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Charles H. Norchi

University of Maine School of Law

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THE LEGAL ARCHITECTURE OF NATION-BUILDING: AN INTRODUCTION

Charles H. Norchi

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THE LEGAL ARCHITECTURE OF NATION-BUILDING: AN INTRODUCTION

*Charles H. Norchi**

A nation may be said to consist of its territory, its people, and its laws.

-Abraham Lincoln¹

I. TOWARD ARCHITECTONIC NATION-BUILDING

In the future, a historian studying the early twenty-first century will observe a trend: numerous lawyers applying their skill sets to the problems of pathological states. Our future historian will note that the topography of the post-Cold War international system was marked by weakly-governed states failing.² Fragile states eroded, frayed, and disintegrated under stress, and their internal social processes became highly susceptible to external forces. Powerful non-state actors, including private armies, operated within the porous boundaries of entities that were once functioning polities. Legal authority became divorced from political control as non-state actors wielded naked power, challenging formal state structures and instruments of governance. Within these unstable systems, populations suffered from personal insecurity and an expectation of violence. The origins of failures were often indigenous conflicts that manifested as intra-state violence or international wars, such as in the Democratic Republic of the Congo, East Timor, Ethiopia, Eritrea, Kashmir, Somalia, Angola, Liberia, Sierre Leone, Sri Lanka, Yugoslavia, Rwanda, and Afghanistan. In Iraq and Afghanistan, regime change precipitated by foreign state intervention required sustained reconstruction efforts.

* Associate Professor of Law, University of Maine School of Law; Research Fellow, Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University. I am grateful for thoughts and comments from Laura Underkuffler, Andrew Willard, Christopher Knott, and for assistance from the highly efficient library staff of the University of Maine School of Law. This work is dedicated to the memory of Professor John D. Montgomery, teacher, friend, and nation-builder from Japan to Afghanistan.

1. Abraham Lincoln, Congressional Address, Second Annual Message to Congress (Dec. 1, 1862).
2. Our future historian would also note a proliferation of literature and research programs dealing with failed states and their reconstruction. *See generally* JAMES DOBBINS ET AL., *THE BEGINNER'S GUIDE TO NATION BUILDING* (2007) [hereinafter DOBBINS ET AL., *BEGINNER'S GUIDE*]; JAMES DOBBINS ET AL., *AMERICA'S ROLE IN NATION-BUILDING FROM GERMANY TO IRAQ* (2003); JAMES DOBBINS ET AL., *THE UN'S ROLE IN NATION-BUILDING FROM THE CONGO TO IRAQ* (2005); ASHRAF GHANI & CLARE LOCKHART, *FIXING FAILED STATES: A FRAMEWORK FOR REBUILDING A FRACTURED WORLD* (2008). Two thought-provoking books by scholars of international political economy that have become standards are FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* (2004) [hereinafter FUKUYAMA, *STATE-BUILDING*] and *NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ* (Francis Fukuyama ed., 2006) [hereinafter FUKUYAMA, *NATION-BUILDING*]. A study of comparative development policies with special reference to Afghanistan is presented in Dennis A. Rondinelli & John D. Montgomery, *Reconstruction, Development, and Nation-Building: Prospects for Afghanistan, in BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSONS FROM DEVELOPMENT EXPERIENCE* (John D. Montgomery & Dennis A. Rondinelli eds., 2004). Of special interest to lawyers is JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (2006).

Our future historian would observe that in these and similar contexts, lawyers possessing special skills and knowledge brought their tool kits to bear upon the many dimensions of distressed, failed, and reconstituting states. This participation of lawyers and the application of their tools inspired this *Maine Law Review* Symposium. The contributors are concerned with nation-building as generally understood in the United States: “state-building coupled with economic development.”³ The context is often post-conflict reconstruction meets development⁴ because in this period of world history, “[d]onors are compelled to practice nation-building when war displaces an existing regime, or when it can no longer function effectively.”⁵ Our contributors bring their own nuanced definitions of nation-building to this Symposium, but they share in their understanding of the enterprise as an accretion of activities designed to transform a state from a present pathological condition⁶ to a preferred future condition, one in which the state is a functioning participant in the world community, and within which the human dignity of the population is respected and protected.⁷ Once that goal is achieved, the international community withdraws stabilization and nation-building resources, and treats the state as a target of development.

The fundamental question is how to bring a population from a condition of hopelessness to one of self-governance, sustainable growth, and viable participation in the world community. As Michael Reisman has asked, “[w]hat are the strategies available to communities in transition, for their process of redefinition, and what role should the international community—an increasingly effective participant in all these subcommunities—take in the process?”⁸ From the standpoint of the legal profession, is there a portfolio of tasks and methods that are especially applicable to nation-building efforts and that signal a new moment or pivotal role for the lawyer in state reconstruction and the associated work of nation-building?

The aim of this Symposium is to stimulate thinking about those questions among scholars and practitioners by exploring whether there is a discernable legal architecture of nation-building. Do apparently disparate nation-building enterprises lend

3. FUKUYAMA, NATION-BUILDING, *supra* note 2, at 3. Further, Fukuyama argues that “[n]ation-building encompasses two different types of activities, reconstruction and development.” *Id.* at 4. In this Article, I use the terms “nation-building” and “state-building” interchangeably.

4. In this Symposium, Michael Reisman writes, “We use the term ‘development,’ to refer to decision processes and decision outcomes which have been designed to induce the shaping and sharing of all values within and among territorial communities in ways and with consequences approximating the goal values of a world order of human dignity.” W. Michael Reisman, *Development and Nation-Building: A Framework For a Policy-Oriented Inquiry*, 60 ME. L. REV. 309, 310 (2008).

5. Rondinelli & Montgomery, *supra* note 2, at 225-26.

6. Pathologies can range from state disintegration, to persistent armed conflict, to varied degrees of institutional incapacity.

7. The state would meet the requirements of the Montevideo Convention of 1933 which prescribes, “the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. This would be coupled with the state’s observance of the international human rights codex and associated protections for the population.

8. W. Michael Reisman, *Communities in Transition: Autonomy, Self-Governance and Independence*, Remarks During Crosscutting Theme II Roundtable (Apr. 3, 1998), in 87 AM. SOC’Y INT’L L. PROC. 248, 249 (1993).

themselves to “structure,” by one definition of architecture?⁹ Can goals be better achieved by a systemic arrangement of the elements of the structure? The contributors to this volume explore these questions by considering the foundation and cornerstones of the architecture. Thus, they join a conversation initiated by the earliest manuals for designing a polity, such as Plato’s *Republic*¹⁰ and *The Laws*.¹¹ Although presented in vividly contemporary terms, the issues that are addressed in the articles and essays that follow transcend the practical contexts to which they are applied. They present design questions and choices that animate the legal architecture of nation-building. Architectural structure emerges from a design process which may begin with a sketch on the back of an architect’s napkin, and may later evolve into a blueprint to guide site selection and construction of the edifice. That process is guided by principles and the science of planning and constructing, or “architectonics.”¹² As nation-building experience is accumulated and appraised in the growing literature, an effective architectonic of nation-building will become apparent. In the language of the law, this is jurisprudence. Following is a preliminary architectonic of nation-building that emerges from the problems addressed and the solutions proposed by the contributors to this Symposium.

II. MYTH AND NATION-BUILDING

Myths help shape the human ordering of things, and nation-building professionals initially encounter three such myths.¹³ The first myth has to do with the contemporary nation-state, the second with the constitutions of nascent states, and the third with the nation-building enterprise itself. These myths are important, in that they express “a pattern of stable perspectives among the members of a collectivity.”¹⁴ Myths and myth systems cannot be ignored, as their features constitute part of the operational code within any community.

The first myth bearing directly on nation-building is the belief that the contemporary nation-state is resilient, enduringly sovereign, and a custodian of its population.¹⁵ Since the Treaty of Westphalia, populations have looked to nation-states to

9. WEBSTER’S UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 109 (2001) (defining architecture as “the structure of anything”).

10. PLATO, *THE REPUBLIC* (Allan Bloom trans., Basic Books 1968).

11. PLATO, *THE LAWS* (Trevor J. Saunders trans., Penguin Books 1970).

12. WEBSTER’S UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 109 (2001).

13. A.V. Dicey wrote that “[t]he whole body of beliefs existing in any given age may generally be traced to certain fundamental assumptions which at the time, whether they be actually true or false, are believed by the mass of the world to be true with such confidence that they hardly appear to bear the character of assumptions.” A.V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 20 (2d ed. 1914).

14. Harold D. Lasswell & Allan R. Holmberg, *Toward a General Theory of Directed Value Accumulation and Institutional Development*, in *POLITICAL AND ADMINISTRATIVE DEVELOPMENT* 354, 380 (Ralph Braibanti ed., 1969).

