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Grappling With A Grotian Moment: Sovereignty and the Quest for a Normative World Order

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GRAPPLING WITH A GROTIAN MOMENT: SOVEREIGNTY AND THE QUEST FOR A NORMATIVE WORLD ORDER

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I. INTRODUCTION

On the first day of the same French Revolution that Wordsworth captured in his exuberant lines,

> Bliss was it in that dawn to be alive
> But to be young was very heaven!

legend has it that one Frenchman's diary entry read: "Nothing happened here today." The same mixture of enthusiasm and skepticism greeted President Bush's 1991 announcement of a new world order. But two years later no one needed to take his word for it. By 1993 it had become clear that the world had changed more rapidly and more fundamentally in two years than in the previous forty. Who could have anticipated, five years ago, the collapse of the Soviet empire, the end of the cold war, the multilateral involvement of the United Nations in a myriad of crises around the globe—the Persian Gulf, Somalia, Cambodia, Angola, Libya, Haiti, El Salvador, South Africa, Yugoslavia—while others, such as Nigeria, clamor for its attention? Who could foretell Nelson Mandela's release, the South African regime's renunciation of apartheid as a tragic perversion, a South African president addressing the UN General Assembly for the first time since the 1945 San Francisco conference, or Nelson Mandela's call for the end of sanctions against South Africa? Who could have envisaged Yitzhak Rabin and Yassir Arafat signing accords in Washington repeating the words of John Lennon's song, "Give peace a chance"? So much has happened so fast that neither policy analysts nor even intelligence agencies have had a chance to find their

footing in this rapid transformation of orthodoxies into obsolescence. The danger, however, is that incredulity can give way to blind faith—that the hard work of transforming transitory opportunities into lasting benefits can be abandoned for belief in miracles. The current crisis in the former Soviet Union, the intransigent clan warfare in Somalia, and the tribal bloodletting in Europe and South Africa caution us against this temptation and alert us to the hard work which still needs to be done.

Much has been written about recent changes, most of it ex post facto.[1] Perhaps history is a more congenial vocation than prophecy. Some writers, however, do predict or postulate models for the future.[2] But all these analysts, retrospective or prospective, have tended to concentrate on only two aspects of the new world order: the political and the institutional. Political analysts discuss power realignments and reconfigurations and ask such questions as: who will be our friends now, and who will be our enemies?[3] Institutional analysts deal with the legal

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1. *See, e.g.,* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992); JOHN LUKACS, THE END OF THE TWENTIETH CENTURY AND THE END OF THE MODERN AGE (1993).

2. There is a mystical aura at the end of a millennium which makes the urge to prophesy utterly irresistible despite the startling unpredictability of recent events. Some books have taken on the dual role of analysis and prophesy with vigor. *See, e.g.,* PAUL KENNEDY, PREPARING FOR THE TWENTY-FIRST CENTURY (1993); ALVIN TOFFLER, POWERSHIFT: KNOWLEDGE, WEALTH AND VIOLENCE AT THE EDGE OF THE 21ST CENTURY (1990).

3. There are two principal camps here. There are those who see the post-cold war world as unipolar—as one where the United States is the supreme power. Krauthammer, for instance, writes: "The immediate post-cold war world is not multipolar. It is unipolar. The center of the world power is the unchallenged superpower, the United States, attended by its Western allies." Charles Krauthammer, *The Unipolar Moment,* 70 FOREIGN AFF. 69 (1991).

On the other hand, there are those who vehemently reject this unipolar view. Owen Harries goes further and denies that "the West" represents a coherent unity without the Soviet threat. Owen Harries, *"The West" is Only a Flag of Convenience,* N.Y. TIMES, Aug. 28, 1993, at 19. One also notes a certain helplessness in the uncertain present, even a longing for more predictable days of identifiable enemies:

> One of the nice things about the Cold War was that we could nearly always tell who were our friends and who were our enemies. There were certain countries we could more or less count on to take our side, and others that regularly opposed us. It is, however, more complicated now. If we could previously take the opposition of countries in the communist bloc for granted, we are now able to look to those same countries for occasional support. With such nations potentially willing to side with us on selected issues, we have fewer "reliable" enemies.

structure of the UN, including such puzzles as the composition and respective authority of the Security Council, the International Court of Justice, and the General Assembly.[4]

This Article focuses on the rather neglected third dimension of the world order: the normative one. In particular, it discusses how the perennial conflict between state sovereignty and real human interests should be resolved for the new order. The principal thesis which runs through the Article is that the time has come to make the concept of human rights the irreducible foundation of the world legal system. This will not entail a withering away of the state—that is neither likely nor desirable. But it will mean a reconceptualization of statehood away from intrinsic sovereignty toward a more functional, juristic personality.

There are three main parts to this Article. Part II revisits the concept of state sovereignty—its Westphalian origin as a normative concept, anthropocentric inroads in 1945, and the competition between Grotian and Clausewitzian visions in the period between 1945 and 1989. Part III deals with the postmodernist challenge to the Grotian project, the latter having for the time being triumphed over Clausewitzian realism since the end of the cold war. Part IV then briefly sketches the contours of a new statehood predicated upon intrinsic human

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Lea Brilmayer, *The Odd Advantage of Reliable Enemies*, 32 HARV. INT'L L.J. 331, 331 (1991).

    This uncertainty of international political alignments at the century's end is thought to be even more ominous for the South: will it mean jeopardy for the right to development and, indeed, for all third generation and even second generation human rights? Could all rights be homogenized into civil and political rights? *See* Brenda Cossman, *Reform, Revolution or Retrenchment? International Human Rights in the Post-Cold War Era*, 32 HARV. INT'L L.J. 339, 345 (1991).

    With regard to economic, social, and cultural rights, or the right to development, the pessimistic view is an extrapolation from the West's advocacy of civil and political rights throughout the post-1945 period. But this position needs to be seen against the background and distortions of the cold war paradigm. Western-led efforts in Somalia and Haiti seem to suggest that the West may look at these matters differently. Some commentators are more positive about recent events. *See, e.g.*, Richard B. Bilder, *International Law in the "New World Order": Some Preliminary Reflections*, 1 J. TRANSNAT'L L. & POL'Y 1 (1992); Louis B. Sohn, *How New is the New International Legal Order?*, 20 DENV. J. INT'L L. & POL'Y 205 (1992).

    4. *See* Gerald P. McGinley, *The I.C.J.'s Decision in the Lockerbie Cases*, 22 GA. J. INT'L & COMP. L., 577, 587-600 (1992); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993); W. Michael Reisman, Note, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993).

dignity and human rights consistent with the ultimate sovereignty of real human beings within each state.

II. OLD ORDER PARADIGMS AND STATEHOOD PRE-1989

A. *The Grotian Revolution and Statehood Before World War II*

A "Grotian moment"[5] is an epoch in which a confluence of circumstances portends the birth of a new era in international law so long as a Grotius is on hand to wrest the new order from the chaos and ambiguities of the dying one. The first Grotian moment is naturally that which Hugo Grotius himself seized over four centuries ago and crafted into modern international law. But to understand the nature of Grotius's work and the normative imperatives of Grotian moments, one needs to look briefly at the forerunner of international legal ordering—the Roman Empire.

The *Pax Romana* had a normative foundation: it rested on the normative bedrock of natural law and on a legal system synthesized from its diverse culture. With the spread of Roman dominion, Greek natural law[6] was handed down to the Ro-

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5. The term is actually Richard Falk's. Richard Falk, *Some Thoughts on the Decline of International Law and Future Prospects*, 9 HOFSTRA L. REV. 399, 407-09 (1981) [hereinafter Falk, *Some Thoughts*]; Richard Falk, *On the Recent Further Decline of International Law*, *in* LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE 264, 272 (A.R. Blackshield ed., 1983).

6. The story of "natural rights" is in part also the story of natural law—that law which stood above and censured human laws and conventions. Natural law was the matrix in which many modern human-rights principles were molded, including those in the American and French Declarations, and to a lesser degree those in the Universal Declaration of Human Rights itself. Natural law was also the vehicle through which Greek and other ancient notions of justice reached the West and the world. JULIUS STONE, HUMAN LAW AND HUMAN JUSTICE 18 (1968).

The story of natural law begins in ancient Greece with the Sophists philosophizing about the nature of things. The Sophists argued that "the edicts of the laws are imposed artificially, but those of nature are compulsory" and that "the edicts of the laws are arrived at by consent, not by natural growth, whereas those of nature are not a matter of consent." *Id.* at 16 (Antiphon, the Sophist, 5th B.C.). Their version of natural law was man-centered and individualistic. *Id.* For Plato natural law was the "unchanging idea of law" in a realm which only philosophers could grasp, hence his belief that only philosophers should make laws. Aristotle, on the other hand, regarded the nature of a thing as its state of highest development—this was true of everything: "a man, a horse, or a family." 2 Aristotle, *Politics* 28, *in* 8 GREAT BOOKS OF THE WESTERN WORLD 445, 446 (Mortimer J. Adler ed. & Benjamin Jowett trans., 1991). Natural law, he said, was immutable and valid everywhere "as fire burns both here and in Persia," while the rules of human or conventional justice were like "wine and corn measures . . . not every-

mans amongst whom it found a keen recipient in Cicero.[7] This natural law had three dimensions: the *lex aeterna* (the law of reason of the Cosmos), the *jus humanum* (human law) and the *jus naturale* (natural law). Meanwhile, commercial practice and diverse cultures were clamoring for recognition in Roman jurisprudence. The *jus civile* (civil law) was inadequate to accommodate them, and was in any case restricted to Roman citizens. As the special *Praetor*—the *Praetor Peregrinus*—administered justice in disputes involving noncitizens, however, he soon discovered that there were elements common to the systems of the different foreign peoples of the empire. Soon these elements formed a body of law, the *jus gentium* (the law of nations or of humankind), which later merged with the natural law to be administered as Roman law. In this process natural law thus played the innovative role of adapting "the law of a petty tribal agricultural society to the needs of an empire diverse in constituent peoples and great in dominions, wealth and commerce."[8]

Natural law already involved a search for universal principles—principles based on human nature which might underlie the various customary systems and serve as criteria for their assessment. It is this element which Roman lawyers administering justice among the diverse peoples of the empire seized upon[9] and developed into the law of nations or of human-

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where equal." Nichomachean *Ethics v. 7* (1134b-1135a) *in* 8 GREAT BOOKS OF THE WESTERN WORLD 339, 382 (Mortimer J. Adler ed. & W.D. Ross trans., 1991).

The Greeks philosophized about justice, natural law, and the art of government, but they did not build a durable legal system. Philosophy was their principal pre-occupation—law only a subordinate concern. They formed no legal representation to allow skill and expertise in the art of advocacy to grow beyond the most basic level. Consequently, for the Greeks, even "natural law remained essentially a philosopher's speculation in an age of unsettled convictions and political disorders . . . ." STONE, *supra*, at 39.

