



BIROn - Birkbeck Institutional Research Online

Fitzpatrick, Peter (2003) 'Gods would be needed...': American empire and the rule of (international) law. *Leiden Journal of International Law* 16 (3), pp. 429-466. ISSN 0922-1565.

Downloaded from: <https://eprints.bbk.ac.uk/id/eprint/486/>

Usage Guidelines:

Please refer to usage guidelines at <https://eprints.bbk.ac.uk/policies.html> or alternatively contact lib-eprints@bbk.ac.uk.

**Birkbeck ePrints: an open access repository of the
research output of Birkbeck College**

<http://eprints.bbk.ac.uk>

Fitzpatrick, Peter (2003). 'Gods would be needed...': American empire and the rule of (international) law. *Leiden Journal of International Law* **16** (3) 429-466.

This is an author-produced version of a paper published in *Leiden Journal of International Law* (ISSN 0922-1565). This version has been peer-reviewed but does not include the final publisher proof corrections, published layout or pagination.

All articles available through Birkbeck ePrints are protected by intellectual property law, including copyright law. Any use made of the contents should comply with the relevant law. Copyright © 2003 Foundation of the Leiden Journal of International Law, Cambridge University Press.

Citation for this version:

Fitzpatrick, Peter (2003). 'Gods would be needed...': American empire and the rule of (international) law. *London: Birkbeck ePrints*. Available at:
<http://eprints.bbk.ac.uk/archive/00000486>

Citation for the publisher's version:

Fitzpatrick, Peter (2003). 'Gods would be needed...': American empire and the rule of (international) law. *Leiden Journal of International Law* **16** (3) 429-466.

‘Gods would be needed...’: American Empire and the Rule of (International) Law

*Peter Fitzpatrick**

Keywords: International Law, Power, Law, Sovereignty, Ethics, Empire.

Abstract: In the perennial debate over whether the dependence of international law on power is complete or whether international law maintains some independence for itself, the latter position is increasingly and at best marginal. Here that direction of the debate is reversed. The very dependence of international law on power is integral to a relation of mutual dependence between them. It is in this relation that power constitutently depends on an international law which, in its turn, contains a primal efficacy. That efficacy is illustrated in its countering the claims of American empire.

1. INTRODUCTION

* Anniversary Professor of Law, Birkbeck, University of London. Sundhya Pahuja and Sara Ramshaw sustained this enterprise in many ways, one being an abundance of research and references. Teshar Fitzpatrick helped with Rousseau, yet again.

If a grand solipsism is both constituent of empire and cause of its decline, then that irony should contain contradictions that are as intractable as they are significant. To unfold an example: the latest National Security Strategy of the United States, presented in the name of a putative President Bush, initially elevates an *imperium* comprising ‘a single sustainable model for national success’, a rather loose model made up of ‘political and economic liberty’ and ‘free and open societies’, as well as, more particularly, the market, human rights, and the rule of law, these more particular components themselves being associated with this freedom and openness.¹ However by the document’s end it is clear that there can be freedom only so long as it is not ultimately free, and that there can be openness only so long as it is not ultimately open, since to maintain this openness and ‘to defend freedom’, ‘[o]ur forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equalling, the power of the United States.’² This is but the making explicit of numerous intimations in The National Security Strategy that all can be free and open so long as the United States remains predominant, so long as it does

¹ G. W. Bush, *The National Security Strategy of the United States of America*, Preface (2002).

² *Id.*, at 30.

not have ultimately to open to others, and so long as its oxymoronic ‘distinctly American internationalism’ is not freely and openly challenged.³ To take just one instance of some current import, those who would join cause with the United States could readily know exactly where they stand: wider ‘coalitions’ will be resorted to as a means whereby ‘America will implement its strategy’ – or in Rumsfeld’s now well-known version: ‘The mission must determine the coalition, the coalition must not determine the mission.’⁴

All of which has been greeted or condemned as a change in direction but it is not so.⁵ Even though some such position is now ‘being put forth with an unusual degree

³ *Id.*, at 1.

⁴ *Id.*, at 25; D. H. Rumsfeld, ‘*Transforming the Military*’, 81 *Foreign Affairs*, 20, at 31 (2002).

⁵ For example, the ready and ridiculous contrast is drawn with the ‘cosmopolitan’ Clinton administration, the same administration that would deny any challenge to its trumpeted ‘full-spectrum dominance’: see J. Garamone, ‘*Joint Vision 2020 Emphasizes that Full-spectrum Dominance*’, American Forces Press Service, June 2. (2000).

of brazenness', the 'imperial republic' was ever thus.⁶ There is a related element of continuity which will prove central to my argument here. The world's first invented nation is often said to have been conceived and thence sustained in opposition to imperialism, a contrast being drawn between monadic empire and the United States as one of a diversity of differing nations. The contrary argument here will be that nation, or at least the nation of modern nationalism, has been and continues to be a compatible carrier of *imperium*, and most effectively so in the case of the United States.

Such a national imperialism relies on another element of continuity, on the idea of a surpassing sovereignty. That idea imports an existent or ever-incipient completeness of power, an illimitable authority, which can yet be determinately emplaced. This challenging combination was once effected, after a fashion, through a transcendental reference which joined determinate rule to deific scope. With the advent of modern nationalism, this combination becomes embedded in nation itself. And it is nation,

⁶ N. Chomsky, 'Chomsky in London' Red Pepper, March, 22-27 2003, at 24. On being ever thus see generally J. Wilson, *The Imperial Republic: Constitutionalism from the Colonial Era to the Beginning of the Twentieth Century* (2002) ; and for the conjunction of American Empire in its origin and present configuration see P. Fitzpatrick, 'Immanence of Empire' in Jodi Dean and Paul Passavant (Eds.) *The Empire's New Clothes?* (2003).

along with national sovereignty, which comes to take on the two diverse dimensions making up that combination. These dimensions match those of modern law, and claims to a rule of law would have law itself occupy the position of the sovereign. Operatively, it has never done so. Translating the Latin saws, it has always been a matter of ‘the preservation of the republic is the supreme law’ overriding the clarion to ‘let justice be done though the heavens fall’. The once-revolutionary dimension of the rule of law, its being ever-responsive to change and unsettling of any fixed rule, becomes predominantly oriented towards its dimension of determinate settlement. Without this taming orientation, the animate combining of these dimensions in law would pose a constant challenge to sovereign rule. In occidental systems of rule, this challenge has been countered by rendering law as the instrument of the sovereign – an outcome obligingly theorized by a compliant jurisprudence. It could be said, however, that there are constituent complicities between sovereignty and law, even the rule of law, for in that coupling law takes content and coherence from the dictates of monadic sovereign power.

An antique but extant tradition of thought would take the national law formed in conjunction with such a sovereign power as paradigm, and it would see international law as deficient and dependent in the comparison.⁷ That still common, even prevalent, perspective is here reversed. Perhaps, the argument goes, international law as

⁷ See H.L.A Hart, *The Concept of Law* 1st ed. (1961) chapter X.

unencumbered of a singular, surpassing sovereignty, or relieved of some equivalent connection to an emplaced society, may be more true to law in itself. If so, can modern law assume a cohering and a commonality in itself? And if it can, might it not be that sovereignty is reliant on law for its sustained cohering rather than, or just as much as, vice versa? And if that proves to be the case, might it not be that the reliance of the national sovereign on law is a reliance not just on the law of its bounded nation but also a reliance on international law? If so, how may that law be constituted – and constituted apart from its commonly assumed reliance on nation or on the nation-state?

Many and large questions, but they are posed here to indicate a sequence of the argument, even if it does not unfold in exactly that way. The test of the argument then comes in the large ‘case’ of what is now frequently called American empire, an empire seen here in its current or recent manifestations, but also with some regard to historical depth. The test is a negative one in that it aims to evoke a distinct international law through its being that which opposes the imperial claims of the United States to a quasi-sovereign completeness. This is not at first a propitious exercise for it finds this to be a type of national imperialism compatible in ways with the domains of the international and its law. Yet, to borrow from a recent account of ‘the new world order’ widely hailed for its eternal verities, it is ‘the weak’ who place ultimate reliance on law, including international law, and the ‘power’ of the United States can and will ultimately act untrammelled by law, especially when

‘multilateralism is impossible and unilateral action unavoidable’.⁸ That contrast not only heightens, or lends definition to, international legality but it also reveals imperative and counter-imperial ethics to this legality, an ethics which does not simply enhance existence but is a condition of it.

2. LAW AND/AS SOVEREIGN

The whole argument is now initially set in a worryingly simple and sharp division within law, each side of the divide being amply shored up in jurisprudential orthodoxy. Where some reassuring complexity enters is in the relation between the different sides of the divide and in what that may tell us about the quality of being in law. The rule of law provides a revealing instance. In its modernist mode, the rule of law was initially advanced as a secular certainty, and its quality of predictability, continuance and such remains uppermost in its occidental conception. For law to rule in these terms, it assumes an autonomy, a posited or ‘positive’ quality in itself. To achieve such autarky, law has to be coherent, closed and complete. If it were not coherent but contradictory, something else could resolve the contradiction. If it were not closed but open, then something else could enter and rule instead of or along with

⁸ R. Kagan, *Paradise and Power: America and Europe in the New World Order* 38-39, 102 (2003).

law. If it were incomplete and not a whole *corpus iuris*, and thence necessarily related to something else, then that something else could itself rule or share in ruling with law. Finally, a law which in any of these situations is not going to be dependent upon something else must also be self-originating and self-regulating.

Readily as these qualities are associated with the rule of law, in another jurisprudential tradition law cannot be autonomous and thence enduringly ordered and predictable since it must change and adapt to ‘society’ or ‘history’, to take only two of the overwhelming imperatives commonly advanced. And this contrary quality, this responsiveness, is also essential for the rule of law. If law were aligned with an invariant sameness, it would cease to rule the situation that would inexorably change around it. Furthermore, the very holding to a position requires a creatively accommodating responsiveness to all that would impinge upon and affect it. So, the rule of law cannot be complete if it must ever respond to the infinite variety of fact and circumstance coming to it. It cannot be closed when it must be ever responsive to all that is beyond what it may at any moment be. And in extending to what is continually other to itself, law cannot avoid pervasive contradiction. In short, its determinations cannot be conclusively predictable and ordered when, in its responsive dimension, it has to exceed all fixity of determination.

It is the comprehensive quality of the rule of law which pushes its constituent dimensions to such stark extremes, but these dimensions can be found in any law, and indeed in any enduring existential condition – although there is a distinctiveness to

law yet to be rescued here from that generality. For the time being let me lay out some consequences for law of this dimensional divide, consequences which may at first be obvious but which ultimately become less so. These are, furthermore, consequences which go to establish the ruling quality of law, whether or not it is tied to the comprehensive claims of the rule of law itself.

Given this insistent divide in law, it may be productive to persist a little longer with the obvious and to extend jurisprudential enquiry beyond its characteristic confinements to either side of the divide by considering in combination the dimensions which it would separate. 'After all', even though determinate positioning and a responding to what is beyond position are different things, there can be neither enduring position without responsiveness to what is always beyond it nor effective responsiveness without a position from which to respond. In their separation yet inexorable combining, these dimensions could be seen as marking the horizon of law, the horizon both as a condition and quality of its contained being, and the horizon opening on to all that lies beyond this being. Within that horizon, law's 'autonomous' position cannot be at all irenically set. The assertion of position has always to be made in relation to the infinitely responsive. It cannot be enduringly stilled in its completion or in any positioned part of itself. This impossibility of invariant positioning, moreover, is what makes law possible. Even at its most settled, or especially at its most settled, law could not 'be' otherwise than in a responsiveness to what was beyond its determinate content 'for the time being'. If that content could be perfectly

stilled, there could be no call for decision, for determination, for law. And it is in the very response to this call, in the making and sustaining of its distinct content, that law ‘finds itself’ integrally tied to its exteriority.

Yet, if law continually becomes itself and is sustained in its responsiveness to exteriority, there must nonetheless be a positioned place where this responsiveness can be made determinate. That which is purely beyond is merely inaccessible, and out of responsive range. So, law not only comes from but also returns to determinate position. And to sustain position there must be some shielding from an importunate responsiveness. Yet no matter how secure a protected position may be, it cannot be ultimately so. Even the epochal elevation of occidental law’s determinate dimension over the responsive cannot create an enveloped and settled domain. That elevation is to orient the movement of law acquisitively, even imperially, but it still cannot contain law’s responsiveness. Admittedly, with any law there has to be a constant, reductive effort to ensure that ‘the aleatory margin...remains homogeneous with calculation, within the order of the calculable’.⁹ The resulting content and the particular impelling quality of this reduction remains, however, pervaded by the relation to what is beyond. It must still itself be labile and protean to an illimitable extent.

⁹ J. Derrida, *Psyche: Inventions of the Other*, trans. C. Porter in L. Waters and W. Godzich, (Eds.), *Reading de Man Reading* (1989), at 55.

Admittedly, vertiginous possibility is not the first characteristic usually attributed to law. Perhaps this unruly dimension could be rendered more conceptually tractable if the constituent dimensions of law were seen in terms of movement. If law subsists in-between determinate position and what is ever beyond position, then what moves law is the antinomy between these two dimensions combined with their necessity for each other. This is a movement ever beyond what is determinately positioned ‘for the time being’, yet also a movement of return to position, and it is in the decisive combining of these movements that law assumes determinant force. More has to be said about law’s distinctive quality of determination, but before coming to this there is a momentous consequence of law’s responsive movement which needs to be given a central emphasis in my argument.

