described as a triadic model of sign activity. The three elements of what he understood to be the semeiotic triad are as follows:

> A sign, or *representamen,* is something which stands to somebody for something in some respect or capacity. It addresses somebody, that is, creates in the mind of that person an equivalent sign, or perhaps a more developed sign. That sign which it creates I call the *interpretant* of the first sign. The sign stands for something, its *object.*[39]

In accordance with this arrangement, the object lies distinct from and anterior to the sign, which in turn lies anterior to the interpretant, along a signifying continuum, as it were.[40] Indeed, driven by, and reciprocally driving human thought, sign activity proceeds along a perpetually ongoing network that pulses throughout our semeiotic universe. As Peirce goes on to state:

> Anything which determines something else (its *interpretant*) to refer to an object to which itself refers (its *object*) in the same way, the interpretant becoming in turn a sign, and so on *ad infinitum.*[41]

Peirce's understanding of an ongoing process of sign activity is consistent with the idea, set forth in the prior discussion of intertextuality, that a legal system is linked within a "signifying chain" that leads a percipient reader to the sources of the law's fundamental meaning.

*ii. The Importance of the Peircean Triad*

The immediate importance of the Peircean triad is pointed up by his key observation that a sign stands for its referent object, "not in all respects, but in reference to a sort of idea, which I have [sometimes] called the *ground* of the representamen."[42] I will now conclude the chapter's analysis of the great value in regarding legal systems as semeiotic texts by demonstrating two basic reasons why this point of Peirce's is so crucial for us.

*a) The Representation of Key Ideas By Juridical Signs*

First, Peirce's statement buttresses the notion that a legal system is a text whose constituent signs represent particular ideas, which in turn signify further ideas by which the initial ideas have been informed, and so forth. To illustrate: using a Peircean mode of analysis, Kevelson has considered how law – especially the common law, but other systems of law, as well – signifies two pivotal ideas, property and contract, that are very close to the two ideas read as signs in this dissertation. Her interest has been in how law's multifarious, semeiotic embodiments of the ideas of property and contract – from the law's governance of the development and alienation of land, to the way in which it imagines the proprietary nature of an amorphous thing such as air space – provokes in the minds of those who read the signs (namely, persons within society) normative

evaluations of the law. She suggests that interpreters who construe the law's signification of property and contract are necessarily being pointed beyond these two ideas, to, for example, the political–economic and ideological concepts which drive the law. Consequently, such readers become engaged in a societal dialogue about the justness and worth of law and its underlying values and moral principles, which can contribute to change and development in the ideas embodied in law.[43]

A clear parallel may be drawn between the sorts of fundamental meaning that Kevelson reads as being semeiotically conveyed by the juridical ideas of property and contract, and the religious content that I maintain is signified by secularist law. Beyond this, I am not necessarily focused on the question of whether a commentator's disclosure of secularist law's unspoken, religious significance can help to effect meaningful change in the law and its religious and ideological foundation. This being said, I would argue strenuously that shedding light on, and thereby opening up to critique modernist, epistemic presuppositions whose root influence on the law generally goes unrecognized would seem to be a vital, initial step towards effecting such change.

*b) The Platonist Orientation of the Peircean Triad*

A second reason why the Peircean triad is so pertinent to this inquiry is that its Platonist orientation helps to explain how the concepts embodied in any system of law might be read as pointing beyond their juridical instantiations, to an ultimately religious source of meaning and significance. As Peirce explains, when he speaks of a sign as standing, specifically, for "a sort of idea",

> "[i]dea" is here to be understood in a sort of Platonic sense, very familiar in everyday talk; I mean in that sense in which we say that one man catches another man's idea, in which we say that when a man recalls what he was thinking of at some previous time, he recalls the same idea, and in which a man continues to think anything, say

> for a tenth of a second, in so far as the thought continues to agree with itself during that time, that is to have a *like* content, it is the same idea…[44]

Thus, as I understand Peirce, a sign stands not (as a nominalist might presume) for individual, concrete things, nor even for particular, cognitive instantiations of one idea; rather, it represents an idea, understood as a singular essence. Especially insofar as one reads Peirce from a deeply Platonist, perennialist standpoint, it may therefore be inferred that, within our semeiotic universe, each and every sign refers to a specific idea whose reality derives, in the first instance, from a universal, ideational essence. Continuing with this line of reasoning, if one accepts that Transcendent Reality lies anterior, and gives ultimate rise to the sphere of universals, it follows that all signs may be traced to a source of religious meaning that profoundly informs the specific ideas represented by the signs.

The importance of Peirce's Platonism for our ability to employ his semeiotic in accessing the religious meaning that infuses juridical ideas is also highlighted by his indication that each element of the semeiotic triad – sign, interpretant, and object (or, as we have come to see, the referent idea) – is, indisputably, an existential reality.[45] As Monsignor Luigi Giussani illustrates, recognizing the fundamental reality of a sign, as well as that which it represents, is indispensable for understanding that the ultimate referent of the semeiotic world in which our lives are enmeshed is religious in character:

> The sign…is a reality which refers me to something else. The sign is a reality whose meaning is another reality, something I am able to experience, which acquires its meaning by leading to another reality….
>
> Just as a sign demonstrates the thing of which it is a sign, so the world in its impact with the human being functions [as] a sign…[of] "God."[46]

Hence, while the specific way in which a sign is construed is inevitably contingent on the hermeneutic perspective of its reader, this does not change the fact that the idea which is

represented by the sign is an incontrovertible reality. This represented idea eventually points, in turn, to some real, universal, ideational essence from which it derives. And, in its turn, the universal ultimately points to Absolute Reality.[47] In light of this, I will seek, in the remaining pages of the dissertation, to offer a revealing reading of two secularist juridical signs that point to the eminently real, if unspoken, way in which a modern, immanentist mode of envisioning and responding to Absolute Reality imbues the law.

## 5. Endnotes

1. Roberta Kevelson, *Peirce, Paradox, Praxis: The Image, the Conflict, and the Law* (Berlin: Mouton de Gruyter, 1990), pp. 139-40.

2. See, for example, Roberta Kevelson, 'Comparative Legal Cultures and Semiotics: An Introduction', *American Journal of Semiotics,* vol. 1, no. 4 (1982), pp. 63-84; and Roberta Kevelson, *The Law As a System of Signs* (New York: Plenum, 1988). The latter source serves, as well, as an excellent introduction to Kevelson's thought.

Legal semeiotics is a distinct field of inquiry that is dedicated to the investigation of signs arising within juridical contexts. Accordingly, scholars within the field draw on semeiotic doctrine, that is, doctrine concerning the study of textually and linguistically embedded signs, in general. The burgeoning of the discipline over the past two to three decades has been due in no small measure to Kevelson's influence – see William Pencak's tribute following her quite recent death, 'Introduction: Why a Gryphon? The Life and Work of Roberta Kevelson', pp. xi-xvi in Kevelson's posthumously published book, *Peirce and the Mark of the Gryphon* (New York: St. Martin's Press, 1999). Helpful overviews of legal semeiotics are provided by Kevelson, both in Thomas A. Sebeok, ed., *Encyclopedic Dictionary of Semiotics,* 2 tomes (Berlin: Mouton de Gruyter, 1986), tome 1, pp. 438-43, and Christopher Berry Gray, ed., *The Philosophy of Law: An Encyclopedia,* 2 vols. (New York and London: Garland, 1999), vol. 2, pp. 792-4; and by William E. Conklin, in Paul Bouissac, ed., *Encyclopedia of Semiotics* (Oxford, UK: Oxford Univ. Press, 1988), pp. 356-8.

It should be observed that Kevelson's and Conklin's encyclopedia entries tend to privilege, respectively, two competing tributaries of thought within legal semeiotics. In turn, these tributaries flow more or less correspondingly from two distinct currents of thought in modern semeiotic theory, as a whole. More will be said later in the chapter about the distinctions between these two theoretical currents. The first, which is privileged by Kevelson's entries, represents a tradition of thinking indebted to the "semeiotic", or general theory of how signs arise, function, and are interpreted, that was set forth by the American philosopher Charles Sanders Peirce (1839-1914). During the course of the analysis, I will explain why the dissertation's line of reasoning follows Kevelson in favoring Peirce's mode of semeiotic inquiry. The second current, privileged by Conklin's entry, represents a tradition of thinking associated with a contemporary of Peirce's, the Continental linguistic theoretician Ferdinand de Saussure (1857-1913).

Finally, a note on spellings, in light of the dissertation's preference for Peircean sign theory: throughout the inquiry, I include the second letter "e" in the spelling of semeiotic (as opposed to the frequently seen spelling, "semiotic", which even Peirce himself sometimes employed). The reason I do this is that the spelling, semeiotic, apparently was regarded by Peirce as representing the more etymologically correct derivation of *semeion,* the Greek for sign. See Max H. Fisch, 'Peirce's General Theory of Signs', pp. 31-70 in Thomas A. Sebeok, ed., *Sight, Sound, and Sense* (Bloomington, IN: Indiana Univ. Press, 1978), p. 32; and Vincent M. Colapietro, *Glossary of Semiotics* (New York: Paragon,

1993).

3. *Cf.* the notion of a legal system set forth in John Henry Wigmore's classic, if now somewhat dated, comparative account of "the world's legal systems". Therein, he indicates that such a system is defined by its comprising a "well-defined, organized, continuous body of legal ideas and methods", predominating at a particular time and geographic place in world history. John Henry Wigmore, *A Panorama of the World's Legal Systems,* 3 vols. (St. Paul, MN: West Publishing, 1928), vol. 1, pp. 3-6.

Doubtless, one might offer significant emendations to Wigmore's historically progressional schema of the sixteen legal systems, from the "Egyptian" to the "Anglican", that he regards as demonstrating "the dignity and solidarity" prerequisite to being classified as a system of law. This is especially the case, given the development of influential scholarship subsequent to Wigmore's era that critiques historiographical biases arguably implied by his analysis. One such bias involves the "Whiggish" mode of legal historiography that triumphantly reads "the fundamental principles of Anglo-Saxon liberty [as realizing] themselves progressively...through time, peaking more or less optimally in [the common law of] our own time" (see Robert W. Gordon, 'An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson: Letter to William Nelson from Robert W. Gordon', pp. 151-68 in Sugarman, *Law in History,* vol. I, p. 162). Another involves the Orientalist tendency to objectify non–Westerners as exotic and benighted Others, as was seminally explored in Edward Said's landmark 1978 work, *Orientalism* (available in a 1994 edition from New York: Vintage Books).

This being said, Wigmore's suggestion that a legal system encapsulates the predominating, juridical ethos existing within a given civilizational context is compelling, and is not inconsistent with the approach taken by more recent, basic works in comparative law such as René David and John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law,* 3rd ed. (London: Stevens & Sons, 1985).

4. I would like to acknowledge Donald Schurman's insights that helped me to refine my conception of a juridical prism.

5. On the pivotal role played by the jurisprudential commentator in helping to construct the meaning imparted through juridical texts, see, for example, Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC and London: Duke Univ. Press, 1989).

6. In this respect, the dissertation's line of interpretation runs counter to scenarios in which interpreters of juridical texts participate in the construction of the texts' believed authoritativeness, and thereby help to affirm the presupposed, religious, epistemic, and ideological validity of a given legal system. For analysis of such scenarios, see, for instance, the work of Peter Goodrich, especially his books *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford, UK: Basil Blackwell, 1986); and *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and

Nicolson, 1990).

7. On the philosophical genealogy of the modernist notion that the meaning and significance of natural phenomena can be captured and represented by one who apprehends the phenomena, as if in the "mirror" of his or her mind, see Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton, NJ: Princeton Univ. Press, 1979); and Dupré, *Passage to Modernity,* pp. 79-90. In addition, see Foucault, *The Order of Things,* pp. 46-77, which probes into the post–Renaissance development of the *mathesis,* or "a universal science of measurement and order" employed for the purpose of representing empirically apprehended natural phenomena.

8. Seyyed Hossein Nasr, 'Reply to Wolfgang Smith', pp. 486-92 in Lewis Edwin Hahn, Randall E. Auxier, and Lucian W. Stone, Jr., eds., *The Philosophy of Seyyed Hossein Nasr* (Chicago and La Salle, IL: Open Court, 2001), pp. 486-7. See also Nasr, *Knowledge and the Sacred,* pp. 189-220.

9. *Ibid.,* p. 191.

10. *Ibid.*

11. Seyyed Hossein Nasr, *Islamic Art and Spirituality* (Albany, NY: SUNY Press, 1987), p. 41. By no means, however, does Nasr suggest that it is only the scriptural faiths that grasp the religious semeioticity of the cosmos. See Nasr, *Knowledge and the Sacred,* pp. 192-3. For a sense of how this understanding is expressed across the various branches of the Perennial Tradition, see Whitall N. Perry, ed., *A Treasury of Traditional Wisdom* (Louisville, KY: Fons Vitae, 2000) [originally published in 1971], pp. 302-24.

12. Nasr, *Knowledge and the Sacred,* p. 192. The translated phrase, "having understanding", I draw from a *sura,* 'The Cow', which I again cite immediately below while using a different Quranic translation. In the present instance, I have used A.J. Arberry, trans., *The Koran Interpreted* (New York: Touchstone, 1996) [this translation originally published in 1955], p. 49.

13. Seyyed Hossein Nasr, 'The Cosmos and the Natural Order', pp. 345-57 in Seyyed Hossein Nasr, ed., *Islamic Spirituality: Foundations* (New York: Crossroad, 1997) [originally published in 1987], p. 345.

14. *Ibid.,* pp. 345-6.

15. *Sura* 2:164 in Marmaduke Pickthall, trans., *The Meaning of The Glorious Koran* (New York: Alfred A. Knopf, 1992) [this translation originally published in 1930], p. 44.

16. Annemarie Schimmel, *Deciphering the Signs of God: A Phenomenological Approach to Islam* (Albany, NY: SUNY Press, 1994), pp. xii-xiii. Excellent analyses dedicated to the examination of the Islamic conception of the signs of God (*ayat allah*) are offered by Schimmel's book, as well as Ian Richard Netton, *Allah Transcendent: Studies in the Structure and Semiotics of Islamic Philosophy, Theology and Cosmology* (London and

New York: Routledge, 1989).

17. Schimmel, *Deciphering the Signs of God,* p. xiii.

18. Bernard G. Weiss, 'Covenant and Law in Islam', pp. 49-83 in Edwin B. Firmage, Bernard G. Weiss, and John W. Welch, eds., *Religion and Law: Biblical-Judaic and Islamic Perspectives* (Winona Lake, IN: Eisenbrauns, 1990), pp. 82-3 and *passim.*

19. Guénon, *The Crisis of the Modern World,* p. 66.

20. See Winifried Nöth, *Handbook of Semiotics* (Bloomington, IN: Indiana Univ. Press, 1990), p. 332; and Martin Manser and Megan Thomson, eds., *Chambers Combined Dictionary Thesaurus* (Edinburgh: Chambers, 1995), p. 1271.

21. John Deely, *Basics of Semiotics* (Bloomington, IN: Indiana Univ. Press, 1990), p. 64.

22. *Cf.* Edwina Taborsky, *Architectonics of Semiosis* (New York: St. Martin's Press, 1998), p. 78.

23. Contrast this understanding of a legal system's textuality with that which is indicated by Francis Lieber's classic, 1830's work, *Legal and Political Hermeneutics.* Demonstrating an innovative foreshadowing of later, nineteenth– and twentieth–century developments both in semeiotic doctrine, and the application of this doctrine to the interpretation of juridical texts, Lieber expounds on the presence within legal and political texts of "[t]hose signs by which man...endeavors to convey his ideas to another". Francis Lieber, *Legal and Political Hermeneutics, Or Principles of Interpretation and Construction in Law and Politics, With Remarks on Precedents and Authorities,* 3rd ed., William G. Hammond, ed. (St. Louis: F.H. Thomas and Co., 1880) [the second edition of Lieber's work, on which this edition is based, was originally published in 1839], p. 10. While taking quite an inclusive view of the sorts of ideational conveyances that might be taken as signs (words, gestures, sculptures, insignia, and so forth), Lieber restricts his categorizing of the texts which would be of concern to "the science of legal hermeneutics" to "definite form[s] of words embodying and formulating the law, such as we find in the written law and not elsewhere." *Ibid.,* p. 249.

24. See David Lidov, *Elements of Semiotics* (New York: St. Martin's Press, 1999), p. 6; and Netton, *Allah Transcendent,* p. 71.

25. Julia Kristeva, *The Kristeva Reader,* Toril Moi, ed. (New York: Columbia Univ. Press, 1986), p. 111. The original source from which the quote derives is Kristeva's 1974 book, *La Révolution du langage poétique*; translated in 1984 as *Revolution in Poetic Language,* the book is a notable contribution by this important figure in modern semeiotic theory.

26. My analysis draws inspiration at this point from Umberto Eco, *Semiotics and the Philosophy of Language* (Bloomington, IN: Indiana Univ. Press, 1984), pp. 24-5.

27. In a related vein, it is well possible for law to play the very powerful role of a text that does not merely validate an underlying, normative order, but rather, points the way towards "an imagined alternative" to a predominating "concept of...reality". *Cf.* Robert M. Cover, 'The Supreme Court 1982 Term, Foreword: *Nomos* and Narrative', *Harvard Law Review,* vol. 97, no. 4 (1983), pp. 4-68, especially pp. 4-10.

28. The notion of a web of signs employs a figure of speech associated with the work of Thomas Sebeok, an influential scholar of semeiotics who specialized in the analysis of sign processes occurring in the animal, as well as human, worlds. See, for example, Thomas A. Sebeok, *Contributions to the Doctrine of Signs* (Bloomington, IN and Lisse, The Netherlands: Indiana Univ. Press and Peter De Ridder Press, 1976). I do not intend, however, to draw a specific connection to Sebeok's thought.

29. The phrase "signifying chain" is adapted from Eco, *Semiotics and the Philosophy of Language,* pp. 24-5.

30. By structuralist linguistics, I have in mind the field "launched...on its course" by Saussure that examines language as a systematic structure linking "the mental operations of the individuals who use it" with the broader, "linguistic community" in which they live. See Roy Harris and Talbot J. Taylor, *Landmarks in Linguistic Thought I: The Western Tradition from Socrates to Saussure,* 2nd ed. (London and New York: Routledge, 1997), pp. xxi, 211-13.

31. This characterization was offered by the later–generation Frankfurt School philosopher Karl-Otto Apel. See Karl-Otto Apel, *From a transcendental-semiotic point of view,* Marianna Papastephanou, ed. (Manchester: Manchester Univ. Press, 1998), pp. 43-63.

32. There are numerous useful accounts covering the history of the systematic study of signs. The standard, Western historical view tends to trace the roots of semeiotic doctrine back greater than two millennia, to pre–Aristotelian, Aristotelian, and Stoic thought. In spanning from the contributions of Greek philosophers to those of Peirce, whom Sebeok terms "the...founder and first systematic investigator of modern semiotic" [Sebeok, *Contributions to the Doctrine of Signs,* p. 5], such accounts map landmarks including: Augustine's theory of signs; medieval and Renaissance philosophy of language, logic, and epistemology; and key, seventeenth–century semeiotic theories, including the rediscovered, Spanish–originating, *A Treatise on Signs,* by John Poinsot, and John Locke's "doctrine of signs", set forth as one of the three divisions of the sciences in his treatise, *An Essay Concerning Human Understanding.* Pertinent, recommended secondary sources are: Deely, *Basics of Semiotics,* pp. 105-24; John Deely, *Introducing Semiotic: Its History and Doctrine* (Bloomington, IN: Indiana Univ. Press, 1982); Eco, *Semiotics and the Philosophy of Language;* Nöth, *Handbook of Semiotics;* Sebeok, *Contributions to the Doctrine of Signs,* pp. 1-5; and Tzvetan Todorov, *Theories of the Symbol,* Catherine Porter, trans. (Ithaca, NY: Cornell Univ. Press, 1982), pp. 15-59. Citations for the two seventeenth–century primary sources mentioned above are John Poinsot, *Tractatus de Signis: The Semiotic of John Poinsot,* interpretative arrangement by

John Deely (Berkeley, CA: Univ. of California Press, 1985); and John Locke, *An Essay Concerning Human Understanding,* 2 vols., collected and annotated by Alexander Campbell Fraser (New York: Dover, 1959), vol. 2, pp. 461-2.

The attention paid by Western sources on the history of semeiotic doctrine to non–Western sign theory, such as the significant body of semeiotic thought arising within the context of classical and medieval Islamic theology, metaphysics, and linguistic philosophy, tends to be rather thin. However, as Netton suggests, the Islamic understanding of signs actually anticipated a considerable amount of the semeiotic doctrine that is commonly taken as having emerged, centuries later, from within the nineteenth– and twentieth–century West. See Netton, *Allah Transcendent; cf.* Schimmel, *Deciphering the Signs of God;* and Kees Versteegh, *Landmarks in Linguistic Thought III: The Arabic Linguistic Tradition* (London and New York: Routledge, 1997).

33. For Jackson's contributions in the field of legal semeiotics, see, for example, his books *Semiotics and Legal Theory* (London: Routledge & Kegan Paul, 1985); *Law, Fact and Narrative Coherence* (Liverpool: Deborah Charles, 1991); *Making Sense in Law* (Liverpool: Deborah Charles, 1995); and *Making Sense in Jurisprudence* (Liverpool: Deborah Charles, 1996).

34. This quote is borrowed from the excerpt of *Course in General Linguistics* appearing at pp. 141-68 in Mark C. Taylor, ed., *Deconstruction in Context: Literature and Philosophy* (Chicago: Univ. of Chicago Press, 1986), p. 147. Also drawn on at this point is Harris and Taylor, *Landmarks in Linguistic Thought I,* pp. xxi, 230.

35. Central to this field has been some of the thought of the highly influential, present–day philosopher Jacques Derrida. See, for instance, his books *Of Grammatology,* Gayatri Chakravorty Spivak, trans. (Baltimore: Johns Hopkins Univ. Press, 1998) [originally published in 1967 as *De la Grammatologie*]; and *Positions,* Alan Bass, trans. (Chicago: Univ. of Chicago Press, 1981) [originally published in 1972 under the French title *Positions*]. See, as well, the secondary analysis in Kevin Hart, *The Trespass of the Sign: Deconstruction, Theology and Philosophy* (Cambridge, UK: Cambridge Univ. Press, 1989).

36. See Jackson, *Law, Fact and Narrative Coherence,* p. 27; and Conklin's entry in the *Encyclopedia of Semiotics,* p. 357.

37. Charles Sanders Peirce, *Collected Papers of Charles Sanders Peirce,* 8 vols., vols. V-VI, Charles Hartshorne and Paul Weiss, eds. (Cambridge, MA: Belknap Press, 1960) [originally published in 1934], vol. V, p. 302. One may recognize the inspiration derived from Peirce's words in the title of a work such as Thomas A. Sebeok, ed., *A Perfusion of Signs* (Bloomington, IN: Indiana Univ. Press, 1977).

38. For analysis of this question, see, for example, Todorov, *Theories of the Symbol,* p. 41 [as concerns the Augustinian strand of the Christian tradition]; and Netton, *Allah Transcendent,* p. 71 and *infra, passim.*

39. Peirce, *Collected Papers,* vols. I-II [these two volumes originally published in 1931-2], vol. II, p. 135.

40. The term, sign, sometimes is taken as encompassing the entire triadic relation; hence, the term, sign vehicle, often is employed to refer to the specific component of a sign that actually conveys the semeiotic message. For example, if a law inscribed in a given statutory code were to be read as a sign, the written words spelling out the law might be considered the sign vehicle. *Cf.* Colapietro, *Glossary of Semiotics,* p. 182.

41. Peirce, *Collected Papers,* vols. I-II, vol. II, p. 169.

42. *Ibid.,* p. 135.

43. See, for instance, Kevelson, *Law As a System of Signs,* pp. 241-70; Kevelson, *Peirce, Paradox, Praxis,* pp. 141-59; and Roberta Kevelson, 'Property: The Legal "Thing" As Artwork: Thirteen Ways of Looking at Estates in Law', pp. 193-209 in Roberta Kevelson, ed., *Law and Semiotics,* vol. 3 (New York and London: Plenum Press, 1989).

44. Peirce, *Collected Papers,* vols. I-II, vol. II, p. 135.

45. See James Hoopes, ed., *Peirce on Signs: Writings on Semiotic by Charles Sanders Peirce* (Chapel Hill, NC and London: Univ. of North Carolina Press, 1991), p. 10.

46. Luigi Giussani, *The Religious Sense,* John Zucchi, trans. (Montreal and Kingston, ON: McGill-Queen's Univ. Press, 1997), pp. 111, 116.

47. To emphasize the universality of the notion that linguistic and textual signs point towards real ideas, universals, and Ultimate Reality, respectively, see the account provided in Harold G. Coward, *The Sphota Theory of Language: A Philosophical Analysis* (Delhi: Motilal Banarsidass, 1980) on how several millennia of Indian thinkers have understood this dynamic to play out.

# Chapter 6

## Two Juridical Signs of Modernity's Worldly Religious Orthodoxy: Secularist Law's Linked Ideas of a Human, Proprietary Claim and Transactional Power Over All Existing Things

### I. Historical Context: The Emergence of the Market Society and Its Expanding Conception of Property

In order to read the two juridical signs upon which we are to focus, namely, secularist law's linked ideas of a human proprietary claim and transactional power over all existing things, let us first consider the historical context from within which the ideas arise. The epic work, *Commentaries on the Laws of England,* by the eighteenth–century English jurist Sir William Blackstone (1723-80), is synonymous with the common law's classical conception of itself as both the living, juridical embodiment of the fundamental principles of nature, and a legal tradition that bespeaks England's divinely elected role as a universal model for the right ordering of justice.[1] In issuing his take on the juridical ramifications of the natural order of things, Blackstone both captures and typifies a general notion that, in point of fact, has tended to be held, in one or another form, by the various historical instantiations of the modernist legal mind, as a whole. Essentially, this notion is that, at the center of reality, lies property.[2]

In a passage that has assumed a legendary status within legal theory and historiography, Blackstone implies that the just operation of the common law is guided, above all, by the law's responsibility for safeguarding the rights of individuals to wield absolute authority over the property that they hold. As such, he carries forth – in terms that would prove quintessentially influential for the "near–mythic" import subsequently accorded to property within American jurisprudence – John Locke's (1632-1704) seventeenth–century maxim that the "chief end" of civil society, and therefore, the sole

end of "Government", is the preservation of property.[3] Blackstone states:

> THERE is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[4]

However, there is a crucial distinction between the content implied by Locke's usage of the idea of property, and that implied by Blackstone's usage. In 1962, the Marxist–influenced scholar C.B. Macpherson put forth a now well–known thesis, in which he depicted Locke as an early apologist for the strongly capitalistic conception of property that would prove to take root within the common law.[5] As I will discuss during this and other portions of the chapter, though, the marriage between the common law's peculiar devotion to property and the ideology of commercial capitalism actually occurred predominantly during the eighteenth and nineteenth centuries, that is, the era of Blackstone and beyond, rather than during Locke's time. In this vein, some of the numerous responses and critiques that have followed from Macpherson's thesis may collectively help to lead us towards a realization that is important for coming to grasp the basic contours and historical development of modern, secularist law's effectively sacral notion of property.[6] As we will see, Macpherson surely provides an indispensable analysis of how Locke contributed to the typically modernist notion that the individual person is, in his or her ontological essence, an actual, or at least potential, holder of property. Nonetheless, Jeremy Waldron represents a compelling view, when he asserts that "Macpherson has exaggerated the role that Locke played in the legitimation of early English capitalism".[7]

Most important for us, it should be kept in mind that when, amid the post–Civil War, 1680s reassertion of English parliamentary power, Locke expounded on the individual's

sacrosanct, natural right to property, he would appear to have been referring, above all, to the necessity for landowners – the bourgeois among them – to be free to do as they saw fit with their land, including improve most of it for capital gain.[8] By comparison, Blackstone, while no doubt deeply concerned with landed property interests, wrote at a point in the history of the common law at which the understanding of what constitutes property had begun expanding in terms that were consistent with the eighteenth–century emergence of a truly, market–based society.[9] For instance, as J.G.A. Pocock has maintained (partly in opposition to Macpherson's arguably anachronistic reading of Locke), the "Financial Revolution of the middle 1690s, which saw the foundation of the Bank of England and the successful and lasting creation of a system of public credit whereby individuals and companies could invest money in the stability of government" began to help to usher in the "commercial society".[10] A cornerstone of this society was the rise of "a new form of property", namely, "capital in the form of government stock".[11] Thereby getting underway was a distinctly modern transition, in which "wealth…[was coming to consist] largely of promises—by companies to pay dividends on stocks and shares, by Government to pay interest on stock, by debtors to pay their debts, and so on."[12] This was as opposed to the prior state of affairs, under which "a man's wealth was thought to consist largely of his 'possessions', of physical property, principally land".[13]

Thus, as the eighteenth century unfolded, the basic distinction existing in the common law between real property and movable, personal property became ever more important;[14] this, as movable property, whose accumulation (especially in the form of capital) is so intimately associated with the workings of capitalist political economy, undertook its rise towards predominance. By the era of nineteenth and early–twentieth

century industrialism, this rise will have culminated in the development of what R.H. Tawney memorably decried as modern, Western, "Acquisitive Societies".[15] Within such societies, "the rivalry between property in capital", on the one hand, and, on the other, the once unparalleled locus of Western, social and political–economic power, "property in land", "has long since ended" in favor of capital.[16] Indeed, as I will suggest in the dissertation's conclusion, a unitary, globalized "Acquisitive Society" may be the effective, sought end – complete with the powerful monopolists whom Tawney recognized as the prime beneficiaries of such a society – of today's onrushing, juridically, politically, economically, culturally, and militarily propelled forces of globalist neo–liberalism.

Within Blackstone's increasingly capitalistic, eighteenth–century world, then, the idea of "property as individual absolute dominion"

> is hardly confined to property in land and chattels. It is rapidly and recklessly generalized to intangibles, then to any type of potentially valuable expectancy, and ultimately to public, political rights as well. As John Reid has exhaustively shown in his study of American Revolutionary rhetoric, liberty itself was property.[17]

Reid, for his part, confirms and enriches this pivotal observation of Robert W. Gordon's by pointing out how the emerging, modernist legal consciousness of Blackstone's era and ilk imagined property in non–corporeal as well as corporeal terms:

> …property, even the concept of property as material accumulation, was not limited to the physical in the eighteenth century. It included constitutional rights that English people counted among the attributes of liberty.[18]

The implications of this line of reasoning could not be more significant for us. As I will go on to elaborate with our semeiotic construal in this chapter, what no less a scholar then Berman has recognized as modern, secularist law's effective "sanctification…of property"[19] is intimately connected with the law's tendency to reduce all existing things –

corporeal and non–corporeal; biological and non–biological; human and non–human – to a form that may be held as private property, and transferred as commodities.

Gordon's and Reid's analyses notwithstanding, it is very telling that further commentary has observed how Blackstone's "absolutist concept" of an individual's "sole and despotic dominion over [a] thing", "such as goods [or] money", in fact presupposed "a "physicalist" concept of property that required some external thing to serve as the object of property rights".[20] Moving beyond the first glance at which these lines of analysis might appear to be contradictory, I would maintain that, actually, they are quite complementary, and crucially so.

Blackstone may be fairly interpreted, on the basis of his all–encompassing characterization of "the rights of things", as an intellectual exemplar of an eminently modernist ontology that, as I argued earlier in the dissertation, tends to reduce reality to the form of particular, concrete things. To be sure, in keeping with the temper of Blackstone's cultural setting and his overall conservatism, he would hardly ever have denied the transcendence of God. This being said, he reads the Book of Genesis in a light that parallels Locke's vision of a divinely created world that is granted to humankind as an effective repository of property whose original, common status is subject to change by private appropriation. In this way, Blackstone implies that basically all existents other than God are reducible to a proprietary form. The Whiggish legal historian states as much, in no–nonsense terms that are reflective of his seeing law, and the history thereof, "as a rational science":

> In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man "dominion over "[*sic*]all the earth; and over the fish of the sea, and over the "[*sic*]fowl of the air, and over every living thing that moveth "upon the earth." This is the only true and solid foundation of man's dominion over external things,

> whatever airy metaphysical notions may have been started by fanciful writers upon the subject. The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator.[21]

Considered within the historical context in which he wrote, Blackstone's depiction of creation as a plenitude of proprietary "things" evokes what Macpherson himself recognized as the market society's inclination to reduce property to "material things or revenues."[22] More than this, Blackstone's writing helps to illustrate how the emerging, modernist juridical mind was increasingly wont to reify even non–corporeal "abstractions" as material property.[23] A prime example of this involves the literary expression of ideas by an author, which was reified as material property by England's 1710 Statute of Anne. An early landmark in the growth of intellectual property jurisprudence, the Statute of Anne established copyright protection as a property interest, thereby laying a building block for "the formation of…proprietary authorship."[24]

Owing to historical factors ranging from the ongoing development of the welfare state, to the now seemingly exponential proliferation of new information technologies, and forms of biomedical and biotechnological research, recent decades in jurisprudential thought and process have been replete with debates and decisions centering on the reification of intangible entities as material property. The present mention will need to suffice for some important instances of this, such as Charles Reich's influential, 1960s call for public benefits such as "unemployment insurance [and] membership in the bar," as well as private benefits like "the right to receive privately furnished utilities and services, [and] status in private organizations", to be designated "a new [form of] property."[25] Other instances, such as the "claim that [personal, genetic information encoded within DNA] is property which the individual can protect from state collection

or control";[26] or efforts at the patenting of genes, will be revisited later in the analysis, as they have especially great resonance where the hidden, religious significance of secularist law's notion of property is concerned. For immediate purposes, what I would like to emphasize is simply that the modern, secularist juridical mind is marked by a tendency, whose roots trace back through several centuries of legal and intellectual history, to treat all existents, corporeal or not, *as if they were* material property and commodities. This tendency, which is so deeply redolent of a materialist metaphysics, will now be unpacked in further detail, so that we may then read how it signifies an underlying, immanentist religious tradition.

## II. Contours of the Two Ideas

### *A. Idea One: All Existing Things Are Subject to One or Another Individual's Personal, Proprietary Claim*

#### *1. The Role of Kant, Hegel, and Locke in Constructing Modern Liberalism's Proprietary Conception of the Things of the World*

In portions of Chapters 2 and 3, I argued that Kant's theory of the transcendental subject has helped to construct, within the mind of modernity, an absolute, knowing subject who is effectively, at the same time, an apotheosized subject. Drawing on the Kantian heritage, modernity characteristically presupposes a human subject who possesses the quasi–divine, epistemological wherewithal to stand astride the world while creating the reality of its constituent objects, thereby enabling these objects to be bent to the subject's "Promethean" will.[27]

Throughout the body of writings in which she explicates the intellectual and historical processes by which modernity has entwined the experience of proprietorship with the essence of "personhood", legal theoretician Margaret Jane Radin suggests how

Kantian thought, and subsequently, Hegelianism, have contributed to the modernist predominance of a form of liberal ideology typified by "universal commodification".[28] The strong impact of this ideology on modernity's legal principles and institutions is, on Radin's view, exemplified by the influential practitioners of the school of law and economics. Radin's finding would appear to be borne out by the words of Richard Posner, Judge in the U.S. Court of Appeals for the Seventh Circuit, and a legal scholar who is dominant within law and economics:

> ...[W]e have seen that the law of property (including intellectual property), of contracts and commercial law, of restitution and unjust enrichment, of criminal and family law, and of admiralty law all can be restated in economic terms that explain the principal doctrines, both substantive and remedial, in these fields of...law. These doctrines form a system for inducing people to behave efficiently, not only in explicit markets but across a whole range of social interactions.[29]

Under the commodity–based mode of liberalism identified by Radin, the ability to freely own and trade commodities is prerequisite to the full realization of one's humanness, a realization made all the more possible by the fact that "Universal commodification [construes] freedom as the ability to trade *everything* [italics mine] in free markets...."[30] Before "everything" can be conceived of as an alienable commodity, though, it must first be imagined as property that one is free and able to control and manipulate. As Radin's analysis aids in showing, the way in which modernity and its legal institutions typically reduce all things to a proprietary form that then can be traded as a commodity is singularly indebted to the Kantian and Hegelian visions of the all–powerful, proprietary subject.

"For Kant," Radin explains, "property–that is, the possibility of *title* over and above mere possession–is necessary precisely in order to extend the realm in which persons may exercise their free will by manipulating objects to their own ends."[31] As Radin thus

indicates, Kant proffered a "personality theory of property", one which proposes that an individual's essential freedom is realized, and his or her very personhood constituted, through the control and ownership of things. This basic linkage connecting the right to property with the essence of what it means to be a human being has, Radin emphasizes, emerged as a central tenet of modern liberalism.

What sorts of entities, on Kant's understanding, can be held as personal property? In his 1797 work, *The Metaphysics of Morals,* Kant specified that objects external to one's own self comprise the basic pool of existents from which personal property can be derived. Kant then breaks this pool down into three categories from which "external objects of [an individual's] choice" can be drawn as objects of proprietary claims: "a (corporeal) *thing* external to me;" "another's *choice* to perform a specific deed" (such as a contractual obligation); and "another's *status* in relation to me" (such as where one would speak of "my" spouse or child).[32] Especially in the light of Kant's anthropological model of an extraordinarily potent human subject, one finds that, for all intents and purposes, the pool encompassing the potential objects of personal property is very vast, indeed. As Kant theorizes, "It is possible for me to have any external object of my choice as mine".[33] The profoundly significant upshot of this Kantian tenet is captured with lucidity by Radin: "Kant thought that property should extend to the furthest reaches of all objects in the universe so that we could express our personhood."[34] A few years after Kant, the later Idealist Hegel carried forth in a similar vein, in the pages of his grand, theoretical formulation of social and political order, the *Philosophy of Right:*

> A person has the right to place his will in any [external] thing.... The thing thereby becomes *mine* and acquires my will as its substantial end (since it has no such end within itself), its determination, and its soul – the absolute *right of appropriation* which human beings have over all things....[35]

Radin demonstrates how the Kantian and Hegelian tradition of property theory constitutes a prime, intellectual tributary flowing into the broader stream of liberal property theory, in conjunction with other, key currents such as Locke's labor–based account of property rights.[36] While I will devote further attention to Locke as I move along in the chapter, what is important to grasp at the moment is his basic understanding of how "the things of Nature" become transformed into private property.[37] Strongly foreshadowing Blackstone's depiction of property in the *Commentaries,* Locke posits, in the 'Second Treatise of Government', that "God gave the World to Men in Common".[38] "[B]ut", Locke continues,

> since he gave it them for their benefit, and the greatest Conveniences of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational…(and *Labour* was to be *his Title* to it;)….[39]

"Thus", Locke proclaims, "*Labour*, in the Beginning, *gave a Right of Property*".[40] In other words, on Locke's understanding, "Nature and the Earth", as a repository of "almost worthless Materials, as in themselves", can be quite miraculously appropriated and converted into personal property by one who combines with them the alchemical ingredient of his labor.[41] In this manner, and further in anticipation of Blackstone, Locke indicates that the biblical grant bestowing on humankind "Dominion" over "the Earth" can be taken as providing, at the same time, divinely originating "Authority…to *appropriate*" the bounty of the world as personal property.[42]

### *2. Imagining Persons As Property*

Over the past several pages, I have indicated that what Kant and Hegel, in particular, had in mind by the basic category encompassing potential objects of private property is,

while certainly very capacious, nonetheless restricted to things that are external to the human subject. This leads us to what is today a singularly burning question within certain circles of religious, ethical, and juridical thought, a query that will prove very pertinent in later portions of the dissertation, where I discuss secularist law's tendency towards reifying as material property such elements, or by–products of the human being as genetic information and body parts. In essence, the question is, to quote the eponymous title of an insightful, recent book on the matter: are persons property?[43] For when one speaks of the secularist, juridical idea that all existing things can be conceived of as personal property, it stands to reason that the human being – that is, a person, standing vis-à-vis his or her own, subjective self – would fall within this ambit.

