

History and Importance of the Rule of Law

Introduction

This White Paper is a companion to the Final Report of the Task Force on ABA Goal VIII ("Task Force Report"). It is intended to flesh out the background against which the Task Force Report is written. The White Paper has three Parts. Part I offers a synthesized account of the idea, if not the definition, of "the rule of law." Part II examines the historical development of the rule of law – both as an idea and as practiced. Part III offers a critical analysis of rule of law reforms to date, including a discussion of the benefits provided by rule of law reforms and the difficulties encountered by reformers. It then considers lessons that can be applied as the ABA moves forward.

I. What Is the Rule of Law?¹

A. Rule By Law, Not Men

One simple formulation of the idea of "rule of law" is the idea that society should be ruled "by law, not men." At perhaps the most basic level, the "rule of law" has thus been used to mean a system in which governance is based upon neutral and universal rules. This basic formulation emphasizes three intertwined concepts: (1) that legal detriments should only be imposed by law, not on the basis of the personal will or arbitrary decisions of government officials or private actors (neutrality); (2) that government action should be subject to regulation by rules, and that government officials

¹ The following account is drawn generally from Lawrence B. Solum, *Equity and the Rule of Law*, in *The Rule of Law 120* (Ian Shapiro ed., 1994), and Geoffrey de Q. Walker, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 23-42 (1988).

should not be above the law (universality); and (3) that people should be protected from private violence and coercion (governance).

But the very idea of “rule by law, not by men,” creates an apparent dilemma: how are the laws to be applied against those responsible for their creation and enforcement? To make this possible, one generally accepted prerequisite for the rule of law is a strong, independent, and accessible judiciary capable of holding the government accountable and providing redress for violations of the law, a role that is supported and sustained by a bar sharing those same traits. Three fundamental practices – separation of powers, constitutions, and judicial review – are of particular use in sustaining judicial independence and, thus, the rule of law.

The role of judges, however, raises in turn the question of who will guard the guardians.² Although institutional arrangements may be of some help, it is ultimately necessary that courts consider themselves bound by the law and that they refrain from exercising unchecked discretion.

B. Structural Requirements of Laws

To satisfy the basic underlying requirements of the rule of law, it is often thought necessary that laws themselves must satisfy three structural criteria. First, laws must represent more than just an arbitrary or reasonless exercise of discretion. Laws must be general, rather than being aimed at particular individuals; justified by reference to relevant legal rules and principles; and regular, treating similar cases similarly.

Second, it must be reasonably possible for people to follow the law. Not only must the law demand no more than what it is physically possible to do, but people need to

² To quote the Roman satirist Juvenal, *Sed quis custodiet ipsos custodes* – but who will guard the guardians?

know what the law requires. Laws thus must be clear, public and prospective, and relatively stable – allowing people to understand the law, know the law governing how they now act, and predict the law governing how they will act in the future. Even if a society's rules are themselves general, justified, and regular, even their consistent application may seem arbitrary if those rules are not known and understood.

Third, laws must be – and must be seen to be – fully and fairly enforced, by open, accessible, and impartial tribunals. No matter how general, justified, and regular the rules are, they will not forestall arbitrary action unless they are enforced, and they will not instill confidence unless they are seen as being enforced.

C. Popular Consent

To endure over the long run, the rule of law must be legitimated by popular consent, as popular opposition will lead to either resistance or non-enforcement. How this consent is given or expressed will vary from time to time and from place to place. What is essential is that the law remain reasonably in accordance with public opinion, so that the people remain willing to obey and respect the law.

D. The Moral Element to the Rule of Law

As became particularly clear in the twentieth century, a purely structural conception of the rule of law may be insufficient. Such an account threatens to legitimate governments that are absolutist, but not arbitrary; ruled by means of public and general, but unjust, rules; and supported by a powerful majority, but oppressive to a powerless minority. As a result, it is often argued that, to serve as a bulwark against tyranny, the rule of law must go further and expressly protect individuals' moral and political rights. It is in this spirit that the Universal Declaration of Human Rights of 1948 declares that "it

is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.”³ Although expressed differently by different authors, one bare-bones account is that even a structurally proper enactment does not and should not count as a “law” if it is extremely unjust, or if the avowed purpose of the law is an inequitable one.⁴

E. A Working Definition

Informed by the concepts discussed above, for the purposes of its review the Task Force on Association Goal VIII has used the following shorthand definition of the rule of law: a rules-based system of self-government that includes a strong and accessible legal system featuring an independent bar and judiciary.⁵

II. Historical Development of the Rule of Law in the Western Tradition

This Part traces the historical development of the rule of law in the Western context. Although important, an account of the historical development of the rule of law outside of the Western context is beyond the scope of this White Paper. It is certainly possible to find elements of the Western conception of the “rule of law” in other cultures’ legal traditions.⁶ Analyzing the historical development of these elements is more difficult, however, for at least two reasons. First, as the question in the title of Karen Rutner’s article suggests (“Rule of Law Ideals in Early China?”), there are fundamental

³ Quoted in Solum, *supra* n. 1, 121.

⁴ Robert Alexy, *A Defense of Radbruch’s Formula*, in *Recrafting the Rule of Law: The Limits of Legal Order 1* (David Dyzenhouse, ed., 1999).

⁵ See Task Force on Association Goal VIII Report, Part II.

⁶ See generally M. Cherif Bassiouni and Gamal M. Badr, *The Shari’ah: Sources, Interpretation, and Rule-Making*, 1 *UCLA J. Islamic and Near Eastern Law* 135 (2002) (Islamic law); Nathan Brown, *Constitutions in a Nonconstitutional World* 20-26 (State University of New York Press 2002) (Islamic law); Nathan Brown, *The Rule of Law in the Arab World* (Cambridge University Press 1997) (Islamic law); W. Theodore De Bary, *The Constitutional Tradition in China*, 9 *Journal of Chinese Law* 7-34 (1995) (Chinese law); Karen Rutner, *Rule of Law Ideals in Early China?*, 6 *Journal of Chinese Law* 1-44 (1992) (Chinese law).

questions and divided opinions about whether, or to what degree, these elements of the rule of law existed or were put into practice in non-Western cultures, much less how they developed over time. Although Western legal history is hardly fixed in stone, there seems to be a greater degree of consensus about what actually happened, even if consensus is lacking as to its significance. Second, as Rutner herself points out, a discussion of the “rule of law” in a non-Western culture is “inevitably comparative, because the notion is so closely linked with the deeply ingrained respect for law in the Western classical tradition and the institutional developments peculiar to the nation states that emerged in early modern Europe.”⁷ Without expertise in the legal tradition of another culture, aspects of the rule of law that do not fit cleanly into the idea as it has developed in the West could easily be overlooked.⁸

A. The Rule of Law in Ancient Greece

Although pre-dated by non-European legal codes, the first evidence of a European society governed by law – i.e., one in which rules were ascribed in permanent and public form – comes from ancient Greece in the late seventh and early sixth centuries B.C.⁹ Once written and publicly accessible, the Greeks’ laws were no longer so subject to arbitrary interpretation by a privileged class.¹⁰ Once written down, the Greeks placed significant obstacles in the way of their laws’ amendment,¹¹ and Greek courts were bound to apply the letter of the law even in the face of countervailing equitable considerations.¹²

⁷ Rutner, *supra*, 9 *Journal of Chinese Law* 1, 2.

⁸ Pragmatic considerations relevant to implementing rule of law initiatives abroad are discussed in Part IV, *infra*.

⁹ John Kelly, *A Short History of Western Legal Theory* (Clarendon Press: Oxford, 1992), 1, 9.

¹⁰ Kelly, *supra* n. 5, 9.

¹¹ Kelly, *supra* n. 5, 10-11.

¹² Kelly, *supra* n. 5, 28-29.

At least in theory, the Greeks believed that laws should be universal and general. Solon was said to have established a state in Athens that provided “equality of laws to all manners of persons,” and that was governed by the application of known rules.¹³ Describing a later Athenian state, Pericles held that, “as regards the law, all men are on an equal footing so far as concerns their private disputes.” Finally, the Greeks at least purportedly barred the enactment of laws directed against specific individuals.¹⁴

Both proud and respectful of their rules, the Greeks, Herodotus asserted, “although free, [were] not free in everything: they [had] a master, namely the law,” which they “fear[ed]” even more than the Persians did their tyrannical king, Xerxes.¹⁵ This respect could have stemmed from the Greeks’ pragmatic belief that the rule of law was essential in establishing a prosperous and just society. Plato described a society in which law was impotent as facing imminent ruin, in contrast to the blessings bestowed on societies in which “the magistrates are servants to the law.”¹⁶ Demosthenes, appealing more directly to self-interest, highlighted the connection between the personal security of judges, as members of society, and their willingness to uphold the law on behalf of others.¹⁷ And in the *Nicomachean Ethics*, Aristotle argued that while a perfect world would not need laws, in an imperfect world justice “[could] only exist between those whose mutual relations are regulated by law.”¹⁸ As a general matter, then, the Greeks believed that the proper purpose of laws was to advance the common good,¹⁹ although

¹³ Walker, *supra* n. 1, 93.

¹⁴ Kelly, *supra* n. 5, 29-30.

¹⁵ Kelly, *supra* n. 5, 10.

¹⁶ Kelly, *supra* n. 5, 25.

¹⁷ Kelly, *supra* n. 5, 16-17.

¹⁸ Kelly, *supra* n. 5, 26.

¹⁹ Kelly, *supra* n. 5, 22.

they recognized that laws, in practice, were too often written to advantage, instead, the privileged classes of society.²⁰

Greek political institutions helped to support the rule of law. At least in democratic cities, laws were seen as deriving their authority from popular consent.²¹ In part on the grounds that they were expressly popularly enacted, Greeks gave particular respect to written statutes as a source of law.²² Additionally, the Greeks relied on a mixed government (in which power was split among bodies representing different classes of people) to avoid the concentration of all state power in one entity and forestall absolutism.²³ If that was unsuccessful, the Greeks acknowledged the legitimacy of resistance to tyranny.²⁴

Finally, the ancient Greeks – specifically, Aristotle – provided a theoretical justification for the rule of law. On Plato’s account, the rule of law was an inferior alternative to rule by men, his philosopher-kings, who were to be guided by their perfect knowledge of the good.²⁵ By contrast, Aristotle argued that, because of the inevitable infirmities of rulers, the laws should be sovereign: “We do not permit a man to rule, but the law.”²⁶

He who bids law to rule seems to bid God and intelligence alone to rule, but he who bids that man rule puts forward a beast as well; for that is the

²⁰ Kelly, *supra* n. 5, 19.