In contrast, the Romans, who were not as accomplished in speculative philosophy as the Greeks, were far better lawyers. They built a legal system which outlasted their vast empire and became the foundation of most of the major contemporary legal systems of the world, especially the Western ones. It was the Romans who encouraged and perfected legal representation into a highly skilled art.

7. Others who took up Stoic philosophy were the Roman senator of Spanish origin, Seneca; the Greek slave, Epictetus; and Emperor Marcus Aurelius (2 A.D.).

8. STONE, *supra* note 6, at 40.

9. ROBERTO M. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 76-77 (1976).

kind—which they in turn incorporated into the corpus of Roman jurisprudence.[10]

When the Roman Empire collapsed, the Christian church moved in to fill the vacuum as an umbrella authority over Europe. This form of "international order"—the *Respublica Christiana*—was also founded upon natural law, with a distinctly theological twist as a system of norms emanating, ultimately, from God. The *Respublica Christiana* endured for a thousand years, but despite Thomas Aquinas's best efforts, it could not withstand the onslaught of Aristotelian philosophy,[11] the Renaissance, and the Reformation. It was brought to a violent end by the Thirty Years War (1618-1648).

From the ashes of this war came the modern state system—but its emergence was not phoenix-like; its normative foundation was painstakingly constructed out of natural law by Hugo Grotius.[12] Grotius wrested natural law from divine ordination and drew from it norms to govern sovereign states newly emerging from their tussle with the universal church and unwilling to submit to either positive or divine law.[13] As the

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10. The classic statement is found in GAIUS, INSTITUTES OF ROMAN LAW (Edward Poste trans., 1991):

    1.   CONCERNING CIVIL AND NATURAL LAW

    (1)   All peoples who are ruled by laws and customs partly make of their own laws, and partly have recourse to those which are common to all men; for what every people establishes as law for itself is peculiar to itself, and is called the Civil Law, as being that peculiar to the State; and what natural reason establishes among all men and is observed by all peoples alike, is called the Law of Nations, as being the law which all nations employ . . . .

11. After the Dark Ages, Greek philosophy returned to Europe by a circuitous route through Syria, Persia, and Arabia, regaining contact with the Christian West in Spain. Its return to Europe is a tribute to Muslim—Al Kindi (*circa* 801-873), Al Farabi (*circa* 870-950), Avicenna (Ibn Sina) (980-1037), and Averroes (Ibn Rushd) (1126-1198)—and Jewish (Moses Maimonides) (1135-1204) scholars. Like Thomas Aquinas, they too were trying to reconcile Aristotelian philosophy with their faith.

12. *See* HUGO GROTIUS, DE JURI BELLI AC PACIS LIBRI TRES, *translated in* 2 CLASSICS OF INTERNATIONAL LAW (James B. Scott ed. & Francis W. Kelsey trans., 1964). *See also* Myres S. McDougal, *Law and Peace*, 18 DENV. J. INT'L L. & POL'Y 1, 8 (1989).

13. For Grotius, consent as expressed in the maxim *pacta sunt servanda* (norm of international law created by custom) was central to the binding force of international law, but its ultimate basis was natural law. JAMES LESLIE BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY THE LATE JAMES LESLIE BRIERLY 10 (Sir Hersch Lauterpacht ed., 1958).

    But it would be an overstatement to say that Grotius was the originator of all international law. As already noted, his work had its roots in the Graeco-Ro-

old order was dying and a new one was struggling to emerge, Grotius stepped into the breach and created an international legal system which has endured for almost half a millennium.

The sovereign state which emerged victorious from the Thirty Years War was unassailable both externally and internally. Externally, its will was not subject to that of another. Internally, it was not accountable to the will or interests of the flesh and blood men and women within its borders. Rulers claimed their right to rule from God—not from their subjects. Thus, in 1609, King James I of England could boast in Parliament:

> Kings are justly called gods, for they exercise a manner or resemblance of divine power upon the earth: for if you consider the attributes to God, you shall see how they agree in the person of a king. God hath power to create or destroy, make or unmake at his pleasure, and to God are both soul and body due. And the like power have kings: they make and unmake their subjects, they have power of raising and casting down, of life and of death, judges over all their subjects and in all causes and yet accountable to no one but God only. They have power to exalt low things, and make of their subjects, like men at the chess—a pawn to take a bishop or a knight—and to cry up or down any of their subjects, as they do their money. And to the king is due both the affection of the soul and the service of the body of his subjects . . . .[14]

In France, as in England, monarchs claimed divine authority to rule. They believed that their will was identical to the will of the state as succinctly expressed in Louis XIV's famous maxim: *L'etat, c'est moi.*[15]

Then came the revolutions. From England—where Charles I, a staunch believer in the divine right of Kings, was charged,

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man tradition. Besides, other civilizations—such as the Indian and the Chinese—already had mature concepts of international law. A.M. CONNELLY, THE HISTORY OF INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 251 (1980).

14. SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS 293-95 (G.W. Prothero ed., 1913).

15. In Europe, at this time, this kind of absolutism was both anachronistic and shortsighted for a number of circumstances showed that it was doomed: the decline of ecclesiastical authority; the mercantilist spirit and freely trading individuals acquiring property; the pioneering English documents such as Magna Carta; and the philosophical doctrines about the Rights of Man which were taking shape within the matrix of natural law.

tried for treason by Parliament, found guilty, and hanged—with its English Declaration of Rights in 1689, to the American and French Revolutions of 1776 and 1789, internal sovereignty was transferred from ruler to subject-turned-citizen. External sovereignty, however, remained more or less with the state, and up until the Second World War, only states, not individuals, could be subjects of international law.[16]

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16. Before 1945, international law embodied a number of limited but important provisions for the protection of human rights. Professor Louis B. Sohn notes that treaties dating as far back as 450 B.C.—such as that between the Corinthian Greek cities of Oeantheia and Chalaeum—contained a sprinkling of human-rights norms. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 3 (1982). Progressively more salient provisions began to appear in treaties and conventions. For instance, religious freedom was featured in the Treaty of Augsburg of 1555; the Treaty between the Holy Roman Empire and Sweden concluded under the Westphalian peace settlement of 1648; the Treaty of Olivia of 1660 concluded between Sweden, Poland and Russia; and the Treaties of Nymegen (1678) and Ryswyck (1697) concluded between France and Holland. Even more extensive provisions were incorporated in the Congress of Vienna in 1815 and the Treaty of Berlin of 1878, providing not only for religious liberty, but also for civil rights and the protection of minorities. PIETER N. DROST, HUMAN RIGHTS AS LEGAL RIGHTS: THE REALIZATION OF INDIVIDUAL HUMAN RIGHTS IN POSITIVE INTERNATIONAL LAW 16-17 (1965). Protection of minorities, abolition of slavery, and humanitarian law were featured in many other major treaties prior to 1945. The latter two notions were indeed the subject of independent conventions of their own: the International Convention on the Abolition of Slavery and the Slave Trade concluded on September 25, 1926, under the auspices of the League of Nations, 60 L.N.T.S. 253, and the Geneva (Red Cross) Conventions on the Conduct of Warfare of August 22, 1864, which, with substantial revisions in 1909 and 1929, continued in operation until they were replaced by the Geneva Conventions of 1949. RED CROSS CONVENTION, *reprinted in* THE LAW OF WAR: A DOCUMENTARY HISTORY 187-91 (Leon Friedman ed., 1972).

Nor were pre-1945 human rights provisions in treaties restricted to traditional civil and political rights. Part 13 of the Treaty of Versailles of 1919 provided for the establishment of the International Labour Organization to promote better working conditions for men and women. This august body has since spawned many conventions and standards relating to the work place. It should not be forgotten, too, that the right to self-determination made an early appearance during these peace-treaty negotiations at the end of the First World War. The old *terra nullius* (literally, territory belonging to no one) doctrine, which had legitimized colonial annexation of territory abroad to serve the interests of the annexing colonial power—the spirit of the Berlin Conference of 1885—was to give way to the call for decolonization and independence, which, for many colonies, came within the first 50 years after the end of the First World War.

Apart from treaty obligations, general international law also recognized the right of states to protect their nationals abroad—even to the extent of waging war against another state on whose territory violations occurred—as well as the correlative duty of states not to mistreat alien nationals within their borders. But states were not entirely free to mistreat their own nationals either. With regard to these individuals, international law accorded states the limited right of humanitar-

Writing on the eve of the First World War Oppenheim makes this point forcefully:

> Several writers maintain that the law of nations guarantees to every individual at home and abroad the so-called rights of mankind, without regarding whether an individual be stateless or not, or whether he be a subject of a member-state of the Family of Nations or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practicing any religion one likes, the right of emigration, and the like. But such rights do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such guarantee since the Law of Nations is a law between States, and since individuals cannot be subjects of this Law.[17]

Intrastate sovereignty in Europe and America had begun to give way to the sovereignty of the people, but at the international level sovereignty remained as unyielding to human interests as ever.

B. World Order Models Before 1989: Grotian versus Clausewitzian Paradigms

Between 1945 and 1989, two paradigms competed for control of the world order: the normative paradigm (Grotian), and the realist paradigm (Clausewitzian).[18] The Grotian, or normative, paradigm posits a world order permeated by, and oriented toward, justice; in Grotius's time justice was, of course, natural law, and natural law was a transcendent, not an anthropocentric, system. But in our own time justice bears the decidedly homocentric imprint of seventeenth and eighteenth

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ian intervention in the territory of a state whose treatment of its own citizens was of such magnitude as to shock the conscience of mankind. Although its existence and scope have never been beyond controversy among jurists, the right of humanitarian intervention was familiar even to ancient China where Mencius supported the idea of liberation from tyrants. The right of humanitarian intervention was repeatedly exercised in Europe during the nineteenth century.

17. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 367-68 (2d ed. 1912). See, however, the modified view in the 7th edition of Oppenheim's *International Law* edited by H. Lauterpacht. 2 LASSA OPPENHEIM, INTERNATIONAL LAW (Hersch Lauterpacht ed., 7th ed. 1952).

18. Grotian here signifies not the international law or system of sovereign states that Grotius built, but rather the normative stance of his project. *See* Falk, *Some Thoughts, supra* note 5, at 408-09.

century   revolutions.[19]   Today,   justice   would   thus   mean
human[20] justice and would entail some version of human dig-
nity and human rights as foundational normative concepts. By
contrast, the Clausewitzian world order is predicated upon a
Machiavellian emphasis on power and strategy, with little
concern for normative or moral questions; it is built on the
factual "is" rather than the normative "ought"[21] of world or-
dering.

