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ROBERT COVER AND INTERNATIONAL LAW—NARRATIVE NUDGES AND NOMADIC NOMOS

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A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior.¹

ABSTRACT

What was once understood as a unified field of international law, emerging from the state system and centered on the rationalization of the relations among public authorities has fractured. What had been the expression of a unified narrative of the organization of human society around the allocation of political authority now searches for new bases for authority as states become market actors, market actors assume governmental authority, markets define the territories within which law is made and applied, and the normative proscriptions of traditional law are quantified and data driven. This essay considers the way that Robert Cover's insights on nomos, narrative, and the sacral (exogenous) elements both may inform the rationalization and authority of these critical developments in the constitution of international law. Cover advanced the perception that law was neither fixed nor aligned with and expressed through states; it was nomadic and its narrative was nudging. This is founded on the twin premises

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¹ Robert M. Cover, 97 *Nomos and Narrative*, HARV. L. REV. 4, 9 (1983).

that, first, narrative produces multi-sourced nomos within a domestic legal order, and second, that international law produces a distinct plane of narrative with its nomos. Assuming both, then it is likely that international normativity will resist its reduction to a singularity, or single expressive force. These insights are first applied to international law's post-1945 orthodox narrative and its challenges, constructed as a form of animal husbandry. It then considers this orthodoxy against emerging nomic challenges: the private law of public law bodies, the public law of private bodies, data driven international law-norms, and the emerging systems of platform governance at the international level. Each is grounded in quite distinct sacral foundations. Cover's insights suggest both the power and permanence of these nomic contests within an international law that has at once lost its moorings in public law but is building new foundations of authority and action interlinked with but distinct from public law. Nonetheless, at its limit we arrive at the current state, where the central challenges the question of the relationship between collectives and the technologies of its production.

I. INTRODUCTION

My task today is to consider Robert Cover's work as it relates to international law. This is no easy undertaking. The task is made harder still because its object—international law—remains a rapidly moving target with nudging and nomadic characteristics.² What was once understood as a unified field of international law, emerging from the state system and centered on the rationalization of the relations among public authorities,³ has fractured.⁴ It self-consciously understands itself as existing on the cusp of nomic transformation.⁵ What had been the expression of a unified narrative of the organization of human society around the allocation of political authority now searches for new bases for authority as states become market actors, market actors assume governmental authority, markets define the territories within which law is made and applied, and the normative proscriptions of traditional law are quantified and data driven.⁶ It is a fracture in search of a rationalizing theory.⁷

² See generally MARTTI KOSKENNIEMI, *GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001); STEPHEN C. NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* (2014). Cf. Deborah Whitehall, *A Time-Map for International Law*, 7 *CAMBRIDGE INT'L L.J.* 4, 15-20 (2018) (following Hanna Arendt, interrogating what a time-map for international law might look like if international lawyers notice the gaps, rhythm and sequences that set and reset their part in international historical time, and its critique).

³ See, e.g., WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 29-39, 307-15 (1924).

⁴ See generally Int'l Law Comm'n, Rep. of the Study Group, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006); Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 *TILBURG L. REV.* 177 (2012).

⁵ See Martti Koskenniemi, *Why History of International Law Today?*, 4 *RECHTSGESCHICHTE* 61, 63-64 (2004) ("In addition to the sense of an increased political possibility connected with the end of the Cold War, the other factor contributing the emergence of historical studies has undoubtedly been the breakdown of the modernist frame of politics that used to provide a rather optimistic and above all universalistically inclined interpretation of the international world.").

⁶ Larry Catá Backer, *The Cri de Jessup Sixty Years Later: Transnational Law's Intangible Objects and Abstracted Frameworks Beyond Nation, Enterprise, and Law*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL* 386, 386-418 (Peer Zumbansen ed., 2020).

⁷ See generally Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 *EUR. J. INT'L L.* 1 (1991); ANDREA BIANCHI, *INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* (2016).

This project already produced a brilliant exposition in furtherance of legal pluralism in the extra-national context almost fifteen years ago.⁸ Paul Schiff Berman considered the rise of the self-styled New Haven School of International Law⁹ and its focus on law as a social process of authoritative decision-making.¹⁰ He argued that “Cover’s emphasis on norm-generating communities—rather than nation-states—and his celebration of ‘jurisdictional redundancy’ provide a useful analytical framework for understanding the plural normative centers that are the focus of much current international law scholarship.”¹¹ And so it did. Cover advanced the perception—unavoidable among international lawyers¹²—that law was neither fixed nor aligned with and expressed through states; it was nomadic and its narrative was nudging.¹³ Cover made palatable to Americans this idea of narrative and normative polycentricity, one already elaborated outside of the United States¹⁴ and beyond the narrow conditions of orthodox narratives of law (over which lawyers and legal

⁸ See Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301 (2007).

⁹ *Id.* at 305 (“[T]he New Haven School offered a kind of socio-legal realism to combat the power-based realism that had dominated the early Cold War period.”).

¹⁰ *Id.* at 302 n.3 (citing Symposium, *McDougal’s Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC’Y INT’L L. PROC. 266 (1985)).

¹¹ *Id.* at 303. However, Berman further stated: “Unfortunately, those who study international public and private law have not, historically, paid much attention to Robert Cover’s work or to the scholars of legal pluralism more generally.” *Id.* at 309.

¹² See, e.g., GERALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010); Larry Catá Backer, *Governance Without Government: An Overview*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 87-123 (G. Handl et al. eds., 2012).

¹³ See Robert LePenies & Magdalena Małecka, *The Institutional Consequences of Nudging—Nudges, Politics, and the Law*, 6 REV. PHIL. PSYCH. 427, 430-32 (2015); Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 683-84 (2017) (“Although first conceived as a public policy tool, nudges are not limited to government. Because nudges are by definition simple interventions that have the ability to change behavior—possibly of many people at low cost—companies have also taken notice.”).

¹⁴ See, e.g., Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOB. ENV’T CHANGE 550 (2010); Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 643 (2010). For the U.S. “collective action” variation, see, for example, AMY R. POTEETE ET AL., *WORKING TOGETHER: COLLECTIVE ACTION, THE COMMONS, AND MULTIPLE METHODS IN PRACTICE* (2010).

academics served as a sort of leading forces vanguard).¹⁵ This suggested a complexity to the unity of notions of master narrative¹⁶ the ordering framework of collective coherence expressed through law.¹⁷

Berman's exposition, in turn, enriched Cover's starting point—the advancement of the idea of the *enterprise of law as fundamentally exogenous* from states and other bodies corporate, from other collectives, and from stateless meaning-making communities.¹⁸ Breaking the alignment of law with specific organs (and ideologies) of institutional orthodoxy represented as law *made it altogether easier to identify the plural sources of norms, and the sacral myths*, around which communities constitute themselves.¹⁹ These are the imperial virtues of *Nomos and Narrative*. In the far richer language of the original bound up in the suggestion that unitary orthodoxy has been lost to the golden ages of civilizations, Cover explained:

But the Temple has been destroyed—meaning is no longer unitary; any hermeneutic implies another. Keeping the peace is no simple or neutral task. For in the normative worlds created around us, not all interpretive trajectories are insular. The worlds of law we create are all, in part, redemptive.²⁰

That destruction scattered the seeds of text, norm and narrative—and fractured it—dividing its powers and applications among communities constituted for the purpose of developing *nomos* from narrative. But it also suggested that the destruction of insularity had its limits. The marker of those limits was embedded in the

¹⁵ For a critique by Larry Catá Backer of the premise of this approach, of the essence of American jurisprudential turns such as the self-styled Yale School, see Backer, *supra* note 6.

¹⁶ See generally JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984).

¹⁷ See generally Donna L. Akers, *Decolonizing the Master Narrative: Treaties and Other American Myths*, 29 WICAZO SA REV. 58 (2014).

¹⁸ See generally Cover, *supra* note 1. In later describing this impulse, Cover explained: “I considered primarily the commitments and narratives of those communities who would make a law for themselves apart from that of the State. I believed and still believe that that emphasis is a necessary corrective to the imbalanced character of almost all contemporary legal theory.” Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. UNIV. L. REV. 179, 182 (1985).

¹⁹ See generally Cover, *supra* note 1.

²⁰ *Id.* at 60.

connection *between* narrative communities based on core principles, histories, cultures, and the like. People devote their lives to developing systems of classification of virtually everything. It is a reflex grounded in the premise that there is value in aligning like with like—at least in the sense that their similarities will likely prove valuable in distinguishing communities or collections of “like” from others. That impulse to mediate between the insular and the common is, of course, the essence of the nomic enterprise of international law.²¹

Like the enterprise of law, the *collective impulse of international law toward self-constitution, to mythos and meaning making, is also exogenous*.²² That self-constituting is undertaken against a primal referent, that is, to a “thing” against which origin, legitimating, values, and fidelity stories (the collective’s master narrative²³ and its imaginaries²⁴) can be assessed and sometimes challenged. That referent is Exodus;²⁵ but also Samuel.²⁶ Here, international law resonates with Cover’s sacral nomic.²⁷ It is the

²¹ Berman, *supra* note 8, at 308.

²² See Cover, *supra* note 18, at 182.

²³ See, e.g., LYOTARD, *supra* note 16.

²⁴ JEAN-PAUL SARTRE, *THE IMAGINARY: A PHENOMENOLOGICAL PSYCHOLOGY OF THE IMAGINATION* (Jonathan Webber trans., Routledge 2010) (1940).

²⁵ *Exodus* 7:1-6, 32:1-28 (King James) (“And the LORD said unto Moses, Go, get thee down; for thy people, which thou broughtest out of the land of Egypt, have corrupted themselves: They have turned aside quickly out of the way which I commanded them: they have made them a molten calf, and have worshipped it, and have sacrificed thereunto, and said, These be thy gods, O Israel, which have brought thee up out of the land of Egypt.”).

²⁶ 1 *Samuel* 8:1-9 (King James) (“Then all the elders of Israel gathered themselves together, and came to Samuel unto Ramah, And said unto him, Behold, thou art old, and thy sons walk not in thy ways: now make us a king to judge us like all the nations. But the thing displeased Samuel, when they said, Give us a king to judge us. And Samuel prayed unto the LORD. And the LORD said unto Samuel, Harken unto the voice of the people in all that they say unto thee: for they have not rejected thee, but they have rejected me, that I should not reign over them.”).

²⁷ That sacral nomic was much in evidence in the counter-majoritarianism of *Brown v. Board of Education*, 347 US 483 (1954) and the cases thereafter. See generally Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982). For a discussion on counter-majoritarianism and the dialogue between domestic constitutional and international law, see *id.* at 1297-98. “The significant element in both the international law antecedent and the New Deal experience was the conceptualization of a ‘minorities problem’ that cut across the contingent experiences of any particular minority group.” *Id.* at 1299; Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1604 (1986) (“Martyrdom, for all its

beheading of the human incarnation of the state (from time to time);²⁸ or triumph in violent confrontation that serves as an incarnation of the mandate of heaven.²⁹ From it is woven the cloth—incarnated by the flag, the prayer shawl or prayer rug, the emblem or action³⁰—again the referent against which the ordinary deviation from the ideal can be measured and the distance between the ideal state of affairs and the current state of being may be diminished.³¹

It is in this context that Cover’s evocation of the “bridge” is particularly powerful,³² with reference to a norm that is itself “the application of human will to an extant state of affairs as well as toward our visions of alternative futures.”³³ For at its heart—at least as it was conceived in 1983—this embrace of a pulsing ecology of nomos and

strangeness to the secular world of contemporary American Law, is a proper starting place for understanding the nature of legal interpretation.”).

²⁸ Cf. Manuel Eisner, *Killing Kings: Patterns of Regicide in Europe, AD 600–1800*, 51 BRIT. J. OF CRIMINOLOGY 556 (2011) (discussing the nature of risk factors in European regicide, with respect to which regicide after trial was rare); Marilyn Kleinberg Neimark, *Regicide Revisited: Marx, Foucault and Accounting*, 5 CRITICAL PERSP. ON ACCT. 87 (1994) (abstracting the concept of regicide from the body of the king to the incarnation of fields of knowledge or activity); SUSAN DUNN, *THE DEATHS OF LOUIS XVI: REGICIDE AND THE FRENCH POLITICAL IMAGINATION* (1994) (explaining the complexities of regicide and the popular imaginary through the lens of the decapitation of Louis XVI and with it, the birth of the nation).

²⁹ Cf. K.R. Bolton, *China and the Mandate of Heaven*, 41 J. SOC., POL., & ECON. STUD. 42 (2016) (analyzing legitimacy, progress and the Chinese imperial concept of “mandate of heaven”); GIULIO MAGLI, *SACRED LANDSCAPES OF IMPERIAL CHINA: ASTRONOMY, FENG SHUI, AND THE MANDATE OF HEAVEN* (2020) (construing the expression of ideology, legitimacy and authority in the construction and manipulation of public space and that construction’s role in the further development of those concepts).

³⁰ Larry Catá Backer, *Bannermen and Heralds: The Identity of Flags; The Ensigns of Identity*, in *FLAGS, COLOR, AND THE LEGAL NARRATIVE: PUBLIC MEMORY, IDENTITY AND CRITIQUE* (Anne Wagner & Sarah Marusek eds., 2020).

³¹ Cover, *supra* note 1, at 45 (“Creating legal meaning, however, requires not only the movement of dedication and commitment, but also the objectification of that to which one is committed. The community posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law.”).

³² *Id.* at 9 (“Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative. . . . A nomos is a present world constituted by a system of tension between reality and vision.”).

