# The Sacred in Law: An Introduction

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It seems that the specter of the sacred always haunts the law, even in the most resolute of contemporary secular democracies. Indeed, the more one considers the question of the relation between law and the sacred, the more it appears that endless debate over the proper relationship of government to religion is only the most quotidian example of a problematic that lies at the heart of law itself. And in the current historical moment, as some in the United States grapple with the seeming fragility of secular democracy in the face of threatening religious fundamentalisms, the question of the relation between law and the sacred has gained a particular urgency.

Rather than taking up current controversies that address the claims organized religions make on and against contemporary governmental policies, *Law and the Sacred* explores questions about the foundational role of the sacred *as such* in the constitution of law, both historically and theoretically. To focus solely on the First Amendment is to examine doctrinal debates about a thick jurisprudence that depends on the already divided categories of sacred and secular. The chapters in this volume are preoccupied with a prior question: How did that spatial division come to be, in what ways, and with what effects? In addressing these issues, they highlight the ambivalent place of the sacred in the self-image of modern states and jurisprudence. For if it is the case that, particularly in the developed West, contemporary law posits a fundamental conceptual divide between sacred and secular, it nevertheless remains true that the assertion of that divide has its own history, one that defines Western modernity itself. Unearthing that history helps us to see the ways law represses its relation to the sacred to differentiate itself from religion.

Although we intentionally reify "the sacred" in our title to provoke a sense of its comparability with and distinctness from law, the word is more commonly adjectival, attached to or inhering in places or entities that are, by virtue of their sacred

character or status, set apart. The Latin root of sacred, *sacer*, has a double meaning: It signifies both something holy or consecrated and something accursed or devoted to destruction.[1] And although current parlance often empties the term of its darker connotations, recognizing the awesome and sublime aspect of that which is sacred can help us to connect sacrality with law in illuminating ways, provoking questions about the kinds of power law accrues when it is imagined as partaking of what Peter Fitzpatrick calls "beyond the existent world."

Even as the concept of the sacred reverberates with religious meaning, it cannot be reduced to a component of religious expression. Rather, sacrality imbues a variety of acts, institutions, and symbolic systems with a quality of mystery and a sensibility of the sublime. As a result, there exists no one definition of the sacred or any agreed-upon understanding of the relation between the sacred and law. As a means of illustrating the most suggestive approaches to the subject, we begin with an exploration of Franz Kafka's *The Trial*.[2] This enigmatic, unfinished novel acts as a screen on which we project various notions of the sacred in relation to law, both because of its overt thematizing of the conjunction and because its power as a work of fiction comes from its own aesthetics of sacrality. We then turn from the realm of literature to that of history and jurisprudence, tracing the association of law and the sacred as it is expressed in theories of nation-founding and in American constitutional interpretation and legal culture.

## The Trial

As *The Trial* begins, the protagonist K. finds himself unceremoniously awoken one morning by a couple of slightly bumbling, slightly sinister police hacks who inform him that he has been arrested and then eat his breakfast, attempt to steal his clothes, and leave after minimal interaction. It quickly becomes clear that K. is "on trial" for unspecified crimes; or rather, as the novel tells us, the law seems to have attached itself to his guilt—over what, neither he nor we know. He has not committed any acts prohibited by positive law, and yet as the novel's darkly comical warders, lawyers, and judges inform him and as his readers discern along the way, K. acts like a man with a bad conscience.[3] While he is technically free to roam the city and work at his bank job, once accused, he cannot shake the law.

To what kind of law is K. subject? None that would be recognizable to those who understand law to consist of systems of rules administered by legal actors in a procedurally regular way. Indeed, K. struggles throughout the novel to gain access

and insight into the nature and locus of law's authority, only to encounter again and again mere functionaries and adjuncts. Even worse, those encounters regularly represent legal processes as farce—degraded, surreal, violent, and obscene. K. receives notice to go before an examining magistrate, but finds his "court" on the fifth story of a slum building, in a room choked by a contentious mob more interested in watching public sex acts than K.'s long-winded bluster about justice. He opens a closet door in the bank building where he works and confronts a macabre scene in which two of his jailers are about to be whipped because K. has complained about their behavior in his rooms. He wanders the back hallways of a court bureaucracy lined with zombielike petitioners, and the place so saps his energy that he must be helped out the back way and dumped on the threshold, gasping for fresh air. And he seems to find his strongest ally not in his bedridden lawyer, whom he visits only to have sex with the lawyer's servant, but in Titorelli, the court painter, who produces grotesque iconic portraits of lesser judges with whom he curries influence.

How can this kind of law partake in any way of the sacred? The absurdist character of these encounters makes the law, such as it is, appear deeply profane—desecrated and blasphemous.[4] It might be argued that K.'s world is marked by the utter *absence* of law: There are no rules or procedures to follow, and no sovereign authority (monarch, general, legislature, judge) appears to issue edicts, command enforcers, or direct K.'s "trial." How can there be law without these mechanisms of external force?[5] Indeed, this novel does not present the most historically obvious link between law and the sacred: the figure of the divine lawgiver.[6] To the extent that Kafka's novel willfully obscures an identifiable sovereign presence, it can be read as describing a bureaucratic dystopia in which the ruler, or more precisely, the rule of law, is absent, with harrowing results.

And yet the world of *The Trial* is not anarchic. If the central locus of legal power is never overtly visible, it is nevertheless always and everywhere felt by K. Crucially, while K. appears disgusted by its absurd workings, he is nevertheless drawn to a number of perverse manifestations of law and legal spaces. The force he feels is internal and mostly immaterial—if the law is drawn to guilt, perhaps it is guilt that compels K. to seek out the law—and in being "drawn to" law, he is literally compelled by his own desire to find and encounter it in places set outside the ordinary flow of time and space. And where does the law reside? Not in the world of everyday places and procedures but in hallucinatory, otherworldly spaces. The "courtroom," the closet, the stale hallway, the cramped artist studio with hidden doorways—all of these are places set apart from the knowable and comprehensible city

in which K. has lived his life. Whatever absurdities or obscenities they may contain, in their feeling of spatial and temporal dislocation, they signal K.'s departure from the common and quotidian and his entry into the realm of sacrality.

Identifying this ethos as "sacred" locates this kind of analysis in longstanding anthropological, sociological, and psychoanalytic literatures that define the sacred as an unstable combination of the venerated and the unclean. As Roger Caillois summarizes the point in *Man and the Sacred*, sanctity and defilement are "two poles of a dreadful domain"[7] set apart from the profane world of the everyday.[8] In this view, religious forces are of two sorts: one benevolent and pure, inspiring love and respect for the gods; the other evil and impure, producing fear and horror.[9] As much akin as opposite, both qualities of the sacred are forbidden, set apart from the profane world, and can in fact exchange values: Sometimes an impure thing can become holy, and vice versa, through a change in external circumstance.[10] This fusion of seeming opposites, and the possibility of their transformation, constitutes what Durkheim calls the ambiguity of the sacred.[11]

