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The New Imperialism: Violence, Norms, and the "Rule of Law"

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THE NEW IMPERIALISM: VIOLENCE, NORMS, AND THE “RULE OF LAW”

Rosa Ehrenreich Brooks*

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I. INTRODUCTION

[It] is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it: not a sentimental pretence but an idea; and an unselfish belief in the idea — something you can set up, and bow down to, and offer a sacrifice to . . .

—Joseph Conrad¹

A. *The Explosion in “Rule of Law” Promotion*

The past decade has seen a surge in American and international efforts to promote “the rule of law” around the globe, especially in post-crisis and transitional societies.² The World Bank and multinational corporations want the rule of law, since the sanctity of private property and the enforcement of contracts are critical to modern conceptions of the free market.³ Human-rights advocates want the rule of law since due process and judicial checks on executive power are regarded as essential prerequisites to the protection of substantive human rights.⁴ In the wake of September 11, international and national-

1. JOSEPH CONRAD, *HEART OF DARKNESS* 4 (Dover 1990) (1902).

2. See Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95 [hereinafter Carothers, *The Rule of Law Revival*] (“One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles.”); cf. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 4 (1999).

When we look . . . at recent developments in Eastern Europe and Latin America, we speak of the progressive transition from dictatorial systems to the rule of law. We measure their progress — or lack of it — against our end. When we observe third world countries, we see the absence of law’s rule as a pathological condition. We have a missionary zeal, believing our truth to be revealed truth. . . . Not to see the end of social order as the rule of law strikes us as unnatural

Id. (citation omitted).

3. See, e.g., JOHN HEWKO, FOREIGN DIRECT INVESTMENT: DOES THE RULE OF LAW MATTER? 3 (Carnegie Endowment for Int’l Peace, Working Paper, Rule of Law Series No. 26, Apr. 2002) (noting that “[t]he conventional wisdom within the international development community is that foreign direct investment (FDI) is an important component of economic growth and prosperity . . . and that a crucial, if not decisive, factor in enticing investment is a stable, consistent, fair and transparent legal and judicial system.”), available at <http://www.ceip.org/files/pdf/wp26.pdf> (last visited Nov. 9, 2003). Hewko is skeptical of the conventional wisdom, arguing that “the philosophical framework the international development community has traditionally used to carry out its legislative and institutional reform efforts . . . is incomplete” *Id.* at 4.

4. See, e.g., Owen Fiss, *The Autonomy of Law*, 26 YALE J. INT’L L. 517, 521 (2001).

The rule of law revival that we are experiencing today is not just a product of the neoliberal development paradigm but also of the recent triumphs of the human rights movement. The growing attachment to human rights has been warmly applauded throughout the world It represents, as Michael Ignatieff has said, a revolution in human consciousness. As part of this revolution, there has been an increasing demand for law, or, more specifically, for the treatment of human rights as justiciable claims rather than mere aspirations, and for legal institutions that are able to enforce these claims.

In the wake of September 11, the human-rights community has redoubled its commit-

security experts also want to promote the rule of law, viewing it as a key aspect of preventing terrorism.⁵

Given their conflicting priorities, human-rights advocates, economic analysts, and those concerned primarily with national and international security naturally differ on the proper law-reform priorities for transitional societies. They battle over whether commercial-law reform should precede criminal-law reform, whether the creation of new commercial courts should take priority over the creation of human rights and war crimes courts, and whether judicial reform ought to come before police reform. Since September 11, 2001, the three groups have also disagreed about the imperatives of the “war on terror,” which many rights advocates see as privileging short-term security concerns over longer-term commitments to promoting human rights.⁶ Nonetheless, the three groups (which can overlap) share the basic assumption that the rule of law is central to stable and modern democratic society.⁷

ment to promoting “the rule of law,” although many within the human-rights community have grown increasingly concerned by the apparent willingness of some democratic governments to value national-security concerns over strict adherence to domestic and international legal norms. *See, e.g.,* LAWYERS COMM. FOR HUMAN RIGHTS, *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW AND SECURITY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES* (2003).

5. *See, e.g.,* COUNCIL ON FOREIGN RELATIONS, *IRAQ: THE DAY AFTER* (2003); *see also* Robert G. Kaiser, *U.S. Plants Footprint in Shaky Central Asia*, WASH. POST, Aug. 27, 2002, at A1; Thomas Carothers, *The New Aid*, WASH. POST, Apr. 16, 2002, at A19; Thomas Carothers, *Promoting Democracy and Fighting Terror*, FOREIGN AFF., Jan./Feb. 2003, at 84.

The United States faces two contradictory imperatives: on the one hand, the fight against al Qaeda tempts Washington to put aside its democratic scruples and seek closer ties with autocracies throughout the Middle East and Asia. On the other hand, U.S. officials and policy experts have increasingly come to believe that it is precisely the lack of democracy in many of these countries that helps breed Islamic extremism.

Id. Post-September 11 events have undeniably raised new questions about whether even democratic cultures share a universal conception of the rule of law and its relative importance vis-à-vis national security. Nevertheless, rhetorical commitments to the rule of law also continue to be made by numerous governmental actors. *See, e.g.,* George W. Bush, State of the Union Address (Jan. 29, 2002) (“America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance.”) (transcript available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>). Similarly, the U.S. Department of State puts news releases related to the treatment of Iraqi prisoners of war and Guantanamo detainees in a section of its website titled “The Rule of Law: War on Terrorism.” U.S. Dep’t of State, *The Rule of Law: War on Terrorism*, at <http://usinfo.state.gov/topical/rights/law/warlaw.htm> (last visited July 25, 2003). As this Article will discuss, the concept of the rule of law is amorphous and undertheorized; perhaps for this reason, groups as otherwise disparate as free-market advocates, human-rights activists, and national-security hawks have all been eager to embrace the concept.

6. *See, e.g.,* *Anti-Terror Campaign Cloaking Human Rights Abuse*, HUM. RTS. NEWS, Jan. 16, 2002 (Human Rights Watch, New York, N.Y.), at <http://www.hrw.org/press/2002/01/wr2002.htm>.

7. What’s more, despite tussles over priorities, all three groups often assume that creating the rule of law in one sphere will have automatic positive spillover effects in the other: that is, if a given society has functioning judicial bodies that enforce contracts fairly and

The U.S. and other international actors⁸ have supported programs designed to promote the rule of law for years, with many early efforts in Latin America.⁹ The pace and funding levels of those programs increased dramatically in the early 1990s, as the collapse of the Soviet Union and the toppling of totalitarian regimes in other parts of the globe dramatically energized rule-of-law assistance.¹⁰ According to Freedom House, a leading nongovernmental organization, fledgling democracies were springing up worldwide during the 90s,¹¹ and international organizations and donors rushed to help; in the wake of the Soviet Union's collapse, one commentator describes a veritable "explosion of rule-of-law assistance" around the world.¹²

An increasing number of "failed states," civil wars, and human-rights crises have also helped fuel enthusiasm for rule-of-law promotion efforts, with ambitious rule-of-law programs in areas as disparate as Kosovo, East Timor, Sierra Leone, Afghanistan, and Iraq. Since 1990, the U.S. and other bilateral and multilateral donors have spent literally billions of dollars on promoting the rule of law, and those huge governmental sums have been matched by similarly large

protect property rights, that society will ultimately also protect basic civil and political rights, and vice versa. See Carothers, *The Rule of Law Revival*, *supra* note 2. There is, to my knowledge, little empirical evidence to support this assumption, and some work that calls it into question. See, e.g., Susan Rose-Ackerman, *Political Corruption and Democracy*, 14 CONN. J. INT'L L. 363 (1999); see also HEWKO, *supra* note 3.

8. The diverse group of supporters of rule-of-law programs includes various countries, particularly the European states and Japan, and also regional and intergovernmental organizations such as the UN, the EU, the OSCE, the World Bank, and the IMF.

9. For a description and analysis of many of these early programs, see Linn Hammergren, *Applying Rule of Law Lessons from Latin America*, DEMOCRACY DIALOGUE (USAID Center for Democracy and Governance), Fall 1997, available at http://www.usaid.gov/democracy/pdfs/ddfallwin97_fi.pdf.

10. See Carothers, *The Rule of Law Revival*, *supra* note 2.

11. According to Freedom House, 120 of the world's 192 states are now electoral democracies — compared to 22 states in 1950. FREEDOM HOUSE, DEMOCRACY'S CENTURY: A SURVEY OF GLOBAL POLITICAL CHANGE IN THE 20TH CENTURY (Dec. 7, 1999), available at <http://freedomhouse.org/reports/century.html>; see also Madeleine Albright, Remarks to the National Democratic Institute International Leaders Forum (Aug. 13, 2000) ("I am confident that when the history of the 1990's is written, the growth of democracy will be its dominant theme.") (transcript available at http://www.usembassy.it/file2000_08/alia/a0081404.htm).

12. THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 165 (1999). For some similar observations, see Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 325 (1998), noting

[t]he upsurge of interest in comparative constitutional law among U.S. constitutional scholars [which] may be the result of the breakup of the Soviet Union, and the rapid and widespread transformation of non-democratic regimes in proto-democratic or democratic nation-states. A byproduct of the rapidity with which the change occurred was the proliferation of efforts by U.S. constitutionalists to instruct people elsewhere on what a well-designed constitution should look like.

donations from private foundations.¹³ The war on terrorism has given further impetus to U.S. and international enthusiasm for rule-of-law promotion; most recently, millions have been pledged for rule-of-law programs in post-Taliban Afghanistan and post-war Iraq.¹⁴

Until less than a decade ago, rule-of-law assistance traditionally involved aid packages designed to encourage governmental law-reform initiatives and support law-related nongovernmental organizations (“NGOs”).¹⁵ In recent years, however, with the upsurge in United Nations and NATO peacekeeping operations, there have been more and more situations in which the U.S., UN, and other key actors (The European Union (“EU”), the Organization for Security and Cooperation in Europe (“OSCE”), etc.) find themselves wholly or partially administering a society in crisis.

In Kosovo, the UN, the EU, the OSCE, and NATO still collaborate to administer Kosovo under a UN umbrella, assisting the fledgling Kosovar governance structure; in East Timor, the UN was the central government until the recent elections and still administers numerous “government” programs; in Sierra Leone, the fragile indigenous government relies heavily on UN administrators and peacekeeping troops to preserve the still-tenuous peace and help with everything from education, health care, and food aid to legal and judicial reform.

The Bush administration’s early determination to resist Clinton-style “nation building” adventures collapsed in the wake of September 11. Today, Afghanistan is essentially run (though not particularly well run) by the UN, the EU, and dozens of international NGOs, with extensive assistance from U.S. troops and civilian personnel. International experts inspect Afghan prisons, train police and judges, plan elections, and help rewrite the laws. An international security-assistance force patrols the streets of Kabul, and American soldiers continue military operations to root out al Qaeda forces in the rest of the country.¹⁶ In Iraq, the American presence is felt everywhere.

13. See Carothers, *The Rule of Law Revival*, *supra* note 2. While some of that money has gone to indigenous nongovernmental organizations in the target countries, or to government coffers, a great deal of it has gone toward paying the salaries of peripatetic international lawyers, many of them Americans, who trot around the globe, rack up frequent-flyer miles, and give advice (often unsolicited) to citizens and government officials in far-off lands.

14. See, e.g., USAID, REBUILDING AFGHANISTAN (Sept. 2002), available at http://www.dec.org/pdf_docs/PNACQ617.pdf.

15. See Carothers, *The Rule of Law Revival*, *supra* note 2.

16. See generally CONSORTIUM FOR RESPONSE TO THE AFG. TRANSITION, FILLING THE VACUUM: PREREQUISITES TO SECURITY IN AFGHANISTAN (Mar. 2002), available at <http://www.hrlawgroup.org/resources/content/AfghanRpt.pdf>. Many critics charge that the international community has nevertheless put too few resources into rebuilding Afghanistan, and that lawlessness prevails in much of the country. See, e.g., HUMAN RIGHTS WATCH, *Afghanistan*, in WORLD REPORT 2003, available at <http://www.hrw.org/wr2k3/asia1.html>; see also *Afghanistan Weekly Situation Reports* (UN Assistance Mission in Afghanistan), July 28 — Aug. 3, 2002, available at <http://www.reliefweb.int/w/rwb.nsf/c7ca0eaf6c79faae852567af003c69ca/556e95a56f2e470ac1256c0f004cfa70?OpenDocument> [hereinafter *Afghanistan Week-*

Nearly 150,000 U.S. soldiers remain in Iraq today,¹⁷ and Iraq is governed by an American civilian administrator who reports directly to the U.S. Department of Defense.¹⁸ American military police are in charge at Baghdad police stations; American JAG lawyers supervise Iraqi courts; Iraqis accused of crimes are detained by U.S. soldiers at U.S. military bases.¹⁹

In an increasing number of places, promoting the rule of law has become a fundamentally imperialist enterprise, in which foreign administrators backed by large armies govern societies that have been pronounced unready to take on the task of governing themselves.²⁰

B. *A String of Expensive Disappointments*

Despite billions of aid dollars, programs to promote the rule of law have been disappointing.²¹ For example, in Russia, more than a decade after a massive infusion of foreign aid began, there have been few rule of law success stories. Organized crime continues to play an enormous role in the economy, corruption among public officials shows no sign of abating, economic hardship continues for millions, life expectancy remains lower than it was under communism, the prisons are overcrowded and allegations of abuse routine, and Russia's ill-starred and never-ending military campaign in Chechnya has killed thousands, including many civilians who died as a result of massive Russian bombardments in Grozny.²²

ly Situation Reports I]; *Afghanistan Weekly Situation Reports* (UN Assistance Mission in Afghanistan), Aug. 4-11, 2002, available at <http://www.reliefweb.int/w/rwb.nsf/c7ca0eaf6c79faae852567af003c69ca/603233c16c1da59349256c1a000dfb44?OpenDocument> [hereinafter *Afghanistan Weekly Situation Reports II*]; Telephone Interview with William H. Spencer, Senior Advisor, International Resource Group (Aug. 26, 2002) (notes on file with author). News reports confirm these sources. See, e.g., Belquis Ahmadi, *Reality Gap in Afghanistan*, WASH. POST, July 8, 2002, at A17; Alex Spillius, *Afghans to Carry on Stoning Criminals*, DAILY TELEGRAPH (London), Jan. 5, 2001, at 16.

17. See John Milburn, *Roberts Sees Need for Larger Armed Forces, Defends Iraq Mission*, ASSOCIATED PRESS WIRE, Aug. 29, 2003, available at WL 8/29/03 APWIRE 19:35:00.

18. See Kathleen T. Rhem, *Bush Appoints State Department Official to Administer Iraq*, American Forces Information Service, May 6, 2003, available at www.dod.mil/news/May2003/n05062003_200305061.html.

19. See generally News Transcript, U.S. Dep't of Defense, DoD News Briefing — Secretary Rumsfeld and Ambassador Bremer (July 24, 2003), available at www.dod.mil/transcripts/2003/tr20030724-secdef0452.html. These comments are also based on the author's personal observations during a trip to Iraq in August 2003.

20. For a critical commentary on America's role in these increasingly imperialist enterprises, see, for example, Michael Ignatieff, *The American Empire: The Burden*, N.Y. TIMES, Jan. 5, 2003, § 6 (Magazine), at 22.

21. See, e.g., Stephen Holmes, *Can Foreign Aid Promote the Rule of Law?*, E. EUR. CONST. REV., Fall 1999, at 68; see also Carothers, *The Rule of Law Revival*, *supra* note 2.

22. See CAROTHERS, *supra* note 12, at 171-72 ("In other parts of the world where the U.S. has invested significantly in rule-of-law aid, disappointment is also common. . . . [S]ome

In Kosovo, four years after a massive NATO bombing campaign, things are little better, despite the fact that the international community literally took over the province's administration. For three years after the air campaign ended, Kosovo was run by over 40,000 NATO troops and a civilian UN administration that amounted to almost ten thousand additional foreigners (including NGO representatives, civilian police, and OSCE, and EU staff).²³ This worked out to roughly one foreigner for every thirty-six Kosovars, a ratio of foreign occupiers to locals that would have inspired the envy of nineteenth-century colonial powers. Today, more than 20,000 NATO troops still remain,²⁴ but ethnic intolerance continues to rage, with daily assaults and frequent murders; thuggishness and organized crime grow virtually unchecked.²⁵ The fledgling UN-sponsored judicial system remains unable to offer even reasonably speedy trials, much less consistent and independent rulings.²⁶

The same story could be told in dozens of other places, all at varying stages in the "transition to democracy" (an optimistic phrase). In Latin America, many commentators have concluded that the earlier era of rule-of-law promotion programs have had little lasting impact.²⁷ More recent experiments have similarly been of questionable value. In Sierra Leone, 17,000 UN peacekeeping troops from thirty-one countries²⁸ remain unable to ensure basic security in parts of Sierra Leone's territory,²⁹ much less guarantee accountability for past

ten years later, the lack of rule of law in Russia is an open sore . . ."); ANATOL LIEVEN, *CHECHNYA: TOMBSTONE OF RUSSIAN POWER* (1998); *see also* Holmes, *supra* note 21.

23. *See* NATO, KFOR INFORMATION, at <http://www.nato.int/kfor/kfor/about.htm> (published Dec. 30, 2002).

24. E-mail from KFOR press spokesman Chris Thompson to author (Oct. 10, 2003) (on file with author).

25. *See, e.g.*, LEGAL SYS. MONITORING SEC., ORG. FOR SEC. & COOPERATION IN EUR. MISSION IN KOSOVO, REPORT 9: ON THE ADMINISTRATION OF JUSTICE (Mar. 2002), available at http://www.osce.org/kosovo/documents/reports/justice/report9_eng.pdf; *see also* DEP'T OF HUMAN RIGHTS AND RULE OF LAW, ORG. FOR SEC. & COOPERATION IN EUR. MISSION IN KOSOVO, REVIEW OF THE CRIMINAL JUSTICE SYSTEM: SEPTEMBER 2001-FEBRUARY 2002 (2002), available at http://www.osce.org/kosovo/documents/reports/justice/criminal_justice4_eng.pdf (last visited Aug. 25, 2002).

26. *See, e.g.*, LEGAL SYS. MONITORING SEC., *supra* note 25; DEP'T OF HUMAN RIGHTS AND RULE OF LAW, *supra* note 25.

27. *See, e.g.*, LINN HAMMERGREN, DO JUDICIAL COUNCILS FURTHER JUDICIAL REFORM? LESSONS FROM LATIN AMERICA (Carnegie Endowment for Int'l Peace, Working Paper, Rule of Law Series No. 28, June 2002); *see also* Carothers, *The Rule of Law Revival*, *supra* note 2; Hammergren, *supra* note 9.

28. *See* UNITED NATIONS MISSION IN SIERRA LEONE, FACT SHEET, at <http://www.un.org/Depts/dpko/unamsil/unamsil.pdf> (last visited Aug. 22, 2003).

29. *See, e.g.*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, CONSULAR INFORMATION SHEET FOR SIERRA LEONE (Feb. 13, 2003).

abuses.³⁰ In East Timor, 5,000 blue-helmeted UN troops and the civilian UN administration struggle to maintain their credibility in the face of economic depression and continued security threats from pro-Indonesian militias.³¹

The news from Afghanistan is similarly disheartening: the delivery of aid funds has been delayed; security problems have prevented judicial and legal assessments beyond the capital city of Kabul; in much of the country women reportedly face serious retaliation if they fail to wear the burqa; prison conditions are reportedly appalling; a resurgence of Taliban military activity has killed hundreds of Afghans; many Taliban-era regulations are still enforced, although technically no longer valid; and the new chief justice has spoken publicly in favor of punishments such as the execution of adulterers by stoning or flogging.³²

Meanwhile, in Iraq, five months after President George W. Bush announced the end of "major combat," American soldiers continue to be killed and wounded by hostile forces on an almost daily basis.³³ Sabotage has slowed the restoration of basic services such as electricity.³⁴ Deadly terrorist attacks on the United Nations and on nongovernmental organizations have slowed reconstruction efforts.³⁵ The newly reconstituted Iraqi police remain unable to prevent widespread violent crime,³⁶ and the police themselves have increasingly been the targets of deadly terrorist violence.³⁷

30. See, e.g., *Sierra Leone Indictments Welcomed*, HUM. RTS. NEWS (Human Rights Watch, New York, N.Y.), Mar. 11, 2003 (noting that despite recent indictments issued by the Special Court for Sierra Leone, "[b]ecause the Special Court is anticipated to prosecute around twenty persons, it will leave many crimes unaddressed"), at <http://www.hrw.org/press/2003/03/sleone031103.htm>.