³³ *Id.*

narrative was both quintessentially American and essentially conservative and progressive. It is American in the sense of its search, through its vanguard magisterium, for a constraining “sacred narrative.”³⁴ It is both conservative and progressive in the sense of moving from a “here” (a state of imperfection) to a “there” that better approaches an alignment between lived reality and the promise of our customs and traditions as they are embraced by the people.³⁵ These states of “here” and “there,” as well as the bridges built to move from one to the other, are made in our own image. This image is an idealized image the community projected outward as the attributes of either the peculiar genius of this Republic³⁶ or as the manifestation of the Divine. The nomic produces a semiotic theology centered on the human community whose collective self-expression is incarnated as its “genius.”³⁷ This foreshadows the trope and the reflexive nomic

³⁴ Cover, *supra* note 18, at 182-83. “The commitments that are the material of our bridges to the future are learned and expressed through sacred stories. Paradigmatic gestures are rehearsed in them. Thus, the claim to a ‘law’ is a claim as well to an understanding of a literature and a tradition.” *Id.* at 182.

³⁵ See, e.g., Larry Catá Backer, *The Mechanics of Perfection: Philosophy, Theology and the Foundations of American Law*, in ON PHILOSOPHY IN AMERICAN LAW 44, 44-52 (Francis J. Mootz, Jr., ed., 2009).

³⁶ Alfred Young, *The Pressure of the People on the Framers of the Constitution*, in 1 MAJOR PROBLEMS IN AMERICAN HISTORY 134, 135 (Elizabeth Cobbs et al. eds., 4th ed. 2017) (“The constitution was ‘intended for the ages.’ To last it had to conform to the ‘genius’ of the American people. ‘Genius’ was a word eighteenth-century political thinkers used to mean spirit: we might say character or underlying values.”). But of course, it meant more than that—it was the incarnation of the collective manifested through their customs, traditions, expectations, and values. It was Logos made flesh from out of the body of the people. *John* 1:1-5.

³⁷ Franz Boas, *The Diffusion of Cultural Traits*, 4 SOC. RSCH. 286 (1937).

The study of the types of cultures found the world over gives the impression of an enormous diversity of forms. The differences are so great that we may be inclined to think that every one of these cultures developed quite independently and that the peculiar genius of the people has found expression in the forms under which they live.

Id. at 286 (arguing that the particular expression of the genius of a collective is an amalgam of indigenous and borrowed elements, thus cultural purity is a chimera). Cf. Ilhan Niaz, *A System Suited to the “Genius” of the People: The Pursuit of a Presidential Pakistan, 1954–1969, and its Legacy*, 51 ASIAN AFF. 569, 587 n.2 (2020) (“Whilst talking about administration, there is the problem of our legal system, which is most expensive, ineffective, dilatory, tyrannical and totally unsuited to our genius The answer would seem to lie in having a ‘Jirga’ based “judicial system and revision of evidence and procedural laws with only one right of appeal.”) (citations omitted).

meaning making that then migrates from the domestic to the international collective. In its most basic manifestation normative bridging is the sort of nudging at the heart of the coercive enterprise of law. Narrative provides the legitimacy enhancing premises (norms) for the realization of which tools (law, regulation and the like) are tooled.³⁸ The tools can be used defensively (to protect customary practices and tradition) or they can be used positively—to provide a basis for changing behaviors and the expectations that make behavior desirable.³⁹

That self-reflexive impulse, in turn, provides a basis for the legitimacy of narrative—and thus a certain comfort in its approach to nomos—that produce political-cultural urtext, within which a host of narrative sources may create an ecology of narrative.⁴⁰ As Cover reminds us, these may be “founded in myth or history. They may owe their fabulous character to literary or religious imagination, to failure to appreciate and preserve scientific historicity, or to the need—in some periods—to disguise a story with revolutionary implications.”⁴¹ But it is American as well for how it remains deeply embedded in the mythos of the American revolutionary experiences, the fires from out of which a union and then eventually a nation emerged.⁴² It is this mythos that is projected inward toward an understanding of the ecologies of domestic nomic orders in the face of an expanding and always contested conception of the state, and projected outward as the template which is the American gift to the world, a world which is to be remade in its image. The material for that making is meaning; narrative meaning making is the clay that would transform the international as the outward projection of the national ideal. The impulse is hardly exceptional—Communist internationalism and the

³⁸ See, e.g., Oliver P. Hauser et al., *Budging Beliefs, Nudging Behavior*, 17 MIND & SOC’Y 15, 23 (2018) (“Budges, we argue, are a form of intervention that systematically considers beliefs, barriers and context to create behaviour change.”).

³⁹ For an example, see generally, Matthias Lehner et al., *Nudging: A Promising Tool for Sustainable Consumption Behaviour?*, 134 J. CLEANER PROD. 166 (2016).

⁴⁰ Cover, *supra* note 18, at 182-83.

⁴¹ *Id.* at 184.

⁴² And here the sacred script, once fashionable, and now less so:

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.

Genesis 1:26 (KJV).

European version of the universalization of the idealized bureaucrat as the incarnation of the Enlightenment grand clock master provide analogous compulsions.

That detachment of law from the narrative of normative systems that are themselves necessarily aligned with a specific institutional structure is even more quintessentially conservative. While it dabbles with the notion of “some undisciplined jurisgenerative impulse”⁴³ it is to the disciplinary cages of narrative as sovereign rulemaking, as coherent systems of conduct norms that can be enforced by the communal organs established for that purpose, that serves as the *summum bonum* of the narrative experience.⁴⁴

It is not the romance of rebellion that should lead us to look to the law evolved by social movements and communities. Quite the opposite. Just as it is our distrust for and recognition of the state as reality that leads us to be constitutionalists with regard to the state, so it ought to be our recognition of and distrust for the reality of the power of social movements that leads us to examine the nomian worlds they create.⁴⁵

That insight squares nicely with the American infatuation with constitutionalism as a specific form of narrative—or rather—as that conversation between *nomos* and narrative that has made this Republic so special, but that has also marked its borderlands and the limits of its narrative possibilities.⁴⁶ It also suggests the nomadic nature of normative communities within even an overarching normative system, like the U.S. Entanglement is at the heart of the project of interactive normative collectives, and that entanglement suggests migration of norms and narrative always in a dynamic state.⁴⁷

And yet, there is something here that speaks to international law-making, at least at its edges. Cover was sensitive to the transitive

⁴³ Cover, *supra* note 1, at 67.

⁴⁴ *Id.* at 44.

⁴⁵ *Id.* at 68.

⁴⁶ Larry Catá Backer, *Some Thoughts on The American Declaration of Independence and its Irish/European Connections at Century's End*, 8 TULSA J. COMPAR. & INT'L L. 87, 87 (2000).

⁴⁷ See Nico Kirsch, *Framing Entangled Legalities Beyond the State*, in ENTANGLED LEGALITIES BEYOND THE STATE 1, 4 (Nico Kirsch ed., 2021) (“The entanglements that come into focus here are primarily about mutual de facto influences and the travelling content of legal norms.”).

implications of nomos, narrative, and the organization of human society. This is derived from the twin premises that, first, narrative produces multi-sourced nomos within a domestic legal order, and second, that international law produces a distinct plane of narrative with its nomos. Assuming both, then it is likely that international normativity will resist its reduction to a singularity, or single expressive force. As a collective expression, it must be autonomous of and resist confinement to, management by or for the benefit of specific public national and international organs. That was an important underlying insight in the effort to constitute a war crimes tribunal to try an identified set of leaders of those states which lost the conflict that ended in 1945.⁴⁸ Here was narrative myth-making that “was sounded at the outset in terms of the capacity of the event to project a new legal meaning into the future.”⁴⁹ And here as well the projection of law outward from the state to the community of states to hold accountable individuals not under a set of nomic principles but within its consequential legalization at the international level.

The 1945 Tribunals, then, were not unique events but a template that could be applied in the future. That projection forward in time was a critical element of the nomic project. And thus, Cover’s consideration of subsequent efforts to replicate that effort in the context of U.S. engagement in Vietnam undertaken by Sartre and Russell.⁵⁰ Cover’s engagement with the Sartre-Russell attempt at replication was attempted in the shadow of, but liberated from, the structures that produced the Nuremberg nomos. Its animating narrative as an ideal type, freed from the context of the time and place for which it was developed,⁵¹ could itself serve as a basis for reconstitution of nomos beyond its original elements. Narrative, it seems, could only move toward multi-vectored nomos gingerly and always looking over its shoulder for the acknowledgment and affirmation of those with the power to back their norms and narrative with force. There is irony here as well—what was impossible in the

⁴⁸ Cover, *supra* note 18, at 198.

⁴⁹ *Id.*

⁵⁰ *Id.* at 199-202.

⁵¹ *Id.* at 202 (“The Russell/Sartre tribunal, like the Sanhedrin that R. Jacob Berab tried to set up, was a philosopher’s realization of an ideal type. But both “Courts” refrained from acts that might have tested definitively their capacity to transform their worlds.”).

context of Vietnam became plausible in the context of Rwanda,⁵² and then in the Yugoslav wars of independence.⁵³ And it found an institutional home in its nomic aspects in the Rome Statute;⁵⁴ aligned with its institutional manifestation in the International Criminal Court and its jurisprudence.⁵⁵

Cover reminds us that it is not inevitable to see the world today (as it is manifested in narratives and their nomoi) as the narratives through which a *particular caste* of narrative meaning-makers (or maintainers) would have us see the world and our place in it, though it may be necessary to bend to its power.⁵⁶ Thus, when considering what Cover contributes to a more sensitive engagement with international law, one ought not to feel constrained to speak only, or with particular reverence to, the current orthodoxy. As such, Cover might speak here not only to the great enterprise of global legalization that was the vision of the great lawyer/administrators of the post-1945 period. For their well-meaning project, he might also have engaged these high priests of the externalization of the ethos, the spirit, of the emerging post-War great American mythos. Here is a triumphant international law grounded on the possibility of the incarnation of values from narrative through the great projects of legalization and juridification.⁵⁷ These, in turn, would be aligned with an increasingly tightly intertwined network of administrative oversight, which itself would be bounded by

⁵² See generally Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, AM. J. INT'L L. 501 (1996).

⁵³ See generally Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167 (1997).

⁵⁴ See, e.g., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese et al. eds., 2002).

⁵⁵ See, e.g., Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT'L J. HUM. RTS. 444 (2014).

⁵⁶ Cover, *supra* note 1, 17 ("The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal patterns of commitment, resistance, and understanding. . . are subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence."). The possibility of narrative and nomic otherness is, for Cover, the essence of the "radical message of the first amendment." *Id.* It applies as well within the framework of international law.

⁵⁷ See, e.g., Gunther Teubner, *Juridification Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 3, 3-48 (Gunther Teubner ed., 1987); Rachel Sieder, *The Juridification of Politics*, in THE OXFORD HANDBOOK OF LAW AND ANTHROPOLOGY (Marie-Claire Foblets et al. eds., 2020).

rules-based exercises of discretionary decision making for the benefit of increasingly managed and passive populations.⁵⁸ This nomic expression, this grand project of international law after 1945, served as a basis for the rationalization of domination grounded in the sacral quality of human dignity and the divine dignity of the individual within political collectives.⁵⁹ But it has not proven to be either the last or only word.

Attention ought to be drawn to the voluptuously generative activity on the peripheries of this now ancient vision-narrative embraced as the “truth” of international law. Likewise, a focus on the evolving and fracturing character and ideology of narrative itself might be revealing.⁶⁰ That character is something Cover took as a given, though one whose variability was most interesting when expressed as norm. For Cover, law narrative was an object that could be identified because, though it might vary as to its expression, *its form tended to remain unchanged*.⁶¹ Cover implies that though narrative and the content of law on which it is based changes, that variation in narrative and its expression as law does not produce an effect on the *form* that law takes. That may now be challenged by the great tech and normative innovation of data-based governance;⁶² indeed it is a

⁵⁸ I use the term population here as collectives that represent the essentialized reduction of the individual, aggregated to produce some sort of reified mass singularity, cobbled together with statistics and measured against an ideal toward which those who know better have an obligation to nudge. *See generally* MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS LECTURES AT THE COLLÈGE DE FRANCE, 1978-79*, at 79-104 (Michel Senellart et al. eds., Graham Burcell trans., 2004).

⁵⁹ *See generally* Grundgesetz [GG] [Basic Law], translation https://www.gesetze-im-internet.de/englisch_gg/.

⁶⁰ *See* Backer, *supra* note 4, at 182-88.

⁶¹ The point was made in contrasting the agonistic foundation of legal narrative (its interpretive framing) against literary interpretation in general. “Here, by sharp contrast, I am concerned with the practical considerations of normative world building for those who perpetuate or seek to perpetuate violence successfully.” Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the World, the Deed, and the Role*, 20 GA. L. REV. 815, 817 (1986).

⁶² *See* Larry Catá Backer, *Next Generation Law: Data Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China*, 28 S. CAL. INTERDISC. L.J. 123, 123-72 (2018).

premise that Chinese Leninist theorists⁶³ and European philosophy,⁶⁴ and only later law, now challenges. It is not for nothing, then, that Bertrand Russell and Jean-Paul Sartre find themselves seeking to mimic the forms of Nuremberg even as they seek to modify its narrative.

The unchanging ideal was itself bound up in the notion that it is exogenous to the narrative community and that the iterative process of narrative nomos is to (finally) get it “right”—to approach both an ideal perfection and to work toward its realization. Nonetheless, what remains sacred and eternal are its forms—the language and expression of the nomic and its framing of collective organs. It is here that international law, as it is emerging from the margins, provides a fertile space in which to explore the way that nomos and narrative are themselves together with two sides of the same coin—the incarnation of ideological premises in the form of its perfection (nomos) and its expression as lived reality (narrative).

The focus here is those nomos narratives beyond the state and its domestic nomic orders. More specifically, the changes to the foundations of narrative multiplicity—and nomic polycentricity—among these actors appear to be treating the old meta-orthodoxies of the post-1945 narrative ordering extra-nationally as less relevant to their constitution. In the process, the conception and expression of nomoi are transforming as well. The cumulative effect of this transformation may challenge the coherence of the field of international law itself, even broadly conceived. More interesting, the movement in extra-national arenas.⁶⁵ Its effects, however, are borrowing deeply into the practices and sensibilities of domestic legal and constitutional orders. Each represents the striving toward the grasping of an ideal that can then be expressed as a form of perfection (its narrative) and application (its structures of compulsion or the ideal made manifest, incarnated as “law”).