This responsive movement replays or, in a more static sense, encapsulates the determinant antinomy ‘in’ law. If law is suffused by responsiveness, if it must ever respond to ‘society’ and such – as one jurisprudential tradition would require, then in terms of that same tradition law is intrinsically dependent and derivative, quite lacking in any content of its own. That same vacuity, that same imperative for law to derive its contents from elsewhere, resonates with the contrary jurisprudential tradition elevating law’s autonomy, since an insistent responsiveness requires that law remain ‘pure form’ and surpass any of its contents, modifying or rejecting them.¹⁰ Before the

¹⁰ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen 51 (1998).

law, before this force of utter origination, its contents ‘for the time being’ become evanescent. Law itself becomes ‘absolute and detached from any origin’ anterior to itself.¹¹ Here law ‘affirms itself as law and without reference to anything higher: to it alone, pure transcendence’.¹²

Let me initially relate this desolate law to sovereignty, since, when we come to international law, we will have to accommodate the extravagant claims of the sovereign nation-state. ‘The first prerogative...of a sovereign prince is to give the law’ decreed Bodin, and that elevation of the sovereign remains at the core of the occidental polity: ‘In Western European societies from the Middle Ages sovereignty is principally conceived as a transcendent form of authority exercised over subjects within a definite territory. Its principal instruments are laws, decrees and regulations backed up by coercive sanctions...’¹³ There could be no more stark illustration of

¹¹ J. Derrida, *Acts of Literature*, trans. A. Ronell 194 (1992).

¹² M. Blanchot, *The Step Not Beyond*, trans. L. Davis 25 (1992).

¹³ J. Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, trans. J. H. Franklin 56 (1992); M. Dean, *Governmentality: Power and Rule in Modern Society* 105 (1999).

this instrumental subordination of law and its persisting into modernity than the unacknowledged echo of venerable authority in John Austin's influential conception of law as 'positive law', law as 'posited' by a sovereign, as existing by virtue of the 'position' of that sovereign – a position occupied by a 'determinate' and independent 'political superior' who 'set' the law 'to political inferiors': in all, to adopt Austin's famed formula, law is the command of a sovereign habitually obeyed.¹⁴ Subsequent efforts in this tradition to free law of its dependence on a sovereign endowment have only served to confirm it.¹⁵ In a more insightful and compendious vein, we find Agamben merging the desolation of law within an encompassing sovereignty, a sovereignty which 'is the originary structure in which law refers to life and includes it in itself by suspending it'.¹⁶ That is the most pointed challenge to my earlier attempt

¹⁴ J. Austin, *The Province of Jurisprudence Determined*, 2nd edn and *Lectures on Jurisprudence* vol 1 1-2, 5, 170 (1861-3).

¹⁵ Hart, without more ado, imports 'municipal law' as the paradigm: Hart, *supra* note 7, at 3, 7, 209-210. Dworkin resorts to a purely transcendental competence rendered determinate by judges as the 'princes' of 'law's empire': R. Dworkin, *Law's Empire* 407 (1986).

¹⁶ Agamben, *supra* note 10, at 28.

to show that law could have no origin anterior to itself, and clearly that challenge must be returned to. It could be approached by way of another, more oblique challenge coming out of Agamben's *aperçu*.

What, in terms of that *aperçu*, could contain 'in' itself a law commensurate in its range and effect with the whole of life? Derrida provides a generative answer in his discussion of 'the concept of sovereignty,...the sovereignty of the state' – an answer central to the rest of my paper, so it should be given a full rendition:

It was at the beginning a religious concept, that is, God, the Almighty is sovereign. Then in absolute monarchies, the king was sovereign, that is, Almighty by virtue of God, because God gave him this power. Then this concept of sovereignty became, as one says, secularised, that is, one could, with Rousseau for instance, say that people in a democracy, in a republic, the people become sovereign, and in principle without depending on God for this sovereignty. But if you read closely Rousseau you will see that there is something sacred – and that's Rousseau's word – in the people's sovereignty, in the democratic or republican sovereignty of the people. So here you have a concept which is in principle secularised, but for which the very secularisation means the inheritance of a theological memory. It is a theological phantasm or concept. When for instance Carl Schmitt says that all the political concepts, all the concepts of the political,

in the Western society are theological concepts secularised, that is what he means: that our culture lives on secularised sacred concepts, secularised theological concepts. Even the current stage, of, let's say, democracy, not to speak of absolute monarchy, of inherited monarchy, but even the concept in which one defines the nation state, the modern nation state, the modern democracy – these concepts are still theological, they are still tied to the idea of sovereignty which is a theological heritage, a religious heritage.¹⁷

That account could be supplemented, in a conventional sense, by noting that Rousseau's ascription of a 'sacred' quality to 'the social order' was attended with a notorious difficulty.¹⁸ The sovereignty of the people needed 'universal and

¹⁷ J. Derrida, *A Discussion with Jacques Derrida*, 5 *Theory and Event*, at 49 (2001) http://muse.jhu.edu/journals/theory_and_event/v005/5.1derrida.html. 'Phantasm' in its spectral variant has an abundant resonance for Derrida: *see* note 39 *infra*.. For the point attributed to Schmitt, some relevant references would be C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab 36 (1985), C. Schmitt, *The Concept of the Political*, trans G. Schwab 42 (1996).

¹⁸ J.-J. Rousseau, *The Social Contract*, trans. Maurice Cranston 50 (1968).

compelling power to move and dispose of each part in whatever manner is beneficial to the whole’, so much so that ‘the social pact gives the body politic an absolute power over all its members’.¹⁹

I will return shortly to that momentous outcome, but for now remark only its condign relation to law, a law which Rousseau equated with the acts of the sovereign, and a law which thence had to assume a like universal scope – more specifically assume a detached omniscience, assume a determinative ability ‘beyond human powers’, such that ‘[g]ods would be needed to give men laws’.²⁰ Almost as notoriously, the ‘giver’ of law had to come from beyond the determinate polity, and had to be endowed with the ‘miracle’ of a ‘great soul’.²¹ Yet Rousseau has the lawgiver alternating between this deific domain beyond and the enduring legal order which the lawgiver bestows, the ‘model’ which the ‘prince has only to follow’.²²

¹⁹ *Id.*, at 74.

²⁰ *Id.*, at 84, 86.

²¹ *Id.*, at 87.

²² *Id.*, at 84.

‘Gods would be needed’ then not only to occupy the suprahuman and unalloyed beyond, the realm of the purely possible, but also to embed an assured determinate order. One or other of these antithetical characteristics has commonly adorned deities – the ineffable god of infinite possibility and the god of complete and constant order. And, as in scholastic theology for example, the perfected deity would somehow combine both these characteristics. Connecting now with my earlier analysis in which law assumed similar characteristics, the perfected deity can be seen as a specular concentration of the law emanating from it.

Law and sovereignty would seem, then, to be well matched since sovereignty’s theological disposition can be extended to accommodate the like dimensions ‘in’ law. So, sovereignty would optimistically combine in itself being determinate with an illimitable efficacy. To the extent that it may at any time be explicitly limited, by constitutional constraints for example, this limit can be suspended or abrogated. Sovereignty no longer relies on a transcendental reference to combine these contrary dimensions. Rather, as a secularised theological concept, sovereignty would in itself subsist finitely yet encompass what is ever beyond it. In so doing it is aptly endowed to provide content to a law which shares with sovereignty these dimensions of existence but finds itself dependent on sovereignty for its contents.

How can this competence, somehow transcendent in itself, ‘take place’ within a profane world? Kant, for one, would prohibit such enquiry because it would not

produce anything, yet somehow also prove ‘a menace to the state’.²³ Such enquiry, however, is hardly uncommon and its results are incessantly advanced, often vaunting the sovereign state or seeking to establish its necessity, and at times accommodating its orientation beyond any fixity of position in idylls of progress or restless expansion. The problem with all such enterprises, however, is that they are the contained and contestable outcomes of ‘the production of truth through power’, to borrow the term and something of the following thought from Foucault – and as such they are reliant on a facticity which may sustain but does not ultimately touch the matter of sovereignty, for sovereignty is a claim of right, not a claim to truth.²⁴ No amount of asserting the happening, even the inevitability, of a sovereign act or condition – an act of war or a condition of effective control of territory, to offer what will prove to be tendentious examples, can make the qualitative leap to being-in-right.

²³ I. Kant, *Kant's Political Writings: The Metaphysics and Morals* Ed. H Reiss 147 (1970). Here he seemingly puts aside his own ‘enlightened’ injunction that truth be pursued no matter how ‘great the disadvantage’: I. Kant, *Grounding for the Metaphysics of Morals* 64 (1993).

²⁴ M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972 - 1977*, trans. C. Gordon *et al.* 93 (1980), and see generally 92-108.

How, then, can that be done? Kant offers an answer, the shock of which in the setting of ‘enlightened’ thought may relieve what could by now be its monotony in the setting of this paper:

A law which is so sacred (i.e. inviolable) that it is practically a crime even to cast doubt upon it and thus to suspend its effectiveness for even an instant, cannot be thought of as coming from human beings, but from some infallible supreme legislator. That is what is meant by the saying that ‘all authority comes from God,’ which is not a *historical derivation* of the civil constitution, but an idea expressed as a practical principle of reason... .²⁵

Gods, or a god, would still be needed. Yet this has also to be not just a practical principle but also one that will conform to reason.

Taking that as a daunting agenda, we could seek initial assurance in the intensely practical by posing the issue of how sovereignty could be sovereign without the law. The sovereign has to traject temporally not just what it would continuously require of its subjects but its very own being, and in so doing it must sustain both requirement and being beyond, or even contrary to, the impelling force of existent factuality. Both

²⁵ Kant, *supra* note 23 (Political Writings), at 143 – his emphasis.

requirement and being share what Beardsworth discerns as ‘the essential lack of identity to all human organizations’.²⁶ In an immediate way this could be seen as the inevitable lack in the identity of the organization as it faces the vagaries of future time, but that same lack must also be seen as intrinsic to the identity itself. What the organization is ‘for the time being’ will always lack in relation to what in time constantly impinges on and challenges it, but the survival of the organization beyond its fleeting foundation, its continuance in time, will depend on its constitutively integrating that lack. To do this, the organization has only one continuously extensive and amenable means, and that is law. So, whilst law in one of its configurations depends on a sovereign, the sovereign also depends on law.

The argument could be concentrated now in a return to Agamben’s conception of sovereignty as ‘the originary structure in which law refers to life and includes it in itself by suspending it’.²⁷ To repeat somewhat, in its dependence or desolation, law is reliant on a sovereignty anterior to it for the endowment of its content. This is a law which, as Agamben would have it (by way of a borrowing from Savigny), ‘has no existence in itself, but rather has its being in the very life of men’.²⁸ Yet how can

²⁶ R. Beardsworth, *Derrida & the Political* 146 (1996).

²⁷ Agamben, *supra* note 10, at 28.

²⁸ *Id.*, at 27.

there be something ‘originary’ anterior to a law commensurate in range and effect with life itself? From where would such originary matter come from beyond life itself? The puzzle is heightened in Agamben’s advancing sovereignty as both coming from beyond and yet itself not ‘a power external to law’.²⁹ Furthermore, and as we saw, once with-in law sovereignty’s endowment to it can always be exceeded and countered by that law. To support an anterior, and exterior, sovereignty Agamben offers the exception, the exception to what the law is ‘for the time being’: ‘only the sovereign decision on the state of exception opens the space in which it is possible to trace borders between inside and outside and in which determinate rules can be assigned to determinate territories.’³⁰ There has indeed to be some such surpassing decision beyond what law may ‘at any time’ be if it is to have and sustain some determinate content. That much emerged from the earlier analysis in this paper of law and of the rule of law. But from that analysis it also emerged that this competence was integral to law. Agamben would seem to confirm as much: ‘Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the

²⁹ *Id.*, at 28.

³⁰ *Id.*, at 21.

exceptio: it nourishes itself on this exception and is a dead letter without it.’³¹ The exception, then must be of the ‘inside’ as well as the out and Agamben would explicitly find that the sovereign exception is not ‘a power external to law’.³² There is yet more. As we saw in the previous paragraph, sovereignty is dependent on law for its constitution and for at least some of its content. All of which still leaves the possibility of a sovereignty which, although necessarily dependent on law, still is not entirely encompassed by it. Whether that sovereignty is necessary for law, however, is quite another question. The claim of the rule of law as a legal system occupying the sovereign position would suggest not, as would the perhaps more confident claim to self-subsistence of a customary legal system. The constituent challenge thence facing these systems would be how to reconcile law’s ultimate vacuity with the attraction of content to itself. A response to that considerable challenge will now be sought in a sociologic of law.

3. A SOCIOLOGIC OF LAW

³¹ *Id.*, at 27.

³² *Id.*, at 28.

There has been, in addition to an overweening sovereignty, another instrumental subjection of law in modernity, one which will now be drawn on here. This subjection is effected through an idea of society as a ‘ruling idea’, one elevated and sustained in its completeness by a further phantasm, by ‘an illusion which lies at the heart of modern society: namely, that the institution of the social can account for itself’ – an illusion engendered in the claim of society, in the absence of any reference beyond it, to have become ‘transparent to itself’ or ‘intelligible in itself’.³³ We have already been visited by cognate apparitions, most pointedly by Rousseau’s ‘social pact [that] gives the body politic an absolute power over all its members’, a pact derived from ‘the people’ and their ‘universal and compelling power to move and dispose of each part in whatever manner is beneficial to the whole’, the only possible alternative to that social totality being the complete individual utterly separate from all others found in the ‘pure state of nature’.³⁴ What now happens in this section of the paper is that the

³³ C. Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* trans. J. B. Thompson 184, 201, 207 (1986). And on the ruling idea see K. Marx and F. Engels, *The German Ideology Part I* 64 (1974).