*i. Kant and the Blurring of the Boundaries Between Subject and Object*

As logically follows from his emphasis on the external nature of proprietary objects, Kant was patently opposed to the notion that a human being could be reduced to such an alienable entity. In *Lectures on Ethics,* he states:

> Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.[44]

Certainly, Kant's reasoning might appear to make good sense to one who recognizes within the idea of ownership over persons the latent potential for an intellectual defense of such an abhorrent practice as slavery, given that, "if persons can objectify their selves they become susceptible to objectification by others."[45] Indeed, proponents of an individual's natural right to property no less strong than the Framers of the US Constitution recognized that "[n]o one [could defend] the ownership of slaves as included

among the natural rights of property." This being said, because they understood that "slavery [was] a political reality that could not be immediately removed", the Framers, for one, tried to indicate that, in the case of such a "social right" as property in slaves, "government interference with [this] property [would be] a fundamental violation of individual liberty."[46]

However, as Radin deftly shows, a conception of property that rests on an Idealist's understanding of the divide between subject and object contains the seeds of a serious problem. Specifically, while Kant, and Hegel after him, may initially have had a clear sense of what they intended to see remain on either side of the divide, the epistemological fallout of Kant's theory of the subject – some of which I have sought to articulate through my earlier analysis of the post–Kantian, absolute subject – involves a distinct blurring of the boundaries between subject and object.[47] Especially within the context of a liberal ethos that tends towards the doctrine of "universal commodification", the inexorable conflation of an object with the knowing subject that is responsible for cognitively creating it can result in a general inability to distinguish between external, proprietary objects, on the one hand, and the proprietor–subject, on the other. As Radin helps to illustrate, prime modern societal examples of the consequent conversion of aspects of personhood into alienable property are such phenomena as the pervasive reification, across various segments of culture, of sex as property and a commodity; and the maxim of liberal jurisprudence that aims to bolster and legitimate freedom of expression by implicitly reifying thought and speech as alienable property within "the marketplace of ideas".[48]

*ii. The Contested Significance of Locke's Idea of Property in One's Own Person*

The intellectual base on which secularist law might be interpreted as building a uniquely expansive conception of property that incorporates fundamental aspects of personhood becomes stronger, still, once one goes on to consider also the deep, abiding, and ever–emerging influence of Lockean thought, especially on the common law. In the 'Second Treatise', Locke puts forth a bold assertion whose reverberations can be felt throughout the theoretical foundations and workaday institutions of liberal societies and their legal systems, not to mention in the ongoing debates among minds who differ over the implications of Locke's claim for modernist law and society. He avers:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person.* This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.[49]

As they grapple with the abundant significance of this passage, differing lines of commentary point to vastly divergent conclusions. Consider, for example, on the one hand, the reactions of Leon Kass, an ethicist and scholar of the humanities and natural sciences, as well as Chair of the US President's Council on Bioethics that was established in 2001 by the Bush administration. Kass actually seems to find reflected in Locke's words a theoretical heritage that can be usefully drawn upon in combating such an alarming, potential reduction of the person to commodified property as human cloning.[50] Kass argues that, on Locke's line of reasoning, "My body and my life are my property *only in the limited sense* that they are *not yours*"; thus, "They are different from my alienable property—my house, my car, my shoes."[51] On Kass's view, the key difference for Locke between "the property rights in the fruits of [a man's] labor" and "the property a man has in his own person" is that the latter "is inalienable: a man cannot transfer title

to himself by selling himself into slavery."[52] Accordingly, "The "property in [a man's] own person" is less a metaphysical statement declaring self-ownership than a political statement denying ownership by another."[53] By maintaining that Locke's thought leads to the conclusion that "[m]y body and my life, while mine to use, are not mine to dispose of",[54] Kass appears to be in sympathy with those "[m]any writers deeply indebted to Locke [who] doubt that individuals have property rights in themselves, their qualities, and their bodies."[55] Indeed, one may persuasively argue, as does Kass, that by and large, the traditional "common-law teaching [has been] that *there is no property in a body*—not in my own body, not in my own corpse, and...not in the corpse of my deceased ancestor."[56] As will we see in Chapter Eight, Kass, both in his politically–linked position as the Chair of President Bush's Bioethics Council, and as a scholar, has applied his arguments for the non–proprietary character of the human body to assert the legal and ethical inappropriateness of such emerging, technologically–fostered developments as the commercializing of human reproductive material, and the patenting of biological elements in human life.

Yet, we are today faced with a stark, civilizational milieu that bespeaks the intensely scientistic, technocratic, and capitalistic nature of modern, Western societies during the early twenty–first century. Within the setting of this milieu, myriad biotechnological and commercial developments – from the cloning of various life forms, to the genetic construction of "designer babies", to heightening markets for the sale of organs and other body parts – have helped to transform the body into "a potential source of valuable patents, marketable products, and useful information about the identity of individuals and their present and future health."[57] Inasmuch as secularist legal systems are now hearing a

siren call from an increasing number of actors to "[a]cknowledge that one person could have property rights in another's bodily materials, or that [individuals] could have property rights in [their] own bodily materials,"[58] one must ponder how Locke's conception of a person's property interest in himself or herself can be read, *contra* Kass, as serving such an acknowledgement. This is a very timely concern, because as Radin indicates, and as I will discuss in further detail in later chapters of the dissertation, it would appear that the move towards reducing key aspects of the person to commodified property "is gaining ground" within recent jurisprudence.[59]

For one thing, it is crucial to recognize that on one, compelling line of interpretation, Locke's overall theory of property must be read within the context of the parallels between his thought and the tradition of early–modern and Enlightenment–era, rationalist, naturalistic philosophy.[60] To be sure, Locke leaves no doubt that it is, in the first instance, a transcendent God "who hath given…[t]he Earth, and all that is therein…to Men for the Support and Comfort of their being."[61] However, is Locke's train of reasoning truly theistic, that is, does it indicate that the world, and humankind's proprietary right to the bounty of the world, are utterly sustained by the Divine's continuous, creative activity and metaphysical connection with creation?[62] Or, by contrast, is Locke closer to being a deist? If the latter is the case, he can be read as suggesting that the world and humankind's proprietary right to it, while having been bestowed by God at the initial point of creation, now "[appeal] to no supernatural commission", and are therefore governed, instead, "by the immutable laws of nature".[63] The resolution of this query, which, it has been suggested by scholars of modern intellectual history and socio–economic theory such as Tawney, Peter Gay, and M.

Douglas Meeks, in fact points to Locke's deism, is pivotal for us.[64] This is because, as I discuss further a bit later in the chapter, if we read Locke as a deist, our interpretation will indicate that, following from the Lockean theory of property, a mechanistic, private right to property effectively emerges as its own, metaphysical validation and virtuous end – in other words, as "the ultimate reality".[65] But above all, for present purposes, Edwin Hui emphasizes that once we recognize Locke as sharing in an empiricist, naturalistic understanding of creation and the human person, we can move on to grasp Locke's basic contribution to the principle that, "[i]f the human body is basically the raw material of nature, it [can be] treated under the paradigm of property rights".[66]

Also imperative for us at this point in the analysis is a return to Macpherson's reading of Lockean property theory, together with his understanding of the way in which Locke's theory serves as a foundational element underlying modern, democratic capitalism's axial principle of possessive individualism. As Macpherson indicates with power and cogency, Locke's model of civil society is predicated on a philosophical anthropology that depicts individuals as being, in their ontological essence, proprietors. Hence, on Macpherson's understanding of Locke, the latter argues that society and political community are to be orchestrated in a fundamentally mechanistic, economistic fashion:

> Society is a series of relations between proprietors. Political society is a contractual device for the protection of proprietors and the orderly regulation of their relations.[67]

Within this social context, Locke propounds, the freedom of the individual hinges on his sole proprietorship over his own self. In Macpherson's words, "The individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society."[68] In attesting to the profound influence of Locke on the "possessive market

society" of twentieth–century (which was, of course, Macpherson's historical vantage point, though his claim is today equally compelling) "liberal-democratic nations," Macpherson continues as follows:

> The individual in a possessive market society *is* human in his capacity as proprietor of his own person; his humanity does depend on his freedom from any but self-interested contractual relations with others; his society does consist of a series of market relations.[69]

It is quite true that, even on Macpherson's reading of Locke, the basic form of proprietary holding in the self that one is free to alienate is one's labor. Thus, for instance, "no one has a natural right to alienate his own life",[70] as in the case of committing suicide or selling oneself into slavery. A basic implication of Locke's theory of property, though, as it has been absorbed into the ethos of modern, neo–liberal, democratic capitalism, is that civil society is fundamentally "an appendage of [an all-encompassing] market".[71] Further, as Radin has shown, it is both convincing and consistent with Macpherson's interpretive scheme to read Locke as implying the proprietary nature not only of one's labor, but also of, so to speak, the limbs by which one's labor is directly produced.[72] As viewed in this light, it would certainly seem increasingly problematic, where the legacy of Locke's theory of property is being brought to bear within the horizons of what Radin describes as today's intensifying, worldview of commodification, to separate out those aspects of personhood which can be legitimately imagined as property, from those which cannot.

### *3. Summarizing Secularist Law's Embodiment of the Idea that All Existents Can Be Imagined As Property*

We can now sense how the confluence of several, key elements in the intellectual history of modernity as a whole, and of liberal, democratic capitalist ideological and

political–economic doctrine, has helped to construct a secularist, juridical mindset in which practically "everything in the world may be identified as someone's property."[73] To recap, some of these elements include: a phenomenalist metaphysics that reduces all of existence to particular, material things that can be controlled and manipulated by humans; the philosophical creation of an absolute subject who wields the epistemological power to reign over the world's phenomena in such a fashion; and an economistic model of the individual and civil society that distils down to the experience of proprietorship the very essence of what it means to be an autonomous human, living within a community.

In his evocative essay, 'The Concept of Property and Its Contemporary Significance', Kenneth Minogue indicates how the modern, Western, legal imagination has, following in the wake of such thinkers as Locke, come to employ the idea of property as an all–encompassing device for regulating humans' relations both with one another, and with the surrounding, natural universe. From the perspective of modernist legal systems, the proprietary nature of the world's existents

> extends to the most remarkable things. The air we breathe, it might be thought, belongs to no one; but I can object if the pure and wholesome air around my house is polluted by a neighboring factory or a newly established fish-and-chips shop. The clouds above would seem to be free from such *appropriation* but in times of drought one American state [specifically, Idaho] has brought another [Washington] to court on a charge of "cloud-rustling." Lord Byron once apostrophized the sea with the words:
>
> > Man marks the earth with ruin – his control
> > Stops with the shore.
>
> No longer. The law of the sea and modern technology have conjointly seen to that. The history of human endeavor, from man's first hesitant scramblings upon this planet up to his present dizzy eminence is a history of progressive appropriation, and indeed also of the continuing invention of new things (such as copyrights) that might be appropriated.[74]

Then, too, Minogue goes on to observe how "Locke's famous remark that "Every man

has a property in his own person"" encapsulates "a point that haunts the literature": namely, the conundrum of where, if at all, a distinguishing line can be drawn between external property that manifests in "the ownership of productive capital", and "property understood as personal characteristics".[75]

Not least, notice how, within Minogue's account of the proprietary template that modernist law tends to superimpose upon the plenitude of things and beings around us, he implies how nuisance law provides one, colorful example of how an individual's right to remain free from some harm or intrusion seems inevitably to be conceived of by the law in proprietary terms. The common law's jurisprudential basis for nuisance law extends as far back as the thirteenth–century jurist Henry of Bracton's (d. 1268) teaching that, as quoted by Elizabeth Brubaker, "no one may do in his own estate any thing whereby damage or nuisance may happen to his neighbour."[76] By the time of Blackstone and beyond, this principle had become inextricably interwoven with the presumed, sacrosanct nature of individual property rights, as the lodestar of modern, nuisance law emerged in the form of the rule that no one has the right to use his or her land in a way that injures another's property, or interferes with its use or enjoyment.[77] Thereby illustrated is how, when within the context, for instance, of today's US jurisprudence, "we *especially* want to hold on to something (welfare benefits, a job)[,] we try to get the object of our concern characterized as a property right."[78] Indeed, as Radin observes, it is typical of the juridical mindset that is enmeshed within the worldview of "universal commodification" to "conceive of all rights of persons, no matter to what they pertain, as property rights."[79]

### *B. Idea Two: All Existents, As Actual or Potential Property, Are Subject to One or Another Individual's Rightful, Transactional Power*

The way is now paved for us to assess the sign comprised by secularist law's idea that all existing things can be reduced to a proprietary form constantly validates, and is in turn reinforced by, the law's allied idea that all existents, as actual or potential property, are subject to one or another individual's rightful, transactional power. In sum, secularist legal systems are fundamentally grounded in a modernist, epistemic outlook, and a consequent body of liberal, democratic capitalist, ideological and political–economic doctrine, that privileges an economistic mode of envisioning the human being, society (whether on a local, regional, national, or global level), and phenomenal world.[80] By conceiving of human subjects, together with the objects around them, in an essentially proprietary vein, secularist law is led, quite logically, to further conceive that it is appropriate for these same subjects and objects to be ordered and arranged in accordance with a market–based, transactional model of existence.

#### *1. Capitalism*

Several salient, and sometimes discordant, historical factors demonstrate how, especially from the eighteenth century forward, there came to be presupposed within the common law, in particular, an increasingly tight nexus between the right to property, as articulated by such a thinker as Locke, and the notion of humans as transactional agents who are engaged within a market–oriented, social and natural world. Of course, one of these factors, as I alluded to earlier in the chapter, is the rise of capitalism – and of, consequently, a predominantly capitalist, as opposed to an agrarian, conception of property, together with the ownership and alienation thereof – within England, its various colonies, and, in their respective turns, independent, common law nations such as the US,

Canada, and Australia. As Andrew Buck has observed:

> While the concept of property was being revised in England via the enclosure movement of the late eighteenth century, whereby pre-capitalist (or more to the point – anti-capitalist) concepts of property and agrarian practice were being effectively negated and replaced by law in favour of a profit-oriented conception of property as a tradable commodity, this transformation and the set of ideas it expressed – the mindset, if you will – was also being transported from the old world to the new.[81]

Thus, as the nineteenth century unfolded, the common law of the US, for example, tended to develop strongly in accordance with the overarching, normative goal of fostering the commercial development of land and society; this, by virtue of the law's encouraging the free, contractually arranged alienation of both real and personal property.[82]

Further in this connection, classical economists such as Adam Smith (1723-90), "[i]n their search for Natural Law principles governing political economy,"[83] integrated the theory of an individual's natural right to property, particularly that propounded by Locke, into emerging, market doctrine. On Smith's view, what Locke identified as being "[t]he property which every man has in his own labour" represents "the original", and, therefore, "the most sacred and inviolable", "foundation of all other property".[84] Smith's doctrine of a naturally competitive, self–regulating, free–market society in which labor is the prime, exchangeable resource driving economic progress deeply informed the common law tradition's understanding of the impelling need to craft juridical policy that embodies "the general principle of maximum economic freedom."[85]

*2. The Contractarian Theory of Society*

In drawing on Macpherson's analysis of the role played not only by Locke, but also by Hobbes, in the establishment of "the political theory of possessive individualism", Atiyah's invaluable work of intellectual, political, and legal history, *The Rise and Fall of Freedom of Contract,* illustrates another historical factor influencing secularist law's all–

encompassing notion of transactional power.[86] Specifically, Atiyah shows how Hobbes and Locke contributed to the foundational, modernist idea that liberal, social order rests on an essentially contractual arrangement among autonomous, self–interested individuals, who have agreed to join together in community for the purpose of ensuring their own, separate, material well–being. Thereupon, Atiyah emphasizes that Hobbes and Locke, as two central architects of modernity's contractarian theory of society, also helped to lay, necessarily, the intellectual base for the juridical doctrine of freedom of contract – that doctrine which, in effect, places property in the service of the perpetual, exchange mechanisms of commercial capitalism.

As Atiyah shows, there is a clear, epistemological and institutional connection between the contractarian, modernist premise, pinpointed by Macpherson, that "Human society consists of a series of market relations" "between proprietors", and the subsequent understanding that such a society should be chiefly devoted to enabling free, commercial exchanges among its participants.[87] Indeed, on Atiyah's explanation, the seminal contractarian Hobbes, as read by Macpherson,

> thought…that political society is an artificial contrivance of human beings, designed to protect the individual's person, property, and goods, and to preserve orderly relationships of exchange between individuals.[88]

### *3. Benthamite Utilitarianism*

The onset of the nineteenth century saw the increasing influence both on liberal thought, and on the manifestations of evolving liberalism within the common law tradition, of scientistic, utilitarian doctrine, especially as formulated by Jeremy Bentham (1748-1832), an English intellectual heir to the *philosophes.* His effect was acutely felt, for instance, in sweeping, nineteenth–century English policy reforms in "such areas as

poor law revision (1834), health and sanitation (1840s), and railway regulation (1860s)."[89] Edwin Chadwick, a personal disciple of Bentham's who went on to become "one of the most influential Utilitarian policy makers in nineteenth-century England" was instrumental in having these particular reforms undertaken.[90]

Bentham is well known for the radically secularist tenor of his comprehensive, utopian schema of morality, ethics, jurisprudence, and political life, which, given its ardent worldliness, can be read as surpassing even Comtean positivism in its claimed, anti–religious fervor.[91] His ideas were grounded in "the greatest happiness principle", an axiom that he sought to embody within his call for property–related legislation that ran directly counter to the illusory, natural rights theory of property that he saw represented in the writing of such a figure as his intellectual nemesis, Blackstone.[92] On Bentham's quintessentially positivist view, there can be no God–given, natural right to property, because "[r]ights are no more than rules of utility defined by law."[93] Offering to the common law world "a theory of property…which would sustain liberal reforms but ward off revolution", Benthamite utilitarianism takes as its touchstone the phenomenon of wealth, that commodity whose equal distribution would provide, ideally, the greatest happiness to the greatest number.[94] Arguing, though, that in realistic terms, "[t]he establishment of equality is a chimera", Bentham's schema of property jurisprudence aims to answer, above all, "the supreme principle of security".[95] This schema seeks to increase laborers' happiness by at least providing them with a secure, political–economic system within which the unequal distribution of wealth is diminished, and workers are able to enjoy, to the greatest extent possible, the fruits of their labor.

Benthamite utilitarianism is so very significant for us because, as Radin argues, it

"leads directly to universal commodification".[96] Bentham's theory of property suggests that, whereas natural rights theoreticians like Locke and Blackstone thought of property, per se, as the locus of individuals' self–fulfillment, it is far more enlightened to think, instead, of wealth as a pre-eminent source of human happiness. In Radin's words, Bentham thus conceived "of all things valuable in terms of wealth."[97]

### *4. Summarizing Secularist Law's Embodiment of the Idea that All Existents Are Subject to Humans' Transactional Power*

The three historical factors that I have just presented underscore how the ontologically all–encompassing, liberal conception of property upon which secularist law draws has become intertwined with the notion that all property can be legitimately regarded as commodities that are subject to unfettered alienation within the marketplace.[98] As Radin indicates, the legal institutions of modern, liberal, democratic capitalist societies therefore typically presuppose that the things of the world are at once governed by a liberal conception of private property, and by a complementary idea of freedom of contract; the latter idea suggesting that the things of the world, as property, are universally transferable, by means of contractually underwritten transactions:

> The legal infrastructure of capitalism—what is required for a functioning laissez-faire market system—includes not merely private property, but private property plus free contract.[99]

There is a further, crucial point to be made about secularist law's idea that all existents are subject to humans' transactional power. Specifically, this idea, together with the all–encompassing concept of property that it reciprocally reinforces, serves as a prime, juridical mechanism for advancing the process of globalization, and, with that, for aiding in the worldwide propagation of neo–liberalism and its dogmatic exaltation of human proprietorship. Through international, policy–making institutions such as the

International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO), the economistic, epistemic and ideological presuppositions of modernity are set forth as putative, universally valid maxims. The consequent teaching is that:

> In this global market economy, everything is now up for sale, even areas of life once considered sacred, such as health and education, culture and heritage, genetic codes and seeds, and natural resources, including air and water.[100]

## III. Reading the Signs: The Immanentist Religious Significance of Secularist Law's Ideas of Human Proprietorship and Transactional Power

Recall how, in Chapter Five, I maintained that, on the Perennial Tradition's characteristic understanding of the religious significance conveyed by the signs that compose the phenomenal world, the sacred referent of the signs never is immured within phenomena, but rather, ultimately transcends the world. In support of the way in which the perennialists' critique of the modern, Western worldview implies modernity's utter inversion of the metaphysics of the Perennial Tradition, one finds secularist law's linked ideas of human proprietorship and transactional power striking for how they intimate a modernist conception of Ultimate Reality that effectively injects and confines divinity within the human proprietor and his or her commodified property. As Tawney powerfully argues, modernity's "reverence" for property and commerce equates to a fetishistic devotion to an idol that has been operatively transmogrified into "the ultimate reality".[101] In other words, on the unspoken, faith of modernity, the condition and experience of human proprietorship and transactional power over the things of the world implicitly constitute sacred icons that refer not to a transcendent referent, but rather, point self–referentially to their own, wholly immanent divinity.

In this section of the chapter, I specify two basic respects in which secularist law's allied concepts of property and transactional power manifest an immanentist mode of

iconolatry. For one, the two ideas, as juridical signs, bespeak the historical process whereby the presupposed, ultimate ontological basis for the believed, human right to own and transfer private property has become thoroughly naturalistic. In addition, the ideas indicate how secularist law's presupposition that the human being is, in his or her ontological essence, a proprietor who lords over the world's bounty, points to an idolatrous philosophical anthropology. On the basis of this model of the human being, the apotheosized, human proprietor is implicitly believed to derive continuous, sacred power and status from the totemic objects that he or she owns, controls, and exchanges. Following this section, I will briefly contrast secularist law's immanentist understanding of the inhering sacredness of property and commodities with a classical, Islamic perspective, which reads property as indicative, instead, of a Sacred Reality that lies beyond the worldly realm of human ownership and exchange.

### *A. The Naturalistic Basis for Secularist Law's Conception of Property*

#### *1. Grotius and Locke*

On pages 156-7, I alluded to the importance for my analysis of the line of scholarship indicating that Locke's theory of property, together with the profound legacy that it has bestowed on the subsequent growth of secularist law's overall conception of human proprietorship, can be read as fundamentally naturalistic, ideational constructs. Let us now expand on this line of interpretation by reaching back to the Dutch jurist "Hugo de Groot, or Grotius (1583-1645), [who is most commonly] regarded as the founder of modern international law", and who, along with Samuel Pufendorf (1632-94), "the most highly regarded German jurist of his time", moreover acted as a foundational source for Locke's theory of the natural right to property.[102]

Grotius was an Arminian, meaning that he belonged to a strain of Dutch Protestantism with which, in a telling turn, Locke also came later to be associated.[103] Founded by Jacobus Arminius (1560-1609), Arminianism "accepted the main tenets of Protestantism, but insisted that God and nature acted, and could not help but act, according to rational principles."[104] Besides being a seminal treatise on international law, Grotius's 1625 work, *De Jure Belli Ac Pacis Libri Tres,* that is, *Three Books on the Law of War and Peace,* contains an exposition of his highly influential, likely even watershed, theory of natural rights. The key issue here is that, while all indications point to Grotius's having himself been a faithfully believing Christian, the philosophical fallout of his natural rights theory has resulted in its being widely read as the catalyst for a radical fissure in the natural law tradition. On the far side of this newly carved divide lay the unquestionably theistic, Scholastic line of natural law thinking, represented by figures spanning from Aquinas to the Spanish Jesuit Francisco Suarez (1548-1617). However, on the near side now lay a distinctly Protestant, and, in its doctrinal implications, arguably deistic, to say nothing of "entirely secular", body of natural law theory.[105] It is on the latter half of the chasm that Locke's idea of the natural right to property, together with all that flows from the concept, plainly falls.

The pivotal language in *De Jure Belli Ac Pacis* centers on Grotius's well–known "impious hypothesis".[106] In leading up to his articulation of the hypothesis, Grotius first indicates that it is consistent with "the law of nature, that is,...the nature of man", for individuals "to follow the direction of [their rational,] well-tempered judgement" in striving for the "maintenance of the social order".[107] Such efforts would involve, for example, the property–related principle of "leaving to another that which belongs to him,

or…fulfilling our obligations to him."[108] Directly thereafter, Grotius goes on to state:

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.[109]

While Grotius immediately took great pains to express that, in spite of his hypothetical scenario, it is in fact the case that "we owe all that we are and have" "to God as our Creator," the intellectual deed had been done.[110] As the scholar of law and religion Brian Tierney explains, even while he meticulously argues that Grotius was himself no secularist:

> Later writers were able to use Grotius as a source for natural rights theories more secular in spirit than his own because the idea of natural rights that he transmitted always had been rooted in human reason, with divine revelation employed as a complementary (*and, as it later proved, detachable*) [italics mine] source of argument.[111]

Reading matters in this light, one may consider the profound, philosophical effect of the mechanistic, deistic turn that can be discerned in the versions of Protestantism represented by figures such as Grotius, Hobbes, and Locke. Specifically, it is possible to construe as having been set well in motion, by the end of the seventeenth century, an historical process whereby the Transcendent, while still, on the view of the Protestant mind of the era, vitally important as a creative force, nonetheless is rapidly receding away from creation. Accordingly, if we now refocus on the natural law thinking of Locke, we can see that the right to property derived therefrom is free to be fully detached, as it were, from its original, transcendent creator. In this way, the natural right to property is allowed to stand, especially amid the heightening naturalism of the post–seventeenth–century epistemic mindset, as its own, materialist, ontological foundation. The naturally–based property right, as rendered by Locke and eventually absorbed into modern

liberalism, thus exemplifies, willy-nilly, the emerging, metaphysical and theological transmutation whereby the now seemingly absent, transcendent author of nature becomes effectively reconstituted in the form of nature and its plenitude of proprietary offerings. What is more, as such an historical input as Benthamite utilitarianism comes to offer a further, if in important ways philosophically contrasting, naturalistic impetus for wealth maximization, it nonetheless further widens the economistic avenue leading towards "secular salvation".[112]

*2. The Salvational Significance of Commodified Property*

Having in mind the notion of secular salvation that is achieved by economistic, worldly means, it is important also to ponder how the intertwining of early–modern Protestantism with "the sanctity of property" that had long been presupposed by the common law has come ultimately to be subsumed within modern naturalism.[113] The result, as authors such as Tawney have helped to illustrate, is an "idolatry of wealth, which is", he claims, "the practical religion of capitalist societies".[114]

As Weber famously argued in his landmark work, *The Protestant Ethic and the Spirit of Capitalism,* central strands of early–modern Protestantism were marked by their belief in a tight connection between individuals' worldly callings, and the principle that "[t]he world exists to serve the glorification of God and for that purpose alone."[115] Hinging on the Calvinist conception of divine grace, the Weberian thesis postulated that, inasmuch as Calvinists "held…an absolute duty to consider [themselves] chosen" to receive the salvational blessing of God's grace, they were compelled to engage in "worldly asceticism" in order to demonstrate their chosen state, together with their successful "combat[ting]…of temptations of the devil".[116] Specifically, one's

"justification in the daily struggle of life" demanded diligent work at one's earthly calling, and the consequent accumulation of wealth and property, as means of "attain[ing] certainty of one's own election".[117]

Weber was a plaintive critic of the "iron cage" of modernist rationalism, and also of what was, from his perspective, modern man's attendant, economistic thirst for "the making of money", such that "acquisition" has emerged "as the ultimate purpose of his life."[118] On Weber's view, an intensely secularist, prevailing modern ethos was exemplified by this tragic state of affairs. In keeping with his sense of modernity's "disenchantment of the world", Weber asserted that

> To-day the spirit of religious asceticism—whether finally, who knows?—has escaped from the cage. But victorious capitalism, since it rests on mechanical foundations, needs its support no longer. The rosy blush of its laughing heir, the Enlightenment, seems also to be irretrievably fading, and the idea of duty in one's calling prowls about in our lives like the ghost of dead religious beliefs. Where the fulfilment of the calling cannot directly be related to the highest spiritual and cultural values, or when, on the other hand, it need not be felt simply as economic compulsion, the individual generally abandons the attempt to justify it at all. In the field of its highest development, in the United States, the pursuit of wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane passions, which often actually give it the character of sport.[119]

However, much like I sought to argue, in the introduction to the dissertation, that Weber's influential "disenchantment" thesis misses the eminently real phenomenon of a modernist world that is fact pervasively enchanted by immanentism, I would maintain that his critique of modern economism displays a similar, interpretative blind spot. In particular, Weber misses the extent to which modern economism actually embodies the compression, within the worldly realm itself, of the transcendent God who had provided the original justification for early–modern, Protestant worldly asceticism.[120] David Loy has offered a compelling argument not dissimilar to the one that I am making here,

although I am not sure that I quite agree with his indication that Weber indeed fully recognized that modern "capitalism remains essentially religious in its psychological structure."[121] While Weber does find within capitalism the vestigial "ghost of dead religious beliefs", his overall reading of modernity and its political–economic infrastructures seems to me to diagnose, predominantly speaking, the absence, rather than the implicit presence, of religious faith. This being said, Loy for his own part observes how, even though Calvinism's "original goal" of "[having one labor] to prove oneself saved" by means of accumulating surplus wealth has "[become] attenuated,...inner-worldly asceticism did not disappear as God became more distant and heaven less relevant."[122] Hence:

> In our modern world the original motivation has evaporated, but our preoccupation with capital and profit has not disappeared with it; on the contrary, it has become our main obsession. Since we no longer have any other goal, there being no other final salvation to believe in, we allow the means to be, in effect, our end.[123]

*B. Reducing the Person's Essence to His or Her Status As a Proprietor*

*1. The Common Law and the Civil Law: Pertinent Similarities and Distinctions*

As I have had the occasion to assert at various points throughout the inquiry, a hallmark of secularist law's linked ideas of human proprietorship and transactional power is the powerful tendency of these ideas to imply a philosophical anthropology whereby the person is essentially reduced to his or her status as a proprietor. Put another way, the human being is regarded by secularist law as a fundamentally self–interested, economistic actor. As we have seen, thinkers from both the Anglo–American tradition, such as Locke and Blackstone, and the continental tradition, such as Kant and Hegel, have been instrumental in helping to construct this peculiar model of the proprietary individual.

Further, while my primary focus has been, and will continue to be, on construing how the two juridical ideas are manifested within the common law, it is of course very important to note that they are likewise embodied within the civil law tradition, in ways that are equally pregnant with religious significance. For example, as authors such as Tawney and Talmon have helped to illustrate, the utopian and messianic socio–political program of the 1789 French Revolution integrally involved "the dogma of the sanctity of private property", based largely on a Lockean and Blackstonian, natural rights model.[124] Indeed, as Richard Schlatter also explains, "the Lockean theory expressed the real meaning of the Revolution."[125] As such, the theory was enshrined in the seminal, 1804 Napoleonic Code, whose authors "thought of themselves as the codifiers of the revolutionary tradition."[126] Schlatter goes on to characterize, and with colorful excerpts cite, the expressed sentiments of the authors:

> 'Its grand and principal object,' wrote one of the authors of the Code, 'is to regulate the principles and the rights of property.' 'Its most precious maxim,' said another, 'is that which consecrates the right of property; everything else is but the logical consequence of this fact....'
>
> The Code guarantees property, Treilhard [one of the lawyers who drafted the Code] said, because 'property is the foundation, and one of the most powerful springs, of society.' Society was made to secure property and we must all be protected in the enjoyment of the 'fruit of out labour and of our industry.' That property is a natural right, said Grenier [another drafting lawyer] is a 'dogma which men, whatever their condition, cannot fail to recognize when they use their reason,[*sic*]' 'Property is the base of all legislation, the source of all the moral affections, and of all the happiness to which man may aspire.'[127]

There is, though, something distinctive about the way in which the common law tradition conceives of the individual's proprietary experience. This aspect of the common law renders it, in its modernist form, singularly emblematic of how (as we will see in more detail momentarily), the secularist legal mind implicitly conceives of the

proprietary things of the world as sacred totems, so to speak, which reinforce the apotheosis of the humans by whom the existents are owned and exchanged. Namely, as is hinted at by Macpherson's exposition of the English intellectual genealogy of "possessive individualism", the common law stresses the experience of possession as being the basis for an individual's rightful ownership of property.[128] By contrast, within the civil law tradition, and most notably within its seminal ancestor, Roman law, there historically was drawn a fundamental distinction between the ownership of property (as in the sense of an owner's holding valid title to a piece of property), on the one hand, and on the other, the possession of property.[129]

Carol M. Rose evokes how, within the context of the common law tradition, the competitive, physically domineering character of the act of possession has exemplified the exaltation that the law accords to the human subordination of the things of nature. As she explains, "the quintessentially individualistic act" is "the claim that one has, by "possession," separated for one's self property from the great commons of unowned things."[130] As such, the act taps into what Locke depicted as the quite magical process by which a human being can exercise the power to convert part of the commons into his personal property. In fact, as Tully demonstrates, Locke went so far as to imply a clear parallel between the creative power of God and the possessive act of the human laborer:

> …[Locke] sees the labourer as making an object out of the material provided by God and so having a property in this product, in a manner similar to the way in which God makes the world out of the prior material He created.[131]

### *2.The Apotheosis of the Human Proprietor*

As I reiterated on page 148, a foundational element of Kant's legacy to modernity is his pivotal part in creating an absolute subject who is, moreover, an effectively

apotheosized subject. More specific to the matter at hand, we may now branch out from this point to derive a sense of how the God–like human subject, as a proprietor who potentially wields his or her cognitive and physical power over all the objects of the universe, to say nothing of elemental facets of the self, manifests his or her operative divinity through the activities of proprietorship and commodity exchange.

### *i. Marx and the Fetishism of Commodities*

The contributions of nineteenth–century thought provide us with some of the most penetrating insights for construing the modernist phenomenon of the apotheosized, human proprietor. In the well–known and intriguing section of Marx's (1818-1883) 1867 work, *Das Kapital* (translated as *Capital*), entitled 'The Fetishism of the Commodity and Its Secret', he likens the fetishism of commodities to idolatry.[132] *Capital* represents the stage in Marx's thought at which he had shifted his focus, broadly speaking, from how ideology (of which he argued that religion is a pernicious form)[133] embodies an illusory view of reality that stems from unequal material conditions, to "the specific material conditions which need to be overcome in the capitalist mode of production."[134] Consistent with this, his attention alighted on "[t]he mysterious character of the commodity-form".[135]

As Marx had argued in earlier writings of his, labor within the capitalist system produces commodities not only in the form of the objects that are created by labor power, but also "produces itself and the worker as a *commodity*".[136] By the time of *Capital,* he had come to realize, moreover, that commodities represent, above all, the social relations lying behind their production. Consequently, as Radin explains, "[r]elations between people are disguised as relationships between commodities"; or, as Marx himself put it,

"the definite social relation between men...assumes...the fantastic form of a relation between things."[137]

On Marx's view, the idea that commodities, within the capitalist system, are so potent as to be imbued with the power embodied in social relations demands that, "to find an analogy we must take flight into the misty realm of religion."[138] Just as, in religion, "the products of the human brain appear as autonomous figures endowed with a life of their own,...[s]o it is in the world of commodities with the products of men's hands."[139] Specifically, commodities are endowed with a fetishistic significance. On my reading of the atheistic Marx, this means, in essence, that commodities become imbued with what is, for him, the effective, metaphysical ultimate, namely, the collective material conditions embodied in social relations. As such, "the fetishism...attaches itself to the products of labour as soon as they are produced as commodities, and is therefore inseparable from the production of commodities."[140] Moreover, the fetishism of commodities plays out further in the "magic of money", that "physical object, gold or silver in its crude state, [which] becomes, immediately on its emergence from the bowels of the earth, the direct incarnation of all human labour."[141] As Radin shows, such a major, twentieth–century interpreter of Marx as Georg Lukács recognized that Marx's theory of the fetishism of commodities captures the pervasive means by which capitalist society tends towards the commodification of all existents.[142] To this, I would add that Marx's analysis demonstrates, further, the quasi–mystical significance that economistic, liberal capitalism implicitly imparts both to the commodities that, on the capitalist mind, make up essentially the whole of existence, and to the actors who are involved in their exchange.

*ii. Hegel and the Idolatry of the Human Being's Absolute Right of Appropriation*

While Marx valuably helps to demonstrate the idolatrous nature of commodities and those who control them – a demonstration that, as I implied on page 166, was later to be picked up by another scholar who has been of great aid to us, Tawney – his overall intellectual posture would have precluded his stressing the God–like stance of an ordinary, human subject living under capitalism. Indeed, the intellectual coherence of the Idealist philosophical tradition, that line of thought which I have read as forming a basic part of the foundation for the modernist model of the apotheosized subject, came under withering attack from Marx; this, within the context of a sustained critique of Hegel that helped to define the earlier portions of Marx's career.[143] However, as Peter Stillman helps to illustrate, it is precisely Hegel's portrayal of the domineering, subjective will who asserts "the absolute *right of appropriation* which human beings have over all things" that points to the implicitly idolatrous character of an emerging, modernist conception of proprietorship.[144]

On Stillman's reading of the Hegelian model of property, "property is the proof of man's domination of and liberation from nature and his assertion of himself as a spiritual being".[145] Such a vision of human proprietorship, which, as I have argued, represents a central thrust of modern, liberal ideology, implies that, by means of the experience of proprietorship, human beings effectively attain the realization and reinvigoration of their latent, sacred power and status, as they assert their supremacy over the things of the world. As Stillman interprets Hegel:

> By the willful appropriation of the world, that is, by each man's owning property and developing and expressing himself in it, appropriating his mind and body, dominating nature, creating and comprehending social and political institutions, and recognizing others as free, men shape and maintain the spiritual world to serve

human purposes and goals....[146]

This is an exceptionally striking portrayal of how the modern person's ontological reduction to his or her status as a proprietor connects with the apotheosis of the person. It boldly illustrates how the divinizing of the person is enabled by the very process of proprietorship, and by the attainment of unfettered domination over the world's existents.

As Eliade, for one, understood, even the modern who purports not to be religious cannot free himself or herself of the latent, religious psyche that is "ready to be reactualized in his [or her] deepest being."[147] This reactualizing, he suggests, can be triggered by the abundant, "magico-religious" phenomena that surround the modern person, from cultural myths and taboos, to ritual celebrations ordained by the passage of time.[148] I wish to suggest that, in a parallel fashion, secularist law, with its deeply rooted, historical devotion to the sacredness of property, therewith presupposes the totemic nature of property. By means of the individual's "magico-religious" experience of proprietorship and commodity exchange, the spirit of modernist immanentism is actualized.

## IV. Contrasting the Immanentist Religious Significance of Secularist Law's Ideas of Human Proprietorship and Transactional Power With a Parallel, Theistic Perspective

To gain some insight into where we have travelled thus far, it is helpful to briefly consider a religious perspective on proprietorship that strongly contrasts with the immanentism of parallel, juridical ideas that are rooted in modernity's hidden, religious tradition. As I first noted in the introduction to the dissertation, the basic conception of property presupposed by classical, Islamic jurisprudence is especially salient, as it is indicative of an utterly theistic notion of divinity, in which God is theophanically

manifested in, but in no way materially confined to, the realm of earthly property.

Within the context of classical Islam's conception of legal justice, there is a strong emphasis on humankind's right to possess and enjoy property.[149] Over the complex and lengthy span of history encompassing continuous, juristic interpretations and re–evaluations of classical Islamic legal doctrine, there have developed conflicting schools of thought concerning whether this right was granted to humankind collectively, or whether "the mode of distribution [was left] to man".[150] In the end, the hermeneutic struggle has "tended on the whole to affirm the principle of individual ownership" (albeit qualified by such religious duties as almsgiving, or *zakat,* which is one of the Five Pillars of Islam).[151] For our purposes, however, the crucial point that it is difficult to overemphasize is that, "Ultimately, God alone is the owner of the heavens and the earth and all that they contain."[152] As Weiss explains, where he explicates classical Islam's understanding that God is the ultimate font of political sovereignty, God's sovereignty springs from the same transcendent source as, and is thus seamlessly joined with, the "full property rights" that He holds over creation.[153] Under *Shari'a,* it is axiomatic that property is held by humans only in the form of a sacred trust. Their responsible use of property must be consistent with the Divine Law's mandate for the exaltation of God, who is manifested throughout the creation of which He is the final owner.

Another highly significant contrast between the conception of ownership intrinsic to Islamic, as opposed to secularist, law involves the matter of proprietorship over the self. As Nasr argues:

> The modern idea that "This is my body and I can do whatever I want with it" is totally absent from the Islamic perspective; Islam states, "My body is not mine, for I did not create it—it belongs to God."[154]

Accordingly, inasmuch as human life is a sacred element of creation, and is, as such, owned by God, rather than by the individual, the individual to whom it is entrusted has an obligation, under the Divine Law, to work to maintain the well–being of both body and soul.[155] In a similar vein, one finds that classical Judaism, which shares with its Abrahamic relation, Islam, the conception of an utterly transcendent God who holds supreme authority over His creation, may also be read as opposing "any form of [human] ownership of the human body", which, in point of fact, "belongs to God".[156]

## V. The Path From Here

Over each of the next two chapters, I will interpret how a specific area (or, in the case of Chapter Eight, two specific areas that intersect in an exceptionally telling way) of secularist jurisprudence manifests the implicitly religious, modernist tendency to reduce all existents to the form of commodified property. Clearly, there are numerous areas of law that one might select as being suitable for this purpose (as we are speaking, after all, about the full, variegated range of worldly things!). However, I have sought to select three legal fields that I believe demonstrate, both literally and symbolically, just how ontologically all–encompassing is secularist law's vision of commodified property, as well as the depth and pervasive character of the unacknowledged, religious import conveyed by this vision.

In Chapter Seven, I will consider how, in keeping with the predominating mode of modern liberalism that I have depicted in the present chapter, the natural world is, within important quarters of environmental jurisprudence, reduced to the naturalistic form of property and commodities. Also within this context, I take note of lines of resistance to the commodification of nature, occurring both from within modern, Western

jurisprudence (as in the form of the precautionary principle), and from without modernist law, as in the case, once again, of Islamic jurisprudence. In Chapter Eight, I will return to the motif of non–corporeal abstractions that are reified as material property, where I consider how intellectual property law, within a modern secularist setting, reduces crucial forms of knowledge and creativity to commodified property. And, also in Chapter Eight, I will revisit the question of whether persons are property, by delving further into the tendency of secularist law to treat human, biological material, and therefore life itself, in a proprietary fashion. In illuminating the revealing interface between intellectual property law and law governing human biological property, I will bring into focus the distinct matter of how attempts to patent human life exemplify the reduction of human biological material to commodified property.

## 6. Endnotes

1. As Richard Schlatter observes, "That the laws of England were, for the most part, valid declarations of natural law, Blackstone did not doubt." Richard Schlatter, *Private Property: The History of An Idea* (New York: Russell & Russell, 1973) [originally published in 1951], p. 169. Also drawn on at this point is Harold J. Berman's important new contribution to the field of law and religion, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA and London: Harvard Univ. Press, 2003), p. 376.