⁶³ Here we enter the world of Chinese social credit theory and implementation. See generally Liang et al., *Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure*, 10 POL’Y & INTERNET 415, 415-53 (2018).

⁶⁴ See Louisiana Lightsey, *Biopolitics and Globalization*, GLOB. S. STUD. (Aug. 17, 2017), <https://globalsouthstudies.as.virginia.edu/key-concepts/biopolitics-and-globalization> (providing an example of the emerging notion of biopolitics).

⁶⁵ This is an old notion in now new clothing. See generally Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 173-240 (2001).

Considered at greater length below are the application of Cover's insights to the emergence of the post-1945 orthodox narrative and its challenges certainly after the end of the last century. The narrative and nomos of orthodox post-War *international law* was constructed as a form of animal husbandry (and its biblical origins) after 1945 and formed the baseline narrative of the field.⁶⁶ That, indeed, was the solution to the problem of racialized violence and militarism. The structures of peace might be hardened through the narrative of the farm rather than of the treasure raid. Here one encounters the modernist baseline within which even orthodox understandings of legal pluralism are entrenched—a movement from an obsession with territory to one obsessed with the control of populations.⁶⁷ This modernist baseline narrative is a narrative of containing conflict within a cage of legalization, the enforcement of which is developed further under conditions of advanced judicialization of politics.⁶⁸ Against it has emerged the ideal of the *private law of public bodies*, states operating in and through markets, and as market actors to project public authority privately. This narrative of public entity private law forms the narratives of sovereign wealth funds and state-owned enterprises.⁶⁹ But it also suggests the operational narratives of international financial organs and privatized instruments of global macro-economic governance.⁷⁰ It suggests the

⁶⁶ See generally Larry Catá Backer, *The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN ST. INT'L L. REV. 509 (2003).

⁶⁷ See, e.g., Adam Sitze, *Biopolitics and the Political Space*, 9 COMMC'N. & CRITICAL/CULTURAL STUD. 217 (2012) ("Carl Schmitt, like Foucault, cites the figure of the shepherd in Plato's *Statesman* as the genealogical precursor for the ministers and ministries who take charge of the health and welfare of populations in the modern administrative state.").

⁶⁸ See generally Backer, *supra* note 66.

⁶⁹ See Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AM. U.L. REV. 1, 30-46 (2013) [hereinafter Backer, *Sovereign Investing*]; Larry Catá Backer, *Human Rights Responsibilities of State-Owned Enterprises*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 223, 223-44 (Surya Deva & David Birchall eds., 2020); Larry Catá Backer, *The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy*, 50 VAND. J. TRANSNAT'L L. 827, 860-67 (2017).

⁷⁰ See Larry Catá Backer, *The Corporate Social Responsibilities of Financial Institutions for the Conduct of their Borrowers: The View from International Law and Standards*, 21 LEWIS & CLARK L. REV. 881, 890-905 (2017); Larry Catá Backer,

nomic importance of conditionality in loan agreements, in the force of capacity building, and the power of control of the substance of audits and accountability measures. From that, it is only a small step to the *narratives that celebrate the triumph of the market*—these are grounded in narratives of private law as public international law and of the governmentalization of the private sector to advance public law objectives,⁷¹ with its crown jewel in the human rights soft law instruments of the early 21st century.

This last narrative impulse opens the door to future narratives. Two possible futures are considered. The first is the move toward quantification and measurability in lieu of the old language and sensibilities of sovereignty and command of classical narrative and *nomos*.⁷² *Data-driven governance and its simulations and predictive analytics*, its rating systems serve as a novel basis for law⁷³—accountable, quantified, and measured in a rationalized way against measurable ideals.⁷⁴ That rationalization, however, is undertaken with a new language—the language of numbers, of prediction, of the sovereign authority of the statistical center (in regimes meant to suppress deviance) or the imperial authority of the outlier (where the narrative is progressive in the sense of managing populations towards some ideal state)—for example, racial justice, equality, or of the establishment of a communist society. Lastly, one offers a glimpse at a potential future—transforming nomic institutions from the administrative-bureaucratic models to that grounded in *information and operationalized through platforms*.⁷⁵ This data driven nomic

Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order, 18 IND. J. GLOB. L. STUD. 751, 782-800 (2011).

⁷¹ See, e.g., Larry Catá Backer, *The Problem of the Enterprise and the Enterprise of Law: Multinational Enterprises as Polycentric Transnational Regulatory Spaces*, in OXFORD HANDBOOK OF TRANSNATIONAL LAW 777, 777-80 (Peer Zumbansen ed., 2021).

⁷² See Larry Catá Backer, *And an Algorithm to Entangle them All? Social Credit, Data Driven Governance, and Legal Entanglement in Post-Law Legal Orders*, in ENTANGLED LEGALITIES BEYOND THE STATE, *supra* note 47, at 79, 97-103.

⁷³ See generally Backer, *supra* note 62, at 150-70.

⁷⁴ See, e.g., Larry Catá Backer, *International Financial Institutions (IFIs) and Sovereign Wealth Funds—SWFs as Instruments to Combat Corruption and Enhance Fiscal Discipline in Developing States*, 6 INT'L REV. L. 1, 1 (2015).

⁷⁵ Tarleton Gillespie, *Governance of and by Platforms*, in SAGE HANDBOOK SOC. MEDIA 254 (Jean Burges et al. eds., 2017); Larry Catá Backer, *Trust Platforms: The*

narrative is the world of social credit, ratings-based nudging, and cultures in which accountability and compliance become the operative language and the founding mythos of law.⁷⁶ This narrative is manifested in the nomic world that is Facebook; now self-consciously part of the construction of a metaverse, a nomic universe that seeks to meld human and divine.⁷⁷ This is Chinese Social Credit regimes externalized through its global production chains projected through its Belt & Road Initiative; Delta Airline's blacklists platforms (coordinated by the state) for punishing unruly passengers.

Each of these expressions of the imaginaries of international law contains its own nomos, and its own narratives. Each envisions bridges from a quite distinct "here" to a very different "there." And each is grounded in quite distinct sacral foundations. Yet Cover might find in the religious traditions of the Jewish testament a basis for these sacral foundations, and that connection then enriches the emerging narrative ecologies of international law. More significantly, Cover's insights suggest both the power and permanence of these nomic contests within an international law that has at once lost its moorings in public law but is building new foundations of authority and action interlinked with but distinct from public law.

Digitalization of Corporate Governance and the Transformation of Trust in Polycentric Space, PENN ST. L. (2021), <https://ssrn.com/abstract=3895425>.

⁷⁶ Backer, *supra* note 62, at 160.

⁷⁷ See, e.g., *Who Will Govern the Metaverse? (No, It Won't Be Facebook)*, XR TODAY (Dec. 23, 2021), <https://www.xrtoday.com/virtual-reality/who-will-govern-the-metaverse-no-it-wont-be-facebook> ("The metaverse is defined as a three-dimensional, virtual space where users can interact with their surroundings and each other. It has three defining properties—interoperability, universality, and a social environment – and is built on three core technologies—XR, blockchain, and artificial intelligence."); Yiyang Bian et al., *Demystifying Metaverse as a New Paradigm of Enterprise Digitization*, in *Big Data 2021: 10th International Conference Held as Part of the Services Conference Federation, SCF 2021 Virtual Event, December 10–14, 2021, Proceedings*, 12988 LECTURE NOTES IN COMPUTER SCIENCE 109, 109 (Jinpeng Wei & Liang-Jie Zhang eds., 2021); see also Daniel D. Bretone et al., *Bridging Virtual and Real Worlds: Enhancing Outlying Clustered Value Creations*, 18 J. STRATEGIC MKTG. 613, 620-24 (2010).

II. INTERNATIONAL LAW AS ANIMAL HUSBANDRY

Nomos. The *nomos* of international law has been changing⁷⁸ to mirror the great changes in its narrative expression as globalization between 1945 and 2016. But those changes in narrative have affected the ambitions but not the forms of *nomos*.⁷⁹ Indeed, fidelity to the forms of nomic expression is central to the notion of international law as the outward reflection of the inward constitution of states as states bodied corporate begin to develop their governance communities, especially with the development of the United Nations system after 1945.⁸⁰

International law as *nomos* assumes three primary forms: (1) contract; (2) the constitutional law of supra-national organs; and (3) regulatory and administrative functions of supra-national organs, all in their nomic functions.⁸¹ Pluralism comes in the forms that these nomic activities assume, as well as in their combinations. The most direct and simplest form of nomic expressions are contracts between states. These are the expression of private law of public entities, which by the parties' public nature, change their character.⁸² Like contracts among individuals, these expressions of private law by public entities can be based on assumptions of formal and de facto equality among states, the transformative *grundnorm*⁸³ of the United Nations system in rationalizing and expanding the public character of these contracts as a field of law, or they can express the hegemonic realities of international relations among states of unequal power.⁸⁴

⁷⁸ A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L STUD. 133, 133 (2001) (identifying challenges to the primacy of the nomic structures of the Westphalian model of collectives with the state at the top and politics as the privileged language of authority through law making).

⁷⁹ JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 65-82 (2006).

⁸⁰ AMOS YODER, THE EVOLUTION OF THE UNITED NATIONS SYSTEM 7-39 (Christine Williams & Christine Winter eds., 3d ed. 1997).

⁸¹ For a contemporary orthodox example, see ALVAREZ, *supra* note 79, at 109-22.

⁸² Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 323 (1994).

⁸³ J.W. Harris, *When and Why Does the Grundnorm Change?*, 29 CAMBRIDGE L.J. 103, 103-33 (1971).

⁸⁴ See Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843 (2001).

After 1945, the focus of international law moved decisively from the expression of contractual relations among states (treaty law) to the constitution of an institutionalized community of states (the law of the constitution and operation of international organizations).⁸⁵ These institutions were then elaborated under a set of constraining norms meant to protect and rationalize this system of collective state authority a world in which states privilege was protected.⁸⁶ International law becomes the constitutional law of the relations among states, creating an institutional order within which the community of states may engage authoritatively (through law) that mimics the representative character of liberal democratic domestic orders.⁸⁷ International law then shifts from the now crude set of contract relations among states to the development of the domestic legal orders of internationally constituted bodies. The institutional bodies constituted through this re-constituted narrative international law as a legitimating structure for supra-national institution building were like states constituted through constitutional law, both representative and bureaucratic, and as such, capable of becoming centers of autonomous legislative, executive, and judicial authority in their own right for the community of states.⁸⁸

Narrative. The international law master narrative is one that is essentially focused on community, and more precisely in its orthodox form, of an exclusive community limited to states.⁸⁹ This ordering of the reality expressed through the discursive language of law is as much the law of the organization of states as it is about the narrative of authority and legitimacy of constituted bodies built around the supremacy of politics and its expression through law by bureaucracies vested with a representative and delegated authority to act for others. In this sense, the narrative represents an apotheoses of the state *system*

⁸⁵ See generally ALVAREZ, *supra* note 79.

⁸⁶ See José E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'*, 24 AM. U. INT'L L. REV. 811, 812 (2009).

⁸⁷ Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 247 (2000).

⁸⁸ See, e.g., Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002).

⁸⁹ For a critical discussion in the shadow of transnational narratives beyond the state, see, for example, Larry Catá Backer, *Governance Without Government: An Overview*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 87, 90-92 (Günther Handl et al. eds., Brill Pub. 2012).

into a form distinct from its constituent parts.⁹⁰ Those bodies may interreact in communities of similar persons, but they are superior to the world around them.

Just as human collectives can constitute a state as their collective incarnation, collectives of state-persons constitute a supra-national body corporate as the incarnation of the collective organization and community of states. This is the narrative of the people of Israel begging their prophet Samuel for a King to be like other peoples.⁹¹ And it is the narrative of collective sovereign authority exercised by representatives but subject to the Divine will. In this case, the Divine is not the spirit of God in the Abrahamic holy books, but rather the collective genius of the people expressed through their customs, traditions and memorialized as their normative imaginaries from which law springs authoritatively. The story of the kingship of Saul provides the template for the structures of international law.⁹² The manifestation of the genius (the fixed and

⁹⁰ See generally CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (Percy E. Corbett trans., Princeton Univ. Press 2015) (1953).

⁹¹ 1 *Samuel* 8:4-7, 9-10, 19-20.

⁹² In a longer study, I noted the Biblical echo in the relationship between community, leader and its imaginaries that could be understood as the basis of the narratives of globalization:

A direct relation between the people and its God, its communal *genius*, is too unsettling. It is *necessary* for Israel to resemble all other nations. But, in turn, all other nations will also find it easier to resemble Israel, and thus come into the ultimate, but now removed kingdom of God. Of course, this is the fundamental principle of Christian success in the pagan world; a pagan success with a Hebrew purpose. An abstraction, God, is a hard master—imitation of others is a gentler God. But such imitation does not make the imaginary real—it merely blinds the believer.

The error of imaginary causes bedevils the tale of Saul as well. The people disobeyed God in the matter of the destruction of the Amalekites because Saul so ordered. The people are easily characterized as helpless, either as against the king's desire or their own. In one sense, then, they were the weak instruments of the king. They followed the king's commands because they must—the king controlled the army. In another sense they were the weak instruments of their base desire. The people trusted the king to implement the divine commandments against their human cravings. The imaginary here centers on the illusion of kingship for the protection of the community—and its consequences. The people create in Saul an imagined image of God—as Saul. This imaginary God—the leader—is comforting. Disobedience of a king was infinitely less severe an infraction than disobedience of the will of God. And should the consequence of their actions be adverse—the people could always unmask the king. No longer a stand-in for God, the king could be transformed into a stand-in for the community, a community, in this case, that was innocent because they

exogenous manifestation)⁹³ of the nomic is then manifested in the concept of stewardship. It is also manifested in a mechanics of preservation around which communities protect themselves against the destruction of their value by the state and its instrumentalities (operating through law).⁹⁴

The bridge: All around international law are auguries of decay.⁹⁵ But decay is as much a sign of the life to emerge from what is falling away as it is about passing. Yet this is a fruitful sense of decay and death that bridge the way from endings and beginnings in a way that makes it difficult to identify where one starts and the other ends, a circularity common to eschatological systems.⁹⁶ On one side, the architecture of dominion shifts from the individual to the collective to the state and to the community of states. On the other, the growing importance of the responsibility of those with dominion over the welfare of their flock. As the power of the individual over themselves

were collectively only following orders. Saul, after all, and not the people, had transgressed. Thus, the people profit in both directions. From Saul they secure obedience—because the power of the community to action resides in the people. From God—the inescapable normative context of their constitution—the people have secured a proxy against destruction, for when the community errs, it is their proxy, the king, who pays in the place of the community.

