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THE OCCUPATION OF TRUTH

*John Dever & James Dever**

“What are Kingdoms but great robberies?”

—Saint Augustine, 5th Century C.E.¹

I. INTRODUCTION

The central issue between Israelis and Palestinians is the conflict over land. Consequently, peace will remain elusive in Palestine until the Israelis halt the ongoing occupation and exploitation of Palestinian land and resources. Yet wars are fought with words as well as armies. As an imbalance of power between Israelis and Palestinian refugees exists, the creation of a new Israeli metanarrative can properly contextualize the past six decades of conflict. Once polemic gives way to historical truth the legitimate aspiration of the Palestinian people for self-determination can be laid bare before a candid world. It is at that point where a conversation about a feasible two-state solution may begin.

In our paper, we argue that widespread acceptance of the Israeli “New Historian” perspective is an essential precondition for peace. During the last twenty-five years, a new wave of Israeli scholarship challenged the traditional Zionist triumphal narrative wherein Palestinians eschewed compromise and increasing Israeli occupation of Palestinian land was the only solution to safeguard Israeli citizens. Indeed, the conclusions of the new historians shattered many of the central tenets of Israeli historiography that dealt with the Arab-Israeli conflict of 1948.

The current plight of Arab-Israelis who experience socioeconomic decline is evidence that a rights-based approach in a one-state solution is unlikely to succeed. As it stands, because a Jewish majority is necessary for the existence of a Jewish state, the status quo requires that Arab-Israelis remain perpetual alien residents met with racism, misunderstanding, and

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1. ST. AUGUSTINE, *THE CITY OF GOD* Bk. IV, ch. IV (Henry Bettenson, trans., Penguin Classics 2003).

xenophobia. Accordingly, only a two-state solution offers a viable option for peace.

The paper begins with a historical investigation into the late nineteenth century when Zionists first began purchasing Palestinian land. During the following British Mandate period, Jews immigrated to Palestine in increasing numbers and consolidated their grip on the region. After declaring independence, Israel made war upon the Palestinians and forcibly dispossessed the vast majority from their homeland. As a result of the tumultuous Occupation, two conflicting narratives arose concerning the “*nakba*.” On the one hand, the classic Palestinian story tells of a brutal Israeli war of aggression which devastated the indigenous population. On the other hand, the traditional Israeli narrative is that the Zionist venture is legitimate due to religious reasons or due to the unique trauma of the Holocaust. In this schema, the Arabs are the aggressors and the vastly outnumbered Israelis desperately fought a defensive action to save themselves from extermination.

Twenty-five years ago in a dramatic break from past scholarship, the rise of the Israeli “New Historians” undercut the ahistorical and jingoistic metanarrative previously embraced by the generations of Israelis who experienced first-hand the trauma of the 1948 conflict. Significantly, by investigating declassified Israeli government sources, these scholars are creating a more nuanced and accurate history of Palestine. Yet while the revisionists deserve praise for their willingness to write a critical history of Israel, they nonetheless merit censure for the lack of Arab voices and Palestinian agency in their works. In addition, the sad truth is that Arab-Isrealis form an underclass within Israeli society and suffer both legal and socioeconomic discrimination at the hands of the Jewish majority. Although their stories must likewise be incorporated into the new metanarrative, those looking to write the first comprehensive history of the Israel-Palestine Conflict need also look within and discover the mechanisms by which the Israeli judiciary casts a false aura of legitimacy on the state. In the *Elon Moreh* case, the Israeli Supreme Court ruled that requisition of land for a Jewish settlement in the Occupied Territories had been illegal because it was situated on private lands and did serve a purely military purpose. Hailed within and without Israel as a landmark case that proved the existence of a powerful and independent judiciary, *Elon Moreh* was illusory relief which lent credibility to the myth of rights perception about the willingness of the Israeli Supreme Court to exact meaningful political change. As it is insufficient to merely forget the past because it renders the present incoherent, the viability of a two-state solution depends upon the construction of a fresh metanarrative which offers the chance for Palestinians and Israelis to better understand each other, thereby facilitating self-determination, stability, peace, and dignity in Palestine.

II. THE CREATION OF THE STATE OF ISRAEL

A. *Zionist Purchase of Palestinian Land*

Conflict between the Palestinians and Israelis may be traced back to events before World War II. As a consequence of “increased anti-Semitism in the late nineteenth century, Zionism emerged as a European-wide political movement.”² The goal of Zionism was to help Jews escape persecution in Europe by establishing a national homeland.³ Although early Zionists considered several sites for the Jewish state, Palestine was ultimately Zionism’s target because of its historical ties to the Jewish people.⁴ Accordingly, the acquisition of Palestinian land was essential to the Zionist dream.⁵ While some Jews purchased land for themselves, far more land was bought by a Jewish National Fund (“Fund”) which would lease the land to individual Jews who were forbidden to sublease or employ non-Jews.⁶ The Zionist plan did not go unnoticed by Arabs but due to an unfortunate Ottoman land registration system in the 1890s that led wealthy Turks to gain legal title to land in Palestine through questionable means, Arab farmers oftentimes found themselves tenants of absentee owners.⁷ And because Fund bought property from the absentee owners, Arab farmers were dispossessed of land that had been in their families for generations.⁸

In 1904, Chaim Weizmann became the acknowledged leader among British Zionists.⁹ Wielding his influence in the British admiralty during World War I, Weizmann tried to persuade Lord Balfour, then British foreign secretary, that Britain should sponsor a Jewish state in Palestine because the Jews could bring civilization to the region as well as guard the Suez Canal.¹⁰ By 1917 Weizmann had persuaded Balfour to propose a policy statement to the British cabinet supporting Zionism.¹¹ The statement was approved, and Balfour wrote an infamous letter to Lord Rothschild known as the Balfour Declaration, stating that the British government

“favour[ed] the establishment in Palestine of a national home for the Jewish people . . . it being clearly understood that nothing shall be done which may prejudice the civil and

2. Stacy Howlett, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 VAND. J. TRANSNAT'L L. 117, 122 (2001).

3. *Id.*

4. *Id.* at 122–23.

5. *Id.*

6. *Id.* at 123 (citing JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 5–6 (1990)).

7. *Id.*

8. *Id.*

9. *Id.* at 124.

10. *Id.*

11. *Id.*

religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”¹²

“Pursuant to the Balfour Declaration, the British government made promises to both the Zionists and Palestinian Arabs.”¹³ From the outset, the Palestinians viewed the Balfour Declaration with suspicion and perceived it as a thinly veiled attempt to create a Jewish state at their expense.¹⁴ Three implications of the Balfour Declaration warrant particular attention: first, it ran contrary to the spirit of pledges for independence previously given to Arabs; second, Palestine’s fate was determined by unilateral consultation with the Zionists thereby utterly ignoring the rights and interests of the Palestinians; and third, the British had no right to dispose of Palestine in any event because the declaration was made when the land was still officially a part of the Ottoman Empire.¹⁵

B. *The British Mandate for Palestine*

In the post-war period, President Wilson’s “fourteen points” demonstrated his rather anti-colonial stance and therefore the mandate system was envisioned as a compromise between colonialism on the one hand and the creation of a Jewish state on the other.¹⁶ Meanwhile, Turkey was forced to renounce its claim to the Ottoman Empire and the administration of Palestine, Transjordan, and what would later become Iraq was given to Great Britain in 1920.¹⁷ Backed by the Balfour Declaration, the Fund stepped up its purchase of Palestinian land.¹⁸ Furthermore, during the 1920s, the British government permitted greater numbers of Jews to settle on Arab land. The consequences of ever-increasing Zionist settlement were plain for all to see and led Arthur Ruppin who headed the Fund to concede in 1936 that “[o]n every site where we purchase land and where we settle people the present cultivators will inevitably be dispossessed.”¹⁹ In the early 1930s, as anti-Semitism grew in Hitler’s Germany, Britain allowed immigration at levels that doubled the Jewish population of Palestine between 1931 and 1935.²⁰ That influx increased the Zionist share of the population to thirty percent and following the increase Britain again allowed substantial new land purchases.²¹

12. M.E. YAPP, *THE MAKING OF THE MODERN NEAR EAST* 290 (1987).

13. Howlett, *supra* note 2, at 124.

14. Eliot Shackelford, *Review of From Coexistence to Conquest: International Law and the Origins of the Arb-Israeli Conflict, 1891-1949* by Victor Kattan, 30 *BERKELEY J. INT’L L* 638, 640-41 (2012).

