

Righteous Empire

By Peter Fitzpatrick*

A borrowed beginning: “The business of America may be business as Calvin Coolidge once said, but it is at least as accurate and as important to assert that the religion of America is America.”¹ That comes from Jaroslav Pelikan’s review in 1971 of Martin E. Marty, *Righteous Empire: The Protestant Experience in America*.² So, the title of this paper is also borrowed. I will return to it shortly, after first offering a hopefully less derivative indication of what this paper tries to do. Initially, it engages with the sense in which it can be said that “the religion of America is America.” More pointedly, it engages with the notion of “American civil religion,” to adopt the standard term. American civil religion is advanced by its proponents as a religion that infuses political life in the United States, and one distinct from religious denominations and sects, yet a religion that is still a religious religion (if the pleonasm can be tolerated). As such, it can be contrasted to what could be called European civil religion, a religion discerned in supposedly secular attachments to modern nation and modern empire. My preliminary argument, then, will be that American civil religion is less the religious religion claimed by its proponents and more akin to a secular religion of the European variety.

The rest of the paper revolves around the mutually constituent relation between this secular civil religion and “American empire,” to adopt a reviving usage. Although both imperial self-elevation and God’s political involvement are usually taken to be recently acquired qualities of the U.S. polity, the argument here will be that both practices have always characterized the United States even if in varying forms and in varying intensities. That expanded perspective on empire and political religion is then focused on two vaunted carriers and justifications of imperium — on law and on human rights as a legal artifact. These both prove to be intimately revealing of the nature of modern empire. Such empire’s self-constituting and god-like claim is to be able to embed an illimitable reach in a determinate entity. Law and human rights have a homologous ability. Empire adopts law and human rights as commensurate instruments in its own cause. This leads to the apt “critical” conclusion that law and human rights are to be understood as instruments of some surpassing power, in this case of empire. Yet the argument goes on to show how the very attributes of law and human rights that would subordinate them to imperial power result also in their not being contained in or by empire. Rather, they extend beyond and serve also to resist

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¹ Jaroslav Pelikan, *Righteous Empire*, N. Y. TIMES, March 14, 1971, *available at* <http://www.nytimes.com/packages/html/books/nba-Marty.pdf>.

² MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (1970).

empire. And on that deeply discordant note, the essay ends, but this is also a note of promise, a note resonant with the intimation of existence being otherwise.

Returning now to the title, this paper's notion of being "righteous" is more variegated than Marty's use of "righteous" to characterize the formation of a Protestant ascendancy in the United States. There is an immediate relevance to "righteous" in that the term is often used, as we will see, in relation to the pretensions of American empire, but the term is meant also to accommodate the complex just outlined. Obliging, "righteous" covers acting rightly whether the source or motivation is religious or secular, and it would extend without emendation to self-righteousness, to the solipsistic appropriation of being in the right that characterizes modern empire. Then, in terms of my further argument about law and human rights, "righteous" would extend agreeably to being lawful and rightful.³

Civil religion (1)

Any uncivil account of civil religion in the United States has to start with a work invariably taken as seminal, Robert Bellah's *Civil Religion in America*.⁴ In that essay, Bellah identified "an elaborate and well-institutionalized civil religion in America," a religion that "exists alongside of and rather clearly differentiated from the churches," a religion having "its own seriousness and integrity," so much so that it is quite distinct from specific denominations and sects: "Though much [of it] is selectively derived from Christianity, this religion is clearly not itself Christianity."⁵ Its cohering reference is to a God that is amenably unspecific, the God of "in God we trust" and of "one nation under God," yet somehow still a God lending motivational specificity to "a genuine apprehension of universal and transcendent religious reality as seen in or, one could almost say, as revealed through the experience of the American people."⁶

There is an ambivalence to this much-quoted description of an apprehended religious reality. This ambivalence has to do with the ultimate source of that reality. What "one could almost say" is that "the American people" are the source of a reality revealed through their own experience, a reality thence given a deific finish. Bellah would want American civil religion to be a thing of the people, of "Americans" and as such he would see it as "a genuine vehicle of national religious self-understanding," an understanding compatible with "the responsibility and the significance our *republican* experiment has for the whole world."⁷ Yet, returning again to that quivering phrase, "one could almost say" that the "transcendent religious reality" is its own source and that "the experience of the American people" is simply the profane medium through which the reality is revealed. Indeed, Bellah does endow American civil religion with

³ Much of the etymology of "righteous" that would carry, in terms of its old spelling, being "rightwise" must be considered dubious in its modern usage, something that will be amply illustrated later.

⁴ Robert N. Bellah, *Civil Religion in America*, in *AMERICAN CIVIL RELIGION* (Russell E. Richey & Donald G. Jones eds., 1974).

⁵ *Id.* at 21, 28.

⁶ *Id.* at 24, 33.

⁷ *Id.* at 29, 38 (emphasis added).

more than a touch of the theocratic. With civil religion, as he conceives of it, “American experience” is to be understood “in the light of ultimate and universal reality,” an ultimacy that involves “the obligation, both collective and individual, to carry out God’s will on earth”:

Though the will of the people as expressed in majority vote is carefully institutionalized as the operative source of political authority, it is deprived of an ultimate significance. The will of the people is not itself the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong.⁸

For Bellah, American civil religion is *sui generis*, but like most instances of “American exceptionalism,” this one does not appear to be exceptional. The separation of church and state commonly taken to be effected by the First Amendment may seem to bring the United States close to a modernist divide between the religious and the secular, but nothing that Bellah says is necessarily inconsistent with Congress being prevented from making any law “respecting an establishment of religion.”⁹ The First Amendment was, however, but a pale reflection of an imperative enjoined with modernity separating the religious and the politically secular and making the latter determinative in the “public” sphere — an imperative also well in place in a pre-modern Europe.¹⁰ In line with that tradition of thought, some do see American civil religion as being of the public secular sphere, and more specifically, see it as the apotheosis of nation in nation’s substituting for divine authority, even if for some that shift results in “idolatry.”¹¹ And it would seem to be the case that, if one takes Bellah’s attributes of American civil religion, they would be found amply and collectively replicated in other national locations. So, Bellah would emphasize the sacral quality that has been continuously attributed to the founders of the nation and to its constitutive texts; he would emphasize the chosen quality of the American people, how God is taken to have “a special concern for America”; and he would emphasize how invocations of the deity, biblical imagery and sacred symbols commonly attend public ceremonies.¹² All of these attributes of American civil religion could be abundantly and just as significantly replicated in the lives of many other secular nations.¹³

If there were not a defining distinction between civil religion in this general, “secular” sense and Bellah’s theocentric “civil” religion, then the recent and current alarms about God’s takeover of the presidency and the Republican Party would be

⁸ *Id.* at 24-25, 40.

