

Enduring Right: Law, War and the Market

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“Not only can man’s being not be understood without madness, it would not be man’s being if it did not bear madness within itself as the limit of his freedom.”¹

Among the more outrageous claims Baudrillard makes in “The Melodrama of Difference” there is one which aptly invokes extremities.² To the geographical extremity of the Alakaluf people of Tierra del Fuego, Baudrillard would add an existential one. “They call themselves ‘Men’ – and there were [for them] no others;” and so, “[i]n their singularity, which could not ever conceive of the Other, the Alakaluf were inevitably vanquished,” in effect exterminated, by “the Whites.”³ Yet, he goes on, “who can say that the elimination of this singularity will not turn out, in the long run, to be fatal for the Whites too? Who can say that radical foreignness will not have its revenge – that, though effectively conjured away by colonial humanism, it will not return...dooming them to disappear themselves one day in much the same way as the Alakaluf.”⁴ Although Baudrillard offers little more than eloquent assertion evidencing this intimated fate, by the work’s end it has become inexorable and imminent. If we were to question the position of surpassing perception which enables Baudrillard so encompassingly to know the Alakaluf, then consistently we should likewise question the complete assurance with which he knows the Occident and its terminus.⁵ With the Occident, however, the evidence, if inevitably inadequate, is somewhat more dense. The evidential strand now pursued in this paper concerns a pure and primal humanity, a

completeness of being, arrogated by the Occident through claims to the ‘human’ of human rights and to the freedom embedded in their assertion, the particular focus here being the United States and the sharpened salience assumed by these rights and this freedom in the aftermath of the ‘events’ of September 2001.

The sad extravagance of the Alakaluf claim to completeness becomes the quotidian norm of the Occident. Formulaic reassurance now abounds. In Bauman’s terms, “this is the kind of society which no longer recognizes any alternative to itself,” or, as the indicatively effective mnemonic has it, TINA: there is no alternative.⁶ Another instance, purporting to transcend the colloquial, comes from Fukuyama’s notorious affirmation of occidental triumphalism with “the end of history” – although we are now told that it has not quite ended because “we are nowhere near the end of science.”⁷ In all other seemingly severable respects however, we are still assured that history has quite ended. So, September 11, 2001 “raised doubts about the end-of-history thesis” because it was seen as symptomatic – borrowing another formula – of a clash of civilizations “between the West and Islam,” but there is no such thing: there is only “a desperate rearguard action that will in time be overwhelmed by the broader tide of modernization.”⁸ Still, “science and technology” do provide a “malign ingenuity” with the means to strike at “our civilization’s key vulnerabilities.”⁹

With “us” this mix of surpassing certitude and vulnerability is now standard. Bobbitt’s *The Shield of Achilles: War, Peace and the Course of History* provides a recent telling instance, telling not only because it has already achieved widespread approbation but also because its author combines having been, in the United States, a governmental strategist of significance and an academic of renown.¹⁰ In this considerable volume, Bobbitt’s combinatory powers join the aura of inevitability, in the form of the crudest historical determinism, with a realm of freedom in which “we” adopt strategies to master an “era” of uncertainty.¹¹ With the expansive reach of democracy and the market, the world is now

characterized by the “market-state: the emerging constitutional order that promises to maximize the opportunity of its people, tending to privatise many state activities and making representative government more responsive to the market.”¹² Bobbitt is deserving of gratitude for the concept and for some evidencing of its prospect, if not achieved presence. For my purposes, there is also a more immediate gratitude for the intimation of my central concern here – a concern with the quality of the law accompanying the market-state, with this law’s taking on a contained, instrumental, ultimately subordinated quality, and this in contrast with the claim of modernist legality to a rule of law.

