Recent Publications

The Elusive Promise of Indigenous Development: Rights, Culture, Strategy. By Karen Engle. Durham: Duke University Press, 2010. Pp. xiii, 424. Price: $24.95 (Paperback). Reviewed by Giselle Barcia.

"Development policies that take into account indigenous peoples' culture and identity can be beneficial not only to indigenous peoples, but also for Member States, and developing countries in particular."[1] In 2010, the U.N. Permanent Forum on Indigenous Development made that loaded assertion in a news statement. Indeed, the "special theme" of last year's Forum was "Development with Culture and Identity" and, at the Forum's opening, U.N. Secretary-General Ban Ki-moon declared: "Diversity is strength—in cultures and in languages, just as it is in ecosystems."[2]

Indigenous rights and self-determination for indigenous groups has long been a topic of advocacy on the world stage, and culture has often served as the connective thread between the two. Yet, as the Tenth Session of the U.N. Forum approaches in May, a question persists: why has success in this area remained notably limited? In *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, Karen Engle tackles that question and offers a provocative answer. Throughout the book she identifies the legal strategies that indigenous activists use in international law to advocate for rights and, in turn, evaluates the advantages and drawbacks of those strategies. *Elusive Promise* is firmly rooted in the rich literature about indigenous self-determination,[3] but Engle's central thesis is unique. She argues that the idea of culture, which emerged as the primary mode of legal advocacy in the pan-indigenous movement, has in fact minimized the movement's success. The two clashing forces of a right to culture and a right to self-determination, Engle contends, result in the eponymous "elusive promise" of development.

Engle acknowledges that the culture argument has often resulted in progressive jurisprudence for indigenous groups. She studies the Inter-American Court and cites several examples of property and land ownership claims brought under a right to culture (p. 127-32). Yet those successful cases contain an "invisible asterisk" (p. 133). Engle argues that the resulting

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1. Press Release, Econ. and Soc. Council, Impact of Development Policies on Indigenous Culture, Identity Focus as United Nations Permanent Forum Meets at Headquarters 19-30 April, U.N. Press Release HR/5011 (Apr. 16, 2010), *available at* http://www.un.org/News/Press/docs/2010/hr5011.doc.htm.

2. Ban Ki-moon, U.N. Sec'y-Gen.. , Remarks at the Opening of the Ninth Session of the UN Permanent Forum on Indigenous Issues (Apr. 19, 2010), *available at* http://www.un.org/apps/sg/sgstats.asp?nid=4497.

3. *See* ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2007); Lea Brilmayer, *Secession and Self-Determination: A Territorial Approach*, 16 YALE J. INT'L L. 177 (1991); Thomas M. Franck, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1989).

outcomes do not provide sufficient autonomy in politics, economics, or property. With *Elusive Promise*, then, Engle makes a significant contribution to indigenous rights advocacy not by simply rejecting a culture-based strategy, but by revealing its underbelly: though on its face progressive, a culture strategy has actually produced very limited rights, and those rights sometimes bring with them adverse effects.

In order to challenge the widely held assumption that indigenous development advocates should rely on a right-to-culture strategy, Engle traces the role of culture in the history of international and transnational indigenous rights movements. Turning first to the origins of that strategy, she begins her narrative with colonialism, comparing the English and Spanish modes of conquest and explaining why indigenous movements have tended not to rely on a human rights legal argument. Engle makes the compelling point that in post-colonial Latin America indigenous advocates "had long been skeptical of human rights," a concept "inseparable from the civilizing mission of colonial days or the globalizing or liberalizing mission of neocolonialism" (p. 43). Rather than setting the stage for self-determination, human rights instead threatened indigenous culture.

Engle's impressive historical account of the indigenous movements elegantly presents the countervailing strategies available to indigenous rights advocates. She traces the rise of the right-to-culture strategy amidst a strained history of colonialism, the emergence of the pan-indigenous movement, and, finally, the more recent quest for legal self-determination. Completing that historical account, Engle turns to the clash itself between human rights and the right-to-culture strategy in indigenous rights advocacy, highlighting the constraints on a culture strategy. Engle examines culture in three primary modes, each of which, she maintains, carries a limiting factor in its use as strategy for indigenous development: "The first, culture as heritage, threatens to alienate indigenous peoples from their heritage; the second, culture as land, makes indigenous land inalienable; and the third, culture as development, combines with the second to limit the forms of development available to indigenous people" (p. 7).

Engle's examination of "Human Rights and the Uses of Culture in Indigenous Rights Advocacy," is the most compelling of the three parts of *Elusive Promise*, wherein Engle explores the shifting notions of what culture can mean and how it can limit the results of indigenous development. Here, Engle asks difficult questions to test her thesis: "What does the World Bank mean . . . when it says it has agreed to 'mainstream' ethnodevelopment in a particular policy or project? What role do indigenous heritage and land play in such mainstreaming?" (p. 208). "To secure land tenure," she posits and then examines the somewhat questionable results. "What if indigenous groups want to engage in development activities that have nothing to do with traditional cultures?" Engle asks. "Or, to put it another way, if indigenous groups are entitled to autonomy, why should anyone outside the group have a say over how they choose to develop? . . . [W]hat or who is the subject of protection in indigenous rights advocacy[?] Is it the culture, the people, or the peoples?" (p.

210-11). Engle cites specific examples on both sides, where certain special protections seem to arise from tradition and where attempts at development seem divorced from tradition. Regardless, problems in the distribution of power and resources persist.

The last section of *Elusive Promise* presents an unexpected case study: the case of Afro-Colombians. At first, it seems odd for Engle to choose a non-indigenous case study to end the book. Yet the analysis serves as a way to expand Engle's theory, and it benefits from Engle's extensive on-site research. In a recent interview, Engle stated that she chose to end the book with the Afro-Colombian case study "in part to consider how rights based on identity become so important to social movements or groups that might not otherwise have opportunities for land use or ownership or development."[4] Tracing the consequences of the complex Law 70, which gave unprecedented protection to the Afro-Colombian community, Engle argues that the limiting effects of structuring a rights movement around culture are not exclusive to the context of indigenous development.

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The report on the Ninth Session of the Forum states that "the violation of [indigenous peoples'] human rights affirmed in the United Nations Declaration on the Rights of Indigenous Peoples—specifically, the right to self-determination and the right to development with culture and identity based on indigenous world views—has caused them to experience many critical socio-economic problems."[5] That statement exemplifies the view that Engle is attempting to complicate in her work: that the right to culture is not a sound framework on which to construct a strategy for indigenous development. She argues that "the framing of cases around cultural identity often displaces or defers issues of economic inequality and even of structural racism," which clearly limits the positive effects of an advocacy effort.[6]

Yet, in *Elusive Promise*, Engle's task runs deeper than that already important insight: she challenges not only the idea of a static understanding cultural identity, but also the notion of a static strategy in indigenous legal advocacy. She seeks to demonstrate the "unpredictability of strategy—the inability of social movements ever to know that they are on the right long-term path—and the dangers of insisting that there is only one proper path" (p. 274). Engle further emphasizes that point in an interview: "[I]f social movements get too attached to a particular strategy, they lose the possibility for

4. *An Interview with Karen Engle on Her New Book on Indigenous Rights and International Law*, The Elusive Promise of Indigenous Development: Rights, Culture Strategy, U. TEX. L. MAG. (Oct. 12, 2010), http://www.utexas.edu/law/magazine/2010/10/12/engle-releases-new-book-on-indigenous-rights-and-international-law [hereinafter *An Interview with Karen Engle*].

5. Permanent Forum on Indigenous Issues, Rep. on the Ninth Session, Apr. 19-30, 2010, ¶ 91, U.N. Doc. E/2010/43-E/C.19/2010/15 (May 19, 2010).

6. *An Interview with Karen Engle*, *supra* note 4.

experimentation, for imagining new legal relationships."[7]

The central question of *Elusive Promise* is whether "the indigenous promise of development ultimately require[s] the abandonment of the assertion of cultural identity" (p. 213). Engle argues that indigenous rights advocates should abandon essentialized cultural conceptions and move toward "a more nuanced (and more 'real') understanding of culture" (p. 277). That attenuated understanding, combined with a measure of strategic creativity, may yield more productive results for indigenous self-determination. With this impressive and truly interdisciplinary approach to international law, historians, anthropologists, and lawyers alike can appreciate Engle's account of indigenous rights advocacy and move toward a more complex strategy that successfully integrates culture.

The Statehood of Palestine: International Law in the Middle East Conflict. By John Quigley. New York, NY: Cambridge University Press, 2010. Pp. xix, 326. Price: $27.99 (Paperback). Reviewed by Samir Deger-Sen.

For over sixty years, Palestine's legal status has been an ambiguous and contested issue. Traditional conceptions of statehood place central importance on fixed territorial boundaries, capacity for internal self-government, and reciprocal recognition by other states. On this view, Palestine's statehood is conditional on Israeli acquiescence—Palestine will become a state through a negotiated settlement with Israel that confers upon it the power to govern within fixed and secure borders. Not so, says John Quigley, professor of international law at Ohio State University and frequent writer on the Arab-Israeli conflict. Quigley argues instead that Palestine is already a state under international law and has been a state since the fall of the Ottoman Empire. Quigley deftly weaves historical and legal analysis into a compelling, persuasive account of Palestinian statehood. As Quigley points out, statehood is often conflated with self-government or defined borders, but it can and does exist in the absence of both. Indeed, recognition of statehood, far from being the consequence of territorial control, is perhaps a precondition for it. With statehood comes the power to speak at international fora, the presumptive right to self-determination, and access to international organizations, all of which are crucial if the Palestinian people are to be able to negotiate a fair and final settlement on political autonomy and the limits of their territory. Quigley's work therefore is a timely, valuable, and novel contribution to what is already a voluminous literature on the Arab-Israeli conflict.

