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# Are Things Falling Apart?<sup>1</sup> Rethinking the Purpose and Function of International Law

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## I. INTRODUCTION

Since the end of the Cold War, the Western discourse in international law has increasingly focused on how to *save* the “failed” or “outlaw” state.<sup>2</sup> This discourse has risen to the level of a strategic and moral din after the terrorist attacks on September 11, 2001. With the primary aim of preventing Third World states

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1. This title was appropriated from WILLIAM BUTLER YEATS, *THE SECOND COMING* (1922) (“Things fall apart, the center cannot hold; Mere anarchy is loosened upon the world”).

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2. See generally GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES* (2004) [hereinafter SIMPSON, *GREAT POWERS*]; Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997); Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL’Y 3 (1992); Sebastian Mallaby, *The Reluctant Imperialist*, 81 FOREIGN AFF. 2 (2002); Henry J. Richardson, III, “Failed States”, *Self-Determination, and Preventative Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT’L & COMP. L.J. 1 (1996); Ralph Wilde, *The Skewed Responsibility Narrative of the “Failed States” Concept*, 9 ILSA J. INT’L & COMP. L. 425 (2003). The term “save” means not only to rescue or preserve from harm, but also to deliver and redeem from evil and sin. While a failed state may require saving because its infrastructures have collapsed, an outlaw state requires saving from the sins it propagates on its own peoples or other states. The purpose of this article is to rethink the issue of saving by asking, “Who are we really trying to save – them or ourselves?”

from becoming “reservoirs and exporters of terror,” scholars, policymakers, and journalists have advocated various paradigms to redeem these states from their collapsed governmental infrastructures (the failed state scenario) or from their illegal acts of internal or international violence (the outlaw state scenario).<sup>3</sup> Such paradigms have included placing conditions on development or humanitarian aid,<sup>4</sup> engaging in forceful humanitarian or democratic intervention,<sup>5</sup> instituting post-conflict United Nations transitional administrations,<sup>6</sup> returning to a trustee system,<sup>7</sup> and even bringing back old-fashioned colonialism.<sup>8</sup> In the last fifteen years, these paradigms have become the tools for collective or unilateral interventions of various degrees in Libya, Panama, Iraq, Somalia, Haiti, Cambodia, Sierra Leone, Bosnia, Rwanda, the Federal Republic of Yugoslavia, East Timor, Sudan, Afghanistan, and more.<sup>9</sup>

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3. Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFF., 127, 128 (2002); see Wilde, *supra* note 2, at 426 (discussing Western legal scholars’ definition of the “failed state”); see Gerry Simpson, *Two Liberalisms*, 12 EUR. J. INT’L L. 537, 560-65 (2001) [hereinafter Simpson, *Two Liberalisms*] (discussing Western legal scholars’ various definitions of an “outlaw state”).

4. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1994); see also Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 513, 624-26 (2002) (discussing how the World Bank and IMF seek to promote good governance through conditions on development loans).

5. See, e.g., W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 239 (Gregory H. Fox & Brad R. Roth eds., 2000); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. OF INT’L L. 141 (1999); Fernando Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT’L L. 323 (1996).

6. See, e.g., Rotberg, *supra* note 3, at 127; Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76 (2001). For a general analysis of United Nations state-building efforts, see Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT’L L. 583 (2001).

7. See, e.g., Helman, *supra* note 2, at 12-18; Inis L. Claude, Jr., *The United Nations of the Cold War: Contributions to the Post-Cold War Situation*, 18 FORDHAM INT’L L.J. 789, 790-93 (1995).

8. See, e.g., William Pfaff, *A New Colonialism?*, 74 FOREIGN AFF. 2 (1995); Paul Johnson, *Colonialism’s Back – And Not a Moment Too Soon*, N.Y. TIMES, Apr. 18, 1993, at 6.

9. James Thuo Gathii has commented that “[s]ince the end of the Cold War, an industry in international legal circles has developed around justifying more interventionism in international affairs to protect human rights, avert or attend to international humanitarian emergencies, install democracies, monitor elections, and oversee transitions from authoritarian one-party states and military regimes, among a variety of similar do-gooder programs and projects.” James Thuo Gathii, *Neoliberalism*,

The legal debate surrounding the failed or outlaw state phenomenon has centered on whether established principles of sovereignty and self-determination permit unilateral or collective intervention into the internal affairs of non-Western states to remedy the perceived causes of their failure or criminality, namely, terrorism, fundamentalism, nationalism, and tyranny. However, this debate ignores two main presumptions (along with a genealogy of more general presuppositions descending from each of these presumptions) that underlie the concept of the failed or outlaw state.

First, the failed/outlaw state concept presumes that when a state collapses or commits illegal acts of internal or international violence, “the state, its people and its leaders are solely responsible.”<sup>10</sup> Under this presumption, the state itself failed or turned to a life of crime. This presumption is derived from the liberalist presupposition that since 1945, “ex-colonial states have been internationally enfranchised and possess the same external rights and responsibilities as all other sovereigns.”<sup>11</sup> Thus, the Third World states’ own cultural and political immaturity, rather than the vestiges of colonialism, account for the failing governmental infrastructures.<sup>12</sup> This presupposition of sovereign equality is, in turn, based on another presupposition that colonialism was an exceptional, ephemeral, and non-integral part of international law.<sup>13</sup> Finally, at bottom, is the idea that international law evolved toward universality by extending “sovereignty to all states without making the invidious cultural distinctions between the civilized European and the uncivilized

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*Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2010 (2000) (critiquing BRAD ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999)).

10. Wilde, *supra* note 2, at 426; see Simpson, *Two Liberalisms*, *supra* note 3 (discussing international legal scholars’ various definitions of an “outlaw state”).

11. ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 21 (1996).

12. *Id.* at 25. Those who contend that the vestiges of colonialism and imperialism remain are typically accused of either attempting to shift the blame or engaging in a useless debate. See Brad R. Roth, *Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii*, 98 MICH. L. REV. 2056, 2065 (2000) [hereinafter Roth, *Governmental Illegitimacy*] (arguing that Gathii’s characterization of “contemporary international law as essentially continuous with patterns of past Western domination . . . scarcely promises a more effective defense to the phenomena – economic disempowerment, cultural imperialism, and the proposals to subject ‘failed states’ to trusteeship – against which he inveighs”).

13. Gathii, *supra* note 9, at 2019.

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non-European that had served in the nineteenth century to exclude non-Europeans from the realm of sovereignty while subjecting them to colonialism.”<sup>14</sup>

The second presumption underlying the concept of the failed or outlaw state is that the state at issue falls below a certain level of success (in the case of a failed state) or law-abidingness (in the case of the outlaw state).<sup>15</sup> But this presumption necessarily presupposes an existing benchmark against which to judge the success and lawfulness of these states. Since the concept of the failed or outlaw state originated in Western scholarly and policy discourse, it must further be presupposed that the modern Western nation-state provides the benchmark; otherwise, Western scholars would be in the predicament of deeming their own states as failures or outlaws. This, in turn, presupposes that “Western models ultimately offer the only reasonable alternative to the current state of international affairs” and that “Western philosophy, science, and culture remain the sole guarantors of international stability and prosperity.”<sup>16</sup> Thus, so long as a state remains different from Western states, it is considered stagnant, declining, or ‘Third World,’ and therefore deserves to be treated as such. At the bottom of this lineage of presuppositions is the idea that the world is divided into states that are successful, lawful, and rational (i.e., Western states), and those that are not (i.e., non-Western states).

The two presumptions that underlie the concept of the failed or outlaw state are inherently contradictory. One assumes universality in which all states are treated equally under international law. The other assumes division in which states that cannot, or do not, conform to the Western model of a modern state are inferior and, therefore, subject to unequal treatment. One speaks of increasing inclusion, while the other speaks of perpetual exclusion. One preaches the end of history; and the other prophesizes the clash of civilizations.<sup>17</sup> This seemingly obvious contradiction is entirely missing from the mainstream “sovereignty” debate regarding failed or outlaw states. Yet, not

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14. Anghie, *supra* note 4, at 514.

15. Gathii, *supra* note 9, at 2018; *see also* Wilde, *supra* note 2, at 428.

16. SIBA N’ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 180 (1996).

17. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992); Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

only is this contradiction essential to the resolution of the problem of the outlaw or failed state, but it beats at the very heart of international law, its institutions, and its prescriptions. It is how international law has reconciled the presumption of universality with that of division that contributes to (if not causes) terrorism, fundamentalism, nationalism, and tyranny in the world. International law is part of the problem, not the solution, of failed and outlaw states.

This article seeks to rethink the purpose and function of international law from an entirely different perspective. It proposes to show how international law employs techniques of universality and division along the continuums of time and space to acquire knowledge and power over difference. To do so, this article adopts a postmodern approach in which “[w]riting about otherness is writing *otherwise*.”<sup>18</sup> As Barbara Stark observed, postmodernism is “the method of choice of the ‘omitted,’ the excluded, because it focuses on those narratives at the margins rather than on those at the center.”<sup>19</sup> Furthermore, since transgressing boundaries is characteristic of the postmodern method, it allows comparisons with works of other genres.<sup>20</sup> For this reason, this analysis is based on the two texts, *Orientalism* by Edward Said, and *Discipline and Punish: the Birth of the Prison* by Michel Foucault.<sup>21</sup> While these writers are not legal scholars, they nevertheless provide new insights into the function and purpose of international law.

This article is divided into four parts. Section II briefly explains why I have chosen these particular authors and texts as the basis of my comparison. The next section discusses how the historical methodologies found in *Discipline and Punish* and *Orientalism* challenge international law’s metanarrative that depicts its legal history as an evolutive process toward universal and neutral legal principles. The history underneath this

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18. PETER MASON, DECONSTRUCTING AMERICA: REPRESENTATIONS OF THE OTHER 4 (1990).

19. Barbara Stark, *After/word(s): “Violations of Human Dignity” and Postmodern International Law*, 27 YALE J. INT’L L. 315, 318 (2002).

20. *Id.* at 319 n.26; Stephen Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 693-97 (2000).

21. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Allen Sheridan trans., Pantheon Books 1977) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH]; EDWARD W. SAID, ORIENTALISM (Penguin Books 2003) (1978) [hereinafter SAID, ORIENTALISM].

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metanarrative shows how international law uses universalism and division along the time and space continuums to control a vast number of cultures, peoples, and histories. Section IV addresses Said's and Foucault's theories of resistance to show how, far from preventing or rehabilitating failed and outlaw states, international law has created them. Section V analyzes these issues in the context of the ongoing Iraqi crisis that is a quintessential case of international law's attempt to create and dominate an outlaw state.

## II. WHY SAID AND FOUCAULT?

Even before the coalition forces marched into Baghdad in the sequel to the 1991 Gulf War, international legal and political scholars in the United States already began talking extensively about how to build a democratic Iraq.<sup>22</sup> While this rush to democratize was not unprecedented, other post-conflict democratization drives (in Bosnia, Kosovo, and East Timor, for instance) *appeared* more justifiable given that both the international community and the warring factions publicly agreed that self-determination was the primary goal of those conflicts. In Iraq, however, the coalition was not there to liberate a people, but rather to promote its own interests, whether those interests were national security, oil, or the elimination of an old adversary. In fact, President George W. Bush repeatedly disavowed any desire to engage in the state-building activities of his predecessor, in Iraq, or anywhere else.<sup>23</sup> Moreover, it was not universally clear that the people of Iraq wanted international help with democratization – or at least their voices were noticeably absent from the state-building discourse. If *our* interests were not self-determinative, and *their* interests were yet unknown, then what was the driving force

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22. See, e.g., Daniel Byman, *Constructing a Democratic Iraq: Challenges and Opportunities*, 28 INT'L SECURITY 47 (2003); Aeed Dawisha & Karen Dawisha, *How to Build a Democratic Iraq*, 82 FOREIGN AFF. 36 (2003); Kanan Makiya, *A Model For Post-Saddam Iraq*, 14 J. DEMOCRACY 5 (2003).

23. During his election campaign, then-Governor George W. Bush stated (quite presciently), "If we don't stop extending our troops all around the world in nation-building missions, then we're going to have a serious problem coming down the road." See *Vice President Gore and Governor Bush Participate in Presidential Debate* (Oct. 3, 2000), at <http://www.cnn.com/ELECTION/2000/debates/transcripts/u221003.html>; see also Mallaby, *supra* note 2, at 5-6. Even after the terrorist attacks of September 11, President Bush maintained this position, refusing to commit peacekeeping troops in Afghanistan. Only after public pressure following the occupation in Iraq did he appear to change his view regarding state-building.

behind this democratization project?

The search for this unidentified driving force led me to Edward Said, whose works are not only critical of the international treatment of Iraq since 1990,<sup>24</sup> but also include *Orientalism*, which is considered one of the founding texts on postcolonial studies.<sup>25</sup> While *Orientalism* focuses primarily on how literature over the last two centuries created and re-created the Orient, his work is “deeply informed by, and engaged in commenting upon, the dynamics of political and cultural interaction in world politics and the relationship of the West to the non-West.”<sup>26</sup> However, the scope of *Orientalism* extends beyond Middle East politics. Said seeks “to illustrate the manner in which the representation of [the West’s] ‘others’ has been institutionalized since at least the eighteenth century as a feature of its cultural dominance.”<sup>27</sup> As Said states in the preface to the 2003 edition of *Orientalism*, the book “for all its urgent worldly references, is still a book about culture, ideas, history and power, rather than Middle Eastern politics *tout court*.”<sup>28</sup> Thus, *Orientalism* offers a methodology for analyzing how international law, which is also a product of Western culture, ideas, history, and power, perpetuates the colonial and imperialist legacies of earlier centuries.<sup>29</sup>

At its core, *Orientalism* is about cultural dominance. Through the analysis of texts by various Western authors, Said shows how Western culture has sought over time to represent and dominate its “others” in a way that has allowed it to maintain a superior self-image.<sup>30</sup> In its material manifestation, Said defines Orientalism as

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24. See, e.g., Edward Said, *When Will We Resist?*, GUARDIAN (Jan. 25, 2003) [hereinafter Said, *When Will We Resist?*]; Edward Said, *A Window on the World*, GUARDIAN (Aug. 2, 2003) [hereinafter Said, *A Window on the World*]; see also SAID, ORIENTALISM, *supra* note 21, at 2003.

25. JACINTA O’HAGAN, CONCEPTUALIZING THE WEST IN INTERNATIONAL RELATIONS: FROM SPENGLER TO SAID 185 (2002).

26. *Id.* at 185-86.

27. BILL ASHCROFT & PAL AHLUWALIA, EDWARD SAID 49 (1999).

28. SAID, ORIENTALISM, *supra* note 21, at xii.

29. Although this article uses the terms interchangeably, Said defines “imperialism” as “the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory” and “colonialism” as “the implanting of settlements on distant territory.” He argues that while colonialism has largely ended, imperialism “lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic, and social practices.” EDWARD W. SAID, CULTURE AND IMPERIALISM 8 (1993) [hereinafter SAID, CULTURE AND IMPERIALISM].

30. See SAID, ORIENTALISM *supra* note 21, at 12, 32. In a 1995 review of ORIENTALISM, Said described the intention of his work as a “multicultural critique of

“the corporate institution for dealing with the Orient – dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style of dominating, restructuring, and having authority over the Orient.”<sup>31</sup>

Here enters Foucault. To identify Orientalism, Said expressly relies on Foucault’s notion of discourse, and its implied relationship between knowledge and power, as described in *Discipline and Punish* and *Archaeology of Knowledge*. Said contends that “without examining Orientalism as a discourse, one cannot possibly understand the enormously systematic discipline by which European culture was able to manage – and even produce – the orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period.”<sup>32</sup> While this assertion implicitly references Foucault’s ideas about power in *Discipline and Punish*, Said offers no further explanation of his indebtedness to Foucault.<sup>33</sup>

Nor is it entirely self-evident how Foucault’s book about the birth of the prison system in modern Europe relates to the study of cultural imperialism and the relationship between the West and the non-West. As one commentator observed:

Foucault had a lot to say about power, but he was curiously circumspect about the ways in which it operated in the arenas of race and colonialism. His virtual silence on these issues is striking. In fact Foucault’s work appears to be so scrupulously Eurocentric that you begin to wonder whether there isn’t a deliberate strategy involved.<sup>34</sup>

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power using knowledge to advance itself.” Edward Said, *East Isn’t East: The Impending End of Orientalism*, 4792 TIMES LITERARY SUPP. 4 (Feb. 3, 1995) [hereinafter, Said, *East Isn’t East*].

31. SAID, ORIENTALISM, *supra* note 21, at 3. Said also defines “Orientalism” textually as an academic discipline and a style of thought. *Id.* at 2-3. While the corporate institution definition is the one most relevant for purposes of this article, all three definitions are interrelated and illustrate how “Orientalism is a complex web of representations about the Orient.” ASHCROFT & AHLUWALIA, *supra* note 27, at 57.

32. SAID, ORIENTALISM, *supra* note 21, at 3; *see also* Edward W. Said, *Foucault and the Imagination of Power*, in FOUCAULT: A CRITICAL READER 153 (David Couzens Hoy ed., 1986) [hereinafter Said, *Foucault and the Imagination of Power*] (commenting that “Foucault is certainly right – and even prescient – in showing how discourse is not only that which translates struggle or systems of domination, but that *for which* struggles are conducted”).

33. SAID, ORIENTALISM, *supra* note 21, at 23.

34. Robert J. C. Young, *Foucault on Race and Colonialism*, 25 NEW FORMATIONS 57

Said shared this perception about the Eurocentricity of Foucault's work.<sup>35</sup> Nevertheless, as Sara Mills observed, primarily because of Said's use of Foucault's theories in *Orientalism*, "[p]ost-colonial theory . . . has consistently drawn on and reacted to Foucault's work and, in some instances, has tried to make it more profoundly political or materialist and even compatible with psychoanalytical thought."<sup>36</sup> Thus, in order to better understand Said's ideas about culture and imperialism in *Orientalism*, they should be analyzed alongside Foucault's ideas in *Discipline and Punish*. The latter provides the methodological springboard for the former, to the extent that the two works both converge and diverge. Moreover, together they suggest how international law functions as a means of dominating and confining the West's "other."

### III. INTERNATIONAL LAW'S COUNTER-NARRATIVE

#### A. *The Orthodoxy*

In his article, *Nomos and Narrative*, Robert Cover observes that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning . . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."<sup>37</sup> Therefore, the narrative that is chosen to describe international law has an enormous impact on the world's disparate human communities.<sup>38</sup> Unfortunately, instead of a lively debate over the history of international law, one metanarrative is accepted, almost dogmatically so, among Western international legal scholars.<sup>39</sup>

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(1995).

35. See Edward Said, *Wild Orchids and Trotsky*, in POWER, POLITICS, AND CULTURE 167 (Gary Viswanathan ed., 2001) [hereinafter Said, *Wild Orchids*]; Edward Said, *Michel Foucault, 1926-1984*, 4 RARITAN (1984), reprinted in 7 MICHEL FOUCAULT: CRITICAL ASSESSMENTS 261, 267-68 (Barry Smart ed., 1995) [hereinafter Said, *Michel Foucault 1926-1984*].

36. SARA MILLS, MICHEL FOUCAULT 30 (2003).

37. Robert M. Cover, *The Supreme Court, 1982 Term-Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

38. See Stark, *supra* note 19, at 321-22.

39. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 316 (1907) (remarking that "[t]he history of international law is certainly the most neglected province").