Bobbitt’s book “treats of the relationship between strategy and law,” both being seen as “key instruments of the State.”¹³ Strategy and law configure, via “history,” with the market and with war. The market-state still allows, or will allow, law a part in shaping the “internal order” of that state, but otherwise “the old ways of the superseded nation-state (its use of law to bring about certain desired moral outcomes, for example) fall away.”¹⁴ War, “a new, epochal war,” is thence inevitable, and strategy must “shape” war to ensure that “we can win.”¹⁵ In a way, it was ever thus: “war is a natural condition of the State...and cannot be finally avoided.”¹⁶ The “main point” then, which Bobbitt would wish his “readers to bear in mind,” is that “war is a product as well as a shaper of culture. ...No less than the market and the law courts, with which it is inextricably intertwined, war is a creative act of civilized man... .”¹⁷ Indeed, some gentle scorn is reserved for those who would seek to “banish war once and for all,” those who do not appreciate the “mutually supportive” relation between law and war: “a state without a strategy for war would be unable to maintain its domestic legitimacy and thus could not even guarantee its citizens’ civil rights and liberties; a lawless state at war could never make peace and thus would be trapped in the cycle of violence and revenge.”¹⁸ That passage proves to be a perverse leitmotiv of my paper, but for now I will only mark an incipient dissent with the comment that it is not entirely appropriate for Bobbitt

to find an iconic encapsulation of his theme in the sheltering shield of Achilles – “the strong/Iron-hearted man-slaying Achilles/Who would not live long.”¹⁹ True, Hephaestus forged on the same shield scenes of law and of war, but he separated them.²⁰ And Hephaestus had no affection for the god of war.

Although for Bobbitt war is a shaper of culture and although the market-state will have to engage in wars, the brave new world of this state is not one whose fundamental characteristics change in or as a result of war. Much like the challenge ‘science’ poses for Fukuyama’s society at the end of history, a challenge to be met with the “regulation” of bioscience, Bobbitt’s war is something to be planned for and accommodated within the “strategy” of the market-state.²¹ What results in both cases is a strangely bifurcated world, a world self-possessed of a completeness of immanent being, of an encompassing factuality, yet a world somehow still subject to risk or disruption coming from without. To meet such risk and disruption, something beyond encompassing factuality is called for, some non-factual guide, yet this something must be in a way operatively compatible with an encompassing factuality. This is a world which calls forth the normative combined with the factual in human rights. Aptly enough, then, Fukuyama devotes much of his new book on bioscience to human rights and to the “nature” of the human involved in human rights.²² Bobbitt’s resort to human rights is also significant if not as extensive.²³ Summarily, human rights would marvellously combine in themselves the encompassingly, humanly factual with transcendent normative rights somehow embedded in that same factuality.

That combining has a modern origin in the ‘declaration’ and elevation of universal rights, ‘rights of man’, in the French and ‘American’ revolutions.²⁴ Much criticism has been aptly directed at the terms in which such universal rights have been tied to the ‘fact’ of the putatively human, tied for example to the formation of particular national societies or to particular social relations. A hugely significant instance of such social relations would be the

intimate association between the subject of such rights and capitalist economic relations, most pointedly those of the ‘free’ market. There was also a coeval emergence of modern occidental right and its subject. More pointedly, the personalist notion of right involved – the elevation of the “free” individual – is reconciled to being-with others, reconciled to the demands of the social, through rights themselves. Neither this nor any comparable reconciliation can be irenically set but is, rather, ever contested and labile. Its content is taken on by way of negation in that the “man” of this right and the “political society” of this man were formed in a constituent negation of the savage ‘other’.²⁵ The ensuing civilized being, not being ‘positively’ bounded, was one whose significance could extend globally, and one ever able to bring effect to a world without necessarily being affected by it. Consistently with all that, rights could be found in the contained or inert savage only to the extent allowed by such enlightened being.²⁶ The constitution of human rights in variants of such exclusion persists.²⁷

Yet that very constitution of human rights itself demanded an inclusion within the universality of the human. This inclusiveness of human rights is now prominently marked in their more recent explicitly international or ‘global’ manifestations – “international human rights is the world’s first universal ideology”.²⁸ So, as well as the imperious, and imperial, assertion that comes with human rights as exclusionary and as self-regarding, there is a responsive regard to the other and a sharing in a commonality of the human. As a component of their legality and as ideology, this inclusive dimension of human rights counters the dimension of self-regarding exclusion, but not entirely so. With the finitely human the two dimensions are inseparable, and what ‘counts’ is the quality of their combining. For the Occident, the self-regarding and excluding dimension could, and did, imperially extend by subordinating the other-regarding and inclusive dimension to itself.