15. Howlett, *supra* note 2, at 124.

16. *Id.* at 124-25.

17. *Id.* at 125.

18. JOHN QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 17 (2005).

19. *Id.* at 20.

20. *Id.*

21. *Id.*

By 1936, the Mandate System began to deteriorate. The Palestinians started to organize in both nonviolent and violent groups which aimed to halt further immigration and land purchases by Jews.²² And Zionist terror groups emerged to raid Arab villages, plant explosives, and kill Palestinian civilians.²³ Upon the end of World War II, frustrated with its inability to create peace, Britain announced that it was leaving Palestine and turned the problem over to the UN in April 1947.²⁴ The Mandate System was a failure because it did not create an independent Palestinian state but instead pursued a half-hearted attempt at establishing a Jewish homeland.²⁵ When Britain asked the UN to make recommendations on the issue of Palestine, five Arab states asked the UN General Assembly to take up the matter as “the termination of the Mandate over Palestine and the declaration of its independence.”²⁶ Perhaps not surprisingly, the Arab nations were concerned that Britain’s open-ended request for a recommendation on the future governance of Palestine invited the UN to link the issue of Jewish refugees in Europe with that of Palestine’s status.²⁷

C. Israel Declares Independence

In 1947, the UN “created a special committee to investigate the international legal status of the Palestinian territory.”²⁸ “The committee determined that the British Mandate should be terminated and that independence should be granted to Palestine” via Resolution 181.²⁹ Pursuant to Resolution 181, two states were to be created with each guaranteeing the other certain standards of normative behavior.³⁰ The proposed Jewish state would have had 56 percent of Palestine thus the plan gave much Arab territory to the Zionists.³¹ On the one hand, the day after Resolution 181 was adopted by the Zionists but rejected by the Arab Higher Committee, the Jewish Agency called on all Jews age seventeen to twenty-five to register for military service in the *Haganah*.³² On the other hand, the Arab Higher Committee undertook no military decisions but instead called on Palestinian Arabs to hold a three-day commercial strike to protest the partition plan.³³ On May 15, 1948, Israel unilaterally declared its independence and full scale war broke out the next day.³⁴ By the spring of 1949 Israel held seventy-seven percent of Palestine which included everything

22. Howlett, *supra* note 2, at 126.

23. *Id.*

24. *Id.*

25. *Id.* at 127.

26. QUIGLEY, *supra* note 18, at 32.

27. *Id.*

28. Winston Nagan & Aitza Haddad, *The Legal and Policy Implications of the Possibility of Palestinian Statehood*, 18 U.C. DAVIS J. INT’L L. & POL’Y 343, 356 (2012).

29. *Id.*

30. *Id.* at 361.

31. QUIGLEY, *supra* note 18, at 36.

32. *Id.* at 39.

33. *Id.*

34. Howlett, *supra* note 2, at 128.

except the Gaza Strip and the West Bank.³⁵ In this manner, a type of double minority syndrome evolved amongst Israelis and Palestinians whereby each side perceived itself at once a minority and a majority.³⁶ The Palestinian community is a minority in Israel yet part of a regional majority whereas the Jewish majority community in Israel is a tiny minority when considered in relation to the rest of the Middle East.³⁷

A central problem regarding the Palestinian refugee community in the wake of 1948 is that the property issue immediately became intertwined with the political and diplomatic vicissitudes of the wider Arab-Israeli Conflict. This is the case despite considerable global concern over the refugees and their plight and notwithstanding repeated regional and international efforts to isolate and solve this human tragedy separately from the wider political context of the conflict.³⁸ The losers in this failing process were of course the refugees and their descendants.³⁹ Efforts toward compensation, restitution, or the lack of such efforts, therefore were politicized and subject to the changing nature of the Arab-Israeli conflict from the outset.⁴⁰ Accordingly, this politicization has fostered two interrelated outcomes: first, it meant the refugees' needs for resolving their property claims waxed and waned in the minds of Arabs, Israelis, Americans, and the global community in direct correlation to the various political and military crises that punctuated the conflict over the past six decades; and second, the property question was subject to shifting conceptual approaches that were related to political and military events on the ground yet nonetheless constituted an entirely different dimension on the conflict.⁴¹ In the end, the tortured history of the Palestinian refugee property issue serves as a pressing reminder that if the current populations avoid peace, the task will prove even more costly for future generations.⁴²

III. CONFLICTING NARRATIVES

A. *The Palestinian Perspective*

The classic Palestinian narrative is that the *nakba* or “catastrophe” of 1948-49 which resulted in approximately seven to eight hundred thousand Palestinians losing their homes is a story of colonization, displacement, and

35. *Id.*

36. Ilan Saban, *Theorizing and Tracing the Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel's First Three Decades (1948-1978)*, 25 EMORY INT'L L. REV. 299, 309 (2011).

37. *Id.*

38. MICHAEL FISCHBACH, RECORDS OF DISPOSSESSION: PALESTINIAN REFUGEE PROPERTY AND THE ARAB-ISRAELI CONFLICT XXVII (2003).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 368.

occupation at the hands of the Israelis.⁴³ In this paradigm, the *nakba* completed and formalized the loss of their native land that had already occurred through the Zionist colonization project which began in the late nineteenth century.⁴⁴

From this viewpoint, Israel is an illegitimate outcome of the Western colonial era and in no way should Palestinians have to bear the burden of compensating Jews for crimes committed upon them by Nazi Germany.⁴⁵ At the conclusion of the Arab-Israeli conflict, about 160,000 Palestinians were left within Israel's cease-fire borders and were incorporated into the Jewish state.⁴⁶ A central tenet of the traditional Palestinian narrative is that the war devastated the indigenous population who at once became a stateless and a trans-state people spread across Israel, Jordan, Lebanon, Syria, and Egypt.⁴⁷

Contrary to the dominant Zionist narratives, which locate the Palestinians' displacement as an unintentional product of a defensive war forced upon the Jewish people, in the Palestinians' eyes, this displacement was no mere accident induced by the fog or war.⁴⁸ Rather, the Palestinians understand their expulsion in terms of ethnic cleansing and the culmination of a Zionist plan to solidify their position in Palestine.⁴⁹ Although Israeli and Palestinian historians disagree both on the relative intentionality of the forced removals and the level of violence, it is beyond dispute that after the war the Israeli government destroyed hundreds of Arab villages to clear the way for the continuation of the state-building enterprise.⁵⁰ Following the preemptive Israeli Six Day War of 1967 where Israel captured the West Bank, the Gaza Strip, the Golan Heights, and the Sinai Peninsula, Palestinians viewed Israel's continual occupation of their former territory as a reminder of their loss of homeland and denial of their ethno-nationalism.⁵¹

43. Ariel Meyerstein, *Transitional Justice and Post-Conflict Israel/Palestine: Assessing the Applicability of the Truth Commission Paradigm*, 38 CASE W. RES. J. INT'L L. 281, 298 (2007); see generally Raef Zreik, *Palestine, Apartheid, and the Rights Discourse*, 34 J. PALESTINE STUD. 68 (2004) (analyzing the three different categories of Palestinians: refugees in exile, those in the Occupied Territories, and those living as citizens in Israel).

44. Meyerstein, *supra* note 43, at 298.

45. William Quandt, *Israeli-Palestinian Peace Talks: From Oslo to Camp David II*, in HOW ISRAELIS AND PALESTINIANS NEGOTIATE: A CROSS-CULTURAL ANALYSIS OF THE OSLO PEACE PROCESS 15 (Tamara Wittes ed., 2005).