Quigley begins his inquiry in 1919 at the fall of the Ottoman Empire. After over four hundred years of Ottoman rule, Palestine was designated a Class A mandate within the League of Nations system, and was to be "guided" toward full independence. Britain withdrew from Palestine in 1948 under the terms of the U.N. partition plan defined in U.N. Resolution 181. However, Britain made no effort to enforce the partition plan, and the subsequent Arab-Israeli war saw mandatory Palestine dismembered and divided between Jordan

7. *Id.*

and the new state of Israel. Some argue, therefore, that Palestine has never existed as a state—it was under Ottoman control at the inception of the state system, British control from 1919 to 1948, and Israeli control since 1948. Palestinian people have lived permanently under the sovereignty of other states—Israel, Egypt, Lebanon, and Jordan. Quigley cites *Knox v. Palestine Liberation Organization*[8] for the idea that "it would be anomalous indeed to hold that a state may achieve independence and statehood . . . [during the] occupation of a separate sovereign" (p. 221).

Quigley explains, however, that "under Ottoman administration in Palestine, central governance was weak, leaving the people in the main under their own local rule" (p. 10). The treaties that transferred legal authority over Palestine from the dissolved Ottoman Empire to Britain conceived of Palestine as an "independent nation" (p. 10). Article 22(4) of the League Covenant also considered the mandates as states. Indeed, the basic legitimacy of the mandate system depended on the non-annexation principle. Within this context, Britain allowed self-government for the Palestinian people and the continuous operation of Palestinian private law during the mandatory period. Quigley draws on an impressive array of sources from the inter-war period to show that Palestine was implicitly considered a state under international law by both Britain and the international community as a whole.

Quigley then turns his attention to showing that the creation of Israel in 1948 did not prejudice Palestine's basic claim to statehood. Quigley points out that the U.N. partition plan conceived of two separate states within the territory of Palestine, that "the 1949 armistice agreements explicitly stated that the lines they drew were not international borders" (p. 123), and that no state recognized that Palestinian statehood was voided by the creation of Israel. Indeed, "[E]ven after admitting Israel as a member, the United Nations continued to refer to Palestine using terminology that reflected its statehood" (p. 115). Since 1948, Palestine has, to varying degrees, exercised many of the rights of an independent state, which include engaging in international negotiations, issuing internationally recognized passports, and implementing and enforcing private law. Moreover, although no state other than Palestine lays claim to the territory in the West Bank and Gaza strip, no one would claim that such territory is *terra nullius*—as Quigley points out, not since the birth of state system has there been territory that is not controlled by a state and yet not *terra nullius* (p. 77). Moreover, Palestine's statehood has been affirmed by its status in the United Nations as a member in all but name, and by the recognition granted to Palestine by over one hundred other states. To be sure, Palestine is a state with disputed borders (like India, Pakistan, and Israel itself), and a state under belligerent occupancy (like Kuwait during Iraqi occupancy in 1990, or France during German occupancy between 1940 and 1945), but it is a state nonetheless.

After engaging in this historical analysis, Quigley turns his attention to a theoretical question: what criteria must an entity meet in order to be considered

8. 306 F.Supp.2d 424 (S.D.N.Y. 2004).

a state? Quigley analyzes many commonly articulated standards, such as a permanent population, defined territorial boundaries, internal self-government, and the capacity to enter into relations with other states. Quigley problematizes these conceptions of statehood: some states are microstates with tiny permanent populations and no citizens, such as Niue and the Cook Islands; some are in deep, intractable border disputes, such as Ethiopia and Eritrea; some are failed states, without meaningful capacity for internal self-government, such as the Democratic Republic of Congo and Somalia; some make international agreements only with the consent of another state, such as Palau and the Marshall Islands. Moreover, universal recognition is not required as a precondition for statehood—after all, Israel itself was admitted to the U.N. with only thirty-seven out of fifty-eight states voting for its inclusion. Quigley never attempts to give us a more precise definition of statehood, but he suggests that, even by restrictive definitions, Palestine constitutes a state. Many readers may be uncomfortable with Quigley's reluctance to provide either a positive or normative definition of statehood. Nevertheless, Quigley's underlying point is that Palestine has more true features of statehood than many states that have been universally recognized.

Quigley's thesis is compelling, and his prose clear and elegant. He has mastery over a rich and diverse set of historical materials, and he carefully rebuts all major objections to his argument. His ventures into history never become sidetracked by the complex political dynamics of his subject matter, but remain instead tightly focused on the legal arguments he so persuasively makes. Even those who strongly oppose Palestinian statehood as a normative matter will be forced to think very deeply about the legal conclusions Quigley is able to draw from his careful legal research.

If there is a problem with Quigley's thesis, it is that he equivocates on the crucial question of *where* this Palestinian state is. Why is Palestine's inherent, unbroken right to statehood limited to Gaza and the West Bank? Why is it not a claim to all of mandatory Palestine? Or, at least, defined by the 1948 partition plan, which was the last legal instrument created by an actor with undisputed lawmaking power in Palestine? Quigley is never clear on this point. Accepting the legality of Israel's borders implies that Israel's military expansion in 1948 was enough to transform some of the pre-existing Palestinian state into an Israeli state. Here, Quigley is caught in a dilemma. If Israel's military expansion in 1948 was enough to annex some of the Palestinian state, then why is Israel's military expansion in 1967 not sufficient to convert the rest of it into Israeli territory? If, on the other hand, military expansion cannot confer statehood, then why did Israel's actions in 1948 permit the legal constitution of the Israeli state? Quigley gives very different legal status to the military expansions of 1948 and 1967, but does not articulate why. If we are to give them equivalent legal status, we must either reach the conclusion that Palestinian statehood implies a right to territory that is now almost universally recognized to be Israeli, or conclude that Palestinian statehood has been extinguished by military annexation and is now at the mercy of Israel-Palestine negotiations.

As fascinating as Quigley's analysis is, it pulls us in these two polar, politically unpalatable directions. Quigley wants to make his legal analysis consistent with the most politically expedient solution—establishing a Palestinian state in Gaza and the West Bank. Unfortunately, they simply do not square. To counter this problem, Quigley places much stock in the fact that "Israel has made no claim of sovereignty in Gaza and the West Bank" (p. 221). However, this vests far too much legal authority in Israel's rhetorical posture toward the occupied territories. As a theoretical matter, Israel's claim to territory cannot by itself carry legal effect—if Palestine is a state, then a mere claim by another state cannot abridge its statehood. Indeed, this is the very notion that Quigley is arguing against—that Palestinian statehood is somehow contingent on whether Israel claims sovereignty over the occupied territories. By attempting to limit the implications of his legal claims, Quigley inadvertently undercuts his central argument. Quigley recognizes that a legal conclusion that requires Israel to cede much of the territory acquired in 1948 would never garner political support. Yet, unfortunately a resolution that would garner political support simply does not follow from his legal analysis.

Nevertheless, Quigley's richly textured analysis is an extremely valuable contribution to the legal literature on Palestinian statehood. As Quigley himself points out, recognition of Palestine as a state has been a fiercely contested element of Arab-Israeli negotiations. U.N. Security Council Resolution 242, passed after the 1967 war and seen by many as the basis for negotiations over the last forty years, famously contains no reference to Palestinian statehood, only "a just settlement of the refugee problem."[9] It is this asymmetric recognition of statehood that contributes to Palestinian feelings of marginalization and isolation, and it is valuable, therefore, to see Quigley's fine-grained legal analysis of the subject. Many have argued that recognition of Palestine is fair, just, and pragmatic, but Quigley's point is that it is legally mandatory. In an area that inspires such fierce passion on both sides, and where historical and normative claims are so deeply contested, it is refreshing to see Quigley's largely dispassionate analysis and moderate tone.

The Statehood of Palestine is highly recommended for anyone wishing to better understand the legal issues surrounding Palestinian statehood. While it is easy for states to use the complexity and intensity of the Palestine question as an excuse to avoid the issue altogether, Quigley reminds us that international law is for us all to enforce. Palestine can only be a state if the world stands up and recognizes it as one. The WHO and UNESCO have postponed their votes on Palestinian recognition multiple times (p. 170). The U.N. General Assembly has granted Palestine every privilege of statehood aside from formal membership (p. 141). Western European governments interact with Palestine on a daily basis, but do not yet call it a state (p. 179-81). If Quigley is right about Palestine's legal status, then what is one to make of this reticence? What is law if no one has the courage to enforce it? This is the question Quigley raises, which the international community must answer.

9. S.C. Res. 242, pmbl., U.N. SCOR, 22d Year, U.N. Doc S/Res/242 (Nov. 22, 1967).

Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State. By Lara J. Nettelfield. New York, NY: Cambridge University Press, 2010. Pp. xvii, 333. Price: $90.00 (Hardcover). Reviewed by Sue Guan.

When the United Nations announced that it planned to close the International Criminal Tribunal for the Former Yugoslavia (ICTY) by 2014, women who had lost their husbands, sons, and brothers in the 1995 Srebenica massacre gathered in Sarajevo to protest the decision. Standing in the rain, they carried signs saying, "We are the families of the killed and the disappeared. Because of us the Tribunal was founded. Don't close it. Don't obstruct it. Let it dispense justice and truth" (p. 1). In *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State,* Lara J. Nettelfield, Simon Fraser University political science professor, attempts to tell these protesters' stories in order to show how the ICTY has succeeded in addressing the human rights violations committed during the Yugoslav Wars of the early 1990s.