1.   The Grotian Foundation of the Post-1945 Order

The international legal system which Grotius built rested
on the twin normative principles of state sovereignty and *pacta
sunt servanda*. At Westphalia, the intrinsic sovereignty of
states as a normative concept made perfect sense. A system of
sovereign states was the guarantee that one of the most brutal
wars Europe had ever seen—the Thirty Years War—would not
occur again. On the other hand, the intrinsic dignity of men
and women made in the image of God had not yet crossed over
from the theological to the moral and political realms. And
even if it had, it would not have entailed any "rights," let alone
natural or inalienable ones, for the notion of human beings as

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19. Grotius, in fact, built the bridge between the transcendent and
anthropocentric phases of natural law:

> The law of nature, again, given is unchangeable—even in the sense that
> it cannot be changed by God. Measureless as is the power of God, never-
> theless it can be said that there are certain things over which that pow-
> er does not extend; for things of which this is said are spoken only,
> having no sense corresponding with reality and being mutually contradic-
> tory. Just as even God, then, cannot cause that two times two should not
> make four, so He cannot cause that which is intrinsically to be not evil.

GROTIUS, *supra* note 12, at 40.

20. To the pre-Socratic Milesian school of Greek philosophers, justice was still
conceived as a kind of natural balance or equilibrium: a natural law directed *both*
at man and God enjoining them not to overstep "eternally-fixed boundaries."
BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 27 (1946). The Pythago-
reans conceived of justice in terms of equality. Later still, Platonic Greek philos-
ophers came to regard justice as "an ethical principle for human conduct, a specifi-
cally human virtue." STONE, *supra* note 6, at 12. Aristotle placed justice finally
and squarely in the context of human relations but anthropocentric natural law
came into its own only in the seventeenth and eighteenth centuries.

21. For a discussion of the "is-ought" question and David Hume's famous
thesis that a norm cannot be logically derived from or reduced to a fact (really
another way of saying that conclusions are already contained in the premises), see
THE IS-OUGHT QUESTION: A COLLECTION OF PAPERS ON THE CENTRAL PROBLEM IN
MORAL PHILOSOPHY (W.D. Hudson ed., 1969).

bearers of rights had not been invented; the very idea of rights and correlative duties was a feat of abstraction which not even the Romans achieved. To be sure, the Thirty Years War was a stage in the process which eventually freed the individual from the absolute hegemony of church and state. But the English Revolution was still forty years away, and the American and French Revolutions, with their lofty Declarations of the Rights of Man and their notions of a social contract between citizens and the state, well over a century into the future.

In a dramatic break with this past, the post-World War II order was explicitly built upon the normative foundation of human dignity and human rights. This triumph—of natural law over the positivism that had enjoyed pre-eminence for most of the nineteenth and the first part of the twentieth centuries[22]—was due to specific historical circumstances.

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22. Natural law had been the ideology that sustained European revolutions and the doctrine of natural rights in the seventeenth and eighteenth centuries. But soon the doctrine of natural rights ran into rough waters. Politically, the revolutionary spirit which had nurtured natural rights waned in disillusionment and frustration in the wake of the Jacobin terror which led to Napoleonic centralism and authoritarianism in France. Philosophically, the doctrine came under attack from the incisive pens of those two positivist-empiricist philosophers par excellence—Auguste Comte and Leon Duguit in France—George Hegel in Germany, and most particularly Jeremy Bentham, in England whose unremitting contempt for the natural rights doctrine is captured in the oft-quoted view that the notion of natural and imprescriptible rights was "nonsense upon stilts." Jeremy Bentham, *Anarchical Fallacies, in* 2 WORKS 491 (Bowring ed., 1838-43) (an essay he wrote in response to the French Declaration of the Rights of Man in 1791).

Indeed, the thesis that there were no rights apart from legal rights and that therefore the notion of rights anterior, or contrary, to law was an absurdity "became for a time part of conventional wisdom and was accepted as a truism by many English social thinkers," even those only peripherally interested in political philosophy such as the poet and critic, Matthew Arnold. H.L.A. Hart, *The Shell Foundation Lectures, 1978-1979: Utilitarianism and Human Rights* 53 TUL. L. REV. 663, 669 (1979). Thus, the nineteenth and early twentieth centuries saw a general eclipse of natural-law-type theories and the ascendancy of positivist-empiricist ones, of which utilitarianism was among the most influential. With this decline in natural law thinking, there was also a general shift in the basis of human rights norms and standards of justice from the metaphysical to the empirical, from the absolutist to the relativist, and from the universalist to the particularist. STONE, *supra* note 6, at 4-5.

Far from confirming the final demise of the natural rights doctrine (or of natural law philosophy generally), however, subsequent history has shown that the doctrine was simply in abeyance before its great revival later in the twentieth century. The experiences and horrors of the Second World War, especially the Nazi Holocaust under the aegis of positivism, showed the starkest depth of a popular philosophy gone wrong. As a result, attention was turned again to natural law

It is normal after a great war for a new political order to emerge among nations. This is a feature which the Second World War shares with previous major wars; the chaos and destruction of war always give rise to a yearning for peace and frantic efforts to devise measures that might prevent a reappearance of hostilities.[23] The uniqueness of the Second World War lies in the fact that, more than any other major war in history, it was ostensibly waged and fought in defense of human rights and dignity which Adolf Hitler had trampled underfoot with impunity at home—even as he let his expansionary zeal run riot abroad. Granted, it was not so much Hitler's atrocities at home as his adventures abroad which provided the main impetus to arms for his opponents,[24] but one matter remains clear: if defense of their national security was the opposition's main motivation, the threat to human dignity and rights supplied a ready moral justification for the Allied war effort which dislodged Nazism and its allies. Statements and declarations made at various stages of the war bear this out. An example was the Atlantic Charter of August 14, 1941, later endorsed by forty-seven nations, which embodied the hope for a peace with commensurate guarantees for the safety of all

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and its transcendent norms; it is this revival of natural-law thinking which gave ascendancy to the concept of human rights in international law.

23. Thus, out of the ruins of the Thirty Years War, which devastated Europe between 1618 and 1648, came the Treaties of Westphalia in 1648, the birth of the modern state system, and the very foundations of modern international law in the work of Grotius. In the aftermath of the Napoleonic wars, the Congress of Vienna which convened in 1815 was also to witness a call for a new order to guard against the dangers revealed in the old; those dangers were, of course, perceived differently then and differently guarded against—by a supra-national system of four European powers consisting of England, Prussia, Austria, Russia (and later France) to police Europe and preserve the status quo. Similarly, in the twentieth century, the League of Nations—predecessor to the United Nations—was formed in the wake of the First World War. Its structure was the first part of the Treaty of Versailles of 1919 and contained some of the features of the present international system. This pattern of order following chaos seems to vindicate Toynbee's "challenge-and-response" theory of the origin of human civilizations. ARNOLD J. TOYNBEE, A STUDY OF HISTORY (2d ed. 1935). The first four volumes were published in 1934, the next three in 1939, the following four in 1954, and the last two in 1959 and 1961. There are also useful abridgments of the first ten volumes by D.C. Somerwell and a re-issued, illustrated version. In other places, Toynbee refers to his "challenge and response" theory as the "virtue of adversity." *Id.* at 27.

24. *See, e.g.,* JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES (1974). The same could be said of the wars that dislodged Pol Pot in Kampuchea and Idi Amin in Uganda.

nations and the assurance of a life free from fear and want to all people in every land. Another was the Declaration by the UN signed on January 1, 1942; this was a statement by representatives of twenty-six nations then fighting in the war, later adhered to by twenty-one others, in which the signatories expressed the conviction that total victory over the Axis powers was essential "to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands . . . ."[25] A recent UN report on human rights activities sums up the position as follows:

> The Second World War proved to many the close relationship between outrageous behavior by a Government towards its own citizens and aggression against other nations, between respect for human rights and the maintenance of peace. The experience of the war resulted in the widespread conviction that the effective international protection of human rights was an essential condition of international peace and progress.[26]

It is this conviction—that peace and human rights are intertwined—which persisted to become, at the end of the war, the cornerstone of the new international order set up in the Charter of the UN of 1945. In this foundation instrument—the supreme expression of *jus cogens* (peremptory norms), in international law[27]—the signatories resolved, among other things,

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25. UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS at 5, U.N. Doc. ST/HR/2/Rev. 2, U.N. Sales No. E.83.XIV.2 (1983) [hereinafter UNITED NATIONS ACTION].

26. *Id.*

27. *See* Louis B. Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1, 18 (1978).

. The germ of that idea had been implanted several years before when, in August 1941, United States President Franklin D. Roosevelt met Winston Churchill aboard the Prince of Wales, and issued the Atlantic Charter—the forerunner of the UN Charter. The Atlantic Charter incorporated Roosevelt's famous four freedoms: freedom of speech, freedom of worship, freedom from want, and freedom from fear. Later at the Dumbarton Oaks Conversations in 1944—between representatives from the USSR, the United Kingdom, and the United States (from 21 August to 28 September) and between the latter two and the representative from China (from 29 September to 7 October)—proposals were drawn up for a UN organization committed to the promotion of respect for human rights and fundamental freedoms. The General Assembly was to be charged with responsibility for this function, but (under its authority) an Economic and Social Council would be given

"to save succeeding generations from the scourge of war, which twice in our lifetime has brought, untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ."[28] In the same document, the objectives laid down for the UN included the principles of "equal rights and self-determination of peoples" and "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[29] Article 55 of the Charter of the United Nations spells out this human rights mission of the UN:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
>> (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
>> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[30]

Further, in Article 56, all the members of the UN "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set

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power to act on these matters, on its own initiative.

The Dumbarton Oaks proposals were the foundation for the fifty-nation UN Conference on International Organization held in San Francisco beginning on April 25, 1945. Some delegations at this conference—including representatives from Chile, Cuba, and Panama—urged for the inclusion and guarantee of specific human rights in the Charter of the UN itself. But in the end, the Conference decided not to include a bill of rights in the Charter on the ground that such a bill required more time and consideration than was possible during the discussion on the basic document. John P. Humphry, *The Universal Declaration of Human Rights: Its History and Judicial Character, in* AFTER THE UNIVERSAL DECLARATION 21 (B.G. Ramcharan ed., 1979)

28. U.N. CHARTER pmbl.
29. U.N. CHARTER art. 1.
30. U.N. CHARTER art. 55.

forth in Article 55."[31] Altogether, there are no less than seven references to human rights in the Charter of the UN.

The new commitment to human rights reflected in the above foundation documents also pervaded the agenda of the earliest UN activities. In conformity with the Economic and Social Council's Resolution 9(11) of June 21, 1946, peace treaties such as those made with Hungary, Bulgaria, Finland, Italy, and Romania (all signed on February 10, 1947) contained a commitment to fundamental human rights. Similarly, post-war trusteeship agreements included an express commitment "to encourage respect for human rights and fundamental freedom for all without distinction as to race, sex, language, or religion."[32] But, perhaps, the act most symbolic of the new ethos was the apprehension, trial, and punishment of individuals guilty of committing human rights atrocities—under the rubric of "war-crimes and crimes against humanity"—in the Nuremburg and Tokyo Trials. These imposed liability upon individuals even if their crimes were committed in the service of their states.[33] The corollary of these trials was the positive assistance rendered to the surviving victims of these atrocities.