15. Thomas Hobbes wrote,

This is the Generation of that great Leviathan . . . *One Person of whose Acts a great Multitude, by mutual Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defense.*

THOMAS HOBBS, *LEVIATHAN* 89-90 (Ernest Ryhs ed., E.P. Dutton & Co. 1914) (1651).

satisfy a wide range of needs. Operating in a world community of similarly organized units, these territorial political arrangements provide security for citizens while also serving as bases of state power. In return for security, the people cede control and confer an expectation of authority upon ruling state elites. This bargain is a foundation of the state system and forms the delicate balance upon which world order turns.¹⁶ For large swaths of the world's population, this myth has been shattered.

In the post-Cold War international system, the myth of the state as protector and provider of values resonated for much of the planet. But increasingly, weak and fragile states collapsed and their sovereignty was pierced. People living within their borders were often engulfed by armed conflict, and their human rights denied. Failed states harbored exportable violence and became problems for an international system that lacked the institutional capacity to address such problems.

The United Nations Charter did not contemplate the collapse or disintegration of a state. It presumed effective communication among sovereign governments and their elites, and a range of action available to the Security Council, including provisional measures, sanctions short of force, and possibly coercion.¹⁷ However, these instrumentalities were designed to bring pressure upon a cohesive form of supra-national, political organizations: functioning states. By the late twentieth century the problem of failing states was becoming an urgent challenge,¹⁸ and with the September 11, 2001 attacks on world public order, it was apparent that disintegrating and failed states were "threat[s] to the peace" in the words of the United Nations Charter.¹⁹ Since preventing threats to the peace was a fundamental purpose of the United Nations,²⁰ the world community came to appreciate that addressing this genre of threat would require new approaches: strengthening fragile states, and the corollary imperative of reconstructing failed states through comprehensive nation-building efforts.²¹

16. This has been so, more or less, since 1648 when the Thirty Years War ended in Europe with the treaties of Münster and Osnabrück, and the Westphalian State System emerged. Some scholars argue that the nation-state system predates 1648. They assert that it originated with the Concordat of Worms in 1122 because the Investiture Struggle established a property right corresponding to sovereign territory as it established "the right of kings to the income from the territory defined by the domain of each bishop." Bruce Bueno de Mesquita, *Popes, Kings and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty*, 2 INT'L. STUD. REV. 93, 94 (2000).

17. See U.N. Charter arts. 39-51 (outlining appropriate responses to "threats to the peace, breaches of the peace, and acts of aggression").

18. See generally Chester Crocker, *Engaging Failing States*, FOREIGN AFF., Sept.-Oct. 2003, at 32.

19. U.N. Charter art. 39.

20. *Id.* art. 1, para. 1.

21. Because no part of the system effectively helped countries transition from war to peace, Secretary General Kofi Annan proposed a Peacebuilding Commission, the High Level Panel on Threats, Challenges and Change, as a key reform to fill the hole in the United Nations institutional machinery. See The Secretary-General, *Note, Follow-Up to the Outcome of the Millennium Summit*, U.N. Doc A/59/565 (Dec. 2, 2004). The U.N. Security Council, acting concurrently with the General Assembly, established the U.N. Peacebuilding Commission as an intergovernmental advisory body in December 2005. See S.C. Res. 1645, ¶ 1, U.N. Doc S/RES/1645 (Dec. 20, 2005). The Commission has a standing Organizational Committee comprising seven members of the Security Council including the permanent members, seven members of the Economic and Social Council, five top providers of contributions to the U.N. budget, and five top providers of military personnel and civilian police to United Nations missions. *Id.* ¶ 4. International financial institutions, such as the World Bank and the International Monetary Fund are invited to participate in meetings of the Commission. *Id.* ¶ 9. Its main purposes are:

The character of state sovereignty was changing as states became interdependent and then adjusted to the many external forces of globalization.²² Such forces included pressures from the international finance and trade systems, drug cartels, private armies, and the positive evolution of the international human rights system. These emerging conditions of international life were buffeting the long presumed robust character of the sovereign state and its institutions. As was observed by Judge Alvarez in the *Corfu Channel Case*:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them. . . .

. . . .
This notion has evolved, and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer accept sovereignty as an absolute and individual right of every State The sovereignty of States has now become an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law.²³

Sovereignty was not absolute.²⁴ It had been changing to reflect the reality of the world social process, yet sovereignty remained an important technique wielded by state elites and it performed a stabilizing international function that remained central to world public order. It had helped solve a problem of the anarchical state system: “[H]ow is order maintained in international politics?”²⁵ Without order, the fear was that the international system would collapse into an absolute Hobbesian environment, for which failed states are a conditioning factor.

However, the old myth was giving way to a view of sovereignty based in part on the Universal Declaration of Human Rights, which stated, “The will of the people shall be the basis of the authority of the government.”²⁶ The old bargain had begun to

(a) [t]o bring together relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery; (b) [t]o focus attention on reconstruction and institution-building efforts necessary for recovery from conflict . . . ; and (c) [t]o provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, to develop best practices, to help endure predictable financing for early recovery activities and to extend the period of attention given by the international community to post-conflict recovery.

Id. ¶ 2.

22. See the discussion of sovereign power and the challenge presented by private military actors in this volume. Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429 (2008).

23. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 43 (Apr. 9, 1949) (individual opinion of Judge Alvarez).

24. C. Wilfred Jenks’ observation that “[s]overeignty is not absolute, but divisible” was increasingly apparent. He had observed that this was “in conceivable to the dogmatic school of thought” represented by Hobbes’ *Leviathan*, “which regarded the essence of sovereignty as being its absolute quality.” C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 499 (1964).

25. HEDLEY BULL, *THE ANARCHICAL SOCIETY* 51-73 (1977).

26. Universal Declaration of Human Rights, art. 21, para. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

change from the peoples' ceding of power to the sovereign in return for security to the peoples' ceding of power to the sovereign in return for guarantees of rights. Where absolute sovereignty was about state security, popular sovereignty is about human dignity. Popular sovereignty has changed expectations about state behavior and is a component of both state-building design and the legal architecture of nation-building.²⁷

For states that were pathologically weak, the technique of sovereignty became an imperfect tool as territorial integrity came under critical challenge.²⁸ Francis Fukuyama wrote, "Sovereignty and the nation-state, cornerstones of the Westphalian system, have been eroded in fact and attacked in principle, because what goes on inside states—in other words, their internal governance—often matters intensely to other members of the international system."²⁹ Interventions, both humanitarian and strategic-based, resulted in the removal of odious regimes and nation-building projects that assumed traditional state functions. One scholar notes that "[t]he statebuilding practices of international administrations reveal a sovereignty paradox: international administrations compromise a fundamental aspect of a political community's sovereignty by violating its right to self-governance, but do so with the aim of making it sovereign with regard to the relations between state and society."³⁰ In short, for collapsed states, traditional sovereignty was an empty shell.³¹

27. United Nations Secretary General Boutros Boutros-Ghali wrote in 1992, "While respect for the fundamental sovereignty and integrity of the state remains central, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory." Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF., Winter 1992-93, at 89, 98-99. In his 1999 annual speech to the U.N. General Assembly, Secretary-General Kofi Annan stated,

The sovereign state, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The State is now widely understood to be the servant of its people, and not vice versa. . . . [I]t is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era—an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.

U.N. GAOR, 54th Sess., 4th plen. mtg. at 1-2, U.N. Doc. SG/SM/7136 (Sept. 20, 1999).

28. The principle of territorial integrity of states is a central goal of the United Nations. See U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.").

29. FUKUYAMA, *STATE BUILDING*, *supra* note 2, at 92.

30. DOMINIK ZAUM, *THE SOVEREIGNTY PARADOX: THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING 27* (2007) (footnote omitted). Zaum further notes that

[t]he institution of sovereignty is central to understanding the normative framework underlying the statebuilding activities of the international administrations. By establishing international administrations and denying self-governance to the affected populations, the international community compromises one of the fundamental aspects of sovereignty, the norm of self-determination. However, as sovereignty is closely related to the notion of statehood, arguably even constitutive of it, it is the institution which necessarily incorporates the relevant elements of the normative framework that shapes statebuilding. The relationship between sovereignty and statebuilding is therefore a complex and seemingly contradictory one.

Id.