²¹ Kelly, *supra* n. 5, 10.

²² Kelly, *supra* n. 5, 9-10.

²³ Martin H. Redish and Elizabeth J. Cisar, “If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory, 41 Duke L.J. 449, 458 (1991).

²⁴ Eric V. Orts, The Rule of Law in China, 34 Vand. J. Transnat’l L. 43, 87 (2001).

²⁵ Richard Flathman, *Liberalism and Political Institutionalization*, in *The Rule of Law*, 297, 302 (Ian Shapiro ed., 1994); Ernest J. Weinrib, *The Intelligibility of the Rule of Law*, in *The Rule of Law: Ideal or Ideology*, 59, 62-63 (Allan C. Hutchinson and Patrick Monahan, eds., 1987). Somewhat similarly, “some Confucian proponents of li [the view that lawful norms of behavior are essential to good government and preferable to enforcement of positive law] believe that good morals alone, especially when practices by the rulers of a political state, are in themselves sufficient to provide social order without relying on the enforcement of positive legal rules or principles at all.” Orts, *supra* n. 19, 52.

²⁶ Kelly, *supra* n. 5, 25.

sort of thing desire is, and spiritedness twists rulers even when they are the best of men.²⁷

Aristotle's theory of the rule "of law, not men," required judges to possess a character unlike that ascribed to even the best of rulers—a constant disposition to act fairly and lawfully.²⁸

B. The Rule of Law in Ancient Rome

The rule of law was less prominent in Roman thought than it was among the Greeks.²⁹ As Rome changed from a Republic to an Empire, its rules were no longer adopted by popular consent, but were instead dictated by the emperor.³⁰ This practice shaped Roman thought, and Roman writers eventually came to hold that law was little more than the will of the ruler, and that rulers were thus not bound by the written laws.³¹ Similarly, although "[o]ne of the earliest sources of Roman law, the Law of the Twelve Tables, provided that 'no privileges, or statutes shall be enacted in favour of private persons, to the injury of others contrary to the law common to all citizens, and which all individuals, no matter of what rank, have a right to make use of,'"³² Rome came to give special rights and privileges to the privileged classes, who were the beneficiaries of different laws and different court procedures.³³

At least some early Romans, however, defended the ideas of the rule of law. Cicero emphasized that laws should be both general (specifically opposing the legitimacy

²⁷ Weinrib, *supra* n. 23, 60.

²⁸ Judith Sklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology* 1, 3 (Allan Hutchinson and Patrick Monahan eds., 1987).

²⁹ Kelly, *supra* n. 5, 69.

³⁰ Kelly, *supra* n. 5, 43-44.

³¹ Kelly, *supra* n. 5, 68-70.

³² Walker, n. __, 93-94.

³³ Kelly, *supra* n. 5, 71-72.

of bills of attainder) and regular (with like cases being treated alike).³⁴ Similarly, Marcus Aurelius argued in favor of the universality of law (“a state with one law for all”).³⁵ Albeit while defending Rome’s dual system of justice, Cicero held that Roman laws, even if wrong, should nonetheless be respected:

[I]t is a far greater shame, in a state which rests upon law, that there should be a departure from law. For law is the bond which secures these our privileges in the commonwealth, the foundation of our liberty, the fountain-head of justice . . . The state without law would be like the human body without mind . . . The magistrates who administer the law, the judges who interpret it – all of us, in short – obey the law in order that we may be free.³⁶

Despite Rome’s eventual move to absolutism, moreover, it made an original contribution to the rule of law – the creation of a legal profession – that would ultimately have the most significant of consequences. Roman society was the first – and, until the Middle Ages, the last – in Europe to have a class of people devoted to “expounding rules of law, drawing up formulas for legal transactions, [] advising magistrates, litigants, and judges,” and communicating their understanding of law through publications and schools.³⁷ The work of these jurists contributed to making the law both public (going beyond the accessibility of written, but unexplained, statutes) and regular (the latter through, *inter alia*, their reliance on the “congruent opinions of other or earlier jurists”).³⁸ The Romans’ jurisprudence was paralleled by a well-functioning legal system, distinguished by accessible and impartial courts.³⁹ Ultimately, it was the Roman jurists’

³⁴ Kelly, *supra* n. 5, 72; Walker, *supra* n. 1, 94.

³⁵ Kelly, *supra* n. 5, 72.

³⁶ Kelly, *supra* n. 5, 69-70.

³⁷ Kelly, *supra* n. 5, 49.

³⁸ Kelly, *supra* n. 5, 49-50.

³⁹ Kelly, *supra* n. 5, 75-76.

accounts of the laws of the Roman Republic that, when reintroduced to Western Europe around 1100 A.D., provided a practical alternative to the absolutism of the Dark Ages.⁴⁰

C. The Rediscovery of the Rule of Law in Western Europe

The fall of the Western Roman Empire was not accompanied by an end to its absolutist philosophy, which also survived in the Byzantine Empire for another thousand years. The Germanic tribes that conquered the Roman Empire had originally seen rulers as deriving authority from the consent of the people.⁴¹ But absorption of Roman thought, along with widespread conversion to Christianity, led to a triumph of the theory of absolute rule.⁴² Christian thought, in particular, provided a theological justification for absolute rule by deriving the authority of kings from a divine grant of power rather than from the consent of the governed.⁴³ Although the power of kings to create law was still sometimes seen as limited by the need for popular consent, this had little practical effect, as “law” was dominated by the enforcement of customs – at the kings’ discretion – rather than by new legislative enactments.⁴⁴

Even during the Dark Ages, however, the idea of the rule of law was not wholly extinguished. Some individual thinkers, and even rulers, continued to assert that the purpose of government, and of laws, was to advance the common good, and that kings should obey their own laws. Simultaneously, however, it was generally acknowledged that kings could not be compelled to obey the law, and that their subjects had no remedy (i.e., were not justified in rebelling) if they did not.⁴⁵

⁴⁰ Kelly, *supra* n. 5, 82.

⁴¹ Kelly, *supra* n. 5, 92-95.

⁴² Kelly, *supra* n. 5, 92-95.

⁴³ Kelly, *supra* n. 5, 92-95.

⁴⁴ Kelly, *supra* n. 5, 100-02.

⁴⁵ Kelly, *supra* n. 5, 95-96, 98-99; Walker, *supra* n. 1, 94-95.

Around 1100 A.D., a combination of social circumstances contributed to the rebirth of the idea of the rule of law – as different circumstances would later contribute to its eclipse. Renewed interest in the rule of law corresponded with a lengthy conflict between the Pope and the German Emperor, which had led to widespread publication of religious arguments against temporal absolutism; the rediscovery of early Roman law, and its perpetuation and study in legal schools; and a growth in the population and economy of Western Europe, with a corresponding growth in governments' need for legal proficiency.⁴⁶ More rapidly changing social circumstances also gave rise to a need to enact new legislation. Because new laws were still thought to require popular consent, the need for new laws strengthened the voice of the people (or at least a subsection thereof) and weakened the absolute power of kings.⁴⁷ And even legal measures intended to secure the power of rulers, like the record of King William's realm set out in the Domesday Book, contributed to the rule of law by making individual rights – during these initial stages, rights in land – a matter of record.⁴⁸

The change was neither swift nor absolute, however. During this period, St. Thomas of Aquinas argued that because the power of kings originated with the people (rather than from God), the people retained the power to depose an unjust tyrant,⁴⁹ and concluded that even rulers should obey the laws' directives. Aquinas also addressed the proper purpose of laws, arguing that laws that failed to promote equity and the common good were unjust, and thus had “the quality not of law, but of violence.”⁵⁰ But Aquinas

⁴⁶ Kelly, *supra* n. 5, 97-99, 114-31.

⁴⁷ R.M. Helmholz, “Magna Carta and the *Ius Commune*,” 66 U. Chi. L. Rev. 297, 324-25 (1999) (noting that, in England the king was required to obtain the “common counsel of the realm” before levying new taxes); Kelly, *supra* n. 5, 139-40.

⁴⁸ Speech by Justice Kennedy in London on the occasion of receiving a copy of the Domesday Book.

⁴⁹ Kelly, *supra* n. 5, 129-30.

⁵⁰ Kelly, *supra* n. 5, 136-37.

nonetheless conceded that rulers could not be compelled to obey the law, as he was unable to see a way in which the state could be made to enforce laws against itself.⁵¹

What Aquinas could not see as possible, however, was in this period put into effect: the English King was required (for a time) to submit to the authority of a constitution, the Magna Carta (Great Charter), in which he agreed to act only in accordance with the law.⁵² “The great gift to the Western world of law from the Magna Carta in 1214 was the notion that no person, including the sovereign, is above the law and that all persons shall be secure from the arbitrary exercise of the powers of government. The Magna Carta is the spiritual and legal ancestor of the concept of the Rule of Law.”⁵³

Although the Magna Carta is not a perfect embodiment of the rule of law,⁵⁴ and is sometimes criticized as a document that did more to secure baronial privileges than more universal equality,⁵⁵ it nonetheless represents an early and influential embodiment of many of the attributes of the rule of law – equality (for some), stability, and procedural protections. Many of the Magna Carta’s most important protections, including a bar on punishment “except by the lawful judgment of [one’s] peers [and] by the law of the land,” expressly applied to all “free men.”⁵⁶ The Charter also emphasized the need for care in adopting new laws that upset long established laws and customs, which had given rise to settled expectations.⁵⁷ Finally, to preserve the rights that it had granted, the Magna Carta protected the independence of courts, who were tasked with knowing and enforcing

⁵¹ Kelly, *supra* n. 5, 132.

⁵² Kelly, *supra* n. 5, 133.

⁵³ Justice Sandra Day O’Connor, “First Annual White Lecture,” Indiana University School of Law, Indianapolis, Indiana, April 2, 2002.

⁵⁴ For example, one of the Magna Carta’s least general provisions required “removal of all relatives of Gerard of Athee from the king’s bailiwicks.”