The above pronouncements, documents, acts, and events together constituted a new ethos in international relations: a foundation for a new world order and new world body, the United Nations, for the promotion and protection of human rights.[34] The Second World War had thus installed flesh and

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31. U.N. CHARTER art. 56.

32. See those agreements approved by the UN General Assembly on December 13, 1946 for Togoland (British administration), Togoland (French administration), the Cameroons (British administration), the Cameroons (French administration), Tanganyika (British administration), Western Samoa (New Zealand administration), Ruanda-Urundi (Belgian administration), and New Guinea (Australian administration); the one approved by the Security Council on April 2, 1947 for the Trust Territory of the Pacific Islands as a strategic Trust Territory (United States administration); those approved by the General Assembly on November 1, 1947 for Nauru (Australia, New Zealand, and the United Kingdom administration on behalf of Australia); and on December 1, 1950 for Somaliland (Italian administration). The subsequent fate of these trust territories was not always a happy one. UNITED NATIONS ACTION, *supra* note 25, at 7.

33. *See* Hans W. Baade, *Individual Responsibility, in* THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (VOL. IV): THE STRUCTURE OF THE INTERNATIONAL ENVIRONMENT 291 (Cyril E. Black & Richard A. Falk eds., 1972); RICHARD FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 195 (1981).

34. Moreover, the human rights which came to be accepted in international law were not just the libertarian political rights which had been so important to

blood men and women as subjects of international law, and sought to extend the erosions of the intrastate sovereignty we saw earlier, to the whole world, by a process which would inevitably diminish external sovereignty as well.

2. The Clausewitzian Ascendancy

The human rights roots of the post-Second World War order need to be emphasized, but in doing so it would be a mistake to overlook its still robust Westphalian dimension. Article 2(7) of the UN Charter attempted to preserve Westphalian sovereignty as follows: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter . . . ."[35] However, it soon became the manifesto of rogues[36] in the field of human rights. More seriously, the cold war soon set in and pushed both the normative and institutional (legal) dimensions of the world order aside, leaving only the power-political dimension to provide support for this one-legged stool. The resulting order rested not on legal or moral norms, but on the threat of nuclear annihilation. Almost every incident and every human aspiration, be it protest against apartheid or an existing regime, was seen through the distortion of the cold war lens.

The UN itself was thoroughly paralyzed: the General Assembly, by ideological blocs; the Security Council, by the Superpower veto. While this gridlock lasted, dictators and rogues sprouted all over the world and wreaked untold brutality upon their people with the utmost impunity. The promise of a new era of human dignity and human rights which had arisen from the ashes of the Holocaust soon receded before the unrestrained exercise of state power outside the UN system—with no regard for legality. States, large and small, thumbed their

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merchantilists in their struggle against the state; they included an unprecedented synthesis of nineteenth and twentieth century social and economic rights as well. *See* LOUIS B. HENKIN, THE RIGHTS OF MAN TODAY 5-29 (1978).

35. U.N. CHARTER art. 2(7).

36. It has been invoked repeatedly by states guilty of violations of human rights: for instance, South Africa (defending its apartheid system), the former Soviet Union, and Uganda's Idi Amin regime.

noses at the UN: Clausewitzian realism had truly trumped Grotian normativity, as the world descended further and further into a Hobbesian wilderness. As for the human rights norms at the foundation of the post-1945 order, doubts were voiced even as to their validity as imperative legal norms.[37]

3. Theoretical Perspectives

But not all commentators shared the bleak view that the cold war interlude meant that the world scene was, and could only be, a Hobbesian wilderness. Louis B. Sohn, for instance, described some protagonists of the Clausewitzian view as "members of the younger generation of international lawyers, born after the 1940's holocaust and not seeming to understand the importance of international protection of human rights, trying to turn the clock back."[38] In particular, even in the shadow of the cold war, a number of leading international law scholars such as Louis Henkin still insisted on a human rights dimension for the post-World War II order.[39] Others put forward normative models for world ordering, the most well-known being those of Wilfred Jenks,[40] Myres McDougal,[41] and Richard Falk.[42]

Wilfred Jenks's world order model was predicated upon norms which had already filtered into the various legal systems of humankind. Rather like the Roman *Praetor Peregrinus* fashioning the *jus gentium* from basic elements and principles in the local laws which were common to all, Jenks conceived of

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37. *See*, Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1978); Eric Lane, *Mass Killing by Governments: Lawful in the World Legal Order?*, 12 N.Y.U. J. INT'L L. & POL. 239 (1979); James S. Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT'L L. 60 (1977).

38. Louis B. Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347 (1981). *See also* Lowell F. Schechter, *The Views of "Chartervists" and "Skeptics" on Human Rights in the World Legal Order: Two Wrongs Don't Make a Right*, 9 HOFSTRA L. REV. 357 (1981).

39. *See* HENKIN, *supra* note 34.

40. *See* C. WILFRED JENKS, THE COMMON LAW OF MANKIND (1958).

41. MYERS S. MCDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER 295 (1960); Myers S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); MYERS S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

42. *See* RICHARD A. FALK, A STUDY OF FUTURE WORLDS (1975).

the world legal order as being built upon a similar "multicultural, multi-legal" juristic effort. In his vision, as Julius Stone summarized it:

> [T]he contents of international law are seen as determined by the interplay, comparison, synthesis, and manipulation of legal rules, principles, conceptions, and policies found among the various human societies. The tasks of both doctrinal writers and decisionmakers are here given a magistral autonomy in revealing a body of data consisting of legal ideas shared by [hu]mankind generally.[43]

McDougal's scheme resembles Jenks's in its focus on the normative content of world order which McDougal finds in his values of human dignity: power, respect, enlightenment, wealth, well-being, skill, affection, rectitude, and sincerity. As fundamental human values, these are supposed to provide a universal normative foundation for the world legal order.[44] But McDougal's scheme is more ambitious than Jenks's in that it reaches beyond the institutional legal norms to the underlying moral and social strata.

Richard Falk's model is different from both in that it focuses less on posited content, and more on the framework for generating truly homocentric norms for a world order that would bypass the nation-state. It has been suggested that although Falk's world order bears certain similarities to Jenks's in its lack of faith in state consensus or cooperation, and with McDougal's in its rejection of states as the exclusive "law-creators," Falk "begins at points beyond where Jenks and McDougal stopped short."[45] Falk's solution is a temporal evolution of world ordering from dependence upon sovereign states to the global consciousness of "a single interdependent planetary community."[46]

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43. JULIUS STONE, VISIONS OF WORLD ORDER: BETWEEN STATE POWER AND HUMAN JUSTICE 11 (1984) [hereinafter STONE, VISIONS OF WORLD ORDER].

44. These are rather like Hart's minimum content of natural law, H.L.A. HART, THE CONCEPT OF LAW 189-95 (1961), which are in fact Hobbesian, based on the premise that people do desire to live—so that our concern is "with social arrangements for continued existence, not with those of a suicide club." *Id.* at 188. See also Prakash Sinha's needs of humanity's planetary existence, Prakash Sinha, *The Anthropocentric Theory of International Law as a Basis for Human Rights* 10 CASE W. RES. J. INT'L L. 469 (1978).

45. STONE, VISIONS OF WORLD ORDER, *supra* note 43, at 33.

46. STONE, VISIONS OF WORLD ORDER, *supra* note 43, at 33. For this view

What Jenks, McDougal, and Falk have in common is not just their Grotian espousal of the normative over the realist view of world ordering; it is also their answer to Stone's question of whether the global justice-constituency consists of states or human beings. Their answer is that it is human beings who must ultimately count. Their differences are in how this would or ought to happen.

In his *Visions of World Order: Between State Power and Human Justice*,[47] a book which won an award from the American Society of International Law, the late Professor Julius Stone wrote a thorough critique of each of the three normative models of world order above—especially of their homocentric foundation in a world still dominated by "the arrogance of sovereignty."[48] His verdict was that sovereign states were not about to wither away, and as long as they endured, an insurmountable barrier to any meaningful planetary community was firmly in place. A world in which interposed state entities insulated national populations from each other was not amenable to the sociological enquiries necessary to map out a global, homocentric justice-constituency. In Stone's view, the attempts by Jenks, McDougal, and Falk did not succeed in reaching beyond Clausewitzian fortresses to build a normative world order. He closes his analysis with this unanswered dilemma:

Stone cites from Falk's, *Statecraft in an Era of World Order, Decay and Renewal*, Arthur F. Yencken Memorial Lectures, Australian National University, 1974:

> Put simply, the planet is too crowded, its resource base too constrained, its social structure too hierarchical, and its political structure fragmented and overly responsive to the concerns and interests of dominant groups to allow for an easy transition to a global community where the needs of the species for survival with dignity could be established. As such, the pressures are mounted against mechanisms ill-conceived for such global integration, and the options narrow to various frantic efforts to stare of disintegration, by refusing to heed the formulated aspirations of peoples. Can this holding operation of the State system succeed? Do we as citizens of a given time and place and members of a species want such a strategy to work during our lifetime? Are there alternatives for the future that transform world order without breaking it asunder? . . . . New sparks of political consciousness must be struck if we are going to be able to effectuate a world order solution that serves the interests of the human species as a whole. The only viable moral premise for politics in the sociological age is an anthropological one.

STONE, VISIONS OF WORLD ORDER, *supra* note 43, at 33.

47. STONE, VISIONS OF WORLD ORDER, *supra* note 43.
48. STONE, VISIONS OF WORLD ORDER, *supra* note 43, at 156.

> This conclusion again returns us to basic presuppositions of
> any careful inquiry concerning *international* justice. How far
> can we get with such an enterprise before we succeed in
> delineating the membership of an international justice con-
> stituency? And what constituency can we delineate here that
> will simultaneously embrace the human claims involved and
> the rather inescapable interposing authority of *state*
> decisionmakers . . . ?[49]

As for the postwar promise of a homocentric world order, he
notes, rightly, that "many euphoric post-1945 expectations of
international law and the United Nations have faded, at this
time of writing, into mere banalities if not hypocrisies of
speeches at the opening of each year's General Assembly."[50]

Now, of course, Stone was right. The world order of 1984
was a Hobbesian wilderness. The Clausewitzian ascendancy in
the wake of the cold war had eclipsed human interests behind
the curtain of an intransigent sovereignty. In this world, deep
doubts of an existential kind, over whether Westphalian inter-
national law could serve human interests were, indeed, well-
founded.