⁹ U.S. CONST. amend. I, cl. 1.

¹⁰ See MICHAEL BURLEIGH, *EARTHLY POWERS: RELIGION & POLITICS IN EUROPE FROM THE FRENCH REVOLUTION TO THE GREAT WAR* 20, 28-9 (2005); see also NICCOLÒ MACHIAVELLI, *THE PRINCE* 15, 87-88 (Peter Bondanella trans., 2005). But there could be divergent views about the genealogical depth of modernity here.

¹¹ See Russell E. Richey & Donald G. Jones, *The Civil Religion Debate*, in *AMERICAN CIVIL RELIGION*, *supra* note 4, at 10-11.

¹² Bellah, *supra* note 4, at 27-30, 40.

¹³ ANTHONY D. SMITH, *CHOSEN PEOPLES: SACRED SOURCES OF NATIONAL IDENTITY* (2003).

pointless. Going on Bellah's theocentric notion, the supposed takeover would simply be business as usual. Yet this situation is widely perceived as new, and as without any parallel outside of, possibly, the earliest days of the republic.¹⁴ That situation is concentrated in the title to Kevin Phillips's new book, *American Theocracy*.¹⁵ It is beside my point that his notion of theocracy proves to be both elusive and evasive because, in discerning "hints of theocracy,"¹⁶ Phillips is illustrating "hints" of a true religious religion in which the resort to God plays a directly determinative part in the operation of the polity, as opposed to a previous pervasively secular situation in which God was an indeterminate influence.¹⁷ The somewhat more than terminological point is that neither theocracy nor Bellah's theocentric civil religion is "civil." It is not a religion of the *civis*, a religion of the citizenry, of the citizens in community. It is the religion of a national God and of a deific nation placed beyond and acting on the community.

Civil religion (2)

The generative error in Bellah's essay lies in his otherwise apt reference to Rousseau as the source of the term "civil religion." In referring to chapter eight of Book IV of *The Social Contract*, a chapter headed *The Civil Religion*, Bellah has Rousseau outlining "the simple dogmas of the civil religion," the first of which Bellah describes as "the existence of God."¹⁸ But Rousseau's first dogma is "the existence of an omnipotent, intelligent, benevolent divinity," and this divinity is not God.¹⁹ To see this divinity in "theocratic" terms would, for Rousseau, be "pernicious."²⁰ Rather, the "dogmas" are laid down by the sovereign, not "strictly as religious dogmas" but as the substance of "a profession of faith which is purely civil," a profession "without which it is impossible to be either a good citizen or a loyal subject," all of which for Rousseau does not involve "any question of theology."²¹ So, as well as faith in a divinity, the remaining dogmas would require the citizen to believe in "the life to come; the happiness of the just; the punishment of sinners; the sanctity of the social contract and

¹⁴ See KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* chs. 6-7 (2006); JIM WALLIS, *GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT* ch. 9 (2005).

¹⁵ PHILLIPS, *supra* note 14.

¹⁶ *Id.* at 208.

¹⁷ *Id.* at 208-09, 213, 218.

¹⁸ Bellah, *supra* note 4, at 26.

¹⁹ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 186 (Maurice Cranston trans., 1968) (Book IV, ch. 8).

²⁰ *Id.* at 187 (Book IV, ch. 8).

²¹ *Id.* at 186 (Book IV, ch. 8). Anyone who does not believe in the dogmas can be banished "not for impiety but as an antisocial being." *Id.* It was in following through Rousseau's ideas in the French Revolution that a "Supreme Being" was erected but this was a civil being, decidedly not God; and in that spirit Mirabeau wrote in 1792 that "the Declaration of the Rights of Man has become a political gospel and the French Constitution a religion for which people are prepared to die." See BURLEIGH, *supra* note 10, at 81, 102-03.

the law”²² That is a list in which, operatively, the last shall be first since for Rousseau, “laws are really nothing other than the conditions on which civil society exists.”²³ And it is here that something of the divine would enter and extend beyond the realm of faith, for Rousseau finds that “Gods,” Gods plural, “would be needed to give men laws.”²⁴ This is a momentous point which will now be developed in Rousseau’s terms, and developed in a way that informs the rest of my essay.

In Rousseau’s terms, for laws to be effective and lasting, they had to come from a quasi-divine lawgiver possessed of an entirely disinterested “great soul,” always selflessly attuned to possibility, and able “to make the Gods speak.”²⁵ Yet, even though the lawgiver’s “task . . . is beyond human powers,” it is a task the achievement of which Rousseau sees as necessary in the world.²⁶ It is a task which Rousseau configures to the qualities of the lawgiver. In bestowing the laws of the constitution, the lawgiver has to create a social bond that integrates individuals into it, a bond believed in by those individuals, and one that is “lasting.”²⁷ To perform these tasks, the god-like lawgiver has to be quite apart from the “nation” being so endowed, lacking in any authority, right, force or interest to create the laws. Not only is the law so given incapable of being encompassed by the determinate national sovereign, but for good measure the only way in which the sovereign can act is “to make laws.”²⁸ And Rousseau would go so far as to equate departure from the “voice” of law “alone” with a return to the divisive and “pure state of nature.”²⁹