Of late, this subordination has taken on a new explicitness. The putatively globalized economy sustaining the free market – along with the resurrected belief that the good of all is ensured in the self-regarding assertion of each – now seeks to absorb human rights as its instrument. It does so, for example, by attaching human rights to ‘conditionalities’ binding nations in loan, aid and trade agreements. A related instance was provided in March 2002 when George W. Bush announced a large increase in foreign ‘aid’ including “extra help for countries that agree to respect human rights and reform their economies”.²⁹ Another and portentous example can be seen in the placing of human rights at the forefront of “The Nine Principles” ostensibly guiding “The Global Compact” for cooperation between the United Nations and “the private sector.”³⁰ What is perhaps of most significance here is another foregrounding of human rights, that found in the “Charter of Paris for a New Europe” of 1990 bringing a formal conclusion to the Cold War and heralding “a new era of democracy, peace and unity” in which “human rights, democracy and the rule of law” are tied to the market economy.³¹

Peace, however, is becoming a more disputable element of such packages. True, the combining of peace with human rights and the market does remain standard. Resorting to Fukuyama again for an instance, we find him noting in the setting of human rights that “when two human groups butt up against each other, they face a choice between engaging in a violent, zero-sum struggle for dominance, or else in a peaceful positive-sum relationship of trade and exchange.”³² More significantly, in the aspiration and ethos of the Universal Declaration of Human Rights, human rights were set against barbarism and war. Yet from the start there was ambivalence here in that the Declaration retrospectively rendered the preceding ‘world’ war one for human rights. The conjunction becomes closer with the recent ‘human rights war’ in the Balkans, a type of war prefigured in the ‘humane intervention’ of the Gulf War.³³ An elaborated justification of the connection between war and human rights –

one which resonates with Bobbitt's seeing war as the protector of rights and liberties – can now be found in a screed called “What We're Fighting For” subscribed to by numerous intellectuals in the United States.³⁴ There we learn that the war following the “events” of September 11 2001, the war in Afghanistan and beyond, is a “just war” in defence of natural right and universal values, these values in turn being equated with “American values,” although the Universal Declaration of Human Rights is invoked in this same setting.³⁵ A sustaining belief is also professed “in the universal possibility and desirability of human freedom.”³⁶ In sum, the facility with which war and the market can combine with human rights suggests a significant compatibility. What provides much of this combining force, I will now argue in the refracted light of the ‘events’ of that September, is a particular kind of freedom and its paradigm exercise by certain actors.

To come to the point, this is an idea of freedom as immune to its effects. It is a self-sufficing freedom, complete in and of itself – an “enduring freedom,” to borrow an accessible phrase. What will be brought to bear here is a contrary idea of freedom once offered by Nietzsche and since amplified in empathic thought. For Nietzsche “freedom is measured...by the resistance which has to be overcome, by the effort it costs to stay *aloft*.”³⁷ Such freedom is an affective “superiority over him who must obey;” it entails a readiness “to sacrifice men to one's cause,” and, when “viewed more closely” in the setting of liberalism, it is a “war *for* liberal institutions.”³⁸ The notion of freedom against which Nietzsche inveighs is one of a freedom which is transcendent and universal, yet one which is also possessed of a sealed immanence, of an enwrapped completeness.³⁹ It is, for instance, the freedom espoused by Arendt when, with an apt resonance, she declares that “we [that is, all of ‘us’] hold human freedom to be a self-evident truth,” an “axiomatic assumption.”⁴⁰ And it is this freedom as the primal freedom to choose which informs human rights, at least in their occidental conception. Furthermore, this freedom is not only the well-spring of “practical” or “political”

action but also its validation.⁴¹ But, Nietzsche again, “the raising” of such an idea always involves a “breaking” and a “sacrifice.”⁴²

When the raised is instantiated, when it is enclosed in particularity, there is an inexorable exclusion and sacrificing of others – of those who are ‘other’ to that emplacement of universal freedom. That exclusion, in turn, takes on an irreducible intensity because those excluded others, being beyond a universal good, can only ‘be’ absolutely and chasmically beyond. They can only be “enemies of freedom,” as George W. Bush put it in his address to the Congress of the United States on 20 September, and this is why they “hate us:” “They hate our freedoms, our freedom of religion, our freedom of speech, or freedom to vote and assemble and disagree with each other.”⁴³ They are, he would add, “hateful of freedom” itself, “jealous of our way of life,” a way of life founded on freedom, and war has to be waged against them in the name of and for that freedom.⁴⁴ Yet, being universal, that good also extends incipiently to them. Here an apt rhetorical charge is provided by the British Prime Minister. The clarion that was his speech to the annual Conference of the Labour Party on 2 October 2001 would spread the “values of democracy and freedom round the world,” and would bring into the fold “the wretched...those living in want and squalor from the deserts of northern Africa to the slums of Gaza, to the mountain ranges of Afghanistan: they too are our cause.”⁴⁵ This extension is not offered even remotely in a spirit of mutual adjustment. It is the extension of a sovereign community which can be-with or ‘tolerate’ others within an unencumbered freedom and without change to its ‘normal’ position.⁴⁶ In all, yet another variant of the frustrated algebra impelling the Occident’s universal – the impossible combining of exclusion with inclusion. This is not exactly “wanted dead or alive,” to borrow another presidential *aperçu*, but rather “wanted dead and alive.”

