

Latin Roots: Imperialism and the Making of Modern Law^{*}

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Abstract

By way of theorizing forgetting as an active force in the creation of historical and legal memory, supposedly pre-modern elements are revealed within modern imperialism and within modern law. This is a revealing of what is necessarily forgotten but necessarily enduring in the combined constitution of modern imperialism and modern law. Yet there are contrary qualities in modern law that are revealed as well – not only its imperial orientation, but also its ultimate resistance to imperialism.

Introduction

To show how modern law was formed in the colonization of the Americas, as this paper does, poses a seeming conundrum. The argument must posit some contained historical origin or formation of law. Yet the argument will also rely throughout on the uncontainable quality of both law and history. The resolution lies in a certain equation of the containing quality of the age with the contained notion of law it produces. The general orientation of the argument takes impetus from Wilson Harris and his meditation on Spanish imperialism and Inca civilization where he seeks liberating resources

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seemingly lost to conquistadorial ages, ages which would see the world they despoil as finished and “so finished it could be sold again, without insight, or understanding of the unfinished past, the unfinished present.”¹ So, the culminating effort here will be to integrate that unfinished, or unfinishable, quality of law into a conception of law that opposes its imperial formation.

The argument begins by taking a highly formed origin of modern law from the teachings of Vitoria on the Spanish colonization of the Americas. Vitoria, of course, is readily recognized as providing a limited origin of modern law – limited in being confined to international law and limited by his reliance on elements that were not modern and were aptly forgotten in later and more accurate renditions of modern law. It is these forgotten elements, so the argument will run, that reveal both the uncontained quality of law and the putative terms of its modern occidental containment. The Vitorian formation is then shown to be a template for modern imperialism and for this modern occidental law as its offspring. Yet, if modern occidental law is the child of imperialism, it will be revealed not only as a dutiful child but also as a child with oedipal inclinations, one whose ultimately uncontainable being opposes, even disposes of, its imperious parent.

Speak, Memory²

¹ Wilson Harris, *The Dark Jester* 100 (Faber & Faber 2001).

² This heading is stolen from Vladimir Nabokov, *Speak, Memory: An Autobiography Revisited* (Vintage Books 1989).

The whole argument of this paper now courts the precarious by relying on the theme of forgetting. This is a reliance close to Nietzsche's exploration of memory and forgetting in *On the Genealogy of Morals*, and closest to his idea of "active forgetfulness:" "Forgetfulness is no mere *vis inertiae* [force of inertia] as the superficial believe; it is rather an active – in the strictest sense, positive – inhibiting capacity...."³ Blanchot would push the point further by finding a generative primacy in forgetting: "Forgetting is the sun: memory gleams through reflection, reflecting forgetting and drawing from this reflection the light – amazement and clarity – of forgetting."⁴ This forgetting, then, cannot simply be a finished force, one that creates and fixes a memory 'back then.' Rather, it is a continuously impelling force. As a memory, an historical memory, presses forward, it must be renewed and what it forgets must be continually reconfigured. In that process it always emerges iteratively from the illimitable manifold of what gives it determinate existence.

There are two dimensions to this insistence of forgetting that will prove crucial for the argument here. One dimension is the opposition of this insistence to any set determination of historical memory, whether that determination be retrospective or

³ Friedrich Nietzsche, *On the Genealogy of Morals* 39, (Douglas Smith trans., Oxford University Press 1996). Nietzsche is writing here of individual psychology but he proceeds to merge this dynamic into what could be called social or historical memory. For the avoidance of doubt, as the lawyers optimistically put it, perhaps it should be emphasized that forgetting here is a *positive* constituting force and it is not simply a matter of an existent social form entailing the suppression of its opposite, as to which see R. Dahrendorf, "On the Origin of Inequality among Men" in *Social Inequality* (André Béteille ed., Penguin 1969).

⁴ Maurice Blanchot, *The Infinite Conversation* 315, (Susan Hanson trans., University of Minnesota Press 1993).

prospective, an invariant monument or a looming end. Or, in a Nietzschean spirit, this dimension would oppose “a suprahistorical perspective: a history whose function is to compose the finely reduced diversity of time into a totality fully closed upon itself;” and so, “the traditional devices for constructing a comprehensive view of history and for retracing the past as a patient and continuous development must be systematically dismantled.”⁵ Such dismantling will serve to reveal the second dimension of the insistence of forgetting. The formation of historical memory in the forgetting of what would counter it does not entail a mere or complete forgetting. Rather, the formation remains in an integral relation to what has to be forgotten – to what has to be forgotten so that the formation can be what it ‘is’. As Derrida puts it in the setting of the formed historical record, the One, the unity that the record becomes, “*se garde de l’autre*,” meaning both that it guards itself against the other and that it guards or keeps the other within itself.⁶ So, to take an instance that we will come to, the historical formation of a modernist secular law has both to guard against and to absorb its religious ‘other.’