This imperative vacuity in the giving of the law is matched by a putative solidity in the receiving of it. Rousseau provides a list of attributes needed for a people to be “fit to receive laws,” attributes which amount to absolute autarchy.³⁰ He finds that “there is still one country in Europe fit to receive laws, and that is the island of Corsica.”³¹ Departing from the persistent prescription in *The Social Contract* that states should be small, Rousseau next resorts to the largeness of Poland as a propitious candidate for this autarchic fitness to receive laws.³² In that realm of undying optimism known as “elsewhere” I have shown that Rousseau undermines his own attributions of autarchy in his recognition that a nation must responsively relate to what is beyond it, and that indeed the nation depends on that relation for its very self-identity.³³ So, whilst it may readily be conceded that the ineffable giving of the law needs some determinate em-

²² ROUSSEAU, *supra* note 19, at 186 (Book IV, ch. 8).

²³ *Id.* at 83 (Book II, ch. 6).

²⁴ *Id.* at 84 (Book II, ch. 7).

²⁵ *Id.* at 87 (Book II, ch. 7).

²⁶ *Id.* at 86 (Book II, ch. 7).

²⁷ *Id.* at 84-85, 87, 99 (Book II, chs. 7, 12).

²⁸ *Id.* at 101 (Book III, ch. 1).

²⁹ JEAN-JACQUES ROUSSEAU, A DISCOURSE ON POLITICAL ECONOMY IN THE SOCIAL CONTRACT AND DISCOURSES 136 (G. D. H. Cole trans., 1986).

³⁰ ROUSSEAU, *supra* note 19, at 95 (Book II, ch. 10).

³¹ *Id.*

³² JEAN-JACQUES ROUSSEAU, THE GOVERNMENT OF POLAND 14 (Willmore Kendall trans., 1972).

³³ PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 148-49 (2001).

placement, that place cannot subsist and be without a responsive relation beyond it. Partly to counter the straightened reception of law in modernity and partly to accommodate the range of modern civil religion, I will now match these dimensions of law taken from Rousseau with the neo-sacral dimensions of putatively modern being as these would be given to us, with some persuasion, by Nietzsche.

It may be risking some premonitory weariness, but the oft-repeated report of God's death given us by Nietzsche's supremely sane madman does provide my inescapable starting point.³⁴ In *The Gay Science* we find the madman, "having in the bright morning lit a lantern," proclaiming to a group of mocking moderns gathered in the marketplace that he is looking for God, only then to fix them in his stare and announce that God is dead and that, furthermore, "[w]e have killed him — you and I! We are all his murderers."³⁵ The madman then puts a series of piercing questions to his audience. In muted summary: How could we possibly encompass this deed? How could we survive in the ultimate uncertainty that results from it? What substitutes will we have to invent to replace the murdered God? His audience is silent and disconcerted. He realizes he has "come too early," realizes that news of this deicide, of this "tremendous event," is still on its way, yet to reach "the ears of men."³⁶ "This deed," he concludes, "is still more remote to them than the remotest stars — and yet they have done it themselves!"³⁷

What of Nietzsche's own response to the deed? That response could be rendered in three related dimensions, moving at times now beyond *The Gay Science*. And all three are compacted in one of the madman's questions: "What festivals of atonement, what sacred games will we have to invent for ourselves?"³⁸ Nietzsche saw that deific substitutes were, for now, imperative. We "have to invent" them. This imperative can be discerned in his stricturing dear George Eliot for yet another English vice: the vacuous affirmation of Christian morality even though "[t]hey have got rid of the Christian God."³⁹ And indeed Nietzsche did mark and decry the emergence of such "new idols" as the "man" of humanism — "the religion of humanity" to borrow the

³⁴ FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 119-20 (Josefine Nauckhoff trans., 2001) (§ 125).

³⁵ *Id.* (emphasis in original).

³⁶ *Id.*

³⁷ *Id.* at 120 (emphasis in original).

³⁸ *Id.* I have presumed to substitute "sacred" for the "holy" in Nauckhoff's translation. The German is "heilig" but "holy" would seem to be altogether inadequate in describing a deific substitute, and my obliging German dictionary indicates that "sacred" is equally acceptable.

³⁹ FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS*, in *TWILIGHT OF THE IDOLS/THE ANTI-CHRIST* 69 (R. J. Hollingdale trans., 1968) [hereinafter NIETZSCHE, *TWILIGHT*] (§ 5 of "Expeditions of an Untimely Man"). More generally, and contrary to reputation, Nietzsche did see "the religious significance of life" as having a positively sustaining place in contemporary existence, and saw this often in the same respects as he had just excoriated others for holding them. See FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 43 (Helen Zimmern trans., 1997) [hereinafter NIETZSCHE, *GOOD AND EVIL*] (§ 61); and most conspicuously, FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS*, *Third Essay* (Douglas Smith trans., 1996) [hereinafter NIETZSCHE, *MORALS*].

phrase — and the state, the state that would still act like “the ordering finger of God.”⁴⁰ There is, in short, a jostling pantheon of new idols involved in this first response of Nietzsche to the deicide.