31. Sir Hersch Lauterpacht concluded that sovereignty is not in the nature of an absolute and rigid category, but that, being no more than a bundle of rights, it is capable of division and separation in a manner permitting a real measure of competence on the part both of the residuary sovereign and of the authority

Yet the shell, this structure without walls, could suddenly find itself with a roof: a newly drafted constitutional text. While potentially important, to the population the new text is often very much a myth. To the nation-building lawyer the new constitution may appear to apply, while other long-standing normative systems are in fact applied. This is because societies and communities possess multiple relevant normative systems. The normative code relied upon by officials is actually a myth system and its reliability for normative guidance will vary. Often far more important is the unofficial normative system which operates as the real operational code.³² As the entrenched normative system of the populace, the operational code will prevail over any new constitution and codified law.³³

This divergence of official and unofficial normative systems was especially apparent during earlier eras marked by what Noah Feldman has termed “imposed constitutionalism.” As he writes,

[a]lthough the wholesale imposition of an entire constitutional order is increasingly rare, constitutions *are* being drafted and adopted in the shadow of a gun. In the last decade, in the former Yugoslavia, East Timor, Afghanistan, and . . . Iraq, interim or permanent constitutions have been drafted under the conditions of de facto or de jure occupation. Each of the cases has also seen substantial local participation in the constitutional process; but each has also seen substantial intervention and pressure imposed from outside to produce constitutional outcomes preferred by international actors Yet there is something theoretically and practically distinctive about imposed liberal constitutionalism today: *it takes place against a backdrop of widespread commitment to democratic self-determination.*³⁴

While there are often demands for indigenous participation in the process, the catalyst is likely to be external—spawned by international actors and nation-building lawyers who are trained in foreign legal systems. The indigenous commitment may be to a form of self-determination and to a myth of Western style democracy.

Donald Horowitz raises the real possibility that constitutional design is an oxymoron, and pointedly writes that “there is no agreement on the political and constitutional arrangements most likely to be conducive to peace and accommodation in a democratic context.”³⁵ This is at the base of the problem of constitutional myth

charged with its total or partial exercise.

SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 324-25 (1958).

32. See W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS* 16 (1979).

33. As one scholar classically observed,

I shall continue to do my best to clarify the process and the law of interpretation, of both words and acts as symbols of expression; to demonstrate that no man can determine the meaning of written words by merely gluing his eyes within the four corners of a square paper; to convince that it is men who give meanings to words and that words in themselves have no meaning

Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 *CORNELL L. Q.* 161, 164 (1965).

34. Noah Feldman, *Imposed Constitutionalism*, 37 *CONN. L. REV.* 857, 858-59 (2005) (citations omitted).

35. Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 253, 253-54 (Ian Shapiro & Stephen Macedo eds., 2000).

for newly constituted states. The same attention that is devoted to drafting the text must also be devoted to the process of grounding the new document until the population of the state accepts it as authoritative. In new states especially, the constitution is more process than text. As the Roman jurist Papinian wrote, “*Lex* is a common engagement of the Republic.”³⁶ In other words, the people assumed a common responsibility *because* they participated in assenting to the law. This same participatory imperative must ground post-conflict constitutive processes in order to contribute to a stable, governable future that will represent a break with the past. For example, in post-conflict states such as Afghanistan and Iraq, the constitutive process must take root in the teahouses and mosques.³⁷

Nation-builders drafting constitutional texts and codified laws must sift through both the myth system and the operational code in order to determine which processes of community decisions are both authoritative and controlling. A newly drafted constitution may be a myth while what people actually do in informal settings is the accepted code of operation. The experience of most failed states that are candidates for nation-building is that of a pre-constitutional moment marked by the absence of political authority and state control. While “[t]he primary function of any constitution is to manage power, a critical feature of which is the prevention of destructive conflict,”³⁸ in these settings, power centers are contested and the constitution is not the prevailing operational code.

Myths serve important functions at every level of community. Plato wrote of the noble lie to facilitate an ordered and just society.³⁹ There is also the noble lie of nation-building, and it too serves a just cause. For the interveners and the beneficiaries (or targets) of nation-building, the whole enterprise must be elevated to a high order goal of the international community. Jane Stromseth, David Wippman, and Rosa Brooks have recently observed that

[i]nterventions are a costly and dangerous business, diverting government resources away from domestic priorities and risking the lives of the intervening power’s soldiers. The electorates of western nations are often loathe to support expensive, risky foreign ventures that offer few clear short-term domestic dividends. Because modern international and domestic norms forbid interventions designed explicitly to exploit resources of other states, today’s interventionists must generally make a public commitment to building just, democratic, peaceful and prosperous societies in the areas that they control, if they are to avoid worldwide condemnation. Yet building

36. CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 50 (rev. ed.1947) (1940).

37. In Afghanistan, the constitutive process was characterized by discrepancies between preferences about how decisions are made versus how they should be made. Formal authority was minimal and dispersed, effective control was spotty and rarely applied from the administrative and governmental center of the country, Kabul. There had long been a disconnect between formal authority and effective control. See Charles H. Norchi, *Toward the Rule of Law in Afghanistan: The Constitutive Process*, in *BEYOND RECONSTRUCTION IN AFGHANISTAN*, *supra* note 2, at 115.

38. Nagan & Hammer, *supra* note 22, at 430.

39. The “noble lie” was a persuasive device, a myth devised and observed for the common good. See PLATO, *supra* note 10, at 93. Indeed, one scholar commenting on Plato’s work notes that “it is baldly stated [in the *Republic*] that the only truly just civil society must be founded on a lie.” Allan Bloom, *Preface to PLATO*, *supra*, at xv.

just and prosperous societies is complex and requires intervening powers to make virtually open-ended commitments of resources and people to post-intervention societies—which is, again, likely to be less popular with domestic constituencies concerned about how their tax dollars are spent.⁴⁰

The noble lie of nation-building signals to the world community that the cause is just. The communication might assure populations who must tolerate intervention, disruption, and occupation while hoping for the pay-off of a functioning state and human dignity. It might mollify the taxpaying citizen of the intervening country who foots the bill. It helps to comfort families who lose loved ones serving in far away lands. The function and limitations of the noble lie must be recognized by nation-building participants.

III. SPACE FOR STATE-BUILDING

Ensuring the human dignity of the beneficiary population is one of the foundational justifications for nation-building projects. As a practical matter, this is also a precondition for progress on any other reconstruction front. Conditions of extreme crisis shaped by chaos, indiscriminate killing, targeted attacks, insurgency, and persistent conflict must be addressed before extensive nation-building can occur. The continuing problem is that ungoverned space will be filled by chaos because frayed, faux, and failed states lack the capacity to monopolize power. Security for the population must be achieved in the earliest phases of nation-building and sustained throughout the process.

In this writer's view, the achievement of a condition of centrally-authorized state power is a critical component of the legal architecture of nation-building. As Francis Fukuyama has observed, "[i]n post-conflict reconstruction operations, adequate security is the absolute sine qua non of success."⁴¹ Legal tasks may overlap and be conducted in parallel with stability operations, because of the need for institutional coordination in fluid environments.⁴² Those who have political power use it to achieve their objectives, and when those objectives are hostile to the goals of nation-building, those exercises of power must be addressed, by military means or otherwise. Illegitimate and unauthorized action grounded in sheer power must be curtailed.⁴³

A Rand Corporation nation-building study recently concluded that "[t]he first-order priorities for any nation-building mission are public security and humanitarian

40. STROMSETH ET AL., *supra* note 2, at 4.

41. FUKUYAMA, NATION-BUILDING, *supra* note 2, at 234.

42. U.S. counterinsurgency doctrine holds that it is important to identify existing coordination mechanisms and incorporate them into comprehensive [counterinsurgency] efforts. This includes existing U.S. Government, multinational, and [host-nation] mechanisms. Context is extremely important The nature of the conflict and its focus on the populace make civilian and military unity a critical enabling aspect of a COIN operation.

U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL 69 (2007) [hereinafter COUNTERINSURGENCY FIELD MANUAL].

43. This includes illegitimate action from all quarters, including the ranks of the nation-builders. *Id.* at 42 ("Illegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents.").

assistance.⁴⁴ The study prioritizes the relevant tasks in this order: security, humanitarian relief, governance, economic stabilization, democratization, and development. Always, the first order of business is building the space necessary for nation-building, and that requires stabilization, peacekeeping, and police and security sector reform. Security operations cannot be conducted acontextually or absent integrated planning. Stromseth, Wippman, and Brooks observe that “[b]ecause sustainable security requires at least minimally functioning state institutions, security efforts are meaningful only if undertaken as part of a larger post-conflict reconstruction and rule of law project.”⁴⁵ Security is the precondition of effective legal reform, yet security itself is dependent on the formal existence, at least, of operational law and state institutions.

Because contemporary nation-building typically combines state-building and military operations, there has been rethinking of the strategic environment in the American security policy community. United States Army operational themes⁴⁶ now explicitly include peacekeeping, peace building, peacemaking, peace enforcement, and conflict prevention. Along the spectrum of conflict from stable peace, to unstable peace, to insurgency and general war, peace operations would fall in the middle.⁴⁷ Much civilian nation-building work occurs in conjunction with Army stability operations. These operations are described as “various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or re-establish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.”⁴⁸ The goal of these operations is to help “establish a safe and secure environment and facilitate reconciliation among local or regional adversaries” and to “help establish political, legal, social, and economic institutions and support the transition to legitimate local governance. [They] . . . must maintain the initiative by pursuing objectives that resolve the causes of instability.”⁴⁹

Recognizing and resolving the root causes of instability are especially important and difficult under conditions of insurgency. Afghanistan and Iraq are two contexts in which nation-building programs have been implemented while counterinsurgency (COIN) operations⁵⁰ are conducted. The current U.S. Army and Marine Corps Counterinsurgency Field Manual connects nation-building goals and civilian participation to military counterinsurgency operations:

44. DOBBINS ET AL., BEGINNER’S GUIDE, *supra* note 2, at xxiii; *see also id.* at 47-72.

45. STROMSETH ET AL., *supra* note 2, at 140.

46. As the most recent Army field manual notes, “An *operational theme* describes the character of the dominant major operation being conducted at any time within a land force commander’s area of operation Operational themes have implications for task-organization, resource allocation, protection and tactical assignment.” DEP’T. OF THE ARMY, FIELD MANUAL 2-3 (2008) [hereinafter FIELD MANUAL].