31. See MISSION IN SUPPORT OF E. TIMOR, UNITED NATIONS, FACTS AND FIGURES, at <http://www.un.org/peace/timor/unmisetF.htm> (last visited Aug. 22, 2003).

32. See, e.g., CONSORTIUM FOR RESPONSE TO THE AFG. TRANSITION, *supra* note 16; see also *Afghanistan Weekly Situation Reports I*, *supra* note 16; *Afghanistan Weekly Situation Reports II*, *supra* note 16; Telephone Interview with William H. Spencer, *supra* note 16. News reports confirm these sources. See, e.g., Ahmadi, *supra* note 16; Spillius, *supra* note 16; Ben Ehrenreich, *Afghanistan Revisited*, L.A. WEEKLY, Oct. 3-9, 2003, available at <http://www.laweekly.com/ink/03/46/features-ehrenreich.php>.

33. See Alex Berenson, *Two US Soldiers Are Killed in Iraq; One of Them Is a Woman*, N.Y. TIMES, Oct. 2, 2003, at A14.

34. See Harry de Quetteville, *Dane Killed as Sabotage Stretches Coalition in Iraq*, DAILY TELEGRAPH (London), Aug. 18, 2003, available at 2003 WL 61864303.

35. See Alex Berenson, *U.N. Chief Orders Further Reduction of Staff in Baghdad*, N.Y. TIMES, Sept. 26, 2003, at A8.

36. See Alex Berenson, *Iraqis' New Army Gets Slow Start*, N.Y. TIMES, Sept. 21, 2003, at A1.

37. See *Bombers Kill 8*, SUN (London), Oct. 10, 2003, available at LEXIS, News Library, Sun File.

In a sense, citizens of Kosovo, Afghanistan, Iraq, and the like must put up with some of the worst aspects of imperialism (culturally insensitive occupying armies that drive up prices, distort local economies, and push through ham-handed “reforms”) with few of imperialism’s benefits, such as they were; the new imperialists lack the capacity or the will to stamp out crime, pick up the trash, or make the trains run on time.

C. *What’s Gone Wrong?*

The very concept of the rule of law is rarely examined or understood by key U.S. and international decisionmakers,³⁸ although “promoting the rule of law” has become a mantra for many in the foreign-policy, human-rights, and international-development communities.³⁹ There is a substantial academic literature on the nuances of the idea of the rule of law,⁴⁰ but for the most part, decisionmakers and commentators — including many scholars in the international-law and human-rights-law communities — do not engage with this literature.⁴¹ Decisionmakers and commentators tend to conflate formal and procedural aspects of the rule of law (such as structurally independent courts, “modernized” legislation, etc.) with a more substantive conception (such as respect for individual and minority rights, a commitment to nonviolent means of resolving disputes, substantive due process, and so on).⁴² Most decisionmakers recognize in theory that the rule of

38. See, e.g., CAROTHERS, *supra* note 12, at 165:

Aid providers interested in promoting the rule of law have not, for the most part, agonized much about the complexity and even ineffability of the concept. They have concentrated on two of its most tangible manifestations — the state institutions that play a central role in the enforcement of law and the written laws themselves.

39. See John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 71 (1998) (“The Rule of Law is routinely prescribed these days for what ails the post-Communist World.”); see also Carothers, *The Rule of Law Revival*, *supra* note 2; Holmes, *supra* note 21; WORLD BANK, RULE OF LAW AND DEVELOPMENT, at <http://www1.worldbank.org/publicsector/legal/ruleoflawanddevelopment.htm> (last visited Aug. 22, 2003).

40. See, e.g., Orth, *supra* note 39; see also Richard H. Fallon, Jr., “The Rule of Law” as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307 (2003); Ruti G. Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 CORNELL INT’L L.J. 355 (2002).

41. In part, this may be because much of the scholarly discussion of the idea of the rule of law takes relatively stable, peaceful, and law-oriented societies as the starting point for analysis, not the end point. Disputes have to do primarily with how to perfect the rule of law, or with disagreements about its definition and methods for evaluating it. This makes such discussions less than wholly useful for scholars and practitioners who wish to understand how the rule of law might be created where it does not exist at all.

42. Both common sense and the academic literature warn against the easy assumption that formalistic transplants such as constitutions and legal institutions will automatically produce the desired changes in culture and behavior. See, e.g., A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 403 (1996) (warning that “[p]lanting a [constitutional] proposition in a different cultural, historical, or traditional context may lead to results quite different from those one finds in the country from which

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law has important normative, substantive, and formal dimensions. Yet, in practice, rule-of-law promotion efforts continue to focus on establishing the formal dimensions of the rule of law, assuming with little evidence that this will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law.⁴³

For the most part, the U.S. human-rights and foreign-policy communities have applied an identical template to societies all over the world, taking little account of their differences or the template's failures in other places.⁴⁴ (And it is not only the U.S. foreign-policy community that does this: the UN, the World Bank, the EU, the OSCE, large philanthropic foundations such as Ford, MacArthur, Rockefeller, and other major players have all taken essentially the same approach.)⁴⁵ In his recent book *Aiding Democracy Abroad*, Tom Carothers of the U.S. Institute for Peace even offers (by no means uncritically) what he refers to as the "Rule of Law Assistance Standard Menu." It includes "reforming institutions" (judicial reform, strengthening legislatures, police and prison reform, etc.), "[r]ewriting laws" (modernizing criminal, civil, and commercial laws), "[u]pgrading the legal profession through support for stronger bar associations and

the proposition was borrowed"). This is all the more true when the thing to be transplanted is as capacious as the very idea of the rule of law. Nonetheless, in practice, the same formalistic mistakes are made time and again.

43. Legal scholars have offered varying definitions of the rule of law. *See, e.g.*, William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV 723; *see also* Fallon, *supra* note 40, at 7-9 (distinguishing between formalist, historicist, substantive, and legal process "ideal types" of the rule-of-law concept). Most of the varying conceptions contain at least some overlapping components, however, as do the varying conceptions of the rule of law drawn upon by the foreign-policy community. Most assume that the rule of law has both a formal component (statutes, rules known in advance, courts, politically independent judiciary with powers of judicial review, etc.) and a substantive component that implicitly is nonpositivist. To most in the foreign-policy community, the rule of law also involves laws that comport with basic notions of human rights. Fallon notes that most conceptions of the rule of law share three purposes or values: protection against anarchy and the Hobbesian war of all against all; creating conditions in which people can plan their affairs with reasonable confidence that they can know in advance the legal consequences of their actions; and protection against some types of official arbitrariness. *Id.* Beyond these purposes of the rule of law, Fallon notes that most conceptions of the rule of law emphasize five basic elements: 1) people must be able to understand and comply with the law — thus, the rule of law must involve the existence of some set of legal rules, standards, and principles that can guide people; 2) the law *should* actually guide people; 3) the law should be reasonably stable; 4) the law should be supreme, ruling officials and judges as well as ordinary citizens; and 5) there should exist "instrumentalities of impartial justice" — that is, the rule of law requires courts that employ fair procedures. *Id.* at 8-9.

44. *See* CAROTHERS, *supra* note 12, at 176 (noting, "As aid providers attempt judicial reform work in previously uncharted regions, they seem determined to repeat mistakes made in other places.").

45. *See generally* CAROTHERS, *supra* note 12.

law schools,” and “[i]ncreasing legal access and advocacy” through the support of legal-advocacy NGOs, law-school clinics, and so on.⁴⁶

This model simply does not work.⁴⁷ What this type of formalistic approach fails fully to recognize or acknowledge is that creating the rule of law is most fundamentally an issue of norm creation.⁴⁸ The rule of law is not something that exists “beyond culture” and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law *is* a culture, yet the human-rights-law and foreign-policy communities know very little — and manifest little curiosity — about the complex processes by which cultures are created and changed.⁴⁹

Recent U.S. and international interventions to promote the rule of law (interventions through military force and through massive aid infusions designed to alter fundamental aspects of societies) have been disappointing in large part because their architects are unwilling to grapple with complex issues of norm creation and the relationship between “law” and “norms.” We have failed to define or justify our goals and we have failed to even ask, much less search for the answers, to some very basic questions about how and when societies change,

46. *Id.* at 165, 168. Although Carothers notes that rule-of-law promotion efforts have been less than fully successful, and that law is “about norms and values” as much as it is about institutions and statutes, his concrete suggestions for improving rule-of-law promotion seem limited to adding a focus on “bottom-up efforts that work with civil society as well as with governmental entities.” *Id.* at 115. His approach is similar to that taken by Stephen Holmes. See Holmes, *supra* note 21.

47. See CAROTHERS, *supra* note 12, at 170 (“What stands out about U.S. rule-of-law assistance since the mid-1980s is how difficult and often disappointing such work is.”).

48. See, e.g., John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT’L L. 811, 860 (1997) (noting that democracy building “is a goal to be assisted through norm creation, education, electoral observation, and other modes of peaceful engagement. [It is not] a charter for an intolerant one-size-fits-all dogma. Room must always be left for the many paths to the same bottom line which honor local conditions and wishes.”). Outside of the academy, however, these insights are given a certain amount of lip service, but they rarely bring decisionmakers to reexamine the thrust of rule-of-law promotion efforts.

49. *C.f.* KAHN, *supra* note 2, at 2. Kahn argues for “the cultural study of law”:

If we approach law’s rule as the imaginative construction of a complete worldview, we need to bring to its study those techniques that take as their object the experience of meaning. Inquiry must begin with a thick description of the legal event as it appears to a subject already prepared to recognize the authority of law. That subject brings to the event a unique understanding of time, space, community, and authority. He or she also brings an understanding of the self as a legal subject. These are the constitutive elements of that form of political experience we describe as the rule of law. A cultural study of law advances from thick descriptions to the interpretive elaboration of each of these imaginative structures, all of which together make possible the experience of law’s rule. All questions of reform — the traditional end of legal study — are bracketed. They are not abandoned forever, but they are left aside as long as this form of inquiry continues. The object here is not to make us — personally or communally — better, but to understand who we really are.

what role (if any) law can play in such cultural change, whether law has any necessary correlation with order and violence, and how and when outsiders (or insiders, for that matter) can promote norm change in particular directions.⁵⁰

These questions are urgent and of far more than just academic interest. Globalization, the decline of state structures, intrastate group conflicts, and the rise of organized terrorist groups that recruit heavily in poor and “lawless” regions make it overwhelmingly likely that the U.S. and the international community will continue to become involved in what we once might have dismissed as the “internal affairs” of foreign states. (And although the theoretical insights about the relationship between law and violence are of urgent importance in the international domain, they are equally applicable to domestic settings.) The U.S. and the international community will continue to promote the rule of law through foreign-aid programs, through diplomacy, and at times through military interventions and peacekeeping forces. We will also continue to promote the rule of law through *lawyers*: through America’s law schools and various American Bar Association projects, lawyers and legal scholars will continue to work as employees and consultants for the U.S. Agency for International Development, for foreign governments, for the UN, and for NGOs.⁵¹ More and more law students will become involved in this work both while in school and after graduation, and these students will hunger for courses and scholarship on these issues. If we are to respond to this trend in a meaningful way, issues of norm creation will have to move to center stage in international and comparative law, and in the grow-

50. Readers may ask what it is I mean by such terms as “society,” “culture,” “norms,” “law,” and the “rule of law,” all terms which have been defined in numerous different ways by numerous different scholars. I use the terms in a general, common-sense way. Thus, I use “society” to refer to a group of people living in a reasonably bounded geographical area and tied together by at least some common governmental institutions, history, a language, certain customs, etc. I use “culture” to mean the widely shared myths, assumptions, behavioral patterns, customs, rituals, and social and historical understandings of a group. I use “norms” to mean widely shared attitudes and their associated behavioral imperatives. I use the term “law” primarily in a somewhat more restrictive sense in this Article, since I am interested in the formal law of statutes and institutions, regardless of whether such law is widely accepted, enforceable, or in fact enforced. At other times, I discuss law as one of the many kinds of social narratives different cultures use to make sense of violence, but when I use law in this different sense I make it clear in the text. I take “the rule of law” to mean several things, both the existence of certain kinds of functioning institutions and an enforceable body of rules, and at the same time a widely shared societal/cultural commitment to the idea that formal law is the best way to resolve certain kinds of disputes, that the state should have monopoly on violence, and that the law should be built on substantive principles such as due process, equal protection, and so forth. Throughout this Article, I note that these two aspects of the rule of law are often conflated, or the existence of the second aspect is presumed to follow naturally from the first, or both. For a broader discussion of how the concept of the rule of law is used in American constitutional discourse, see, for example, Fallon, *supra* note 40.

51. See Tushnet, *supra* note 12.

ing scholarly literature on promoting the rule of law in the international arena and individual societies around the globe.

There is an irony here that is worth noting. For years, legal scholars who focused on domestic legal issues dismissed international law as “not really law,” but something else: unenforceable moral directive, for instance, or mere politics.⁵² In other words, the claim was that international law is really a matter of social norms, not law. Today, however, domestic-law experts are beginning to recognize the powerful role social norms often play in guiding, buttressing, and sometimes undermining domestic law.⁵³

Ironically, at the very same time, many international-law experts are hailing a new age of international law, one in which international law is increasingly interpreted by judicial and quasi-judicial bodies whose decisions are increasingly backed by substantial coercive powers (in the form of a widespread willingness on the part of more and more states to use economic sanctions and, at times, military force to enforce those decisions).⁵⁴ In other words, just as many domestic-law experts are belatedly recognizing the critical importance of social norms to law, and the need to understand how norms and law interact, some international legal scholars are insisting triumphantly that international law has moved beyond “mere” norms.⁵⁵

52. See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 164-67 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (arguing that international law is merely “morality,” not law, since it is not enforced through sovereign coercion); H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994) (noting that international law is not true law because it lacks “secondary rules of change and adjudication which provide for legislatures and courts” and lacks a “unifying rule of recognition”). See generally Anthony D’Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293 (1984); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (discussing this debate); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT’L L.J. 81, 114 (1991) (noting, “Under the assumptions of liberalism, international law must collapse into political choice.”). Purvis also notes that to Critical Legal Studies, the claim of international law to objectivity and naturalness “hides the deep incoherence, normative basis, and indeterminacy of international law.” *Id.*

53. For an introduction to this literature, see Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998). See also Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 3 (1999).

54. Consider the emergence of the ad hoc international-criminal tribunals, the evolution of the International Criminal Court, tribunals for resolving WTO disputes, and so on. For a somewhat skeptical account of these developments, see generally Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT’L L. 237 (2000). See also Paul B. Stephan, *The New International Law — Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999).

55. Some might question whether this is still true in the wake of the U.S.’s more or less unilateral decision to invade Iraq. I think it is; notably, the U.S. cast its military intervention in Iraq in terms of enforcing preexisting security council resolutions. While the sincerity of this motive can be questioned — as can the validity of the underlying interpretation of the applicable legal framework — it is worth noting that even the most unilaterally oriented in the Bush administration felt that this was necessary to legitimize U.S. action.

A key challenge for international- and comparative-law scholars today is to reinvigorate the study of norms as part of the study of international law, international human-rights law, comparative law, and international affairs.⁵⁶

In particular, we need to study norm change in the places and moments where international law, domestic law, and comparative law *intersect*. Traditionally, international, comparative, and domestic law were seen by most scholars as largely separate areas for analysis: international-law scholars studied the rules governing interactions between states; comparativists examined different domestic legal systems in an effort to understand their provenance and seek out creative ways to borrow useful ideas from other legal cultures; domestic-law scholars studied the laws of their own country; and all viewed the occasional areas of overlap as more or less incidental. Thus, some studied the development of transnational legal process; some studied how different national legal regimes “borrowed” from one another; and some studied law and legal process within relatively bounded societies. Meanwhile, an important area of study slipped through the cracks — the study of how societies do or do not absorb the norms associated with international law, in a context where actors from different states interact in complex transitional and crisis situations.

The urgency of this project is only increased by the same trends that have led some scholars to assert that international law is beginning to look more like “real” law: the decline of the idea of absolute state sovereignty, the increasing importance of international human-rights law, the growth in transnational and regional tribunals and arbitration regimes, and the steady movement in many parts of the world towards the incorporation of international law into domestic law. These trends are partly a product of the emergence of new kinds of transnational actors, from NGOs, to multinational corporations, to globally diffuse terrorist networks. These developments blur the lines between international law, comparative law, and domestic law. Today, domestic, regional, and international regimes are increasingly interwoven and overlapping, albeit in ways that are ad hoc and constantly evolving. We are quite possibly in the midst of one of the greatest periods of global cultural diffusion and adaptation the world

56. Some scholars have addressed these issues. *See, e.g.*, Koh, *supra* note 52, at 70 (urging scholars to attempt a “thick description” of transnational legal process); *see also* Purvis, *supra* note 52 (suggesting that structuralist anthropology may have much to offer international-law scholars and urging that international law be understood in terms of myth, ritual, etc.). Nonetheless, most such work has focused on state compliance with international law, not on the degree to which international-law norms about human rights, the rule of law, humanitarian law, etc., are truly internalized by the citizens of states, as well as reflected in treaties, statutes, and government practice. With the growing importance of nonstate actors (from armed insurgent forces, to ethnic groups, to multinational corporations) this near-exclusive focus on government elites becomes increasingly problematic.

has ever known,⁵⁷ and we can no longer afford to ignore these emerging legal-process issues.

The goal of this Article is to participate in the challenging project of carving out a new area of study in the place where international law, comparative law, and domestic law intersect. In this Article, I use the story of flawed rule-of-law assistance efforts to demonstrate the importance of this inquiry.

I take as a basic premise that there are many situations in which it is justifiable and beneficial for the U.S. and other actors to seek to promote human rights and the rule of law abroad, and that at times even military interventions are a necessary and justifiable part of this effort. These are controversial statements (and do not imply endorsement of any particular past intervention), but I will simply assume their truth for the limited purposes of this Article.

If we assume that efforts to promote the rule of law are important and justifiable, however, we need to make those efforts as effective as possible. The initial goal of this Article, then, is to convince readers that there is indeed a problem with how we go about promoting human rights and the rule of law.⁵⁸ I argue that the root cause of the problem is the failure to take seriously issues of norm creation, and the complex relation between law and norms. In part, truly acknowledging this problem must involve recognizing something lawyers are often reluctant to acknowledge — that at times “the law” in its formal sense is of peripheral importance at best. Although we imagine that the trappings of formal law are central to creating order and reducing violence, there is little evidence that this is so.⁵⁹

Second, this Article seeks to map out a preliminary research agenda for this new field, outlining the kinds of questions we urgently need to start asking, and suggesting some of the things we will need to do to start feeling our way towards some answers. I recognize, of course, that we may never have complete answers to questions of such complexity, but insist nonetheless that we can be at least a little bit more sophisticated than we currently are. Finally, I want to suggest some very preliminary hypotheses about what those answers might look like.

57. For two very different perspectives on this, see, for example, BENJAMIN R. BARBER, *JIHAD V. MCWORLD* (1995), and SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

58. This is in part because there is a real disconnect between the academic literature on the rule of law and rule-of-law promotion on the ground. Part II, *infra*, provides a case study of Kosovo and how efforts on the ground to promote the rule of law can go awry.

59. See, e.g., Lawrence Rosen, *A Consumer's Guide to Law and the Social Sciences*, 100 *YALE L.J.* 531, 543 (1990) (reviewing *LAW AND THE SOCIAL SCIENCES* (Leon Lipson & Stanton Wheeler eds., 1986) (noting, “Law may matter, but until the resonances among numerous domains have been sought out, the centrality of any given institution cannot be presumed.”)).