46. Saban, *supra* note 36, at 309.

47. *Id.*

48. Meyerstein, *supra* note 43, at 299.

49. *Id.*

50. *Id.*

51. *Id.*; see also David Mennie, *The Role of the International Covenant on Civil and Political Rights in the Israeli-Palestinian Conflict: Should Israel's Obligations Under the Covenant Extend to Gaza and the Other Occupied Palestinian Territories?*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 511, 520 (2012).

B. *The Israeli Perspective*

The Israeli narrative intuitively frames “the conflict with the Palestinians within a broader and much older history of persecution and [] extermination that indicts not just the Arab regimes of the Middle East but most of the governments of Europe for their disregard for Jewish life within their borders.”⁵² “Central to this collective Jewish and Israeli narrative of suffering and victimhood is the tragedy of the Holocaust” which is often referred to as the “basic trauma of Israeli society.”⁵³ On the Israeli side, therefore, there is a deep feeling that the entire enterprise of modern Zionism, the creation of a Jewish state in the Holy Land, is legitimate whether for religious reasons or because of the unique trauma of the Holocaust.⁵⁴ Jews not only have the right to a state, most Israelis will argue, but also had no alternative to the path they took to create and defend it.⁵⁵ Since Arabs and Palestinians were initially unwilling to recognize Israel’s existence, Israel was under no obligation to make concessions on issues such as borders or the Palestinian refugee problem.⁵⁶ War, the Israelis maintain, was forced upon them and thus the Arabs are seen as the aggressors.⁵⁷ In this regard, Israeli author Amos Oz captures the essence of Israeli victim ideology succinctly: “We Israelis often look at Arabs not as fellow victims but as an incarnation of our past oppressors: Cossaks, pogrom-makers, Nazis who have grown mustaches and wrapped themselves in kaffiyehs, but who are still in the usual business of cutting Jewish throats.”⁵⁸

IV. THE “NEW HISTORIANS”

A. *The Need For Critical History*

Revision in history is salutary because a critical examination at premises refreshes historical inquiry and helps facilitate new understanding.⁵⁹ The historical truth regarding the Palestine – Israel Conflict exists “somewhere in between these stylized collective memories” but tragically these metanarratives continue to dominate and fuel the cycles of violence in which both sides participate.⁶⁰ Looking at the situation realistically, many Palestinians fail to recognize the negative cumulative effects that anti-Semitism, the Holocaust, and Arab rejectionism has had on the Jewish psyche.⁶¹ Likewise, most Jews and Israelis fail to grasp how Palestinians

52. Meyerstein, *supra* note 43, at 299.

53. *Id.*

54. Quandt, *supra* note 45, at 14.

55. Meyerstein, *supra* note 43, at 299.

56. *Id.*

57. *Id.*

58. *Id.* (citing Neil Caplan, *Victimhood and Identity: Psychological Obstacles to Israeli Reconciliation with the Palestinians*, in *ISRAELI AND PALESTINIAN IDENTITIES IN HISTORY AND LITERATURE* 73 (Kamal Abdel-Malek & David Jacobson eds., 1999)).

59. Anita Shapira, *The Failure of Israel's "New Historians" to Explain War and Peace*, NEW REPUBLIC ONLINE (Dec. 1, 2000), <http://ontology.buffalo.edu/smith/courses01/rtrtw/Shapira.htm>.

60. Meyerstein, *supra* note 43, at 301.

61. *Id.*

perceive them as nothing more than colonizers who have unjustly deprived them of their land. Accordingly, Israelis also fail to understand that Palestinian violence, far from merely being a continuation of hatred against Jews which has existed for centuries, is rather largely a consequence of the *nakba* and the brutality of the Occupation.⁶² Indeed, the violence and repression of the Occupation to include house demolitions, restriction of movement, humiliating checkpoints, and extra-judicial killings that often harm civilians is viewed as state-sponsored terrorism to the Palestinians.⁶³ Meanwhile, Israel proclaims its Occupation tactics are necessary defensive measures required to safeguard innocent Jewish citizens from Arab terrorists. And so it continues, with each population held hostage to a conflict culture forged from reality as well as their own fears, hatred, assumptions, and mythologies of the other.⁶⁴

B. *Reinterpreting Israel's Triumphalist Metanarrative*

Yet not all myths are created equal. Due to the imbalance of power existing between the Israelis and Palestinians, the Israeli version of events remains predominant in the eyes of the global community. A central problem is how the discursive mechanisms of Zionism and the State of Israel enabled most Jews to “forget” what they once “knew”: that the majority of Palestinians were ethically cleansed from the lands that became Israel.⁶⁵ Importantly, in recent decades, new scholarship in Israeli historiography dealing with the period from 1947-49 are beginning to address portions of the mythological metanarratives mentioned above.⁶⁶ In the late 1980s, a handful of Israeli scholars and journalists, labeled the “New Historians” or the “revisionists” achieved notoriety in Israel by publishing several books on the causes of the 1948 conflict. The scholars principally associated with the revisionist movement are Benny Morris, Avi Sclaim, Ilan Pappé, Tom Segev, and Simha Flapan.⁶⁷ Prior to the late 1980s:

Israeli scholars and historians accepted as historical fact several important ideas: that the Jews created Israel out of necessity after their attempts at peaceful negotiation with the Arabs failed; that the Arabs instigated and initiated the Arab-Israeli conflict; and that the Arab leadership encouraged the Palestinians to flee to neighboring countries during the conflict, resulting in the Palestinian refugee crisis.⁶⁸

62. *Id.* at 302.

63. *Id.*

64. *Id.*

65. Joel Beinin, *Forgetfulness for Memory: The Limits of the New Israeli History*, 34 J. PALESTINE STUD. 10 (2005).

66. Irene Gendzier, *Weapons of Mass Destruction and What We Don't Know About U.S. Policy in the Middle East*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 49, 67 (2012).

67. VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB ISRAELI CONFLICT, 1891-1949* 170-71 (2009).

68. Major Roger Mattioli, *Palestine Betrayed*, 2010-OCT ARMY LAW. 43, 44 (2010).

Collectively, these scholars began creating a more nuanced and accurate history by consulting declassified Israeli government documents which led them closer to the conclusions reached by veteran Palestinian historians such as Walid Khalidi.⁶⁹ In doing so, the revisionists challenged the traditional view

“that Zionism was beneficent . . . that Israel was born into an uncharitable, predatory world; that Zionist efforts at compromise and conciliation were rejected by the Arabs; and that Palestine’s Arabs . . . for reasons of innate selfishness, xenophobia . . . launched a war to extirpate the foreign plant.”⁷⁰

In ensuing years, the new historians reached five conclusions regarding the Arab-Israeli conflict: (1) Britain did not arm and secretly encourage its Arab allies to invade Israel; (2) Israel’s victory was not a case of “David against Goliath;” (3) Arabs did not flee Palestine of their own volition but were displaced by the Zionists; (4) Arabs did not unite as one to attack the fledgling Jewish state; and (5) Israel was intransigent at the end of the conflict because Israeli leader David Ben-Gurion did not want to conclude a peace treaty with the Arab world that would result in territorial concessions or a return of refugees.⁷¹ Of course, revisionist history is not unique to Israel. For instance, knowledge of the Cold War benefited enormously from the work of scholars armed with repose, hindsight, and access to declassified American and Soviet government documentation. On a positive note, since the late 1990s, the revisionists’ account of the 1948 war is progressively being approved of by Israel’s Education Ministry and has even found its way into some Israeli high school textbooks.⁷²

C. Criticism of the Revisionists

Despite the ability of the revisionist history to detail a more accurate version of the past, strident critics of the new approach such as traditional Israeli historian Efraim Karsh insist that revisionist history accomplishes little more than national self-loathing because it portrays “Zionism as the original sin underlying the region’s violent history.”⁷³ In Karsh’s view, the new historians are leftist “politically engaged academics and journalists who . . . have turned the saga of Israel’s birth upside down, with aggressors transformed into hapless victims and vice versa.”⁷⁴ Although Karsh

69. KATTAN, *supra* note 67, at 171.

70. Benny Morris, *The New Historiography: Israel Confronts Its Past*, 6 *TIKKUN* 3, 20 (1988).

71. KATTAN, *supra* note 67, at 171. Unfortunately, it is still the case that many international attorneys locate Israel’s conduct during the 1948 conflict as defensive. The staunchest advocate of this view is Alan Dershowitz, the Felix Frankfurter Professor of Law at Harvard Law School, who argued in 2003 that Israel was fighting “a genocidal war of extermination” in 1948. *Id.* See also ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 74 (2003).