Defined by its separation from the profane, the sacred is fundamentally associated with the concept of taboo. First denominated in William Robertson Smith's 1889 *Lectures on the Religion of the Semites*, *taboo* meant "a system of restrictions on man's arbitrary use of natural things, enforced by the dread of supernatural penalties."[12] That broad definition influenced a wide variety of scholarship, carrying over from anthropology to sociological and psychoanalytic attempts to locate the origins of law. In Freud's influential *Totem and Taboo*, for example, we find an account of taboo that specifically equates it with law. A thing or person that is taboo is set apart; it is dangerous, unapproachable, and contagious, and contact with it makes the thing or person in contact taboo as well. Freud argues that the origin of taboo lies in the original sacrifice of the father by a band of brothers and the subsequent sacrificial feast of both celebration and mourning. In Freud's narrative, these brothers, driven away from the primal hoard by a jealous father, returned, killed, and devoured him. But though they hated their father enough to murder him, they also loved him as a father, and that love produced a deep ambivalence about their act of sacrifice. Out of remorse, the sons prohibited the killing of the totem (their father substitute) and sexual conjugation with the women they had wanted, thus (according to Freud) producing the two most fundamental taboos: those against murder and incest.[13] (As Freud noted, we make taboo those things to which we are most violently drawn.[14]) The rules surrounding taboo are prohibitive, regulative,

and hence, order producing,[15] and in them Freud sees not only the origins of law but of conscience as well.[16]

Not only do taboos emerge from an ambivalent relation to the (now sacred) totem; they also signal an internal ambivalence in which the sacred thing is both holy and defiling.[17] Insofar as taboo fuses the transcendent and the bodily, the high and the low, life and death, it indicates something fundamental about the nature of the sacred. "What is sacred," Georges Bataille writes, "not being based on a logical accord with itself, is not only contradictory with respect to things but, in an undefined way, is in contradiction with itself. This contradiction is not negative: inside the sacred domain there is, as in dreams, an endless contradiction that multiplies without destroying anything."[18] The sacred, whether it be made manifest in group ritual or individual encounter, is powerful precisely because it conjoins what we desire and what we fear.[19] To the extent that taboos are contagious—that is, that having come into contact with a taboo person or thing, one becomes taboo oneself—they interpolate, and sometimes entice, those who approach them into their otherworldly, transformational spaces. And to the extent that encounters with taboo are order producing—that is, to the extent that they partake of law—they underscore the potential violence associated with legal power. One does not come into contact with a taboo without repercussion.

We do not know what K. may have done to be "arrested" and put on trial; but as we follow his successive encounters with law, we see him unmoored from the world of everyday life even as he moves nearer and nearer to his inevitable death and the comedic element of his encounters with law disappears. No scene in the novel underscores this feeling of otherworldliness, and overtly signals the mixing of law with the sacred, more than the chapter "In the Cathedral." In it, the protagonist K. finds himself in a dark church to which he has been mysteriously and unknowingly summoned. He wanders aimlessly through the dimly lit and rapidly darkening space until a priest—a prison chaplain—calls him out: "Joseph K.!"[20] Knowing he is free to leave, K. nevertheless turns around, drawn to the priest, who tells him that his case is going badly, that his guilt is "supposed, for the present, at least, to be proved."[21] When K. protests against the abstruse, labyrinthine proceedings brought against him, the priest responds with a parable that Kafka in other places called "Before the Law."[22]

In that well-known parable, a man from the country comes before a doorkeeper to beg admittance to the Law. Although the door to the Law stands open,

the doorkeeper tells him that he cannot be admitted at the moment. The country man decides to wait for permission to enter and sits for years in vain. At the very end of his life, he asks the doorkeeper a question. "Every man strives to attain the Law," he says, "how does it come about, then, that in all these years no one has come seeking admittance but me?" And the doorkeeper replies, "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."[23]

The man from the country wishes to be admitted to the law itself—to the emanations of light he sees only as he is dying, not to any mediating embodiment of law.[24] Yet he is forbidden entrance, verbally, and he obeys that proscription. What is it that has kept the man sitting by that door, day after day, neither leaving nor pushing past the doorkeeper? What does the figure of the doorkeeper represent? Is the man from the country free? Is the doorkeeper powerful or inferior to him? Is the doorkeeper a part of the Law or deluded about its nature? It may be that the law resides only in the word of the doorkeeper, or inside the man from the country himself.[25] K. and the priest consider a number of interpretations of the parable, which the priest calls "unalterable scripture," but no particular exegesis seems, finally, to exhaust the possibilities of meaning.[26] But as the priest remarks, "The commentators note in this connection, 'The right perception of any matter and a misunderstanding of the same matter do not wholly exclude each other.'"[27]

Perhaps one meaning of the prison chaplain's parable is that "the law" consists of the rule that one can never reach the law—that it is forbidden.[28] But what does it mean to come "before" such an enigma? To come before (*vor*) is variously defined as standing outside of something spatially, preceding it temporally, awaiting something, coming under the cognizance of something or someone, or being put on display before something or someone.[29] Each of these definitions posits a relation between two entities but does not tell us the nature of that relation. Is the entity that comes before superior or inferior? Is it utterly outside or does it necessarily define the nature of that which is inside or comes after or is awaited? Could it be prior to the law? The word *before* marks a threshold that, like the many doors in Kafka's novel, stands open to something or someone not determined or knowable. The door itself, both dreadful and intoxicating, can be understood to signal the operations of taboo without itself indicating what is forbidden. And it is that very undefined quality, which provokes both desire and fear, that from an anthropological perspective gives the sacred its awesome power. Indeed, the hermeneutic debate between K. and the prison chaplain itself suggests that indeterminacy is one

central characteristic of sacredness, which this parable places at the heart of the Law's power—an example of the sacred's "inexhaustible morphology."[30]

## K. as Sacred Man

Thresholds are places of crossing, spaces between known and unknown, past and future, life and death. The dark, silent cathedral K. visits is just such a space. Its sacrality derives not just from its association with religion but from its liminality: darkened almost beyond toleration during the day, empty but for K. and the prison chaplain, who "belongs to the Court"[31] and who presages the guilty verdict in K.'s case. Here K. stands literally before the law on the threshold of death, already essentially entombed. With no hope of acquittal or expiation, K. has been drawn into the sacred and has become of it.[32] That transformation helps to explain his relation to law and the circumstances of his death.

K.'s "trial" ends in quick, slicing violence. One evening, two gentlemen appear at the door of his apartment as K. sits, dressed in black. At first, they attach themselves to his sides, intertwining their arms with his as they lead him through the city streets; but in the end, K. essentially directs himself to the scene of his own execution, a bleak quarry past the edge of the city. Though his warders seem to desire it, he cannot rise to the occasion to "relieve the officials of all their tasks" and kill himself. He dies, rather, "like a dog," stabbed in the heart under the warders' gaze.[33]

This last grim scene proposes another way of understanding the relation between law and the sacred. Rather than locate the sacred in law, we might rather locate it in K. himself; that is, we might say that in being touched by the law, K. has become a sacred man. But his death is no collective act of ritual sacrifice, no expiation or offering to the gods.[34] Rather, K.'s trial itself can be understood as a legal gesture producing what Giorgio Agamben has called *homo sacer*, or sacred man—he who may be killed but not sacrificed.[35] Originating in early Roman law, *homo sacer* is one who has been abandoned by law and as a result has only "bare life."[36] Rejecting anthropological conceptions of the sacred, Agamben understands sacrality to be in the first instance a political, not a religious, attribution,[37] produced by the sovereign's power to decide the exception—that is, to determine who is placed under the ban, outside the protection of law.[38] Because the relation between sovereign and sacred man is a political relation for Agamben, *homo sacer* is not taboo; he is neither contagious nor, in the final analysis, a particularly religious figure in the ways described by Robertson Smith and others.[39] Indeed, he is not

even outside the law; rather, he is utterly enveloped by it to such an extent that he has no life outside of legal power.[40] On Agamben's reading of *The Trial*, for K. law becomes indistinguishable from life, and K. has lived in the state of exception from the novel's beginning.[41]