II. CASE STUDY: KOSOVO

The previous section noted that many recent rule-of-law promotion efforts have been surprisingly unnuanced and formalistic, and their shallow formalism has condemned them to irrelevance at best. At worst, such approaches may not only fail to create the rule of law — they may actually undermine the rule of law. Several examples, all from events of the last few years in Kosovo, help illustrate these points. The Kosovo experience makes a useful case study because it is neither too far in the past to provide valid insight into *current* approaches and problems, nor too recent for us to draw meaningful conclusions about its successes and failures.⁶⁰

Much of the discussion that follows is drawn from personal experiences working in Kosovo in 1999 and 2000, as well as from follow-up discussions with numerous colleagues and former colleagues still working in Kosovo. First, some background.⁶¹ When Milosevic agreed to withdraw Serbian troops from Kosovo after months of NATO bombs, the UN Security Council passed Resolution 1244,⁶² which created an international civilian administration in Kosovo under the auspices of the UN. This civilian administration became known as UNMIK, short for UN Mission in Kosovo. Bernard Kouchner, the French human-rights advocate who founded Médecins Sans Frontières, was appointed as UNMIK's head, the Special Representative of the Secretary General ("SRSG"). His deputy was Jock Covey, a former U.S. State Department official.⁶³

When Kouchner and a small army of international experts arrived in the battered city of Pristina in June 1999, they faced the daunting challenge of governing 1.8 million people in a devastated region with no functioning courts, no functioning prisons, and no police. A decade earlier, when the Serbs ended Kosovo's political autonomy within Yugoslavia in 1989, Albanians were dismissed from most public-sector jobs and denied access to higher education. As a result, immediately before the NATO air war began, all of the judges in Kosovo were Serbs, as were most of the practicing lawyers (discriminatory laws

60. Events in Afghanistan are unfolding too rapidly for Afghanistan to make a useful case study, but as noted previously, early indications suggest that rule-of-law promotion efforts there are encountering the same problems as past efforts in Kosovo and elsewhere.

61. For good general histories of Kosovo, see TIM JUDAH, *KOSOVO: WAR AND REVENGE* (2000), and NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (2000). The discussion that follows draws mainly on my field research in Kosovo for the U.S. Department of State in 1999 and 2000, and on numerous informal conversations with colleagues and former colleagues since then.

62. S. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

63. See generally *KOSOVO JUDICIAL ASSESSMENT MISSION REPORT* (prepared by interagency group led by members of Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State) (April 2000), available at <http://www.usofficepristina.usia.co.at/jud.pdf>.

meant that Albanian lawyers had only very limited practice opportunities). All of the police were Serbs. Albanians were fired from the law faculty at the University of Pristina and Albanian law students were forced to study in private houses to earn a law diploma that the Serbs refused to recognize anyway. When NATO ended its bombing campaign and hundreds of thousands of angry Kosovar Albanians rushed back home from the refugee camps of Macedonia and Albania, many Serbs fled, fearing — rightly, as it turned out — that they would be subject to violent acts of revenge. The short-term result was that after the war, since most of the Serbs had fled and the Albanians were ten years out of practice, Kosovo was left without a functioning civil service.⁶⁴

A. *Looking for the Law*

When UNMIK set up shop in the summer of 1999, Kosovo lacked courts, police, prisons, lawyers, and judges. It also lacked an agreed-upon body of law. After all, if Serbia was no longer in charge, and the UN was running the show, what body of law was applicable in Kosovo? What laws should govern the apprehension and trial of criminal suspects, the thorny problem of disputed property claims, and the actions of UNMIK itself? The route UNMIK took to resolve these issues demonstrates that simplistic formalism is a dead end for reformers when more culturally potent symbolic issues are at stake.

After a brief consideration of the problem of applicable law, UNMIK head Bernard Kouchner decided that the simplest thing to do was make the applicable law in UN-administered Kosovo the same as the law that was applicable *before* the NATO air campaign began. He issued UNMIK Regulation 1, which stated that “the laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo,” insofar as those pre-March 1999 laws did not conflict with internationally recognized human-rights standards, the UNMIK mandate under UN Security Council Resolution 1244, or any other UNMIK regulation.⁶⁵

A fine idea, one which William of Occam would have approved — until he saw the resulting chaos. The problem was that to Kosovo’s one and one-half million ethnic Albanians, the applicable laws in Kosovo before the bombing campaign began were “Serb laws,” a key symbol of Serbian oppression against the Albanians. While the concept of “honor” may have little salience in modern America, in

64. See generally KOSOVO JUDICIAL ASSESSMENT MISSION REPORT, *supra* note 63.

65. UNMIK REGULATION NO. 1999/1 § 3, *reprinted in* KOSOVO JUDICIAL ASSESSMENT MISSION REPORT, *supra* note 63, at app. C, 100.

Kosovo it remains of great cultural importance.⁶⁶ After ten years of Serb oppression, an ethnic cleansing campaign, an armed struggle, and, perhaps, a narrowly averted genocide, the idea that the UN would issue a decree requiring the Kosovar Albanians to continue to live under Serb law was profoundly insulting to many Kosovars. To the bureaucrats at UNMIK, the fact that the pre-1999 laws had been promulgated by Serbs seemed purely academic — but to many Kosovars, it was an offense to honor of the deepest sort.

It made no difference that UNMIK Regulation Number 1 said that human-rights standards would trump the laws on the books in the event of a conflict. To the Kosovars, Serb law was Serb law, and they wanted none of it. Nearly all of the fifty-five people sworn in by UNMIK to serve as judges and prosecutors in UNMIK's new "Emergency Judicial System" immediately declared that they would not apply Serb law.

A crisis ensued, complete with angry editorials and dozens of stormy meetings in Pristina, UN headquarters, the State Department, and other sites. UNMIK refused to rescind Regulation 1. At the same time, since most prosecutors and judges refused to accept Regulation 1, few judicial proceedings began in the makeshift courts. Most judges insisted that the applicable law should by right be the laws in force before 1989, since these laws were passed with the approval of the Albanian-dominated Kosovo parliamentarians before the Serbs ended Kosovo's autonomy. Some judges began to move forward with court proceedings, but applying pre-1989 laws. Other judges applied an eclectic mix of pre- and post-1989 laws. UNMIK continued to insist that such actions were effectively illegal, but a few creative Kosovar jurists noted that since the post-1989 laws were themselves arguably illegal (since they were imposed by Belgrade after the dissolution of the Kosovo parliament), they had never truly been legally applicable in Kosovo, which meant that the pre-1989 laws in fact *were* the laws applicable in Kosovo on March 22, 1999.

This particular controversy ended in defeat for UNMIK. Six months after issuing Regulation 1, UNMIK (without comment) made a full about-face in the form of UNMIK Regulation 24.⁶⁷ This new regulation declared that the law applicable in Kosovo would henceforth be the law in force on March 22, 1989, immediately prior to the ending of Kosovar autonomy. Regulation 24 in fact permitted Kosovar

66. For a discussion of the idea of "honor" in Kosovar society, see Margaret Hasluck, *The Albanian Blood Feud*, in *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 381 (Paul Bohannon ed., 1967). See also BLERIM REKA, *ELEMENTS OF CONFLICT PREVENTION AND RESOLUTION IN CODE OF LEKE DUKAGJINI [sic] (A COMPARATIVE STUDY)* (1997); Richard T. Oakes, *The Albanian Blood Feud*, 6 *J. INT'L L. & PRAC.* 177 (1997).

67. UNMIK REGULATION NO. 1999/24, *reprinted in KOSOVO JUDICIAL ASSESSMENT MISSION REPORT*, *supra* note 63, at app. C, 110-11.
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judges to pick and choose whatever law they liked best: when the pre-1989 laws failed to cover a given situation, Regulation 24 gave judges the freedom to apply any nondiscriminatory legal provision applicable in Kosovo after March 22, 1999. And, of course, all law applied had to be consistent with international human-rights standards — although Regulation 24, like Regulation 1, neglected to identify sections of the law inconsistent with human-rights standards, or lay out the procedures to be followed in the event of perceived conflict between a provision of the law and human-rights standards.

This was not a trivial oversight. Ironically, the pre-1989 laws, so dear to the Kosovar Albanian community, were far less consistent with modern international human-rights standards than the post-1989 Serb law they had so vehemently rejected. The pre-1989 laws were designed in the Communist era, before the fall of the Berlin Wall and the advent of greater openness in Yugoslavia.⁶⁸ Not only did the pre-1989 laws fail to conform to international human-rights standards in numerous ways, but the property- and civil-law regime they created reflected a very different set of assumptions about how social life should be organized than most Kosovars held a decade later. On their face, the post-1989 Serb laws appeared to be an improvement on their predecessors. They included a more modern understanding of private property, and the criminal-law statutes covered war crimes and other humanitarian-law violations, unlike earlier laws. It was primarily the implementation of these post-1989 laws that had been discriminatory and oppressive.⁶⁹

This is a small example of how an overly formalistic approach to law floundered when it came up against certain “irrational” but powerful cultural understandings. Although this dispute seems ludicrous in many ways — after all, UNMIK only wanted to save everyone time and effort by adapting the by-and-large decent law that was already in use — its consequences were major. If UNMIK read the Kosovar Albanian rejection of Regulation 1 as irrational and obstructionist, the Kosovar Albanian community read UNMIK’s initial refusal to take its objections seriously as evidence both that the international community had little respect for its history, fears, and aspirations, and as evidence that the “rule of law,” UNMIK-style, was little different from rule of law, Milosevic-style. Furthermore, UNMIK’s ultimate reversal on the question of applying the pre-1989 laws suggested to the Kosovars that law UNMIK-style was a matter of arbitrary decrees that could be issued and reversed by an unaccountable, appointed bureaucracy. UNMIK’s law, therefore, need not have and should not have been followed by lawyers or judges, much less by ordinary people.

68. For a readable history of Yugoslavia, see TIM JUDAH, *THE SERBS: HISTORY, MYTH AND THE DESTRUCTION OF YUGOSLAVIA* (2d ed. 2000).

69. See generally KOSOVO JUDICIAL ASSESSMENT MISSION REPORT, *supra* note 63.
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B. *Self-Determination Versus Human Rights*

The dispute over Regulation 1 was one small part of a larger problem that plagued efforts to create the rule of law in Kosovo. UNMIK could never entirely decide whether its ultimate goal was to promote self-determination, or to promote and ensure human rights. For that matter, UNMIK never truly confronted the question of whether a commitment to human rights requires a commitment to democratic decisionmaking, or what truly constitutes democratic decisionmaking in a society with no obviously legitimate representatives, or how to resolve crises in which majoritarian democracy seemed likely to trample on minority and individual rights.⁷⁰ These are complex issues without easy answers, but UNMIK's failure to confront them at all was particularly damaging given that UNMIK's whole *raison d'être* in Kosovo involved protecting the Kosovars' right to self-determination and promoting human rights. Indeed, NATO went to war in Kosovo with the stated aim of protecting the Kosovars from Serb domination and human-rights abuses.

UNMIK proved unable to come up with any coherent mechanism for addressing these sometimes conflicting imperatives. In the early days of the UN administration, UNMIK established a variety of consultative bodies designed to include the Kosovars in decisions about the all-important project of reestablishing the rule of law. The Judicial Advisory Council ("JAC") was created, as were the Interim Advisory Council ("IAC"), and the Legislative Advisory Council ("LAC"). Including prominent Kosovar lawyers, academics, and political figures, these bodies were meant to help appoint judges, revitalize legal education, and produce legal codes. But time and time again, this consultative process foundered, as quarrels broke out over substantive issues and over who should serve on the advisory bodies (no clear criteria existed, and the different ethnic groups and political parties clashed both with UNMIK and with each other over how to divvy up the seats), and in what language the proceedings should be conducted in. (The Serbs insisted on Serbian and the Albanians on Albanian. Since the UN personnel generally spoke neither, this forced meetings to include multiple translators, leading to further inefficiency and misunderstanding.)

The consultative process also faltered on more substantive issues: not infrequently, for instance, Albanian participants would express the view that there should be no Serb judges, as all Serbs were war criminals, or that the property code should give all Serbian property to Albanians, since it had been stolen from them in the first place, even if decades or centuries before, or that revenge killings of Serbs by

70. Cf. Fiss, *supra* note 4 (discussing the inherent conflict between justice and autonomy, despite the tendency of human-rights discourse to conflate the two).

Albanians should be treated more leniently than other kinds of killings.

Such disputes did not bode well for the due process of law that UNMIK hoped to see emerge, and UNMIK responded by dismissing its advisory councils and making key decisions itself. In other words, when a majoritarian form of self-determination came up against human rights, self-determination lost; and the sequence of events leading to those decisions hardly looked like due process. Basically, UNMIK wanted the decisionmaking process to be as participatory and democratic as possible, but when the Kosovar participants came up with suggestions or demands that UNMIK found unpalatable, UNMIK simply dismissed them and made the decisions on its own. Unsurprisingly, this did little to enhance UNMIK's reputation with the Kosovars, as they saw UNMIK as increasingly arbitrary and unaccountable in its rule. Ultimately, the advisory councils became semipermanent battlegrounds, frequently dissolved by UNMIK, just as frequently boycotted by one or more Kosovar or Serb groups, and nearly always locked in angry paralysis.

C. *Human Rights Versus "Law and Order"*

In Regulation 1, UNMIK effectively incorporated international human-rights standards into Kosovo's law, and this was affirmed in Regulation 24. Although UNMIK's regulations never specified precisely how to identify a norm of international human-rights law, UNMIK legal advisers, other international actors, and Kosovars all took "international human rights" to include, at a minimum, the core rights at the heart of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), the European Charter, and decisions of the European Court of Human Rights (since Kosovo was, after all, part of Europe, and the EU and the OSCE both had major roles in Kosovo under the UNMIK umbrella). Under each of these overlapping regimes, core rights include (among others) the rights to equal protection, due process, fair and expeditious judicial proceedings, freedom from arbitrary detention, adequate detention conditions, and representation by counsel.⁷¹

The police, prison, and judicial systems established by UNMIK were unable to comply with those standards, however, or even with the generally less-stringent standards that had been laid out in pre- or post-1989 Kosovo, Serbian, and Yugoslavian law. An international civilian police force for Kosovo got up and running only slowly, and to this day functions poorly. In some regions of Kosovo, UN civilian

71. For a basic introductory text on core international human-rights principles and regimes, see THOMAS BUERGENTHAL ET AL., *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* (3d ed. 2002).

police from around the world apprehend suspects and investigate crimes. In other regions, Kosovars who have gone through a basic training course at a UN police school patrol the streets. In some areas, NATO soldiers act as the police. In still other areas, all three share de facto responsibility for policing. These various policing agents speak different languages and apply widely varying methods in different parts of Kosovo. As a result, they have been notoriously ineffective at preventing crime or solving crimes in which suspects are not caught red-handed. Moreover, since police procedures vary widely depending on the nationality and experience levels of the police, NATO soldiers and police in different areas apply widely differing standards for stopping, questioning, and detaining suspects.⁷²

Detention facilities in Kosovo are equally variable. Most prewar prisons were damaged by bombs or arson, and some detainees end up in police holding cells or in NATO tents behind barbed wire. Few are held in facilities that were purposely built for long-term detention, which means that many detainees have no exercise areas, no health-care facilities, no private visitation areas (or set standards for determining when to allow access for visitors), and no access to legal materials. Few facilities allow full separation of men from women, juveniles from adults, or pretrial detainees from convicted criminals. There are few adequately trained prison and detention-facility guards, and detention-facility officials have, in several well-publicized cases, been unable to prevent ethnic violence among detainees, or escapes by well-organized groups of prisoners assisted by outsiders.

Court resources vary as well. Most courts use Kosovar judges appointed by the UN or the fledgling Kosovar government. Some courts make partial use of international judges (who are paid more than ten times as much as local counterparts, and given far better resources and security, which unsurprisingly breeds resentment). Many courts still lack law libraries or basic equipment. (Indeed, for many judges the issue of applicable law remained moot for well over a year after UNMIK took over. Until summer 2000, most Kosovar judges lacked copies of either the pre- or post-1989 statutes, as well as copies of international human-rights treaties, UNMIK regulations, and European Court of Human Rights case law.) For eighteen months after the NATO air campaign ended, most courts and prosecutors' offices also lacked vehicles, office equipment, furniture, and full staffs.⁷³

As a result of resource limitations, unresolved jurisdictional issues, and the dispute over the applicable law, most courts were slow to

72. See generally KOSOVO JUDICIAL ASSESSMENT MISSION REPORT, *supra* note 63.

73. See generally *id.* In the spring and summer of 2000, a \$2 million grant from the U.S. State Department's Bureau of Human Rights, Democracy, and Labor ultimately rectified some of these resource problems.

begin hearing cases. In many areas, no judicial proceedings were held at all for more than eight months after the beginning of the UNMIK administration, and Kosovo's courts still face a formidable backlog today. But NATO and UN civilian police ("CivPol") began arresting criminal suspects as soon as they were deployed, since the restoration of "law and order," in the sense of stopping the widespread violence, was viewed as a key priority. For most of the first year of UNMIK administration, NATO and CivPol resource limitations meant that only those caught more or less red-handed while committing serious crimes (rape, arson, kidnapping, murder) were actually apprehended; most other suspects were given a warning and released immediately. Nonetheless, within months after the UN administration started, several hundred criminal suspects were detained in makeshift NATO and UN jails. But for the most part, these detainees could not be tried or even indicted since the courts were so slow. Although virtually any straight reading of the applicable law (pre- or post-1989 Kosovo law, European human-rights law, whatever) made it clear that detainees could certainly not be held indefinitely without charge, many detainees were not released, even though they were not charged either.⁷⁴ Some suspects were also detained pursuant to the UN Special Representative's executive powers.⁷⁵

The UN administration's commitment to upholding human rights and the rule of law created another conundrum: holding people for indefinite periods without charge was surely a problem under anyone's reading of the law, but letting dangerous suspects — including a number of people accused of war crimes — back out into the streets also seemed unacceptable to NATO and UNMIK. Allowing criminals to run free would undermine all of the UNMIK and NATO efforts to restore order, reduce violence, and increase public confidence in the international community's commitment to good governance in Kosovo. UNMIK ultimately resolved this conundrum by issuing UNMIK Regulation 26, which noted blithely that "in order to ensure the proper administration of justice," pretrial detainees could be held for a *full year* if they were suspected of serious crimes.⁷⁶

Passage of this regulation did little to inspire confidence in the rule of law in Kosovo. Many Kosovars and international observers claimed that those suspects who were released (either through the exercise of prosecutorial discretion or because a judge determined that they had been held for excessive periods without charge) tended to be disproportionately Albanians who either had "connections" to powerful

74. *See id.*

75. *See* LEGAL SYS. MONITORING SEC., *supra* note 25; DEP'T OF HUMAN RIGHTS AND RULE OF LAW, *supra* note 25.

76. UNMIK REGULATION NO. 1999/26, *reprinted in* KOSOVO JUDICIAL ASSESSMENT MISSION REPORT, *supra* note 63, at app. C, 112.

people or who had committed revenge crimes against Serbs and other minorities, while those who continued to be detained were often minorities or those without powerful friends.

The story of missteps in creating the rule of law in Kosovo does not end here — I could go on to discuss further and more recent instances of ethnic bias, corruption, and intimidation in the courtroom, prison escapes, and so on.⁷⁷ But I think I have said enough to demonstrate the perils of equating formalism with the substance of the rule of law. Although UNMIK did its best to create all the formal trappings of the rule of law,⁷⁸ in the end it accomplished little and arguably undermined the rule of law for years to come. When UNMIK set up shop with 40,000 NATO troops, the Kosovars had just emerged from a long period in which the law was no more than a naked instrument of oppression — and UNMIK's inept approach to reestablishing the rule of law sent the message that law is, indeed, an arbitrary and manipulable thing, nothing that a person of integrity ought to heed. And in a society such as Kosovo, in which other conflict-resolution tropes exist — most notably, bloodfeud and outright war — such an inept formalism ultimately undermines itself.

This should not be a surprise. Much of the psychological and socio-legal work that has been done on why people obey the law reminds us that rational-choice theory tells us only a very little bit about law-abidingness. People may indeed weigh the risks and consequences of getting caught as they consider whether to break the law, but factors such as the perceived morality of the substantive law and the perceived legitimacy and procedural fairness of legislative and judicial processes are often of paramount importance in explaining why people do (or do not) behave in accordance with law.⁷⁹ In Kosovo, virtually *every* factor that might create the rule of law broke down, and UNMIK, because of its self-imposed limitations, proved incapable of putting the pieces back into place. Even a purely rational actor could certainly have concluded that despite NATO's overwhelming military presence, the odds of actually being caught and punished for committing a crime were quite low.