⁵ This comes from Foucault’s marvelous concentration of Nietzsche’s thought on history: “Nietzsche, Genealogy, History” in Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* 152-3 (Donald F. Bouchard and Sherry Simon trans., Cornell University Press 1997).

⁶ Jacques Derrida, *Archive Fever: A Freudian Impression* 78, 84 (Eric Prenowitz trans., University of Chicago Press 1995). And on this distinction see Jonathan Elmer, “The Archive, the Native American, and Jefferson’s Convulsions” *diacritics* 5, 16 (1998). There are many Derridean concepts that would recognize the forgotten as constituting the remembered, but perhaps the most pointed here would be “hauntology” and the spectral: see generally Jacques Derrida, *Specters of Marx: The State of the Debt, The Work of Mourning, & The New International* Chap. 3, (Peggy Kamuf trans., Routledge 1994). Many Freudian notions also are premised likewise and this combined remembering and forgetting would extend to the collective or the community: see Sigmund Freud, *Group Psychology and the Analysis of the Ego*,

To create and sustain a formed ‘One’ is to prise it from, and to forget, the inescapable connection with its ‘other,’ an imperative separation captured in Canetti’s grim vision:

Blindness is a weapon against time and space; our being is one vast blindness, save only for that little circle which our mean intelligence – mean in its nature as in its scope – can illuminate. The dominating principle of the universe is blindness. It makes possible juxtapositions which would be impossible if the objects could see each other. It permits the truncation of time when time is unendurable. Time is a continuum whence there is one escape only. By closing the eyes to it from time to time, it is possible to splinter it into those fragments with which alone we are familiar.⁷

And as for formed memories, those splinters of time, the necessity of some separating, some fragmenting or some delimiting through forgetting is intimated in fictions of its absence. For one, there are the Sirens whose song lures travellers to their death, the Sirens who “know of all things that come to pass on the fruitful earth.”⁸ More expansively, in “Funes the Memorious” Borges gives us a character who can forget nothing: “He knew by heart the forms of the southern clouds at dawn on 30 April 1882, and could compare them in his memory with the mottled streaks on a book in Spanish binding he had only seen once and with the outlines of the foam raised by an oar in the Río Negro the night before the Quebracho

(James Strachey trans.), and “Civilization and its Discontents” in *Civilization, Society and Religion: The Pelican Freud Library* Vol. 12 (Joan Riviere trans.).

⁷ Elias Canetti, *Auto da Fé* 63 (C. V. Wedgwood trans., Pan Books 1978).

⁸ Homer, *The Odyssey* 147 (Walter Shewring trans., Oxford University Press 1980).

uprising.” As a result of a miasmatic inability to separate out and select memories, Funes “was not very capable of thought,” and even, it would seem, not very capable of living long. But, tellingly, Borges begins his tale in this way: “I remember him (I have no right to utter this sacred verb...)”.⁹ In a light now more leavening than Canetti’s gloom, it could be said that to remember is sacred in that the sacred involves the animating entry into the finite of what remains ever beyond. From this position of finitude, we can never extend – either in retrospect or in advance, as it were – to encompass all that is forgotten or will be forgotten in the making of memory. What is retrievable of the forgotten is what it proves possible to retrieve.

One possible line of the retrievable is now traced. Extravagant as it may at first seem, this involves taking Vitoria’s lectures and correspondence on the Spanish colonization of the Americas as a template for the formation of modern law. There are three related and forgotten patterns to this template which will now be considered in the rest of this paper. The first goes under the head of “legal theology” and concerns a forgotten sacral dimension of ‘secular’ law. The next concerns what is called here an “imperial imperative” – the like sacred dimension forgotten in but enduringly integral to modern imperialism. And the third, and final, forgotten pattern concerns the ability of law to carry yet resist that imperial imperative. This is headed “legal imperialism.” A preliminary caution is, as ever, advisable. Given the theoretical opening to the paper and what it says about

⁹ Jorge Luis Borges, *Labyrinths: Selected Stories and Other Writings* 87, 92 and 94 (Penguin Books 1970) in *Funes The Memorious* (James E. Irby trans.).

forgetting, about the ever unfinished, and about our productive inability to account fully for things, Vitoria cannot be taken as providing some complete picture of the formation of modern law. What Vitoria does provide is a set of intimations of what is forgotten, and necessarily forgotten, in the constitution of modern law, a picture of what is inconsistent with the terms of that constitution yet essential to it. And what Vitoria also provides is *some* historical warrant for those intimations of the forgotten.