Backer, *supra* note 66, at 518-19.

⁹³ See Paola Gambarota, *Syntax and Passions, Bouhours, Vico, and the Genius of the Nation*, 97 ROMANIC REV. 285, 286-87 (2006); see also Cover, *supra* note 18, at 182.

⁹⁴ Backer, *supra* note 66, at 523. There I noted:

The cultivation of the leader through the inversions of miscausation can be dangerous for a community, especially for one theorized as essentially passive. Yet, the cultivation of miscausation can also serve a community well. Nietzsche again provides insight. In this case that insight suggests that the inversions so useful to the leader's authority serve the power of the community in equal measure. Shifting one's gaze from Saul to Israel—from the leader to the nation—provides a basis for removing a veil cloaking the place where power resides. The forms of miscausation that preserve the *authority* of the leader, that create the illusion of power centered on the leader, also undergird the *power* of the community from both its leader and the normative foundations of the community nations (our modern global deity). This normative foundation currently finds expression in the human rights norms that have come to dominate systems of behavior codes between nations.

Id.

⁹⁵ See generally ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW* (2d ed. 2019).

⁹⁶ JOSEPH L. HENDERSON & MAUD OAKES, *THE WISDOM OF THE SERPENT: THE MYTHS OF DEATH, REBIRTH, AND RESURRECTION* 60-66 (1963).

shrivels, as persons lose agency (and the power to bear the consequences of that agency) that agency moves first to the state (its perversion—the nanny state) and then to the community of states (human rights and humanitarian law, the law of war with its singular focus on the protection of the bodies and goods of the individual).

The sacral: The sacral authority of Genesis 1:26⁹⁷ involves sovereign imitation, delegation, and sovereign stewardship⁹⁸ for things that do not belong to use but concerning which we are given use. Just as humanity was given dominion over the Earth and all of its creatures by God, so the state has been given dominion over human collectives to serve the ends of dominion; but that hierarchical constitution has moved up a level. The Fuhrer Principle of International Law and the legitimacy of dominion within vertically stacked power collectives organized functionally with politics at its head⁹⁹ serves as internationalization of the fundamental principle that, as Michel Foucault put in the title to one of his lecture series at the Collège de France, society must be defended.¹⁰⁰

III. THE PRIVATE LAW OF PUBLIC INTERNATIONAL LAW (STATES AND LAW IN MARKETS)

Nomos: The nomos and narrative of the state has fractured;¹⁰¹ just as the state has fractured as a legal construction.¹⁰² Its expression as international law now merely frames one element (though an

⁹⁷ *Genesis* 1:26 (“Let us make man in our image, after our likeness: and let them have dominion.”).

⁹⁸ See Paul Arthur Berkman, *Biodiversity Stewardship in International Spaces*, 8 *SYSTEMATICS & BIODIVERSITY* 311, 311 (2010); Duncan B. Hollis, *Stewardship Versus Sovereignty? International Law and the Apportionment of Cyberspace*, *TEMPLE UNIV. STUD.* (Mar. 19, 2012), <https://ssrn.com/abstract=2038523>.

⁹⁹ Backer, *supra* note 66, at 528 (“Political communities have had written into the international law of inter-communal conflict a series of protections in its favor against their own leaders. The wealth of communities is the community itself, as a (to use the language of business) a going concern. Leaders, in a sense, are either parasites, or tools useful for the deployment of the coercive power of the community—God’s description of the nature of the practices of kings is revealing in this light.”).

¹⁰⁰ See MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE 1975-1976*, at 215-65 (Davis Macey trans., 2003).

¹⁰¹ See Larry Catá Backer, *Fractured Territories and Abstracted Terrains: Human Rights Governance Regimes Within and Beyond the State*, 23 *IND. J. GLOB. LEGAL STUD.* 61, 64 (2016).

¹⁰² Backer, *supra* note 4, at 183.

important) in the way that states engage with the world around them. States have increasingly become active participants within markets. This is not your grandparents' European socialism, nor is it necessarily old Marxist-Leninist economic practices with its nomenklatura masquerading as the factotums of ghostly market substitutes, and especially its European variant.¹⁰³ Rather, it is the development of a complex set of nomic modalities in which states use private law to organize and project their public power through private markets beyond the constraints of their borders.¹⁰⁴ Those modalities, though, mimic the forms of private arrangements between non-state parties, but here with regulatory effect. The idea being that states may participate as market actors beyond their territories and ought to conform to the expectations of private actors in those markets, yet their sovereign character may not be denied, nor the sovereign character of their projections of private power outward.¹⁰⁵ This notion is especially powerful within the nomic narratives of contemporary Marxist-Leninist systems.¹⁰⁶

Here one encounters the forms of law now transformed by narrative expectation and function. For example, international financial institutions, like the World Bank, the International Monetary Fund, and now the Asian Investment and Infrastructure Bank all regulate (that is, all advance their public policy objectives) by developing elaborate systems of management embedded in their loan

¹⁰³ Thus, for example, it is possible to understand the modern form of central planning as a (perhaps crude) attempt to reduce the aggregations of market transactions into a model that can both describe and predict macro-economic activity by attempting to simulate the market itself, considered in its contemporary forms. See LARRY CATÁ BACKER, *CUBA'S CARIBBEAN MARXISM: ESSAYS ON IDEOLOGY, GOVERNMENT, SOCIETY, AND ECONOMY IN THE POST FIDEL CASTRO ERA* 159-97 (2018).

¹⁰⁴ See Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOB. LEGAL STUD. 191, 208 (2007).

¹⁰⁵ See, e.g., Rihantoro Bayuaji & Rahmadi Mulyo, *Strengthening the State-Owned Enterprises (SOE) as an Implementation Instrument of Article 33 of the 1945 Constitution in the Perspective of Foreign Investment*, 77 J.L. POL'Y & GLOBALIZATION 54, 58-60 (2018); Backer, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 GEO. J. INT'L L. 425, 436-50 (2010).

¹⁰⁶ See, e.g., Wenjuan Nie, *China's State-Owned Enterprises: Instruments of its Foreign Strategy?*, J. CONTEMP. CHINA, Sept. 2021, at 1.

agreements.¹⁰⁷ This governance by contract conditionality uses the form of contract to develop contract-based administrative regulation systems that focus on national economic policy.¹⁰⁸

A variant focuses on the elaboration of public policy, especially macro-economic policy, through the direct operations and interventions of state-owned enterprises¹⁰⁹ and sovereign wealth funds.¹¹⁰ Here one faces the fracture of the old unified narrative of sovereignty as its sacral foundations—the state as the manifestation of divine power on earth—breaks into functionally differentiated pieces in the face of the larger meta-narratives of globalization.¹¹¹ One encounters here as well the application of the traditional nomic forms to overcome the weakness of the state system and its constraints within international law—the territorial borders of states and their manifestation as physical presence tied to the land. The old nomic form serves as a bridge across governance gaps made manifest by the realities of globalization as a supra-international legalist force.¹¹² For sovereign investment facilities, like sovereign wealth funds, states may project their national policies or their articulation of mandatory

¹⁰⁷ See, e.g., Devesh Kapur & Richard Webb, *Governance-related Conditionalities of the International Financial Institutions*, UNITED NATIONS [UN] 1, (Aug. 2000), <https://unctad.org/system/files/official-document/pogdsmdpbg24d6.en.pdf>; Scott Greer, *Structural Adjustment Comes to Europe: Lessons for the Eurozone from the Conditionality Debates*, 14 GLOB. SOC. POL'Y 51, 52 (2014); Wolfgang Mayer & Alexandros Mourmouras, *The Political Economy of IMF Conditionality: A Common Agency Model*, 9 REV. DEV. ECON. 449, 450 (2005).

¹⁰⁸ Ademola Ariyo & Afeikhen Jerome, *Privatization in Africa: An Appraisal*, 27 WORLD DEV. 201, 201 (1999).

¹⁰⁹ See generally Judith Schönsteiner, *Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters*, 40 U. PA. J. INT'L L. 895 (2019).

¹¹⁰ Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3, 4 (2010).

¹¹¹ For a discussion of this fracture, see generally, SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT, AND FUTURE OF A CONTESTED CONCEPT (Hent Kalmo & Quentin Skinner eds., 2010).

¹¹² See Stephanie Schrage & Dirk Ulrich Gilbert, *Addressing Governance Gaps in Global Value Chains: Introducing a Systematic Typology*, 170 J. BUS. ETHICS 657, 657 (2021) (discussing the nomos and narratives of governance gaps). The challenges of governance gaps were especially important in the context of constructing an international framework for the regulation of the human rights harms attributed to economic activities. See JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 1-36 (2013).

international norms (not law) in a number of ways. First, states may use these instruments as a means to intervene in financial markets by developing a rule or objectives-based system for making decisions about which enterprises may be included in their investment universe. Alternatively, they may use the projection of their financial investing abroad to develop and apply guidance and standards against which they will implement strategies for interventions as shareholders. Third, states may use these financial instrumentalities as vehicles of corporate observation and compliance which are initiated by assessments of corporate behavior that points to the violation of rules of appropriate conduct.¹¹³

The performance of the legal, the formulation, placing, and enforcement of rules thus migrates from politics and its expression through government to markets and its expression through the government of enterprises and other private collectives. Public policy is corporate governance.¹¹⁴ For the state, that shift is expressed not through their political organs but through the operations of their economic institutions. In this context, the SOE and the production of nomos through the regionalization of functionally differentiated control structures—acquire a broader authority along with the gaps that exist at the borders of states and along global production chains. But it acquires greater power when those borderlands are managed

¹¹³ The nomic universe of the Norwegian pension fund global is perhaps the most advanced of this type. *See generally* Backer, *Sovereign Investing*, *supra* note 69. The standard setting bodies such as the Organization for Economic Cooperation and Development (“OECD”), Financial Stability Board (“FSB”), and the Basel Committee on Banking Supervision provide baseline standards that are then privatized and applied through these instruments. *Corporate Governance*, WORLD BANK (Feb. 24, 2016), <https://www.worldbank.org/en/topic/financialsector/brief/corporate-governance>.

¹¹⁴ This produces alignments at the international level between, for example, the work of the World Bank’s Corporate Governance Team within the Financial Markets Integrity Group, which provides policy advice and capacity building facilities on corporate governance related to the financial sector and capital markets, and standard setting bodies including the OECD, the Financial Stability Board, and the Basel Committee on Banking Supervision. *See Corporate Governance*, *supra* note 113; *see also* *Why Corporate Governance?*, IFC (2018), https://www.ifc.org/wps/wcm/connect/258e1815-a80c-462c-a3df-9419f04d1dfa/Why_Corporate_Governance.pdf?MOD=AJPERES&CVID=mpqJSxs (“IFC believes that this approach helps improve the financial, social, and environmental sustainability of investments and enhances the public trust in its operations.”).

through the emerging great regional trading block—the Chinese Belt & Road Initiative,¹¹⁵ America First,¹¹⁶ and the EU’s Brussels Effect project of internationalizing its regulatory framework.¹¹⁷ Here, state action through private instrumentalities is coordinated through international law-based structures. This coordination is both nomic (in the sense of the forms of law used) and narrative (in the sense of providing a political-economic model which is to be realized at all levels of interaction). The concept of “at all levels” can have very specific nomos in the context of liberal democratic systems that may be embedded within capacity building, contract, and accountability. In the context of Marxist-Leninist Belt and Road systems, it may be manifested through coordinated security, loan, and cultural exchange programs.

Narrative: The apotheosis of the collective and the de-territorialization of bodies corporate asserting political authority become a vital element of the narrative of international law. The fusion of law, politics, economics, and culture—the construction of comprehensive approaches to the management of relations among states through interventions in the private sector and using the tools of private sector relationships—becomes an essential element in the construction of the narrative of the state as a fractured and functionally

¹¹⁵ See generally Yiping Huang, *Understanding China's Belt & Road Initiative: Motivation, Framework and Assessment*, 40 CHINA ECON. REV. 314 (2016); Weidong Liu & Michael Dunford, *Inclusive Globalization: Unpacking China's Belt and Road Initiative*, 1 AREA DEV. & POL’Y 323 (2016); Xue Gong, *The Belt & Road Initiative and China's Influence in Southeast Asia*, 32 PAC. REV. 635 (2019).

¹¹⁶ Most of the old intellectual classes in the United States have been reluctant stakeholders in this now bipartisan foreign policy rewriting of the nomic narrative of the United States in the world. See Richard Haas, *The Age of America First: Washington's Flawed New Foreign Policy Consensus*, FOREIGN AFFS. (Nov./Dec. 2021), <https://www.foreignaffairs.com/articles/united-states/2021-09-29/biden-trump-age-america-first>; Edward Aiden, *Bidenomics Is 'America First' With a Brain: Trump's Economic Revolution Is Alive And Well—And Continuing In Abler Hands*, FOREIGN POL’Y (June 18, 2021), <https://foreignpolicy.com/2021/06/18/biden-bidenomics-economy-america-first-trump-trade-supply-chains-industrial-policy-china-reshoring-protectionism>; Dan Steinbock, *U.S.-China Trade War and Its Global Impacts*, 4 CHINA Q. INT’L STRATEGIC STUD. 515 (2018); but see David E. Sanger, *The End of 'America First': How Biden Says He Will Re-Engage with the World*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/11/09/us/politics/biden-foreign-policy.html>.