⁵⁵ Walker, *supra* n. 1, 97 (discussing but rejecting criticism).

⁵⁶ Walker, *supra* n. 1, 95-96.

⁵⁷ Helmholz, *supra* n. 49, 308.

the laws,⁵⁸ and acted, in part, as a constitution – i.e., as a “higher kind of law against which the legitimacy of later laws and statutes could be tested”⁵⁹

D. Seventeenth Century England and John Locke: Practical Instantiation and Theoretical Justification for the Rule of Law

For a time, social circumstances – the turmoil and violence of the Black Death, widespread warfare, and religious conflict – gave renewed strength to absolutism and led to the temporary eclipse of the rule of law.⁶⁰ Although in Continental Europe little could be done to check the absolute power of kings, the period did see the rule of law sustained in the ordinary practices of courts. Throughout Europe, the law was increasingly regularized, in large part by the continued incorporation of Roman law.⁶¹ In France, law and order was upheld by the *parlements* (courts), which purportedly – but probably not in actuality – could “give[] judgment even against the prince of the kingdom, and in such judgments . . . condemn the king himself.”⁶²

Even in this period, however, at least one state – England – eventually saw the rule of law given compelling practical effect in the court system. Throughout the period, English judges were expected to uniformly apply the country’s traditional customs – i.e., the common law. In the beginning of the seventeenth century, additionally, Chief Justice Coke asserted the power of the courts to decide legal questions even against the will of the government, with the common law “control[ling] Acts of Parliament, and sometimes [judging] them to be utterly void.”⁶³ Having held courts entitled to this power, Coke protected their independence by rebuffing attempts by the king to inquire into the

⁵⁸ Helmholz, *supra* n. 49, 309, 345-46.

⁵⁹ Walker, *supra* n. 1, 96.

⁶⁰ Kelly, *supra* n. 5, 173-79.

⁶¹ Kelly, *supra* n. 5, 179-81.

⁶² Kelly, *supra* n. 5, 177.

⁶³ Kelly, *supra* n. 5, 223; Allan C. Hutchinson and Patrick Monahan, *Democracy and the Rule of Law*, in *The Rule of Law: Ideal or Ideology* 102 (Hutchinson & Monahan, eds., 1987).

attitudes of judges prior to court proceedings.⁶⁴ Although Coke himself was ultimately dismissed, the Act of Settlement of 1701 ultimately protected judges from dismissal at the king's whim.⁶⁵ Coke's rulings in support of the independence of the courts were accompanied by his collection of English common law into a "disciplined and workable body of learning," and his fostering the independence of the bar, both of which afforded a stronger foundation for the independence of the judiciary.⁶⁶

England also saw the rule of law given political effect. Parliament secured the King's consent to the Petition of Right, which required the king to govern according to the laws of the realm, barred the application of martial law to civilians, and eliminated the king's power of arbitrary arrest without breach of a specific provision of the criminal law.⁶⁷ Towards the middle of the century, the move to abolish the Star Chamber centered on the charge that its judges had acted outside the law, having "undertaken to punish where no law doth warrant, and make decrees for things, having no such authority, and to inflict heavier punishments than by any law is warranted."⁶⁸ Similarly, the English Bill of Rights of 1688 justified the replacement of James II as king of England by William of Orange on the grounds that James II had "endeavored to subvert . . . the laws and liberties of this Kingdom" by various acts "utterly and directly contrary to the known laws and statutes and freedom of this realm."⁶⁹ To prevent the same from recurring, the Bill of

⁶⁴ Walker, *supra* n. 1, 114.

⁶⁵ Hutchinson and Monahan, *supra* n. 61, 103.

⁶⁶ Walker, *supra* n. 1, 106, 114.

⁶⁷ Hutchinson and Monahan, *supra* n. 61, 102-03.

⁶⁸ Kelly, *supra* n. 5, 233.

⁶⁹ Kelly, *supra* n. 5, 233-34.

Rights required the new King to rule through Parliament⁷⁰ and, like the Magna Carta, served in much the same role as a binding constitution.⁷¹

As the rule of law gained practical strength, moreover, it was given both a clear exposition and theoretical justification by John Locke. Describing the rule of law, Locke insisted that:

Whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known by the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws And all this to be directed to no other end but the peace, safety, and public good of the people.⁷²

Locke's theoretical defense of the rule of law was premised on the idea that a government's legitimacy depended upon popular consent. According to Locke, without consent, "the law could not have that which is absolutely necessary to its being a law, the consent of society, over whom nobody can have power to make laws but by their own consent and by authority received by them."⁷³ Because individuals would not consent to a government that would not offer them security, and a government ruling by arbitrary decrees would not offer such security, Locke concluded that a legitimate government must "dispense justice and decide the rights of the subject by promulgated standing laws" ⁷⁴ Similarly, because individuals would not consent to the interpretation of those laws by interested parties, Locke concluded that the rule of law required "known authorized judges."⁷⁵ Finally, given the necessity of popular consent, the legislature was

⁷⁰ Hutchinson and Monahan, *supra* n. 61, 103.

⁷¹ Hutchinson and Monahan, *supra* n. 61, 103.

⁷² John Locke, *Two Treatises of Civil Government*, Book Two, Chapter 9, Section 131.

⁷³ Locke, *supra* n. 70, Book Two, Chapter 11, Section 134.

⁷⁴ Locke, *supra* n. 70, Book Two, Chapter 11, Section 136.

⁷⁵ Locke, *supra* n. 70, Book Two, Chapter 11, Section 136.

not only bound to advance the common good (not having been granted the power to work against it), but could be replaced if it failed to perform its side of the bargain.⁷⁶

E. Bulwarks of the Rule of Law: Constitutions, Separation of Power, and Judicial Review

By the eighteenth century, contemporary thinkers universally dismissed arbitrary and uncontrolled despotism in favor of the idea that “the best form of government is one in which the individual is subject to known and clearly expressed laws.”⁷⁷ This trend was reflected, at least in England and America, by a continued movement towards general laws of universal applicability. In England, Blackstone asserted that the government was in no way outside the law, and that “the principal duty of the king[] is to govern his people according to law.”⁷⁸ In America, in turn, the House of Representatives was barred from making any law “which will not have its full operation on themselves and their friends, as well as on the great mass of the society.”⁷⁹ The government of pre-revolutionary France, by contrast, was criticized for regularly bending, if not breaking the law. As a result, French litigants lost respect for the law and argued “that established rules might be departed from in their case as seriously and as earnestly as if they had been insisting on the honest execution of the law”⁸⁰

Generality was accompanied by certainty. The Federalist Papers thus criticized the idea that that the legislature could reverse the result of a judicial decision in a particular case, undermining certainty, even if it had the power to prospectively proscribe

⁷⁶ Locke, Book Two, Chapter 13, Section 149; Orts, *supra* n. 19, 88.

⁷⁷ Kelly, *supra* n. 5, 282 (quotation and citation omitted).

⁷⁸ Kelly, *supra* n. 5, 282. Prussia went even further, allowing the ruler to be sued and providing that “such disputes were to be decided in accordance with the law, and by the ordinary courts.” *Id.*, 283.

⁷⁹ Federalist Papers, no. 57.

⁸⁰ Kelly, *supra* n. 5, 283 (quoting Tocqueville).

a new rule for future cases.⁸¹ Similarly, Montesquieu argued that, in a republic, “it is the nature of the constitution for judges to follow the letter of the law.”⁸² Certainty, in turn, went hand-in-hand with clarity, and Voltaire concisely held that “the whole of the law should be clear, uniform and precise.”

More generally, the eighteenth century saw the development of three institutions often considered vital to the rule of law: written constitutions; the separation of powers; and judicial review.⁸³

Reflected most prominently at the time by the newly formed United States and revolutionary France, written constitutions were intended, and have since been used, to anchor “the structures of liberty in a written charter with the force of law.”⁸⁴ Such charters typically gave great weight to the structure of laws – e.g., in the American constitution, requiring laws to be knowable (thus barring ex post facto laws and laws impairing contracts) and ensuring adequate legal procedures (due process), and, in the revolutionary French constitution, by guaranteeing equal treatment under the laws.⁸⁵

The principle of the separation of powers was given its classic formulation by Montesquieu, who concluded that the protection of political liberty required the separation of legislative, executive, and judicial power:

When the legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

⁸¹ Federalist Papers, No. 81.

⁸² Montesquieu, *The Spirit of the Laws*, Book Six, Chapter 3.

⁸³ Although important, however, at least two of these institutions – a traditional written constitution and judicial review – are not held in common by all countries governed by the rule of law. The British Constitution does not take the form of a single document, and not all European countries recognize the concept of judicial review.

⁸⁴ Kelly, *supra* n. 5, p. 277.

⁸⁵ Kelly, *supra* n. 5, p. 291.

Nor is there liberty if the power of judging is not separate from the legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.⁸⁶

In practice, one way in which the separation of powers was given effect was a bar on bills of attainder, which would have allowed conviction and condemnation of individuals by the legislature without the involvement of a court.

Finally, although not given effect until the United States Supreme Court's 1803 decision in Marbury v. Madison, the eighteenth century saw the strengthening of the idea of judicial review. Asserting that acts of the legislature that violated the Constitution were unlawful (as exceeding the authority delegated the legislature by the people), Hamilton defended the power of courts to keep the legislature within the bounds of its authority in much the same words later used by Chief Justice Marshall: "The interpretation of the laws is the proper and peculiar province of the courts."⁸⁷

Most of the nineteenth century marked an ebb tide in the development of the ideas of the rule of law.⁸⁸ At the end of the century, however, the doctrine was given a contemporary formulation – and the phrase itself, "the rule of law," popularized – by A.V. Dicey, who understood it to embody three concepts: the supremacy of law over arbitrary power; the universal application of law by the courts; and the derivation of rights from the ordinary law of the land, rather than from a written constitution.⁸⁹

⁸⁶ Montesquieu, *supra* n. 81, Book Eleven, Chapter 6; Gerhard Casper, "An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211; 214 (1989).

⁸⁷ Federalist Papers, No. 78. Marshall's formulation emphasized the legitimacy of the court's role in interpreting the laws, but removed the implication that only the court served such a role: "[I]t is, emphatically, the province of the judicial department to say what the law is."

⁸⁸ Walker, *supra* n. 1, 128.