The history often told of the ICTY is one of unmet expectations: critics scholarly and lay have denounced the length of the court's trials, the arbitrary nature of its legal procedures, and the alleged bias against ethnic Serbs in the court's choice of indictments. Nettelfield, on the other hand, asks for more modest—and more forgiving—expectations of the ICTY. Unlike "insiders" who author "tell-all" books about the failures of the ICTY or scholars who find the ICTY lacking when compared to abstract ideals of international justice, Nettelfield bases her evaluation of the ICTY on field research conducted while she lived in Bosnia for four years between 1998 and 2008, setting the stage for a more realistic and honest evaluation of the ICTY.

Using her study of the ICTY's impact in Bosnia to springboard her discussion of international courts in "transitional justice" (a term of art referring to the approach a state takes to deal with past human rights violations), Nettelfield takes a longer view than scholars critical of the ICTY have taken in the past. In compiling her evaluation of the ICTY, Nettelfield conducts interviews of court officials, politicians, journalists, and members of the military; surveys civil rights groups, engages in archival and oral history work; and traces the changes in local attitudes regarding the ICTY. Nettelfield praises what she calls the ICTY's "expressivist" achievements: the justice and human rights norms it has helped legitimize, the messages it sends about legal and moral accountability for war crimes, and the internalization of these norms by Bosnian citizens over time.

Of course, the ICTY has had its problems, and Nettelfield acknowledges them. For starters, the unwieldy Dayton Agreement creating the ICTY generated an institution so bureaucratic that practical tasks, such as transferring defendants to court, stonewalled. During the court's early years, the court's indictment choices lacked transparency, and alleged war criminals remained politically active. Ethnic divides remained, while financial support for refugees returning to their homes waned over time.

Despite these drawbacks, Nettelfield makes a strong case for the ICTY's longer-term benefits. The grieving women who protested the announcement of the ICTY's planned closing provide one vivid example: they wanted the ICTY to remain open because they thought it had not yet fully dispensed justice, a goal meaningful only because those women had internalized the norms around justice and human rights that the ICTY stood for. As another example, memorial services held in Potočari for victims of the Srebenica massacre drew crowds of more than twenty thousand. And in 2000, the Mothers of Srebrenica and Podrinje (a group of women who lost loved ones in the wars) filed a criminal complaint demanding that the ICTY investigate officials allegedly involved. Nettelfield cites this as evidence of ordinary citizens' growing sense of justice and entitlement to the protections of the rule of law. And she credits the ICTY's legitimization of victims' rights as the cause.

The ICTY has also fostered concrete changes in the infrastructure available in Bosnia to further transitional justice. Thanks to the ICTY outreach program, local populations can now learn about the court's decisions via conferences, websites, and local activists. In 2005, the ICTY spun off the Bosnian War Crimes Chambers, a state court in Bosnia that is tasked with trying cases referred to it by the ICTY. This and other local courts will continue to prosecute war criminals after the ICTY closes shop. Nettelfield marshals examples that provide powerful evidence for her argument that contrary to the criticism, the ICTY has been a force for good in post-conflict Bosnia.

Nettelfield's larger point is not merely that the ICTY was a success in Bosnia, but that instruments of transitional justice more generally—whether international tribunals or truth commissions—are forces for good in helping post-conflict societies transition to democracy. This is a difficult argument to make—are all post-conflict societies just like Bosnia? Would all states' citizens react in the same way? Who is to say that other governments would be willing to provide the infrastructure for trials and commissions? Nettelfield doesn't provide the answers. And in order to do so, Nettelfield would have to engage in a much broader examination of transitional justice across multiple post-conflict societies than she has. Without a link between the case in Bosnia and elsewhere, Nettelfield's arguments for transitional justice being helpful to democratization feel like afterthought; these arguments appear only in the introduction and the conclusions of each chapter and of the book. Moreover, they distract from the power of Nettelfield's case-specific argument for the ICTY's benefits in Bosnia.

This is not the only instance where Nettelfield would have been better off in limiting her argument. While in Bosnia, Nettelfield surveyed and interviewed locals, civil rights groups, and members of the military as part of what she calls "attitudinal" research, a term from the disciplines of "legal anthropology" and "law and society." Yet although "attitudinal" is a term that may carry cache among political scientists, it does little to illuminate research that can substantively stand on its own. For instance, the survey she gave to members of the military consists of eighty-nine questions that ask respondents to rate their views of various international organizations set up to deal with war

crimes (pp. 297-304). The results? Generally positive. But does the impact benefit from being called "attitudinal"? Not necessarily.

As an addition to her concrete evidence of local criminal trials, the increased rhetoric among locals of accountability and justice, and the ICTY's facilitation of civil rights groups' mobilization in lobbying for everything from legislative change to financial redress, Nettlefield's surveys certainly add force to the argument. But framing them in terms of "legal anthropology" and "law and society," which Nettelfield doesn't satisfactorily define, diminishes the evidence's punch. Nettelfield claims that these disciplines, compared to more "positivist" (something she also neglects to define) studies, more accurately measure the "expressivist" achievements of the ICTY. It seems that the real point should be that traditional studies of the ICTY should take locals' attitudes into account because they are important, not because they are integral to law and society research.

To that point, Nettelfield's book has a simple, powerful thrust, but couching it in jargon and overbroad claims to consequence only serves to limit her audience—an unfortunate consequence for a book that finds its niche in reaching out to locals. But despite these drawbacks, Nettelfield's focus on local populations in Bosnia is refreshing, and it is key to an evaluation of any international court's impact in a post-conflict society. International legal scholars often neglect local voices, something Nettelfield does well to address. She is leading the way for other scholars. While victims' and locals' increased sense of justice will not silence all critics of the ICTY, it gives powerful sway to Nettelfield's argument: the ICTY has furthered transitional justice, at least in Bosnia. She does a service by showing us how to look at the right evidence, and fairly.

Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser. By Michael P. Scharf & Paul R. Williams. New York, NY: Cambridge University Press, 2010. Pp. xi, 305. Price: $30.99 (Paperback). Reviewed by Charanya Krishnaswami.

The unprecedented firestorm of publicity surrounding the 2009 nomination of Harold Koh to the position of Legal Adviser to the State Department captured headlines and airwaves. Koh, a zealous supporter of international norms who had criticized the Bush administration for its ignorance of international conventions,[10] proved a highly controversial nominee. Critics painted a picture of a future in which Koh's "radical transnationalism" would compromise national security prerogatives,[11] while supporters of Koh applauded his advocacy of the moral force of international law.[12] For the first time, the Office of the Legal Adviser, which had enjoyed a

10. Eric Lichtblau, *After Attacks, Supporters Rally Around Choice for Top Administration Job*, N.Y. TIMES, Apr.1, 2009, at A19.

11. *See* Ed Whelan, *Harold Koh's Constitutional Game*, NAT'L REV. ONLINE (Apr. 15, 2009), http://www.nationalreview.com/corner/180413/harold-kohs-constitutional-game/ed-whelan.

12. *See* Ronan Farrow, *Confirm Harold Koh*, FORBES (Apr. 28, 2009), http://www.forbes.com/

low profile in the American public consciousness, was catapulted into the spotlight.

Not only did the debate surrounding Koh's nomination speak to the growing prominence of international law—and the diverse opinions regarding its legitimacy—in the collective American consciousness, but it also highlighted the difficult questions that Legal Advisers have had to grapple with in each successive presidency and in each successive war. The title of Michael P. Scharf and Paul R. Williams' book, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser*, foreshadows the most important of these questions. Does international law shape foreign policy, or is it the law that is molded to fit policy objectives? Rather than addressing this question normatively, Scharf and Williams, who worked as attorney-advisers in the office during the Bush I and Clinton administrations, seek to understand the relationship between foreign policy and international law in practice. To do so, they undertook a groundbreaking project to canvass and convene the ten living legal advisers from the Carter to Bush II administrations with the goal of creating the first comprehensive descriptive account of American public international law as told by those who practiced at the forefront of the field.

Scharf and Williams's book begins by providing the reader with a quick primer on the extensive normative debate about a state's obligation to comply with international law. Scharf and Williams survey the various rationales for state compliance with international law, both historical and modern, and find that "constructivism"—a theory arguing that international law shapes national identity such that compliance inheres in a government's bureaucratic identity—has been the prevailing rationale for adherence to international law.

Next, the book offers a brief summary of the history and function of the Office of the Legal Adviser, which was not officially created until 1931. The authors liken the Office of the Legal Adviser, known colloquially and rather inscrutably as "L", to the Office of the Solicitor General. Just as the Solicitor General represents the government in front of the Supreme Court, the Legal Adviser's office represents the United States in hearings before international tribunals and in all international claims made against the U.S. government. The Legal Adviser's office also plays another, broader role: it analyzes the legal implications of foreign policy decisions and provides advice to the Secretary of State.

However, in spite of these important functions, the Legal Adviser's office remained somewhat pigeonholed until the Kennedy-era tenure of Abram Chayes, who involved the office in an expansive array of substantive issues and helped the Legal Adviser's office achieve the prominence it enjoys today. Chayes also implemented competitive hiring practices at L, fostering its reputation as an elite public international law firm (p. 16). The elitism of L is further evinced by the descriptions of former Legal Advisers of their ascent to

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2009/04/28/state-department-sharia-law-opinions-contributors-harold-koh.html; Dahlia Lithwick, *And Then They Came for Koh . . .*, SLATE (Apr. 3, 2009), http://www.slate.com/id/2215142/.

the position, which reveals nothing so much as the extraordinarily privileged, homogenous backgrounds of the vast majority of these high-ranking government officials—three of whom worked at the same sterling New York law firm before being appointed Legal Adviser (p. 149).