More important than that, however, the law struck many Kosovars as neither moral nor legitimate. In a society in which many people (by no means all, but enough) took seriously the idea that revenge was not

77. See LEGAL SYS. MONITORING SEC., *supra* note 25 (detailing flaws in the Kosovo justice system); DEP'T OF HUMAN RIGHTS AND RULE OF LAW, *supra* note 25 (same).

78. UNMIK had assistance from numerous other actors, from the OSCE to the American Bar Association's Central & East European Law Initiative.

79. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); see also Raymond Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 LAW & SOC'Y REV. 7 (1989) (noting that moral beliefs were more central to decisions about whether to break the law than assessments of the likelihood and seriousness of punishment).

only excusable but perhaps even morally required,⁸⁰ attempts to clamp down on ethnically motivated revenge crimes and ensure equal treatment for Albanians and Serbs struck many as unjust: Why, after all, should the international community permit the Serbs to escape the consequences of what many Kosovars saw as their (collectively) evil actions? When the process for selecting law and deciding how to reform legal institutions was so arbitrary, high-handed, and confused, the basic criteria for legitimacy were unmet. Little wonder, then, that efforts to create the rule of law in Kosovo have been so disappointing, in ways that should give pause to those optimistic about the ongoing efforts in Afghanistan and Iraq.

Do these Kosovo stories imply that changes in formal law never matter? Not at all. In fact, in some societies, formal law very clearly matters in a reasonably straightforward way to most people, most of the time. In the U.S., for instance, where we basically share a substantive normative commitment to the rule of law, changes in formal law certainly affect our behavior, generally (although not always) in ways that are possible to predict.⁸¹ If a judge orders a vote count stopped, it stops. If a statute is declared unconstitutional, it will not be enforced. If the law requires everyone to pay more in taxes, most of us groan, but comply.

In such a context — where there is a preexisting and broad cultural commitment to the amorphous bundle of values we call “the rule of law” — it makes perfect sense to see the law as an instrument of social change. Although the precise effect of changes in the formal law is often difficult to measure, it is probably correct to believe that changes in the law have helped bring about real changes in our society: changes in how minorities are treated, changes in the degree to which women are truly able to participate as equal citizens, changes in the distribution of wealth, and so on.⁸² In such a context, too, “reforms” designed to make courts more independent and to make legislation more consistent and up to date and to improve court administration find fertile ground, and may make precisely the difference they are designed to make.

In the U.S., then, formal law matters, and the same could certainly be said for Canada, most of Western Europe, and many other coun-

80. See Hasluck, *supra* note 66, at 382-83 (noting that revenge was not considered a choice but some sort of transgenerational duty); see also Oakes, *supra* note 66.

81. In any society in which the rule of law does exist in a substantive sense, norms and law are interconnected. As anthropologist Lawrence Rosen notes, “[L]aw is preeminently an artifact of culture: it is influenced by and constitutive of the way in which the members of a society comprehend their actions towards one another and infuse those actions with an air of immanent and superordinate worth.” Rosen, *supra* note 59, at 542.

82. *But see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that the changes in the law reflect, rather than cause, cultural change).

tries around the globe, from Japan to Costa Rica to Botswana. Nonetheless, even in these societies, formal law almost certainly matters less (and in more complicated ways) than lawyers and legal academics may like to think. As many legal realists have noted, what really goes on in the office of the divorce lawyer or the insurance salesman certainly has *something* to do with “the law” and with legal institutions, but that something is not always what we think; individuals and groups understand the law in different ways, and organize their affairs in ways that sometimes reflect the law, sometimes subvert it, and sometimes barely connect to it at all⁸³. The recent work of Robert Ellickson has reinforced this message: the law’s shadow is sometimes distorted, and often simply irrelevant to the bargaining process.⁸⁴

Consider also the Kosovo-like societies within the United States: the many inner-city communities, for instance, that are simultaneously oversaturated with law (in its most coercive manifestations) and that at the same time least resemble any robust conception of societies in which the rule of law prevails. The punitive measures of the “war on drugs” — along with the legacy of racism and police brutality — have left some impoverished minority communities in America disdainful of the idea of the rule of law,⁸⁵ and have created an environment in which alternative means of organizing social life and ordering violence (such as gangs) may appeal to increasing numbers of citizens.⁸⁶

Even in the United States, formal law matters only in ways more complex and inconsistent than we would like to think. If the relationship between formal law and substantive normative commitments — the relationship between formal law and cultural assumptions and behavior — is quirky and complicated even in the U.S., a nation that prides itself in having been built upon the idea of law’s supremacy, how much more quirky and complicated is that relationship in Kosovo, in Sierra Leone, in Russia, in East Timor, in Afghanistan, or in Iraq, all places where formal law has been so utterly discredited.

83. See generally JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990); LANGUAGE IN THE JUDICIAL PROCESS (Judith N. Levi & Anne Graffam Walker eds., 1990); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93 (1986); Barbara Yngvesson, “Kidstuff” and Complaint: *Interpreting Resistance in a New England Court*, in CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE 138 (Mindie Lazarus Black & Susan F. Hirsch eds., 1994).

84. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

85. See, e.g., Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000).

86. See, e.g., ELIJAH ANDERSON, *THE CODE OF THE STREET: DECENCY, VIOLENCE AND THE MORAL LIFE OF THE INNER CITY* 1-2 (1999); PHILIPPE BOURGOIS, *IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO* (1996).

The complex and sometimes tenuous relation between formal law and normative commitments that we find in the United States turns out to be culturally contingent and not generally exportable in any simple way. In societies that lack a strong and shared substantive commitment to the rule of law, changes in the formal law are likely to have little effect on people's behavior.⁸⁷

To put it a little differently, what we have is a serious chicken-and-egg problem: we know, more or less, that given certain widely shared normative commitments in a given society, formal law can lead to changes in cultural assumptions and behavior. But when such normative commitments are not widely shared, changes in formal law and the structure of legal institutions are likely to have little real impact. The paradox is that when people already believe law matters, it will matter; when people think law doesn't matter, it never can, and it is unclear how to go from the latter state to the former.⁸⁸

III. LAW, ORDER, AND VIOLENCE: A MISUNDERSTOOD RELATIONSHIP

Thus far, this Article has argued that international efforts to promote the rule of law tend to focus on changes in formal law and legal institutions, despite the lack of evidence to suggest that formalistic changes will lead reliably to changed normative commitments within a given community. In the context of Kosovo, I have suggested that such formalistic efforts may have actually undermined international attempts to create the rule of law, since UNMIK combined its formalistic approach with ignorance of local preferences, high-handedness when expressed local preferences failed to conform with UNMIK values, inconsistent messages, and, at times, sheer incompetence. But the problem goes even deeper, because recent international and U.S. efforts to promote the rule of law have been based on fundamentally flawed assumptions about the relationship between law, order, and violence.

The implicit assumptions about law, order, and violence at the root of most rule-of-law promotion efforts run something like this: "We need the rule of law in crisis-ridden societies such as Iraq, Afghanistan, Kosovo, East Timor, and Sierra Leone — as well as in

87. Rosen notes that this requires us to recognize the limits of law in constituting communities and influencing norms and behavior: "law may be quite central or quite secondary depending on the issue." Rosen, *supra* note 59, at 543.

88. Cf. KAHN, *supra* note 2, at 36:

The rule of law is a social practice: it is a way of being in the world. To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation. It is to understand the actions of others and the possible actions of the self as expressions of these beliefs. Without these beliefs, the rule of law appears as just another form of coercive governmental authority.

more stable places such as Russia and Guatemala — because the rule of law is essential to ensure that society functions in an orderly, predictable fashion. Without law, there will be violence and disorder. Where there is violence, there is disorder, and where there is disorder, there is violence. But disorder and violence are bad for human rights, bad for commerce, and a threat to international security. Rational people dislike chaos, violence, and suffering, and they like peace, predictability, and economic prosperity. Therefore, rational people desire the rule of law, since law brings order, reduces violence and suffering, and enables prosperity.”⁸⁹

There are two problems with these assumptions, the second more profound than the first. The first problem is that even if these assumptions are basically valid, serious collective-action problems arise in most postcrisis or “transitional” societies. The second problem is that most of our standard assumptions about the relationship between law, order, and violence cannot be justified at all. Law has no inherent ability to reduce violence or suffering, and what is more, some of the time at least, people actively prefer violence and suffering to peace and prosperity.

A. *Collective Action and Conflict Entrepreneurs*

The first problem is fairly straightforward. Even if we accept the notion that in the long run all rational people desire peace and order, in the short run some people profit greatly from disorder and from violence. Such people can be dubbed “conflict entrepreneurs.”⁹⁰ The people who profit from disorder and violence may be most reluctant to see the rule of law emerge triumphant, since the rule of law threatens their position and profits — and in extreme cases may place them in serious physical jeopardy, if they are prosecuted for crimes committed during the period of violence and disorder.

Thus, in Kosovo, Hashim Thaqi’s Kosova Liberation Army (“KLA” or, in Albanian, “UÇK”) was often (and accurately) accused by UNMIK and other international authorities of sabotaging rule-of-law promotion efforts by keeping stockpiles of illegal weapons, committing or encouraging politically motivated killings, and intimidating

89. For example, Richard Fallon describes the core values underlying most descriptions of the rule of law; he suggests that most commentators view a central purpose of the rule of law as protecting against “anarchy and the Hobbesian war of all against all.” Fallon, *supra* note 40, at 8.

90. See Democracy and Rule of Law Project, Carnegie Endowment for Int’l Peace, *Events: Combating Conflict Entrepreneurs* (Feb. 7, 2002), at <http://www.ceip.org/files/events/events.asp?p=1&EventID=453>. “Conflict entrepreneurs” may simply profit from violence and disorder; at other times, they may create a new violent order themselves, offering “protection” to those who cooperate in their activities.

judges into ruling in their favor.⁹¹ For the KLA, such a strategy made perfect sense: the KLA had been politically marginal in prewar Kosovo, sidelined by Ibrahim Rugova's Democratic League of Kosovo, which emphasized nonviolent resistance to Serbian oppression. In the years leading up to the NATO intervention, the KLA launched small-scale attacks on Serb targets (both military and civilian). It was labeled a terrorist group by many in the international community, but it slowly began to attract followers, mostly rural, mostly young, and mostly male.

Violent and disproportionate Serbian retaliation for KLA attacks created KLA martyrs — including civilians massacred indiscriminately by Serb forces — and the KLA gained more popular sympathy. During the NATO bombing campaign, the KLA recruited thousands of young men eager to avoid remaining passively in refugee camps and critical of Rugova's equivocal role during the conflict. Supported by generous financing from the Kosovar Albanian diaspora, KLA forces inflicted an unknown but probably substantial amount of damage on Serbian troops in Kosovo. As the only anti-Serb military force on the ground, the KLA was in frequent contact with NATO, which stopped just short of arming the KLA but provided tacit support by coordinating bombing attacks with KLA leaders.

When "peace" returned, however, the KLA's brash young fighters found the rug had been pulled out from under them. Initially hailed as heroes by other Kosovars for their wartime conduct, KLA fighters sought to transform themselves into a viable political force. They urged UNMIK to treat the KLA as the legitimate and effective (if unelected) government of Kosovo, the only group capable of administering and controlling Kosovo's villages. But NATO and UNMIK wanted to negotiate with older, clearer-headed Kosovars, not with young men mere steps away from terrorism, and Rugova reasserted his claim to be the moral leader of the Kosovars.

As it lost ground politically, the KLA found itself struggling to hold onto the power and wealth it had gained during the conflict. Organized crime quickly proved a natural and lucrative arena for the KLA, and soon the KLA could be relied upon to support the rule of law half-heartedly, at best. Without the rule of law, the KLA could have guns, power, and money, maintaining control by bribery and intimidation. Individual KLA supporters would have access to lucrative positions, fine houses taken from Serbs or from "uncooperative" Kosovars, and plenty of money and opportunities to offer their

91. See Gregory Piatt, *KFOR Trying to Crack Organized Crime Ring*, STARS & STRIPES (Wash., D.C.), Nov. 28, 2000, available at <http://ww2pstripes.osd.mil/article.asp?section=104§ion&article=5236&archive=true>; see also Erin Schultz, *The UN in Kosovo: The Potential for Justice*, PROSPECTUS (Center for Strategic and International Studies, Washington, D.C.), Spring 2000, at <http://www.csis.org/pubs/prospectus/00springSchultz.html>.

families. The rule of law, in contrast, offered few short-term attractions. With the rule of law, many KLA soldiers would return to the state they were in before the conflict: no jobs, no means of income, no power, no future.

Even aside from the KLA, there were plenty of other Kosovars for whom the rule of law was unattractive in the short term. Many ordinary people who did not particularly support the KLA were nonetheless reluctant to turn over stockpiled weapons to NATO and UNMIK, reluctant to use the new courts, and inclined to take law into their own hands. Few Kosovars believed that NATO and UNMIK could or would protect them if things went wrong, and to many, involving NATO or UNMIK in a dispute over a violent crime or a property matter seemed like an excellent way to become enmeshed in red tape, more or less forever, while one's enemies prospered. Some ordinary Kosovars "acquired" cars or houses or appliances during the chaos; all of these people stood to lose a great deal if the rule of law were truly restored. And for those who had lost a house or a relative, informal kin and friendship networks often led to the KLA, which might remedy a loss in exchange for support. Why have faith in the rule of law when organized crime and the KLA offered a more reliable way to solve problems?⁹²

Much of this, of course, was beyond the control of UNMIK and NATO. It might well be that if NATO and the UN had moved more aggressively to police the borders, confiscate illegal weapons, detain criminal suspects (not just those caught red-handed in the commission of the most serious crimes), create new jobs in rural and urban areas, and set up an effective system for reclaiming stolen property and compensating people for wartime economic losses, ordinary Kosovars would have been more willing to support the rule of law and the KLA's incentive structure would have shifted as legitimate opportunities opened up. But although sheer incompetence hindered UNMIK efforts at times, UNMIK and NATO were both captive to the interests

92. Historically, groups like the KLA may well have been the precursors of numerous respectable national governments. As Charles Tilly notes, the notion of the statemakers as coercive and entrepreneurial is more accurate than the vision of a social contract:

War makes states Banditry, piracy, gangland rivalry, policing and war making all belong on the same continuum To the extent that the threats against which a given government protects its citizens . . . are consequences of its own activities, the government has organized a protection racket. Since governments themselves commonly simulate, stimulate, or even fabricate threats of external war and since the repressive and extractive activities of governments often constitute the largest current threats to the livelihoods of their own citizens, many governments operate in essentially the same ways as racketeers.

Charles Tilly, *War Making and State Making as Organized Crime*, in BRINGING THE STATE BACK IN 169, 170-71 (Peter B. Evans et al. eds., 1985). In Kosovo, there is little doubt that the KLA turned to straightforward racketeering — but unlike UNMIK's attempt to regulate behavior, extract taxes, etc., the KLA's racketeering was both more transparent and more competent from the vantage point of many Kosovars. Little wonder that the KLA seemed a more viable governing force to many.

of their member states — and like all UN entities, UNMIK was only as effective as UN member states were willing to let it be; NATO troops, in turn, were only as effective as NATO member states allowed. The U.S., Britain, France, Russia, and other key players kept NATO and UNMIK too limited in resources and mandate to be effective. To some extent, then, it was inevitable that efforts to create the rule of law in Kosovo would fall far short of the mark.

Such collective-action problems are not unique to Kosovo. They plague most transitional and postcrisis societies, since there will always be those who reap short-term profit from violence and disorder. In Afghanistan, for instance, the U.S.-backed warlords of the Northern Alliance are currently a larger threat to security and the rule of law on the ground than the Taliban or al Qaeda. For many ordinary Afghans, warlordism is a disaster, but for the warlords, warlordism works exceptionally well. With profits from the opium trade and illegal-weapons trade, Afghan warlords and their clients fare far better now than they conceivably would in a peaceful, democratic Afghanistan.⁹³ In Iraq, we see early indications of the same phenomena, as individuals and groups rush to take advantage of the current leadership vacuum, seeking profit, revenge, or political power.⁹⁴

B. *The Lure of Violence*

Standard assumptions about the relationship between law, order, and violence often overlook the kinds of short-term, collective-action problems described in the preceding section, but they also suffer from a more profound flaw. To put it bluntly, contrary to much legal mythologizing, there is little correlation between law, order, and violence. This is in part because many people value moral meaning more than they value safety and prosperity.⁹⁵ As a result, for some people, in some places, some of the time, violence and suffering are actually more attractive than peace and prosperity, not simply because violence offers a chance to gain power and wealth, but because killing

93. See Rosa Ehrenreich Brooks, *Afghanistan: After Bombs Must Come Civil Rights*, L.A. TIMES, Nov. 25, 2001, at M1; see also Ahmadi, *supra* note 16; *Afghanistan Weekly Situation Reports I*, *supra* note 16; *Afghanistan Weekly Situation Reports II*, *supra* note 16.

94. See, e.g., Jason Burke, *The Struggle for Power: Arabs Flee the Revenge of the Kurds*, OBSERVER (London), Apr. 20, 2003, at 14, available at <http://www.observer.guardian.co.uk/international/story/0,6903,940160,00.html>; Paul McGeough, *Chaos Reigns in a Land of Fear and Revenge*, SIDNEY MORNING HERALD, Apr. 12, 2003, available at <http://www.smh.com.au/articles/2003/04/11/1049567875707>.

95. Cf. KAHN, *supra* note 2, at 5. Kahn notes:

It may be that any state that wants to participate in the new, international economic regime will have to order itself under [a Western] conception of the rule of law. Doing so may very well bring an increase in material benefits to that community. Whether it will produce a life as full of meaning as the alternatives is an open question.

Id.

(or dying) for a cause can seem far more important — indeed, more appealing — than mere survival or acquiring wealth. Are such preferences “rational”? Perhaps not, but such preferences can certainly be powerful.⁹⁶

The myth we tell ourselves about law still owes a great deal to Hobbes. From a Hobbesian perspective, law is necessary because a world without law is a world of pervasive and uncontrollable violence.⁹⁷ In this view — shared, to one degree or another, by most Enlightenment and post-Enlightenment legal theorists — law arises as a response and an alternative to violence. Indeed, many would assert that law is the very antithesis of violence, since law seeks to create a system of social order and moral meaning based upon reason rather than brute force.⁹⁸

Empirically, there is little reason to believe this is true, at least if we consider law in the formal sense⁹⁹ (and, as I have already argued, most rule-of-law promotion efforts are premised on a deeply formalistic understanding of law¹⁰⁰). In fact, empirically there seems to be little correlation at all between law, in the formal sense, and order and violence.

Consider several brief examples:

Order without law: In his study of cattle-related disputes in rural Shasta County, California, Bob Ellickson explicitly took on Hobbes’s equation of anarchy with chaos. In Shasta County, the laws governing wandering livestock were unknown to most residents. To the extent that county residents were aware of relevant laws, they often

96. Recent events in the Middle East underline this, as do the events of September 11. For a discussion of this general phenomenon in the context of consumerist capitalism versus religious and tribal fundamentalism, see BARBER, *supra* note 57.

97. See THOMAS HOBBS, *LEVIATHAN* 185 (Penguin English Library 1981) (1651) (“Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.”). In the state of war, Hobbes writes, there is “worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.” *Id.* at 186. Although Locke and many others modified this bleak view, the basic assumptions remained the same: men enter society to avoid the state of war.

98. Of course, as Robert Cover, Austin Sarat, and many others have pointed out, law also relies on violence for its efficacy. See Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986); Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in *THE FATE OF LAW* 209 (Austin Sarat & Thomas R. Kearns eds., 1993). For Cover, Sarat, and their intellectual progeny, this raises a troubling question: Is the violence of the law really any different from the violence that the law claims to prevent and combat?

99. If we choose to think of law in a less formal sense, we risk assuming what we need to prove. That is, if we start from the premise that law is a set of normative commitments, and a set of functioning institutions that relate to violence in particular ways, we beg the question of how and why certain formal institutions come to be accompanied by certain sets of normative commitments.