⁸⁹ Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 Geo. Wash. L. Rev. 149, 151 (1987); Hutchinson and Monahan, *supra* n. 61, 105; Solum, *supra* n. 1, 122; Orts, *supra* n. 19, 79.

Although the first two prongs of Dicey's formulation are well-established, its third has found less universal favor – particularly because it would deny the status of “rule of law” to American government, in which the judiciary is granted the power to reject duly enacted legislation as contrary to the written Constitution.⁹⁰ The parochialism of Dickey's expressly Anglo-centric definition may seem obvious in hindsight. Less obvious is whether modern formulations of the idea share a similarly blinkered view of what does and does not constitute the rule of law.

F. Modern Developments of the Rule of Law

If the seventeenth century was marked by Locke's idea that society must be governed by known laws interpreted by an impartial judiciary in order to retain the popular consent that legitimated the government, and the eighteenth and early nineteenth century by the tools to put Locke's idea into action (written constitutions, separation of powers, and judicial review), the twentieth century saw two major, but not entirely compatible, developments in the idea of the rule of law: On the one hand, a growing sense of the importance of law's procedural legitimacy, and, on the other, an increasing awareness of the moral element of the rule of law.

Although previous accounts of the rule of law had acknowledged the importance of certain ‘structural’ features of laws, it was argued at times in the twentieth century that an adequate account of the rule of law could be given in entirely structural terms. In the middle of the twentieth century, Friedrich Hayek argued that the basis of the rule of law was the proposition that “government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's

⁹⁰ Ortz, *supra* n. 19, 79.

individual affairs on the basis of this knowledge.”⁹¹ At approximately the same time, Lon Fuller presented a somewhat more detailed account of the structural requirements of law, holding that laws must be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced as promulgated.⁹² Fuller argued that a legal system satisfying these criteria would not degenerate into a truly monstrous tyranny like Nazi Germany, while acknowledging that structurally sound laws might nonetheless be somewhat unjust.⁹³ At least on their face, these structural accounts excluded certain ideas from the concept of the “rule of law” that had been intimately tied up with it as a historical matter: e.g., the argument that the purpose of law is to advance the common good, and the connection drawn between the legitimacy of laws and popular consent.

In time, the existence of unjust laws – and, in particular, of unjust states (Nazi Germany, apartheid South Africa) – posed a challenge to the purely structural conception of the rule of law, and seemed to necessitate the introduction of an expressly moral element. Shortly after the Second World War, Gustav Radbruch, a German, argued that even a properly enacted “law” does not qualify as a law if it is extremely unjust, or if the avowed purpose of the law is an inequitable one.⁹⁴ More modern accounts of the rule of law have also emphasized its moral element. On Ronald Dworkin’s account, judges are required not only to demonstrate that their decisions have a plausible connection with society’s legal history, but also to seek “substantive justice” – i.e., rights that a just state

⁹¹ Hutchinson and Monahan, *supra* n. 70, 106 (quoting Friedrich Hayek, *The Road to Serfdom* (1946), p. 54); Steven J. Burton, *Particularism, Discretion, and the Rule of Law*, in *The Rule of Law*, Ian Shapiro, ed. (1994), 180 (same)

⁹² Burton, *supra* n. 90, 180 (citing Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969), 33-94); Randall Peerenboom, “Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China,” 23 *Mich. J. Int’l L.* 471, 472 (2002).

⁹³ Robert P. George, “Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition,” 46 *Am. J. Juris.* 249, 250-51 (2001).

⁹⁴ Alexy, *supra* n. 3, _.

would establish and enforce.⁹⁵ “Dworkin’s . . . theory equates the Rule of Law with the consistent application of sound principles of political morality reflected in authoritative legal materials.”⁹⁶ Frank Michelman, in turn, demonstrates a concern with the moral legitimacy of laws when he argues that “laws” must be such as to command, or at least to be capable of commanding, universal assent.⁹⁷

III. The Impact of Rule of Law in Economic Growth and Social Development.

Having explored the nature and history of the rule of law, we must determine whether reforms designed to promote the rule of law have had a positive impact and whether such reforms should continue to be a primary goal of the American Bar Association. The prevailing mood among rule of law reformers is disappointment.⁹⁸ Despite significant investments, successful reform efforts have been limited. Although reform efforts have borne considerable fruits in certain regions and places, the movement’s overall accomplishments are modest. Recent empirical scholarship, however, suggests that rule of law factors are positively and significantly associated with economic growth and social stability.⁹⁹ Moreover, rule of law reforms appear to play an integral part in promoting democracy and protecting civil and human rights.

⁹⁵ Burton, *supra* n. 90, 180.

⁹⁶ Richard H. Fallon, “The Rule of Law as a Concept in Constitutional Discourse,” 97 Colum. L. Rev. 1, 22 (1997).

⁹⁷ Fallon, *supra* n. 95, 23.

⁹⁸ See Bryant G. Garth, *Building Strong & Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results* at 2 & n.4 (unpublished manuscript) (collecting articles that describing the prevailing mood of rule of law reformers)

⁹⁹ See, e.g., Katharina Pistor et al., *Law and Finance in Transition Economies*, Harvard Center for Int’l Dev. Working Paper No. 49 at 1 (2000) (describing evolution from the conclusion in the early 1990s that law was of secondary importance to the conclusion, in the late 1990s, that law was an important determination of stock market development and the banking sector). See generally Garth, *supra* note 98, at 4-5 & nn.9-10 (describing the current consensus among economists and political scientists that rule of law reforms are necessary for development).

Scholars from a variety of disciplines have attempted to explain the gap between the predicted results of rule of law reforms and their actual impact on economic and political development. They have offered sophisticated critiques, both of particular programs and rule of law initiatives as a whole. This Part offers a brief, critical analysis of recent empirical work suggesting that the rule of law plays an important part in economic development, and it explains the prevailing consensus that rule of law reforms promote democracy and protect human rights. It then explores some of the scholarly critiques and responses to those critiques. Finally, it distills from the academic debate, and from testimony before the ABA Task Force on Goal VIII, lessons that might be used to guide the ABA's future efforts.

A. Empirical Analysis of Rule of Law Reforms and Economic Development

Recent empirical studies suggest that rule of law is a significant, positive factor in economic growth. Like most empirical studies, the findings are nuanced and debatable, but they suggest that certain legal rules and institutions are positively correlated with economic growth and social stability.¹⁰⁰ None of these studies is unassailable, however. Each attempts to quantify rule of law variables, and the resulting imprecision lessens the practical force of each study's conclusions. In addition, the process of selecting variables inevitably limits the role of variables that are not easily quantified. Nonetheless, these studies focus valuable attention on the role that rule of law plays in economic development.

¹⁰⁰ See, e.g., Robert Cooter, "Can Lawyers Say Anything About Economic Growth?" *Comment on Frank Cross's Economic Growth*, 80 TEX. L. REV. 1777, 1789 (2002) (discussing the empirical support justifying the new consensus that emphasis on rule of the law and institutional reform is a fundamental part of development and transition efforts).

Perhaps the most ambitious empirical analysis is the recent World Bank study designed to examine the impacts on growth from variables associated with rule of law. The study covered more than 3800 enterprises in 73 countries, and its variables included: (1) processes for making and changing legal rules, (2) whether changes in government create extraordinary policy changes, (3) security of persons and property, (4) the predictability of judicial enforcement, and (5) corruption.¹⁰¹ Its conclusions were striking. The aggregate rule of law measure significantly correlated with economic growth and the sub-factor most closely associated with rule of law issues, predictability of judicial enforcement, was the most robust measure of economic growth.¹⁰²

A similar study, which disaggregated an economic freedom index created by the Fraser Institute in Canada and the Heritage Foundation in Washington, D.C., found that “institutional market frameworks,” which include “property rights, the rule of law, contract viability, and guaranteed political liberties,” were strongly associated with growth.¹⁰³ These factors outweighed other factors important to those foundations, such as limited government.

Other studies have focused on more limited sets of countries or economic sectors, but they have reached similar conclusions. For instance, a 2000 study of transition economies in Central and Eastern Europe concluded that after controlling for other factors, legal effectiveness had a large, positive impact on market capitalization.¹⁰⁴ By

¹⁰¹ Aymo Brunetti et al., *Credibility of Rules and Economic Growth: Evidence from a Worldwide Survey of the Private Sector* at 2-3 (1997), available at <http://www.unibas.ch/wwz/wifor/staff/bw/survey/wberdef.pdf>.

¹⁰² *Id.* at 25-26.

¹⁰³ Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1768 & n.219 (2002) (citing Martin Leschke, *Constitutional Choice and Prosperity: A Factor Analysis*, 11 CONST. POL. ECON. 265, 277 (2000)).

¹⁰⁴ Pistor, et al., *supra* note 99, at 18. This study also vividly demonstrated the crucial role that implementation plays in Rule of Law reforms. It noted the pathbreaking work of Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, which demonstrated that effective law

way of example, “the difference between Russia’s and Poland’s rating for *rule of law* . . . would be sufficient to explain a 20 percentage point difference in market capitalization.”¹⁰⁵ An equally large effect was reported for availability of private credit.¹⁰⁶ An in-depth study of six East Asian economies (China, India, Malaysia, Japan, Korea, and Taiwan) over a 35-year period yielded the same results. The authors concluded that legal changes, primarily associated with adoption of Western legal concepts and Western-style, rule-based market systems had played an important role in these nations’ significant economic growth.¹⁰⁷

These analyses, while useful, are open to attack. For example, the Pistor and Wellons study has been criticized for missing important cultural and historical variables and offering too glib a conclusion regarding the role that law played in the economic development in the six countries studied. A representative comment comes from an Indonesian scholar, who notes that Pistor & Wellons “provide useful insights” but they “pay relatively scant attention to the social and cultural issues involved in legal development” and “by not considering the impact of social and cultural factors, the stud[y] may be inadvertently overstating the rate of progress in the growth of legal and corporate governance systems in these countries, while understating the actual problems faced by development initiatives and the time required to implement them.”¹⁰⁸ More

enforcement is not a substitute for poor laws. *Id.* at 21. It also confirmed that the reverse is true: Good laws were ineffective without good enforcement. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 19.

¹⁰⁷ See Katharina Pistor & Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (1999). Garth notes strong interest in this study. Garth, *supra* note 98, at 7 n.17. As discussed below however, this study has been heavily criticized.