There is, however, a monism imported by Nietzsche’s second response. The festivals that have to be invented are ones of atonement, at-one-ment, the recovering of a unity.⁴¹ “I fear we are not getting rid of God because we still believe in grammar”⁴² Grammar, in this broad dispensation, enables us to act as if there were still a God-like “measure of reality” within which an entity, including a new idol such as the nation-state or the “human,” could be constituted as a “thing in itself,” a thing that can carry a force of effective domination.⁴³ I will try to show shortly how the imperial appropriation in such terms of the “human” of human rights is ultimately impossible, but to show also that this impossibility is productive of possibility. That opening to possibility leads, seamlessly enough, to Nietzsche’s third deicidal response, to the coming of this “tremendous event . . . still on its way,” and thence to overcoming the death of God. It is here that we come to a Nietzschean edge. With the death of God there forebodes a “deep darkness,” perhaps totalitarian comprehensions, conveyed by Nietzsche’s prophecy for “the next century” of “the shadows that must soon envelop Europe.”⁴⁴ And in the same written breath, this dread is diminished by exaltation, by the incipience of overcoming, by a new openness, “a new dawn,” in which “our heart overflows with gratitude, amazement, forebodings, expectation”⁴⁵

In a preliminary way, I would want to identify, even instantiate, this exalted openness with that dimension of law which Rousseau would attribute to the quasi-deific lawgiver, that dimension always opening, always inclined beyond any existent realiza-

⁴⁰ FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA, in THE PORTABLE NIETZSCHE 160-01 (Walter Kaufmann trans., 1954) [hereinafter ZARATHUSTRA] (First Part, *On the New Idol*); FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN 14 (Marion Faber & Stephen Leyhmann trans., 1994) [hereinafter NIETZSCHE, HUMAN] (§ 2). As for the borrowing, see Thomas Paine, *The Crisis*, available at <http://www.ushistory.org/Paine/crisis/singlehtml.htm> (last visited April 21, 2006). For the aforesaid “finger of God,” see also *Exodus* 31:18.

⁴¹ See WALTER W. SKEAT, A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 30 (1963).

⁴² NIETZSCHE, TWILIGHT, *supra* note 39, at 38 (§ 5 of “Reason” in *Philosophy*).

⁴³ *Id.* at 50 (§ 3 of *The Four Great Errors*); FRIEDRICH NIETZSCHE, THE WILL TO POWER 14, 300-07 (Walter Kaufmann and R. J. Hollingdale trans., 1968) (§ 12 and §§ 553-69). These points in the text are put together from different contexts in Nietzsche’s work. At least one specific qualification: Nietzsche’s “grammar” is probably not so much a sustaining of God in his absence as an evolutionary endowment. See, e.g., NIETZSCHE, HUMAN, *supra* note 40, at 18-19 (§ 11).

⁴⁴ NIETZSCHE, THE GAY SCIENCE, *supra* note 34, at 199 (§ 343). Compare NIETZSCHE, MORALS, *supra* note 39, at 134-35 (*Third Essay*, § 27), for a broadly similar foreboding following on the coming of atheism and the end of morality, although the prophecy here is perhaps rather less pointed, the vista being one “for Europe over the next two thousand years.” *Id.* at 135.

⁴⁵ NIETZSCHE, THE GAY SCIENCE, *supra* note 34, at 199 (§ 343). These dissonant “overcomings” are notoriously associated with *Thus Spoke Zarathustra*. Obviously I think that this work espouses the latter overcoming.

tion. The other dimension of law that Rousseau isolates — the receiving of the law as realized, as encased and determinate — reflects Nietzsche's second response to the death of God, reflects the attributed ability for the thing to be "in itself" and carry a force of effective domination. I will return to and illustrate these dimensions of law after first orienting them in the direction of American empire.

Imperial right

No matter how indistinct the relation between religious religion and civil religion may be within the confines of the United States, the two have become historically separated in its imperial extensions. This is not simply a matter of American imperialism becoming more modern and more secular the more it has had to act as a manager of a "global" imperium shared with other and secular powers. Rather, even in times when American imperialism relied conspicuously on religious religion, this reliance was always something incidental to and in support of a civil religion, a civil religion capable of assuming contents similar to those taken on by religious religion and capable also of dispensing with it. This is not to say that the effects of religious religion simply disappear. There does exist now within the United States a fitful "theology of empire,"⁴⁶ to borrow the term from Wallis, a theology which at least resonates with a presidential penchant for Manicheism — "the evil empire," "the axis of evil," those not with us being against us and so on. The European division between monotheistic religious religion and civil religion has not been entirely replicated. With that division, the two have to be kept apart not so much because they are different but more because they are the same, and mutually contagious.

When it comes to the historical connections between American empire and these two types of religion, there need be little strain on originality because of the concentrated account, replete with an extensive guide to sources, so engagingly offered by Anders Stephanson in his *Manifest Destiny: American Expansion and the Empire of Right*.⁴⁷ The further virtue for my purposes of Stephanson's vivid description of an "empire of right" is that it serves to show how indiscriminate imperial righteousness can be as between its religious and its secular sources. So, whilst imperial righteousness was once directed by "the finger of God" (echoing both Nietzsche and *Exodus*), and even whilst it was once guided by divine "Providence," always "carrying out God's will" and insistently "chosen" to do so, all the while seeking the reconciliation of "God and humankind," even with all this excess of justification, the United States was from the beginning "a sacred-secular project."⁴⁸ There was no ritual or other mediatative mechanism for determining the exact will of God, the content of the sacred, and such, and from the outset there were "secular" equivalents to the sacred and deific justifications, equivalents which effectively displaced the religious. These were, and

⁴⁶ The term is the title of chapter nine of WALLIS, GOD'S POLITICS, *supra* note 14.

⁴⁷ ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT* (1995). For the guide to sources, see *id.* at 131-38.

⁴⁸ For the quoted passages, see (in order) *id.* at xii, 59, 12, 7. The mention of Old Testament would be, again, to *Exodus* 31-18. Invocations of "Providence" and "choseness" are almost numberless. See, *e.g.*, *id.* at 21, 25, 28-29, 40, 43, 52.

are, legion. A sampling would include the justification of a surpassing “morality,” of “world-duty,” of the “rightful” and of “universal righteousness,” of “the absolute principles of Right, the universal interests of mankind,” of “advancing the welfare of mankind,” of spreading “civilization” and countering “barbarism,” and the spreading of commerce, trade, democracy and peace; all of which justifications were impelled by the inexorability of “nature,” “destiny,” and “historical fate.”⁴⁹ The commensurate carrier of every such imperative was the United States.