2. My prime concern within this portion of the argument is with the common law tradition. However, I will return at various points later in the chapter to the continental strand of modern, liberal property theory, especially the thought of Kant and Hegel. This strand, which, like the common law, demonstrates "a strong and wide conception of ownership", has deeply influenced segments of the civil law tradition, in particular, as well as – perhaps above all – the basic, modernist notion that exercising proprietorship over the world's objects lies at the heart of what it means to be human. See Markku Oksanen, 'Nature As Property: Environmental Ethics and the Institution of Ownership', Academic Dissertation, Univ. of Turku, Finland, 1998, p. 32; and Thomas C. Grey, 'The Disintegration of Property', pp. 69-85 in J. Roland Pennock and John W. Chapman, eds., *Nomos XXII: Property* (New York: New York Univ. Press, 1980), pp. 73-4.

3. See, respectively: Mary Ann Glendon, '"Absolute" Rights: Property and Privacy', pp. 182-88 in John Echeverria and Raymond Booth Eby, eds., *Let the People Judge: Wise Use and the Private Property Rights Movement* (Washington, D.C.: Island Press, 1995), p. 184; William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington, IN and London: Indiana Univ. Press, 1977), pp. 114-15; Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford, UK: Clarendon Press, 1996), pp. 176-80, 207; and John Locke, 'The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government', pp. 265-428 in John Locke, *Two Treatises of Government,* Peter Laslett, ed. (Cambridge, UK: Cambridge Univ. Press, 1991) [Laslett's revised version of Locke's text, which was composed in the 1680s and bore the date 1690 on its first edition, was originally published in 1970], pp. 323, 329.

4. William Blackstone, *Commentaries on the Laws of England,* 4 vols., 5th ed., (Oxford, UK: Clarendon Press, 1773) [*Commentaries* originally published between 1765-1769], vol. 2, p. 2.

5. See C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, UK: Oxford Univ. Press, 1962).

6. For important examples of such responses and critiques, see: Richard Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government* (Princeton, NJ: Princeton Univ. Press, 1986), pp. 150-60; Richard Ashcraft, *Locke's Two Treatises of Government* (London: Unwin Hyman, 1987), *passim;* J.G.A. Pocock, *Virtue, Commerce, and History:*

*Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, UK: Cambridge Univ. Press, 1985), pp. 103-23; Alan Ryan, *Property and Political Theory* (Oxford, UK: Basil Blackwell, 1984), pp. 42-6; James Tully, *A Discourse on Property: John Locke and his adversaries* (Cambridge, UK: Cambridge Univ. Press, 1980), *passim;* and Jeremy Waldron, *The Right to Private Property* (Oxford, UK: Clarendon Press, 1988), pp. 93, 140, 157-60, 220, 225.

7. *Ibid.,* p. 160.

8. *Cf.* Laura Brace, *The idea of property in seventeenth-century England: Tithes and the individual* (Manchester, UK: Manchester Univ. Press, 1998).

9. This all having been said, one should take note of Barbara Arneil's intriguing, partial rejoinder to the critics of Macpherson's thesis, in which she argues that Locke's theory of property did serve as a key inspiration to English efforts at colonizing the new world for commercial gain. Arneil, *John Locke and America,* pp. 209 and *passim.*

10. Pocock, *Virtue, Commerce, and History,* pp. 108-09.

11. *Ibid.,* p. 108.

12. P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, UK: Clarendon Press, 1979), p. 102.

13. *Ibid.* In addition to making oneself aware that Locke was not, perhaps, quite the capitalist that Macpherson made him out to be, one also should keep in mind that Macpherson's reading both of Locke and the era in which he worked tends to elide discussion of the important historical phenomenon of civic republicanism. As Pocock is famous for having emphasized, the capitalistic conception of property that began to flourish in the eighteenth century by no means went unchallenged during that era. Rather, it had to contend with other, formidable property discourses, most notably the discourse of civic republicanism, whose roots reached back to Aristotle and Aquinas. According to the ideals of civic republicanism,

> The citizen possessed property in order to be autonomous and autonomy was necessary for him to develop virtue or goodness as an actor within the political, social and natural realm or order. He did not possess it in order to engage in trade, exchange or profit; indeed, these activities were hardly compatible with the activity of citizenship. Pocock, *Virtue, Commerce, and History,* p. 103; see also Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property In American Legal Thought 1776-1970* (Chicago and London: Univ. of Chicago Press, 1997), pp. 30-1.

As Alexander indicates, the great extent to which the predominating, present–day legal imagination is "immersed in a culture of commodities and [has] internalized the commodified understanding of property" should not blind us to the realization that non–capitalistic understandings of property still did bear some influence during a prior time in

modern, Western legal history. *Ibid.,* p. 139.

14. On the deep, historical embedding of this distinction within the common law tradition, see J.H. Baker, *An Introduction to English Legal History,* 2nd ed. (London: Butterworths, 1979), pp. 315 ff.

15. R.H. Tawney, *The Acquisitive Society* (New York: Harvest Books, 1948) [originally published in 1920].

16. *Ibid.,* p. 28.

17. Robert W. Gordon, 'Paradoxical property', pp. 95-110 in John Brewer and Susan Staves, eds., *Early Modern Conceptions of Property* (London and New York: Routledge, 1997), p. 95; *cf.* John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago and London: Univ. of Chicago Press, 1988). In fact, Alexander has characterized the latter portion of the eighteenth century as representing "the triumph of imaginary property", by which he means especially "commercial paper", such as "promissory notes, banknotes, and certificates of public debt". Alexander, *Commodity & Propriety,* pp. 69-70.

18. Reid, *The Concept of Liberty in the Age of the American Revolution,* p. 72.

19. Berman, *Interaction of Law and Religion,* p. 65.

20. Deborah Fisch Nigri, 'Theft of Information and the Concept of Property in the Information Age', pp. 48-60 in J.W. Harris, ed., *Property Problems From Genes to Pension Funds* (London: Kluwer Law International, 1997), p. 50.

21. Blackstone, *Commentaries on the Laws of England,* vol. 2, pp. 2-3. *Cf.* Locke, 'Second Treatise of Government', pp. 285-302 [the seminal chapter, 'Of Property']; and Genesis 1:26.

22. C.B. Macpherson, *The Rise and Fall of Economic Justice and Other Essays* (Oxford, UK: Oxford Univ. Press, 1987) [originally published in 1985], p. 77. Macpherson's insight here is somewhat ironic, because he actually takes the full–fledged, modern market society's materialist conception of property to represent a narrowing from a broader, late–seventeenth century mindset in which "[o]ne's own person, one's capacities, one's rights and liberties were regarded as individual property." *Ibid; cf.* Reid, *The Concept of Liberty in the Age of the American Revolution.* While Macpherson's point about the modern market society's tendency to reduce all property to a material form is compelling, I believe that he misses the extent to which (as I comment on next, within the main body of the text) the modernist juridical imagination has proved willing to convert intangibles to material property, as if by a metaphysical sleight–of–hand.

23. John Brewer and Susan Staves, 'Introduction', pp. 1-18 in Brewer and Staves, *Early Modern Conceptions of Property,* p. 10.

24. See Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard Univ. Press, 1993), pp. 31-48; and Laura J. Rosenthal, '(Re)Writing Lear: Literary property and Dramatic Authorship', pp. 323-38 in Brewer and Staves, *Early Modern Conceptions of Property.*

25. Charles A. Reich, 'The New Property', pp. 179-98 in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: Univ. of Toronto Press, 1981) [originally published in 1978]. This extract is drawn from a 1964 article of Reich's in the *Yale Law Journal.*

26. Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford, UK: Oxford Univ. Press, 2003), p. 106.

27. See *supra,* pp. 44-5, 76-7, and corresponding endnotes.

28. See, especially, her works: 'Property and Personhood', pp. 53-74 in Elizabeth Mensch and Alan Freeman, eds., *Property Law, Volume I* (New York: New York Univ. Press, 1992) [originally published in 1982 as an article in the *Stanford Law Review*]; *Contested Commodities* (Cambridge, MA and London: Harvard Univ. Press, 1996); *Reinterpreting Property* (Chicago and London: Univ. of Chicago Press, 1993); and 'Market-Inalienability', pp. 1126-48 in D. Kelly Weisberg, ed., *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work, and Reproduction* (Philadelphia: Temple Univ. Press, 1996) [comprised of extracts from an article originally published in 1987 in the *Harvard Law Review*].

It should be noted that, on Radin's understanding, Kant and Hegel do not "lead so readily", in and of themselves, "to the worldview of commodification." Radin, *Contested Commodities,* p. 34. Above all, this is because (as will be especially pertinent at several points later in my analysis) they believed "that only objects separate from the self are suitable for alienation." *Ibid.* Thus, the liberalist worldview of "Universal commodification" may be read as having absorbed Kantian and Hegelian thought into a pervasively capitalistic paradigm which, by increasingly extending the ethos of commodification even to aspects of the self – such as body parts, for example – adapts Kant and Hegel in ways that they themselves likely would have found objectionable.

29. Richard A. Posner, *Economic Analysis of Law,* 6th ed. (New York: Aspen Publishers, 2003), p. 249. See also Carol M. Rose, 'Given-Ness and Gift: Property and the Quest for Environmental Ethics', *Environmental Law,* vol. 24, no. 1 (1994), pp. 1-31, p. 4, where it is argued that thinkers such as Posner are in favor of "[reducing]...unowned objects [such as the things of nature] to property" as a means of producing "wealth and peace."

30. Radin, 'Market-Inalienability', p. 1132.

31. Radin, *Reinterpreting Property,* p. 9.

32. Immanuel Kant, *The Metaphysics of Morals,* reprinted at pp. 353-603 in Immanuel

Kant, *Practical Philosophy,* Mary J. Gregor, trans. and ed. (Cambridge, UK: Cambridge Univ. Press, 1996), pp. 402-3.

33. *Ibid.,* p. 404.

34. Margaret Jane Radin, 'Cloning and Commodification', *Hastings Law Journal,* vol. 53, no. 5 (2002), pp. 1123-1132, p. 1129 [consisting of transcribed remarks of Radin's from the symposium, 'Conceiving a Code for Creation: The Legal Debate Surrounding Human Cloning'].

35. Hegel, *Elements of the Philosophy of Right,* p. 75.

36. See, for example, Radin, *Reinterpreting Property,* p. 1 ff.

37. Locke, 'Second Treatise of Government', p. 298.

38. *Ibid.,* p. 291.

39. *Ibid.*

40. *Ibid.,* p. 299.

41. *Ibid.,* p. 298.

42. *Ibid.,* p. 292.

43. Margaret Davies and Ngaire Naffine, *Are Persons Property?: Legal debates about property and personality* (Aldershot, UK: Ashgate, 2001).

44. Radin, *Contested Commodities,* p. 36, quoting from Immanuel Kant, *Lectures on Ethics,* Louis Infield, trans. (London: Methuen and Co., 1930). *Lectures on Ethics* is a translation of *Eine Vorlesung über Ethik,* which had originated as student notes derived from Kant's teachings. See W.H. Walsh, 'Immanuel Kant', pp. 305-24 in vol. 4 of Paul Edwards, ed., *The Encyclopedia of Philosophy,* 8 vols. (New York: Macmillan, 1967), p. 323.

45. Davies and Naffine, *Are Persons Property?,* p. 10.

46. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago and London: Univ. of Chicago Press, 1990), pp. 40, 152-3.

47. Radin, *Contested Commodities,* p. 40.

48. *Ibid.,* pp. 154-83.

49. Locke, 'Second Treatise of Government', pp. 287-8.

50. For an expression of Kass's stance against human cloning, see Leon R. Kass, 'Preventing a Brave New World', *The New Republic Online,* posted May 17, 2001 <www.tnr.com> (July 27, 2001).

51. Leon R. Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2002), p. 214.

52. *Ibid.*

53. *Ibid.*

54. *Ibid.,* p. 215.

55. Steven David Ross, *The Gift of Property: Having the Good* (Albany, NY: SUNY Press, 2001), p. 60.

56. Kass, *Life, Liberty and the Defense of Dignity,* pp. 191-2. See also Davis and Naffine, *Are Persons Property?,* p. 181; Russell Scott, *The Body as Property* (New York: Viking Press, 1981), pp. 6-7; and Polly J. Price, *Property Rights: Rights and Liberties under the Law* (Santa Barbara, CA: ABC-CLIO, 2003), p. 157.

57. Lori Andrews and Dorothy Nelkin, *Body Bazaar: The Market for Human Tissue in the Biotechnology Age* (New York: Crown Publishers, 2001), p. 174. See also Andrews's article, 'People As Products: The Conflict Between Technology and Social Values', *The Hedgehog Review: Critical Reflections on Contemporary Culture,* vol. 4, no. 3 (2002), pp. 45-65. Also apropos is Kass's critique of the modernist notion, underlying the genetic engineering of children, "that children are like property, that they exist *for* the parents." Leon R. Kass, *Toward a More Natural Science: Biology and Human Affairs* (New York: Free Press, 1985), pp. 95-6.

58. This quotation is adapted from Pilar N. Ossorio, 'Property Rights and Human Bodies', pp. 223-42 in David Magnus, Arthur Caplan, and Glenn McGee, eds., *Who Owns Life?* (Amherst, NY: Prometheus Books, 2002), p. 236.

59. Radin, *Contested Commodities,* p. 204. See, as well, Alan Hyde, *Bodies of Law* (Princeton, NJ: Princeton Univ. Press, 1997), especially pp. 48-79.

60. See, for example, Nasr, *Knowledge and the Sacred,* p. 98.

61. Locke, 'Second Treatise of Government', p. 286.

62. Alan Ryan is one who would seem to adhere to such a position. See Ryan, *Property and Political Theory,* p. 5.

63. R.H. Tawney, *Religion and the Rise of Capitalism,* with a new introduction by Adam B. Seligman (New Brunswick, NJ: Transaction Publishers, 1998) [originally published in 1926], p. 7.

64. In addition to *ibid.,* see Peter Gay, *Deism: An Anthology* (Princeton, NJ: D. Van Nostrand Co., 1968), pp. 24-6; and M. Douglas Meeks, *God the Economist: The Doctrine of God and Political Economy* (Minneapolis: Fortress Press, 1989), pp. 193-4.

Also illuminating is James Tully's contribution to the debate, which argues that "Locke's characterisation of God as a maker stands between two extreme views": the pantheism of Bruno, and "the view held by Gottfried Leibniz (1646-1716), later embraced by Deist and Enlightenment thinkers, that God created the world in a manner similar to the making of a machine". Tully maintains that, "[o]n Locke's model", God's act of creation is "analogous to the way in which man makes intentional actions." Consequently, "[m]an is…in a relation of continuous and intimate dependency on God in the way intentional actions are existentially tied to the agent who makes or performs them." Tully, *A Discourse on Property,* pp. 35-6.

65. Tawney, *The Acquisitive Society,* p. 13.

66. Edwin C. Hui, *At the Beginning of Life: Dilemmas in Theological Bioethics* (Downers Grove, IL: InterVaristy Press, 2002), p. 74.

67. Macpherson, *Political Theory of Possessive Individualism,* p. 269.

68. *Ibid.,* p. 263.

69. *Ibid.,* pp. 271-2.

70. *Ibid.,* p. 219.

71. Ulrich Duchrow, *Alternatives to Global Capitalism: Drawn from Biblical History, Designed for Political Action,* Elaine Griffiths, et al., trans. (Utrecht, The Netherlands: International Books, 1998) [originally published in 1995 as *Alternativen zur kapitalistischen Weltwirtschaft: biblische Erinnerung und politische Ansätze zur Überwindung einer lebensbedrohenden Ökonomie*], p. 27.

72. Radin, 'Property and Personhood', p. 61.

73. Kenneth R. Minogue, 'The Concept of Property and Its Contemporary Significance', pp. 3-27 in Pennock and Chapman, *Nomos XXII: Property,* p. 11.

74. *Ibid.,* pp. 11-12, 26.

75. *Ibid.,* p. 12.

76. Elizabeth Brubaker, *Property Rights in the Defence of Nature* (London and Toronto: Earthscan, 1995), p. 41.

77. *Ibid.,* pp. 41-2. One should note that, taken within the context of the history of nuisance law, the sacrosanct property right contains an important, inherent tension:

namely, that between "the interest in conserving the land and preserving time-honoured uses on the one hand, and the interest in productive exploitation of the land and its resources on the other." John P.S. McLaren, 'Nuisance Law and the Industrial Revolution—Some Lessons From Social History', *Oxford Journal of Legal Studies,* vol. 3, no. 2, pp. 155-221, p. 156.

78. Glendon, '"Absolute" Rights: Property and Privacy', p. 185.

79. Radin, *Reinterpreting Property,* p. 15.

80. *Cf.* the useful discussion in John B. Cobb, Jr., *The Earthist Challenge to Economism: A Theological Critique of the World Bank* (Basingstoke, UK, London, and New York: Macmillan Press and St. Martin's Press, 1999), pp. 44-60.

81. A.R. Buck, ''Strangers in their own land': Capitalism, Dispossession and the Law', pp. 39-56 in A.R. Buck, John McLaren, and Nancy E. Wright, eds., *Land and Freedom: Law, property rights and the British diaspora* (Aldershot, UK: Ashgate, 2001), p. 47.

The enclosure movement to which Buck refers involved a move by landowners – partly driven, it has been suggested, "by 'an almost religious conversion' [commencing in the seventeenth century] of landowners to the new principles of improvement and personal profit" – to hem in as private property, by such means as hedges, ditches, and so forth, land theretofore existing as part of the commons. See Brace, *The idea of property in seventeenth-century England,* pp. 62-85.

82. See the still–valuable analysis provided in the classic work of American legal historiography, James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, WI: Univ. of Wisconsin Press, 1956), and, as well, Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA and London: Harvard Univ. Press, 1977). For an exhaustive account of parallel, yet earlier (specifically, eighteenth–century) developments within an increasingly commercialized, English society and legal system, see Atiyah, *Rise and Fall of Freedom of Contract, passim.*

83. *Ibid.,* p. 295.

84. Schlatter, *Private Property,* p. 161 [quoting Smith].

85. See Atiyah, *Rise and Fall of Freedom of Contract,* pp. 294-304; Schlatter, *Private Property,* pp. 182-6; and Scott, *In Pursuit of Happiness,* pp. 71-93.

86. Atiyah, *Rise and Fall of Freedom of Contract,* pp. 39-52, 69-72.

87. See *ibid.,* p. 70; and Macpherson, *Political Theory of Possessive Individualism,* p. 3.

88. Atiyah, *Rise and Fall of Freedom of Contract,* p. 71.

89. Edwin G. West, 'Property Rights in the History of Economic Thought: From Locke to J.S. Mill', pp. 20-42 in Terry L. Anderson and Fred S. McChesney, eds., *Property Rights: Cooperation, Conflict, and Law* (Princeton, NJ and Oxford, UK: Princeton Univ. Press, 2003), p. 31.

90. *Ibid.*

91. James E. Crimmins, *Secular Utilitarianism: Social Science and the Critique of Religion in the Thought of Jeremy Bentham* (Oxford, UK: Clarendon Press, 1990), p. 299.

92. See, for instance, Jeremy Bentham, *A Fragment on Government,* excerpted at pp. 45-72 in Mary Peter Mack, ed., *A Bentham Reader* (New York: Pegasus, 1969). Appearing in 1776 in response to Blackstone's *Commentaries,* this work of Bentham's is alternatively known as *A Comment on the Commentaries.*

93. Schlatter, *Private Property,* p. 246.

94. *Ibid.,* pp. 245-6.

95. *Ibid.,* p. 247 [quoting from Bentham's *Principles of the Civil Code*]. *Principles of the Civil Code,* which appears in John Bowring's 1838-1843 edition of *The Works of Jeremy Bentham,* was originally published in 1802, in French, as *Principes du Code Civil.* In this initial form, which had been assembled by Bentham's "Swiss friend and collaborator, Etienne Dumont (1759-1829)," the *Principes* drew on eighteenth–century material of Bentham's that he had furnished to Dumont. See Charles Milner Atkinson, *Jeremy Bentham: His Life and Work* (New York: Augustus M. Kelley, 1969) [originally published in 1905], pp. 74, 137-8.

96. Radin, *Contested Commodities,* p. 32.

97. *Ibid.*

98. See Buck, 'Strangers in their own land', p. 43. Consequently, as Buck has perceptively observed, there is a "temptation on the part of the law to treat everything as transferable goods in the marketplace." Andrew Buck, 'The Garden of Iden: Enclosures & the Rhetoric of Property in Early Modern England', unpublished paper delivered in a University of Victoria Department of History workshop, November 6, 2003; and Andrew Buck, personal communication, February 2, 2004.

99. Radin, 'Market-Inalienability', p. 1131.

100. Maude Barlow and Tony Clarke, *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water* (New York: New Press, 2002), p. 81.

101. Tawney, *The Acquisitive Society,* pp. 13, 44.

102. See J.M. Kelly, *A Short History of Western Legal Theory* (Oxford, UK: Clarendon Press, 1992), pp. 214, 224; Arneil, *John Locke and America,* p. 6; and Tully, *A Discourse*

*on Property, passim.*

103. R.L. Colie, 'Arminius and Arminianism', pp. 164-5 in Edwards, *Encyclopedia of Philosophy,* vol. 1.

104. Schlatter, *Private Property,* p. 126.

105. Kelly, *A Short History of Western Legal Theory,* p. 226.

106. See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta: Scholars Press, 1997), p. 319.

107. Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres,* Francis W. Kelsey et al., trans. (New York: Oceana Publications, 1964) [a reprint of a 1925 edition], vol. 2, pp. 12-13.

108. *Ibid.,* p. 13.

109. *Ibid.*

110. *Ibid.*

111. Tierney, *Idea of Natural Rights,* p. 320.

112. West, 'Property Rights in the History of Economic Thought', p. 41.

113. *Cf.* David Sugarman and Ronnie Warrington, 'Land law, citizenship, and the invention of "Englishness": The strange world of the equity of redemption', pp. 111-43 in Brewer and Staves, *Early Modern Conceptions of Property,* p. 127.

114. Tawney, *Religion and the Rise of Capitalism,* p. 286.

115. Max Weber, *The Protestant Ethic and the Spirit of Capitalism,* Talcott Parsons, trans., with an Introduction by Anthony Giddens (New York: Charles Scribner's Sons, 1976) [Giddens's very useful Introduction dates from 1976, whereas the rest of this edition is based on a 1958 version of Parsons's 1930 translation], p. 108 and *passim. The Protestant Ethic* was "[f]irst published as a two-part article in 1904-5, in the *Archiv für Sozialwissenschaft und Sozialpolitik*". Giddens, 'Introduction', pp. 1-12(b) in *ibid.,* p. 1.

116. *Ibid.,* p. 111.

117. *Ibid.*

118. *Ibid.,* p. 53.

119. *Ibid.,* pp. 181-2.

120. *Cf.* the Canadian philosopher, theologian, and social critic George Grant's insightful analysis of the phenomenon of American, "secularized Calvinism". George Grant,

*Philosophy in the Mass Age,* William Christian, ed. (Toronto: Univ. of Toronto Press, 1995 [originally published in 1959], pp. 75-89.

121. Loy, 'Religion of the Market', p. 279.

122. *Ibid.*

123. *Ibid.*

124. See Tawney, *The Acquisitive Society,* p. 53; Talmon, *Origins of Totalitarian Democracy,* pp. 171, 188-9; Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Westport, CT: Greenwood Press, 2000), p. 14; and Schlatter, *Private Property,* pp. 205-38.

125. *Ibid.,* p. 231.

126. *Ibid.*

127. *Ibid.,* pp. 232-3.

128. See, for example, Carol M. Rose, *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO: Westview Press, 1994), p. 12.

129. See Barry Nicholas, *An Introduction to Roman Law* (Oxford, UK: Clarendon Press, 1962), p. 107; and Weber, *Max Weber on Law in Economy and Society,* pp. 221-2.

130. Rose, *Property & Persuasion,* p. 20.

131. Tully, *A Discourse on Property,* pp. 116-7.

132. See Karl Marx, *Capital, Volume 1,* Ben Fowkes, trans. (Harmondsworth, UK: Penguin Books, 1976), pp. 163-177; and Meeks, *God the Economist,* p. 205, note 26.

133. Refer back to Chapter 1, endnote 1, of the dissertation.

134. See Jorge Larrain, *The Concept of Ideology* (Athens, GA: Univ. of Georgia Press, 1979), p. 54; *cf.* Martin Nicolaus's foreward at pp. 7-63 of Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy,* Martin Nicolaus, trans. (New York: Vintage Books, 1973) [derives from the 1859 *Zur Kritik der politischen Ökonomie*].

135. Marx, *Capital,* p. 164.

136. Radin, *Contested Commodities,* p. 80 [quoting from Marx's 'Economic and Philosophic Manuscripts of 1844'].

137. *Ibid.,* p. 81; Marx, *Capital,* p. 165.

138. *Ibid.*

139. *Ibid.*

140. *Ibid.*

141. *Ibid.,* p. 187.

142. Radin, *Contested Commodities,* pp. 81-3.

143. See Karl Marx, *Selected Writings,* David McLellan, ed. and trans. (Oxford, UK: Oxford Univ. Press, 1977) [in particular, the 1844 sources, 'Towards a Critique of Hegel's *Philosophy of Right:* Introduction', at pp. 63-74; and 'Economic and Philosophical Manuscripts', at pp. 75-112].

144. See Peter G. Stillman, 'Property , Freedom, and Individuality in Hegel's and Marx's Political Thought', pp. 130-67 in Pennock and Chapman, *Nomos XXII: Property*; Meeks, *God the Economist,* p. 206, note 32; and Hegel, *Elements of the Philosophy of Right,* p. 75.

145. Stillman, 'Property, Freedom and Individuality in Hegel's and Marx's Political Thought', p. 151.

146. *Ibid.,* pp. 144-5.

147. Eliade, *The Sacred & the Profane,* p. 204.

148. *Ibid.,* pp. 204-5.

149. Weiss, *The Spirit of Islamic Law,* pp. 158-63.

150. Khadduri, *Islamic Conception of Justice,* p. 138.

151. *Ibid.*

152. Othman Abd-Ar-Rahman Llewellyn, 'The Basis for a Discipline of Islamic Environmental Law', pp. 185-247 in Richard C. Foltz, Frederick M. Denny, and Azizan Baharuddin, eds., *Islam and Ecology: A Bestowed Trust* (Cambridge, MA: Harvard Univ. Press, 2003), p. 198.

153. Weiss, *The Spirit of Islamic Law,* p. 24.

154. Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (New York: HarperCollins, 2002), pp. 278-9.

155. *Ibid.,* p. 278.

156. Michael F. Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard Univ. Press, 2003), p. 102. Note, too, how Biblical Judaism extends this principle to place on humankind an ethical obligation for the care of nature, with respect to which portion of

creation "God is not an absentee landlord but is actively present". Scott Dunham and Harold Coward, 'World Religions and Ecosystem Justice in the Marine Fishery', pp. 58-66 in Harold Coward, Rosemary Ommer, and Tony Pitcher, eds., *Just Fish: Ethics and Canadian Marine Fisheries* (St. John's, NF: Institute of Social and Economic Research, 2000), p. 58.

Not least, to take the third Abrahamic faith, Christianity, consider how Paul, in Romans 8, appears to understand the entirety of creation as "[having] been groaning in travail" in the wake of the original sin which affected all of "earthly existence" (to borrow Max Oelschlaeger's phrase); accordingly, one might read Paul as articulating humankind's ethical obligation to work towards a harmonious reunion with nature and God, together. See Romans 8:22 in *The Holy Bible;* and Max Oelschlaeger, *Caring for Creation: An Ecumenical Approach to the Environmental Crisis* (New Haven, CT and London: Yale Univ. Press, 1994), pp. 132-3. In this connection, notice further that, as is earlier expressed by Paul in Romans, humankind's ultimate reverence should be unequivocally directed towards God, rather than towards the natural world which, while manifesting transcendentally emanating, divine presence, still itself requires redemption. See Romans 1:20-23 in *The Holy Bible;* and Robert Whelan, Joseph Kirwan, and Paul Haffner, *The Cross and the Rain Forest: A Critique of Radical Green Spirituality* (Grand Rapids, MI: Acton Institute for the Study of Religion and Liberty, 1996), p. 35.

# Chapter 7

## Secularist Environmental Jurisprudence: Reducing Nature to Commodified Property

### I. Deciphering the Concept of Nature Expressed in Secularist Environmental Law and Policy

#### *A. Reading Environmental Jurisprudence As a Semeiotic Text*

The collective environmental laws and policies of a secularist polity together create a text that can convey in a very revealing manner how secularist law's elemental, linked ideas of human proprietorship and transactional power over all of the world's existents signify the religious immanentism suffusing modernist legal systems. Under the rubric of environmental laws and policies – or, to use an equivalent phrase evoking the ineluctable religious and philosophical import of such laws and policies, environmental jurisprudence – one might include "all government actions that alter natural environmental conditions and processes, for whatever purpose and under whatever label."[1] This is the case, inasmuch as

> [p]olicies promoting transformation of the environment for mineral extraction, for agriculture or forestry or outdoor recreation, for urban or industrial development, or for transportation infrastructure are in their effects just as much elements of environmental policy as are pollution control regulations or habitat protection programs – whether or not they are called by that name. So are military operations, international trade agreements, and other policies with environmental impacts.[2]

In particular, the semeiotic text that is composed by the promulgated laws, rules, and regulations, as well as the unwritten ideas and practices, of a given environmental jurisprudence regime, is notable for how it expresses specific versions of that singularly complex and culturally telling concept, nature.[3] (In this connection, I would like to underscore how, much like the phenomenon, explored in Chapter Five, of a legal system existing at the national or civilizational level, a discrete body of environmental law and

policy also may be usefully thought of as a text made up of interconnected signs).[4] Within whatever varied, discursive setting the idea of nature is being constructed and conveyed – for instance, visual, aural, or another form of performance art; literature; science and technology; popular culture; politics and law; or an amalgamation of some among these, and countless other ideational venues – the concept is typically woven by uncommonly symptomatic language.[5] As such, the idea of nature is itself a potent semeiotic medium for intimating the foundational influences – religious, epistemic, civilizational, historical, ideological, societal, and so forth – that are involved in constructing the idea in one or another fashion.[6]

### *B. Imagining Nature As Property and Commodity Within the Context of Secularist Environmental Jurisprudence*

In this chapter, my basic concern is with the unspoken, religious import which is signalled by the fact that:

> Our [modern, Western, but especially common–law] legal conception of ownership tells us…that the Earth is something that we can own; it is something that can belong to us and over which we can exercise the various rights and prerogatives of ownership.[7]

Given that, "[w]hen lawyers refer to the physical world, to this field and that forest and the next–door city lot, they think and talk in terms of property and ownership",[8] it follows that modern, Western environmental jurisprudence – especially in its common law form – has tended to presuppose that nature is at once property and a commodity.[9] Consistent with this, one might interpret secularist environmental law and policy as in large measure turning on the notion that "[r]egimes of property rights", that is, "the structure of rights to resources and the rules under which those rights are exercised", constitute a valid basis on which to regulate humans' "use of the [natural] environment".[10]

As I will go on to further explain, this aspect of modernist environmental law and policy points up a significant irony that is embedded within this area of jurisprudence. Without question, secularist environmental jurisprudence has undergone intensive development – heralded, for example, by the US Congress's 1969 passage of the National Environmental Policy Act (NEPA) – as a direct result of the past several decades' heightening of awareness within the modern West concerning the immense environmental harm that has been wrought by human actions, especially such modern historical factors as industrialism.[11] At the same time, modernist environmental jurisprudence has tended to cling, regardless, to "the secularized view of nature as property"[12] that flows from the very, scientistic worldview spawning such economistic ideologies as industrial capitalism. Accordingly, as an ultimate by–product of modernity's naturalistic religious tradition, secularist environmental law and policy predominantly exhibits the immanentist conception of nature and reality that is imagined by the modernist worldview as a whole. Let us now go on to briefly examine, then, the intellectual background from which a quintessentially modernist understanding of nature as property and a commodity has come to inform secularist environmental jurisprudence. Afterward, I will begin to illustrate how this immanentist notion of nature is expressed in environmental law and policy.

### *1. The Intellectual Roots of Modernity's Immanentist Conception of Nature*

#### *i. Historical Landmarks*

In crucial ways, the character and genealogy of modernity's quintessential conception of nature already have been indicated by the depiction and historical analysis of the modernist worldview, including the perennialist critique of this worldview, that I

presented in Chapters Two and Three.[13] Above all, modernity's basic, "secularized view of nature" is founded on the presupposition of a radical, metaphysical division between transcendent divinity and the phenomenal world.[14] This notion of nature is diametrically opposed to the understanding of the natural world intrinsic to the Perennial Tradition, which teaches that "the physical world is related to God by levels of reality which transcend the physical world itself and which constitute the various stages of the cosmic hierarchy."[15]

As I explained in Chapter Three, the late–medieval rise of nominalism helped to usher in a modernist metaphysics in which material phenomena came to be imagined as having a concrete reality that is nondependent on the Transcendent. Concurrently, nominalist doctrine propounded that human reason holds the power to fully produce true knowledge of the material world. As a result, nominalism acted as a crucial, historical building block in laying the groundwork for the paradigmatic, modernist idea that nature is now free to be cognitively captured, and thereby dominated and controlled, by humankind.[16]

The emerging, modernist belief in a cleft between God and the world gained further, profoundly influential expression in the sixteenth– and seventeenth–century advent of mechanical philosophy. As Nasr elaborates:

> The rising view of nature as a machine and the order of nature as a mechanical order was based on the thesis that, because nature itself was devoid of intelligence and life, its order was due to laws imposed upon it by an intelligent being outside of nature—that is, God as the author of nature—but in a sense divorced from it....Reduced to a machine by the new [dualistic] mental conception of what constituted physical reality, nature was to be studied by the human mind through laws that it was in the nature of the mind to understand, and God was reduced to the role of a millwright or a clockmaker....[17]

Nasr goes on to explain how the late–Renaissance advent of a mechanistic

conception of nature helped to lay the base, in turn, for the establishment of modern scientific method. As I will emphasize throughout this chapter, it is difficult to overstate the influence that modern experimental science, together with modernity's concomitant, deep, instrumentalist reliance on technology, have exerted on the modernist idea of nature ultimately signified by secularist environmental jurisprudence. Remaining for the moment, though, within a seventeenth–century historical context, an especially significant shadow is cast by the epic figure of the "rationalistic empiricist" English philosopher Francis Bacon (1561-1626).[18] Emblematized by Bacon is how, within the early modern West, "the new mechanical philosophy" became translated into the popular understanding of a natural world that, as a machine, could be scientifically understood, as well as dominated by humankind, through "the instruments of scientific knowledge".[19] Indeed, as Nasr argues, in terms that will resonate when we consider, in short order, how the domineering, scientistic perception of nature leads directly into the modernist tendency to reduce nature to a proprietary and commodified form:

> In [Bacon] can be found the genesis of that aspect of modern science which is concerned not so much with understanding the order of nature as with dominating over it, with the result of imposing upon nature a purely human order aimed at the attainment of material goals.[20]

Consistent with Nasr's reading of Bacon, one finds reflected in the thought of the latter the proto–positivist conviction that science, with its promise of "the knowledge of Causes, and secret motions of things", is the proper vehicle both for humankind's "effecting of all things possible" (among them the mastery of nature), and, with that, the attainment of human salvation.[21]

With the rise of the Enlightenment, one may identify further intellectual trends feeding the intensifying, "rationality of domination"[22] that typifies modernity's stance

vis-à-vis the natural world. For one, naturalistic thinkers such as the *philosophes* spurred on the predominance of a materialist ontology that continually broadened the distance between God and the world; this, while reducing the essence of physical reality to the form of "atoms in a void."[23] In concert with this, the establishment of the absolute, knowing subject who stands completely over and above the objects of his or her cognition enabled the scientistic, epistemological model of a reducible, natural world that "can be conceived in mathematical terms",[24] and that can be, consequently, assigned its ultimate value by the human mind. Philip Sherrard, a critic of scientism who had ties to the perennialist school, assessed the consequences of the scientistic conception of nature that flows from the accreted, historical influences of the Enlightenment and its antecedent epochs:

> Modern science,...ignoring the sacred aspect of nature as a condition of its own genesis and development, tries to fill the vacuum it has created by producing mathematical schemes whose only function is to help us to manipulate and "dominate" matter on its own plane, which is that of quantity alone. The physical world, regarded as so much dead stuff, becomes the scene of man's uncurbed exploitation for purely practical, utilitarian or acquisitive ends. It is treated as a de-incarnate world of phenomena that are without interest except in so far as they subserve statistics or fill test-tubes in order to satisfy the curiosity of the scientific mind, or are materially useful to man considered as a two-legged animal with no destiny beyond his earthly existence.[25]

### *ii. How Can Modernity's Scientistic Notion of Nature Be Read As Manifesting an Immanentist, Religious Worldview?*

It is important to observe that, much as the perennialists' critique of the modern, Western worldview greatly helps to reveal, but itself largely neglects to recognize, the fundamentally religious character of this worldview, their critical assessment of modernity's secularist conception of nature likewise implies, yet resists explicitly acknowledging, that this conception is imbued with a genuine, religious immanentism.

Invoking terms similar to those I attributed to the perennialists in Chapter Two of the dissertation, where we heard them assert, in essence, that strands of the modernist worldview such as scientism constitute "counter–religion", rather than "authentic religion", Nasr states:

> Although in the West the religious view of nature has been lost, even here it is still religion to which most ordinary people listen, while the number is much greater in other parts of the globe. That is why any secularist ideology that tries to replace religion always tries also to play the role of religion itself. This has happened with the ideology of modern science in the West which for many people is now accepted as a "religion." That is why the people who try to sell you many kinds of goods on television do so as "scientists"—as agents of "authority"—and always wear a white robe, not a black robe of traditional priests. They are trying to look like members of the new "priesthood." They function as the "priesthood" of a *pseudo-religion* [italics mine]. Their whole enterprise is made to appear not as simply ordinary science but as something that replaces religion.[26]

Several pages later in the same essay, Nasr depicts the great extent to which "the environmental crisis…is…the consequence of the secularization of nature and what I call the *absolutization of the human state* [again, italics mine], beginning with Renaissance humanism and all that came after it."[27] He then immediately goes on to suggest that the "absolutization" of the human being is inimical to an authentic "religious perspective".[28] However, as I have maintained throughout the inquiry, modernity's absolutization of the subject, especially as it is expressed in such secularist, juridical ideas as the notion of humankind's ontologically all–encompassing, proprietary and transactional power, is nothing if not a genuine manifestation of what Nasr himself sees as "[t]he desire for the transcendent…which defines what it means to be human".[29] Modernity's absolutization of the subject, which equates, for all intents and purposes, to the apotheosis of the subject and his or her power to control and manipulate the things of the world, necessarily represents a distinct, however misguided, expression of this essential, human "desire for

the transcendent".

Continuing in this vein, we see Sherrard, who on the one hand persuasively observes that modernity "see[s] nature as existing apart from God", at the same time maintain that, indeed, the modern, Western worldview "attribut[es] value and significance solely to those aspects of the natural order which are susceptible to quantitative study".[30] I would claim that Sherrard's depiction, in succinctly alluding to modernity's naturalistic ontology, as well as its reductionist, scientistic epistemology, in fact precisely captures a prime means by which the modernist worldview tacitly signals its unacknowledged, injection and confinement of divinity within the phenomenal world. By regarding "the world…as a self-contained entity…that man is quite entitled to explore, organize and exploit without any reference to the divine",[31] the modernist consciousness imagines nature as a final reality to which humankind, as the omnipotent master of this reality, is free to ascribe an utterly naturalistic, ultimate meaning and significance. Thus, notwithstanding the implication of Sherrard and other perennialists that modernity's phenomenalist conception of nature points to the existence of nothing more than a modern, Western pseudo–religion, I would maintain the opposite. This is because, on my analysis, the modernist notion that nature constitutes a final reality whose ultimate meaning and significance inhere within is little other than the very definition of an authentically religious, albeit immanentist, worldview.