³⁴ Rousseau *supra* note 18, at 50; J.-J. Rousseau, *A Discourse on the Origin of Inequality in The Social Contract and Discourses*, trans. G.D.H. Cole 136 (1986), see generally 60-65.

completeness of this ‘whole’ and of ‘parts’ such as the individual is tested and found wanting. Each is opened up and constituted in an integral relation to the other, an other supposedly subsumed or rejected in the completeness. To counter what may well be a premonitory weariness in the reader, it would be as well to acknowledge at the outset that sociology both offers divisions comparable to that between some such ‘whole’ and ‘parts’ and finds them to be constituted in relation to each other.³⁵ But just how, conceptually, they can relate constitutively yet retain an integral identity remains a mystery. It is, to intimate something of an answer, a mystery similar to that facing Bodin’s prince who, in exercising his ‘first prerogative’, has ‘to give law to all in general and each in particular’.³⁶ First, however, there should be some indication of what these claims to completeness may be.

The claims to the completeness of the social whole may appear especially formidable but their very variety is some intimation of their failure. At the risk of being over-schematic, three related manifestations could be identified. With one, there is an enfolding closure which combines society with some encompassing force or entity. Variants involve some capital pervasion – of leadership, of communion – inhabiting society and conferring on it what is in common between its members. The

³⁵ Copious examples will be offered shortly.

³⁶ Bodin *supra* note 13, at 56.

most 'perfect' example of this is perhaps totalitarianism, but liberal claims to 'the end of history' could also qualify. This kind of encompassing closure is usually rendered in terms of what is natural or organic about society or its members, or in terms of some purposeful agency, some vital and universal force or formula – the will of the leader, the spirit of a race, of history, of the people. It follows from its supposed totality that with such a society each member is confined in a relation to the social or to its expression, a relation which displaces or incorporates the relations between members. It would also be the case that society as totality absorbs all alterity. There can be neither division within it nor can there be anyone apart from it. And it follows, furthermore, that such a society itself can never be anything other than what it is – a kind of terminal stasis. On this point the second manifestation of the social totality may seem quite different but it only somewhat moderates the first. Here society is still developing or evolving but it remains society as a totality which is developing or evolving. Its inclusive completeness is yet to come. The third is less a moderation and more a reprise of the first manifestation. Here some force is identified which, although within society, has a comprehensive constituent effect on it – economy, different diachronies, various sociological laws. Yet with these forces within, we still end up on the plane of the impossible social totality, but now with the puzzle of how something encompassed within society may also encompassingly determine or impel it.

As for the social parts, these also can be presented in a worryingly tripartite division. With one, the parts are carriers of a determinant social whole and

constituently pervaded by its distinctive force. With another, distinctiveness is less evident, the whole and the parts being constituently interdependent. The divide between 'structure' and 'agency' is often seen in this way. With the third, the now misnamed 'part' breaks away, as it were, and itself assumes distinctness and completeness, the social being a mere resultant of the relations between the distinct entities. 'Methodological individualism', where society is rendered entirely in terms of its individuals members and denied any distinct efficacy, offers perhaps the strongest example, but there are broadly similar reductions of the social in economic versions of it or where it is allowed to appear only in the perspectives or interpretations brought to bear on it.³⁷ Here the social endures only adjectively. This third rebellious 'part' is the significant one here. The first is simply subsumed in a distinct whole and the second simply sets the problematic which will now be considered.

For a society of parts or particulates to 'work', for its particular entities to be distinct yet in common, it could only be a society of conjoint insularity in which the entities would be the same as each other, quite interchangeable, and thence lose any

³⁷ For these 'parts' and debates about their force and sufficiency, see for example P. Winch, *The Idea of a Social Science and its Relation to Philosophy*, 2nd edition (1990); S. Lukes, *Methodological Individualism Reconsidered*, in D. Emmet and A. MacIntyre (Eds.), *Sociological Theory and Philosophical Analysis* (1970).

substantive distinctness. All of which would obviate the relation between the entities which generated the social 'in the first place'. Another terminal impasse. Alternatively, if the substantive distinctness of the entities is to be preserved, then they could only advance as many different versions of what is social or in common as there are entities. This would be the utter dissipation of the social. Yet neither can these entities in their distinct particularity relate simply or solely to a set totality, to some comprehensively determined and determining commonality beyond. That would be to lose the particularity and the distinctness in a comprehensive determination and to return to the terminal stasis of a social totality.

Something has to 'give'. The seemingly paradoxical price of the distinctness of social entities in their relation is the existence of *some* determinate being-in-common inhabiting and limiting the entities 'in' their very distinctness. Putting it in Davidson's terms, the entities could exist distinctly yet in relation 'only if there is a common coordinate system on which to plot them; yet the existence of a common system belies the claim to dramatic incomparability', to an utter distinctness.³⁸ There must, however, be some 'give' on the other side as well. Society as the being-in-common of these entities cannot be an all-absorbing totality in the relation to them. It has, for itself, to be determinate, delimited and existentially constituted, in that relation.

³⁸ D. Davidson, *On the Very Idea of a Conceptual Scheme*, in J. Rajchman and C. West (Eds.), *Post-Analytic Philosophy* 130 (1985).

More abruptly, given the responsiveness intrinsic to relation, neither the society nor the social entities can be simply determinate, enduringly delimited. They have ever to extend beyond, to exceed, what is ‘for the time being’ their determinate content and, so as to continually create society, they have to do this in their relation to each other – in the relation between social entities as well as the relation between them and the social.³⁹ The relation subsists, then, neither in the purely determinate nor in the purely responsive. With the first there would be a completeness of being and with the second a dissipation, both quite negating relation. Society, in sum, ‘finds itself’ neither completely constrained by the determinate nor lost in the liquidity of the responsive, but finds itself rather in their protean combining. It finds itself in law.

Making up the sociologic of law just outlined are two apposite dimensions corresponding to those dimensions of law itself extracted in my earlier analysis. What that idea of law would add to the sociologic is the element of continuance sustained by the juridical norm. Society can only ‘account for itself’, returning to Lefort’s

³⁹ The exceeding in relation, and indeed this sociologic, could be seen as a bond that is, in Derrida’s terms, ‘spectral’: for a revealing use of the term in relation to international law, *see* J. Derrida, *Nietzsche and the Machine* in *Negotiations: Interventions and Interviews 1971-2001*, trans. E. Rottenberg 241 (2002). *See also* J. Derrida, *Specters of Marx*, trans. P. Kamuf chapter 3 (1994) on international law, and generally at p.63..

terms,⁴⁰ can only be and continue to be ‘in itself’, because it combines indistinguishably ‘in’ itself a determinate, a delimited factuality with a normatively oriented responsiveness beyond any existent delimitation. That combining will be returned to shortly. What the sociologic adds to the idea of law is a drawing in of content to law, a content to which law has no constituent commitment. If that sociologic were given full play, the very societies which trumpet their intrinsic adherence to the law would be very different to what they are. The content of the social within its adductive law would have to be seen as contingent and partial, even if necessarily so. It would have to be seen as entailing the sacrifice of what runs counter to that content, and entailing thence, it could be hoped or expected, the recognition of responsibility for who or what is being sacrificed.⁴¹ Even if that perception of law is not entirely Panglossian, given its lack of content a desolate law is susceptible to being seen in quite other ways, even to the extent of being instrumentally subordinated to what would endow it with content, to sovereignty and society for instance. Yet even though law is constantly dependent on an exterior content and has itself no constituent content to pit against this, we saw that with both sovereignty and

⁴⁰ Lefort, *supra* note 33, at 201.

⁴¹ For a brilliant engagement with the point *see* J. van der Walt, *Law as Sacrifice*, 2002 *Journal of South African Law* 710 (2002).

society it was not simply a matter of their affecting law from afar. They not only generated law's content but were themselves indistinguishable from that content. (The sovereign decision, for example, is not separable from the sovereign.) They themselves were within law, suffused by and dependent on it. They do assume some necessary invariance, however, and this does counter the unsettling 'in' law. Yet that invariance, 'really' its semblance, is itself dependent on their ability to move beyond what it may be 'at any one time' and adaptively come to '[a]ll things counter, original, spare, strange'.⁴² And that is an ability normatively trajected.

If the constituent complicity between law and society underscores an inevitability of law, there are typically modernist claims that would marginalize law because of the perceived impact of other forces in society ensuring social order and coherence. There are said to be, for example, tentacular disciplinary regimes rendering law insignificant, even otiose; but, in that sanguine spot of academic self-reference known as 'elsewhere', I have shown how such regimes depend integrally upon law.⁴³ There

⁴² G. M. Hopkins, *Pied Beauty* in *The Poems of Gerard Manley Hopkins* 4th ed 70 (1970).

⁴³ *See, generally* M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (1979). For the dependence on law *see* P. Fitzpatrick, *The Mythology of Modern Law* 147-169 (1992). 'Sanguine' here is meant in more than one sense.

are, however, other forceful phenomena of the social which I want to isolate and tie to law here because they will prove relevant to the constitution of international law and of American empire. These are, extending now Derrida's accounting for sovereignty, 'secularised theological concepts' which Lefort can be taken as collecting compendiously in the category of bourgeois ideology, an ideology whose text, says Lefort, 'is written in capital letters', and he would instance 'Humanity, Progress, Nature, Life,...Society, Nation'.⁴⁴ Then Barthes would enter and strip bare the elevation of these capital creations, seeing the 'ideology' entailed as a reduction of 'the historical quality of things' to the image of the natural, thence 'making contingency appear eternal'.⁴⁵ A generic name for the capital creations naturalized in this way can be borrowed from Auden's 'Lament for a Lawgiver', a lawgiver departed whose erstwhile jurisdiction extended over 'Eternal Objects' which are now bereft and '[d]rift about in a daze' without his cohering presence.⁴⁶ These Eternal Objects are deific entities able to combine in themselves an objectness with being *sub specie aeternitatis*.

⁴⁴ Derrida, *supra* note 17, at 49; Lefort, *supra* note 33, at 205.

⁴⁵ R. Barthes, *Mythologies* trans A. Lavers 142 (1973).

⁴⁶ W. H. Auden, *Lament for a Lawgiver in Selected Poems* 99 (1979).

For my immediate purposes, and in the terms provided by Barthes, what we find reduced into the image of the natural is the historical quality and the contingency of law. The way in which this naturalism would render Eternal Objects in their relation to law can perhaps be approached through G. E. Moore's 'naturalistic fallacy' – the deriving of what 'ought' to be from what 'is', or vice versa.⁴⁷ Its jurisprudentially renowned origin comes from Hume's observing that in accounts of 'every system of morality' of his acquaintance there is a move or a slide from 'is' to 'ought', whereas the two are 'entirely different'.⁴⁸ Without going so far as to say that this attribution of fallacy is itself fallacious, there does seem to be more to it. Eternal Objects would seem to encapsulate a position not unlike that of the deity in versions of scholastic natural law. That natural law emanated from a deity which remained of the law, providing its contents, yet this was also a deity set apart from the law. The deity, furthermore, combined enduring order with all that should be. It combined them in itself into a perfect whole, a whole in which things could never be 'entirely different'. No matter how apt or accurate it was for Hume to distinguish 'is' and 'ought' in the

⁴⁷ G. E. Moore, *Principia Ethica* 2nd ed. (1993) chapter II.

⁴⁸ D. Hume, *A Treatise of Human Nature* III (i) 1 (1777). In the Penguin edition 521 (1969).

uniform plane of a comprehensive, and ‘enlightened’ reality, this is not the *habitus* of the Eternal Object. It is in its normative projection that the Object continuously is. Being indistinguishably what ought to be and what is carries the Object as integral beyond a confined present, providing the force for it to come to, and the potential for it to contain, that beyond. If we relate these dimensions of the Eternal Object to those of law outlined in the previous section, the Eternal Object can be seen as a carrier of the juridical – the juridical as the assumptions law must make for its own existence.

Even if perception of the juridical composition of Eternal Objects will be subject to a varying agnosia, that composition may enable us to talk about them in a way that is more general than the verisimilitude of a naturalism or the natural would allow. ‘[I]t is not necessary to accept everything as true, one must only accept it as necessary’ asserts one of Kafka’s protagonists in debating the demands of the Law.⁴⁹ Sovereignty, for example, may not be accepted as natural but it is widely accepted as necessary and, given the earlier analysis of it, sovereignty would fit the characteristics of the Eternal Object. A naturalness could be lent to it when placed in particular ‘natural’ places such as Nation. The instance of national sovereignty will be taken up shortly when considering international law and its testing against American empire. For now, the argument will be illustrated and advanced by way of another instance

⁴⁹ F. Kafka, *The Trial*, trans. W. and E. Muir, in *The Collected Novels of Franz Kafka* 167 (1988).

assuming significance in those settings. This is modernity's ur-instance, that of Humanity.

This is a humanity of primal self-sufficiency in which the universally human can enter a finite world and become completely yet particularly emplaced. Extending the sociologic, especially in its countering totality or completeness, it could be said that those outside of that elect place, those apart from the universally human, must then be absolutely apart from it, must be of a different and distinct type of existence. Yet being universal, the human must (also) include all. There is then a split, an indetermination, within this humanity. There are, of course, well-worn expedients which would sustain a unified humanity. Being unable to assert its proffered integrity positively – that is, without confronting the split or indetermination within it – its characteristics are typically derived in a negative reference to the excluded. What the excluded are, it is not. Or, in a strategy overlaid on this kind of divide, some positive content is derived from the claim to exemplarity. With the exemplar in this situation, the uncontained or universal human can be concentrated in and exemplified by the particular, by the included as a particular people who not only supremely manifest the universal but also have a prerogative hold on it. From such exaltation the excluded are bidden, in such modes as the civilizing mission, to join the universal concert of humanity.