Agamben understands the prison chaplain's parable as an exemplar of the structure of the sovereign ban. "Kafka's legend," he writes, "presents the pure form in which law affirms itself with the greatest force precisely at the point in which it no longer prescribes anything—which is to say, pure ban. The man from the country is delivered over to the potentiality of law because law demands nothing of him and commands nothing other than its own openness. . . . law applies to him in no longer applying, and holds him in ban by abandoning him outside itself."[42] As Agamben notes, this is precisely the relation the prison chaplain ascribes between himself and K.: "The Court wants nothing from you. It receives you when you come and dismisses you when you go."[43] The structure of the sovereign ban, Agamben argues, is "a law that is *in force but does not signify*."[44] And that law—sacred in itself—in turn consecrates K. such that he is killed not like a sacrificial lamb but, profanely, like a dog.[45] To stand before such a law, placed in a state of exception, does not provoke any affective ambivalence of the sort imagined in an anthropological account of sacrality; rather, this kind of law renders K. a non-psychologized legal subject by virtue of a totalizing interdiction.

Just before his killing, K. sees a figure lean from the window of a lone house by the quarry, reaching out to him. As he reaches out in return, he wonders,

> Who was it? A friend? A good man? Someone who sympathized? Someone who wanted to help? Was it one person only? Or was it mankind? Was help at hand? Were there arguments in his favor that had been overlooked? Of course there must be. Logic is doubtless unshakable, but it cannot withstand a man who wants to go on living. Where was the judge whom he had never seen? Where was the high Court, to which he had never penetrated?[46]

K. cannot in the end unravel the meaning of this "faint and insubstantial" apparition. Perhaps it signals the existence of a more just social world lying outside the horrifying bounds of the quarry, but at best, it has no more presence than the law K. desires—a just, responsive law—and whose absence he once again decries. If this law marks a missing space in which more arguments might be made on his behalf, the quarry is the place in which arguments do not matter. K. is the man whom the sovereign has excepted from the law,[47] and the quarry is a space of sovereignty, constituted by the fundamental indistinction of law and violence.[48]

## The Sacred in Modern Law: Foundings, Sacred Texts, Civil Religion

But perhaps we might question the totalizing effect of Agamben's reading by considering further the question of critique in *The Trial*. Why does K. pull his final warders through the streets toward his own death scene? The horror of that moment in *The Trial* resides in what seems to be K.'s identification with the state and its malign purposes. He is, as Hannah Arendt argues, "capable of entering the world of necessity and injustice and lying, of playing a role according to the rules, of adapting himself to existing conditions."[49] This frightening identification seems to suggest that K. not only has bowed to the inevitable judgment of the state but has acceded to the judgment's legitimacy as well. Indeed, through the whole of the novel, K. has been unable to gain a firm critical purchase on the law: Even as he has condemned it as corrupt and unprincipled, he has been lured toward it to the point of self-obliteration.

And yet K.'s identification with the state is not utterly complete: Bound, ready to die in the quarry, he nevertheless does not take his own life. Kafka casts this moment as one of inaction rather than overt resistance:

> K. now perceived clearly that he was supposed to seize the knife himself, as it traveled from hand to hand above him, and plunge it into his own breast. But he did not do so, he merely turned his head, which was still free to move, and gazed around him. He could not completely rise to the occasion, he could not relieve the officials of all their tasks; the responsibility for this last failure of his lay with him who had not left him the remnant of strength necessary for the deed.[50]

K.'s failure is also ironically the law's failure insofar as K.'s passivity marks the last space of difference between his own self and the state. While such a wan opt-out gesture hardly constitutes a trenchant rejection of a totalitarian regime, we might nevertheless read it as a critique if we place this scene alongside the close of the chaplain's parable. If both K. and the man from the country die abjectly, they nevertheless appear to relate to that abjection, and to the law, differently. Over the course of the parable, the man from the country has grown increasingly "childish" as he waits for the Law, to the point that he begs the very fleas on the doorkeeper's coat to help him gain entrance. As he lies dying, he sees a divine radiance streaming from the door of the Law, as if God were calling out to him. What beckons K. in his death scene is not radiance but "a flicker as of light going up" and the outstretched arms of someone unknown. This flicker of sociality, in contrast to the man from the country's utter isolation, may represent something outside law and its

unreasoning violence; and it is precisely K.'s weakness, his passive refusal to produce his own death, that forces that violence into view. Even as he articulates his shame in succumbing to the power of the state, K., seeing this elusive figure, knows he does not want to die. There, in that knowledge and that desire, a critique of the state's legitimacy resides, however humbly.

The divergences between these two endings propose a refining heuristic useful for an analysis of the relation between modern law and the sacred. On the one hand, insofar as the man from the country takes a deferential stance toward the Law, the law is for him an object of single-minded reverence and worship. K.'s agonism and distance from the law, on the other hand, signal the familiar ambivalence that marks a more nuanced account of the sacred. If law is no less powerful a force in K.'s life and death than in the country man's, the space opened up by K.'s ambivalence is the space where a critique of law worship, legal violence, and hence, law's legitimacy can reside.

The tension in *The Trial* between reverence for law's divine emanations and ambivalence (that is, a conjoining of desire and fear) about law's totalizing power nicely illustrates the ways in which various positional attitudes toward the sacred play into both the constitution and critique of law's legitimacy. This tension, which runs more generally through modern law, concerns less the existence of the sacred in law than the proper relation one ought to exhibit toward the law as it is expressed in sacred moments, objects, or regimes of meaning. We can see this tension most acutely, particularly in the United States, in three separate but related domains of legality: theories concerning the moment of founding, interpretations of the status of constitutional texts as "sacred," and assertions about the status of law more generally as a kind of "civil religion." In each, a tendency to assume the existence and directive, determining presence of a revered entity or moral framework resides uneasily alongside, and sometimes clashes with, an ambivalent and often negating stance toward the direct and determining influence of such an entity or framework.

### *Foundings*

Derrida has written that the founding moment is "the moment in which the foundation of law remains suspended in the void or over the abyss, suspended by a pure performative act that would not have to answer to or before anyone."[51] In emphasizing the act of founding as a "performative," he underscores the problem

articulated by Hannah Arendt in *On Revolution*: the problem of the legitimacy of constituting power. What is it, she asks, that helps us overcome our suspicions that all states are illegitimately founded, caught up in a "vicious circle" such that those who constitute a new government are themselves "unconstitutional" (as Arendt puts it) because they have no authority to do what they set out to achieve?[52] What is it, in other words, that comes "before the law" in a temporal sense to make just the violence of revolution? The confounding "problem of the absolute," as she calls it, at first glance appears to have been solved for the American founders by an assertion of divine warrant: "When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with each other, and to assume among the powers of the earth the separate and equal station to which the laws of Nature and Nature's God entitle them . . ." As Derrida writes elsewhere, "They sign in the name of the law of nature and in the name of God. They *pose* or *posit* their institutional laws on the foundation of natural laws and by the same coup (the interpretive coup of force) in the name of God, creator of nature. He comes, in effect, to guarantee rectitude of popular intentions, the unity and goodness of the people."[53] In this view, God functions as an absolute that undergirds the legitimacy of the new order by virtue of its greater harmony with divinely ordained natural law.