47. *Id.* at 2-1.

48. *Id.* at 3-12.

49. *Id.* (“Stability operations can be conducted in support of a host-nation or interim government or as part of an occupation when no government exists. Stability operations involve both coercive and constructive military actions.”).

50. *Id.* at 2-55 (“Counterinsurgency is those military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency. In counterinsurgency, host-nation forces and their partners operate to defeat armed resistance, reduce passive opposition, and establish or re-establish the host-nation government’s legitimacy.”).

The cornerstone of any COIN effort is establishing security for the civilian populace. Without a secure environment, no permanent reforms can be implemented and disorder spreads. To establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support. Using a legal system established in line with local culture and practices to deal with such criminals enhances the [Host Nation] government's legitimacy.⁵¹

To achieve this, "[s]oldiers and Marines help establish [host nation] institutions that sustain that legal regime, including police forces, court systems and penal facilities."⁵²

Thus, contemporary state-building efforts integrate civilian and military components. What does this integration mean in concrete terms? One model is the Provincial Reconstruction Team (PRT), which is designed for service delivery and basic state-building activities in rural areas where the central government has minimal or no reach. The configuration of PRTs in Afghanistan and Iraq, for instance, vary by region and supervisory authority. The units are typically staffed by 50 to 300 troops and include development professionals and diplomats. They generally function in high-risk environments where there is little non-governmental organization penetration. The units typically work on infrastructure projects, law and governance, and security sector reform. Because of the tremendous variability in local conditions in Afghanistan, "[e]ach PRT leadership team received tremendous latitude to determine its own strategy."⁵³ The PRT model is still evolving through experience and application, and has not been without problems. One close observer recommends "the PRTs should place greater emphasis on capacity-building programs that improve local governance and help tie local officials and institutions to the central government."⁵⁴ However, a model that mixes humanitarian and military components carries risks. How are the tasks divided? Does the local population understand this integration of humanitarian and military actors? If there is hostility toward the military operation, do humanitarian organizations operating in the vicinity face increased risk?

In this Symposium, Winston P. Nagan and Craig Hammer critique the use of another model used to help create the space for nation-building: Private Military

51. COUNTERINSURGENCY FIELD MANUAL, *supra* note 42, at 42. In connecting nation-building and counterinsurgency,

[t]he field manual stresses the role of politics and outlines an ideal balance of civil and military responsibilities in COIN. The manual highlights military dependence not simply upon civilian political direction at all levels of operation, but also upon civilian capacities in the field. . . . Equally important, success in COIN relies upon nonkinetic activities like providing electricity, jobs, and a functioning judicial system. This wide swath of operational capacities for nation-building do not reside in the U.S. armed forces.

Id. at xxix-xxx.

52. *Id.*

53. *Id.* at 73.

54. Michael J. McNerney, *Stabilization and Reconstruction in Afghanistan: Are PRTs a Model or a Muddle?*, PARAMETERS, Winter 2005-06, at 32, 45. McNerney, a senior U.S. government official, concluded that in Afghanistan, "the PRTs grew increasingly effective in supporting security-sector-related capacity-building in the provinces. . . . It would be beneficial if the PRTs can also play a role in supporting judicial capacity-building programs, which the international community has implemented far too slowly."

Id. at 42-43.

Contractors (PMCs) and Private Security Contractors (PSCs). Nagan and Hammer appraise this model and its implications for world order. For instance, they note that through reliance of PMCs and PSCs, “the line between combat operations and service delivery has been noticeably indistinct; there has been an alarming lack of clarity as to when private military actors have assumed combat roles versus when they have been limited to training, and other non-combat roles.”⁵⁵ The authors appraise the difficulties created by the use of these actors that are disconnected from sovereign power, and argue that these institutions “are not supported by traditional, appropriate sources of authority, even though national sovereigns are a key part of this process of assigning sovereign power.”⁵⁶ They write that “[t]he constitutive implications arising from military privatization efforts are particularly grave, especially where political leaders are able to operate outside norm-generating forces, including public scrutiny, government oversight, and domestic and international law.”⁵⁷

One alternative to private military and security contractors is greater reliance on traditional national armies, and the lawyers serving in their ranks. U.S. Army Judge Advocate Dan E. Stigall urges reliance on the U.S. military because of its unique combination of capabilities that include legal capacity. He argues,

[m]ilitary assets are the preferred choice for the task of state-building for many reasons. One reason is that their presence is a generally indispensable element of any state-building operation. Another reason . . . is the modern military’s diverse and robust contingent of professionals. The armed forces of the United States regularly deploy, not only with skilled infantrymen and other “combat arms” soldiers, but with a host of trained professionals such as physicians, lawyers (Judge Advocates), and engineers—all of whom are uniformed service members. . . . Specifically in the legal realm, the armed forces possess a corps of educated, trained, and skilled attorneys who regularly practice law within the United States and abroad. . . . They are able to operate in post-conflict states and assist in rebuilding or developing legal infrastructure.⁵⁸

This solution meets the “security first” imperative of nation-building. But does it unevenly tip the civilian-military balance in the architecture of nation-building?

Ensuring the security of the population requires addressing crime. Writing in this Symposium, James Cavallaro explains this is a matter of “transitional justice,

55. Nagan & Hammer, *supra* note 22, at 437.

56. *Id.* at 448.

57. *Id.* at 433 (footnote omitted).

58. Dan E. Stigall, *Comparative Law and State-Building: The “Organic Minimalist” Approach to Legal Reconstruction*, 29 LOY. L.A. INT’L & COMP. L. REV. 1, 40 (2007). Stigall further argues that

[d]elegating the primary responsibility of legal reconstruction to the Judge Advocates whose presence is already required in post-conflict settings, economizes the assets already in use while achieving a unity of command which is unattainable with non-governmental entities.

Thus, they are not only suitable for the job of legal reconstruction, but they are, in many ways, ideal.

Id. at 41.

democratic stability, and nation-building.”⁵⁹ He notes that “insufficient attention has been paid during the transitional era to addressing ordinary crime during transitions and beyond.”⁶⁰ Nation-building efforts must devote enhanced attention “to common crime and to the establishment of transparent, efficient, and democratic police and criminal justice systems to control it.”⁶¹ This requires detailed planning amidst the rush to state-building. Space for state-building means protecting vulnerable populations from crime, insurgency, and armed conflict. The problem from the policy perspective is how to minimize unauthorized coercion and violence. If the well-being of the population is under threat, if security is absent, there is no space for state-building, nowhere to ground the architecture of a new nation.

IV. THINKING BELOW THE STATE

The state as nation-building myth was discussed above.⁶² Because of the problems inherent in a state-centric view, it follows that the design process for the legal architecture of nation-building merits adjustment. At the core of this adjustment, in this writer’s view, is thinking below the state. This requires adopting a standpoint for the appraisal of law that penetrates below the easily identifiable surface. Oliver Wendell Holmes reflected similar thinking, when he famously wrote:

It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. [Law is] . . . an exercise in the morphology and transformation of human ideas.⁶³

Vibrant customary communities and microlegal systems function below the radar of failed and weak states. These communities merit attention because within them human rights and development are denied or achieved, through them demands are made upon the world community, and many communities reject certain organizing principles of world public order including the basic international human rights codex. Lawyers engaged in failed state and post-conflict reconstruction must acknowledge individuals and their communities which provide and protect fundamental values and upon which all governance rests. Whether in functioning or deeply pathological states, people’s values are indulged or deprived in smaller communities that are mere micro-participants in the world community, but whose participation can occasionally produce broad and intense effects.⁶⁴ In all communities, the ultimate systemic unit is the person.

59. See James L. Cavallaro, *Looking Backward to Address the Future? Transitional Justice, Rising Crime, and Nation-Building*, 60 ME. L. REV. 461, 462 (2008).

60. *Id.* at 464.

61. *Id.*

62. See *supra* Part II.

63. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

64. Indeed, “our world is composed of a series of community contexts beginning with the globe as a whole and diminishing in territorial range and scope.” Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 10 (1959).

