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MAKING "REGIME CHANGE" MULTILATERAL. THE WAR ON TERROR AND TRANSITIONS TO DEMOCRACY

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Since September 11, American policy at home and abroad has centered on engineering transitions from political contexts that spawn hatred and violence to those that promote peace and the rule of law.[1] Unfortunately, the current Administration has proceeded without considering the experience of countries making transitions to democracy This article suggests that heeding the lessons of their experience would produce policies that are both different and more effective.

To effect transitions, the Administration has relied heavily on military force abroad and the expansion of legal sanctions at home – a top-down set of strategies that comprise what I call the preemptive model.[2] In relying on such strategies, however, the preemptive model also effectively preempts recognition of the crucial role played by global inequality Pervasive media and technology allow groups to perceive inequality transnationally.[3] Inequality shapes social identities, sharpens social comparisons that prod groups to act, and mobilizes social capital dedicated to violence. Pursuit of a preemptive model stressing military force obscures the role of inequality thereby promoting polarization, not transition.

The preemptive approach has attracted criticism from scholars associated with

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Professor of Law, Roger Williams University. I thank Kevin Johnson, Diane Orentlicher and participants at a workshop at the Society of American Law Teachers Conference on Pedagogy and Crisis in October, 2002 for their comments on a previous draft.

1. This project encompasses number of related areas, including the intervention in Iraq, anti-terrorism enforcement, and immigration policy. *See infra* text accompanying notes 2-15 (analyzing these issues).

2. Use of the term "preemptive" in this Article dovetails with the Administration's espousal of a doctrine of preemptive force against perceived threats throughout the globe. *See* The National Security Strategy of the United States (2002) *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Apr. 26, 2004). While this national security doctrine is not centerpiece of my discussion here, its application to justify the United States military intervention in Iraq set the stage for the issues involving Iraq' transition to democracy that I analyze in the final section of the piece; *See infra* text accompanying notes 98-140; For a succinct theoretical and historical defense of the preemptive model, see ROBERT KAGAN, PARADISE AND POWER 75 (2003) ("[T]he United States has had the difficult task of trying to abide by, defend, and further the laws of advanced civilized society while simultaneously employing military force against those who refuse to abide by such rules.").

3. *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 459-73 (2002), citing BENEDICT ANDERSON, IMAGINED COMMUNITIES (rev. ed. 1991) (discussing globalization of information and information's role in formation of global "imagined communities"); Michael C. Hudson, *Imperial Headaches: Managing Unruly Regions in an Age of Globalization*, 9 MIDDLE E. POL'Y 61, 68-70 (Dec. 2002) (discussing impact of media transmission of images that depict suffering by Arabs and Muslims); Larbi Sadiki, *Popular Uprisings and Arab Democratization*, 32 INT'L J. MIDDLE E. STUD. 71, 83 (2000).

what I call the state-skeptical view While the state-skeptics often advocate for state measures such as increased foreign aid that seek to remedy material inequality they typically oppose new state initiatives involving the use of force or legal sanctions to deter transnational networks' violence against civilians.[4] In their concern with constraining state force, however, the state-skeptics fail to adequately address the threat to equality posed by violent transnational networks, such as Al Qaeda, Hamas, or Kach.[5] These groups, led by "authenticity entrepreneurs, foment violence based on nationality, ethnicity, or religion, and frustrate transitions.[6]

This article advances a multilateral transition model that refines and extends the literature on transitions to democracy [7] Transitions of the kind that the current Administration seeks are multilateral, requiring the cooperation of a multitude of constituencies, including Muslim[8] and Jewish[9] communities that spill across national borders. Law and policy should frame this dialogue of diasporas to promote transitions.

The transition scholars identify three factors as crucial to democratic transi-

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4. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Ronald Dworkin, *The Threat to Patriotism*, N.Y REV. BOOKS, Feb. 28, 2002, at 44 (asserting that post-September 11 legislation designed to disrupt terrorist groups' ability to raise funds and recruit new members "sets out new, breathtakingly vague and broad definition of terrorism" and is "not consistent with our established laws and values").

5. *See* Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 197-200 (2003) (discussing violent transnational networks).

6. *Id.*

7 *See* GERARD ALEXANDER, THE SOURCES OF DEMOCRATIC CONSOLIDATION (2002); JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 7-9 (1996); Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is and Is Not*, in TRANSITIONS TO DEMOCRACY 3 (Geoffrey Pridham ed., 1995); Gerard Alexander, *Institutionalized Uncertainty, The Rule of Law, and the Sources of Democratic Instability*, 35 Comp. Pol. Stud. 1145 (2002); Guillermo A. O'Donnell, *Democracy, Law, and Comparative Politics*, 36 STUD. COMP INT'L DEV. 7 (Spring 2001); Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3 (1999). A valuable complement to the comparative politics literature is the law and development literature, in which the theme of inclusion stressed here is a significant focus. *See* AMY L. CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998); CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE (2003) (for comprehensive study that analyzes transition and polarization from historical and social science perspective); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE 225 (2000) (for work centering on the appropriate forms of redress for abuses committed by prior regimes); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997).

8. *See* ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 236 (2002) ("It is international neglect of the Muslim interest in the Palestine and Kashmir conflicts, the presence of US troops on Saudi soil and the frequent double standards of the big players that have legitimized the use of violence.").

9. *See* BRUCE HOFFMAN, INSIDE TERRORISM 100-01 (1998) (reporting a speech in Los Angeles by Rabbi Meir Kahane, the New York native who founded the Israeli extremist group Kach, that "described Arabs as 'dogs' as people who 'multiply like fleas' who must be expelled from Israel or eliminated").

tion and consolidation. The first is institutional repertoire, defined as the range of a country's social and political institutions, from the nongovernmental organizations of "civil society" to the executive, legislative, and judicial branches.[10] The second is inclusiveness, defined as the degree to which the country in question treats all of its constituents as full members.[11] The third element is redress, defined as the access to remedies for victims of inequity.[12] Successful multilateral transitions offer all sides a stake in peaceful dispute resolution through inclusion and redress, and deploy force and sanctions authorized by law where necessary to constrain authenticity entrepreneurs who are unwilling to invest in peace.[13]

Transitions are never easy The element of redress, in particular, creates troublesome cross-currents. Ignoring redress can engender disillusionment that undermines transitions.[14] However, scholars of transitional justice have also recognized that the quest for perfect redress can destroy the mutuality on which all transitions depend.[15] For a transition-centered view, balance is everything.

In keeping with this pragmatic outlook, a transition-centered approach integrates difficult measures that might seem mutually exclusive when viewed from either a preemptive or state-skeptical perspective. For example, a transition model would require accountability, acknowledgment, and redress from groups that target civilians for violence, and would uphold the criminalization of assistance to groups such as Hamas, Kach, or the "Real IRA that use violence to undermine efforts at peaceful change.[16] However, a transition-centered model would also stress the importance of fair procedures in the adjudication of charges against alleged terrorists, to do justice and to build perceptions of legitimacy among transnational communities.[17] The integration of such measures bridges fault lines in order to promote peaceful change.

This Article is in three parts. Part I analyzes the problems with approaches to transitions that have sprung up in the wake of September 11. This Part critiques the preemptive model's failure to address inequality, and the state-skeptics' failure to acknowledge the pernicious role of authenticity entrepreneurs. Responding to these flaws, Part II outlines a transition-centered approach based on institutional repertoire, inclusion, and redress. Part III applies the transition-centered approach to three pressing global issues: changes in immigration policy after September 11, regulation of violent transnational networks, and the adjudication of alleged violations of the law of war.

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10. *See* Margulies, *supra* note 7

11. *Id.*

12. *Id.*

13. *See* Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 507-10 (discussing fairness, transparency, and transitions in transnational humanitarian organizations).

14. *See* Ruti G. Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT'L L.J. 893 (2003) (discussing complexities of transitional redress).

15. *Id.*

16. However, a transition-centered approach would regulate such efforts carefully to guard against the perils of vagueness and law enforcement overreaching. *See infra* text accompanying notes 56-62.

17. *See infra* text accompanying notes 84-91.

I. TERRORISM, TRANSNATIONAL VIOLENCE, AND PROBLEMS OF TRANSITION

Since September 11, 2001, the policy of the United States government has focused on the challenges of transitions in law and culture on an international scale. In Iraq, United States military intervention sought and accomplished a "regime change" that deposed Saddam Hussein and aims to establish a democratic federation. President Bush and his advisors persistently linked the Iraq war to the effort to curb the power and resources of transnational organizations such as Al Qaeda that carry out violence against civilians. The Bush Administration and its intellectual allies have also argued that the Iraq intervention and other steps involving the use of force will aid the cause of transition throughout the Middle East.

After September 11, a transition to democracy, peace, and the rule of law from political environments that generate hatred and violence may be a necessity, not merely an idle aspiration. However, the manifest need for such a transition should not obscure the challenges inherent in the task. The Administration's approach to meeting these challenges has been disturbingly one-dimensional. Adopting a preemptive approach, the Administration has relied on military force and broad legal sanctions applied by the United States and its allies. Inspired in part by the neo-Platonic conception of a natural political aristocracy developed by the philosopher Leo Strauss,[18] champions of the preemptive approach have frequently disdained consultation, consensus, and international law Often, the Administration has acted in a stark manner that discounts human rights and civil liberties at home[19] and abroad,[20] and incurs opportunity costs through the alienation and resentment of those whose support the Administration will need to achieve its goals.[21] Indeed, in a worst case scenario, the preemptive approach threatens a downward drift in which accountability and civil rights are honored more in the breach than in the observance.[22] This combination of resentment in affected communities and erosion of American democracy is a recipe for global polarization,

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18. *See* Leo Strauss, *Plato*, in HISTORY OF POLITICAL PHILOSOPHY 33, 49 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987) (noting the differences between Platonism and liberal democracy, and observing that for Plato "[t]he founding of the good city started from the fact that men are by nature different, and this proved to mean that men are by nature of unequal rank [a]s result, the good city comes to resemble a caste society"); James Atlas, *Leo-Cons; A Classicist's Legacy: New Empire Builders*, N.Y TIMES, May 4, 2003, Sec. 4, at 1 (noting the intellectual debt of influential Administration figures, such as Paul Wolfowitz, to Strauss, while asserting that the Administration may have neglected Strauss's own warnings about the abuses of empire).

19. *See* Cole, *supra* note 4 (critiquing detention of immigrants after attacks); Margulies, *supra* note 13; Volpp, *supra* note 4 (describing the marginalization of particular communities after September 11); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001. The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2002).

20. *See* JOSEPH S. NYE, JR. THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 35 (2002) (arguing that preemptive approach by the United States will result in the loss of "important opportunities for cooperation in the solution of global problems such as terrorism").

21. *Id.*

22. *See* Dworkin, *supra* note 4.

rather than the mutuality required for successful transitions.

In addition to the war in Iraq, the preemptive approach has been evident in Administration legal and policy initiatives on three other fronts. In the immigration sphere, the Administration has used nationality, religion, and ethnicity as criteria to selectively register, apprehend, detain, and deport immigrants.[23] By seeking to regulate transnational networks carrying out violence against civilians, the Administration has relied on broad and sometimes vaguely defined statutory language barring "material support" of groups designated by the Secretary of State as terrorist organizations.[24] To prevent future terrorist attacks, the Administration has established military tribunals that lack fundamental procedural safeguards.[25] Each policy has undermined perceptions of legitimacy crucial to the success of antiterrorist efforts.