Arendt was surely right to note the irony that the founders, harbingers of modernity in politics, invoked religious warrant from God only subsequently to instantiate the divide between sacred and secular that continues in the constitutional system to define modern law.[54] Moreover, this turn to God comes at an extremely inharmonious moment: one of rupture and one that anticipates the impending revolutionary violence that inaugurates a new law, which will in turn legitimate the preceding violence.[55] The reverent invocation of divinity here is not acontextual but part and parcel of the effort revolutionaries must necessarily undertake to sanction their law-making violence, whose justice cannot be guaranteed prior to victory.[56] If in the context of the American Revolution this invocation was not cynical, it nevertheless also illustrated a deeper ambivalence about the relation between law and the sacred at that originary moment. As a necessary guarantee of rectitude and moral legitimacy, these constituting words drew much of their authorizing weight from a reverent relation to the divine; yet the founders themselves kept divinity at a distance both rhetorically and philosophically. Their God did not command; He warranted, and then only indirectly, through the mediating power of Nature. And the new regime He warranted ironically produced the principle of

religious toleration and, ultimately, the value of secularism as an organizing principle of the new national government. Thus, if reverence masked the violence that lay at the heart of the Revolution, ambivalence about the imperiousness of religion both inscribed and negated the sacred in the moment of founding.

### *Sacred Texts*

The "cult of the Constitution" in the United States, with its many celebrations and their "fulsome rhetoric of reverence," has a long history, and a significant strain of modern constitutional scholarship argues that the Constitution may be best understood as a sacred text similar to the Bible.[57] For some, the analogy leads to the kind of worship Justice Hugo Black exhibited in the concluding paragraphs of his slim paean, *A Constitutional Faith*: "[The] Constitution is my legal Bible; its plan of government is my plan and its destiny my destiny. I cherish every word of it, from the first to the last and I personally deplore even the slightest deviation from its least important commands."[58] Modern textualist, and to some extent originalist, theories of constitutional interpretation are perhaps the most recent jurisprudential manifestation of this reverent relation to a sacred text. Indeed, Robert Bork, a strong advocate of originalism, provocatively describes nonoriginalist constitutional theories as "heresies."[59]

Vincent Crapanzano paints this strain of contemporary legal scholarship as a reaction to postmodernism, one that "idealizes the past, fetishizes the original, and indulges in nostalgia for that which was never experienced and probably never existed."[60] But in a move that reorients us toward ambivalent conceptions of sacrality, other scholars who analogize the Constitution to a sacred text do so to complicate claims that plain legal meaning can be located in the words of the Constitution, or the intentions or understandings of the founders. Sanford Levinson, one of the contributors to this volume, has written elsewhere that the Constitution lies at the center of a "genuine community of faith" in the United States,[61] acting as a unifying force. Yet, Levinson argues, the analogy between the Constitution and the Bible contains a double message: If the Constitution foments a sense of national integration and identity, it also always has the potential to be a source of fragmentation and disunity precisely because, as a text, it generates competing interpretations.[62] Michael Perry extends Levinson's insight about the Constitution's destabilizing potential, arguing that it is best understood as a sacred, *prophetic* text.

> the sacred text constantly *disturbs*—serves a prophetic function in—the life of the community. Indeed, it is in significant part because of its "writtenness" and thus its "per-

> manence" that a sacred text is (in the life of a community that might prefer, from time to time, to ignore it) irrepressible, disturbing, prophetic. And it is in significant part because of its comprehensiveness and indeterminacy and thus its "excess of meaning" that a sacred text (as symbol) achieves its power to disturb from one generation to the next and from one place to another, over the lives of communities separated in time and space and with very different experiences and questions.[63]

Under this view, we might say that the Constitution's sacrality lies not so much in its admirable origins but rather precisely in its capacity to generate an intractable and irresolvable debate about proper methods of legal interpretation (a debate that, like the violence of revolution, has and continues to spill blood, both literally and metaphorically[64]). Along with K. and the prison chaplain, we are drawn to an inexhaustible, unsettling, and unsettleable text.

### *Civil Religion*

Whatever rhetorical and political disturbances the Constitution has produced in the world of legal theorists, in a broader context the document itself has become the central icon of what many have called America's "civil religion."[65] Rousseau originated the concept, writing in *The Social Contract* that "[t]here is thus a purely civil creed whose tenets the sovereign is entitled to determine, not precisely as dogmas of religion, but as sentiments of sociability, without which it is impossible to be a good citizen or a loyal subject." He continued:

> The existence of a powerful, intelligent, benevolent, foreseeing, and provident Divinity, the life to come, the happiness of the righteous, the punishment of the wicked, the sanctity of the social contract and the law—these are the positive tenets. As for negative tenets, I limit them to a single injunction: There shall be no intolerance, which is part of the religions we have excluded.[66]

In drawing upon Rousseau's idea, Robert Bellah has argued that religion, and particularly the idea of God, played a "constitutive role" in the minds of the American founders.[67] They relied on "a collection of beliefs, symbols, and rituals with respect to sacred things and institutionalized in a collectivity" that was nevertheless not specifically Christian in nature and signaled a "genuine apprehension of universal and transcendent religious reality . . . as revealed through the experience of the American people."[68] As Rousseau makes clear and Bellah implicitly argues, civil religion does not replace religion as such; the two complement—even enable—each other by virtue of religion's very disestablishment and free exercise. Indeed, Tocqueville famously argued, "Religion [really, Christianity], which never

intervenes directly in the government of American society, should therefore be considered as the first of their political institutions, for although it did not give them the taste for liberty, it singularly facilitates their use thereof" by directing mores and regulating domestic life properly.[69] In this view, public life is grounded by and in Christianity as a regime of meaning and morality, and to the extent that it underwrites the secular, the two are inseparable.

The indirect relation Tocqueville posits between religion and American government is fundamentally at odds with the strong and perhaps more normative than descriptive claim that the United States is a "secular" democracy.[70] As William Connolly notes in his book *Why I Am Not a Secularist*, the dominant historical narrative commonly offered to justify the maintenance of a secular public realm emphasizes the critical role played by secularization in promoting "private freedom, pluralistic democracy, individual rights, public reason, and the primacy of the state" over the church as an antidote to the destructive effects of religious warfare in the early modern period.[71] Under this stark theory of social organization, which we assimilate to the phrase "separation of Church and State," the political world is one evacuated of the sacred and the metaphysical in favor of reason, tolerance, and the promotion of human well-being and justice in this life rather than the next. Connolly argues that this thin secularist view represses a richer and more inclusive range of potential intersubjective relations and obscures the continuing subterranean connections between religion and public life that Tocqueville noted.