¹⁰⁸ See Benny S. Tabalujan, *Why Indonesian Corporate Governance Failed—Conjectures Concerning Legal Culture*, 15 COLUM. J. ASIAN L. 141 (2002).

generally, Thomas Carothers has explained that the link between economic development and rule of law “is by no means as clear-cut as many might hope.”¹⁰⁹

The same is true of the link between rule of law reforms and foreign investment. Some have hypothesized that rule of law reforms are significant factors in development because they play a strong role in attracting foreign investment. Foreign investors typically demand a transparent and predictable legal system that features procedural fairness, enforcement of contracts, and protection of property rights. Foreign investors have pressed governments to improve their rule of law protections not only by adopting national reforms but also by joining multilateral conventions such as those covering dispute resolution and enforcement of intellectual property rights. On the other hand, others have stated that although this hypothesis has “undeniable common sense appeal,” foreign investors have not shown a reluctance to invest in countries such as China, which is “notorious for its lack of Western-style rule of law,” and a recent study involving post-communist countries concluded that “[w]eak rule of law is not a major factor in determining investment flows.”¹¹⁰

In sum, several empirical studies suggest that the rule of law measures are significantly correlated with economic growth, and anecdotal evidence suggests that rule of law reforms are important in attracting foreign investment. The apparent link between rule of law and economic development offers a hopeful starting point, but, unsurprisingly, the apparent link is not unassailable. Legal scholars and reformers responsible for implementing rule of law reforms have raised serious concerns about the

¹⁰⁹ Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge, Democracy & Rule of Law Project Working Paper, No. 34*, at 7 (Jan. 2003).

¹¹⁰ *Id.* at 6 (citing John Hewko, “Foreign Direct Investment: Does the Rule of Law Matter?,” Carnegie Endowment Working Paper no. 26 (2002)).

validity of the link and, more generally, to the prevailing wisdom that guides many reformers' efforts. Their criticisms are examined in more detail below, in Section IV.C.

B. The Rule of Law in Promoting Democracy and Protecting Human Rights

Although law has occasionally been used as an instrument of oppression, it is a truism that "neither human rights nor democracy can possibly flourish in a situation where civil society is repressed and there is no real rule of law."¹¹¹ Relatively few organizations have attempted to measure the impact of rule of law reforms on democratic development and human rights protection. A possible exception is Freedom House's *Nations in Transit* reports. For example, *Nations in Transit 2002* examines a series of questions related to democratization, the rule of law, and economic liberalization for 27 countries in Central and Eastern Europe and Eurasia.¹¹² The report does not, however, explicitly link rule of law reforms to democratic development.

More generally, reformers have often cited the inexorable link between rule of law and democratization. For instance, Richard Goldstone, former Chief Prosecutor for the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda, and Justice of the Constitutional Court of South Africa, opened a 1996 address to the Stanford Law School by stating: "There is no element of a democratic and open society more essential to its well-being than the rule of law. This, more than all else is the dividing line between freedom and despotism which has taken some of its most sophisticated forms of repressive cruelty in this century."¹¹³ Similarly, a noted law professor and former U.S.

¹¹¹ *Democratization and International Law*, 88 Am. Soc. Int'l L. Proc. 197, 204 (1994) (remarks of Holly Burkhalter, Director of Advocacy and Washington Director for Human Rights Watch, at a panel chaired by Thomas Carothers, Democracy and Rule of Law Project, Carnegie Endowment for International Peace).

¹¹² Adrian Karatnycky, *Nations in Transit 2002: A Mixed Picture of Change*, in *NATIONS IN TRANSIT* 15, 15 (2003).

¹¹³ Richard Goldstone, *Assessing the Work of the United Nations War Crimes Tribunals*, 33 *STAN. J. INT'L L.* 1, 1 (1997).

Secretary of State for Democracy, Human Rights and Labor, has stated that “[g]enuine democracy requires not just elections,” but also a host of other prerequisites including “the rule of law, characterized by vibrant political institutions, constitutionalism and an independent judiciary”¹¹⁴ Indeed, as mentioned at the outset of this Paper, popular consent and respect for basic human rights are thought to be necessary components of rule of law.¹¹⁵

Moreover, rule of law reforms, democratic reforms, protection of human rights, and economic development can form a “virtuous cycle” whereby progress on one of the components promotes progress on the others. Nobel Laureate Amartya Sen has explored this process in depth. For example, he has shown that “elections and a free press give leaders in poor countries incentives to avert famines.”¹¹⁶ A recent report from the UN Development Program builds upon his work, and it concludes that “the move toward democracy can trigger a ‘virtuous cycle of development,’ as newly empowered people push for policies that expand opportunities and check government corruption and distorted budget priorities.”¹¹⁷ Counter examples are, of course, possible. Professor Amy Chua recounts that democratization and marketization efforts that fail to take cultural and ethnic limitations into account have led to backlash and even genocidal attacks on ethnic minorities.¹¹⁸ Similarly, Thomas Carothers has noted the complex relationship between rule of law reforms and democracy and has concluded that “the idea that specific

¹¹⁴ Harold Honju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 325-26 (2002).

¹¹⁵ See *supra* pp. 14-15 (discussing Locke’s conception of popular consent); *id.* pp. 19-20 (discussing trend toward international conceptions of basic human rights).

¹¹⁶ G. John Ikenberry, book review of *Human Development Report 2002*, in FOREIGN AFFAIRS, Nov/Dec. 2002.

¹¹⁷ *Id.*

¹¹⁸ See Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 Harv. Int’l L.J. 287, 290, 346-47 (2000).

improvements in the rule of law are necessary to achieve democracy is dangerously simplistic.”¹¹⁹ On balance, however, it seems safe to conclude that rule of law reforms play a vital role in fostering democratic values and protecting human rights.

C. Scholarly Criticism of Rule of Law Reforms

Since 1989, rule of law initiatives have generated a dizzying array of programs sponsored by government agencies, non-governmental organizations, academic institutions, jurists, the legal academy, and the private bar.¹²⁰ These activities, although largely uncoordinated, reflect the now-established consensus that reform of law and legal institutions is a critical part of all development strategies. As Bryant G. Garth, Director of the American Bar Foundation, has noted, “[j]udicial reform is at the heart of today’s foreign aid programs.”¹²¹ Neither this nor a decade of reform efforts, however, has yielded the hoped-for progress.

Scholars from a variety of disciplines and viewpoints have offered possible explanations for reformers’ limited successes. Although the categories overlap, it is useful to divide their analyses into two camps: (1) those focused primarily on economic development; and (2) those focused primarily on democratic values and human rights.¹²² The first group, which includes a sizeable faction with a predisposition to non-governmental solutions, has suggested that rule of law initiatives have failed adequately

¹¹⁹ Carothers, *supra* note 109, at 7.

¹²⁰ See generally Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 184-212 (1999) (describing the stunning volume of Rule of Law activities of U.S. Federal agencies, large private foundations, universities, judges, and practitioners).

¹²¹ Bryant G. Garth, *supra* note 98, at 1-2.

¹²² Garth offers a similar, but separate, characterization of these two schools as: (1) those concerned with “economic or business imperatives;” and (2) “the emancipatory pillar,” concerned primarily with human rights, civil liberties, and environmental protection. *Id.* at 6-7. Carothers uses a similar taxonomy when describing the two contestable axioms of rule of law reformers: “The rule of law is necessary for economic development and necessary for democracy.” Carothers, *supra* note 109, at 6.

to understand existing, and often informal, economic structures and institutions. They argue that national law often provide a small, and sometimes irrelevant, portion of the property protection and dispute resolution services necessary to spur economic development and to attract investment.¹²³ Their views are grounded, in part, in the growing literature regarding “private-ordering.” A second group suggests that rule of law reformers have had limited success in their initiatives to promote democracy and human rights because they have acted in a culturally naïve manner: Reformers failed to understand fully the cultural limits on transplanted laws and the need to take account of local skepticism, cultural practices, and political barriers to reform.¹²⁴ Thus, reforms have failed to penetrate deeply enough to take root.¹²⁵ And, in some cases, “reforms” may have strengthened, inadvertently, ineffective or corrupt legal systems. Both sets of critiques have merit, but both are open to serious counterargument.

1. Rule of Law Reforms and Economic Development.

A subset of legal scholars has questioned whether rule of law reforms have gone astray by focusing too narrowly on governmental institutions. As one noted reformer explained:

Clearly law is not just the sum of courts, legislatures, police, prosecutors, and other formal institutions with some direct connection to law. Law is also a normative system that resides in the minds of the citizens of a society. As rule-of-law providers seek to affect the rule of law in a country, it is not clear that they

¹²³ Michael Heller, An Immodest Postscript at 1, 23-27 (2003) (unpublished manuscript).

¹²⁴ deLisle, *supra* note 120, at 255-274 (discussing reformers procedural mistakes); *id.* at 274-301 (discussing the need to address substantive incompatibilities between U.S. law and the law of countries in which the U.S. seeks to enact reform); Garth, *supra* note 98, at 18-20 (hypothesizing that elites have used reform movements to preserve their power and elite status and have avoided reforms that threaten their power base).

¹²⁵ Testimony of Thomas Carothers, Senior Associate, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, Before the Task Force on Association Goal VIII Meeting, Washington D.C. at 5 (Dec. 13, 2002); Heller, *supra* note 123 at 15.

should focus on institution-building or instead try to intervene in ways that would affect how citizens understand, use, and value law.¹²⁶

This sentiment is buttressed by research into “private ordering,” which has revealed that group-enforced social norms play a powerful role in resolving disputes and protecting property and personal rights in many countries. These norms are most commonly enforced outside of formal government institutions, through interaction of tight knit groups, such as those based on familial and ethnic ties.¹²⁷ Thus, two questions arise: (1) does the role of informal norms cast doubt on reformers’ attempt to build legal institutions?; and (2) should reform efforts seek to harness existing social norms to promote economic growth? This Section briefly introduces this social norms literature and then explores possible answers to these questions.

Private ordering scholarship is of relatively recent vintage. Its origin is often traced to Stewart Macaulay’s analysis of informal relationships and agreements in the business world.¹²⁸ The field blossomed in the 1990s, producing a significant library of scholarship, including several well-regarded empirical works, all of which demonstrated that extra-legal rules have a significant impact in the business world and that informal institutions can play a strong role in commercial and non-commercial conduct.