72. KATTAN, *supra* note 67, at 171.

73. EFRAIM KARSH, *FABRICATING ISRAELI HISTORY: THE “NEW HISTORIANS”* 1 (2000).

74. EFRAIM KARSH, *PALESTINE BETRAYED* 4 (2011).

charges the revisionists with historical inaccuracy, his own scholarship demonstrated that he conveniently paints a whitewashed history wherein the motives of the Israeli people were practically always altruistic and they repeatedly “extended [their hands] in peace to [their] neighbors.”⁷⁵ The fallacious nature of that aspect of Karsh’s argument is clear. It is sufficient to remember the chilling words of Ben-Gurion regarding the methodical destruction of Palestinian population centers in 1948 that Israel indeed has blood on its hands:

“[Our] strategic objective was to destroy the [Palestinian] urban communities. . . . [We accomplished this] by the conquest and destruction of the rural areas surrounding most of the towns. . . . Deprived of . . . food, and raw materials, the urban communities underwent a process of disintegration . . . which forced them into surrender.”⁷⁶

Nonetheless, if Karsh’s claims of bias against the new historians ring hollow, his criticism that the revisionists habitually ignore Arab sources is valid. Karsh takes Benny Morris, a leading voice in the revisionist movement, to task for Morris’s conclusion in his book *1948 and After: Israel and the Palestinians* that “so long as . . . critics are unable to show exactly how a given Arab (Arabic) source could and would substantially and accurately alter, enhance, or correct the picture painted [in Morris’ works] . . . the relative non-use of Arab sources is irrelevant.”⁷⁷ In Morris’ narratives, therefore, like in those of the traditional Israeli historians, Jews are the subjects of history while Palestinians are the objects of Jewish action.⁷⁸ Indeed, Morris’ empiricist and positivist historical method excludes Palestinian voices nearly to the same degree as the old historians.⁷⁹ The ground truth is that a precondition for writing a less jingoistic and mythological Israeli metanarrative is the inclusion of Palestinian and Arab sources.⁸⁰ After all, to write the history of relations between Israel and the Arab world almost exclusively on the basis of Israeli sources results in myriad distortions. To take one example, because the Israeli documentation contains a pro-Zionist bias, violent Arab actions are perceived as inevitable while the Palestinian people are stripped of both their agency and legitimate aspiration for self-determination.⁸¹

75. *Id.* at 1.

76. Mattioli, *supra* note 68, at 44–45.

77. Karsh, *supra* note 73, at 4–5. See BENNY MORRIS: 1948 AND AFTER: ISRAEL AND THE PALESTINIANS 44 (1994).

78. Beinín, *supra* note 65, at 16.

79. *Id.*

80. Shapira, *supra* note 59, at *4.

81. *Id.* at *18.

V. THE PLIGHT OF ARAB-ISRAELIS

A. *Arab-Israeli Disenfranchisement*

A further limitation of the New Historians' perspective is their overwhelming focus on the events surrounding the beginning of the Israel-Palestine Conflict. While uncovering a more nuanced truth about that tumultuous period is necessary, so too is focusing on the dreadful progression of discrimination against Arab-Israelis. In large measure, Arab-Israelis form a type of underclass within Israeli society and without proper historical contextualization their plight continues to suffer from mainstream Jewish prejudice built in part upon an ahistorical understanding of why Arab-Israelis face a daunting journey toward upward social mobility. Palestinian Arabs in Israel number approximately 1.5 million people, comprising 20 percent of the state's population.⁸² They are descended from about the Arabs who remained inside Israel after the 1948 war.⁸³ Arab-Israelis thus constitute an indigenous minority. Although some Arab-Israelis would like to see Israel become a bi-national state, others make more radical claims. As Mohammed Dahle, the attorney who created the Legal Center for Arab Minority Rights in Israel has argued: "[W]e are not a minority. . . . If you open an atlas . . . you will see a billion and a half Muslims. . . . At the end of the day, it is the natives, not the immigrants, who have a supreme right to the country."⁸⁴ The Israeli government has acknowledged the cultural distinctiveness of Arab-Israelis by recognizing Arabic as an official language, exempting Palestinians from mandatory military service, creating an Arabic-language school system, and maintaining Islamic *shari'a* courts.⁸⁵ Though eventually granted civic rights, the Arab community in Israel has suffered a long history of discrimination due to the widespread perception amongst Jews that Arab-Israelis are a "fifth column" looking for the first opportunity to rebel against the state.⁸⁶

B. *Jews Over Palestinians*

The social reality of the Arab-Israeli minority in Israel exposes both a legal and socioeconomic discrimination against the population.⁸⁷ Formal discrimination has been secured in the law since the establishment of Israel, and de facto socioeconomic discrimination exists due to Jewish prejudice and the living conditions of Arab-Israelis.⁸⁸ Israeli law contains a number of provisions that openly formalize inequality between Jews and Arabs. For example, all eleven of Israel's Basic Laws express a fundamental desire

82. Robert Nicholson, *Legal Intifada: Palestinian NGOs and Resistance Litigation in Israeli Courts*, 39 SYRACUSE J. INT'L L. & COM. 381, 382 (2012).

83. *Id.*

84. Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT'L L. J. 453, 479 (2003).

85. *Id.*

86. Meyerstein, *supra* note 43, at 299.

87. Yousef Jabareen, *Constitution building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WIS. INT'L L. J. 345, 360 (2008).

88. *Id.*

to preserve the Jewish character of the state thereby instilling an “ethnic affiliation” in these laws which results in a legal arrangement that privileges Jews over Arabs.⁸⁹ From a democratic perspective, defining the essence of the state according to religion and ethnicity is clearly problematic in a country wherein one-fifth of the population is not represented.⁹⁰ In the realm of symbolism, moreover, the Israeli anthem according to law is the *Hatikva* or “The Hope,” and the following text is the wording included in the law which demonstrates its unsuitability for Arab Israelis: “As long as deep in the heart, the soul of a Jew yearns, and forward to the East, to Zion, an eye looks, our hope will not be lost, the hope of two thousand years, to be a free nation in our land, the land of Zion and Jerusalem.”⁹¹

A further general bias against Arab-Israelis exists in Israeli law with respect to immigration and citizenship as established in the 1950 Law of Return. Pursuant to the Law of Return, “every Jew” has a “right to come [to Israel].”⁹² This unrestricted right of immigration for Jews is deemed a basic aspect of the idea of a Jewish state.⁹³ As Ben-Gurion explained, Israel “is not a Jewish State only because Jews constitute a majority, but a State for Jews wherever they are, and for every Jew who wants to be here.”⁹⁴ Furthermore, the 1952 Nationality Law conferred Israeli citizenship automatically on Jews who, *inter alia*, maintained continuous residence in Israel from May 14, 1948 to July 14, 1952.⁹⁵ However, Arab-Israelis displaced in 1948 have no right under the Israeli Law of Return and were excluded from the Nationality Law under the pretense of disloyalty.⁹⁶ Israeli journalist Daniel Rubinstein has gone so far as to describe the Law of Return as “over discrimination” of the kind that “was the basis for the apartheid regime in South Africa.”⁹⁷ Currently, some progressive Jews see the Law of Return as an obstacle to full democracy in Israel.⁹⁸ Revisionist Tom Segev notes that “although the Law of Return was originally designed to restore historical justice to the scattered and beleaguered Jewish people, it has . . . been discriminatory to the Arab citizens of Israel and, hence, has jeopardized full democracy.”⁹⁹ Similarly, Israeli political scientist Ilan Peleg argues that Ben-Gurion laid the foundation for an ethnocentric, illiberal Israel when he defended the Law of Return before the Knesset.¹⁰⁰

89. *Id.* at 363.