Legal theology

What is remembered of Vitoria? What survives of him in the conceptual compaction that is ‘law’ in the modern Occident? If we note the now standard view that the modern world, the very ability to conceive of a world entire, was formed in the ‘discovery’ and colonization of the Americas; and if we accept, as is simply the case, that Vitoria has proved to be an enduringly significant contemporary apologist for that colonization, then we might expect that the remembered relevance of Vitoria would be considerable.¹⁰ Yet, the still perceived relevance of Vitoria is constrained and tenuous. There are two connected ways in which he is still remembered. With one, Vitoria is seen as espousing the interests of indigenous populations against a predatory colonization. That espousal continues to prompt the other way in which Vitoria is still remembered – remembered as a remote parent of

¹⁰ For this expectation, both as to the world and Vitoria, see e.g. Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* Part II, (G. L. Ulmen trans., Telos Press 2003).

international law.¹¹ Of late, however, Vitoria's supposed espousal of the interests of indigenous peoples tends to be seen more as a refined justification of imperial acquisition.¹² As for the parenting of international law, this could be seen as an anachronism since, for Vitoria, the *ius inter gentes*, the law between peoples or nations, was derived not, or not just, from the different *gentes* but, rather, from an already-encompassing scheme of things within which the nations found their existence. Indeed, it was Vitoria's basing this scheme on theology and natural law that served to rationalize the elevation of others, most notably Grotius in the seventeenth century, as more deserving parents of an international law that derived its positive being solely from the sovereign nations out of which it dependently emanated. That derivation meant, in Vattel's stark formulation from the eighteenth century, that the society of nations was to have no overarching commonality, and this to such a complete extent that none of its members "yield...rights to the general body," each sovereign state being "independent of all the others."¹³ The definitive or primary type of law is thence the national or 'municipal law' produced by the sovereign state.

We could begin to question that familiar scenario by noting, with inexcusable brevity, what has to be forgotten so as to elevate the ancestral claims of Grotius in

¹¹ For both of these ways see e.g. James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Clarendon Press 1934).

¹² See e.g. Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* 96-108 (Oxford University Press 1990).

¹³ Emer 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 (C.G. Fenwick 9 trans., Carnegie Institute 1916/1758).

its terms. Without wishing, or needing, to diminish the achievements of Grotius in formulating an extensive body of international law and a distinctive system of national law, it would still be an exercise in retrospection to separate these achievements from Grotius's attachment to natural law, even to divine law, and to an international law cohering in its Christian and civilized character by being set against the heathen and the barbarian, even if Grotius would also extend international law in part so as to include such peoples.¹⁴ Understandably enough, acute commentators have discerned one Grotius opposing another but, as we will now see, if Vitoria is taken to be more than one of the "forerunners of Grotius" then such opposition may still coalesce in some conception of modern occidental law.¹⁵ Before embarking upon the engagement with Vitoria, there will at this point be a reversal of the natural order with a reference from a footnote, the next one, to the text and this is done to explain the bracketed numbers that will appear in the text as references to works of Vitoria.¹⁶

¹⁴ Hugo Grotius, *De Jure Belli ac Pacis* vol.1, 28 (Sijthoff. 1919/1625); C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* 44-9, 85-6 (Clarendon Press 1967); Peter Stein, *Roman Law in European History* 229-30 (Cambridge University Press, 1999).

¹⁵ For the discernment see e.g. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* 229-30 (Cambridge University Press, 2004). See supra n. 10, 117.

¹⁶ There is now a superb and readily available collection and translation of the works of Vitoria of particular relevance here, or of key extracts from them, edited by: Francisco de Vitoria, *Political Writings* 1-44, 153-204, 205-30, 231-92, 293-327, 331-3, 339-51, (Anthony Pagden & Jeremy Lawrance eds., Jeremy Lawrance trans., Cambridge University Press 1991).

Going on the literature, the most general perception of the works of Vitoria would have to be that it is difficult, if not impossible, to have a generally agreed perception. There is a dramatic disparity in the ways Vitoria is perceived. The divisions over his parenting international law and over his championing indigenous peoples have already been noted. Both these divides are embroiled, in turn, with dissension over whether Vitoria was at base a medieval theologian or, rather, whether he was a humanist and a rationalist – and even, as it is claimed, a modern intellectual who, among others, initiated modern political philosophy and the study of society.¹⁷

An immediate response to these epochal divisions could be that they make no difference. Let me approach and, admittedly, moderate that response by way of the inadequacy of the most famous case for Vitoria as medieval theologian, that advanced by Schmitt in *Der Nomos*, a work in which Vitoria is rendered as the expressive apotheosis of a quasi-international law based on religion, the law of the *republica Christiana*. This law is quite superseded by a radically different international law, the *ius publicum Europaeum*, based solely on secularising European states. Theologians are thence told to depart the scene. To say that Schmitt is not precisely consistent about this transition would be a considerable understatement, but consistency here is beside my point. As Schmitt sees it, the acolytes of the new order offer no cohering basis for it, and he would make good

¹⁷ Alvaro D'Ors, *Francisco de Vitoria, Intellectual*, VII , XLI and XLII, *Revista de la Universidad de Oviedo* 115, 124-5, 132 (1946). See supra n. 16, xviii-xiv. Randall Collins, *The Sociology of Philosophies: A Global Theory of Intellectual Change* 525 (The Belknap Press of Harvard University Press 1998).