Those connections may be less subterranean now than at any point in the last fifty years. Yet, however much politics and religion now appear to be intermixing, it remains the case that constitutional jurisprudence requires the maintenance of distinctions between Church and State. The difficulty, of course, comes in defining the proper ambit of those distinctions, and in those difficulties, we can see yet another instance of ambivalence toward the sacred in law. Although the U.S. Supreme Court has not offered a consistent interpretation of what "nonestablishment" means, as a general matter it can be said that the First Amendment requires that government be neutral as among religions and (though this is more controversial[72]) avoid preferring religion to nonbelief.[73] But that rule raises the question, what practices constitute a "religious activity" such that it cannot be supported or funded by government?[74] And what is a religion, anyway?[75] Thus, for example, under the Supreme Court's so-called "Lemon test," which while now somewhat modified is still the leading establishment clause case, to pass constitutional mus-

ter a challenged law must: (1) have a secular purpose; (2) have a primary secular effect; and (3) must not involve the government in an excessive entanglement with religion. The word *excessive* here signals an ambiguity in even this relatively strict conception of the distinction between secular and religious, in a paradoxical gesture of calling into being a line of demarcation while simultaneously undoing it. One can understand this third prong of the Lemon test to say that in spite of the state's strenuous efforts to occupy fully the space of the "secular" to the exclusion of religion, the secular–religious binary can never be fully sustained.[76]

In a country notable for both its religiosity and its religious pluralism, the idea of separating Church and State has had significant symbolic and practical effects. Still, in shifting the conceptual terrain from sacrality to religion, secular democracies appear to wish both to deny the relevance of the sacred to the project of law and to mask the ways in which sacrality remains integral to it. "Religion," a term that denominates a sphere of activities set apart from law, becomes the repository of the sacred, and law is the repository of the profane and a marker of the secular. Yet if we insist upon the distinction between religion and sacrality, we can see more clearly the ways in which, by virtue of masking that very distinction, modern law's relation to the sacred remains deeply ambivalent and that, as such, the sacred lies at the very heart of law.

## Overview of the Chapters

In the chapters that follow, our contributors take issue, from both historical and theoretical perspectives, with the conceit that equates law and the profane, religion and sacrality. All of these authors conceive of the "sacred" as a multilayered and shifting realm and attend carefully to its porous relations with law, sovereignty, and jurisprudence. We begin with two chapters that subtly trace the relation between religious and secular law in a premodern era. Nomi Stolzenberg's "The Profanity of Law" forcefully confronts predominant narratives about the secularization of modern law by arguing, counterintuitively, that "secular" law was originally a religious concept, born not of a rejection of divine law in the early modern period but of the all-encompassing religious epistemological framework of the Middle Ages. Stolzenberg reconstructs a tradition of thought that she calls "theological secularism" or "secularist theology"—that is, theological arguments for secular law, enforced by secular political authorities, that can be found in one form or another in all major religions.

Secular theology is both a legal and religious philosophy that developed, under the auspices of religious authority, out of a recognition of human fallibility. In an ideal world, humans ought to be governed by sacred law, but the Christian and Jewish religious authorities on whom Stolzenberg focuses clearly understood that no procedures implemented by humans could guarantee God's perfect justice. Those charged with law enforcement could not be expected to make the kinds of judgments that would infallibly mirror God's own; and legal rules emanating from religious precepts concerned with perfect justice required impossibly high procedural safeguards and so were ineffective in curtailing social disorder. To more effectively produce social order while keeping sacred law unsullied by these kinds of human failings, religious authorities created and authorized a supplement to sacred law in the form of secular legal institutions, accepting that divine law and sacred ideals of justice had in effect to be violated in the temporal world. If secular theology was always necessarily profane insofar as it was contaminated with human fallibility, it was also until relatively recently understood as religiously necessary for the preservation of social comity.

The line between sacred and secular law was not conceptual but jurisdictional, argues Stolzenberg, and produced multiple spaces and types of law for both Christians and Jews in the Middle Ages. The tensions generated by those jurisdictional lines were delicately and effectively negotiated until the rise of secularism in the Enlightenment. It is this theological secularism, rather than the secularism emerging out of the seventeenth and eighteenth centuries, that actually produced the "liberal" legal values of pragmatism, pluralism, and probabilism that we tend to associate with purely "profane" legal systems today. Stolzenberg's chapter complicates our contemporary tendency to bifurcate sacred and profane and provides a corrective genealogy to the simplifications offered by current warring worldviews of modern secularism and religious fundamentalism. If legal systems are conceived as "profane" both in the sense of being outside the realm of the sacred (*pro fanus*, or "before the temple") and, more normatively, in the sense of being unholy and unable to administer divine justice, Stolzenberg reminds us that such profanity is itself a product of religion, not a contrary value to either embrace or disdain.

Marion Holmes Katz's "Pragmatic Rule and Personal Sanctification in Islamic Legal Theory" addresses a similar tension between sacred and secular aims within religious law itself, in this case the shari'a, as a means of excavating ways of understanding religious law that do not reduce it to a positivistic legal code. If many contemporary interpretations of the shari'a emphasize the sacred nature of Islamic law

and its comprehensive reach over human conduct (and so heighten the perceived contrast between at least Christian and Islamic legal regimes), Katz argues that as a historical matter early medieval Islamic religious thinkers, in ways similar to their Jewish and Christian counterparts, did in fact recognize a realm of temporal power separate from sacred law. Unlike the Jewish and Christian thinkers, however, they did not conceive this arena of prohibition and regulation as autonomous; rather, it was understood to be a discretionary domain of pragmatic and ad hoc action. Over time, Islamic legal scholars, influenced by Sufi thought, began to assimilate this discretionary domain into the overall framework of the shariʿa in sometimes conflicting ways.

Much of Katz's chapter traces the profound but ambiguous influence of Sufi thought in foundational legal theories concerning the goals and purposes of the shariʿa. Sufism takes as its ultimate aim the sanctification of everyday life and the transformation of self through self-renunciation. The shariʿa, like other legal systems, can be conceived more minimally as a set of broad parameters governing human behavior without imposing any particular framework for the cultivation and transformation of self. What, asks Katz, is the role of the "heart" in these varied Sufi interpretations of the shariʿa? Is the shariʿa meant to encourage renunciation and self-denial or to enable worldly benefit and pleasure? Is it central in reaching the highest degree of human virtue, or does it have a relatively modest, secular function, imposing behavioral limits rather than addressing human interiority? Can divine law be understood as something designed to fulfill human needs, or does it necessarily contradict all human passions? For some theorists, the shariʿa, properly understood, constructs a hierarchy of objectives and values that, while allowing for the pleasures of worldly benefit, at their zenith understand pleasure and benefit to come from the contemplation of God. For others, worldly benefit is consonant with virtue only if approached with spiritual detachment or out of strict obedience to divine motive and rationale. These arguments about the ambiguous relation between the shariʿa and the cultivation of self in the history of Islamic legal commentary complicate contemporary assertions about the sacred nature of Islamic law. They also undo what may be perceived in the West as a fundamental incompatibility between the ultimate, interior aims of sacred law and the kinds of regulation that can be accomplished by positive law, which addresses only the exteriorized object of human behavior. If worldly virtue can be cultivated through spiritual practice, then perhaps the conceptual split that so troubles positive law—the split between interior and exterior self—is a false one.[77]

Like Katz's chapter, Sanford Levinson's "Our Papalist Supreme Court: Is Reformation Thinkable (or Possible)?" recognizes the internal fractures that complicate any simple assertions about "religion" and the "sacred." Rather than focusing on hermeneutical conflict about sacred law itself, however, Levinson relates religious arguments about textual interpretation to debates about the role the Supreme Court plays in interpreting the Constitution. Drawing on a heuristic he develops in his book *Constitutional Faith*, Levinson contrasts a "protestant" approach to the Constitution, which takes the text itself as the sole authority for doctrine, with a "catholic" approach, which supplements and in some instances supersedes sacred texts with the traditions and teachings that have developed around those texts over time. Levinson critiques what he sees as an intensification of a protestant "sanctimonious reverence" for the Constitution, a document which in his view contains significant flaws, but he is equally concerned about the tendency of the current Court toward institutional authoritarianism of the sort that has been evident historically in the Catholic Church.