But the world order Stone described in 1984 had all but
disappeared by 1990. Its central logic of a nuclear stand-off
between Washington and Moscow had vanished overnight; the
confidence that dictators and rogue regimes could hitch their
survival to cold war allegiances could no longer be taken for
granted; the Berlin wall had crumbled as did apartheid in
South Africa; and the plight of peoples all over the world now
has a direct claim upon the resources of a reinvigorated,
though financially struggling, UN. The march of events seems
to lead toward a Grotian, not a Clausewitzian, world order. We
are, indeed, living in another Grotian moment. Old orthodoxies
are gone and a mountain of scholarly work and intelligence
data are obsolete. Change, even for the better, is disorient-
ing—but this is not the occasion for nostalgic yearnings for
those days when we had *"reliable* enemies."[51] The present
cries out rather for Grotian minds to wrest a new order from
the prevailing chaos, and to grapple afresh with the question of

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49. STONE, VISIONS OF WORLD ORDER, *supra* note 43, at 156.
50. STONE, VISIONS OF WORLD ORDER, *supra* note 43, at *xv.*
51. Brilmayer, *supra* note 3, at 331.

human justice which Stone raised in less hospitable times. As for Stone's account, I sometimes wish that my much-admired teacher had lived a few more years to lend his exemplary clarity of thought to this project.

III. NEW PARADIGMS: GROTIAN VERSUS CARTESIAN

The end of the cold war has, at least temporarily, disarmed the Clausewitzian challenge to the Grotian project, but a new challenge has arisen to take its place. The new challenge is postmodernist nihilism, which has its roots in the epistemic skepticism of René Descartes,[52] a contemporary of Grotius. It has been said that when two men look out of a prison window, one sees the stars while the other sees the mud. Looking upon the crises of their time, Grotius worked on a possibility of a normative order while Descartes doubted the existence of everything except his own mind: *cogito, ergo sum* (I think, therefore I am). Cartesian skepticism is built upon some rather serious epistemological mistakes;[53] it is certainly at odds with what we know today about how the brain works—its perception and conceptualization, and especially its creation of patterns and catchments of meaning.[54] The Cartesian dualism of body and mind—which Descartes took from Plato and gave a radically new twist[55]—may also be, in the light of current knowledge, untenable. "Finding a prior philosopher's conclusions untenable," Mortimer Adler counsels, "the thing to do is to go back to his starting point and see if he has made a little error in the beginning."[56] Subsequent philosophers did not do this. Instead, building upon Descartes's skeptical foundation of modern Western philosophy, Locke,

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52. French Philosopher and Mathematician, 1596-1650.

53. *See generally* MORTIMER ADLER, TEN PHILOSOPHICAL MISTAKES (1985).

54. *See, e.g.,* HOWARD MARGOLIS, PATTERNS, THINKING AND COGNITION (1987); JEREMY CAMPBELL, THE IMPROBABLE MACHINE: WHAT THE UPHEAVALS IN ARTIFICIAL INTELLIGENCE RESEARCH REVEAL ABOUT HOW THE MIND REALLY WORKS (1989); JOHN L. CASTI, PARADIGMS LOST: TACKLING THE UNANSWERED MYSTERIES OF MODERN SCIENCE (1989).

55. Descartes's dualism is characterized by "disengagement" of one part from the other. *See* Charles Taylor, *Inwardness and the Culture of Modernity, in* PHILOSOPHICAL INTERVENTIONS IN THE UNFINISHED PROJECT OF THE ENLIGHTENMENT 88, 98 (Axel Honneth et al. eds. & William Rehg trans., 1992) [hereinafter PHILOSOPHICAL INTERVENTIONS].

56. ADLER, *supra* note 53, at 193.

Hume, and Kant compounded Cartesian errors. As Colin Wilson notes:

> After Hume, philosophy faced a blank wall. Descartes at least had left a basis for certainty: "I think, therefore I am." Hume replied: "That does not prove that you exist at all." Berkeley had got rid of the outside world; now Hume got rid of the mind as well. Reason had proved to be a kind of forest fire that ended by consuming everything. Descartes's principle of doubt left nothing standing.[57]

Conceived as an attack on the Enlightenment, especially its human-centered liberal notions such as human rights and law, postmodernism[58] is the contemporary version of that forest fire razing all canons to the ground. There are many strands in postmodernist theory, of course, but all have their conceptual arsenals trained on this common target. They are also distinguished by the weaponry in these arsenals: "[d]econstruction," "[d]ecanonization," "[i]ndeterminacy," "[s]elflessness," "[d]epthlessness," "[i]rony," "[h]ybridization,"[59] and above all "incredulity toward meta-narratives."[60]

In law, postmodernism takes the form of Critical Legal Studies (CLS) which brings the tenets above into the legal context. CLS, for instance, sees international law as hopelessly indeterminate and incoherent.[61] In the context of the interna-

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57. COLIN WILSON, BEYOND THE OUTSIDER 51 (1991).

58. There is serious confusion in postmodernist theories as to whether the attack is against Enlightenment, "essentialist" anthropocentrism, or against modernism: the two are *not* the same. Indeed, the modernist positivism and scientism of nineteenth and early twentieth century thought was an attack on seventeenth and eighteenth century anthropocentric natural law. *See supra* note 22.

59. MARGARET ROSE, THE POST-MODERN AND THE POST-INDUSTRIAL A CRITICAL ANALYSIS 52-53 (1991).

60. *Id.* at 55.

61. For an excellent but sympathetic account of the CLS movement, see Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27 (1993). For CLS in international law, see generally Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L. J. 81 (1992). Purvis seems, in places, to use the term "modernism" for what is commonly understood as "postmodernism," but even nomenclature here is not without its difficulties. *See* ROSE, *supra* note 59, at 3-39.

The confusion of targets identified in postmodernist theories also bedevils CLS. *See supra* note 58. For instance, in his enlightening article, Gary Minda seems to show that CLS takes *one* strand of jurisprudential thought and mistakes it for *all* jurisprudence. The attack is on moderns who saw law as "an autono-

tional legal order of the post-cold war era, CLS looks out of the prison window of current uncertainties and sees nothing but pure mud. One CLS view, for instance, suggests that Eastern Europe "will arrive at the station marked 'market democracy' just after the train has departed for 'post-industrial' society."[62] To understand CLS claims against international law and the possibility of a normative world order, we need to turn to the basic tenets of the postmodern paradigm in which it is rooted. Postmodernist themes rest upon three tenets: epistemological skepticism, existential dread, and a liberationist agenda. How compelling are these tenets? Let us take a closer look at each of them.

A. *Epistemological Skepticism*

The postmodernist case for epistemic skepticism proceeds in several stages. It begins with Saussurian structuralism which insisted, earlier in this century, that we do not apprehend external objects directly, that our perception is always one remove from the outside world, and that the meanings we attach to external objects are mediated by the internal structure of our language. The meaning of the word "dog," for instance, has less to do with the four-legged animal we are familiar with, than with the position of that word as a noun in the English language.[63] The linguistic structure is everything.

Postmodernism takes this structuralist non-referentiality (*i.e.*, language having no *direct* reference to the real world) as a device for enthroning the kingdom of writing so that, as

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mous, self-generating activity [and believed] that a distinct legal method [was] discoverable and that such a method would unlock the door to the ultimate truths of the law." Minda, *supra.* But surely only legal positivists like Austin Kelsen and Hart—and their attacker Ronald Dworkin—might fit this bill; but would Roscoe Pound or Julius Stone or the Realist Movement?

62. David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures,* 32 HARV. INT'L L. J. 373, 396 (1991).

63. TERENCE HAWKES, STRUCTURALISM AND SEMIOTICS 17 (1977). There are some overtones of Locke here. *See* ADLER, *supra* note 53. But Adler suggests:

> A meaningful word, a notation with significance, is a sign. A sign functions by presenting to the mind for its attention an object other than itself. Thus, when I utter the word "dog," you not only hear the word itself, but hearing the word serves to bring before your mind the object thus named.

ADLER, *supra* note 53, at 60-61.

Jacques Derrida insists, there is nothing outside the text,[64] for "text" here means not just the usual forms of writing such as literature or law; its domain extends, metaphorically, to all reality and all human experience. In his *Of Grammatology*, Derrida, citing Rabbi Eliezer, shows how writing can be conceived in this way:

> If all the seas were of ink, and all ponds planted with reeds, if the sky and the earth were parchments and if all human beings practised the art of writing—they would not exhaust the Torah I have learned, just as the Torah itself would not be diminished any more than is the sea by the water removed by a paint brush dipped in it.[65]

Writing and textuality thus comprehend all constructs, all narratives, and meta-narratives that underwrite human discourse: art, culture, value-systems, law, and so forth. In Derrida's view, even language itself cannot escape writing's embrace: "By a slow movement whose necessity is hardly perceptible, everything that for at least some twenty centuries tended toward and finally succeeded in being gathered under the name of language is beginning to let itself be transferred to, or at least summarized under, the name of writing."[66]

But this structuralist gathering together of virtually all reality into the text is only the first stage in the postmodernist project. Postmodernist thinking is also *post*-structuralist and, especially, *post*-Saussarian because it goes beyond an insistence on the text-boundedness of meaning, and in the next stage, *deconstructs* texts and makes textual meaning problematic. It attempts to show that texts are what CLS folk claim about international law and liberal notions such as rights, liberty, and equality: indeterminate, incoherent, meaningless, and internally at war with themselves. In other words, the kingdom of writing is torn by civil war. With its Freudian overtones, this stage takes place on the territory of "semiotics,"

64. JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri C. Spivak trans., 1976).

65. *Id.* at 16. He also refers to Galileo: "It [the book of Nature] is written in mathematical language"; Descartes: "to read in the great book of Nature . . . "; Bonnet: "It would seem more philosophical to me to presume that our earth is a book that God has given to intelligences far superior to ours to read, and where they study in depth the infinitely multiplied and varied characters of His adorable wisdom." *Id.*

66. *Id.* at 6.

the domain of the signs (including words) we use to communicate.

In traditional semiotics there are three principal features in communication: (1) someone who wishes to communicate something (the author, the speaker, the subject); (2) the words or signs (the signifiers) he or she uses to convey the message; and (3) the recipient of the message who understands it because he or she shares with the communicator the same linguistic culture (they speak the same language). These three features can be understood as production (authorship), text (or signifier), and reception..

Deconstruction attempts to show that this model is illusory because the text or signifier is in fact divorced from both its author and the reality it is presumed to represent (the signified) by the notion of *"différance"*[67] (a French word that can mean both difference and deferral) and "supplementarity."[68] No meaning can be determined outside context, and there are two clusters of contexts here—production and reception—which tend to "frame" the text:

Production Context	Text Signifier	Reception Context
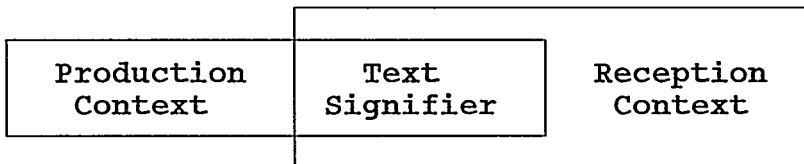
But since no single context permits saturation—the text is much richer than any of its interpretations—no single, stable, or determinate meaning, whether intended by the author or

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67. The term "différance" (spelt with an "a") has been described as "perhaps the most effective" in Derrida's "shifting battery of terms" because it is "suspended between the two French verbs 'to differ' and 'to defer'"; therefore,

> language depends on "difference" since, as Saussure showed once and for all, it consists in the structure of distinctive oppositions which make up its basic economy. Where Derrida breaks new ground, and where the science of grammatology takes its cue, is in the extent to which "differ" shades into "defer." This involves the idea that meaning is always *deferred*, perhaps to the point of an endless supplementarity, by the play of signification. *Différance* not only designates this theme but offers in its own unstable meaning a graphic example of the process at work.