Michael Reisman writes in this volume that “[d]evelopment . . . implies specific scope values with respect to which strategies for securing selective changes are invented and against which change-flows in decision structures and in the production and distribution of values are constantly evaluated.”⁶⁵ This optic is critical as most state-building occurs in failed states where the principal building blocks are communities. When thinking and operating below the state, it becomes apparent that “as total systems, societies differ radically in their patterns of values. The differences reside not only in hierarchies or priorities—the ordering of values according to importance, in some sense—but also in other important modes of relationships among values.”⁶⁶ There are important relationships between values, individual decision-making, and collective community choice. As Talcott Parsons noted,

[t]he values which come to be constitutive of the structure of a societal system are then the conceptions of the desirable type of society held by the members of the society of reference and applied to the particular society of which they are members.

... A value-pattern then defines a direction of choice, and consequent commitment to action.⁶⁷

A key nation-building development task is thus to appraise the direction of choice implicit in value aspirations in communities that are often disconnected from the state.

In the absence of a functioning state, it is especially important to understand the cultural context and to evaluate the deprivation or fulfillment of values which may underlie institutional manifestations.⁶⁸ Value priorities differ among cultures. And institutional practices vary greatly from culture to culture, within and across civilizations. Even the most traditional community is complex, with multiple value and legal systems at work. Working with traditional communities—often the most coherent cultural block in failed states—entails the analysis of culture as an “interpretive [task] in search of meaning.”⁶⁹

Thinking and working below the state means not confusing legal systems with legal rules.⁷⁰ In any community, *rules* rest on the surface of the legal system. The real dimensions of the *system* are often found in other places. This is especially apparent in traditional villages where customary and formalized councils are both engaged in choice-making, in dividing up the weal and woe of life.⁷¹ One must come to terms with

65. Reisman, *supra* note 4, at 310.

66. Robin M. Williams, Jr., *Change and Stability in Values and Value Systems: A Sociological Perspective*, in UNDERSTANDING HUMAN VALUES 15, 17-18 (Milton Rokeach ed., 1979).

67. Talcott Parsons, *On the Concept of Value-Commitments*, 38 SOC. INQUIRY 135, 136 (1968) (citation omitted).

68. *See generally* FRANCIS MADING DENG, TRADITION AND MODERNIZATION: A CHALLENGE FOR LAW AMONG THE DINKA OF THE SUDAN (1971) (applying a contextual analysis to institutions within tribal communities, using the Dinka people as a case study).

69. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973).

70. As Bronislaw Malinowski urged, “[t]he true problem is not to study how human life submits to rules—it simply does not; the real problem is how the rules become adapted to life.” BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 127 (Routledge & Kegan Paul 1966) (1926).

71. *See* W. Michael Reisman, *Law from the Policy Perspective*, in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1, 6-9 (1981).

other processes within the culture and the society if one is to truly understand law in context.⁷² A legal system may have more to do with custom, religion, or tradition than with what might be considered modern social conventions. Unwritten law, emanating from political process, is an important feature of community decision-making.⁷³

There is also a distinction between the terms *law* and *rule of law*. In nation-building practice, the latter is typically taken to mean a sector that includes the judiciary, ministry of justice, lawyers, legal codes, mechanisms, and practices that regulate public and private life.⁷⁴ A group of scholars has offered a “rule of law” definition that they believe affords a more synergistic approach to law and nation-building:

The “rule of law” describes a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with the procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibitions on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions, and extrajudicial killings). In the context of today’s globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes.⁷⁵

Thinking and acting below the state means engaging microlegal processes because “law, *real law*, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction.”⁷⁶ Accordingly, “[l]aw is a property of interaction. Real law is generated, reinforced, changed and terminated continually in the course of almost all of human activity.”⁷⁷ This law, termed “microlaw” by Michael Reisman, “manifests a constitutional dimension[,] . . . a constitutive process: part of every decision is concerned, not with the immediate decision, but with the structure of decision-making itself.”⁷⁸ Through expectations, reciprocity, and retaliation within those communities that function independently of formal institutions, “[m]icrolaw is effective and sanctioned.”⁷⁹ The

72. John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 195, 222-29 (Mauro Cappelletti ed., 1978). As Merryman observes,

if we are really interested in knowing something about the legal system in any society we quickly have to expand our vision to include the law machine—the complex of legal structures, actors and processes. We will not get very far in that effort by studying merely the rules of law.

Id. at 227.

73. Diogenes, discussing Plato’s view on the law, observed that “there is a written and an unwritten law. The one by which we regulate our constitutions in our cities is the written law; that which arises from custom, is the unwritten law.” *DIODEGENES LAERTIUS, THE LIVES AND OPINIONS OF EMINENT PHILOSOPHERS* 143 (C.D. Yonge trans., 1853).

74. See DOBBINS ET AL., *BEGINNER’S GUIDE*, *supra* note 2, at 73-74.

75. STROMSETH ET AL., *supra* note 2, at 78.

76. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 2 (1999).

77. *Id.*

78. *Id.*

79. *Id.*

legal architects of nation-building must plan for and take account of these micro-legal processes.

In this Symposium, Thomas Barfield considers microlaw, multiple legal systems, and the need to devote close attention to customary law in nation-building. He writes,

Afghanistan's restoration of the rule of law has set in motion a renewed debate about fundamental rights and legal principles that has not been seen in the West since the time of the Enlightenment: Who is justice for? Who has the right to seek compensation or justice? Does the state or the individual have priority in seeking justice and delivering punishment? Is law a human creation or is it rooted in divine authority?⁸⁰

The problem, as Barfield observes, is that "so many areas of Afghanistan have operated without (or outside of) formal government institutions for a very long time."⁸¹ Neither international law nor state law has had traction at the local level. In order to know the law in Afghanistan, one cannot solely rely on formal agreements and other textual statements.

In addition, one must also observe habitual behavior. Behavior which in the beginning might be considered unlawful, if repeated through a period of time, might become regarded as lawful. To make the distinction requires observance of a flow of behavior and a flow of words.⁸² The fundamental role of the state in legal prescription and application is questioned by many Afghans who wonder, "[i]s state authority a good idea? Who should set the terms of agreement? Who should determine the rights and the wrongs?"⁸³ As with many populations that have survived state failure, for most Afghans legal life does not unfold with reference to formal codes and institutions. Yet, as Barfield argues,

[T]he major role of the international community has been in aiding the reconstruction of the Afghan state One reason that Afghan society has survived so many years of turmoil has been its ability to govern itself at the local level even in the absence of state institutions. The international community should take advantage of this strength by recognizing that most problems are not solved in the formal judicial institutions but rather informally.⁸⁴

Thus, close attention must be accorded to the cultures that shape communities and people apart from the state.⁸⁵ Viewing cultures and civilizations via a horizontal optic alone reveals only surface identifications. With a vertical examination, the full complexity of overlapping and conflicting identifications accompanied by expectations and demands become apparent. Normative systems are layered. Hence, levels of

80. Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347, 348 (2008).

81. *Id.*

82. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, The Harold D. Lasswell Memorial Lecture (April 24, 1981), in 75 AM. SOC'Y INT'L L. PROC. 101, 108-11.

83. Barfield, *supra* note 80, at 348.

84. *Id.* at 373.

85. See *id.* Culture "is the term that characterizes the most distinctive patterns of value distribution and institutional practice to be found in the world community." MYRES S. MCDUGAL & HAROLD D. LASSWELL, *STUDIES IN WORLD PUBLIC ORDER* 20 (1960).

governance, constitutional texts, and formal institutions are features of a context that include, but are not limited to, the state. This discernment operation can be especially vexing to those who work with non-Western communities, where social processes evolve below the surface of the community.

Social groups within the state typically receive scant attention from practitioners and scholars. For example, as is explained by Tracy E. Higgins and Rachel Fink in this Symposium, in every nation-building context, the family is part of the legal architecture through “the relationship between family structure and the overarching social structure of the nation-state.”⁸⁶ The authors note that “[t]he family comprises the fundamental principle of social organization in all societies, across a wide range of culture and political forms.”⁸⁷ Family and social hierarchy, including hierarchy and power constellations, may be “reproduced in the structure of the nation.”⁸⁸ Gender roles and particular manifestations of family structure may be reinforced by long-standing customary law.

In placing family law at the center of a legal architecture of nation-building, Higgins and Fink note that “the social institution of the family and the legal framework that defines it embody power relations that, in turn, help to shape the larger polity . . . [and] may figure in important ways in the struggle for national identity that often takes place contemporaneously with nation-building.”⁸⁹ The authors approach nation-building differently than do lawyers and scholars who are accustomed to a world of formal institutions, codified law, and top-down methods. When a “below the state” observational standpoint is incorporated and adopted, nation-building lawyers can better calibrate the tools and jurisprudence they bring to the enterprise in order to achieve commonly sought outcomes.