This metanarrative describes international law as progressing towards increasingly greater equality among nation-states in which current international legal norms reflect universal values that promote the welfare of all.<sup>40</sup> Thus, the modern period “introduced a system in which states, for the first time, are treated equally and in which international law aspires to global coverage.”<sup>41</sup> The orthodox Western view of the history of international law with regard to sovereign equality among nation-states can be summarized as follows. Prior to the seventeenth century, the international system was highly centralized. The Catholic Church exercised spiritual dominion over Europe and the Holy Roman Empire exercised political control over the same. Gradually, the Holy Roman Empire began to dissolve and was replaced by a system based on territorial sovereignty and the nation-state. The watershed moment came with the Westphalian peace settlement of 1648, which Western publicists typically attribute to origins of both their discipline and the modern idea of sovereign equality among nation-states.<sup>42</sup> Westphalia “emasculated the Empire, reducing it to one among many sovereigns, and begins a process by which the state becomes a standard item of social organization eclipsing the multifarious forms in existence at that time.”<sup>43</sup> From Westphalia forward, international law increasingly became “the voice of civilization, of the center, of the modern, of the future, and of universal humanism and progress against, or in dialog with, the voices of the non-Christian world, the primitive, underdeveloped, non-Western, outlaw world of those who do not yet see things from a high place.”<sup>44</sup> According to this metanarrative, to consider Europe the nucleus of this evolution is not egocentric at all because it merely places the emphasis on “the active agent in a process of which . . . the rest of the world was merely the passive object.”<sup>45</sup>

Within this metanarrative, colonialism and imperialism are explained as nineteenth century aberrations in international law’s

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40. See SIBA N’ZATIOULA GROVOGUI, *supra* note 16, at 11-12.

41. SIMPSON, GREAT POWERS, *supra* note 2, at 12.

42. *See id.* at 30.

43. *Id.* at 35.

44. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335, 359 (2000).

45. GEORG SCHWARZENBERGER, *POWER POLITICS: A STUDY OF WORLD SOCIETY* 28 (3d ed. 1964).

quest for universality. For example, Charles Alexandrowicz insists on the historic universality of international law, arguing that it was tainted by Eurocentricism only in the nineteenth century.<sup>46</sup> Similarly, both Henry Reynolds and Georges Abi-Saab argue that the prevalent doctrinal assumption before the period of the Westphalian peace settlement was that the universality and neutrality of international law transcended the confines of Europe, and it was the (mis)interpretation of these neutral laws by the last two centuries of empire builders that resulted in the colonial aberration.<sup>47</sup> Less apologetically, L.C. Green asserts that the past imbalance between the West and non-West has been exaggerated. While capitulation treaties entered into between the colonizer and the colonized had flaws, they were consistent with the international practice of the time.<sup>48</sup> In short, while scholars accuse the politicians of the colonial period of selectively applying international norms to further their own self-interests, international law itself is exonerated. Since the transformation of colonial territories into sovereign states, and the establishment of the principle of self-determination, modern international legal scholars view international law as now truly universal and cosmopolitan.<sup>49</sup>

Whether self-classified as positivists, naturalists, liberals or realists, international legal scholars overwhelmingly support the universalistic narrative of international law.<sup>50</sup> Jonathan Sacks aptly labeled this metanarrative “Plato’s Ghost” which has haunted Western imagination ever since this *The Republic* philosopher argued that only ideas and concepts are real, eternal, and immutable.<sup>51</sup> Moreover, all these approaches to international law

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46. See CHARLES HENRY ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES 47-59 (1967). See generally SIBA N’ZATIOULA GROVOGUI, *supra* note 16, at 120.

47. See Georges Abi-Saab, *International Law and the International Community: The Long Road to Universality*, in ESSAYS IN HONOUR OF WANG TIEYA 34, 39-40 (Ronald St. John MacDonald ed., 1994); Roth, *Governmental Illegitimacy*, *supra* note 12, at 2065; see e.g., HENRY REYNOLDS, THE LAW OF THE LAND 46 (1992).

48. See L.C. GREEN & OLIVE P. DICKASON, THE LAW OF NATIONS AND THE NEW WORLD 14-20 (1989).

49. See Anghie, *supra* note 4, at 513-14.

50. See GREEN & DICKASON, *supra* note 48, at 33; see also Steve Smith, *Is the Truth Out There? Eight Questions About International Order*, in INTERNATIONAL ORDER AND THE FUTURE OF WORLD POLITICS 99, 111 (T.V. Paul & John A. Hall eds., 1999).

51. Jonathan Sacks, *The Dignity of Difference: How to Avoid the Clash of Civilizations*, ORBIS 603 (2002).

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bow to the sanctity of the nation-state. While scholars dispute whether nation-states are, or should be, equal, and whether international institutions can, or should, limit their freedom to act in their self-interest, these legal theorists take for granted that the nation-state is the essential building block of any international legal order. What is lacking is a counter-narrative, and Foucault and Said provide the essential tools to begin constructing one.

### B. Foucault's Theories about Discipline

#### 1. A Genealogical Approach to History

At the onset of *Discipline and Punish*, Foucault declares his rejection of Western teleological approaches to history when he tells the reader why he is writing a history of penal reform: "Why? Simply because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing the history of the present."<sup>52</sup> As Mark Posner observes, "Foucault is not proposing a new metaphysics of history in which one age is ontologically separate from the others. Rather, he attempts to extract from the complexity of the past certain lines of struggle because . . . they can have an impact on the way we think about the structures of domination in the present."<sup>53</sup> In this way, *Discipline and Punish* displays Foucault's general aversion to "the form of history that reintroduces (and always assumes) a suprahistorical perspective; a history whose function is to compose the finally reduced diversity of time into a totality fully closed upon itself; a history that always encourages subjective recognitions and attributes a form of reconciliation to all the displacements of the past."<sup>54</sup> To Foucault, such a subjective approach hardens the "error we call truth" into an unalterable form.<sup>55</sup> To avert this pitfall, Foucault employs an approach to history, derived from the Nietzschean concept of genealogy, which reveals "the exteriority of accidents."<sup>56</sup>

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52. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 31.

53. Mark Poster, FOUCAULT, MARXISM AND HISTORY: MODE OF PRODUCTION VERSUS MODE OF INFORMATION 100 (1990).

54. Michel Foucault, *Nietzsche, Genealogy and History*, reprinted in THE FOUCAULT READER 86 (Paul Rabinow ed., 1984) [hereinafter Foucault, *Nietzsche, Genealogy and History*].

55. *Id.* at 79-80.

56. *Id.* at 81.

Foucault's genealogical approach explains why the post-Enlightenment period stands center stage in *Discipline and Punish*. For Foucault, the modern individual and the concept of society were joint projects of this period.<sup>57</sup> The post-Enlightenment humanists attempted to reconcile the need to govern society with individual liberties by disassociating power (viewed as negative and restrictive) from truth (considered benign and emancipatory).<sup>58</sup> Foucault seeks to expose the fallacy of this project, stating "we must cease once and for all to describe the effects of power in negative terms. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production."<sup>59</sup> Far from providing a triumphant story of evolutionary emergence between individual liberties and liberal society, Foucault shows how the individual is the "fabricated reality" of a disciplinary society.<sup>60</sup> He accomplishes this by studying how the prison emerged as the predominant method of punishment over two other methods: the medieval method of torture and public execution, and the classical humanist method of correct representation. This study reveals that this transition from the spectacle of public execution to prison "is not a transition to an undifferentiated, abstract, confused penalty; it is the transition from one art of punishing to another, no less skillful one. *It is a technical mutation.*"<sup>61</sup>

Torture and the public execution were the traditional, monarchical means of punishment based upon a "policy of terror" intended to "make everyone aware, through the body of the criminal, of the unrestrained presence of the sovereign."<sup>62</sup> For Foucault, the public execution did not re-establish justice but rather displayed on the body of the condemned person the dissymmetry of power between the sovereign and those who challenged his laws.<sup>63</sup> It reactivated power in a ritual of violence in

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57. *Id.* at 241-42.

58. See William V. Spanos, *Heidegger, Foucault, and the "Empire of the Gaze": Thinking the Territorialization of Knowledge*, in FOUCAULT AND HEIDEGGER: CRITICAL ENCOUNTERS 235, 267 (Alan Milchman & Alan Rosenberg eds., 2003).

59. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 194.

60. See HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 143 (1983).

61. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 257 (emphasis added).

62. *Id.* at 49.

63. *Id.* at 109.

which “the body of the condemned man became the king’s property, on which the sovereign left his mark and brought down the effects of his power.”<sup>64</sup> But while the king usually prevailed in this contest, it was costly and inefficient; each time his power was challenged, he had to respond with a surplus amount of power in order to restore his control over the realm.<sup>65</sup>

The disproportionate and grotesque nature of both torture and the public execution led a group of humanist reformers in the Classical period to advocate an alternative means of punishment. These reformers observed that the “hand-to-hand fight between the vengeance of the prince and the contained anger of the people, through the mediation of the victim” was not only revolting, but also politically dangerous as the criminal was often pitied or elevated to heroic status by a sympathetic public.<sup>66</sup> According to Foucault, the penal reformers sought a gentler form of punishment that touched the soul rather than the body, that not only addressed the wrong but “obtained a cure,” in order to bring the offender back into the fold of society.<sup>67</sup> Moreover, humanity now sought to impose a limit on punishment.<sup>68</sup> To achieve these objectives, the humanists promoted a whole technology of representational punishment through which a correct ordering of social life could be achieved.<sup>69</sup> Each punishment was carefully imposed to closely correspond with the crime in order to immediately alert the public to the crime and the corresponding remedy. For instance, murder was punished by death and idleness by hard labor. Punishment could therefore function “as a deterrent, recompense to society, and a lesson, all immediately intelligible to the criminal and society.”<sup>70</sup> Yet, beneath the reformers’ humanitarian agenda lurked the true objective of the reform movement:

Not so much to establish a new right to punish based on more equitable principles, as to set up a new ‘economy’ of the power to punish . . . so that it should be distributed in homogenous circuits capable of operating everywhere, in a continuous way, down to the finest grain of the social body . . . [N]ot to punish

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64. *Id.*

65. *Id.* at 50; see DREYFUS & RABINOW, *supra* note 60, at 145.

66. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 61, 73.

67. *Id.* at 22.

68. *Id.* at 92.

69. *Id.* at 104.

70. DREYFUS & RABINOW, *supra* note 60, at 148.

less, but to punish better . . . .<sup>71</sup>

The representational form of punishment, however, was never fully realized. It was supplanted by the disciplinary technologies which manifested in the form of prisons. While these technologies adopted a few characteristics of Classical criminology, including a detailed classification of crimes and an economy of punishment, they contradicted others. In particular, punishment no longer rested on didactic moral insight through public representation. Rather, it focused on the secret, detailed, and studied manipulation of an individual's body through the application of administrative techniques of power.<sup>72</sup> Although disciplinary technologies had long existed in armies, workshops and monasteries, it was not until the post-Enlightenment period that the disciplines became an art of dominating the body in a way that "makes it more obedient as it becomes more useful, and conversely."<sup>73</sup>

Thus, the disciplines introduced a means of meticulous control that both increases utility and decreases resistance, thereby creating what Foucault termed "docile bodies." The fundamental question addressed in *Discipline and Punish* is not, therefore, why torture was replaced by a gentler form of punishment, but rather how "the coercive, corporal, solitary, secret model of power to punish [came to] replace the representative, scenic, signifying, public, collective model."<sup>74</sup>

Foucault suggests at least three reasons for this "colonization of the penalty by the prison."<sup>75</sup> First, because the disciplinary technologies operated outside public view, they were more effective at silencing the criminal than the public execution – which allowed the criminal to give public death speeches that often mocked the sovereign or proclaimed their innocence – and representative punishment – which allowed the criminal to participate in a kind of public morality play. As Dreyfus and Rabinow note, "[w]ith the disciplinary society, human beings

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71. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 80-82; see Spanos, *supra* note 58, at 256; Bob Fine, *Struggles Against Discipline: The Theory and Politics of Michel Foucault*, in 4 MICHEL FOUCAULT: CRITICAL ASSESSMENTS 320 (Barry Smart ed., 1995).

72. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 128-29; DREYFUS & RABINOW, *supra* note 60, at 152.

73. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 137-38.

74. *Id.* at 131.

75. *Id.* at 117.

became objects to be molded, not subjects to be heard or signs to be circulated or read.”<sup>76</sup> This silencing effect also permitted power to inscribe a history of its own choosing upon the body of the criminal. Second, the disciplinary technologies offered the best means of controlling a large number of people with relatively few personnel, which Foucault later labels “the problem of the accumulation of people.”<sup>77</sup> Foucault finds that towards the end of the eighteenth century there was a “shift from criminality of blood to criminality of fraud” in order to infuse the mechanisms of power into the everyday lives, behaviors, and identities of individuals.<sup>78</sup> More types of crimes meant more criminals requiring punishment and surveillance. As will be seen in the next section, the beauty of the disciplinary technologies is that – unlike the other two forms of punishment – in their optimal form they are omnipresent and self-sustaining. Third, the disciplinary technologies maximize power through a meticulous control of the body that assures the constant subjugation of its forces and a relation of docility-utility.<sup>79</sup> The next section will also show that in order to accomplish this docility (and its corresponding increase of power) the disciplinary technologies continuously regulate and manipulate dimensions of time and space.

## 2. The Panopticon’s Use of Time and Space

In *Discipline and Punish*, both space and time are essential as the means through which the disciplinary technologies seek to create docile bodies. Moreover, it is how the disciplinary technologies reconcile seemingly opposing spatial and temporal processes that provide maximum effectiveness for their domination and control over a large number of individuals.

Turning first to Foucault’s theories about space, *Discipline and Punish* relates how the modern disciplines derived their spatial tools from the historical methods of dealing with two diseases. First, leprosy “gave rise to rituals of exclusion.”<sup>80</sup> The leper was caught up in a practice of rejection and exile-enclosure in which he was cut off from the rest of society and “left to his doom in a mass

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76. Michel Foucault, *The Eye of Power*, in FOUCAULT LIVE 230 (Sylvère Lotringer ed., 1996).

77. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 77.

78. *Id.* at 137.

79. *Id.* at 198.

80. *Id.* at 198.

among which it was useless to differentiate.”<sup>81</sup> Second, the plague gave rise to the disciplinary project whereby instead of a “binary division between one set of people and another,”<sup>82</sup> the plague-stricken town demanded:

[an] enclosed, segmented space, observed at every point, in which the individuals are inserted in a fixed place, in which the slightest movements are supervised, in which all events are recorded, in which an uninterrupted work of writing links the centre and periphery, in which power is exercised without division, according to a continuous hierarchical figure, in which each individual is constantly located, examined and distributed among the living beings, the sick and the dead – all this constitutes a compact model of the disciplinary mechanism.<sup>83</sup>

Thus, between leprosy and the plague, two different scenarios of exercising power over individuals existed (the leper and his separation, and the plague and its segmentations), along with two different political dreams (a pure community free from leprosy, and a disciplined society during the plague).<sup>84</sup> Foucault suggests that the nineteenth century witnessed these seemingly disparate projects coming together in the disciplinary technologies. “Treat ‘lepers’ as ‘plague victims,’ project the subtle segmentations of discipline onto the confused space of internment . . . individualize the excluded, but use procedures of individualization to mark exclusion.”<sup>85</sup> Thus, these disciplines operate in a dual mode: that of “binary division and branding (mad/sane; dangerous/harmless; normal/abnormal), and that of coercive assignment, of differential distribution (who he is; where he must be; how he is to be characterized; how he is to be recognized; how a constant surveillance is to be exercised over him in an individual way, etc.).”<sup>86</sup> Foucault asserts that the disciplinary technologies achieve this dual mode through the interplay of hierarchical observation and normalizing judgment.

Under hierarchical observation, architecture is no longer built primarily to be seen or to observe external space as were the

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81. *Id.*

82. *Id.*

83. *Id.* at 197.

84. *Id.* at 198.

85. *Id.* at 199; see STUART ELDEN, *MAPPING THE PRESENT: HEIDEGGER, FOUCAULT AND THE PROJECT OF A SPATIAL HISTORY* 146 (2001).

86. FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 21, at 199.

medieval fortresses. Instead, it seeks to facilitate internal, constant, and detailed control. Accordingly, the ideal disciplinary apparatus is one that would ensure total subjugation. “[It] would make it possible for a single gaze to see everything constantly. A central point would be both the source of light illuminating everything, and the locus of convergence for everything that must be known: a perfect eye that nothing would escape and a center towards which all gazes would be turned.”<sup>87</sup> Hierarchical surveillance enables the disciplinary power to be both “absolutely *indiscreet* since it is everywhere and always alert,” and “absolutely *discreet* since it functions permanently and largely in silence, thereby minimizing the need to resort to violence.”<sup>88</sup> The normalizing judgment, in turn, provides standards that both unify the operations of the disciplines and solidify their punishments to fine level of specification.<sup>89</sup> These standards are directed against a range of behavior that includes faults (such as lateness, untidiness, and uncleanness) and nonconforming attitudes (such as insolence, disobedience, and disloyalty).<sup>90</sup> By establishing these standards, normalization not only homogenizes, but it also individualizes and hierarchizes through comparison, “making it possible to measure gaps, to determine levels, to fix specialties and to render the differences useful by fitting them one to another.”<sup>91</sup> Thus, for Foucault, it is unsurprising that normalization thrives alongside the Enlightenment principles of equality and emancipation “since within a homogeneity that is the rule, the norm introduces, as a useful imperative and as a result of measurement, all the shading of individual differences.”<sup>92</sup>

Disciplinary technologies combine hierarchical observation and normalized judgment into a ‘normalizing gaze’ or ‘examination,’ making it possible to qualify, classify, and punish the individual while simultaneously maintaining its own invisibility.<sup>93</sup> Thus, unlike in the *ancien régime*, where visibility ascended toward power (i.e., the monarchy), in a disciplinary

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87. *Id.* at 173.

88. *Id.* at 177.

89. See Dreyfus & Rabinow, *supra* note 60, at 158; see Elden, *supra* note 85, at 139.

90. See ALAN HUNT & GARY WICKHAM, FOUCAULT AND THE LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 21 (1994).

91. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 184.

92. *Id.*

93. *Id.* at 183-84.

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regime it descends from it: “as power becomes more anonymous and more functional, those on whom it is exercised tend to be more strongly individualized.”<sup>94</sup> According to Foucault, it is this inversion that assures the exercise of power even in its lowest manifestations through infinite examination and compulsory objectification.<sup>95</sup> The disciplines *make* individuals, not by overt force, but by combining hierarchical observation and normalizing judgment.

Turning to the disciplinary technologies’ temporal processes, Foucault argues that they achieve docile bodies through both seriation and totalization. Using as an example Demia’s suggestions for teaching children in Lyon how to read in stages, Foucault explains that seriation makes possible “a detailed control and a regular intervention . . . in each moment of time” and permits the characterizing of individuals according to a specific level in the series. Seriation additionally allows for the accumulation of time that is “totalized and usable in a final result” of an individual’s capacity. The combined result is that power is “articulated directly onto time,”<sup>96</sup> thereby making time a useful method of subjugation:

The disciplinary methods reveal a linear time whose moments are integrated, one upon another, and which is orientated towards a terminal, stable point; in short, an ‘evolutive’ time. But . . . at the same moment, the administrative and economic techniques of control reveal a social time of a serial, orientated, cumulative type: the discovery of an evolution in terms of ‘progress’ . . . . With the new techniques of subjection, the ‘dynamics’ of continuous evolutions tends to replace the ‘dynastics’ of solemn events.<sup>97</sup>

Thus, by exercising the body through these temporal processes, the disciplinary technologies are able to bend “behavior towards a terminal state,” making possible “a perpetual characterization of the individual in relation to this term, in relation to other individuals, or in relationship to a type of itinerary.”<sup>98</sup> Yet, the terminal state is never fully achieved because the disciplinary technologies exercise bodies towards a subjection

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94. *Id.* at 193.

95. *Id.* at 189.

96. *Id.* at 160.

97. *Id.* at 160-61.

98. *Id.* at 161.

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that never reaches its limit. Herein lies the lesson: the history the disciplines inscribe on our bodies is the very same evolutionary history that Foucault's genealogical approach rejects because it hardens the error of truth into an unalterable form.