90. *Id.*

91. *Id.* at 366–67.

92. QUIGLEY, *supra* note 18, at 126.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Steven Menashi, *Ethnonationalism and Liberal Democracy*, 32 U. PA. J. INT'L L. 57, 69 (2010).

98. *Id.*

99. *Id.*

100. *Id.*

Among the most pernicious and discriminatory Israeli laws was the Absentees' Property Law, adopted in 1950, which permitted the confiscation of the land of a person deemed an "absentee."¹⁰¹ The law defined an "absentee" to include any Palestinian who in 1948 left the land to go either to another state or to an area of Palestine held by Arab League forces.¹⁰² Forbidden to return to their homes even though many were living in Israel, these unfortunate Palestinians were given the incongruous appellation of "present absentees."¹⁰³ Importantly, although some Jews would have qualified as "present absentees" under the law, it was implemented only against Arabs.¹⁰⁴ Yet, because the Absentees' Property Law permitted confiscation but did not provide the Israeli government title to the land seized, the Knesset devised the Land Acquisition Law which gave the state title to confiscated territory.¹⁰⁵ Jewish existentialist philosopher Martin Buber condemned the Land Acquisition Law as amounting to a "robbery of the land" of Palestine's Arabs. Nonetheless, despite the startling discriminatory nature of many of these laws, the Israeli democratic system places a firm limit on the scope of change: no one may use the political process to change the Zionist character of Israel because no political party that denies the nature of the state may stand in elections.¹⁰⁶ Therefore, in fighting for their rights, Arab-Israelis confront a Gordian knot: how to facilitate their goal of self-determination from within a society that is designed to deliberately cast them as second-class citizens?

C. *Palestinian Underclass*

The socioeconomic discrimination against Arab-Israelis is especially apparent with respect to the allocation and distribution of government funds.¹⁰⁷ The scarcity of budgetary investments tailored to the needs of the Arab-Israeli population over more than six decades has led to the creation of abysmal gaps between Jews and Arabs in practically all areas of life including income levels, unemployment, poverty rates, the extent of infrastructure, environmental conditions, crowded housing conditions, infant mortality and life expectancy rates, drop-out rates from state institutions of education, rates of incarceration, and more.¹⁰⁸ In other words, the inferior legal status of Arab-Israelis is compounded by deep-seated socioeconomic inferiority.¹⁰⁹ As Professor Ruth Gavison, a leading constitutional law scholar on the exclusion of Arab-Israelis within Israel intoned, "Where the State of Israel exists, the Arabs are denied the possibility of controlling

101. Michael Kagan, *Restitution as a Remedy for Refugee Property Claims in the Israeli-Palestinian Conflict*, 19 FLA. J. INT'L L. 421, 435 (2007).

102. QUIGLEY, *supra* note 18, at 107.

103. *Id.*

104. *Id.* at 108.

105. *Id.*

106. HUSSEIN ABU HUSSEIN & FIONA MCKAY, *ACCESS DENIED: PALESTINIAN LAND RIGHTS IN ISRAEL* 19 (2003).

107. Jabareen, *supra* note 87, at 381.

108. *Id.* at 381-82.

109. *Id.* at 383.

their public-cultural life. . . . The State is running an enterprise in which the Arab minority are not full partners, and its laws prejudice their interests in order to serve others.”¹¹⁰ Arab-Israelis thus inhabit an uneasy middle ground alienated from both Israeli and Palestinian society.

In regards to education, the Israeli Supreme Court has at times supported the civic rights of Arab-Israelis. The Court recently held in *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel* that a governmental classification that financially benefited Jewish educational zones to the detriment of the local Palestinian populace was void because the government is responsible for giving benefits to Arabs as well as Jews.¹¹¹ Delivering the opinion of the Court, Chief Justice Barak explained in a well-reasoned manner that:

the way in which the government demarcated the national priority areas in education achieved a discriminatory result, whether it was an intentional result or not. The geographic demarcation along the lines that were chosen led to a result in which the 500 towns that received the status of a national priority area for the purpose of benefits in education included only four small Arab towns. . . . This is a discriminatory result that cannot stand. This is a result that Israeli democracy cannot tolerate. The effect of the government’s decision is that it discriminates against the members of the Arab sector in the field of education.¹¹²

Additionally, in a case with the same spirit, the Supreme Court imposed a duty on the Israeli Ministry of Education to construct a secondary school near an Arab Bedouin village in order to facilitate the local population to maintain its traditions and prevent female students from riding in a school bus alongside male students.¹¹³

A handful of remarkable cases aside, however, a comparative study on race and ethnicity in Israel’s public schools reveals that Arab- Israelis suffer from institutional segregation and a widespread neglect of the importance of integration.¹¹⁴ Although it has been proven that the “hidden assumption that tolerance, curiosity, and dialogue with the ‘other’ can be taught as theoretical, and not practical, issues, and that random encounters [between Jews and Arabs] can make up for what is lacking in practice” is false, nonetheless mainstream Israeli society still balks at a fully integrated

110. *Id.* at 384.

111. See HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel*, ISR. L. R. 105 (2006), available at http://elyon1.court.gov.il/files_eng/03/630/111/a18/03111630.a18.pdf.

112. *Id.* at 126, 127.

113. Zeev Segal, *Do Israeli Arabs Have Collective Rights?*, 12 J. L. SOCIETY 94, 104 (2011); see also *Abou Sbila v. Minister of Education* (2007) (Isr.).

114. Yishai Blank, *Brown in Jerusalem: A Comparative Look on Race and Ethnicity in Public Schools*, 38 URBAN LAWYER 367, 433 (2006).

school system.¹¹⁵ Therefore, without almost a complete overhaul of the Israeli public education system, the deep segregation that characterizes the institution and builds barriers instead of bridges will continue to haunt Israeli society.¹¹⁶ The real-world consequences of inaction is a longitudinal incapacity for the different members of the politic to conduct meaningful dialogue with each other as a significant minority of the population further devolves into an underclass by lacking the tools which can only be provided by a well-funded education program to rise above difficult social conditions and achieve upward mobility.¹¹⁷

VI. THE OBFUSCATION OF JUSTICE

A. *The Israeli Supreme Court*

It is inadequate for a new comprehensive history of Palestine to merely include Arab sources and Palestinian voices. Scholars must also critically examine past assumptions and create a new synthesis to challenge the received wisdom of convenient mythologies. The Israeli Supreme Court serves a two-fold function: as a High Court of Appeal, hearing appeals from district courts, and as a High Court of Justice with original jurisdiction over disputes between individuals and the state in matters that are outside the jurisdiction of other courts and tribunals.¹¹⁸ Judicial review, the power of a court to declare the actions of political branches unconstitutional is an American invention that in the words American historian Charles Beard constitutes “the most unique contribution to the science of government which has been made by American political genius.”¹¹⁹ The system of judicial review has earned worldwide respect and administration and has been increasingly adopted in recent decades by democratic regimes to include Israel.¹²⁰

On a certain level, it is extraordinary that Israel adopted judicial review because it lacks a formal written document that may “be labeled a constitution; Israel’s legislative body, the Knesset, like its British model, controls the jurisdiction of the courts; and no Act of the Knesset has expressly endowed the Court with the necessary competence.”¹²¹ Judicial review has frequently been mentioned in response to criticism of Israeli government actions in the Occupied Territories. For instance, in 1993, lawyers in the Military Advocate-General’s Unit of the IDF declared:

115. *Id.*

116. *Id.* at 434.