V. HUMAN RIGHTS FOR HUMAN DIGNITY

The fundamental goal of nation-building is achieving human dignity for the beneficiary population.⁹⁰ In this Symposium, Michael Reisman postulates the goal of a world order of human dignity, and this “involves increasing the aggregate participation in the shaping and sharing of all values.”⁹¹ That is the full nation-building task. In modern state-building practice, this means constructing a human rights culture in compliance with international human rights standards, and national and international protection mechanisms as strategies to achieve human dignity outcomes. In many instances, populations in failed and disintegrated states have suffered human rights abuses for generations. There is evidence that deep and extensive human rights

86. Tracy E. Higgins & Rachel Fink, *Gender and Nation-Building: Family Law as Legal Architecture*, 60 ME. L. REV. 375, 385 (2008).

87. *Id.* at 386.

88. *Id.* at 407.

89. *Id.* at 377.

90. According to scholars Myres S. McDougal and Harold D. Lasswell, “[t]he essential meaning of human dignity . . . can be succinctly stated: it refers to a social process in which values are widely and not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power.” McDougal & Lasswell, *supra* note 64, at 11.

91. Reisman, *supra* note 4, at 312.

deprivations over time are a factor in state collapse.⁹² In post-conflict reconstruction and nation-building, human rights design must be integrated at the outset and considered within every project that will have an impact on the beneficiary population.

Human rights have been central to state-building and post-conflict reconstruction since the end of the Second World War when, with the Holocaust fresh in their minds, delegates to the United Nations Conference in San Francisco decided that how a government treated its own people on its own soil would no longer be its own business. The constitutive document of the new organization, the United Nations Charter, reaffirmed “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”⁹³ The framers of the Charter recognized evolving demands for human rights, postulating and prescribing new protections for fundamental rights of the individual regardless of the posture of the state in which that citizen lived.⁹⁴ The Universal Declaration of Human Rights (UDHR) has been called a Magna Carta for all humanity.⁹⁵ It is the constitutive text at the core of the International Bill of Human Rights and at the core of the legal architecture of nation-building.⁹⁶

Nation-building work cannot be undertaken without incorporating human rights standards and obligations, as well as the mechanisms and arrangements for promotion and protection. It cannot proceed without the participation of the human rights “movement” that is largely drawn from civil society. Building a human rights culture requires partnerships and national human rights institutions as a component of the architectural design.⁹⁷ Human rights, as a component of the legal architecture of nation-building, are addressed explicitly and implicitly by each contributor to this Symposium.

The issue of culturally particular perspectives and demands as a challenge to universal standards is a human rights problem that becomes acute when Western

92. Much has been written on the connection between widespread human rights abuses over time and the collapse of the state. For the situation in Afghanistan, see generally U.N. Econ. & Soc. Council [ECOSOC], *Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan*, U.N. Doc. A/C.3/42/8 (Nov. 17, 1987); EDWARD GIRARDET & JONATHAN WALTER, *AFGHANISTAN* (Charles Norchi & Mirwais Massood eds., 2004); A HELSINKI WATCH REPORT, “TEARS, BLOOD AND CRIES”: HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION (1984); A HELSINKI WATCH/ASIA WATCH REPORT, *BY ALL PARTIES TO THE CONFLICT: VIOLATIONS OF THE LAWS OF WAR IN AFGHANISTAN* (1988); Norah Niland, *Justice Postponed: The Marginalization of Human Rights in Afghanistan*, in *NATION-BUILDING UNRAVELED? AID, PEACE AND JUSTICE IN AFGHANISTAN* 61 (Antonio Donini, Norah Niland & Karin Wermester eds., 2004).

93. U.N. Charter, Preamble.

94. See Charles Norchi, *Human Rights: A Global Common Interest*, in *THE UNITED NATIONS: CONFRONTING THE CHALLENGES OF A GLOBAL SOCIETY* 79 (Jean E. Krasno ed., 2004).

95. ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* 11 (2001).

96. See Fact Sheet, Office of the High Commissioner for Human Rights, Fact Sheet No. 2 (Rev. 1), *The International Bill of Human Rights* (June 1996), <http://www.unhcr.ch/html/menu6/2/fs2.htm>. The International Bill of Human Rights consists of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, two Optional Protocols and specialized international legal instruments. *Id.*

97. National human rights institutions, as strategies for building a human rights culture, should be considered in nation-building design. See, e.g., Charles H. Norchi, *The National Human Rights Commission of India as a Value-Creating Institution*, in *HUMAN RIGHTS: POSITIVE POLICIES IN ASIA AND THE PACIFIC RIM* (John D. Montgomery ed., 1998).

countries undertake nation-building programs in non-Western societies.⁹⁸ The perspectives of certain civilizations seemed wary, if not hostile, to what Richard Falk called “the cult of modernization”⁹⁹ with which certain cultures associate the human rights system. In distinctly non-Western contexts, perspectives on a range of values bearing on human dignity may vary from international legal standards. This is a concrete problem which lawyers, including this writer, have confronted in non-Western nation-building environments. Its urgency was recently conveyed by Pope Benedict XVI in an address to the United Nations General Assembly:

[T]he Universal Declaration [of Human Rights] . . . has enabled different cultures, juridical expressions and institutional models to converge around a fundamental nucleus of values, and hence of rights. Today, though, efforts need to be redoubled in the face of pressure to reinterpret the foundations of the Declaration and to compromise its inner unity so as to facilitate a move away from the protection of human dignity towards the satisfaction of simple interests, often particular interests.¹⁰⁰

Burns Weston, writing in this Symposium, proposes a practical means for dealing with this problem. He argues that “universalist international human rights law can and should serve as a basis for rendering cross-cultural normative judgments.”¹⁰¹ Historically, deprivations of respect are the roots of abuses suffered by vulnerable populations in failed states. Professor Weston proposes “an analytically neutral approach for deciding when cultural differences are to be respected and when not.”¹⁰² He refers to this approach as a “methodology of respect,”¹⁰³ and urges a “cross-cultural dialogue that can yield substantial detailed consensus on the many factual and policy-oriented questions that absolutely need to be asked by all participants engaged in nation-building.”¹⁰⁴

Additionally, nation-building, particularly in war-torn societies, requires protecting refugee populations and the internally displaced. In this Symposium, Rebecca M. M. Wallace and Diego Quiroz discuss means for protecting refugees and the internally

98. Charles H. Norchi, *A Pivotal States Human Rights Strategy*, in *THE PIVOTAL STATES: A NEW FRAMEWORK FOR U.S. POLICY IN THE DEVELOPING WORLD* 315, 327-28 (Robert Chase, Emily Hill & Paul Kennedy eds., 1999).

[S]chism has arisen between those who believe ideas and institutions are *nomos*, or made by man, and those who believe our ideoethnemes are *physis*, or imposed by nature or divine will. The former view engendered Western civilization from the Enlightenment to the present, and with it human rights. In its extreme form, the latter view is a crucial challenge. Its triumph would amount to one of the most profound value shifts since the Age of Reason. And its impact on the planet would be no less significant than when God first spoke to Muhammad.

Id.

99. Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* 44, 45 (Abdullahi Ahmed An-Naim ed., 1990).

100. Address of His Holiness Benedict XVI to the United Nations General Assembly 2 (April 18, 2008) (transcript available from the Holy See Press Office).

101. Burns H. Weston, *Human Rights and Nation-Building in Cross-Cultural Settings*, 60 *ME. L. REV.* 317, 326 (2008).

102. *Id.*

103. *Id.* at 328.

104. *Id.* at 346.

displaced (IDPs) as a critical nation-building challenge.¹⁰⁵ They “explore the interdependent relationship between post-conflict nation-building on the one hand, and refugee repatriation and intrastate reintegration of IDPs on the other.”¹⁰⁶ The authors appraise the framework of international protection of refugees through human rights law and international refugee law that must serve to guide nation-building actors. They write that “[i]n any population of returnees there will be groups that are particularly vulnerable. Any successful nation-building exercise must consider these groups and implement procedures and programs that effectively address their particular situations.”¹⁰⁷

Human rights must be a key component of the legal architecture of nation-building because many populations of failed states have been subjected to the Melian experience. Thucydides recorded the famous Melian dialogue during the time of the Peloponnesian wars. In the dialogue, the Athenians proclaimed that the “strong do what they can and the weak suffer what they must.”¹⁰⁸ There was no human rights culture, and the Melians suffered the consequences. For contemporary nation-building, the legal architect must address the means and methods of building a human rights culture to secure the population early in the design process.

VI. CAPACITY-BUILDING

What is the “building” in nation-building? This writer believes it is building the capacity of people and their institutions. Among development professionals, capacity is understood as the ability of people, organizations, and society to manage their affairs successfully.¹⁰⁹ Thus the legal architecture of nation-building should adopt Amartya Sen’s “capability approach” that he applies to poverty reduction.¹¹⁰ The 2005 Paris Declaration identified capacity development as an endogenous process, led from within a country with donors playing a supporting role. The effective performance of country systems—administration, governance, goods and service delivery, a suitable policy, regulatory and legal environment for sustainable development—depends on capacity.¹¹¹

105. Rebecca M. M. Wallace and Diego Quiroz, *Refugees and Internally Displaced: A Challenge to Nation-Building*, 60 ME. L. REV. 409 (2008).