A. Inequality and Social Dynamics

The core problem with the Administration's strategy is its lack of regard for equality as a factor in the social dynamic that produces violence. The certainty animating the preemptive approach leaves little room for understanding the complex process underlying the formation of social identity in regions, such as the Middle East, that acolytes of the preemptive approach hope to shape. Compounding this lack of comprehension is a failure to appreciate the role of identity in fostering social comparisons that provoke concern about unfairness, and the role of social identity and comparison in turning social capital toward violence.[26]

Social identity is the first component in the terrorism dynamic. Social identity theory suggests that people are essentially social beings, concerned with how they relate to others.[27] While the ruling elites that have been the traditional focus

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23. Patrick J. McDonnell & Russell Carollo, *An Easy Entry for Attackers; Immigration flaws garner attention as authorities track the Sept. 11 hijackers' movements through the United States*, L.A. TIMES, Sept. 30, 2001, at A1 (discussing the new policy, which purported to respond to indications that many of the September 11th attackers manipulated United States immigration law to enter this country, but has attracted widespread criticism by academics and government officials); *See* Cole, *supra* note 4; Akram & Johnson, *supra* note 19; Margulies, *supra* note 13; Volpp, *supra* note 4. *Cf.* Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), *available at* http://www.usdoj.gov/oig/special/0306/analysis.htm (last visited Apr. 30, 2004).

24. Cole, *supra* note 4; Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. den. sub nom.* Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001) (upholding statute against facial challenge, but finding that certain statutory terms were unconstitutionally vague as applied).

25. *See* Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000).

26. Critics of the Administration's reliance on force and legal sanctions, whom I refer to collectively as the "state-skeptical" school, also suffer from an incomplete picture of the interaction between inequality and social dynamics. *See infra* text accompanying notes 53-55.

27 *See* David O. Sears, et. al., Cultural Diversity and Multicultural Politics: Is Ethnic Balkanization Psychologically Inevitable?, *in* CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT 35, 40-41 (Deborah A. Prentic & Dale T. Miller eds., 1999); Michelle Adams, Intergroup Rivalry, Anti-Competitive Conduct, and Affirmative Action, 82 B.U. L. REV. 1089, 1100-04 (2002);

of American law and policy contribute to the formation of social identity, popularly shared experiences of trauma, oppression, or inequity can also play a significant role.

The role of trauma is evident in the way the tragic events of September 11 contributed to some Americans' sense of their own identity as a people embattled in a hostile world. The experience of displacement has also been constitutive for a broad range of other groups, including African-Americans,[28] Jews,[29] and Palestinians,[30] each fashioning narratives of hope and resistance. For Arabs and Muslims throughout the globe, the Palestinian experience in particular has been a compelling metaphor for threats posed by the West.[31] Media technology makes instances of trauma or perceived disparate treatment, such as the attacks of September 11 against the United States by Al Qaeda, the Israeli government's measures against alleged Palestinian militants, or the United States military's causing of civilian casualties during the war in Iraq, immediately available, graphic, and vivid.[32]

The "social comparisons" fueled by such images can spur change for better or worse. Identification with a group, coupled with the perception that the treatment accorded that group is unfair or unjustified, impels people to take action.[33] Human history and experience teach us, however, that intuitions about equity and fairness can all too easily degenerate into envy, resentment, and rage.[34] Particularly when a group within a society or region that is dominant in terms of numbers, culture, or historical pedigree feels threatened by those perceived as outsiders, social com-

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Diana C. Mutz & Jeffery J. Mondak, Dimensions of Sociotropic Behavior: Group Based Judgments of Fairness and Well-Being, 41 AM. J. POL. SCI. 284 (1997); James N. Baron & Jeffrey Pfeffer, The Social Psychology of Organizations and Inequality, 57 (3) SOC. PSYCHOL. Q. 190, 196-98 (1994). *See* Tilly, *supra* note 7, at 32 (discussing political identities as "networks deploying partially shared histories, cultures, and collective connections with other actors").

28. *See* Adams, *supra* note 27

29. *See generally* ANTON LA GUARDIA, WAR WITHOUT END: ISRAELIS, PALESTINIANS, AND THE STRUGGLE FOR A PROMISED LAND (2001).

30. Graham Usher, *Facing Defeat: The Intifada Two Years On*, 32 J. PALESTINE STUD. 21, 22 (Winter 2003).

31. *See* Sadiki, *supra* note 3 (discussing influence of the Palestinian intifada on expressions of popular sentiment in Jordan and Egypt).

32. *See* Berman, *supra* note 3, at 459-73; Hudson, *supra* note 3, at 68-70; Sadiki, *supra* note 3. (This is not to say that *any* reaction to such trauma or injustice is acceptable. The contours of the right of self-defense and proportionality will always be crucial in evaluating possible responses. Disproportionate responses, such as the attacks of September 11, are a sure sign that organizations with their own agenda have hijacked the formation of social identity.).

33. The African-American struggle for civil rights stemmed from just such dynamic. *See* Adams, *supra* note 27 The Zionist movement stemmed from the sentiment that Jews needed home that could serve as a refuge from the persecution they had encountered in Europe. LA GUARDIA, *supra* note 29. The yearning of Palestinians for meaningful sovereignty and an end to the displacement caused by Israeli settlements has an analogous origin. Usher, *supra* note 30. (discussing Palestinian unrest commencing in September, 2000 as in part a reaction to increased settlement activity subsequent to signing of the Oslo peace accords).

34. *See* TILLY, *supra* note 3, at 141 (discussing "[a]ctivation of available us-them boundaries" in course of Rwandan genocide).

parisons can fuel murderous and even genocidal hatred.[35]

Where social identity and social comparison go, social capital soon emerges. Social capital is the constellation of groups, networks, and organizations that help provide the infrastructure for action.[36] Social identity and social comparison can skew social capital in either positive or negative ways. For example, profound feelings of powerlessness can turn networks toward self-destructive and risk-prone behavior.[37] When the future looks bleak, many people refuse to invest time and effort in building long-term institutions.

Instead they adopt an apocalyptic perspective, creating a vacuum between today and eternity.[38] This is the temporal domain of the suicide bomber. Suicide bombings and other acts of coordinated violence require social capital of a special kind.[39] Discipline and coordination are necessary to construct munitions, select a target, avoid detection, and execute an attack.[40] Unfortunately, this brand of social capital is not readily transferable to the construction of institutions that nurture democracy and the rule of law.

Modes of social capital and the framing of social comparison and identity thus exist in a dialogic relationship. While substantive perspectives on equality and belonging shape the form taken by social organizations, the form that emerges also influences the framing of definitions and claims. For example, highly hierarchical, secretive, or homogeneous groups are likely to perceive both identity and grievances in a far more polarized fashion.[41] In homogeneous groups, new elites can emerge, instilling and exploiting a hunger for "authenticity" within the group – a yearning for an imagined triumphalist past.

These "authenticity entrepreneurs" can help inaugurate social cascades that culminate in extreme violence or even genocide.[42] Indeed, the twentieth century's

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35. *See* James L. Gibson & Amanda Gouws, *Social Identities and Political Intolerance: Linkages within the South African Mass Public*, 44(2) AM. J. POL. SCI. 278, 289 (2000) (discussing linkage between social identity and intolerance among South African whites).

36. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 307-18 (2000) (discussing importance of social capital).

37 *See* Hudson, *supra* note 3, at 70 ("the network [of Islamists] produces the social-capital rewards for membership in addition to the instrumental agendas being put forth [c]odes of dress and deportment are among the social cues and pressures that attract and consolidate commitment to the cause[d]uring repressive periods Islamists migrated into the subaltern and protected spaces ").

38. *See* ANDERSON, *supra* note 3.

39. *See* TILLY, *supra* note 7 (discussing "violent specialists"); Bruce Hoffman, *The Logic of Suicide Terrorism*, ATLANTIC MONTHLY, June 2003, at 43 (quoting a journalist who observes that, "We hardly ever find that the suicide bomber came by himself. There is always a handler.").

40. Hoffman, *supra* note 39.

41. *See* Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV J. L. & PUB. POL'Y 429 (2002).

42. *See* TILLY, *supra* note 7, at 34 (discussing role of "political entrepreneurs" who "promote violence by activating boundaries, stories, and relations that have already accumulated histories of violence; by connecting already violent actors with previously nonviolent allies; by coordinating destructive campaigns; and by representing their constituencies through threats of violence"); Timur Kuran, *Ethnic Norms and their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623 (1998) (discussing how small changes in perceptions and behavior prompted in part by signals from

experiences of genocide, from the Nazis in Germany to the Hutu machete-wielders in Rwanda, often had roots in perceived oppression at the hands of "inauthentic" others.[43] The lay-person Bin Laden's campaign against infidels in the West, articulated in *fatwahs*[44] that traditional Islam allows only clerics to issue,[45] and Kach's calls for the expulsion of Palestinians,[46] along with other grim examples, illustrate how secrecy, homogeneity, and the rhetoric of authenticity have promoted violence against innocents.

B. The Failures of the Preemptive Approach and Its Critics

Unfortunately, the preemptive style, rooted in coercion and legal sanctions, does little to dislodge the processes of social identity construction and social comparison that create a fertile ground for asymmetric violence. Because of this negligible impact on underlying processes, the Administration's approach to disrupting the social capital of groups practicing asymmetric violence is ineffective. Indeed, the punitive approach in some ways enhances the social capital available for asymmetric violence, by sharpening the social comparisons that serve as the best recruiting tools for those committed to extremism.[47]

The recent war with Iraq offers an example of a transition that risks spiraling into polarization. The problem started with the focus of Administration policymakers on efficiently achieving a military victory.[48] Having geared their efforts toward war against the Ba'athist regime, policymakers were ill-prepared for the consequences of the regime's collapse.[49] In particular, policymakers failed to anticipate grass-roots reactions to the power vacuum, such as the protracted cascade

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social and political leaders can snowball into massive political upheavals and ethnic strife); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (analyzing role of "availability entrepreneurs" in shaping public policy by leveraging stories and images that are cognitively salient). Ironically, authenticity entrepreneurs often appropriate images and group structure from those they identify as enemies. *See, e.g.*, Ladan Boroumand & Roya Boroumand, *Terror, Islam, and Democracy*, 13(2) J. DEMOCRACY 5, 7-8 (2002) (discussing the influence of Fascism and Communism on theorists of violent Islamism, including Sayyid Qutb); JOHN ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 20, 32 (2002) (noting Islamic strictures against killing noncombatants and Osama bin Laden's disregard of these rules); KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 338-39 (2001) (analyzing Qutb's revision of Islamic juridical doctrine on tolerance for rebellion).

43. *See* CHUA, *supra* note 7.

44. *See* ESPOSITO, *supra* note 42.

45. *Id.*

46. *See* Margulies, *supra* note 5.

47 *See, e.g.*, Michael P O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned By the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1677 (2003) (noting that restrictive legislation enacted by the British to deter terrorism "alienated broad swaths of the Northern Irish community, thereby providing assistance to. paramilitary groups").

48. *See* Eric Schmitt & David E. Sanger, *Aftereffects: Reconstruction Policy; Looting Disrupts Detailed U.S. Plan to Restore Iraq*, N.Y TIMES, May 19, 2003, at A1.