117. *Id.*

118. Ronen Shamir, “Landmark Cases” and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice, 25 *LAW & SOC. REV.* 781, 784 (1990).

119. Malvina Halberstam, *Judicial Review, A Comparative Perspective: Israel, Canada, and the United States*, 31 *CARDOZO L. REV.* 2393, 2431 (2010).

120. *Id.*

121. *Id.*

judicial review by Israel's highest Court has not only provided a form of redress for the grievances of Area inhabitants and a safeguard for their rights; it has also provided a powerful symbol and reminder to the officials of the Military Government and Civil Administration of the supremacy of law and legal institutions and of the omnipresence of the Rule of Law wherever Israeli officials' writ may run.¹²²

Judicial review of government action has two primary functions: that of imprinting governmental action with the stamp of legitimacy, and that of checking the political branches of government.¹²³ Although the Israeli Supreme Court has done an excellent job of fostering a perception of legitimacy regarding the Israeli government, it has been woefully inadequate in checking the abuse of state power in relation to the Palestinian people. Indeed, by clothing acts of the Israeli military in a cloak of legality, the Court justifies and rationalizes these decisions.¹²⁴ Even if this legal sleight of hand has failed to produce legitimization in the eyes of Palestinians living in the Occupied Territories, it has done so for both the Israeli public, in whose name the Israeli military takes action, and for international observers sympathetic to Israel's traditional metanarrative.¹²⁵ More worrisome still, the few "landmark" cases where the Court has decided against the Israeli military, serve merely to enhance the legitimizing function of the court by reinforcing the "image of the Court as an impartial body which boldly challenges the government in pursuit of justice."¹²⁶

B. Radical Israeli Settlement

Israeli Supreme Court records indicate that in almost two decades after the 1967 Six Day War, residents of the Occupied Territories submitted 557 petitions.¹²⁷ Of those cases, the vast majority were removed, compromised, or reached settlement but sixty-five reached adjudication and were officially published as Israeli Supreme Court decisions in matters of dispute between the Israeli government and its agents to include military authorities and the residents of the Occupied Territories.¹²⁸ Five out of the sixty-five cases upheld at least a portion of the petitioners' arguments.¹²⁹ The most famous of these five cases is *Dawikat et. al. v. Government of Israel* (1979), commonly referred to as the *Elon Moreh* case.

122. DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 3 (2002).

123. *Id.*

124. *Id.* at 2.

125. *Id.*

126. *Id.* at 3.

127. Shamir, *supra* note 118, at 785.

128. *Id.*

129. *Id.*

“Although Article 46 of the 1907 Hague Regulations prohibits an occupying force from confiscating the private property of an occupied population, Article 52 states an exception to this rule for temporary military needs.”¹³⁰ Utilizing this loophole, “between 1968 and 1979, Israel captured a vast amount of private Palestinian property for what was then defined as military purposes.”¹³¹ “Prime Minister Menachem Begin, of the [right-wing] Likud Party, saw the West Bank as an area with which the Jewish people had a special historical connection because it is the area where the Jewish Kingdom of biblical times had thrived.”¹³² Prior Jewish settlements in the West Bank and the Gaza Strip were built in the early 1970s pursuant to the military commander’s claim that the settlements were necessary outposts to create a security barrier of standoff distance against possible attacks from the East.¹³³ “In previous cases, the Court was willing to accept that theory, especially because the land in some of the cases was not privately owned.”¹³⁴

In January 1979, at the height of the controversy in Israel over the terms of the Camp David agreement and the fears of the Jewish settlers’ movement that Jewish settlement in all the Occupied Territories was at an end, members of a militant sect set up an unauthorized settlement and demanded that the Israeli government allow them to remain.¹³⁵ The Israeli government was highly sensitive to the charge that it was reneging on its political and ideological commitment to Jewish settlement in all of the land of Israel.¹³⁶ At the same time, however, the government was eager to show that it, and not the settlers’ movement, was setting policy.¹³⁷ Consequently, government representatives managed to convince the settlers to leave the area after promising that a settlement would be established in the region.¹³⁸ The Cabinet Committee on Settlement thereafter examined potential settlement sites and decided upon one located on private land.¹³⁹ The chief of staff then gave his approval for requisition of the land for military purposes which was endorsed by the Cabinet in a majority vote, but the minister of defense and the foreign minister joined the deputy prime minister in opposing the decision.¹⁴⁰ Thereafter, an order was signed by the Israeli Defense Forces commander in the West Bank requisitioning about 700

130. Irus Braverman, “*The Tree is the Enemy Soldier*”: A Sociological Making of War Landscapes in the Occupied West Bank, 42 *LAW & SOC’Y REV.* 449, 456 (2008).

131. *Id.*

132. Ammon Reichman, *Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial review of Military Actions in Israel*, 2011 *UTAH L. REV.* 63, 77 (2011).

133. *Id.*

134. *Id.*; see, e.g. H CJ 606/78 *Ouyeb v. Minister of Defense*, 33(2) PD 113, 120 (1979) (Isr.); H CJ 258/79 *Amira v. Minister of Defense*, 34(1) PD 90, 94 (1979) (Isr.).

135. KRETZMER, *supra* note 122, at 85.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

dunams of land “for the needs of the army” and two days later Israeli civilians with Israeli Defense Forces backing began preparing the requisition land for the new settlement of Elon Moreh.¹⁴¹

C. *The Elon Moreh Case*

The land requisitioned for Elon Moreh was uncultivated, but seventeen Arabs who owned 125 dunams of the land successfully challenged the action before the Israeli Supreme Court.¹⁴² The *Elon Moreh* case produced three different opinions, the majority written by Deputy President Justice Landau in which two other Justices concurred and separate concurring opinions by Justices Witkon and Bekhor.¹⁴³ Overall, the opinions paint a negative portrait of the settlers and their actions. Indeed, Justice Landau’s opinion was highly critical of the speed that the requisition and initial construction occurred and the impropriety of the military governor having given notice to the village *mukhtar* rather than the actual landowners which were steps that created “the impression . . . the occupation of the land was organized as a military operation by employing an element of surprise and in order to forestall the ‘danger’ of intervention by the Court on an application by the landowners before work began in the area.”¹⁴⁴

Essentially, in *Elon Moreh*, it was difficult for the Court to be convinced that a security rationale was indeed behind the confiscation of land. In this regard, the settlers certainly did not help their own case. Unlike the settlers in the *Beth-El* case, wherein the Court determined certain settlements fulfilled a security function, the *Elon Moreh* Court permitted the settlers to file affidavits supporting their position.¹⁴⁵ “While the military commander stated that the settlement was necessary for the security of Israel, the settlers themselves attested that the reason for the settlement was the fulfillment of the ‘right of return’ of Jews to their historic homeland.”¹⁴⁶ Further undercutting the military commander’s assertion were other segments of the Israeli Defense Forces which stated that there was no real security reason in the particular spot chosen for the settlement.¹⁴⁷ “The Court therefore concluded that the order was ultra vires and void.”¹⁴⁸ In Justice Landau’s words, “the military needs referred to in [Article 52 of the 1907 Hague Regulations] cannot include, on any reasonable interpretation, national security needs in the broad sense,” that is, the broad political perspective of the Israeli government and settlers.¹⁴⁹

141. KRETZMER, *supra* note 122, at 86.

142. David Philips, *The Unexplored Option: Jewish Settlements in a Palestinian State*, 25 PENN. ST. INT’L L. REV. 75, 135 (2006).

143. *Id.*

144. *Id.* at 136.