Numerous legal academics have asserted that “over a wide range of human activity, informal norms provide efficient and effective mechanisms to govern conduct,”¹²⁹ and

¹²⁶ Carothers, *supra* note 109, at 8.

¹²⁷ For example, Professor Chua notes that “although Chinese affluence in Southeast Asia is well known, the persistence and extent of their economic power is startling,” and she also notes that other ethnic minority groups, such as Vietnamese in Cambodia, Tamils in Sri Lanka, the Indians in Burma, appear to have used ethnic ties to establish credit and trust necessary for larger scale development. See Amy L. Chua, *Markets, Democracy, and Ethnicity*, 108 YALE L.J. 1, 22-25 (1998).

¹²⁸ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

¹²⁹ Curtis Milhaupt and Mark West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. Chi. L. Rev. 41, 43 (2000); see also ROBERT C. ELLICKSON, ORDER

have argued that there “are many informal substitutes for the legal enforcement and protection of property and contract rights.”¹³⁰

Thus, several social norms scholars would answer the first question—whether informal norms cast doubt on the usefulness of rule of law reforms—affirmatively.¹³¹ For example, one scholar who examined rule of law reforms in Russia stated that “the case for state enforcement of contracts may be overplayed.”¹³² Others have suggested that a shift to formal legal rules will displace functioning enforcement mechanisms and have concluded that “the informal mechanisms which businesses use can be just as effective in supporting economic development as some formal systems.”¹³³

Private enforcement regimes suffer from a variety of limitations and pathologies, however, which suggest limits to their ability to substitute for legal institutions. For

WITHOUT LAW 280-83 (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115, 157 (1992) (arguing that norm-based dispute resolution among diamond traders is more efficient than legal resolution of disputes); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001) (same for cotton industry).

¹³⁰ Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 2 (1998). Cross cites Posner and others as commentators who argue not only that extralegal norms complement legal protection for property, but also that “private substitutes can take the place of legal arrangements and create the climate that enables economic growth.” Cross, *supra* note 103, at 1744.

¹³¹ Cross, *supra* note 103, at 1743-44; see also ELLICKSON, *supra* note 129, at 138 (criticizing “legal centralism,” in which government and formal laws are “the chief sources of rules and enforcement efforts”). As discussed in detail below, however, private ordering has significant pathologies of its own. See *infra*. See generally Milhaupt & West, *supra* note 129, at ___ (explaining that activities of organized criminal groups in Japan closely track the inefficiencies in formal legal structures, including inefficient substantive laws and the state-induced shortage of legal professionals).

¹³² Timothy Frye, *Contracting in the Shadow of the State: Private Arbitration Commissions in Russia*, in THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA 123, 123 (J.D. Sachs & Katherina Pistor, eds., 1997).

¹³³ Amanda J. Perry, *International Economic Organizations and the Modern Law and Development Movement*, in MAKING DEVELOPMENT WORK 19, 28 (Ann Seidman, et al., eds., 1999). Professors Robert Cooter and Jonathan Macey argued that in some instances, a shift to formal legal rules would be disruptive and counterproductive. See Robert O. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT’L REV. L. & ECON. 215, ___ (1994) (examining land tenure in Papua New Guinea); Jonathan R. Macey, *Public and Private Ordering and the Protection of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1140 (1997) (concluding that private ordering can produce rules that are superior to those created by law). Other theorists have gone further, claiming that formal law displaces beneficial private enforcement arrangements and creates incentives for entrepreneurs to engage in wasteful rent-seeking. See Cross, *supra* note 103, at 1745 (citing Bruce L. Benson, *Economic Freedom and the Evolution of Law*, 18 CATO J. 209, 229 (1998)).

example, effective extralegal norms are largely limited to “close-knit groups,” in which “individuals repeatedly interact, when they have a great deal of information about each other, and when small numbers characterize the group.”¹³⁴ Thus, even if the norms created by private ordering are efficient, their reach is limited, and they prevent “potentially mutually beneficial exchanges among a much larger network of trading partners” outside of the close-knit group.¹³⁵ Private ordering may therefore produce small, efficient markets of repeat players, but large-scale economic growth requires enforceable, impartial legal arrangements that facilitate long-term agreements between strangers, such as those required for large-scale borrowing and other capital investment.¹³⁶

Similarly, a breakdown in the relationship or the community that enforces agreements can render private ordering ineffective: When relationships are stable, informal arrangements work well, but these “mid-game norms” are inefficient during “endgame,” when relationships have broken down.¹³⁷ Accordingly, formal legal rules form a “structural legal ‘backstop’” that protects against the consequences of relationship termination and resulting opportunistic behavior.

¹³⁴ Cross, *supra* note 103, at 1747-48 (quoting DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 12 (1990)).

¹³⁵ *Id.* (quoting Kevin Davis, et al., *Ethnically Homogenous Commercial Elites in Developing Countries*, 32 LAW & POL’Y INT’L BUS. 331, 333 (2001)); see also Douglas C. North, *Institutions, Transaction Costs and Economic Growth*, 25 Econ. Inquiry 419, 420 (1987)) (explaining that efforts to expand the range of business partners entails considerable transactions costs, and these “costs of transacting . . . are the key obstacles that prevent economies and societies from realizing well-being.”).

¹³⁶ Cross, *supra* note 103, at 1749 (citing Young Lee & Patrick Meagher, *Misgovernance or Misperception? Law and Finance in Central Asia*, in ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES 133, 165-66 (Peter Murrell ed., 2001) (describing the need for formal legal arrangements in the Kyrgyz Republic and Kazakhstan despite heavy reliance on informal arrangements); see also Kathryn Hendley, et al., *Law Works in Russia: The Role of Law in Enterprise Transactions*, in ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES, *supra*, at 56, 82-85 (explaining that in Russia, law-related variables were more important than those related to the potential for long-term relationships)).

¹³⁷ Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996).

Private ordering also exhibits a “dark-side.”¹³⁸ It can produce norms that are efficient for small groups but harmful for society as a whole.¹³⁹ For example, private ordering will often produce a bias against new entrants, thereby squelching innovation and growth.¹⁴⁰ Like formal law, it can also produce institutions and norms that are neither fair nor efficient.¹⁴¹ One commentator, summing up the literature on private ordering’s downside, noted that private-order institutions “may rely on exclusionary entry barriers, which may be grounded on race, gender, ethnicity, or other characteristics; coordination among firms, which may yield collusive anticompetitive practices such as price-fixing; and graduated forms of coordinated sanctions, which may include physical violence and other forms of criminal activity.”¹⁴²

This latter problem—the link between gaps in legal institutions and organized criminal activity—has been explored extensively. For instance, a recent article about Japan shows that the structure and activities of organized criminal groups results from perceived inadequacies in law and legal institutions.¹⁴³ The article shows that the lack of formal legal remedies in a variety of substantive areas, such as bankruptcy, debt collection, land-lord tenant issues, shareholders’ rights, and enforcement of contractual and property rights, has given rise to criminal solutions.¹⁴⁴ The same dynamic has been

¹³⁸ Milhaupt & West, *supra* note 129, at 44.

¹³⁹ See ELLICKSON, *supra* note 129, at 249.

¹⁴⁰ Posner, *supra* note 130, at 3; see also ELLICKSON, *supra* note 117 (noting that numerous small, close-knit groups can produce “constant strife between neighboring groups”).

¹⁴¹ Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1678-94 (1996) (“[S]ocial norms sometimes fail to emerge when needed, or they emerge when not needed for fairness or efficiency.”); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1698, 1705-10 (1996).

¹⁴² Ellen D. Katz, *Private Order and Public Institutions*, 98 Mich. L. Rev. 2481, 2483 (2000).

¹⁴³ Milhaupt & West, *supra* note 129, at 42.

¹⁴⁴ *Id.* at 71.

chronicled in Russia, Bulgaria, and Latin America.¹⁴⁵ For those reasons, many rule of law reformers have answered the second question—whether to attempt to incorporate informal structures into legal institutions—negatively.¹⁴⁶

Competition for legal rules, however, is not limited to the nation state and private actors. In recent years, countries with “a history of unitary centralism” have shown a willingness to consider “domestic federalism” and other means of creating “decentralized, plural legal authorities.”¹⁴⁷ These reforms enhance the capacity for beneficial competition. Similarly, transnational institutions offer a potential method for spurring reform. Examples include the European Court of Justice, NAFTA, and the World Trade Organization.¹⁴⁸ Of course, the decisions of these institutions are often controversial, but they provide an institutional mechanism for competition that could help reformers to overcome inertia and resistance from those who control national legal institutions.¹⁴⁹ Moreover, membership in the WTO or the European Union is a large incentive that can help in shaping political will for reform.¹⁵⁰

In addition, some transnational bodies and rules have served as a substitute for national law by protecting property rights directly and also by providing redress for human rights and other violations. An example is the European Court of Human Rights. Other bodies, however, such as the International Covenant on Civil and Political Rights

¹⁴⁵ Cross, *supra* note 103, at 1751-52.

¹⁴⁶ Of course, the reformer must beware to avoid characterizing a legal system’s decision not to regulate in a particular field as a “pathology” or “inadequacy.” There remains debate as to what constitutes the “bright” and “dark” side of private ordering.

¹⁴⁷ Heller, *supra* note 123, at 23.

¹⁴⁸ *Id.* at 23 & n.42 (discussing the potential for transnational bodies to issue decisions that spur reforms).

¹⁴⁹ *Id.* at 24-25 (noting that the benefits of competition are well established in other portions of development theory and suggesting that competition could help rule of law reforms to overcome their difficulties in effectuating change).

¹⁵⁰ Testimony of Jerry Hyman, Director of the Bureau for Democracy, Conflict and Humanitarian Assistance, U.S. AID, Before the Task Force on Association Goal VIII Meeting, Washington D.C. (Dec. 13, 2002).

("ICCPR") Committee, have been less successful. Nonetheless, rule of law reformers are justified in targeting transnational bodies and rules as means to further their reform efforts. A full account of reformers' efforts to promote transnational rules and bodies is, however, beyond the scope of this White Paper.