49. *Id.*

of looting that damaged the nation's infrastructure.[50] The devastation deprived post-Ba'athist civil authorities of essential tools of transition, such as the means to provide power, water, and basic services to the populace.[51] These failures triggered Iraqi resentment, hindering the cause of effective transition. Analogous problems with the preemptive approach beset issues of immigration regulation in the wake of September 11, efforts to disrupt the human and financial capital of groups practicing violence against civilians, and attempts to adjudicate violations of the law of war by alleged terrorists.

The defects of the preemptive perspective cry out for an alternative. Unfortunately, the alternative most vigorously pressed, what I call the state-skeptical approach, also suffers from significant flaws. The state-skeptical approach is wary of any expansion of government power. For this reason, champions of the state-skeptical approach oppose measures that would restrict the financial and human capital available to organizations such as Al Qaeda, Hamas, or Kach.[52] However, state-skeptics fail to acknowledge the increase in violence against innocents promoted by the "authenticity entrepreneurs" leading such groups, the hateful stereotypes authenticity entrepreneurs invoke to encourage violence, or the way in which organizational hierarchy, homogeneity and secrecy facilitate violence.[53] State-skeptics also forget that groups practicing violence against innocents provide powerful rhetorical ammunition to advocates of the preemptive approach pressing for punitive responses. This perverse dynamic encourages polarization, and prejudices the prospects for peaceful transitions. Neither the preemptive nor the state-skeptical view deals adequately with the challenges of a violent world.

II. A BETTER ALTERNATIVE TO THE PREEMPTIVE APPROACH: THE TRANSITION-CENTERED VIEW

A transition-centered perspective is better able to respond to these challenges.

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50. *Id. See also* TILLY, *supra* note 7, at 134 (noting that opportunistic "seizure or damage of property" is a hallmark of "low-capacity regimes, like the chaotic governance arrangements in Iraq immediately after Saddam's fall, that exert little or no authority over the conduct of their constituents).

51. TILLY, *supra* note 7, at 134.

52. *See* Cole, *supra* note 4 (conceding that Al Qaeda is an organization so intrinsically devoted to violence that regulation of its access to financial assistance may be appropriate, but offering no readily cognizable standard that would allow courts to separate permissible from impermissible regulation, implicitly conferring upon Al Qaeda the impunity conferred upon organizations such as Hamas).

53. *Id.* (Cole acknowledges that security is a legitimate concern of government. However, he regards as suspect measures that criminalize the development of an institutional capability for violence. Moreover, he argues that the First Amendment bars legislation prohibiting financial aid to organizations like the Palestinian extremist group Hamas, which sponsor both violence and social services. In making this argument, he ignores both the difficulty of regulating the accounting of organizations based outside the United States, and the way in which the provision of social services legitimizes the violence perpetrated by such groups.) *Id. See* Margulies, *supra* note 13 (discussing organizational synergies within organizations providing both violence and social services); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIG. L.J. 313, 330-32 (2000) (explaining why regulation of transnational organizations practicing violence does not violent first amendment); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. denied*, Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001).

Unlike the preemptive perspective, the transition-centered strategy recognizes that regime change – either national, regional, or global – is necessarily multilateral. For this reason, a transition-centered strategy requires reflection about the opportunity costs imposed by the use of force. While force and legal sanctions have a role, the transition-centered approach recognizes that using them can set in motion a dynamic that the side using force cannot fully control. The transition-centered approach recognizes that a more refined menu of responses is necessary to move social identity, comparison, and capital away from violence and toward the rule of law. At the same time, the transition-centered approach acknowledges that when the state must use force or sanctions against entities practicing violence, it should use only those measures tailored to the occasion, and should also support the emergence of alternative entities committed to peaceful change.

A transition-centered approach stems from the substantial body of literature striving to make sense of the governmental changes occurring throughout the world in the last quarter-century. Considering regime changes in regions as disparate as Eastern and Southern Europe, Latin America, the Caribbean, and Africa, scholars have identified crucial elements in the transition to democracy [54] These dynamic models recognize that change is complex and unpredictable. As one commentator has pointed out, "[D]emocratic evolution is [not] a steady process that is homogeneous over time. temporal discontinuity is implicit."[55]

Creating and maintaining the right mix of elements is a matter of art and chance, not science. The traditions, institutions, and actors that affect the process of transition do not necessarily respond to the seeming certainties embodied in formal law or the application of force. Indeed, this literature explicitly borrows from conceptions of regime change developed over the centuries by political theorists who viewed such change not as a function of structural or material forces, but instead as the "contingent product of human collective action,"[56] which can move from despotism to democracy, or just as readily travel in the opposite direction.[57]

The account of democracy and the rule of law developed by the transition theorists involve both popular participation and constraint on popular choices. The transition theorists believe that human beings fulfill themselves when they participate in decisions regarding the well-being of the community [58] This expression of self is dynamic, because no mechanical formula — no shorthand of class, race, or economic interest — can conclusively determine how people speak and act as they

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54. *See* Margulies, *supra* note 7.

55. *See* Dankwart A. Rustow, *Transition to Democracy: Toward a Dynamic Model*, in TRANSITIONS TO DEMOCRACY, *supra* note 7, at 67.

56. *See* Philippe C. Schmitter & Terry Lynn Karl, *The Conceptual Travels of Transitologists and Consolidologists: How Far to the East Should They Attempt to Go?* 53 SLAVIC REV 173, 174 (1994).

57 *See id.* ("There is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer than to introduce a new system of things: for he who introduces it has all those who profit from the old system as his enemies and he has only lukewarm allies in those who might profit from the new system. quoting NICCOLO MACHIAVELLI, THE PRINCE, ch. VI, 21 (1950)).

58. *See* O'Donnell, *supra* note 7, at 113 (arguing that "the discharge of public duties is an ennobling activity" and that "dedication to the public good demands and nurtures the highest values").

engage with the speech and action of others. Regimes must provide for this dynamic element, by permitting political expression, and providing avenues for changing a particular government that incurs popular dissatisfaction. At the same time, the rule of law requires institutions such as courts that can check the popular will in the name of abiding values.[59]

The multilateral transitions required to deal with worldwide issues of asymmetric violence add new layers of uncertainty. Transitions are unpredictable even when they hinge largely on the interaction of institutions and actors within a particular, relatively homogeneous state. When transitions involve ethnic conflict and links with transnational communities, complexity and unpredictability increase exponentially

In multilateral transitions, developments within one country can exert a powerful impact on events abroad. This impact is inescapable when, as in efforts to combat asymmetric violence, one of the countries involved is the world's lone superpower. Moreover, when the locus of transition resides in popular sentiments, matters of tone and imagery become crucial. Such intangible concerns can be decisive in the formation of social identities and the framing of social comparisons. This dynamic process can make the difference between the spiraling violence of polarization and the progress of transition.

While there is no single template for democracy or the rule of law, we can create an operating definition.[60] A pathway to democracy must ensure input from all stakeholders and offer protections against overreaching by government and powerful private groups. The three central elements advanced by the transition theorists for realizing this definition are 1) inclusion, 2) institutional repertoire; and, 3) redress. I address each in turn in the following paragraphs.

A. Inclusion

The premise that participation in politics is the hallmark of democracy indicates the importance of inclusion. All stakeholders must have the opportunity to participate.[61] Multilateral transitions expand the pool of persons who should be considered stakeholders in the process.

Inclusion is important not only for its own sake but because of its instrumental value. The lessons of social identity, comparison, and capital teach us that excluded groups despairing about gaining a stake in government may respond to the urgings of authenticity entrepreneurs.[62] In contrast, the shared stakes promoted by

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59. *See* FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 157-58 (2003) ("Constitutions were meant to tame the passions of the public, creating not simply democratic but also deliberative government.").

60. *See* Tilly, *supra* note 7.

61. The importance of participation in transitions suggests the need for regulating institutions such as markets that can exacerbate inequality. *See* Chua, *supra* note 7; Richard Bilder & Brian Z. Tamanaha, The Lessons of Law-and-Development, 89 AM. J. INT'L L. 470 (1995) (book review).

62. *See generally* William P Alford, *Book* Review, 113 HARV. L. REV 1677, 1704 (2000) (noting that "ethnic tensions" can disrupt transition to democracy).

inclusion give otherwise disparate parties an incentive to cooperate in shaping new institutions.[63] For example, in Northern Ireland, Catholics' resentment over their exclusion from power fueled violence that in turn provided an easy justification for the Unionists' violent response.[64] Recently, more inclusive processes have encouraged Unionists and Catholics to cooperate in a range of complex areas, including health, education, and finance.[65] In Sri Lanka, while violence shows signs of ebbing, decades-long marginalization of the predominantly Hindu Tamil minority by the predominantly Buddhist Sinhalese majority has prompted brutal attacks by the extremist Tamil group the "Liberation Tigers."[66] The Sinhalese have responded in kind.[67] Stopping the violence will require inclusive measures such as progress toward a federated system, allowing autonomy for both groups.[68]

The situations in Northern Ireland and Sri Lanka are examples of multilateral transitions. In multilateral transitions, policymakers and actors in the legal system must appreciate that they have multiple audiences. One audience will consist of persons designated as members of the polity, such as citizens who can vote in national elections.[69] Another audience consists of lawful permanent residents, who cannot at present cast a vote in national elections but typically have or will have the option of becoming citizens in the future, and who participate in the cultural, social, and political life of the polity in a variety of other ways.[70] However, for a nation engaged in a multilateral transition process with other countries, entities, and institutions on a global level, the audience for government decisions is actually far broader. It includes foreign governments and transnational communities with members held together by ties of nationality, ethnicity, religion, or ideology.[71]

The expansion of audiences for multilateral transitions has significant implications for global initiatives undertaken by the United States and other countries.[72] In some cases, policymakers will seek the approval from international bodies such as the United Nations, as the Bush Administration did both before and after the

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63. *See* Tilly, *supra* note 7.

64. *Id.*

65. *See* Colm Campbell & Fionnuala Ni Aolain, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 871, 886 (2003).

66. *See* Neil DeVotta, *Illiberalism and Ethnic Conflict in Sri Lanka*, 13 J. DEMOCRACY 84, 90-91 (Jan. 2002).

67 *Id.*

68. *See id.* at 97 (arguing that solution to conflict will involve "a policy of credible devolution that promotes Tamil self-determination").

69. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 177-81 (2002) (arguing that many legal distinctions between citizens and lawful resident aliens stem from faulty premises).

70. *Id.*

71. *See* Tilly, *supra* note 7 (discussing how emigre communities, such as Irish-Americans who supported the Irish Republican Army, can contribute to polarization); Philippe C. Schmitter, *Civil Society East and West*, in CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES 239, 250 (Larry Diamond et al. eds., 1997) (discussing "transnational civil society").

72. *See generally* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (discussing the need for transnational mutuality and reciprocity in legal doctrine and practice).

Iraq war.[73] Other initiatives, such as global anti-terrorism efforts, also require transnational agreements and cooperation. Aspects of United States law regarding foreign nationals, such as refugee law and policy, incorporate provisions from international law.[74] In addition, policymakers in the United States operate within informal dimensions of accountability. Initiatives by the United States, for example those proposed as elements of antiterrorist enforcement, are subject to judgments about legitimacy by an array of audiences including the members of transnational nongovernmental organizations and grass-roots communities abroad. Consent and meaningful participation by each group is often necessary to the success of the underlying multilateral project.