Although brief, these earlier sections provide a useful set-up to the next section of the book—the ten first-person recollections of the living Legal Advisers, dovetailed by a roundtable discussion at the American Society of International Law with all of the advisers. Each of the recollections is loosely structured around three significant foreign policy issues, the Legal Adviser's reaction to each, and what he perceived to be the influence of international law in addressing these crises.

While the accounts detail a diverse array of policy decisions and implications, there are common threads throughout. For example, Herbert Hansell, Legal Adviser in the Carter Administration, mentions at the outset of his interview the legal implications of recognizing "one China" while attempting to sustain diplomatic relations with Taiwan—a problem the government continues to grapple with today. Abraham Sofaer, Legal Adviser under the Reagan and Bush I administrations, discusses the government's struggles with Libyan dictator Muammar Qadhafi, whose government is once again at the center of controversy regarding use of force. And nearly every former Legal Adviser describes manifestations of the growing specter of terrorism, from plane hijackings to embassy bombings to, finally, the cataclysm of September 11.

It is against the backdrop of these crises that the role of the Legal Adviser becomes especially important. As Sofaer notes, "[P]erhaps the most important advice a Legal Adviser can be called on to give is whether a proposed use of force is lawful" (p. 82). From the preemptive invasions of Grenada and Nicaragua under the Reagan administration to Operation Iraqi Freedom, the Legal Adviser's office has been responsible for examining the legal justifications for uses of force and ensuring that they comport with the dictates of international law. The Legal Adviser's involvement can begin either before or after the use of force takes place; Davis Robinson, Legal Adviser during the Reagan Administration, who furnishes a particularly colorful recollection of a colorful tenure, describes the difference as assisting in the "takeoff" in policy versus "an after-the-fact containment of a train wreck" (p. 60).

However, as Robinson goes on to note, the United States "has gone from contending with one large elephant to dealing with about one thousand snakes" (p. 55). The nature of the foreign policy beast has fundamentally changed. The Cold War and the threat of the Soviet Union have been replaced with a nebulous, multi-fronted "War on Terror." As the foreign policy landscape has changed, Legal Advisers have had to adapt their application and interpretation of developed legal norms, a task Conrad Harper, Legal Adviser during the Clinton Administration, likens to "smuggl[ing] into old jars new wine" (p. 161).

When L is called on to give advice regarding the lawful use of force or to fit legal norms to new policy challenges, the advisers paint a picture of a

collaborative and cohesive policymaking process. Unfortunately, however, what the oral histories more often reveal—and what Scharf and Williams seem to overlook in their optimistic conclusion regarding L's potent ability to uphold and enforce international law—is a picture of L being entirely shut out of foreign policy decisionmaking, an office scrambling in the aftermath of a international debacle for post-hoc justifications.

Sofaer, for example, describes how the Legal Adviser's office was blindsided by the Iran-Contra Affair, in which the Reagan administration was caught exchanging weapons for hostages. He notes that the scheme "violated both the letter and spirit" of the Reagan Administration's own policies (p. 80) and states that L had no involvement in the planning or execution of the program.

Similarly, Robinson details the difference between the Reagan administration's invasions of Grenada and Nicaragua, both in the name of combating the spread of Communism. In Grenada, Robinson recounts the Legal Adviser's involvement in every step of the policy planning process. By contrast, in Nicaragua, the Legal Adviser had no notice of the invasion, and when a "supposedly covert" intelligence operation became "open and notorious," it prompted a "hailstorm of international criticism" that ultimately led to an adverse holding by the International Court of Justice (p. 60).

From more recent history, William Howard Taft IV, who served as the Legal Adviser during the first half of the Bush II administration, describes how the administration shut out the Legal Adviser's office from extensive internal deliberations regarding the applicability of the Geneva Conventions and the Convention Against Torture to Guantanamo detainees. Taft notes that his office believed, and advised the Secretary, that international treaties *did* apply to the detainees. Afterward, the Legal Adviser was excluded from conversations between the Attorney General and Office of Legal Counsel on the Convention's applications to detainees: "[We] were not invited to review this work and we were, indeed, unaware that it was being done . . . . I think we were excluded because it was suspected . . . that we would not agree with some of the conclusions other lawyers in the Administration expected us to reach" (p. 130).

Each of these examples suggests a disillusioning fact about L: that it is not consulted when it most should be—that is, when a proposed use of force is most clearly in violation of international law. This seems to undercut L's role as what Legal Advisers ranging from Davis Robinson to Harold Koh have likened to the "moral conscience of American foreign policy" (p. 206). Yet just as a human conscience can be ignored, so can L fall victim to an attitude of *inter armas silent leges* on the part of policymakers. As a result, L's real ability to shape foreign policy is questionable, and perverse incentives are created whereby L is only consulted when it is willing to tell the government what it wants to hear.

The book ultimately casts into doubt whether, given that L is so often shut out of the policymaking process when it expresses—or is most likely to express—dissent, L is really able to serve as a "moral conscience" on

international law. In a roundtable discussion that convened the foreign counterparts to the Legal Adviser, Scharf asked each adviser who they perceived to be their client. Is it the job of the Legal Adviser to fit the facts to the law, to encourage the most favorable interpretations of international law, even to find loopholes allowing the government to sidestep the law altogether? Or does a Legal Adviser ultimately have a higher obligation to international law writ large?

While nearly every Legal Adviser noted that there is such a compelling moral obligation superseding mere policy objectives, the U.K. counterpart perhaps had the truest and most practical descriptive account: "[T]he Legal Adviser must advise one's client with a particular knowledge of that client's needs and objectives, thus advising one's client on a sympathetic and knowledgeable basis." (p. 174). Perhaps no one could speak more to this fact than Harold Koh himself, who recently justified the government's use of predator drone strikes[13]—which one U.N. expert has deemed a species of "extrajudicial killings" in violation of international law.[14] Koh has noted his own shift in tone from academic to bureaucratic and attributed it to the difference between the "'ivory tower'" and Foggy Bottom: "[T]he making of foreign policy is infinitely harder than it looks. . . . In this maze of bureaucratic politics, there is only so much that any one person can do."[15]

Although Scharf and Williams conclude the book with a rose-colored vision of the government's adherence to L's advice and L's corollary ability to mold foreign policy to the dictates of international law, the advisers' recollections themselves seem to tell a different, and bleaker, story: perhaps a better title would have been *Shaping International Law To Meet the Demands of Foreign Policy in Times of Crisis.* Despite this fact, the book is still an important contribution to the field, and the oral history format, unprecedented as it is, makes the book readable and revealing—a cautionary tale for advocates and believers of the moral force of international law.

The Life of Sir Hersch Lauterpacht, QC, FBA, LLD. By Sir Elihu Lauterpacht. Cambridge: Cambridge University Press, 2010. Pp. xii, 505. Price: $180.00 (Hardcover). Reviewed by: Shashank P. Kumar.

In *The Life of Sir Hersch Lauterpacht*, Hersch Lauterpacht's only child—a distinguished international lawyer in his own right—weaves together the story of his father, one of the greatest international lawyers of the twentieth century. Hersch Lauterpacht's son chronicles his father's variegated

13. Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, NAT'L PUB. RADIO (Mar. 26, 2010), http://www.npr.org/templates/story/story.php?storyId=125206000&ft=1&f=3.

14. Press Release, General Assembly, UN Expert Tells Third Committee No State Free from Human Rights Violations, Accountability System Must Be Effective: Committee Hears from Human Rights Council Experts on Education, Extrajudicial Execution, Foreign Debt, as Two-Week Debate Continues, U.N. Press Release GA/SHC/3960 (Oct. 27, 2009).

15. Jack Goldsmith, *Presidential War Unilateralism and the Role of a Government Lawyer: The Case of Harold Koh*, LAWFARE (Mar. 21, 2011, 8:26AM), http://www.lawfareblog.com/2011/03/presidential-war-unilateralism-and-the-role-of-a-government-lawyer-the-case-of-harold-koh.

professional life as a prolific teacher, scholar, judge, practitioner, and advocate. His progressive writing and ideas have had a continuing influence on the development of international law, particularly with respect to the position of the individual and role of the judge in the international legal order. As a member of the International Law Commission and as the Special Rapporteur on the Law of Treaties, he made foundational contributions to the codification of the law. As a practitioner, he was involved in the prosecution of Nazi war criminals following the Second World War. During his tenure as a judge at the International Court of Justice (ICJ) for a little over five years, he personified his vision of international judicial function and delivered several landmark opinions, many of them separate and dissenting, which enriched the early jurisprudence of the Court and remain relevant today.

Much has been written about Hersch Lauterpacht's life and work, but these accounts often provide only "fragments for a portrait"[16] of his distinguished international legal career. Published in 2010 to coincide with the fiftieth anniversary of Hersch Lauterpacht's death, Elihu Lauterpacht's biography of his father tells a much more complete story of Hersch Lauterpacht in the many realms of his personal and professional life.

The biography draws heavily from previously unpublished correspondence between Hersch Lauterpacht and his family and colleagues, carefully collected and preserved by his wife. The resulting narrative, built around these letters, provides a personal account of Hersch Lauterpacht's life, defined not merely by his scholarly publications and judicial opinions, but also through his thoughts and activities.