Inevitably that picture has to be refined. Although nowadays there is considerable and unabashed adoption of the label “American empire” by advocates of such empire, the predominant view remains that “America” is not and has not been an empire and that it has opposed imperialism, even if the more historically attuned could hardly deny that the treatment of colonies acquired through the Spanish-American war was one of the more draconic instances of that colonizing imperialism consolidated by occidental powers in the latter part of the nineteenth century. As that concession would indicate, there should be at least some regard to variety.⁵⁰ Taking first things first, there is a seemingly sharp difference between that colonialism and “the imperial republic” announced by Jefferson. The colonial imperium was founded on an explicit racism, whereas the imperial republic was to be in a way republican. That supposed republicanism was also imperial, however, in that it enshrined the ability and even the duty of the United States to expand hugely, but it was also republican in that the “territories” so acquired had eventually to be admitted to the union as new states.⁵¹ It was to be, in another of Jefferson’s phrases, “an empire of liberty.”⁵² But, rather obviously, there was to be liberty only for some since slaves, and, in large measure, Indian peoples were placed beyond the “liberty . . . for all” of the republican equation. The empire was constituted and maintained as “massively racialized.”⁵³ In that decidedly non-republican spirit, territories acquired by imperial expansion would only “become equal states” when they had “an adequate Anglo-American population,” and the absence of such a population and the potential for one to become predominant were constant factors in deciding on expansion.⁵⁴

The other main objection to the proposition that the “United States has always been simultaneously a republic and an empire, an imperial republic,” would be that, no matter what came before, empire could not survive the advent in the early twenti-

⁴⁹ And for a sampling of references, including the quoted phrases, see *id.* at 7, 40, 43, 61-64, 84, 119, 124.

⁵⁰ It is at least arguable that the description of varieties of imperium that follows now in the text should be further refined in distinguishing between “empire” and “imperialism,” but for present purposes nothing turns on the distinction.

⁵¹ JAMES G. WILSON, *THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY* 63, 73 (2002).

⁵² See STEPHANSON, *supra* note 47, at 22. The phrase was not quite so original in that the British had used it to describe their early empire by way of a contrast with the Spanish. The heavy historical irony is that the U.S. “empire of liberty” was set against British imperialism, among others.

⁵³ *Id.* at 14.

⁵⁴ WILSON, *supra* note 51, at 107.

eth century of President Wilson's explicitly anti-imperial stance of national "self-determination," a stance that somehow did not lead to self-determination for colonies of the United States, and a stance that was cast in ambivalence by Wilson himself for, America being "the light of the world," it had "to lead the world in the assertion of the rights of peoples and the rights of free nations."⁵⁵ This, then, was business and civil religion as usual in that the United States was from the outset, in Marty's phrase, "a national empire," one in which "the reality of empire had to be tied very closely to the formation of a strong national unity."⁵⁶ Like its European contemporaries, the American nation was one which assumed the neo-deific, "sovereign" ability to subsist finitely yet extend infinitely, the ability to be both an emplaced entity and a universal extraversion — qualities which are themselves defining of imperium.

The same qualities and their imperial cast persist to this day, something that would counter the argument that, no matter what the position in the past, the United States does not now make such claims to empire. The most thoroughly elaborated recent statement of such claims is provided in *The National Security Strategy* of September 2002 and in its belated successor of March 2006. The first is the more tightly focused. It initially elevates "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.⁵⁷ However, by the document's end it is clear that there can be freedom only so long as it does not mean being ultimately free, and that there can be openness only so long as it does not mean being ultimately open, since, to maintain this openness and "to defend freedom," "our forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States."⁵⁸ 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 not have ultimately to open to others, and so long as its oxymoronic "distinctly American internationalism" is not challenged, any perceived challenge being subject to the now notorious right of pre-emption, the right to take action against "emerging threats before they are fully formed."⁵⁹

That right of pre-emption is expounded in the latest National Security Strategy in terms of being able to "deal with threats and challenges before they can damage our people or our interests," and for that purpose being able to use "force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack."⁶⁰ The inviolability of surpassing military strength is also reaffirmed. "We must maintain a military without peer," and means are to be developed always to deal with "chal-

⁵⁵ See, respectively, *id.* at 1; and STEPHANSON, *supra* note 47, at 117.

⁵⁶ MARTY, *supra* note 2, at 14, 48.

⁵⁷ *Preface* to THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002).

⁵⁸ *Id.* at 30.

⁵⁹ *Id.* at 1.

⁶⁰ *Introduction* to NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 23 (2006).

enges” that would “counter our traditional military advantages.”⁶¹ In a like vein, there is also a revival of the language of the Cold War with the repeated clarion that “the United States will lead and calls on other nations to join us in a common international effort directed at advancing freedom, human rights,” and so on, and directed at ending tyranny and terrorism.⁶² More generally, America must have regard to “problems in other lands,” it “must lead by deed as well as by example,” and so we find that “the international community is most engaged” in action “meeting WMD proliferation . . . when the United States leads.”⁶³ The single sustainable model for national success is now refined to include limited government, foreign investment and the opening of markets and of “societies,” as well as “unleashing the power of the private sector.”⁶⁴ The focal emphasis in the previous National Security Strategy on human rights and the rule of law becomes in the present document an incantation throughout, one accompanied by the mantric espousal of “human dignity.” All these find their exemplar in the United States and their pending milieu in the world at large.

Legal right

At this stage the compulsory reference to de Tocqueville becomes appropriate. In seeking “to characterize Anglo-American civilization” he finds it to be “the result . . . of two quite distinct ingredients . . . which Americans have succeeded somehow to meld together in wondrous harmony; namely the *spirit of religion* and the *spirit of liberty*.”⁶⁵ The content of religion, he finds, is the object of invariant devotion, whereas with the spirit of liberty,

political principles, laws, and human institutions appear flexible and can be shaped at will into any combination. Before their advance, the barriers which imprisoned the society into which they were born were lowered; old opinions which for centuries had governed the world, melted away. An almost limitless path, a field without horizon opened before them; the human spirit rushes forward to travel these places.⁶⁶

The rush of spirit stops short, however, “at the limits of the political world,” beyond which limits the enduring content of religion supervenes, a religion that is “the guardian of morality,” of “the moral world,” a world in which “everything is classified, systematized, and anticipated, and decided beforehand” — and that morality, in turn, is “the guarantee of law.”⁶⁷ “Far from harming each other,” de Tocqueville writes, “these two inclinations, despite their apparent opposition, seem to walk in

⁶¹ *Id.* at 44.