¹¹⁷ See ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* xiii-xiv (2020) (using nomos and narrative to reshape the world in the EU’s image).

differentiated actor.¹¹⁸ Regimes of functional differentiation and the rise of abstract territories as the concepts of sovereignty become detached from physical moorings. The merger of political and economic space makes possible the privatization of public activity, and with it a nomos of private derivative sovereign authority. This is the narrative of inversions—the use of economic instruments for the construction and operationalization of nomic acts—contract as statute; economic policy as an instrument of public policy and its sensibilities to the reification of the agency and integrity of political bodies corporate.

The Bridge: Cover's concept of the bridge speaks to the transformation of the focus of human activity from fractured to comprehensive—the fusion of the inter-effects of political, economic, and cultural activity toward an end. But at the same time, it is indifferent to the role of the state in the movement from a past to a future, and thus contributes to the de-politicization of the state. A state is the apex of assertions of formal and legitimate political authority, but its authority is subordinated to other states (and perhaps other actors) where it engages in and projects *economic* power beyond its borders. Combining notions that the state may project its power comprehensively against the theory that within the community of states, such power must be circumscribed by the authority of other states to protect their own bodily integrity. The concept of the bridge then creates the space of integrity in which political bodies must conform to economic expectations when they move from territory to the territory of markets and from a territorial to a production space.

The sacral: This concept touches on the primacy of the market as the genius of human interaction. It is driven by narratives that exalt the core value of maximization of benefit mediated within communities of participants irrespective of their character. It is a democratic and participatory space in that it aligns with the democratic and participatory ideological basis for robust markets.¹¹⁹ Markets,

¹¹⁸ See generally Philip Czerny, *Functional Differentiation, Globalization, and the New Transnational Neopluralism*, in BRINGING SOCIOLOGY TO INTERNATIONAL RELATIONS: WORLD POLITICS AS DIFFERENTIATION THEORY 205 (Mathias Albert et al. eds., 2013); Jiri Přibáň, *Legal Flexibility, Governance and Differentiated Integration: On Functional Differentiation of EU Law and Politics*, in WHICH EUROPE? THE POLITICS OF DIFFERENTIATED INTEGRATION 24-38 (Kenneth Dyson & Angelos Sepos eds., 2010).

¹¹⁹ See Samuel Bowles & Herbert Gintis, *The Democratic Firm: An Agency Theoretic Evaluation*, in MARKETS AND DEMOCRACY: PARTICIPATION, ACCOUNTABILITY, AND

enterprises, states, and others all align in their constitution and operation—consent based, efficiency driven, grounded in the aggregation of an infinite number of discrete transactions (economic, social, cultural, political) that then evidence the hand of the divine.

IV. THE TRIUMPH OF THE MARKET (THE PUBLIC LAW OF PRIVATE LAW)¹²⁰

Nomos: The movement of states from the narrative realms of politics to those of economics portends a more significant transformation realized through the development of the narratives and sensibilities of globalization after 1945. These were centered, for good or ill,¹²¹ on markets and their management through (self and state sourced) accountability-based private law systems. The narrative of markets produces a powerful alignment. States expand the scope of their authority through their interventions in private markets (traditionally the space they regulate) by mimicking the nomic forms of the market. But that alignment worked in two directions. As states projected themselves into private markets, private enterprises expanded the scope of their authority through their interventions into regulatory space by mimicking the forms and sensibilities of

EFFICIENCY 11-35 (Samuel Bowles et al. eds., Cambridge 2012). This connection was much in evidence in the Summit for Democracy sponsored by the U.S. President in December 2021. See Press Release, White House, Summit for Democracy Summary of Proceedings (Dec. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/summit-for-democracy-summary-of-proceedings>. The focus on anti-corruption had both a markets protective and a democracy enhancing character. See Joe Biden, President of the United States, Remarks by President Biden at The Summit For Democracy Opening Session (Dec. 09, 2021) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/09/remarks-by-president-biden-at-the-summit-for-democracy-opening-session>) (“We’re going to launch new programs to help connect . . . anti-corruption activities across civil society, the media, academia, labor, and protect whistleblowers and help partners eliminate money laundering and safe havens.”).

¹²⁰ See generally Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801 (2008).

¹²¹ For the classics, see, for example, JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 23-52 (W.W. Norton ed., 2003); THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 29-72 (Anchor 2000) (1999).

administrative bureaucracies and the legal objects they produce.¹²² This movement produces a distinct sort of private enterprise, the governmentalized private enterprise as a source of law,¹²³ the corporation as a private administrative agency,¹²⁴ and the operational element in implementing public policy objectives.¹²⁵ Private law is now the instrument of public objectives;¹²⁶ the state recedes as a source of a law that operates between states (private law as the solution to transnational governance gaps). One speaks here of the methods and sensibilities of global administrative law¹²⁷ and of legal pluralism;¹²⁸ as well, one understands the notion of transnational legal orders.¹²⁹

The state does not disappear as a nomic source; but it changes character (at least for the moment) at the margins. The state becomes the foundation for systems of compliance and accountability, and the holder of authority over the narrative around which nomos is constructed. The exemplars have become prominent instruments in the toolkits of international actors with nomic narratives of their own, directed to move their objects from an unacceptable “here” to a desired

¹²² For a systems approach, see GUNTHER TEUBNER, *Global Bukowina: Legal Pluralism in the World-Society*, in GLOBAL LAW WITHOUT A STATE 3, 3-28 (Gunther Teubner ed., 1997); Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 UNIV. CONN. L. REV. 1739, 1751-61 (2007).

¹²³ See generally Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT’L L.J. 471 (2005).

¹²⁴ For an interesting take redolent with narrative, see Dennis Arnold & Martin Hess, *Governmentalizing Gramsci: Topologies of Power and Passive Revolution in Cambodia’s Garment Production Network*, 49 ENV’T & PLAN. 2183, 2183-02 (2017); Steen Vallentin & David Murillo, *CSR as Governmentality*, CBS CTR. CORP. SOC. RESP. (2009), https://research-api.cbs.dk/ws/files/58953890/wp_cbscsr_2009_4.pdf.

¹²⁵ Olha O. Cherednychenko, *Contract Governance in the EU: Conceptualizing the Relationship Between Investor Protection Regulation and Private Law*, 21 EUR. L.J. 500, 500-20 (2015).

¹²⁶ See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press 2004); United Nations, *Guiding Principles for Business and Human Rights*, HR/PUB/11/04 (June 16, 2011).

¹²⁷ Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 250 (2005).

¹²⁸ Berman, *supra* note 8; CALLIESS & ZUMBANSEN, *supra* note 12.

¹²⁹ See generally TERENCE C. HALLIDAY & GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERS* (2015).

“there”—responsible business conduct¹³⁰ and corporate social responsibility¹³¹ in the form of international soft law measures, which sometimes harden into public law or in private law measures. One speaks here primarily of soft law in the sense of directing states to delegate global norms through domestic legal orders to private economic enterprises the jurisdiction of which was limited to its functionally differentiated operational spaces.¹³² The U.N. Guiding Principles for Business and Human Rights and its second pillar, Corporate Responsibility to Respect Human Rights;¹³³ the O.E.C.D.

¹³⁰ *OECD Guidelines for Multinational Enterprises*, OECD PUBL’G (2011), <https://www.oecd.org/corporate/mne/48004323.pdf> (“[R]ecommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”); *OECD Due Diligence Guidance for Responsible Business Conduct*, OECD PUBL’G (2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> (“[P]rovide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises by providing plain language explanations of its due diligence recommendations and associated provision.”).

¹³¹ Tamás Szabados, *Multilevel Hardening in Progress—Transition From Soft Towards Hard Regulation of CSR in the EU*, 28 MAASTRICHT J. EUR. & COMPAR. L. 83, 89-91 (2021). CSR raises more complex issues of nomic authority in multilateral institutions, especially tightly woven ones like the European Union. In the case of the European Union, the central element of complexity is jurisdictional is case between the substantive fields and the competence of the public organ to legislate rather than to produce soft law framing measures. *See id.* at 91. This echoes Cover’s fundamental construction of the nomic and its hierarchies. *See Cover, supra* note 1, 12-14.

¹³² *See generally* Fabien Terpan, *Soft Law in the European Union—The Changing Nature of EU Law*, 21 EUR. L.J. 68 (2015). “[S]oft norms and coordination may provide a viable alternative to hard norms and the Community method.” *Id.* at 69. Fionnuala Ní Aoláin, ‘Soft Law’, *Informal Lawmaking and ‘New Institutions’ in the Global Counter-Terrorism Architecture*, 32 EUR. J. INT’L L. 919, 921 (2021) (“The turn to soft law in counter-terrorism has many similarities to the use of soft law in other areas, including environmental protection, human rights, refugee law and arbitration.”). For further discussion on this topic, *see id.* at 922-24.

¹³³ United Nations, *supra* note 126. As John Ruggie, the moving force behind the development of the UNGP explained, “[w]hereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company’s social license to operate . . . The corporate responsibility to respect exists independently of States’ duties.” U.N. GAOR, 8th Sess., at 16-17, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008). Indeed, the very description of the responsibility acknowledges both the relationship

Guidelines for Multinational Enterprises¹³⁴ are key nomic structures for this enterprise. The form of nomic activity—corporate policy as law—the supply chain guidelines within global production chains; human rights due diligence. These are first embedded in disciplinary collectives of economic markets and now increasingly forming part of the domestic legal order of states (Germany, France, Australia, the UK).¹³⁵

But it is also the nomic terrains of tort and contract.¹³⁶ These draw on the soft law norms of international instruments that then become hardened within private law self-regulatory systems.¹³⁷ These private law systems constitute the regulatory structures for the management of multinational enterprises as they seek to regulate their global production systems.¹³⁸ So hardened, these public soft private hard law obligations may then produce tort or contract-based liability over which national courts may assert jurisdiction.¹³⁹ Private law

to and the autonomy from the domestic legal systems of those states within which a corporation or other economic enterprise may operate.

¹³⁴ *OECD Guidelines for Multinational Enterprises*, *supra* note 130.

¹³⁵ Good examples include the recent legislative efforts around disclosure regimes, the object of which is to manage compliance with international norms (and national law to the extent applicable) around forced labor. *Modern Slavery Act 2018* (Cth) (Austl.) (“An Act to require some entities to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes.”). Similar in ambition are supply chain due diligence laws in France and Germany. *See, e.g.,* Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 *BUS. & HUM. RTS. J.* 317, 317-23 (2017); Markus Zeiner, *Germany Gets Serious About Supply Chain Law; Large Firms Would Have to do Due Diligence on Human Rights and Labor Standards*, *STRAITS TIMES* (Dec. 5, 2020), <https://www.straitstimes.com/world/europe/no-gains-without-human-rights-germany-gets-serious-about-supply-chain-law>; *see also* Enrico Partiti et al., *Curbing Supply-Chain Human Rights Violations through Trade and Due Diligence, Possible WTO Concerns Raised by the EU Conflict Minerals Regulation*, 51 *J. WORLD TRADE* 1043 (2017).

¹³⁶ Madeleine Conway, *A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains*, 40 *QUEEN’S L.J.* 741, 741 (2015).

¹³⁷ *See generally* Backer, *supra* note 122 (explaining the ecologies of these closed loop public-private regulatory systems).

¹³⁸ *See* Larry Catá Backer, *14 Multinational Corporations as Objects and Sources of Transnational Regulation*, *ILSA J. INT’L & COMPAR. L.* 499, 505 (2008) (discussing the role of private regulatory contract as a form of governmentalization of the private sphere).

¹³⁹ *See* Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 *UNIV. PENN. J. INT’L L.*

systems are embedded both within the great webs of administrative oversight, usually with the state at its apex. But it can also be embedded in oversight systems in which the market provides functionally differentiated private mechanisms for surveillance and accountability. In the United States, disclosure systems sometimes serve those ends, especially with respect to the transnational footprint of economic actors. The United States might seek to assert a measure of control.¹⁴⁰

Narrative: One speaks here to the mythologies of markets and market actors as the primary subjects of regulatory management over the great societal drivers—economic activity.¹⁴¹ What might have been a great taboo in the narratives of the apotheosis of the state and its manifestation within an international system of states constituting themselves as the apex collective legitimating and speaking through law¹⁴² is now at the center of the narratives of legitimacy, of accountability, and of compliance.¹⁴³ “Global law is coming. In some respects, it has already made an appearance in efforts to govern the behavior of states. But it steals into the global village in darkness, a village once populated by a relatively homogenous collection of state

519 (2021); see, e.g., Rainer Baisch et al., *Liability of Parent Companies for Human Rights Violations of Subsidiaries*, 27 EUR. BUS. L. REV., 669, 669-95 (2016) (discussing an early consideration of these relations and their possibilities as nomos).

¹⁴⁰ See MICHAEL V. SEITZINGER & KATHLEEN ANN RUANE, CONG. RSCH. SERV., R43639, CONFLICT MINERALS AND RESOURCE EXTRACTION: DODD-FRANK, SEC REGULATIONS, AND LEGAL CHALLENGES (2015).

¹⁴¹ Robert S. Spich, *Globalization Folklore Problems of Myth and Ideology in The Discourse on Globalization*, 8 J. ORG. CHANGE MGMT. 6, 6-29 (1995). Even the counter narratives share in the core premises of the sacred mythologies of the convergence of public and private. See Manfred B. Steger et al., *Anti-Globalization or Alter-Globalization? Mapping the Political Ideology of the Global Justice Movement*, 56 INT’L STUD. Q. 439, 439-54 (2012).

¹⁴² See, e.g., Mahmoud Al-Akra et al., *The Influence of the Introduction of Accounting Disclosure Regulation on Mandatory Disclosure Compliance: Evidence from Jordan*, 42 BRITISH ACCT. REV. 170, 170-86 (2010) (stating disclosure regulation reforms produced the most significant influence on mandatory disclosure compliance).