Levinson argues that in case after case, from *Casey v. Planned Parenthood*[78] through *Bush v. Gore*,[79] the Court has shown no interest in engaging in a dialogue about constitutional meaning, acting more like a papacy or monarch than one instrument of governance among several in a democratic society. Liberals, perhaps ironically, have acceded to this "authoritarianism" since the era of *Brown v. Board of Education*,[80] and their continuing support appears guaranteed by their commitment to *Roe v. Wade*.[81] If the general public is inclined to go along with this vision of judicial supremacy, Levinson nevertheless advocates a version of protestantism that decenters and pluralizes our agencies of constitutional interpretation.

William E. Connolly's "The Ethos of Sovereignty" echoes Levinson's political stance as he offers an analysis of the dynamics of sovereign decision making under conditions of democratic pluralism. Pointedly critiquing the decision in *Bush v. Gore*, Connolly asks us to consider the relation between sovereignty and law in moments of constitutional uncertainty in plural societies. The "paradox of sovereignty" first elaborated by Rousseau suggests that societies governed by the rule of law require a kind of sovereign power—an ethos of self-rule—that both precedes and stands above, as well as inside, the law to produce in the first place the conditions that ultimately enable democracy. Although this paradox is most visible at the moment of founding, it recurs as a problem of democratic governance, which requires a particular ethos of self-rule to carry forward. That ethos, argues Connolly, is *part of* sovereignty in a democracy and must be accounted for in any

theory of sovereign power; and judicial strategies that resort to the fig leaf of "strict constructionism" mask that necessary component of sovereignty.

In applying the insights of Rousseau's paradox to contemporary conditions, Connolly turns to (among others) Agamben's work on sovereignty and its interpolation of the sacred. If sovereignty is that which decides the exception, Connolly argues, in the context of modern politics, Agamben's framework must be refined so as to define sovereignty as "a plurality of forces circulating through and around the positional sovereignty of the official arbitrating body." Pluralist democracies reveal Agamben's analysis of sovereign power to be overly formal and incapable of encompassing the messy materiality of culture in such a setting. Thus, alongside the "positional sovereignty" of governmental institutions, "cultural sovereignty," emerging out of that messy materiality, must be accounted for in any adequate theory of sovereign power. Connolly concludes that conceptualizing the ethos of sovereignty in a contemporary context requires an "audacious pluralization of the sacred" and a "corollary relaxation of what it takes to defile the sense of the sacred." The sacred is better understood in a more conventional and capacious sense as something to be approached with awe rather than, as Agamben suggests, as that which is both the highest and most susceptible to annihilation.

Connolly's definition loosens the nexus between sovereignty and the sacred and pluralizes the definition of sacrality itself, and his extended critique of Agamben's narrow and ambiguous definition of sovereignty in turn enables a skeptical reading of *Bush v. Gore*. In modern American democracy, he argues, the Supreme Court's positional sovereignty operates alongside and in relation to the cultural sovereignty of a democratic populace and "orientations to the sacred" into which much of both the Court and the populace is inducted. In *Bush v. Gore*, the Court exercised its positional sovereignty in opposition to the democratic, cultural element of sovereignty that prizes voting. To the extent that a discourse of strict constructionism (which Connolly sees as linked tacitly to the ethos of a narrow, exclusionary version of Christianity) masks the partisanship of the Court in that case, it demands contesting—without concomitant accusations of defilement—on the ground that its decision amounts, effectively, to the imposition and enforcement of one faith over others for partisan purposes.

If for Connolly an analysis of modern pluralist societies requires us to loosen the conceptual link between sacrality and sovereignty, Peter Fitzpatrick nevertheless argues in "The Triumph of a Departed World: Law, Modernity, and the Sacred" for the centrality of the sacred to modern law as such. Fitzpatrick, too, takes

issue with Agamben's work, in this case his conception of *homo sacer* as unambiguously apart from the law. If under conditions of modernity law claims to be secular, claims to be determinative, and claims to act without regard for otherworldly concerns, Fitzpatrick understands that claim to secularism as a form of negation, "the realization yet denial of the sacred." In Fitzpatrick's view, the sacred is paradoxical: It is both that which is omnipresent and of perfect order and completeness and that which is transgressive of any order, partaking of the miraculous and ineffable. It is, like premodern imaginings of God, both fully determinate and ineffable. The dual nature of sacrality makes perfect closure or resolution of conflict or meaning impossible, and as a result, attempts to determine or enclose are always a denial of what otherwise might have been.

Fitzpatrick understands that denial to be a sacrifice. Sacrifice, he argues, is an act that mediates between sacred and profane, an ambivalent boundary between what is and what otherwise might be. Drawing on Freud's account of the origins of civilization in the killing of the father, Fitzpatrick links premodern sacrifice to the instantiation of law which, performed reiteratively in ritual, asserts continuity while responding to change. Under conditions of modernity, Fitzpatrick argues, we see a kind of unacknowledged sacrifice in the assertion of transcendent universals (the nation-state, sovereignty, and so forth) and attendant, impossible attempts at enclosure. If law has at certain moments been thought to be such a universal—the closed, complete, orderly Benthamite system being only one example—it is by now clear that law so conceived cannot be responsive to change or the chaos of possibility. Thus, if (unlike premodern religion) modern law has no transcendent content of its own, its operations nevertheless bring the indeterminate beyond into the realm of determination: The transgressive and miraculous sacred is precisely what enables modern law's responsiveness to and in the world. In defining law as the neosacral combining of immutable stasis and boundless vacuity in enforceable social relations, Fitzpatrick makes clear his claim that the sacred is both perfected and negated in modernity; and if the sacred has in some sense "departed," it nevertheless conditions and perhaps constitutes the ways we understand modern law.

Taken together, the chapters that follow challenge the meaning and stability of the fundamental divide between sacred and secular that constitutes what we call modernity. Law, thought to be one of the exemplary domains of secularism, instead emerges as a signal location in which the sacred has resided and continues to reside alongside and as a fundamental part of the secular. Although our authors agree neither on the most appropriate definition of "the sacred" nor on the extent to which

law and sacrality *ought* to intermix, they suggest both implicitly and explicitly that there is in fact an inescapable relation between the two. As Nomi Stolzenberg concludes, in undermining the either–or logic of modernity, these chapters offer a crucial corrective to the terms upon which contemporary debates about the proper relation among religion, politics, and jurisprudence depend. These debates, in which advocates of religion call for law to return to the field of morality while secularists defend their visions of an unbreachable wall between Church and State, gather heat from the presupposition of a sharp separation between sacred and secular. But in the final analysis, the critical question appears to be not whether religion can recapture law or law can stave off religion but whether we in a modern democratic polity can learn to negotiate the delicate tensions produced by the sacred within law itself.

## Notes

1. http://bible-history.com/latin/latin_s.html. Giorgio Agamben explores this second aspect of the term, which lies "before or beyond the religious," in *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998).

2. Kafka wrote *The Trial* in 1914–1915 but left it unfinished and in uncertain order. It was published in 1925, the year after his death, by his friend Max Brod. All references in this essay are to Franz Kafka, *The Trial*, trans. Willa and Edwin Muir (New York: Schocken Books, 1992).

3. As Hannah Arendt remarks, "In the case of K., submission is obtained not by force, but simply through increase in the feeling of guilt of which the unbased accusation was the origin in the accused man. This feeling, of course, is based in the last instance on the fact that no man is free of guilt. . . . The feeling of guilt, therefore, which gets hold of K. and starts an interior development of its own, changes and models its victim until he is fit to stand trial." Hannah Arendt, *Essays in Understanding, 1930–1954*, ed. Jerome Kohn (New York: Harcourt Brace, 1994), 70–71.