From what position can ‘the lords of humankind’ thus bestride such an ambivalent world? How can universal arrogation be conjoined with particular location? Transposing this

second question to human rights, we could also ask how the 'human' of human rights can be encompassed, set about, made containedly present, yet still be the encompassing, surpassing human. How could such a quality of the human be definitively instantiated? Any particular instantiation as an operative human right is immediately revealed as contested and uncertain (we are, after all, only human), backed by different efficacies of force and representation, subject in its very formulation to broad discretions and derogations. So instantiated, the right in question could no longer be held as transcendently pure, but would be revealed as ever contingent and varying, and as constitutively including some people and excluding others. There have been necessary expedients in which this arrogation of the universal and its particular location have been conjoined as, for example, inescapable fact, or as natural, or as a racialized prerogative, but the most prominent expedient in the current situation, and one which concentrates these others, is that of the exemplar.

With this expedient, a universal value or ideal is concentrated in the particular through an exemplar conceived in occidental or national terms. The very purchase on the universal becomes folded into and even a property of this exemplar. So, the 'human' of human rights is realized in the exemplar where it becomes factually placed and palpable, yet where it remains universally elevated and a repository of human rights as juridical norm. Those outside the range of the completeness of this fusion of fact and norm can only ever be somehow less-than-human. As such, they provide a structured transgression of human rights and endow the vacuity of these rights with content as that which is thus transgressed against.

Such exemplarity, being intrinsically exemplary of the universal, imports that solipsistic extremity attributed by Baudrillard to "the West." Intimations generated by the September events abound. For example, "anti-Americanism" can be countered by promoting a more adequate picture of the United States and its deeds.⁴⁷ The exemplar, then, need only hold fast to what it is. Donald Rumsfeld, when "asked what he would call a victory in

America's new war,...said that if he could convince the world that Americans must be allowed to continue with their way of life, he would consider it a victory."⁴⁸ This enduring exemplarity has also to be more than held, for with it comes the responsibility, the burden, the "mission," the destiny of making the value or the ideal 'truly' universal.⁴⁹ This is a surpassing responsibility for the other, for bringing the other into sameness, not a responsibility to the other. And so the British Prime Minister, in that same speech to his Party, could call "us" not just to benevolent action but also to force of arms and, in responding to both calls, we would "reorder the world around us," all in the name of that selfsame world.⁵⁰ Such calls can only be absolute – "let there be no moral ambiguity" cautioned the same moral source.⁵¹ If they were anything less, if such calls were explicitly contingent or delimited, or ambiguous, the exemplar could no longer appear as the carrier of the universal.

That exorbitant position can hardly be a pacific one. Not only is there an oppositional exclusion of others in its very constitution but, with the universalist imperative that the same others be included, it ensures that the relation to them is an engaged confrontation. This unsettled combining of inclusion with exclusion is an extraversion of the irresolution within the exemplar itself. The modern universal cannot be endowed with enduring content in some quondam reference beyond. Nor can such content form within such universal, for to come to the universal from within is never to encompass or be able to hypostatize it. In short, the bringing of the universal into a determinate, and determinant, particularity can never be something enduringly set. The particularity of its instantiation will itself be continually subject to dissipation. In the result, the position of exemplarity does have constantly to be 'held,' self-evidently or otherwise. To achieve this there has to be some responsive regard to the chaos of possible effect that ensures from an orientation towards, and from within, the universal. That responsiveness, in turn, has to combine with a bringing of the chaos of effect

into order. Summarily, with its embracing of the universal, the position of exemplarity brings possible effect into relation with the particular and, in the same moment, its universalised elevation of the particular rejects what is found unfitting.