### *2. The Basic Link Between Modernity's Scientistic View of Nature and Its Correlating, Economistic View of Nature*

#### *i. Heidegger: On Nature As a "Standing-Reserve" of Resources*

Once the emerging modern, Western mind came fundamentally to conceive of nature as something that humankind was entitled to control and manipulate by scientific and

technological means, for human ends, it became quite logical for nature further to be envisioned as "primarily a resource to be exploited in the human quest for progress and the regaining of Adam's dominion over the nonhuman world."[32] Scholarship in environmental ethics and environmental philosophy has become keenly aware of just how much Heidegger, in particular, has to contribute to our understanding of how the modern, technological mindset, with its integral utilization of "exact physical science", imagines the natural world as comprising little more than a "standing-reserve" of resources.[33]

As Heidegger indicates in what is his landmark writing for purposes of environmental thought, 'The Question Concerning Technology', modern humanity's tightly intertwined relationship with technology has the effect of fostering humankind's rapacious "setting-upon" of nature, whereupon "the energy concealed in nature" is "unlocked" and "transformed" by humans into orderable resources.[34] This utter reduction and manipulation of nature as a storehouse of economic assets is possible, in the first instance, because "[m]odern science's way of representing pursues and entraps nature as a calculable coherence of forces."[35] As Ladelle McWhorter illustrates, the scientistic, technocratic, and ultimately economistic impulse that Heidegger discerns in the essence of modernity contributes not only to the reduction of natural phenomena to the form of economic existents, but also, as the dissertation has foreshadowed and will further explore in Chapter Eight, the similar reduction of human beings. Specifically, it follows from this impulse that:

> All is here simply for human use. No plant, no animal, no ecosystem has a life of its own, has any significance, apart from human desire and need. Nothing, we say, other than human beings, has any intrinsic value. All things are instruments for the working out of human will. Whether we believe that God gave Man dominion or

> simply that human might (sometimes called intelligence or rationality) in the face of ecological fragility makes us always right, we managerial, technological thinkers tend to believe that the earth is only a stockpile or a set of commodities to be managed, bought, and sold. The forest is timber; the river, a power source. Even people have become resources, human resources, personnel to be managed, or populations to be controlled.[36]

As one might imagine, part of what lends Heidegger his appeal in the eyes of some advocates of environmental protection is his recognition that modernity's troubling exaltation of human power over nature "threatens man with the possibility that it could be denied to him…to experience the call of a more primal truth."[37] On Heidegger's view, modernity's reduction of nature to a mere stockpile of resources awaiting instrumental manipulation for the purpose of material, human gain embodies the grave danger that humankind will be unable to access the fundamental, existential meaning that can unfold only in a world unfettered by humankind's technological control. As I read Heidegger's position, humankind's failure to protectively treat nature as if it holds a significance more fundamental than its modernist status "as standing-reserve" is a self–punishing ill, akin to the failure to pursue available teachings of divine reality, that prevents "man [from seeing] and [entering] into the highest dignity of his essence."[38]

### *ii. The Pivotal Presupposition of an Economistic View of Nature: Nature As Property and Commodity*

#### *a) The Telling Character of "Multiple-Use/Sustained-Yield Management"*

As I will build on later in the chapter, secularist environmental jurisprudence, especially in its recent form within the US, might be interpreted as having some of its primary, institutional roots in the public land management regimes "that grew out of the conservation movement at the turn of the [twentieth] century".[39] Emerging from out of the states and territories of the late nineteenth–century American West, the conservation

movement was inspired by a fear that American forests and wildlife were being lost to federally "abetted" "private exploitation".[40] Following what is thought of as one of the movement's inaugural events, the US Congress's 1872 designation of "Yellowstone National Park as a permanently public property," conservation went on to be politically and juridically enshrined during the Theodore Roosevelt presidency.[41] To take a pivotal instance, it was under the aegis of the Roosevelt administration that the influential conservationist Gifford Pinchot (1865-1946) established the US Forest Service.

Under Pinchot's leadership, conservation drew into US public policy a German idea, stemming from the late eighteenth and early nineteenth centuries, known as "the sustained-yield theory of environmental management".[42] The sustained–yield theory is based on the principle that science holds the key to determining how forests can be "managed" in a fashion that accords with the precise number of "trees [that] could be taken without diminishing the forests themselves or undermining their long-term biological continuity."[43] From Pinchot's standpoint, sustained–yield doctrine furthered a proper understanding of nature that Heidegger, for one, likely would have recognized as quintessentially modernist. As Donald Worster depicts Pinchot's eminently Baconian view:

> …the state, guided by technically trained professionals like himself, must take an active role in managing the nation's natural resources in order to secure a sustainable future. For [him], nature was little more than a utilitarian commodity to be managed and harvested for the common good. [He] had absorbed completely the dominant world-view of [his] era, which taught that the primary goal of social life is economic progress—steadily increasing production over the long term—adding only the corollary that such production must be directed by the state and its experts to avoid destroying the organic social order.[44]

Thus, on the basis of sustained–yield doctrine, together with the associated, conservation–based tenet that public land should be put to productive, "multiple uses",

foundational, US public land law postulated that public lands are comprised essentially of natural resources. As such, this building block of secularist environmental law and policy "reflect[s] perceptual construction of the natural environment as a vast supermarket, where resource-extractive industries go shopping for the food, fiber, minerals, and water needed to sustain human life and society."[45] For example, as was originally set forth "in the Secretary of Agriculture's charge to Pinchot as the first head of the Forest Service", US national forests "were to be managed "for the first benefit of the home builder," and thereafter for agriculture, mining, lumber, and cattle, "considering the locally dominant industry first.""[46] A "primary mission of commodity use" was in this manner drawn upon, as ""multiple-use/sustained-yield management"...became the official and in 1960 the statutory policy of the Forest Service".[47]

*b) Inferring a Proprietary Conception of Existence from the Bellwether Doctrine of "Multiple-Use/Sustained-Yield Management"*

It is crucial to realize how "the reduction of nature to pure economic resource" that is arguably an inherent trait of scientistic, technocratic modernity, and that is boldly manifested, for one, in the conservation–based land management principles flowing directly from the modernist worldview, in turn further bespeaks an underlying, fundamentally proprietary conception of existence.[48]

In part by analyzing the primary sources extracted in Keith Thomas's often–cited 1983 book, *Man and the Natural World: A History of the Modern Sensibility,* Markku Oksanen demonstrates in a compelling fashion how what Thomas identifies as the predominating, sixteenth– to nineteenth–century English belief in the "virtually unlimited" character of "Man's authority over the natural world" took a largely proprietary form.[49] As Oksanen explains, such statements as the 1620 claim that "[Man]

might use [the natural world] as he pleased,... 'for his profit or for his pleasure',

> often indicate that mastery over nature was frequently formulated by using the vocabulary of ownership, possession, property, and other related words.[50]

One might infer from the historical context and general tenor of the extracted, primary source material analyzed by Oksanen that the pervasively influential figure of Locke could not be far behind, and indeed it is not. Elsewhere, Oksanen indicates how the Lockean theory of property, which I argued in the previous chapter to be a basic influence on the secularist juridical mind, especially in the common law tradition, and beyond this, on the modern, Western worldview as a whole, has, moreover, profoundly informed modernist law's implied understanding of the natural environment.[51]

It is true that, on one level, such a principle of environmental jurisprudence as "multiple-use/sustained-yield management" reflects the conservation movement's awareness that it is necessary for the state to act as a governor on the individual actor who would otherwise exercise his or her right to private property in a manner that exploits the common pool of natural resources. In fact, as Oksanen makes clear, Locke himself emphasized that the natural right of individuals to appropriate portions of the earth as their private property is subject to important limitations, such as the duty not to spoil land.[52] Further, "multiple-use/sustained-yield management" points up a fundamental tension which is inherent in the Lockean concept of property, and which serves as the basis for fervent debate both in the ongoing analysis of existing environmental jurisprudence regimes, and in the proffering of emendations to environmental law and policy; namely, the question of whether "environmental goods [should] be treated as private or as common property".[53]

This being said, I would maintain that "multiple-use/sustained-yield management"

exemplifies how secularist environmental law and policy, in springing from within modernity's scientistic, economistic worldview, remains largely reflective of "a general desire prevalent in [Locke's] time as well as today for maximum agricultural productivity."[54] As regarded in this light, the natural environment as a whole tends to be reified in the concrete form of "land", which is in turn "perceived as little more than legally described, discrete pieces of negotiable property."[55] For that matter, it might be argued that, especially within the present context of George W. Bush–era US public policy, with its tremendous emphasis on private property rights and "economic prosperity" as forming the gateway to "environmental progress", there even is a "vision of space" in which "the universe [is thought of] as a thing to be exploited, as property."[56]

*c) Following the Thread of Logic: Land and Nature As Commodities*

Consistent with the line of reasoning that I pursued in Chapter Six, it follows that, once the notion of nature as property becomes intertwined with such historical factors as the rise of capitalism, nature becomes simultaneously imagined as a commodity which can serve as the object of marketplace transactions. Herman Daly and John Cobb, as well as Worster, have demonstrated especially well how the economistic, modernist tendency to reduce the vast complexity of the natural environment to land, conceived of as a discrete, material and spatial entity, makes "it…easy to treat [land]", and in turn nature itself, "as something to be bought and sold."[57] As Worster details, modern capitalism's creation "for the first time in history [of] a general market in land" had the effect of transforming land and nature into commodities that were "made available to be traded without restraint."[58] On my reading, his provocative analysis suggests that this historical process helped to foster the preoccupation with the agricultural productivity of land that

one may discern as a common thread running from Locke, through to the conservation doctrine that lies at the roots of secularist environmental jurisprudence:

> What actually happened to the world of nature, once it had been reduced to the abstraction "land," is one of the most interesting historical problems presented by the capitalist transformation and will require a great deal more research by environmental historians. There are many possible lines for that research to take, but among the most promising is an inquiry into the restructuring of agroecosystems that capitalism promoted. First in England and then in every part of the planet, agroecosystems were rationally and systematically reshaped in order to intensify, not merely the production of food and fiber, but the accumulation of personal wealth.[59]

As I will elaborate in the chapter's next major section, one need not look solely to the paradigmatic example of conservation doctrine, and its associated juridical principles, to construe how secularist environmental law and policy signifies a scientistic, economistic conception of nature. From the body of US land law that is "suffus[ed]" with an "economistic, developmental bias that...remains its dominant theme",[60] to regulatory regimes that take as their touchstone technocratic, managerial experts' reduction of human and environmental risks to the form of integers within a benefit–cost calculus, ample proprietary and transactional signs of modernist, religious immanentism are there to be deciphered.

## II. How Secularist Environmental Jurisprudence Manifests an Economistic Conception of Nature: Key Examples

As I indicated earlier in the chapter, a great irony of secularist environmental law and policy is that, despite its seeming recognition of the fact that the modernist worldview has given, and continues to give direct rise, to tremendous environmental degradation, this body of environmental jurisprudence has remained, in large measure, epistemically rooted in the same worldview. (Nonetheless, there increasingly are arising important currents of intellectual and institutional resistance to Western environmental

jurisprudence's tendency to stay lodged within the modernist mindset. As I will later elaborate, a particularly salient example is the precautionary principle, whose inherent questioning of humankind's ability to scientistically assay and manage environmental risks has thus far found its most welcoming juridical homes within international environmental jurisprudence, and "in European Community law").[61] Eric Katz argues:

> The goal of the domination of Nature remains with us, in the Western world, even today....[T]he primary goal of the Enlightenment project of the scientific understanding of the natural world is to control, manipulate, and modify natural processes for the increased satisfaction of human interests. Humans want to live in a world that is comfortable—or at least, a world that is not hostile to human happiness and survival. Thus the purpose of science and technology is to comprehend, predict, control, and modify the physical world in which we are embedded. This purpose is easy to understand when we view technological and industrial projects that use Nature as a resource for economic development—but the irony is that the same purpose, human control, motivates much of environmentalist policy and practice.[62]

On my reading, Katz's observations are limited somewhat by their failure to capture, in the last sentence, the necessary link between scientism and economism that ultimately plays out in secularist environmental jurisprudence. However, the broader point that he powerfully suggests – specifically, that the policies and practices following in the wake of the quite recent, Western burgeoning of environmental consciousness remain infused with the presuppositions of a typically modernist, Baconian worldview – allows us to draw forth for ourselves the economistic implications for environmental law and policy. In many respects, today's Western (and, for that matter, global) body of environmental jurisprudence is the product of the 1960s "rise of modern environmentalism", a movement that led, in the US, to such a "defining [1970] event" as "Earth Day, an extraordinary nationwide mass demonstration of environmental concern that vividly demonstrated public support for strong government action."[63] Thus, Sheila Jasanoff asserts that:

> The codification of environmental law around the world during the last three decades of the twentieth century can justly be seen as an achievement of humankind's enhanced capacity to reflect upon its place in nature. With this body of legislation, the governments of virtually all the nations of the earth announced their intention to safeguard the environment through systematic regulatory action, and to subordinate the desires and appetites of their citizens to the needs of other species and biological systems on the planet.[64]

Yet, at the same time, secularist environmental jurisprudence seems to have remained powerfully influenced by the idea (which originally informed, interestingly, the early modern, Enlightenment–era, and post–Enlightenment development of the concept of ecology, whose etymological forerunner was "oeconomy [*sic*] of nature") that "the earth…must be somehow managed for maximum output."[65] This is especially the case, it might be argued, in such common law (or predominantly common law) nations as the US and Canada, which persist in taking an "approach to environmental law and policy [that] does not address consumption and population", "the root causes of environmental degradation".[66]

While it would be difficult, and necessarily somewhat arbitrary, to attempt to divide the whole of secularist environmental jurisprudence into fixed, impermeable categories that neatly describe exactly what is being regulated, and by what regulatory means, one can seek to offer certain explanatory categories that serve the aims of one or another line of analysis. For example, a law school casebook seeking to educate students in the legal processes and substantive laws of a given, national environmental law and policy regime might find it useful to distinguish among areas of environmental jurisprudence specifically pertaining to natural resource development, the regulation of "hazardous wastes and toxic substances", "air pollution control", "water pollution control", and so forth.[67]

By parallel, for the purposes of the present inquiry, I would like to offer what I submit is a useful, basic distinction for thinking about the different sorts of ways in which secularist environmental law and policy manifests an economistic conception of nature. First, we will consider how the law regulates the manner in which portions of the natural environment – as, the law presumes, property – may be used by their owners. A telling motif within this context is brought to the fore by US land use law, such as the question raised therein of the extent to which the government must compensate a landowner for regulating his or her land in a fashion that impinges upon its "economically beneficial use".[68] Thereafter, I will draw into the discussion the ""command and control" systems which proscribe environmentally harmful effects and require specific control measures to produce environmentally beneficial results",[69] particularly their powerful reliance on benefit–cost analysis and a linked, instrumentalist approach to the sought assessment and management of environmental risks.

### *A. State Regulation of Property Use*

#### *1. Environmental Jurisprudence in Service of the Liberal "Values of Property and Autonomy"*

Especially within the context of US environmental jurisprudence, which draws at its roots on the "foundational…values of property and autonomy" that inhere "in the political culture of the United States," "the protection of personal and property rights" stands, Mark Sagoff maintains, as one of the prime "purposes of environmental law".[70] On his understanding, "[US] laws controlling pollution", such as the 1970 Clean Air Act, collectively offer a classic example of a mode of environmental regulation that "seeks…to honor [individuals'] personal and property rights" by protecting them from

harm that might otherwise be caused by other parties in the use of their property.[71] Thus, in this sense, environmental law and policy is operating under a quintessentially liberalist paradigm that regards the parties whose conduct is being regulated, as well as the parties for whose benefit the regulation is being undertaken, as, in their shared, ontological essence, property holders.

Further, while envisioning environmental law and policy as a discrete, codified body of regulatory jurisprudence might be a valid conceptual artifact reflecting the popular and legal consciousness of the past several decades, it is by no means a post–1960s innovation to apply a proprietary conception of land and the natural world, and of individuals' attendant rights and duties, in order to counteract environmental ills. As I indicated in Chapter Six, the common law has a lengthy historical tradition of applying proprietarily conceived, nuisance law to

> [prohibit] an infinite variety of environmental harms. People have used it to protect themselves from pesticide sprays, smoke, soot, steam, dust, fumes, and other air pollutants. Road salt has been successfully challenged under nuisance law, as have leaking oil tanks and seeping privies. Foul smells are often found to be nuisances, as are noise and vibrations from commercial and industrial operations. In the 1920s, one [Canadian] judge went so far as to say, "Pollution is always unlawful and, in itself, constitutes a nuisance" (*Groat v. Edmonton* 1928, 532).[72]

As John McLaren has illustrated, it was accepted as early as "the end of the eighteenth century…that there was a natural right to clean air, and to water undiminished in quantity", thereby providing a jurisprudential basis for employing common law nuisance principles to attempt to address the spike in environmental pollutants that accompanied the Industrial Revolution.[73]

### *2. The Importance of Land Use Law*

As Sagoff's analysis suggests, a basic means by which US environmental

jurisprudence, for one, seeks to further the liberal "values of property and autonomy" is by regulating the use of property, itself. Given this, one finds that the regulation of property in the US for the purposes of "environmental management" – a process that manifestly dates from the time of the conservation movement, but which also might be interpreted as reaching from the colonial era of land development, up through the period of nineteenth–century industrialization – has been profoundly influenced by the individualist and "reifying" property doctrines of the common law.[74] As read in a panoramic light, this historical factor points to a notable juridical emphasis on regarding the natural environment as a repository of resources that can be harvested in the pursuit of private wealth.

Consistent with the modernist tendency, which I characterized in the previous, major section of the chapter, towards reducing the whole of nature to the status of land that is free to be imagined as commodified property, law governing the use of land, specifically, constitutes a great deal of that portion of secularist environmental jurisprudence hinging on the regulation of property use. Land use law that falls under the rubric of environmental law and policy might be understood as taking the form, for example, of zoning regulations, common law doctrines of trespass or nuisance, and regulations that:

> impose…duties on landowners…to maintain the integrity of landmarks and scenic areas, to refrain from filling wetlands, to preserve open space, to restore mined land to its original contours, to maintain habitat for endangered species, to allow public access to waterways and beaches, to leave minerals in place to support surface structures, and so on.[75]

It is illuminating to note that while land use law certainly functions as a focal point of secularist environmental jurisprudence, environmental law and policy does also frame some elements of the natural world as existents that take the form of personal, rather than

real, property, and that are, as such, also subject to state regulation. An important example is offered by the matter of property in animals. Significantly, one may discern in the common law, as it pertains to property in animals, an economistic emphasis that very much parallels what we will see to be the stress that land use law similarly places on ensuring the economic productivity of land. A vital lesson of this is that, embedded within secularist environmental jurisprudence is an inherent tension between, on the one hand, the imperative to protect, by regulatory means, the natural environment for the public good, and, on the other, the iconic, modernist liberal idea of an apotheosized right to private property. Owing to the literally sacrosanct character of this right, especially as it is postulated within the secularist juridical mind, one might expect that, under such an ethos as that of modern, US liberalism, the value accorded to the property right will tend to supersede the value affixed to the ideal of "managing" the environment for the common good.[76] In this connection, Gary L. Francione asserts as follows, after first alluding to the landmark, 1992 US Supreme Court case, *Lucas v. South Carolina Coastal Council,* that we will soon return to in order to consider how it enshrines the idea of the economic productivity of land:

> Although *Lucas* dealt with real, as opposed to personal, property, the principles would apply to animal property, and especially uses of animals involving land, such as cattle grazing or the construction of a research laboratory. Although the state can regulate the use of property pursuant to police power to abate nuisances, it may not deny an owner all economic or beneficial use of property through regulation or frustrate investment-backed expectations. American law, echoing common-law principles, has historically permitted animal users virtually unlimited discretion to treat their animal property as they wish. Significant regulation of the ownership of animal property would at least be suspect.[77]

*i. US Land Use Law in Historical Context*

On Arthur McEvoy's enlightening account, the history of US land use law embodies

a "constant tension" between "market and nonmarket values" that fits with the struggle between capitalist and other property discourses, such as civic republicanism, which similarly has marked American legal history.[78] According to his explanation, the "[e]cological concerns [that] have emerged as an important factor in debates over land use in the second half of the twentieth century…are only the latest manifestations of the long-standing…concern" that envisions property ownership as a means for pursuing, in the first instance, not capital gain, but rather, "the highest good" that is constituted by "participation with other citizens in self-government".[79] Nonetheless, the juridically fostered development of US commercial society, especially during the nineteenth century, helped ultimately to bring about an overall schema of land use law that distinctly represents the rise to predominance of a potent, "pro-developmental bias".[80] McEvoy states:

> The law of property in the United States contains a profound bias toward developmental uses and against such nonmarket values as the health and welfare of the communities that live on the land or, indeed, the ecological well-being of the land itself. This bias is so deeply ingrained in the U.S. legal culture that it presents itself as a law of nature: the fundamental liberty of private owners to develop their property as they please is the cornerstone of American civil and economic freedom, while relatively unlimited access to the resources of the public lands is an all but inviolate principle in American politics.[81]

McEvoy's conclusions are bolstered by those of other scholars such as Freyfogle and William Cronon (the latter of whom serves as a source both for McEvoy's and Freyfogle's analyses), who shed light on the late eighteenth– and early nineteenth–century origins of US land use policy. As Freyfogle illustrates, in a broad historical light:

> Colonial Americans began buying and selling nature practically from the moment they stepped ashore. To do that, they first had to divide nature into commodities, such as acres of land, iron-ore mines, and waterwheel sites. This decidedly utilitarian and individualistic mode of valuing nature has been dominant in American culture for a full two centuries. Nature has been a storehouse of resources that gain

> values only through human use, not an integrated ecological whole to be studied and valued as such.[82]

At this point in his analysis, Freyfogle cites to Cronon, who has demonstrated in detail how, by 1800, New England ecosystems had been thoroughly transformed into repositories of marketable commodities by European colonists who brought ashore with them the emerging consciousness of modern capitalism. As Cronon observes, in alluding to the ecological degradation wrought by "[t]he transition to capitalism", "[w]e live with [the] legacy today" of an historical process whereby "New England ecosystems [were integrated] into an ultimately global capitalist economy."[83] Further to Cronon's point, the reduction of New England lands to commodified property represented the supplantation, by an ecologically harsh, economistic mentality that "assumed the limitless availability of more land to exploit," of Indigenous land use practices whose emphasis on deriving subsistence rather than rather than profit from the land had "made relatively slender demands on the ecosystems".[84]

As I noted in the prior chapter, legal historians such as James Willard Hurst and Morton Horowitz have explained how nineteenth–century US jurisprudence proceeded to encourage the advancing trend towards the wide–scale, commercial development of land. On McEvoy's synoptic reading of this line of legal historiography, long–standing, common–law protections against environmental degradation, such as nuisance law, came largely to be superseded by the courts' crafting of economistic property jurisprudence:

> Common-law rules, which frequently authorized complaining neighbors to put a stop to offensive uses themselves without waiting for formal authorities to step in, limited the harvest of wildlife, the diversion of rivers and streams from their natural courses, even the erection of structures that blocked neighbors' access to light and air....In the early nineteenth century, many of these traditional restrictions fell away as American courts overturned these "anti-developmental" property rules and replaced them with market-oriented, pro-development doctrines so as to encourage what the

> legal historian J. Willard Hurst (1956) called the "release of entrepreneurial energy." The relative "reasonableness" of competing uses for land or water, for example, came by 1850 to be measured and compared in terms of their dollar contribution to the community's net economic product....[85]

McEvoy maintains that, notwithstanding the "pro-developmental bias...built into [US] law over the course of the nineteenth century by courts, legislatures, and private citizens", "the utilitarian, market-oriented calculus" that increasingly drove land use policy (as we saw illustrated by the rise of conservation) did help "reasonably well to serve both economic expansion and the preservation of public virtue for quite some time."[86] Indeed, one might interpret conservation, with its call for the maintenance of public lands over and against private exploitation (even if it called, at the same time, for these lands to be made available for regulated, private economic use) as a paradigmatic demonstration of such a policymaking balance. In the twentieth century, however, McEvoy indicates, "the stakes would rise", as "the corrosive effects of the free market in land" became exemplified not only by the arguable, loss of political virtue that civic republicans had feared could result from profit–driven, property ownership, but also by, in a related sense, the massive, industrially–exacerbated despoiling of the natural environment.[87]

*ii. Lucas and the Recent, Economistic Outlook of US Land Use Law*

It is ironic that, even though land use law constitutes such a major component of US environmental jurisprudence, a compelling argument can be made that, "[a]s a whole, the United States' land regulatory system is a failure."[88] Some basic, interconnected reasons for this, indicate John Turner and Jason Rylander, have been the fragmented, chaotic character of land use regulation that occurs in a simultaneous, uncoordinated way at local, regional, and national levels; and land development processes that stubbornly move

forward without paying adequate, long–term heed to the urgent imperatives for ecological sustainability and preservation.[89]

Simultaneously, ongoing tensions between "market and nonmarket values", to employ McEvoy's phrase, have been manifested, following the early 1970s advent of wide–scale, environmental regulation, in such significant, recent intellectual influences on land use, and other forms of environmental policymaking, as free–market environmentalism. Free–market environmentalism represents a powerful movement to counter the perceived harm that modern environmental regulation has wrought against business and property interests. It seeks to achieve this by integrating, into environmental law and policy, market–based strategies such as the privatization of water resources, and the invention of tradable allowances that regulated, industrial polluters can purchase in order to entitle them to legitimately emit pollutants.[90] This sort of economistic doctrine, explains Freyfogle, turns on

> the construction of actual markets in resources and environmental amenities, whether in water, pollution emissions, conservation easements, river rafting rights, scenic views, free-flowing river segments, or migratory bird nesting spots.[91]

In the wake of the 2004 re-election of President Bush, one might expect that US environmental policymaking will tend to integrate these sorts of approaches more actively than ever; this, as "the election returns that gave Mr. Bush a clear victory and expanded the Republicans' majorities in Congress have emboldened those determined to hard-wire free-market principles into all environmental policy."[92]

The notion that the iconic role of private property in the popular and juridical consciousness of the US continues, in large measure, to perpetuate a strongly economistic model of land use law is exemplified by the influential, and, in a semeiotic vein, deeply

telling *Lucas* opinion, which was delivered by the leading conservative Supreme Court Justice Antonin Scalia. *Lucas* deals with the constitutional question of when the governmental regulation of land rises to the level of an effective "taking" of property, for which the state must compensate the title holder.[93] With its wide broadening of the spectrum of governmental land regulation measures that would demand monetary compensation, *Lucas* can be interpreted as an indicator of how the intensifying influence of such a school of thought as law and economics has helped to establish "the preeminence of economic rights" over other, competing values in US jurisprudence.[94]

The facts behind *Lucas* involved a South Carolina owner of beachfront property who sued the state after the application of its Beachfront Management Act "brought…to an abrupt end" his residential development plans for the land.[95] The state had forestalled David Lucas's plans on the basis that they would have interfered with the erosion–prevention "baseline" that had been, quite literally, drawn in the sand by the South Carolina Coastal Council. As Justice Scalia explains, "under the Act construction of occupable improvements was flatly prohibited seaward of a line drawn 20 feet inward of, and parallel to, the baseline".[96] Lucas's claim was that "the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives", lest he suffer a constitutionally prohibited violation of due process.[97] Agreeing with Lucas, the trial court awarded him $1,232,387.50 in government compensation. This decision then was reversed by the Supreme Court of South Carolina, which indicated that the Act's consequences for the value of Lucas's property, onerous as they may have been, were justified, in "that the Beachfront Management Act [was] properly and validly

designed to preserve…South Carolina's beaches."[98]

In its turn reversing the decision of the Supreme Court of South Carolina, the US Supreme Court ultimately established that, "Where the State seeks to sustain regulation that deprives land of all economically beneficial use,…it may resist compensation" only if there is a demonstration that the landowner had, in the first instance, no title–based right to the "proscribed use interests".[99] In other words, conjuring up the common law's deeply–fixed conception of a landowner's uniquely powerful hold over his or her land, the Court limited the conditions under which the government may freely "prohibit all economically beneficial use of land" to those that were foreseen "in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[100] Thereby steering around the more recently–emphasized imperatives for environmental protection whose expression is predominantly found within statutory and administrative law, Scalia opined (while nonetheless leaving the final, remanded determination to a state court): "It seems unlikely that common law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land".[101] As a commentator might succinctly respond, "Indeed."

McSpadden observes that such a line of reasoning as that set forth in *Lucas* has "caused some analysts to speculate that the Court is moving gradually toward a return to the [Franklin D. Roosevelt–era] New Deal Court's interpretation of the Fourteenth Amendment's due process clause as protecting private property from most regulation by all levels of government."[102] (McSpadden's observation can be elucidated by noting that, during the mid–1930s, the US Supreme Court invalidated several major portions of

President Roosevelt's New Deal program for recovery from the Great Depression; this, on the grounds that the sweeping economic and regulatory reforms brought in by Roosevelt and his allied, Democratic Congress represented illegitimate overextensions of federal power).[103] This insight has gained ever more currency during the George W. Bush era of US environmental law and policy, during which "[c]onservatives across the country" (in carrying forth a process that dates from "at least the mid-1990's and the 1994 Republican [Congress's] "Contract With America") "have championed the idea of compensation for aggrieved land owners", in response to "environmental or zoning rules [that] hurt [owners'] investments".[104]

### *B. Secularist Environmental Law and Policy's Powerful Reliance on Instrumentalist Models of Risk, and Benefit–Cost Analysis*

#### *1. The Modernist Idea of Risk, and Environmental Jurisprudence*

On Jasanoff's view, "[n]o single concept has been so central to the development of modern environmental law as risk."[105] Consistent with her appraisal, I would submit that the paradigmatically modernist idea of risk that has been woven into the semeiotic text of secularist environmental jurisprudence acts as an acutely telling indicator for the scientistic, economistic conception of nature, and underlying, immanentist religious tradition, that this text further reveals.

In a manner that is especially prominent within US law, environmental regulatory regimes have been deeply dependent on the quintessential, modernist notion that the risk of specific environmental harms is capable of being mathematically calculated, and with this, adequately known, by scientific experts, whose authoritative findings can thereby serve as the basis for technocratic managers' instrumentalist control over the environment.[106] During the past several decades, there has arisen a major body of

scholarly research – much of it centering around, or at least partially inspired by, Ulrich Beck's analysis of the modern 'risk society' – that reveals modern, Western civilization's deep preoccupation with the assaying and management of the innumerable risks that are endemic to life in the era of modern, hyper–complex, technological industrialism.[107] On the whole, the "dominant [modernist] discourses of risk" tend to embody presuppositions such as the following: risk, in its essence, involves the threat of physical harm to the biological health of humans and ecosystems; the chances of such harm's occurring are calculable on the basis of experts' probabilistic reasoning and assessment; it is possible to discover specific, causative links between this potential harm, and ways in which natural processes have been affected by human actions; and, perhaps above all, it is feasible to manipulate and control, in a rationalist, instrumental fashion, the sequence of interactions between nature and humankind that give rise to, or perpetuate, a given risk.[108]

Even before the advent of Beck's account of the 'risk society', scholars understood that the idea of risk inevitably conveys, often in quite an illuminating fashion, the religious, epistemic, cultural, societal, and political–economic influences informing particular occurrences of the idea.[109] This is strikingly so within the context of modernity. The modernist notion of environmental risks as scientifically and mathematically knowable factors that can be controlled through the implementation of technocratic expertise is patently suffused with reductionist, epistemic premises that imply the natural world to be a machine subservient to the omnipotent, mechanical skills of humankind. Similarly reductionist – and, one may argue, similarly self–deluding – is a classic precept of modernist risk assaying, which holds that a clear distinction can be drawn between, on the one hand, the ostensibly value–neutral processes of scientific risk

assessment, and, on the other, the value–laden, policymaking terrain that plays host to deliberations concerning the acceptability of risks, as well as other aspects of risk management.[110]

*2. The Key Role of Benefit–Cost Analysis*

Perhaps most crucial for us is the potent degree to which the modernist idea of risk, especially as it plays out within secularist environmental jurisprudence, is indicative of the modern, Western predominance of economistic ideology, and, with this, a political–economic commitment to the perpetuation of industrial capitalism. Inherent in the modernist paradigm of risk assaying is benefit–cost analysis, a regimen that reduces to a strict, monetary calculus the relative benefits and detriments of addressing a particular, environmental condition.[111] As the philosopher Nicholas Rescher argues, "the orthodox theory" of "risk evaluation and comparison" boils down the assaying of risks to a benefit–cost analysis.[112]

A prime means by which US environmental law and policy, for one, integrates benefit–cost analysis is through the mechanism of the regulatory impact analysis (RIA). An RIA must be conducted by the Environmental Protection Agency (EPA) "and other federal regulatory agencies" to "ensure that", in the case of "all new 'major' [environmental] regulations...the potential benefits to society outweigh the potential costs of the proposed action".[113] A sequence of Executive Orders from the administrations of Presidents Jimmy Carter, Ronald Reagan, and Bill Clinton helped to embed benefit–cost analysis within the RIA regime.[114] Especially noteworthy was President Reagan's Executive Order 12291, which "instituted a purely economic criterion" for the evaluation of environmental law and policy by setting forth a narrow,

essentially economic definition of societal costs, vis-à-vis a vague notion of societal benefits.[115] Pursuant to President Reagan's Order, "[c]ompliance with [these] requirements was policed, not by the courts, but by the Office of Management and Budget. Also, economic impact assessment requirements and other economic barriers to environmental regulations were established."[116]

The effective reduction of human and environmental health, indeed, of natural phenomena, generally, to the form of integers in an economic equation bespeaks a foundational, political–economic imperative for the enhancement of "productive performance".[117] As Wolfgang Sachs forcefully asserts, the unfortunate adoption by much, mainstream environmental policymaking of a theoretical approach that "reduces ecology to a set of managerial strategies aiming at resource efficiency and risk management…treats as a technical problem what in fact amounts to no less than a civilizational impasse".[118] The modernist, juridical and political validation and enforcement of industrialism, and, at a foundational, epistemic level, of an economistic conception of nature, is signified by secularist environmental law's ready reliance on benefit–cost analysis. It is ironic that this reliance can be evaluated as fatally undermined, in an operational sense, by its failure to address, and its possible exacerbation of, the root, epistemic and ideological causes of environmental harm.[119]

### *3. The Precautionary Principle: Posing a Fundamental Challenge to Secularist Environmental Law and Policy's Intertwined Conceptions of Risk and Nature*

As I indicated earlier in the analysis of how secularist environmental jurisprudence specifically manifests an economistic conception of nature, the precautionary principle is a juridical concept that represents, even from within the setting of Western legal systems, an emerging recognition of, and resistance to the deleterious effects of this way of

imagining the natural world. Over the past two to three decades, the principle has been invoked within an increasing number of law and policy pronouncements and regimes concerning public health and the natural environment, especially in the international and European Community arenas. The precautionary principle mandates that, where a potential, environmental or health hazard appears to exist, preventive steps should be taken to forestall or mitigate the hazard, even in the absence of determinate, scientific evidence purporting to establish a causal link between the hazard, and harm to humans and the environment. In this way, the precautionary principle – which derives from the Federal Republic of Germany's 1970s domestic environmental policy motif of *Vorsorgeprinzip,* or "precaution principle", a precept that advocated proactive, environmental protection – stands in contradistinction to the reactive posture of modernist attempts at risk assaying and management.[120]

In an illustrative light, the precautionary principle serves to underscore the problematic, epistemic, ideological, and political–economic presuppositions that have informed secularist environmental law and policy's predominating conceptions of risk and nature; this, as the principle poses a radical, intellectual and institutional challenge to the presumed validity of these conceptions. To begin, the precautionary principle indicts the implicit claim that modern, scientistic, risk assaying schemas are able to predict with reasonable, scientific and mathematical certainty, and thereby enable the instrumental manipulation and controlling of, unfolding environmental hazards. By contrast, the precautionary principle suggests that the natural world, far from being a mechanistic entity whose workings can be fully known and predictably manipulated with the aid of modern, empirical science, is in reality a bastion of indeterminacy whose full essence and

meaning cannot be captured by a probabilistic, materialist mode of inquiry, nor its processes reliably harnessed by instrumental means.[121] Thus, the principle calls for the prevention of potential environmental hazards from the outset, so to speak, before they are introduced into the natural world, and perhaps yield unforeseeable harm.

In keeping with its call for potential risks to be reduced before they arise, the precautionary principle further confronts the industrialist model of existence that deems hazards to human and environmental health to be, in essence, an unavoidable outflow of economic productivity. The principle encourages the development, instead, of more environmentally–friendly production systems that regard the well–being of persons and the environment as a prime end to be factored into the construction of production processes themselves, rather than as an ancillary, commodifiable existent.[122]

Ultimately, the precautionary principle's emphasis on the inadequacy of reducing the evaluation of environmental risks to an economic calculus highlights the vital significance of imperatives for environmental protection, such as ethical and aesthetic considerations, that, at least from a non–secularist perspective, cannot be legitimately cobbled into a naturalistic framework. The principle intimates that the final meaning of the natural environment, together with fundamental rationales for environmental preservation, cannot be fully captured by a scientistic, economistic mode of risk assessment and management. In this way, the precautionary principle can be interpreted as being consistent with religious conceptions of nature that understand the essential import of natural phenomena as deriving from sacred transcendence.[123]

## III. Contrasting Secularist Environmental Law and Policy's Immanentist Notion of Nature As Commodified Property With a Theistic Understanding of Nature

### *A. Overall Religious Perspectives on the Natural Environment*

In *Earth's Insights,* his influential, comparative 1994 study of "ecological ethics" across a varied, and sometimes quite esoteric, spectrum of the world's belief traditions, J. Baird Callicott offers a provocative observation:

> ...purely secular programs—bureaucratic, technological, legal, or educational—aimed at achieving environmental conservation may remain ineffective unless the environmental ethics latent in traditional worldviews animate and reinforce them.[124]

Callicott's criticism of the limitations of such "secular programs" is consistent with what I have suggested to be the inherently problematic character of a body of secularist environmental jurisprudence that, while recognizing the role of the modernist worldview in helping to create severe, environmental degradation, nonetheless remains, at the epistemic level, largely dependant on that worldview. In a similar vein, the environmental philosopher Max Oelschlaeger has argued that "religion is the institution best suited to deal with the ethical and political questions raised by ecocrisis".[125] This, Oelschlaeger indicates, is in significant measure because religious, as opposed to secularist, programs of environmental ethics are better equipped to avoid the arrogant and delusory, modern, technocratic belief "that the human species can manage planet Earth."[126] Callicott's and Oelschlaeger's assertions act to highlight the profound contrast between the modernist worldview, with its guiding assumption that nature is free to be held and controlled by humans, whether for boldly rapacious or more benevolent ends, and religious traditions that regard natural phenomena as sacred existents that are not properly subject to ultimate, human domination. I would like to succinctly expand on

this contrast, so as to further demonstrate, in the revealing light of comparativity, the hidden, religious essence of secularist environmental law and policy's economistic idea of nature.

Over the past few years, there has arisen a large body of literature by scholars who share Callicott's and Oelschlaeger's sense that the world's great religious traditions, rather than the modern secularist worldview, provide the most fruitful insights for helping to ameliorate the environmental harm largely wrought from within modernity. This field of literature was originally inspired, in part, by a wish on the part of thinkers sympathetic to religion to contest Lynn White's now well–known 1967 thesis that the biblical tradition, with its emphasis on God's granting to humankind dominion over the earth, helped to propagate human abuse of the environment. Accordingly, writers in the field have instead illustrated how multiple world religions, the Abrahamic faiths among them, in fact doctrinally foster the stewardship and preservation of nature.[127]

In this section of the chapter, my primary concern is with a radically theistic perspective on the natural world, most notably an Islamic view, because it offers perhaps the sharpest contrast, metaphysically and theologically speaking, to modern secularism's immanentist notion of nature. However, the literature that has sprouted up concerning religious responses to environmental degradation, and religious conceptions of nature in general, is by no means restricted to the exploration of theistic traditions. Various strands within the exceptionally diverse tradition of Hinduism, as well as Buddhism, Confucianism, Taoism, Shintoism, Indigenous traditions from various continents, and African religious traditions, all are among the worldviews which, while keeping in mind their own, internally differing forms and branches, have had their broadly salutary

outlooks on the natural environment analyzed.[128] Moreover, it should be noted that there are a variety of religious perspectives on the environment – some of them, for instance, strands of 'ecological spirituality' practiced within the modern West, partly in response to modern industrialism's despoiling of nature – that can be interpreted as immanentist.[129] Possible doctrinal critiques of these specific perspectives notwithstanding, one must distinguish between their avowed manner of sacralizing nature, and the unspoken piety of modern materialism.

### *B. The Islamic Tradition on Nature As a Sacred Trust, Bestowed by God to Humankind*

As I initially indicated in the introduction to the dissertation, and have had cause to subsequently mention in, for example, the Chapter Five discussion of the Perennial Tradition's understanding of the universe as a semeiotic text that refers to the Transcendent Creator, the Islamic worldview is pervaded by an awareness of nature's sacred origin and essence, and with this, humankind's responsibility for treating nature reverentially. As Charles Le Gai Eaton phrases it:

> The Muslim is assured that the whole earth is a mosque for him....The fields, the forests and the desert are equally fitting as places of prayer and therefore demand the same respect that is accorded to a conventional mosque. The link with heaven can be established anywhere and everywhere....[130]

Proceeding from an intellectual and spiritual standpoint that is, like Eaton's, intimately attuned to the classical, Islamic notion of a textual cosmos that (for one who perceives the text's meaning) ubiquitously bespeaks the Transcendent Divine, Nasr already emphasized to us that, for a believing Muslim, "the phenomena of nature [comprise] so many *ayat* [i.e., signs] of the Supreme Author".[131] As the complement to "the written Quran", "the text of the cosmic Quran" helps, in concert with the former book, to guide its reader

towards the divine Source of all existence, the Source that gives rise, necessarily, to nature and its ultimate meaning.[132] As Nasr further articulates:

> The reality of nature is not exhausted by its outward appearance. Each phenomenon is precisely "an appearance" of a noumenal reality. The phenomena of nature are not only facts but primarily symbols related to the states of being above. Nature is not only the domain of quantity, the source of power and resource. It is above all the abode of spiritual presence and source for the understanding and contemplation of divine wisdom....As the complement to the Qur'an as revelation, nature responds to our spiritual needs.[133]

At the metaphysical and theological level, the Islamic understanding of nature as a semeiotic text that points beyond itself to, rather than capturing, the divine font of its final significance, could not present a keener contrast to the modern, scientistic conception of nature, which implicitly regards natural phenomena as themselves constituting the immanent source and repository of their own, ultimate meaning. As we can infer from the line of reasoning that the inquiry has followed thus far, this vast, doctrinal divide has profound ramifications: we see, on the one hand, Islam's idea of nature as an entity of God's that is conditionally "held in trust by human beings, to be used only in accordance with [its] divinely ordained purposes"; and we further see, on the other hand, the modern, secularist notion of nature as human property, with which humankind is utterly entitled to do as it wills.[134]

Indeed, it would appear that the distinction between Islam's notion of nature as belonging, in the first instance, to God, and the modern West's notion of nature as belonging, in a parallel sense, to humankind, lies at the heart of the divergent schemas for environmental ethics to which the two worldviews can give rise. From the Islamic perspective, there is a divinely ordained, human responsibility to use natural existents only in ways that are consistent with their status as manifestations of God's glory; hence,

the existence of such requirements in *Shari'a* as commands not to waste or despoil the fruits of nature, nor to use protected lands in ways that run contrary to the public good.[135] By contrast to Islam's understanding of the natural world's transcendent origin and essence, secularist environmental jurisprudence implicitly adheres to an immanentist notion of nature's materialist essence. As such, secularist environmental law and policy relies primarily on scientistic and economistic logic – which has the inherent detriment of fuelling the very assumption that nature can be reduced to commodified property – in its attempts to restrain human actors from wreaking further havoc on the natural environment. Whether such modernist logic is sufficient to the challenging and urgent task of environmental protection is perhaps doubtful; however, the evidence increasingly suggests that non–secularist responses to the situation offer a hopeful, alternative path.