Although a personal focus pervades the entire narrative, the chapters describing the life of the Lauterpacht family during the Second World War (chapters five to seven), reveal his strong character and love for his family. During the war years, Hersch Lauterpacht divided his time between Cambridge and the United States, visiting several U.S. law schools while his family remained in New York. The frequent family correspondence during this period forms the basis of the narrative. Amid that correspondence, the book also provides insight into the close relationship between Hersch Lauterpacht and his son, the biographer, who stayed back in the United States for his education when Hersch Lauterpacht and his wife returned to Cambridge. The letters exchanged between them show his deep concern for his son's education and personal development. The correspondence thus provides a detailed character sketch of Hersch Lauterpacht the man, and an account of the difficult conditions that beset the family. They reveal him as "a man of strong will, determination and the ability to cope with adverse circumstances" (p.133) and show his undying love and concern for his family.

Hersch Lauterpacht also kept many close friendships and relationships with colleagues. Perhaps the two most influential and important were his friendships with Arnold McNair and C.W. Jenks. On the relationship between

16. Stephen M. Schwebel, *Hersch Lauterpacht: Fragments for a Portrait*, 8 EUR. J. INT'L. L. 305 (1997).

Hersch Lauterpacht and Lord McNair, the biographer notes: "It is impossible to overstate the extent and quality of McNair's friendship with Hersch. McNair was a party to every step in Hersch's career, first at the LSE, then at Cambridge and ultimately at the ICJ. Hardly a week passed without letters passing between them" (p.43). His friendship with Jenks, documented through the "correspondence of two giants of legal literature" (p.8), demonstrate his "capacity for constructive friendship" (p.8), honesty, and reciprocity.

The unique combination of the biographer's thorough knowledge of international law and his close filial relationship with Hersch Lauterpacht enables him to paint a detailed portrait of his father. This, along with his reliance on Hersch Lauterpacht's correspondence with his family and colleagues, allows him to coherently interweave the personal with the professional, contextualizing his work and accomplishments with his beliefs and motivations.

The book roots Latuerpacht's accomplishments in a historical and situational context. For example, the seeds of Hersch Lauterpacht's highly regarded lecturing skills are traced back to lectures on Jewish philosophy and history that he gave as the chairman of a group of Zionist school students in his teens. Similarly, his work in assisting the United States by developing legal arguments supporting qualified neutrality in 1941, his involvement in the prosecution of war criminals between 1942 and 1946, and his work on the international protection and enforcement of human rights between 1942 and 1945 are explained as motivated by his concern and distress about the fate of his Polish family, who were captured by the Germans and eventually murdered.

Early in his prolific professional life, Hersch Lauterpacht's scholarly writings demonstrated his belief in "international law as a complete legal system," and his desire "to take international law from its esoteric origins into an important and influential area of law" (p.64). Hersch Lauterpacht's early scholarly contributions demonstrate the common thread of his belief that international legal rules are mere vessels whose content is defined through the judicial function. Similarly, the biographer notes that Lauterpacht's editorial work on the *Annual Digest and Reports of the Public International Law Cases* (renamed *International Law Reports* in 1950) and the *British Yearbook of International Law* was driven by the belief that "if international jurists were to be the 'backbone' of an international legal system, they needed the proper tools with which to perform their essential role" (p.64).

For international lawyers and scholars familiar with the ideas of Hersch Lauterpacht, such a narrative provides an essential backdrop for studying and analyzing his work, giving insight into the thought processes and qualities that made him such a successful international lawyer and scholar. This narrative is also useful in charting the historical development of international law pedagogy and practice from the perspective of someone very closely involved in the process. The chapters covering Hersch Lauterpacht's travels across the United States and visits to various U.S. law schools, for example, provide a detailed account of the history of international law pedagogy in the United States during the Second World War. The exchanges between Hersch Lauterpacht and his

colleagues expose the conditions under which the "classical traditional law of nations"[17] developed. For instance, while covering Lauterpacht's years in practice and his tenure at the ICJ, chapters nine and eleven give a detailed picture of the inceptive years of postwar international legal practice.

The biographer presents an accessible and interesting narrative, despite the depth and range of the professional work portrayed. Such an approach is particularly beneficial for students and would even be of use to non-lawyers who are looking for an initial foray into the field of international law. The chapters detailing Hersch Lauterpacht's years as a practitioner and judge perhaps best exemplify this accessibility. Without getting lost in the specific facts and law of the disputes in which Lauterpacht was involved, the biographer presents a simplified, yet comprehensive, description of the major issues and the background of each dispute on which Hersch Lauterpacht worked as well as the institutional practice of the ICJ, where he spent much time working.

Further, as the biographer himself notes, a formidable challenge for a son writing a biography of his father is "approaching the subject with a sufficient degree of detachment and objectivity" (p. 5). In discussing the response to the publication of Hersch Lauterpacht's book *The Function of Law in the International Community* (1933), for example, the biographer notes E. H. Carr's criticism of the work as "utopian idealism" (p.66). While the author strives for balance, the biography is written as a tribute to Hersch Lauterpacht that seeks "to do appropriate justice to his memory" (p. 429), and it would be unreasonable to expect any further objectivity on the biographer's part.

In sum, *The Life of Hersch Lauterpacht* is an accessible and personal account of the life of one of the leading international lawyers of the twentieth century. Apart from defining Sir Hersch Lauterpacht's achievements and success as a function of his beliefs and motivations, the biography—in part instructive, in part inspirational—contains much information and wisdom that will be useful to a range of readers, from seasoned international lawyers, scholars, and historians to students who are new to international law.

Torture, Terror, and Trade-offs: Philosophy for the White House. By Jeremy Waldron. New York: Oxford University Press, 2010. Pp. 400. Price: $37.50 (Hardcover). Reviewed by Lowry Pressly.

As the tenth anniversary of the September 11 terrorist attacks approaches, we stand poised to commemorate the nearly three thousand lives lost in that horrific act of mass murder, as well as the lives of the more than eight hundred first responders who died. This will also be a time for reflection on what is commonly referred to as "the day that everything changed," "the day that changed America," or "the day that changed the world"—indeed, political thinking (especially in the arena of national security) is often delineated into either pre- or post-9/11. The image of the watershed moment has become so

17. Ram P. Anand, *Attitudes of Asian-African States Toward Certain Problems of International Law*, 15 INT'L. & COMP. L.Q. 55, 63 (1966).

common in our discourse that its conclusions are taken for granted. This near universal perception of a major change in American life begs the beguilingly simple question: what is it that has changed? This is a question not just of interest to historians and commentators, but—as Jeremy Waldron recognizes in his new collection of essays, *Torture, Terror, and Trade-offs: Philosophy for the White House*—it is a question the answer to which has profound implications for our Republic.

As a practical matter, little has changed for the average U.S. citizen. To be sure, the level of fear has skyrocketed (despite the relative statistical improbability of being the target of a terrorist attack and the governmental measures aimed at assuaging fears and/or threats to safety), but aside from longer lines at airports, the average citizen has been asked to sacrifice very little in the name of enhanced security. As Ronald Dworkin notes, "None of the administration's [security] decisions will affect more than a tiny number of American citizens. . . . Most of us pay almost nothing in personal freedom when such measures are used against those the president suspects of terrorism."[18]

The importance placed on U.S. national security and the rhetoric surrounding it have certainly become elevated. The tragedy has become a political philosopher's stone for a certain class of office-seeker; it (and especially the fear of repeated atrocities) has been used as justification for policies ranging from a declaration of war to abduction (rendition) and torture of suspected terrorists to warrantless wiretapping of U.S. citizens. Policies that had long been considered off the table have come back into the realm of possibility. So perhaps the more important question is: how did our moral universe morph, if at all, after September 11? It is this question—and the fact that such a change is taken for granted by so many—that lies at the heart of Waldron's excellent book.

There is a simple answer to this seemingly fraught question: nothing. The moral foundations we went to bed with on September 10, 2001 were the same ones we carried through those initial days of horror and uncertainty, and they remain unchanged by the exigencies of an indeterminate "War on Terror." This seems simple enough—that the normative demands of our society's moral fundaments do not change under the pressure of either the first or the last incidence of national tragedy—but the sheer magnitude of the 9/11 events opened up for discussion what had before been forbidden by legal and moral strictures. Waldron's book centers on the most brutal and invasive of these changes: the institutionalized use of torture by the United States and the rhetoric surrounding it both pre- and post-9/11.

At the heart of most justifications for the use of torture (and other measures previously thought beyond the pale) is that, in a post-9/11 world beset at all times by the very real threat of international terrorism, we "need to realign balances between security and freedom."[19] In an excellent essay,

18. Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. OF BOOKS, Feb. 28, 2002, at 44, 48.

19. Nicholas Kristoff, *Liberal Reality Check: We Must Look Anew at Freedom vs. Security*,

Waldron takes this idea of balancing liberty and security to task. The essay is noteworthy, among other reasons, for the fact that it was written in 2002, near the height of national fear and years before stories of Abu Graib, Guantanimo, and black sites—one is tempted to say it was ahead of its time were the principles on display not as old as the Republic. Lawyers have long struggled with the concept of balancing in a number of contexts. As a jurisprudential practice, the rhetoric of balancing is cover, whether for pragmatism or pretext is a matter of debate, but few would make any claim to the level of precision that the term connotes. In the case of security, the idea of balancing can be dangerous in that it implies not only a ratio between security and liberty (often not just liberty, but fundamental rights) but also a relationship between the two such that when political exigencies demand greater security, the effective and required solution will involve the constriction of liberty. This is, of course, not the case, and Waldron marshals a number of convincing arguments against this conception. And, as Dworkin's observation points out, there are serious distributional concerns involved in trading liberties or rights for security.