Any such surpassing position which would co-exist with the essential unity of humanity would have to be held as a combined assertion of fact and the right, of what

‘is’ and what ‘ought’ to be. The factual delimitation of particular people[s] and their qualities is something necessary but far from sufficient for the claim to humanity. That delimitation cannot extend of itself beyond the existent particular without the conjoint claim that this is what all ought to be. The human here becomes fact and norm indistinguishably. More expansively, it is quite beside the point in the constitution of the human or Humanity that there can be no cohering of fact and norm within a uniform reality where fact and norm are now utterly separate, for Humanity as an Eternal Object is, borrowing Derrida’s term, a ‘secularised sacred concept’, uniting as it does an impelling force of transcendent right with a profane location in the factual.⁵⁰ Making the human factually and containedly present reveals it as partial, as including some people and excluding others. It can only ‘be’ encompassingly human if combined with the dimension of right – in the rightful assertion of what all should be, of what all should come to. Yet that same normative extraversion holds out the prospect and the ultimate inevitability of the delimited arena becoming other than what it is, of the excluded entering and themselves taking up a rightful place within. Humanity, then, must carry in itself this openness, this incipience of inclusion, this ability to extend ever beyond itself and in so doing transform the nature of its constituent bond.

⁵⁰ Derrida, *supra* note 17, at 49.

This further paean to incompleteness imported by the juridical can, in a way, be readily countered. Even if the ‘man’ of this humanity could be declared into being by the law, by certain revolutionary constitutions for example, did this not result in the elevation of a humanity above the law, the elevation of a ‘man’ instrumentally subordinating the law, of a ‘man’ who now ‘legislates without any ground or authority other than himself’?⁵¹ And was not, and is not, this humanity and this man exclusively and enduringly exemplified in certain elect nations?⁵² And even in its expansive, liberatory promise, were not the human and the rights attached to it primarily modes of a ‘tacit but increasing inscription of individuals’ lives within the state order’?⁵³ That dismal line of questioning will be extended when engaging with human rights and American empire, but it should be enough for now to raise more than the suspicion that the juridical dimension of the Eternal Objects may more securely embed a given dominance than challenge it, may more typically bring what is beyond within that dominance than bring the dominance transformed to it. As for the law

⁵¹ See C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* 93 (2000),

⁵² See *id.*, at 102, 109-144.

⁵³ Agamben, *supra* note 10, at 121. See also Foucault, *supra* note 24, at 95-96.

itself, would not its dependence on exterior content and its absence of any countervailing content of its own orient it receptively towards ruling power? And even if the juridical is needful for such power to be made enduring, does this not thoroughly implicate the juridical in that power? The formative force of the norm extends and intensifies the hold of such power, since the norm renders what the power 'is' in fact as what it 'ought' to be.

Yet there is also a contrary orientation inseparable from this containing one. It is because the ever extensive norm cannot be ultimately contained that its infinite possibility has to be drawn in repeatedly. And it is exactly where this reduction of the norm is explicit and enforceable, in law, that there is also an explicit dependence of that power. For although, as we saw, law depended on an exteriority such as this power for its content, ruling power in turn depends on law's effecting the sociologic, including a sustaining normativity. That much has already been considered, but there is a further dimension to law's dependence on and independence of power. Its dependence, as we also saw, was a consequence of a constituent juridical assumption – of a primal lack of limitation, an intrinsic inability to be bound to any pre-existent, a generative incompleteness and labile openness. It is in and as this open quality of law and the juridical that an ethics may be found, an ethics enabling law to 'speak truth to power', as many would want it to.⁵⁴ The nature of this ethics should, however, first be

⁵⁴ For a significant instance *see* M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* 514 (2001).

clarified – if that is not putting it too optimistically. This is not an ethics of replete standards and principles, a guide to specifically required or desired behaviour. It is more akin to a meta-ethics in that it does not produce or confirm a detailed content of the ethical. What it offers is a generative intimation of such content. If that would render it more attenuated than ethics as usually understood, its further deviation from the usual could be seen as a strengthening of its ethical being. For, although this ethics is inevitably normative, it is also, in the stretched sense used by Derrida, a matter of ‘*ethos*, of manner of being, of *habitus*’.⁵⁵ It is an ethics of the existent.

Lest that preamble raise expectation unduly, it should be emphasized that there is a fragility, even evanescence, to this ethics. What it offers is an evinced normative which in its realisation is always countered, whence it persists only in part. Working through an example, in the irreducible openness of law, in its not being tied to any pre-existent differentiation, there is an incipient ethic of equality – equality before the law, to evoke a phrase. Truly, that ethic of equality can exist fully only before or anterior to the law made determinate, for with the coming of the determinate differentiation and inequality will always supervene. Thence the ethic endures in a shrunken life of ‘more or less’. Likewise, there is a freedom before the law in law’s not being tied to any enduring denial of it, a fragile freedom countered and rendered

⁵⁵ Derrida, *supra* note 39 (*Negotiations*), at 13.

‘more or less’ in the law made determinate. An ethic of impartiality can be situated in the same way. Law’s lack of ties to the pre-existent inclines towards a lack of attachment in its ‘application’. This, however, becomes inexorably compromised in the determinate scene of application.

It is not only within law as determinate that this ethics assumes operative existence. There is also a dimension of normative assertion in which the ethics assumes a less inhibited, less attenuated existence. This can be identified with the help of Hart in *The Concept of Law* and his constant concern there to bring out how the concept of law is affected by legal rules being carriers of obligation, and thence being things formed and used by people in active and reflective ways.⁵⁶ He would depart from venerable attempts in jurisprudence to identify law in terms of some ‘external’ factuality by bringing to bear an integral ‘internal’ aspect of rules in which people use them ‘in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules’.⁵⁷ In this way, Hart opens up law demotically in a normative dimension, but having done so he resorts to diverse expedients to close it down again, for example by asserting a stable and containing ‘core’ to all rules; but what is

⁵⁶ Hart, *supra* note 7.

⁵⁷ *Id.*, at 88.

especially revealing about this effort at closure is its failure, a failure produced by the impertinent openness of law and of its 'rules', by their incessant and imperative becoming other than what they are.⁵⁸ It is in that infinitely expansive terrain that, as we saw, the ethics of law originate, and it is from there that such an ethics animates the 'claims, demands, admissions, criticism' which go to evaluate behaviour in relation to rules and which contribute to the creation of the rules themselves, a contribution that can be channelled and formed through 'secondary rules', such as rules of adjudication, identifying what is made determinate as law.⁵⁹

Such claims, criticism, and so on, as well as the whole 'internal' aspect of rules, can only have effect in a community which would 'make sense' of them, a community of some mutual regard among its members, and the ethics or meta-ethics we have been considering would extend to this community. As with the ethics of equality, freedom, and impartiality, this community has to be seen in truncated terms. The initiating openness of law, its not being bound in itself to any pre-existent exclusion, trajects an incipient openness of relation, an invitation to an inclusive being-in-common, to a

⁵⁸ For this and other expedients, and their failure, *see* P. Fitzpatrick, *supra* note 43, chapter 6, and P. Fitzpatrick, *Modernism and the Grounds of Law* 97-99 (2001).

⁵⁹ Hart, *supra* note 7, at 88.

regardful community that is a 'community of law'.⁶⁰ Yet this would be, aptly borrowing the term from Nancy, an inoperative community.⁶¹ This community, when made operative in a determinate law that inevitably excludes, even if it also includes, then assumes a rarefied existence of 'more or less'. Yet, like the ethical field it inhabits, the inoperative community remains insistent and unassuaged.⁶² It would be a bar to any ultimate exclusion being consistent with law, with the legality of inflicting death for example.

4. THE LAW BETWEEN NATIONS

⁶⁰ Cf. J.-L. Nancy, *The Inoperative Community*, trans. Peter Connor 28 (1991).

⁶¹ *Id.*, at chapter 1.

⁶² It could be argued that this ethics is enveloped by the containing force of law and the juridical. Like the normative generally, such ethics could be taken as affirming that the determinate, in absorbing them, is already what the ethics would claim it ought to be. But any such asseveration, in its turn, would have to 'deal with' law as disruptively open, as holding out the possibility of things being otherwise. And the alternation would go on.

It would be superfluous, not to say presumptuous, to summarily transpose this paper as far as it has gone onto the refined debates in the theory of international law. In a sense, as the *cognoscenti* will have anticipated already, the story up to now is a prelude to the engagement with international law now offered in this present section of the paper. What could also have been anticipated is the particular and persistent debate in international law which focuses this section. On one side of the debate, power is dominant over international law. On the other, law assumes some significant independence of power.⁶³ Here I will draw on the debate in its broad lines and, in the process, bring in issues frequently related to it. That exercise will connect increasingly as it goes on to the account of law in the paper thus far. Next, and perhaps less predictably, the story extends to the dissonant relation between international law and American empire.

An aptly stark conspectus of the two sides of this focussing debate is offer by Koskenniemi:

We have either chosen a formalism that insists on the law's validity and binding nature irrespective of its distance from the world of political facts

⁶³ For a recent and cogent analysis and account see G. Simpson , *The Situation On The International Legal Theory Front: The Power Of Rules and the Rule Of Power*, 11 European Journal of International Law 439 (2000).

or we have become realists and stressed the law's dependence on political facts and ridiculed "binding force" as a formalist fiction.⁶⁴

And in the debate itself, no matter which side is espoused, power or *realpolitik*, variously conceived always seems to provide something of a primary force. 'Even theorists sympathetic to international law', noted Aristodemou along with much apt authority, 'have seen its reliance on the practice of States as rendering the task of distinguishing the legal from the political problematic'.⁶⁵ In its relation to power and such, there always seems to be some deficiency in law, something more which it needs in order adequately to confront power. Hence there are, especially of late, frequent calls for a new or renewed consensus on fundamental value in the international community so as to subject power to the rule of law.⁶⁶ Yet it is difficult

⁶⁴ M. Koskenniemi, *International Law in a Post-Realist Era*, 16 *The Australian Year Book of International Law* 1, at 4 (1995).

⁶⁵ M. Aristodemou, *Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia*, 5 *European Journal of International Law* 532, at 545 (1994).

⁶⁶ *E.g.* M. J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2001).

to see how any such consensus, or community, or values could exist without power ‘in the first place’. Or there is a bind in Koskenniemi’s noting that ‘in the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before’, when he has already recognized that any such standpoint would be ‘political’.⁶⁷ So, whether political power provides some overarching standpoint for law or whether it does not, a deficient law seems inexorably to come to power. There remains a tangential force of international law which some would discern in its ability to lay down processual paths through which power passes in taking effect, or at least some of its effects, but even that consolation is being diminished of late by the perceived ability of power now to transform the processes constituting international law itself.⁶⁸ In the literature on international law there seems now to be more and more a recognition of the ultimacy of a power which remains alone and apart. A recent and lauded, if hardly factory-fresh, contribution comes with Kaplan’s thesis that the irenic ‘paradise’ that is Europe can only cleave so virtuously to international law because of the sheltering ‘power’ of the United States.⁶⁹ Yet even with all this

⁶⁷ Koskenniemi *supra* note 54, at 516.

⁶⁸ R. Mullerson, *Jus ad Bellum: Plus ca Change (Le Monde) Plus c’est La Meme Chose (Le Droit)?* 7 Conflict & Security Law 149 (2002).

⁶⁹ Kaplan, *supra* note 8.

abjection, there is impeccable authority for saying that ‘most international lawyers...cannot help believing that law has some autonomous, constraining effect on state behaviour’.⁷⁰

International law retains at least a sufficiently enduring presence to focus enquiry into the nature of the power on which it depends. This is usually put as the power of nations or of nation-states, but some contrary regard is had also to the claims of *imperium*. It is important for my argument to show that these are not quite so contrary, and to set them together so as to develop an idea of power which would encompass both, some regard to origins is necessary. Here several anachronisms will have to be tolerated, including the use of the term ‘international law’ itself.

Although genealogies in the trade often cast it further back, for my purposes Vitoria provides the point of departure, although in a way it is a point already departed. Vitoria produces an international law set in a theologic but, so Schmitt would reveal, the lineaments of that international law endure beyond Vitoria and beyond the departure of the deific element.⁷¹ So, when Schmitt sees international law originating in the appropriation of the Americas, this is international law as a ‘theological

⁷⁰ Simpson, *supra* note 63 at .

⁷¹ See Schmitt, *The Land Appropriation of the New World* 109 Telos 29 (1996).

phantasm’, to again borrow from Derrida’s description of sovereignty.⁷² What would purport to animate the resulting *ius publicum Europaeum*, what would displace the theologic, would be the supposedly ‘self-contained, sovereign, territorial state’.⁷³ Yet ‘in a world fully and exhaustively divided’ into such self-contained entities, there is ‘no space left for internationalism’, including international law.⁷⁴ What was left was a ‘new spatial order’, an ‘open space’.⁷⁵ How, then could the ‘space’ be both a space fully occupied by these states being in common yet also a space ‘open’ to imperial appropriation – ‘an immeasurable space of free *land* – the New World, America, the land of freedom, i.e., land free for appropriation by Europeans’.⁷⁶

⁷² Derrida, *supra* note 17 at 49.

⁷³ Schmitt, *supra* note 71 at 55. In the bareness of my account here there is a foreshortening of this displacement of a theologic and the advent of sovereign, territorial states.

⁷⁴ Z. Bauman, *Modernity and the Holocaust* 53 (1989).

⁷⁵ Schmitt, *supra* note 71 at 30, 77.

⁷⁶ *Id.*, at 37 – his emphasis.