## 7. Endnotes

1. Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (New Haven, CT and London: Yale Univ. Press, 1999), p. 4.

2. *Ibid.*

3. *Cf.* Peter Coates, *Nature: Western Attitudes Since Ancient Times* (Berkeley, CA and Los Angeles: Univ. of California Press, 1998), pp. 1-2.

4. *Cf.* Katrina S. Rogers, *Toward a Postpositivist World: Hermeneutics for Understanding International Relations, Environment, and Other Important Issues of the Twenty-First Century* (New York: Peter Lang, 1996). Therein, it is explained how unwritten sources can serve as textual elements of international environmental law and policy, in particular, and are, as such, ripe for hermeneutic inquiry.

5. See, for example, Carl G. Herndl and Stuart C. Brown, eds., *Green Culture: Environmental Rhetoric in Contemporary America* (Madison, WI: Univ. of Wisconsin Press, 1996); and Patrick D. Murphy, ed., *Literature of Nature: An International Sourcebook* (Chicago: Fitzroy Dearborn, 1998).

6. There seems to be an ever–expanding, and occasionally somewhat bewildering, body of literature on the notion of nature as a concept that necessarily points to the bedrock influences leading it to be constructed in one or another vein. From among these sources, I have found the following to be especially useful: Coates, *Nature*; Denis E. Cosgrove, *Social Formation and Symbolic Landscape* (Madison, WI: Univ. of Wisconsin Press, 1998) [originally published in 1984]; Phil Macnaghten and John Urry, *Contested Natures* (London: SAGE Publications, 1998); Simon Schama, *Landscape & Memory* (London: Fontana Press, 1995) [especially pp. 3-19]; and Robert M. Torrance, ed., *Encompassing Nature: A Sourcebook* (Washington, D.C.: Counterpoint, 1998).

7. Eric T. Freyfogle, *Justice and the Earth: Images for Our Planetary Survival* (New York: Free Press, 1993), p. 51.

8. *Ibid.,* p. 49.

9. See, for instance, *ibid.*; Andrews, *Managing the Environment, Managing Ourselves,* pp. 28-50; and Craig Anthony (Tony) Arnold, 'The Reconstitution of Property: Property As a Web of Interests', *Harvard Environmental Law Review,* vol. 26 (2002), pp. 281-364.

10. Susan Hanna, Carl Folke, and Karl-Göran Mäler, 'Chapter I: Property Rights and the Natural Environment', pp. 1-10 in Susan S. Hanna, Carl Folke, and Karl-Göran Mäler, eds., *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Washington, D.C.: Island Press, 1996), p. 1. See also Susan Hanna, Carl Folke, and Karl-Göran Mäler, 'Property Rights and Environmental

Resources', pp. 15-29 in Susan Hanna and Mohan Munasinghe, eds., *Property Rights and the Environment: Social and Ecological Issues* (Washington, D.C.: Beijer International Institute of Ecological Economics and The World Bank, 1995).

11. As NEPA states:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Public Law 91-90 (42 U.S.C. §§ 4321-4345), pp. 1-4 in Jackson B. Battle, Robert Fischman, and Mark Squillace, *Environmental Decisionmaking: NEPA and The Endangered Species Act: Statutes and Regulations* (Cincinnati: Anderson Publishing Co., 1995), § 4331 [NEPA § 101], p. 1.

12. Susan Hanna and Svein Jentoft, 'Human Use of the Natural Environment: An Overview of Social and Economic Dimensions', pp. 35-55 in Hanna et al., *Rights to Nature,* p. 37.

13. See especially *supra,* pp. 39-47, 73-81, and corresponding endnotes.

14. See H. Paul Santmire, *The Travail of Nature: The Ambiguous Ecological Promise of Christian Theology* (Minneapolis: Fortress Press, 1985), p. 136. Nasr's insights are also invaluable in this connection. See, for example, Nasr, *Religion and the Order of Nature,* pp. 80-190; and Seyyed Hossein Nasr, 'The Spiritual and Religious Dimensions of the Environmental Crisis', pp. 73-100 in Barry McDonald, ed., *Seeing God Everywhere: Essays of Nature and the Sacred* (Bloomington, IN: World Wisdom, 2003).

15. *Ibid.,* p. 80.

16. See Paul van Dijk, 'Theological-Anthropological Reflections on the Environmental Issue', pp. 56-62 in Wim Zweers and Jan J. Boersema, eds., *Ecology, Technology and Culture: Essays in Environmental Philosophy* (Cambridge, UK: White Horse Press, 1994), p. 59.

17. Nasr, *Religion and the Order of Nature,* p. 131.

18. *Ibid.,* p. 135.

19. See *ibid.* and van Dijk, 'Theological-Anthropological Reflections on the Environmental Issue', p. 59.

20. Nasr, *Religion and the Order of Nature,* p. 135.

21. See Bacon's 1624 work, *The New Atlantis,* reprinted at pp. 710-32 in John M. Robertson, ed., *The Philosophical Works of Francis Bacon* (Freeport, NY: Books for Libraries Press, 1970). This edition of Bacon's collected works is reprinted from the texts and Latin–to–English translations, as well as the notes and prefaces, included in R.L. Ellis's and J. Spedding's standard, nineteenth–century edition of the same. With respect to Bacon's belief in the salvational significance of scientific inquiry, see Robert K. Faulkner, *Francis Bacon and the Project of Progress* (Lanham, MD: Rowman & Littlefield, 1993); and Robert E. Stillman, *The New Philosophy and Universal Languages in Seventeenth-Century England: Bacon, Hobbes, and Wilkins* (London: Associated University Presses, 1995), p. 15.

For a classic, but not uncontroversial work that includes an interpretation of Bacon as a progenitor of the tyranny and domination over humans and nature, alike, that were wrought by the self–destructive, Enlightenment project, see Theodor W. Adorno's and Max Horkheimer's 1944 book, *Dialektik der Aufklarung* [known in English as *Dialectic of Enlightenment,* it is available in an edition translated by John Cumming (London and New York: Verso, 1997)].

22. Ziauddin Sardar, 'Development and the Locations of Eurocentrism', pp. 44-62 in Ronaldo Munck and Denis O'Hearn, eds., *Critical Development Theory: Contributions to a New Paradigm* (London and New York: Zed Books, 1999), p. 53.

23. Herman E. Daly and John B. Cobb, Jr., *For the Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future,* 2nd ed. (Boston: Beacon Press, 1994), p. 390.

24. Frederick A. Olafson, *Naturalism and the Human Condition: Against Scientism* (London and New York: Routledge, 2001), p. 3.

25. Philip Sherrard, 'The Desanctification of Nature', pp. 109-30 in McDonald, *Seeing God Everywhere,* pp. 117-8.

26. Nasr, 'Spiritual and Religious Dimensions of the Environmental Crisis', p. 76.

27. *Ibid.,* p. 90.

28. *Ibid.*

29. Seyyed Hossein Nasr, 'Ours Is Not a Dead Universe', *Parabola: Myth, Tradition, and the Search for Meaning,* vol. 29, no. 2 (2004), pp. 6-13, p. 9.

30. Sherrard, 'Desanctification of Nature', p. 116.

31. *Ibid.,* p. 113.

32. David Kinsley, *Ecology and Religion: Ecological Spirituality in Cross-Cultural Perspective* (Englewood Cliffs, NJ: Prentice Hall, 1995), p. 133.

33. See Martin Heidegger, *Basic Writings: from Being and Time (1927) to The Task of Thinking (1964),* rev. ed., David Farrell Krell, ed. (New York: HarperCollins, 1993) [specifically the 1953 selection 'The Question Concerning Technology', at pp. 307-41]; this, together with such secondary literature as Ladelle McWhorter, ed., *Heidegger and the Earth: Essays in Environmental Philosophy* (Kirksville, MO: Thomas Jefferson Univ. Press, 1992), and Michael E. Zimmerman, *Contesting Earth's Future: Radical Ecology and Postmodernity* (Berkeley, CA and Los Angeles: Univ. of California Press, 1994).

34. Heidegger, 'Question Concerning Technology', *passim.*

35. *Ibid.,* p. 326.

36. Ladelle McWhorter, 'Guilt as Management Technology: A Call to Heideggerian Reflection', pp. 1-10 in McWhorter, *Heidegger and the Earth,* p. 6.

37. Heidegger, 'Question Concerning Technology', p. 333.

38. *Ibid.,* p. 337.

39. Michael E. Kraft and Norman J. Vig, 'Environmental Policy from the 1970s to 2000: An Overview', pp. 1-31 in Norman J. Vig and Michael E. Kraft, *Environmental Policy: New Directions for the Twenty-First Century,* 4th ed. (Washington, D.C.: CQ Press, 2000), p. 10.

40. Donald Worster, *The Wealth of Nature: Environmental History and the Ecological Imagination* (New York and Oxford, UK: Oxford Univ. Press, 1993), p. 103.

41. See *ibid.,* p. 104, together with Donald Worster, *Nature's Economy: A History of Ecological Ideas,* 2nd ed. (Cambridge, UK: Cambridge Univ. Press, 1994), pp. 261-71.

42. Worster, *Wealth of Nature,* pp. 144-5.

43. *Ibid.,* p. 144.

44. *Ibid.,* p. 145; Worster, *Nature's Economy,* p. 267.

45. Lloyd Burton, *Worship and Wilderness: Culture, Religion, and Law in Public Lands Management* (Madison, WI: Univ. of Wisconsin Press, 2002), p. 170.

46. Andrews, *Managing the Environment, Managing Ourselves,* pp. 145-6.

47. *Ibid.,* p. 146.

48. See Piers H.G. Stephens, 'Picking at the Locke of Economic Reductionism', pp. 3-23 in N. Ben Fairweather, Sue Elworthy, Matt Stroh, and Piers H.G. Stephens, eds., *Environmental Futures* (Basingstoke, UK: Macmillan Press, 1999), p. 17.

49. See Keith Thomas, *Man and the Natural World: A History of the Modern Sensibility* (New York: Pantheon Books, 1983), p. 21, together with Oksanen, 'Nature As Property', p. 31.

50. *Ibid.;* and Thomas, *Man and the Natural World,* p. 21.

51. Oksanen, 'Nature As Property', pp. 154-69.

52. *Ibid.,* p. 168.

53. Zev Trachtenberg, 'The Environment: Private or Common Property?', *Oklahoma Law Review,* vol. 50, no. 3 (1997), pp. 399-403, p. 399. For useful examples of this debate, see: Lynton Keith Caldwell and Kristin Shrader-Frechette, *Policy for Land: Law and Ethics* (Lanham, MD: Rowman & Littlefield, 1993); Rose, 'Given-Ness and Gift'; and Arnold, 'Reconstitution of Property'. As Rose argues in an intriguing fashion,

> Modern environmentalism needs to build on the normative metaphors of property....We can use the concepts of property, and especially common property, to derive norms of responsibility and carefulness about a shared trust that we want to last. *Ibid.,* pp. 28, 31.

54. Eugene C. Hargrove, *Foundations of Environmental Ethics* (Englewood Cliffs, NJ: Prentice Hall, 1989), p. 69.

55. Daly and Cobb, *For the Common Good,* pp. 97-117; Caldwell and Shrader-Frechette, *Policy for Land,* p. 4.

56. Felicity Barringer, 'Bush Record: New Priorities In Environment', *The New York Times,* September 14, 2004, pp. A1, A18; Dennis Overbye, 'Adventure or Inquiry?: Two Visions of Cosmic Destiny', *The New York Times,* February 3, 2004, p. D3.

57. See Daly and Cobb, *For the Common Good,* pp. 97-117, 256; and Worster, *Wealth of Nature,* p. 58.

It should be noted that, once nature is reified as marketable land, it then is free to be divided up "into transferable parts—acres of land, barrels of oil, tones of ore, board feet of lumber", that is, not only parcels of land, per se, but also exchangeable resources that can be extracted from land. See Eric T. Freyfogle, *Bounded People, Boundless Lands* (Washington, D.C.: Island Press, 1998), p. 65.

At this point, I would like also to offer a few guideposts regarding the fairly diverse literature that exists on modernity's reduction of nature to the form of a commodity. As one might expect, Daly and Cobb's *For the Common Good* and Worster's *Wealth of*

*Nature* provide two excellent starting points. Especially as pertains to a US context, Freyfogle is a superb source of information and insight. In addition to the book of his that I cite directly above, see his work, *The Land We Share: Private Property and the Common Good* (Washington D.C.: Island Press, 2003), especially pp. 179-201, where he draws on another important volume concerning the US's historical commodification of nature, William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983). Also recommended are Freyfogle's essay, 'Community and the Market in Modern American Property Law', pp. 382-414 in John F. Richards, ed., *Land, Property, and the Environment* (Oakland, CA: Institute for Contemporary Studies, 2002), which has the added benefit of a vast, pertinent "suggested reading" list, and, as well, his article, 'The Culture of Owning', *Orion,* vol. 24, no. 2 (2005), pp. 16-23.

Further, there is a significant amount of Marxist–oriented literature dealing with how "capitalist economics…forces the commodification of the environment." Rory O'Brien, 'Law, Property, and the Environment: An Introduction', pp. 57-63 in Matthew Alan Cahn and Rory O'Brien, *Thinking About the Environment: Readings on Politics, Property and the Physical World* (Armonk, NY and London: M.E. Sharpe, 1996), p. 60. Useful entry points into this line of analysis are: Noel Castree, 'Commodifying what nature?', *Progress in Human Geography,* vol. 27, no. 3 (2003), pp. 273-97; and Arturo Escobar, 'Constructing Nature: Elements for a poststructural political ecology', pp. 46-68 in Richard Peet and Michael Watts, eds., *Liberation Ecologies: Environment, development, social movements* (London and New York: Routledge, 1996).

58. Worster, *Wealth of Nature,* p. 58.

59. *Ibid.*

60. Arthur McEvoy, 'Markets and Ethics in U.S. Property Law', pp. 94-113 in Harvey M. Jacobs, ed., *Who Owns America?: Social Conflict Over Property Rights* (Madison, WI: Univ. of Wisconsin Press, 1998), p. 104.

61. Theofanis Christoforou, 'The Precautionary Principle: Risk Assessment, and the Comparative Role of Science in the European Community and the US Legal Systems', pp. 17-51 in Norman J. Vig and Michael G. Faure, eds., *Green Giants?: Environmental Policies of the United States and the European Union* (Cambridge, MA and London: MIT Press, 2004), p. 42.

62. Eric Katz, 'Nature's Presence: Reflections on Healing and Domination', pp. 49-61 in Andrew Light and Jonathan M. Smith, eds., *Space, Place, and Environmental Ethics* (Lanham, MD: Rowman & Littlefield, 1997), p. 52.

63. Andrews, *Managing the Environment, Managing Ourselves,* pp. 201-26.

64. Sheila Jasanoff, 'Law', pp. 331-46 in Dale Jamieson, ed., *A Companion to Environmental Philosophy* (Malden, MA and Oxford, UK: Blackwell, 2001), p. 331.

65. Worster, *Nature's Economy,* p. 37. See also Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics* (Madison, WI: Univ. of Wisconsin Press, 1989), p. 22.

66. David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003), pp. 273-88.

67. See, for example, Thomas J. Schoenbaum and Ronald H. Rosenberg, *Environmental Policy Law: Problems, Cases, and Readings,* 2nd ed. (Westbury, NY: The Foundation Press, 1991).

68. *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886.

69. Schoenbaum and Rosenberg, *Environmental Policy Law,* p. 34.

70. Mark Sagoff, 'Environmental Policy and Law', pp. 784-9 in Stephen G. Post, ed., *Encyclopedia of Bioethics,* 3rd ed. (New York: Macmillan Reference USA, 2004), 5 vols., vol. 2, p. 784. Sagoff's basic work relating to this matter is *The economy of the earth: Philosophy, law, and the environment* (Cambridge, UK: Cambridge Univ. Press, 1988).

71. Mark Sagoff, 'Environmental Policy and Law', pp. 701-7 in Warren Thomas Reich, ed., *Encyclopedia of Bioethics,* rev. ed. (New York: Macmillan Reference USA, 1995), 5 vols., vol. 2, p. 701.

72. Elizabeth Brubaker, 'The Common Law and the Environment: The Canadian Experience', pp. 87-118 in Peter J. Hill and Roger E. Meiners, eds., *Who Owns the Environment?* (Lanham, MD: Rowman & Littlefield, 1998), p. 93.

73. McLaren, 'Nuisance Law and the Industrial Revolution', p. 170.

74. Burton, *Worship and Wilderness,* p. 22.

75. Mark Sagoff, 'Property Rights and Environmental Law', pp. 48-53 in Claudia Mills, ed., *Values & Public Policy* (Fort Worth, TX: Harcourt Brace Jovanovich College Publishers, 1992), p. 48.

76. *Cf.* Matthew Alan Cahn, *Environmental Deceptions: The Tension Between Liberalism and Environmental Policymaking in the United States* (Albany, NY: SUNY Press, 1995).

77. Gary L. Francione, *Animals, Property, and the Law* (Philadelphia: Temple Univ. Press, 1995), p. 48.

78. McEvoy, 'Markets and Ethics in U.S. Property Law'; and *supra,* pp. 178-9, endnote 13.

79. McEvoy, 'Markets and Ethics in U.S. Property Law', pp. 94, 100.

80. *Ibid.,* p. 94.

81. *Ibid.*

82. Freyfogle, *Land We Share,* p. 182.

83. Cronon, *Changes in the Land,* p. 170.

84. *Ibid.,* pp. 166, 169.

85. McEvoy, 'Markets and Ethics in U.S. Property Law', p. 102; see also Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States,* especially pp. 3-32.

86. McEvoy, 'Markets and Ethics in U.S. Property Law', pp. 94, 103.

87. *Ibid.,* pp. 103-4.

88. John Turner and Jason Rylander, 'Land Use: The Forgotten Agenda', pp. 60-75 in Marian R. Chertow and Daniel C. Esty, eds., *Thinking Ecologically: The Next Generation of Environmental Policy* (New Haven, CT and London: Yale Univ. Press, 1997), p. 63.

89. *Ibid., passim.*

90. A formative source for the free–market environmentalism movement is the eponymously titled book, Terry L. Anderson and Donald R. Leal, *Free Market Environmentalism* (Boulder, CO: Westview Press, 1991).

91. Freyfogle, *Land We Share,* pp. 186-7.

92. Felicity Barringer and Michael Janofsky, 'G.O.P. Plans to Give Environmental Rules a Free-Market Tilt', *The New York Times,* November 8, 2004, p. A14.

93. *Lucas, passim.*

94. Lettie McSpadden, 'Environmental Policy in the Courts', pp. 145-64 in Vig and Kraft, *Environmental Policy,* p. 158.

95. *Lucas,* 505 U.S. at 1008.

96. *Ibid.,* at 1008-9.

97. *Ibid.,* at 1009.

98. *Ibid.,* at 1009-10.

99. *Ibid.,* at 1027.

100. *Ibid.,* at 1029.

101. *Ibid.,* at 1031. Lettie McSpadden sums up the acutely ironic, eventual disposition of the *Lucas* case: "The *Lucas* decision eventually forced the state to buy his property at such an inflated figure that it subsequently had to sell the property for development." McSpadden, 'Environmental Policy in the Courts', p. 157.

102. *Ibid.,* p. 158.

103. Kenneth Jost, ed., *The Supreme Court A to Z,* 2nd ed. (Washington, D.C.: Congressional Quarterly Inc., 1998), pp. 335, 387-8.

104. Felicity Barringer, 'Rule Change in Oregon May Alter the Landscape', *The New York Times,* November 26, 2004, pp. A1, A26.

105. Jasanoff, 'Law', p. 334.

106. *Cf.,* for example, *ibid.,* pp. 334-6; Richard N. L. Andrews, 'Risk-Based Decisionmaking', pp. 210-31 in Vig and Kraft, *Environmental Policy;* and David Cayley, *The Age of Ecology: The Environment on CBC Radio's Ideas* (Toronto: James Lorimer & Co., 1991), p. 120 [from an interview with the keenly provocative critic of modern, Western environmental and development policy, Wolfgang Sachs].

107. Ulrich Beck, *Risk Society: Towards a New Modernity,* Mark Ritter, trans. (London: SAGE Publications, 1998) [originally published in 1986 as *Risikogesellschaft: Auf dem Weg in eine andere Moderne*].

On the risks intrinsic to the complex, industrial and technological systems of modernity, see Charles Perrow, *Normal Accidents: Living With High-Risk Technologies* (New York: Basic Books, 1984).

108. See Scott Lash and Brian Wynne, Introduction', pp. 1-8 in *ibid.,* as well as the very valuable volume, in terms of both further analysis and bibliographical guidance, that Lash and Wynne have helped to edit, Scott Lash, Bronislaw Szerszynski, and Brian Wynne, eds., *Risk, Environment & Modernity: Towards a New Ecology* (London: SAGE Publications, 1996).

109. See, for instance: Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (Berkeley, CA: Univ. of California Press, 1982) [a pioneering work on the cultural and social contingency of the content and meaning ascribed to the idea of risk]; and Vincent T. Covello and Jeryl Mumpower, 'Risk Analysis and Risk Management: A Historical Perspective', pp. 519-40 in Vincent T. Covello, Joshua Menkes, and Jeryl Mumpower, eds., *Risk Evaluation and Management* (New York: Plenum Press, 1986). For some excellent sources from after 1986, see Giddens, *Consequences of Modernity* [especially his contrastive inquiry, at pp. 100-12, into the modern, secularist conception of humanly created risks, vis-à-vis pre–modern, religious understandings of risks arising from divine forces at work within the

natural world]; and Niklas Luhmann, *Risk: A Sociological Theory,* Rhodes Barrett, trans. (Berlin: Walter de Gruyter, 1993).

110. For illustrations of this presumed distinction, see Kathryn Harrison and George Hoberg, *Risk, Science, and Politics: Regulating Toxic Substances in Canada and the United States* (Montreal and Kingston: McGill-Queen's Univ. Press, 1994); and Deborah G. Mayo and Rachelle D. Hollander, eds., *Acceptable Evidence: Science and Values in Risk Management* (New York and Oxford, UK: Oxford Univ. Press, 1991).

111. Benefit–cost analysis is a term coined in the US, pursuant to a 1936 "legal requirement imposed...on the water resource projects of the federal government". The technique is alternatively known in the United Kingdom, for example, as cost–benefit analysis. Alan Gilpin, *Dictionary of Environmental Law* (Cheltenham, UK: Edward Elgar, 2000), pp. 19-20.

112. Nicholas Rescher, *Risk: A Philosophical Introduction* (Washington, D.C.: University Press of America, 1983), pp. 44-5.

113. See Ludwig Krämer, 'The Roots of Divergence: A European Perspective', pp. 53-72 in Vig and Faure, *Green Giants?,* p. 56; Gilpin, *Dictionary of Environmental Law,* pp. 265-7 [providing an excellent, comparative chart explaining how benefit–cost analysis, or parallel procedures, factor into environmental regulatory regimes in various countries, both within the common law and civil law traditions]; and A. Myrick Freeman III, 'Economics, Incentives, and Environmental Regulation', pp. 190-209 in Vig and Kraft, *Environmental Policy,* pp. 191-7.

114. *Ibid.,* p. 193.

115. Cahn, *Environmental Deceptions,* p. 29.

116. Krämer, 'Roots of Divergence', pp. 56-7.

117. Wolfgang Sachs, *Planet Dialectics: Explorations in Environment and Development* (London and New York: Zed Books, 1999), p. 68.

118. *Ibid.*

119. For a further, detailed philosophical critique of the axial role of benefit–cost analysis within modernist risk assaying, see Kristin Shrader-Frechette, *Science Policy, Ethics, and Economic Methodology: Some Problems of Technology Assessment and Environmental-Impact Analysis* (Dordrecht, Holland: D. Reidel, 1985).

120. There is an abundance of useful literature on the precautionary principle, covering such matters as its historical and conceptual foundations; strategies for, and the challenges facing its implementation; and the essential ways in which it runs counter to modernist models of risk. Some recommended starting points are: Christoforou, 'Precautionary Principle'; Commission of the European Communities, *Communication*

*from the Commission on the Precautionary Principle* (Brussels: Commission of the European Communities, 2000); David VanderZwaag, 'The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces', *Journal of Environmental Law and Practice,* vol. 8, no. 3 (1999), pp. 355-75; Carolyn Raffensperger and Joel Tickner, eds., *Protecting Public Health & The Environment: Implementing the Precautionary Principle* (Washington, D.C.: Island Press, 1999); and David Freestone and Ellen Hey, eds., *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague: Kluwer Law International, 1996).

121. *Cf.* Brian Wynne, 'Uncertainty and Environmental Learning: Reconceiving Science and Policy in the Preventive Paradigm', *Global Environmental Change,* vol. 2, no. 2 (1992), pp. 111-27 [on how the precautionary principle helps to "retrieve indeterminacy"].

122. See R. Michael M'Gonigle, 'A Dialectic of Centre and Territory: The Political Economy of Ecological Flows and Spatial Relations', pp. 3-16 in Fred P. Gale and R. Michael M'Gonigle, eds., *Nature, Production, Power: Towards and Ecological Political Economy* (Cheltenham, UK: Edward Elgar, 2000), p. 11.

123. For example, as Llewellyn specifically shows, Quranic injunctions against the "[c]orruption" of creation, and the "destruction of the environment", together with the correlating "demands that all natural resources be used frugally and efficiently, and that pollution be prevented, reduced, and cleaned up", make Islamic doctrine consistent with a call for "the precautionary principle to be adopted with regard to development activities". See Llewellyn, 'Basis for a Discipline of Islamic Environmental Law', pp. 198-9.

124. J. Baird Callicott, *Earth's Insights: A Multicultural Survey of Ecological Ethics from the Mediterranean Basin to the Australian Outback* (Berkeley, CA: Univ. of California Press, 1994), p. 234.

125. Oelschlaeger, *Caring for Creation,* p. 43.

126. *Ibid.*

127. The relevant essay by White, which originally appeared in the journal *Science,* is reprinted and surrounded by a seminal debate concerning it in Ian G. Barbour, *Western Man and Environmental Ethics: Attitudes Toward Nature and Technology* (Reading, MA: Addison-Wesley, 1973).

128. There are several effective strategies by which one can enter into, and select from, this ever–expanding body of literature. One way is to access the works produced by major research institutes, of which there are now several, that do significant work on religion and the environment. For example, the Centre for Studies in Religion and Society (CSRS), University of Victoria, Victoria, Canada, where I have been housed while researching and writing this dissertation, has emerged as a prime contributor to the field. See, for example, the following CSRS–originating publications, each of which offers insights into a breadth of religious traditions, as well as helpful bibliography:

Harold Coward, ed., *Population, Consumption, and the Environment: Religious and Secular Responses* (Albany, NY: SUNY Press, 1995); Harold Coward, ed., *Traditional and Modern Approaches to the Environment on the Pacific Rim: Tensions and Values* (Albany, NY: SUNY Press, 1998); and Harold Coward and Daniel C. Maguire, eds., *Visions of a New Earth: Religious Perspectives on Population, Consumption, and Ecology* (Albany, NY: SUNY Press, 2000). In addition, Harvard's Center for the Study of World Religions has been producing a valuable, multi–volume series on 'Religions of the World and Ecology', distributed by Harvard Univ. Press. Each constituent volume focuses on a distinct religious tradition, such as Islam, Buddhism, and so forth [or, a set of related traditions, as with, for instance, the volume, John A. Grim, ed., *Indigenous Traditions and Ecology* (Cambridge, MA: Harvard Univ. Press, 2001)]. The Vatican also has been involved in the research area, in intriguing ways. See, for instance: *Religion and the Use of the Earth's Resources: Acts of a Christian-Muslim Colloquium Organized Jointly by The Pontifical Council for Interreligious Dialogue (Vatican City) and The Royal Academy for Islamic Civilization Research Al Albait Foundation (Amman-Jordan),* Rome, 17-20 April 1996.

Then, too, perennialist scholars have made substantial and often quite poetic contributions to the literature. Consult, for example: Seyyed Hossein Nasr, 'Islam, the Contemporary Islamic World, and the Environmental Crisis', pp. 85-105 in Foltz, et al., *Islam and Ecology;* Nasr, *Religion and the Order of Nature;* McDonald, *Seeing God Everywhere;* Kenneth Oldmeadow, 'The Translucence of the Eternal: Religious Understandings of the Natural Order', *Sacred Web: A Journal of Tradition and Modernity,* no. 2 (1998), pp. 11-31 [providing a helpful bibliography of perennialist writings on nature]; and Kenneth Oldmeadow, '"Signposts to the suprasensible": Notes on Frithjof Schuon's understanding of "Nature"', *Sacred Web: A Journal of Tradition and Modernity,* no. 6 (2000), pp. 47-58.

Further, the International Society for Environmental Ethics maintains an invaluable, updated bibliography at its web site [http://www.cep.unt.edu/ISEE.html], which offers one of the most efficient means for researching the vast, journal and monographic literature on religion and the environment.

Given the context of the present inquiry, it is also interesting to observe that, with respect to writing specifically on the implications of religious thought for environmental jurisprudence, the singularly rich tradition of Islamic law has received a notable amount of distinct treatment. See, for instance: Llewellyn, 'Basis for a Discipline of Islamic Environmental Law'; Mawil Izzi Dien, *The Environmental Dimensions of Islam* (Cambridge, UK: Lutterworth Press, 2000), especially 'Islamic Legal Perspectives on the Environment', at pp. 97-116; and Mawil Izzi Dien [transliterated as Deen in this source], 'Islamic environmental ethics, law, and society', pp. 189-98 in J. Ronald Engel and Joan Gibb Engel, eds., *Ethics of Environment & Development: Global Challenge, International Response* (Tucson, AZ: Univ. of Arizona Press, 1990).

129. See, for example: Holmes Rolston, III, 'Scientific Inquiry', pp. 387-413 in Peter H.

Van Ness, ed., *Spirituality and the Secular Quest* (New York: Crossroad, 1996), pp. 406-11; and Catherine L. Albanese, *Nature Religion in America: From the Algonkian Indians to the New Age* (Chicago and London: Univ. of Chicago Press, 1990), pp. 153-98.

130. Eaton, *Remembering God,* p. 41.

131. Nasr, 'Cosmos and the Natural Order', p. 346. As a fellow perennialist who is, like Eaton, deeply steeped in the Islamic tradition, in particular, Nasr provided a foreword to Eaton's *Remembering God.*

132. See Nasr, 'Cosmos and the Natural Order', p. 345.

133. Nasr, 'Islam, the Contemporary Islamic World, and the Environmental Crisis', p. 96.

134. Llewellyn, 'Basis for a Discipline of Islamic Environmental Law', p. 198.

135. *Ibid., passim.*

# Chapter 8

## Intellectual Property Law, and Law Governing Human Biological Property: Recreating the Transcendent Source of Knowledge and Life Within the World

### I. The Parallel Fashion in Which These Two Areas of Secularist Law Together Signify Modernity's Immanentist Faith

Intellectual property law, especially when read in conjunction with modernist legal doctrine governing human biological property, offers further, powerful intimations of how secularist law's tendency to imagine all existents as commodified property exemplifies modernity's immanentist faith.

#### *A. Intellectual Property Law: Converting Knowledge and Creativity Into Concrete, Economic Existents*

Today commonly regarded as a discrete body of jurisprudence encompassing, at its heart, the property rights surrounding trademarks, copyrights, patents, and trade secrets, intellectual property law is fused together, at the level of its Renaissance– and early modern–era genealogical foundations, with "the early stages of capitalism."[1] This hypostasizing area of law effectively reduces to corporeal, commodified property, as if by a metaphysical sleight–of–hand, multiple forms and manifestations of an essentially intangible entity, knowledge. In the process, intellectual property doctrine acts as a prime, institutional agent for "protect[ing] the legitimacy and intellectual suasion of the liberal world view".[2] It achieves this by converting the nebulous phenomena of knowledge and creativity into concrete, economic existents. By means of this conversionary act, intellectual property law seeks to square the intangibility of knowledge and creativity with the naturalistic, economistic, modern liberal presupposition that individuals can realize their humanness, whether within a private or social context, pre-eminently through the holding, and exercising of power over tangible property.[3] Indeed,

the naturalistic philosophical orientation of modern intellectual property law is underscored by the way in which this field of jurisprudence "treat[s]...knowledge as atomistic bits of information to be made useful and profitable".[4]

In a very telling fashion, modernity's reduction of all existents to a material, and, ultimately, an economically orderable form within intellectual property doctrine positions the modernist worldview in contradistinction to various religious worldviews that are by contrast broadly consistent with the Perennial Tradition's vision of reality. (Recall that a hallmark of the Perennial Tradition is its assertion that phenomenal existence is not essentially material, but, rather, derives its reality from the transcendent Absolute). For instance, as we will see in further detail later in the chapter, the Islamic, and various Aboriginal worldviews, regard knowledge as a divine, communally–shared gift that cannot be reduced to the form of a tangible, privatized commodity.[5]

### *B. Law Governing Human Biological Property: Exemplifying and Validating Humankind's Quasi–Divine Control Over the Body*

In a parallel sense, the notion of legal doctrine that legitimates the ownership of human biological existents, as manifested, for example, by the idea that one can have a legally protected, proprietary holding in his or her own body (or pieces of it), presupposes a strikingly modernist philosophical anthropology. To illustrate, the ostensible possibility of the self–ownership of one's body points directly to Descartes's "fundamental division of the human being...between that part of us which thinks (*res cogitans*), and our material beings (*res extens*) [*sic*] that is, the body."[6] Further evoked by the idea of self–ownership of the body is the historical outflow of Kant's transcendental, knowing subject, whereby the human individual is elevated to the potential status of an omnipotent manipulator, who reigns over all of the world's corporeal objects. As John Coughlin has

persuasively argued in a recent issue of *The Journal of Law and Religion,* there is, necessarily, a reciprocal relationship between law and philosophical anthropology, such that "[e]very system of law reflects the deeper assumptions about the human being of the society that it regulates"; and, "[a]t the same time, the law of a given society shapes the development of the deeper societal assumptions."[7] Given this, the dualistic model of the human being that is both exemplified and validated by secularist law governing human biological property bespeaks an implicit, immanentist religious outlook. The human subject's power of proprietorship, and with this, quasi–divine control over the body that are expressed by the modernist worldview could not be more antithetical to, for instance, the Islamic tradition's transcendentally–oriented understanding of ultimate authority over the body. As the latter worldview professes, the human body is in reality a holding of God's, and, as such, sustains a biological life whose final meaning and significance is "not intrinsic", but rather, derives from the Divine.[8]

From the outset, it should be kept in mind that the question of the extent to which secularist law in fact regards human biological existents as commodified property is notoriously contested. As I discussed in Chapter Six, Kass, and many other contemporary scholars, like the law professor Polly Price, have worked to emphasize that, within the historical lineage of the common law, "[c]ourts and legal scholars have often said that there can be no property rights in human bodies...."[9] However, on my analysis, the operative point here is that such scholars have *worked to emphasize* this finding. Take the example of Kass, who serves, as we will recall, in the not–coincidental, dual roles of a politically conservative academic who unabashedly abhors such exemplars of "the hand of man playing at being God" as the "specter...of cloning human beings",

and as the Chair of President George W. Bush's Council on Bioethics, a position rendering him the chief signatory on reports such as a 2004 volume that cautions against "[t]he commercialization of various elements of human reproduction".[10] Understandably, Kass would appear intellectually inspired to marshal evidence against the notion that the Anglo–American legal tradition somehow validates the derogation of human life which follows from its crass commodification.

Kass does concede the following, in a quotation that serves to encapsulate with lucidity a number of the specific types of human biological existent that the common law, in its historical as well as contemporary manifestations, has demonstrated a clear tendency to view in accordance with a proprietary paradigm:

> The living body as a whole is surely not alienable, but parts of it definitely are. I may give blood, bone marrow, skin, a kidney, parts of my liver, and other organs without ceasing to be me, as the by-and-large selfsame embodied being I am. It matters not to my totality or identity if the kidney I surrendered was taken because it was diseased or because I gave it for donation. And, coming forward to my cadaver,...I can contemplate donating from it.... [Further,] the common-law courts had granted to next of kin a quasi property right in the dead body, purely a custodial right for the limited purpose of burial, and one which also obliged the family to protect the person's right to a decent burial against creditors and other claimants....[11]

As one can gather from these comments of Kass's, invoking as they do such non–commercial concepts as donation, and proper burial, what he regards as "repel[lent]" is, specifically, "[t]he idea of commodification of human flesh".[12] Herein, though, lies a paramount problem for scholars like Kass and Price. As Radin, and an expanding group of other recent writers have shown, given the quite radical economism of present–day, modernist civilization, there should be little mistake that the tendency towards reducing human biological entities not simply to property, but commodified property, is inexorably surging forward, within all manner of social and cultural venues.[13] Prime examples

include, to name but a few: the active, global trade in human organs (a trade that, while contravening existing laws such as the US prohibition on "sell[ing] organs or other tissue for transplant," is seen by some commentators, notably in the law and economics movement, as the proper object not of prohibition, but of institutional regulation); the exchange of reproductive material such as eggs and sperm, which is a "booming…business" in the highly developed world; and popular perceptions to the effect of "This is my body," such as the comment, made by a young North American woman to a newspaper reporter, that she "own[s her] sex," and "can use it" however she deems fit.[14] As I maintain in this chapter, secularist jurisprudence, especially over the past several decades, has demonstrated an inclination towards accommodating and absorbing, rather than stemming, the broader, modern epistemic reduction of human beings to repositories of commodified, biological property.

### *C. The Revealing Intersection of Intellectual Property Law with Law Governing Human Biological Property: "Patenting Life"*[15]

Intellectual property law, and law governing human biological property, each is permeated with immanentist religious significance, when taken on its own. However, this significance is revealed all the more, where the two areas of jurisprudence tightly intersect with one another – as is today occurring with unprecedented frequency and intensity, a trend that seems likely only to increase in the future – in the realm of patents. At the heart of this nexus lie scenarios involving biotechnological research and innovation that results in humanly–manipulated, or even invented, life forms for which the economic rewards of a patent are sought by the researchers and technicians themselves, as well as by the larger business interests who stand to benefit from their work. A watershed moment in this respect, and one to which we will return later in the

chapter, in order to better appreciate Kass's powerful diagnosis of the event as embodying the "the [US Supreme] Court['s] [emergence] as the teacher of philosophical materialism", is the 1980 judicial decision, *Diamond v. Chakrabarty*.[16] *Chakrabarty* established, in a decision that would have been patently (if the pun may be allowed!) inconceivable before the Promethean obsessions of modernity, that it is legitimate for a living organism to be patented. All that is required is a demonstration that the party seeking the patent did not merely make a "discovery…[of] nature's handiwork"; but, rather, created by his or her own invention a distinctive organism that is "non-naturally occurring".[17]

The full range of implications spawned by *Chakrabarty* is colossal, as the exponential growth of biotechnology, and rise in the number of those facets of nature that are open to biotechnological manipulation and alteration, has moved apace over the past few years. The activist and environmental thinker Vandana Shiva has, for one, provocatively demonstrated how this decision of the US Supreme Court has helped to open the door to the patenting, and, with this, the commodification, of a panoply of natural existents, spread across the world's entire spectrum of ecological biodiversity. In large measure, what Shiva is concerned with revolves around the "new industrial revolution [that is] under way in the form of genetic engineering—the manipulation and engineering of life forms at the genetic level."[18] She shows how the *Chakrabarty* court's notion that a genetically engineered, and therefore invented, life form can be legitimately patented is now in the process of being rapidly applied to a vast array of plants and seeds; and, as well, to "hundreds of genetically engineered animals, including fish, cows, mice and pigs [that] are figuratively standing in line to be patented by a variety of researchers

and corporations."[19]

To be sure, I hardly could be more sympathetic to Shiva's assertion that "Patents on life amount to claiming the role of Creator or God", where the forms of life being referred to primarily constitute plants and non–human animals.[20] Nonetheless, I maintain that the effective apotheosizing of the human proprietor that the patenting of life acts to signify is nowhere made more starkly manifest, than where the form of life concerned is human.