4. This classic dichotomy between the sacred and profane has been most fully developed by Émile Durkheim and expanded by his followers in the short-lived but provocative College de Sociologe (1937–1939). See Émile Durkheim, *Elementary Forms of Religious Life*, trans. Karen E. Fields (New York: The Free Press, 1995), 34–39.

5. As Jacques Derrida has argued, "there is no such thing as law (*droit*) that doesn't imply *in itself, a priori, in the analytic structure of its concept*, the possibility of being 'enforced,' applied by force. . . . [T]here is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical

or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth" (emphasis in the original). But Derrida anticipates this paradox of enforceability without physical violence in his refinement of the concept insofar as he understands force as something that can be laid on indirectly, symbolically, via interiority, subtly, discursively, via regulation, etc. Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Deconstruction and the Possibility of Justice*, eds. Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (New York: Routledge, 1992), 6–7.

6. Carl Schmitt, *Political Theology*, trans. George Schwab (Cambridge, MA: MIT Press, 1985), 46. Schmitt traces the theoretical and historical interrelations of law and theology from seventeenth-century conceptions of absolute monarchy through theories of natural law to nineteenth-century theories of the organic relation between ruler and ruled. He describes absolutism as giving the state a "decisionist" character of a sort seemingly absent in Kafka's novel. From a historical perspective, under theories of absolute monarchy, the monarch stood just below God in authority and carried out God's will through his own. He was considered no ordinary mortal, having in himself certain qualities of the divine, and was not supposed to be judged on rational principles. See Robert Eccleshall, *Order and Reason in Politics: Theories of Absolute and Limited Monarchy in Early Modern England* (Oxford: Oxford University Press, 1978), 48, 77. See also J. Russell Major, *From Renaissance Monarchy to Absolute Monarchy: French Kings, Nobles, and Estates* (Baltimore: Johns Hopkins University Press, 1994). However outmoded that figure may seem in the world of modern secular states, the connection between theology and sovereignty remains a powerful one. As Schmitt has put it, "All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure." Schmitt, 36. See also Paul Kahn, who argues that the sacred and the sovereign are deeply intertwined in Western religious and political traditions. Paul W. Kahn, "The Question of Sovereignty," *Stanford Journal of International Law* 40 (Summer 2004), 259–282.

7. Roger Caillois, *Man and the Sacred*, trans. Meyer Barash (Glencoe, IL: The Free Press, 1959), 35.

8. This conception of the term *the sacred* is thicker than the usual contemporary understanding, which tends to stress the exceptional, positive, and transcendent quality of a person, place, or thing. On this point, see Caillois, 132–138.

9. Durkheim, 412. Durkheim offered as examples of the former objects and places held sacred by certain totemic clans; and of the latter, corpses and menstrual blood.

10. On the concept of "ambivalence," see William Robertson Smith, *Lectures on the Religion of the Semites* (Edinburgh: Adam and Charles Black, 1889), 143; Durkheim, 412–417; Caillois, 36; Sigmund Freud, *Totem and Taboo: Some Points of Agreement Between the Mental Lives of Savages and Neurotics* (New York: W. W. Norton, 1950), especially chap. 2.

11. Durkheim, 415. Durkheim attributes this ambiguity (which others term *ambivalence*) to the common origins of both pure and impure (or as he puts it, "lucky" and "unlucky sacred") in the symbolic rites and representations of collective life. For him, religious impulses arise from society itself rather than emanating from an actual metaphysical realm. "What makes a thing sacred," he argues, "is . . . the collective feeling of which it is the object." Durkheim, 416.

12. Robertson Smith, 142. Robertson Smith argued that the vagueness of the boundary between holy and unclean—that is, the ambivalence of the sacred—marked a religion as primitive, though a number of anthropologists have taken issue with Robertson Smith's haughty division between savage and civilized. See Robertson Smith, 143, and in rejoinder, Mary Douglas's *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (New York: Penguin, 1970), 21–22.

13. Freud, *Totem and Taboo*, 175–179.

14. Freud, 40.

15. Douglas, 12, 15.

16. Freud, 85. Peter Fitzpatrick offers an extended analysis of Freud's story of origin in his contribution to this volume. Freud explicitly connects taboo with law in *Civilization and Its Discontents*, trans. and ed. James Strachey (New York: W. W. Norton, 1950), 55.

17. Cited in Douglas, 18.

18. Georges Bataille, *The Accursed Share*, vols. 2 and 3, trans. Robert Hurley (New York: Zone Books, 1993), 215.

19. Caillois, 36.

20. Kafka, 209.

21. Kafka, 210.

22. Kafka published "Before the Law" separately in the journal *Selbstwehr* (Prague), 9: 34 (Sept. 7, 1915), later incorporating it into *The Trial*.

23. Kafka, 214–215.

24. Commentators have suggested that this imagery connects Kafka's parable with specifically Judaic renderings of law. See, for example, Jacques Derrida, *Acts of Literature* (New York: Routledge, 1992), 217–220.

25. Helene Cixous explores this last point in a psychoanalytic reading of "Before the Law." See Helene Cixous, *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva*, ed. and trans. Verena Andermatt Conley (Minneapolis: University of Minnesota Press, 1991), 14–19.

26. On the connection between legal and sacred script, see Andrew D. Weiner and Leonard V. Kaplan, *On Interpretation: Studies in Law, Culture, and the Sacred* (Madison: University of Wisconsin Press, 2002).

27. Kafka, 216.

28. Derrida, *Acts of Literature*, 205.

29. http://dictionary.oed.com/cgi/entry/50019489?query_type=word&queryword=before&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=3hAw-KLyLWP-13279&hiliteô50019489.

30. Caillois, 13.

31. Kafka, 222.

32. On inexpiable defilement, see Caillois, 48.

33. Kafka, 229.

34. Sacrificial rites, long an object of fascination for anthropologists, classically have been understood as a ritual of gift exchange between gods and humans that, according to Durkheim, regenerates a sense of divinity within society. Rituals of sacrifice are collective acts that reunify and revivify social worlds through actual violence. Here we have only the barest glimpse of a connection to any social world, at the moment K. sees arms outstretched toward him and returns the gesture. The scene is defined by the absence of ritual and offers both K. and the reader no sense of transcendent meaning, as K. clearly understands at the threshold of death, as he dies "like a dog." On the collective and ritual nature of sacrifice, see Durkheim, 340–352; Girard, *Violence and the Sacred*, trans. Patrick Gregory (Baltimore: Johns Hopkins University Press, 1979); Robertson Smith, lectures 6 to 11; Henri Hubert and Marcel Mauss, *Sacrifice: Its Nature and Function*, trans. W. D. Halls (Chicago: University of Chicago Press, 1964). See also Alexander Irwin, *Saints of the Impossible: Bataille, Weil, and the Politics of the Sacred* (Minneapolis: University of Minnesota Press, 2002), 2–7.

35. Agamben, 8. For a helpful and insightful review of Agamben, see Nasser Hussain and Melissa Ptacek, "Thresholds: Sovereignty and the Sacred," *Law and Society Review* 34: 2 (2000), 495–515.

36. Agamben, 28.

37. Agamben, 75, 9.

38. "The sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life—that is, life that may be killed but is not sacrificed—is the life that has been captured in this sphere." Agamben, 83. Note that being placed under ban is not the same as being placed "outside the law"; rather, it is a legal relation in itself, one that Agamben sees as in fact the original and central legal relation. Agamben, 85.