this deficiency by showing how that order subsists on what can only be a sacral ground, somewhat literally: a *nomos* of the earth. This *nomos* entails two marvellous consequences. One is the combining of “concrete order” with “orientations” beyond any given or contained order. The other marvellous consequence is the ability of this *nomos* to provide a singular ground, a world-ground, generated in the imperial “land-appropriation of a new world” of the Americas, a ground for a “European international law” made up of state entities that are completely distinct yet related to each other in somehow sustaining this ground of their being with each other.¹⁸

Both of these consequences import the sacred, the sacred as a recognition of the bringing with-in the existent of what is ever beyond it. Hence, law, the sovereign, myth are all seen in many traditions as giving form and force to the sacred. And it has now, of course, to be admitted that there are differences to be

¹⁸ See supra n.10, 69, 70, 82-3, 121, 127, 135. For a striking example of inconsistency, see the reference to D’Ors at 114. On the “transcendent significance” of the “European” order of international law, see Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* 124-5 (Marcus Brainard trans., The University of Chicago Press 1998). Aptly enough, Schmitt’s own secularism is a contested quality. As well as relegating the theologians, he described himself as “a theologian of juridical science:” see Jean-François Kervégan, “Carl Schmitt and World Unity” in *The Challenge of Carl Schmitt* 70-1 (Chantal Mouffe ed., Verso 1999). And in line now more with the argument that follows in the text, Schmitt did cogently render the modern political and its forms as a secularized theology: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 36 (George Schwab trans., MIT Press 1985); Carl Schmitt, *The Concept of the Political* 42 (George Schwab trans., University of Chicago Press 1996).

observed ‘in’ the sacred – admitted that Vitoria’s religion is not the same as Schmitt’s secularism. Yet, perversely pursuing similarity, we could veer back towards Vitoria now by looking at these dimensions of the sacred in a theologic of monotheism, and proceed from there to delineate a mix of similarity and difference that will prove crucial to the imperial constitution of modern law.

Vitoria’s monotheism was hardly unique in its having to reconcile in the being of one deity the intractable divide just touched on in relation to the sacred. God had to be for Vitoria, as his lectures on law in the scholastic tradition of Thomas Aquinas revealed, a god of “revelation,” a god of “divine law,” a god quite beyond us yet still somehow discernable as a “unity” (164). This is a god comparable to various monotheisms where we would find a boundless, unrepresentable, and ineffable god, a god in whose presence there can only be dissolution of the existent – a god of miracles, grace and of nature confounded. On the other side of the deific divide, there is a god more compatible with Vitoria’s scholasticism. This is an omnipresent and determinate god, the god of perfect order, the god of constancy, caught by ‘his’ own laws, by ‘nature,’ and forbidden by Malebranche to “disturb the simplicity of his ways.”¹⁹ In Vitoria’s Thomistic terms, this god was the source of law, of natural law: “the rules of law are in God *as in the thing which is to rule*” (163 – his emphasis). That still left earthly natural law derivative of a transcendent “divine law,” but access or attachment to that divine law was not necessary for either the integrity of natural law or for the ability to know it (164). It can be

¹⁹ P. Riley, *The General Will Before Rousseau: The Transformation of the Divine into the Civil* 40 (Princeton University Press 1986).

known comprehensively by human reason being brought to bear on nature, and all people, even if they are not Christian, have that facility (155, 164). Bluntly, a determinate natural law can exist without divine revelation, and it can exist even if the godhead did not.²⁰ Hence there is Vitoria as a supposed humanist, a political theorist, an incipient social scientist, and such.²¹

We can begin to draw out the consequences of this capturing of the deity in the cause of a containing law by evoking some memory of what contributed to this capture. The most pervasive contribution of course was a Catholic theology, but this was also a theology supplemented in two seminal directions. With one, Vitoria's working through scholastic theology was a response and an adaptation to the humanism then assertively emergent in Europe.²² With the other direction, that Catholicism has to be seen as itself shaped by the rationalizing legal and bureaucratic legacy of its having become the official religion of the Roman empire, and shaped further by the legalist Gregorian reform of the church in the eleventh century, a reform placed in Berman's monumental study at the origin of "the

²⁰ Charles S. Edwards, *Hugo Grotius: The Miracle of Holland: A Study of Political and Legal Thought* 80-81 (Nelson-Hall Publishers 1981); Anthony Pagden, *The Fall of Natural Man* 62-5, 171-2 (Cambridge University Press 1982). This can make God at times surprisingly amenable to the diverse ways of humans when he is brought back into the picture. Polygamy, for example, can be accommodated, almost doubtless because of its presence in the Old Testament. All of which is not to deny that Aquinas would acknowledge mystery when a containing scholasticism failed to solve it.

²¹ See supra n. 17.