Consistent with today's ongoing debate over issues involving the biotechnological manipulation of the genes animating human, biological life – from reproduction that is carried out with the aid of genetic engineering, to stem–cell research, to human cloning – there now is an abundance of literature grappling with the daunting matter of how legal regimes should seek to regulate the various activities of this ambitious and profitable domain of "Techno-science".[21] A chief concern with which this literature is compelled to wrestle is whether it is legally legitimate, and ethically appropriate, for patents in genetic material to be granted to parties responsible for producing biotechnologically manipulated human genes, or for decoding genetic information in the pursuit of, for example, pharmaceutical development.[22]

As one might imagine, given the enormous, present fluidity of biotechnological research and innovation, secularist legal doctrine concerning the patenting of human genes remains quite unsettled and malleable. For example, in the US, "there have been patents issued on modified human tissues and cell lines, and DNA molecules of human origin."[23] However, in 2004,

> Congress enacted a measure effectively prohibiting the issuance of patents on human organisms. The Consolidated Appropriations Act of 2004 provides, "None of the

> funds appropriated or otherwise made available under this Act may be used to issue patents on claims directed to or encompassing a human organism." [Pub. L. No. 108-199, 118 Stat. 3].... [T]he manager's statement for this amendment points to a June 22, 2003, colloquy wherein Rep. David Weldon (the amendment's sponsor) assured Rep. David Obey (the ranking minority member of the House Committee on Appropriations) that the amendment "would not interfere" with any existing patents on human genes or human stem cells. Weldon further noted that the purpose of the amendment was to affirm that "human life in any form should not be patentable." The Weldon Amendment thus proscribes the patenting of human organisms at any stage of development.[24]

Yet, with *Chakrabarty*'s having "laid the all-important legal groundwork for the privatization and commodification" of the genetic material composing the Earth's flora and fauna, the extension to human genes of the decision's line of reasoning would not be inconsistent with modernity's biotechnologically aided "global economic rationalizing of [human] life."[25] The reduction of human, biological life to an object of instrumental manipulation, and, following this, commodified property, while profoundly troubling to many at the visceral, intellectual, and spiritual levels, may yet be in the process of emerging as the demonstration *par excellence* of a modernist worldview that strips down all of existence to amalgamations of atoms that can be scientifically known, technologically controlled, and economically ordered. Thus, to assert, with Jeremy Rifkin, that "the new genetic technologies grant us a godlike power", is to pinpoint a distinct, religious premise underlying the mind of modernity as the latter ascribes sacred significance to humankind and the corporeal objects of human control, a premise that secularist law may prove to be in a strong position to express and enforce.[26]

## II. Intellectual Property Law's Signification of Modernity's Faith: A Closer Reading

### *A. Copyrights*

Two subsets of intellectual property jurisprudence are, for our purposes,

exceptionally revealing: copyrights, to which I first made detailed reference within the context of Chapter Six's account of how secularist law tends to reify even non–corporeal abstractions, such as the act of literary expression, as material property; and patents, whose uniquely pervasive significance has just been introduced into the discussion. Let us begin by traversing the relatively circumscribed terrain of copyrights.

*1. The Current Expansion of Copyright Protection*

In recent years, a number of commentators on copyright doctrine have criticized what has become an unprecedented expansion of the principles and mechanisms of copyright protection, whereby this field of intellectual property law now reaches into every venue sustaining public discourse and information exchange, artistic expression, and scholarly research.[27] As an illustration of the harmful consequences that may be interpreted as flowing from the current expansion of copyright protection, consider an example provided by Corynne McSherry, which cuts extraordinarily close to the bone for those participating in academic life:

> Viewed through this lens [viz., the increasingly prevalent lens that perceives intellectual property law, particularly copyright doctrine, as an appropriate mechanism for governing the putative "cognitive property" produced in the academy], academic research looks like a matter of individual inspiration and labor; pedagogy like an equally individualized one-way activity; the university like a fully autonomous corporation; and professors like Hollywood actors. More generally, the conflation of property rights and "academic rights" participates in a set of discourses which offer to replace the hierarchies of the academy with the inequalities of the free market, discourses in which freedom can only be understood to mean "individual free enterprise." In this emergent property story, academic freedom is simply the "right of self-interest," and the "self" in question is an individual, rather than a disciplinary community. In retelling this tale academics risk losing a language for talking about knowledge as other than private property and the university as other than economically "useful."[28]

Overall, as Siva Vaidhyanathan also has gone on to suggest, US "copyright discourse", in particular, has become obsessed with injecting "property talk" into the juridical and

political calculus of how to ensure that individuals gain the protection of an economic interest in the fruits of their creative work.[29]

Having raised this line of critique, I wish to be clear, right away, about an underlying, basic point: an economistic *raison d'être* has, it would appear, underlain from the beginning the official, US grasp of copyright doctrine. The US constitution states: "Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".[30] On the whole, this charge has been interpreted by "[b]oth the United States Supreme Court and Congress" in a fashion consistent with these institutions' shared notion that "copyright exists only for the purpose of advancing social welfare through economic incentives for authorship."[31] In this respect, the US construction of copyright doctrine clearly is representative of the commercially–oriented, Anglo–American juridical mindset that originally derived its "figure of the proprietary author" by inferring, from a Lockean starting point, that "property aris[es] from an author's labour."[32]

Nevertheless, US law, for one, has in very recent times been overseeing the growth of copyright doctrine into a newly potent force that acts to transform ever more manifestations of knowledge and creativity into the corporeal embodiment of private property. This has been prompted by such present–day factors as the ongoing intensification of neo–liberal, democratic capitalist ideology, the power of profit–motivated, "[c]orporate legal intimidation", and the fact that a constantly growing proportion of creative expression now occurs within the metaphysically nebulous domains of cyberspace and various other digital media.[33] In Robert Boynton's account of

the emerging, "digital future" (an account that, ironically, should call back to our minds seminal, eighteenth–century efforts at converting intangible entities into material property), he explains as follows:

> Some of the most significant changes in intellectual property law took place in the Copyright Act of 1976, after which it was no longer required to register one's work in order to protect it. Anything "fixed in a tangible medium"—e-mail messages, those doodles in the margins of this magazine—automatically become copyrighted. Recent laws—like the 1998 Digital Millennium Copyright Act, which increased protection of copyrighted material on the Internet,...have elevated intellectual property's status to such a degree that many courts and corporations often treat it in virtually the same way as they do physical property.[34]

On the view of such critics of current copyright policy as McSherry and Vaidhyanathan, the extension of copyright doctrine within this privatizing vein threatens, rather than promises to protect, virtues like creativity within the public sphere, and a fertile, communally shared pool of knowledge and information. Employing an evocative metaphor that will ring familiar to us, Boynton observes how these critiques point to the need for a "digital environmentalism" that, in the words of another important analyst, James Boyle, protects this public bounty from "an exponentially expanding intellectual land grab".[35]

### *i. Converting Ideas to Material Property*

It is revealing to focus on some of the specific sorts of intellectual and cultural phenomena that are, as a result of the spreading reach of copyright law, more and more being converted to the form of material property. A chief type of phenomenon that is undergoing such a conversion consists of ideas themselves; this follows, on Vaidhyanathan's reading, from the emerging dissolution of "the idea/expression dichotomy."[36] As a foundational principle of modern copyright doctrine, "the idea/expression dichotomy" holds, in sum, that "copyright protects only a work's

expression, not its underlying ideas."[37] Inasmuch as "ideas...are the taproot of all creativity", copyright law traditionally has maintained that a novelist, playwright, moviemaker, composer, and so forth, is free to draw on the ideas of others, so long as he or she does not plagiarize the terms in which these ideas have been expressed.[38]

In pointing out the danger increasingly posed to "the idea/expression dichotomy" – a juridical maxim that is vital in helping to maintain a public ethos which encourages authorial and artistic creativity – Vaidhyanathan singles out such examples as today's rising effort to place stringent copyright protection, within US as well as European Union and international law, on computer databases. As he explains, this initiative towards "bottling up information" would break down the line between idea and expression, by encasing within the bounds of copyright protection such conceptual material as, for instance, the intellectual reasoning that is embodied in a database's categorization of historical facts in one or another fashion.[39] Echoing McSherry's concerns about the oppressive intrusion of copyright doctrine upon the academy, Vaidhyanathan demonstrates that this particular manner of reifying ideas as commodified, private property would especially threaten the pursuit of scholarly research. Moreover, given that such databases originate largely from within highly computerized, Western nations, and, with this, fall often under "rich and powerful" corporate ownership, peculiar detriments have been emphasized by "representatives of underdeveloped nations who are concerned by the concentration of database access in western [*sic*] nations".[40]

*ii. Copyright Doctrine and Indigenous Cultural Artefacts*

The matter of relations between Western and non–Western nations draws to the fore a further, illustrative context in which the ongoing expansion of copyright doctrine serves

to help reify intangible phenomena as material property. Often (as we will see in further detail later in this section of the chapter), analyses of the contentious interplay occurring among indigenous communities, Westerners, and intellectual property regimes concentrate on how patent law can be interpreted as a mechanism for facilitating the Western appropriation of such embodiments of indigenous knowledge as agricultural and botanical expertise pertaining to plants and seeds. Similarly in keeping with keen, current scholarly interest in the conditions of post–colonial cultures and societies, recent literature also examines how copyright doctrine factors into efforts by various indigenous populations to regain control over cultural and religious artefacts of theirs that had been appropriated by colonizers.[41] In a variety of nations, especially common law states such as Australia, and the Anglophone portions of Canada, the inexorable predominance of modern, Western law has prompted indigenous communities to turn to copyright regimes as a basic, practicable means of "argu[ing] for control over cultural resources they define as uniquely theirs."[42] Such resources include, for example, narratives, songs, pictorial creations, and ceremonial items that had been appropriated and reproduced by Westerners, ranging in identity from writers, to government agencies, to corporations.

However, some troubling, interconnected paradoxes and ironies are pointed up by these indigenous communities' efforts. To begin, the reification of knowledge and creativity as tangible, private property that is demanded under the basic premises of modern, secularist, intellectual property jurisprudence often is at odds, at the most fundamental, epistemic level, with the non–materialist forms in which indigenous artefacts were created, and continue to be envisioned. Thus, even as indigenous leaders have sought, for the sake of reclaiming and retaining their heritage, to reconcile

themselves to the counterintuitive metaphysics of modern, Western, intellectual property law, they have encountered a measure of juridical resistance to offering copyright protection for "'intangible' property such as oral narratives".[43] Similarly, indigenous claimants asserting that their cultural artefacts must be maintained under the custodial care of a community have sometimes found that this position does not square with the individualism of copyright doctrine. In sum, the implicit presupposition of intellectual property law that "knowledge…[is] a commodity, a neutral object with no connections to persons except as a source of profit" is utterly inimical to various indigenous groups' worldviews.[44] Rather, these worldviews often give rise to the understanding that:

> Knowledge is a gift from nature, possible only within a set of relationships based on respect. Rejecting the view of knowledge as property to be acquired, sold, or stolen, in favor of viewing knowledge as a gift encourages attention to the relationships that exist among knowers and those who wish to know.[45]

Within a recent, ground–breaking book of his, Michael Brown cuts to the heart of this matter in a chapter named with the apposite Weberian allusion, 'Native Heritage in the Iron Cage'.[46] Critiquing, in particular, a 1997 United Nations document which advocates an approach that he terms "Total Heritage Protection", Brown cautions against strategies for the facilitating of indigenous control over their cultural artefacts that, however well–intentioned, risk illegitimately constricting Aboriginal traditions within the bounds of rationalist, Western administrative frameworks for cultural protection, such as copyright doctrine.[47] He summarizes:

> In their struggle for just and dignified treatment of cultural productions, native communities face formidable opposition, including corporations committed to the privatization of knowledge in its multiple forms. Total Heritage Protection is seductive because it promises a legal framework strong enough to counterbalance these forces. Yet it is a totalizing model, and such approaches have a disturbing tendency to reshape the world in unforeseen and harmful ways. In this case they are likely to foster bureaucratized and lifeless cultures that operate by a proprietary logic

perilously close to that of the corporations they seek to resist.[48]

### *2. The Significance of the Historical and Theoretical Foundations of Copyright Doctrine*

Beyond considering how the current expansion of copyright protection both exemplifies and facilitates secularist intellectual property law's transformation of knowledge and creativity into the form of commodified property, one should not lose sight of how the historical and theoretical foundations of copyright doctrine have contributed to this transformation. The very idea of copyright, as with the notion of intellectual property law as a whole, is in crucial respects an icon for the intellectual history of modernity. As Mark Rose explains, "copyright is…a specifically modern formation produced by printing technology, marketplace economics, and the classical liberal culture of possessive individualism."[49] Consistent with this historical account, copyright doctrine, especially in the common law, presupposes a modernist philosophical anthropology incorporating (as I alluded to several pages earlier) the Lockean "axiom that an individual's "person" [is] his own property."[50] This dictum, together with the corollary tenet that "through labor an individual might convert the raw materials of nature into private property", helped to spawn "the representation of the author as [a] proprietor" who is entitled to a property interest in the peculiar product of his or her labor.[51]

Beginning with its "earliest genuine anticipations…in fifteenth-century Venice", where "exclusive [printing privileges had been] granted by the state to individuals…to reward them for services or to encourage them in useful activities", copyright doctrine spread, in a nascent form, to other parts of Europe during the sixteenth century, including England in 1518.[52] As Rose illuminates, during the period of copyright doctrine's sixteenth– and seventeenth–century germination within the common law, copyright was

grounded not so much in "issues of "property" [as in] "issues of propriety.""[53] That is,

> [t]he acknowledgement of the author's personal right to control the publication of his texts was a principle based on concepts of honor and reputation consistent with the traditional patronage society. It was not necessarily the same as the acknowledgement of a property right in the sense of an economic interest in an alienable commodity.[54]

However, as we are aware, the intellectual landscape of the common law world had, by the early eighteenth century, moved a significant distance towards fostering the establishment of "a marketplace society"; this, as "the values of possessive individualism [came to be] defined and promulgated."[55] During this era, the 1710 Statute of Anne, which might in actuality be "called the world's first copyright act[,] was passed by the British Parliament".[56] Inasmuch as it was "essentially…a legislative continuation of the ancient trade regulation practices of the Stationers' Company, the London guild of printers and booksellers which had long controlled the book trade in Britain", the Statute perhaps was "not quite the landmark recognition of authors' rights that it has often been claimed to be."[57] Nonetheless, the legislation's semeiotic significance as an indicator of the emerging cast of mind informing copyright jurisprudence is profound. By newly "establish[ing] authors [themselves] as the original owners of the rights in their works," the Statue of Anne effectively superimposed Lockean thought on the legal construction of authorship, thereby "transform[ing] authors, as well as booksellers, into potential owners of literary property."[58] Consequently, it became possible for no less a figure than Blackstone to suggest that the existence of literary property hinges on "the expression of ideas", that specific phenomenon which modern intellectual property law has typically conceived of as the pith of copyright protection.[59] This intellectual step taken by Blackstone, "in the context of the developing marketplace society," helped to convert the

image of "the text" from its "early modern" rendition as a sort of amorphous, creative "action, [that is,] …something done", to the new form of a concrete, proprietary "thing."[60]

Fascinatingly, while Rose does not mention such a specialized theological concept as immanentism, he does indicate that, essential to the philosophical anthropology that we have seen inform copyright doctrine is the image of an author who, in a quasi–divine fashion, holds the power to create "works out of thin air."[61] Thereby suggested is that "the essentially religious concept of originality," which is set into action by "the notion that certain extraordinary beings called authors" possess this creative power, renders the God–like creator of literature entitled to sacrosanct, proprietary control over his or her creation.[62] In this way, the author's property interest in his or her creation arises not by virtue of "a transcendent moral idea" of copyright, but rather, from the quite earthbound idea that it is the author's actualized, worldly creative power which entitles him or her, in and of itself, to this hallowed interest.[63]

### *B. Patents*

#### *1. Colonialism and the History of Patents: The West's Reduction of Indigenous Knowledge to Commodified Property As the "Secular Conquest" Achieved by "A New Religion of the Market"*

##### *i. The Overall Scenario*

As with copyrights, modern patent law, which is commonly understood to serve the purpose of "stimulating and rewarding inventions and innovations", has its most direct origins in fifteenth–century Venice.[64] Shiva concisely elaborates:

> In March 1474, the Venetian Senate passed the first general patent law which became the historical precedent for stimulating inventions. As the preamble of the Venetian Patent Law states, 'We have among us men of great genius, apt to invent and discover ingenious devices….Now, if provisions were made for the works and

> devices discovered by such persons, so that others who may see them could not build them and take the inventors' honour away, more men would then apply their genius, would discover, and would build devices of great utility for our common wealth.'[65]

Thus birthed was an utterly "mystical" sort of property right which "is not intrinsic in any product or creation", but rather, takes "the invention of a new product or...process," and transforms into commodified property the knowledge and creativity embodied in the invention.[66] Patents achieve this by enabling the law to grant "a monopolistic right to the...person who made the invention or innovation", thereby "exclud[ing], for a fixed period only, other persons from imitating, manufacturing, using, or selling a patented product, or from utilizing a patented matter or process."[67]

The historical development of patenting systems has proceeded in intimate connectivity with the growth and geographic spread of modern capitalism, industrialism, and technology. Singularly illustrative for us in this connection is the integral fashion in which patents have served to further the economic and strategic interests of "industrially advanced countries", particularly "imperial powers...[such as] Britain, France, Belgium, the Netherlands, Portugal, Spain, Italy,...Germany", and, not least, the US (in which nation the government's power to oversee patents, as well as the state's increasing tendency to construe patents in an economistic light, turn in the first instance, as with copyrights, on article 1, section 8, of the US constitution).[68] Specifically, this role played by patents has had significant importance for the history of colonialism. As Surendra Patel illustrates:

> The imperial powers...imposed the [intellectual property rights system, especially patent doctrine] on their colonies soon upon their conquest. And the United States did the same in the Latin American countries under its domination. Just a few months after the suppression of India's 1857 rebellion against British rule, the Indian Patent Act of 1859 was forced upon India by Great Britain. It reserved at one stroke and for all time Indian markets for the British exporters. Similar laws and

> regulations were introduced by other powers in their colonies, dominions, and semicolonies.[69]

The sorts of writers whom we saw, several pages ago, to be especially concerned with how copyright doctrine plays out in the context of relations between indigenous communities and Western actors often are similarly concerned with how patents have been historically deployed by Western powers as an instrument of colonial domination and expansion.[70] Once again, Shiva proves a key contributor to the discussion. As she suggests, the history of patenting doctrine is, in a chief respect, simultaneously the history of how patents have been used by "Western powers" to appropriate, and "to protect this piracy of", indigenous knowledge concerning biological organisms.[71] Offering an analysis that is singularly relevant for our purposes, Shiva demonstrates how the Western "colonizing impulse to discover, conquer, own, and possess everything," including "every society, every culture", has played out in a long–running, colonial effort to reduce indigenous knowledge of the natural world to Western–held, commodified property.[72] In the process, Western powers have sought not merely to enhance the immediate, material benefits that accrue to them as the result of their patent–aided "biopiracy", but also to ensure the transformation of colonial economies into subsidiary markets that the West can dominate for its long–term gain.

Moreover, on Shiva's interpretation, the modern West's endeavor to employ patents as a means of helping to transform embodiments of indigenous knowledge into commodified property, and thereby pursue a complex set of colonial aims, equates to the "secular conquest of diverse knowledge systems and economies".[73] By utilizing the intertwined, juridical and economic power of patents to help compel communities around the world to convert to a global, neo–liberal creed, the West seeks to forcibly propagate

an eminently real, religious tradition under whose tenets indigenous knowledge is free to be inserted into the stream of commerce. Shiva summarizes her insights in the following way:

> Patents have, through history,...been associated with colonization. At the beginning of the colonization of the world by Europe, they were aimed at the conquest of territory; now they are aimed at the conquest of economies.... Recolonization is a 'secular' project, but there is a new religion of the market that drives this so-called secular project. Territory, gold and minerals are no longer the objects of conquest. Markets and economic systems are what have to be controlled. Knowledge itself has to be converted into property, just as land was during colonization.... [K]nowledge that is 'invented', 'patented' and converted to 'intellectual property' is often an existing innovation of indigenous knowledge systems. This claim to invention, like the claim to discovery in the patent charters of colonial conquest, is the justification for the take-over of market systems and economic systems through globalized patent regimes.[74]

*ii. "Patenting Life": The Newly Prevalent Form of Patent–Aided Colonialism*

As Rifkin asserts, during the present epoch of widespread genetic engineering,

> [g]enes are the "green gold".... The economic and political forces that control the genetic resources of the planet will exercise tremendous power over the future world economy, just as in the industrial age access to and control over fossil fuels and valuable metals helped determine control over world markets.... Multinational corporations and governments are already scouting the continents in search of the new "green gold," hoping to locate microbes, plants, animals, and humans with rare genetic traits that might have future market potential. Once having located the desired traits, biotech companies are modifying them and then seeking patent protection for their new "inventions." Patenting life is [a key element] of [this] new operational matrix....[75]

One may argue, then, along with Shiva, that a prime vehicle by which patent–aided colonialism today continues to advance is through the ever–more–pervasive patenting both of indigenous knowledge in biological spheres including food, other forms of agriculture, and medicine; and of genetically engineered organisms, such as plants and seeds, whose original, natural elements have been appropriated from within the developing world.[76]

A juridical instrument that proves pivotal in this connection is the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), an international protocol administered by the World Trade Organization (WTO) that "[came] into force…in 1995".[77] TRIPS grew out of international negotiations attendant to the *General Agreement on Tariffs and Trade* (GATT), and therefore also out of, in important measure, "the effective lobbying of industrial concerns, mostly in the United States".[78] As a result of its markedly broad construction of what constitutes patentable material, the "patents section of TRIPS" has emerged as an ideological battleground.[79] Standing on one side of the debate are advocates who believe that the protocol's roomy conception of patents is necessary for the establishment of a global intellectual property regime that privileges free trade. Rallying on the other side are critics, including "[r]epresentatives of many indigenous and traditional societies", who caution that TRIPS promotes a "monopoly protection of products derived from communally-held resources…[that] is economically exploitative and morally and spiritually repugnant."[80] Then, too, foes of TRIPS from within Western and indigenous communities alike assail the protocol on the grounds that its facilitating of "the patenting of genetically modified organisms (GMOs)" is conducive to "ecological damage and…prejudicial to human health or animal welfare"; and that its paving of the way for "the patenting of life-forms – that is to say whole plants and animals, and functional or structural components of life-forms such as gene sequences, proteins and cells", amounts to an ethical abomination.[81]

*2. The Legal and Intellectual Watershed Brought About by the Chakrabarty Decision*

Within her forceful critique of TRIPS, Shiva makes the revealing assertion that the protocol has, in effect, "globalized US-style patent laws."[82] The day–to–day, to say

nothing of ideational, and even epistemic, consequences of this development are vast and profound:

> The universalization of patents to cover all subject matter, including life forms, has resulted in patents invading our forests and farms, our kitchens, and our medicinal plant gardens. Patents are now granted not just for machines but for life forms and biodiversity; not just for new inventions but for the knowledge of our grandmothers.[83]

As Shiva indicates here and elsewhere, a basic reason why "US-style patent laws", in particular, should have such an effect is the consequential legacy of the *Chakrabarty* decision.[84]

In an insightful new study, Steven P. McGiffen exhaustively demonstrates how the US, and, to a significant extent, Canada following it, diverge from the European Union in their "[lax]…regulation of biotechnology and its products", an approach that is "bolstered by a patent system" increasingly non–reticent towards the patenting of living organisms.[85] By contrast, McGiffen maintains, the EU has demonstrated a somewhat greater degree of regulatory caution in these respects, earning it the ire of the US; this, at the same time as the EU assiduously supports the biotechnology industry in its purported position at "the centre of Europe's economic future."[86] Prior to *Chakrabarty* in 1980, a basic principle of US patent doctrine had been that "phenomena of nature" are non–patentable elements of the commons, as it were.[87] (Although, it should be noted that Congress's 1930 passage of the Townsend-Purnell Plant Patent Act, at the long–standing behest of "plant breeders and nurserymen[,]…granted the first patent rights for agriculture in the world"; this, by "allow[ing] novel varieties of plants to be patented").[88] However, the *Chakrabarty* court implied that the vital imperative whereby patenting offers economic encouragement for ingenuity demands "a broad construction [of

patentable material]" that is unconstrained by a fixed ban on the patenting of natural phenomena. In this way, suggests Richard Gold, the court "turn[ed] a blind eye to noneconomic values".[89] On this construction, human intervention into natural processes that is sufficient to reorder matter – including living, biological matter – into a unique arrangement that is the "product of human ingenuity" effectively acts to transform natural phenomena into "human-made inventions."[90]

*i. Chakrabarty and Its Legal Ramifications*

*a) Legal Ramifications in the US*

The facts of *Chakrabarty* were as follows: in the early 1970s, Ananda Chakrabarty, later to become an academic, was working as a staff microbiologist at the General Electric Company (GE) in Schenectady, New York.[91] Arising from his research at GE was a

> human-made, genetically engineered bacterium…capable of breaking down multiple components of crude oil. Because of this property, which is possessed by no naturally occurring bacteria, Chakrabarty's invention is believed to have significant value for the treatment of oil spills.[92]

Following Chakrabarty's application for 36 patent claims covering the processes and products surrounding his invention, a patent examiner rejected those of his claims asserting rights "to the bacteria themselves", explaining that, as "products of nature," and "living things", the micro-organisms were "not patentable".[93] The patent examiner's decision was upheld by the Patent Office Board of Appeals, but then reversed by the Court of Customs and Patent Appeals, "which held that "the fact that microorganisms …are alive…[is] without legal significance" for purposes of the patent law."[94] Subsequent to a series of juridical procedures that led to this court's decision being vacated, and then reinstated, the Commissioner of Patents and Trademarks, standing fast

in opposition to the issuing of patent rights for Chakrabarty's bacteria, was granted review by the US Supreme Court.

The Supreme Court held that Chakrabarty's "micro-organism plainly qualifies as patentable subject matter."[95] Informing its audience that, based on a reading of relevant legislative history, "Congress intended [potentially patentable] subject matter to "include anything under the sun that is made by man"", the Court went on to determine that the peculiar, "non-naturally occurring manufacture or composition of matter" created by Chakrabarty fell into this category.[96] Chief Justice Warren Burger explained:

> ...the patentee has produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility. His discovery is not nature's handiwork but his own; accordingly it is patentable subject matter....[97]

In the course of its reasoning, the Court asserted that, in a case such as *Chakrabarty,* "the relevant distinction" in differentiating that which is patentable, from that which is not, is "not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions."[98] With this observation, Justice Burger indicated that the Court was well aware that commentators would be closely watching the *Chakrabarty* decision for its implications concerning the potential patenting of multitudinous higher organisms. Indeed, in its latter portions, the decision directly addressed those who would "[point] to grave risks", to the "gruesome parade of horribles", "that may be generated by research endeavors such as [Chakrabarty's]", and, in their wake, by genetic engineering (or even merely by, as the Court put it, "genetic research and related technological developments").[99] In response to such asseverations, the Court maintained that the interpretative question before it was a narrow one, limited to the determination of what constitutes patentable material; and that "matter[s] of high

policy" surrounding genetics, and the patenting of living organisms, must be debated and determined through democratic political processes, rather than resolved by the judiciary.[100]

Perhaps one of the keenest evaluative verdicts that has been issued on the *Chakrabarty* decision itself is that of none other than Ananda Chakrabarty:

> ...the Supreme Court decision on *Diamond v. Chakrabarty* appears to have gone beyond what the Supreme Court justices perhaps intended to grant. The subject of "who owns life?" has therefore become a significant, timely, and dominant issue of our times.[101]

In terms of simply setting legal precedent for the subsequent patenting of other, increasingly complex life forms, the effects of *Chakrabarty* have been immense. As Jack Wilson points out, in several significant US instances during the mid–1980s, disagreements over whether patents were warranted were settled in the affirmative "by the patent and trademark office in light of the *Chakrabarty* decision."[102] In keeping with this trend, in 1988,

> [t]he first patent on a multicellular animal was granted to Harvard University scientists.... The patent on the Harvard "OncoMouse" was licensed to DuPont, and these mice were sold to cancer research laboratories. The mice contain several genetic sequences...that make them susceptible to developing tumors.[103]

Wilson goes on to maintain that, as of the early–twenty–first century, "approximately 1,500 patent applications on a wide variety of multicellular animals had been filed covering everything from seafood to cattle that express human hormones in their milk."[104]

*b) Legal Ramifications in Canada*

Consistent with McGiffen's analysis above, Canadian jurisprudence has, to an important degree, although perhaps not to the extent of the US legal system, also

followed along with the broadening, economistic conception of patents signified by *Chakrabarty.* For example, in the well–publicized case of *Monsanto Canada Inc. v. Schmeiser,* the Supreme Court of Canada held in 2004 that Percy Schmeiser, a Saskatchewan farmer philosophically opposed to the cultivation of genetically modified (GM) crop varieties, had nonetheless infringed on a Monsanto patent for "genetically modified genes and cells" contained in an herbicide–resistant variety of canola (canola being "a valuable crop…used to make edible oil and animal feed").[105] Although Schmeiser had never purchased the seed for this GM crop, nor the license necessary to grow it, Monsanto investigators found that a high concentration of the canola variety was growing on his farmland, thereby prompting Schmeiser's assertion that the GM seed "was carried to [his] field without his knowledge", perhaps from nearby farms, by the wind.[106] The Court rejected Schmeiser's claim that, as a "higher life form", the GM material was unpatentable in the first instance, responding that, under operative Canadian legislation, "an invention in the domain of agriculture is as deserving of protection as an invention in the domain of mechanical science."[107] Moreover, the Court ruled that, despite Schmeiser's argument that "he never took commercial advantage" of the crop's special, herbicide–resistant qualities, his act of cultivating the GM crop – in the absence of sufficient, countervailing evidence that he did not actually intend to do so – effectively infringed on Monsanto's right to "the full enjoyment of their monopoly" on this agricultural creation.[108]

Recalling Wilson's mention of the 1988 US patenting of the Harvard "OncoMouse", it should be noted that Schmeiser, in arguing his case, had sought to rely on a 2002 decision of the Supreme Court of Canada, *Harvard College v. Canada (Commissioner of*

*Patents),* (commonly known in Canada as 'Harvard Mouse'), in which the Court had refused Harvard's request for a separate, Canadian patent on the OncoMouse.[109] In that decision, the Court ruled that, under Canada's *Patent Act,* "higher life forms are not patentable", with respect, potentially, to plants as well as animals.[110] On the Court's analysis, "a fertilized egg injected with an oncogene may be a mixture of various ingredients," and could therefore be a patentable human creation, but "the body of a mouse" would not be similarly patentable, because it "does not consist of ingredients or substances that have been combined or mixed together by a person."[111] However, as the *Schmeiser* court indicated, and as several dissenting justices in 'Harvard Mouse' had argued in that decision, the 2002 Court's basic admission of the patentability of a "fertilized, genetically altered oncomouse egg [that] is an invention under the *Patent Act*" hardly allows for a material distinction to be drawn between the egg, per se, and "the resulting oncomouse…that grows from the patented egg".[112] In other words, once the invented egg is deemed patentable, there is no valid legal basis on which to deny a patent for the consequent, invented mouse.

*ii. Foundational Implications of Chakrabarty*

As I have suggested at various points in the chapter, *Chakrabarty* is of monumental significance not simply by virtue of its practical, juridical effects, but because "in the decision, the Court promoted a new dimension in how all organisms are understood."[113] In his impassioned critique of the ruling, Kass decries "the Court…[as] a teacher of shallowness", whose materialist reduction of living and non–living phenomena, alike, to the same sort of manipulable matter fails to grasp "the sensible limits" that should be placed on humankind's "mastery and possession of nature."[114] Kass's acerbic analysis

demonstrates how the Court's radical "enlargement of the sphere of what may be owned and possessed" rests on the troubling assumption "that anything under the sun made of tangible stuff falls under "composition of matter," and is therefore patentable, so long as its origin is in human art."[115] As he depicts the conceptual thrust, and philosophical consequences, of this peculiar materialism –*cum*–jurisprudence:

> Consider first the implicit teaching of our wise men, that a living organism is no more than a composition of matter, no different from the latest perfume or insecticide. What about other living organisms—goldfish, bald eagles, horses? What about human beings? Just compositions of matter?[116]

It is not difficult to appreciate that, although his evaluative dismantling of *Chakrabarty* originally took place nearly twenty–five years ago, Kass's impression that the decision had urgent potential for fostering the rapid transformation into commodified property of ever–higher forms of genetically engineered organisms could not have been more prescient.[117] He asks:

> What is the principled limit to this beginning extension of the domain of private ownership and dominion over living nature? Is it not clear, if life is a continuum, that there are no visible or clear limits once we admit living species under the principle of ownership? The principle used in *Chakrabarty* says that there is nothing *in the nature of a being,* no, not even in the human patenter himself, that makes him immune to being patented.... If a genetically engineered organism may be owned *because* it was genetically engineered, what would we conclude about a genetically altered or engineered human being?[118]

To be certain, the question of how *Chakrabarty,* as the "precedent that...changed how patent law was applied to biotechnology," might ultimately be extended, so as to effect the conversion of humans to property – one and a half centuries, one might add, after the abolition of the West's last outpost of sanctioned slavery – poses a burning issue for current analysts of modern Western law, culture, and society.[119]

## III. After *Chakrabarty,* and Further Recent Key Developments for Law Governing Human Biological Property

As I argued in the first main section of this chapter, and also suggested earlier in the dissertation, one can discern in the present, economistic age an overall "move toward the property model" of the human body, in jurisprudence as well as the civilization at large.[120] Certainly, *Chakrabarty* would appear to have acted as a prime catalyst for emerging efforts at converting human genetic material, in particular, to commodified property, as "[a]ttempts to patent human DNA rest legally on" that decision.[121] But the extent to which secularist jurisprudence has recently been tending to accede to the modernist proprietarization of human biological existents – even over just the past one to two decades – is markedly broadening.[122]

Lori Andrews and Dorothy Nelkin have recently stood in the forefront of research demonstrating how the commodification of human tissue is emerging as a massive boon for corporate and other market–based interests, acting with the explicit or implicit co-operation of the secular state.[123] A good deal of this process of commodification has been facilitated by new developments in biotechnology, which have helped to foster the conversion to property of much human tissue beyond genetic material alone. As Andrews and Nelkin illustrate:

> The business of human bodies is a growing part of the $17 billion biotechnology industry comprising more than thirteen hundred biotechnology firms. Those companies extract, analyze, and transform tissue into products with enormous potential for future economic gain. Their demands for skin, blood, placenta, gametes, biopsied tissue, and sources of genetic material are expanding. The blood that we all provide routinely for diagnostic purposes is now useful for the study of biological processes and the genetic basis of disease. Infant foreskin can be used to create new tissue for artificial skin. Umbilical cords are valued as a source of stem cells—a substitute for bone marrow transplants. Eggs and sperm are bought and sold for both research and in vitro fertilization, and embryos have been stolen. Cell lines derived from the kidneys of deceased babies are used to manufacture a common clot-

> busting drug. Human bones, valued today as a means to study human history and satisfy curiosity, are stored in museums and sold in shops as biocollectibles. Human tissue such as blood, hair, and DNA is a medium for artists. And human DNA can even be used to run computers, since the four chemicals—represented by the letters CATG—provide more permutations than the binary code.[124]

### *A. John Moore v. The Regents of the University of California: The Notorious "Spleen" Case*[125]

The 1990 decision of the Supreme Court of California in *John Moore v. The Regents of the University of California* has emerged as a prime precedent helping to foster a legal milieu within which it seems to be increasingly legitimate to conceive of numerous forms of human tissue as private, commodified property.[126] The background for the case began to arise in 1976, when Moore commenced treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA). From that year through 1983, Moore's treatment involved the withdrawing from his body of various tissue samples such as blood, bone marrow aspirate, skin, and sperm, and, as well, the removal of his spleen (which organ acted as the source of cells that would prove the basis for legal dispute). Moore had been told by his attending physician, Dr. David W. Golde, that these procedures were "necessary and required for his health and well-being", and "were to be performed...only under Golde's direction."[127] However, it was concealed from Moore that, at the same time, Golde and others "were conducting research on [his] cells and planned to benefit financially by exploiting the cells and their exclusive access to the cells by virtue of Golde's ongoing physician-patient relationship."[128] As the court's statement of facts observes, Golde and his colleagues "were aware that certain blood products and blood components were of great value in a number of commercial and scientific efforts and that access to a patient whose blood contained these substances would provide competitive, commercial, and scientific advantages."[129]

"Sometime before August 1979, Golde established a cell line from Moore's T-lymphocytes (a type of white blood cell)", which went on to become the object of a 1981 patent application filed by UCLA, "listing Golde and [researcher Shirley] Quan as inventors."[130] The sought–after patent was issued in March 1984. Following a lucrative "[c]ommercial exploitation of the cell-line [that] was negotiated between the University and two biotechnology companies[,]...Moore discovered the uses to which his body tissue had been put and sued" the parties involved for causes of action including a breach of fiduciary duty, for not having informed him of these uses, and the tort (or civil wrong) of conversion.[131] Conversion, the court explained, "protects against interference with possessory and ownership interests in personal property."[132] Thus, under this particular claim, Moore asserted that he had a proprietary interest in his cells that was violated by the "defendants' unauthorized use".[133]

The court held that Moore had a legitimate cause of action for the fiduciary breach, but not for conversion. Under the court's reasoning, any ownership interest that Moore might once have had in his cells was undone, in significant measure, by the fact that he "clearly did not expect to retain possession of [them] following their removal".[134] Further, relying on *Chakrabarty,* the court determined that "the subject matter of the...patent--the patented cell line and the products derived from it--cannot be Moore's property", because this material comprised a patentable "product of "human ingenuity"" distinct from "the cells taken from [his] body."[135] In other words, consistent with our earlier discussion of *Chakrabarty,* the Supreme Court of California effectively indicated in *Moore* that Golde and his colleagues had successfully transformed the natural material of Moore's bodily tissue into a unique, human invention, which therefore served as the

basis for a private property interest.