100. Or they are premised on an assumption that the forms of law will lead reliably to substantive commitments to the rule of law.

misunderstood the nature of the laws in significant ways, and the laws rarely influenced people's behavior. Indeed, Ellickson noted, "large segments of social life [were] located and shaped beyond the reach of law."¹⁰¹ Nonetheless, Shasta County was, by and large, a peaceable, orderly place, although little law was in evidence, and even the shadow of the law was rarely evident. Indeed, strong norms favoring cooperation, nonhierarchical coordination, and "neighborliness" prevailed and actively discouraged the use of centralized, legalistic solutions to problems involving straying livestock.¹⁰²

Nazism and the "order of terror":¹⁰³ In Hitler's Germany, there was a superfluity of formal law: no matter was too large or too small to be minutely regulated, and some scholars have in fact attributed the Holocaust to deeply rooted German cultural attitudes towards law and authority.¹⁰⁴ In the purely positivist sense, the Nuremberg laws and ultimately the death camps were all "legal,"¹⁰⁵ and the death camps themselves were triumphs of orderly murder, complete with roll calls, parades, inmate numbers tattooed upon flesh, and minutely detailed records. Law was pervasive and order rigidly maintained; yet both the law and the order coexisted comfortably with the most appalling violence and suffering, deliberately inflicted. Here, law and order not only failed to decrease violence — they were intimately and causally bound up with horrific violence.¹⁰⁶

Urban America and the "code of the street": Consider certain American inner-city communities in the 1980s and 1990s. Marred by poverty, crime, and violence, such communities were seen by many outsiders as nests of disorder, areas in which ordinary behavioral rules did not apply, and outbreaks of illegal violence could be as unpredict-

101. See ELLICKSON, *supra* note 84, at 4.

102. See *id.*

103. See WOLFGANG SOFSKY, *THE ORDER OF TERROR: THE CONCENTRATION CAMP* (1993).

104. See, e.g., DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1997).

105. This caused something of a dilemma for the architects of the Nuremberg trials, who had to resort to rather vague notions of custom and usage to respond to the objection that prosecuting Germans for their acts violated the principle of legality.

106. See SOFSKY, *supra* note 103. Many have objected to a positivistic or formalistic understanding of law precisely because it can both coexist with and enable extreme brutality and suffering. Consider the famous Milgram experiments, in which college students were told to inflict what they thought were painful and even potentially lethal electric shocks on others. For the most part, the student subjects of the experiments were entirely willing to inflict what they believed to be terrible pain on others, once they had been assured that doing so was "part of the experiment." The authority of those running the experiment allowed the students to displace any anxiety or guilt about hurting others in the same way that law under the Nazis presumably played a critical role in enabling ordinary Germans to shrug off their fears that the treatment of Jews was wrong: if the law dictated it, then it must be all right. Milgram's experiments are discussed in Sarat & Kearns, *supra* note 98.

able as they were lethal.¹⁰⁷ Nonetheless, such communities were filled with “law.” Indeed, as I have already noted, they were oversaturated with law in its most coercive manifestations. The criminal law remains a daily presence in many poor urban communities, extending its long arm through the war on drugs and, more recently, the war on gangs. In part as a result, America’s prisons are populated disproportionately by young, black men from inner-city areas.¹⁰⁸ But despite the irreducible centrality of law, such communities remained, from the perspective of outsiders, stubbornly prone to violence. Even with nearly a fourth of young black men in prison at one point or another, the violence (some, but not all, drug-related) continued more or less unchecked.¹⁰⁹ In this setting, law, though omnipresent and overtly coercive, has proven utterly unable to fulfil its promise to replace and minimize violence. If anything, the law may have even increased certain kinds of oppositional violence: law became so discredited that illegal violence took on its own mystique for some people.¹¹⁰

Despite the violence, there was also plenty of order in even the most “dysfunctional” inner-city American communities, although the nature of the order was far from apparent to most outsiders (and bewildered some insiders as well). By and large, even the violence in inner-city communities followed certain widely understood rules: there was “good” and “bad” violence, heroic violence and shameful violence, violence that was easily understood as following inevitably from certain kinds of competitions, challenges, and transgressions. To the (mostly young) men and women at the center of the violence, the violence was sometimes exhilarating, sometimes appalling, but generally perfectly intelligible and predictable.¹¹¹

This widespread extralegal violence contrasts with the situation in Nazi Germany, where almost unimaginable violence was an integral and carefully planned part of the legal order. Under the Nazis, law

107. See generally ANDERSON, *supra* note 86.

108. See HUMAN RIGHTS WATCH, UNITED STATES: PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (June 2000), at <http://www.hrw.org/reports/2000/usa/>.

109. The recent decline in urban crime rates is more plausibly attributed to shifting demographics and economic patterns than to the changed legal framework. See JEREMY TRAVIS & MICHELLE WAUL, URBAN INST., REFLECTIONS ON THE CRIME DECLINE: LESSONS FOR THE FUTURE? (Aug. 2002), available at http://www.urban.org/UploadedPDF/410546_CrimeDecline.pdf.

110. See generally ANDERSON, *supra* note 86.

111. See *id.* at 1-2. Anderson notes that:

In some of the most economically depressed and drug- and crime-ridden pockets of the city . . . a “code of the street” often holds sway. At the heart of this code is a set of prescriptions and proscriptions, or informal rules, of behavior organized around a desperate search for respect that governs public social relations, especially violence, among so many residents, particularly young men and women.

Id.

created extreme order, and it also (not coincidentally) created unprecedented kinds of violence and suffering, all wholly “legal.” In some American inner-city communities, by contrast, law has utterly failed to constrain illegal violence, and may indeed have encouraged extralegal violence through its crudeness and inequity. Meanwhile, order has nonetheless emerged — although that order has everything to do with violence, and little to do with “law.”

Bloodfeuds and martyrs: In nineteenth-century Albania, there was effectively no central government.¹¹² There were no legislatures, no statutes, no courts, no police, and no prisons. Albania was a violent land; murders were frequent, and from time to time bloodfeuds depopulated whole villages. But although law was absent, and violence pervasive, Albanian society was both exceptionally egalitarian¹¹³ and extremely well-ordered. No social or economic elites held even a near-monopoly on violence or the means of production, and the violence itself followed an elaborate system of rules laid out in oral tradition (and eventually recorded by a monk as the “Code of Lek” or the “Kanun of Leke”). The oral tradition associated with the Code of Lek laid out rules governing numerous aspects of social behavior, from marriage and family relations to murder, revenge, and compensation.

Crucial to the entire code was the notion of honor.¹¹⁴ Without honor, life was not worth living; a man without honor was socially “dead.”¹¹⁵ The primary way for the dishonored to be restored to honor was through revenge, and the Code of Lek offered detailed guidelines for responding to various degrees of insult and injury. Revenge was never to be arbitrary or excessive; the Code specified the precise ways in which revenge might be taken, and outlined the limits on revenge and the etiquette of revenge (for example, revenge could not be taken on women, except in certain specified and exceptional circumstances; also, the relatives of the dead must be notified in certain specified ways and times that their loved one had been murdered¹¹⁶). By and

112. See Hasluck, *supra* note 66.

113. Among ethnically Albanian men, at least. See *id.*

114. See *id.* at 382-83. The Albanian bloodfeud was not dissimilar from bloodfeud traditions in Icelandic, Somalian, Berber, and Chechen cultures. See, e.g., WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* (1990); see also ANATOL LIEVEN, *CHECHNYA: TOMBSTONE OF RUSSIAN POWER* (1998). Some scholars have suggested that modern law emerged from the bloodfeud (certainly the laws of war emerged from a conception of war as an obligation linked to ideas of honor). See A.W.B. Simpson, *The Agincourt Campaign and the Law of War*, 16 MICH. J. INT'L L. 653 (1995) (reviewing THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES* (1993)).

115. See Oakes, *supra* note 66, at 220.

116. For instance, the Code of Lek states:

The murderer, if he is able to do so himself, turns the victim over on his back. If he can, well and good; if not, he must tell the first person he meets to turn the victim over on his back

large, most nineteenth-century Albanians seem to have taken the Code of Lek quite seriously, and obeyed it to at least the same degree to which modern Americans obey the law. When transgressions occurred, they were punished by social disapproval — and in extreme cases, by collective punishments, shaming rituals, or exile from the community.¹¹⁷ In nineteenth-century Albanian society, there was no law in the modern formalistic sense — no courts, no legislatures, and so on — but one finds plenty of order, albeit a violent order.

The cult of martyrdom promulgated by some extremist Islamic organizations such as Hamas and al Qaeda presents similar issues. Those who are willing both to kill and die on behalf of their religion are people who (more or less by definition) disobey earthly laws in order to be obedient to a higher law. As in bloodfeud cultures, some people in such extremist cultures value honor or religion over life. Although formal law may be minimal or ignored, the violence that exists is orderly, intelligible, and in fact may appear laudable when seen from within the perspective of extremist religious belief.¹¹⁸

“Anarchy” and state dissolution: State structures never truly existed in nineteenth-century Albania. If we look at a more recent example of state structures that existed and then imploded, we see similar developments. In Somalia in the early 1990s, state dissolution was rapid and experienced by many Somalis as chaotic. Nevertheless, although state structures remain nonexistent in most of Somalia, “disorder” was short-lived in the sense that people rapidly fell back both on older modes of social organization (based on lineage and clan loyalty, in some cases, and on Islam in other cases) and on newer modes of social organization that became suddenly useful.¹¹⁹ Levels of violence remained high in postdissolution Somalia, but for most Somalis, the violence itself became ordered and predictable within a relatively short time.¹²⁰ (The same could be said for Kosovo after the NATO air campaign ended: a period of chaos ensued, but Kosovar society rapidly became orderly again, although the nature of the order was violent.)

For some Somalis, life after the dissolution of the state was more dangerous and less pleasant than before; for others — including many

and place his weapon near his head. The murderer may not dare to take the victim's weapon. If he commits such a dishonorable act, he incurs two blood-feuds.

Code of Lek, *quoted in* Oakes, *supra* note 66, at 192; *see also* Hasluck, *supra* note 66, at 389.

117. *See* Hasluck, *supra* note 66; *see also* REKA, *supra* note 66.

118. *Cf.* BARBER, *supra* note 57; Barbara Ehrenreich & Rosa Ehrenreich Brooks, *A Twisted Sense of Duty and Love*, *PROGRESSIVE*, Nov. 2001, at 10.

119. *See* Anna Simons, *Somalia and the Dissolution of the Nation-State*, 96 *AM. ANTHROPOLOGIST* 818 (1994); *see also* William Finnegan, *Letter from Mogadishu: A World of Dust*, *NEW YORKER*, Mar. 20, 1995, at 64.

120. *See* Simons, *supra* note 119.

of the young fighters employed by clan warlords — life in postdissolution Somalia was markedly better than it had been before. For most people, life went on somehow or other; as Bill Finnegan noted in a 1995 *New Yorker* article, “[E]ven while Somalia has no government, a great deal of political decision-making does get done, most of it . . . indistinguishable from what goes on . . . when there is a government.”¹²¹ As a result, in postdissolution Somalia, ordinary people continued to have children, celebrate marriages, observe religious rituals, start businesses, borrow and repay debts, teach their children, and invest in the future — even while clan warfare continued unabated around them. In postdissolution Somalia, then, as in Albania, the absence of law coexisted with both order and a great deal of violence.

C. *The Moral Meaning of Violence*

What should we make of all this? First, we should probably conclude that “order” is the default setting in human societies. All societies go through periods of genuine chaos and rapid change, caused sometimes by natural disaster, sometimes by war, sometimes by economic collapse. During these periods, social relations may be disrupted, institutions may collapse, and old modes of interacting may rapidly become irrelevant or impossible. But even in the midst of “chaos,” patterns can usually be found: modes of interaction that persist in times of crisis,¹²² and new modes of interaction that emerge rapidly to fill gaps created by the collapse of old institutions and customs.

As anthropologist Anna Simons suggests, it may be there is “an organization to dissolution” itself,¹²³ and that disorder and dissolution are best viewed “as the liminal phase between two segments of order and structure.”¹²⁴ Nature abhors a vacuum, and humans abhor disorder. It is probably in the nature of human beings to create order as quickly as possible, since total unpredictability makes species survival difficult. Human societies appear able to carry on for long periods of time with astronomically high levels of violence and suffering, as long as there is at least some reasonable degree of predictability and pattern to the violence.

If order is the default mode for human societies, however, it is almost certainly wrong to imagine that formal law (in the modern

121. Finnegan, *supra* note 119, at 70.

122. See John Davis, *The Anthropology of Suffering*, 5 J. REFUGEE STUD. 149 (1992).

123. Simons, *supra* note 119, at 822; see also PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998).

124. See Simons, *supra* note 119, at 822.

sense of statutes, courts, and legislatures) has much of anything to do with order. The examples I have just given strongly suggest that as long as there is not a constant barrage of disastrous and unpredictable external events, human societies will find patterned ways to organize themselves to allow planning and predictability. They will use custom, rituals, habits, cooperative behavior, and sometimes force — but order will almost certainly emerge, law or no law. As Bob Ellickson rightly suggests, this should give pause to those who imagine that the modern regulatory state is the only possible way to successfully organize human society.¹²⁵

Of course, not all types of “order” are equal. A high degree of order is entirely consistent with extraordinary amounts of violence and suffering, and to say that order will inevitably emerge from periods of chaos says nothing about the degree or distribution of suffering.¹²⁶ In Nazi Germany, order (and plenty of law) coexisted with appalling suffering, differentially distributed to affect Jews and various other “undesirables,” such as gypsies, communists, and homosexuals. In nineteenth-century Albania, women had little role in public life, and had simply to accept the bloodfeuds that could ultimately claim all their male kin; “outsiders” such as gypsies and foreigners were entirely marginalized.¹²⁷ In Shasta County cattle disputes, there was little violence or suffering, but as Ellickson’s work implicitly suggests, the order that existed benefited some more than others. Thus, “newcomers” were more likely to turn to formal law, since they lacked other means of penetrating a tightly knit social network and resolving disputes collaboratively.¹²⁸ In postwar Kosovo, ethnic Albanian men

125. See ELLICKSON, *supra* note 84, at 4.

126. Some of the early law-and-economics literature on the role of social norms can seem rather Panglossian at times, assuming that free of interference from meddling governmental actors, groups will naturally develop ways of interacting that are not only orderly but presumably work well for all involved. Although little of the literature on law and norms draws upon the classics of social anthropology, this Panglossian tendency was common in early functionalist anthropological works — and has been roundly criticized since then. Contrast Bronislaw Malinowski’s emphasis on coordination and reciprocity in “primitive” societies, BRONISLAW MALINOWSKI, *FREEDOM AND CIVILIZATION* 186 (1947), with Edmund Leach’s scathing critique. Leach writes:

[T]he functionalists always try to have it both ways. If the manifest overt purpose of a custom is to emphasize values of which the anthropologist himself approves — e.g., social cohesion, the liberty of the subject, fair shares for all — then this aspect of the custom will be stressed; if on the other hand the manifest form of the custom runs contrary to the anthropologist’s own ethic — e.g., customs involving feud, murder, rebellion, torture, etc. — then an intricate piece of special pleading will be introduced which will “demonstrate” that the custom in question is not what it seems; that the actual, as distinct from the apparent, outcome of the institution is social cohesion, liberty of the subject, etc.

Edmund Leach, *Law as a Condition of Freedom, in THE CONCEPT OF FREEDOM IN ANTHROPOLOGY* 74, 82 (David Bidney et al. eds., 1963).

127. See Hasluck, *supra* note 66.

128. Cf. David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, in CAROL J. GREENHOUSE ET AL., *LAW AND COMMUNITY*

with guns thrived; others (especially in minority groups) suffered enormously. In Somalia, people with close ties to powerful clans did rather better than others.¹²⁹ In some American inner cities, the violent order that has been created by gangs may be experienced as positive by those young men who find status and wealth through gang affiliations and conflicts, but older citizens and many women experience the violence as debilitating and painful, making bringing up children and going to work exceptionally difficult.¹³⁰

It should also be evident that the presence or absence of formal law has as little to do with violence as it has to do with order. Like order, law can coexist with extreme violence, and the existence of law tells us little about how violence and suffering are distributed within society. As the most cursory dip into the rich ethnographic literature on stateless societies suggests, lack of formal legal structures can be accompanied by equitable and peaceful forms of social organization, equitable and violent forms of social organization, peaceful but inequitable forms of social organization, and forms of social organization that are both violent and inequitable. Similarly, societies possessing the full legal apparatus of the modern state can be organized in a very wide range of ways.

But if law is not creating order or reducing violence, what is it doing? The answer is that law is simply one of the many mechanisms human beings have developed to give moral meaning to violence. Every human society experiences some degree of conflict and suffering; the central question for each society is how to make sense of the kinds of violence and suffering that occur.

In societies without law in the modern sense, myths, customs, and rituals give moral meaning to violence. They tell people that killing a relative is bad, but killing an “enemy” from another group is good, or that death in battle is blessed, while death through illness is shameful, or that illness is sent by God to test a person’s mettle, or is caused by witchcraft and must be avenged, or that a brave person turns the other cheek. There are as many ways to organize and make sense of violence and suffering as there have been human societies in the world.

IN THREE AMERICAN TOWNS 27 (1994). Engel notes that in Sander County, Illinois, old-time residents filtered anxieties about an influx of immigrants into their town through concerns about excessive personal-injury litigation. Newcomers were indeed more likely to turn to litigation to resolve disputes, but not out of any inherent litigiousness. The newer, poorer, ethnically different, and more marginal residents of the town lacked an alternative social safety net arising out of strong family and social networks. For them, litigation was a sign of exclusion from a cohesive and cooperative social system, and represented the only means of getting help when injuries occurred. See Carol J. Greenhouse, *Interpreting American Litigiousness*, in *HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY* 252 (June Starr & Jane F. Collier eds., 1989). See generally ELLICKSON, *supra* note 84, ch. 5.

129. See Simons, *supra* note 119, at 820.

130. See ANDERSON, *supra* note 86.

In modern states, law is itself a form of ritual and, to use anthropologist Paul Bohannan's phrase, a set of "double-institutionalized" norms.¹³¹ Formal law will be most successful when its rituals are widely acknowledged as meaningful and appropriate, and when the norms it embodies are widely shared by its subjects. But whether or not law's subjects regard it as legitimate, law always represents an effort (at least on the part of those who create it) to organize and give moral and social meaning to violence and suffering.

Again, however, law does not generally or necessarily operate to *reduce* violence and suffering. Sometimes law is part of broader cultural patterns that do tend to reduce violence and suffering. But law can equally be part of broader cultural patterns tending to increase violence and suffering. (And in either case, law cannot be cleanly separated from other aspects of culture.) Law attaches labels to certain kinds of violence and suffering. It labels violence and suffering socially beneficial or socially detrimental, deliberate or accidental, preventable or inevitable.¹³² As such, in many modern societies in which the law embodies widely shared norms, the law is an important part of how people come to terms with suffering and violence.

D. *Auto "Accidents" and Felony "Murders"*

Law's role in giving meaning to violence can be illustrated by reference to several examples from modern America, where most of us accept the law's legitimacy (in other words, where most of us believe in something we call "the rule of law"). First, consider some familiar aspects of criminal law. On the most obvious level, law tends to excuse "self-defense" and "accident," while it punishes "murder."¹³³ Modern criminal law, as Austin Sarat and others have pointed out, also defines most state-sponsored violence as good or appropriate

131. Paul Bohannan, *The Differing Realms of the Law*, in LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT, *supra* note 66, at 43, 43.

132. I don't mean to imply, here, that labeling violence is law's sole or primary function. After all, law is also concerned with the regulation of commercial affairs, family life, and many other things. My argument is simply that to the extent law is concerned with violence, it exists not to reduce it, but to categorize and give it meaning.