¹⁴³ See, e.g., James A. Fanto, *The Governing Authority's Responsibilities in Compliance and Risk Management, as Seen in the American Law Institute's Draft Principles of Compliance, Risk Management, and Enforcement*, 90 TEMP. L. REV. 699, 704-11 (2018); see also Wendy Mason Burdon & Mohamed Karim Sorour, *Institutional Theory and Evolution of ‘A Legitimate’ Compliance Culture: The Case of the UK Financial Service Sector*, 162 J. BUS. ETHICS 47, 48-53 (2020).

gathered together behind thick walls of protective ideology.”¹⁴⁴ One speaks here of corporate sovereignty—of the sovereignty of the collective incarnated in corporate bodies that may rival the state in form, function, and authority.¹⁴⁵ This is the narrative of governmentalization of private organs as instruments of public ends (the converse of state projections of public power through private activity) and the rise of sovereign authority ecologies.¹⁴⁶ The merger of the sensibilities of the administrative state and its bureaucratization with the risk-seeking wealth-maximizing cultures (now dampened) of market driven organs produces a new hybrid entity—private in function and the public in administration. There is no differentiation between political and economic policy or between public and private responsibility. Yet governmentalization fundamentally changes the traditional character of both public and private bodies in ways that are sometimes contested.¹⁴⁷

These are the narratives of accountability,¹⁴⁸ and these are the structures of compliance whose imaginaries now shape how stakeholders understand and engage with nomos and perceive the bridges that will move them from “here” to “there.” What is encountered, then, are forms of attack on the ancient narrative of the corporation and the way it is “seen” and “understood” and more importantly, the way it is rendered. One moves from the notion of an agency-based wealth maximization for the benefit of internal

¹⁴⁴ Backer, *supra* note 4, at 178.

¹⁴⁵ JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM 19-41 (2013); Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 130 (2008).

¹⁴⁶ Cf. Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN L. REV. 1, 16 (1993).

¹⁴⁷ See, e.g., Jack Ma, *Jack Ma's Speech at the Bund Summit 2020 in Shanghai*, APPLE NEWS (Aug. 11, 2020), www.chinathanks.com/2020/11/jack-mas-speech-at-bund-summit-2020-in.html (“As far as I know, the ‘improvement of the ability to govern’, as mentioned by President Xi, is about maintaining healthy and sustainable development under orderly regulations. It is not about having no development under regulations.”).

¹⁴⁸ See generally Richard Mulgan, ‘Accountability’: An Ever-Expanding Concept?, 78 PUB. ADMIN. 555 (2000); Larry Catá Backer, *Unpacking Accountability in Business and Human Rights: The Multinational Enterprise, the State, and the International Community*, in ACCOUNTABILITY AND INTERNATIONAL BUSINESS ORGANIZATIONS: PROVIDING JUSTICE FOR CORPORATE VIOLATIONS OF HUMAN RIGHTS, LABOR, AND ENVIRONMENTAL STANDARDS 60 (Liesbeth Enneking et al. eds., 2020).

communities to a welfare maximization for the communities within which the enterprise is embedded. The apotheosis of the victim as a legal-moral-cultural category. The future is moving from human rights-based (and thus anthropocentric) to environmental and sustainability-based maximization.¹⁴⁹

The Bridge: One travels from the “here” (the need for governmentalized collectives) to the “there” (the realization of this need through the transformation of economic collectives as private organs of state policy operating through markets and invoking the nomic expectations of markets) on the corporate body politic. This bridge is built over the governance gaps of the managerial orders of globalization¹⁵⁰ in parallel to that other bridge built from the “here” (of states as purely public regulatory actors) to the “there” (of functionally differentiated state activity) and privatized state operations in markets. The economic collective is as much a public organ as the public body corporate is an economic actor. In the process, one sees the consequences of this development bound up in notions of agency and autonomy. For the collective, the bridge of governmentalization produces the rise of the narrative of collective agency and “free will”¹⁵¹ even as the agency of the individual is delegated up into those collectives. For the individual the opposite: the passivity and stripping of agency of the individual produces a condition in which both the state (collective) the community of states (through international law) and the collective of economic bodies corporate now bear responsibility for the individual.¹⁵² On the other side of the bridge—the emergence of individual bodies corporate who now serve as the aggregated substitute for the individual and within which aggregated agency to

¹⁴⁹ See Larry Catá Backer, *Flavors of the Month Rarely Outlast Their Novelty: A Close Examination of Article 4 and the Construction of the Victim as a Legal Category*, 14 EMANCIPATING MIND 245, 245-54 (2019).

¹⁵⁰ Cf. MANFRED STEGER, GLOBALISM: THE NEW MARKET IDEOLOGY (2002).

¹⁵¹ For the germinal statement of the claim, see Peter French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207-15 (1979). For its consequences in the political sphere taken to its nomic narrative limits, see John Hasnas, *Should Corporations Have the Right to Vote? A Paradox in the Theory of Corporate Moral Agency*, 150 J. BUS. ETHICS 657, 663-68 (2018).

¹⁵² This trajectory was clearly exposed in the debates about a treaty for business and human rights considered by a working group appointed by the UN Human Rights Council in 2014. See Larry Catá Backer, *On the Victimization of International Law and the Ethos of the Treaty Project in Article 1*, 14 EMANCIPATING THE MIND IN THE NEW ERA: BULLETIN OF THE COAL. FOR PEACE & ETHICS 191, 191-95 (2019).

protect against violation of rights is now vested.¹⁵³ As against Apple, Inc., one now finds Amnesty International in the space once reserved for rights-holding individuals.

The sacral: The accountable self serves as the form of and the incarnation of Logos within this nomic-narrative universe in international law structures.¹⁵⁴ Wrestling with the account, accounting, and those to whom accounts are rendered form the essence of the relationship between private law internationalism and the individual (or aggregate) self.¹⁵⁵ Globalization and its sensibilities serve as the incarnation of the sacred. Here the sacred has been transformed from a transcendent to an immanent manifestation. Humanity has remade God in its own image. This “genius” humanity then suggests a movement toward convergence and coordination even in the face of diversity. The primary manifestation of the divine is the human person, now not merely the object of stewardship (recall the narratives of classical post-1945 international law as the law of animal husbandry) but the manifestation of collections of attributes, the welfare of which must be protected. The result: the primacy of human

¹⁵³ See, e.g., *Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Survival International and Vedanta Resources plc*, NAT'L ARCHIVES (Mar. 27, 2019), <https://webarchive.nationalarchives.gov.uk/ukgwa/20121212135622/http://www.bis.gov.uk/files/file50697.doc>. The Special Instance had been filed by a UK NGO, Survival International to protect the interests of an Indian indigenous group, the Dongria Kondh in connection with a proposed mining project operated by entities related to the UK parent corporation, Vedanta. *Id.* Vedanta objected arguing that the Specific Instance should have been brought by the injured parties. *Id.* The UK National Contact Point disagreed. *Id.* It noted that the procedural rules for Special Instance proceedings permitted complaints to be brought on behalf of identified parties. *Id.* (“The UK NCP considers that Survival International has an interest in this matter because one of its stated objectives is to promote for the public benefit the human rights of indigenous peoples established by UN covenants and declarations.”).

¹⁵⁴ For its embedding, see generally, Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2017).

¹⁵⁵ For an interesting discussion of its limits, drawing on the work of Judith Butler, see Martin Messner, *The Limits of Accountability*, 34 ACCT. ORG. & SOC'Y 918, 918-38 (2009). Note the confessional nature of this sacral relationship: “To say that someone should be accountable for particular events or actions is to hold certain expectations about what this person or organization should be able and obliged to explain, justify and take responsibility for.” *Id.* at 918 (citing S.M. Cooper et al., *Corporate Social Reporting and Stakeholder Accountability: The Missing Link*, 32 ACCT. ORG. & SOC'Y 649, 649-67 (2007)).

rights and the welfare of the individual. Nonetheless, this is human rights centering with a quite specific purpose, to ensure the stable development of productive forces, the responsibility for which is now broadened irrespective of the character of the body corporate. The rise of the realm of Foucault's "statistics" on incarnated abstraction "populations," "states," "international communities," etc.¹⁵⁶ The rise and legitimacy of reductionism of the individual and essentialism of the aggregation of traits that define them. And at the bottom of the sacred well, the multi-national enterprise as an object, inter-linkages, and as the very system of management through rules of or effectively law; the object becomes the system, and the enterprise collapses into itself.¹⁵⁷

V. DATA DRIVEN GOVERNANCE AND THE NARRATIVES OF SIMULACRA

Nomos: Quantifiable measures against an ideal; the rating, algorithms, and the construction of systems of rewards and punishment for deviations from the ideal. Measurability, compliance, and accountability become the mechanisms of law making. Naturalization becomes its favored mode of enforcement. The language of measurement is articulated both through traditional international law and the private law of public law, but its operationalization has significant regulatory effects. Those effects are built into the design of the measures and the ways those measures are realized through data harvesting and analytics.¹⁵⁸ Here is a space in which states and private enterprises can be fused into a new governance organ around data.¹⁵⁹

¹⁵⁶ MICHEL FOUCAULT, "SECURITY, TERRITORY, POPULATION" LECTURES AT THE COLLÈGE DE FRANCE 87-134 (Graham Burchell trans., Picador 2009).

¹⁵⁷ See Backer, *supra* note 71.

¹⁵⁸ Hints of this may be seen in the move toward smart cities. See, e.g., Margarita Angelidou, *Smart Cities: A Conjunction of Four Forces*, 47 CITIES 95, 95-106 (2015); Renata P. Dameri et al., *Understanding Smart Cities as a Global Strategy: A Comparison Between Italy and China*, 142 TECH. FORECASTING & SOC. CHANGE 26, 26-41 (2019).

¹⁵⁹ See generally Towards a European Strategy on Business-to-Government Data Sharing for the Public Interest: Final Report Prepared by the High-Level Expert Group on Business-to-Government Data Sharing, COM (2020).

Narrative: This is the narrative realm of creation stories.¹⁶⁰ People are disassembled and measured as against an ideal, institutions and processes are broken down into their bits, and then from the data that is the evidence of their respective existence, they are reconstituted—the ideal worker, debtor, health advancing body. The narratives of Chinese social credit systems are robustly explicit about this.¹⁶¹ Those in the West are less so but the ideal is still manifested in accordance with the driving force of the ideal in contemporary space-equality, anti-racism and the like, which produce an image of the ideal person in an ideal social environment.¹⁶² All of this requires data—and data requires a high degree of technology fueled surveillance.¹⁶³ Western traditional nomic expression has been building toward this, especially in the context of business conduct.¹⁶⁴ Data governance is grounded in the premise that the object of regulation (people, institutions, organizations, etc.) are no more than the sum of their actions or engagements, that these actions or engagements can be recorded, and once recorded assed, especially against an ideal of conduct that sets the standard by which consequences of assessment can be applied. The narrative of governance shifts from an autonomous person, to the management of the aggregation of the actions of that person worthy of recording and subjecting to consequence producing analytics. This is a bridge that takes us far

¹⁶⁰ See generally Alan L. Wilkins, *The Creation of Company Cultures: The Role of Stories and Human Resource Systems*, 23 HUM. RES. MGMT. 41 (1984); Bryan E. Penprase, *The Power of Stars*, in CREATION STORIES FROM AROUND THE WORLD 87, 87-111 (2d ed. 2017).

¹⁶¹ See generally Xin Dai, *Toward a Reputation State: The Social Credit System Project of China*, PEKING U. L. SCH. (forthcoming 2022).

¹⁶² See generally Elisabeth Ivarsflaten et al., *The Anti-Racism Norm in Western European Immigration Politics: Why We Need to Consider it and How to Measure it*, 20 J. ELECTION, PUB. OP. & PARTIES 421, 421-45 (2010) (discussing how the literature is already rich if unfocused of its nomic and sacral implications); Nadha Hassen et al., *Implementing Anti-Racism Interventions in Healthcare Settings: A Scoping Review*, 18 INT'L J. ENV'T RES. PUB. HEALTH 2993 (2021); INNOCENT CHILUWA & GWEN BOUVIER, ACTIVISM, CAMPAIGNING AND POLITICAL DISCOURSE ON TWITTER (2019).

¹⁶³ See generally Larry Catá Backer, *Law at the End of the Day: Automated Law—Microsoft's "Insight Computing System," the Power to Manage Labor, and the Intimacy of Emerging Regulatory Forms*, LC BACKER BLOG (Dec. 1, 2020), <https://lcbackerblog.blogspot.com/2020/12/automated-law-microsoft-s-insight.html>.

¹⁶⁴ Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring after Sarbanes-Oxley*, MICH. S. L. REV. 327, 427-38 (2004).

from Cover's normative constitutional project but which is built on his narrative nomic theory. More importantly, it is a narrative and a nomos that applies to all constructs—what is the difference between the United States and May Smith where both can be incarnated as the sum of those of its parts that are deemed worthy of inclusion? What is the means of regulation is itself its own object within the private law of enterprises and the public law of states and the international law of nations?¹⁶⁵

The Bridge: From the dominion of the qualitative to that of the quantitative. If it cannot be measured it may not be relevant; and the measure itself is the object infused not just with meaning (signification) but with values.¹⁶⁶ From the language of command to that of judgment. From the exogenous enforcer to the internalization of punishment and reward. The bridge crosses, as well from the dominion of the lawyer, the politician, the policymaker, to the coder, the statistician, the modeler and the realm of predictive analytics. Nomos moves from words as symbols to symbols as words. But it is a world in which the collective provides the morals-objectives, and the coders develop the measures necessary to measure its attainment.

The sacral: This is the world of Abraham's bargaining with God over the fate of Sodom.¹⁶⁷ But it is also the realm of Pharaoh's

¹⁶⁵ See LOKKE MOEREL, BINDING CORPORATE RULES: CORPORATE SELF-REGULATION OF GLOBAL DATA TRANSFERS 19-36 (Oxford Scholarship Online 2012).