²² See Wikipedia, School of Salamanca, at http://en.wikipedia.org/wiki/School_of_Salamanca (accessed Dec. 31, 2004).

western legal tradition.”²³ Allowing these huge contributions to resonate now with Stein’s pellucid summary we come to the crux: the *ius gentium* and the different meanings it can carry:

Vitoria argued that the *ius gentium* of the Roman texts, in which it meant the law shared by all peoples, should be understood also as *ius inter gentes*, that is, a set of rules governing the relations between one people and another. This law was based not on a sharing of religious belief but on the nature of mankind. For *ius gentium* is defined, in Institutes 1.21, as what natural reason has laid down among all peoples.²⁴

The *ius gentium* was, however, even more obliging and protean than this. Put less indulgently, there were other and opposing aspects of the *ius gentium* that had to be forgotten for it to assume this universal inclusiveness. One such aspect would acknowledge readily enough that the *ius gentium* could extend to “all peoples,” but its content in so extending was not made up of a nominalist resolution derived from the varied laws of different peoples. It was, rather, an extraversion of Roman law.²⁵ And perhaps not unrelated to this, something of an older meaning of *ius gentium* as “the law regulating relations between Romans and foreigners” retained purchase in

²³ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 106, 113 (Harvard University press 1983). This is, rather obviously, to use a very broad brush. A more refined account would have to extend to Vitoria’s resistance to the universal claims of the papacy.

²⁴ See supra n. 14, 94-5, n. 16, 278.

²⁵ Tony Honoré, *Law 200 to 400 AD: From Cosmopolis to Rechtstaat?* 3, at <http://users.ox.ac.uk/~alls0079/cosmos2.pdf> (accessed Dec.31, 2004). In its Christian rendition, however, some marginal modification was possible (e.g. 171-2).

the *ius gentium* being confined at times to “the law common to civilized peoples.”²⁶

These seemingly contradictory contents of the *ius gentium* will now be carried forward to the next section on “imperial imperative” where they will, in a sense, be reconciled. That reconciliation will be in terms explaining the correspondence between the law of Vitoria’s contained god and the law of the imperial Occident.

Imperial imperative

Whether or not Vitoria was a humanist, he was certainly humane in the intensity of his expressed opposition to the more resolutely genocidal of the Spanish invaders, his opposition to their “butchery and pillage” (331, 333). And in that same vein, he also opposed the division of the world, including a papal division, into areas of Christian lawfulness and areas without law, and ripe for free acquisition (259-61). What Vitoria advanced against this division of the world and against unbridled conquest was the pervasive *ius gentium*. The difference between these two scenes, that of conquest and that regulated by the *ius gentium*, could be set initially in Todorov’s distinction between massacre and sacrifice. Massacre, says Todorov, “takes place outside the ritual framework.” Unlike sacrifice, massacre is not “structured, channelled and held in check by fixed laws.” Todorov would expand the distinction to typify whole societies: “sacrifice-societies” and “massacre-societies.” With sacrifice-societies, the victim is “neither identical nor totally different” to the society, the sacrifice is effected through constraining forms

²⁶ See supra n.10, n. 6. Ernest Nys, “Introduction,” to Francisci de Victoria, *De Indis et de Iure Belli Relectiones* 56 (John Pawley Bate trans., Carnegie Institution of Washington 1917).

and norms, and “testifies to the power of the social fabric.” Massacre-societies are quite contrary. Here the victim is “remote and alien...more or less identified with animals,” there is no effecting ritual, and massacre “reveals the weakness of this same social fabric.” For Todorov, such a society was imperial Spain, which, although observed here in a conquistadorial age, still “heralds the advent of modern times.”²⁷ Vitoria’s bringing a highly elaborated and all-encompassing *ius gentium* to bear can be retrospectively read as an effort to shore up a society of sacrifice that was passing, an effort undermined by the inextricable tie between the more humanist, and more modernist orientations of his thought and a society of massacre.²⁸

To begin on the side of the angels, however, Vitoria drew on Aquinas so as to affirm that “the Indians,” by virtue of being human and thence possessed of reason, had *dominium*; that is, they had a mastery of property and a mastery of rule, “public and private” – all of which was evidenced by their living in communities and their having families, hierarchical government, legal institutions and something like religion (239, 250-1). And, still following the angelic Doctor, Vitoria found that such *dominium* was entirely embedded in human nature, and was not ordained by “grace” (18). The result was to disavow many of the claimed grounds, spiritual and temporal, of title to the Americas that would deny this *dominium*.

²⁷ Tzvetan Todorov, *The Conquest of America: The Question of the Other* 143-4 (Richard Howard trans., Harper Collins 1984).

²⁸ Todorov’s terminology of sacrifice was unavailable to Vitoria, not least because of his opposition to some types of sacrifice engaged in by the barbarians, Id. 212-26.