The virtue of this kind of inclusion is evident even in ostensibly domestic judgments.[75] Matters generally viewed as at the heart of the polity's self-definition, such as the admission and removal of immigrants, can shape the effectiveness of multilateral transitions. For example, United States immigration policies that target undocumented immigrants from the Middle East and South Asia may then intensify the view that anti-terrorism efforts constitute a "war against Islam."[76] Sending a more inclusive message offers transnational communities a stake in the success of anti-terrorism efforts.[77]

B. Institutional Repertoire

For transition theorists, inclusion also prompts a healthy development of social and political organizations that I have elsewhere called "institutional repertoire. Policymakers and theorists sometimes equate democracy with the occurrence of elections. However, elections are only one facet of a durable transition to democracy. A repertoire of institutions, including courts, administrative agencies, and nongovernmental organizations, is necessary.

A varied institutional repertoire of both state and nongovernmental organiza-

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73. *See* Bob Deans, *Bush U.N. Speech Targets Iraq*, ATLANTA J. CONST., Sept. 12, 2002, at 18A.

74. *See* Beharry v. Reno, 183 F Supp. 2d 584, 591-93 (E.D.N.Y. 2002), *rev'd on other grounds sub nom.*, Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

75. In this fashion, policymakers recognized that domestic battles over inclusion, such as the civil rights struggles of the mid-twentieth century United States, had an impact on transnational judgments of legitimacy regarding the Cold War. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, in CRITICAL RACE THEORY: THE CUTTING EDGE 110, 115-16 (Richard Delgado & Jean Stefancic eds., 1995) (discussing international controversies spurred by racial discrimination within the United States).

76. *See* THOMAS L. FRIEDMAN, *In Pakistan, It's Jihad 101*, in LONGITUDES AND ATTITUES: EXPLORING THE WORLD AFTER SEPTEMBER 11 100, 101 (2002) (quoting student in Pakistan madrasa, or religious school, who described Americans as "unbelievers [who] do not like to befriend Muslims, and want to dominate the world with their power"); GUNARATNA, *supra* note 8, at 236 (discussing roots of resentment of American policies in Muslim world); Abbas Amanat, *Empowered Through Violence: The Reinventing of Islamic Extremism*, in THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER ELEVEN 25, 51 (Strobe Talbot & Nayan Chanda eds., 2001) ("The U.S. could only benefit from promoting the cause of democracy and open society in the Muslim world and encouraging voices of moderation, religious tolerance, and human rights.").

77 *See infra* text accompanying notes 99-118 (discussing immigration and multilateral transitions).

tions refines deliberation about public issues. It gives participants in the polity a menu of opportunities for nonviolent engagement,[78] and a multitude of perspectives for fostering reflection.[79] The "horizontal accountability" yielded by institutional repertoire also nurtures commitments to both formal and informal separation of powers, thus reducing the risk that any single institution will impose an oppressive homogeneity.[84]

Experienced architects of transitions understand the importance of institutional repertoire. In East Timor, for example, where crimes against humanity occurred in the course of a bitter struggle with Indonesia for independence, the United Nations has invested substantial time, effort, and funding to promote the development of an independent judiciary.[80] In Islamic countries, hopes for transition have been bolstered by the development of indigenous women's organizations.[81]

Authenticity entrepreneurs whose regimes and organizations embrace violent exclusionary practices tend to narrow institutional repertoires. Authenticity entrepreneurs can come in all shapes and sizes, from the genocidal demagogues of Rwanda[82] to government officials who invoke fear of violence committed by others as a justification for expanding state power.[83] Authenticity entrepreneurs accumulate power not through the peaceful resolution of disputes, but through the ratcheting up of violence.

In a multilateral context involving disputes between groups, countries, or regions, this narrowing of repertoires is often contagious. As the Israeli-Palestinian conflict demonstrates, escalating violence discredits those seeking peaceful means for resolving disputes.[84] The result is not transition, but polarization. Confronting

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78. *See* TILLY, *supra* note 7, at 120-27 (noting that ethnic or religious violence in areas such as Northern Ireland has historically been linked with a narrow repertoire of occasions such as holidays that sparked rival public demonstrations).

79. *See* Ziad Abu-Amr, *Pluralism and the Palestinians*, J. DEMOCRACY, July 1996, at 83, 90-91 (noting that the Palestinian Legislative Council has the potential to operate as counter-weight to excesses within the Palestinian Authority).

80. *See Report of the Secretary-General on the United Nations Mission of Support in East Timor*, U.N. SCOR, at 1, U.N. Doc. S/2002/1223 (2002), *available at* http://www.un.org/Docs/sc/reports/2002/sgrep02.htm (last visited Apr. 26, 2004).

81. *See* Janine Astrid Clark & Jillian Schwedler, *Who Opened the Window? Women's Activism in Islamist Parties*, 35 COMP. POL. 293 (2003).

82. *See* TILLY, *supra* note 7.

83. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (observing that "emergency powers would tend to kindle emergencies"); *see also* Cole, *supra* note 4 (criticizing policies of Attorney General Ashcroft); Akram & Johnson, *supra* note 19; Lely T. Djuhari, *President Hints She Will Back Vigilante Teams*, SEATTLE TIMES, July 6, 2003, at A3 (quoting Indonesian president as suggesting that the mobilization of armed groups of citizens, which has already led to substantial human rights violations in the last 5 years in East Timor and elsewhere, may be necessary to deal with separatists in Aceh); Jane Perlez, *Indonesia Says Drive Against Separatists Will Not End Soon*, N.Y. TIMES, July 9, 2003, at A3 (discussing United States efforts to deal with human rights abuses of Indonesian military, complicated by need for military's cooperation in anti-terrorist efforts).

84. *See* Andrew Kydd & Barbara F Walter, *Sabotaging the Peace: The Politics of Extremist Vio-*

violence, policymakers aid the cause of transition by deterring authenticity entrepreneurs, nurturing alternatives, and guarding against their own surrender to authenticity entrepreneurship's temptations.

C. Redress

When authenticity entrepreneurs twist transition into polarization, redress is crucial in putting the process back on track. Redress signals both a commitment to inclusion, and an "all-clear" for those brave souls willing to invest their time, effort, and well-being in the development of a rich and varied institutional repertoire.[85] In this sense, remedies to uphold the claims of the weak against the powerful are a bulwark of democracy and the rule of law.[86] A transition without redress is inherently unstable – a camouflaged continuation of the status quo that will eventually give way to violence. However, demands for complete redress can also destabilize the transition agenda.

Transitional redress is most effective in conjunction with commitments to both inclusion and institutional repertoire. To serve inclusion, avenues for redress should be the product of dialogue. For example, debates about reparations in the United States have brought to the surface subjects submerged in generations of oppression, such as corporate complicity with slavery. Transitions that approach redress in a top-down fashion, categorically ruling out classes of remedies, suppress conversations that are difficult, but necessary. Consider here the eventual failure of the Oslo peace process in the Middle East: the politicians that signed the Oslo accord sought to glide by wrenching issues such as settlements and the return of refugees to Israel. When these crucial issues re-emerged, they combined with failures of leadership on both sides to fuel the polarization of the second Palestinian intifada.[87]

Institutional repertoire also plays a central role in transitional redress. Truth and reconciliation commissions developed in Latin America, South Africa, and elsewhere to supplement and supplant legalistic vehicles for redress such as reparations and criminal prosecution of human rights violators.[88] Such innovations may be particularly appropriate as touchstones for transition in multi-ethnic conflict, in which authenticity entrepreneurs on both sides have fostered a discourse of stereotyped narratives. Allowing people at the grass roots to break through those narratives and model a different kind of conversation for the future can consolidate tran-

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lence, 56 INT'L ORG. 263 (2002).

85. *See* Guillermo O'Donnell, *Illusions About Consolidation*, J. DEMOCRACY, Apr. 1996, at 34, 36-37 (noting that democracy must "include an intertemporal dimension: the generalized expectation that . freedoms will continue into an indefinite future").

86. *See id.* at 45 (noting many states with ostensibly democratic elections still deprive people of rights and participation, citing examples including "[t]he rights of battered women to sue their husbands and of peasants to obtain a fair trial against their landlords, the inviolability of domiciles in poor neighborhoods, and in general the right of the poor and various minorities to decent treatment and fair access to public agencies and courts").

87. *See* Usher, *supra* note 30.

88. *See* Teitel, *supra* note 14, at 902-03.

sitional momentum. However, redress of material inequality should accompany the symbolic and affective benefits of truth and reconciliation commissions. In an emerging democracy such as South Africa, persistent economic inequality has eroded some of the good will accorded post-apartheid reforms, with a rising number of blacks telling pollsters that their lives were better under apartheid.[89]

A pragmatic repertoire of remedies is also vital because the search for perfect redress can undermine transition. In some Eastern Bloc countries, for example, "lustration" – the exposure and prosecution of ex-Communist officials – became a kind of fetish for ostensible reformers such as Solidarity once they acceded to power. The result was a neglect of other policy goals, such as economic development.[90] In dealing with the remnants of a dictatorship, punishment of key figures will send a powerful message of transition, while sparing people who had little choice but to serve the regime and whose help is required for a successful transition.[91] Indeed, in a multilateral transition involving at least two organizations or entities, the demand of one or more sides for complete redress may foster not transition, but increased polarization.

III. APPLYING A TRANSITION-CENTERED APPROACH

The criteria of inclusion, institutional repertoire, and redress can inform law and policy on multilateral transitions. Employing a transition-centered analysis can illustrate the limits of relying on force and legal sanctions. Yet, a transition-centered analysis can also provide a clearer case for state intervention to level the playing field between groups practicing violence and groups seeking non-violent alternatives. This section explores the relevance of transition-centered analysis for three problems related to transnational asymmetric violence: 1) immigration policy after September 11, 2) the regulation of organizations that practice violence against civilians; and 3) the adjudication of alleged violations of international humanitarian law.

A. Immigration Enforcement after September 11

Viewing the struggle against asymmetric violence as a process of multilateral transition can furnish support for a re-framing of bodies of law traditionally left to the discretion of the government, such as laws governing immigration. As noted above, the relevant audience for United States immigration law is not merely do-

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89. *See* Robert Mattes, *South Africa: Democracy Without the People?* J. DEMOCRACY, Jan. 2002, at 22, 32; Brandon Hamber, *Dealing with the Past: Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT'L L.J. 1074, 1074-87 (2003) (discussing disappointment felt by some victims of apartheid in work of South African truth and reconciliation commission).

90. *See* Denise V Powers & James H. Cox, *Echoes from the Past: The Relationship between Satisfaction with Economic Reforms and Voting Behavior in Poland*, 91 AM. POL. SCI. REV 617, 627-28 (1997) (discussing disillusionment engendered by undue focus on rooting out former Communist functionaries).

91. *Id.*

mestic in nature, but transnational.[92] Perceptions of unfairness shared by the transnational audience undercut the legitimacy of United States law, and the effectiveness of United States antiterrorist policy The use by courts of international instruments, such as the International Covenant on Civil and Political Rights and the International Convention on the Rights of the Child to inform the interpretation of statutory rights under United States immigration law would bolster international perceptions of the legitimacy of United States law by promoting the values of inclusion, institutional repertoire, and redress.[93]

Current United States immigration jurisprudence gives plenary substantive authority to Congress and broad enforcement discretion to the executive branch.[94] Substantial authority and discretion are not necessarily inconsistent with the multilateral transition paradigm.[95] However, the degree of authority exercised by the political branches in the United States over immigration can also frustrate multilateral transitions.