How that came about can perhaps be clarified if we do not see Vitoria as the mere precursor of this space, if we do not absolve him of it and its consequences quite so readily as Schmitt tends to do. The initiating reason why Vitoria is seen as getting international law off to an aptly exalted start is his universalist and supposedly humanitarian espousal of the interests of indigenous peoples during the Spanish colonization of the Americas.⁷⁷ Vitoria set his lectures in opposition to the more predatory and more resolutely genocidal of the Spanish colonists. Contrary to their claims, Vitoria found that the ‘Indians’ had rights of *dominium* and that, furthermore, they were basically human beings, even if ones with considerable shortcomings. These rights had, however, to adjust to the expansive natural rights of all people, including the Spanish, to travel, trade, ‘sojourn’ and, in the cause of Christianity, to proselytize. Such natural rights could not be aggressively asserted unless they were resisted but, when resisted, they could be asserted to the full extent of conquest and

⁷⁷ E.g. J. B. Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (1934). And *see generally* Vitoria *De Indis in id.*. Here and in the rest of this section, from time to time I will be immodestly using modest amount of Part II of Fitzpatrick *supra* note 58 (Modernism). For a fuller account of the present line of argument in relation to Vitoria *see id.*, at 152-156.

disposition, and Vitoria did constitute the Indians as inherently resistant.⁷⁸ Even if that terminus could be justified, as Vitoria would so justify it, in terms of scholastic theology, there would remain a point to the revisionist view that Vitoria certainly did bequeath the enduring lineaments of international law, but that he did so by way of providing a refined framework for one of the more spectacularly rapacious imperial acquisitions.⁷⁹

So, as Anghie puts it, the Indian in Vitoria's lectures had to be 'schizophrenic', included in the sameness of universal humanity, even if Vitoria would not put it in such terms, yet set apart from it as different.⁸⁰ And with Anghie's elegant analysis we find that Vitoria's lauded origin of international law is not so much to do with its conventional concern, the relation between sovereign states, as with the colonial

⁷⁸ For specific coverage of these points *see id.* (1934: xiii-iv [section I, para. 24], xxxvii-viii, xxxix, xli-ii [section III, paras. 3, 4, 6, 9, 10, 12])

⁷⁹ *See e.g.* R. A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* 96-180 (1990).

⁸⁰ A. Anghie, *Francisco de Vitoria and the Colonial Origins of International Law in* E. Darian-Smith and P. Fitzpatrick (Eds.), *Laws of the Postcolonial* (1999) at 96.

domination of people burdened with racial difference.⁸¹ Perhaps it could now be added that Vitoria's scheme imports imperial domination as effecting the relation between these sovereign states. Their completeness and sovereignty leaves no 'space' for the international, as we saw. There is then no 'space' for a dynamic enabling the international in international law to take on identity positively. In Vitoria's mould it does so negatively, in the imperial division between the *barbari*, who are not sovereign or Christian or civilized, and the European nations which specularly are. 'Space' filled with the theologic was compatible with division since the theologic indicated what was inescapably the case. This imperative assumed existence as *ius naturale* and thence as *ius gentium*, even if the acceptability of the *gentes* could be debatable. Returning to Schmitt's perception, then, what is carried forward from Vitoria is not simply division and a theologic quite vacated, a pure phantasm. What 'takes the place' of the theologic with international law, what reconciles exclusions with the universally inclusive, is the Eternal Object variously formed, formed for example as international society or community, nation, or humanity.

This is not to say that Vitoria's division of peoples was as chasmic as that which later entered international law and is more usually taken as constituent of its modern form. It was only in the early nineteenth century, Alexandrowicz tells us, that international law 'started contracting into a regional (purely European) legal system,

⁸¹ *Id.*, generally.

abandoning its centuries-old tradition of universality based on the natural law doctrine. ...International law sank to regional dimensions though it still carried the label of universality'.⁸² Doubtless there was a qualitative shift then, and it was the case that the range of peoples admissible to the international came to be more and more confined in terms of European systems of sovereign rule. Yet the division and its constituent effect can also be seen as continuous.⁸³

This is now, supposedly, a continuity that no longer continues. In the genealogies of the trade, the imperial constitution of international law is a matter of the past, for now the impelling power within international law comes solely from nation-states freed of the imperial carapace. The definitive, if not then complete, shift is said to come in the aftermath of the First World War and at the considerable urging of the United States, a nation-state which thereafter parades its opposition to imperialism and lends support to the efforts of colonies to achieve a national independence. If then one were to insist on some continuing efficacy of *imperium*, this would be to advance a further phantasm, to advance even the phantasm of a phantasm if one traced a continuity from the displaced theologic, to the displaced imperial, and thence to the national. My

⁸² C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* 2 (1967).

⁸³ *See e.g.* H. Grotius, *De Jure Belli ac Pacis* 28 (1919).

argument will now attempt to illustrate that this seemingly tenuous exercise is an entirely apt one.

In the broad configuration of power inhabiting international law, some continuity would seem to be quite evident. Imperialism cannot be thought, or thought only, as a monadic force which then contrasts radically with the diversity of nations. Yet neither can nation be thought as simply an autarchy entirely and immanently subordinating its relation to a wider world. There is much, I will argue later, to distinguish the two scenes but for now, and still in terms of a broad configuration of power as it affects international law, similarity is the thing that will be more marked. Although ‘the great powers’ of the nineteenth century were seen, and saw themselves, as involved in a common project which was distinguished by its occidental, progressive, civilizing, (and so forth) character, this was certainly not at the expense of national assertion. Quite the contrary, it was a stridently national assertion, one attended by an intense rivalry indicatively called ‘inter-imperial’. Nor was this national extraversion confined to the explicitly imperial but, rather, it created and sustained ‘the comity of nations’ – a comity of, yet beyond, any singular nation, imperial or otherwise. For nation, and especially the nation of modern imperialism, was not a thing contained in its territorially bounded plot, much as territory was taken to be definitive of the modern nation. As Eternal Object nation was, and is, oriented ever beyond the determinate – oriented, in terms of the primal claims of modern nation, towards the

universal.⁸⁴ The very coming to the universal from within, from a particular if elect national place, left the universal unencompassed and unlimited. This, however, did not derogate from but, rather, enhanced destinal claims to the universal, claims of the particular, determinate nation to an exemplary, evolutionary, or prerogative hold on the universal. The universal could, then, inhabit nation without being confined and negated by nation's determinate dimension. And the determinate could inhabit the universal without dissipating in the universal's 'lack' of limitation.

It was the diapason of other Eternal Objects such as the comity or the community of nations which, as it were, filled the divide between nation as particular and as universal. These Objects were neither simply congeries of nation nor a cohering position apart, but both. Within such entities as comity and community, nation was stretched on a scalar progression from an obdurate particularity to a perfected universality. The universal was being achieved by some particular civilized nations at one end of the scale, but it was decidedly far from being achieved by those little more than savage nations at the other. And even if there has been an ostensible softening of the criteria of inclusion and exclusion which go to constitute the community of nations, there remain effective variations:

⁸⁴ The point and its connecting with the determinate, such as 'territory', in constituting nation has been explored *in Fitzpatrick supra* note 58, chapter 4.

[T]he triumphant liberal-democratic ‘new world order’ is more and more marked by a frontier separating its ‘inside’ from its ‘outside’ – a frontier between those who succeed to remain ‘within’ (the ‘developed’, those to whom the rules of human rights, social security, etc., apply), and the others, the excluded (the main concern of the ‘developed’ apropos of them is to contain their explosive potential, even if the price to be paid for it is the neglect of the elementary democratic principles).⁸⁵

There is a manifestation of this new world order troubling perceptions of international law, and one which could trouble also the notion of national imperialism being developed here, and that is globalization. Amidst the miasma of what globalization is said to be, there is one constant, or near constant, characteristic attributed to it, its displacing or comprehensively subordinating nation. Perversely, however, globalization can serve to confirm the continuing significance of national imperialism. To encapsulate the argument, what we find is that for dominant nations

⁸⁵ S. Zizek, *Eastern European Liberalism and its Borderlines*, 14 Oxford Literary Review 25, at 34. (1992). For a consummate case study of the division and its constituent force in international economic law see S. Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide* 13 Leiden Journal of International Law 749 (2000).

their extraversion towards the universal is not accompanied by their dissipation or subordination in some global domain. They are not diminished in their determinate or particular being. On the contrary, the more powerful the nation, then the more its extraversion universally will merge with and enhance its particular being. So, what we find in the operative avatars of the global – such as the International Monetary Fund, the World Bank, and the World Trade Organization – is not some power uniformly or even widely spread but, rather, a power concentrated in a few potent and distinct nations. It is not as if, in the modernist scenario laid out by Anthony King, that now with ‘world interdependence...there are no Others’; such a condition can be discerned only hesitantly, ‘in theory at least’, and discerned paradoxically in persisting ‘conditions of grossly uneven development’.⁸⁶ In any case, with the discourses of globalisation now seeming to fade, in a more explicitly fractious world the configuration of national imperialism is more starkly evident. The point will be illustrated in some detail shortly, but to be going on with we could instance its notorious assertion in Bobbitt’s *The Shield of Achilles* with his ‘market-states’ – predominant nations who are bidden to pursue a strategy which would ‘shape’

⁸⁶ A. D. King, *The Times and Spaces of Modernity (or Who Needs Post-modernism?)*, in M. Featherstone *et al.* (Eds.), *Global Modernities* (1995), at 114.

inevitable war so as to ensure that ‘we can win’ and thus overcome a somewhat indefinite but ominous host of enemies.⁸⁷

To the despair of its apologists, international law would seem to provide a spectacular instance of law’s dependence. Even formally speaking, nothing seems to come effectively between it and the sovereign power, or powers, of its unruly subjects. This leaves, as Carty discerns, ‘a *void* at the very heart of international society which is marked by the myth of international legal order’; in the result, ‘there is no legal solidarity on the part of states towards one another’.⁸⁸ But when peered into, borrowing the thought from Blanchot, the void proves to be disappointing.⁸⁹ It is densely inhabited, not least in a solidary dimension which will be taken up shortly. Staying for now with the content more directly contributed by power, given his uniquely perceptive accounts of power and international law, Carty would not see the

⁸⁷ P. Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* xxvii (2002).

⁸⁸ A. Carty, *Myths of International Legal Order: Past and Present* X Cambridge Review of International Affairs 3, at 10 (1997) – his emphasis.

⁸⁹ M. Blanchot, *The Madness of the Day*, trans. L. Davis 8 (1981).

void as an emptying of power.⁹⁰ It contains, for example, ‘a framework’ which has ‘superimposed the European concept of state order globally’.⁹¹ It is that order, in turn, which has given international law its distinctly occidental cast, not just or even so much in terms of its evident receptivity to the power of *imperium* or the power of predominant nations, but also in terms of its own processes of determination, especially judicial processes. Law’s actuality to itself does not escape the made quality of the actual:

[A]ctuality is *made*: it is important to know what it is made of, but it is just as important to know that it is made. It is not given, but actively produced, sifted, contained, and performatively interpreted by many hierarchizing and selective procedures – *false* or *artificial* procedures that are always in the service of forces and interests of which their ‘subjects’ and agents...are never sufficiently aware. The ‘reality’ (to which

⁹⁰ See generally A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986).

⁹¹ Carty *supra* note 88, at 6.

‘actuality’ refers) – however singular, irreducible, stubborn, painful, or tragic it may be – reaches us through fictional constructions.⁹²

The main fictional construction through which the reality of international law reaches us is custom. Although this is a custom attuned to the ‘practice’ of states, it is not a matter of a securely existent law selectively taking content from an extraneous custom. It is, rather, a matter of an unmediated inhabiting of international law by custom. By responsively reflecting state practice and by taking it directly to international law, custom does not disturb the sovereignty of states yet it endows an international law apart from them and of which they are the subjects. So perfectly fitting is custom to these constituent dimensions of international law that one influential view of international law would see it as basically customary, as ‘in the usual terminology of international lawyers, a set of customary rules’.⁹³ Consistently with this, there is also a general view that treaties can be changed by custom, even if

⁹² The Deconstruction of Actuality *in* Derrida *supra* note 39, at 86 – his emphasis.

⁹³ Hart *supra* note 7, at 228. See also H. Kelsen, Introduction to the Problems of Legal Theory 108 (1992).

there is no clear or uniform view on the effective ways in which this can be done.⁹⁴ And even short of the acceptance of such change through custom, there are accepted modes of ‘interpretation’ or of the recognition of changing practice in their effect on treaties which are customary in all but name.⁹⁵ These fragile propensities of treaties might go to explain why they can be considered unstable and porous in comparison with other types of law, in comparison with the solidity myopically visited on constitutional law for example.⁹⁶ Most dramatically, however, *ius cogens*, often seen as a creation of custom, can be replaced or displaced by custom or contrary practice, even if, again, the exact ways in which this can be done are much debated.⁹⁷

⁹⁴ See for a perceptive account of this and related issues M. Byers, *The Shifting Foundations of International Law* 13 *European Journal of International Law* 21 (2001). And cf. N. P. Van Deven, *Taking One for the Team...* 46 *St. Louis University Law Journal* 1091, at 1111-1113 (2002).

⁹⁵ E.g. Vienna Convention on the Law of Treaties, Articles 31 (3) and 62.

⁹⁶ See e.g. I. M. Maazel, *What is the European Union?* 16 *Brigham Young University Journal of Public Law* 243, at 245-248 (2002).

⁹⁷ I. A. Shearer, *Starke’s International Law*, 11th edition 49-50 (1994).

To illustrate and advance the argument, I will take an egregious case asserting the solitary efficacy of practice in the making and unmaking of international law. By way of commenting, in November 2002, on a debate about Iraq in the Security Council of the United Nations, Glennon established, to his own satisfaction at least, that for the United States ‘it would not be unlawful to attack Iraq’ because ‘the Charter provisions governing the use of force are simply no longer regarded as binding international law’.⁹⁸ The only regard Glennon has regard to is that of the United States, but he does adduce a clinching observation: ‘since 1945, dozens of member states [of the United Nations] have engaged in well over 100 interstate conflicts that have killed millions of people’, and by their deeds you shall know them, for ‘the general prohibition against the use of force, as expressed in the Charter, has in this way been supplanted by a changed intent as expressed in deeds’ – and, it could have been added, the United States has been pre-eminent in its contribution to this supposed process.⁹⁹ It may

⁹⁸ M. J. Glennon, How War Left the War Behind, New York Times, 21 November 2002,

<http://www.nytimes.com/2002/11/21/opinion/21GLEN.html?ex=1038886995&ei=1&en=09296b9d456ale27>.