Moreover, the court went on to opine about the inadvisability, on policy–based grounds, of extending the tort of conversion to scenarios analogous to those found in the *Moore* case; this, for fear that "disabling civil liability [might threaten] innocent parties who are engaged in useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes."[136] As the court detailed, sets of circumstances along the lines of those presented in this instance were becoming more and more foreseeable, given the accelerating development, to that date (and ever more so today, one might now add), of biotechnology and related medical research activities:

> In its report to Congress, the Office of Technology Assessment emphasized that [u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant [note the fascinating irony of this modifier, given the 2005 perspective from which I write these words! – AMW] of the biotechnology industry, particularly when the rights are asserted long after the specimen was obtained. The assertion of rights would affect not only the researcher who obtained the original specimen, but perhaps other researchers as well.
>
> Biological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories [such as conversion]. Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.[137]

In the light of concerns such as those expressed by the Office of Technology Assessment, the court expressed its reticence to look with favor on claims such as Moore's allegation of conversion:

> Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful

> biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. Products developed through biotechnology that have already been approved for marketing in this country include treatments and tests for leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors, to name but a few.
>
> The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials....
>
> The theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research. If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery.[138]

It readily follows from the court's line of reasoning that the *Moore* decision has stood to bolster the rising notion that human biological material can be successfully converted to commodified property, especially where post–*Chakrabarty* patent law intersects with the jurisprudence of human biological property. *Moore* is exceptionally significant for our understanding of the intensifying effect that modernity's economistic ethos, especially in its neo–liberal, capitalist embodiment, has on secularist law. A prime reason for this is the way in which the jurisprudential thrust of *Moore* weighs most in favor of biotechnological, industrial, and other business interests who would seek to benefit from the instrumental utilization of human tissue. This is as opposed to the decision's identifying of property interests that would privilege the person from whom the tissue was collected, as one might otherwise be inclined to expect, given the notion of corporeal self–ownership that arguably is inferable from such strands of property theory as the Lockean and Kantian traditions. As the court asserts, "While we do not purport to hold that excised cells can never be" the property of such a person, this sort of claim is strongly militated against by rationales like the public policy imperative to provide economic incentives for biomedical research.[139] In sum, then, the situation seems now

increasingly to be that, as Andrews and Nelkin observe, "[t]he potential for profit from research on human tissue is turning people like John Moore into potential treasure troves."[140]

### *B. Drawing Forth the Immanentist Religious Significance of Law Governing Human Biological Property*

#### *1. Comparing the Religious Import of Intellectual Property Law with That of Human Biological Property Jurisprudence*

In the previous major section of the chapter, we saw demonstrated how secularist intellectual property law intimates modernity's fundamental tendency to confine the ultimate sources of knowledge and creativity within the material world. Consider, for example, the increasingly vast construction of copyright that reduces an immense diversity of authorial creations to the monochromatic form of commodified, private property. This expanding idea of copyright bespeaks intellectual property doctrine's notion that the font, and with this, final authority over the expression, of an instance of knowledge or creativity rest with an individual author, in the mundane realm of economic holdings. This is as opposed to, say, the indication of classical Islamic doctrine that knowledge which is "pass[ed]…from one person to another…belongs to God, not to any individual."[141]

In a similar vein, we saw how patent doctrine, especially as embodied in the *Chakrabarty* decision and its juridical outflow, can be read as signifying the reduction of biological life to a material object that is free to be held, manipulated, and controlled by a human proprietor. Within such a case as *Moore,* and in the broader, civilizational and epistemic predilections for the proprietarizing of human biological life, in particular, that the decision augurs, the transformation of human bodily material into commodified

property further reveals secularist law's conceptualization of life as an essentially material phenomenon. And as secularist law proceeds to grapple with the implications of its jurisprudential principles for the manipulation, and potential, subsequent proprietarization, of the genetic material animating the formation of human life, the possibility arises that the law might be signifying the advent of an utterly new, immanentist account of creation. Seated at the pinnacle of this radically modernist, schema of creation would be the emergent, human lords of genetic engineering.[142]

As I emphasized early in the chapter, and have, also, at various other points throughout the dissertation, the philosophical anthropology that is revealed by such a secularist juridical idea as the proprietary character of human tissue acts as an especially potent sign of underlying, religious immanentism. This notion of the human being as, specifically, an agglomeration of natural material that is ripe for instrumental manipulation, and subsequent commodification, is on display in the *Moore* court's implicit teaching that it is legitimate for human cells to be technologically transformed into the private property of the transformer. As Hui suggests, this naturalistic conception of the human is imbued with "the Enlightenment premise that science and technology are powers over nature and necessary sources of human progress and welfare".[143] This premise stands in contradistinction to the "premodern" ideal that "all the goodness arising from knowledge and technology ultimately comes from God"; hence, were the "premodern" view to be operative, knowledge and technology would have to be applied in a fashion that "reflect[s] God's goodness", rather than reflecting what modernity supposes to be the metaphysical ultimacy of humankind, together with the natural stuff of which humans are composed, and over which they reign.[144]

*2. The Signal Importance of Scenarios Involving the Formation of Life, and the Genetic Engineering of Humans*

Once we move on from fact situations like *Moore,* to scenarios involving not merely the manipulation of pre–existing human tissue, but biotechnological intervention into the formation of life, the legal precepts become murkier, while the implicit religious significance becomes ever more pronounced. It is not only with respect to the genetic engineering of humans where, as I observed earlier in the chapter, relevant law is today in a state of ferment. For instance, as is pointed out in the earlier–cited 2004 report prepared by President Bush's Council on Bioethics, there is in the US, for one, a marked vacuum of cohering federal regulation on "[c]ommerce in gametes, embryos, and assisted reproductive services".[145] Accordingly, "the present regulatory system…sets no uniform, enforceable limits on the buying and selling of human gametes and embryos."[146]

As I also indicated previously in the chapter, upon arriving at what is today the immensely salient matter of the potential proprietarization and commodification of various embodiments and arrangements of human genetic material, we enter onto ground that is continually shifting, in terms of the ongoing development of laws and policy statements. Moreover, this ground is covered with a multiplicity of contending rationales for scientific and economic "progress", vis-à-vis defenses for the "foster[ing] and encourag[ing] [of] respect for life".[147] However, even given the changeable and contested character of this ground, a provisional observation or two can be offered about the emerging lay of the land. For one, it does appear that, within the modern West as a whole:

> Gene patenting has exposed a conflict and, possibly, an incompatibility in patent policy between the United States and the European community. Even though the former does not impose ethical constraints on the patentability of products, the latter

> does, with the consequence that what may be patentable in the United States may not be so in Europe.[148]

Ari Berkowitz and Daniel Kevles build up to this assertion with the preceding explanation that,

> [a]t the end of 1999, [the US Patent and Trademark Office] invited public comments on [what was at the time "its current policy on the patenting of genes and DNA sequences"] and subsequently received them from thirty-five individuals and seventeen organizations. Some of the comments were ethical…; some were legal or practical, raising objections, for example, to granting patents on DNA sequences such as ["expressed sequences tag[s]", or ESTs, a term for a kind of DNA sequence that establishes a gene's "unique identity"] by arguing that they should not be patentable because they exist in nature. In January 2001 the office found reasons to refuse to incorporate any of the comments in its policies. Indeed, its responses to the comments in effect promulgated a policy governing the patentability of genes and DNA sequences that is enormously broad.[149]

The discrepancy between the US and Europe in law and policy concerning the patenting of human genes highlights a motif that has been continually reappearing as one of the prime claims advanced throughout the dissertation. This theme is that US law, with its peculiar, modern, capitalist distillation of the common law's historical fixation on private property, embodies an unparalleled economism that tends to privilege unfettered, market dynamics over non–economic, ethical considerations. Indeed, this motif sheds light, in turn, on one of the prime paradoxes marking modernity's worldly faith, as a whole, as well as the manifestation of this faith in secularist law. The paradox is that the US – which commonly is perceived as a far less secular state and society (by virtue of, for instance, its strong public tenor of evangelical Protestantism) than other Western nations, such as the unabashedly secularist France – appears to be, in fact, an avatar of modernity's immanentism. Perhaps this can be partially explained, to take just one principal factor, by turning back to Weber for a sense of just how powerfully seventeenth–century ascetic Protestantism's transcendent validation for the accumulation

of property and wealth has, in the era of neo–liberalism, become encased within the market sphere itself.

Yet, as I indicated two paragraphs ago, within the present–day US – where it would seem that the dual forces of evangelical Protestantism (which, in at least one Baptist formulation, regards "DNA [as] sacred, inseparable in value from the image of the divine") and economism have never been stronger – conflicting impulses abound where the proprietarization of human genes is concerned.[150] On the one hand, we hear President Bush propound, in the course of speaking out against the cloning of human embryos as a means of deriving stem cells for biotechnological research, that "Life is a creation, not a commodity."[151] On the other hand, there is the framework established by such instruments of law as the legacy of *Chakrabarty;* and, from the same year as *Chakrabarty,* the Bayh-Dole Act (also referred to as the Patent and Trademark Laws Amendment), a landmark piece of Congressional legislation that, by codifying "the explicit U.S. policy of allowing grantees to seek patent rights in government-sponsored research results", is "predicated on the idea that the traditional concept of "ownership" has an important role to play in promoting the technological revolution."[152] The Bayh-Dole Act placed universities that receive US federal funds for such endeavors as biomedical research in the commercial business of pursuing huge patenting bounties for biotechnological development; this, while granting the institutions wide latitude for determining what materials it is appropriate to patent. In this way, the Act helped to set in motion a process whereby there are relatively few legal restrictions on the patenting of genetic information and material such as DNA sequences and stem cells.[153]

Whatever the precise extent to which the proprietarization and commodification of

human genetic material has been, or promises to be, placed under the aegis of secularist law, it is quite manifest that where the law does seek to legitimate this activity, it is at the same time expressing and enforcing an immanentist religious outlook. Once again, this worldly faith is exemplified by the philosophical anthropology on which the law relies in reducing human genes to commodified property, a philosophical anthropology that points to an acutely Promethean conception of the human being and its role in existence. This radically dualistic model of the human being imagines the body as an utterly manipulable, material object, even as it postulates the quasi–divine power of the scientific mind, as exercised through the instrumentation of "genetic technologies", to "[conquer] *fortuna* by technological mastery of nature," and thereby to "seize hold of fate, destiny, luck, chance".[154]

## IV. Contrasting Secularist Law's Notion of Knowledge, Creativity, and Human Biological Life As Commodified Property With Alternative Religious Perspectives

As I did previously, in the cases of secularist law's dual ideas of human proprietorship and transactional power over all of the world's existents, and secularist environmental law and policy's notion of nature as commodified property, I would like now to draw into relief secularist law's immanentist conceptions of knowledge, creativity, and human biological life; this, by briefly contrasting them with alternative religious perspectives emphasizing the transcendent origin and essence of these phenomena.

### *A. Intellectual Property Law As a Basis for Contrast*

Already within this chapter, I have had several occasions to draw attention to the incommensurate character of secularist intellectual property doctrine, when compared

with various religious worldviews that typically regard knowledge and creativity as divine, communally–shared gifts, rather than as privately controllable, commodified property. As in previous chapters, classical Islam, with its commitment both to the transcendence of Ultimate Reality, and the consequent, derivative sacredness of contingent reality, proves to offer an exceptionally revealing counterpoint within the present context.

In an illuminating, recent essay, lawyer Mohamad Mova Al'Afghani criticizes a pronouncement by an Indonesian council of Muslim clerics for its assertion that it is forbidden under Islamic doctrine to violate intellectual property rights. Al'Afghani summarizes as follows the stated rationale for the clerics' decision: "Islamic law protects the rights and property of individuals and...Intellectual property is also a form of property that is protected under Islamic law."[155] Al'Afghani then goes on immediately to claim, however, "This is exactly the point at which [the council's] argument could be mistaken."[156] While it is certain, as Al'Afghani puts forth, that there exist abundant Qu'ranic "verses and hadith [that is, divinely–inspired accounts of the words and deeds of the Prophet Muhammad and his followers] stating that an individual's property must be protected", he proceeds to maintain "that they will hardly find any verses or hadith that states [*sic*] that knowledge or ideas are protected under Islamic law."[157] Rather, "[w]hat they will surely find in those sources is that all knowledge belongs to God and that knowledge seeking and knowledge sharing is an obligation for all Muslims."[158]

Following a brief historical analysis in which he accurately identifies "the concept that intellectual products could be proprietarized" as a construct unique to the modern West, Al'Afghani states his belief that "[w]hether or not an idea expression can be

proprietarized under Islamic law is still not certain."[159] Inasmuch as ""Intellectual Property" is not a sui generis Islamic legal concept", and "Islamic values favor the promotion, transfer and dissemination of knowledge, as compared to treating it as property", Islamic societies would be ill–served, Al'Afghani believes, by reflexively "[i]mporting a capitalistic legal concept and stamping God's word on it".[160] In fact, as Al'Afghani argues (from a standpoint that openly demonstrates his support for the progressive development of Islamic societies, and the "revolutioniz[ing of] Islamic law" in a fashion that will help it adapt to the challenges of the twenty–first century), if the aim is to remedy the situation that "Muslim society is currently being left out in terms of knowledge and scientific development", the way to achieve this is not to accede to the inequities that can result – especially in the developing world – from "[e]xtensive IP protection".[161] Moreover, Al'Afghani suggests, it is perhaps dubious that "the protection of tangible property available in Islam [can be] further extend[ed] and appl[ied]...to intangible property", as the materialist metaphysical presuppositions of modern, Western intellectual property doctrine would dictate.[162]

Al'Afghani's account of the inconsistency between intellectual property doctrine and the Islamic worldview is buttressed by Yusuf Progler's interpretation that the modern, Western approach to "issues of "intellectual property rights" in the context of food, botany, and genetics" reflects a Baconian "insistence that humankind use its knowledge to extend "dominion of the human race over the universe.""[163] On Progler's view, the illegitimately domineering approach to nature embodied in "the spectre of patenting various forms of life, such as seeds and genes" is antithetical to "an Islamic perspective," which contrarily teaches that "only Allah has dominion over the universe".[164] Moreover,

Progler voices the concern, echoing Shiva's critique of how intellectual property doctrine has been used as an instrument for the furtherance of colonial control over indigenous communities, that the Western domination of nature embodied in the sought patenting of life is connected with the West's overall, global imperial project. His wish would be for "the West [to be disallowed] from making the transition from imperial control over natural resources to imperial control over natural and mental resources."[165] Criticizing how "Muslims have largely bought into the Baconian dictum of knowledge is power, with mixed results and with little sense of how this contributes to environmental destruction," Progler implores Muslim societies to help aid the condition of the planet, as well as "the mental health of humanity", by looking anew to "the Islamic tradition" for another, transcendentally oriented way of envisioning knowledge, and the natural world.[166]

*B. Law Governing Human Biological Property As a Basis for Contrast*

Given that biotechnology is becoming an increasingly pervasive component of the human experience within today's world, there is, as one might imagine, significant scholarly interest in the matter of how various religious worldviews perceive the origin and essence, as well as ultimate authority over, the human body.[167] While this is, to be sure, a daunting and complex area of inquiry into which one should not delve cavalierly, it will suffice for our limited, present purposes to emphasize how the teaching of certain theistic traditions that creation "*belongs to God!* [italics and punctuation included in original text]" boldly contrasts with modernity's immanentist notion of the body as commodified property that is to be held by humans.[168]

Within recent writing that focuses on how the sovereignty of God (as opposed to that

of human individuals) over life, death, and creation as a whole is manifested in religious perspectives on ultimate authority over the human body, Islamic, as well as Catholic, voices have been especially pronounced in maintaining that the human body, as a holding of God's, is "not man's laboratory."[169] This stance is implicit, for example, in the 1995 encyclical letter in which Pope John Paul II put forth the Church's stance "that the use of human embryos or fetuses as an object of experimentation constitutes a crime against their dignity as human beings" (let us leave aside the matter of how the Church theologically validates its view that these inchoate human forms constitute human beings).[170] This stance follows from the precept of God's sovereignty over life and death, a teaching antithetical to the notion that "man…is his own rule and measure".[171]

In a parallel vein, Munawar Ahmad Anees argues very explicitly that, in the Islamic tradition, "there is neither an idea of "rights" over one's body nor an "ownership" of the body in the Western sense of the word. For a Muslim, the body is a trust from God. It is neither a solely owned property nor a disposable commodity".[172] On Anees's reading, then, in which he is especially concerned to explicate what he understands to be Islam's necessary prohibition of human cloning (to take but one form of human genetic engineering):

> The Quranic paradigm of human creation, it would appear, preempts any move toward cloning. From the moment of birth to the point of death, the entire cycle is a divine act. Humankind is simply an agent, a trustee of God. The body is a trust from God. In the absence of a Quranic axiom on body as property, genetic intervention would appear to be quite unethical.[173]

Indeed, as Abul Fadl Mohsin Ebrahim maintains, "Muslim religious scholars have unanimously issued a *fatwā* (religious decree) against research in the field of human cloning."[174]

Importantly, though, while Ebrahim accepts the non–proprietary, Islamic view that humans' bodies "are not in reality [their] own, but have rather been given to [them] as an *amānah* (trust)", he takes this dictum as not necessarily prohibiting such an activity as organ donation.[175] So long as no price is affixed to an organ, the fact that organs "belong to Allah", rather than to the individual who holds them in trust, does not preclude "incorporating organ donation in one's will for the purpose of saving another life or enhancing it".[176] As Ebrahim explains, inasmuch as "this gesture is motivated by the *niyyah* (intention) to assist a person in need", "it can in no way be termed as…(breach of trust)."[177]

This being said, it is crucial to note how, on the Islamic worldview, the imperative to save a life is viewed within the context of the overall, transcendentally–oriented schema of reality, rather than accorded, as a principle, its own intrinsic worth. As Jonathan Brockopp observes, "[w]hile human beings are the pinnacle of God's creation, there is nothing essential to the human creature that always demands an overriding consideration for human life."[178] Thus, "in cases of war, abortion, or euthanasia, human life is to be preserved because of God's essential attribute as the author of life and death."[179] The need to balance the understanding that the human body is a sacred trust bestowed by God, and must consequently be cared for and preserved, with the notion that "Allah [rather than modern medicine] [is] the Ultimate Healer" gives rise to exceptionally complex and contentious debates within current Islamic jurisprudence over the nature and degree of appropriate medical intervention.[180] However, in the final analysis, the concept that God, rather than the human actor, reigns sovereign over life and death, and is thus responsible for endowing these phenomena with their final meaning and significance, exemplifies the

vast distinction between a transcendental, and an immanentist, vision of Ultimate Reality.

## 8. Endnotes

1. See Stephen B. Brush, 'Is Common Heritage Outmoded?', pp. 143-64 in Stephen B. Brush and Doreen Stabinsky, eds., *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Washington, D.C.: Island Press, 1996), p. 154 and *passim;* Stephen Gudeman, 'Sketches, Qualms, and Other Thoughts on Intellectual Property Rights', pp. 102-21 in *ibid.;* Ronald V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder, CO: Westview Press, 1996), p. 11; and Rochelle Cooper Dreyfuss and Roberta Rosenthal Kwall, *Intellectual Property: Cases and Materials on Trademark, Copyright and Patent Law* (Westbury, NY: Foundation Press, 1996).

2. James Boyle, *Shamans, Software, & Spleens: Law and the Construction of the Information Society* (Cambridge, MA and London: Harvard Univ. Press, 1996), p. 49.

3. *Cf. ibid.,* pp. 47-50.

4. Cynthia Townley, 'Intellectual Property and Indigenous Knowledge', *Philosophy & Public Policy Quarterly,* vol. 22, no. 4 (2002), pp. 21-6, p. 23.

5. See, for example, Yusuf Progler, 'Knowledge and Wealth in the Islamic Tradition', *Message of Thaqalayn: A Quarterly Journal of Islamic Studies,* vol. 5, no. 3 (2000), pp. 139-48; and Townley, 'Intellectual Property and Indigenous Knowledge'.

6. Davies and Naffine, *Are Persons Property?,* p. 77.

7. Rev. John J. Coughlin, 'Canon Law and the Human Person', *The Journal of Law and Religion,* vol. 19, no. 1 (2003-2004), pp. 7-8.

8. See Jonathan E. Brockopp, 'Taking Life and Saving Life: The Islamic Context', pp. 1-19 in Jonathan E. Brockopp, ed., *Islamic Ethics of Life: Abortion, War, and Euthanasia* (Columbia, SC: Univ. of South Carolina Press, 2003), p. 16.

9. See *supra,* pp. 151-8 and corresponding endnotes; and Price, *Property Rights,* p. 157. See also, for instance, Arthur L. Caplan, *If I were a rich man could I buy a pancreas?: and other essays on the ethics of health care* (Bloomington, IN and Indianapolis: Indiana Univ. Press, 1992), p. 115.

10. See, respectively, Leon R. Kass, 'The Wisdom of Repugnance', pp. 3-59 in Leon R. Kass and James Q. Wilson, *The Ethics of Human Cloning* (Washington, D.C.: AEI Press, 1998), pp. 3-4; and Leon Kass, ed., *Reproduction & Responsibility: The Regulation of New Biotechnologies* (Washington, D.C.: President's Council on Bioethics, 2004), p. 200 <www.bioethics.gov/reports/reproductionandresponsibility> (December 31, 2004).

11. Kass, *Life, Liberty and the Defense of Dignity,* pp. 191-2.

12. *Ibid.,* p. 193.

13. Consult, for instance: Radin, *Contested Commodities;* Andrews and Nelkin, *Body Bazaar;* E. Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington, D.C.: Georgetown Univ. Press, 1996); Ossorio, 'Property Rights and Human Bodies'; James Ridgeway, *It's All for Sale: The Control of Global Resources* (Durham, NC and London: Duke Univ. Press, 2004), pp. 167-90; and Wesley J. Smith, *Culture of Death: The Assault on Medical Ethics in America* (San Francisco: Encounter Books, 2000), pp. 155-87.

14. Refer to, respectively: Robert Jablon, 'Cadavers are big money in the U.S.', *Seattle Post-Intelligencer,* March 11, 2004, p. A6; Nicholas Kristof, 'Psst! Sell Your Kidney?', *The New York Times,* November 12, 2002, p. A31; Arthur L. Caplan, *Am I My Brother's Keeper?: The Ethical Frontiers of Biomedicine* (Bloomington, IN and Indianapolis: Indiana Univ. Press, 1997), pp. 95-100; Stephen R. Munzer, 'An Uneasy Case Against Property Rights In Body Parts', pp. 259-86 in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds., *Property Rights* (Cambridge, UK: Cambridge Univ. Press, 1994); Ridgeway, *It's All for Sale,* pp. 176-81 [*cf.* also Eric A. Posner and Richard A. Posner, 'The Demand for Human Cloning', pp. 233-61, and Richard A. Epstein, 'A Rush to Caution: Cloning Human Beings, pp. 262-79, in Martha C. Nussbaum and Cass R. Sunstein, eds., *Clones and Clones: Facts and Fantasies About Human Cloning* (New York and London: W.W. Norton & Co., 1998)]; Andrews, 'People As Products'; and Peter Cheney, 'Liquor, lights, mobs of men: Girls Gone Wild', *The Globe and Mail,* February 26, 2005, p. A9.

15. *Cf.* Kass, *Toward a More Natural Science,* pp. 128-53; and Jeremy Rifkin, *The Biotech Century: Harnessing the Gene and Remaking the World* (New York: Jeremy P. Tarcher/Putnam, 1998), pp. 37-66.

16. Consult, respectively: Kass, *Toward a More Natural Science,* p. 149; Mark J. Hanson, 'Patenting Genes and Life: Improper Commodification?', pp. 161-74 in Magnus, Caplan, and McGee, *Who Owns Life?,* pp. 169-70; and *Diamond v. Chakrabarty* (1980), 447 U.S. 303, 65 L. Ed. 2d 144, 100 S. Ct. 2204.

17. *Ibid.,* 447 U.S. at 309-10.

18. Vandana Shiva, *Protect or Plunder?: Understanding Intellectual Property Rights* (London and New York: Zed Books, 2001), p. 40.

19. *Ibid.,* p. 41.

20. Such is the case in *ibid.,* p. 42.

21. The quoted phrase is borrowed from Kate Cregan and Paul James, 'Stem-Cell Alchemy: Techno-science and the New Philosopher's Stone', *Arena journal,* no. 19 (2002), pp. 61-72.

22. For an illustrative representation of this notably interdisciplinary body of literature, see, for instance: Gerard Magill, *Genetics and Ethics: An Interdisciplinary Study* (St.

Louis: Saint Louis University Press, 2004); Kass, *Reproduction & Responsibility,* pp. 157-63; Magnus, Caplan, and McGee, *Who Owns Life?;* Davies and Naffine, *Are Persons Property?;* Andrews and Nelkin, *Body Bazaar;* and Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things* (London and New Brunswick, NJ: Athlone Press, 1999) [especially 'Chapter 8: Potential Property: Intellectual Rights and Property in Persons', pp. 161-78].

23. Kass, *Reproduction & Responsibility,* p. 158.

24. *Ibid.,* pp. 162-3.

25. Rifkin, *Biotech Century,* p. 43; Cregan and James, 'Stem-Cell Alchemy', p. 68.

26. Rifkin, *Biotech Century,* p. 226.

27. See, for example: Boyle, *Shamans, Software, & Spleens;* Corynne McSherry, *Who Owns Academic Work?: Battling for Control of Intellectual Property* (Cambridge, MA and London: Harvard Univ. Press, 2001); and Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York and London: New York Univ. Press, 2001).

28. McSherry, *Who Owns Academic Work?,* p. 223. See also Siva Vaidhyanathan, 'Copyright as Cudgel', *The Chronicle Review: The Chronicle of Higher Education, Section 2,* August 2, 2002, pp. B7-B9.

29. Vaidhyanathan, *Copyrights and Copywrongs,* p. 12.

30. US Constitution, art. 1, § 8, reproduced from Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law,* 2nd ed. (Boston: Little, Brown and Company, 1991), pp. xliii-xliv.

31. Alfred C. Yen, 'The Interdisciplinary Future of Copyright Theory', pp. 159-73 in Martha Woodmansee and Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC and London: Duke Univ. Press, 1994), p. 162.

32. David Saunders, *Authorship and Copyright* (London and New York: Routledge, 1992), pp. 30, 75. For comparative treatment of the conceptual foundations of copyright doctrine in such civil law regimes as those of France and Germany, see *ibid.,* pp. 75-121.

33. The quoted phrase is borrowed from Vaidhyanathan, *Copyrights and Copywrongs,* p. 187.

In addition, as Karen Durell argues:

> It would appear that Canada is poised to jump onto the stronger copyright bandwagon. On June 20, 2005 Bill C-60, *An Act to Amend the Copyright Act,* was

introduced in Parliament by way of a first reading. As drafted, the Bill creates a wider scope of copyright protection in Canada and thereby boosts the position of control enjoyed by rightsholders to protect their works against public interference. Karen L. Durell, 'Canadian Copyright on the precipice: Stronger rights and higher fees? Or not? ', Centre for Intellectual Property Policy at McGill Faculty of Law (2005) <www.cipp.mcgill.ca/en/news/current/29/> (August 10, 2005).

34. Robert S. Boynton, 'Righting Copyright: Fair Use and "Digital Environmentalism"', *Bookforum,* vol. 11, issue 5 (2005), pp. 16-19, p. 16.

35. *Ibid.,* quoting from Boyle, *Shamans, Software, & Spleens* (apparently). I say that the quote is "apparently" borrowed from this book of Boyle's, because, while he does not cite to a specific page, Boynton's article comprises a review essay on the book, and three other related volumes, and does not indicate the use of any additional sources.

However, the interested reader should note that further work exists by Boyle and other scholars that is even more directly pertinent to issues surrounding the drawing of parallels between "the environmental movement", and the rising drive to preserve a public domain of non–privatized, non–commodified, knowledge and creativity. See *Law and Contemporary Problems,* vol. 66, nos. 1&2 (2003) [encompassing a collection of papers, for which Boyle served as Special Editor, growing out of a 2001 Duke University conference on 'The Public Domain'; consult especially Boyle's essays, 'Foreward: The Opposite of Property?', at pp. 1-32, and 'The Second Enclosure Movement and the Construction of the Public Domain', at pp. 33-74]. I am grateful to Brewster Kneen and Shiri Pasternak for directing me to this collection, and impressing upon me its importance.

36. Vaidhyanathan, *Copyrights and Copywrongs.*

37. Paul Goldstein, *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1994), p. 19.

38. The quoted phrase is borrowed from *ibid.*

39. See Vaidhyanathan, *Copyrights and Copywrongs,* pp. 163-7.

40. *Ibid.,* pp. 164-5.

41. See, for example: Brown, *Who Owns Native Culture?;* Townley, 'Intellectual Property and Indigenous Knowledge'; Darrell Addison Posey, 'Intellectual Property Rights and the Sacred Balance: Some Spiritual Consequences from the Commercialization of Traditional Resources', pp. 3-23, and Tom Greaves, 'Contextualizing the Environmental Struggle', pp. 25-46 in Grim, *Indigenous Traditions and Ecology;* and Brooke Collins-Gearing and Nancy E. Wright, 'The Rhetoric of Benevolence as an Impediment to the Protection of Indigenous Cultural Property', unpublished paper furnished by the latter author in November 2003. I would like to thank Nancy Wright for a series of stimulating discussions with her concerning this issue,

in particular, as well as a variety of other matters pertinent to the present chapter of the dissertation.

42. Brown, *Who Owns Native Culture?,* p. 226. Also, please note that the dissertation's overall focus on the common law explains why I am less concerned with such Francophone Canadian provincial jurisdictions as Quebec.

43. Collins-Gearing and Wright, 'Rhetoric of Benevolence', p. 2 and *passim.*

44. Townley, 'Intellectual Property and Indigenous Knowledge', p. 24.

45. *Ibid.,* p. 25. For further insight, drawing on such disparate milieus as the modern "scientific community", and "[t]he Indians of the Northwest American coast", specifically the Kwakiutl, on the radical, epistemic contrast between scenarios where "knowledge circulates as a gift," and those where "knowledge is treated as a commodity, for sale at a profit", see: Lewis Hyde, *The Gift: Imagination and the Erotic Life of Property* (London: Vintage, 1999), pp. 74-92.

46. Brown, *Who Owns Native Culture?,* pp. 205-28.

47. *Ibid.,* p. 209.

48. *ibid.,* pp. 226-7.

49. Rose, *Authors and Owners,* p. 142.

50. *Ibid.,* p. 5.

51. *Ibid.*

52. *Ibid.,* pp. 9-11.

53. Mark Rose, 'The Author in Court: *Pope v. Curll* (1741)', pp. 211-29 in Woodmansee and Jaszi, *Construction of Authorship,* p. 214.

54. *Ibid.,* pp. 214-5.

55. *Ibid.,* p. 215.

56. Saunders, *Authorship and Copyright,* p. 10.

57. Rose, 'Author in Court', p. 213.

58. *Ibid.,* pp. 212-3.

59. *Ibid.,* p. 228.

60. *Ibid.*

61. *Ibid.*, p. 142.

62. *Ibid.*

63. *Ibid.*

64. Shiva, *Protect or Plunder?,* pp. 13-14.

65. *Ibid.*, p. 14.

66. Surendra J. Patel, 'Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?', pp. 305-22 in Brush and Stabinsky, *Valuing Local Knowledge,* p. 309.

67. *Ibid.*, p. 310.

68. *Ibid.* I draw at this point also on Gold, *Body Parts,* pp. 66-85, 107-24.

69. Patel, 'Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?', p. 310.

70. See, for example: Brush and Stabinsky, *Valuing Local Knowledge;* Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (Cambridge, MA: South End Press, 1997); Shiva, *Protect or Plunder?;* Brown, *Who Owns Native Culture?;* Nicole Rogers, 'Seeds, Weeds and Greed: An Analysis of the *Gene Technology Act* 2000 (CTH), Its Effect on Property Rights, and the Legal and Policy Dimensions of a Constitutional Challenge', *Macquarie Law Journal,* vol. 2 (2002), pp. 1-30; Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity* (London: Earthscan, 2000); and the two essays cited in endnote 41, above, from Grim, *Indigenous Traditions and Ecology.*

71. Shiva, *Biopiracy,* p. 5.

72. *Ibid.*, p. 3.

73. Shiva, *Protect or Plunder?,* p. 13.

74. *Ibid.*, pp. 12-13.

75. Rifkin, *Biotech Century,* p. 37.

76. Shiva, *Protect or Plunder?, passim.*

77. Dutfield, *Intellectual Property Rights, Trade and Biodiversity,* p. 9.

78. *Ibid.*, p. 14.

79. *Ibid.*, p. 19.

80. *Ibid.,* p. 20.

81. *Ibid.*

82. Shiva, *Protect or Plunder?,* p. 3.

83. *Ibid.*

84. See also, for example, Shiva, *Biopiracy,* pp. 19-21.

85. Steven P. McGiffen, *Biotechnology: Corporate Power Versus the Public Interest* (London and Ann Arbor, MI: Pluto Press, 2005), pp. 82, 93, and *passim.*

86. *Ibid.,* pp. 6-55.

87. Gold, *Body Parts,* pp. 64-85.

88. Jack Wilson, 'Intellectual Property Rights in Genetically Modified Agriculture: The Shock of the Not-So-New', pp. 151-62 in Michael Ruse and David Castle, eds., *Genetically Modified Foods: Debating Biotechnology* (Amherst, NY: Prometheus Books, 2002), p. 153.

89. *Chakrabarty,* 447 U.S. at 308-9; Gold, *Body Parts,* p. 80.

90. *Ibid.,* at 309-10, 313.

91. In addition to the printed case, *ibid.,* an excellent resource for information about the events surrounding *Chakrabarty* is an essay by the now well–known central figure himself: A.M. Chakrabarty, 'Patenting of Life-Forms: From a Concept to Reality', pp. 17-24 in Magnus, Caplan, and McGee, *Who Owns Life?*

92. *Chakrabarty,* 447 U.S. at 305.

93. *Ibid.,* at 305-6.

94. *Ibid.,* at 306.

95. *Ibid.,* at 309.

96. *Ibid.*

97. *Ibid.,* at 310.

98. *Ibid.,* at 313.

99. *Ibid.,* at 316.

100. *Ibid.,* at 316-18.

101. Chakrabarty, 'Patenting of Life-Forms', p. 23.

102. Jack Wilson, 'Patenting Organisms: Intellectual Property Law Meets Biology', pp. 25-58 in Magnus, Caplan, and McGee, *Who Owns Life?,* p. 37.

103. *Ibid.,* pp. 37-8.

104. *Ibid.,* p. 38. With respect to endnotes 102-4 and the accompanying text, consult also the exceptionally helpful appendix, 'Timeline Leading To and From the Chakrabarty Patent Decision', at pp. 47-54 of Wilson's essay.

105. *Monsanto Canada Inc. v. Schmeiser,* 2004 SCC 34 <www.lexum.umontreal.ca/csc-scc/en/rec/html/2004scc034.wpd.html> (June 10, 2004), pp. 6-7; McGiffen, *Biotechnology,* pp. 93-5.

106. *Monsanto Canada Inc. v. Schmeiser,* p. 14.

107. *Ibid.,* pp. 8, 16-17.

108. *Ibid.,* p. 16.

109. See *Harvard College v. Canada (Commissioner of Patents),* 2002 SCC 76 <www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol14/html/2002scr4_0045.html> (December 26, 2005).

110. *Ibid.,* p. 2.

111. *Ibid.*

112. *Monsanto Canada Inc. v. Schmeiser,* pp. 8-9; *Harvard College v. Canada* (Chief Justice McLachlin, and Justices Major, Binnie, and Arbour dissenting), p. 4.

113. Hanson, 'Patenting Genes and Life', p. 169.

114. Kass, *Toward a More Natural Science,* p. 149.

115. *Ibid.,* p. 150.

116. *Ibid.,* p. 149.

117. Kass's article 'Patenting Life', which originally appeared in the December 1981 issue of *Commentary,* serves as the near–verbatim source for the portion of his 1985 book *Toward a More Natural Science* that I am utilizing here. See 'Credits', at the beginning of *ibid.*

118. *Ibid.,* p. 151.

119. The quoted phrase is borrowed from Wilson, 'Patenting Organisms', p. 36. Magnus,

Caplan, and McGee, *Who Owns Life?,* is, throughout, a book that seeks to grapple with this specific issue, among many others.

120. Lori Andrews and Dorothy Nelkin, 'Propriety and Property: The Tissue Market Meets the Courts', pp. 197-222 in Magnus, Caplan, and McGee, *Who Owns Life?,* p. 209.

121. Ari Berkowitz and Daniel J. Kevles, 'Patenting Human Genes: The Advent of Ethics in the Political Economy of Patent Law', pp. 75-97 in Magnus, Caplan, and McGee, *Who Owns Life?,* p. 75.

122. Andrew and Nelkin, 'Propriety and Property', p. 209.

123. See, for example: *ibid.;* Andrews, 'People As Products'; and Andrews and Nelkin, *Body Bazaar.*

124. *Ibid.,* pp. 2-3.

125. *Cf.,* for instance, Boyle, *Shamans, Software, & Spleens,* especially pp. 97-107; and Boyle, 'Second Enclosure Movement', pp. 37-8.

126. *John Moore v. The Regents of the University of California* (1990), 51 Cal. 3d 120, 93 P.2d 479, 271 Cal. Rptr. 146 <www.carthage.edu/~brent/305moore.htm> (January 13, 2005). Especially helpful analyses of the case and its subsequent impact may be found in Gold, *Body Parts;* Andrews and Nelkin, *Body Bazaar;* Boyle, *Shamans, Software, & Spleens,* pp. 97-107; and Davies and Naffine, *Are Persons Property?*

127. *Moore,* p. 1.

128. *Ibid.*

129. *Ibid.*

130. *Ibid.*

131. Davies and Naffine, *Are Persons Property?,* p. 11.

132. *Moore,* p. 2.

133. *Ibid.*

134. *Ibid.*

135. *Ibid.,* p. 3.

136. *Ibid.,* p. 4.

137. *Ibid.*

138. *Ibid.,* pp. 4-5.

139. *Ibid.,* p. 4.

140. Andrews and Nelkin, *Body Bazaar,* p. 2.

141. Mohamad Mova Al'Afghani, 'Ulema edict on IPR could be misleading', *The Jakarta Post.com,* Opinion and Editorial, August 9, 2005 <www.thejakartapost.com/yesterdaydetail.asp?fileid=20050809.E02> (August 11, 2005), p. 1. Once again, I am indebted to Shiri Pasternak for her having pointed me to this important article.

142. I owe the thrust of this observation to William Leiss's two–session seminar presentation, 'Biotechnology, Religion and the Body' held at the University of Victoria's Pacific Centre for Technology and Culture, and co-sponsored by the CSRS, in January 2005.

143. Hui, *At the Beginning of Life,* p. 263.

144. *Ibid.*

145. *Reproduction & Responsibility,* p. 169.

146. *Ibid.,* p. 171.

147. *Cf.* George W. Bush, 'Remarks by the President on Stem Cell Research', pp. 307-12 in Glenn McGee and Arthur Caplan, eds., *The Human Cloning Debate,* 4th ed. (Berkeley, CA: Berkeley Hills Books, 2004) [comprising the text of an August 9, 2001 statement by the President]. President Bush's statements on these matters, as represented here, as well as in the immediately preceding, 2002 selection in this volume, 'Remarks by the President on Human Cloning Legislation', at pp. 303-06, peculiarly underscore the tensions existing among these rationales, as the President navigates between his strong constituencies in industry, on the one hand, and in the evangelical Protestant community, on the other.

148. Berkowitz and Kevles, 'Patenting Human Genes', p. 92. See also McGiffen, *Biotechnology,* pp. 6-92.

149. *Ibid.,* pp. 76, 92.

150. The quoted phrase is borrowed from Hanson, 'Patenting Genes and Life', p. 165.

151. Bush, 'Remarks by the President on Human Cloning Legislation', p. 304.

152. Wilson, 'Patenting Organisms', p. 50; Arti K. Rai and Rebecca S. Eisenberg, 'Bayh-Dole Reform and the Progress of Biomedicine', *Law and Contemporary Problems,* vol. 66, nos. 1&2 (2003), pp. 289-314, p. 290; and David Magnus, 'Introduction', pp. 11-16 in Magnus, Caplan, and McGee, eds., *Who Owns Life?,* p. 12.

153. Rai and Eisenberg, 'Bayh-Dole Reform and the Progress of Biomedicine', *passim.*

154. Craig Holdrege, *Genetics & the Manipulation of Life: The Forgotten Factor of Context* (Hudson, NY: Lindisfarne Press, 1996), p. 159; Benjamin Wiker, *Moral Darwinism: How We Became Hedonists* (Downers Grove, IL: InterVarsity Press, 2002), p. 303.

155. 'Ulema edict on IPR could be misleading', p. 1.

156. *Ibid.*

157. *Ibid.*

158. *Ibid.*

159. *Ibid.,* pp. 1-2.

160. *Ibid.,* pp. 2-3.

161. *Ibid.*

162. *Ibid.,* p. 2.

163. Progler, 'Knowledge and Wealth in the Islamic Tradition', pp. 140, 142.

164. *Ibid.,* pp. 139, 142.

165. *Ibid.,* p. 142.

166. *Ibid.,* pp. 142, 148.

167. As when I observed, in Chapter 7, endnote 128, that the CSRS has emerged as a leader in the interdisciplinary, comparative study of differing religious worldviews and their respective perspectives on the natural environment, a similar statement can be made within the present context. See, for example: Harold Coward and Pinit Ratanakul, *A Cross-Cultural Dialogue on Health Care Ethics* (Waterloo, ON: Wilfrid Laurier Univ. Press, 1999).

168. Pope John Paul II, 'Jubilee of the Agricultural World', pp. 111-14 in Ruse and Castle, eds., *Genetically Modified Foods,* p. 112 [this selection constitutes a November 11, 2000 address by the Pope, reprinted by the editors from "the Internet site of the Holy See, www.vatican.va"].

169. Munawar Ahmad Anees, 'Human Clones and God's Trust: The Islamic View', pp. 277-81 in McGee and Caplan, eds., *The Human Cloning Debate,* p. 281.

170. Pope John Paul II, *Encyclical Letter Evangelium Vitae Addressed By The Supreme*

*Pontiff John Paul II To The Bishops Priests And Deacons Men And Women Religious Lay Faithful And All People Of Good Will On The Value And Inviolability Of Human Life* (Vatican City: Libreria Editrice Vaticana, 1995), p. 113.

171. *Ibid.,* p. 115.

172. Anees, 'Human Clones and God's Trust', pp. 279-80.

173. *Ibid.,* p. 280.

174. Abul Fadl Mohsin Ebrahim, *Organ Transplantation, Euthanasia, Cloning and Animal Experimentation: An Islamic View* (Markfield, UK: The Islamic Foundation, 2001), p. 110.

175. *Ibid.,* p. 53.

176., *Ibid.,* p. 110.

177. *Ibid.*

178. Brockopp, 'Taking Life and Saving Life', p. 16.

179. *Ibid.*

180. Ebrahim, *Organ Transplantation, Euthanasia, Cloning and Animal Experimentation,* p. 107.

# Chapter 9

## Conclusion: State Power as a Vehicle for Modernity's Proselytizing Pursuit of Forced Conversions

### I. Recapitulating the Overall Thesis of the Inquiry

In this dissertation, I have argued that it is not possible to sever religion on the one hand, from, on the other, the legal and political affairs of any polity, even the modern, civil state. In other words, I call into question the secularist premise that the religious life (whether of individual citizens, or communities of believers) can and should be held apart from the legal and political dimensions of the modernist state. Such a severance is impossible, because law and politics necessarily are informed, at a fundamental level, by that which constitutes the core of the religious life: namely, humankind's essential responsiveness to Ultimate Reality.

Further to what I therefore termed, early in Chapter One, the "nonseverability" of religion from law and politics, I have asserted that there is a distinct, yet typically unrecognized and unacknowledged, immanentist religious tradition that is expressed, enforced, and propagated by secularist legal systems, and by other instruments of state power attendant to the modernist polities within which secularist law is situated. Owing to a broad spectrum of historical factors ranging from, to name but a pair, late–medieval, nominalist philosophy's severing of crucial, metaphysical linkages between transcendence and the world, to the pervasive naturalism of the French Enlightenment, modernity's religious worldview is captured, in sum, by its strong tendency towards reducing the entirety of reality to the form of natural phenomena. In reducing even Ultimate Reality to a material form, this worldview effectively presupposes that divinity, and with this, the sources of human salvation, have been injected and confined within the

world of space, time, and materiality. Moreover, given secularist law's intrinsic grounding in modern immanentism, secularist legal systems, as socio–cultural artefacts interwoven within an essentially textual world, act as revealing semeiotic structures that help bring to light their peculiar religious foundation. In other words, secularist law is "the juridical prism" that refracts modernity's transmutation of the religious, or, modernity's relocation, within the mundane realm, of the transcendence and divine presence of Ultimate Reality.