In sum, critics of current reforms have exposed the fallacies that national law must be the sole, or even primary, method for creating rules that resolve disputes. They have demonstrated that extralegal rules and competition among rule makers can provide efficiencies that reformers fail to achieve. Reformers must keep in mind that the benefits of rule of law substitutes tend to arise in limited circumstances, and that private ordering in particular has a dark side that can create significant societal costs. Nonetheless, the mixed success of government-only strategies suggests that private, quasi-private, national, and international actors all have a potentially important role in successful economic development.

2. Cultural and Structural Limitations on Rule of Law Reforms

A second set of critics has suggested that past decade's rule of law reforms have repeated the mistakes of the Law and Development movement of the 1960s and 1970s.¹⁵¹ That movement aimed to replace the developing world's "localism, irregularity, and particularism with the unity, uniformity, and universality of the modern Western state."¹⁵² The results were to include a free market, liberal democratic institutions, and the rule of law.¹⁵³ Roughly ten years after its inception, however, the most prominent founders of

¹⁵¹ See, e.g., Chua, *supra* note 127, at 19-20.

¹⁵² See *id.* at 12-13 (describing history of Law and Development Movement).

¹⁵³ See *id.* at 12 n.42 (collecting sources). Chua, like other contemporary commentators on Rule of Law reforms, characterizes the Law and Development movement primarily through the works of David Trubek and Marc Galanter. See *id.* at 12 n.40 (citing Marc Galanter, *Modernization of Law*, in MODERNIZATION: THE DYNAMICS OF GROWTH 153, 154-55, 157 (Myron Weiner ed., 1966), and David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 9 (1972)).

the Law and Development movement rejected it as “ethnocentric and naïve,” and “imperial”¹⁵⁴ and by the mid-1970s, the movement had been “declared dead by its proponents.”¹⁵⁵

In the 1990s, rule of law reformers took pains to announce that they had learned from the failure of their predecessors.¹⁵⁶ Their efforts show sensitivity to the pitfalls of the past and a willingness to tailor the message and suggested reforms to the needs of the host country.¹⁵⁷ Critics, however, continue to accuse reformers of ignoring cultural factors that limit the effectiveness of reform.¹⁵⁸ These cultural factors include existing and historical governmental systems, the existing and historical economic systems, the ethnic and religious demographics of the country, and other traditions and social structures that influenced relationships between persons and groups.

Critics who emphasize cultural limitations criticize reform efforts, by stating that “theories based on the experience of Western countries may be inapplicable to societies with very different cultural traditions.”¹⁵⁹ And when the extensive reform efforts of the 1990s produced only modest gains, those critics produced complex analyses of the failures, with heavy emphasis on reformers’ inattention to cultural limitations. For instance, they noted the procedural and political mistakes made by reformers and the incompatibilities between U.S. culture and institutions and the culture and institutions of

¹⁵⁴ David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1070, 1080.

¹⁵⁵ Chua, *supra* note 127, at 13; Lan Cao, *Law and Economic Development: A New Beginning?*, 32 Tex. Int’l L.J. 545, 550 (1997); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829, 829 (2000) (“[The] Law and Development Movement ultimately fizzled.”).

¹⁵⁶ Chua, *supra* note 115, at 19-20 (accusing the new movement, like the original, of ignoring the ethnic conflict).

¹⁵⁷ deLisle, *supra* note 109, at 194-204 (explaining the complex web of programs put forward, in part, to encourage their broad and effective dissemination).

¹⁵⁸ Chua, *supra* note 115, at 20.

¹⁵⁹ Ginsburg, *supra* note 155, at 834.

the target country,¹⁶⁰ and they suggested that global and local political realities help to explain the limited effectiveness of reform efforts.¹⁶¹ In fact, some have suggested that culturally-insensitive reforms have had disastrous consequences. One influential scholar has blamed such reform movements for anti-market backlash, a rejection of democracy, and even genocidal attacks on ethnic minorities.¹⁶²

These criticisms are a necessary part of improving the effectiveness of reform efforts, but they should be viewed in context of genuine advances in the face of serious cultural barriers. For instance, with respect to economic growth, even in noncapitalist countries, marketplace transactions are “ubiquitous and irrepressible.”¹⁶³ These transactions, if outside of existing legal structures, are characterized as the “underground economy” or the “informal economy,” but their impact is substantial.¹⁶⁴ For instance, they account for 50% of the GDP in Russia and Ukraine and 62% in Georgia. The International Labor Organization has stated that informal economy generated 85% of new jobs in Latin America and the Caribbean.¹⁶⁵ As discussed above, these informal economies depend upon extralegal enforcement of property rights and contracts. Informality, however, can impose significant costs,¹⁶⁶ and the inability to raise money from capital markets and to protect innovations through intellectual property rights,

¹⁶⁰ See, e.g., deLisle, *supra* note 109, at 255-301; Garth, *supra* note 93, at 2 n.4 (collecting authority critical of the impacts from reform efforts).

¹⁶¹ Garth, *supra* note 93, at 10, 15-23.

¹⁶² Chua, *supra* note 108, at 290, 346-47 (2000).

¹⁶³ Cross, *supra* note 95, at 1755 (citing MANCUR OLSON, *POWER AND PROSPERITY* 173, 174, 180 (2000), and Christopher Clague et al., *Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance*, 4 J. ECON. GROWTH 185, 185 (1999)).

¹⁶⁴ *Id.*

¹⁶⁵ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 69 (2000).

¹⁶⁶ *Id.* at 84-85 (explaining that “operating outside the world of legal work and business was surprisingly expensive,” and offering an example from Peru, in which bribes and commissions consume 10-15% of annual income, and other costs arising from efforts to avoiding penalties, to operate from dispersed locations, and lack of credit).

prevents informal businesses from achieving economies of scale and from entering the official economy.¹⁶⁷

Moreover, the notion that cultural and ethnic strife limits the ability to promote democracy and human rights, is counteracted, at least in part, by data from the World Bank suggesting that rule of law reforms can mitigate the adverse economic consequences associated with “ethno-linguistic fractionalization.”¹⁶⁸ Also, an unpublished, but comprehensive, study found that “legal systems transcended ethnolinguistic divisions and had a powerful effect on growth even with the fractionalization controlled.”¹⁶⁹

More generally, some scholars have suggested that reforms associated with the rule of law have the opportunity to shape institutions and therefore “culture” in a manner than protects and enhances human rights. “Culture,” they argue, is a complicated phenomenon that demonstrates malleability and openness to reform.¹⁷⁰ Reformers must make sure that they are “familiar with the language, culture, laws and other conditions and traditions of recipient countries,”¹⁷¹ but these limitations are as much practical and political as they are cultural. It is crucial that reforms understand local political structures and economic motivations. Thus, effective institutional reform demands (1) a focus on constituencies that have interest and ability to encourage change, (2) knowledge of

¹⁶⁷ DE SOTO, *supra* note 165, at 84-85; *see also* Cross, *supra* note 103 (citing Daniel McGrory, *Civilizing the Russian Underground Economy: Requirements and Prospects for Establishing a Civil Economy in Russia*, 5 *Transnat'l L. & Contemp. Probs.* 65, 74 (1995)).

¹⁶⁸ *Id.* at 1761 (quoting William Easterly, *Can Institutions Resolve Ethnic Conflict?* World Bank Policy Research, Working paper 2482 (2000)).

¹⁶⁹ *Id.* at 1761-62 & n.181 (citing Thorsten Beck et al., *Law Politics, and Finance* 18-20 (Oct. 2001)).

¹⁷⁰ *See, e.g.*, AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 243 (1999) (stating that the “image of regional self-sufficiency in cultural matters is deeply misleading,” and explaining that “national traditions” often reflect past outside influences); *see also* ELLICKSON, *supra* note 129 at 154 (criticizing sociologists’ tendency to treat norms as though they were “exogenous givens”).

¹⁷¹ deLisle, *supra* note 120, at 267.

existing conditions and constraints, (3) a sustained commitment, and (4) selection of goals that fit well with existing institutions and are politically palatable.¹⁷² When reformers “focus[] on transmitting and fostering seemingly neutral and adaptable professional skills to lawmakers, law-drafters, judges, lawyers, regulators, enforcement officials, and local government functionaries,” they are more likely to succeed because they will have “addressed directly the needs and interests of key legal elites in recipient countries.”¹⁷³ In other words, successful reformers show respect for local law and are sensitive to professional and cultural realities. They should also have a broad understanding of comparative law so that they can draw on the legal system or systems that offers the solution for local needs.

It is, of course, simplistic to speak of cultural awareness in these terms. Reformers must beware of, and continually work against, their own cultural biases. First, there is a natural desire for reforming elites to want the most prestigious technology—in this case U.S. laws and legal systems—whether they will work or not. This tendency is exacerbated by the natural tendency to export what one understands best. Thus, American lawyers and entities will naturally design systems that incorporate elements of the system with which they are most familiar. As discussed in more detail below, the best solution is constant attention to these pressures, a conscious effort to consider and suggest alternatives, and exhaustive research into the local needs that motivate the reform and the best methods for satisfying those needs.

¹⁷² These are a restatement of the “process” lessons offered by Jacque deLisle, but they capture most of his “substantive” lessons as well. See deLisle, *supra* note 120, at 256-74.

¹⁷³ deLisle, *supra* note 120, at 293.

D. Next Steps.

The current climate for rule of law reforms offers a significant opportunity for the ABA's rule of law initiatives to refine and rededicate their efforts. The ABA and its members have already contributed substantially to the rule of law literature,¹⁷⁴ and to beneficial legal reforms.¹⁷⁵ There is growing recognition that academic research regarding rule of law issues requires additional legal expertise.¹⁷⁶ And development scholars appear to have reached consensus, backed by empirical support, that rule of law reforms are an important part of development. As discussed below, testimony before this Task Force has indicated several important reforms are especially well-suited to the ABA's expertise. By focusing on its areas of comparative advantage, the ABA can add legal rigor to ongoing reform efforts and perhaps promote effective rule of law reforms.

The critiques and counter-critiques discussed above, and the fact-finding efforts of this Task Force, can be distilled into a set of preliminary lessons:

¹⁷⁴ Professor Chua explains:

[T]here is . . . a growing body of work by lawyers and legal academics struggling with the issue of the transplantability of Western-style democratic and rule-of-law institutions in countries with vastly different histories and social structures. This work ranges from highly abstract treatments; to region-or country-specific studies of democracy's preconditions, optimal institutions, or effects; to "on-the-ground," village-to-village analyses of local governmental processes.