⁶² *Id.* at 6-7.

⁶³ *Id.* at 22, 49.

⁶⁴ *Id.* at 4, 27, 31-32.

⁶⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55 (Gerald E. Bevan trans., 2003) (emphasis in original).

⁶⁶ *Id.*

⁶⁷ *Id.* at 56.

mutual agreement and support.”⁶⁸ Yet, it may be presumptuously added, if such actually, and not just apparently, opposed inclinations are to subsist in relation, they have to be mutually accommodating. Specifically, the religious or moral inclination cannot be invariant but must also, like Rousseau’s quasi-deific lawgiver who visited us earlier, be capable of vacating any content and taking on another.

There is, however, a more encompassing agreement between de Tocqueville and Rousseau. With de Tocqueville the only entity inhabiting both inclinations is law. For Rousseau, as we saw, two dimensions of law were isolated: the dimension of an autarkic, a self-contained determinateness, and the dimension of an attuned, a changeful responsiveness to possibility. With the aid of de Tocqueville, it could now be said that the two are in some sense combined. There can be neither enduring determinateness without responsiveness to what is always beyond it, nor effective responsiveness without a determinate position from which to respond. They are separate yet inexorably joined. Law’s determinate position cannot be at all enduringly set. The assertion of determinate position has always to be made in relation to the infinitely responsive. The very holding to a position requires a creatively accommodating responsiveness to what is beyond the constitution of that position “at any one time.” Law remains pervaded by the relation to what is beyond, labile and protean to an illimitable extent. This impossibility of invariant positioning 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 would 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, and incipiently encompassing of its exteriority.

It is this constituent responsiveness of law, its generative incompleteness and its refusal of any primal attachment, that makes law intrinsically dependent and derivative, quite lacking in any content of its own. This has consequences that are both distinctive and disruptive of law. With this vacuity of enduring content, and unlike the pretensions of nation and empire, law cannot combine its determinate and its responsive dimensions within a sovereign form that is distinctly its own. Rather, because of this vacuity, law is always susceptible to occupation and subordination by powers apart from itself, such as the power of empire. And indeed, we find law going forth in ways characteristic of modern colonialism so as to subdue, order and civilize places characterized in terms of “savagery, tyranny and caprice,” all in the service of the “world-duty” of American imperialism.⁶⁹ To take a telling example, in the so-called Indian Cases, of the first half of the nineteenth century, the Supreme Court invents the modernist notion of legal positivism in the cause of American imperialism.⁷⁰ With these cases, the Supreme Court decided that the natural right of Indian peoples to their land can be comprehensively overridden by a law which the court had to accept

⁶⁸ *Id.*

⁶⁹ See, e.g., STEPHANSON, *supra* note 47 at 60, 84. For imperialism more generally, see PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW*, chs. 3-4 (1992).

⁷⁰ For that argument and an account of the cases, see FITZPATRICK, *supra* note 33, at 164-75.

as prime because the country had been conquered and settled by the people whose “government” had “given us . . . the rule for our decision.”⁷¹ This grounding of law in a national imperialism was confirmed in the Insular Cases of the early twentieth century in which the Supreme Court delimited ostensibly general provisions of the Constitution in national/racial terms.⁷²

Given such forceful occupations of the abject law, what efficacy could it possibly have in its own right, as it were? Any possible answer must appear less than promising when it is recalled that this efficacy inheres in the vacuity of law. In a resolutely optimistic vein, however, and to help identify and instantiate that efficacy, I will now, and finally, engage with the legal construct of human rights in a combined analysis of the human and of rights, taking both as instrumental to imperium yet always going resistantly beyond it. That analysis will focus on human rights in their current imperial manifestation, especially in the cause of American empire, but, as will become evident, the analysis could extend to the many other confined and confining imperial arrogations of the human and of right mentioned earlier.

Human right

“It is . . . impossible,” Fukuyama tells us, “to talk about human rights . . . without having some concept of what human beings actually are like as a species” — without some constitution of “human nature: the species-typical characteristics shared by all human beings qua human beings.”⁷³ Then he would add that “there is an intimate connection between human nature and human notions of rights, justice, and morality,” before cautioning that “the connection between human rights and human nature is not clear-cut, however.”⁷⁴ In a more resolutely tautological vein, Donnelly tells us that “human rights are literally the rights one has simply because one is a human being” — *sancta simplicitas!* — before going on also to concede uncertainty.⁷⁵ It might help that we now have a history of the concept of “humankind” in Fernández-Armesto’s engaging *So You Think You’re Human?*⁷⁶ Not that this would help ground the “human” of Fukuyama’s scientific positivism. Aptly enough, Fernández-Armesto’s historical “human” would counter the human as a neo-deific “new idol,” and would match Nietzschean ideas of history, ideas set against “a suprahistorical perspective, [against] a history whose function is to compose the finely reduced diversity of time into a totality fully closed upon itself”; but, rather, such a “human” would evoke a history that “is an unstable assemblage of faults, fissures, and heterogeneous layers

⁷¹ Johnson v. M’Intosh 21 U.S. (8 Wheat.) 543, 572 (1823).

⁷² See FITZPATRICK, *supra* note 33, at 175-78.

⁷³ FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION 101, 128 (2002).

⁷⁴ *Id.* at 101.

⁷⁵ JACK DONNELLY, THE CONCEPT OF HUMAN RIGHTS 9, 21 (1985).