Even if this was to reject naked monarchical acquisition of territory or papal generosity in allocating the lands of others, there was still left for Vitoria, and for the *ius gentium*, certain modes of acquiring “just title.” The terms of Vitoria’s enquiry into these modes are not exactly propitious for some, the object being to identify “the legitimate titles by which the barbarians could have been subjected to Christian rule,” of which titles there are “seven or perhaps eight” (252). It may be of some relief to note that the first two titles Vitoria considers are given predominant emphasis. The first is a right usually described as one to trade, to travel and to dwell in the countries of the barbarians, although the variant of free trade here, *liberum commercium*, extends beyond trade narrowly conceived and includes intercourse and communication generally (278-90). There was a constituent rationality to this since, for the *ius gentium* to be a singular yet pervasive *ius*, there had to be a certain fullness of relation between peoples. On this score, the second right founding a putatively just title has to be seen as more dubious, the right to proselytize: “Christians have the right to preach and announce the Gospel in the lands of the barbarians” and that even against their will (284-5). As initially announced by Vitoria, then, these titles have to be seen as inchoate. They await perfection in the wars of conquest and in the ensuing territorial acquisitions that result from the recalcitrant *barbari* resisting the assertion of these rights (282-3, 285-6). Thence, “it becomes lawful” for the Spaniards “to do everything necessary to the aim of war,” even if there had also to be some refined restraint since “it may happen that the resulting war, with its massacres and pillage, obstructs the conversion of the barbarians instead of encouraging it” (286). So, in

the end, Vitoria's objections to conquistadorial excess are very much attenuated: "I myself have no doubt that force and arms were necessary for the Spaniards to continue in those parts; my fear is that the affair may have gone beyond the permissible bounds of justice and religion" (286).

The other grounds are diffuse and usually less fulsome, but one variety has a further and pointed significance. This would assert a title justified in the elimination of barbarous practices, or in the protecting of converts or of the *barbari* themselves against such practices, or in defending them from "tyranny and oppression" – a prescience of humanitarian intervention (225-7, 287-8, 347). Again, war was the mode of perfecting title – war leading to conquest and possession. So, as these causes of war would indicate, the barbarians were not only the same as others within the domain of the *ius gentium*, they were different also. In terms that even then were far from original, the barbarians were found to be akin to madmen or children, cannibalistic, sexually perverted, and culinarily outrageous, so much so that they were considered well nigh impervious to a reforming natural reason (e.g. 250, 290).²⁹ In all, and as Anghie puts it, the Indian of Vitoria's lectures had to be "schizophrenic," encompassed in the sameness of a universal humanity yet set apart from it as different.³⁰ Unsurprisingly, then, the relation between peoples that went to make up the *ius gentium* did not entail a respectful reciprocity between the Christians and the *barbari*. Thence, Schmitt's comment on

²⁹ See supra n. 20, 86-91, 100-3.

³⁰ Anthony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law" in *Laws of the Postcolonial* 96 (Eve Darian-Smith and Peter Fitzpatrick eds., University of Michigan Press 1999).

the force of “Vitoria’s Christian convictions” becomes as important as it is obvious: “It never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions”.³¹ And it is not exactly difficult to discern whose perspective is being adopted when authors write of the “discovery” of the Americas in such terms as its being the most important “epoch...in the history of humanity” when there was for the first time an “inclusion of the whole globe within the scope of man’s political activities.”³² What, in the result, is conjoined here is a completeness of possible being in the world with an exclusivity of position in determining its existence. From that position, natural law and the *ius gentium* become carriers of a prerogative hold on being that is unified and universal yet also determinate or determinable, a prerogative hold that can subsist without resolving reference to a deity transcending it.

This achieved universal, in reflecting the exigencies of imperial Spain, anticipates, as Todorov would indicate, modernity and modern imperialism.³³ In

³¹ See supra n. 10, 113. And see Anthony Pagden, *European Encounters with the New World* 74 (Yale University Press 1993) where he quotes Las Casas:

God has given no man neither living nor dead (and that only through His goodness and through no worth of my own) so much experience and understanding of the facts and the Law natural, divine and human, as I have of the things of these Indians.

³² See supra n. 26, 64.

³³ See n. 27, 145; see also Hayden White, *Tropics of Discourse: Essays in Cultural Criticism* 193-4 (Johns Hopkins University Press 1978).

that light, Todorov's societies of sacrifice and societies of massacre could be seen not only as distinct but also as combined. The now encompassing 'universal' in the world admits of no other apart from it, yet, inevitably, the finite emplacement or instantiation of that universal is effected through alterity and exclusion. That which is included in the universal finds its antithesis in what is excluded. As constitutively other to the completeness of the universal, the excluded can only be utterly apart, having no place within a universal humanity and fit only for massacre. This, however, is not simply to confirm a similarity with societies of massacre. The universal as universal must also include everything and extend to what is quite excluded in its finite affirmation. Operatively, the conjunction of exclusion and inclusion is an unavowed, a constantly forgotten sacrifice. One type of existence is asserted in the sacrificial relegation of another – another that is bidden, nonetheless, to endure as a sacrificial victim. Like any sacrificial victim, it has to be capable of being both related to and set apart from the sacrificer: neither totally "identical nor totally different," returning to Todorov.³⁴