An attuned mechanism of exemplarity can be instanced in the “war on terrorism” – a war “to realize the freedom that we have taken for granted up to now,” according to George W. Bush.⁵² With its vacuity of content and range – spatial as well as temporal, with its pervasive incipience and pall, this war not only allows of an indefinite potentiality of action but also accommodates an equally indefinite variety of potential ‘targets.’⁵³ It also takes the idea of a human rights war to something like its ultimate extent. That is, the exemplary espousal of human rights along with the values taken as sustaining them – values of civilization, freedom and democracy – are operatively combined with their extension throughout the globe through the waging of war on those who are deemed in terms of a protean ‘terrorism’ to be opponents of such rights and values..

This is a new type of imperial war. It does draw on elements of older types of war but cannot be reduced to any of them. Although the present ‘war on terrorism’ took fitful justification as the response of a sovereign state to unjustified aggression, and it has been oriented potentially towards states which “harbour terrorists,” it is not at all confined in this way and as yet overt war has been directed against organizations which are not recognized states, or purportedly not considered to be such.⁵⁴ Yet, if the present war is not a more traditional war as between sovereign states, neither is it simply that more figuratively labelled ‘war’ – the war on drugs, the war on crime – where concentrated action is directed against a specific type of transgression, and military means are not supposed to assume a predominance, even if at times and in places they do. Nor can the present war be assimilated to the ‘world’ wars of the twentieth century, even if a similarity of total engagement is asserted: as Rumsfeld has it, “wars in the twenty-first century will increasingly require all

elements of national power: economic, diplomatic, financial, law enforcement, intelligence, and both overt and covert military operations.’⁵⁵ Yet the ‘world’ wars were still limited in aim and geography, and the current conflict asserts a freedom of action that accepts no geographical bounds and advances aims of an ever-expansive kind. Although conducted by particular nations, it is a war that takes the globe as its field of ever incipient battle, and it is waged in the name of a globalized humanity. Yet, further, if in its extensive and extensible range this is a global war, a war for the sovereignty of a global community, it is still not, at least in its self-constitution, akin to some ultimate civil war within or for that community, since the enemy is typically presented as utterly illegitimate, as something at the end of history, an eliminable rump. The old boundaries demarcating, even constituting, war now seem to disappear – the boundary between war and peace, war and law, war and the market.⁵⁶

Before concluding with an indication of what this imports for human rights and for its juridical element, I will set an opposing scene. If their imperiously free assertion has oriented human rights towards absorption within war, and within the market, is there now anything of human rights that is distinctively other-regarding, that would extend towards a humanity or universality surpassing a self-regarding appropriation of human rights by its supposed exemplars? If my argument is accepted, the human of human rights cannot be contained by the particular or the instantiated. Humanity as universal can only be approached from within, and from that orientation such humanity extends ever beyond any fixity of position, exemplary or otherwise. Adhering in this way to the commonality of the human necessarily involves a responsive regard to the other, a regard cast beyond any positioning. And such a self-surpassing orientation is intrinsic to the juridical in human rights.

This intrinsic quality of the juridical can be put in a series of stark contrasts. In one of his many pronouncements on the limits of a “legalist approach,” the doyen of progressive international lawyers, Richard Falk, asserts the futility of setting up an international tribunal

to deal with the attacks on the United States since it would be doubtful whether such a tribunal could impose the death penalty – particularly doubtful having regard to widely accepted human rights – and it would thence be “impossible to persuade the United States government to empower such a tribunal.”⁵⁷ Another contrast intrudes with the purposive holding of people at Guantanamo Bay beyond the range of the now pale precursors of human rights found in the constitution of the United States. With the holding in United States military custody of Abdullah al-Muhajir for supposedly plotting to explode a radioactive “dirty bomb,” the government of that country has extended a power of virtually indefinite detention without charge or trial to cover its own citizens.⁵⁸ There has been much debate over the applicability of the Geneva Conventions to these situations but, even taking the stand most favourable to the United States, two types of arbitrary derogation from the treaties are indisputable. With one, “the administration has taken a menu approach to the Geneva Conventions of 1949: It picks only what it wants and ignores the rest.”⁵⁹ With the other, the government of the United States has not shown even the remotest concern with the procedure in the Conventions for determining their applicability.⁶⁰ What one apologist for the United States as “an enormous force for good” says of the plan to invade Iraq is already the case: “a global strategy based on the new Bush doctrine means the end of the system of international institutions, laws and norms... .”⁶¹ And Madeline Albright, something of an expert on these matters, accuses the advisors to George W. Bush of talking about the rule of law whilst seeming “allergic to treaties designed to strengthen the rule of law in areas such as money-laundering, biological weapons, crimes against humanity and the environment.”⁶² Such incantations are now frequent but what is less observed is something of a constitutional limitation on the United States going beyond national self-interest, a limitation in which popular (national) sovereignty is advanced as an insuperable barrier to the United States being subjected to varieties of international obligation – a barrier often advanced in relation