145. *Id.*

146. Reichman, *supra* note 132, at 77.

147. *Id.*

148. *Id.*

149. Philips, *supra* note 142, at 137–38.

D. Continued Jewish Settlement on Palestinian Land

The *Elon Moreh* Court took pains to extricate itself from the highly contentious political debate surrounding the issue of Jewish settlements in the West Bank and its implication for Israel's security.¹⁵⁰ Indeed, in this isolated and well-differentiated decision, the Court established new limitations on the ability of future petitioners to successfully ward off land seizures and provided a sounder legal basis for future takeovers.¹⁵¹ Similarly, the Court also held that in the future it would not intervene in matters of dispute concerning the ownership status of land and that such disputes would be heard before a military appeal board.¹⁵² Accordingly, in the wake of the *Elon Moreh* case, the number of petitions regarding land seizures fell precipitously and those submitted for adjudication were dismissed.¹⁵³

In the wake of the Court's ruling, Prime Minister Begin pronounced that the case showed the world that "[t]here are judges in Jerusalem" and that the security establishment would abide by the order of the Court.¹⁵⁴ Moreover, the Israeli government pursued an intensive policy aimed at defining and gaining control over state lands on which civilian settlements were subsequently constructed.¹⁵⁵ As a result, *Elon Moreh* is the last decision dealing with requisition of private land for civilian settlements. Later decisions deal with the steps taken to declare land as state land and other aspects of the settlement policy, such as planning decisions, building of roads and expropriation of Palestinian land for those purposes.¹⁵⁶ Therefore, *Elon Moreh* is an essential part of what must become the new Israeli metanarrative: in striking down egregious conduct by the military commander and radical Israeli settlers, and only that conduct, the Court has de facto allowed the settlement project and corollary diminution of Palestinian rights to continue unabated.

VII. LIVING HISTORY

A. The Insufficiency of Forgetting

Beginning in the 1920s, it was obvious to those not blinded by bias that the Zionist project was taking Palestine in a direction incompatible with the rights of the Palestinian people.¹⁵⁷ The Jewish immigration allowed by the British Mandate was a compromise between a Western world that was starting to have misgivings about the ethos of colonialism but had not yet embraced self-determination.¹⁵⁸ From the older perspective of colonialism,

150. Reichman, *supra* note 132, at 77.

151. Shamir, *supra* note 118, at 789.

152. *Id.*

153. *Id.*

154. Reichman, *supra* note 132, at 77.

155. KRETZMER, *supra* note 122, at 89.

156. *Id.*

157. QUIGLEY, *supra* note 18, at 236.

158. *Id.*

the insertion of Jews into Palestine was acceptable, but for Arabs who sought immediate independence, the situation was untenable. Finding itself unequal to the task of either keeping peace or ascertaining a solution to the matter, Britain withdrew from Palestine. If World War II marked the end of the British Empire as a first-rate power, it defined the United States along with the Soviet Union as the two new global superpowers. With oil as the attraction, the United States began to inject itself into the domestic politics of the Middle East.¹⁵⁹ Intent on fostering its own power, the United States pushed the partition plan through the UN General Assembly despite the fact that numerous non-European UN members viewed partition as inconsistent with the national rights of Palestine's Arab population.¹⁶⁰ Although the UN Security Council bears responsibility, under Chapter 7 of the UN Charter, for maintaining the peace internationally, it did little to affect the situation in Palestine in 1948 as the Jewish Agency expelled the indigenous Arab people and extended its control.¹⁶¹ And when Israel occupied the West Bank and the Gaza Strip in 1967, the Security Council again failed to correctly identify Israel as the aggressor or take meaningful action to force Israel to withdraw.¹⁶²

The global community only stands to gain from the establishment of a Palestinian state that could coexist peacefully with the state of Israel.¹⁶³ The Palestinians have long tried to create an independent, sovereign state in the West Bank, including East Jerusalem, and the Gaza Strip which has been continually occupied by Israel since the 1967 Six Day War. The 1993 Oslo Accord between the Palestine Liberation Organization and Israel led to mutual recognition. However, two decades of on again, off again peace talks have failed to produce a permanent settlement. The latest round of direct negotiations broke down in 2010.¹⁶⁴ In an upward trend, however, the UN General Assembly last month endorsed an upgraded UN status for the Palestinian Authority despite strong opposition from both the United States and Israel.¹⁶⁵ The resolution elevates their status from "non-member observer entity" to "non-member observer state," the same category as the Vatican, which Palestinians hope will even the playing field in their negotiations with Israel.¹⁶⁶ In response, Israel declared its willingness to live in peace with a Palestinian state but Prime Minister Benjamin Netanyahu cautioned that "for peace to endure, Israel's security must be protected, the Palestinians must recognize the Jewish state and they must be prepared to end the conflict with Israel once and for all."¹⁶⁷

159. *Id.*

160. *Id.*

161. *Id.* at 237.

162. *Id.*

163. Nagan & Haddad, *supra* note 28, at 441.

164. Q&A: *Palestinians' Upgraded UN Status*, BBC (Nov. 30, 2012), <http://www.bbc.co.uk/news/world-middle-east-13701636>.

165. David Arlosto & Michael Pearson, *UN Approves Palestinian 'Observe State' Bid*, CNN (Nov. 30, 2012), <http://www.cnn.com/2012/11/29/world/meast/palestinian-united-nations/index.html>.

166. *Id.*

167. *Id.*

Showing an increasing willingness to support Palestinian self-determination and to criticize Israel, the U.S. State Department, on December 18, 2012, accused Israel of engaging in a “pattern of provocative action” that calls into question the statements from Israeli politicians that Israel is committed to a lasting peace in Palestine.¹⁶⁸ Indeed, a State Department spokeswoman went so far as to say

“[The United States is] deeply disappointed that Israel insists on continuing this pattern of provocative action. . . . These repeated announcements and plans of new construction run counter to the cause of peace. Israel’s leaders continually say that they support a path towards a two-state solution, yet these actions only put that goal further at risk.”¹⁶⁹

The recognition of the Palestinian state holds within it the promise of moving all parties past this terrible period of war, suffering, acrimony, and impasse.¹⁷⁰ In doing so, Palestinians and Israelis may achieve self-determination, independent stability, widespread peace, and essential dignity.¹⁷¹

B. *Toward a New Future*

The forced exile of hundreds of thousands of Palestinians in 1948, and again in 1967, for many Palestinians was, and remains today, the essence of their conflict with Israel.¹⁷² The new and inclusive metanarrative of Palestine should therefore rest upon three pillars: a reimagining of the genesis of the conflict, recovering Arab-Israeli, Palestinian, and Arab voices and agency, and a candid assessment of the mechanisms whereby the Jewish state reinforces an illusion of legitimacy. The war of words fought by Israel’s new and old historians which largely centers upon competing narratives of the 1948 war is simply insufficient to produce the kind and extent of understanding that must be attained if a viable two-state solution has a chance of implementation. If the history of Palestine has revealed nothing else it is that the continuing deprivation of Palestinian land fuels a cycle of violence from which innocent Palestinians and Israelis may not otherwise be freed.

The clash of narratives is not simply an academic question of historiography. Recently, a proposed law, popularly known as the “*nakba* law” states that any public demonstration of mourning during Israel’s Independence Day would be considered a felony and punishable by up to three

168. Matthew Lee, *US Hits Israel Hard on Settlement Plans*, YAHOO NEWS (Dec. 18, 2012), <http://news.yahoo.com/us-hits-israel-hard-settlement-plans-201526251.html>.