¹⁶⁶ See generally Larry Catá Backer, *Law at the End of the Day: "Objective Subjectivities and the Simulacra of Semiotics in the New Era: Of the Simulation of Signification and of the Modeling and Objectification of Meaning Making"* Remarks Delivered at the "The Rearguard of Subjectivity in Honor of Jan M. Broekman's 90th Birthday", LC BACKER BLOG (July 6, 2021), <https://lcbackerblog.blogspot.com/2021/07/objective-subjectivities-and-simulacra.html>.

¹⁶⁷ Larry Catá Backer, *Law at the End of the Day: "Robert M. Cover and International Law—Narrative, Nudges, and Nomadic Nomos"—Remarks at the Conference "The Life and Work of Robert M. Cover"* Touro Law Center, LC BACKER BLOG (Oct. 5, 2021), <https://lcbackerblog.blogspot.com/2021/10/robert-m-cover-and-international-law.html>

("Gen 18:16-33: The allocation of authority between the Divine and the collective is telling. God controls the rules for determining abomination, he collects data on its extent, and he judges the exception. Lastly, he imposes punishments collectively on a people reduced to their relationship to a specific set of data generating behaviors. Abraham bargains but with caution. But that bargaining itself is mere performance for God already has the data and has undertaken its analytics. The only question for

dream.¹⁶⁸ The realm of data. It is the world of power derived from authority over data and the authority to interpret them (that is to organize and extract a meaning from them). Worlds are constructed from the design, combination, and quantification of data. All in the service of that against which things are measured; the sources of that are not measurable but received: either (1) as the composite of the analytically aggregated sum of the genius of a collective (or its composite in the center or among its outliers for progressive movements), or (2) as the measurable expression of objectives or expectations received from other source (the Divine, custom, etc.). The sacred text of data-based systems—its genius—is its manifestation as the simulation (model) and its projection through time;¹⁶⁹ this is a divinity of predictive analytics.¹⁷⁰ But it is also the manifestation of the sacred, and sacred texts (nomos) in time. If one now understands our narrative by way of quantifiable ideals and assumes that this ideal is deeply embedded in time (as the sum of data constantly produced within its own logics) then the construction and application of time is itself a manifestation of the sacral in the production of law, and especially standards based international law and norm making.¹⁷¹

the community, then, is the extent of innocent blood to be sacrificed for the common good.”).

¹⁶⁸ *Id.* (“Gen. 41:1-57. This is a sacred predictive analytics-but a small step from the interpretation of dreams to the prediction of action from big data analysis of comprehensive data driven aggregated patterns of behavior reduced to meaningful data points.”).

¹⁶⁹ THE MEASURE OF REALITY: QUANTIFICATION AND WESTERN SOCIETY 1250-1600 (1997). Alfred W. Crosby stated:

In practical terms, the new approach was simply this: reduce what you are trying to think about to the minimum required by its definition; visualize it on paper, or at least in your mind, be it the fluctuation of wool prices at the Champagne fairs, and divide it, either in fact or in imagination, into equal quanta. Then you can measure it. Then you possess [sic] a quantitative representation of your subject that is, however simplified, even in its errors and omissions, precise. You can think about it rigorously. You can manipulate it and experiment with it, as we do today with computer models.

Id. at 228-29.

¹⁷⁰ See generally Christophe Lazaro & Marco Rizzi, *Predictive Analytics and Governance: A New Sociotechnical Imaginary for Uncertain Futures*, INT’L J.L. CONTEXT (forthcoming),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3848404.

¹⁷¹ OCTAVIO PAZ, CONJUNCTIONS AND DISJUNCTIONS 138 (Helen R. Lane trans., 1982) (1969). Ironically, it is to poets that one turns to capture the essence of this sacred:

The ideal (our Logos) operate in and through Ikons as well-the data consuming machine, the offal of which is then used to fertilize nomic spaces.¹⁷² Yet, these are living machines over which society now vests a nomic sovereignty. The basis of that delegation: the use of machine learning to make the future knowable in the present,¹⁷³ but also to experiment with quite different futures through the possibilities that modeling can provide.¹⁷⁴ This machine learning modeling and its

I believe we are entering another time, a time that has not yet revealed its form and about which we can say nothing except that it will be neither linear time nor cyclical time. Neither history nor myth. The time that is coming, if we really are living a change at times, a general revolt and not a linear revolution, will be neither a future nor a past, but a present.

Id. at 138. This is the time of data, and this is the temporal half-life of regulation, now infinitely malleable as the continuously accumulating present produces incremental changes to the thrust of the specifics of regulatory environment, even as its objectives may move more slowly as the trajectories of data begin to suggest. Around these predictive analytics can then be used to see into the future by projecting forward the perceived trajectories of the present and can experiment with different future by positing changes in those trajectories of the present.

¹⁷² See generally Larry Catá Backer, *Law at the End of the Day: Simulating Politics in the Shadow of COVID-19: "Like the School Nurse Trying to tell the Principal How to Run the School"*, LC BACKER BLOG (May 4, 2020), <https://lcbackerblog.blogspot.com/2020/05/simulating-politics-in-shadow-of-covid.html>. This is not merely an esoteric leap with no connection with the present. The COVID pandemic exposed the way national and international policy—and the regulations supporting them, have become to a large extent, the expression of simulation and models. More importantly, policy discussion is now undertaken in the shadow of and through the language of simulation and policy outcomes tested through predictive analytics. Larry Catá Backer, *Law at the End of the Day: Data Driven Pandemic and the Ascendancy of Simulated Reality as the New Political Space: The Administration of Disease and the Disease of Administration in the Light of COVID-19*, LC BACKER BLOG (Apr. 28, 2020), <https://lcbackerblog.blogspot.com/2020/04/data-driven-pandemic-and-ascendancy-of.html>.

¹⁷³ See generally KARIN K. CETINA, *EPISTEMIC CULTURES: HOW THE SCIENCES MAKE KNOWLEDGE* (1999).

¹⁷⁴ See Ryan Ziols, *The Perception: A Partial History of Models and Minds in Data-Driven Educational Systems*, in *THE EDUCATIONAL INTELLIGENT ECONOMY: BIG DATA, ARTIFICIAL INTELLIGENCE, MACHINE LEARNING AND THE INTERNET OF THINGS IN EDUCATION* 56 (Tavis D. Jules & Florin D. Salajan eds., Emerald Publ'g Ltd. 2019) (“[T]he emergence of computers and systems-thinking have made possible new horizons of hopes and fears about efforts to generate more robust forms of social engineering by enhancing the capacity to “see” what is unavailable to human perception alone.”). See also Peter Sarlin & Gregor von Schweinitz G., *Optimizing Policymakers’ Loss Functions in Crisis Prediction: Before, Within or After?*, 25 *MACROECONOMIC DYNAMICS* 100, 115-17 (2021).

analytics carries with it the potential to entirely change the language and the practices of nomic communities.¹⁷⁵ The multiple possibilities *of* and *in* law can now be made to travel through time and reality, projected forward can be altered and studied and altered yet again.¹⁷⁶ But, the Devil can also exercise these powers;¹⁷⁷ the Devil also can be made to home in our “Black Box Society.”¹⁷⁸ The great power of these transformations touch on the relationship between individual and the nomic society within which their self-knowledge is constructed and sustained. The machine, the model, the structures of predictive analytics produce a sociality in which being counted becomes the great imperative of nomos made possible only by narrative inclusion.¹⁷⁹

VI. FROM SOVEREIGN TO PLATFORM GOVERNANCE AND THE NOMOI OF CONSUMERS AND CONTRIBUTORS TO THE REALIZATION OF MEASURABLE IDEALS

Nomos: Rewards and punishments interconnected by networked platforms. One moves here from law as a language of command and bureaucratic exogenous enforcement to the idea of law naturalized within shared spaces where users and producers meet for the purpose of exchange. The quid-pro-quo itself becomes the embodiment of nomos—the law of the exchange provide the rules authenticating exchanges and that, in turn, defines the relationship among individuals and institutions in the shared spaces of platforms can use the aggregated data in platforms for analytics.

Narrative: The apotheosis of the exogenous. Judgment is now detached from the judged even as the constitution of that judgment is assembled from the contribution of the thing judged of its data. The narratives of the platform are those of the supreme value of

¹⁷⁵ David Chandler, *A World Without Causation: Big Data and the Coming of Age of Posthumanism*, 43 *MILLENNIUM: J. INT’L STUD.* 833, 844-47 (2015).

¹⁷⁶ See generally JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* (Sheila Faria Glaser trans., 1994).

¹⁷⁷ Lazaro & Rizzi, *supra* note 170, at 16 (“Indeed, consubstantial to any recognition or instauration of some form of life is a reflex of immunisation towards others, deemed expendable because of their difference or abnormality. This type of reflex generates a form of ‘immunopolitics’ that translates into indifference, discrimination, or even alienation.”).

¹⁷⁸ See generally FRANK PASQUALE, *BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2016).

¹⁷⁹ ALEX COBHAM, *THE UNCOUNTED* 17-32 (2020).

accountability, of compliance, of the fundamental obligation to prevent, mitigate or remedy breaches of expectations respecting conduct.¹⁸⁰ This is a baseline obligation that can be made granular (the number of drinks one may ingest in an evening) or telescoped outward (the corporate responsibility of enterprises for the conduct of their supply chain partners). It is in its outward regulation by the traditional mechanisms of public and private law and by the emerging normative sensibilities of international law that sometimes produces paradox and resistance.¹⁸¹

The Bridge: Here, one focuses on the imagery of the Zombies in World War Z climbing over themselves to form a dynamically articulated ladder that is the bridge (and method) used to breach the Walls of Jerusalem, and also the collective of thousands of zombies the delivery of whom into Jerusalem was the object of the bridge.¹⁸² Users, producers and coordinators become the bridge itself, the objects that use the bridge to get from “here” to “there” and the destination itself, which is the bridge. Cover’s “here” and “there” are the same place. Nomos and narrative collapse into each other. “We will work faster . . . promote further integration of the internet, big data, and artificial intelligence with the real economy, and foster new growth areas and drivers of growth.”¹⁸³

¹⁸⁰ See generally *Principles of the Law, Compliance and Enforcement for Organizations Tentative*, AM. L. INST. (May 17, 2021), <https://www.ali.org/news/articles/principles-law-compliance-and-enforcement-organizations-approved/> (discussing compliance and risk management as the new language of nomos).

¹⁸¹ Larry Catá Backer, *Law at the End of the Day: Platform Government—The Emerging State of Contests for Control of Society From Jack Ma and China to Mark Zuckerberg and Australia*, L.C. BACKER BLOG (Feb. 20, 2021), <https://lcbackerblog.blogspot.com/2021/02/platform-government-emerging-state-of.html>; Ma, *supra* note 147 (“While many regulatory departments around the world have become risk-free themselves, the whole economy – as well as society as a whole – has become risky. The race tomorrow will be a race of innovation, not regulatory capabilities. Today all countries are vying to be the most ruthless regulator, and all developments are empty talk.”).

¹⁸² MAX BROOKS, *WORLD WAR Z: AN ORAL HISTORY OF THE ZOMBIE WAR* 30-45, 187-270 (2006).

¹⁸³ Xi Jinping, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era*, Delivered at the 19th National Congress of the Communist Party of China (Oct. 18, 2017).

The Sacral: The platform, and platform governance is built on the sacred spaces of the archive.¹⁸⁴ The sacred is no longer an object but a process—the system itself is the sacral against which its manifestations are curated in accordance with the logic of system itself.¹⁸⁵ The dominion of the *coordinator* reigning over the iterative interactions of users and producers. Platforms archive and generate knowledge—and they can reproduce as well as preserve.¹⁸⁶ But every

¹⁸⁴ Marlene Manoff, *Archive and Database as Metaphor: Theorizing the Historical Record*, 10 LIBRARIES & THE ACAD. 385, 386 (2010) (“We might, therefore, say that our current moment reflects the convergence of two phenomena—new technical capacities and an age-old impulse to gather and preserve. The ease of capturing digital data is an incitement to archive.”). See generally JUSSI PARIKKA, ARCHIVAL MEDIA THEORY: AN INTRODUCTION TO WOLFGANG ERNST’S MEDIA ARCHAEOLOGY 1-22 (Wolfgang Ernst ed., 2013); Jacques Derrida & Eric Prenowitz, *Archive Fever: A Freudian Impression*, 25 DIACRITICS 9 (1995).

¹⁸⁵ NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz, Jr., trans., Stanford Univ. Press 1995) (1984). Here the application of the insights of Niklas Luhmann may be useful, but in a quite different context from out of which they were developed. See NIKLAS LUHMANN, INTRODUCTION TO SYSTEMS THEORY (Dirk Baecker ed., Peter Gilgen trans., Polity Press 2013) (2002); Niklas Luhmann, *The World Society as a Social System*, 8 INT’L J. GEN. SYS. 131-38 (1982). Niklas Luhmann suggests the characteristics of self-reflexive closed systems that are both functionally differentiated, which produce their own ecologies; and which communicate in quite specific forms with other social systems in ways that preserve their integrity even as communicative irritants may produce contextually relevant responses. *Id.* All the systems described in this essay are social systems in that sense; what distinguishes this system from the traditional systems that were the subject of Luhmann’s work is that the system itself may be difficult to objectify except by reference to its product and perhaps only with respect to the rules within which users and producers converge. But that regulator/coordinator may itself be a social system. *Id.* at 135-37. “In this sense, self-observation requires self-referential communication which indicates the communicative system and refers to itself as part of the system.” *Id.* at 136. This is not yet clear. Within the context of international law, archives substitute for regulatory interventions but also coordinate the products of data analytics developed by other archives, the coordination of which then becomes the function of the (political or economic) body which manages either platform, or platform ecologies. Noam Tirosh & Amit M. Schejter, *The Regulation of Archives and Society’s Memory: The Case of Israel*, 20 ARCHIVAL SCI. 245, 247-49 (2020). This becomes the new language of markets and multilateralism. See generally Shafi Aldamer et al., *International Political Economy and Future of Multilateralism: A Platform for Cooperation for G20 Sovereign Wealth Funds*, GROUP OF TWENTY (Dec. 10, 2020), https://www.g20-insights.org/wp-content/uploads/2020/11/T20_TF5_PB5.pdf.