106. *Id.* at 410-11.

107. *Id.* at 424.

108. THUCYDIDES, THE PELOPONNESIAN WAR 351 (Richard Crawley trans., 1982).

109. See generally Organization for Economic Co-Operation and Development Assistance Committee, Reference Document, *The Challenge of Capacity Development: Working Towards Good Practice*, available at <http://www.oecd.org/dac/governance>.

110. AMARTYA SEN, INEQUALITY REEXAMINED 109 (1992). Amartya Sen considers the concept of “development” beyond resource transfer and material well-being. He defines the goal of development as increasing the capability of all human beings to achieve what they most value. See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

111. Montgomery & Rondinelli, *supra* note 2, at 235.

The in-country presence of donor organizations is often a useful means of training civil servants and suggesting organization improvements, but the negative impact of its temporary nature often contributes to an internal “brain-drain” as higher levels of compensation and responsibility attract qualified personnel away from government posts. The balance between offering opportunities to qualified personnel and drawing down the resources of the public service requires close attention. Using existing administrative machinery rather than creating new organizations is a valuable means toward that balance,

This is a way to solve the problem of what Fukuyama calls “weak states and the black hole of public administration.”¹¹²

Sustainable capacity-building depends upon a core skill: individual decision-making. This is critical for a range of optimal outcomes, including an independent judiciary, competent and responsive legal professionals, adequate public health, inclusive education, and the full range of ministerial and provincial government administration. Building indigenous, individual decision-making capacity should be a component of the legal architecture of nation-building because “[l]aw is a process of human beings making choices.”¹¹³ Nation-building lawyers, who become decision specialists through years of training and practice, are best positioned to help develop this core capacity upon which the new state will rise or fall. The ability of a state to produce value outcomes for a population turns on the decision capacity of individuals at every level of social structure but, in particular, at the base. This core capacity is a prerequisite for generating the complete range of value outcomes described by Michael Reisman in this Symposium: power, well-being, skill, respect, wealth, enlightenment, affection, and rectitude.¹¹⁴

Capacity-building efforts should explicitly recognize the community or group’s values to help them guide their views of their own futures.¹¹⁵ The impoverished and dispossessed are too often treated as objects of state-building rather than as genuinely participating subjects. However, they are agents of their choices.¹¹⁶ As one development expert has observed, “The poor want desperately to have their voices heard, to make decisions, and not to always receive the law handed down from above.”¹¹⁷ The goal is to build locally-driven, owned, and thus sustainable processes in select sectors amidst widespread conditions of physical insecurity and socio-economic deprivation.

Another scholar argues that rather than focus upon services, infrastructure, and capital transfers, donor countries and international organizations must define capacity itself as the primary objective of all development assistance.¹¹⁸ This can help avoid the problem of “runaway state-building,” described as the “rapid expansion in the size of the state administration without appreciable gains in its effectiveness [whereby] states continue to underperform, and in some cases have even declined in their capacity for

once disruptive relics of the past are purged from office.

Id.

112. FUKUYAMA, STATE BUILDING, *supra* note 2, at 43.

113. W. MICHAEL REISMAN & A. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 595 (1987).

114. *See* Reisman, *supra* note 4, at 311-13.

115. *See generally* Charles H. Norchi & Karuna Chibber, *A Technical Note for Value-Based Participatory Planning, Monitoring and Evaluation in Community-Driven Development* (World Bank Group, Washington, D.C., May 20, 2003) (discussing the guidelines for Value-Based Participatory Planning, Monitoring, and Evaluation in Community-Driven Development).

116. *See* W. Michael Reisman, *A Jurisprudence from the Perspective of the “Political Superior,”* 23 N. KY. L. REV. 605, 619 (1996). Reisman suggests a methodological approach to building the decision capacity of the disempowered. *Id.*

117. DEEPA NARAYAN ET AL., VOICES OF THE POOR: CRYING OUT FOR CHANGE 281 (2000).

118. *See* FUKUYAMA, STATE BUILDING, *supra* note 2, at 82-91.

governance.”¹¹⁹ The risk is building the capacity of international consultants and non-governmental organizations while people remain disempowered and fragile states remain weak. It is important to be sensitive to approaches that create new external dependencies an outcome of what one expert famously termed, “The Cartel of Good Intentions.”¹²⁰ This “cartel” is the enormous international development technocracy that is self-perpetuating and feeds on large foreign assistance projects while producing local dependency.¹²¹ In the least developed countries it has contributed to minimal state capacity, and economic growth, thwarted service delivery in an inclusive and accountable manner, and enhanced the risk of political instability and state collapse. The cure for runaway state-building is real capacity-building.¹²²

The contributors to this Symposium address a broad spectrum of capacity-building challenges. One challenge, not explicitly treated in this volume, is constitutional text drafting for new states.¹²³ Lawyers engaged in nation-building are especially attuned to the constitutive process, even if they do not participate in drafting the text. The process is at least as important in the life of the new state as the text.¹²⁴ The legal architecture must account for the observations of Donald L. Horowitz:

There are two important questions in post-conflict constitution making, and at present neither of them has a definitive or uniformly accepted answer. The first relates to the best configuration of institutions to adopt in order to ameliorate the problem of intergroup conflict. The second concerns the process most apt to produce the best configuration of institutions, whatever it might be.¹²⁵

There are multiple answers to these questions depending on the context, methods, and jurisprudence that lawyers bring to the problem.¹²⁶ A constitution is a journey, not a

119. CONOR O'DWYER, *RUNAWAY STATE-BUILDING* 1 (2006).

120. William Easterly, *The Cartel of Good Intentions: The Problem of Bureaucracy in Foreign Aid*, 5 *POL'Y REFORM* 223, 226 (2003).

121. See Peter Boone, *Politics and the Effectiveness of Foreign Aid*, 40 *EUR. ECON. REV.* 289, 289-94 (1996); James Bovard, *The Continuing Failure of Foreign Aid* (Cato Inst., Policy Analysis No. 65, 1986); Craig Burnside & David Dollar, *Aid, Policies and Growth*, 90 *AM. ECON. REV.* 847, 847-48 (2000); see generally WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* (2001) (discussing how economic growth in the tropics responds to incentives).

122. A possible solution is “an ‘organic minimalist’ approach to legal reconstruction—an approach aimed at efficiently focusing resources in a way that empowers the organic legal system of the target nation without undermining the legitimacy of the judiciary and other government institutions.” Stigall, *supra* note 58, at 1.

123. The more important constitutive process of which a constitution is a part, however, is explicitly treated in this Symposium. See e.g., Reisman, *supra* note 4, at 312; Barfield, *supra* note 80, at 349-51.

124. Norchi, *supra* note 37, at 115 (“The tradition of creating and adopting a constitution involves a process of authoritative decision-making in which members of a community clarify and implement their common interest.”).

125. Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 *WM. & MARY L. REV.* 1213, 1213 (2008).

126. See Donald L. Horowitz, *Constitutional Design: Proposals Versus Process*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 15, 19 (Andrew Reynolds ed., 2002) (“If there is a subject called constitutional design, then there must be alternative constitutional *designs*. Assuredly there are, but even now most constitutional drafters and reformers are, at best, only vaguely informed by anything resembling an articulate theory of their enterprise.”).

moment. For a nascent state emerging from collapse, an often overlooked role for the nation-building lawyer is to help build local capacity to make the journey.¹²⁷

The pace of capacity-building will necessarily turn on levels of crisis and conflict. In this volume, Michael Reisman writes of different levels of developmental capacity across communities.

At one extreme, the most minimal form of development capacity obtains when a territorial community lacks institutional or functional means for locating itself, with some degree of realism, in its environment and flow of events and of even clarifying and projecting goals and strategies for securing an approximation of human dignity.¹²⁸

Nation-building lawyers may encounter this as the faux state—a polity whose real power lies in diffuse pockets disconnected from the center—where effective control and authority of the government is confined to a narrow space. A constitution might be in place, government ministries might buzz with activity, yet warlords and their private armies control provinces, engage in banditry, and “tax” commerce. The faux state problem must be addressed by intense indigenous capacity-building.

Capacity-building in many new states may be burdened by debts incurred by previous, often outlaw, regimes. The problem is appraised in this volume by Lee C. Buchheit and G. Mitu Gulati who write “in this one area—debt contracts—the former despot will continue to keep a chokehold on the country long after the devil and his other works have been buried.”¹²⁹ The “debt obligations incurred by the prior government in the name of the state,”¹³⁰ merits greater sustained attention from the nation-building community. It is a problem that is an obstruction to capacity-building. Moreover, a large part of the solution lies in building indigenous capacity that possesses sufficient debt-contracting and other related skills.