169. *Id.*

170. Nagan & Haddad, *supra* note 28, at 442.

171. *Id.*

172. GEORGE BISHARAT, *MAXIMIZING RIGHTS: THE ONE-STATE SOLUTION TO THE PALESTINIAN-ISRAELI CONFLICT* 306 (2008).

years of imprisonment.¹⁷³ The fear of the Palestinian counter-memory of the horrors of Israeli occupation is apparently so intense that the law does not even mention the word *nakba* and even fails to elaborate the reasons why Palestinians feel the need to mourn the loss of their homeland.¹⁷⁴ Yet notwithstanding the insufficiency of the law, the rationale behind it is not new to the Israeli Supreme Court.¹⁷⁵ In truth, the judgments of the High Court of Justice show that the problem exists even in landmark cases where the Court strongly defended the rights of Palestinian citizens against discriminatory policies.¹⁷⁶ For example, in the celebrated *Ka'adan* decision, viewed by many as Israel's *Brown v. Board of Education* in terms of its commitment to desegregation, the Court protected the right of a Palestinian citizen to buy a house in a communal Jewish village.¹⁷⁷ In writing for the Court, Chief Justice Barak adopted a "future oriented" approach under which future plaintiffs are encouraged to exclude the story of the *nakba* voluntarily and not claim its continuing relevance to explain such everyday facets of Arab-Israeli and Palestinian life such as the unequal distribution of land in Israel.¹⁷⁸ In doing so, this methodology sanitizes the Court's approach by enabling it to amend discriminatory practices only on an individual basis and thus sanctioning by proxy societal amnesia reminiscent of the short-sighted approach advocated by Israeli intellectual Yehuda Elkana "in favor of forgetting."¹⁷⁹

The ongoing discrimination of Arab-Israelis is evidence that a one-state solution would not suffice to guarantee full civic rights and the socio-economic equality of Palestinians living in Israel. Israel will not cease to be a Jewish state, and it follows that Israel must not extend its sovereignty over too large a Palestinian population thereby placing its status quo existence in jeopardy. A two-state solution, however, has much to recommend itself. After all, a Palestinian state alongside Israel would go far in providing Arabs with a full sense of membership in the polity that they cannot otherwise acquire from a Jewish nation.¹⁸⁰ Moreover, it is beyond question that a gulf exists between the welfare and political participation of Jews compared to that of Arabs.¹⁸¹ Important, too, the issue of Palestinian statehood must be placed in context of wider developments in the Middle East. The recent "Arab Spring" was an assertion of unilateral initiative for popular democratic change on behalf of the peoples of Tunisia, Egypt, Libya, and Syria.¹⁸² Yet while the Arab Spring received positive support

173. Leora Bilsky, *The Habibi Libel Trial: Defamation and the Hidden-Community Basis of Criminal Law*, 61 U. TORONTO L. J. 617, 624 (2011).

174. *Id.*

175. *Id.* at 624.

176. *Id.*

177. *Id.*

178. *Id.*

179. Bilsky, *supra* note 173, at 624.

180. Ruth Gavison, *The Jewish State: A Justification*, in *NEW ESSAYS ON ZIONISM* 17 (David Hazony et al., eds. 2006).

181. *Id.*

182. Nagan & Haddad, *supra* note 28, at 344.

from the global community the Palestinian people have been denied these same universal rights.¹⁸³

C. *A New Understanding*

On May 19, 2011, President Obama delivered a major policy speech at the State Department outlining United States policy in response to the “extraordinary change taking place in the Middle East and North Africa.”¹⁸⁴ In laying out his position, President Obama remarked that:

[A] lasting peace will involve two states for two peoples: Israel as a Jewish state and homeland of the Jewish people, and the state of Palestine as the homeland for the Palestinian people, each state enjoying self-determination, mutual recognition, and peace. . . . The Palestinian people must have the right to govern themselves, and reach their full potential, in a sovereign and contiguous state. As for security, every state has the right to self-defense, and Israel must be able to defend itself—by itself—against any threat. . . . The full and phased withdrawal of Israeli military forces should be coordinated with the assumption of Palestinian security responsibility in a sovereign, non-militarized state.¹⁸⁵

President Obama’s policy statement therefore included a contradiction: if the Palestinian state is indeed to be sovereign, what right does any nation to include the United States have to insist the Palestinian State be non-militarized?¹⁸⁶ Some scholars believe Palestinians might seriously consider voluntarily adopting a non-militarized status because forsaking their insistence on a military would permit them to devote the majority of their resources to economic development as well as externalize much of the cost of protecting their independence from external threat to explicit or implicit international or regional guarantors.¹⁸⁷ Most importantly, these scholars argue that by eliminating the military, Palestinians would eliminate an institution which in the Middle East and other areas of the world such as Latin America has often turned inward to influence, usurp, or undermine the power of democratic governments.¹⁸⁸ Yet the confounding variable at the heart of both President Obama’s assumption and the well-intentioned arguments of scholars is neither is adequately familiar with the accurate history of Palestine. Therefore, a final benefit to the introduction of a reimagined metanarrative is it provides context for the reasons why Palestinians employed violence against the Israelis. Far from an indiscriminate

183. *Id.*

184. Michael Wise, *Constitutions and Control of the Military: Can the Experience of the Americas Assist the Middle East?*, 48 WILLAMETTE L. REV. 497, 498 (2012).

185. *Id.*

186. *Id.* at 499.

187. *Id.*

188. *Id.* at 499–500.

desire to kill innocent Jewish men, women, and children, Palestinian violence has historical antecedents in the brutality of the Israeli occupation. Therefore, by understanding the history of the region, an apparent conclusion presents itself: an armed Palestine will not necessarily destabilize the region if the legitimate aspiration of its people for security and self-determination is realized.

VIII. CONCLUSION

While Israeli scholars must incorporate Arab sources to achieve a more representative history of Palestine, Palestinian writers are likewise starting to challenge Arab histories of 1948 that “have [hitherto] been marked by apologetics, self-justification, onus-shifting and conspiracy theories.”¹⁸⁹ For instance, Rashid Khalidi writes to expose the “tendency in . . . [Palestinian] historiography . . . that denies the Palestinian agency in what happened, or indeed any responsibility for their own fate.”¹⁹⁰ Likewise, the renowned scholar Edward Said rejected the propensity on behalf of certain Palestinians to downgrade the Holocaust: “[A]s Palestinians we demand consideration and reparations from them without in any way minimizing their own history of suffering and genocide. . . . [W]e must think of our histories together . . . free of any exclusionary, denial-based schemes.”¹⁹¹ Therefore, due to the epistemological transformation amongst Arab and Israeli academics over the past twenty-five years, there is at present a golden opportunity for the creation of an accurate history of Israeli-Palestinian relations.¹⁹² However, by failing to sufficiently integrate Arab-Israeli, Palestinian, and Arab sources, the revisionists limited a priori the conclusions that might be drawn from a reimagining of 1948.¹⁹³ Furthermore, due to the imbalance of power inherent between Israel and Palestine, it is incumbent upon Israeli scholars to critically examine their own government to ascertain how illusions of legitimacy are grafted upon the state which serve to bolster ahistorical mythologies and fear of the “other.”

On the one hand, from the view of certain Palestinians, the creation of Israel in 1948, the conquest of land in the pre-emptive Six Day War and the ensuing Jewish settlements in the West Bank and the Gaza Strip are regarded as justifications for violent acts of terrorism. On the other hand, Israel’s defensive action based upon the ongoing Palestinian terrorism which has increased during the last decade combined with virulent discrimination of Arab-Israelis within Israel makes a one-state solution untenable at best. Therefore, the sole avenue for a lasting peace in Palestine is a two-state solution. Once Israeli Jews are exposed to the new metanarrative the hope is they will recognize the state’s three fundamental responsibilities

189. Jeremie Maurice Bracka, *Past the Point of No Return? The Palestinian Right of Return in International Human Rights Law*, 6 MELB. J. INT’L L. 272, 277 (2005).

190. *Id.*

191. *Id.*

192. *Id.*

193. Beinín, *supra* note 65, at 16.

toward Arab-Israelis and Palestinians: first, Jews must acknowledge that the Jewish state has been and will continue to be a burden for Arab-Israelis and Palestinians; second, Jewish citizens must spur the government to immediately staunch the most pressing needs of the Arab community and promote the civil equality of all citizens; and third, there must be a realistic conversation regarding security concerns and the legitimate aspiration for self-determination on behalf of both Israelis and Palestinians. The new history therefore creates the necessary preconditions which must exist before a candid discussion about a two-state solution may begin. There is hope for peace in Palestine but the path to a permanent solution lies first in rediscovering the past which will illuminate the way forward.