This frustration stems from the way in which the authority over immigration exercised in the United States by the political branches of government lends itself to the scapegoating practiced by governmental authenticity entrepreneurs. When government faces challenging problems, officials can target immigrants.[96] Principles of liberty and equality that typically constrain the government are often not available to check such measures in the immigration context.[97] The Justice Department's effort in the wake of September 11 to detain and deport undocumented immigrants from the Middle East and South Asia and conduct immigration proceedings in secret was a product of this lack of accountability [98]

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92. *See supra* text accompanying notes 74-80.

93. International Covenant on Civil and Political Rights, *entry into force* Mar. 23, 1976, *available at* www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Apr. 24, 2004).

94. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

95. The ability of sovereign states to define themselves through criteria for entry preserves an international repertoire of heterogeneity, providing useful check on the homogenizing force of trends toward globalization of culture and commerce. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). Furthermore, some authority over entry is necessary to deter authenticity entrepreneurs and their organizations outside the polity from using the immigration system to stage violent attacks on the polity's population and institutions. The ability of the September 11 attackers to "game the system" through the use and abuse of student and visitors' visas demonstrates the importance and difficulty of immigration enforcement.

96. *See* BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 33-38 (2001) (discussing invocation in public discourse of "us versus them" stereotypes that justify restrictive immigration measures).

97. *See* Ping v. United States, 130 U.S. 581, 609 (1889) (holding that Congress has "plenary power" over immigration); Aleinikoff, *supra* note 68 (critiquing plenary power doctrine); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185 (1998); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV 1047, 1130-33 (1994) (analyzing disparities in First Amendment rights between aliens and citizens).

98. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (critiquing detention of immigrants after attacks); Margulies, *Uncertain Arrivals,supra* note 13; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing the marginalization of particular communities after September 11); Akram & Johnson, *supra* note 19. *See generally* Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?* 112 YALE L.J. 1011 (2003) (arguing that government officials should fashion criteria for national emergencies justifying relaxation of constitutional

The government's reliance after September 11 on nationality, ethnicity, and religion as criteria for immigration enforcement has uprooted many persons with no connection to asymmetric violence.[99] For example, the government's registration program, which requires immigrants from designated countries with substantial Muslim populations to register with the government, will result in the deportation of thousand of Pakistanis who are not documented, but have often been living and working in this country for a number of years.[100] Many of these immigrants have been performing low-paid jobs that in effect subsidize American consumers.[101] Many immigrant children also find themselves in this hapless group.[102] These children, who often came to this country at a young age, had no control over their parents' decision to seek to emigrate from their country or origin. The government's policy of registration followed by deportation fails to take into account the ties immigrants have developed in this country, the value of the work they have performed, or the hardship immigrant children would undergo in returning to a country that they barely know.[103]

In addition to its direct human cost, the harshness of post-September 11 immigration policy frustrates the process of multilateral transition required to reduce the threat of asymmetric violence. A harsh immigration policy buttresses the widespread view in the Middle East and South Asia that the United States has targeted Muslims. Repeated disavowals by the Administration of an intent to trigger a "clash of civilizations" have little resonance when juxtaposed with the spectacle of thousands of displaced people.[104] In a worst-case scenario, such policies make the "clash of civilizations" a self-fulfilling prophecy, alienating crucial communities abroad.

A greater judicial role in reviewing immigration decisions in light of international agreements could remedy the myopia that afflicts current Administration

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regimes, and be held accountable for defending those criteria and implementing them consistently).

99. *See* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 215 F Supp.2d 94, 98 n.4 (D.D.C. 2002) (noting government concession that many aliens detained or deported after September 11 had no terrorist ties), *rev'd on other grounds*, 331 F.3d 918 (D.C. Cir. 2003); Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV 675, 724-26 (2003) (discussing lack of concrete information about terrorism yielded by government's immigration measures); Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES, June 8, 2003, at 4.

100. Catherine Utley, *Fear and Loathing of US Immigrant Rule*, BBC World Service News, Jan. 27, 2003, *available at* http://news.bbc.co.uk/2/hi/south_asia/2698467.stm (last visited Apr. 24, 2004).

101. *See* HONIG, *supra* note 95.

102. *Id.*

103. Post-September 11 immigration restrictions have also had an adverse impact on other groups, such as Mexican immigrants who, before the attacks, had hoped for greater coordination and cooperation between the United States and Mexico on opportunities to earn legal status. *See* Kevin R. Johnson, *Beyond Belonging: Challenging the Boundaries of Nationality: September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV 849, 858-59 (2003) (discussing new obstacles for approval of visas for prospective Mexican immigrants after attacks).

104. While the Administration states the law accurately in asserting that undocumented immigrants have no legal expectation of remaining in the United States, these assertions are unconvincing as a policy matter. Given the small percentage of undocumented immigrants from South Asia or the Middle East, policy that did not single out these individuals would be at least as effective from an immigration enforcement perspective.

policy and the polarization thereby produced. Recent Supreme Court precedent provides a narrow window for such efforts to broaden the institutional repertoire available in immigration law, particularly on the issue of executive discretion.[105] At least one venturesome court has sought to deal with the problems of displacement of immigrant children and families created by draconian pre-September 11 legislative measures by reading into legislation the anti-displacement mandate in the International Covenant on Civil and Political Rights (CCPR) and the International Convention on the Rights of the Child (CRC).[106] While the Court's effort foundered on appeal because of both doctrinal and procedural obstacles,[107] this result does not preclude a renewed effort centering on post-September 11 enforcement actions by the executive.

Courts could read the statute authorizing removal of undocumented immigrants to allow for a hearing on the issue of disruption to families and hardship to immigrant children.[108] This initiative would also provide a form of redress for immigrants used as low-cost labor in the United States economy and then cast aside because authenticity entrepreneurs in government reacting to the trauma of September 11 needed to "round up the usual suspects. Alternatively, courts could focus on inclusion directly by holding that the clear intent to target immigrants from the Middle East and South Asia, the discriminatory effect of such targeting, and the lack of fit between such targeting and bona fide antiterrorism efforts, fall within the narrow ambit of selective enforcement claims that the courts would entertain in the immigration context.

While significant difficulties, including the courts' tendency to view any ostensible anti-terrorism measure as a function of the war and foreign affairs power, would attend such a judicial approach, the effort is worth making. Even if unsuccessful, a case could provide a focus for mobilizing people and narratives that

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105. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (arguing for wide prosecutorial discretion, but suggesting that some cases may be sufficiently egregious to warrant judicial intervention).

106. *See* Beharry v. Reno, 329 F.3d 51 (2d Cir. 2003) *citing* CCPR Article 23(1) (noting the fundamental nature of the family) and CRC Article 3 (asserting that best interests of child should be the "primary consideration" of courts, agencies, and legislatures)), *rev'd on other grounds sub nom.* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003). *See also* Maria v. McElroy, 68 F Supp. 2d 206, 219-20 (E.D.N.Y. 1999) (discussing role of international law in determining whether immigration legislation that expanded grounds for deportation should be retroactive); Sonja Starr & Lea Brilmayer, *Family Separation as Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003) (discussing *Beharry* and *Maria* district court opinions). *See* Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943 (2001) (discussing limitations of conceptions of family in American immigration law); Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997) (analyzing invidious gender consequences of United States immigration policy).

107. *See* Beharry v. Reno, 329 F.3d 51 (2d Cir. 2003).

108. *See generally* Ralph G. Steinhardt, *The Role of International Law As Canon of Domestic Statutory Construction*, 43 VAND. L. REV 1103 (1990); Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003) (invalidating sodomy law as invasion of privacy, citing Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. (1981), which held that anti-sodomy laws were invalid under European Convention on Human Rights).

could prompt legislative or administrative reform.[109] Legal reform would promote the good will of transnational constituencies vital for a multilateral transition in the struggle against asymmetric violence.

B. Regulating Organizations That Practice Violence

A multilateral transition approach can also help shape the legal and policy landscape populated by terrorist organizations and governments seeking to combat terrorist threats. Governments can appropriately regulate the flow of human and financial capital to transnational authenticity entrepreneurs who practice violence. A multilateral approach would recognize, however, that the application of legal sanctions is merely one element in a repertoire of responses. Over-reliance on legal sanctions can promote polarization and provide a vehicle for government officials tempted by the advantages yielded by authenticity entrepreneurship. A transition-centered approach would restrain government officials here and abroad who invoke the threat of terrorism as a basis for repressive measures. In addition, a transition-centered approach would seek out and support indigenous, inclusive alternatives to the violent enterprises of authenticity entrepreneurs.

Authenticity entrepreneurs in government or oppositional roles who practice organized violence undermine core transition values. The violence they authorize and promote damages inclusion, often targeting civilians on the basis of ethnicity, nationality, or religion. For example, in the Israeli-Palestinian conflict, one oppositional group has targeted Jews,[110] while another group seeks to evict Palestinians.[111] Violence against innocents also narrows institutional repertoire. As the Israeli-Palestinian conflict demonstrates, the use of violence on one side bolsters the credibility of those on the other side who wish to reply in kind, and discredits moderates.[112] The Israeli-Palestinian conflict offers convincing evidence that the trauma wrought by violence multiplies claims for redress on each side of a multilateral transition, creating further hurdles for a peaceful outcome.

The polarizing violence sought by authenticity entrepreneurs emerges not only from substantive grievances, but also from an infrastructure of social capital common to most "coordinated destruction."[113] Whatever the sentiments of those

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109. Reform could occur through special legislative action to provide relief to the substantial Pakistani undocumented community. Concerns about hardship and fairness produced significant legislation of this kind in the 1990's. *See* Nicaraguan Adjustment and Central American Relief Act, H.R. 2607, 105th Cong. (1997) (enacted), *discussed in* Kelly, *supra* note 105. Administrative reform could occur through adopting a regime of deliberative enforcement that focused on the opportunity costs, such as alienation and resentment, of mechanical application of immigration law to communities selected on the basis of nationality, ethnicity, or religion.

110. *See* LA GUARDIA, *supra* note 29, at 295 (noting that the Palestinian extremist group Hamas claims that, "[T]he Jews were the instigators of the First World War, which led to the destruction of the Islamic caliphate, and set up the United Nations as a means of ruling the world").

111. *See* HOFFMAN, *supra* note 9 (discussing Kach).

112. *See* Andrew Kydd & Barbara F Walter, *Sabotaging the Peace: The Politics of Extremist Violence*, 56 INT'L ORG. 263 (2002).