Waldron differentiates between instances when all citizens are asked to sacrifice some liberty in the interest of a concomitant increase in security for all (intrapersonal tradeoffs) and instances in which the liberty of one group—often a minority—is sacrificed for the security benefit of another segment of the populace (interpersonal tradeoffs). It is the later case that is particularly disfavored in our legal and moral systems, and the danger posed by such interpersonal rights-trading becomes increasingly instantiated and publicly defended in the face of a pervasive fear of terrorism. Waldron emphasizes that this essay was intended as a "call for care and caution," (p. 46) but, years since that call was ignored, it reads as an indictment of a rhetoric of balancing that has been dangerously unexamined at best and is morally corrupt and intentionally misleading at worst.

The discussion of when and where torture can be justified is driven by the terms of that conversation. Already, by giving the question its most common framing, I have presumed that torture can be justified. Waldron, thoughtfully and correctly, gives the lie to this loaded question. The amount of effort required to wrest the debate back from the presumption of torture's permissibility is dismaying, but Waldron is more than up to the task. One of the more prominent names skewing the terms of the debate was and is Harvard Law School professor Alan Dershowitz. Dershowitz has been in many ways emblematic of the debate surround torture. For Professor Dershowitz, as evidenced publications like "When Torture is the Least Evil of Terrible Options,"[20] the alternative to the illegal torture (forgive for a moment the moral nearsightedness of this phrase) conducted by the United States and its agents (Egypt, Syria, et al.) is not *no torture*, but is rather a judicially regulated torture

PITTSBURGH POST-GAZETTE, June 3, 2002, at A9.

20. Alan Dershowitz, *When Torture Is the Least Evil of Terrible Options*, TIMES HIGHER EDUC. (June 11, 2004), http://www.timeshighereducation.co.uk/story.asp?storyCode=189257&sectioncode=26; *see also* ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002).

regime.[21] In fact, Dershowitz—and he is not alone—has said that in some instances one has a *moral duty* to subject a human to torture.[22] The arguments against this type of consequentialism are legion and convincing, and Waldron examines them in depth. What is more interesting, however, is Waldron's illumination of the shift in the terms of the moral debate over torture.

It strikes Waldron as strange that the permissibility of torture should be taken for granted by so many in this debate (domestic and international positive law, widely shared foundational norms and morality, religious proscriptions, and centuries of moral philosophy notwithstanding, apparently). Indeed, to maintain a categorical ban on torture, as Waldron does, has come to be seen in some circles as naïveté; commentators trumpet their heroic honestly, like Charles Krauthammer who wrote an article simpatico to Dershowitz's position with the subtitle: *It's Time To Be Honest About Doing Terrible Things*.[23] Not doing terrible things is not within the realm of possible options (and it is fairly uncontroversial that torture surpasses simply terrible; as war is terrible, spaghetti can be terrible).

Waldron traces a large part of this initial assumption back to the idea of necessity and to the ubiquitous "ticking timebomb" hypothetical. This should come as no surprise to anyone who has engaged in this debate (especially not to students of law, government, and political science, as I explain further below). The story, reliant upon the inevitability and omniscience of programs like Fox's *24*, goes like this: there is a nuclear device in New York City set to go off shortly, and you (or your agent) has a human terrorist in custody who has information that could prevent the imminent disaster, but the information can be extracted only though the application of torture. In this case, so the thinking goes, "[n]ot only is it permissible to hang this miscreant by his thumbs. It is a moral duty."[24] Painting the victim of torture as a "miscreant" is an ancient tactic for the legitimization of torture, though any real knowledge of miscreancy comes post-hoc—otherwise, why would the man be on the rack? This raises serious moral concerns, which Waldron tackles with aplomb, as well as the problem of moral luck for interrogators (who, as we have seen, will undoubtedly take the fall if the bomb turns out to be a mirage and/or the torture victim was innocent).

These ticking timebomb scenarios have been debunked by a panoply of writers for a number of reasons, though even deontological opponents of torture sometimes allow for an escape valve to prevent a major moral catastrophe. Waldron, however, will not have it. For once one allows for torture in cases of so-called "necessity" (that term itself being impossible in the real world analogs to these hypotheticals), then all that is left is to haggle about is the

21. Dershowitz proposes a regime of torture warrants but somehow assumes that the judiciary will be an effective bulwark against "unjustified" torture. This ignores a number of realities, including the current culture of pro forma warrant approval and the dangerous circularity of probable cause.

22. *See, e.g.*, DERSHOWITZ, *supra* note 20, at 470-77.

23. Charles Krauthammer, *The Truth About Torture: It's Time To Be Honest About Doing Terrible Things*, WKLY. STANDARD, Dec. 5, 2005, at 21, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp.

24. *Id.*

price. "Should it worry us," asks Waldron, "that once one goes down this road, the justification of torture—indeed the justification of *anything*—is a matter of simple arithmetic coupled with the professor's concocting the appropriate fact situation?" (p. 218). Is torture—the practice that had been declared an unequivocally impermissible *malum in se* by international and domestic law—really just a matter of utilitarian calculation? And if so, where does one draw the line? Rape warrants? The torture of family members? When moral deliberation is recast as arithmetic, the unthinkable becomes permissible (indeed, perhaps necessary, as Professor Dershowitz and others have said—under the arithmetic formulation, might we be compelled to torture or even kill ninety-nine humans to save a hundred?).

To be sure, a line must be drawn somewhere, and Waldron draws that line at torture, not out of simplicity, cowardice, or naïveté, but out of earnest engagement with the moral issues. "We can all be persuaded," he writes, "to draw the line somewhere, and I say we should draw it where the law requires it, and where human rights tradition has insisted it should be drawn" (p. 219). There must, after all, be something worth protecting.

Something indeed has changed since September 11, 2001. Before that day, it would have seemed fairly uncontroversial that the line should be drawn where the law requires it. In the years following the attacks, however, intelligent, thoughtful lawyers labored to prove otherwise. Lawyers like John Yoo, Jay Bybee, and Alan Dershowitz are now well known (if not infamous) for their support (and in some cases creation) of the Bush Administration's policies on torture, extraordinary rendition, and the like. The issue has moved from a world all too familiar with the motivations behind Common Article 3 to one where, at least in the United States, the question is not "if" to torture but "when" and "how far," and the question of necessity is not epiphenomenal.[25] Waldron writes:

> But in any case, one's answer [to the necessity hypothetical] is less important than one's estimation of the question. An affirmative answer is meant to make us feel patriotic and tough minded. But the question that is supposed to elicit this response is at best silly and at worst deeply corrupt. It is silly because torture is seldom used in the real world to elicit startling facts about particular bombs [but rather is used to glean lots of small and relatively insignificant pieces of information]. And it is corrupt because it attempts to use a far-fetched scenario, more at home in a television thriller than in the real world, deliberately to undermine the integrity of moral positions. (p. 219)

This last point is of critical importance. In the minds of many Americans—from policymakers to educators to the lay citizenry—the cruelty of torture, that ultimate evil in a liberal society, has been supplanted by a chimerical necessity. To put it another way, the ticking bomb scenario, which David Luban timely decried as intellectual fraud,[26] changes the terms of the debate. Torture

25. It seems we—and by "we" I mean principally the United States, but the wider world as well—missed an educational opportunity early on by framing the issue as a technical matter rather than engaging in a serious discussion on the morality—the rightness and wrongness—of inflicting pain, of brutality and killing.

26. *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425

becomes interrogation, and the calculation shifts from the certainty of torture against a possibility of useful information to the pain of the guilty verses the lives of the innocents. Though it certainly is true that torture probably harms our foreign policy interests politically, Waldron urges us—as citizens—not to ignore the domestic moral cost of assenting to the torture of human beings at the hands of our agents.

It is evident, even from the dedication page that Waldron fully grasps the importance of this debate. These are not mere intellectual exercises or cultural criticism confined to the ivory tower of philosophy departments and law schools. Indeed, torture as we have come to know it in the years since 9/11 has not been the aberrant work of a few bad actors; it was institutionalized, promulgated from the highest levels of government by generally well-educated and thoughtful policymakers. *Torture, Terror, and Trade-offs* reminds us of how important moral philosophy is to our polity, and how truly vital it is that it be taught in our schools—universities, law schools, and medical schools, as they are all implicated in these recent failings. Jeremy Waldron continues to remind us that moral deliberation and taking principles seriously must be fundamental to our society if it is to be worth protecting.

Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World. By Curtis Milhaupt & Katharina Pistor. Chicago: The University of Chicago Press, 2008. Pp. ix, 224. Price: $39.00 (Hardcover). Reviewed by Dave Ryan.

What role does law play in helping countries to achieve economic growth? The prevailing view among scholars of law and economics is that law is a prerequisite for growth because it provides protection of property rights. People will not invent, buy, or sell if their products or profits can be taken without recourse. Strong protective legal systems provide the foundation for building a market economy. If a country does not have such a system, it should acquire it. This view has been implemented throughout the world over the past half-century, influenced by American economic ideology and institutions. Policymakers have transported the legal systems credited with supporting sustained economic growth in the United States and the European Union to a range of countries including Japan after World War II, Eastern Europe after the fall of the Soviet Union, and, now, much of the developing world.