For Foucault, the ultimate model for the convergence of time and space is the Panopticon. This Benthamite invention consists of the large circular building, in the middle of which stands a tower with wide windows facing the inner side of the ring. The peripheral building is divided into cells with two windows: one facing the tower and the other facing the outside, thereby allowing light to traverse the entire cell.<sup>99</sup> In the Panopticon, the cells of the periphery "are like so many cages, so many small theaters, in which each actor is alone, perfectly individualized and constantly visible."<sup>100</sup> The inmate is seen, but cannot see; "he is the object of information, never a subject in communication."<sup>101</sup> Moreover, because power is both visible and unverifiable, the Panopticon induces the inmate into a conscious state that assures the automatic and continuous functioning of power. The inmates become their own bearers of the power relation and, therefore, the actual exercise of power becomes unnecessary.<sup>102</sup> By automatizing and de-individualizing power, Panopticism avoids physical confrontation and dispenses with the need for the king.<sup>103</sup> It is "a machine in which everyone is caught, those who exercise the power as well as those who are subjected to it . . . . It becomes a machinery that no one controls."<sup>104</sup> Moreover, Panopticism is polyvalent in that the panoptic scheme may be used whenever one seeks to impose a task or particular behavior on a multiplicity of individuals.<sup>105</sup> Indeed, by de-institutionalizing the Panopticon, the disciplines have permeated society:

Our society is one not of spectacle, but of surveillance; under the surface of images, one invests bodies in depth; behind the great abstraction of exchange, there continues the meticulous, concrete training of useful forces; the circuits of communication are the supports of an accumulation and centralization of

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99. *Id.* at 200.

100. *Id.*

101. *Id.* at 200.

102. *Id.* at 201.

103. *Id.* at 208.

104. *See* Foucault, *supra* note 76, at 234.

105. *Id.* at 261; *see* Spanos, *supra* note 58, at 261.

knowledge; . . . it is not that the beautiful totality of the individual is amputated, repressed, altered by our social order, it is rather that the individual is carefully fabricated in it, according to a whole technique of useful forces and bodies.<sup>106</sup>

In sum, the ceremonies and marks by which the sovereign formerly manifested its surplus power have been replaced by a disciplinary machine through which constant and detailed surveillance assures difference and individuality, while at the same time produces conformity and universality. This is Foucault's counter-narrative.

### *C. Said's Theories about Orientalism*

#### 1. A Musical Approach to History

In *Orientalism*, Said studies how the West has come to know the Orient, since the beginning of the post-Enlightenment period, through various academic disciplines, institutions, and styles of thought. In doing so, he argues that “without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage – and even produce – the Orient.”<sup>107</sup> Said's appropriation of Foucault's disciplinary history, as well as his ideas about the inseparability of knowledge and power, has generated much of the methodological debate over *Orientalism*.<sup>108</sup> While it is not the purpose of this article to join this debate, it will nonetheless show that the multitude of the criticisms read both authors' works too narrowly. Just as *Discipline and Punish* is not merely about the history of prisons, neither is *Orientalism* merely a history of the West's mistreatment of the Orient. Fundamentally, *Orientalism* is about the struggle for cultural dominance, and it is how Said reconciles his own ideas about cultural domination with Foucault's conception of disciplinary society, and applies them on a global scale, that provides the underlying methodology for his book.

As one commentator observed, while Said does not articulate his historical approach in *Orientalism* itself, he adopts a

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106. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 217.

107. SAID, ORIENTALISM, *supra* note 21, at 3.

108. See ABDIRAHMAN A. HUSSEIN & EDWARD SAID, CRITICISM AND SOCIETY 228 (2002).

methodology that counteracts “what he considers to be the univocality, linearity, and evolutionism of traditional historiography.”<sup>109</sup> Other commentators have linked Said’s methodology in *Orientalism* to Foucault’s genealogical approach.<sup>110</sup> Indeed, in the 1995 *Afterword to Orientalism*, Said speaks in Foucaultian terms when he states that “[just as] the struggle for control over territory is part of that history, so too is the struggle over historical and social meaning. The task for the critical scholar is not to separate one struggle from another, but to connect them, despite the contrast between the overpowering materiality of the former and the apparent otherworldly refinements of the latter.”<sup>111</sup> Yet, while both Said and Foucault describe history in terms of space,<sup>112</sup> Said’s most perceptive observations about history are auditory. In *Culture and Imperialism*, his self-proclaimed sequel to *Orientalism*,<sup>113</sup> Said discusses the musical concept of ‘counterpoint’ whereby “various themes play off one another, with only a provisional privilege being given to any particular one; yet in the resulting polyphony there is concert and order, an organized interplay that derives from the themes, not from a rigorous melodic or formal principle outside the work.”<sup>114</sup> He describes counterpoint more vividly in relation to Beethoven’s symphonies:

[T]he symphonies go back and forth out of chronological order. And then, of course, a listener has accumulated memories of other performances . . . . So, it’s a fantastically rich experience, which is, in fact, an experience in organizing, re-organizing, disorganizing, and organizing sound again. Sound is no longer just linear but also horizontal, diagonal, top to bottom, bottom to top, middle to forward, middle backwards, and then across

109. *Id.* at 130.

110. See JACINTA O’HAGAN, CONCEPTUALIZING THE WEST IN INTERNATIONAL RELATIONS: FROM SPENGLER TO SAID 188 (2002); JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE AND ART 266 (1988).

111. SAID, ORIENTALISM, *supra* note 21, at 331-32. In a subsequent interview Said states that “it becomes possible to see engagement in the historical process as in fact a collective struggle – not a struggle to be won by an individual subject trying to grasp the whole of history in all of its complexity . . . but a collective struggle in which various interests interact over particular sites of intensity and contested domains.” *Overlapping Territories*, in POWER, POLITICS, AND CULTURE 57-58 (GARY VISWANATHAN ED., 2001).

112. Compare Foucault, *supra* note 21, at 84-85 (describing history as a struggle between forces at a “pure distance” or a “non-place”).

113. See *Wild Orchids*, *supra* note 35, at 85.

114. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at 59-60.

pieces, in such a way as to create, in effect, a new whole – the meaning of which is paradoxically withheld.<sup>115</sup>

Placing history in sound, as well as in space, enables Said not only to *envision* struggles but to *hear* them through multiple and simultaneous narratives, without the need to reconcile them.<sup>116</sup> He then proceeds to apply this contrapuntal approach in his textual interpretations to elicit a “simultaneous awareness of both the metropolitan history that is narrated and of those other histories against which (and together with which) the dominating discourse acts.”<sup>117</sup>

If *Orientalism* presents a history of a struggle, then what precisely is this struggle over? Said answers this question by declaring that his book takes:

a step towards an understanding not so much of Western politics and of the non-Western world in those politics as the *strength* of Western cultural discourse, a strength too often mistaken as merely decorative or “superstructural.” My hope is to illustrate the formidable structure of cultural domination and, specifically for formerly colonized peoples, the dangers and temptations of employing this structure upon themselves or upon others.<sup>118</sup>

Indeed, throughout the introduction to *Orientalism*, Said repeatedly emphasizes that he is primarily concerned with the struggle for cultural dominance. He describes the Orientalist discourse as the systematic discipline by which European culture was able to manage the Orient,<sup>119</sup> and later remarks that “the major component in European culture is precisely what made that culture hegemonic both in and outside Europe: the idea of European identity as a superior one in comparison with all the non-European peoples and cultures.”<sup>120</sup> A few pages later, Said states that it was culture that created the West’s interest in the

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115. DANIEL BARENBOIM & EDWARD W. SAID, PARALLELS AND PARADOXES 140 (Nadine Gordimer ed., 2002).

116. See Edward W. Said, *Criticism, Culture, and Performance*, in POWER, POLITICS, AND CULTURE 269 (GARY VISWANATHAN ED., 2001) 99-100 (“multiple identity, the polyphony of many voices playing off against each other, without . . . the need to reconcile them, just to hold them together, is what my work is all about”); see also Hussein & Said, *supra* note 108, at 228.

117. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at 59.

118. SAID, ORIENTALISM, *supra* note 21, at 25.

119. *Id.* at 3.

120. *Id.* at 7.

Orient and that “acted dynamically along with brute political, economic, and military rationales to make the Orient the varied and complicated place that it obviously was in . . . Orientalism.”<sup>121</sup> According to Said, the West’s struggle for cultural dominance is related to our search for identity through difference.<sup>122</sup> He argues that modern Orientalism began at the end of the eighteenth century with the discovery of the roots of Western language in ancient Oriental idioms, such as Sanskrit.<sup>123</sup> From that point forward, the West sought to establish an identity distinct and superior to that of the East. While Said adheres to the view that every culture discovers its existence through and in difference, he is critical of the way in which Western culture approaches a heterogeneous, dynamic and complex human reality from an uncritically essentialist standpoint that suggests “both an enduring Oriental reality and an opposing but no less enduring Western essence, which observes the Orient from afar and, so to speak, from above.”<sup>124</sup> That the reconciliation of culture and identity is a central theme in *Orientalism* should come as no surprise given Said’s personal struggle with his own cultural identity as a result of living between the two worlds of Palestine and the United States.<sup>125</sup> This theme, and Said’s own experiences, also explains why the solutions he offers to address *Orientalism*’s dogmas focus on multiculturalism.<sup>126</sup>

Viewed as a book about cultural domination, *Orientalism* presents a narrative that is remarkably similar to Foucault’s genealogy of the soul with Orientalism playing a role similar to the disciplinary technologies in furthering the subjugation of the “other.” Like the modern disciplines in *Discipline and Punish*,

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121. *Id.* at 12.

122. In a subsequent publication, Said writes of “the power of culture to be an agent of, and perhaps the main agency for, powerful differentiation within its domain and beyond it too.” EDWARD W. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* 9 (1983). Ashcroft & Ahluwalia, *supra* note 27, at 88 (finding that Said’s conception of culture “is both a function of and a source of identity”).

123. SAID, *ORIENTALISM*, *supra* note 21, at 42, 136; see Stuart Schaar, *Orientalism at the Service of Imperialism*, in *ORIENTALISM: A READER* 182 (A.L. Macfie ed., 2000) (finding that the translation of *Avesta* texts into French ‘jolted old beliefs and revealed to Europe the existence of ancient cosmogonical traditions beyond the Mediterranean basin’ as well as questioned the uniqueness of the Bible).

124. SAID, *ORIENTALISM*, *supra* note 21, at 332-33.

125. *Id.* at 339; Ashcroft & Ahluwalia, *supra* note 27, at 79; see *Wild Orchids*, *supra* note 35, at 2250-26.

126. See SAID, *ORIENTALISM*, *supra* note 21, at 328.

Orientalism is not a specific institution (although it too can manifest itself institutionally); rather, it is a family of ideas.<sup>127</sup> In addition, Said views culture as Foucault perceives power: its durability and persistence rests in its ability to produce rather than inhibit.<sup>128</sup>

Moreover, just as the disciplines permeate society, Orientalism is both a subtle and refractive “distribution of geopolitical awareness into ascetic, scholarly, economic, sociological, historical, and philological texts” as well as an “elaboration not only of a basic geographical distinction . . . but a whole series of ‘interests’ which . . . it not only creates but also maintains.”<sup>129</sup> Furthermore, Said shows how Orientalism, like the disciplines, obtains its durability and strength not through governmental coercion, but through the consent of civil society.<sup>130</sup> In fact, Said defines “culture” as “an environment, process, and hegemony in which individuals (in their private circumstances) and their works are embedded, as well as overseen at the top by a superstructure and at the base by a whole series of methodological attitudes.”<sup>131</sup>

Another important parallel between Said and Foucault’s theses is that Orientalism, like the disciplinary technologies, provides a capacity for domination “within a purportedly liberal culture, one full of concern for its vaunted norms of catholicity, plurality, and open-mindedness.”<sup>132</sup> In fact, in some ways,

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127. *Id.* at 46. Some critics have had trouble coming to terms with Said’s description of Orientalism as an idea or construct, rather than as an ideology, movement, or set of social institutions that can be comprehensively studied with historical precision. See, e.g., David Kopf, *Hermeneutics versus History*, in MacFie, *supra* note 123, at 196.

128. SAID, *ORIENTALISM*, *supra* note 21, at 14.

129. *Id.* at 12; see Hussein & Said, *supra* note 108, at 239.

130. SAID, *ORIENTALISM*, *supra* note 21, at 6-7.

131. *Id.* at 8. The frequent criticism that Gramsci’s concept of cultural hegemony is incompatible with Foucault’s notion of micro-physics of power fails to recognize that Foucault never disputes that ruling classes or hegemonies exist. See VALERIE KENNEDY, EDWARD SAID: A CRITICAL INTRODUCTION 26-32 (2000). Indeed, the historical context of *Discipline and Punish* is the rise to power of the bourgeoisie class following the French revolution, and Foucault elsewhere speaks of ‘detaching the power of truth from the forms of hegemony, social, economic and culture, within which it operates at present time.’ See Michel Foucault, *Truth and Power*, in MacFie, *supra* note 123, at 43. Moreover, while for Foucault power is everywhere, as discussed above, the disciplinary technologies use hierarchical observation as a means of rendering bodies docile. Disymmetry and disequilibrium is essential to the functioning of a disciplinary society.

132. See SAID, *ORIENTALISM*, *supra* note 21, at 254. In his sequel to this book, Said comments that it is “genuinely troubling to see how little Britain’s great humanistic ideas,

*Orientalism* offers a more insightful explanation for this paradox. In the third chapter, Said draws a distinction between 'manifest' and 'latent' Orientalism. The former is the "various stated views about Oriental society, languages, literatures, history, sociology, and so forth" that account for any changes that occur in knowledge of the Orient.<sup>133</sup> Latent Orientalism, on the other hand, is "an almost unconscious (and untouchable) positivity" that provides the "doctrinal – or doxological – manifestation of an Orient."<sup>134</sup> Rather than staking its existence upon openness and mutual understanding, latent Orientalism provides a stable consistency through the perpetuation of four dogmas: that there exists an absolute difference between the rational, developed West and the aberrant, undeveloped Orient; that abstractions about the Orient say more than its modern realities; that the Orient is eternal, monolithic and incapable of defining itself; and that the Orient is something to be feared or controlled.<sup>135</sup> It is in this way, Said argues, that Orientalism has persevered through revolutions, wars, and decolonization.<sup>136</sup>

This distinction between manifest and latent Orientalism explains how imperialism coexisted alongside Enlightenment ideals of emancipation and equality. To Said, the differences of opinion that the nineteenth century writers had about the Orient were superficial; underneath they all adhered to "the separateness of the Orient, its eccentricity, its backwardness, its silent indifference, its feminine penetrability, its supine malleability."<sup>137</sup> Moreover, these writers believed the Orient solicited the West for attention, reconstruction, and redemption. Thus, scholars such as François Chateaubriand and John Westlake argued not only that the Orientals require conquering, but that it was not really conquest at all, but liberation.<sup>138</sup> By way of literary example, in *Culture and Imperialism* Said describes how Marlow, the narrator in Joseph Conrad's *Heart of Darkness*, contrasts the ancient Romans with their modern imperialist counterparts in Europe.

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institutions, and monuments . . . stand in the way of the accelerating imperial process. We are entitled to ask how this body of humanistic ideas co-existed so comfortably with imperialism." Kennedy, *supra*, note 131, at 97.

133. SAID, *ORIENTALISM*, *supra* note 21, at 206.

134. *Id.* at 206, 221.

135. *Id.* at 300.

136. *Id.* at 222.

137. *Id.* at 206.

138. *Id.* at 172, 206-07.

While the Romans conquered through brute force, Europeans were “saved” by their “devotion to efficiency” and “redeemed” by their “unselfish belief in the idea.”<sup>139</sup> What is interesting about this comparison is that it melds Enlightenment values (the idea) with economic (efficiency) and religious (salvation, devotion) practices. The modern European imperialist is saved from the ugliness of conquest both because the native and the imperialist are equally ringed by the efficiency of colonial administration, and because conquest is the means through which natives may be freed from their primitive existence.<sup>140</sup> As one commentator suggests, “[t]he crudeness and raw brutality of imperial practice are antiseptically transfigured into an economy of values; the power of technological efficiency begets profit, induces enjoyment, and confers rectitude.”<sup>141</sup> Hence, Marlow’s comparison recalls the humanist reformers in *Discipline and Punish* who, while speaking in liberal terms (e.g., that punishment must be equitable and humane), were motivated by a combination of utilitarianism (i.e., punishment must be economical) and evangelicalism (i.e., punishment must cure the soul).<sup>142</sup>

A number of critics find Said’s distinction between manifest and latent Orientalism troubling.<sup>143</sup> Ahmad accuses Said of refusing to accept the consequences of Foucault’s genealogical approach, noting that “for the idea that there could be a discourse . . . spanning both the pre-capitalist and the capitalist periods is not only an un-Marxist but also a radically un-Foucaultian idea.”<sup>144</sup> This criticism, however, misinterprets *Discipline and Punish*. Foucault does not argue that the desire to control bodies originated in the disciplinary technologies of the post-Enlightenment period, but rather he views these technologies as a “technical mutation” of earlier forms of punishment.<sup>145</sup> What interests Foucault is how the modern disciplines developed a more economical, covert, and powerful art of achieving subjugation.<sup>146</sup>

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139. Said, *supra* note 29, at 81 (quoting HEART OF DARKNESS).

140. Said, *supra* note 29, at 82.

141. ABDIRAHMAN A. HUSSEIN, EDWARD SAID: CRITICISM AND SOCIETY 250 (2002).

142. See SAID, ORIENTALISM, *supra* note 21, at 214-15.

143. See, e.g., Kennedy, *supra*, note 131, at 24; Aijaz Ahmad, *Between Orientalism and Historicism*, in ORIENTALISM: A READER 291 (A.L. Macfie ed., 2000).

144. Ahmad, *supra* note 143, at 291.

145. DISCIPLINE & PUNISH, *supra* note 21, at 257.

146. *Id.*

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Said likewise shows how modern Orientalism accommodated the new imperialism by developing more efficient and effective means of exerting cultural domination over the non-West.<sup>147</sup> It did so in the same manner as the disciplines, through temporal and spatial techniques as discussed in the next section.<sup>148</sup>

## 2. Orientalism's Use of Imaginative Geographies and Histories

Like Foucault's ideas about discipline, Said's theories about cultural domination depend largely on spatial and temporal techniques.<sup>149</sup> He shows how Orientalism seeks to harness the universalizing and dividing dynamics of time and space in much the same manner as the disciplinary technologies do in order to achieve an effective and efficient means of subjugating the Orient. Furthermore, although it does not present as detailed a theory of spatial and temporal power as Panopticism, Said's book shows how the imaginative manipulation of geography and history has facilitated the institutions of colonialism and imperialism.

With regard to space, O'Hagan comments that, "Said's conception of the West is strongly influenced by his perception of territory as land imbued with political meaning."<sup>150</sup> *Orientalism* presents geography as the emotional output of the West's attempt to derive meaning out of the unfamiliar, not as a neutral and empirical science.

[The] universal practice of designating in one's mind a familiar space which is "ours" and an unfamiliar space beyond "ours" which is "theirs" is a way of making geographical distinctions that *can be* entirely arbitrary. I use "arbitrary" here because imaginative geography of the "our land-barbarian land" variety does not require that the barbarians acknowledge the distinction. It is enough for "us" to set up these boundaries in our own minds; "they" become "they" accordingly, and both their territory and their mentality are designated as different from "ours." To a certain extent modern and primitive societies

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147. See SAID, *ORIENTALISM*, *supra* note 21, at 321-22. This point also responds to Ahmad's other criticism that "[o]ne does not really know whether Orientalist discourse begins in the post-Enlightenment period or at the dawn of European civilization." Ahmad, *supra* note 143, at 288. The question is not when Orientalist discourse began, but what about that discourse changed in the post-Enlightenment period that made it different.