See CHRISTOPHER NORRIS, DECONSTRUCTION: THEORY AND PRACTICE 32 (rev. ed. 1991). This book is probably the best explanation of "deconstruction."

68. DERRIDA, *supra* note 64, at 32.

read into it by the recipient, can be attributed to the text. The text is thus freed from both author and reader, set adrift in a sea of indeterminacy where it can yield a potpourri of meanings for each reader to choose from. Every writing is supposed to be a nest of two kinds of binary concepts eternally at war with each other: those explicitly put there by authors or read into it by recipients (texts) and those which they try to suppress or repress (subtexts, supplements). Deconstruction is the process of uncovering these binary oppositions and the hierarchy which allows one kind to dominate its opposite. It reverses the hierarchy to show that it is built not on sound philosophical foundations, but on metaphysics and suspect ideology. An example of such suspect ideology is the "metaphysics of presence" which insists that the author's intentionality inhabits his or her writing, and which privileges speech (where this seems more so) over writing, where the author is less "present." In fact, Derrida insists, *différance* which frees the text from the subject applies equally to speech and to writing. The ubiquitous signifier cannot be pinned down any more by speakers than by writers; it is, by nature, stubbornly itinerant.[69]

It is clear from this that all texts, literal or metaphorical, now have a life of their own, and cannot be tied down to specific meanings. Even our road signs that read "Speed Limit 55 m.p.h." really do not mean that. Postmodernist deconstruction thus denies the referentiality of texts, insists that the "itinerant" signifier cannot be held down long enough to say something, and rejects substantive normative discourse.[70] It is as if having lured meaning into the text, it has now blasted both skyhigh.

The central epistemological problem for deconstructionists, however, is: How to do this and still be able to put their own message into words? How to stem the infinite regression of

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69. For Derrida, unlike some of his disciples—for instance, those in the CLS movement, who in the earlier phases of their movement, veered towards linguistic idealism (the world being a creature of language)—this indeterminacy is somewhat limited. *See* NORRIS, *supra* note 67, at 136-58. "Derrida's skepticism is not what some of his interpreters would make of it, a passport to limitless interpretative games of their own happy devising." NORRIS *supra* note 67, at 127.

70. RICHARD FREADMAN & SEUMAS MILLER, RE-THINKING THEORY: A CRITIQUE OF CONTEMPORARY LITERARY THEORY AND AN ALTERNATIVE ACCOUNT 51 (1992). A new work, JAMES Q. WILSON, THE MORAL SENSE (1993), finds the roots of the moral sense in human biology.

meaning which they have set in motion? How to insist on the incoherence, indeterminacy, and internal chaos of texts using texts to do so? How to cut the signifier loose and still get it to do what they want it to do in their own writings and speeches? In other words, how can "deconstructive denial of 'logocentrism' [be] expounded in wholly logocentric terms"?[71] Skepticism may thus "turn out to be self-refuting"[72] caught in an old children's game of circularities:

> Caesar says that men are liars;
> But Caesar is a man;
> Therefore Caesar is a liar;
> Therefore men are not liars;
> But Caesar is a man;
> Therefore Caesar is not a liar;
> Therefore men are liars;
> But Caesar is a man;
> Therefore . . . .

The way out for postmodernism is the refuge taken by every skeptic from Hume to Derrida: *special pleading.* In defense of Derrida, Norris writes:

> Skepticism in philosophy has always borne this ambiguous relation to the "natural" or commonsense attitude. Its proponents have never pretended that life could be conducted in a practical way if everyone acted consistently on skeptical assumptions . . . . Language continues to communicate, as life goes on, despite all the problems thrown up by sceptical [sic] thought.[73]

In other words, "[t]he man sits on the branch, sawing away, and we half-expect him to fall but he doesn't—it was only a toy saw."[74] Writing "under erasure" like this is part of this psychedelic "now you see it, now you don't" ethic.

Few postmodernists would renounce their commitment to practical outcomes; most, indeed, espouse a decidedly political

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71. GEORGE STEINER, REAL PRESENCES 129 (1989).
72. NORRIS, *supra* note 67, at 126. *See also* MORTIMER ADLER, INTELLECT: MIND OVER MATTER 131 (1990) (Deconstruction of words on a page "is as self-refuting as the skeptical assertion that it is true or (or that it is false) that no statement is either true or false"!).
73. NORRIS, *supra* note 67, at 128.
74. DAVID LEHMAN, SIGNS OF THE TIMES 64 (1991).

stance.[75] But this practical claim sits rather uneasily with epistemic agnosticism. It may be theoretically possible to argue that the road sign which reads "Speed Limit 55 m.p.h." or "Keep to Your Right" does not really "mean" that. But, transferring that epistemic skepticism to the highway could mean the "deconstruction" not just of the road sign, but of driver and vehicle as well.

In any event, philosophers' disclaimers of responsibility for the consequences of their philosophy is another unfortunate turn in modern philosophical discourse. The founders of philosophy saw it not as a game, but as a serious search for guidance on how to live. Socrates did not shrink from what he saw as the consequences of his philosophy, even if the price was his own life. But serious modern philosophers can say that our lives are not real, not earnest, and the grave is "their goal," that "[l]ife may be not only meaningless but absurd," and still go on as if what they had said mattered not a jot.[76] When philosophy is divorced from life and words lose their roots in human necessity, they need not be taken seriously. "[P]hilosophers have a responsibility which they cannot abdicate," a leading philosopher reminds us, "to stop merely sharpening their tools and start using them to solve the *human* problems which confront us at a time of world crisis."[77] But

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75. See the liberationist stance of postmodernism *infra* text accompanying notes 88-101.

76. THOMAS NAGEL, WHAT DOES IT ALL MEAN: A VERY SHORT INTRODUCTION FOR PHILOSOPHY 101 (1987).

77. C.D. Broad, *preface* to THE ABDICATION OF PHILOSOPHY: PHILOSOPHY AND THE PUBLIC GOOD 1 (Eugene Freeman ed., 1976).

The alternative is a re-reading of the story of the Good Samaritan which alerts us to the kind of scholarship that repudiates practical obligations. The writer is referring to the lawyer's question that had prompted Jesus to tell the story. Does it describe scholarship and "discourse" in our academic citadels?:

> The situation is a familiar one in Jesus' ministry: some clever questioners are trying to trap him. A lawyer, possessing a Doctor of Jurisprudence degree from a first-rate law school where he also edited the Law Review, along with a Ph.D. in Humanities that he picked up along the way, has a question: what shall he do to inherit eternal life? Jesus, in good pedagogical fashion, throws the question back to him and elicits the response that eternal life involves loving God and loving one's neighbor. Jesus tells him to get on with it, since he now knows what to do, but the lawyer, unwilling to be disposed of so easily, reenters the fray. He has another question: "Who is my neighbor?"
>
> By asking the question that way, the lawyer gets the discussion back onto safe territory. The discussion need not involve *being* a neighbor

they cannot do this until they stop using philosophy the way a drunk uses a street lamp—for support, not for illumination.

B. *Postmodernism's Existential Dread*

The existential dread of the postmodern mind is engendered by the deeper questions of the human condition facing postindustrial humanity. This existential crisis—postmodern melancholia[78]—is both a cause and a consequence of the postmodernist turn.

As a cause, it originates in antiquity, in the Greek "Twilight of the Gods," where philosophers dragged their gods down from high Olympus and subjected them to human scrutiny. It progresses on to the Renaissance, the Reformation, and the Enlightenment's desecration of religious and royal authority, culminating in Nietzsche's announcement of the "Death of God" and skepticism about universal or objective values.[79] The "Death of God" presented the Western psyche with the mammoth existential problem of cosmic orphanhood, plunging it into the boredom and ennui that Sartre and Camus descri-

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but only *defining* a neighbor. An academic exploration can ensue, and the lawyer, his own life-style now exempt from scrutiny, can do brilliantly in the ensuing verbal exchange. It is the kind of terrain on which lawyers excel.

    Let us explore the lawyer's inner reflections: should the discussion prove fruitful, perhaps a symposium can be organized around a theme like "The Concept of Neighborliness" and a really comprehensive definition arrived at. The lawyer, in fact, sits on the board of a small foundation that might be persuaded to finance such a project. There could be a series of papers: "The Stoic Concept of Neighborliness," "Neighborliness in Recent Mid-East Fiction" (a very short paper), "The Cultural Implications of Neighborliness for Improving Trade Relations with Greece," "Neighborliness: A Woman's Perspective" (written by a man in order to maintain the desired objectivity), and finally, tapping the local Ph.D. thesis market, "Neighborliness as Seen by Members of the Slave Class, Being a Series of Interviews Conducted in the Alexandrian Slave Market for the Purpose of Attaining Contemporary Data on Satisfaction/Dissatisfaction Ratios." The papers (the lawyer continues to reflect) could then be published, perhaps edited by the lawyer himself, and the contributors could add the volume to their list of publications as a way of assuring that they get academic tenure—rather than their neighbors.

    The fantasy (which I regret to report is far from fanciful) illustrates the skill with which *we use thought to avoid action.* A classic ploy.
ROBERT MCAFEE BROWN, UNEXPECTED NEWS 106-07 (1984) (emphasis added).

    78. Minda, *supra* note 61, at 53 (citing Patrick Ewick, *Postmodern Melancholia*, 16 LAW & SOC'Y REV. 755 (1922)).

    79. *See* ROBERT B. PIPPIN, MODERNISM AS A PHILOSOPHICAL PROBLEM 2 (1991).

bed so poignantly in the 1950s.[80] But the crisis was there as far back as the 1890s. In one of his *Adventures of Sherlock Holmes*, Sir Arthur Conan Doyle, having depicted a perfectly technocratic Sherlock Holmes divested of all human sentiment,[81] now allows his hero to describe what had spurred him to solve a dangerous puzzle: "'It saved me from ennui,' he answered, yawning. 'Alas! I already feel it closing in upon me. My life is spent in one long effort to escape from the commonplaces of existence. These little problems help me to do so.'"[82]

As a consequence of postmodernism, this existential crisis now seems to take the form of the "death" or decentering of "man" from "author" to "authored" to mere "trace." Herbert Schnadelbach describes the phenomenon as follows:

> The rumour has been spreading and can now be heard on all sides: man's hour has come. In announcing the death of God, Nietzsche supposedly became the first to insinuate the death of man; his echo resounds in the chorus of voices renouncing humanism and urgently recommending that man finally bid himself farewell. "Farewell to man" means the end of the notion that man is the center of the world, the author of his history and the foundation of all knowledge, including the knowledge of himself.[83]

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80. Sartre and Camus, both previously active in the French Resistance, were overwhelmed by the anti-climax of the post-war "mundaneness"; they were portrayed in Simon de Beauvoir's novel *The Mandarins*, "soaked in an atmosphere of boredom: the characters sit around in nightclubs, drink and smoke too much, and indulge in a kind of aimless promiscuity." WILSON, *supra* note 57, at 18.