¹⁸⁶ Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, MARXISTS (Feb. 2005), <https://www.marxists.org/reference/subject/philosophy/works/ge/benjamin.htm>

user is a producer; and every producer is a consumer within some level of multiple level, overlapping, stacked and coordinated platforms. We worship ourselves as reflected in the organization of the detritus of our lives now organized among collections of privileged data the interactions of which in platforms from which they may be consumed and offered up produce the cosmos of legal effect. This is the future, one the dress rehearsal for which is very much ongoing.¹⁸⁷

VII. CONCLUSION

Cover always reminds me of a nodal point in Oscar Wilde's tragically brilliant play, *Salomé*. It suggests both the excruciatingly self-reflexive character of narrative, and its smallness in the context of larger or inconsistent, or incoherent, narrative. Near the middle of the tragedy, at the point where Salomé will bargain for the head of John the Baptist in return for performing a dance for Herod, the discussion turns to the character and nature of John the Baptist, and its narrative of the law ideal. That, in turn juxtaposes three quite distinct and important narratives, each supported by inconsistent *nomoi*. The first is that of the structures of pre-exilic Judaism, the second the Hellenized cosmopolitanism of the Jewish-Roman ruling classes, and the third pointing to the emerging narratives built around the life and message of Jesus Christ.

The opening question turns on the extent to which Herod "fears" John the Baptist, and the extent to which he may act against him—either his ideas or his body.

HEROD: I am not afraid of him. I am afraid of no man.

HERODIAS: I tell you, you are afraid of him. If you are not afraid of him why do you not deliver him to the Jews, who for these six months past have been clamouring for him?

A JEW: Truly, my lord, it were better to deliver him into our hands.

("During long periods of history, the mode of human sense perception changes with humanity's entire mode of existence. The manner in which human sense perception is organized, the medium in which it is accomplished, is determined not only by nature but by historical circumstances as well.").

¹⁸⁷ Backer, *supra* note 74, at 5-13.

HEROD: Enough on this subject. I have already given you my answer. I will not deliver him into your hands. He is a holy man. He is a man who has seen God.

A JEW: That cannot be. There is no man who hath seen God since the prophet Elias. He is the last man who saw God. In these days God doth not show Himself. He hideth Himself. Therefore great evils have come upon the land.

ANOTHER JEW: Verily, no man knoweth if Elias the prophet did indeed see God. Peradventure it was but the shadow of God that he saw.

A THIRD JEW: God is at no time hidden. He showeth Himself at all times and in everything. God is in what is evil even as He is in what is good.

A FOURTH JEW: That must not be said. It is a very dangerous doctrine. It is a doctrine that cometh from the schools at Alexandria, where men teach the philosophy of the Greeks. And the Greeks are Gentiles: They are not even circumcised.

A FIFTH JEW: No one can tell how God worketh. His ways are very mysterious. It may be that the things which we call evil are good, and that the things which we call good are evil. There is no knowledge of any thing. We must needs submit to everything, for God is very strong. He breaketh in pieces the strong together with the weak, for He regardeth not any man.

FIRST JEW: Thou speaketh truly. God is terrible; He breaketh the strong and the weak as a man brays corn in a mortar. But this man hath never seen God. No man hath seen God since the prophet Elias.

HERODIAS: Make them be silent. They weary me.

HEROD: But I have heard it said that Jokanaan himself is your prophet Elias.

THE JEW: That cannot be. It is more than three hundred years since the days of the prophet Elias.

HEROD: There be some who say that this man is the prophet Elias.

A NAZARENE: I am sure that he is the prophet Elias.

THE JEW: Nay, but he is not the prophet Elias.

THE VOICE OF JOKANAAN: So the day is come, the day

of the Lord, and I hear upon the mountains the feet of
Him who shall be the Saviour of the world.¹⁸⁸

Cover, and the American establishment since, continues to stand on that Judean terrace and they partake of the Ouroborean discourse¹⁸⁹ of everyone under the full moon that inevitably accepted the blood offerings of those vested in dominance over the trajectories of circularity that are our nomos and our narrative.¹⁹⁰ It is not Salomé or John the Baptist that is feared so much as it is indeterminacy.¹⁹¹ The search for the absolute is both religious and political—it is both a cosmology and a political economy, and it is meant to be possible on the human plane (at least until the triumph of the quantitative and the platform) as our rule of and by law. But at the same time the cure for that condition is to be suspicious of the possibility of variation in systems of determinacy.

The price that narrative exacts for its rationalization of domination, then can be high—and its turn to the insular is strong. The determinate rationalization of domination necessarily embraces exceptionalism and makes us all its tools. Here, Cover moves us perilously closer to John—to the determinacy of Logos—than to that of the Sanhedrin and its post Exilic organs.¹⁹² Even a small shift of gaze can transform the role of those in that business from myth makers (the American experience) to that of disciple who are merely “sent to bear witness of that Light.”¹⁹³ Discipleship, after all, appears as important an aspect of the care and feeding of the American determinate state as it is for the leading forces vanguard with custody of the determinacy of Chinese Marxist Leninism. Nonetheless, such embrace of

¹⁸⁸ OSCAR WILDE, *SALOMÉ: A TRAGEDY IN ONE ACT* 34-35 (Alfred Douglas trans., 1893).

¹⁸⁹ See generally Larry Catá Backer, *Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20 IND. J. GLOB. LEGAL STUD. 805 (2013).

¹⁹⁰ Backer, *supra* note 167; WILDE, *supra* note 188, at 29-30 (“HEROD: The moon has a strange look to-night. Has she not a strange look? She is like a mad woman, a mad woman who is seeking everywhere for lovers. She is naked too. She is quite naked. The clouds are seeking to clothe her nakedness, but she will not let them. She shows herself naked in the sky. She reels through the clouds like a drunken woman . . .”).

¹⁹¹ Alessandro Torza, *Structural Indeterminacy*, 101 PHIL. & PHENOMENOLOGICAL RSCH. 365, 365-82 (2020).

¹⁹² See, e.g., Steven Fraade, *Nomos and Narrative Before Nomos and Narrative*, 17 YALE J.L. & HUM. 81, 88-91 (2011).

¹⁹³ *John* 1:8.

determinacy need not invariably turn one inward. It also provides for inter-communal communication. That is, not the realm of Cover—but it is that of Niklas Luhmann¹⁹⁴ and of the meta-narratives that are now the province of globalist internationalism; it is the world across the bridge that like Moses on Mount Nebo,¹⁹⁵ Cover can see the “there” but it exists on the other side of a bridge that may not be crossed. Yet, Cover could also shift the gaze enough to note both the insularity of the narratives of nomos within a community in a globalized managerial space, in which it is deeply embedded in far larger and ultimately far more powerful narratives of dominion.

These are the operational realities of closed and insular communities that are now nudged out of their parochialism or more deeply embedded within them as they are thrust into or against others. This is the world of nomos and narrative that Cover hints at, one that reveals both an internally and externally variegated worlds—insular and closed or cosmopolitan and networked—in which law as an expression of the narratives to which it gives effect, arises. And for the better understanding of these ecologies of narrative ideologies and the little worlds they construct through law contributes. As well Cover’s concepts of nomoi as bridges between the ideal, the yesterday and the tomorrow, actually the many bridges that serve those ends—also contributes a dynamic element that sets these narrative communities in motion.

International law provides a vast stage in which the insights that Cover developed now almost a generation ago play out in what might be unexpected ways, at least from the perspective of the time and context that drove Cover’s work—the law¹⁹⁶ and social constitution¹⁹⁷ of the United States. Nonetheless, Cover provides a useful conceptual approach for approaching the emerging ecologies of nomic systems that now constitute the principal elements of international law. The transposition of Cover’s notion of the imperial virtues is here important. “With respect to a world of redemptive constitutionalism, the Court must either deny the redemptionists the power of the state (and thereby either truncate the growth of their law

¹⁹⁴ See generally NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* (Stephen Holmes & Charles Larmore trans., 1982).

¹⁹⁵ *Deuteronomy* 34:6.

¹⁹⁶ Cover, *supra* note 1, at 6-9.

¹⁹⁷ Cover, *supra* note 18, at 187-90.

or force them into resistance) or share their interpretation.”¹⁹⁸ At the same time there is balance necessitated by competing nomic systems, as well as restraint. “The caution which the Utopian jurist exercises in this regard is parallel to the caution that the state’s judge exercises before the King.”¹⁹⁹

This essay has sought to order them within the theoretical foundations that Cover provides. I have suggested a way for that ordering to be rationalized within five legal communities of international law—the traditional state-based approach and its animating premise of legal husbandry, the private law of public law, the public law of private law, the turn to data driven governance, and the emerging forms of platform governance. Each constituted by the genius of its sacral foundations in ways that produce substantially different baselines for approaching law, its authority, legitimacy, sources, and accountability. Yet, all of these now interact in peculiar ways, each protecting their respective turf and at the same time communicating with, borrowing from, and incorporating the others within their governance structures and operationalizations. This, then, may be the most important insight that can be drawn from Nomos and Narrative in the peculiar context of international law. That requires centering the notion that the plurality of nomic and narrative communities co-exist, sometimes violently. These interactions and that their mutual irritations produce other, shared, spaces of narrative through which it is possible for narrative communities to adjust their operations to engage with the others across the sometimes quite substantial spaces that separate them.²⁰⁰

¹⁹⁸ Cover, *supra* note 1, at 60.

¹⁹⁹ Cover, *supra* note 18, at 202.

²⁰⁰ NIKLAS LUHMANN, THE THEORY OF SOCIETY 66-67 (Rhodes Barrett trans., Stanford Univ. Press 2012) (“Irritations arise from internal comparison of (initially unspecified) events with the system’s own possibilities, especially with established structures, with expectations. There is hence no irritation in the system’s environment and there is no transfer of irritation from the environment into the system. It is always a construct of the system itself, always self-irritation—albeit occasioned by environmental effects. The system then has the possibility of discovering the cause of the irritation within itself and learning from this discovery or attributing the irritation to the environment and treating it as an ‘accident’ or seeking its source in the environment and exploiting or eliminating it.”). *See also* Carlton Clark, *Structural Coupling and Self-Irritation*, SOC. SYS. THEORY (Jan. 13, 2018), <https://socialsystemstheory.com/2018/01/13/structural-coupling-and-self-irritation/>.

These systems, then, are the international law players in Cover's universe of nomos and narrative, systems that supplicate the sacral for the authority to legitimately exercise dominion on the stage of international law as forcefully as on the terrace of Herod's palace in the Jewish Kingdom of Roman Judaea. Today these sacral bridges connects the past, in the form of international law's husbandry narrative, to the present, in the form of the privatization of international law around its great priorities (human rights and sustainability), and to its future, represented by the language of numbers and the prospects of platform governance-of simulacra and the predictive analytics through which a new language of the ideal, and of its derivative narratives and nomoi might emerge. That is the start of something new but also a dangerous task. In the last words of Salome: "Ah! I have kissed thy mouth Jokanaan, I have kissed thy mouth. There was a bitter taste on thy lips. Was it the taste of blood?... But perchance it was the taste of love. They say that love hath a bitter taste."²⁰¹ Robert Cover might agree for national law.²⁰² The blood-love of nomic narrative applies as well within the emerging authoritative and governance structuring narratives of international law. In the end, though, Cover's insights provide a means of usefully rationalizing the fragmentation of international law and providing a basis for understanding its scope, structures and likely trajectories. That is of immense use not just for system builders, but for those burdened with living within the nomic orders that international law is producing.

And lastly, the insights around the rationalization of the emerging avenues of international law provided suggest the strategic possibilities. This moves us from the consideration of the characteristics of nomic narrative to the quite conscious construction of bridges to get communities to a deliberately embraced "there"—that is of the instrumentalization of nomos and narrative at the core of Cover's project—and that of every political community with an agenda. What this essay has suggested is, ultimately, that this bridge building will have quite distinct modalities depending on the baseline narrative—Marxist Leninist bridges will be quite different in form for

²⁰¹ WILDE, *supra* note 188, at 56.

²⁰² Cover, *supra* note 61, at 818 ("The determination of some men to force a polity to emerge out of violence, the determination of others to insist on the permanence and continuity of constitutional union at the price of blood—these are certainly the polestars of commitments through which constitutional understandings come to be translated into pain and death.").

action and effect from those of markets driven communities.²⁰³ At its limit we arrive at the current state, where the central challenges the question of the relationship between collectives and the technologies of its production.²⁰⁴ “And this, in turn, would oblige us to contemplate a last unthinkable: that new and more sophisticated walls are the most for which we can hope from any properly ‘biopolitical space,’ that apartheid is not the past but the future.”²⁰⁵ It reveals the potential contradictions of a weaponized relationship between the collective “I” and its “Thou” among collectives organized as states and other actors.²⁰⁶

²⁰³ Cf. Nicolas Guilhot, *Automatic Leviathan: Cybernetics and politics in Carl Schmitt's postwar writings*, 33 HIST. HUM. SCI. 128 (2020) (discussing cybernetics as an expression of markets-nomic managerialism and its relation to politics). “Adaptive and vicarious learning, not purposive calculation, was the fundamental principle of cybernetic models. The multitude of feedback loops allowing for constant correction tended to dissolve any notion of decision within an open-ended environment.” *Id.* at 140.

²⁰⁴ See Bert A. Rockman, *Bureaucracy Between Populism and Technology*, 51 ADMIN. & SOC'Y 1546, 1562-65 (2019); Nick Dyer-Witheford, *Left Populism and Platform Capitalism*, 18 TRIPLEC 116, 118 (2020) (focusing on surveillance and regulation of speech, dismantling concentrations of tech ownership in private hands, gig economy management, communal ownership of tech, and vaguer calls for “post-capitalism” systems).

²⁰⁵ Sitze, *supra* note 67, at 222.

²⁰⁶ See generally MARTIN BUBER, I AND THOU (Walter Kaufmann trans., 1970).