148. See discussion *infra* Part II.

149. See Ahmad, *supra* note 143, at 290.

150. O'HAGAN, *supra* note 25, at 194.

seem thus to derive a sense of their identities negatively.<sup>151</sup>

Therefore, not only does imaginative geography render the unfamiliar more familiar, it also provides one with a sense of identity. In the East-West context, Said contends that Western culture acquired strength and identity by setting itself off against the Orient “as a sort of surrogate and even underground self.”<sup>152</sup> In performing the role of the West’s weaker twin brother, however, the Orient is not the vast extension beyond the familiar world, but “a closed field, a theatrical stage affixed to Europe.”<sup>153</sup> Nevertheless, no matter how close and familiar the Orient becomes, it is always penalized for lying beyond the boundaries of Western society.<sup>154</sup> This is because imaginative geography causes the mind to “intensify its own sense of itself by dramatizing the distance and difference between what is close to it and what is far away.”<sup>155</sup> Accordingly, the Orient is both incorporated into and excluded from the West; it is brought onto the West’s stage not as an equal but as a space to be possessed, studied, and controlled.<sup>156</sup>

In *Discipline and Punish*, the West achieved this exclusion/incorporation paradox through the examination or normalizing gaze. Said describes similar spatial techniques as employed by Orientalists in the nineteenth century, beginning with the voluminous publication of *Description de l’Egypte* (1809), which declared in its preface “le génie inquiet et ambitieux de Européens . . . impatient d’employer les nouveaux instruments de leur puissance . . . .”<sup>157</sup> Said contends that from this moment onward the range of representation of the Orient expanded enormously as Europe “came to know the Orient more scientifically, to live in it with greater authority and discipline than ever before.”<sup>158</sup> Supremacy was associated with knowledge of the Orient, and no longer principally with military or economic power.<sup>159</sup> But in order to acquire this knowledge, scholars must survey and arrange the rise and decline of Oriental civilization. To

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151. SAID, ORIENTALISM, *supra* note 21, at 54.

152. *Id.* at 3.

153. *Id.* at 63.

154. *Id.* at 67.

155. *Id.* at 55.

156. *Id.* at 210-11.

157. *Id.* at 29.

158. *Id.* at 22.

159. *Id.* at 32.

this end, Said argues that two Orientalists, Silvestre de Sacy and Ernest Renan, provided the scholarly tools.<sup>160</sup> First, Sacy inaugurated modern Orientalism by presenting his theory of chrestomathy: the “Orientalist is required to *present* the Orient by a series of representative fragments that are republished, explicated, annotated and surrounded with still more fragments.”<sup>161</sup> Through his anthologies, Sacy recreated the Orient with a degree of Western rationality that was presumably missing from the original sources. Renan’s task, on the other hand, was “to solidify the official discourse of Orientalism, to systematize its insights, and to establish its intellectual and worldly institutions.”<sup>162</sup> He emphasized scientific demonstration, thereby surveying the Orient from the vantage point of a laboratory scientist, from which he could judge, compare, combine, and induce everything about the Orient as if it were a specimen in a petri dish.<sup>163</sup>

The comparative techniques developed by Sacy and Renan not only allowed Orientalists to artificially reproduce the Orient for the West, but also permitted its depiction from an essentialist standpoint. Like the normalizing judgment, Orientalism is both divisive and homogenizing. It is “absolutely anatomical and enumerative: to use its vocabulary is to engage in the particularizing and dividing of things into manageable parts.”<sup>164</sup> At the same time, it treats its objects like atoms “in a vast collectivity designated in ordinary or cultivated discourse as an undifferentiated type called Oriental, African, yellow, brown, or Muslim.”<sup>165</sup> Unfortunately, these Western scholarly techniques create an artificial and polarized distinction that limits the human encounter between cultures, peoples, and histories.<sup>166</sup> Over time, scholars reify concepts of the West and the Orient into separate, monolithic spaces filled with heuristics that place the “East” inferior to the “West.”<sup>167</sup> The Orient is always seen as irrational,

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160. *Id.* at 130.

161. *Id.* at 128-29.

162. *Id.* at 130.

163. *Id.* at 132, 138, 142.

164. *Id.* at 72.

165. *Id.* at 252.

166. *Id.* at 46.

167. Several critics have misinterpreted this point and accused Said of “Occidentalism.” See Aijaz Ahmad, *Between Orientalism and Historicism*, in *ORIENTALISM: A READER* 289 (A.L. Macfie ed., 2000). However, Said repeatedly maintains that any “notion that there are geographical spaces with indigenous, radically

depraved, and childlike, while the West is viewed as rational, virtuous, and mature.<sup>168</sup> This binomial division between “us” and “them” maintains a distance separating the West from the Orient that is “destined to bear its foreignness as a mark of its permanent estrangement.”<sup>169</sup>

But *Orientalism's* use of binomial norms does more than provide the West with a superior self-image. When combined with another hegemonic discourse - the global economic expansion - it also provides “the necessary furniture of Empire.”<sup>170</sup> It accomplishes this in at least three ways. First, *Orientalism's* particularizing, systematizing, and essentializing techniques supply Western imperialists with the knowledge necessary to grasp an entity, like the Orient, that is otherwise impossibly diffuse.<sup>171</sup> Paraphrasing Lord Evelyn Cromer, Said writes that “knowledge of subject races or Orientals is what makes their management easy and profitable; knowledge gives power, more power requires more knowledge, and so on in an increasingly profitable dialectic of information and control.”<sup>172</sup> Second, by dividing mankind into the categories of “Oriental” or “Occidental,” it is possible to believe that for the Oriental, “liberation, self-expression, and self-enlargement were not the issues they were for the Occidental.”<sup>173</sup> This permits the imperialists to commit themselves to liberal ideals at home, while disregarding such ideals when engaging in conquest. Finally, *Orientalism's* normative distinctions provide imperialism with a universal and moral purpose. Whether called the “White Man’s Burden” (e.g., Britain à la Rudyard Kipling), “Manifest Destiny” (e.g., United States), or “*mission civilisatrice*” (e.g., France), the important thing is “to turn the appetite for more geographical space into a theory about the special relationship between geography on the one hand and civilized and uncivilized peoples on the other.”<sup>174</sup> Said explores this issue further in *Culture*

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different: inhabitants who can be defined on the basis of some religion, culture, or racial essence proper to that geographical space is . . . a highly debatable idea.” Said, *supra* note 21, at 322. Rather, Said is simply exposing how *Orientalism* creates monolithic images of both the West and the Orient in order to achieve its aim of cultural domination.

168. Said, *supra* note 21, at 40.

169. *Id.* at 244.

170. *Id.* at 215 (quoting Lord George Curzon).

171. *Id.* at 66.

172. *Id.* at 36.

173. *Id.* at 263.

174. *Id.* at 216.

and Imperialism, arguing that imperialism's accumulation of land is propelled by the ideological notion that certain people require domination.<sup>175</sup>

With regard to time, Said illustrates how Orientalism inscribes a history on the Orient similar to how the disciplines inscribe history on the body of the criminal. To support this proposition, Said borrows from Anouar Abdel-Malek's well-known analysis of the way in which the Orientalist renders the Orient both historical and ahistorical:

According to traditional Orientalists, an essence should exist [that is] both "historical," since it goes back to the dawn of history, and fundamentally a-historical, since it transfixes the being, "the object" of study, within its inalienable and non-evolutive specificity, instead of defining it as all other beings, states, nations, peoples, and cultures – as a product, a resultant of the vection of the forces operating in the field of historical evolution.<sup>176</sup>

Employing Abdel-Malek's analysis, Said shows how Orientalism confines the Orient in the history of the West while, at the same time, fixing the Orient permanently in the past. With regard to the former process, Said argues that "the Orient was reconstructed, reassembled, crafted, in short, *born* out of the Orientalists' efforts."<sup>177</sup> The Orient is viewed as essentially mystical with no concept of history, and as such, the people of the Orient are depicted as incapable of representing themselves.<sup>178</sup> Thus, it is incumbent upon the West to act as "the spectator, the judge, and jury, of every facet of Oriental behavior."<sup>179</sup> This, in turn, means that "what was neither observed by Europe nor documented by it was . . . 'lost' until, at some later date, it too could be incorporated by the new sciences."<sup>180</sup> Accordingly, the Orient becomes a mere appendage of the West with no historical significance beyond its relationship with Europe.<sup>181</sup> Through the second temporal process,

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175. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at 8.

176. Anouar Abdel-Malek, *Orientalism in Crisis*, in ORIENTALISM: A READER 50 (A.L. Macfie ed., 2000).

177. SAID, ORIENTALISM, *supra* note 21, at 87.

178. *Id.* at 21, 253, 283.

179. *Id.* at 109.

180. Edward W. Said, *Orientalism Reconsidered*, in ORIENTALISM: A READER 355 (A.L. Macfie ed., 2000).

181. SAID, ORIENTALISM, *supra* note 21, at 8; SAID, CULTURE AND IMPERIALISM, *supra* note 29, at xxi.

Orientalism has fixed the Orient in antiquity while viewing the West as progressing forward in history, thus leaving the Orient behind.<sup>182</sup> It has carried forward “a proclivity to divide, subdivide, and redivide its subject matter without ever changing its mind about the Orient as being always the same, unchanging, uniform, and radically peculiar object.”<sup>183</sup> Any deviation by the Orient from norms of Oriental behavior is considered to be unnatural.<sup>184</sup> As Johannes Fabian observes, this denial of “coevalness in time” effectively silences the West’s “other.”<sup>185</sup>

These temporal processes lead to a form of historicism in which non-synchronous events, peoples, and cultures are homogenized and incorporated into a single human history that culminates in the West.<sup>186</sup> As such, the Orient is put in a difficult position. O’Hagan observes that the East “must come to terms with the West, yet is placed at a permanent disadvantage by its perceived lack of capacity to change. This effectively casts the asymmetrical relationship between East and West, placing the West in permanent ascendancy.”<sup>187</sup> By characterizing the Orient as both historical and ahistorical, Orientalism, much like the disciplinary technologies, places the Orient in a terminal state of either progressing toward or declining from, but perpetually lagging behind, Western culture.

Through the coincidence of geography and history, Orientalism assisted Western culture’s expansion as “an irreducible supervisory imperial authority.”<sup>188</sup> According to Said, no other instance of imperialism was as large, as totally dominating, or as unequally powerful.<sup>189</sup> But the Orientalists and imperialists did not succeed on their own. Said also implicates the East in its adherence to the market system and to Western ideas about modernization, progress and culture.<sup>190</sup> As Said noted, “the

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182. SAID, *ORIENTALISM*, *supra* note 21, at 96; SAID, *CULTURE AND IMPERIALISM*, *supra* note 29, at 349.

183. SAID, *ORIENTALISM*, *supra* note 21, at 98.

184. *Id.* at 39.

185. JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* 31-34 (1983).

186. *See* Said, *supra* note 180, at 355.

187. O’HAGAN, *supra* note 25, at 201.

188. SAID, *ORIENTALISM*, *supra* note 21, at 215.

189. *See* SAID, *CULTURE AND IMPERIALISM*, *supra* note 29, at 6-7.

190. *See* O’HAGAN, *supra* note 25, at 209.

modern Orient . . . participates in its own Orientalizing,”<sup>191</sup> thereby enabling Western cultural domination to continue in the postcolonial world despite the decline of overt imperialism.<sup>192</sup> Particularly after World War I, the European powers decreasingly resorted to brute force to transform the Orient, seeking instead to stimulate it to move independently into an essentially Western shape and “contain[ing] the new and aroused Orient in a personal vision, whose retrospective mode includes a powerful sense of failure and betrayal.”<sup>193</sup>

Efficient, covert, self-generating, omnipresent, and omnipotent, the new imperialism bears remarkable resemblance to Bentham’s Panopticon.<sup>194</sup> Foucault’s description of the individual caught in the panoptic machine (i.e., the individual is seen, but does not see; he is the object of information, but never a subject in communication) could alternatively be a description for the subjects of modern imperial conquest.<sup>195</sup> Yet, the analogy cannot be taken too far, as Said himself later claims, “I never talk about discourse the way Foucault does . . . as something that has its own life and can be discussed separately from the realm of the real, or what I would call the historical realm. I think perhaps one of the things of which I am most proud is that I try to make discourse go hand-in-hand with an account of conquest, the creation of instruments of domination, and techniques of surveillance that were rooted not in theory but in actual territory.”<sup>196</sup> For reasons of resistance that will be discussed in section IV, it is vital for Said to keep the problems of cultural domination and imperialism *real*, and to show how they manifest themselves in institutions. Hence, Said frequently classifies the United States as simply the latest embodiment of modern imperialism.<sup>197</sup> Rather than the overt

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191. SAID, *ORIENTALISM*, *supra* note 21, at 325; *see* SAID, *CULTURE AND IMPERIALISM*, *supra* note 29, at 11 (“the durability of empire was sustained on both sides, that of the rules and that of the distant ruled”).

192. *See* SAID, *CULTURE AND IMPERIALISM*, *supra* note 29, at 81 (commenting that the global and all-encompassing modern imperialism continues today).

193. SAID, *ORIENTALISM*, *supra* note 21, at 240-41.

194. At one point in *CULTURE AND IMPERIALISM*, Said comments that Foucault’s analysis of the movement from sovereign to administrative surveillance is related to British imperial policy in India, and specifically, to the work of Sir Henry Maine on the law. *ORIENTALISM*, *supra* note 21, at 198-99.

195. FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 21, at 200.

196. Edward W. Said, *Language, History, and Knowledge, interview in* *POWER, POLITICS, AND CULTURE* 269 (Gary Viswanathan ed., 2001).

197. *Id.* at 285, 295.

breed of imperialism practiced by nineteenth-century Europe, Said contends that the U.S. is currently imposing a new, more subtle, more dogmatically Orientalist (and therefore, more dangerous) form of imperialism upon the non-Western world – all in the name of a ‘New World Order.’ This is Said’s counter-narrative.

*D. International Law and the Nation-State*

Foucault and Said both reject the idea that history is evolving towards a set of universal ideals. Instead they view history as a series of struggles for domination that simply replace earlier struggles.<sup>198</sup> In *Discipline and Punish*, it is the struggle to disassociate power from individuals and to turn this power into an aptitude that can be controlled and increased.<sup>199</sup> In *Orientalism*, it is the struggle to convert diverse cultures into imaginative histories and geographies that provide the West with a superior self-image.<sup>200</sup> In both cases, a certain technology (e.g., the disciplines and Orientalism) is driven by an underlying force (e.g., microphysics of power and the West’s search for an identity) seeking to prevail in this struggle by fabricating its subjects (e.g., individuals and Orientals). The subjects are then placed in a power relation (e.g., the prison and the Orient) that uses temporal and spatial processes to exclude and include, individuate and homogenize, differentiate and universalize.

From this perspective, international law has little to do with progress since any new legal order is merely a technical mutation (as stated by Foucault) or manifest change (as stated by Said) in power/knowledge relations. While international law may find new ways to operate more efficiently, diffusely, subconsciously, and silently, its ends always remain the same. Since the dawn of the Enlightenment, international law has engaged in a struggle with a vast and diverse array of cultures, peoples, and histories. It has sought to prevail in this struggle in precisely the same way that Orientalism and the disciplines have sought to dominate their subjects: first, by fabricating its “other” - the uncivilized and untamed world; then, by proceeding on a mission to divide and enclose this world in the Western concept of the nation-state; and, finally, by incorporating these nation-states into a relatively small,

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198. SAID, *ORIENTALISM*, *supra* note 21; *see also* Smith, *supra* note 50, at 111.

199. *See generally* FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 21.

200. *See* SAID, *ORIENTALISM*, *supra* note 21.

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manageable Family of Nations. In this way, international law has attempted to turn the individuating and universalistic dynamic of the Enlightenment against the rest of the world, thereby subjugating it and ensuring that there is only one way to structure a polity. From this counter-narrative, the current failed and outlaw state paradigm is simply the latest manifestation of a long struggle that began with the first modern nation-builders in the nineteenth century.

### 1. The Age of the Nation-State

At the same time that Europe was creating disciplinary societies and the Orientalists were busy developing new ways to elevate the West's self-image, Western international law was undergoing a similar transformation in the context of imperialism. Prior to the Enlightenment, international law was predominantly based on the natural law doctrine, under which the prevailing assumption was that law universally applied to all humankind.<sup>201</sup> This is not to say that international relations between the Western and non-Western societies were conducted on an equal footing. Christian empires, in particular the Spanish and the Portuguese, looted non-Christian societies and enslaved their peoples.<sup>202</sup> In addition, some pre-Enlightenment legal scholars provided moral justifications for imperialism. As far back as the sixteenth century, Vitoria argued that it was in the best interests of the American Indians that Spain administer over them since the American Indians' government lacked proper laws, magistrates, and means of controlling family affairs.<sup>203</sup> Nevertheless, international legal theory varied from praxis in promoting relative equality in intercultural relationships.<sup>204</sup> Christian rulers, for instance, resorted to papal sanction or absolution to justify or forgive their raids.<sup>205</sup> While this may have created variance between international and canon law, it was explained by drawing "an outer circle that embraces all mankind, under natural law, and an inner circle, the *corpus Christianorum*, bound by the law of Christ."<sup>206</sup>

With the advent of the Enlightenment, international law

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201. See Abi-Saab, *supra* note 47, at 34.

202. Grovogui, *supra* note 16, at 50.

203. Colonialism and the Birth of International Institutions, *supra* note 4, at 564.

204. See Great Powers and Outlaw States, *supra* note 2, at 233.

205. See Grovogui, *supra* note 16, at 50.

206. Martin Wight, *Systems of States* 128 (Hedley Bull ed., 1977).

dislodged itself from the natural world and rooted itself in the Western nation-state. As suggested by international law's metanarrative, the nation-state predates the nineteenth century, having come into existence around the time of the Westphalian peace settlement.<sup>207</sup> However, it is during the post-Enlightenment period that, under the reigning legal positivism of the time, international law proclaimed sovereign nation-states to be the only actors in the international system and itself to be the creation of these actors.<sup>208</sup> As Abi-Saab notes, international law reflected "the Hegelian philosophy of the 'deification' of the State as the *ultima ratio*, which finds in itself its end and justification."<sup>209</sup>

This deification of the nation-state had three profound effects on international law. First, instead of viewing the nation-state as a collection of diverse cultures, peoples and histories, international law accepted it uncritically and univocally "as the main actor, as an ontological entity, or as an observable given institutional entity."<sup>210</sup> This approach meant that the nation-state constituted much more than the source of external relations; it acted as "the site of the most fundamental division between inside and outside, us and them, domestic and foreign, the sphere of citizen entitlements and that of strategic responses."<sup>211</sup> As a result, the nation-state became the primary source of cultural and metaphysical identity for European societies. Because international law also derived its identity from the nation-state, it became fully engaged in the process of distinguishing the Western nation-states from the rest of the "natural" and unenlightened world.<sup>212</sup>

Second, since international law considered itself the product of the will of nation-states, this gave the nation-state the discretion to determine which societies to admit into the Family of Nations.<sup>213</sup> Recognition, therefore, was both a necessary condition for sovereignty and a method "for the delimitation and contraction of

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207. Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resources Curse in Africa*, 26 U. Pa. J. Int'l Econ. L. 1, 56 (2005).

208. See *Colonialism and the Birth of International Institutions*, *supra* note 4, at 538-39.

209. Abi-Saab, *supra* note 47, at 36.

210. E. Fuat Keyman, *Problematizing the State in International Relations Theory*, in *BEYOND POSITIVISM: CRITICAL REFLECTIONS ON INTERNATIONAL RELATIONS* 155 (Claire Turenne Sjolander & Wayne S. Cox eds., 1994) (internal citations omitted).

211. *Id.* at 154.