Among the pathologies of failed and post-conflict states is the absence of commercial law. In this Symposium, Michael J. Stepek writes on commercial law as a component of the legal architecture of nation-building.¹³¹ There is a dire need for legal standards to hold public institutions accountable. This accountability is a key to economic development because “legal institutions enable commercial partners to engage in sophisticated transactions.”¹³² The ability to conduct transactions, provide professional services, and to enter into legally binding agreements requires robust legal institutions and capable staffs. As Mr. Stepek describes, this is an enormous capacity-building challenge that has been fraught with difficulty.

127. A method used by policy-oriented lawyers is the Decision Seminar which this Author has found useful in state-building field applications. *See generally* Andrew R. Willard & Charles H. Norchi, *The Decision Seminar as an Instrument of Power and Enlightenment*, 14 POL. PSYCHOL. 575 (1993) (an account of a Decision Seminar conducted to help build governance, constitution making, and decision capacity for the Afghan government-in-exile and other key participants of the period).

128. Reisman, *supra* note 4, at 310.

129. Lee C. Buchheit & G. Mitu Gulati, *Odious Debts and Nation-Building: When the Incubus Departs*, 60 ME. L. REV. 477, 479 (2008).

130. *Id.*

131. *See generally* Michael J. Stepek, *The Importance of Commercial Law in the Legal Architecture of Post-Conflict “New” States*, 60 ME. L. REV. 487 (2008).

132. *Id.* at 494.

John L. Douglas writes in this volume about a related concern: the role of a banking system in nation-building. This is an important capacity-building task because a “banking system functions as the heart and lifeblood of any functioning economy.”¹³³ Mr. Douglas explains why “one no more builds a nation by establishing a banking system than one builds a nation by writing a constitution.”¹³⁴ The banking system requires concurrent attention to other capacity building tasks: “a legal system that respects contracts and agreements, honoring the rights of both debtors and creditors . . . a judiciary that follows the rule of law[,] a government that understands the importance of strong, healthy banks . . . and a legal framework within which they can operate.”¹³⁵ This component of the legal architecture of nation-building is critical because, as Mr. Douglas writes, a “healthy banking system . . . not only helps build a nation for what it does, it helps build a nation for what it requires.”¹³⁶

There are myriad opportunities for lawyers and non-lawyers to help build the capacity of failed states and of the people who live in them. This Symposium issue includes contributions by volunteer lawyers associated with the International Senior Lawyers Project, who describe their rich field experiences. These lawyers recount their capacity-building efforts undertaken with a wide range of public and private actors. Each volunteer lawyer came away from the experience as seasoned nation-builders with profound insights. As one volunteer reflected after her experience, “[t]he size of the gap between the law on the books and its access by and application to all levels of a society is one crucial indicator of a country’s progress on the rule of law continuum.”¹³⁷ We are reminded that important capacity-building work is not the unique preserve of the civil servants of international organizations, government officials, NGO staff, and law firms. There is an emerging cadre of nation-builders motivated by nothing more than a custodial sense for the greater common interest.

Capacity-building recognizes that people “have the latent capabilities needed for development but those latent capabilities need to be nurtured and brought to fruition if the people are to attain their aspiration, goal, or promise.”¹³⁸ Nation-builders must convey a sincerity of purpose and commitment to populations who worry that compassion fatigue will set in and who fear that they will be victims of a nation-building exit strategy.¹³⁹ Such populations have been orphaned before, usually by powerful nation-building Western states. In the myth of Prometheus, as the Greek gods were molding the first mortal beings from fire and earth, they equipped them with various resources to survive. However, those mortals with reason, the humans, were left with few powers. Thus Prometheus stole fire from the god Hephaestus and wisdom in the arts from Athena and gave these powers to man. But, in allocating powers,

133. John L. Douglas, *The Role of a Banking System in Nation-Building*, 60 ME. L. REV. 511, 512 (2008).

134. *Id.*

135. *Id.*

136. *Id.* at 513.

137. Linda D. McGill, *Measuring the Rule of Law in India: A Volunteer Lawyer’s Experience*, 60 ME. L. REV. 537, 537-38 (2008).

138. DEAN WILLIAMS, REAL LEADERSHIP 223 (2005).

139. See Charles H. Norchi, *A New Start in Afghanistan*, INT’L HERALD TRIBUNE, Oct. 13, 2004, available at <http://www.ihf.com/articles/2004/10/12/opinion/ednorchi.php> (arguing that an Afghan election must not be an exit strategy).

Prometheus parsed skill, allotting it to some people and not others.¹⁴⁰ He skipped the poorest and most marginal communities. In our age, the orphans of Prometheus are found in failing, failed, and collapsed states. Building the skill capacity of the new Promethean orphans is a critical nation-building objective.

VII. THE LAWYER AS ARCHITECT

Nation-building tasks now benefit from the contributions of lawyers. Their profound challenge is to fulfill the human rights and development of populations on the perilous journey from real estate to nation-state.¹⁴¹ This is not entirely new legal territory, but the complex challenges stimulate new approaches, methods, and innovative combinations. It will occur to the readers of this Symposium that if a legal architecture of nation-building is emerging, it is because lawyers, such as the contributors to this volume, are the architects. They are lawyer-architects by virtue of applying their legal disciplines, their deep contextual understanding, their problem-oriented postures, and their multi-method agility to this vexing problem of the Public Order of the World Community.

Even for the most agile and creative lawyers, this pursuit is remarkable because there are few guides for the lawyer as nation-building architect.¹⁴² The problem, as historian Eric Hobsbawm once described, is “the old maps and charts which guided human beings, singly and collectively, through life no longer represent the landscape through which we move, the sea on which we sail.”¹⁴³ Hence lawyers engaged in state-building are devising new maps and blueprints that are the emerging legal architecture of nation-building. The most effective and seasoned lawyers employ “a set of conceptions and working methods that permit and help them to grasp the context in which they operate, the objectives they are trying to achieve, the obstructions likely to be encountered and some appropriate method for making choices.”¹⁴⁴ Working in fluid and often contested environments, these lawyer-architects arrive at a “way of establishing and appraising social goals and values as a necessary step in determining how problems should be solved.”¹⁴⁵ In this manner, they are working in the common interest of failed states, their sub-communities, and the world community.¹⁴⁶

In this early twenty-first century, our diacritic world community still holds pockets of neglected darkness—failed and failing states, conflict zones within porous boundaries of faux states, and sub-state communities that have never benefited from the fruits of development. These places devoid of human dignity present problems.

140. See PLATO, *PROTAGORAS* 13-16 (C.C.W. Taylor trans., Oxford Univ. Press 1991) (1976).

141. See Charles Norchi, *From Real Estate to Nation-State: Who will Lead Afghanistan?*, *DISSENT*, Winter 2006, at 24.

142. See Horowitz, *supra* note 35, at 270 (“There are enormous disjunctions between what severely divided societies require and the methods that are used to decide on the institutions that will govern those societies.”).

143. ERIC HOBSBAWM, *AGE OF EXTREMES* 16 (1994).

144. REISMAN & SCHREIBER, *supra* note 113, at 10.

145. *Id.*

146. See MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 409 (1980) (defining an “interest” as “a pattern of demands for values plus the supporting expectations about the conditions under which these demands can be fulfilled”).

They are problems for the people who live in them, and they are problems for the people of the world community. Such places of disintegration and desperation are prime platforms to export violence. They swell and simmer below what may resemble a functioning state. When states disintegrate, and when communities are ultra-marginalized, human dignity dissipates. The effects can be global. A neglected community that descends into extreme insecurity can facilitate the application of power to distant places. Since September 11, 2001, this is how personal insecurity traveled with the world politics of our time. We are now learning that the long-term solutions are in nation-building, fulfilling human rights, and achieving development.

Each contributor to this Symposium addresses some aspect of the state-building problem as profoundly framed by Sigmund Freud:

[R]eplacement of the power of the individual by the power of the community constitutes the decisive step in civilization The first requisite of civilization, therefore, is that of justice—that is, the assurance that a law once made will not be broken in favour of an individual The final outcome should be a rule of law . . . which leaves no one . . . at the mercy of brute force.¹⁴⁷

For the lawyer as nation-building architect, that is the ultimate challenge. In Plato's *Republic* there were Guardians who "were entirely eager to do what they believe to be advantageous to the city and would in no way be willing to do what is not."¹⁴⁸ Our age of seemingly permanent reconstruction urgently needs guardian lawyers.¹⁴⁹ As Plato's Guardians were charged with looking upon his constructed commonwealth as their special concern, today's guardian lawyers would be custodians of nascent commonwealths under construction. They would be the lawyer architects of nation-building. That guardian ideal is conveyed by the authors who have contributed to this Symposium, *Nation-Building: A Legal Architecture?*

147. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 42 (1961).

148. PLATO, *supra* note 10, at 92.

149. I am grateful to historian Geoffrey Kabaservice for the guardianship metaphor which he used in his seminal work on pivotal figures of the American liberal establishment. See GEOFFREY KABASERVICE, THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT (2004).