Yet, staying with Todorov's terms, this unavowed sacrifice to or for the finite universal cannot attest "to the power of the social fabric," cannot provide that palpable point of symbolic or social cohering which is the avowed or acknowledged sacrifice. All of which, again using Todorov's terms, "reveals" what is now "the weakness of the social fabric."³⁵ That fabric is torn between extremes of exclusion and inclusion, the rudiments of which can be derived from a famed

³⁴ See n. 27, 144.

³⁵ Id. 144-5.

depiction in Said's *Orientalism* where the Occident is constructed circularly: constructed in an oppositional reference to an Orient also constructed by it.³⁶ That circularity is testament here not so much to the failure of Said's account as to the arrogation of a surpassing power of occidental self-constitution in a way that completely subordinates the other. In the result, the fabric still remains torn. On one side are the carriers of the universal, those whose action is possessed of a sealed immanence, of an enwrapped plenitude – those whose action is unaffected by what it effects. On the other side are those acted upon, the carriers of the ambivalence in occidental identity, the excluded who are called to be the same yet repelled as different, bidden perpetually to attain what is intrinsically denied them.

The resulting emplacement of the universal, then, remains unresolved and unrealised, torn 'in itself.' Yet this universal is complete 'in itself' and cannot be endowed with enduring positive content by a transcendent beyond. Nor can such content perceptively form within this universal, for to come to the universal from within is never to encompass or to be able to hypostatize it. The bringing of the universal into a determinate, and determinant, particularity can thence never be something irenically set. The particularity of its instantiation will be continually subject to dissipation. As a result, the position of instantiation has constantly to be held, and for this holding there has to be some responsive regard to the possibility that ensues from an orientation towards, and from within, the universal. That responsiveness, in turn, has to combine with a bringing of this chaos of possibility into order. One way in which this once-sacral or deific combining is brought about

³⁶ Edward Said, *Orientalism* (Penguin 1985).

that we come to next through a return to the inceptive Vitoria is law: the law of and against imperialism.

Legal imperialism

We can return now to the puzzle as to why the paternity of international law attributed to Grotius is somehow more legitimate than the claim of Vitoria. Aided by some constructive forgetting, the Grotian international law was, as we saw, one produced by autonomous nation states who remained completely independent of each other. Potted genealogies of the trade would link Grotius with that modern international law emerging from the Peace of Westphalia of 1648, even though this came after his writings. That settlement of the engulfing Thirty Years War in Europe accentuated the separate and sovereign quality of the ‘European’ nation-states and principalities in opposition to an encompassing religious authority. The contained independence of the nation-state, its free-standing completeness, became the basis for its entry into the society of nations.

Despite the attribution to Grotius of parenting international law, the qualifications of Vitoria to fit this particular bill would appear to be considerable. His own writings, especially “On Civil Power” (1-44) and “On the Law of War” (293-327), aptly accommodated the already formed or forming ‘sovereign’ states of Europe that were, in varying ways, subordinating the spiritual power of the papacy and of the Holy Roman Empire to their own ‘temporal’ claims on power and authority. In defining a “commonwealth” of this kind, Vitoria saw it as “a perfect community” and offered the following “clarification” of such community:

What is a ‘perfect’ community? Let us begin by noting that a ‘perfect’ thing is one in which nothing is lacking, just as an ‘imperfect’ thing is one in which something is lacking: ‘perfect’ means, then, ‘complete in itself’ (*quod totum est, perfectum quid*). A perfect community or commonwealth is therefore one which is complete in itself; that is, one which is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrates. (301)

Grotius did no better than that. And, as we saw, Vitoria rendered the *ius gentium* also as *ius inter gentes*, the law regulating relations between peoples or nations. It was such law that enabled societies of “the Indians” to be recognized, tenuous as that recognition turned out to be. And further, Vitoria rejected claims to “the Indies” made on grounds other than the *ius gentium* (e.g. 253, 260, 331-3). In all, it would seem, a “perfect” anticipation of the Grotian schema.

The problem, the productive problem, with Vitoria is that he includes elements that are both necessary for the schema yet necessarily forgotten if it is to present itself in the limited terms derived from Grotius, terms complicit with the sovereign completeness of the nation-state and terms in which the existent content and force of international law come solely from the distinct being of each such sovereign nation-state.