⁷⁶ FELIPE FERNÁNDEZ-ARRESTO, SO YOU THINK YOU’RE HUMAN? 7 (2004).

that threaten the fragile inheritor from within or from underneath.”⁷⁷ So, Fernández-Armesto’s “human” is interminable, a labile creature whose confident criteria of self-identity have come and eventually gone, or assumed an irresolute half-life, whether these criteria are espoused as a positive marker of the human or, more typically, as its negation — criteria to do with abnormality, race and gender, various corporeal and genetic endowments, monstrosity and the sub-human, culture and language, rationality and dominion, among others. The upshot of so much disabuse is to leave us with, at least, a “precious self-dissatisfaction,” so much so, Fernández-Armesto concludes, that “if we were uncompromising mythbusters, we would tear up our human rights and start again.”⁷⁸

We do not have a comparable history of human rights but from its fragments we can see that many of the criteria that would go to differentiate the “human” as genus figure largely in constituting the “human” of human rights. Not only that, the “human” of human rights has contributed its own refined positivities and extended the range of what must be taken to be definitively human. So, in addition to rights being denied or attenuated because their would-be recipients are deemed not “human” in terms of the genus, or not “human” enough, the human of human rights must now not be too backward, too traditional, and should be conspicuously affiliated with certain economic and political modes of existence.⁷⁹ Not only that, the human of human rights also makes a pointed contribution to the logic of exclusion intrinsic to the genus. This logic has it that the claim to the human is ontologically ultimate and, as such, universal. What is “other” to the human conceived as universal can only be utterly, irredeemably other. Such sharp discrimination shores up the perduring distinctness and inviolability of the “human.” Not only that, being constituted in negation, this “human” compensates for the dissipation of the universal which would ensue were it positively, particularly emplaced. Human rights contribute to this logic in both negative and positive dimensions. By inferentially equating the human and certain rightful conduct, the prescriptions of human rights hone negation by heightening the insuperable, the inhuman alterity of the other. Positively, with human rights equating right conduct with people who behave in specific ways, that people can claim, positively, to exemplify the universal. Hence, Simpson’s witty designation “the export theory of human rights” wherein certain peoples need only regard human rights as something to be dispatched elsewhere. As Simpson says of a momentous negotiation over a human rights treaty, “whatever mixture of motives

⁷⁷ Michel Foucault, *Nietzsche, Genealogy, History*, in MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 146, 152 (Donald F. Bouchard & Sherry Simon trans., 1995).

⁷⁸ FERNÁNDEZ-ARRESTO, *supra* note 76, at 170.

⁷⁹ See Peter Fitzpatrick, *Terminating Legality? Human Rights and Critical Being* in PETER FITZPATRICK & PATRICIA TUFTT EDS., CRITICAL BEINGS: LAW, NATION AND GLOBAL SUBJECT 119, 126 (2004); Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315, 315-38 (1993); *Preface* to NATIONAL SECURITY STRATEGY (2002), *supra* note 57. Cf. Tony Evans, *International Human Rights Law as Power/Knowledge*, 27 HUM. RTS. Q. 1046, 1057-59, 1062-64, 1066 (2005).

influenced the major powers as the primary actors in the negotiations, self-improvement certainly did not feature amongst them.”⁸⁰

Of course, the absolutized “human” of such human rights, the human as “new idol,” would not survive a Nietzschean history. The impossibilities here are well rehearsed and can be concentrated in our inability to extend beyond and thence know a universal within which we have emplaced and defined ourselves. With modernity, the universal cannot assume content in a transcendent reference beyond. Nor can content form within the modern universal, for to come to the universal from within is never to encompass or be able to hypostatize it. The bringing of the universal into a determinate, and determinant, particularity can never be something ironically set. The particularity of its instantiation is, in its very being, continually subject to challenge and dissipation. Which is not to say that our existence is one of constant challenge and dissipation only. Rather, we are also attuned universally or “totally” to the gathering in of effect and endowment in the “making sense” of existence and rendering it determinate

We could provide a focus for this existence, a focus beyond the human as contained and as Nietzsche’s “thing in itself,” by looking more intently at the human as a genus. This focus will, in turn, bring us to the question of law and the rights in “human rights.” In *The Law of Genre*, Derrida engages with a certain ambivalence in the notion of genre, including specifically “the human *genre*,” and in so doing he intimates how “rights and the law are bound up in all this.”⁸¹ That which designates the genre, the genre designation (such as the human), has to be of, yet not of, what is designated. Genre-designations cannot simply be part of the corpus they designate for then they would, as it were, fuse indistinguishably with the corpus.⁸² To mark the genre, the designation must stand apart from it. Yet not entirely apart, for if it is to be an apt designation, it must integrally relate to and be of the corpus. This being of yet not of the genre enables the genre-designation to continue responsively, adaptively as the locus of definition and decision as to what is to constitute the genre. All of which is not (only) the opening out of some putatively monadic genre to intrinsic diversity — to, in language used of human rights, pluralism and relativism. What is entailed is neither a set unity nor a matter of disparate parts. It is a protean assembly measured with and against the genre-designation.

The rights in human rights can now make a pointed, if belated, appearance. Right provides a resolving force commensurate with the genre-designation. It combines a determinate enclosing of the corpus with a holding of it responsively open to alterity. This is an apt stage at which to recall the genius of Rousseau where in *The Social Contract* he finds that the receiving of the law had to be within a determinate enclosing, but that the giving of the law had to come from an unattached openness. Lest this be seen as inadvertent genius, it may also be apt to note that the sub-title of *The Social Contract* is “Principles of Political Right,” that “the social order is a sacred right

⁸⁰ A. W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 347-48 (2001). Cf. Jacques Rancière, *Who Is the Subject of the Rights of Man?* 103 THE S. ATLANTIC Q. 297, 307 (2004).

⁸¹ Jacques Derrida, *The Law of Genre*, in ACTS OF LITERATURE 228 (1992).

⁸² *Id.* at 230 (emphasis in original omitted).

which serves as a basis for all other right.”⁸³ And it may be apt to note further that any “social order” has to combine its determinate existence with being receptive to alterity.