In *Law and Capitalism*, Columbia Law School Professors Curtis Milhaupt and Katharina Pistor draw from their expertise in comparative and corporate law to offer a fundamental and consequential rebuke to this simplistic view of how law affects economic growth. Legal systems, they argue, do not solely protect rights, nor are they fixed foundations. On the contrary, legal systems can also serve a "coordinative" function and adapt in a "rolling relationship" with markets over time (p. 6). Under coordinative legal systems, a small number of centralized government agencies maintain an active and

(2005).

ongoing role in the economy, using law to direct rights and resources to different actors to implement policy goals.

One such country is post-Soviet Russia. The 1993 Russian constitution created "a strong presidency with extensive decree powers" that allowed President Boris Yeltsin to play a significant role in coordinating the massive wave of privatizations after the fall of the Soviet Union (p. 163). Yeltsin's officials did not draft clear, protective laws to facilitate a free-market bidding process for ownership of the privatizing enterprises. Instead, they drafted laws that were "intentionally ambiguous," and designed "to ensure a predetermined outcome . . . deter foreign investors . . . and to give bureaucrats in the privatization agency enough discretion to prevent competing bids" (p. 158).

Less than a decade later, when Yeltsin and then his successor Vladimir Putin sought to re-nationalize major companies, they again used law not to protect property rights but to coordinate resources and actors. They directed state tax and bankruptcy agencies to bring companies to bankruptcy, and then facilitated bidding processes designed to transfer ownership back to the state. Putin followed this strategy to re-nationalize Yukos, a major Russian oil company. First, his officials levied "highly dubious" claims of tax liability against the company, charging it with tax bills in 2001 and 2002 that exceeded its entire revenue from those years (p. 158). Then, the government froze the company's assets, declared it bankrupt, and broke it up, auctioning its assets to various state owned companies (p. 159). Yeltsin and Putin frequently employed tax and bankruptcy law to coordinate resources in the market from 1998 to 2002, during which time "more than 50 percent of all bankruptcy cases each year were brought by the state" (p. 158-59).

Conversely, in "protective law" countries like the United States, laws are made, changed, and enforced through a decentralized process involving a range of private actors, including shareholders, attorneys, and lobbyists, who seek protection of their property rights under the law. The American legal response to the Enron scandal, for example, provides a stark contrast to the Yukos story in Russia. When Enron filed for bankruptcy following years of accounting fraud and false earning reports, the legal response was driven not by government agencies but by "a highly complex and decentralized system of corporate and securities law enforcement, with many of the most powerful tools in the hands of private investors (and their lawyers)" (p. 53). According to Milhaupt and Pistor, the United States "is an outlier in the extent to which it provides legal rights and enforcement mechanisms to shareholders" to allow them to protect their investments (p. 52). These legal rights led to a "blizzard of legal responses" by private investors and creditors to the collapse of Enron (p. 185).

The distinction between coordinative-centralized legal systems and protective-decentralized systems is also helpful for understanding the recent experiences of China and Singapore. In these countries, central governments play large roles in coordinating markets, in contrast to the American system in which private actors take action to enforce rules and protect rights. Indeed the legal response to the Enron case in the U.S. contrasts not only with the Yukos

case in Russia, but with the coordinated, centralized responses to corporate crises in China, Singapore, Japan, and Germany. Investors in Japan and Germany, for example, do not share the private rights of action under securities laws that investors enjoy in U.S. courts. In both Japan and Germany, the protection of private rights is subordinated to the "existing governmental enforcement apparatus" (p. 185).

Both protective and coordinative systems illustrate the second aspect of the thesis of *Law and Capitalism*: that laws exist not as a fixed entity, like a piece of technology, but as a force that must consistently adapt to meet changing market needs. Milhaupt and Pistor recognize that legal change has been addressed in the literature on law and capitalism, but argue that even when it is addressed, "the answer, often implicit, is that legal change is an evolutionary process" through which legal systems "arrive at a comparable menu of strategies to address the common functional needs of market actors" (p. 197-8). This view, they argue, fails to account for the need for law to respond to continuously changing market conditions.

The two aspects of Milhaupt and Pistor's thesis—that law can be either protective-decentralized or coordinative-centralized, and that law is not fixed, but always evolving to meet changing market needs—come together to create wide-ranging implications and pose fascinating questions. The authors recognize two audiences for whom their thesis will be particularly relevant: scholars of the interaction between law and markets, and policymakers interested in using legal reforms to enhance economic growth.

To scholars seeking to understand the relationship between law and markets, the thesis proposes a new framework for comparing and understanding legal systems. The framework suggests that future studies should shift their focus away from the origins of legal systems and away from efforts to identify a single set of characteristics for effective legal systems. Instead, they argue, scholars should focus on how systems differ in function and form and how they change over time. Milhaupt and Pistor intentionally steer clear of empirical research. Instead, they devote the majority of the book to applying the framework to a narrow set of case studies of corporate governance crises in large economies in the past thirty years. The authors themselves acknowledge the limitations of this approach, but respond that such "out-of-equilibrium events" expose true elements of a system that may have been "beneath the radar when it was functioning smoothly" (p. 11). In fact the case studies do provide vivid and detailed illustrations of the authors' framework, as well as interesting and in-depth descriptions of major events.

Such massive corporate crises, though, are unique in the public attention and political implications they create. The resulting legal reforms may be driven less by what the authors characterize as a healthy "iterative" process between law and markets (pg. 6), and more by a rushed and potentially short-sighted political incentive to take strong and visible public action. Further, the authors' solitary focus on corporate governance law does not shine light on the function and organization of law in countless other critical areas where law interacts with market economies, including banking law, property law, and

intellectual property law. Finally, the case studies do not provide context to analyze trends across the globe. The reader is left wondering whether legal change operates substantially differently in response to market needs that happen out of the public eye. Does the framework apply outside of corporate governance law? What percentage of legal systems around the world would be categorized as protective-decentralized or coordinative-centralized? Do more developed or developing countries fall on one side or the other? Are China and Singapore exceptions, or do they truly show an alternative method for using law to promote economic growth? Do countries generally become more protective as they grow and develop, or more coordinative, or neither? That these questions remain unanswered reflects not the failure but the success of this book, which acknowledges early on its goal of provoking further questions in line with the framework it introduces.

Even with these significant questions left unanswered, Milhaupt and Pistor's thesis provides a useful framework for policymakers pursuing legal reforms in the developing world. First, if either protective-decentralized or coordinative-centralized legal systems can support economic growth, then the developing world should not solely import or adopt systems from one end of that spectrum. Indeed the authors argue that, while "well intentioned, the intense focus on U.S. legal approaches may lead to a poverty of imagination in seeking solutions to other countries' governance problems" (p. 222). Additional solutions may be found in countries with more coordinative and centralized legal systems underpinning economic growth such as Germany, Japan, and Korea.

Further, the thesis provides a nuanced view of the prospects and challenges for any "legal transplants" from developed to developing countries. Given the need for law to consistently adapt to meet changing market needs over time, imported legal systems will face inherent challenges, because importing governments must demand and actively accept it enough to integrate, enforce, and adapt it (p. 210). When is this challenge most likely to be overcome? According to Milhaupt and Pistor, legal transplants are more likely to be successful when incoming laws have the same dominant function (protective or coordinative) and organization (centralized or decentralized) as the existing system in that country (p. 210).

Despite these clear policy implications, *Law and Capitalism* does not purport to be a guide for development officials, and contains no roadmap for successful legal reforms for development. The case studies all focus on the function, structure, and dynamics of law in developed countries. The case studies show how law can support developed economies through multiple functions and forms. They do not necessarily show that law can interact with markets in the same ways in developing countries. Challenges to market economies and legal enforcement and the role of legal institutions are very different in developing countries than in the much larger and more advanced economies of developed countries.

To become more directly relevant to policymakers, the framework should be extended to historical analyses of today's developed countries during their

earlier periods of development, and to today's developing countries. Developing countries today face different circumstances than developing countries did a century ago. Many developing countries today seek to accelerate growth through international trade and demand effective legal systems that will facilitate their integration into global markets. Do coordinative or protective legal systems facilitate global integration, and encourage foreign investment, more effectively? To what extent will legal harmonization with key trading partners or strategic allies facilitate outward focused economic growth?

The strength of *Law and Capitalism* is not its comprehensive scope or quantifiable results. In fact the authors profess "dissatisfaction" with the "tendency to place great analytical weight on quantifiable but extremely thin legal variables" (p. 10). The strength of this book is the insightful and provocative analytical framework it offers for rethinking how law interacts with and supports markets. The well-known and dramatic case studies provide accessible and informative illustrations of the framework. The detailed stories and observations distract somewhat from the clarity and utility of the case studies in developing the framework but make for fascinating tales that keep the reader engaged. In the final chapters, Milhaupt and Pistor synthesize the lessons from the case studies and compare and contrast the different legal systems highlighted in the cases. By its end, the book achieves the worthwhile goal it sets out in its introductory pages: to raise an important and novel line of questions for those seeking to understand the relationship between law and economic development.

Networks and States: The Global Politics of Internet Governance. By Milton L. Mueller. Cambridge, MA: MIT Press, 2010. Pp. 313. Price: $35.00 (Hardcover). Reviewed by Paul Slattery.