⁹⁹ *Id.*. And *see* for the magnitude of the contribution by the United States, G. Vidal, *Perpetual War for Perpetual Peace: How We Got to Be So Hated* xii, 22-41 (2002).

indeed be readily agreed, with Carty, that '[h]ardly anyone argues that international law is or can be based on anything other than the practice of States', that even the most peremptory *ius cogens* (as this prohibition on the use of force is or was) must give way if it is no longer accepted as 'fundamental', but Glennon is insufficiently nuanced when it comes to the making actual of practice and acceptance.¹⁰⁰ If the normative were always negated by contrary practice, either it could not exist or its existence would be pointless, since the normative subsists in and even thrives on the transgression of it. If the prohibited use of force never took place, either it would never occur to anyone that it be prohibited or there would be no point in the prohibition. It would either never have been in an actuality, or it would be normatively a 'dead letter'. But with practice still operative proscribed, it may, and often will, be the case that the more instances there are of the contrary practice, the more there is a strengthening of the proscribing norm. The greater use of proscribed force may make actual a greater, a more pointed, a more effective operation of the proscription, rather than lead to its decline or elimination.

More compendiously, transgressive practice *both* undermines and constitutes the normative. The key question, the incessant and ineluctable question, in international law is whether the transgression as a contrary practice goes to show that the norm is no longer customary, or whether it is a breach of the customary norm and hence

¹⁰⁰ Carty *supra* note 90, at 1.

calling for correction. Despite sedulous efforts by decision-makers in international law to shore up the customary norm in itself, to make its actuality invariant in the face of what is to come, this effort must ultimately fail and fail intrinsically. The norm can never be automatically brought to bear, inertly applied to what is an ever new situation. It is always a question, the legal question, whether, and through what remade perception of it, the norm is going to ‘apply’. If the situation could always be automatically matched by an invariant norm, there would be no call for law, for the legal decision, for the ‘fictional’ making of the law, or for custom.¹⁰¹

That line of argument can connect with the account of law in the second section of this paper by way of a closer look at custom. It is at least intriguing that, in an occidental lexicon, ‘custom’ can be used for the ways of brute savages and for ‘the gentle civilizer of nations’ that is international law.¹⁰² The correspondence may help break what is an excessive emphasis on one or other dimension of custom in each of the two locations. With the savage, set in ‘the cake of custom’, the iron invariance of custom could be affirmed because it reflected unchanging practice, the ‘habits’ of the

¹⁰¹ That line of argument is a quite unoriginal condensation of much of J. Derrida, *Force of Law: The ‘Mystical Foundation of Authority’* trans. M. Quaintance in *Acts of Religion* (2002). And evoking as well Derrida *supra* note 92, at 86.

¹⁰² Koskenniemi *supra* note 54, title and epigraph.

torpid savage.¹⁰³ In these perceptions of it, custom is said to depend constitutively on being within the homogenous and intimate natural community. Yet with the international, there is a miraculous transformation to a promiscuous custom freed of any enduring attachment and ever responsive to what is ever changing. If it ceases to change with changing practice, it can no longer be custom. Of course, my point would be that custom combines both extremities of its being in a determinant outcome. What it 'is' is trajected via its normative content towards all that it may become. Somewhere along that trajectory, the decision determinantly intervenes, creating the actuality of custom 'for the time being'. Custom, then, presents law's constituent dimensions writ large. But with law, or at least with law in its characteristic occidental rendering, there is some cohering force exterior to it uniting these dimensions, making them into a cohering actuality. A national sovereign may provide this force. Or there will be cohering modes within law itself, something that law's sociologic makes possible, such as Hart's 'secondary rules' enabling 'primary rules of obligation' to be definitively recognized, changed, or applied.¹⁰⁴ These 'secondary rules' internal to law were related earlier to an ethics of the existent and a community, both in law. I

¹⁰³ W. Bagehot, *Physics and Politics, or Thoughts on the Application of the Principles of 'Natural Selection' and 'Inheritance' to Political Society* 19, 21 (n.d.).

¹⁰⁴ Hart *supra* note 7, at 89-96.

will come to a consideration of such things in the setting of international law by way of the perennial question of what may provide coherence for or in international law.

This is not a propitious enquiry. The obstacle usually advanced is the lack of a unified and unifying sovereign. What there is instead is a congeries of sovereign states each claiming completeness. It may be testament, a testament compounded, to the futility of intellectual endeavour to point out that not only have perspicacious efforts to render this completeness failed, but also the very failure has itself failed to dent the pretence of completeness; furthermore, there has been a failure adequately to theorize the relation that inevitably flows from the lack of completeness.¹⁰⁵ We are here back to the void and to there being ‘no legal solidarity on the part of states to one another’.¹⁰⁶ In this perception, Carty’s critical contribution is at one with a tradition of absence. Vattel decreed that, although there could be universal duty binding its members, the society of nations was not to involve any of its members ‘yield[ing] ...rights to the general body’: each independent state claims to be, and actually is,

¹⁰⁵ For the perspicacious *see e.g.* Rousseau *supra* note 18, at 95, and J.-J. Rousseau, *The Government of Poland*, trans. Willmore Kendall (1972). For remedial reference to the failure of theory *see* Nancy *supra* note 60, and J.-L. Nancy, *Being Singular Plural* (2000).

¹⁰⁶ Carty *supra* note 88, at 10.

‘independent of all the others’.¹⁰⁷ The stark conclusion had already been drawn by Hobbes for whom ‘the law of nations’ allowed of no overarching rule, no commonality of its own, the absence of some surpassing Leviathan being fatal to conceiving of this law of nations as law proper.¹⁰⁸

What this tradition reproduces, by insisting still on something like a society of states or nations, is the impossible society of conjoint insularity outlined in the earlier account of the sociologic of law. For such a society to acquire sociality, for its members to be in common, they would have to be totally so. In a seeming paradox, this society thence becomes a society of the totality thereby eliminating the distinctness and particularity of its members. That, in turn, evokes a more fitful tradition of presence, one that was most evident in the Europe of the eighteenth and early nineteenth centuries in which international law would subsist in the elevation of a transcendent recourse to some all-resolving reason or will, usually entailing a ‘universal history that is inseparable from a kind of plan of nature that aims for a total,

¹⁰⁷ E. de Vattel, *The Law of Nations or the Principles of National Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* Vol. 3, trans. C.G. Fenwick 9 (1916).

¹⁰⁸ T. Hobbes, *Leviathan* 159 (chapter 30) (1952).

perfect political unification of the human species'.¹⁰⁹ Revivals or resemblances can be currently seen in the human of human rights and of humanitarian intervention with their overriding of state sovereignty.¹¹⁰ Short of a completely subordinating social totality, there has to be – as we saw when considering the sociologic – some marker of the commonality, some determinate or determinable being-in-common for the members of the society to have their own distinct and particular being. It is as a response to this necessity that we could understand the naturalist quality often attributed to custom or to 'community' and 'society' in international law, and conceive of them joining the ranks of Eternal Objects.

The way in which international law concentrates the sociologic and provides a being-in-common enabling the distinct identity of its subject states can be illustrated in the contention between what a leading text tells us are the 'two principal theories as to the nature, function and effect of recognition' of nation-states in international law: one is the 'constitutive theory' in which 'recognition alone' creates the nation-state; the other is 'the *declaratory* or *evidentiary* theory' in which the nation-state 'exists as

¹⁰⁹ J. Derrida, *The Right to Philosophy from a Cosmopolitan Point of View* in Derrida supra note 39, at 333.

¹¹⁰ On the latter see A. M. Weisburd, *International Law and the Problem of Evil* 34 Vanderbilt Journal of Transnational Law 225, at 262.

such prior to and independently of recognition’, recognition then being ‘merely a formal acknowledgement of an established situation of fact’.¹¹¹ Only with the latter theory can it be said that ‘the international legal order is still constituted by [nation-states as] *de facto* self-constituted concentrations of power’.¹¹² As the origin of international law, the nation-state must be already given independently of or apart from the international law it originates. All international law can do is declare the existence of something already and factually in being, a scenario securely founded in the evident facts of territory, effective control over it, and such. Yet these facts, even in their seeming solidity, cannot speak for themselves. They have to pass through a constituent process, a process concentrating in itself a complex body of law, and that process ‘recognises’ a particular type of political organization and affectivity. In so doing it rejects, or does not even begin to extend itself to, other types – types falling outside of the historically specific occidental norm of national rectitude. In this way, international law constitutes the nation-state constituting it.

¹¹¹ Shearer *supra* note 97, at 120 – his emphasis. The argument there is that the evidentiary theory is predominant, an argument made out in terms of the legal rules giving effect to it.

¹¹² Carty *supra* note 88, at 12.

Seeing international law in this way as a cohering formation of the sociologic seems to contradict the standard comparison between its dissipated quality and the state-centred solidity of municipal law. Almost in passing, it could be said that this easy attribution of such solidity could not survive the knowledge of nation-states that was either intimate or extensive. Which is not to deny that a centered and uniform plane of determination is often, but not invariably, attached to municipal law. The landscape of international law, in contrast, is taken to be diverse and uneven. Yet the conception of an international law, even if prior to the nineteenth century under other names, is very much one of the *longue durée* rather than the short. And if regard is had to the dimensions of law outlined earlier, the contrast between international and municipal law may not be so sharp. For a start, the ground of comparison is shared in that, as we saw, law is necessary for the municipal sovereign. Further, this is something of a groundless ground in that the cohering of law need not be, and ultimately cannot be, oriented monadically, by some sovereign endowment or otherwise. Law's cohering cannot be procrustean since law necessarily refuses any primal attachment. It's cohering will always be in question. So, with any 'system' of law we should expect contingency and instability, and expect as much stability as there is.¹¹³

All of which is not to deny that if, returning to Savigny's dictum, law 'has no existence in itself, but rather has its being in the very life of men', there are not still

¹¹³ Cf. D. Pears, Wittgenstein 168 (1971).

different ways of living within different types of law.¹¹⁴ So as to distinguish living in international law and in what can be a more straitened scene of the municipal, I will return to the ethics of the existent considered earlier. As we saw, those ethics exist in law in a truncated way. Their first existence as protean possibility is reduced in the second, reduced in law made determinate. The quality accorded that reduction is what becomes crucial here. With many municipal systems, particularly in their occidental manifestation, the first existence is taken to be absorbed without remainder in the second. If this can be seen as an instance of the metaphysics of presence, it can also be seen as instantiating a jurisprudence of presence. The ineradicably challenge posed by the ethics of the existent to this completeness of presence is either ignored or relegated to a jurisprudential arcanum where it remains a persistent puzzle.

We could take as an example, one the significance of which will unfold as it is developed and one that correlates with equality before the law, the requirement that laws be 'general'. Because of this requirement, it is often said that a decision confined to a particular determination does not count as law.¹¹⁵ But law is made determinate in the decision, and the decision will always be specific. Neither the decision nor the

¹¹⁴ See Agamben *supra* note 10, at 27.

¹¹⁵ E.g. Rousseau *supra* note 18, at 82; J. Locke, *The Second Treatise of Government*, in *Two Treatises of Government* 409 (para. 142) (1965).

circumstances provoking it will ever be exactly repeatable or repeated.¹¹⁶ Yet, if the general cannot find itself in law's determinate existence, it cannot be so general that it has no bearing on anything specific, and thence no operative content at all. Hence the common and paradoxical requirement that law's 'generality must be specific'.¹¹⁷ What the general 'does' of course is to straddle and link the two existences of the ethics of the existent. It cannot be wedded ultimately either to the vacuous possibility of the first existence or to the unrepeatable specificity of the second. It must 'be' of both. As such, and drawing this from Derrida again, it is a 'fictional construction' through which the 'actuality' of law reaches us, a way through which this actuality is 'actively produced, sifted, contained, and performatively interpreted by many hierarchizing and selective procedures...'.¹¹⁸

The broadly equivalent fictional constructions in international law do not take on such a supposedly subsuming presence. The first existence of the ethics is not so focally contained, its possibility not so singularly encompassed. Its openness is more

¹¹⁶ See generally Derrida *supra* note 101.

¹¹⁷ F. Neumann, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* 28 (1957).

¹¹⁸ Derrida *supra* note 39 (Actuality), at 86.

persistently and more receptively maintained. There is, then, in international law a less mediated entry of those ‘claims, demands, admissions, criticism’ which go to its making.¹¹⁹ *Opinio juris* has something of an immediacy of effect, for example. It is inevitable that the ethical claims to equality, freedom, impartial consideration, and to regard within community be reduced in the actuality of the determinate, but with international law that outcome is not so generalized, not so much rendered in terms that are evenly produced and overarching.

5. AMERICAN EMPIRE

Still, if an ineradicable ethics of the existent is what sustains international law in its autonomous efficacy, if it is that ethics which provides a position from which the pretensions of power may be countered, this may merely give an added poignancy to the dependence of international law on power. For what is also ineradicable is this dependence, and the very openness of international law facilitates the entry and effectiveness of power. That effectiveness consists in power making law determinate and in so doing it would contain and direct the ethics of the existent. It is at this point that we could especially appreciate the wisdom of Koskenniemi’s observing that ‘[i]n the absence of an overarching standpoint, legal technique will reveal itself as more

¹¹⁹ Hart *supra* note 7, at 88.

evidently political than ever before'.¹²⁰ An overarching standpoint within international law, even if itself 'political', would serve to tame new content by providing some concentrated means of opposing and absorbing it. Without such a standpoint, and Koskenniemi sees us as currently quite bereft, 'international law becomes pragmatism all the way down', and it becomes so most markedly, it could be added, as mere instrumentalism.¹²¹

If, then, international law is merely or ultimately the receptacle and instrument of power, this section on international law and American empire could now end with an abrupt and obvious conclusion. That may be a relief to more people than the writer, but one question, one provocation to further enquiry, would remain. If international law is so abject, so thoroughly receptive to power, and if, as its history richly reveals, it has been particularly accommodating of *imperium*, why should the assertion of American empire ever go beyond or be contrary to international law? Then it could be asked whether it might be that there is 'in' law, in international law, a life that in some identifiable way counters and resists *imperium*? And might we not be able to identify this identifiable way at those points where law counters and resists *imperium*?