to conventions on human rights. Yet what is more significant is the underlying positioning here in which “the menu approach to the Geneva Conventions” can be generalized in terms of what a senior official in the Bush administration prescribed as “à la carte multilateralism.”⁶³ That much, returning to our opening theme of grand solipsism, can be expected from Bobbitt’s world of competing market-states.

With that same scenario, however, law would still be relied on within the market-state “to shape its internal order.”⁶⁴ Still, this is a law subordinated instrumentally to strategy and war. The corrosive consequences for even a formal adherence to the rule of law are increasingly evident. So, a distinguished “professor of law” in the United States has now “come to recognize the limits of the law,” a law which can be trumped by “exigent circumstances.”⁶⁵ Operatively, enemies in the war are to be denied “moral equivalence;” impartial “legal” modalities are found inadequate for dealing with them; those being held who have not been tried, including citizens of the United States, are routinely described by the highest of United States officials as “illegal,” “killers” and “bad guys” – the list could go on, and doubtless will.⁶⁶

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ENDNOTES

¹ Jacques Lacan, *Écrits*, trans. Alan Sheridan, (London: Routledge, 1989), p.215.

² Jean Baudrillard, “The Melodrama of Difference”, in *The Transparency of Evil: Essays on Extreme Phenomena*, trans. James Benedict, (London: Verso, 1993).

³ *Ibid.*, p.135.

⁴ *Ibid.*

⁵ For such a line of questioning see Jean Baudrillard, *Forget Foucault*, trans. Nichole Dufresne, (New York: Semiotext(e), 1987).

⁶ Zygmunt Bauman, *The Individualized Society*, (Polity Press: Cambridge, 2001), p.99. I am grateful to George Pavlich for this reference. For an excellent portrait of TINA see Jane Kelsey, *At the Crossroads: Three Essays*, (Bridget Williams Books: Wellington, 2002), chapter 3.

⁷ Francis Fukuyama, *The End of History and the Last Man*, (Free Press: New York, 1992). For the point about science see Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution*, (Profile Books: London, 2002), p.xii.

⁸ Fukuyama op. cit. (*Posthuman Future*), p.xii.

⁹ *Ibid.*, pp. xii-xiii.

¹⁰ Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History*, (Allen Lane: London, 2002).

¹¹ For a compressed instance of the former see *ibid.*, p.5 – “...technological innovation provides the stirrup and an empire falls...” – and for strategy see *passim* especially chapters 11 and 12

¹² *Ibid.*, p. 912.

¹³ *Ibid.*, pp. xxvii and 814.

¹⁴ *Ibid.*, pp. xxvi and 814.

¹⁵ *Ibid.*, p. xxvii. A qualification, almost in passing. We should not take the newness of the war Bobbitt intimates as importing that the main virtuous protagonist he has in mind, the United States, has not been for a long time now *We Got to Be So Hated*. (New York: Thunder’s Mouth Press/Nation Books, 2002), pp. xii and 22-41. There is a difference post-September 11 in the explicit espousal by political leaders in the United States of something close to constant war. This is taken up later.

¹⁶ Bobbitt op. cit. p. 819.

¹⁷ *Ibid.*, p. xxxi.

¹⁸ *Ibid.*, pp. xxvii and 815.

¹⁹ This is from Auden’s great poem against war “*The Shield of Achilles*” which Bobbitt sets out in full and appropriates inexplicitly to his purpose: *ibid.*, pp. xxx-xxxii and 817-18.

²⁰ See *ibid.*, pp. ix-x.

²¹ Fukuyama (*Posthuman Future*) op. cit. Part III.