The “political” element of right inheres, at least partly, in the imperative ability that right has to go beyond its existent content and thence to necessitate a decision on what its content will be thereafter. Rights then, in having the incessant capacity to be something other than what they determinately are, become in a sense ultimately vacuous — or deracinated and “abstract,” to borrow perversely a criticism classically levelled at the originary Declaration of the Rights of Man and the Citizen.⁸⁴ Being in this way vacuous, it should occasion little surprise that rights, and human rights, are susceptible to occupation by effective powers — by nation and nations, by empire and “the market,” and so on. Yet it is also the position that this vacuity shields human rights from definitive subjection to any power and from enduring containment by any power. Such rights remain ever capable of extending beyond any determinate existence. They remain ever capable of surprising and countering any determinate existence. And they remain ever capable of orienting universally in their incipient responsiveness:

‘[U]niversal human rights’ designate the precise space of politicization proper; what they amount to is the right to universality as such — the right of a political agent to assert its radical non-coincidence with itself (in its particular identity), to posit itself as the ‘supernumerary’, the one with no proper place in the social edifice; and thus as an agent of universality of the social itself.⁸⁵

With their intrinsic promise, a promise not confinable to any particularity, “universal” human rights provide a present instantiation of Nietzsche’s third response to the death of God, the responsive response: with the expectant, the responsive opening to being otherwise and to being anything, rights are always awaiting, always generating, but never succumbing to, realization.

A testing conclusion

That ever opening, responsive dimension of rights, and of law, would oppose the adequacy, but not the necessity, of seeing law as determinately encapsulated. How might we have some purchase on the evanescence of the responsive, of the opening? In an obvious way, such responsiveness is a condition of our continuous relation to each other. And obviously also, that condition cannot conform to the grand solipsism of empire, to the arrogation of “a single sustainable model,” to a perpetual position of leadership or military dominance, to the assured exemplifying of the human. The obvious, however, is obviously not enough since, as we have seen, much that is contrary to it has been and remains so confidently adhered to by so many. The source of

⁸³ ROUSSEAU, *supra* note 19, at 50 (Book I, ch. 1).

⁸⁴ KARL MARX, *On the Jewish Question*, in EARLY WRITINGS 228-31 (Rodney Livingstone & Gregor Benton trans., 1992); cf. COSTAS DOUZINAS, THE END OF HUMAN RIGHTS 95-100 (2000).

⁸⁵ Slavoj Žižek, *Against Human Rights*, 34 NEW LEFT REV. 115, 131 (2005).

adherence considered here has been the civil religion elevating such “new idols” as the imperial nation. I will now conclude by looking at law and human rights in their disrupting relation to American empire, and in so doing insinuate the effect of their responsive dimension.

In one way, as we saw, law and human rights are complicit with imperium, for in their vacuity they depend on it and on other powers for their content. Hence, as we saw also, there was point to those critical, or positivist, or sociological reductions of law and human rights to their being the resultant or the instrument of something else. In these perspectives, the United States should have no problem in complying with, say, the international law of human rights, because, in terms of a standard criticism, such law is constitutively subordinate to the interests of the United States — the United States either as “the sole remaining superpower” or, more accurately, as the main manager of an imperium formed in conjunction with other nations. Yet the relationship of the United States with international human rights law is a spectacularly troubled one. Might there not be, then, something to such law, as well as to law generally, that is troubling of imperium, that even resists it?

It would be tempting to seek that troubling something in recent and current transgressions of international human rights law, but transgression is a necessary constituent of any legal system, and in following this path one becomes mired in questions of extent. There are two types of transgression that have particular point here, however. One is that the transgressions are of human rights law and the United States, as we have seen, professedly exemplifies human rights.⁸⁶ Furthermore, and as we have also seen, the human and the rights of human rights are both illimitable and thence intrinsically challenging of their set appropriation. The second particular point to transgression is that some transgressions go to the very viability of law and of rights.⁸⁷ Such transgressions distort or deny that necessary participation by its subjects in the realization of rights — torture, secret incarcerations, and the blocking of access to legal modes of realization.

These types of transgression are but an instance of an extensive disregard for this imperative participation. Bluntly, without participatory acceptance by its subjects, law cannot be law. There are huge swathes of international human rights law that the United States does not accept. This can be a matter of outright refusal, of not signing treaties or of attaching reservations to them.⁸⁸ Then, perhaps more typically, there is the oblique refusal effected by impeccably constitutional means. The power to enter into treaties is a federal one vested by the Constitution in the President with

⁸⁶ Joe Stork, *Human Rights and U.S. Policy*, in FOREIGN POLICY IN FOCUS, available at http://www.fpif.org/briefs/vol4/v4n08hrts_body.html (last visited April 21, 2006).

⁸⁷ The government of the United States would deny the occurrence or the transgressive quality of some, but not all, of the transgressions of this kind now so frequently attributed to it. It would help in dealing with such irresolution if the United States allowed itself to be subject to procedures for determining the applicability of some significant requirements, such as those of the Geneva Conventions.

⁸⁸ See Stork, *supra* note 86, for copious examples.

the concurrence of the Senate, of “two thirds of the Senators present.”⁸⁹ When combined with the constitutionally appropriate senatorial deference to the rights and interests of states, this amounts to a potent block on ratifying treaties, and especially on ratifying treaties to do with human rights. If, for example, the Convention on the Rights of the Child were ratified, this could inhibit the execution of children, and inhibit their continued detention at Guantánamo Bay. Yet, given their now central place in constituting standards of international legality, human rights provide an especially poignant test of the willingness, or otherwise, of a nation to attune its domestic concerns to a wider community of law. But, of course, such a continuing, responsive regard to others would involve such law being uncontained and uncontainable: involve, we could say, its being unbound.

⁸⁹ U.S. CONST. art. II, § 2, and U.S. CONST. art. I, § 10. And for a critical account, see JOHN NORTON MOORE, *TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW* (2001).