133. Much of the time, of course, litigants disagree about how to label a particular act of violence or injury, and much skirmishing occurs over how to create a legal fact. This is important both because the tangible consequences of different legal labels differ ("murder" can send someone to jail; "negligence" can lead to demands for compensation, etc.), but also because the law helps construct the social meaning of events: it tells us how to "read" violence and suffering. In a sense, "murder" and "accident" are empty categories, filled by culture. For example, in some traditional Islamic cultures, killing to avenge certain kinds of insult (such as adultery) are not construed as murder, while variants of respondeat superior are invoked to turn what American legal culture would deem "accident" into crime. How empty categories are filled tells us a great deal about a particular culture, but very little about "law" per se.

violence, while defining most private violence as bad.¹³⁴ Thus, the pain and suffering caused by imprisonment or even the death penalty are deemed acceptable, while the murderer's act fill most of us with horror and are punished by the law.

Of course, it could be said that American criminal law assigns such meanings to violence and suffering precisely in order to reduce violence and suffering. But it is far from clear that modern American criminal law in fact operates to reduce violence and suffering. This is a hotly contested issue, but many have produced compelling evidence (both theoretical and empirical) to suggest that our criminal law spawns quite as much violence as it prevents — and that our law defines out of existence certain categories of human suffering. Thus, it is argued that the death penalty not only fails to deter violent crime, but may indeed send a contrary message, one that indicates that life is not terribly important after all, since the state itself may take it away from its citizens.¹³⁵ Similarly, some note that many acts of private violence are seen as “law affirming” by their perpetrators.¹³⁶

Moving away from criminal law, consider modern American tort law. Guido Calabresi has argued that tort law can be understood as a method of allocating the costs of accidents.¹³⁷ Tort law thus represents a set of implicit (and sometimes explicit) judgements about cheapest-cost avoiders, but it also represents implicit judgements about good and bad acts, avoidable suffering and unavoidable suffering, acceptable violence and unacceptable violence.¹³⁸ More than fifty

134. As Austin Sarat and Thomas Kearns note, the law does this in part by rhetorically effacing its own violence at the same time it rhetorically exaggerates private violence. See, for example, Sarat and Kearns's rhetorical analysis of *Francis v. Resweber*. Sarat & Kearns, *supra* note 98, at 213-18. See Robert Weisberg as well, noting that law wishes to assert that force is categorically distinct from violence: “Violence is naturally imputed away to the other — to the image of a separate criminal class distinct from normal humanity.” Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, in LAW'S VIOLENCE 175, 176 (Austin Sarat & Thomas R. Kearns eds., 1992).

135. See generally GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES 76-77 (1971) (noting dryly the odd fact that “society has chosen to reduce the criminality of the offender by forcing him to associate with more than a thousand other criminals for years on end”); THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE (Austin Sarat ed., 1999).

136. See Weisberg, *supra* note 134, at 196. Noting that the modern state has not, in practice, truly achieved a monopoly over violence as law enforcement. Weisberg suggests that many “criminals” see themselves as sacrificing themselves for the greater good, pronouncing sentence on those who have done wrong, or enforcing legitimate moral and legal norms through their violent actions. Weisberg suggests that law may in fact “inspir[e] and embolden[]” criminals through the ritual and theatrical aspects of punishment. *Id.* Gourevitch and others note that in a different context, even genocide is seen as order affirming and community creating by its perpetrators. See GOUREVITCH, *supra* note 123.

137. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

138. See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1990).

thousand Americans die every year in auto accidents, and hundreds of thousands more are injured; thousands are permanently maimed. These injuries and deaths occur as a result of collisions between speeding hunks of metal, which, in turn, occur because American society has decided that convenience and speed are worth more to us than saving lives.

As Calabresi reminds us, we know perfectly well that torn, charred, and crushed flesh and bones will result from our desire for speed and convenience, and in this sense the thousands of deaths every year are knowingly inflicted by all Americans, collectively. Tort law may assign one party to an accident the responsibility for paying damages, and in extreme cases the criminal law may label one party criminally liable. But for the most part, our law regards fifty thousand mangled corpses as “inevitable” and “accidental,” a regrettable but acceptable by-product of the American desire for convenience.¹³⁹

Contrast this with the many fewer deaths that occur as inadvertent by-products of robberies motivated by drug addiction or economic desperation, the deaths that occur when poor people who rob convenience stores panic and end up killing the store clerk, and so on. In some sense, such deaths are also “inevitable” and “accidental” in a society characterized by great income inequality, yet our laws label the resulting corpses anomalies that must not be permitted to exist. Thus, in many states, felony murder (where a defendant was merely a participant in a felony that led to a murder, although he did not participate in the murder, and did not desire the murder) is punished as severely as other murders.

My point here is not that automobiles should be forbidden and felony murderers set free. On the whole, I benefit from and approve of the social order that puts felony murderers in prison and allows the rest of us to drive with abandon, even though the death and suffering caused by our greedy desire for speed is far greater than the death and suffering caused by the felony murderer’s greedy desire for cash. My point (as many others have noted before me) is that there is nothing “natural” or inevitable about how we categorize things: auto “accidents” and felony “murders” both represent choices about what behavior we approve and what behavior we dislike.

E. *Terrorism and Torture*

I want to move a step beyond this basic argument, however, and note its implications for how we think about violence and law. Auto accidents and felony murders represent, specifically, a decision to assign different kinds of moral meaning to different kinds of violence

139. See generally CALABRESI, *supra* note 138; CALABRESI & BOBBITT, *supra* note 138. HeinOnline -- 101 Mich. L. Rev. 2316 2002-2003

and suffering. The many deaths from auto accidents are “no one’s fault,” although driving carries a known and quantifiable risk of death. The fewer deaths from felony murders are the “fault” of the hapless accomplices to felonies. Thus, even in America, with its “rule of law” culture, it is far from clear that the law *reduces* violence and suffering in any abstract sense. Instead, the law assigns moral and social meaning to violence and suffering. It is less interested in the sheer quantity of violence and suffering than in labeling that violence and suffering so as to render it more intelligible and meaningful. Humans may well desire peace and prosperity, but often they desire meaning even more.

When we examine them closely, even those areas of law that we consider most centrally concerned with reducing violence and suffering reveal themselves as having different preoccupations. Take an example from international human-rights law: human-rights law insists that the prohibition on torture has the character of a peremptory norm. Unlike certain other human rights, the prohibition on torture is nonderogable. According to the Torture Convention, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁴⁰

When it comes to torture, human-rights law has a Kantian absoluteness. There is no possible end that can justify torture as a means. Thus, when faced with certain old chestnuts, human-rights law offers a rigid response. If the police catch the terrorist who knows how to defuse the hidden nuclear bomb that will shortly destroy New York City, may the police torture the terrorist to find out the bomb’s location? The answer from human-rights law is a resounding no. From the perspective of human-rights law, if the terrorist cannot be convinced through reasoned argument to reveal the bomb’s location, then New York will just have to vanish in a nuclear holocaust.¹⁴¹

It would be difficult to claim, in this instance, that human-rights law is primarily concerned with the reduction of violence and suffering.¹⁴² From the viewpoint of the utilitarian, preventing ten million

140. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. 39th Sess., Annex, Supp. No. 51, at 197, U.N. Doc. A/39/51 *opened for signature* Dec. 10, 1984 (entered into force June 26, 1987), available at http://www.unhcr.ch/html/menu3/b/h_cat39.htm.

141. I was recently at a forum sponsored by the Kennedy School of Government where several prominent American human-rights lawyers asserted precisely this. But compare Alan Dershowitz’s controversial op-ed in the *Los Angeles Times*, asserting that in such situations, torture might well be appropriate. Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at 19.

142. Cf. Paul W. Kahn, *Lessons from International Law from the Gulf War*, 45 STAN. L. REV. 425, 436 (1993) (“[T]here is no direct correlation between complying with international legal rules and minimizing suffering The suffering permitted within the rules of international law is stunning.”) Kahn notes — critically — that when it comes to the laws of war, “[I]nternational law in its present form shows more concern with antiquated concepts of chivalry among combatants than with the modern reality of mass destruction.” *Id.* at 437.

deaths is far more urgent than cossetting one terrorist. So what is human-rights law trying to do? It is trying to make a statement about the moral meaning of human action. It is not in fact terribly interested in anyone's death or suffering.¹⁴³ Mostly, it is concerned with how we live our lives — and it is insistent that the act of torturing someone, for whatever reason, so distorts human beings that it can never be permitted. It is with voluntary evil that human-rights law concerns itself.

F. *Atrocity and Duress*

Take a last example of the way law gives meaning to violence, this one involving humanitarian law. In 1995, the International Criminal Tribunal for the Former Yugoslavia addressed the troubling case of Drazen Erdemovic, a young Croatian soldier who joined the Bosnian Serb army in order to support his wife and small child.¹⁴⁴ Sent to Srebrenica in 1995, Erdemovic was ordered by his commanding officer to participate in the massacre of thousands of unarmed Muslim civilians. According to Erdemovic's own account, he at first refused to participate, but was told that if he did not cooperate, he would be shot himself. At this point, Erdemovic agreed to participate and joined in the killing; by his own estimate, he may have killed as many as seventy or eighty people.

Erdemovic later told his story to a journalist, and ultimately came before the International Criminal Tribunal (more or less voluntarily), where he pled guilty to committing crimes against humanity, but noted that he had committed these crimes under extreme duress:

Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too." . . . I could not refuse because they would have killed me. . . . I said immediately [to my commanding officer] that I did not want to take part in [the

This comes as no surprise, however, if we accept my premise that the law is not in fact concerned with reducing suffering, but merely with articulating concepts of morality and honor.

143. It could be argued that this is just a short-term/long-term problem. In the short term, torturing the terrorist may save New York, but in the long run, more people will suffer if torture becomes a permissible police activity. I find this assertion unpersuasive, however, since in this era of nuclear weapons it is entirely possible that a small number of terrorists could literally wipe out life on earth. Given nuclear weapons, such "long-term" utilitarian calculations lose their force.

144. *Prosecutor v. Erdemovic*, Case IT-96-22-T (Sentencing Judgement) (U.N. Int'l Crim. Trib. Yug. (Trial) 1996), available at <http://www.un.org/icty/erdemovic/trial/judgement/erd-tsj961129e.pdf>. For a lengthy discussion of this case and its implications, see Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity and Duress*, 43 VA. J. INT'L L. 861, 863-69 (2003).

massacre] and I said, “Are you normal? Do you know what you are doing?” But nobody listened to me¹⁴⁵

After some procedural confusion, the Appeals Chamber addressed the question of whether Erdemovic’s claim of duress should properly have led him to plead not guilty — in other words, the Appeals Chamber had to decide whether or not duress, if proven, constituted a complete defense to charges of war crimes and crimes against humanity. By a vote of three to two, the Appeals Chamber declared that while duress might be a mitigating factor that would affect sentencing, duress was *not* a complete defense.¹⁴⁶

This is, in some ways, an astonishing conclusion. Erdemovic had no desire to kill innocent civilians, and he did so only when threatened with his own imminent death. In the context, his death would have served no consequentialist purpose; the Muslim civilians would have been killed with or without Erdemovic’s participation, and refusal to participate in the massacre would merely have added Erdemovic to the list of victims. In some sense, then, Erdemovic’s acquiescence in the massacre could be said to have *reduced* violence and suffering, since at least it meant that his own corpse would not be added to the pile at the end of the day. His refusal to participate would have injured him and benefited no one, and his participation benefited him while injuring no one who would not have been injured anyway.¹⁴⁷

Why then establish a legal standard that insists that duress was no defense for Erdemovic? By establishing this standard, the majority on the appeals court essentially declared that Erdemovic’s legal guilt was foreordained when he was ordered to Srebrenica. The only way he could have maintained his innocence would have been to allow himself to be shot along with the civilian victims. As the Appeals Chamber put it,

145. Prosecutor v. Erdemovic, Case IT-96-22-A at ¶ 14 (Sentencing Judgement) (U.N. Int’l Crim. Trib. Yug. (App.) 1998) (quoting Erdemovic’s testimony before the Trial Chamber in 1996), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-ts980305e.pdf>. Erdemovic ultimately received a five-year sentence.

146. *Id.* (Judgement) (U.N. Int’l Crim. Trib. Yug. (App.) 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.pdf>.

147. Judge Antonio Cassese takes this view. In his dissent in *Erdemovic*, Cassese argued that had Erdemovic

compl[ie]d with his legal duty not to shoot innocent persons, he would [have] forfeit[ed] his life for no benefit to anyone and to no effect whatsoever apart from setting a heroic example for mankind (which the law cannot demand him to set): his sacrifice of his own life would be to no avail.

Id. at ¶ 44 (Separate and Dissenting Opinion of Judge Cassese, appended to Judgement), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-adojcas971007e.htm>. This, says Cassese, sets the standard unacceptably high: “Law is based on what society can reasonably expect of its members. It should not set intractable standards of behavior which require mankind to perform acts of martyrdom, and brand as criminal behavior falling below those standards.” *Id.* at ¶ 47.

[We reject] utilitarian logic. . . . The approach we take does not involve a balancing of harms for and against killing. . . . [O]ur rejection of duress as a defence to the killing of innocent human beings does not depend upon what the reasonable person is expected to do. We would assert an absolute moral postulate which is clear and unmistakable. . . .¹⁴⁸

In some sense, the Appeals Chamber was insisting that Erdemovic ought to have opted to die, rather than choosing life, if life meant participating in terrible crimes.

Here too, it is hard to square such a decision with the idea that humanitarian law is primarily concerned with reducing violence and suffering.¹⁴⁹ Again, the law appears far more interested in attaching moral meaning to violence, and making statements about how human beings ought to relate to violence. In other words, the law is concerned with establishing what it is to live a moral *life* — death is barely relevant. Better by far, said the appellate court majority, to suffer and die but be innocent than to taint one's life by committing crimes against humanity.

Erdemovic himself seemed to agree with the majority: he wept as he explained to the judges why he decided to plead guilty, despite the fact that he acted under duress:

[My attorney] told me, "Drazen, can you change your mind, your decision? . . . I do not know what will happen." I told him because of those victims, because of my consciousness, because of my life, because of my child and my wife, I cannot change what I said . . . because of the peace of my mind, my soul, my honesty, because of the victims and war and because of everything.

Although I knew that my family, my parents, my brother, my sister, would have problems because of that, I did not want to change it. Because of everything that happened I feel terribly sorry, but I could not do anything. . . . Thank you. I have nothing else to say.¹⁵⁰

Erdemovic's reaction, though perhaps belated (at least from the view of the majority), points to something critically important and often underestimated. Legal scholars — especially those of a law-and-economics bent — often take it for granted that rational people eschew suffering and violence. But for many people, much of the time,

148. *Id.* at ¶¶ 80 & 83 (Joint Separate Opinion of Judges McDonald & Vohrah, appended to Judgement), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm>.

149. Indeed, some critics have argued that humanitarian law has historically operated to expedite violence, not reduce it. See Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 50 (1994).

150. *Erdemovic*, Case IT-96-22-A at ¶ 11 (Separate and Dissenting Opinion of Judge Stephen, appended to Judgement) (U.N. Int'l Crim. Trib. Yug. (App.) 1997) (quoting Erdemovic's testimony at his November 1996 sentencing hearing), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojste971007e.pdf>; see also *id.* (Sentencing Judgment) (1998).

living a “moral” life, or an honorable life, is more important than finding guaranteed safety and prosperity. Drazen Erdemovic was tormented by the memory of his own action, even though he felt that he had had no choice; for Erdemovic, pleading guilty — and accepting his sentence — was part of restoring his sense of himself as a moral person. Since the only evidence against him came from his own statements, he could certainly have avoided prosecution and punishment had he wished to do so, and this would surely have been the “rational” course of action. But for Erdemovic, suffering his sentence was necessary to redemption.

Words like “redemption” are out of fashion in legal academia, but the idea retains its power. Both committing and suffering acts of violence can come to be heavily laden with moral meaning. Human-rights law has tended to view violence and suffering as destructive of moral meaning, and assumed that good people never desire violence or suffering.¹⁵¹ But this overlooks millennia of evidence that war and killing are often the primary locus of moral meaning for many societies: to many, manliness, or courage, or tradition, or honor requires acts of violence. Conversely, suffering and sacrifice have historically been deeply attractive to many: consider the many potent stories of political and religious martyrdom, or the events of September 11, or the ongoing violence in the Middle East.¹⁵²

This is part of the reason that law correlates only weakly, if at all, with the degree and distribution of social violence. Formal law, when it exists, is primarily concerned with assigning moral meaning to violence and suffering, rather than with reducing it. Since some people and some societies actually value high degrees of violence and suffering, or value unequal distributions of violence and suffering, it stands to reason that formal law in such societies may reflect these preferences.

IV. TAKING NORMS SERIOUSLY

Where does this leave those who believe that violence is neither desirable nor inevitable; that human beings can and do consciously change the cultures in which they live; that much involuntary suffering can therefore be alleviated; that both moral imperatives and sheer

151. See James R. Dawes, *Language, Violence, and Human Rights Law*, 11 YALE J.L. & HUMAN. 215 (1999) (drawing on Scarry to assert that the prime dilemma for human rights is that violence destroys all possibility of interpretation and meaning); cf. ELAINE SCARRY, *THE BODY IN PAIN* 127 (1985) (asserting that “war is a crisis of substantiation in which shared meanings break down”).

152. Cf. Anthony T. Kronman, *Amor Fati (The Love of Fate)*, 45 U. TORONTO L.J. 113 (1995) (arguing that humans love tragedy precisely because there is something about dissolution, chaos, suffering, and surrender that appeals to us by offering a glimpse of a different sort of freedom and a different sort of meaning).

self-interest give us reason to try to alleviate such suffering, and that the complex mix of cultural commitments we call the rule of law does in fact correlate with a less agonizing, more equitable, and less explosive kind of social order?

I have argued so far that rule-of-law promotion efforts have been disappointing in large part because they don't take enough account of norms and culture. They tend to confuse formal law with substantive normative commitments, assuming that the substantive values that are at the core of most western concepts of the rule of law will flow naturally from the creation of certain kinds of formal legal structures (modernized statutes, courts, etc.). In practice, these rule-of-law promotion efforts stumble when they come up against countervailing cultural commitments that are resistant to clumsy and formalistic efforts to change them. I have suggested that rule-of-law promotion efforts face a chicken-and-egg problem: changes in formal law matter where prevailing cultural norms say that formal law matters. But when formal law has little resonance for people, changes in formal law cannot by themselves create new normative commitments to the rule of law.

Delving deeper, I have suggested that rule-of-law promotion efforts are based on a false premise: that formal law produces order and reduces violence and suffering, and that law is therefore the cure for violence and disorder. I have argued that there is in fact little correlation between law, order, and violence, and that law is merely one mechanism that many modern cultures use to establish the moral meaning of different kinds of violence and suffering. In many modern societies, law is an important mechanism for establishing moral meaning, but it is not the only such mechanism. Thus, it is naïve to imagine that changes to formal legal structures will have any necessary impact on the degree and distribution of violence and suffering in a given society. In some societies that lack a shared normative commitment to the rule of law, only nonlegal initiatives are likely to have any immediate effect on the degree and distribution of violence — and they will be effective only if they succeed in offering alternative narratives that assign new cultural meaning to violence and suffering.

Although law, order, and violence are not always causally linked, certain societies are clearly more equitable and less violent than others.¹⁵³ Societies organize and understand violence and suffering in many different ways, and while “law” plays no *inherent* role in reducing violence and suffering, certain cultures give law an important role in regulating violence and suffering. When societies decide that law is

153. Although generalizations are dangerous and degrees of equity and violence nearly impossible to measure in a satisfying way, I think few would disagree that Sweden is more equitable and less violent than Pakistan, for instance, or that Canada is more equitable and less violent than Nigeria.

a good mechanism to regulate and assign meaning to violence, changes in formal law can indeed lead to changes in the amount and nature of violence. Law reflects social norms, but in societies that believe in the rule of law, law can also shape norms, albeit in ways that are often complex and less predictable than we might wish.¹⁵⁴

A. *Three Clusters of Questions*

If we consider interventions to promote human rights and the rule of law to be justifiable and important at times, whether for moral reasons, economic reasons, or security reasons, we are then faced with some very fundamental questions indeed, questions to which legal scholars have as yet paid insufficient attention: What precisely are the cultural conditions in which law matters? What are the circumstances in which legal rules become enforceable and accepted as legitimate? Under what conditions can law play a role in shaping cultural understandings of violence? When and how can “outsiders” help create those conditions in a given society?