Following on what I have argued throughout the inquiry, modernity's implicit claim to represent an historical era that has successfully broken with, and thereby progressed beyond, the religiously–based thought processes of the pre–modern world is intensely self–deluding, as well as outwardly deceptive. Pivotal for the modernist faith's reduction of existence to a mere aggregation of natural phenomena is modernity's reliance on the notion that valid knowledge is arrived at, necessarily, by means of experimentation, quantification, and rational scrutiny, carried out upon the things of the natural world. Consistent with this, the modern West presupposes that its naturalistic metaphysics is verifiable by the lights of empirical, scientific inquiry, and is, accordingly, unassailable. By implicitly purporting to reveal the ultimate meaning of existence through the instruments of scientific inquiry, the modern, Western worldview holds forth a vision of reality that offers salvation within the worldly realm of the state, society, and human individual.

In keeping with its implicit assertion of a salvational vision of existence that is scientifically verifiable, and thereby universally, indisputably valid, the modern West is impelled by an inherent, imperial civilizational impulse towards propagating its

worldview around the globe. As such, modernity's unacknowledged religious tradition has for several centuries been part and parcel of, to borrow from the cultural commentator Ziauddin Sardar, an "imperial adventure…that [posits] western civilisation as the norm, the sole repository of truth, the yardstick by which all 'Others' are to be measured."[1] As I will demonstrate in this final chapter of the dissertation, by taking the "war on terrorism" as a focal example, the worldwide spreading of modernity's religious orthodoxy is facilitated with especial potency through instruments of state power.

The forcible, state–implemented propagation of modernity's faith is enabled by such ideologies and political–economic doctrines as Marxism, and liberal, democratic capitalism (especially the latter's current, predominating, neo–liberal variant). These ideologies and political–economic creeds transmit the foundational tenets of modernity's religious tradition into the public sphere, including the realm of state policy. Because I have emphasized, throughout the dissertation, the current prevalence of the liberal capitalist denomination of modernity's faith, I am concerned with how this particular ideology serves as a medium for the global propagation of modernity's immanentism. As I have maintained, the immanentist religious significance pervading neo–liberalism, and modern, liberal capitalism more generally, is conveyed by the ideology's naturalistic model of the human being, who is imagined to be, in his or her ontological essence, a proprietor and exchanger of (potentially) all the things of the world. In the present chapter, I will underscore how the US stands at the vanguard of modernist polities that seek to globally proselytize this particular denomination of the modern, Western religious tradition. Perhaps never more forcefully than during the current, "war on terrorism," the US employs such embodiments of liberal, democratic capitalism as a messianic variety of

liberal nationalism, and concomitant claims to universal, moral rectitude, as a conduit for the immanentism that US policy acts to propagate around the world.

## II. The "War on Terrorism": A Case Study in the Proselytizing Drive of Modernity's Worldly Faith, As Executed Through Mechanisms of State Power

As I suggested earlier in the dissertation, the "war on terrorism" constitutes an ongoing campaign by the Bush administration to forcibly supplant, around the world, political regimes and policies that the administration deems to be "allies of terror", and therefore "enemies of civilization".[2] In this way, the US stance would appear to fit quite smoothly with "the civilizing mission ideology" that had led Western powers, at an earlier point during the modern epoch, to "[rationalize] their colonial domination of the rest of humankind."[3] As Michael Adas explains:

> Formulations of this ideology varied widely, from those of thinkers or colonial administrators who stressed the internal pacification and political order that European colonization extended to 'barbaric' and 'savage' peoples suffering from incessant warfare and despotic rule, to those of missionaries and reformers who saw religious conversion and education as the keys to European efforts to 'uplift' ignorant and backward peoples.... Those who advocated colonial expansion as a way of promoting good government, economic improvement or Christian proselytization, agreed that a vast and ever-widening gap had opened between the level of development achieved by Western European societies (and their North American offshoots) and that attained by any of the other peoples of the globe. Variations on the civilizing mission theme became the premier means by which European politicians and colonial officials, as well as popularizers and propagandists, identified the areas of human endeavour in which European superiority had been incontestably established and calibrated the varying degrees to which different non-European societies lagged behind those of Western Europe.[4]

It is hardly an exaggeration to assert that Adas's analysis, even though it pertains specifically to "late-nineteenth-century Europeans", serves nonetheless to describe numerous, distinct strands that converge together within the Bush administration's stated agenda in the "war on terrorism": for instance, the wish to rescue oppressed populations

from despotic rulers; the goal of bestowing an incontrovertibly superior doctrine of political order and economic development upon societies that lack it; and, not least, Christian missionaries' desire "to 'uplift' ignorant and backward peoples". Indeed, as we will see, the ideology embodied in the war exemplifies a uniquely American conflation of evangelical Protestantism's transcendentalism, together with the immanentism of modernity's naturalistic worldview.

Over the next several pages, I examine some of the arsenal of forcible juridical mechanisms deployed by the US in its quest to (as President Bush famously proclaimed) "bring terrorists to justice".[5] The US's juridical weaponry in the war ranges from domestic, "antiterrorist" legislation, policies, and practices, to globally extensive, military, political, and economic measures intended to induce or coerce sovereign states and non–state actors around the world into furthering the war's ostensible pursuit of justice. On the basis of the President's characteristically terse statement of the war's principal aim, I would maintain that most any instrument of state power meant to assist in subjecting those whom the war's prosecutors label as "terrorists" to the prosecutors' standards of justice constitutes a juridical weapon in the war.

By highlighting federal legislation, especially the USA PATRIOT Act, as well as executive branch orders and regulations, I would like to point to various ways in which these legal apparatuses serve to express, enforce, and propagate an immanentist religious orthodoxy within the "American homeland".[6] At the same time, this juridical reinforcement of the American self–conception and its worldly, religious significance contributes to the nation's prevailing idea of its rightful, global role as a terrestrial deliverer (and the prime national embodiment) of sacred virtue. As I initially indicated in

Chapter Four, statutory law hastily enacted in response to the events of September 11 tapped into an upswelling of popular belief in "American national messianism" and the salvational, end purpose of the American historical experience.[7] This tide of belief was raised anew amid the swirl of events surrounding the 2003 commencing of "Operation Iraqi Freedom". More recently, the Bush administration has fought to sustain the tide; this, as the seemingly interminable, "difficult,...necessary, and right" "sacrifices" necessitated by the violent insurgency that has followed the deceptively rapid deposing of Saddam Hussein have interfered with the US claim that American power can "make the world safer, and...more free."[8] Further, I will go on to comment on how the representation of the concept of "terrorism" within state decrees helps to validate an understanding of "terrorism" as an incarnate evil that is mortally opposed to the apodictic good of a democratic capitalist form of social, political, and economic order.

Thereafter, I will go on to analyze the US's international exertion of force under the banner of the "war on terrorism". Because this particular channelling of state power furthers the US's bellwether role in the worldwide proselytizing of neo–liberalism and its underlying, worldly faith, I intend to counter the US's contention that the war does not implicate it as the architect of a religious and civilizational crusade.

### *A. Propagating the Worldly Faith Within the "American homeland"*

The widely documented hyper–nationalist ethos that has marked US public life since September 11 tends to demonstrate, at its base, an intensified confidence in the unassailable, exceptional historical status of the United States.[9] Such trust in foreordained, American exceptionalism is typified by Vice President Richard Cheney's February 2002 pronouncement indicating that it is the US's historic mission to rid the

world of "terror" and the "regimes that sponsor it", whether by leading other nations, or by forging ahead as a lone warrior. In his address to the Council on Foreign Relations in Washington, the Vice President stated:

> Only we can rally the world in a task of this complexity against an enemy so elusive and so resourceful. The United States and only the United States can see this effort through to victory.
>
> This responsibility did not come to us by chance.
>
> We are in a unique position because of our unique assets, because of the character of our people, the strength of our ideals, the might of our military and the enormous economy that supports it.[10]

The Vice President's assertions were elaborated upon in September of the same year, when President Bush took the first anniversary of September 11 (a day that he also officially proclaimed "Patriot Day") to establish that, "The terrible illumination of these events has...brought new clarity to America's role in the world".[11] Foreshadowing the impending release of the 2002 National Security Strategy, the President went on to declare:

> America's greatest opportunity is to create a balance of world power that favors human freedom. We will use our position of unparalleled strength and influence to build an atmosphere of international order and openness in which progress and liberty can flourish in many nations.[12]

*1. Domestic Juridical Weapons in the "War on Terrorism"*

Within this national milieu, the US government has instituted a panoramic series of legal measures, such as the USA PATRIOT Act, that are redolent with nationalism and historical exceptionalism, as they spell out sequences of extreme steps to be exercised against the professed threat of "terrorism". Not only are these steps extreme, they are in the judgment of many commentators, and occasionally the courts, in important respects unconstitutional.[13] The full title of the Act – 'Uniting and Strengthening America by

Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act' – hardly could be more forthright in stipulating the sentiments to which the legislation is intended to appeal. Amending large swaths of pre–existing legislation in such areas as constitutional law, federal criminal law, and immigration law, the Act undertakes, for example, to enhance law enforcement surveillance powers; to broaden the legal definition of "terrorism"; and to tighten restrictions pertaining to non–citizens' entry into, or freedom to remain within the US.

Another prominent piece of legislation bespeaking the fortress mentality that has been cultivated in the American public consciousness since September 11 is the 'Homeland Security Act', which became law in November 2002. The Act elevated the 'Office of Homeland Security' established shortly after September 11 to the status of a massive, executive department that controls numerous, pre–existing agencies dealing with such matters as border and transportation security, immigration and naturalization, customs regulation, and emergency management. In dedicating itself to the co–ordination of government efforts intended to protect the "American homeland" from "terrorist attacks", the Department of Homeland Security enshrines the Bush administration's principle that "The war on terrorism requires all Americans to be vigilant".[14]

Similarly manifesting American nationalism, exceptionalism, and the increasingly absolutist power of the state sovereign are a number of orders and regulations that have issued from the US executive branch. A prime weapon in the "war on terrorism" has been the Department of Justice's indefinite detention of undisclosed numbers of non–citizens, which has been carried out under the aegis of the USA PATRIOT Act, in

concert with executive provisions.[15] For example, before the passage of the Act – in fact, only six days after September 11 – Attorney General John Ashcroft decreed that, "in the event of emergency or other extraordinary circumstance", the Immigration and Naturalization Service (INS) need not obey its general policy of determining, within 48 hours of the arrest of a non–citizen, whether the person should be held in continuing custody, or released. Instead, when operating under these sorts of conditions, the INS "must make such determinations within an additional reasonable amount of time", a provision that has been used to justify ongoing detentions of non–citizens since September 11.[16] In keeping with the Department of Justice's intensified suspicion of non–citizens, it also has undertaken such measures as requiring the registration and fingerprinting of visiting males from select nations, especially states with predominantly Islamic populations.[17]

### *2. Reading Bellah's Analysis of American "Civil Religion" As Pointing to Modernity's Worldly Faith*

The juridical weapons deployed domestically by the US in the "war on terrorism" exemplify the liberal, nationalist ideology representing that nation's unique conflation of modern, naturalistic doctrine with Protestantism. As I will expand on shortly, so, too, do the US's international policies in the war, especially the government's current effort, in an acting out of "messianic imperialism", to compel the Islamic world's adoption of a neo–liberal, democratic capitalist embodiment of the modernist worldview.[18]

Bellah's earlier–cited, landmark essay, 'Civil Religion in America', serves as a vital guide to discerning the contours of this nationalist ideology, including the peculiar way in which it combines Protestantism with a worldly conception of salvational, American nationhood.[19] Therein, Bellah explains how the American nation, "Way of Life", and

flow of history have, since the US's earliest years, been invested by Americans with religious import derived from a literalist reading of the Bible. Bellah suggests that, on this Biblical basis, the archetypal American citizenry conceives of itself as inhabiting a sacred city on the hill, divinely ordained to house a society "perfectly in accord with the will of God", that will serve as a "light to all the nations".[20] Having itself been delivered from tyranny in a symbolic reprising of the Mosaic Exodus of the people of Israel, the messianic, American nation takes as its historical mission the leading of the world's unperfected peoples towards what Bellah terms a "viable and coherent world order".[21] To be sure, the motifs illuminated within Bellah's essay foreshadow in a striking manner the official mode of discourse used to explain and justify American policies and practices surrounding the "war on terrorism". This has been especially so, ever since the US recast its ex post facto justification of "Operation Iraqi Freedom" from, so to speak, a seek–and–destroy mission aimed at elusive "weapons of mass destruction", to a fight "for the cause of liberty and…the peace of the world".[22]

Especially significant, on my interpretation, is how Bellah's analysis intimates the profound degree to which American, liberal nationalist ideology is, even with its transcendentally–oriented, Protestant roots, imbued with a worldly conception of immanent divinity. He appears to wish to maintain that the divine referent of sacral, American nationalism and historical exceptionalism is a transcendent God. Yet, within Bellah's account of American civil religion, and elsewhere in his overall body of research, he refers to aspects of the American nationalist mythos which markedly imply that the divine referent of American nationhood has been effectively relocated within the world. For example, Bellah indicates that the American nation's self–conceived, divine

mission to lead the world's peoples to societal perfection is motivated by an "eschatological hope", an analysis that resonates in the form of more recent accounts interpreting the "war on terrorism" is being propelled by "an apocalyptic intent".[23] Thereby suggested is that, from the standpoint of the messianic American quest, the end of days, together with the divine source of final judgement and human salvation, lies within the temporal bounds of a world historical order orchestrated by the US.

Continuing along these lines, Bellah, as a lucid expositor of Weber, has helped to demonstrate seventeenth–century Anglo–American Protestantism's emphasis on the accumulation of wealth and property, as means for the worldly substantiation of God's grace.[24] As I argued in Chapter Six, this Protestant trait has been crucial to the development of the salvational significance conferred on property within the context of liberal, democratic capitalism, the ideological current that in turn imbues the American national consciousness, and helps to drive the US's understanding of itself as a universal, messianic beacon.

It is now basic, and ever–more thickly documented and elaborated knowledge, that the Bush administration draws pervasively on the theological doctrines, symbolic motifs, and liturgical discourse of evangelical Protestantism in validating its mission – a mission that President Bush regularly is cited as believing that God has called on him personally to lead – to employ US state power as the pre-eminent mechanism for propagating liberal, democratic capitalism around the globe, and throughout the Islamic world, in particular.[25] As President Bush proclaimed in 2005, "The road of Providence…leads to freedom", by which he meant, as he has indicated elsewhere, that it is the US's destiny to guide "every nation and culture" towards its realisation of the God–given right to live in

accordance with a rights–based, modern, liberal ideal of individual liberty.[26] The administration has repeatedly emphasised that the model of "freedom" and "liberty" which it perceives itself as having a divine sanction to propagate around the world encompasses at its heart the intrinsic, divinely bestowed right of all individuals to own private property and "enjoy the benefits of their labor".[27] As such, the US seeks to guarantee this ostensibly universal right by "extend[ing] the benefits of freedom and progress" – in the form of "democracy, development, free markets and free trade" – to "nations that lack them".[28] I would maintain that Protestantism's historical ascription of profound, salvational significance to the proprietary experience – suggested no less by President Bush's language than by the seventeenth–century contexts of concern to Weber – implies the relocation of the transcendent source of salvation within the mundane realm of proprietorship and economic activity.[29]

### *3. Recalling the Thought of Voegelin and Schmitt, Within the Context of the "War on Terrorism"*

As was indicated in Chapter Three, endnote 72, where I concluded the discussion of Voegelin's analysis into how a reawakening of ancient Gnosticism is at work within modernity's "immanentist church-states", the 1950s–era Voegelin idealistically believed that "the American and English democracies" acted as a defense against the "fallacious" eschatology held forth by such immanentist regimes as that of the Soviets. However, I maintain that, from today's vantage point, it is difficult to conceive of a more vivid demonstration of the dynamics of modern Gnosticism than that which takes place through the US government's stark representation of the American nation as the incarnation of goodness and light, which is locked in an apocalyptic struggle with the terroristic forces of evil. President Bush's pronouncement, three days after September 11, that "our

responsibility to history is…clear: to answer these attacks and rid the world of evil", offers a paradigmatic example of this mode of self–representation.[30]

US governmental discourse locates the quintessence of evil within the modalities of "terror" (including the illusory stash of the "world's most dangerous weapons" that had been held forth by the Bush administration as the prime rationale for dispatching the "evil" that is Saddam Hussein), and the "terrorists" who are said to deploy them.[31] At the same time, the discourse implies the US's symbolic representation of itself as having been injected with the pure goodness of transcendent divinity. It would follow that this indwelling of divinity has transformed the American nation into a worldly saviour, set to vanquish evil within temporal history by drawing the transcendent source of divine light into a darkened world. Apart from the startling hubris of such a national self–conception, there is something exceptionally troubling about the US's current exemplification of Voegelin's thesis concerning modern Gnosticism. Specifically, I have in mind Voegelin's recognition of the totalitarian tendencies of Gnostic, political messianism, and the absolutism that arguably is emerging under cover of America's prosecution of the "war on terrorism".

As I now would like to emphasize in turning back to Schmitt, there unfortunately is not a necessary contradiction between modern mass democracy and the quasi–divine absolutism of a secular sovereign. This is especially the case once meaningful public debate has ceased, and the populace has been largely "won over through a propaganda apparatus" that leaves it convinced of the axiomatic righteousness of a stated, national cause.[32] Recall that, on Schmitt's reading, the effectively sacred omnipotence of the secular sovereign is captured by the sovereign's power to unilaterally decide, in times of

state emergency, on exceptions to the constitutionally mandated legal order. Schmitt envisioned, for example, "a case of extreme peril", or "a danger to the existence of the state", as the sorts of exceptions that could serve to rationalize the sovereign's suspension of the existing legal order.[33]

Schmitt's dictum, "Sovereign is he who decides on the exception", echoes throughout the proclamations of the Bush administration.[34] Indeed, as Agamben implies, the administration is verging towards enacting "the state of exception as a paradigm of government".[35] As the President stated shortly before waging war on Iraq:

> The attacks of Sept. 11, 2001 showed what the enemies of America did with four airplanes. We will not wait to see what terrorists or terrorist states could do with weapons of mass destruction. We are determined to confront threats wherever they arise. I will not leave the American people at the mercy of the Iraqi dictator and his weapons.[36]

The administration indicates that, to this end, "we will take whatever action is necessary to defend our freedom and security", including action, as Agamben and numerous other critics of the war have suggested, that transcends the existing, domestic and international legal order. Consider, in this connection, the Bush administration's policy of indefinitely detaining non–American, suspected "terrorists" at the US naval base in Guantanamo Bay, Cuba as "unlawful combatants" who are not due the protections required for prisoners of war under the Geneva Conventions. On Agamben's view, this is emblematic of how the US has enshrined the state of exception as a mode of governance. By unilaterally deciding that "unlawful combatants" are beings who can validly be removed from the scope of established law, and instead governed as "the object[s] of [the sovereign's] pure de facto rule," the US quite miraculously dissolves an essential element of the prisoners' status as human individuals.[37]

### *B. The Official Construction of the Concept of "Terrorism": A Discursive Instrument for Propagating the Worldly Faith*

The state discourse employed in imparting meaning to the term, "terrorism", acts to validate and enforce fundamentally religious presuppositions asserting the intrinsic virtuousness, and unassailable legitimacy of the liberal, democratic capitalist ideology that presumably stands in opposition to this embodied evil. As President Bush pronounced while revelling in "Operation Iraqi Freedom's" purported, successful fight "for the cause of liberty and…the peace of the world", "the liberation of Iraq" (by which the President meant its divinely sanctioned deliverance "from dictatorship to democracy") is a pivotal victory against the "great evil" of terror".[38]

The legislation, and executive orders and regulations that the US has enacted in furtherance of the war contain variously detailed formulations of what constitutes "terrorism", and a number of directives instructing how the American apparatuses of justice should proceed against this allegedly diabolical adversary. Governmental discourse depicts "terrorists" as collectively constituting a unitary enemy against whom it is imperative to wage an indiscriminate an unmerciful campaign, while also warning that this enemy is hydra–headed and ubiquitous. Yet, at the same time, the US's official definition of "terrorism", together with the criteria by which the US grants itself the authority to label various state and non–state actors as "terrorists", are remarkably broad, and malleable in accordance with the US's interests and political exigencies of the moment.

In an executive order issued approximately two weeks after September 11 that seeks to block the financing of "terrorists", President Bush sets forth a definition of "terrorism" that is, in a brief form, quite representative of the definition employed by the US in other

post–September 11 instruments. The President's order states:

> the term "terrorism" means an activity that –
>
> involves a violent act or an act dangerous to human life, property, or infrastructure; and
>
> appears to be intended –
>
> to intimidate or coerce a civilian population;
>
> to influence the policy of a government by intimidation or coercion; or
>
> to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage–taking.[39]

Ironically, a good portion of the conduct that this order describes is arguably epitomized in the current or recent actions of sovereign states – liberal democracies among them – with whom the US is allied (in some cases very closely, such as Israel), not to mention the US itself. As such, the order exemplifies the tendency of some powerful actors to silently and selectively distinguish between what Fred Halliday terms "terrorism from above" and "terrorism from below". "Terrorism from above", insofar as it represents "the violent actions of states", often escapes censure. By contrast, "terrorism from below", which represents the violent actions of those without the benefit of state power – for example, national independence movements, or religiously or ideologically motivated, stateless actors such as al–Qaeda – is more likely to be condemned as an affront to "civilization" by nations such as the US.[40] However, as the "war on terrorism" demonstrates, when "terrorism from above" is deemed to be a threat to the "American values and American interests" that are portrayed as leading the global "advance of freedom", it will indeed be discursively suffused with evil.[41] A classic instance of this was when the Bush administration inveighed that, in resisting American forces, Saddam Hussein's troops ""[fought] like terrorists," not soldiers".[42]

By no means has the US's selective imputation of "terroristic" conduct to sovereign states, with the intention of coercing those states into conforming to the ideological – and implicitly religious – norms of the US, been historically confined to the "war on terrorism". I would maintain that economic sanctions regimes are another prime example of an embodiment of state power that serves such a purpose. Economic sanctions have been, in recent years, a staple of US international policy seeking to ban nations such as Iran from allegedly "[supporting]...acts of international terrorism" (by which the US essentially means, in the Iranian case, that state's support for certain armed movements opposed to Israel).[43] The fact that economic sanctions regimes may themselves be convincingly described as "weapons of mass destruction" of the ilk that the Bush administration has inseparably linked with "terrorism" gives rise to one of the most lamentable ironies surrounding the official construction of the concept of "terrorism".[44]

All in all, a fundamental implication of the US governmental discourse employed in formulating the concept of "terrorism" is that it serves to mark off as being utterly irrational and beyond the pale, and therefore unworthy of substantive debate, the visions of political order represented by alleged "terrorists". In this way, the discourse, together with the state power that stands behind it, validates and enforces the notion that those who pose a perceived danger to the global predominance of liberal, democratic capitalism, and the US's role as the overseer of this reigning ideology, are "terrorists" who intolerably oppose an unassailable, universal good.[45]

### *C. The Global Proselytizing of Modernity's Religious Tradition Through the US's International Instruments of State Power*

Through the instruments of state power that it brings to bear internationally in the "war on terrorism", the US effectively seeks to compel worldwide conversions to neo–

liberal, democratic capitalism, and the immanentist faith underlying this ideology. The international arm of the US's campaign to "bring terrorists to justice" encompasses a panoply of instruments of state power. I just discussed a prominent one among these, namely, the unilateral designation of opposing fighters as "unlawful combatants". Recall that, in Chapter Four, I also had occasion to mention other such instruments, for example, attempts to compel, by military, political, or economic force, international actors to accede to the US's manner of prosecuting the war; and, as well, the sought, thoroughgoing, institutional transformation of invaded territories into client states and societies. A prime illustration of the latter mechanism is provided by one of the US's administrative policies in Iraq. As part of a forceful championing of the "values of freedom" that the US has claimed to undertake in Iraq since the fall of Saddam Hussein, it imposed the quintessentially neo–liberalist, juridical measure, Order 39. Zygmunt Bauman describes (and unapologetically criticizes) this legal instrument that compulsorily "promote[s] the 'Western way of life'":

> Order 39[, as] issued by the coalition-appointed Iraq governor Paul Bremer[,] forbids the future native rulers of Iraq to 'restrict access by foreign owners to any sector of the economy', while it simultaneously authorizes foreign investors to 'transfer abroad without delay all funds associated with investment, including shares or profits and dividends'. One could excuse the natives for translating 'triumph of freedom and democracy' as syndicated robbery of resources and the promotion of an organized as well as officially endorsed corruption.[46]

As I first indicated in Chapter Two, the overall policy posture that the US has adopted through its international imposition of state power in the "war on terrorism" is encapsulated with singular evocativeness in the 2002 National Security Strategy. The Strategy seeks worldwide converts to the universal, salvational doctrine of American–style, liberal, democratic capitalism, as it simultaneously pursues the unchallenged,

economic and geostrategic advantages suggested as being due to a nation that "welcomes [its] responsibility to lead in [the] great mission" of "[furthering] freedom's triumph over [its] foes".[47] Consistent with this is the US's stated plan of leading others along "the path to progress" that "is open to all" by taking such measures as: "[championing] the cause of human dignity and [opposing] those who resist it" (meaning that the US will "stand firmly" for such "nonnegotiable demands" as "the rule of law", "respect for women", and "respect for private property"); "[defeating] global terrorism" by "[disrupting and destroying] terrorist organizations" and "[waging] a war of ideas...against international terrorism"; "[igniting] a new era of global economic growth through free markets and free trade"; and compelling nations by economic means to "[build] the infrastructure of democracy".[48] Integral to this plan is the doctrine of "acting preemptively against...terrorists, to prevent them from doing harm against our people and our country", the basis seized upon by the US as justification for the "liberation" of Iraq.

*D. In the Final Analysis: A Religious and Civilizational Crusade?*

Evident throughout the Bush administration's prosecution of the "war on terrorism" has been a manifest Orientalism. (Hardly insignificant is that one of the countries to have joined most closely with the US in the war is Britain, another nation which, although its proud imperial days lie buried in a distant past, displays Protestant roots that arguably have merged into a liberal, nationalist identity of worldly sacredness and messianism, not to mention a powerful habit of Orientalism).[49] Recently, the Bush administration has been stoking the fear of a fantastic, looming Islamic threat that evokes melodramatic, cinematic images of Arabian horsemen storming across the lands, intent on sacking all that lies within their path:

> …[N]ow, Mr. Cheney and others warn, Al Qaeda's ultimate goal is the re-establishment of the caliphate, with calamitous consequences for the United States. As Mr. Cheney put it in Lake Elmo [Minnesota, a Bush re-election campaign stop in September 2004], referring to Osama bin Laden and his followers: "They talk about wanting to re-establish what you could refer to as the seventh-century caliphate" to be governed by Sharia law, the most rigid interpretation of the Koran."
>
> Or as [US Defense Secretary Donald Rumsfeld] put it [in December 2005]: "Iraq would serve as the base of a new Islamic caliphate to extend throughout the Middle East, and which would threaten legitimate governments in Europe, Africa and Asia."[50]

Whatever the US's protestations to the contrary, its Orientalist stance tends insidiously to depict Arabs and Muslims as benighted, irrational, and suspect peoples who require nothing so much as a Protestant–style, religious reformation, and a paternalist, American–led modernization of all dimensions of their lives and societies.[51] The administration emphasizes that its "war of ideas…against international terrorism" will "[support] moderate and modern government, especially in the Muslim world, to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation".[52] This approach aims to remedy the situation whereby, as was indicated several years ago by President Bush's soon–to–be National Security Advisor (and current Secretary of State) Condoleezza Rice, nations such as present–day Iran, and Iraq under Saddam Hussein "have been left by the side of the road" "[as] history marches towards markets and democracy".[53] Iran, in particular, Rice suggested, seeks "not to disrupt simply the development of an international system based on markets and democracy, but to replace it with an alternative: fundamentalist Islam".[54]

During the days following September 11, President Bush's vigilant handlers were quick to recast his instinctive pronouncement that the US intended to undertake a "crusade" against the uncivilized, on behalf of civilization.[55] While the mention of a

crusade, so patently offensive to the collective, historical memory of the Islamic world, was eliminated from subsequent governmental statements, the US's ascription to itself of a representative role at the head of a supposedly monolithic, civilized world has remained a hallmark of the "war on terrorism". Thus, it is imperative to ask: is the US being genuine in its continuing contention that it has not sought to engage itself in a civilizational contest against Arabs and Muslims, not undertaken the religious and civilizational crusade that such a conflict would imply? Or has the US's professed wish to foster a "just and peaceful world beyond the war on terror" actually catalyzed an implicit crusade fuelled by a peculiar, worldly conflation of Protestant doctrine with modern, metaphysical naturalism?[56]

I maintain that the latter may be the case, and propose, following Tomaž Mastnak, that this modernist crusade can be situated more broadly within the context of Western Christendom's historical propensity for undertaking religious and civilizational crusades against non–Christians, in the name of world peace. He states:

> Intimately connected with the highest ideals and values of Christian society – the ideals of unity and peace, in particular – and seen as a prominent vehicle for achieving them, the Crusades were unchallenged throughout the Middle Ages.... But their impress is not limited to the Middle Ages. As an ideal and a movement, the Crusades had a deep, crucial influence on the formation of Western civilization, shaping culture, ideas, and institutions. The Crusades set a model for "expansionist campaigns by European Christians against non-Europeans and non-Christians in all parts of the world."... In fact, the crusading spirit has survived through Modernity well into our own postmodern age.[57]

I demur only from Mastnak's contention that we now live in a truly postmodern age, as the worldly religious tradition imposed by US state power remains, on my reading, nothing if not eminently modern – or, for that matter, hyper–modern.[58] In all other respects, however, I would wholeheartedly concur that "the crusading spirit has

survived", indeed.[59]

## 9. Endnotes

1. Sohail Inayatullah and Gail Boxwell, eds., *Islam, Postmodernism and Other Futures: A Ziauddin Sardar Reader* (London and Sterling, VA: Pluto Press, 2003), p. 122.

2. 'Full Text: Bush's National Security Strategy', p. 1.

3. Michael Adas, 'Contested Hegemony: The Great War and the Afro-Asian assault on the civilizing mission ideology', pp. 78-100 in Prasenjit Duara, ed., *Decolonization: Perspectives From Now and Then* (London and New York: Routledge, 2004), p. 78.

4. *Ibid.*

5. This motif has figured prominently in the President's discourse, as in his 2003 State of the Union address, where he declared: "We have the terrorists on the run, and we are keeping them on the run. One by one, the terrorists are learning the meaning of American justice." 'President's State of the Union Message to Congress and the Nation', *The New York Times,* January 29, 2003, pp. A12-A13.

6. Note the legal enshrinement of this phrase in the Homeland Security Act of 2002, Public Law No. 107-296, § 2(1): "Each of the terms "American homeland" and "homeland" means the United States."

7. The quoted phrase is borrowed from Anatol Lieven, 'The Push for War', *London Review of Books,* vol. 24, no. 19 (2002), pp. 8-11.

8. United States National Security Council, 'National Strategy for Victory In Iraq', November 2005, p. 34.

9. Lewis Lapham's book, *Theater of War* (New York: New Press, 2002), captures the core of this ethos with especial eloquence.

10. 'In Cheney's Words: 'Our Role Is Clear'', *The New York Times,* February 16, 2002, p. A8.

11. 'Bush Proclaims that Sept. 11 Will Be Called Patriot Day', *The New York Times,* September 5, 2002, p. A14; George W. Bush, 'From great tragedy of 9/11 comes opportunity', *Seattle Post-Intelligencer,* September 11, 2002, p. B7.

12. *Ibid.*

13. From among the abundance of sources exploring these issues, some recommended starting points for achieving an overview are: the 'New Democracy Forum' in *Boston Review: A Political and Literary Forum,* vol. 27, no. 6 (2002-2003), pp. 4-22, especially David Cole's essay at pp. 4-10, 'Their Liberties, Our Security: Democracy and double standards'; and Nancy Chang and the Center for Constitutional Rights, *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*

(New York: Seven Stories Press, 2002).

14. Homeland Security Act of 2002, § 101(b)(1); and letter from US Attorney General John Ashcroft to 'State and Local Officials', March 27, 2002.

15. See Cole, 'Their Liberties, Our Security', pp. 5-6.

16. See 66 *Federal Register* 48334-35 (September 20, 2001); and Christopher Drew and Judith Miller, 'Though Not Linked to Terrorism, Many Detainees Cannot Go Home', *The New York Times,* February 18, 2002, pp. A1, A9.

17. See, for example, 67 *Federal Register* 67766-68 (November 6, 2002). A Department of Justice official proclaimed this registry program "a great success", reasoning that "Sept. 11th awakened the country to the fact that weak immigration enforcement presents a huge vulnerability that terrorists can exploit." Rachel L. Swarns with Christopher Drew, 'Fearful, Angry or Confused, Muslim Immigrants Register', *The New York Times,* April 25, 2003, pp. A1, A17.

18. The quoted phrase is borrowed from Seumas Milne, 'Iraqis have paid the blood price for a fraudulent war', *The Guardian,* April 10, 2003 <www.guardian.co.uk/Iraq/Story> (April 10, 2003).

19. Bellah, 'Civil Religion in America'.

20. *Ibid.,* pp. 175, 186.

21. *Ibid.,* pp. 175, 185.

22. See 'President Bush's Prepared Remarks Declaring End to Major Combat in Iraq', *The New York Times,* May 2, 2003, p. 14; and *cf.* also Rodney Blackhirst and Kenneth Oldmeadow, 'Shadows and Strife: Reflections on the Confrontation of Islam and the West', *Sacred Web: A Journal of Tradition and Modernity,* no. 8 (2001), pp. 121-36.

23. See Bellah, 'Civil Religion in America', p. 186; and Michael Northcott, *An Angel Directs the Storm: Apocalyptic Religion & American Empire* (London and New York: I.B. Tauris, 2004).

24. See Bellah, *Beyond Belief, passim.*

25. *Cf.,* for example, Ron Suskind, 'Faith, Certainty and the Presidency of George W. Bush', *The New York Times Magazine,* October 17, 2004, pp. 44-51, 64, 102, 106.

26. See 'President Bush's State of the Union Message to Congress and the Country', *The New York Times,* February 3, 2005, pp. A18-A19; 'The Inaugural Address: 'The Best Hope for Peace in Our World Is the Expansion of Freedom in All the World'', *The New York Times,* January 21, 2005, pp. A16-A17; and David E. Sanger, 'In Bush's Vision, a Mission To Spread Power of Liberty', *The New York Times,* October 21, 2004, pp. A1, A18.

27. See especially: 'Full Text: Bush's National Security Strategy', p. 1; 'Excerpts From Bush's News Conference on Iraq and Likelihood of War', *The New York Times,* March 7, 2003, p. A10; 'President's State of the Union Message to Congress and the Nation', *The New York Times,* January 29, 2003, pp. A12-A13; Bush, 'From great tragedy of 9/11 comes opportunity'; and 'Text of President Bush's State of the Union Address to Congress', *The New York Times,* January 30, 2002, p. A22.

28. Bush, 'From great tragedy of 9/11 comes opportunity'.

29. Fur further, recent analyses suggesting the immanentism implicit in the Bush administration's efforts at the global propagation of neo–liberalism, see Robert D. Crane, '"Freedom and Democracy" America's Ultimate Polytheism', *Islamica Magazine,* issue 14 (2005), pp. 59-61; and the book on which Crane comments therein, Claes G. Ryn, *America the Virtuous: The Crisis of Democracy and the Quest for Empire* (New Brunswick, NJ and London: Transaction Publishers, 2003).

30. 'Full Text: Bush's National Security Strategy', p. 5.

31. See 'President's State of the Union Message to Congress and the Nation'; and 'In Cheney's Words: The Administration's Case for Removing Saddam Hussein', *The New York Times,* August 27, 2002, p. A8. See, too, President Bush's now–notorious statement, issued as part of his premature, triumphal speech aboard the U.S.S. Abraham Lincoln declaring victory in "Operation Iraqi Freedom", that, "that terrible morning [i.e., September 11], 19 evil men, the shock troops of a hateful ideology, gave America and the civilized world a glimpse of their ambitions." 'President Bush's Prepared Remarks Declaring End to Major Combat in Iraq', *The New York Times,* May 2, 2003, p. A14.

32. Schmitt, *The Crisis of Parliamentary Democracy,* p. 6.

33. Schmitt, *Political Theology,* p. 6.

34. *Ibid.,* p. 5.

35. Agamben, *State of Exception,* pp. 3-4.

36. 'Excerpts from Bush's News Conference on Iraq and the Likelihood of War'.

37. *Ibid.*

38. 'President Bush's Prepared Remarks Declaring End to Major Combat in Iraq'.

39. 'Executive Order on Terrorist Financing: Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism', issued September 24, 2001 <www.whitehouse.gov/news/releases> (February 6, 2002).

40. Fred Halliday, *Two Hours That Shook the World: September 11, 2001: Causes & Consequences* (London: Saqi Books, 2002), pp. 69-85.

41. See 'President Bush's Prepared Remarks Declaring End to Major Combat in Iraq'. Two good sources alluding to the selective condemnation of "terrorism from above" in the name of liberal democracy include: Eqbal Ahmad, *Terrorism: Theirs & Ours* (New York: Seven Stories Press, 2001); and Edward S. Herman, *The Real Terror Network: Terrorism in Fact and Propaganda* (Cambridge, MA: South End Press, 1982).

42. See Eric Schmitt and David E. Sanger, 'U.S. Officials Say Iraqis May Have Killed Some American Prisoners', *The New York Times,* March 26, 2003, p. B11.

43. See Iran and Libya Sanctions Act of 1996, Public Law No. 104-172; and Hossein Alikhani, *Sanctioning Iran: Anatomy of a Failed Policy* (London and New York: I.B. Tauris, 2000).

44. On the idea that economic sanctions regimes constitute "weapons of mass destruction", see, for instance: Noam Chomsky, Edward S. Herman, Edward W. Said, and Howard Zinn et al., 'Sanctions are Weapons of Mass Destruction', pp, 181-3 in Anthony Arnove, ed., *Iraq Under Siege: The Deadly Impact of Sanctions and War* (Cambridge, MA: South End Press, 2000); and Joy Gordon, 'Cool War: Economic Sanctions as a Weapon of Mass Destruction', *Harper's Magazine,* vol. 305, no. 1830 (2002), pp. 43-9.

45. For related lines of argument concerning the epistemological influence borne by the discursive construction of the concept of "terrorism", see: Joseba Zulaika and William A. Douglass, *Terror and Taboo: The Follies, Fables, and Faces of Terrorism* (New York and London: Routledge, 1996); and John Collins and Ross Glover, eds., *Collateral Language: A User's Guide to America's New War* (New York and London: New York Univ. Press, 2002).

46. Zygmunt Bauman, *Europe: An Unfinished Adventure* (Cambridge, UK: Polity Press, 2004), pp. 24-6.

47. 'Full Text: Bush's National Security Strategy', p. 3.

48. *Ibid.,* pp. 3-16.

49. See Longley, *Chosen People;* and Said, *Orientalism.*

50. Elisabeth Bumiller, 'White House Letter: 21st-Century Warnings of a Threat Rooted in the 7th', *The New York Times,* December 12, 2005 <www.nytimes.com> (December 12, 2005).

51. The work of the late Edward Said has never been of such urgent value as it is for its ability to lay bare and assail this tendency with incisiveness and vigour. See especially his landmark work, *Orientalism,* along with such essays written shortly before his death as: 'Thoughts about America: Edward Said warns against the return to a shameful episode in the US's intellectual history', *Al-Ahram Weekly On-line,* February 28-March

6, 2002 <www.ahram.org.eg/weekly/2002> (March 1, 2002); 'An Unacceptable Helplessness: Will the Last Person to Leave Turn Out the Lights?, *CounterPunch,* January 18/19, 2003 <www.counterpunch.org> (February 4, 2003); 'Who is in charge?', *Al-Ahram Weekly On-line,* March 6-12, 2003 <http://weekly.ahram.org.eg/2003> (March 12, 2003); and 'Diary', *London Review of Books,* vol. 25, no. 8 (2003), p. 39.

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52. 'Full Text: Bush's National Security Strategy', p. 6.

53. Condoleezza Rice, 'Promoting the National Interest', *Foreign Affairs,* vol. 79, no. 1 (2000), pp. 45-62.

54. *Ibid.,* pp. 61-2. Indeed, one hardly can raise a newspaper (in early January 2006, as I write these words) without noting that Iran seems ever to be the target of heightening calls for "regime change" emanating from influential quarters of the US government, especially following Iran's 2005 election of the conservative President Mahmoud Ahmadinejad.

55. *Cf.* S. Nawabzadeh, 'The Neo Crusaders', *Echo of Islam,* no. 200 (2003), pp. 14-19.

56. The quoted phrase appears in 'Text of President Bush's State of the Union Address to Congress'.

57. Tomaž Mastnak, *Crusading Peace: Christendom, the Muslim World, and Western Political Order* (Berkeley, CA: Univ. of California Press, 2002), p. 346.

58. *Cf.* Giddens, *The Consequences of Modernity.*

59. *Cf.* Emran Qureshi and Michael A. Sells, eds., *The New Crusades: Constructing the Muslim Enemy* (New York: Columbia Univ. Press, 2003).

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