212. See GROVOGUI, *supra* note 16, at 65.

213. See GERRIT W. GONG, *THE STANDARD OF 'CIVILIZATION' IN INTERNATIONAL SOCIETY* 56 (1984).

the international community, which became the community of those who mutually recognized each other, a kind of select or executive club.”<sup>214</sup> Even as late as 1928, Oppenheim’s *International Law* advocated this constitutive approach:

[T]he Law of Nations, as a law between States based on common consent of the members of the Family of Nations, naturally does not contain rules concerning the intercourse with and treatment of such States as are outside the circle . . . . [I]t is discretion and not international law, according to which the members of the Family of Nations deal with such states as still outside the family.<sup>215</sup>

Finally, because international law no longer derived from a source higher than the nation-state, it could no longer logically stand in variance with its master’s expansionist policies. This created the same sort of dilemma that the humanist prison reformers and the modern Orientalists faced. On the one hand, the Enlightenment ideals demanded the universal principles of emancipation and equality. On the other hand, the European powers sought the subjugation and exploitation of non-European societies. Accordingly, since the nineteenth century, international lawyers have worked to reconcile the Enlightenment’s universalism with imperialism’s divisionism through legal reasoning.<sup>216</sup> International law, therefore, became “integral to scientific administration in the imperializing project of the Enlightenment.”<sup>217</sup>

In its quest for a legal justification for imperialism, international law adopted a two-stepped process. First, it established an elite society of “civilized” nation-states as a unique and superior cultural system. Second, it gradually universalized that system by transplanting the Western nation-state throughout the world.<sup>218</sup> It has achieved this differentiating and universalizing project by employing *in seriatim* three standards: the civilization standard, the nation-state standard, and the self-determination standard. While the metanarrative suggests that each of these

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214. Abi-Saab, *supra* note 47, at 36.

215. LASSA OPPENHEIM, INTERNATIONAL LAW 41 (4th ed. 1928).

216. See Peter Fitzpatrick, *The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment*, in POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN 96-98 (Anthony Carty, ed., 1990).

217. *Id.* at 91.

218. GREAT POWERS AND OUTLAW STATES, *supra* note 2, at 235.

standards was progressively more objective and universal than the last, they were actually increasingly subtler, less overtly violent, and more efficient means of perpetuating colonial subjugation through the use of temporal and spatial techniques. In the language of Foucault, they merely represent a transition from one art of imperialism to another, no less skillful one.

a. The Civilization Standard

The first task for international lawyers in their quest to justify imperialism was to devise special norms to identify which societies were likely candidates for admission into the Family of Nations. While the criteria were initially based on religion or geography, the publicists quickly settled on the standard of civilization which, of course, meant Western civilization. Only civilized states were qualified to apply for full membership in the Family of Nations and protection under international law.<sup>219</sup> Thus, Wheaton wrote in 1866 that “[t]he public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe,” while Hall wrote in 1880 that “international law is a product of the special civilization of modern Europe.”<sup>220</sup> As late as 1928, Brierly defined international law as “the body of rules and principles of action which are binding upon civilized states in their relations with one another.”<sup>221</sup> According to Gerrit Gong, the standard of civilization “provided a basis for international law which not only transcended religious and geographical boundaries, but which also proposed a practical way to make its scope universal in fact.”<sup>222</sup> Thus, this standard sought to universalize through difference.

While the term “civilization” was left conveniently undefined by international legal scholars, Gong suggests that in practice the standards of civilization were based on the “civilized” rights a visitor would expect to be accorded in Europe.<sup>223</sup> These reciprocal rights required, at minimum, efficient and centralized state machinery, a judiciary independent from the executive, and the

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219. See GONG, *supra* note 213, at 56.

220. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 15 (1866); WILLIAM EDWARD HALL, *INTERNATIONAL LAW* 39 (6<sup>th</sup> ed., 1880).

221. J.L. BRIERLY, *THE LAW OF NATIONS* 1 (1928).

222. *Id.* at 54.

223. See GONG, *supra* note 213, at 54-56.

protection of the life, liberty and property of foreigners.<sup>224</sup> As Westlake reasoned, “When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes . . . .”<sup>225</sup> In other words, to be classified as civilized, the non-Western society had to conform to the fundamental internal and external attributes of the nation-state.<sup>226</sup> Since the nation-state was an invention peculiar to Western culture, it is unsurprising that no non-Western society fully satisfied the civilization standard during the nineteenth century.

Exclusion of non-Western societies from international law had its distinct benefits. Because the non-sovereign entity lacked legal personality, the sovereign nation-states could treat it as they wished. If the nation-state coveted territories that were inhabited by tribes or nomads, these lands could be regarded as *territorium nullius*.<sup>227</sup> Where the *terra nullius* principle did not seem appropriate because the non-European society had some semblance of a stable and centralized polity, treaties of cession could produce the same result.<sup>228</sup> For more advanced societies, if they appeared (as they often did) unwilling or unable to provide basic rights to European citizens, international law permitted the nation-states to use capitulations or unequal treaties until the non-European society could satisfy the standard of civilization. Any of these options left the Western imperialists with good consciences – not only were they acting legally, but they were doing the non-Western societies a service by helping them advance towards civilization.<sup>229</sup> Like the Orientalists of the nineteenth century, these imperialists viewed their actions not as conquest, but as liberation.

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224. *Id.* at 64.

225. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 141 (1894).

226. Anghie comments that “[b]oth external and internal reform had to be carried out by a state seeking entry into the family of nations. In the external sphere, the state had to be capable of meeting international obligations and maintaining the diplomatic missions and channels necessary to enable and preserve relations with European states. In the internal sphere, the state was required to reform radically its legal and political systems to the extent that they reflected European standards as a whole.” Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 53 (1999) [hereinafter *Finding the Peripheries*].

227. SCHWARZENBERGER, *supra* note 45, at 202.

228. *Id.*

229. Abi-Saab, *supra* note 47, at 37.

At first the civilization standard was an all-or-nothing affair; either a society was or was not civilized. In Foucaultian terms, the leper was treated as a leper. However, as the nineteenth century wore on, international lawyers were influenced by the science of the day, and in particular Charles Darwin's theories of evolution in *On the Origin of Species by Means of Natural Selection* (1881), which they interpreted as explaining why the West was so much more civilized than the rest of the world.<sup>230</sup> This had two results. First, publicists began developing more elaborate taxonomies that divided non-European societies into various stages of development. Thus, James Lorimer distinguished between the civilized Westerners, the barbaric Turks and the savages (which covered just about everyone else), while Franz von Liszt divided the world into civilized, semi-civilized, and uncivilized peoples.<sup>231</sup> Societies such as Turkey, Persia, Siam, China, and Abyssinia, which publicists admitted possessed a civilization of sorts, were classified as barbarous or semi-civilized because their societies still had not reached the level necessary for them to understand and carry out the dictates of international law. Accordingly, they were granted at most only partial recognition as entities with limited legal rights and personalities.<sup>232</sup> This taxonomic approach lasted well into the twentieth century, and in fact, was utilized by the League of Nations mandate system which divided the former colonies of the German and Ottoman empires into three graduated levels with the "A-Mandatories" provisionally recognized as independent nations "subject to rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone;" the "B-Mandatories" administered under conditions that will guarantee freedom of religion, conscience, and trade; and the "C-Mandates" administered "under the Mandatory as integral portions of its territory" in light of "the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory."<sup>233</sup>

The second scientific advancement in the civilization standard

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230. JACKSON, *supra* note 11, at 72.

231. Abi-Saab, *supra* note 47, at 38. Lorimer further subdivided societies as criminal, unchristian, imbecilic, immature, progressive and non-progressive. SIMPSON, GREAT POWERS, *supra* note 2, at 238-39.

232. GONG, *supra* note 213, at 56.

233. LEAGUE OF NATIONS COVENANT art. 22.

was that it acquired a mission. Non-Western societies were not forever destined to wallow in their primordial existence, but rather could evolve linearly through various stages of development towards European civilization.<sup>234</sup> This led humanist international lawyers to advocate tutelage that – much like Demia's scheme for teaching the children of Lyon to read – would guide non-Western societies incrementally towards Western civilization. Arguably, the British Colonial Office took its tutelage responsibilities the furthest by creating an extensive list of stages that its colonies must go through to achieve independence that mimicked Britain's own constitutional development.<sup>235</sup> However, a colony could progress only so far. As Gong notes,

[p]rogress toward “civilized” status was necessary and possible for the less “civilized” to achieve, but complete and perfect equality was not. Like Sisyphus, the less “civilized” were doomed to work toward an equality which an elastic standard of “civilization” put forever beyond their reach . . . . The “civilized” had a way of becoming more “civilized” still.<sup>236</sup>

In this way, international law could comply with the Enlightenment ideal of promoting universal equality and emancipation, and yet treat parts of that humanity as perpetually inferior, through the same form of imaginary historicism that Abdel-Malek and Said attribute to Orientalism.

All three international institutions that have directly addressed the issue of colonialism have readily adopted the civilizing mission. Article 6 of General Act of the Conference of Berlin of 1884-85 states that “[a]ll Powers exercising rights of sovereignty or an influence in [the basin of the Congo] engage themselves to watch over the conservation of the indigenous populations, and the amelioration of their moral and material conditions of existence.”<sup>237</sup> In a similar vein, Article 22 of the Covenant of the League of Nations founded “a sacred trust of civilization” that assigned advanced nations the responsibility to tutor former colonies that were “not yet able to stand by themselves under the strenuous conditions of the modern world.”<sup>238</sup>

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234. See GONG, *supra* note 213, at 105-06.

235. See JACKSON, *supra* note 11, at 95-96.

236. GONG, *supra* note 213, at 63.

237. *General Act of the Conference of Berlin*, 3 AM. J. INT'L L. 7, 12 (Supp. 1909) [hereinafter *Conference of Berlin*].

238. LEAGUE OF NATIONS COVENANT art. 22.

And, while the word “civilization” was avoided in the UN Charter (no doubt because the atrocities committed by the West during World War II rendered the use of this term hypocritical), Chapter XI reaffirms that the member states administering non-self-governing territories are bound to accept “as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories,” including the development of self-government “according to the particular circumstances of each territory and its peoples and their varying stages of advancement.”<sup>239</sup> Moreover, Chapter XII of the Charter set up a trusteeship system to administer the former colonies of the Axis powers, the former mandates under the League Covenant and any territories the imperial powers chose to place under the system.<sup>240</sup>

Through these international civilizing missions, economic exploitation no longer became simply a means of profit, but rather it was considered indispensable to the progress of the uncivilized society. Just as Marlow found a moral efficiency in modern imperialism, the Congress of Berlin sought simultaneously the “moral and material” well-being of the natives.<sup>241</sup> Likewise, the League’s Permanent Mandate Commission promoted efficient communities by placing the market, which was associated with modernity, over custom and tradition, which were considered backward.<sup>242</sup> Similarly, Chapter XI of the UN Charter uses the term “economic” four times, while it employs the term “self-government” only twice (and avoids the term “independence” completely).<sup>243</sup> Thus, while condemning the outright exploitation of non-Western peoples by chartered companies early in the nineteenth century, the international humanists saw a moral benefit in the international development and exploitation of the resources of colonial, mandate, trust, or postcolonial lands.<sup>244</sup> Indeed, the Bretton Woods institutions perpetuate this tradition in seeking the well-being and development of Third World countries by integrating their economies into the Western economic

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239. U.N. Charter art. 73.

240. U.N. Charter art. 75. *See also* Gordon, *supra* note 2, at 910 (arguing that “utilizing the trusteeship model presupposes that Western modes of governance, politics, and social thought should triumph”).

241. *Finding the Peripheries*, *supra* note 226, at 64.

242. Anghie, *supra* note 4, at 587-88.

243. U.N. CHARTER art. 73-74.

244. Anghie, *supra* note 4, at 586.

system.<sup>245</sup>

In short, the civilization standard used both spatial and temporal techniques to control the entry of non-Western societies into the international legal order and to ensure that the Family of Nations consisted of a relatively small group of homogeneous nation-states. Like the lepers described in *Discipline and Punish*, the civilization standard excluded non-Western societies from the international legal order, and like Orientalism's treatment of the Orient, this was achieved by employing a civilized/uncivilized binomial that essentialized the Western nation-states as always civilized, modern, and efficient and the non-Western societies as perpetually uncivilized, backwards, and inefficient. Towards the end of the nineteenth century, some semi-civilized non-western societies were brought into the international legal fold – the lepers began to be treated as plague victims – but they were placed at the periphery with only partial legal personality and rights until they achieved Western civilization. Temporally, the world was divided between the Western nation-states that made history and the non-Western societies that lacked history.<sup>246</sup> Those that lacked history could acquire one only by entering Western history through the civilizing mission. However, just as the Orient is never allowed to catch up to the superior West, international law always classified the non-Western societies as less civilized than the always-advancing nation-states of Europe. As a result of this “universalization of the European experience,” international law managed to erase a large number of non-Western cultures, peoples, and histories.<sup>247</sup>

#### b. The Nation-Building Standard

With the advent of the League of Nations, a new standard for achieving international law's universalizing and dividing project rose to prominence. While the League of Nations Covenant limited its membership to “fully self-governing states,”<sup>248</sup> in practice “the League tended away from the principle of homogeneous universality . . . towards that of heterogeneous universality.”<sup>249</sup> This shift from exclusion to inclusion is

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245. *Id.* at 628-29.

246. SIMPSON, *GREAT POWERS*, *supra* note 2, at 236.

247. *Finding the Peripheries*, *supra* note 226, at 7.

248. LEAGUE OF NATIONS COVENANT art. 1.

249. Georg SCHWARZENBERGER, *THE LEAGUE OF NATIONS AND WORLD ORDER* 94

attributable to three factors. First, President Wilson was outspoken about the need for the new international legal order to be worldwide because attempts in the past to create exclusive international orders had failed for the very reason that their membership had been restricted.<sup>250</sup> Second, a number of the “uncivilized” states had assisted the Allies in the war, and therefore, it seemed inherently unjust to exclude them from the new world order. Finally, without the United States or the Soviet Union among its membership ranks, the League simply lacked the strength to impose its will on an outside world.<sup>251</sup> Yet, the drafters of the Covenant did not opt for allowing just any community of peoples into the “heterogeneous” international legal order, but rather only those communities considered nation-states. Unlike the civilization standard, this new standard of admission was not constitutive, but rather declaratory according to predetermined criteria,<sup>252</sup> summarized in the 1933 Montevideo Convention as a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.<sup>253</sup> However, while seemingly neutral and objective, these criteria are in fact loaded with Western biases. As Muntarbhon argues, the nation-state standard emanates:

From the perception of European powers towards their colonies and the rise of nation-states from these colonies. The characteristics of ‘permanent population’ and ‘defined territory’ are based upon a sense of control and identity drawn from European experiences, that is, control by the government over its population and defined borders . . . and an identifiable link between the government and its population in the form of nationality.<sup>254</sup>

To paraphrase Said, while the language of the nation-state standard was one of objectivity, the latent positivity of the civilization standard remained constant.<sup>255</sup>

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(1936) [hereinafter THE LEAGUE OF NATIONS AND WORLD ORDER].

250. *Id.* at 23-24, 49.

251. *Id.* at 175-76.

252. See Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1123-24 (1995).

253. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 72 (4th ed. 1990).

254. V. MUNTARBHON, THE STATUS OF REFUGEES IN ASIA 5 (1992).

255. Gordon agrees with this point in arguing that “[a]lthough the jargon has changed, the models advocated continue to represent Western modernization ideologies, which the South . . . must adopt and against which its progress will be judged.” Ruth Gordon, *Saving*

To understand the implications of this new standard for membership, one must grasp the scope of the Western nation-building in Asia and Africa prior to World War I. Before Western colonization, the Asian continent consisted of thousands of sovereign and semi-sovereign communities.<sup>256</sup> Most of these Asian communities did not have centralized, unitary governments with extensive bureaucratic administrations.<sup>257</sup> Rather, the monolithic nation-state and its expansive infrastructure were imported from West to assist the Europeans in consolidating their authority over their vast colonial territories.<sup>258</sup> According to Darling, the basic values and institutions of the nation-state “were most vividly personified and demonstrated by the hierarchy of civil servants administering the official colonial policy” because they “depicted the idea of the Western nation-state as the combination of a fixed ‘national’ territory, a populace united by a common pattern of ‘national’ loyalties, and a sovereign political authority administering a common body of ‘national’ law.”<sup>259</sup>

These large administrative structures in turn led to the fixing of territorial borders and the imposition of nationality and immigration laws in order to facilitate the unification process and to regulate population flows.<sup>260</sup> Because these colonial divisions often cut across traditional frontiers, even the Asian communities not directly colonized had their boundaries and foreign relations altered by the imperialists.<sup>261</sup> Beyond infrastructural and boundary changes, the Western colonial administrators also sought to introduce the Western view of progress as the individual and collective advancement toward a predetermined purpose or goal. According to Darling, this alien philosophy “clashed severely with ascriptive loyalties and intensified achievement consciousness,” as well as precipitating dissatisfaction with the status quo and

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*failed States: Sometimes A Neocolonialist Notion*, 12 AM. U.J. INT’L L. & POL’Y 903, 961 (1997).

256. For example, what is today India contained over five hundred semi-sovereign states. SCHWARZENBERGER, *supra* note 45, at 101.

257. See V. MUNTARBHON, *THE STATUS OF REFUGEES IN ASIA* 9 (1992).

258. FRANK C. DARLING, *THE WESTERNIZATION OF ASIA: A COMPARATIVE POLITICAL ANALYSIS* 161-62 (1979).

259. *Id.* at 161.

260. See MUNTARBHON, *supra* note 254, at 6-7.

261. See ALISTAIR LAMB, *ASIAN FRONTIERS: STUDIES IN A CONTINUING PROBLEM* 215-22 (1968).

engendering cultural secularization.<sup>262</sup> In transplanting the European nation-state into Asia, therefore, the Western colonial administrators tried to propagate in a matter of decades the same values, institutions and codes of conduct that had taken many centuries to develop in the West and that were peculiar to Western culture, history and philosophy.

Africa underwent nearly an identical nation-building process during its colonization by the West. Before the advent of colonialism, Africa was a “complicated lacework of more than a thousand variously defined political societies – some isolated and some interdependent, some free and others slave, some entangled in imperial relations, others in feudal ties, and so on.”<sup>263</sup> Even Pfaff recognizes that when the Europeans first arrived, they found “coherent, functioning societies of varying degrees of sophistication, some of great political subtlety and artistic accomplishment, others simple hunting and gathering communities . . . but all possessing their own integrity and integrated into the natural environment of the continent.”<sup>264</sup> Nevertheless, many of the political attributes that make up the Western nation-state – for example, centralized government, fixed territories, a large bureaucracy, organized military, public means of transport, extensive division of labor and communications – were missing from the vast majority of the African continent. The Berlin Conference changed this by legalizing the division and subordination of the continent to the Western empires. No representatives from the African peoples were invited to the Conference because, while the General Act contained some humanitarian language, the main motive for partitioning Africa was to prevent conflict between the Western nation-states.<sup>265</sup> Besides, under the positivist international law of the day, the Africans lacked the international legal personality to give consent.<sup>266</sup>

The map drawing that ensued as a result of the Berlin Conference carved up Africa according to which European nation-states claimed effective control over a given territory. In doing so, the European Powers treated all of sub-Saharan Africa as a blank

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262. See DARLING, *supra* note 258, at 163-64.

263. JACKSON, *supra* note 11, at 68.

264. Pfaff, *supra* note 8, at 3-4.

265. JACKSON, *supra* note 11, at 69.

266. JACKSON, *supra* note 11, at 70.

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slate, paying little attention to pre-colonial relationships between traditional societies, and compressing the thousands of communities into some forty unitary nation-states.<sup>267</sup> Mutua notes that for many Africans “the newly contrived state represented . . . the physical symbol of the loss of independence and sovereignty over their societies.”<sup>268</sup> Thus, the colonizers in Africa – like their counterparts in Asia – built vast and artificial political jurisdictions by lumping distinct peoples, cultures and histories into to a handful of arbitrarily created territories in what has been aptly labeled “an international enclosure movement.”<sup>269</sup>

While international law’s metanarrative portrays the nation-state standard as a step toward universality and objectivity, the extensive nation-building efforts in Asia and Africa (and elsewhere) suggest otherwise. The nation-state itself can be viewed as a metaphorical prison that incarcerated innumerable diverse communities of cultures, peoples, and histories. These imaginative geographies were neither neutral nor universal but rather were based on Western values, biases and practices. Just as the disciplines make the individual, and the Orientalists create the Orient, international law fabricated these nation-states as a means of control and subjugation. International law chose the nation-state over the civilization standard for the same three reasons that the carceral city was chosen over the punitive city. First, the nation-state acts as a buffer between the international community and nationalist groups in the colonies, which the West perceived as immoral, irrational, and a threat to the stability of the international legal order.<sup>270</sup> It therefore silences resistance. Second, with the expansion of the Family of Nations, international law needed a means of subjugation and control that could be effective against a potentially large number of subjects. The nation-state provided such a mechanism by reducing the number of international actors to a relatively small and controllable lot. Finally, because the nation-state is a normalizing judgment that is also hierarchically structured, it provided a subtle and efficient means of enforcing conformity and eliminating difference with each nation-state acting as a normalizing gaze over the peoples

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267. Mutua, *supra* note 252, at 1113, 1134.