Most fundamentally, these are all issues of norm creation. And although social norms are tightly linked to law in some societies, they are not at all linked in others. When they are delinked, changing the law will have little effect; only an explicit focus on norm creation is likely to lead to the possibility of the rule of law.

Of course, it is easy to state this, and less easy to know what to do about it. Let me begin by laying out a research agenda involving three clusters of questions. None of the questions are easy to answer, but if we do not begin to grapple with them, international interventions designed to promote human rights and the rule of law will continue to have disappointing results.

1. *Choosing and Justifying Norms*

First, what norms should we be trying to create, and how can we justify them? In other words, what precisely are the norms that underlie a substantive commitment to the rule of law, and that can thus enable formal law to be an effective mechanism for further

154. Empirically, there is at least some reason to believe that societies with strong normative commitments to the bundle of values and institutions we call the rule of law are more equitable and less violent than many other societies in the world today. My claim here is not that modern, technocratic, liberal-democratic societies are the only “good” way to organize human beings into units — merely that if we believe that less violence is better than more violence, and that various kinds of suffering should be as evenly distributed as possible, liberal democracies certainly appear today to be accomplishing these goals rather better than other modern forms of social organization. If this is indeed the case, then interventions and aid programs designed to promote the rule of law are both justifiable and important. For a detailed discussion of the value of democratic governance and the rule of law in reducing both inter- and intrastate violence, see generally Moore, *supra* note 48.

cultural change and adaptation? What norms are conducive to less violent and more equitable societies? And how do we justify trying to “interfere” in other societies to create these norms?

2. *Effective Norm Change*

Second, how can these norms be created effectively in societies where they are not widespread to begin with? Can we make any cross-cultural generalizations? At what stage is norm creation better accomplished through education, the media, civil society, and means other than “law”? When does focusing on political elites pay off, and when do bottom-up methods work best?

3. *Constraints*

Third, does a commitment to the norms underlying a substantive conception of the rule of law place limits on the methods the U.S. and the international community should use to create new norms in transitional societies?¹⁵⁵ In other words, does the answer to question one place ethical or legal limits on the ways we can answer question two?

Of the three clusters of questions I have laid out, I consider question two most compelling. I want to bracket the first question, since I see it as primarily a question for the philosophers among us. If we are not careful we can go around in circles with it for quite a while. After all, in a sense it is akin to the relativism/universalism debate that has plagued human rights for a long time.¹⁵⁶ In *The Law of Peoples*, John Rawls recently weighed in on this broad debate, suggesting that there certainly are some core values that a liberal state may require other states to respect if it is to recognize their sovereignty — including the obligation to honor human rights.¹⁵⁷ Martha Nussbaum has suggested that we move beyond the discourse of human rights to a universalism based on the idea of essential human capabilities.¹⁵⁸ Various other scholars have focused on the somewhat narrower question of the normative commitments underlying the rule of law and suggested

155. Cf. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

156. For two recent takes on this debate, see Robert Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527 (2001), and Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

157. JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

158. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2000) (drawing on AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999)).

reasons to consider the rule of law a value system worthy of exporting.¹⁵⁹

All of these approaches are compelling, in their different ways. I am fully persuaded that there are certain core values, capacities, or rights (I am agnostic about which description is best) that are universal. These values act as imperatives, justifying both individual action when they are denied and, at times, concerted action by governments and intergovernmental groups, even when such concerted action involves violating state sovereignty, and even when it goes against the wishes of a majority of people affected by the intervention. These are fighting words. I think they can be defended, but that is not my primary concern here — I know that others have already taken these questions on and will continue to do so. So I will leave these questions to one side for the time being.

The second question I raised is particularly urgent. Once we decide what norms we are trying to create and how interventions to create them can be justified — once we have recognized that formal law will only make a difference when we have certain widely shared normative commitments — how do we figure out how to create those normative commitments?

I find this question most compelling because it is both critical and understudied, especially in the international context. It is critical especially in the wake of September 11, as the U.S. struggles to confront widespread global resentment and the occasional acts of terrorism that such resentment inspires. But while a good deal of recent work on domestic legal issues takes on the descriptive project of analyzing how norms and law interact,¹⁶⁰ only a few legal scholars have addressed the question of how purposive governmental or nongovernmental norm-creation projects might actually work.¹⁶¹ This lacuna is even more noticeable in the domain of international and comparative law.¹⁶²

159. See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (2d ed. 1992) (arguing that military interventions that violate a state's sovereignty are generally to be discouraged, and may be justified only in extreme situations (i.e., to remedy cases of enslavement, massacres, large scale human-rights violations, etc.)); see also Kairys, *supra* note 40; Teitel, *supra* note 40.

160. See, e.g., ELLICKSON, *supra* note 84; ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

161. Some exceptions here are Cass Sunstein, Dan Kahan, and Larry Lessig, among others, who have done interesting preliminary work on self-conscious norm-change efforts. See, e.g., Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859 (1999); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Sunstein, *supra* note 155. For a completely different approach, see JACK BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998), urging an epidemiological model for understanding cultural change.

162. Some recent work has focused on norms and perceptions of legitimacy in international law. See, e.g., Koh, *supra* note 52; see also Purvis, *supra* note 52, at 112 (noting in passing that “[s]tructuralism in anthropology seems particularly relevant to the problem of

As I noted towards the beginning of this Article, these issues of norm creation in the complex context of modern, international interventions are located at the interstices of international law, comparative law, and domestic law, traditionally conceived. They have found no disciplinary home, and tend to slip through the cracks, always at the periphery, never at the center of attention.

Answering these questions about how to promote norm change involves taking stock of what we, as lawyers and legal scholars, know about how cultures change and about how individuals and groups come to alter their normative commitments. Unfortunately, we do not know very much. Most of the time, it doesn't even occur to us to ask the right questions.

But although lawyers and legal scholars may not know much about how cultures change, there are others who know at least a good bit more.¹⁶³ Some anthropologists, for instance, study the question of how cultures change — and how and when law changes and is changed by norms.¹⁶⁴ There is also an emerging literature coming out of business schools and sociology departments about how cultures change — work that is often pitched in the context of how corporate organizational cultures can be changed,¹⁶⁵ but that may nonetheless hold important implications for those of us interested in Kosovo or Russia, or America's troubled inner cities, for that matter. Hollywood marketing experts and advertising-agency executives also may know a surprising amount about norm creation. After all, they appear to be rather good at convincing people around the world to watch certain films, listen to certain music, and desire certain clothes and cars.

The “bad guys” — the “conflict entrepreneurs” — also know quite a lot about norm creation. Human-rights advocates and scholars who study norms are fond of using the term “norm entrepreneurs”¹⁶⁶ to

explaining international law's authority”). For the most part, this work has focused on governmental elites and state-to-state behavior, rather than on the behavior of states toward their citizens or the behavior of citizens and groups to one another within the boundaries of a state or society. Since this is the primary subject of international human-rights law, this lacuna is particularly problematic.

163. See, e.g., KAHN, *supra* note 2 (calling for increasing attention both to issues of law as culture and to insights from other scholarly disciplines).

164. See, e.g., Bohannon, *supra* note 131; see also PAUL BOHANNAN, *HOW CULTURE WORKS* (1995); DONALD L. DONHAM, *WORK AND POWER IN MAALE, ETHIOPIA* (2d ed. 1994); SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS* (1986); PARKER SHIPTON, *BITTER MONEY* (1989); Donald L. Donham, *Revolution and Modernity in Maale: Ethiopia, 1974-1987*, 34 *COMP. STUD. IN SOC'Y & HIST.* 28 (1992); Sally Falk Moore, *The Ethnography of the Present and the Analysis of Process*, in *ASSESSING CULTURAL ANTHROPOLOGY* 362 (Robert Borofsky ed., 1994); Simons, *supra* note 119.

165. See, e.g., MICHAEL FULLAN, *LEADING IN A CULTURE OF CHANGE* (2001); EDGAR H. SCHEIN, *THE CORPORATE CULTURE SURVIVAL GUIDE* (1999).

166. See, e.g., Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 *ST. LOUIS U. L.J.* 293, 303 (2002); see also Sunstein, *supra* note 155, at 909.

describe people such as Gandhi, Nelson Mandela, and Mother Teresa. The term is not ill-used; all of these people managed to persuade quite a lot of other people to alter some of their most deeply held beliefs. But if Mandela is a norm entrepreneur, so is Osama bin Laden, and so are the planners of Palestinian suicide bombings. So was Slobodan Milosevic, and so were the Hutu leaders whose names are unfamiliar to most of us, but who succeeded in dramatically shifting the normative commitments of several million Rwandan Hutus. Osama bin Laden convinced the September 11 hijackers and a large network of other supporters that America's evils justified killing several thousand civilians — and that striking against America was worth certain death.¹⁶⁷ Palestinian suicide bombers (or Tamil suicide bombers, for that matter) must similarly believe their cause so exalted as to be worth both killing and dying for. And Milosevic and the Rwandan genocidaires succeeded in convincing an awful lot of ordinary people that their next-door neighbors — the very people from whom they had been borrowing sugar and for whom they had been babysitting — were fundamental ethnic threats, sub-humans who had to be eliminated or “cleansed” before they could do untold damage to the community of Serbs or Hutus. Hitler, too, was a norm entrepreneur, a chillingly successful one. (And it is worth noting that Milosevic, Hitler, and the Rwandan genocidaires all made ample use (or misuse) of “law” to advance their genocidal agendas.)

Those who care about human rights and the rule of law cannot afford to leave all of the creative insights about norm creation to the anthropologists or to Hollywood — and we certainly cannot afford to leave them to the bad guys.¹⁶⁸ Yet so far, that is precisely what most of us have done, and this has to change.

Let me touch briefly on the third question I mentioned: whether a commitment to the norms underlying a substantive conception of the rule of law places limits on the methods the U.S. and international community should use to create new norms in transitional societies. The answer is certainly yes: bin Laden and Milosevic and the Rwandan genocidaires may have been such effective norm entrepreneurs precisely because they were *unconstrained*, which is to say that they were able to use murder and terror and lies to alter norms. Murder and terror and lies may well be effective ways to alter norms, but are these methods that the international community should use in Iraq, Afghanistan, Kosovo, or East Timor?

167. See, e.g., Ehrenreich & Brooks, *supra* note 118.

168. Cf. BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 40, 42 (1992) (“Liberals cannot afford to wait on the sidelines while nationalists indulge in populist demagoguery. . . . If liberals allow nationalists a monopoly on the effort at mass mobilization, they will be digging their own grave.”).

Indeed, the constraints on what we do in places such as Iraq and Afghanistan, Kosovo, or East Timor may arise not only out of our basic normative commitments, but also out of the very fact that we can engage in the project of norm creation in these places precisely because we have superior powers of coercion. The U.S. now runs Iraq through force majeure, and although interventions elsewhere have enjoyed more multilateral support, the UN similarly runs places like Kosovo and Afghanistan by dint of thousands of heavily armed soldiers (and by the threat of even more soldiers and airplanes and bombs). Precisely because the balance of force is so much in our favor, our methods of norm creation must be constrained. In Afghanistan and Iraq in particular, U.S. claims to represent and advance the rule of law will inevitably be contrasted with our often ham-handed use of coercion. This contrast will be noted by ordinary citizens, who may view the notion of the rule of law skeptically when it appears to come only from the barrel of a gun. And the contrast will be exploited by supporters of ousted regimes and international terrorist groups.¹⁶⁹

How we answer question one — what norms are we trying to create, and how do we justify them — inevitably affects how we answer this last question about the constraints on our norm-creation methods. I want to note here that the question of whether a commitment to human rights requires a commitment to democracy and self-determination is of particular importance to the question of how our norm-creation efforts should be constrained. If we believe that a commitment to human rights and the rule of law requires a simultaneous and evenly balanced commitment to democracy, the possible norm-creation methods open to us may be fewer in number than the techniques available if we decide that democracy is in fact a legitimately lower priority than human rights.¹⁷⁰

But I want to bracket this question as well — as similarly best suited to the philosophers — and return to the second cluster of questions: How do you change norms effectively? How do you create the conditions in which law matters? These questions are far larger than this Article, and there will never be any definitive answers to such complex questions. Nonetheless, I want to do two things in the remainder of this Article: first, offer some suggestions of fruitful ways to feeling our way toward some answers; and second, offer some preliminary hypotheses about the kinds of lessons that might emerge if scholars take up this research agenda.

169. See Rosa Ehrenreich Brooks, *By Force of Will*, LEGAL AFF., Nov./Dec. 2003, at 24 (discussing this issue in the context of Iraq); cf. Sunstein, *supra* note 155 (asking a similar question in the context of liberal-government norm creation in the domestic sphere).

170. See RAWLS, *supra* note 157; cf. ACKERMAN, *supra* note 168, at 69 (suggesting that there may be a tradeoff between accountability and constitution making).

B. *Research Methods*

A serious effort to develop answers involves moving beyond the terrain in which lawyers are most comfortable to engage with the literature of other disciplines: the literatures on corporate organizational change, on advertising methodologies, and on political socialization, as well as literature from the more traditional academic disciplines of anthropology, history, psychology, and sociology.¹⁷¹ But even more importantly, feeling our way towards some answers will involve serious empirical work, and the development of comparative case studies. We will have to identify instances of rapid and wide-scale norm transformation — for better or for worse — in various societies, and try to analyze the factors that contributed to that rapid norm transformation. It will also be useful to compare unsuccessful attempts to shift norms, and identify frequently made mistakes. Obviously, every society is unique, heterogeneous, and subject to differing external pressures and differing internal contestations. As such, comparing successful and failed norm-transformation efforts in different societies will hardly be a scientific endeavor. Nonetheless, I believe that the exercise is one from which we can learn.

As a start, for instance, it will be useful to look closely at both negative and positive instances of rapid norm transformation, some well in the past, some more recent. We might look closely at the period in Germany leading up to the rise of Hitler and World War II, in which moderate and episodic anti-Semitism and xenophobia was transformed into a willingness to participate in the extermination of Jews and other groups for some, and a willingness to simply look away for others.¹⁷² But it will be equally useful to look at West Germany *after* World War II came to an end, under the Allied occupation, a period that for all its problematic aspects led to rapid and apparently deep transformations of German political culture, as Germans redefined their national self-conception, becoming a society that prides itself on political pluralism and pacifism. Looking closely at pre- and post-World War II Japan may be equally instructive.¹⁷³ There too,

171. I am thinking in particular of works such as BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (rev. ed. 1991), and *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terence Ranger eds., 1992).

172. For better or for worse, the literature on this is already vast. *See, e.g.*, CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1992); INGA CLENDINNEN, *READING THE HOLOCAUST* (1999); GOLDHAGEN, *supra* note 104. It goes without saying that I reject the notion of the Holocaust as somehow ineffable and unrepresentable. If we are to understand how to prevent future genocides, we must struggle to comprehend and represent the Holocaust, or risk having it repeat itself over and over — as it already has, in many ways, in Rwanda, and almost did in Yugoslavia.

173. *See generally* JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* (1999) (providing a fascinating account of occupied Japan).

rapid norm transformations both preceded and followed the war, and both periods involved conscious efforts on the part of the authorities to shift norms.¹⁷⁴

Closer to the present, looking at Rwanda and the former Yugoslavia will be useful, both before and after their collapse into genocide and near-genocide. What caused the rapid norm transformation in Rwanda that led thousands of ordinary Hutus — people who had lived side by side with Tutsis for generations, worked with them, and frequently intermarried with them — to willingly hack their Tutsi neighbors to death with machetes?¹⁷⁵ How are Rwandans today learning to live together again? What, if anything, was the role of law in the period leading up to the genocide? And what is the role of law today in rebuilding a multiethnic Rwandan society? The same questions can be asked of Yugoslavia: how did an obscure politician called Slobodan Milosevic turn his dream of a greater Serbia into the animating force for the most brutal ethnic cleansing Europe had seen since the Holocaust?¹⁷⁶ How and why are efforts to move beyond the politics of ethnic hatred succeeding or failing today in Slovenia, Croatia, Macedonia, Bosnia, Serbia, and Kosovo? And, of course, we can ask these questions about the rise of extremist Islam in some corners of the globe: How have so many young Palestinians been persuaded that suicide bombings are worthwhile? Why was the Taliban appealing to so many Afghans? How has Osama bin Laden so successfully recruited so many would-be terrorists?

We also need to look at the genocides and wars that did *not* happen. These are harder to identify, since they are the dogs that did not bark in the night, but South Africa and Czechoslovakia both come to mind. Both are places in which racial or ethnic hatreds might have turned into civil war, but did not. In both places politicians struggled hard to create cultures of toleration and pluralism. South Africa in

174. For an interesting preliminary analysis of these issues, see RAY SALVATORE JENNINGS, *THE ROAD AHEAD: LESSONS IN NATION BUILDING FROM JAPAN, GERMANY, AND AFGHANISTAN FOR POSTWAR IRAQ* (U.S. Institute for Peace, Peaceworks Report No. 49, 2003). The Allied occupations of Germany and Japan of course involved a high degree of coercion. The Allies had won the war. As a result, these examples implicate the third cluster of questions I raised earlier: Are there methods of norm creation that a human-rights-minded government (or NGO, or individual, or intergovernmental body) ought not to use? Does the presence of coercion change the sphere of permissible methods?

175. See GOUREVITCH, *supra* note 123, at 17:

[M]ass violence, too, must be organized Even mobs and riots have a design It must be conceived as the means toward achieving a new order, and although the idea behind that new order may be criminal and objectively very stupid, it must also be compellingly simple and at the same time absolute.

176. See JUDAH, *supra* note 68. It's worth recalling that Milosevic's Bosnian Serb partner, fellow indicted war criminal Radovan Karadzic, was a psychiatrist by profession. *Profile, Radovan Karadzic* (BBC News, Jan. 17, 2002), at <http://news.bbc.co.uk/1/hi/world/europe/876084.stm>.

particular may hold useful lessons: despite its continuing difficulties, it is a success story in which conscious and creative government sponsored norm-creation efforts have played an important part.

Implicit in all I have said so far is the assumption that history is something made. It does not just happen. Genocides require conscious design¹⁷⁷ — and so does nation building, as does the creation of the rule of law.¹⁷⁸ Human society is far too complex for us to be able to understand these processes in any scientific way. (As Marx famously said, “Men make their own history, but they do not make it just as they please”)¹⁷⁹ Nonetheless, I am convinced that we will be able to draw some cross-culturally useful answers from deliberative, comparative work.¹⁸⁰

Here, too, the project of developing useful case studies will take time. Nonetheless, let me offer a few brief anecdotes and vignettes to illustrate some of the reasons I believe this comparative work will pay off — followed by some tentative general hypotheses.

Consider four brief examples from four very different societies:

1. In the former **Yugoslavia**, during the years preceding dissolution and war, the images of different ethnic groups in the state-mandated primary-school textbooks changed steadily. Over time, the images of non-Serbians grew steadily more bellicose and negative, as the stories of Serbian history came more and more to emphasize both a history of Serbian victimhood and the Serbian “tradition” of “incomprehensible and amazing heroism, obediently laying down one’s life for the fatherland.”¹⁸¹ Serbian “turbo-folk” music sent the same message, insisting that the time for glorious vengeance was near.¹⁸²

177. Cf. GOUREVITCH, *supra* note 123, at 95 (noting that “[g]enocide . . . is an exercise in community building,” one that arises out of order and belief in authority rather than out of chaos and anarchy). Gourevitch chillingly lays out the sequence of events leading up to the Rwandan genocide.

178. See generally ANDERSON, *supra* note 171; MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993); THE INVENTION OF TRADITION, *supra* note 171.

179. Karl Marx, *The 18th Brumaire of Louis Bonaparte*, in KARL MARX & FRIEDRICH ENGELS, *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 320 (Lewis S. Feuer ed., Anchor Books 1959) (1869).

180. In the arcane but critical field of “genocide studies,” some important work has already been done, comparing early warning signs of genocide in different societies and suggesting some “lessons learned” for genocide prevention. See generally the work of the Center for the Prevention of Genocide, www.genocideprevention.org.

181. Franke Wilmer, *Identity, Culture, and Historicity: The Social Construction of Ethnicity in the Balkans*, 160 *WORLD AFF.* 1, 9 (1997) (quoting VESNA PESIC & RUZICA ROSANDIC, *WARFARE, PATRIOTISM AND PATRIARCHY: AN ANALYSIS OF ELEMENTARY SCHOOL TEXTBOOKS* 65 (Center for Antiwar Action, Belgrade, Yugoslavia, 1994)).