²² *Ibid.*, chapters 7 and 8.

²³ Bobbitt op. cit. e.g. pp. 636-8. Human rights do not figure in his extensive index. Too large an emphasis on human rights, being something of a “global” or international scale, would not fit well with Bobbitt’s tending to confine law to the internal operations of the market-state.

²⁴ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, (Oxford: Hart Publishing, 2000), chapter 5.

²⁵ Peter Fitzpatrick, *The Mythology of Modern Law*, (London: Routledge, 1992), chapters 3 and 4.

²⁶ E.g. John Westlake, “John Westlake on the Title to Sovereignty,” in P.D. Curtin, (ed), *Imperialism*, (London and Basingstoke: Macmillan, 1971), pp.47, 50-1.

²⁷ Peter Fitzpatrick, *Modernism and the Grounds of Law*, (Cambridge: Cambridge University Press, 2001), pp. 207-12.

²⁸ See Richard A. Wilson, “Human Rights, Culture and Context: An Introduction,” in Richard A. Wilson, (ed), *Human Rights, Culture and Context: Anthropological Perspectives*, (London: Pluto Press, 1997), p.10.

²⁹ Charlotte Denny, and Ian Black, “US and Europe Boost Aid to Poorest Countries,” *The Guardian*, 15 March, 13, 2002.

³⁰ The Global Compact http://65.214.34.30/un/gc/unweb.nsf/content/UN_Report_061402.htm.

³¹ Conference for Security and Co-operation in Europe, 1990 Summit, Charter of Paris for A New Europe, <http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm>.

³² Fukuyama (*Posthuman Future*) op.cit. p.126.

³³ For the unsurpassed analysis of the former and of its partiality see Noam Chomsky, *The New Military Humanism: Lessons from Kosovo*, (London: Pluto Press, 1999).

³⁴ What We’re Fighting For http://www.propositionsonline.com/html/fighting_for.html

³⁵ *Ibid.*, pp.1-4.

³⁶ *Ibid.*, p.3.