39. Agamben, 73.

40. Agamben's paradigmatic example of such a life is one lived in a concentration camp.

41. Agamben, 55. As Agamben puts it, "a life under a law that is in force without signifying resembles a life in the state of exception, in which the most innocent gesture or the smallest forgetfulness can have the most extreme consequences." Agamben, 52.

42. Agamben, 49–50.

43. Kafka, 222.

44. Agamben, 51 (emphasis in the original).

45. Indeed, some commentators who, unlike Agamben, assimilate *homo sacer* to taboo have noted that the preferred method for ridding a community of such a person was not killing, which would put the killer in contact with contagion, but actual abandonment to the elements, in effect making sacred man responsible for his own death. See Caillois 49; Girard, 27, on the Greek figure of *anathema*.

46. Kafka, 228.

47. Agamben's analysis relies on that of Schmitt, who conceived the sovereign as he who decides the exception, a power that lies at the very bottom of state authority. Agamben, 16–17.

48. Agamben, 33–35. See also Walter Benjamin, "Critique of Violence," in *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Demetz, trans. Walter Jephcott (New York: Schocken Books, 1978).

49. Arendt, *Essays in Understanding*, 71.

50. Kafka, 228.

51. Derrida, "Force of Law," 36. By "performative," Derrida means the kind of speech act that does something as it is said, that is or appears to be self-instantiating. See generally J. L. Austin, *How to Do Things with Words* (New York: Oxford University Press, 1962).

52. Hannah Arendt, *On Revolution* (New York: Compass Books, 1965), 184.

53. Jacques Derrida, "Declarations of Independence," *New Political Science* 15 (Summer 1986), 11. See also Vincent Crapanzano, *Serving the Word: Literalism in America from the Pulpit to the Bench* (New York: The New Press, 2000), 215–222.

54. Arendt, *On Revolution*, 185–186.

55. Derrida, "Force of Law," 35. As Walter Benjamin writes in "Critique of Violence," "at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power. Lawmaking is power making." Benjamin, 295.

56. As Derrida writes, "the inaccessible transcendence of the law before which and prior to which 'man' stands fast only appears infinitely transcendent and thus theological to the extent that, so near him, it depends only on him, on the performative act by which he institutes it: the law is transcendent, violent and non-violent, because it depends only on who is before it—and so prior to it, on who produces it, founds it, authorizes it in an absolute performative, whose presence always escapes him." Derrida, "Force of Law," 36. Agamben notes the sinister dimension of the idea of a founding father, which he links to the Roman father's absolute power of life and death over his sons. This is the meaning of the Latin term *vitae necisque potestas*. Agamben, 89. For her part, Arendt contests the view that a "dictating violence" is necessary for all foundings. She argues that the absolute that authorizes the American founding ultimately is derived not from divinity but from the principle of mutual promise and common deliberation—actions based in reflection and choice, not accident and force. Arendt, *On Revolution*, 214–215. She claims that "[o]nly to the extent that we understand by law a commandment to which men owe obedience regard-

less of their consent and mutual agreements, does the law require a transcendent source of authority for its validity, that is, an origin which must be beyond human power." Arendt, *On Revolution*, 189.

57. Thomas Grey, "The Constitution as Scripture," *Stanford Law Review* 37: 1 (Nov. 1984), 1–25; Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988); Jaroslaw Pelikan, *Interpreting the Bible and the Constitution* (New Haven, CT: Yale University Press, 2004).

58. Hugo Black, *A Constitutional Faith* (New York: Alfred A. Knopf, 1969), 66. Black carried a copy of the Constitution in his coat pocket, often pulling it out to consult its exact language. See Levinson, 31–32.

59. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), 4–11.

60. Crapanzano, 232, and generally 229–235, for an overview of debates about the sacralizing of the Constitution. The reference to fetishism here is suggestive insofar as it signals a bestowing of magical, dreadful powers upon an inanimate object, in this case, the awesome power to restrain judges from the temptation to impose their own politics and value judgments in judicial decision making. As Max Lerner wrote in 1937, "Every tribe needs its totem and its fetish, and the Constitution is ours. Every tribe clings to something which it believes to possess supernatural powers, as an instrument for controlling unknown forces in a hostile universe." Max Lerner, "Constitution and Court as Symbols," *Yale Law Journal* 46: 8 (Jun. 1937), 1294.

61. Levinson, 16.

62. Levinson, 17.

63. Michael J. Perry, "The Authority of Text, Tradition, and Reason: A Theory of Constitutional 'Interpretation,'" *Southern California Law Review* 58 (Jan. 1985), 559 (footnotes omitted). Thomas Grey takes issue with the analogy between sacred text and the Constitution, arguing that the Constitution, unlike the Bible, is not ineffable; its secular premises in principle make it subject to human understanding. See Grey, 16. But as we and some of our contributors argue, simply asserting the presence of secularism cannot guarantee the absence of the sacred in law and may indeed be evidence for it. See Fitzpatrick's contribution in this volume.

64. On Civil War–era conflicts over constitutional interpretation, see Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: St. Martin's Press, 1994), especially chap. 4. See also David Ray Papke, "The American Legal Faith: Traditions, Contradictions, and Possibilities," *Indiana Law Review* 30: 3 (1997), 645–657. On the spilling of political blood, see Bork, *The Tempting of America*.

65. See Kammen, 22; Crapanzano, 230. See also Robert N. Bellah, *Beyond Belief: Essays on Religion in a Post-Traditional World* (New York: Harper & Row, 1970).

66. Jean-Jacques Rousseau, *The Social Contract*, bk. 4, chap. 8, in *The Essential Rousseau*, trans. Lowell Bair (New York: New American Library, 1974), 113.

67. Bellah, 173. As Sanford Levinson defines the phrase, it is less inflected with religion: Civil religion is "that web of understandings, myths, symbols, and documents out of which would be woven interpretive narratives both placing within history and normatively justifying the new American community coming into being following the travails of the Revolution." Levinson, 10.

68. Bellah, 179.

69. Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer, trans. George Lawrence (New York: Harper & Row, 1966), 292.

70. For a strong critique of secularism, see Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (Grand Rapids, MI: William B. Eerdmans, 1984).

71. Connolly, 20. See also Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993), particularly chap. 1, in which Asad argues that only in the nineteenth century did the split between religion and public power really take hold, as evolutionary thought considered religion "an early human condition from which modern law, science, and politics emerged and became detached." Asad, 27. For a judicial articulation of this narrative, see *Everson v. Board of Education*, 330 U.S. 8–9 (1947). For a history of the idea of the separation between Church and State in the United States, see Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002).

72. See, for example, Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

73. See Perry, 7. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

74. See *McGowan v. Maryland*, 366 U.S. 420 (1961), Sunday closing laws do not constitute a law respecting an establishment of religion; *Engel v. Vitale*, 82 S.Ct. 1261 (1962), prohibiting official prayer in public schools.

75. See *U.S. v. Seeger*, 85 S.Ct. 850 (1965), conscientious objector can gain exemption from combatant training and service if he has a "sincere and meaningful belief . . . parallel to that filled by orthodox belief in God." See also Kent Greenawalt, "Religion as a Concept in Constitutional Law," *California Law Review* 72 (1984), 753–816.

76. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

77. On this point, see Asad, chap. 2.

78. 505 U.S. 833 (1992).

79. 51 U.S. 98 (2000).

80. 347 U.S. 483 (1954).

81. 410 U.S. 113 (1973).