182. See Wilmer, *supra* note 181, at 9; see also FRANKE WILMER, *THE SOCIAL CONSTRUCTION OF MAN, THE STATE, AND WAR: IDENTITY, CONFLICT, AND VIOLENCE IN FORMER YUGOSLAVIA* (2002).

2. In **Rwanda**, the years leading up to the genocide saw a significant rise in government-sponsored hate radio and hate newspapers (such as Kangura and Radio-Télévision Libre des Mille Collines). Frequently, the media depicted Tutsis as nonhuman, often as “inyenzi”: cockroaches — who naturally required extermination.¹⁸³ In 1990 the “Hutu Ten Commandments” were broadcast on radio stations throughout Rwanda; the commandments included “Hutus must stop having mercy on the Tutsis.”¹⁸⁴ One popular song of the era leading up to the genocide went, “Where are those Tutsi who used to phone me? Ah, they must have all been exterminated. Let us sing: The Tutsi have been killed. God is always just! The criminals will be exterminated!”¹⁸⁵ The phenomenon of hate media in pre-genocide Rwanda was identical in many respects to the caricaturing of Jews as nonhuman simians and rodents that was typical of pro-Hitler media in post-World War I Germany and Austria.¹⁸⁶

3. In postwar **Japan**, MacArthur’s efforts to create a democratic Japan relied on indirect rule, making extensive use of existing Japanese law and institutions.¹⁸⁷ To the extent MacArthur and the Allies eliminated and reformed some laws and institutions, they built heavily and consciously on existing traditions and tropes as they did so — including the near-divine status of the Emperor, whom the allies exonerated from blame for the war and Japanese atrocities, despite his clear complicity. The Allies relied heavily on censorship and control of the media to send democratic messages.¹⁸⁸

4. In **South Africa**, the postapartheid ANC government sought to alter South Africa’s political culture through a participatory constitutional-revision process in which ordinary South Africans were encouraged to participate.¹⁸⁹ The government sponsored constitutional idea hotlines, placed cartoons in regional newspapers encouraging

183. See A. WALTER DORN ET AL., PREVENTING THE BLOODBATH: COULD THE U.N. HAVE PREDICTED AND PREVENTED THE RWANDAN GENOCIDE? (Cornell Univ. Peace Studies Program, Occasional Paper No. 24, Nov. 1999), available at <http://www.ciaonet.org/wps/dao01/>.

184. See GOUREVITCH, *supra* note 123; see also Dina Temple-Raston, *Journalism and Genocide*, COLUM. JOURNALISM REV., Sept./Oct. 2002, at 18.

185. See DORN ET AL., *supra* note 183.

186. For a discussion of patterns leading up to genocides, see generally PREVENTIVE MEASURES: BUILDING RISK ASSESSMENT AND CRISIS EARLY WARNING SYSTEMS (John L. Davies & Ted Robert Gurr eds., 1998); Temple-Raston, *supra* note 184; Ervin Staub, *The Evolution and Prevention of Genocide and Mass Killing, with Some Thoughts on Kosovo*, OTHER VOICES, Feb. 2000, at www.othervoices.org/2.1/staub/commentary.html.

187. See generally DOWER, *supra* note 173.

188. See *id.*

189. I lived in South Africa from August to November 1995, researching efforts to create a human-rights culture in the South African police; these observations are based on personal experience.

people to mail in their thoughts on how the new South African state should define itself, sponsored school debates and television shows, and plastered posters all over South Africa. People were urged to send in or call in their ideas on everything ranging from which rights should be enshrined in the Constitution to what the new state flag and songs should be. The government also used traditional African concepts such as “ubuntu” (meaning, loosely, harmony and mutual respect) to advance a conception of the new, tolerant, multiracial society that would peacefully replace the old, divided society of the apartheid era. In many ways, the government took a Wizard-of-Oz-type approach to using the formal law to create a culture of the rule of law: believe in the Wizard, don’t look behind the curtain, and the Wizard is real; act as if law matters, and it will. In South Africa, there is some evidence that this collective, government-encouraged leap of faith created something real.¹⁹⁰

C. *Preliminary Hypotheses*

What lessons might we learn from these anecdotes and the comparative case studies yet to be developed? Right now, only the most tentative hypotheses can be advanced, which will have to be tested against more extensive theoretical and comparative work. Nonetheless, let me offer some thoughts, based on what has already been discussed in this Article and on my own additional preliminary field and library research, about how we might make rule-of-law promotion efforts more sophisticated and nuanced — and thus more successful. Although it may be too late for these lessons in many rule-of-law promotion efforts, it is not yet too late in Afghanistan and Iraq (although the early signs are that few lessons have been learned).

At this preliminary stage, we might consider seven proposals for more effective rule-of-law promotion. They all overlap, but are conceptually distinct, and they can be abbreviated as follows: A) Know what you want; B) Know the culture; C) Build on what’s there; D) Acknowledge the lure of violence and sacrifice and offer alternative narratives to provide moral meaning; E) Don’t assume law’s centrality; F) Make-believe may sometimes work; and G) Pick your battles.

The proposals that follow are advanced with some trepidation. They are not a panacea; promoting the rule of law is something that will always be complex and difficult, because so many factors need to be reckoned with. Nonetheless, I offer these proposals as a preliminary step forward.

A) Know what you want. First, for norm-creation efforts to be successful, their architects need to know precisely what it is that they

190. See Rosa Ehrenreich Brooks, *Creating a Human Rights Culture: The Case of the South African Police* (1997) (unpublished manuscript, on file with the author).

are trying to do. This is difficult, especially when it is the international community, so-called, that is intervening in an effort to create new norms: that is, when it is the UN, or NATO, or some other regional or multinational entity. Such entities are notoriously hampered by the diversity of constituencies within them. Nonetheless, even UNMIK in Kosovo and UNTAET in East Timor have broad discretion in a day-to-day sense, and the lack of effort to clarify the goals and internal contradictions of rule-of-law promotion efforts certainly played a role in the disappointing results. And to a significant extent, the governmental and intergovernmental bureaucrats involved in these interventions (and the NGO actors as well) fall back on previously existing understandings and consensus about goals — which means that more theoretical discussion of goals, abstracted from a given conflict or transition, may help ensure that interventions can get off the ground quickly and effectively.

An obvious corollary to knowing what you want is to be consistent. If norm-creation architects alter their message and their methods all the time, it is unlikely that they will be effective — and, as the Kosovo examples indicate, when the norms they wish to create are those associated with “the rule of law,” lack of consistency can be fatal.

B) Know the culture at issue and take it seriously. On some level, there is no such things as “Kosovar culture” or “Sierra Leonean culture” or “Iraqi culture” or “Afghan culture”; there are only individuals and groups who are at any given time struggling, arguing, questioning one another, and creating new narratives and structures. But postmodern insights notwithstanding, it remains possible to make certain kinds of cultural generalizations: for instance, that the concept of honor is more important in Kosovo than it is in America, or that the concept of “dignity” is more important in the legal cultures of France and Germany than it is in America,¹⁹¹ or that consensual methods of resolving disputes and rituals of atonement and compensation are more valued in Sierra Leone than in America. Despite our modern temptation to assume that in this era of globalization and the Internet, everyone is really the same all over the world, people are not the same. All humans have the same inherent capacities, but culture and experience form the lenses through which we see the world. With imagination and effort, most of us can learn to see through different eyes, to some extent at least — but our differences in perspective, though not immutable, are real, and we ignore them at our peril.

It should go without saying that in order to change the norms of a given culture, one must first understand what existing norms are and how they came to be. Unfortunately, many of today’s neo-imperialists are as ignorant of the cultures they seek to change as most

191. See generally James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000).

nineteenth-century European imperial bureaucrats were of the colonial societies over which they ruled.¹⁹² But it matters that the idea of honor is important in Kosovo: if we know that, we can predict that certain actions (such as UNMIK Regulation 1) will have negative effects, and we may also be able to work with local people who share our goals to capitalize on existing traditions. There might be creative ways, for instance, to use even old traditions of honor and bloodfeud to underscore the importance of mercy, fairness, atonement, and compensation, aspects of bloodfeud that have always existed and have historically been used to mitigate bloodfeud's potentially devastating impact.¹⁹³

C) Build on what's there. Another lesson, then, is that norm entrepreneurs (be they governments or NGO activists) should build on existing cultural materials. The fact that Kosovars (and Serbs as well) come from a society in which elaborate bloodfeud traditions were widespread and persistent until relatively recently¹⁹⁴ may help account for the rapidity with which the former Yugoslavia slid into violence — but perhaps the bloodfeud tradition (the Code of Lek in Albania) did not have to lead in the direction of unending violence and atrocity. As Kosovar legal scholar Blerim Reka has argued in the *Kosova Law Review* and elsewhere, the honor-based Code of Lek also contains guidelines about how to bring cycles of revenge to a peaceful end. It involves rituals of forgiveness and mercy quite as much as it outlines rituals of violence and death.¹⁹⁵ While the Code has no formal status, it remains an important referent, and source of moral authority for many Kosovars (especially rural people). Milosevic and Hashim Thaqi's KLA fighters chose to draw upon the latter aspects of the bloodfeud tradition; creative promoters of the rule of law might be able to benefit from drawing consciously upon the former.

Similarly, in South Africa, government and nongovernmental norm entrepreneurs used the Nguni term “ubuntu” to appeal to traditional African notions of intergroup cooperation. Ubuntu is an umbrella term that includes concepts such as sharing, harmony, cooperation, and mutual respect. The ideas of ubuntu are reflected in the saying “Umntu Ngumntu Ngabantu”: “A person is a person through other people.” This notion was used to try to bring an end to intergroup violence, and to help create a feeling of unity after the divisiveness of apartheid. Norm entrepreneurs sought deliberately to

192. Over and over, on my travels, I have been amazed by the number of well-meaning “experts” on promoting human rights and the rule of law who lacked even the most rudimentary knowledge of the history and traditions of the societies they wished to change. Current U.S. efforts in Iraq are also a case in point.

193. See Hasluck, *supra* note 66, at 385, 406; see also REKA, *supra* note 66.

194. See REKA, *supra* note 66; see also Hasluck, *supra* note 66.

195. See REKA, *supra* note 66.

replace older myths about conflict and difference (the story of the Battle of Blood River, the story of the Voortrekkers, etc.)¹⁹⁶ with new stories based on equally potent cultural materials. Although South Africa faces many problems, it did not collapse into violence and civil war, and the creativity of government norm-creation methods may be partly the reason for its relative success.¹⁹⁷

In Rwanda, government efforts to try thousands upon thousands of people for genocide quickly overwhelmed the court system, led to massive human-rights violations as suspects were detained for long periods in inadequate prisons, and culminated in popular frustration that there was no true accountability for the foot soldiers of the genocide. In 1998-1999, the Rwanda government released many lower-level suspects, and passed a bill permitting local communities to use traditional “gacaca” dispute-mechanism proceedings to address such accused genocidaires. Gacaca traditionally has involved entire communities in deliberating on the appropriate response to crime and conflict, and the tradition has emphasized reconciliation and atonement as well as punishment. It is too early to say how the gacaca system will do, but it may hold out Rwanda’s best hope of coming to terms with the genocide in a way that rebuilds public confidence in the government and the rule of law.¹⁹⁸ Similarly, in Sierra Leone, creating the rule of law in the aftermath of one of the world’s most brutal civil wars may depend on the government’s ability to link legalistic methods of seeking accountability (through the UN-created Special Court) with a broader truth-and-reconciliation program, one that seeks to reintegrate violent individuals into the community by building upon the cleansing and atonement rituals used for centuries in tribal “secret societies” such as the Poro, Wende, Gbangbani, and Bondo.

Would-be norm entrepreneurs need to take seriously myths and stories, customs and rituals, habits and assumptions, and patterns of interaction. All of these may be misused and manipulated to sow discord and violence — but they are available to the positive-norm entrepreneur as well. And just as a society’s traditions and myths may themselves provide building blocks for the norm entrepreneur, the successful norm entrepreneur will also make use, insofar as possible, of existing institutions, from the media to schools, churches, and professional associations. The media in particular can play a critical role: in Rwanda and predissolution Yugoslavia, hate media helped enable the slide into genocide; more recently, television probably played a

196. See CONOR CRUISE O’BRIEN, *What Can Become of South Africa?*, in *PASSION AND CUNNING: ESSAYS ON NATIONALISM, TERRORISM, AND REVOLUTION* 142-43 (1988).

197. Much of this is based on my own 1995 research in South Africa.

198. See generally JOHN PRENDERGAST & DAVID SMOCK, U.S. INST. FOR PEACE, *POST-GENOCIDAL RECONSTRUCTION: BUILDING PEACE IN RWANDA AND BURUNDI* (1999), available at <http://www.usip.org/oc/sr/sr990915/sr990915.html>.

crucial role in the peaceful end of Milosevic's rule¹⁹⁹ and in the toppling of General Guei in Côte D'Ivoire.²⁰⁰ Attempts to prevent genocides and build the rule of law will have to consciously counter the effects of hate media.

Building on existing institutions may be more effective than creating "brand new" institutions, as long as the institutions that are built upon are credible.²⁰¹ While there may be times when some sort of institutional or culture "shock therapy" genuinely works (the architects of Russian economic reform imagined that this was what they were doing),²⁰² most people may be far more willing to accept change if new things can be linked imaginatively to existing traditions and institutions that seem authentic.

D) Acknowledge the lure of violence and suffering, and seek alternative ways to provide moral meaning. To some people, some of the time, violence and suffering are deeply compelling in ways that go far beyond "material" advantage. Honor may be deemed to require violent revenge, or sacrifice may be seen as sanctifying individuals or groups. Would-be norm entrepreneurs need to grapple with this, and recognize that simple assertions that peace is better than violence often lack cultural salience. Truly creative efforts to promote human rights and the rule of law may need to find ways to tap into the very same sources of moral meaning that drive people to kill and to die for causes human-rights advocates view with disapproval. Violence can be powerfully compelling — but ethnographic and historical evidence suggests that ideas of sacrifice can be equally compelling.²⁰³ Promoting a culture of sacrifice may be the only effective way to counter a culture that glorifies killing.

What this means concretely will vary from society to society. In Kosovo, where conceptions of honor may drive some revenge killings, I have already suggested that it might have been useful to appeal to the ideas of sacrifice, hospitality, and charity that also lie at the heart of most traditional Kosovar conceptions of honor.

E) Don't assume that law is always central to creating the rule of law. Sometimes law matters, but sometimes it doesn't. A rush to

199. See Timothy Garton Ash, *A Reality Show That's Riveting the World*, N.Y. TIMES, Nov. 28, 2000, at 29.

200. See Nurimitsu Omishi, *Popular Uprising Ends Junta's Rule over Ivory Coast*, N.Y. TIMES, Oct. 26, 2000, at 1 (quoting an Ivorian student saying, "The mistake [General] Guei made was to let us watch scenes from Belgrade.").

201. When they are not, starting from scratch may be better — but even then, linking the "new" to the successful old, even when the old has not existed for years, may be most effective.

202. See Bernard Sanders, *IMF "Salvation" In Russia?*, CHRISTIAN SCI. MONITOR, June 25, 1998, at 11.

203. Cf. BARBARA EHRENREICH, *BLOOD RITES* (1997); RENE GIRARD, *VIOLENCE AND THE SACRED* (1979).

build up formal legal institutions may at times be inappropriate and premature, even detrimental, as in Kosovo. This has obvious implications for what has come to be called “transitional justice,” a phrase that sounds broad in its application but is typically used narrowly to refer to accountability mechanisms designed to address past human-rights abuses.²⁰⁴ In some societies, prosecutions of those who violated human rights may have played a role in creating the rule of law. In others, such as Rwanda, a rush to prosecute may have in fact undermined governmental efforts to stabilize society and regain public confidence.²⁰⁵ At particular moments in particular societies, “nonlegal” aspects of culture may protect human rights, reduce violent conflicts, and promote order and predictability in social life far more effectively than formal legal structures. Ultimately, *nonlegal* myths and stories, customs and rituals, habits and assumptions, and patterns of interaction may be what enables the emergence of the rule of law.

F) Sometimes “make-believe” may work. Notwithstanding the last paragraph, at times, norm entrepreneurs may be able to bring about change simply by acting as if change has already occurred. This is tricky, and for success a core group of people committed to acting “as if” may be necessary. In South Africa, representatives from every political party took part in televised discussions of what the postapartheid constitution should look like, arguing passionately over every clause. On the level of formalism, many of the debates mattered little, since we all know that law in the books may have little or no bearing on human rights and the rule of law in practice. But in a nation where the law had been almost wholly discredited as an instrument of racist oppression, the important message of these televised discussions was that actors from all sides of the political spectrum *believed* that the formal law was important. Here, the process itself carried within it a revolutionary message: from now on, the written constitution will guide and constrain us; from now on, South Africa will be a nation which believes in the rule of law. Such Wizard-of-Oz-style legerdemain may be difficult to pull off — but at times, it may magically circumvent the chicken-and-egg problem of getting to the rule of law in societies where formal law has been discredited.

G) Pick your battles, and recognize that true cultural change is generally incremental. While rapid norm transformations (norm cascades and norm bandwagons, to use Cass Sunstein’s phrase)²⁰⁶ sometimes occur, usually they do so only when many tiny individual norm shifts have gone before. Trying to change every single thing at

204. See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

205. The gacaca system may not only dispose of cases quickly but do so in a way that is experienced as more fair and stable. Cf. ACKERMAN, *supra* note 168, at 69-72 (discussing some of the pitfalls of what he terms “corrective justice”).

206. See Sunstein, *supra* note 155, at 909.

once is likely to lead to backlash and failure, as the stories from Kosovo suggest. The post-World War II allied occupations of Germany and Japan may suggest — dispiritingly, for some human-rights activists — that norm transformations were possible in part because the Allies allowed many imperfect institutions and laws to remain, and allowed many people to remain part of governing structures despite their complicity in abuses. (In both Germany and Japan, many of the highest ranking and most visible Nazi and Imperial leaders were ousted, and often tried, but middle- and lower-level people who were equally complicit were generally left alone.)

V. CONCLUSION

This Article is a first step towards understanding why so many well-intentioned international interventions to create “the rule of law” have had disappointing results. It suggests that if we want to take seriously issues of norm creation in international interventions, we need to carve out a new area of study at the place where traditional international-law inquiries intersect with the concerns of comparative legal scholars and the concerns of domestic legal scholars. It also suggests that before we will be able to intervene effectively to change the degree and distribution of violence in conflict-ridden societies, we will need to let go of some of our basic assumptions about the relationship between law, order, and violence.

This implies something that may be disturbing to many human-rights advocates: that both violence and suffering can be deeply compelling to human beings. The human-rights discourse will have to create alternative ways to conceptualize violence and suffering if it is to capture people’s hearts and minds, and to do so it may need to draw on some of the very same traditions that give meaning to violence and suffering in the first place. At times, formal law may be helpful in this endeavor. At other times, it may be irrelevant or damaging. The trick will be to tell the difference.

While this Article raises as many questions as it answers, the issues it outlines are critically important for those of us who believe that “law” is a valuable human invention. Ultimately, I hope the questions raised here will enrich domestic efforts to understand how law affects cultural change, as well as enriching international efforts to create rule-of-law cultures.

It should go without saying that the project of intervening in “other” cultures in order to change and “improve” them is a fundamentally arrogant and imperialist project, with many pitfalls. Nonetheless, I do not think it is a project we can abandon, since the price of abandoning it is turning our backs upon immense human suffering — and increasing our own vulnerability to acts of terrorism fueled by hopelessness and rage. As the process of globalization

continues, we have less and less basis for turning our backs upon the suffering of others, whether they live in our town or country or on the other side of the globe.

My prediction is that while it may never be possible to justify interventions to promote human rights and the rule of law in a way that will be satisfying to everyone, such interventions will continue to seem like moral imperatives to many people. To others, such interventions will seem imperative for international-security reasons, even if not for moral reasons. And if we are going to engage in the risky business of neoimperialist interventions to create new norms, we owe it to ourselves and to the world to do it as self-consciously and effectively as possible.