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- ³⁷ Friedrich Nietzsche, *Twilight of the Idols in Twilight of the Idols and The Anti-Christ*, trans. R. J. Hollingdale, (Harmondsworth: Penguin, 1968), p.92 – his emphasis.
- ³⁸ Friedrich Nietzsche, *Beyond Good and Evil*, trans. R. J. Hollingdale, (Harmondsworth: Penguin, 1973), p.30 – his emphasis.
- ³⁹ It could be countered that characteristic notions of ‘liberal’ freedom are inherently qualified in the recognition that freedom is tied to responsibility. Freedom is constrained when there are pertinent obligations to others or when its exercise would do ‘harm’ to others. These constraints, however, constitute a posterior qualification which is not allowed to disturb freedom’s primal efficacy. What the qualification involves is a consequential calculation, one aimed not infrequently at softening the effect of the initial free assertion or aimed at securing its acceptance. Qualification of this kind would serve to sustain rather than disabuse claims to the prerogative possession of a “self-evident” freedom.
- ⁴⁰ Hannah Arendt, *Between Past and Future*, (New York: Penguin Books, 1993), p.143. For resonance becoming direct attribution, see Arendt’s identification of such freedom with the U.S. revolution: Hannah Arendt, *On Revolution*, (London: Penguin, 1973).
- ⁴¹ Arendt (*Past and Future*) op. cit. pp. 143, 151.
- ⁴² Friedrich Nietzsche, *The Genealogy of Morals in The Birth of Tragedy and the Genealogy of Morals*, trans. Francis Golfing, (New York: Doubleday, 1956), p.228.
- ⁴³ Arundhati Roy, “The Algebra of Infinite Justice,” *The Guardian Saturday Review*, 29 September, 2001; Vidal op. cit. p.5.
- ⁴⁴ Morris Berman, “Waiting for the Barbarians,” *The Guardian Saturday Review* 6 October, 2001; Julian Borger, “Blunders Prompt US Security Shake-Up,” *The Guardian*, June 7, 2002.
- ⁴⁵ Richard Shannon, “History lessons,” *The Guardian – G2*, 4 October, 2001, 3.
- ⁴⁶ For a brilliantly delineated genealogy of such tolerance see Paul Passavant, *No Escape: Freedom of Speech and the Paradox of Rights*, (New York: New York University Press, 2002), chapter 3.
- ⁴⁷ David Owen, “A World of Difference,” *The Guardian – G2*, 11 October, 2001.
- ⁴⁸ Roy op. cit..
- ⁴⁹ Jacques Derrida, *The Other Heading: Reflections on Today’s Europe*, trans. Pascale-Anne Brault, and Michael Naas, (Bloomington: Indiana University Press, 1992).
- ⁵⁰ Hywel Williams, “The Danger of Liberal Imperialism,” *The Guardian*, 4 October, 2001, 21.
- ⁵¹ *Ibid.*
- ⁵² Simon Tisdall, “Cool But Confident Welcome for Victory,” *The Guardian*, 7 December, 2001.
- ⁵³ Donald H. Rumsfeld, “Transforming the Military,” *Foreign Affairs*, Vol. 1, No.83, 2002, pp. 20-32. Like much else touched on here, this is not an entirely new response to September 11. Before that, the professed policy of the United States was one of “full-spectrum dominance,” which translates as “the ability of U.S. forces operating alone or with allies, to defeat any adversary and control any situation across the range of military operations,” and these operations would also include “amorphous situations like peacekeeping and noncombat humanitarian relief.” Jim Garamone, “Joint Vision 2020 Emphasizes that Full-spectrum Dominance,” *American Forces Press Service*, June 2, 2000.
- ⁵⁴ The Taliban were either not treated as the government of a sovereign state or were treated as an illegitimate regime.
- ⁵⁵ Rumsfeld op. cit., p.30.
- ⁵⁶ Cf. generally Eric Hobsbawm, “War and Peace in the 20th Century,” *London Review of Books*, Vol.24, No.4, 21 February, 2002.
- ⁵⁷ Richard Falk, “Ends and Means: Defining a Just War,” *The Nation*, October 29, 2001, 11, p.12.
- ⁵⁸ The power is claimed, in terms that resonate with the Geneva Conventions, to be exercisable until the end of hostilities – an end projected by Rumsfeld and others beyond fifty years: Matthew Engel and Oliver Burkeman, “Ashcroft Under Fire in Dirty Bomb Case,” *The Guardian*, June 13, 2002.
- ⁵⁹ For the arguments on both sides see Human Rights Watch: <http://www.hrw.org/press/2002/01us012802-ltr.html>. The quotation comes from Charles Levendosky, “We Cannot Ignore Provisions of the Geneva Conventions,” *Casper Star-Tribune*, February 10, 2000,

reproduced in First Amendment Cyber-Tribune Fact,
<http://w3.trib.com/FACT/1st.lev.genevaconventions.html>

⁶⁰ On the question of applicability see Article 5 of the Geneva Convention of 1949, the text relied on here being at <http://www.unhchr.ch/html/menu3/b/93.html>.

⁶¹ William A. Galston, "Why a First Strike Will Surely Backfire," Washington Post, June 16, 2002.

⁶² Giles Whittell, "Albright Attacks US Foreign Policy as Schizophrenic," The Times, May 21, 2002.

⁶³ Richard Butler, "US Unilateralism: Sovereignty Über Alles," The Globalist: wysiwyg://13/<http://www.theglobalist.com/nor/richter.2002.04-24-02.shtml>. Butler adds: "Others in the Bush administration have justified the approach because the United States is the sole superpower and is therefore exceptional." Ibid.. A particularly revealing instance of this arrogance can be found in the attitude to "coalitions" put together to fight "the war on terrorism:" see e.g. Rumsfeld op. cit. p.31.

⁶⁴ Bobbitt, op. cit. p.814.

⁶⁵ Michael J. Glennon, "Terrorism and the Limits of Law," The Wilson Quarterly, Vol. XXVI, 2002, pp.12,19.

⁶⁶ See e.g. the Rumsfeld news conference at http://www.defenselink.mil/news/Nov2001/t11132001_t113nb.html and Ewen MacAskill, Richard Norton-Taylor, and Julian Borger, "UK Dilemma over Treatment of Captives" and "What will happen to the Prisoners?" The Guardian, January 18, 2002, and also Julian Borger, "Rumsfeld Sets out Tribunal Plan for War Captives," The Guardian, March 22, 2002. For the list going on see e.g. Ronald Dworkin, "The Trouble with Tribunals," The New York Review of Books, Vol. XLIX, 2002, p.10.