113. *See* TILLY, *supra* note 7.

persons persuaded by authenticity entrepreneurs to destroy themselves in order to kill others, executing attacks requires a core cadre of "violent specialists," who have a vested interest in continuing their activities and discouraging other forms of dispute resolution. This cadre performs an array of organizational tasks, including selecting a target, making explosives, producing the bomber's valedictory videotape, conferring financial rewards on the bomber's family, and soliciting financial contributions to the enterprise, sometimes from unwitting donors.[114] Violent specialists often require secrecy, and rarely sponsor reflection.[115]

To allow each side of a multilateral dispute to foster inclusion and develop a richer institutional repertoire, governments must stem the flow of human and financial capital to violent authenticity entrepreneurs. The United States Congress, for example, has prohibited the provision of "material support" to organizations such as Kach and Hamas designated by the Secretary of State as pursuing a strategy of asymmetric violence.[116] Such legislation is permissible if it does not bar purely political speech, but instead focuses on the organization's command structure for acts of violence, its solicitation of financial services and support, and its provision of logistical assistance and specialized instruction such as explosives training.[117]

Stemming the flow of human and financial capital to groups practicing violence has aided the progress of multilateral transitions in places as diverse as Northern Ireland and Sri Lanka.[118] Regulating capital flows prompts greater transparency in fund-raising and accounting, denting the secrecy and deception central to violent organizations. Regulation of capital flows can encourage transnational communities that support such organizations to become more vigilant, asking probing questions about the activities funded by their contributions.[119] When organizations cannot furnish satisfactory answers, underwriting communities may start new organizations that promote nonviolent reform.

However, regulating capital flows to organizations practicing asymmetric violence also has perils. In some cases, government designations of groups as terrorist organizations may be hasty or inaccurate. Such "false positives" can create irremediable harm, particularly where organizations, such as Al Barakaat in Somalia, are central to the economy of a country or region.[120] Investigations of

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114. *See* HOFFMAN, *supra* note 9.

115. *See* Kuran & Sunstein, *supra* note 42.

116. *See* 18 U.S.C. § 2339A (2003).

117 Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. denied sub nom* Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001). *But see* Cole, *supra* note 4 (arguing that statute violates first amendment).

118. *See* Thomas L. Friedman, *Lessons from Sri Lanka*, N.Y TIMES, Aug. 7, 2002, at A17 (noting moderating force on LTTE "Tigers" group in Sri Lanka when "Tamil diaspora started choking off their funds").

119. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30-43 (1970) (discussing role of "voice" in curing group complacency).

120. *See* Margulies, *supra* note 13, at 510 (noting lack of fairness in Somalia episode); Donald G. McNeil, Jr., *A Nation Challenged: Sanctions; How Blocking Assets Erased a Wisp of Prosperity*, N.Y

suspected groups may be unduly intrusive, such as the F.B.I. raids on Muslim organizations in the Spring of 2002 that have thus far yielded no indictments, but created substantial fear and resentment in the community [121] Statutes that expand the threshold of culpability by prohibiting activity such as "material support" of terrorist organizations can also be vague as applied, chilling protected activities such as legal defense or expressions of solidarity from members of the public.[122] In such cases of overreaching, anti-terrorist enforcement becomes a tool to enhance the authority of authenticity entrepreneurs within the government.

Regulation of capital flows to organizations engaged in multilateral disputes can also prompt polarization if transnational constituencies perceive regulation as favoring an oppressive status quo. By definition, such regulation does not target friendly governments that may pursue inequitable policies subsidized directly or indirectly by the regulating country's taxpayers, such as the Israeli government's expansion of settlements on the West Bank. To rectify such imbalances, regulating countries must use their leverage to promote more equitable policies on the part of friendly regimes.

A pragmatic approach to redress is also important in regulating organizational violence. If a regulating government erroneously classifies an organization as a terrorist group, it should seek to compensate persons and entities affected by the resulting dislocation. By the same token, to consummate a transition, an organization that has practiced violence should be prepared to acknowledge the harm it has caused and implement procedures that reflect accountability, transparency, and a commitment to non-violence. Groups that take this route should be eligible to seek a legal safe harbor. This legal device, which the approach suggested in this Article would refer to as "transition relief," would operate much like bankruptcy, limiting claims for organizations that sought to make a fresh start. Groups that reject such transitional steps should not expect relief from regulation.[123]

The justifications for regulation and redress regarding organizations do not extend to extralegal remedies. The "targeted killing" or assassination of suspected practitioners of violence by government, including the Israeli government's killing

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TIMES, Apr. 13, 2002, at A10 (discussing hardship in Somalia caused by asset freeze); *See* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208 (D.C. Cir. 2001) (holding that Secretary of State had to provide organization with an opportunity to present evidence demonstrating it does not support terrorism prior to freezing assets).

121. *See* Panel, Civil Liberties and Muslims in the U.S. After 9-11: What is Really Happening?, Sponsored by Karamah and the Journal of Law and Religion, El Hibri Foundation, Washington, D.C., (Jan. 3, 2003); *See* Douglas Farah & John Mintz, *U.S. Trails Va. Muslim Money, Ties; Clues Raise Questions About Terror Funding*, WASH. POST, Oct. 7, 2002, at A1 (quoting members of Muslim community who criticized what they viewed as heavy-handed government methods).

122. *See* Margulies, *supra* note 5, at 203-06.

123. To ensure that redress is also effective to curb abuses by friendly governments, survivors of such excesses should be able to pursue claims under statutes such as the Alien Tort Claims Act to hold multinational corporations accountable for participating in or benefiting from repressive practices. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (arguing that multinational corporations should be held accountable for human rights violations resulting from enterprises over which they have control).

of Hamas leaders,[124] suffers from the same flaws as killings carried out by transnational oppositional organizations. Such summary measures do not comfortably fit within the procedural safeguards of law enforcement, the temporal and geographic bounds of most wars,[125] or the obligations to a civilian population undertaken by an occupying power.[126] Targeted killings shrink institutional repertoire by decreasing the stake of each side in peaceful means of dispute resolution. They also undermine inclusion, because they tend to affect not only specifically intended targets, but also civilians from the same communities who happen to be in the way.

Finally, the regulation of organizational asymmetric violence must also entail assistance to nonviolent organizations. Such assistance expands institutional repertoire, and combats the exclusion that can stem from blanket assumptions about transnational communities.[127] For example, conventional wisdom in the West seems to hold that Islamic parties offer women few opportunities for voice, and reject democratic values.[128] However, the reality is far more complex. Women have been able to develop substantive roles in many Islamic organizations, and

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124. *See* Laila El-Haddad, *Israel Continues Assassination Policy*, Aljazeera.net *at* http://english.aljazeera.net/NR/exeres/75B25D3C-1FF3-4F75-9B1E-9E7A160F0DBF.htm (Jan. 4, 2003) (last visited Mar. 23, 2004).

125. *See* Noah Feldman, *Choices of Law, Choices of War* 25 HARV. J.L. & PUB. POL'Y 457 (2002) (discussing uneasy fit of both terrorism and anti-terrorism enforcement within "war" or "crime" paradigms).

126. Some experts defending the Israeli government's use of "targeted killings" argue that the situation in the West Bank and Gaza is tantamount to what in the law of war is called "belligerent occupation, under which substantial parts of the disputed territory are under the control of the enemy. A state of belligerent occupation would give the occupying force more leeway to take lethal action against suspected enemy personnel, subject to the constraints of proportionality and reasonableness. Even under this more permissive standard, however, substantial doubt exists as to whether the IDF has taken into account the likelihood of civilian casualties resulting from targeted killings. *See generally* Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934, 943-44 (2003) (citing Hague Convention Respecting the Law and Customs of War on Land, Oct. 18, 1907, Annex, Sec. III, 36 Stat. 2277, T.S. No. 539). *Cf.* Emanuel Gross, *Democracy in the War Against Terrorism – The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1194 (2002) (arguing that the IDF has acted consistently with proportionality and reasonableness). In Gaza in the Summer of 2002, for example, more than ten civilians died when IDF aircraft attacked an apartment complex to kill Hamas military leader. Other punitive measures pursued by the IDF including the demolition of the houses occupied by the families of accused terrorists, are equally troubling. While the legality of targeted killing is sub judice at the Supreme Court of Israel, the Court has upheld the practice of house demolitions. The Court's holding, while requiring some showing of a link between other residents of the household and the alleged terrorist, accepts the military's contention that house demolitions have a "deterrent" effect on violence. *See, e.g.*, Alamarin v. IDF Commander in Gaza Strip, HCJ 2722/92 (IDF commander has discretion to destroy single-family home if one occupant has committed terrorist act, but may lack authority to order destruction of multiple-unit dwelling absent proof that residents of separate units were complicit in behavior). However, both the law of occupation, with its limits on collective punishment, and the insights of the transition scholars, demonstrate the contrary. Each holds expressly or implicitly that over-broad punitive actions will merely galvanize occupied communities to engage in further violence.

127 *See* Adrien Katherine Wing, *The Palestinian Basic Law: Embryonic Constitutionalism*, 31 CASE W RES. J. INT'L L. 383, 392-94 (1999) (discussing strengths and weaknesses of disparate Palestinian civil society).

128. *See* Volpp, *supra* note 4 (critiquing this view as essentialist).

scholars have articulated visions of Islamic law that embrace women's rights.[129] The same can be said for democratic values. Governments can nurture such efforts not only with direct assistance, but with reforms in their own policies that respond to legitimate grievances.[130]

C. Adjudicating Violations of the Law of War and Crimes against Humanity

Few matters since September 11 have excited more scholarly commentary than issues regarding the appropriate forum and procedures for the adjudication of alleged violations of the law of war. In the wake of the United States-led military intervention in Iraq, analogous questions have begun to arise about the adjudication of alleged crimes against humanity perpetrated by Saddam Hussein and his subordinates. Much of the debate has conflated issues regarding the appropriate forum for such decisions and the fairness of procedures applicable in a particular forum, such as the military tribunals established by the current Administration.[131]

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129. *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003); Janine A. Clark & Jillian Schwedler, *Who Opened the Door? Women's Activism in Islamist Parties*, 35 COMP. POLITICS 293 (April 2003); Heiner Bielefeldt, *"Western Versus "Islamic Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights*, 28 POL. THEORY 90, 109-12 (2000). *See generally* NOAH FELDMAN, AFTER JIHAD: AMERICAN AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 62-68 (2003) (discussing gender, political, and religious equality in Islamic polities).

130. In the Middle East, for example, Israel's creation by the United Nations offfered both necessary redress for the worldwide persecution of Jews and sanctuary from future persecution, *See* LA GUARDIA, *supra* note 29, at 360 (noting that "the U.N. partitioned Palestine to create a Jewish state as an act of expiation for the Holocaust") However, it also displaced significant numbers of Palestinians; George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994) (discussing history of displacement of Palestinians); Benny Morris, *The Rejection*, NEW REPUBLIC, April 21, 2003, at 31 (book review) (critiquing persistent hold of authenticity entrepreneurs over Palestinian nationalist efforts, while acknowledging that Israeli government policies succeeded in "ultimately displacing more than half the Palestinians from their homes" inside Israel). Such actions have compounded processes of social comparison that increase the credibility of violent authenticity entrepreneurs on each side. Crucial steps taken by Israel, in conjunction with reforms undertaken by the Palestinian Authority, could include an apology for the government's role in spurring the outflow of refugees in 1948, compensation for Palestinians displaced at that time, and the recognition of enhanced but not absolute immigration rights for Arab Israelis seeking to sponsor relatives, including refugees from 1948 and their descendants, for lawful residence. Such family reunification policy, phased in over time, would be limited version of "right of return" for Palestinians that would also preserve the sanctuary for Jews contemplated in the United Nations' creation of the State of Israel; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Article 12(4) (1966) (providing that refugees wishing to return to their country of origin have right to repatriation, although countries of origin can derogate from their obligations upon declaration of state of emergency); *Cf.* Vic Ullom, *Voluntary Repatriation of Refugees and Customary International Law*, 29 DENVER J. INT'L L. & POL'Y 115, 142 (2001); John Quigley, *Displaced Palestinians and Right of Return*, 39 HARV. INT'L L.J. 171 (1998).