268. *Id.* at 1113, 1137.

269. JACKSON, *supra* note 11, at 71.

270. See Guyora Binder, *The Case for Self-Determination*, 29 STAN. J. INT’L L. 223, 224-25 (1993).

within its borders.

#### 4. The Self-Determination Standard

The most recent technical mutation of the civilization standard is that of self-determination. Although the concept of self-determination that had inspired the American and French revolutions, and that President Wilson presented to the post-World War I international community, was based on the principle of government by popular consent, such a revolutionary concept would have subverted international law's universalizing and dividing project by permitting practically any form of unified peoples to become international actors.<sup>271</sup> Instead, the League of Nations opted for a version of self-determination that favored territoriality over all other forms of identity such as culture, history, tradition, or opinion.<sup>272</sup> Thus, while the Allies of the First World War allowed the Balkanization of Europe, they did not apply Wilsonian self-determination to Africa or Asia, choosing instead to maintain preexisting territorial boundaries.<sup>273</sup> In this way, international law was able to use the self-determination standard to continue the process of "validating and essentializing" the colonial nation-state.<sup>274</sup>

Likewise, although the UN Charter lists among its purposes the "self-determination of people," the term "people" has not been interpreted in the sociological sense, but rather once again within the colonial territorial framework.<sup>275</sup> Indeed, nowhere in the Charter is it suggested that the colonial nation-state is a nullity or that sovereignty should be returned to pre-colonial peoples in the process of preparing them for independence. Rather, as Mutua observes, "[t]he Charter in fact says the opposite: it recognizes the right to political self-determination only for those territorial units that are 'internationally determined' of which the colonies are the classic example."<sup>276</sup> Thus, self-determination of people under the

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271. *Id.* at 525.

272. See Joshua Castellino, *Territory and Identity in International Law: The Struggle for Self-Determination in the Western Sahara*, 28 *MILLENNIUM* 523, 523 (1999).

273. See Binder, *supra* note 270, at 223, 227-29.

274. Mutua, *supra* note 252, at 1113, 1137.

275. U.N. CHARTER art. 1, para. 2; see MALCOLM N. SHAW, *INTERNATIONAL LAW* 230-31 (2003).

276. Mutua, *supra* note 252, at 1113, 1140. Grovogui argues that "like the mandate system it replaced, the trustee system was in practice another form of colonial control, primarily organized around the military, political and economic interests of the colonial

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Charter means nothing more than the self-determination of the colonial nation-state.

Even the UN General Assembly resolutions that spurred the rapid period of decolonization from 1950 until the early 1970s perpetuated the colonial nation-state. While both the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514) and the 1970 Declaration on Principles of International Law Concerning Friendly Relations (Resolution 2625) call for a speedy and unconditional end to colonialism, they adhere to the doctrine of *uti possidetis* (i.e., the maintenance of pre-existing boundaries regardless of how they were established). These Declarations, therefore, limited the right of self-determination to those territories officially recognized by the UN as former colonies.<sup>277</sup> As a result, self-determination has become “perhaps the single greatest influence on the shaping of the map of the world today” as well as “in the creation and maintenance of modern postcolonial identities.”<sup>278</sup> By freezing the territorial boundaries that were arbitrarily established by the colonial powers, this doctrine has effectively prevented groups within these artificially created colonial nation-states from establishing their own identities and destinies in the international community.<sup>279</sup>

Ironically, it was the postcolonial nation-states themselves that advocated this territorially delimited definition of self-determination. While the former colonial nation-states argued that the doctrine of *uti possidetis* was necessary to preserve their fragile governments during the transition to independence, the leaders of the independence movements in the former colonies were usually educated in the West and supported in government posts by the former imperialist powers.<sup>280</sup> As a result, they had a vested interest in the preserving the centralized administrative apparatuses – the *Gesellschaft* – of the imperialist powers.<sup>281</sup> Put more polemically, Grovogui argues that “the African elites surrendered political and

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powers.” GROVOGUI, *supra* note 16, at 151.

277. See Binder, *supra* note 270, at 223, 238. This interpretation was confirmed in the International Court of Justice decisions in the Namibia and Western Sahara cases. See Advisory Opinion, Western Sahara, 1975 I.C.J. 12 (Oct. 16); Advisory Opinion, Namibia, 1971 I.C.J. 16 (June 16).

278. See Castellino, *supra* note 272, at 523, 527.

279. *Id.* at 523, 529.

280. See Gordon, *supra* note 2, at 903, 959.

281. See DARLING, *supra* note 258, at 161.

economic initiative and subscribed to a discourse that legitimated the liberal state, proscribed any form of ownership other than capitalist, and recognized colonial structures and boundaries.”<sup>282</sup> Moreover, the international community protected these postcolonial regimes from secessionist claims as long as they kept meeting the Western criteria for the nation-state.<sup>283</sup> Just as the Orient participated in its own Orientalization, the former colonies perpetuated their own subjugation by using self-determination as a means of maintaining the Western image of statehood rather than as a means of challenging it.<sup>284</sup>

We have witnessed how international law has used the civilization, nation-state, and self-determination standards to achieve its universalizing and dividing project. Through this project, international law has placed diverse communities of cultures, peoples, and histories in a double prison. First, these communities have been imprisoned in the imaginative geography of the colonial nation-state, and second, these artificial nation-states have been imprisoned within an international order that seeks to preserve them into perpetuity through territorially delimited legal norms. Temporally, international law subjects these diverse communities to the same historical/ahistorical process that Abdel-Malek and Said describe in the context of Orientalism. The individual histories of these various cultures and peoples are interrupted, erased, and replaced by the history of the colonial nation-state. Moreover, because international law preserves these nation-states as the imperialists left them, the peoples contained within these nation-states are likewise frozen in the past. Far from promoting progress, nation-building and self-determination have effectively silenced the progress of thousands of pre-colonial narratives. In *Nietzsche, Genealogy and History*, Foucault finds legal rules “are empty in themselves, violent and unfinalized” that can be bent to any purpose by those who are able to seize them.<sup>285</sup> The “universal” norms of self-determination and sovereignty illustrate this point by showing that the way one defines a legal term, and who does the defining, can have a profoundly homogenizing and controlling effect on those against whom the

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282. GROVOGUI, *supra* note 16, at 197.

283. See Binder, *supra* note 270, at 223, 237.

284. Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241, 252 (1994).

285. See Foucault, *Nietzsche, Genealogy and History*, *supra* note 54, at 85-86.

term is employed. Moreover, these norms show how words can project into the future the arbitrary and senseless violence of the past.

Perhaps what is most troubling about this international disciplinary machine is that it is self-sustaining. Just like Bentham's Panopticon, there is no need for a king in the international community because all nation-states act as their own jail keepers. With regard to the postcolonial nation-states, their leaders have a strong interest in preserving the status quo, as it assures their privileged positions and preserves their legitimacy among fellow nation-states in international society. Indeed, that the international disciplinary machine is de-individualizing and automatizing offers an explanation why recent international nation-building missions in Kosovo and East Timor are equally staffed by citizens of former colonies *and* their former colonizers, and why some African academics are urging the reintroduction of the UN trusteeship system in parts of Africa with African and Asian nation-states participating as mandatory powers.<sup>286</sup> However, the analogy to the Panopticon can be taken even further, as Anghie does in his study of the League of Nations. He argues that the League's mandate system constituted a new technology of monitoring and management by which knowledge about colonial territories was collected from the furthest peripheries, consolidated and then subjected to a number of interpretive processes including administration, legislation and adjudication.<sup>287</sup> This knowledge was also synthesized by eminent colonial administrators so that the end result was that "the natives existed more vividly in Geneva, than they did in the mandate territories themselves."<sup>288</sup> Moreover, following in the footsteps of the humanist prison reformers, the mandate project sought to regulate behavior through persuasion rather than physical force; it sought to render the native "visible and amenable to the mechanisms and techniques of administration through the vocabulary of birth rates, productivity, wage rates, and so forth."<sup>289</sup>

What Anghie says about the mandate system can certainly be said about the United Nations, which had a program budget of

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286. See Ali Mazrui, *Decaying Parts of Africa Need Benign Colonization*, INT'L HERALD TRIB., Aug. 4, 1994.

287. See Anghie, *supra* note 4, at 513, 614.

288. *Id.*

289. *Id.* at 513, 617.

\$2.536 billion for fiscal year 2000<sup>290</sup> and a secretariat of approximately 8,900 civil servants drawn from some 160 countries.<sup>291</sup> Since 1948, the UN has operated 59 peacekeeping operations around the world, and each year it produces approximately 400 publications.<sup>292</sup> The United Nations is an enormous bureaucratic machine that is constantly collecting, analyzing, processing, combining, and penetrating almost every aspect of the nation-states that are on its agenda. Moreover, when one of its members falls out of line, the UN Security Council has the power to subject that nation-state to a highly repressive regime of stigmatization, sanctions and surveillance as it did to Libya (Resolutions 731, 748, 883), Serbia (Resolutions 1203 and 1244) Afghanistan (Resolution 1333) and Iraq (Resolution 687 and 688).<sup>293</sup> It is not entirely ironic, therefore, that the very man that developed the concept of the Panopticon also wrote an essay “to submit to the world a plan for universal and perpetual peace.”<sup>294</sup>

In sum, the counter-narrative described above shatters four myths contained within international law’s metanarrative. First, it rejects the common perception that the practices of imperialism and colonization were historical aberrations that were remedied by the post-1945 decolonization project. Rather, as Anghie argues, these practices “continue to play a role in contemporary international relations and generate important analytic categories that have an enduring and crucial significance to our understanding of international law as a whole.”<sup>295</sup> Second, this counter-narrative rejects the common perception that terms such as sovereignty and self-determination are neutral. Instead, these

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290. A CONCISE ENCYCLOPEDIA OF THE UNITED NATIONS 15 (Helmut Volger ed., 2002) [hereinafter CONCISE ENCYCLOPEDIA].

291. BASIC FACTS ABOUT THE UNITED NATIONS 15 (Dep’t of Public Info. 2000). This figure excludes employees of the United Nation’s twenty-one programs (such as the World Food Program and UNICEF) and nineteen specialized agencies (such as the World Bank and ILO). The World Bank alone has a staff of some 11,000 and administrative annual budget of \$1.4 billion, and the World Food Program has staff of over 5000 and an annual budget of \$1.5 billion. *Id.* at 42, 52.

292. CONCISE ENCYCLOPEDIA, *supra* note 290, at 15.

293. Simpson contends that outlaw states such as Iraq and Serbia are incarcerated within a separate legal regime without democratic rights and subject to continual surveillance and occasional disciplinary violence. See Simpson, *Two Liberalisms*, *supra* note 3, at 537, 570 (discussing Western legal scholars’ various definitions of an “outlaw state”).

294. See SCHWARZENBERGER, *supra* note 45, at 15.

295. See also Anghie, *supra* note 4, at 513, 518 (2002) (discussing how the World Bank and IMF seek to promote good governance through conditions on development loans).

rights derive from conceptions of society and politics that are definitely Western.<sup>296</sup> Finally, it rejects the perception that nation-building is purely an altruistic endeavor. Rather, underneath every civilizing mission or the nation-building project lingers always an economic motive as well. When placed in the context of this counter-narrative, the failed/outlaw state phenomenon is neither new nor ephemeral, but rather is a “history of the present” extending at least as far back as the Berlin Conference but arguably to the West’s first attempts at nation-building. If this is the case, then contemporary nation-building in places such as Bosnia, Kosovo, East Timor and Iraq are simply colonialism in new dress.<sup>297</sup>

#### IV. RESISTANCE AND INTERNATIONAL LAW

##### A. *The Orthodoxy*

The last section placed international law in the context of Foucault’s and Said’s theories about domination to show how it has used the spatial and temporal processes of universalism and division in an effort to reduce, essentialize, homogenize, and control a vast array of cultures, peoples and histories. This section addresses whether this effort has faltered in light of the current crisis of failed and outlaw states. As Said points out, usually the first reaction to violence committed by a member of the ex-colonial world against a law-abiding and successful Western nation-state is to ask, “[W]hy don’t they appreciate us, after what we did for them?”<sup>298</sup> A range of theories then follow this initial reaction, blaming the violence on the Third World’s own backwardness, corruption or inability to come to terms with Western ideals. At the polar extremes of these theories are the ideas of Francis Fukuyama and Samuel Huntington.

To explain the current onslaught of anti-Western sentiment,

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296. GROVOGUI, *supra* note 16, at 4.

297. Gathii, *supra* note 9, at 1996, 2024-25. Wilde comments that the type of international territorial administration used in Kosovo and East Timor is “protection – and colonialism – in a new guise ostensibly serving objectives set by the member states of international organizations collectively, rather than by European states individually. It enables the same underlying process without attracting the opprobrium that the foreign state administration model, especially in the colonial context, came to attract in the twentieth century.” Wilde, *supra* note 2, at 583, 602.

298. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at 22.

Fukuyama divides the ex-colonial world into two groups. The first comprises the nation-states of the underdeveloped world whose economic development lags so far behind that of the West that for the foreseeable future they will remain in history.<sup>299</sup> The second group consists of fundamentalist Islamic nation-states which, although more advanced than many of the Third World countries, nonetheless harbor deep animosity towards the West.<sup>300</sup> Neither group, however, presents a credible threat to the international order of liberal nation-states because the former are nothing more than violent police states at the whim of corrupt dictators, and the latter are based upon religious superstitions that are no longer relevant in the post-historical world. Moreover, they both put forth futile efforts to resist the fact that “[m]odern economics – the process of industrialization determined by modern natural science – is forcing the homogenization of mankind, and is destroying a wide variety of traditional cultures in the process.”<sup>301</sup>

Huntington, who got his idea about a clash of civilization from Said’s nemesis,<sup>302</sup> argues that the interactions among peoples of different civilizations enhance the “civilization-consciousness” of those peoples, which then invigorates historical differences and animosities.<sup>303</sup> Particularly divisive, is the process of economic modernization and social change throughout the world, which although bringing Western power to its apex has caused a “return to the roots phenomenon” in less advanced non-Western civilizations.<sup>304</sup> Moreover, these non-Western civilizations do not share “Western ideas of individualism, liberalism, constitutionalism, human rights, equality, the rule of law, democracy, free markets, the separation of church and state.”<sup>305</sup> As a result of this inevitable clash, the West must maintain its economic and military supremacy to protect its interests, while at the same time developing a more profound means of obtaining

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299. See FUKUYAMA, *supra* note 17, at 235; see also HOWARD WILLIAMS, DAVID SULLIVAN & E. GWYNN MATTHEWS, FRANCIS FUKUYAMA AND THE END OF HISTORY 109-22 (1997).

300. FUKUYAMA, *supra* note 17, at 234-38.

301. *Id.* at 235.

302. See generally Bernard Lewis, *The Roots of Muslim Rage*, 266 THE ATLANTIC MONTHLY 60 (1990).

303. Huntington, *supra* note 17, at 26.

304. *Id.*

305. *Id.* at 40.

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knowledge about the other civilizations.<sup>306</sup>

Rather than viewing them as opposites, Said sees the theories of Huntington and Fukuyama as equally apologetic of an “exultant Western tradition.”<sup>307</sup> Both views oversimplify characterizations of the West and East, failing to recognize that cultures are hybrids, heterogeneous, and “so interrelated and interdependent as to beggar any unitary or simply delineated description of their individuality.”<sup>308</sup> Moreover, Foucault and Said show that while in some ways both theories are correct, they ultimately miss the point. Huntington correctly views resistance as inevitable, and Fukuyama correctly observes the homogenizing effects of Western liberal democracy. However, neither theory recognizes how international law creates and perpetuates these dividing and homogenizing phenomena. It is neither cultural difference nor global modernization, but the disciplinary machine of international law – currently rooted in the concept of the nation-state – that is the underlying cause of failed and outlaw states.

### *B. Is Foucault Against Resistance?*

There are two places in *Discipline and Punish* where the issue of resistance emerges in relation to the disciplinary technologies. First, during his discussion of how the micro-physics of power produce docile bodies, Foucault comments that the power exercised on the body is not conceived as property or a privilege, but as a strategy or a “network of relations, constantly in tension” that goes “right down into the depths of society.” As a result, “[t]he overthrow of these ‘micro-powers’ . . . is not acquired once and for all by a new control of the apparatus nor by a new functioning or destruction of the institutions.”<sup>309</sup> As Bob Fine suggests, by depicting power as a network of relations, Foucault argues that the overthrow of the disciplinary apparatus requires the formation of new networks of relations.<sup>310</sup> Simply seizing power from the ruling class, or even destroying existing institutions, will leave the micro-powers intact. The problem is that Foucault offers no guidance on how to go about identifying and destroying these micro-powers. While a revolt may direct its forces towards

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306. *Id.* at 49.

307. SAID, ORIENTALISM, *supra* note 21, at 349.

308. *Id.*

309. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 272.

310. *See* Fine, *supra* note 71, at 310.

something tangible like a ruling class or a state institution, it is difficult to fathom how to revolt against a strategy.

The second place in the book where resistance is implicated is during Foucault's discussion of delinquency. He acknowledges that the prison system is not very effective at eliminating illegality or reforming prisoners.<sup>311</sup> While some might classify these failures as a form of resistance to the penal system, Foucault remarks that "[f]or the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well in producing delinquency, a specific type, a politically or economically less dangerous – and, on occasion, usable – form of illegality."<sup>312</sup> Relating delinquency to his theories of Panopticism, Foucault further states that in the panoptic society the delinquent

is not outside the law; he is, from the very outset, in the law, at the very heart of the law, or at least in the midst of those mechanisms that transfer the individual imperceptibly from discipline to the law, from deviation to offense. Although it is true that prison punishes delinquency, delinquency is for the most part produced in and by an incarceration which, ultimately, prison perpetuates in its turn.<sup>313</sup>

Thus, the true function of the prison is not to eliminate illegality but rather to create one which is easily supervised, limited to an enclosed group of individuals, kept on the fringes of society, and useful economically and politically.<sup>314</sup>

Given his theories of micro-power and delinquency, it is easy to see why Foucault's attitude toward resistance is often characterized as pessimistic. In fact, when it comes to resistance, Said is one of Foucault's biggest critics. In *Culture and Imperialism*, Said pities how Foucault "turned his attention away from the oppositional forces in modern society which he had studied for their undeterred resistance to exclusion and confinement . . . and decided that since power was everywhere it was probably better to concentrate on the local microphysics of power that surround the individual."<sup>315</sup> In an essay, Said accused

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311. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 272.

312. *Id.* at 277; see also *From Torture to Cellblock*, in FOUCAULT LIVE 146, 147 (Sylvère Lotringer ed., 1996) (interview of Michael Foucault).

313. SAID, ORIENTALISM, *supra* note 21, at 349.

314. Fine, *supra* note 71, at 324.

315. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at 26.