81. In *Adventure 1—A Scandal in Bohemia* published in *The Strand* between July 1891 and December 1892, Sherlock Holmes is described in the following terms:

> It was not that [Sherlock Holmes] felt any emotion akin to love for Irene Adler. All emotions, and that one particularly, were abhorrent to his cold, precise, but admirably balanced mind. He was, I take it, the most perfect reasoning and observing machine that the world has seen; but, as a lover, he would have placed himself in a false position. He never spoke of the softer passions, save with a gibe and a sneer. They were admirable things for the observer—excellent for drawing the veil from men's motives and actions. But for the trained reasoner to admit such intrusions into his own delicate and finely adjusted temperament was to introduce a distracting factor which might throw a doubt upon all his mental results. Grit in a sensitive instrument, or a crack in one of his highpower lenses, would not be more disturbing than a strong emotion in a nature such as his.

SIR ARTHUR CONAN DOYLE, THE CLASSIC ILLUSTRATED SHERLOCK HOLMES 11 (1987).

82. *Id.* at 40.

83. Herbert Schnadelbach, *The Face in the Sand: Foucault and the Anthropo-*

The final stage in this progression is what the late Australian historian, Manning Clark, aptly christened "the Kingdom of Nothingness."[84] In this kingdom, epitomized by the disintegration of art, law, meaning, and other meta-narratives, purged of Derrida's "metaphysics of presence," texts have no semiotic reference to reality beyond themselves. All the constructs that have given humanity comfort and hope in a lonely cosmos are portrayed as unravelling ideologies of a pretentious and discredited elite. There are, of course, dissenting voices,[85] but this is the contemporary phase of the philosophical tradition founded by Descartes: "a philosophy of despair masquerading as hyper-radicalism."[86] It is as if the nuclear annihilation which the cold war nearly unleashed now attempts to return in the guise of philosophical nihilism. But this despair is itself rooted in the very modernism it rejects.[87]

C. Postmodernism's Liberationist Claim

Despite its epistemic skepticism and its existential despair, postmodernist theories do claim to have a liberationist agenda. In one form or another, they have, indeed, been adopted by those discriminated against in their struggles for equality and respect. But how can repudiation of the normative be liberating?

In part, the answer to this apparent paradox lies in postmodernism's challenge to established orthodoxies and canons, as well as its celebration of heterogeneity and inclusiveness. This is not an insignificant contribution. Sectarianism is one of the greatest threats to the very possibility of a new world order. Who would have thought that President Bush, having self-assuredly declared the dawn of a new world order only a few months earlier, would greet the news of Rajiv

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logical Slumber in PHILOSOPHICAL INTERVENTIONS, *supra* note 55, at 311.

84. MANNING CLARK, A HISTORIAN'S APPRENTICESHIP (1992).

85. *See, e.g.,* RUDOLF ARNHEIM, TO THE RESCUE OF ART (1992); STEINER, *supra* note 71; FREADMAN & MILLER, *supra* note 70; Lehman, *supra* note 74.

86. Joel Whitebook, *Freudian Slip*, N.Y. TIMES, Sept. 12, 1993 (Book Review), at 31.

87. *See generally* Tibor Scitovsky, THE JOYLESS ECONOMY (rev. ed., 1992). For some solutions to this condition, see generally MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE (1990).

Gandhi's assassination by Sikh militants with an incredulous "I just don't know what the world is coming to"?[88] Henry Louis Gates, Jr. documents the cultural version of this fragmentation, in the United States, eight months before the 1992 Los Angeles riots:[89]

> Increasing incidents of violence are associated with ethnic differences in very many places in the world: Hasidim and African-Americans in Crown Heights, Brooklyn; Serbs and Croats in Yugoslavia; Koreans and African-Americans in Flatbush, Brooklyn; Zulus and Xhosas in South Africa; Poles and Gypsies in Poland; the Tutsis and Hutus in Rwanda; the Yoruba and Igbos in Nigeria; and, of course, the fate of the Jews in Ethiopia and in the Soviet Union. The list seems to grow longer, rather than shorter as we stumble our way as a society into the twenty-first century. In 1903, W.E.B. Du Bois could write, prophetically, that the problem of the twentieth century would be the color line. We might well argue that the problem of the twenty-first century will be the problem of ethnic differences, as these conspire with complex differences in color, gender, and class.[90]

The Postmodernist challenge to canons and edifices might flush out those whom Gates calls "[v]ulgar cultural nationalists" and "polemicists" who "thrive on absolute partitions" but who are ultimately "whistling in the wind."[91] It also attempts to bring in from the wilderness long excluded particularities of gender and race.[92]

But its *modus operandi* is equivalent to cracking a nut with a sledgehammer. It gives minorities and those "othered" by society a weapon which attacks the pretentiousness of domi-

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88. Thomas L. Friedman, *Nations at War With Themselves*, N.Y. TIMES, June 2, 1991, at E3.

89. As Michael Mandelbaum, director of East-West Studies at the Council of Foreign Relations, remarked in 1991, "The gulf war is the wave of the past. India, Ethiopia, Yugoslavia and the breakup of the Soviet Union are the wave of the future." *Id.*

90. HENRY GATES, JR., LOOSE CANONS: NOTES ON THE CULTURE WARS xii (1992). He might have added to the list: Tanils and Singhelese in Sri Lanka; Catholics and Protestants in Northern Ireland; but also people of no discernible ethnic or religious differences as in Somalia.

91. *Id.* at xvi (giving as an instance ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987)).

92. *See generally* EDWARD W. SAID, CULTURE AND IMPERIALISM (1993) (and explanations for masked actions).

nant canons, even as it destroys the very moral foundations of the attacker's own case. It attempts to expose hidden self-interest in ostensibly universal norms, but leaves the whole edifice shattered into a thousand fragments—each ensconced in its own belligerent subjectivism.[93] We would do well to heed Gates's injunction that "the mindless celebration of difference for its own sake is no more tenable than the nostalgic return to some monochrome homogeneity."[94] By espousing "difference for its own sake"[95] and by repudiating ethical discourse altogether on the assumption "that its obsolescence or even perniciousness are established facts,"[96] postmodernism has implicitly repudiated and subverted its own claim to be liberating.[97]

It has been suggested that repudiation of ethical value might lead to playing fast and loose with substantive moral imperatives.[98] It is more to the point that the towering personalties who courageously stood against evil this century were, without exception, driven by their unwavering fidelity to the moral canons of human dignity, human rights, meaning, justice, faith, hope. From Elie Weisel and Victor Frankl to Aleksandr Solzhenitsyn and Andrei Sakharov; from Mahatma Gandhi to Mother Teresa and Archbishops Oscar Romero, Desmond Tutu, and Janaan Luwuum; from Martin Luther King, Jr. to Nelson Mandela—the claims of those who light candles instead of exalting the darkness have always been logocentric.

In his famous Lincoln Memorial speech, Martin Luther King, Jr. could have proclaimed, in true deconstructionist style, that the text of the United States Constitution's "unalienable rights" had collapsed into the subtext of slavery and

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93. The normative here also points to principles that govern rationality which have both personal and interpersonal function. ROBERT NOZICK, THE NATURE OF RATIONALITY (1933).

94. GATES, *supra* note 90, at xix.

95. GATES, *supra* note 90, at xix.

96. FREADMAN & MILLER, *supra* note 70, at 51.

97. Minority and feminist scholars have increasingly taken Critical Legal Studies to task over its attack on rights which historically have been the idiom of their claim to human dignity and equality. *See, e.g.*, Minda, *supra* note 61, at 40 n.82 (citing Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986)).

98. In his *Signs of the Times: Deconstruction and the Fall of Paul de Man*, David Lehman makes the connection between de Man's ethical agnosticism and his wartime anti-semitic journalism. LEHMAN, *supra* note 74.

legalized racism, and self-deconstructed out of existence. Instead he saw in the words of the Constitution a promissory note to be honored as he put it in one of the greatest moral statements of this century:

> In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.
>
> It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check; a check which has come back marked "insufficient funds." *But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check—a check that will give us upon demand the riches of freedom and the security of justice.*[99]

But the greatest embarrassment to deconstruction's celebration of nihilism comes from those for whom nihilism was not an intellectual position, but reality.[100] From the unrepresentable world of the Holocaust, Victor Frankl protests against "the contemporary nihilism transmitted on many an academic cam-

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99. Rev. Martin Luther King, Jr., *Enables the Civil Rights Movement at the Lincoln Memorial, reprinted in* LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 495, 497 (William Safire ed., 1992).

100. For instance in his recent *Race Matters* Cornell West has powerfully chronicled the nihilistic threat to African-Americans which liberal structuralists misunderstand and conservative behaviorists contribute to:

> Nihilism is not new in black America. The first African encounter with the New World was an encounter with a distinctive form of the Absurd. The initial black struggle against degradation and devaluation in the enslaved circumstances of the New World was, in part, a struggle against nihilism. In fact, the major enemy of black survival in America has been and is neither oppression nor exploitation but rather the nihilistic threat—that is, loss of hope and absence of meaning. For as long as hope remains and meaning is preserved, the possibility of overcoming oppression stays alive. *The self-fulfilling prophecy of the nihilistic threat is that without hope there can be no future, that without meaning there can be no struggle.*

CORNELL WEST, RACE MATTERS 15 (1993) (emphasis added).

pus" which gleefully contends "that everything is meaningless," that there is no justice, that everything is random and the world a cruel joke.[101] The Holocaust is one occasion where disowning meaning and repudiating faith would have been unanswerable.[102]

The voices of those who had reason to succumb to nihilism but did not still break through the eerie silence of the postmodernist wasteland and its philosophy of despair. The Grotian challenge to rebuild against odds is an affirmation of hope. Entropy needs no assistance; it is the default mode of the universe.

IV. RE-INVENTING THE CANNON OF HOMOCENTRIC STATEHOOD

What shape then should the normative dimension of the new world take? In a recent article, the Secretary General of

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101. VICTOR FRANKL, MAN'S SEARCH FOR MEANING 176-77 (rev. ed. 1984).
102. Robert McAfee Brown describes a visit to Holocaust camps:

The roof of the crematorium at Birkenau, the death-camp of Auschwitz. We are standing on ruins the Germans tried (unsuccessfully) to obliterate, to hide evidence that six million Jews had been shot and gassed and burned in such places, solely because they were Jews. I reflect: if Golgotha revealed the sense of God-forsakenness of one Jew, Birkenau multiplies that anguish at least three and a half million times. For the rest of my life, this crematorium will represent the most powerful case against God, the spot where one could—with justice—denounce, deny, or (worst of all) ignore God, the God who was silent.