131. For sampling of this extensive debate, compare Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 249 (2002) (arguing for validity of Administration's Military Order establishing military tribunals); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 274-75 (2002) (discussing statutory authority for military tribunals); Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists? · A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 613-20

A transition-centered approach would disaggregate those issues. In the realm of procedure, it would consider whether safeguards exist to assure the international community that a forum's determinations are fair. To resolve issues of forum selection, a transition-centered approach would consider the stake of a particular state in adjudicating such cases, as well as the accuracy and reliability of the forum proposed.[132]

Critics have rightly focused on the problematic nature of procedures for the military jurisdiction of the tribunals, which encompass not merely violations of the law of war such as the killing of civilians or the conduct of hostilities by forces acting without appropriate identification, but also expressions of status such as membership in Al Qaeda.[133] This broad jurisdiction takes the tribunals far beyond the adjudication of cases involving "enemy belligerents" engaged in specific operations directed at United States persons or property.[134] A second procedural problem is the treatment of counsel for the accused, who are subjected to monitoring of conversations with clients.[135] Thirdly, Administration sources have indicated in undocumented conversations with journalists that core guarantees of the criminal justice system, such as access to exculpatory evidence, might be unavailable.[136] Finally, the Administration has resisted any express provision for judicial review,[137] and has argued, thus far successfully, that the courts lack jurisdiction over proceedings at the United States Naval Base at Guantanamo Bay, Cuba.[138] These

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(2002) (arguing that military tribunals are appropriate under international law); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that express legislative authority, including declaration of war, is required); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 735-39 (2002) (critiquing *Quirin*); Diane F Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 656-57 (2002) (critiquing *Quirin*).

132. *See generally* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1869-71 (2003) (discussing institutional aspects of interaction between human and constitutional rights).

133. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001). *cf.* Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 68 Fed. Reg. 39, 374 (March 21, 2002).

134. *See Ex parte Quirin*, 317 U.S. 1 (1942) (authorizing military tribunals in cases involving "enemy belligerents").

135. *See* Jonathan D. Glater, *A.B.A. Urges Wider Rights in Cases Tried By Tribunals*, N.Y. TIMES, Aug. 13, 2003, at A18.

136. *See* Philip Shenon, *White House Called Target of Plane Plot*, N.Y. TIMES, Aug. 8, 2003, at A7 (reporting that alleged "twentieth hijacker" Zacarias Moussaoui would be tried before military tribunal if civilian courts required government to grant Moussaoui access to detainee allegedly in possession of exculpatory information).

137 No provision for judicial review is contained in the Military Order. Counsel to the President Alberto Gonzalez has indicated that the Administration believes that habeas corpus review is available, although the Administration has argued that the applicable standard on habeas review is exceedingly deferential. *See* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *reh g and reh'g en banc denied*, Pagels v. Morrison, 2003 U.S. App. Lexis 13717 (4th Cir. July 9, 2003) (supporting Administration's position).

138. *See* Rasul v. Bush, 2004 U.S. LEXIS 4760 (S. Ct. June 28, 2004) (holding that federal courts had jurisdiction under the habeas statute to hear petitions from Guatanamo detainees).*Cf.* Paul Schiff

problems undermine the global legitimacy of the military tribunals established by the Administration.

Critics of the Administration have combined concern about these procedural problems with concern about the appropriateness of military tribunals as a forum for adjudicating cases involving alleged terrorist activity. They argue that either civilian courts or international tribunals are more appropriate.[139] In particular, critics assert that judges in military tribunals are intrinsically biased, because they remain part of the military command structure.[140]

Arguments that military tribunals are per se inappropriate ignore contrary evidence and countervailing values. Historical evidence suggests that when the right procedures are in place, military tribunals can make accurate determinations of culpability In *Ex Parte Quirin*, for example, a military tribunal convened during World War II found after a three-week trial that the defendants had undertaken a mission on orders of the German High Command to operate clandestinely in the United States for the purpose of harming persons and property essential to the war effort.[141] While scholars have criticized aspects of the role played by the civilian judiciary in the case,[142] no scholar has expressed doubt about the accuracy of the military tribunal's finding.[143]

The Framers of the Constitution recognized that military tribunals had developed a tradition of adjudicating violations of the law of war, and found no conflict between performance of that specified task and a sound constitutional order.[144] Indeed, for the detainees at Guantanamo Bay captured on the battlefield, a military tribunal with a grasp of the exigencies of combat is arguably a far more appropriate forum than a civilian or international court lacking such knowledge. For cases re-

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Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 459-73 (2002) (arguing that jurisdictional distinction between cases within U.S. territory and cases outside that territory has been rendered obsolete).

139. *See, e.g.*, Laura M. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002).

140. *See* ORENTLICHER & GOLDMAN, *supra* note 131, at 660.

141. *See Ex parte Quirin*, 317 U.S., at 20-21.

142. *See* TURLEY, *supra* note 130, at 735-39 (discussing series of ex parte contacts between Justices and Administration).

143. *See id.* (Two of the *Quirin* petitioners introduced evidence at their trial that they had withdrawn from the conspiracy by contacting the Federal Bureau of Investigation. They sought to withdraw, however, only after attempting to buy the silence of Coast Guardsman who had observed their surreptitious landing in the United States. Under the law of conspiracy, withdrawal is an affirmative defense to liability for subsequent acts committed by co-conspirators, but not complete defense to the charge of conspiracy itself); U.S. v. Robinson, 217 F.3d 560, 564 (8th Cir. 2000). *Cf.* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1379 (2003) (arguing that withdrawal is appropriately only partial defense because public interest favors deterrence of initial entry into conspiracy). The efforts of the two defendants, while not sufficient to convince the finder of fact to acquit, ultimately resulted in pardons dispensed by the President. TURLEY, *supra* note 130.

144. *See Ex parte Quirin*, 317 U.S., at 31 (noting the case of British Army Major John Andre, who was tried and convicted before a military commission convened by George Washington in 1780 after being apprehended in disguise and with false papers within United States lines on mission to contact the traitorous General Benedict Arnold).

moved from the battlefield paradigm involving collateral activities such as fund-raising for Al Qaeda, military tribunals may not be appropriate.[145] However, the analysis of appropriateness should turn on procedural issues such as the scope of jurisdiction asserted in the President's Order, not speculation regarding the inherent nature of the forum.[146]

The usefulness of disaggregating choice of forum and procedural concerns is even more apparent when one considers the flaws of a proposed alternative such as an international tribunal for alleged Al Qaeda combatants apprehended on the battlefield. Problems with an international tribunal in this context emerge in the interpretation of governing law and the choice of law rules that such a tribunal might adopt. The Geneva Convention provides that combatants without uniforms may still be considered lawful if they have taken up arms "spontaneously" to resist an invading military force, and respect the laws of war.[147] A federal court has found that members of the Taliban cannot invoke protection under this provision, since they violated the laws of war by targeting civilians.[148] However, an international tribunal may be tempted to downplay the disqualifying effect of the Taliban's ac tions.[149] An international tribunal may also apply to the Taliban and their Al Qaeda allies the Protocol added to the Geneva Convention that protects combatants in "wars of national liberation, even though the United States expressly declined to ratify this Protocol because of concerns about terrorism.[150]

Commentators who argue that an international tribunal is inherently superior also offer a flawed account of accuracy in adjudication. While courts and commentators have rightly focused on the importance of minimizing "false positives" – individuals incorrectly convicted of an offense[151] – they have also acknowledged the importance of minimizing "false negatives" – culpable individuals wrongly adjudicated as blameless.[152] Particularly in low-level cases of persons captured on

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145. *See* Katyal & Tribe, *supra* note 130, at 1260-66 (discussing problems with jurisdictional sweep of President's Military Order); Orentlicher & Goldman, *supra* note 130.

146. *See* Anderson, *supra* note 130, at 613-20.

147 *See* Multilateral Prtotection of War Victims, Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 138-40.

148. *See* U.S. v. Lindh, 212 F Supp. 2d 541, 557-58 (E.D. Va. 2002).

149. In so doing, members of an international tribunal would be echoing two distinguished American law professors who made similar omission in an otherwise incisive analysis of the flaws in the President's Military Order establishing military tribunals. *See* Katyal & Tribe, *supra* note 130, at 1264 (suggesting in passing that members of the Taliban might qualify for protection under the Geneva Convention, while failing to note that the provision protecting combatants who "spontaneously take up arms" also requires that such combatants refrain from targeting civilians).

150. *See* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 14 (2003) (discussing unratified Protocols). *See also* Letter of Transmittal from President Ronald Regan to the the U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910 (1987) (explaining rationale for recommending against ratification of Protocol).

151. *See In re* Winship, 397 U.S. 358 (1970) (holding that due process requires that the prosecution show a defendant's guilt beyond a reasonable doubt) (Justice Harlan concurring viewed the Court's holding as "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.") *Id.* at 372.

152. *See* Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001) (asserting that the government, in

the battlefield, international judges may have incentives to unduly discount the risk of false negatives.

Consider here the case of Yaser Esam Hamdi, an apparent American citizen allegedly apprehended with a weapon on the battlefield in Afghanistan, now detained by the United States as an "enemy combatant" without charges.[153] While Hamdi should be either charged or released, if he were charged an international tribunal would not necessarily provide a more accurate determination than a military court. Hamdi's father has argued that his son was actually providing humanitarian aid to Afghans.[154] International judges whose countries have not been targeted by transnational networks such as Al Qaeda may wish to credit this account, either to avoid retaliation against their countries,[155] or because of a reluctance to scrutinize allegedly humanitarian work.[156] A judge influenced by these factors could make an inaccurate determination of culpability Of course, the government's indefinite detention of Hamdi or of individuals held at Guantanamo Bay might itself be based on inaccurate or biased information.[157] Addressing that issue requires adequate *procedures*, not necessarily an international forum.

The same analysis obtains for the prosecution of officials in Saddam Hussein's regime in Iraq. Here the most appropriate forum is neither a military nor an

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deciding to apprehend an individual suspected of plotting terrorist activity – in that case an alleged pre-September 11 plan to bomb the World Trade Center – could consider not only the probability that an individual had engaged in such activity, but also the extent of the destruction that might have resulted if the plan had been successful); ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 187-96 (2002) (acknowledging constitutional concern with false positives, while arguing that the challenge of terrorism complicates issue); Laurence H. Tribe, *Trial By Fury: Why Congress Must Curb Bush Military Courts*, THE NEW REP Dec. 10, 2001, at 18, 20 (arguing that public interest requires adjustment of balance between false positives and false negatives in terrorism cases); *but see generally* Ronald Dworkin, *The Threat to Patriotism*, N.Y REV. BOOKS, Feb. 28, 2002, at 44 (warning against lowering standards of proof in terrorism cases).

153. *See Hamdi* 316 F.3d, *reh'g and reh'g en banc denied*; *Pagels* 2003 U.S. App. Lexis (upholding indefinite detention with evidentiary hearing or access to counsel); *cf.* Padilla v. Bush, 233 F Supp.2d 564 (S.D.N.Y 2002) (upholding indefinite detention but requiring hearing and assistance of counsel); Anthony Lewis, *Civil Liberties in a Time of Terror* 2003 WIS. L. REV. 257 (2003) (discussing enemy combatant detention).