¹²⁰ Koskenniemi *supra* note 102, at 516.

¹²¹ *Id.*

All of which may sound promising but there is the further and inhibiting question of how these points, in their turn, could be identified given the absence of ‘overarching’ markers of law within international law and given its related responsiveness to power. This difficulty is specifically aggravated in the case of American empire. Although its claims to imperial rule are becoming more explicit, they are not obligingly contrasted with rule through law. Quite the contrary. If we return to those explicit imperial arrogations of The National Security Strategy outlined at the beginning of this paper, we find that they are accompanied by fervent and repeated, if vicarious, commitments to the rule of law, to the rule of law as one of the ‘nonnegotiable demands of human dignity’, as something which others are bidden to ‘embrace’ or praised for ‘respecting’.¹²² So much is at least politic if, in terms of my earlier argument, any ruling continuance depends on law, and that argument extends to imperial rule. Since the distinct efficacy of international law, or the perception of that efficacy, is obscured in the various ways just outlined, here it will be approached obliquely. Situations will be taken where the United States acts contrary to or disregards international law, or where it seeks to go beyond or contain international law, and the attempt will then be made to derive from these negative relegations of international law what may positively and resistantly be ‘in’ it.

¹²² Bush *supra* note 1, at 3, 9-10, 19, 22, 28.

Perhaps the situation that has of late generated most debate about whether the United States is adhering to norms of international law is its treatment of detained ‘terrorists’. An initial distinction needs to be drawn. Considerable scope could be allowed this treatment and it would still remain within range of legal justification. Numerous provisions of the law of international human rights would run counter to various powers of virtually indefinite detention without trial which have been recently exercised by the United States. But some of these powers emanate from specific legal enactments and justifications for these can be advanced for their ‘exceptional’ necessity in the cause of national security. The pertinent situations here, however, are those where *imperium* goes beyond and subordinates the domain of law. Going on decisions of courts in the United States, this is the situation with the detentions at Guantanamo Bay.¹²³ Staying within the ethos of the oblique, that specific situation can be summarized from a judgement of the English Court of Appeal in a case concerning one of the people detained, Mr Abbasi, in which judgement the court was of the opinion that ‘in apparent contravention of fundamental principles recognised by both [English and American] jurisdictions and by international law, Mr Abbasi is at

¹²³ These are decisions in one case the latest manifestation of which is *Khaled A. F. Al Odah et al. v. United States of American et al.* United States Court of Appeals for the District of Columbia Circuit, No 02-5251, March 11, 2003. I am grateful to Stewart Motha for this reference.

present arbitrarily detained in a “legal black-hole”, because he was ‘subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal’.¹²⁴ This, in the view of the court, ‘objectionable’ scene was one confirmed by the United States courts in restricting their jurisdiction to review the acts of the executive to the effects of those acts on people who are either citizens of the United States or within the territory over which the United States is sovereign. And, so it was held, the people detained at Guantanamo Bay were neither.¹²⁵ The circumstances may have been unique but there is also much older judicial authority in the United States to the same effect, authority enabling the executive to act in an imperial abandon freed of even the most fundamental constitutional restraints.¹²⁶

¹²⁴ *R. ex parte Abbasi & Anor. v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department* (Court of Appeal, Civil Division, [2002] EWCA Civ. 1598) paras. 64 and 66. I am grateful to Stewart Motha for this reference also.

¹²⁵ *Id.*, para. 66 for ‘objectionable’ and *Khaled supra* note 123 for the rest.

¹²⁶ See the ‘Insular Cases’ as discussed in Fitzpatrick *supra* note 58, at 175-177. A broadly similar freedom of imperial action was bestowed by the Indian Cases so-

It could still be the case that matter, the matter of international law, comes into this black hole but if it does, like any matter coming into a black hole, we do not know what happens to it. For example, there has been much significant debate over the application of the Geneva Conventions to this situation.¹²⁷ Yet it would seem that the government of the United States has not shown the remotest concern with the procedure in the Conventions for determining their applicability.¹²⁸ It has been observed that ‘the administration has taken a menu approach to the Geneva Conventions of 1949: It picks only what it wants and ignores the rest.’¹²⁹ The point could be countered in the administration’s claim that the Geneva Conventions do not

called decided by the Supreme Court in the early nineteenth century: *see id.*, at 164-175.

¹²⁷ For argument on both sides see Human Rights Watch, <http://www.hrw.org/press/2002/01us012802-1tr.html> (2002).

¹²⁸ On the question of applicability *see* Article 5 of the Geneva Convention of 1949.

¹²⁹ C. Levendosky, *We Cannot Ignore Provisions of the Geneva Conventions*, Casper Star-Tribune, February 10, reproduced in First Amendment Cyber-Tribune Fact, <http://w3trib.com/FACT/1st.lev.genevaconventions.html> (2002).

apply and such that are brought to bear are only done so as a matter of its grace and favour. No matter how contested the status of the people being held, it is at least difficult to avoid the application to them of numerous international human rights laws dealing with what could broadly be called due process. What all these things tend to indicate is not matter awaiting definitive determination by international law but, rather, a perceived irrelevance or a disregard of international law.

Conceivably, the treatment of international law in that situation could be put down to the transgression, uncertainty and debate essential to any legal order, rather than being definitive of its subordination to something else. That excuse or mitigation will be qualified shortly but, more immediately, it would not accord with the way in which people detained are routinely and officially described. They are not presented as deviants or proper enemies in war who could return to the amenable law and its peace. Rather, they are 'illegal' and 'unlawful' in the sense of being beyond the law; they are 'outlaws', 'bad guys', and as such 'evil'.¹³⁰ (The same and much the same terminology is extended to states and 'regimes', an extension which will be

¹³⁰ See e.g. D. H. Rumsfeld, *News Conference 4* (2001), http://www.defenselink.mil/news/Nov2001/t11132001_t113nb.html; E. MacAskill, , R. Norton-Taylor, , and J. Borger, Julian, *UK Dilemma over Treatment of Captives and What will happen to the Prisoners?* The Guardian, 18 January 2002.

considered soon.) The sentiment, at least, is religious, and usually religious as well, and this is a religion of a Manichaean kind.

With a touch of inevitability, this characterisation returns us to the neo-sacral quality of the Eternal Object, and it will lead us onto the dramatically different directions in which the Object's juridical dimensions can move. For that purpose, we can return also to that ur-instance of the Eternal Object, to humanity or the human, and its juridical dimensions can be explicitly connected to international human rights. Humanity can be particularly emplaced and yet be universally, encompassingly human if its delimited place is joined with the element of right in its assertion of what all should be. Those who are not as they should be fall outside of the range of the human and, to repeat somewhat, being apart from the universal can only be absolutely apart, of a different order of existence. They are the 'evil' that, in Badiou's terms, negatively endows human rights with content.¹³¹ As such, the excluded provide an inherent transgression of human rights enabling the content of the human to emanate specularly from the transgressive, this being a universal content that cannot be contained and positively specified in any operative way. Yet, as we also saw, that same universal, that same 'lack' of positive closure, extends the human inclusively and, it could now be added, extends human rights likewise.

¹³¹ A. Badiou, *Ethics: An Essay on the Understanding of Evil*, trans. P. Hallward 8-9 (2001).

In that divide, human rights can be seen as always juridically poised between the determinate that excludes and the inclusively receptive or responsive. Where human rights then 'go' depends on whether, with the inevitable combining of the two dimensions, human rights is predominantly oriented in the direction of the one or of the other. If the determinate is predominant, the orientation becomes imperial. The responsive is inclined and made conformable to the singularly determinate. The contrary inclination is from the determinate to the responsive, producing what Baxi calls 'contemporary human rights', a 'paradigm...based on the premise of radical self-determination', one in which 'human rights enunciations proliferate, becoming as specific as the networks from which they arise and also in turn sustain'.¹³² My immediate concern is not with this opening of the human but with its imperial enclosing.

The claustrophobic content of The National Security Strategy can serve again to indicate the terms of this enclosing, not this time the terms of an unsurpassable and ultimate power, but now the milieu of what is enclosed. Both the preface to the document as well as the 'strategy' proper open with an announced end of history:

¹³² U. Baxi, *The Future of Human Rights* 29, at 31 (2002). The dual nature of human rights is well captured by A. Sarat and T. P. Kearns, *The Unsettled Status of Human Rights: An Introduction* in A. Sarat, and T. R. Kearns, (Eds), *Human Rights: Concepts, Contests, Contingencies* (2001).

‘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...,’ and referring to the same period and the same type of struggle: ‘That great struggle is over. The militant visions of class, nation, and race which promised utopia and delivered misery have been defeated and discredited.’¹³³ What distinguishes the elect nations already conforming to the ‘single, sustainable model for national success’ is their commitment to ‘basic human rights’ – the ‘evil’ of ‘outlaw groups and regimes’ being manifest in their disregard for human rights, along with their lack of civilization.¹³⁴ The single, sustainable model is one attended with much detail, a detail that marvellously coincides with neo-liberal economic imperatives and their attendant ‘good governance’, but in its more generalized prescriptions, this model is put in terms of ‘the market’.¹³⁵ And lest the deluded think the end of history would usher in an era of perpetual peace, it has, rather, ushered in one of perpetual war, a war propounded in the National Security Strategy to preserve

¹³³ Bush *supra* note 1, preface.

¹³⁴ *Id.*, and G. W. Bush, *The World must Hold Saddam to Account* The Guardian 4, September 13 (2002).

¹³⁵ Bush *supra* note 1, at 17 and 19.

the peace, and to secure the predominance of the United States against such as '[t]errorists...organized to penetrate open societies and to turn the power of modern technologies against us'.¹³⁶

To show how these components of the 'new world order' go to settle the relation between *imperium* and international law, enquiry will have to be broadened beyond the happy conjunction of the two in The National Security Strategy. This broadening can be by way of certain jobbing oracles of the 'new world order'. These are intellectuals whose evidentiary significance, at least in this setting, consists in the widespread attention and, usually, approbation they receive. I will consider recent works of three. Starting, aptly enough, with the begetter of the thesis of the end of history, or of an end similar to that announced in The National Security Strategy, Fukuyama and the Strategy are also at one in being concerned with some impertinent persistence on the part of history. In *Our Posthuman Future: Consequences of the Biotechnology Revolution*, Fukuyama mutes the triumphalism of the end of history; we are now told that it is not quite ended because 'we are nowhere near the end of science', which is just as well if one is writing a book about its potent effects.¹³⁷ In all

¹³⁶ *Id.*, preface.

¹³⁷ F. Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (2002).

other seemingly severable respects however, we are still assured that history is quite ended. So, September 11, 2001 ‘raised doubts about the end-of-history thesis’ because it was seen as symptomatic of a clash of civilizations, borrowing another formula, a clash ‘between the West and Islam’; but there is no such substantial clash: Islam presents only an eliminable rump, ‘a desperate rearguard action that will in time be overwhelmed by the broader tide of modernization.’¹³⁸ Still, ‘science and technology’ do provide a ‘malign ingenuity’ with a means to strike at ‘our civilization’s key vulnerabilities’.¹³⁹ This apprehension about the ominous utility of science and technology and the general mix of achieved certitude and vulnerability are both things which Fukuyama shares with The National Security Strategy.¹⁴⁰ Furthermore, Fukuyama’s previous reliance on modern society’s ability to make the vagaries of history immanent to itself is now necessarily supplemented by a new guide through these remaining uncertainties, and that guide is provided by a human nature asserted

¹³⁸ *Id.*, at xii. And for the thesis on the end of history *see* F. Fukuyama, *The End of History and the Last Man* (1992).

¹³⁹ Fukuyama *supra* note 136, at xii-xiii.

¹⁴⁰ *E.g.* Bush *supra* note 1, preface.

through human rights.¹⁴¹ In terms of constituent exclusion, then, empire appears more benign than its apologist for it would also extend itself to ‘Islam’ even if in other moments it would also be excluded. The ‘evil’ is then constituted as that which is beyond the retrievable human, hyper-excluded and irredeemably barred, the ‘minority’ of ‘terrorists’ and ‘fundamentalists’.

In extending the focus now beyond human rights to take account more extensively of law and international law, we could approach the second oracle, Bobbitt and *The Shield of Achilles: War, Peace and the Course of History*.¹⁴² In this considerable volume, Bobbitt’s combinatory powers join the aura of inevitability in the guise of an historical determinism with a realm of freedom in which ‘we’ adopt strategies to master an ‘era’ of uncertainty, strategies which fuse war and the market and are made effective by the ‘market-state’ which is characterized as the ‘emerging constitutional order that promises to maximize the opportunity of its people, tending to privatize many state activities and making representative government more responsive to the market’.¹⁴³ It is within this fusion of war and the market that Bobbitt’s book ‘treats of

¹⁴¹ Fukuyama *supra* note 136, chapters 7 and 8.

¹⁴² Bobbitt *supra* note 87.