Foucault of being “on the side of power” because the “undifferentiated power he seemed to ascribe to modern society” was “irresistible and unopposable.”<sup>316</sup> Said blames Foucault’s pessimism on “a singular lack of interest in the force of effective resistance” which he attributes in turn to Foucault’s disenchantment with the insurrections of the 1960s and the Iranian revolution.<sup>317</sup> It is suggested here that Said goes too far with his criticism of Foucault. In an essay published after *Discipline and Punish*, Foucault wrote that

[i]t would not be possible for power relations to exist without points of insubordination which, by definition, are means of escape. Accordingly, every intensification, every extension of power relations to make the insubordinate submit can only result in the limits of power. The latter reaches its final term either in a type of action which reduces the other to total impotence (in which case victory over the adversary replaces the exercise of power) or by a confrontation with those whom one governs and their transformation into adversaries.<sup>318</sup>

Thus, power permeates society through points of resistance. As Elden observes, under Foucault’s conception of power, resistance is everywhere there is power.<sup>319</sup> “This is why there is no single focus for resistance, just as there is not a single focus for power. Resistance is the ‘other,’ the opposite of power.”<sup>320</sup>

The more valid criticism, therefore, is not that Foucault’s conception of power prevents resistance (it in fact depends on it), but rather, why, under his conception of knowledge and power, anyone should or would resist.<sup>321</sup> It is difficult to locate a clear answer in his works. However, one possibility is that resistance *speaks* by giving a voice to the subjected. “It is through revolt that

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316. Said, *Foucault and the Imagination of Power*, *supra* note 32 at 151.

317. *Id.*

318. DREYFUS & RABINOW, *supra* note 60, at 225. In an interview, Foucault remarked that “aside from torture and execution, which preclude any resistance, no matter how terrifying a given system may be, there always remain the possibilities of resistance, disobedience, and oppositional groupings.” *Space, Knowledge and Power*, in THE FOUCAULT READER 239, 245 (Paul Rabinow ed., 1984) (interview of Michael Foucault by Paul Rabinow and translated by Christian Hubert).

319. See ELDEN, *supra* note 85, at 106-07.

320. *Id.* at 107. Said recognizes this point, stating that “Foucault seems paradoxically to have stimulated himself and his audience to a greater degree of sovereign authority, as if to illustrate his own thesis that power produces resistance, and resistance, new forms of power.” Said, *Foucault and the Imagination of Power*, *supra* note 32, at 264.

321. See ELDEN, *supra* note 85, at 106.

subjectivity . . . introduces itself into history and gives it the breath of life . . . . One does not have to maintain that these confused voices sound better than the others and express the ultimate truth . . . it is sufficient that they exist and they have against them so much which is set up to silence them . . . it is due to such voices that the time of men does not have the form of evolution, but precisely that of a history.”<sup>322</sup> Another possibility is that resistance *exposes* by acting “as chemical catalyst so as to bring to light power relations, locate their position, find out their point of application and the methods used.”<sup>323</sup> Finally, and perhaps most relevant to this article, resistance *re-directs* by showing us that “the target nowadays is not to discover what we are, but to refuse what we are. We have to imagine and to build up what we could be to get rid of this kind of political ‘double bind,’ which is the simultaneous individualization and totalization of modern power structures.”<sup>324</sup> In short, for Foucault, the process of resistance serves very important purposes in society even if it can never triumph over the micro-physics of power that envelop the individual.

### C. Is Said Overly Optimistic About Resistance?

Thus far, this article has showed how Said’s ideas about cultural domination in many ways resemble Foucault’s theories about discipline, particularly in regard to how time and space are used as a means of control. *Orientalism* elevates Foucault’s concepts from their Eurocentricity and applies them globally and perhaps more tangibly, while *Discipline and Punish* adds depth and complexity to Said’s sometimes overly political rhetoric. But it is on the issue of resistance that Said has vocally distanced himself from Foucault, and it is argued here that this issue is the primary source of division between the two academics’ ideas.

Said *needs* to resist. It is integral to his personal politics as well as his own identity as a Palestinian victim of imperialism

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322. Michel Foucault, *Is It Useless to Revolt?*, 8 PHIL. & SOC. CRITICISM 8 (1981).

323. DREYFUS & RABINOW, *supra* note 60, at 211; *see also* Michel Foucault & Noam Chomsky, *Human Nature: Justice versus Power*, in REFLEXIVE WATER: THE BASIC CONCERNS OF MANKIND 171 (Fons Elders ed., 1974) (“[T]he real political task in a society such as ours is to criticize the working of institutions which appear both neutral and independent . . . in such a manner that the political violence which has always exercised itself obscurely through them will be unmasked.”).

324. DREYFUS & RABINOW, *supra* note 60, at 216.

exiled to a Western metropolis.<sup>325</sup> Although often dismissed as polemical, Said's commentaries on the Middle East probably make up the largest part of his writings. Indeed, many of his theories presented in *Orientalism* were outlined in an essay he wrote about the Arab-Israeli October War of 1973. In that essay, he proclaimed that Arab resistance to Israeli-Western imperialism has shattered the myth of the Arabs as passive, supine and impotent Orientals.<sup>326</sup> At bottom, resistance requires three things: (1) the possibility of resistance; (2) something to resist against; and (3) a reason for resisting. *Orientalism* and its sequel, *Culture and Imperialism*, develop Said's thoughts on each of these three components, as well as explain many of his divergences from Foucault's ideas on power and resistance.

With regard to the possibility of resistance, *Orientalism* itself offers the non-Westerner little hope. Throughout the book, Said maintains that the Oriental is effectively silenced by the representations of the Orientalist. "[I]f the Orient could represent itself, it would; since it cannot, the representation does the job, for the West, and . . . for the poor Orient."<sup>327</sup> Even when Said briefly addresses decolonization, he appears to primarily credit the European empires with the initiative.<sup>328</sup> In an interview, Said explained,

I was trying to look at the way in which a certain view of the Orient was created and accompanied, or perhaps was used to subordinate the Orient during the period of imperialism beginning with the conquest of Egypt by Napoleon. And that's all I was trying to do. I had nothing to say about what the Orient was really like. I said nothing about the possibility of resistance to it.<sup>329</sup>

Yet, even in *Orientalism* Said begins to sow the seeds for his ideas about independent choice and responsibility, proclaiming that "unlike Michel Foucault . . . I do believe in the determining imprint of individual writers upon the otherwise anonymous

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325. ASHCROFT & AHLUWALIA, *supra* note 27, at 117.

326. See Edward W. Said, *Shattered Myths*, in MIDDLE EAST CRUCIBLE 427 (Naseer H. Aruri ed., 1975).

327. SAID, *Orientalism*, *supra* note 21, at 21.

328. See *id.* at 240-41. His views changed little when he revisited the topic of Orientalism in 1985 and wrote that the Orient was "not Europe's interlocutor, but its silent Other." Said, *Orientalism Reconsidered*, *supra* note 180, at 349.

329. Said, *Language, History, and Knowledge*, *supra* note 196, at 269.

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collective body of texts constituting a discursive formation like Orientalism.”<sup>330</sup>

The sea change comes with *Culture and Imperialism* in which Said dedicates an entire chapter to the topic of resistance, argues that resistance has existed since the dawn of modern imperialism, and directly criticizes Foucault’s conception of power as providing no possibility for political resistance.<sup>331</sup> He distances himself further in a 1996 interview where he not only implies that Foucault is wrongly labeled a rebel, but he attributes his “writing from the point of view of power” to his homosexuality and sadomasochistic tendencies.<sup>332</sup> As discussed above, Said wrongly charges Foucault’s theories with not allowing the possibility of resistance. Indeed, Said speaks in Foucaultian terms when he argues that “history also teaches us that domination breeds resistance.”<sup>333</sup> More accurately, Said’s criticism of Foucault hinges on the other two conditions for resistance.

With regard to the need for something to resist against, both *Orientalism* and *Culture and Imperialism* provide a tangible alternative to Foucault’s all-consuming micro-physics of power. Although Said also characterizes Orientalism as a family of ideas and a way of thinking, he provides the non-Western dissident with easily identifiable institutions of Western cultural dominance and imperialism, as well as a whole list of former and current Orientalists who are perpetuating myths about the non-West. Unsurprisingly, this has exposed *Orientalism* to methodological criticism. On the one hand, Foucault’s micro-powers are necessary to show how Orientalism has permeated civil and global society – namely, the media, academics and the arts. But, on the other hand, Said identifies the West, the former colonial powers, and in particular the United States and Israel, as definite loci of cultural domination.<sup>334</sup> This sounds like trying to have one’s cake and eat it too, but it is understandable in the context of Said’s need to resist. As Kennedy remarks, “Said sets out to reconnect European scholarship and literature on the Orient with the political contexts of imperialism” but “chooses as one of his major theoretical

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330. SAID, ORIENTALISM, *supra* note 21, at 23; *see* HUSSEIN, *supra* note 141, at 239-240.

331. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at 191.

332. Said, *Language, History, and Knowledge*, *supra* note 196, at 268.

333. *See* SAID, CULTURE AND IMPERIALISM, *supra* note 29.

334. *See* KENNEDY, *supra* note 131, at 26.

sources a thinker who . . . refers to a model of power which obscures the role of a central locus of power in producing oppression.”<sup>335</sup> Yet, as mentioned before, Foucault’s theories are not wholly incompatible with the idea of resisting against something tangible. In an essay published after *Discipline and Punish*, Foucault writes that he does not wish to deny the significance of institutions, only that “one must analyze institutions from the standpoint of power relations, rather than vice versa.”<sup>336</sup> He then goes even further by remarking how power relations have been increasingly governmentalized and centralized in state institutions, and by calling for our liberation “from the state and from the type of individualization which is linked to the state.”<sup>337</sup> Thus, Foucault does not oppose resistance to institutions *per se*.

It is contended here that where Said and Foucault truly diverge is on the reason for resisting. For Said, the answer is plain: emancipation and enlightenment. In *Orientalism*, Said employs instruments of humanistic research to assist him in studying Orientalism, and where he criticizes Enlightenment scholars, it is not for their universal pronouncements, but for their failure to apply their value system abroad.<sup>338</sup> He further disassociates Enlightenment ideals from their originators in his 2003 preface to *Orientalism* where he draws the distinction between “the will to understand for purposes of co-existence and humanistic enlargement of horizons, and the will to dominate for the purposes of control and external dominion.”<sup>339</sup> Likewise, in *Culture and Imperialism*, he argues that the eighteenth century principles of emancipation and enlightenment were turned against their authors as they “mobilized people in the colonial world to rise up and throw off imperial subjection,”<sup>340</sup> and further suggests that a universalism that is neither limited nor coercive is possible.<sup>341</sup> And, when Said agrees with Enlightenment thinkers such as Adorno, he does not hesitate to praise them, leading one critic to observe that he “wishes to complete the work of earlier European humanists . . . by extending Enlightenment concepts of human and political

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335. *See id.* at 27.

336. Foucault & Chomsky, *supra* note 323, at 222.

337. *Id.* at 224.

338. *See SAID, ORIENTALISM, supra* note 21, at 26, 254.

339. *Id.* at xiv.

340. SAID, *CULTURE AND IMPERIALISM, supra* note 29, at xiii.

341. *Id.* at 277.

rights to the peoples of the non-Western world.”<sup>342</sup> Less sympathetically, Ahmad accuses Said of positing against what he debunks “the values, precisely, which he has learned from that very tradition: tolerance, universality, non-racialistic pluralism, liberalism, humanism, sympathetic participation in the emotional experience of the Other, etc.”<sup>343</sup>

However, Said’s advocacy of Enlightenment values is not without purpose. Shocked by how Islamic nationalist and fundamentalist groups adopted *Orientalism* as a manifesto to essentialize and denigrate the West,<sup>344</sup> Said was understandably eager to develop a theory of resistance that clearly rejects all dogmatic orthodoxy. He found help in Frantz Fanon’s distinction between nationalism, in which “nationalist consciousness can very easily lead to frozen rigidity; merely to replace white officers and bureaucrats with colored equivalents”<sup>345</sup> and liberation, in which a people move beyond national consciousness to *social* consciousness.<sup>346</sup> In other words, true liberation from cultural domination requires rejecting separatism and triumphalism for a more integrative view of human community and culture. Moreover, liberation requires entering into the discourse of the West and making it recognize marginalized or forgotten histories – what Said calls “the voyage in.”<sup>347</sup> Thus, Said’s concept of liberation is tied to his advocacy of multicultural discourse as the solution to the dogmas associated with both Orientalism or Occidentalism.<sup>348</sup>

In espousing his theory of liberation, Said recognizes that nationalism is often the necessary and inevitable response to Western domination as diverse peoples unite against a common enemy.<sup>349</sup> Moreover, he attributes the staying power of nationalism to the West’s imposition of the nation-state on newly decolonized

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342. See KENNEDY, *supra* note 131, at 34. Another commentator notes that “Said sees the politics of difference as achieving the universal tolerance that liberalism preaches, but fails to achieve.” JOHN MCGOWAN, *POSTMODERNISM AND ITS CRITICS* 172 (Cornell Univ. 1991).

343. Ahmad, *supra* note 143, at 286.

344. See SAID, *ORIENTALISM*, *supra* note 21, at 331-33, 335-36, 338.

345. See SAID, *CULTURE AND IMPERIALISM*, *supra* note 29.

346. See *id.*

347. *Id.* at 239.

348. See SAID, *ORIENTALISM*, *supra* note 21, at 338 (promoting over uncritical nationalism “the idea that communities of interpretation exist within and outside the Islamic world, communicating with each other in a dialogue of equals”).

349. *Id.* at 263.

states. "The national identity struggling to free itself from imperialist domination found itself lodged in, and apparently fulfilled by, the state."<sup>350</sup> In an interview, Said argues further that the creation of postcolonial nation-states "gives rise to embattled, emergent resistance movements which then in turn . . . fall into homogenized unities, imagined communities." These imagined communities then become "reified, stable entities, and on them is built the usually repressive apparatus of the national security, one-party state."<sup>351</sup> This "pathology of power" occurs no matter how much the postcolonial government may try to conform to the global processes or external norms.<sup>352</sup> Similarly, he describes fundamentalism as a kind of Freudian transference in which governments that feel powerless against the West turn their frustrations toward repressing their own populations, which then leads to a further sense of resentment, anger, and helplessness.<sup>353</sup> In both cases, cultural identity becomes unnaturally associated with the nation-state, differentiating "us" from "them" and typically leading to xenophobia and coercive campaigns for the return to cultural roots.<sup>354</sup> Yet, notwithstanding the inevitability of nationalism or fundamentalism, Said insists that these orthodoxies must not stand in the way of true liberation because any other view would accept the racial, religious, and political divisions imposed by imperialism, thereby resigning the world to the "senseless" dynamics of an essentialized world.<sup>355</sup>

Said's ideas about emancipation and enlightenment clearly differ from Foucault's viewpoints. Ahmad does not exaggerate too much when he proclaims that "Foucault was quite possibly the most rigidly anti-Humanist writer of our time."<sup>356</sup> As Hussein comments, Said attempts to move beyond Foucault, contending that "for ideology critique to be effective, the intellectual must posit a utopian moment beyond Foucault's powerfully effective but largely negative criticism."<sup>357</sup> But in doing so, Said moves away from postmodernism. Thus, O'Hagan observes that Said's work

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350. *Id.* at 319.

351. EDWARD SAID: A CRITICAL READER 233 (Michael Sprinker ed., 1992).

352. *Id.* at 236.

353. SAID, ORIENTALISM, *supra* note 21, at xxi.

354. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at xiii.

355. *See Id.* at 276, 333.

356. Ahmad, *supra* note 143, at 285-286.

357. HUSSEIN, *supra* note 141, at 129.

straddles the boundaries between the modern and postmodern in much the same way that his life straddled boundaries, disciplines, and worlds.<sup>358</sup> Just as Foucault's aversion to politics made him go postmodern, Said's attraction to politics drove him from postmodernism. While Said found his struggle in native peoples' preservation of geographical territory,<sup>359</sup> Foucault centered his in a "non-place" to which neither adversary belongs, and consequently, no one can glory in it.<sup>360</sup>

#### *D. Resistance and International Law Reconsidered*

The separation of two phenomena – colonization and the failed or outlaw state – has been based on the widespread claim among Western liberal scholars that since decolonization, all states are equal under international law and the norms of international law are neutral, apolitical, and universal.<sup>361</sup> Based on this assumption of postcolonial redemption, international law has been able to wash the colonial past from its hands and attribute the current crises of failed and outlaw states to inadequate domestic leadership and modernization in the Third World. Indeed, one commentator argues that the rapid decolonization following the Second World War can be viewed as the classic example of "be careful what you wish for" because the Third World nation-states simply lacked the political maturity upon independence to fully exercise their sovereignty and self-determination within the international system.<sup>362</sup> This assumption, however, blinds us to the way in which international law's disciplinary machine is ultimately responsible for perpetuating the failed and outlaw state problem. As Fitzpatrick notes, "[w]hen the universal project of Enlightenment confronts the limits of its appropriation of the world, it creates the very monsters against which it so assiduously sets itself."<sup>363</sup>

A handful of scholars have observed how current issues of collapsing or rogue states are tied to the inherent characteristics of the postcolonial nation-state. Franck, for example, argues that there has been a revival of tribal self-determination that challenges

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358. O'HAGAN, *supra* note 25, at 190.

359. *See, e.g.*, SAID, *CULTURE AND IMPERIALISM*, *supra* note 29, at 252.

360. *See* Foucault, *Nietzsche, Genealogy and History*, *supra* note 54, at 76, 85.

361. GROVOGUL, *supra* note 16, at 182.

362. *See* JACKSON, *supra* note 11, at 21.

363. Fitzpatrick, *supra* note 216, at 105.

the widely perceived belief in an irresistible trend in human history toward modernism and globalization and away from both tribalism and nationalism.<sup>364</sup> He labels this revival “postmodern neo-tribalism” which he partly attributes to “the backlash against the anomy fostered by centripetal socialization and bureaucratization,” as well as “the rise of the enlightened state from the seventeenth to the nineteenth century in Europe . . . [which] succeeded in unifying small principalities, republics, and city-states into larger national entities” that often “encompassed diverse religious and ethnic groups.”<sup>365</sup> Postmodern tribalism, therefore seeks a political and legal environment that facilitates the break up of multicultural nation-states into “unicultural” ones.<sup>366</sup>

Akbar Ahmed argues that one of the worst legacies of Western modernism is the nation-state, particularly in the way it has manifested itself in Africa and Asia.<sup>367</sup> “The nation-state, in its monolithic power, its desire to centralize, corrupt and control, its security apparatus characterized by unlimited power and limited imagination, is often an unmitigated disaster for the less privileged, in particular the minorities.”<sup>368</sup> He traces many of the present tensions in non-Western politics to the ignorant nation-building exercises of the European colonizers.

For example, the majoritarian rule has led to a form of democratic tyranny in which religious or ethnic majorities deny minority groups any say in economic or political decisions, thus leaving no alternative for these minority groups but to resort to violence.<sup>369</sup> In other words, contrary to its supposedly universal and multicultural purpose, the nation-state has in fact led to cultural particularism. Unlike Franck, however, Ahmed does not consider tribalism a derogatory or regressive term. Rather, he sees the modern state as having “sapped the tribal system of its vitality. Indolence and fatalism have taken the place of its élan.”<sup>370</sup>

Castellino, Mutua, and Jackson all agree that the wave of

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364. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW* 140-41 (1995).

365. *Id.* at 140-44.

366. *Id.* at 143-44.

367. AKBAR S. AHMED, *POSTMODERNISM AND ISLAM: PREDICAMENT AND PROMISE* 129-30 (rev. ed. 2004).

368. *Id.* at 130.

369. *Id.*

370. *Id.* at 134.

decolonization that followed the Second World War is directly implicated in the current collapsed and rogue state phenomenon. Castellino attributes the problem to the *uti possidetis* doctrine. While peoples of different cultural, ethnic or religious backgrounds united to remove a common foreign enemy, after decolonization they gradually realized that they had little in common with each other and set about trying to secede from the postcolonial nation-state.<sup>371</sup> Mutua likewise places the contrived citizenry of the African nation-state at the center of the Third World crises. In addition, he also believes that African nation-states, although formally independent, have remained conceptually colonial entities because Africans have simply occupied the seats left vacant by the departing European powers.<sup>372</sup> Along these lines, Jackson attributes the problem of the failed or outlaw state to the fact that the benefits of statehood have yet to trickle down to the citizenry at large whose lives have scarcely improved, and may even have been adversely affected, by independence.<sup>373</sup> While illegitimate and often incompetent rulers of what Jackson calls “quasi-states” are fully recognized by international law, members of the general population who seek to reform the system through the only means available to them – resistance and rebellion – are disparagingly shunned as separatists, secessionists or irredentists.<sup>374</sup>

Said and Foucault add depth to this discussion by showing that opposition is inevitable so long as the imbalance in power relations continues. Thus, international law is wrong to view resistance or rebellion as abnormal or illegitimate; instead, it is an integral component of the current state of national and international relations.