154. Other detainees have made similar claims, asserting that they were caught up in the chaos of war, and either denying that they possessed weapons at the time of their apprehension or preserving their option to justify the need for firearms in the delivery of humanitarian aid. *See* Richard A. Serrano, *Detainees Launch Legal Step*, L.A. TIMES, Oct. 16, 2002, at 1 (describing Kuwaiti nationals detained at Guantanamo Bay who claimed that tribesmen had turned them over to American forces in Afghanistan in exchange for bounty).

155. *See* Charles Hill, *A Herculean Task: The Myth and Reality of Arab Terrorism*, *in* THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPT. 11 83, 104 (Strobe Talbott & Nayan Chanda eds., Basic Books 2001) ("European countries have taken a benign view of the presence of foreign terrorist organizations in their cities in a kind of tacit agreement that 'we won't bother you if you don't target us. ").

156. *See* Don Van Natta Jr. with Timothy L. O'Brien, *Flow of Saudis' Cash to Hamas is Scrutinized*, N.Y TIMES, Sept. 17, 2003, at A1, 10 (quoting an American diplomat as saying that, "It is considered rude in the kingdom to inquire about the motives behind charity, and so Saudis don't do it.").

157 *See generally* LEWIS, *supra* note 152 (criticizing Hamdi's detention and appellate court's deferential review).

international tribunal, but an Iraqi court.[158] No other tribunal has a comparable stake in such prosecutions, which will help set the tone and direction of subsequent regimes.[159] An American military tribunal may err on the side of culpability, lacking a comprehensive understanding of the pressures experienced by Iraqis under Saddam Hussein. An international tribunal will not provide the sense of empowerment that will emerge from Iraqis confronting and coping with challenges from their own past.[160]

In choosing the appropriate forum, a transition-centered approach would consider 1) the stake of the entity sponsoring the forum,[161] 2) the likelihood of error,[162] and, 3) the availability of a functional forum in the entity with the greatest stake.[163] Procedural protections such as limits on the jurisdiction of military tribunals, judicial review, access to exculpatory evidence, and unimpaired access to counsel would also obtain. These conditions would fulfill the transition-based criteria of inclusion, institutional repertoire, and redress.

Considering these factors promotes a forum-selection process that can adapt to changing contexts and circumstances. For matters regarding September 11 and related Al Qaeda efforts to attack persons or property within the United States, America clearly has the greatest stake. However, other nations also have an interest, given the presence of nationals from many countries among the victims of September 11.[164] Assuming that both the United States and the international community could provide a functioning system the dispositive factor would be the likelihood of error.

For alleged low-level Al Qaeda combatants purportedly captured on the battlefield, such as those held at Guantanamo Bay, an international tribunal might yield too many false negatives, if judges unduly discounted the threat posed by "little fish."[165] A military tribunal operating with the benefit of procedural safeguards would be appropriate for trying such individuals. However, limiting the jurisdiction of military tribunals to cases of "enemy belligerents" would require trials in United States civilian courts for alleged Al Qaeda operatives engaged not

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158. *See* Richard A. Oppel Jr. & Patrick E. Tyler, *Iraqis Plan War-Crimes Court; G.I.s to Stay Until Elections*, N.Y TIMES, July 16, 2003, at A9.

159. *See generally* Diane F Orentlicher, *Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing for the prosecution of primary perpetrators of human rights abuses).

160. *See* MINOW, *supra* note 7, at 61-83 (discussing importance of redress and voice for victims in developing democratic traditions).

161. *See* Gary J. Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading Von Mehren*, 36 CORNELL INT'L L.J. 125, 126-28 (2003) (discussing choice of law principles).

162. *See* Mathews v. Eldridge, 424 U.S. 319, 344 (1976) (one element of procedural due process analysis is "risk of error").

163. *See Ex parte* Milligan, 71 U.S. 2 (1866) (holding that long-time resident of Indiana with no demonstrated ties to Confederate military could not be tried before military tribunal when civilian courts were functioning).

164. Mark A Drumbl, *Victimhood in Our Neighborhood: Terroritst Crim, Taliban Guilt, and the Asymentires of the International Legal Order*, 81 N.C.L. Rev 1, 67-69 (2002).

165. *See* Tribe, *supra* note 151, at 18.

in active hostilities but instead in collateral activities such as fundraising. Al Qaeda higher-ups, including those presently confined in undisclosed locations subject to United States control, might be more appropriate candidates for eventual trial before international tribunals. Animus against such individuals might run too high in the United States to control the risk of false positives. In contrast, factfinders on an international tribunal might be sufficiently dispassionate to control this risk, while also being cognizant of the danger posed by major players in Al Qaeda.[166]

In considering the appropriate forum for the trial of former Ba'athist officials, considerations of stake are paramount, making Iraqi courts the best choice. Although a desire for retribution might increase the risk of false positives, such a risk would be minimized by procedures to ensure representation of a cross-section of Iraqis, including members of the Sunni minority most supportive of the Ba'athist regime. However, years of Ba'athist rule and the chaos attending military intervention have required the rebuilding of the Iraqi judiciary.[167] Trial by Iraqi courts could challenge the fragile security framework in Iraq and exacerbate ethnic strife. If Iraqi or coalition officials could not respond to such concerns, Iraq would be left without a functional forum for trying such cases. An international tribunal would be the second-best choice, given the international community's stake in holding major Ba'athist officials accountable for the crimes against humanity committed during Saddam's rule.Disaggregating forum and procedure in this fashion would promote transitions. The flexibility built into the forum-choice factors would serve inclusion, as would commitment to norms of procedural fairness accepted under international law. The forum-choice factors would expand institutional repertoire, avoiding the rigid consequences risked by both the Administration and its critics. Finally focusing on stake would emphasize redress for the victims of attacks on civilians.[168] Disaggregating forum and procedure would build legitimacy for anti-

166. This might hold especially for mainstream Islamic jurists, who understand the corruption of Islamic teaching wrought by Bin Laden. *See* ESPOSITO, *supra* note 42, at 20, 32 (noting bin Laden's departures from mainstream Islamic thought); EL FADL, *supra* note 42, at 205-09 (analyzing arguments of jurists that persons who kill innocents in pursuit of political goals lose the consideration accorded rebels under Islamic teaching); GRAHAM E. FULLER, THE FUTURE OF POLITICAL ISLAM 60 (2003) ("[E]rroneous and distorted understandings of Islam can emerge that can serve to justify violence or even terror.").

167. *See* Hassan bin Talal, *Can Democracy Take Root in the Islamic World? Seeing Iraq's Future By Looking at Its Past*, N.Y. TIMES, July 18, 2003, at A17 (focusing on need for functioning judiciary in Iraq); *cf.* Ahmed Hashim, *Saddam Hussain and Civil-Military Relations in Iraq: The Quest for Legitimacy and Power*, 57 MIDDLE EAST J. 9, 29-32 (2003) (discussing Saddam's efforts to destroy the Iraqi military as an institution that could challenge his rule). *See generally* KANAN MAKIYA, REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ 46-72 (1998) (discussing torture and repression under Ba'athist regime).

168. In addition, redress would require compensation for "false positives" wrongfully detained and for civilians harmed in the course of antiterrorism efforts. The failure to spend money appropriated by Congress to assist civilians injured by the United States military intervention against the Taliban and Al Qaeda in Afghanistan is a vivid example of a recent failure of redress. *See* April Witt, *After the Airstrikes, Just Silence; No Compensation, Little Aid for Afghan Victims of U.S. Raids*, WASH. POST, April 28, 2003, at A17 In Northern Iraq, United States Army commander operating largely autonomously from the central occupation authority has been successful in part by promptly compensating Iraqi civil-

terrorism efforts, and defuse processes of social comparison that exacerbate polarization.

CONCLUSION

Measures to effect transitions toward democracy and the rule of law have dominated United States policy in the aftermath of September 11. The current Administration has generally pursued a preemptive approach, emphasizing force and punitive measures, dealing largely with elites, and downplaying demands for equality made by popular movements abroad. Unfortunately, the preemptive approach often generates polarization, not transition. Social science research indicates that excessive reliance on force and punitive measures can spawn social identities shaped by opposition to American interests and social comparisons such as views of the Arab-Israeli conflict that portray the United States as subsidizing unjust policies. The preemptive approach also yields forms of social capital such as authenticity entrepreneurship that leverage oppositional identities and comparisons to produce violence against innocents. Critiquing the preemptive approach is easier than devising a constructive alternative. One alternative, the state-skeptical approach, abjures force and punitive measures. While state-skeptics may ease transitions through the re-framing of social identities and comparisons, they fail to address the "spoiler" role played by authenticity entrepreneurs.

To avoid these blind spots, a multilateral transition approach integrates the insights of social science research and comparative law and politics. Responding to social identity, social comparison, and social capital formation requires a multilateral perspective focused on transnational communities. In a diasporated world knit together by technology, attention to the transnational flow of people, information, and resources is crucial.

A multilateral approach seeks to influence these flows, guided by three overlapping factors identified by comparative scholars: institutional repertoire, inclusion, and redress. Institutional repertoire requires a range of organizational structures, strategies, and discourses, each operating as a check on the power of the others. The flourishing of civil society is one element of this repertoire, complemented by a viable governmental authority that can resort to force and legal sanctions when necessary to achieve legitimate public objectives. Inclusiveness requires a polity such as the United States, which seeks to exert influence around the world, to acknowledge that its relevant audience is not merely domestic but transnational, by acting to minimize global inequality

Redress requires the most delicate balance of the transitional elements. A polity such as the United States that seeks to defend its interests and effect transitions on a global scale should acknowledge responsibility for damage to innocents

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ians for losses suffered during ongoing efforts to defeat guerilla forces; Michael R. Gordon, *101st Airborne Scores Success in Northern Iraq; A Reconstruction Effort is Led by the Military*, N.Y TIMES, Sept. 4, 2003, at A1, (analyzing approach used by Army unit, which also includes substantial delegation to newly established Iraqi local governmental units).

caused by efforts to vindicate these goals. Redress also mandates that survivors of past abuses and overreaching have access to remedies, to effect closure on disputes and clear the way for new institution-building.

A multilateral transition approach clarifies analysis of current issues such as the enforcement of immigration law after September 11, the regulation of terrorist organizations, and the adjudication of alleged violations of international humanitarian law. A transition-centered approach to immigration policy would curb nationality-based immigration enforcement and promote family unity, thereby leveraging immigration to the United States to give other areas in the world a broader stake in the struggle against terrorist organizations such as Al Qaeda. Regulation of terrorist organizations would stress not only legal sanctions to disrupt the infrastructure relied on by violent authenticity entrepreneurs, but also support for nonviolent alternatives, reform of governmental policies that catalyze violent opposition, and a fresh start through "transition relief" for organizations that demonstrated that they had implemented substantial and durable institutional reforms to materially reduce violence. Adjudication of alleged violations of international humanitarian law would disaggregate issues of forum selection and procedure, allowing for flexibility in the forum selection process and requiring procedures in all forums to ensure justice and preserve legitimacy.

Adopting a multilateral transition approach stressing institutional repertoire, inclusion, and redress will not ensure the rule of law or erase transnational violence. Transitions are unpredictable. Forms of social capital that foster violence and undermine the rule of law can always emerge from the social identities and comparisons generated by collective human endeavors. However, a transition-based approach at least highlights the right questions. That is a necessary first step in setting the course of transnational law and policy after September 11.