Milton L. Mueller's *Networks and States: The Global Politics of Internet Governance* evaluates international disputes over who should provide which forms of Internet governance. Mueller, a professor of information studies at Syracuse University, uses the term "Internet governance" to refer to everything from the regulation of intellectual property and cybercrime to the management of routing and domain names. He situates his argument between the two poles that have dominated Internet governance debates thus far. Mueller rejects the "cyberlibertarian" view that communications technology inherently creates freedom, thrives without any regulation, and is rendering traditional states obsolete (p. 3). He also rejects the "cyberconservative" view that states can approach Internet governance as a run-of-the-mill policy problem easily addressed with domestic and intergovernmental law (p. 3). Instead, Mueller argues that the openness, transnationalism, and networking that characterize the Internet are driving institutional innovation in Internet governance and challenging states' ability to control their communications policy by traditional means. Mueller focuses this descriptive argument on Internet governance debates surrounding intellectual property, national security, Internet resource

management, and content regulation.

As a normative matter, Mueller argues that we must embrace the "Internet's early promise of unfettered and borderless communication" (p. 5). We must also recognize, however, that some regulation is inevitable and work to protect the Internet's emancipatory power as Internet governance matures. The key, Mueller feels, is to avoid hierarchal regulatory systems based exclusively on states or intergovernmental bodies, which will stifle innovation and political freedom on the web. Mueller's alternative is "networked governance," a system in which states, businesses, nonprofits, and civil society cooperate to manage the Internet. (p. 6). Networked governance is meant to mirror the elements that have made the Internet successful. First, it emphasizes "multistakeholderism"—the inclusive participation of all interested parties (p. 7). Second, it utilizes "peer production"—the aggregation of many independent individuals' contributions, as exemplified by Wikipedia and cybercrime hotlines (p. 7). In the final pages of his book, Mueller suggests that "true" cyberlibertarianism, a more nuanced version of contemporary libertarian approaches to the web, should guide Internet governance (p. 268). This philosophy would embrace a "universal right to receive and impart information regardless of frontiers" and "prevent states from ensnaring global communications in interstate rivalries and politico-military games" (p. 269).

Mueller offers an excellent descriptive framework and body of background material on Internet governance. It is accessible without technical knowledge and efficiently summarizes the secondary literature. It also does not presume familiarity with slightly obscure policy debates and institutional history, and it is sufficiently comprehensive to be an introduction for professionals or the first book in a communications law seminar. The book is particularly valuable as a historical introduction to the institutions and debates that have dominated Internet governance thus far—the U.N.'s World Summit on the Information Society, the Internet Corporation for Assigned Names and Numbers (the American nonprofit that largely controls domain names), and the parties and interests that have shaped both. The book is imminently readable, though the necessary and necessarily dry background on the evolution of intergovernmental institutions and network theory requires some resolve from readers.

Though the book shines in the descriptive sections, its normative arguments feel incomplete. Mueller's analysis of the conflicts in Internet governance, how they pressure governments, and how governments might react to inhibit the Internet's development are persuasive, but his prescriptive arguments suffer from two main weaknesses. First, he treats his "networked governance" and "true" version of cyberlibertarianism a bit like magic bullets. They make conceptual sense when read with his criticisms of modern Internet governance debates, but a reader would have difficulty figuring out how to apply them to specific cases. Granted, Internet governance presents a multitude of apparently disparate policy issues, and developing a practical and unified regulatory approach would be challenging. However, networked governance and cyberlibertarianism are vague and largely defined in the negative, which

makes them feel like malleable foils for Mueller's criticisms of the status quo.

Second, Mueller thoroughly explores the Internet's promise and its vulnerability to unthinking or politically motivated regulation, but he analyzes states and their interests vis-à-vis the Internet very little. Mueller dismisses the idea that the Internet is rendering states obsolete, and he dismisses the idea that states may approach Internet governance like any other policy issue. However, his preferred approach—networked governance—is largely about protecting the Internet from what states would do if given free reign to regulate. The book thus provides little insight into the policy space in which states are operating and what their interests might be. One gets the sense that China, more than any other nation, provides the lurking content behind the term "state." States are presumed to be interested in blocking political content, tracking criminals and others alike, and leveraging control of the Internet for geopolitical power. Indeed, Mueller takes a dim view of any state or intergovernmental intrusion into Internet governance, which may explain why networked governance emphasizes the participation of nonprofits and civil society at the expense of exclusive state power.

A comprehensive theory of state interests in the Internet would be beyond the scope of Mueller's book, but it would be useful to analyze how the Internet has changed the environment in which states operate, in addition to how states might change the Internet. China, with its somewhat successful efforts to edit and territorialize the Internet, is fairly unique, and it is not clear that its model is sustainable. If a more comprehensive view is taken, there are a number of ways in which the Internet changes the game for states.

As Mueller notes, the Internet collects a previously unthinkable amount of information from many disparate sources and transports it across national borders, but Mueller does not address the challenges for states trying to resist this free flow of information. Outright rejection of connectivity by a state is enormously costly. The Internet offers more efficient communication, more appeal to foreign direct investors, and a shot at increased entrepreneurship through online education and online marketing of domestic products. In sum, divorcing these benefits from the transmission of political speech and sensitive information poses at least four challenges that counsel a more optimistic view of the Internet's resilience in the face of state regulation.

First, filtering the Internet is technically difficult and risks the exit of major service providers. For countries with smaller markets, developing the expertise and infrastructure to censor information from many redundant international sources is likely to prove both costly and futile, and the risk that irreplaceable multinational service providers will exit rather than endure the costs of tailoring services to domestic regulation is real. Even in larger markets, filtering is a difficult task. The discord between Chinese regulators and Google over censorship of Google search results generated service interruptions and posturing by both the U.S. and Chinese governments.[27] However, the impact on

27. *See, e.g.*, Hillary Rodham Clinton, U.S. Sec'y of State Remarks at the Newseum in Washington, D.C. (Jan. 21, 2010), *available at* http://www.state.gov/secretary/rm/2010/01/135519.htm.

the information available to Chinese citizens may prove minimal. To date, while Google has ceased redirecting all traffic to its less-filtered Hong Kong site, it now provides a link to the site on its Chinese search page. Moreover, an information containment strategy that conceals politically controversial knowledge *most* of the time is a bit like a nuclear nonproliferation strategy that conceals the details of how to build a bomb *most* of the time. An explosive fact need only get through once to defeat the entire strategy.

Second, anticipating the pathways and forms of information that pose a threat to an established order is not easy. One of the most striking aspects of the Internet age has been the variety of unanticipated uses users find for a fundamental technology once it is released. The easiest example is the Internet itself, though the phenomenon is reflected in everything from the open-source movement to the use of Google Earth to crowd-source 3D building models. The fall of Hosni Mubarak in Egypt, as well as recent political unrest in other Middle Eastern countries, illustrate the difficulty this innovation and adaptation poses for censors. The case is easily overstated, but it is suggestive that a public affinity for Twitter could prove to be a crucial source of information for multinational media and an organizational tool for revolutionaries. Mueller is concerned about the failures of imagination native to government bureaucracies, but where "tweeting" proves a substantial threat to state security, these deficiencies may protect the emancipatory power of the Internet.

Third, even if states generally want to censor political content on the Internet, it is not clear that they will cooperate to do so, and even one defecting state can often thwart such joint censorship efforts. The WikiLeaks saga illustrates the extent to which divergences of law and opinion across states may create space for radical organizations. WikiLeaks hosting, for example, has been a forum-shopping odyssey. The group's central servers remain in Sweden, though it has switched service providers and also received hosting at various times from Amazon, French web company OVH, and the Swedish Pirate Party.[28] Efforts to cut off WikiLeak's donations have led to similar forum shopping, as its accounts have been suspended, reinstated, and reconfigured by many companies in many countries. In short, disagreements between governments, multinational corporations, and intergovernmental groups may facilitate emancipatory projects on the Internet, particularly if groups like WikiLeaks take advantage of the free speech and asylum commitments of countries like Sweden, Iceland, and Switzerland.

Finally, the free flow of information on the Internet and projects like WikiLeaks are not without support from powerful traditional interests. The most obvious example would be a state with a vested stake in controversial information getting out. Leaking classified information about, for example, U.S. military interventions may be quite popular with various domestic publics, and it may be even more so with states concerned about U.S. meddling in

28. Raphael G. Satter and Peter Svensson, *WikiLeaks Fights To Stay Online Amid Attacks*, BUS. WK. (Dec. 3, 2010, 11:27 AM), http://www.businessweek.com/ap/financialnews/D9JSHKUG0.htm.

domestic affairs or simply looking for a diplomatic leg up. Google's clash with China has certainly illustrated the currency that the free flow of information may have in diplomatic relations. Moreover, states are not the only powerful interest that may provide support, shelter, or advocacy for radical online projects. Ideological groups including Public Citizen, the ACLU, the Project on Government Oversight, and the Electronic Frontier Foundation have provided WikiLeaks free legal support. Perhaps more significantly, WikiLeaks has received donations from *The Associated Press*, *The Los Angeles Times*, and the National Newspaper Publishers Association, and it has received awards from *The Economist*, Amnesty International, and *Time Magazine*. One gets the sense from Mueller's book that the Internet is a coalition of the little guys vulnerable to attacks by traditional powerful interests, but the free flow of information on the web appears to have some established allies with money and influence.

In sum, Mueller provides an accessible and thorough background and framework for discussing Internet governance debates. Mueller's prescriptive arguments leave readers with more questions than answers, but that difficulty may be inherent in writing about the broad range of issues that fall under the Internet governance heading. Regardless, while domestic regulation and intergovernmental posturing may be anathema to the openness and innovation that have marked the culture of Internet pioneers, advocates for the free flow of information on the web will need to be strategic in their approach to states and state interests. As regulation inevitably develops, a well-developed understanding of the interests of governments and intergovernmental bodies with regard to the Internet may be a crucial tool in protecting the emancipatory potential of the web.