Moreover, Said’s ideas linking resistance to the nation-state not only align with the views of the scholars mentioned above, but they offer a further explanation: decolonization did not equate with true liberation from colonialism. The distinction between nationalism and liberation places Franck’s theories about postmodern neo-tribalism within a proper temporal perspective. Popular support for this movement as well as for religious fundamentalism is not so much due to a desire to return to the past

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371. See Castellino, *supra* note 272, at 530.

372. See Mutua, *supra* note 252, at 1145.

373. JACKSON, *supra* note 11, at 41.

374. *Id.*

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as it is to a desire to return to the future. The diverse cultures, peoples and histories that were silenced by the nation-state have never stopped searching for a way to regain their national and international voices. Unfortunately, they have learned that the only language to which the international community listens must be equally essentialist and reductive as that of international law. What the world is facing, then, is not a clash of civilizations, but a clash of two languages – neither of which actually represents any existing culture, people, or history. While Said dislikes both Orientalism and fundamentalism, he argues that the latter is in many ways a necessary and inevitable response to the former. True liberation, therefore, requires the elimination of the essentialism in both the language of resistance and the language of international law.

Foucault's theory of delinquency presented in *Discipline and Punish* offers a significantly different perspective to the current crisis in international law. To paraphrase Foucault, one should perhaps substitute the hypothesis that international law has succeeded extremely well in producing delinquent nation-states for the observation that international law fails to eliminate failed and outlaw states. Delinquent nation-states are not outside international law but in the very midst of international law's disciplinary mechanisms. This approach explains the way in which the West has traditionally treated those who rule illiberal nation-states.

When these nation-states were colonies, the colonial administrators were often the focal point of indigenous opposition to colonial rule. Notwithstanding, these civil servants never acted to permanently suppress nationalism, but rather they would encourage it so long as it did not threaten the overthrow of the colonial nation-state itself.<sup>375</sup> As the colonial administrations withdrew from these nation-states, they frequently handpicked their successors based not on whether the new ruling elites were democratic or humanitarian, but rather on whether the former imperial powers thought they could control them. Since decolonization, international law has unqualifiedly guaranteed these nation-states' survival no matter how repressive, corrupt, violent or disorganized they become, so long as they generally play

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375. See DARLING, *supra* note 258, at 175.

by the international (i.e., Western) rules.<sup>376</sup> Indeed, as Jackson points out, the international community often compensates these “ramshackle states” for their illiberality and underdevelopment with economic assistance.<sup>377</sup>

Finally, during the Cold War, the postcolonial nation-state’s existence, as well as the repressive and corrupt elites that controlled it, were preserved by the East-West balance of power.<sup>378</sup> Either these nation-states were considered off limits by the two superpowers, or the superpowers used them as pawns and collaborators in their global contest. Thus, just like a delinquent in the panoptic society, the delinquent nation-states created by decolonization were tolerated, and even encouraged, in the Cold War era. This remained true so long as they remained an easily supervised and enclosed group of states on the fringes of international society that were useful economically and politically to international power relations. However, once one of these states moved beyond delinquency by posing a direct threat to the international legal order, then the international community felt justified in intervening and, if necessary, destroying and rebuilding the failed or outlaw state.

However, with the end of the Cold War, and the resulting decrease in interest by hegemonic powers to prop up repressive postcolonial nation-states, the diverse cultures, peoples, and histories within these nation-states began to reassert themselves against their repressive and illegitimate regimes. This rebirth of resistance took the international community by surprise as it had already been assumed that all of these voices had been long silenced by the homogenizing effects of nation-building. With postcolonial nation-states around the world in a tenuous existence, the modern international disciplinary machine began losing its centering hold.

Nevertheless, through the 1990s, the international disciplinary machine managed to teeter through the 1991 Iraq War, the Rwanda Genocide, the anarchy in Somalia, the Bosnian War, and the Kosovo conflict. But after the terrorist attacks on September 11, 2001, the chaos proved too much and hegemonic powers such

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376. Thus, John Rawls argues that internally illiberal states should remain part of international society so long as they abide by the basic norms of procedural justice operating in the international legal order. *See generally* DARLING, *supra* note 258.

377. *See* JACKSON, *supra* note 11, at 23-24.

378. *See* Mutua, *supra* note 252, at 1160.

as the United States no longer held themselves bound by an international legal order that could not maintain the conformity it was designed to achieve.

President Bush, therefore, laid down the “new” international legal order by dividing the world in two: “Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”<sup>379</sup> He also returned to the same civilized/uncivilized binomial employed by Westlake, Hall and the other post-Enlightenment legal scholars. He declared in a speech before the UN General Assembly that “[e]very civilized nation here today is resolved to keep the most basic commitment to civilization . . . . Civilization itself, the civilization we share, is threatened. History will record our response . . . . The civilized world is now responding.”<sup>380</sup> Afghanistan was the first victim of this new international legal order, but it is Iraq that is the quintessential outlaw state.

#### V. IRAQ AND THE INTERNATIONAL DISCIPLINARY MACHINE

Having reviewed the various universalizing and differentiating practices that international law has used to contain and control its natural and uncivilized “others,” we can better understand how the ongoing conflict in Iraq is both a continuation of and a deviation from these practices. To begin with, the Iraqi nation-state is an imaginative geography upon which the West has inscribed its own history. As part of the Ottoman Empire since 1634, Iraq managed to avoid the direct effects of Western imperialism until after the First World War.<sup>381</sup> With the dissolution of the Ottoman Empire, however, Iraq became an A-Mandate territory under the League of Nations with the United Kingdom as its mandatory power. As they had done in sub-Saharan Africa and Asia in the nineteenth century, the Allied Powers redrew the map of the Middle East based on their own strategic considerations and secret pacts,<sup>382</sup> paying little attention to the interrelations between

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379. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>.

380. George W. Bush, Address to UN General Assembly (Nov. 10, 2001), at <http://www.whitehouse.gov/news/releases/2001/11/print/20011110-3.html>.

381. See POLITICAL PARTIES OF THE MIDDLE EAST AND NORTH AFRICA 174-75 (Frank Tachau ed., 1994) [hereinafter POLITICAL PARTIES].

382. See Robert Fisk, *Iraq, 1917*, INDEPENDENT (LONDON), June 17, 2004, at Review

long-established communities. Thus, for example, the Kurdish community was split between half a dozen newly defined nation-states.<sup>383</sup>

Britain initially attempted to rule Iraq directly, particularly in light of the valuable oil deposits discovered in the territory; however, this led to strong resistance by nationalist groups.<sup>384</sup> After quelling the rebellion through large “cost-effective” aerial bombing campaigns and the use of poison mustard gas in 1920, Britain decided to opt for indirect rule instead.<sup>385</sup> This still meant that the British installed their preferred leader as king, established a parliamentary monarchy modeled on their own and entered into a treaty with Iraq that granted them lucrative oil concessions and access to military bases.<sup>386</sup> After renewing the Anglo-Iraqi treaty, Britain assisted Iraq with the speedy termination of its mandatory status,<sup>387</sup> and in 1932, Iraq was granted formal independence (although British influence remained significant) and League membership upon promising to protect the various minority groups living in the nation-state.<sup>388</sup>

The Iraqi nation-state began its descent into international delinquency in 1941 when a group of nationalists took over the Iraqi government. After granting British troops permission to land in Basra, the nationalist government threatened to shoot down British planes taking off from al-Habbaniyyah air base if they carried evacuees. Britain considered these actions a violation of the Anglo-Iraqi treaty and acts of war, and therefore attacked and defeated the Iraqi military, reoccupied Iraq, and re-installed a pro-British government.<sup>389</sup> While the monarchy maintained a semblance of control over Iraq over the next 17 years, in 1958 an

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2. For instance, Transjordan, which did not constitute a unified entity prior to World War I, was created as a result of a secret agreement between France and Britain in 1916. See POLITICAL PARTIES, *supra* note 381, at 259.

383. See AHMED, *supra* note 367, at 133.

384. See Patrick Cockburn, *Britain's Role in Shaping Iraq*, BBC, Feb. 3, 2003, at <http://news.bbc.co.uk/1/hi/uk/2719939.stm>.

385. See David Omissi, *Baghdad and British Bombers*, GUARDIAN (Jan. 19, 1991); see also generally Robert Fisk, *Iraq, 1917*, INDEPENDENT (June 17, 2004); POLITICAL PARTIES, *supra* note 381, at 75; see Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 588-89 (2002).

386. See POLITICAL PARTIES, *supra* note 381, at 175.

387. See *id.* at 472.

388. See *id.*; Cockburn, *supra* note 384.

389. See SCHWARZENBERGER, *supra* note 45, at 179.

army coup brought nationalist parties – including the Arab Socialist Resurrection (Ba'ath) Party that included Saddam Hussein among its younger ranks – back into power.<sup>390</sup> The nationalist government abolished the monarchy and parliament and forged strong military and cultural relations with the Soviet Union, thus insuring its preservation by enmeshing itself in the Cold War.<sup>391</sup> In a 1968 coup, the Ba'ath Party finally consolidated its control over the government and suppressed all internal opposition – in particular, the Communists, Shi-ites and the Kurds – through violence and intimidation.<sup>392</sup> As deputy to Ba'ath President Bakr, Saddam Hussein began building the political base that enabled him to emerge as party leader, chairman of the Revolutionary Command Council, president, prime minister, and commander in chief of the armed forces in 1979.<sup>393</sup> Within a year, Saddam embarked on a war against Iran that lasted until 1988.<sup>394</sup> While officially neutral, declassified documents reveal that the United States provided significant financial, military and technical support to Saddam upon deciding that post-revolutionary Iran posed a threat to American interests.<sup>395</sup> Saddam diverted some of this assistance to help maintain internal control over rebellious groups, including the infamous poison gas attack on Halabja in 1988 that killed 5,000 Kurds.<sup>396</sup> Iraq had learned much from its colonial masters.

Iraq's status as a useful and manageable international delinquent was jeopardized when it invaded the (equally artificial) nation-state of Kuwait in 1990, and the UN Security Council determined that invasion to be a breach of international peace and security.<sup>397</sup> For Said, the coalition action that followed to “liberate” Kuwait was yet another example of cultural domination premised on the essentializing dogmas of Orientalism and colonialism: “that a small Third World dictatorship, nurtured and supported by the

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390. *See id.* at 182.

391. *Id.* at 182-83.

392. *See id.* at 184-85.

393. *See id.* at 186-88.

394. *See* POLITICAL PARTIES, *supra* note 381, at 188-89.

395. *See* National Security Archive, *The Saddam Hussein Sourcebook*, (Dec. 18, 2003), at <http://www.gwu.edu/~nsaarchiv/special/iraq/index.htm>.

396. *See* AHMED, *supra* note 367, at 135.

397. *See* G.A. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg. at 19, U.N. Doc. S/INF/46 (1990); G.A. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg. at 27, U.N. Doc S/INF/46 (1990).

West, did not have the right to challenge America, which was white and superior.”<sup>398</sup> After coalition forces drove Iraq from Kuwait, the UN Security Council employed several spatial and temporal techniques to discipline and control Iraq. Spatially, this disciplinary regime stationed UN observers ten miles inside the Iraqi border to monitor a demilitarized zone, established a border commission to re-determine Iraq’s frontiers, sent teams of international weapons inspectors to search for and oversee the destruction of chemical, nuclear and biological weapons, and imposed classical trade sanctions.<sup>399</sup> Later, this regime was expanded to include no-fly zones in the north and south of Iraq after the UN Security Council condemned Iraq for suppressing Kurdish and Shi’ite rebels who had supported the coalition forces during the conflict.<sup>400</sup> From inside and out, Iraq was divided, differentiated, organized, monitored, and supervised in an international effort to make the errant nation-state permanently visible and entirely subjugated.

Temporally, the UN Security Council resolutions that imposed the sanctions and surveillance were timeless and universal. Resolution 678 broadly permitted the use of force “to restore international peace and security in the area,” and not just to drive Iraq from Kuwait. Moreover, these penalties applied to all peoples of Iraq, regardless of whether they historically supported Saddam or the war against Kuwait. Furthermore, Resolution 687 provided no date upon which its burdensome regime of sanctions, surveillance and stigmatization would cease.<sup>401</sup> As Foucault wrote in *Discipline and Punish*, “[t]he ideal point of penalty today would be an indefinite discipline: an interrogation without end, an investigation that would be extended without limit to a meticulous and ever more analytical observation, a judgment that would at the same time be the constitution of a file that was never closed, the calculated leniency of a penalty that would be interlaced with the

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398. SAID, *CULTURE AND IMPERIALISM*, *supra* note 29, at 359.

399. See G.A. Res. 687, U.N. SCOR, 46th Sess., 2963rd mtg. at 11, U.N. Doc. S/INF/47 (1991); SIMPSON, *GREAT POWERS*, *supra* note 2, 293-94.

400. See G.A. Res. 687, *supra* note 399, at 11.

401. See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 567 (2003) (arguing that UN Resolution 687’s authorization on the use of force had not expired because “[w]hen the Security Council has taken the serious step of ending its authorization to use force, it has only done so . . . either by expressly terminating the prior authorization or by setting an up-front deadline”).

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ruthless curiosity of an examination.”<sup>402</sup> The UN sanctions following the first Gulf War came very close to this ideal.

Thus, having already imprisoned the diverse cultures, peoples and histories of Mesopotamia in the Iraqi nation-state, the United States led the international community to set about imprisoning this nation-state within a repressive international disciplinary regime. Simpson has drawn a parallel between such a regime and a prison:

In the case of criminal states, there is control through exclusion followed by a mixture of surveillance and community-sanctioned violence . . . . Pushing this metaphor further, one might argue that the outlaw state is incarcerated within a separate legal regime without rights and subject to continual surveillance and occasional disciplinary violence.<sup>403</sup>

To administer this prison, the United Nations both implicitly and explicitly made the U.S. and its allies the wardens. But with this responsibility came “an indispensable autonomy” to individualize and vary the application of the penalty based on the judgment of the warden.<sup>404</sup> Accordingly, it was the coalition forces, and not international law or its institutions, which determined when, where, and how to enforce the disciplinary regime.<sup>405</sup>

While the international disciplinary regime did not render Iraq a docile nation-state, between 1991 and 2002 it did appear that Iraq returned to a controllable form of delinquency. Iraq would occasionally flout the authority of the prison wardens, and the wardens would occasionally discipline Iraq with bombing campaigns, but the situation appeared to pose no immediate threat to the international legal order. However, after September 11 the U.S. perceived the international legal order as no longer able to ensure the subjugation of its non-Western “others.” So, it took matters into its own hands and returned to a form of overt and grotesque imperialism that the post-Enlightenment international lawyers had sought to minimize through their nation-building efforts. In Foucaultian terms, the United States returned to the

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402. See generally, FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21.

403. SIMPSON, GREAT POWERS, *supra* note 2, 313-14.

404. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 21, at 246.

405. This authority allowed the United States, Britain and France to bomb Iraqi territory at their discretion without seeking additional Security Council resolutions. Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 579 (2003); see, e.g., Yoo, *supra* note 401, at 570.

ancient form of punishment: torture and the execution. Thus, the second Gulf War can be viewed as a confrontation between the surplus power of the king and the body of the condemned man, or as Said observes, as “a personalized struggle between, on the one hand, a Third World dictator . . . and, on the other, the president of a country which has taken on the mantle of empire inherited from Britain and France.”<sup>406</sup> As with the execution, this excessive and overt means of punishment unsettled large groups of people around the world, leading to public demonstrations as well as increased threats of terrorist attacks. Additional acts of terrorism and displays of power, all enhanced by the media’s coverage, lead to what Said calls a “senseless dynamic”:

The fear of terror induced by the overscale images of “terrorism” and “fundamentalism” . . . hastens the individual’s subordination to the dominant norms of the moment. Thus to oppose the abnormality and extremism embedded in terrorism and fundamentalism . . . is to uphold the moderation, rationality, executive centrality of a vaguely designated “Western” . . . ethos. The irony is that far from endowing the Western ethos with the confidence and secure “normality” we associate with privilege and rectitude, this dynamic imbues “us” with a righteous anger and defensiveness in which “others” are finally seen as enemies, bent on destroying our civilization and way of life.<sup>407</sup>

Yet, the former international legal order – and along with it, the international disciplinary machine – continues to breathe. In the debate over the second Gulf conflict, international lawyers fixated on the issue of whether the UN Security Council had previously authorized the United States and its allies to re-invade Iraq – suggesting that if it had, then the violence that ensued would have been more justifiable and less imperialistic.<sup>408</sup> Moreover, despite President Bush’s expressed aversion to nation-building and no clear indication from Iraqis that they wanted international help in rebuilding their nation, the coalition forces were quickly joined “by a whole army of private contractors and eager entrepreneurs to whom shall be confided everything from the writing of textbooks and the constitution to the refashioning and

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406. SAID, CULTURE AND IMPERIALISM, *supra* note 29, at 300.

407. *Id.* at 310.

408. See generally Lori Damrosch & Bernard Oxman, Note, *Agora: Future Implications of the Iraq Conflict: Editors’ Introduction*, 97 AM. J. INT’L L. 553 (2003).

privatization of Iraqi political life and it is oil industry.”<sup>409</sup> The Coalition Provisional Authority set about immediately to build a new liberal democracy, promulgating regulations and orders on everything from de-Ba’athification of Iraqi society, to privatization of state-owned industries, to establishing competitive banks, to amending the nation-state’s patent and copyright laws to make them conform to international standards.<sup>410</sup> Perhaps then, this battle between the king and the condemned man occurred only momentarily outside the international carceral city to which we shall all soon return.<sup>411</sup>

## VI. CONCLUSION

Robert Cover observes that law is “the projection of an imagined future upon reality.”<sup>412</sup> This article has attempted to show that international law is trapped between two imagined futures: one that is divisive, and the other that is universalizing; one that predicts the end of history, and the other that predicts a perpetual clash of civilizations. While both offer an explanation of the ongoing problem of failed and outlaw states, neither sees that the international legal narrative that we have chosen has had a profound impact not only on our own lives, but also on the cultures, peoples, and histories that are different from our own. So long as we continue to employ spatial and temporal techniques to universalize and divide our “others,” international law will never amount to more than a means of suppressing and silencing those who do not conform to our vision of the world. True to the post-modernist approach, this article does not offer solutions, only new ways to ask questions. Perhaps Said comes closest to providing such an answer when he advocates liberation and multiculturalism. But can international law march to the beat of a thousand drums? Will such a rhythm produce cacophony or Beethoven symphonies? Will it be anarchy or the ultimate liberation?<sup>413</sup> An international

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409. *Id.*

410. See generally Coalition Provisional Authority, May 16, 2003, at <http://news.bbc.co.uk/1/hi/uk/2719939.stm>.

411. As this article was written, the world awaits the first elections in Iraq since the second Gulf War, which the Bush Administration has marked as the watershed moment at which Iraq rejoins the international legal order.

412. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1604 (1986).

413. Boutros-Ghali has questioned, “Could the United Nations discharge its responsibilities if, instead of being composed of 166 States, it had double that number of members? . . . Nationalist fever will increase *ad infinitum* the number of communities

legal order in which every state and every people, in whatever form, participates in the world's discourse may seem like a utopian dream, but it is no more an imagined future than the reality in which we are now living.

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claiming sovereignty, for there will always be dissatisfied minorities within those minorities that achieve independence. Peace, first threatened by ethnic conflicts and tribal wars, could then often be troubled by border disputes." *SG/SM/4691/Rev.I, SC/5360/Rev.I* (Jan. 31, 1992).