¹⁴³ *Id.*, at 819-823, 912, and *see generally* chapters 11 and 12.

the relationship between strategy and law’, both being seen as ‘key instruments of the State’.¹⁴⁴ Strategy and law configure with the market and with war. The market-state still allows, or will allow, law a part in shaping the ‘internal order’ of that state, but otherwise ‘the old ways of the superseded nation-state (its use of law to bring about certain desired moral outcomes, for example) fall away’.¹⁴⁵ War, possibly ‘a new, epochal war’, is inevitable, and strategy must ‘shape’ war to ensure that ‘we can win’.¹⁴⁶ Indeed, war generally is something inevitable, it ‘is a natural condition of the State...and cannot be finally avoided’, and part of Bobbitt’s ‘main point’ is that war and law are ‘inextricably intertwined’, there is a ‘mutually supportive’ relation between them.¹⁴⁷ Although in this book Bobbitt is extensively concerned with international law and varied theories of it, the place of law in his general scheme, as it has just been outlined, exhibits ‘pragmatism all the way down’.¹⁴⁸ With that scheme

¹⁴⁴ *Id.*, at xxvii, 814.

¹⁴⁵ *Id.*, at xxvi, 814.

¹⁴⁶ *Id.*, at xxvii.

¹⁴⁷ *Id.*, at xxvii, xxxi, 819.

¹⁴⁸ *E.g. id.*, at 642-661; Koskenniemi *supra* note 54, at 516.

we find, much like the dominant strand of legal theorizing in the United States, that law, pragmatically, is to be known by its effects. What is producing the effects, then, is accorded, by massive implication at least, an anteriority of position with law becoming subordinated to that position in a variety of instrumentalism.

The final member of that oracular trio sets that prior positioning more explicitly. This is Kagan and his *Paradise and Power: America and Europe in the New World Order*.¹⁴⁹ The book is a brief and blunt account of the divide between ‘America’ as the repository of effective power and a Europe found to be a ‘Paradise’. This little-known condition connotes a European fantasy of self-sufficient peace with law, the law espoused by the weak and an unreliable international law, and this fantasy can exist only because the sustaining power of the United States extends its ‘military might’ to protectively envelop the realm of law thereby shielding it from the ‘jungle’ that is the rest of the world, that enveloping being possible it seems (although the connection is not made so explicitly) because of ‘a uniquely American form of universalistic nationalism’ inseparable from an ideology of ‘expansionism’ which is characteristic of American history: indeed The National Security Strategy should not

¹⁴⁹ Kagan *supra* note 8.

have occasioned such surprise as it did because its ambitions were ‘little more’ than a restatement of long-standing American policies.¹⁵⁰

The ‘little more’ can be seen as an unabashed assertion of the type of imperialism involved. The closest comparison would be with ‘the empire of trade’, ‘the empire of liberty’, the ‘bright empire’ espoused by the British and the French in the seventeenth and eighteenth centuries, but with the addition of a degree of centralized and centralizing control that would surpass these, something redolent more of Rome. It is Europe’s nineteenth century, however, which sees the full development of the mechanism of expansion and appropriation relevant here, the self-regulating market. This, as The National Security Strategy and other pronouncements tirelessly tell us, because reminding does seem to be necessary, is a realm of freedom. But this is, to borrow the phrase, an enduring freedom, a freedom which would secure the ability of a set condition to extend itself imperatively.¹⁵¹ That imperative quality is shored up in a certain inevitability which is partly a matter of the end of history and the key part the market plays in that end, but mainly a matter of naturalist assumption. The market is comprehensively evoked as natural and naturally existent, condition. It

¹⁵⁰ *Id.*, 3, 16, 40, 74, 76, 86-88, 93.

¹⁵¹ P. Fitzpatrick, *Enduring Freedom in 5 Theory & Event* (2002)

http://muse.jhu.edu/journals/theory_and_event/v005/504fitzpatrick.htm.

concentrates various of the values that ‘are right and true for every person, in every society’, as The National Security Strategy reveals.¹⁵² Or, as Alan Greenspan recognizes, markets ‘are an expression of the deepest truths about human nature and...as a result, they will ultimately be correct’.¹⁵³ Whilst waiting for the ultimate, and until such correctness is factually and universally realized, the free market stands as the apotheosis that all should come to. In this way the free market becomes or evokes a condition of being which already, naturally is, yet one needing extensive and tentacular measures for it to be brought about and upheld. Among the host of these – ‘conditionalities’ required by the International Monetary Fund or attached to ‘aid’ and to trading agreements, for example – there is law. Although The National Security Strategy recognizes that ‘commerce depends on the rule of law’, this is but a variation on the ways in which the Strategy presents law as the instrument of the market, or the instrument of a preordained type of polity.¹⁵⁴ In all, the market joins the transcendent ranks of the Eternal Objects as one whose juridical dimensions are imperially

¹⁵² Bush *supra* note 1, preface.

¹⁵³ R. H. Wade, *US Hegemony and the World Bank: The Fight over People and Ideas*, 9 *Review of International Political Economy* 215, at 215. (2002).

¹⁵⁴ Bush *supra* note 1, at 3, 9-10, 19, 22, 28.

inclined, and certainly not one constitutively inclined in a responsive regard to what is beyond its 'enduring' objectness.

The reign of an assertively enduring freedom can hardly be a pacific one and the United States has for long been pre-eminent among nations in its resort to war. What The National Security Strategy heralds, or perhaps more confirms, is a struggle 'different from any other war in our history', and that difference consists in its being of 'uncertain duration' as well as a 'global enterprise', a characteristic that includes its not being confined to any specific enemy.¹⁵⁵ Just how distinctive these characteristics may be is debatable. There have been world wars, so-called, and there has been 'total' war which would fit Rumsfeld's perception of 'America's new war': 'wars in the twenty-first century will increasingly require all elements of national power: economic, diplomatic, financial, law enforcement, intelligence, and both overt and covert military operations.'¹⁵⁶ The totality of this 'new war' occupies quite another dimension, however – that of the illimitability of empire.

In stark contrast to the modes in which war is usually delimited, this new condition of war is projected so illimitably in cause, space and time that it becomes, taking Gore

¹⁵⁵ *Id.*, preface, 5.

¹⁵⁶ Rumsfeld *supra* note 4, at 30.

Vidal's resonant title, a perpetual war for perpetual peace.¹⁵⁷ It resembles more a perpetual police but without the legal infrastructure on which policing criminality would depend. The mediations of law or of the juridical which could attend war and police action more conventionally perceived can here only be subsumed instrumentally within the 'total' project, a project commensurate with the completeness of *imperium* itself. Those who fall outside of this totality and completeness, those who are the butt of this 'war', are quite apart from the total and the complete. They are fit, therefore, only to be kept separate from it, or eliminated. These are the constantly decried 'outlaw regimes', 'tyrants' with their 'evil designs', 'rogue states', the 'axis of evil'.¹⁵⁸ Even if we grant the ever expansive and increasingly tenuous justifications for this war extracted from international law –

¹⁵⁷ Vidal *supra* note 99.

¹⁵⁸ E.g. Bush *supra* note 1, preface, 13, 15; Bush *supra* note 133; G. W. Bush, *Our Power to Change the World* The Guardian 20, September 12 (2002). Where nations or national territories are invaded, this is not a classic war on a sovereign state but war on some vaguely illegitimate entity. The casting of the enemy quite beyond and the claim to an enduring completeness would heighten that perception of vulnerability referred to earlier and instanced in Bush *supra* note 1, preface and Fukuyama *supra* note 136, at xii-xiii.

humanitarian intervention, the ‘right’ of pre-emptive attack, a defensive attack against ‘emerging threats before they are fully formed’, for example – ¹⁵⁹ international law cannot extend to this condition of war. The ultimacy of *imperium*, its being ‘strong enough’ to counter any ‘surpassing, or equalling, [of] the power of the United States’, the exclusiveness and exclusions of ‘a single sustainable model’, all are incompatible with the inextinguishable openness of law.¹⁶⁰ This openness could now, with a heavy irony, be contrasted to the ‘openness’, the ‘open societies’ insisted on in The National Security Strategy, a contained ‘openness’, an openness always to be conditioned by and within a fully and ‘enduringly’ closed domain.

If international law has some efficacy apart from the powers inevitably enabling it, there should be some dissonance or divergence between it and empire. Whether and how that may be so is the final question now taken up in this paper. To have confirmed a standard view hardly suggests that my argument was highly original, but Kagan has already revealed that, in the European perception, America sees the world as divided between good and evil, seeks finality in international affairs, and is sceptical about international law.¹⁶¹ The official self-perception of the United States

¹⁵⁹ Bush *supra* note 1, preface for the phrase.

¹⁶⁰ *Id.*, preface and at 30.

¹⁶¹ Kagan *supra* note 8, at 2.

would seem to differ on at least the latter score, for one of the indicators helpfully listed in The National Security Strategy of states being roguish is that they ‘display no regard for international law, ...and callously violate international treaties to which they are party’.¹⁶² As for violation, it could be considered beyond the range of concern here because, in my argument, transgression is integral to the law. However, ‘crime, like virtue, has its degrees.’¹⁶³ Violation which would negate or undermine the very hold of law and its processes, as at Guantanamo Bay, does mark a divide between law and empire, and recent history has provided other dramatic instances.¹⁶⁴

But some extensive transgression would seem to be prerequisite to concluding, without more, that the divide was definitive, that it amounted to a basic disregard.

¹⁶² Bush *supra* note 1, at 14.

¹⁶³ Racine, *Phédre* IV: 2.

¹⁶⁴ Of the unfortunate abundance of instances, torture and its production of coerced speech is especially emphatic in its destruction of law’s ethics of the existent. For a survey of evidence of the recent use of torture by or on behalf of the United States *see* D. Campbell, *US Interrogators turn to ‘Torture Lite’*, *The Guardian*, 25 January 2003, at 17.

Despite increasingly frequent accusations to the contrary, the United States does not seem to transgress international law extensively. Such virtue, however, could be due to the want of opportunity or necessity to sin, for there is a great deal of international law which the United States does not accept. The prospect of the United States ratifying treaties which touch upon domestic concerns within the nation is particularly fraught. The power to enter into treaties is a federal one vested by the constitution in the President with the concurrence of the Senate, of 'two thirds of the Senators present'.¹⁶⁵ When combined with the entirely appropriate senatorial deference to the rights and interests of states in the federation, this amounts to a potent block on ratifying treaties. It has, to take a large instance, amounted to a virtual bar on ratifying treaties to do with human rights. If, for example, the Convention on the

¹⁶⁵ Article II section 2 and Article I section 10. For a pellucid and brief account of the relevant law *see* A. W. B. Simpson *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* 470-473, 818-823 (2001). For further references *see id.*, at 470. And for a recent and illuminating critical account *see* J. N. Moore, *Treaty Interpretation, The Constitution and the Rule of Law* 42 *Virginia Journal of International Law* 163 (2001).

Rights of the Child were ratified, this could inhibit the execution of children.¹⁶⁶ Yet, given its now central place in constituting standards of international legality, human rights provides an especially pointed test of the willingness, or otherwise, of a nation to subordinate domestic concerns in a community of law. This, in a sense, is the crux. The countervailing ‘theory’ of human rights which has, in effect, been advanced by the United States as empire, and one which resonates with the imperial appropriation of human rights analysed earlier, is a theory adroitly rendered by Simpson as an ‘export theory of human rights’.¹⁶⁷ The values enshrined in human rights are already intrinsic to the United States, and so it is something of an irrelevance that explicit acceptance of the international law of human rights is almost non-existent. Human rights need only be considered as something to be dispatched elsewhere. As Simpson says of one momentous set of negotiations over a human rights treaty, ‘whatever mixture of motives influenced the major powers as the primary actors in the negotiations, self-improvement certainly did not feature amongst them’.¹⁶⁸ More

¹⁶⁶ It could eventually have inhibited also the detention of children at Guantanamo Bay: see O. Burkeman, *Children Held at Guantanamo Bay*, *The Guardian*, 24 April 2003, at 1.

¹⁶⁷ Simpson *supra* note 164, at 347-348.

¹⁶⁸ *Id.*, at 348.

broadly, the export theory of human rights typifies an *imperium*, and an Occident, whose claims to a surpassing completeness is the quotidian norm.

Even short of treaties being submitted to the severity of this ratifying process, there is another standard perception which sees the United States as increasingly reluctant to conclude treaties. Madeline Albright, something of an expert on these matters, accuses the advisors to George W. Bush of talking about the rule of law whilst seeming ‘allergic to treaties designed to strengthen the rule of law in such areas as money-laundering, biological weapons, crimes against humanity and the environment’.¹⁶⁹ ‘Crimes against humanity’ evokes the Rome Statute of the International Criminal Court, a particularly significant, if hardly unique, instance of the United States refusing the jurisdiction of international courts.¹⁷⁰ Having successfully applied pressure in the negotiation of the treaty to ensure that the jurisdiction of the court would not be ‘universal’ but, rather, national and territorial, and President Clinton having signed the treaty (although the politics of that were devious), the United States then negated the signature. This it did in terms of Article

¹⁶⁹ G. Whittell, Giles, *Albright Attacks US Foreign Policy as Schizophrenic*, The Times, 21 May 2002, at 8.

¹⁷⁰ *E.g. Nicaragua v. United States*, Merits, [1986] ICJ Rep. 14.

18 of the Vienna Convention on the Law of Treaties by making ‘its intention clear not to become party to the treaty’. This negated also its obligation under that same Article ‘not to defeat the object and purpose of a treaty prior to its entry into force’. All of which proved to be a prelude to the intense pressure the United States applied to several nations to exempt its citizens from prosecution.¹⁷¹

Attenuated as they may be in law once they are made determinate, if the constituent ethics of law do not reach the point of legal determination, they cannot be effective at all. Here the effect of disregard, active opposition, and violation merge. They cumulatively conform to that definitive difference between *imperium* and a community of law. It is not as if law’s determinate content, responding as it does to the demands of predominant power, would be likely to pose a ruptural challenge to American empire. That challenge would come from an ethics of the existent within law, from an insistence this ethics would carry into law made determinate, an insistence on equality, freedom and impartiality within law, and an insistence on a regardful community of law.

¹⁷¹ See I. Traynor, *East Europeans Torn on the Rack by International Court Row*, The Guardian, 17 August 2002, at 16.