Of what use are words at such a time? So many cried out to God at this spot and were not heard. Human silence today seems the only appropriate response to divine silence yesterday. We remain silent. Our silence is deafening. And then it comes—first from the lips of one man, Elie Weisel (standing in the camp where thirty-five years earlier his life and family and faith were destroyed), and then in a mounting chorus from others, mostly Jews, the great affirmation: *Shema Yisroel, Adonai Elohenu, Adonai echod,* Hear, O Israel, the Lord our God, the Lord is One.

At the place where the name of God could be agonizingly denied, the name of God is agonizingly affirmed—by those with most reason to deny. I shake in the tension between my impulse to deny and their decision to affirm.

Because of having stood at Birkenau *with them,* it is now possible for me to affirm God in ways I never did before.

ROBERT MCAFEE BROWN, CREATIVE DISLOCATION—THE MOVEMENT OF GRACE 29 (Robert A. Raines ed., 1980); *cf.* JEAN-FRANCOIS LYOTARD, THE POSTMODERN EXPLAINED TO CHILDREN: CORRESPONDENCE 1982-1985 30-31 (Julian Refanis & Morgan Thomas trans., 1992) (originally published in French as *Le Posmoderne Explique aux Enfants,* a most deceptive title if ever there was one, this piece gives the postmodernist view of the Holocaust).

the UN insisted that the most positive feature of the post-cold war period was multi-lateralism which needs to be defended against ultra-nationalism on the one hand, and micro-nationalism on the other.[103] Ultra-nationalism is another name for the unilateralism of the cold war era: "[N]ostalgic for the years when one or a few big powers called all the shots," Boutros-Ghali wrote, "[ultra-nationalists] would prefer that the UN serve as cover for [their] interests and return to the relatively marginal role it played in years past."[104] Micro-nationalism is the upsurge of "ethnic or tribal forces that cause states to fracture and fall apart."[105] Multi-lateralism, the Secretary General noted, was the voluntary cooperation of nations for peace and development, rooted in the popular democratic will of the world's people: "The people of the world have become convinced that democracy is essential to progress with justice. Multi-lateralism is the democracy of international society."[106]

Now multi-lateralism is clearly preferable to both ultra-nationalism and micro-nationalism. One hardly hears any dissenting voices to recent UN activities in Somalia, Haiti, and elsewhere; the calls are, indeed, for greater (not less) involvement in more places. There is, however, a problematic leap in the Secretary General's reasoning from human interests to state interests. The equation of human democracy with multilateral state action, and of a concert of states with the international society, glosses over the normative dimension of the emerging world order and the persistent question of whether and how human interests will be protected in that order.

A. *The Grotian Project at Century's End*

In formulating an answer to the question of human interests, one needs to guard against two pitfalls. The first is facile utopianism, the kind that has brought untold suffering to millions of people in the twentieth century alone. Human beings should not again be recklessly sacrificed "on the altars of abstractions—nation, church, party, class, progress, the forces of history"[107] or any other. So many eggs have been broken this

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103. *See* Boutros Boutros-Ghali, *Don't Make the U.N.'s Hard Job Harder*, N. Y. TIMES, Aug. 20, 1993, at A29.
    104. *Id.*
    105. *Id.*
    106. *Id.*
    107. ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE

century and "the habit of breaking them [grew] but the om-elette remain[ed] invisible."[108] The second pitfall is that of simply reacting to events as they occur the way a subsistence farmer responds to his or her needs of sustenance. The subsistence approach may have served humanity well in simpler times but it will not do today, let alone in the twenty-first century.

Between these extremes lies a cautious approach. The first task is to construct a universal order from what is available. This is a temporal *process*—a process that requires sociological studies into diverse communities, cultures, and value systems that make up the world population with a view to identifying common themes—that is, continuing the work of Jenks, McDougal, and Falk in earnest. The second task is to reconceptualize statehood in line with the new imperatives.

B. *Limited Sovereignty and Qualitative Statehood*

The Westphalian concept of statehood, as we have already seen, was built on intra- and inter-state sovereignty. In some western nations, intra-state sovereignty grudgingly gave way to popular sovereignty but in the majority of states this has not happened yet, although the prospects look better now than at any other time.

There are two possible conceptions of statehood: the organic conception, and the collective one. The organic conception attributes to the state a personality independent of, and indeed superior to, the human beings living in its borders. This was particularly the doctrine of those states which continued to cling to both internal and external sovereignty—principally Nazi Germany, the Soviet bloc, and to a certain degree, the newly independent nations immediately after their colonial experience. The doctrine held not only that "[t]he existence of sovereign states . . . is not dependent upon the will or desire of individual persons"[109] but also that "The extent and character of human rights within a specific state (they do not exist outside a state) are defined in the final analysis by the nature

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HISTORY OF IDEAS 16 (1991).
    108. *Id.*
    109. G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 242 (William E. Butler trans., 1974).

of the state, and this nature is itself a product of the economic system of a given society."[110] Consequently, the principle that human rights fell within the exclusive domestic jurisdiction of states was regarded as a "proposition of cardinal importance."[111] There is, therefore, no remedy for human rights violations committed by the state: The state giveth; the state taketh away.[112]

The alternative view is to regard the state as a collective, having no independent juristic personality apart from the real human beings who make up its population. This would create a legal system approximating that of Josephus Jitta who, writing in 1919, insisted, surely against the facts, that "Mankind [was] undoubtedly a community *de facto*, producing positive and negative duties of each member of the community, towards his fellow-members and towards the community as a social body."[113] Roscoe Pound echoes this view in the relationship he postulates between individuals and social interests: "The life of individuals in society is one thing not two. Any claim made by a member of society has the aspects both of his own continuance as an individual and of the continuance of the society in which he is an individual . . . ."[114]

I suggest that, contrary to the collective model, the nation-state is not about to wither away; nor would it be a good thing if it did. But neither should it retain its pretentious claim to intrinsic sovereignty not derived from its human population. I propose rather, an "instrumental personality" for states—a juristic personality which, like that of a corporation, exists because it is needed for the performance of particular functions. As with a corporation, circumstances may require the veil of a state's juristic personality to be lifted so as to reveal the actual human circumstances behind it. This would be a belated recognition of the fact that the very *sine qua non* of nation-states, as of the world order, is the protection of human dignity and human rights. Entrenching a normative foundation such as this would give validity to the commendable multilateralism which we have seen since 1989. In the twenty-first

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110. *Id.* at 82.
111. *Id.* at 83.
112. *See* H. KELSEN, THE COMMUNIST THEORY OF LAW 179 (1955).
113. JOSEPHUS JITTA, THE RENOVATION OF INTERNATIONAL LAW 2 (1919).
114. JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 199 (1966).

century, qualitative, homocentric statehood ought to replace formal statehood. The precise formulation of this principle and the framework for its realization is the urgent new Grotian project now freed from Clausewitzian and Cartesian fetters; it is the imperative of a normative dimension of the new world order. Thomas Franck's recent article, *The Emerging Right to Democratic Governance* is a salutary step in this direction.[115]

V. CONCLUSION

A world order is a stool on three legs: the political, the normative, and the institutional. Built on only two—the political and institutional, for instance—it may endure for a while, but will not stay upright very long. An enduring world order is one in which the institutional (legal) dimension mediates between the political and normative ones; an order in which institutional integrity welds and melds together the reality of power and the vision of justice. For as Manuel Komroff warns in his foreword to Dostoyevsky's *Brothers Karamazov*: "Between revolutionary ruthlessness and conservative stupidity man is caught and crushed."[116]

In this Article I discussed two paradigms inhospitable to the Grotian task of building a normative foundation for the new world order: Clausewitzian realism which has somewhat retreated with the end of the cold war, and postmodernist skepticism with its deafening obituaries to the "death of man." This Article not only supports the Grotian project; it also insists that, contrary to postmodernist orthodoxy, that project must be homocentric—grounded in the intrinsic dignity of the human person—the unrealized promise of 1945. Human dignity was self-evident to the Psalmist: "For thou hast made [man] a little lower than the angels,"[117] and to Shakespeare: "What

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115. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

116. Manuel Komroff, *Foreword* to FYODOR DOSTOYEVSKY, THE BROTHERS KARAMAZOV at xiii (Constance Garnett trans., Signet Classics 1986).

117. Psalms 8:3-5:

> When I consider thy heavens, the work of thy fingers, the moon and the stars, which thou hast ordained; What is man that thou are mindful of him? and the son of man that thou visitest him? For thou hast made him a little lower than the angels, and hast crowned him with glory and honour.

Id.

a piece of work is man! how noble in reason! how infinite in faculties!"[118] But humanity, it is now often assumed, has been "decentered" by Copernican cosmology and post-Cartesian skepticism. I have attempted to show that the latter has all but deconstructed itself out of existence. But what of the existential dread, the "Death of God" and its attendant cosmic orphanhood in which women and men, far from being made in the image of God, are insignificant specs in a vast, indifferent cosmos? The Copernican revolution seemed to supply this sure cosmological foundation to postmodernism.

The answer is that these obituaries are "grossly exaggerated." The nature of humanity is as intellectually fascinating a study today as ever.[119]   Indeed, it is quite possible that the postmodernist decentering of "man" and its repudiation of the normative, derived from this Copernican mold, are already history. Modern cosmologists and mathematicians with their "theories of everything," these days sound more and more theological as they contemplate the marvel of humanity the way the Psalmist and Shakespeare did, and as they ponder the notions of aesthetic and moral value in art, poetry, music, spirituality, and the moral sense,[120] and ask: are they simply illusions as logical positivists used to claim, or are they "real presence[s]"[121]—rumors of a deeper and more exalted reality? These are difficult puzzles. But for the intrinsic worth of the human personality that creates them we might as well allow a leading mathematician, physicist, and cosmologist to speak the last word into the postmodernist wilderness:

> We who are children of the universe—animated star dust—can nevertheless reflect on the nature of that same universe, even to the extent of glimpsing the rules on which it runs. How we have become linked into this cosmic dimension is a mystery . . . . the physical species *Homo* may count

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118. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2. ("What a piece of work is man! how noble in reason! how infinite in faculties! in form and moving how express and admirable! in action how like an angel! in apprehension how like a God!").

119. *See, e.g.,* CARL N. DEGLER, IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT (1991); RENÉ DUBOIS, THE IDENTITY OF MAN (1983); THE BOUNDARIES OF HUMANITY: HUMANS, ANIMALS, MACHINES (James J. Sheehan & Morton Sasna eds., 1991).

120. WILSON, *supra* note 70.

121. STEINER, *supra* note 71, at 98.

for nothing, but the existence of mind in some organism on some planet in the universe is surely a fact of fundamental significance. Through conscious beings the universe has generated self-awareness. This can be no trivial detail, no minor byproduct of mindless, purposeless forces. We are truly meant to be here.[122]

There is no firmer normative foundation for the world order of the Third Millennium.

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122. PAUL DAVIES, THE MIND OF GOD: THE SCIENTIFIC BASIS FOR A RATIONAL WORLD 232 (1992).