Chua, *supra* note 127, at 16-17 (footnotes omitted).

¹⁷⁵ For example, the ABA's Central European and Eurasian Law Initiative ("CEELI") has created programs to develop more competent and independent legal professions, to aid transitions to market economies, to improve the qualities of the criminal justice system, to foster independent and professional judiciaries. deLisle, *supra* note 120, at 189. Other ABA initiatives in support of Goal VIII include "technical assistance to nations in the Arab world that have pursued legal reforms," a "law and democracy program" for Cambodia to promote democracy, a market economy, and rule of law, and a broad initiative for Africa. *Id.* CEELI's success has spawned regional analogues: the ABA's Asia Law Initiative, Africa Law Initiative, and Latin American Law Initiative.

¹⁷⁶ To cite one example of the potential synergies between the ABA's efforts and other academic fields, an article in a recent symposium on Law and Economic Growth urged legal scholars to re-visit the study of how to structure law to best promote economic well-being, and it explained that lawyers' involvement is vital in a field dominated by economists because lawyers can ensure accuracy in the variables selected for study, can identify variables that economists or political scientists may overlook, and can generally broaden the scope of existing research. Cross, *supra* note 103, at 1773-75.

1. Functional Reform Is More Successful than Transplantation

Successful reform requires attention to the specific problems to be remedied. Rather than attempting to transplant foreign laws that may be useless in the target country, reformers are most effective when they identify and explore specific problems and help in creating a solution that relies on a combination of local expertise and foreign experience. To be effective, however, those reforms require individuals who can think and communicate abstract ideas in a practical manner. Thus, this model assumes an extended commitment by knowledgeable actors, integration into the local scene, and willingness to dispense advice judiciously.¹⁷⁷ Similarly, it de-emphasizes uncritical reliance on U.S. systems and experience, and it attempts to “indigenize” material to the extent possible without inadvertently reinforcing existing, negative features.¹⁷⁸ Finally, it recognizes that the rule of law serves a variety of complex functions that can be served through a variety of institutions.¹⁷⁹

Note, however, that the distinction between a functional solution and a transplanted one is difficult to make in advance.¹⁸⁰ Even reformers who believe themselves to be unbiased can be deeply beholden to their own predispositions. As discussed below, training and a long-term commitment can dull biases and make reform efforts more

¹⁷⁷ Testimony of Thomas Carothers, Senior Associate, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, Before the Task Force on Association Goal VIII Meeting, Washington D.C. at 5 (Dec. 13, 2002).

¹⁷⁸ Testimony of Jerry Hyman, *supra* note 150, at 13; *see also* Testimony of Carothers, *supra* note 165, at 4 (“What’s needed is to get [local reforms] to look at their own countries and systems and what would create a process of change that would work for them. The constant emphasis on U.S. law and process is misplaced.”); Heller, *supra* note 123, at 1,16-17 (noting that rule of law reforms sometimes reinforce an established legal order that is dysfunctional). Some features of rule of law reforms, such as short conferences, have been heavily criticized. Testimony of Carothers, *supra* note 165, at 5 (noting the local perception that short trips by American lawyers and judges are little more than tourist events); Interview with Brest and Heller at 2 (noting offense taken when reformers are seen as parachuting in with little local knowledge).

¹⁷⁹ Heller, *supra* note 123, at ____.

¹⁸⁰ E-mail comments of Bryant Garth at 1 (Mar. 12, 2003).

successful. Through exposure to alternative ideas and local needs, biases can be tempered. Ultimately, however, there is no easy method for ensuring that selected reforms are functional rather than inappropriate transplants.

2. Reformers Must Heed Political and Cultural Realities

Several commentators have noted that successful reformers match their idealism with realism. Reforms occur in a particular political and cultural context, and reformers who demand change without understanding local conditions are frequently unsuccessful.¹⁸¹ Reformers must recognize that key local actors will have a vested interest in the existing system.¹⁸² Thus, success requires patience, planning, and attention to strategically promising targets. For instance, Mexico is currently undergoing a significant decentralization of its government. That process offers an opportunity for influential guidance.¹⁸³

This need for realism is especially pronounced in situations involving ongoing conflict and post-conflict transition. In such situations, reformers must balance the elaborate protections of the criminal justice system against the need for broad-scale, basic justice and battlefield realities. If they fail to do so, they run the risk of becoming irrelevant.¹⁸⁴

¹⁸¹ See, e.g., Testimony of Hyman, *supra* note 150, at 13.

¹⁸² Testimony of Hyman, *supra* note 150, at 13 (explaining that the lack of reform is not based on a lack of technical skill, but rather on entrenched interests who will lose from reform); Heller, *supra* note 112, at 1, 21.

¹⁸³ Interview memorandum recounting discussions between Task Force Chairman William Neukom, Paul Brest of the Hewlett Foundation, and Thomas Heller of Stanford Law School, at 2 (Dec. 17, 2002).

¹⁸⁴ Testimony of Ruth Wedgewood, Director of International Law and Organization Program, the Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, Before the Task Force on Association Goal VIII Meeting, Washington D.C. at 9 (Dec. 13, 2002).

3. Successful Reform Requires Training and Commitment

Reform programs are frequently criticized for failing to provide adequate training and to assure a long-term commitment.¹⁸⁵ For instance, Thomas Carothers noted that volunteers typically have no background in rule of law development or in providing aid, and they have little idea of how to help foster change. These volunteers are given limited or no training and placed in a complex situation with only a year to be effective. The majority of that year is spent building the knowledge, contacts, and trust necessary to accomplish their goals, which drastically limits their effectiveness. Moreover, the need to manage untrained volunteers exhausts the resources of permanent staff.¹⁸⁶ Thus, reform efforts should—to the greatest extent possible—focus on providing sustained commitment and provide high quality materials, training, and support to volunteers and staff throughout the life of the project.¹⁸⁷ Similarly, rule of law advocates must be realistic about the pace of reforms and need for long-term arrangements.¹⁸⁸

There is tension between the need for expertise, cultural sensitivity, and commitment on the one hand and the ABA's extensive use of volunteers on the other. CEELI has used volunteers extensively and predominately effectively.¹⁸⁹ CEELI has demonstrated that the use of volunteers brings great benefits, including idealism and legitimacy. Volunteers are ineffective, however, unless they are carefully selected and unless they receive good training beforehand to ensure they have the requisite cultural

¹⁸⁵ Memorandum from Bryant Garth to Michael McGrath and Katy Englehart at 3 ¶ 10 (Nov. 19, 2002).

¹⁸⁶ Testimony of Carothers, *supra* note 165, at 4; *see also* Testimony of James Goldston, Executive Director, Open Society Institute, Before the Task Force on Association Goal VIII Meeting, Washington D.C. at 11 (Dec. 13, 2002) (explaining that training is crucial and decrying short-term visits without adequate preparation).

¹⁸⁷ Testimony of Carothers, *supra* note 165, at 3-4, 5-6. Interview with Brest and Heller, *supra* note 171.

¹⁸⁸ *See, e.g.*, Testimony of Wedgewood, *supra* note 172, at 8 (explaining that international organizations have failed to provide the long-term policing strategies necessary to give meaning to the rule of law).

¹⁸⁹ E-mail comments of David Tolbert at 2 (May 19, 2003).

sensitivity. Moreover, volunteers are most effective when supported by a trained professional and local staff. Thus, reformers must consider carefully the proper mix of volunteers and professional staff.

4. Reformers Must Find a Balance Between Coordination and Competition

The proliferation of uncoordinated rule of law programs is cause for concern. For instance, reformers have occasionally provided conflicting advice, which leads to confusion as to which reforms are important, opportunistic bargaining during which aid providers are played off against one another, and reforms that are internally inconsistent.¹⁹⁰ Coordination under a command center model, however, seems unrealistic and would likely be counterproductive.¹⁹¹ Ideally, local and foreign actors would agree on a general menu that could be used to avoid the most obvious duplication of efforts.¹⁹²

At the same time, competition among groups can be beneficial because it encourages improvement. Moreover, the need for most services is so great that duplication does not lead to as much waste as might be thought.¹⁹³ There appears to be general agreement, however, that jockeying for position, especially in post-conflict situations, is widespread and problematic.

5. Narrow and Deep Reforms Have Greater Long-Term Impact than Broad and Shallow Reforms

A frequent criticism is that even relatively successful reforms have had little impact at the local level and for the broader public.¹⁹⁴ Reformers have been most successful

¹⁹⁰ Testimony of Carothers, *supra* note 165, at 6.

¹⁹¹ Testimony of Wedgewood, *supra* note 172, at 7.

¹⁹² *Id.*; Testimony of James Hurlock, Chairman of the Board, International Development Law Organization, Before the Task Force on Association Goal VIII Meeting, Washington D.C. at 15 (Dec. 13, 2002) (explaining the need for a meeting between all actors doing work in that country to prioritize programs).

¹⁹³ Testimony of Hurlock, *supra* note 179, at 15.

¹⁹⁴ Interview with Heller and Breast, *supra* note 171, at 1; Heller, *supra* note 112, at 14-15.

when they focus on specific issues within their special expertise. For example, Open Society's criminal justice program has been effective because it focused narrowly on criminal justice reform, which had largely been neglected by other groups.¹⁹⁵

Commentators have identified several areas in which the ABA has unique expertise.¹⁹⁶ Examples include: reforming and promoting rigorous legal education; encouraging bar associations to play a meaningful role in promoting reform; ensuring access to law through programs such as legal aid and pro bono services; and training and encouraging judges, human rights activists, and local reformers.

Conclusion

History, ancient and recent, suggests that the rule of law is needed for effective development. That it is needed, however, is no guarantee that it will survive, much less thrive. That is why the Task Force exists: to explore and implement the best practices for encouraging the rule of law.

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¹⁹⁵ Testimony of Carothers, *supra* note 165, at 3.

¹⁹⁶ Memo from Garth to McGrath and Englehart at 1 ¶¶ 3-4, 2 ¶¶ 6-7; Presentation to the ABA Rule of Law Task Force by Patrick Meagher (suggesting means through which the ABA could use its visibility, leverage, and expertise); Testimony of Goldston, *supra* note 174, at 10 (explaining that an organization with ABA's clout is well placed to encourage bar associations in other countries).