The immediate and, one would have thought, obvious difficulty presented by this schema is that, as Bauman puts it, “in a world fully and exhaustively divided

into national domains, there was no space left for internationalism.”³⁷ That such space was a necessary space can be indicated by Davidson’s perception that different entities can only be distinct and in relation “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.”³⁸ Reversing the trajectory of the argument, if different entities complete in each of themselves are to be-with each other in some commonality, then the only commonality possible is their being the same as each other. The paradoxical price of their being different to, and recognizably distinct from, each other is the existence of some being-in-common inhabiting and delimiting the entities ‘in’ their very distinctness. Hence, there endures in the discourses of international law invocations of the international community or the community of nations or, once, the comity or concert of nations. What becomes crucial for the argument now is the appreciation that this community as a continue being-with cannot be contained within any existent realization of it. It cannot abide an enduring stasis but must ever extend receptively beyond present existence, otherwise it will be unable to continue ‘in being’. Which is not to deny that *some* realization of being-with is necessary if such being is to have any existence at all. International law, or simply law, is commensurate with these dimensions of being. There will ‘at any one time’ be an existent, a realized body of international law self endowed with a prehensive and responsive dimension

³⁷ Zygmunt Bauman, *Modernity and the Holocaust* 53 (Polity Press 1989).

³⁸ Donald Davidson, “On the Very Idea of a Conceptual Scheme” in *Post-Analytic Philosophy* 130 (John Rajchman and Cornel West eds., Columbia University Press 1985).

able to bring to existence what is ever beyond it – both the exigency and the possibility of what comes from beyond. Law, then, joins community in replicating those dimensions of the deity and of the sacred touched on earlier but, as we will see shortly, in ways that are ambivalent.³⁹

It is these inextricable dimensions of law and community that Vitoria's tractable *ius gentium* accommodates. It extends to all people yet is realized, or fully realized, only by some, by the Christian and civilized nations. Whilst a delimiting by way of realization is inevitable, the imperial imperative intervenes when this select grouping arrogates to itself as a temporal power the 'universal' terms in which what has yet to be revealed and yet to come will be recognized and realized. This can be done in terms of the *ius gentium* since, as we saw, the *ius gentium* would still pertain even if the godhead did not. Law, law once identified with the uncontainable godhead, now becomes an object of earthly acquisition, something to be contained within national and imperial domains. Thence we have that strangely suicidal legal positivism in which law assumes autonomy in its very subjection to *imperium* or to sovereign authority. Yet this erstwhile deific or sacral dimension of law persists in its uncontainment, as it must if law is to endure as the normative orientation and determination of our being-with each other. And to so endure, law has to be utterly responsive to the illimitable unpredictability and uncertainty that ever confronts it, and us.

³⁹ For the (modern) conjunction of law with the gods or the sacred, see e.g. Jean-Jacques Rousseau, *The Social Contract* 50 (Maurice Cranston trans., Penguin 1968), and Immanuel Kant, *Critique of Practical Reason* 95 – 6:319 (Mary Gregor trans., Cambridge University Press 1997).

What distinguishes modern law explicitly is the persistence of the divide between its contained or determinate dimension and its uncontainable responsiveness. There is no longer a transcendent reference to resolve, or ostensibly resolve, this division. And since neither side of the divide is assimilable to the other or capable of existence without the other, law has somehow to combine within itself dimensions of being that also remain separate. With its responsive dimension not being ultimately containable, law becomes the most independent and yet the most dependent of things. It is independent of any given or enduring content apart from its own determination. Yet in the vacuity that flows from its responsiveness, in its having to be capable always of being other than what it determinately is, modern law has to depend for its content on what is apart from it. It thus becomes susceptible to content endowed by predominant power. Yet power, if it is to have organizational persistence, will depend on law, on 'its' law, as the only continuously extensive and amenable means of securing this existence.

The prototypical power in the Victorian schema was that of nation, but not nation in its solitary self-constitution but nation integrally tied to a community of inter-nation within which a predominant concentration of power formed as imperialism, a national imperialism. Thereafter, this national imperialism forms in two overlapping modes. With one of these, imperialism takes form as concentrations of 'leading' nations, such as 'the great powers,' as their "legalised hegemony," and as their organizational extensions in 'international' and 'global' terms.⁴⁰ With the other mode, although the supposedly singular nation gives its

⁴⁰ For the phrase "legalised hegemony," and for much more, see *supra* n.15, 68, *et passim*.

name to the imperialism in question, it operates as a focus for diverse types of power ranging beyond it. This was a mode exemplified by Spanish imperialism.⁴¹

The relation between law and this modern imperialism is endemically uneasy. Although it appropriates a dependent law to itself, this imperialism depends in turn on that law for its continued organizational existence – depends on a law that cannot be contained by the terms of imperialism’s heteronomous hold on being.⁴² That hold is something law has to resist if it is to be law.

⁴¹Henry Kamen, *Empire: How Spain Became a World Power, 1492-1763* (Harper Collins 2003).

⁴² See e.g. Peter Fitzpatrick, ““Gods would be needed...”: American Empire and the Rule of (International) Law”, 16 *Leiden Journal of International Law* 429 (2003).