

## COUNTERINSURGENCY AND THE RULE OF LAW

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### 1. INTRODUCTION

The Roman orator Cicero is credited with the phrase “*Silent enim leges inter arma*” – “When swords are drawn the laws fall silent . . . .”<sup>1</sup> The nature of counterinsurgency conflict belies Cicero’s statement – in counterinsurgencies, laws must instead be vibrant and active in order to secure success. Rather than a convenience that can be restored at the cessation of hostilities, the rule of law should play a fundamental role in the conflict. While it may be possible for an incumbent power to succeed in a counterinsurgency without a strong focus on the rule of law, this success will likely come at an extremely high cost in terms of military resources, civilian life, and international legitimacy.

#### 1.1. Definitions

This Comment will deal with terms such as “counterinsurgency” and “the rule of law,” which have gained a certain cachet in contemporary discourse. Yet, there can be significant disagreement on what these terms mean. In some cases, this disagreement arises from confusion on the precise meaning of a broad phrase,<sup>2</sup> while in other cases, multiple terms have been

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<sup>1</sup> Marcus Tullius Cicero, *Pro Milone*, in *CICERO: DEFENCE SPEECHES* 162, 186 [¶ 11] (D.H. Berry trans., Oxford World Classics 2000) (52 BCE).

<sup>2</sup> See, e.g., Dafna Linzer, *How I Passed My U.S. Citizenship Test: By Keeping the Right Answers to Myself*, *PROPUBLICA* (Feb. 23, 2011, 5:31 AM),

used to cover closely related, yet distinct phenomena. It is important to clarify what is meant by these critical terms, so that this Comment can progress without any confusion.

### 1.1.1. *The Rule of Law*

In September 2010, the University of Pennsylvania Law School hosted a conference entitled *Rule of Law Reform in Iraq and Afghanistan: Challenges for the Coming Decade*.<sup>3</sup> Topics addressed at the conference included federalism, administrative law, and the integration of informal justice systems into a nation's judiciary, but all those present seemed to take the meaning of "the rule of law" for granted. While there is certainly a general understanding of what sorts of topics fall within the penumbra of "the rule of law," namely topics dealing with governance and legitimacy, the protection of human rights, and a functional and effective legal system, the precise definition is vague. In their work *Can Might Make Rights?* Jane Stromseth, David Wippman, and Rosa Brooks liken the state of the term "rule of law" to Justice Potter Stewart's definition of obscenity—an "I know it when I see it" quality, intuitively understood but not clearly defined.<sup>4</sup>

An obvious question then arises: Why is defining the rule of law important? Does the generalized understanding not suffice? As Stromseth and her co-authors pointedly note, "as a guide to making intelligent policy decisions, 'I know it when I see it' is not terribly effective."<sup>5</sup> The idea of the rule of law playing a central role in the resolution of foreign policy issues is long-standing and widespread,<sup>6</sup> but varying interpretations of the phrase amongst

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<http://www.propublica.org/article/how-i-passed-my-us-citizenship-test-by-keeping-the-right-answers-to-myself> (discussing varying perspectives of the term "rule of law").

<sup>3</sup> See *Rule of Law Reform in Iraq and Afghanistan: Challenges for the Coming Decade*, Agenda, PENN LAW (Sept. 23, 2010), <http://www.law.upenn.edu/international/conferences/ruleoflaw/agenda.html> (providing a description of the topics and speakers present at the University of Pennsylvania Law School's symposium).

<sup>4</sup> JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 56 (2006) (discussing the elusiveness of the term "rule of law" and the importance of defining it).

<sup>5</sup> *Id.* at 57.

<sup>6</sup> See, e.g., Orrin G. Hatch, *Promoting the Rule of Law in the Post-Cold War Era*, in *DEMOCRACY AND THE RULE OF LAW* 3, 4-6 (Norman Dorsen & Prosser Gifford eds.,

policy planners and administrators<sup>7</sup> has the potential to severely damage efforts to implement such an ill-defined goal.

The primary competing definitions of the rule of law are centered on whether the phrase should simply mean the “formal and structural components” present within a legal system and society’s recognition of it, or encompass both structural components and “particular substantive commitments.”<sup>8</sup> Thomas Nachbar, in his article *Defining the Rule of Law Problem*, chooses a maximalist, substantive approach, and distills U.S. military doctrine on the definition of the rule of law into seven categories: state monopolization of force, security of person and property, law constraining state action, stable and clear law, individual recourse to a fair legal system, protection of basic human rights, and daily reliance on legal institutions.<sup>9</sup> While others present somewhat different criteria (for instance, replacing state monopolization of force with a broader “military and security systems that function under the law”<sup>10</sup>), Nachbar’s criteria bear the greatest resemblance to those used by the U.S. military, and will be used for the purposes of this Comment.<sup>11</sup>

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2001) (describing the need for rule of law promotion in U.S. foreign policies supporting democratic reform).

<sup>7</sup> See, e.g., TOM BINGHAM, *THE RULE OF LAW* 9 (2010) (supporting the idea that the rule of law does not require an unqualified admiration of the law but which accepts that people would rather live with the rule of law); STROMSETH ET AL., *supra* note 4, at 58–61 (describing the surge in rule of law promotion by the United States and other countries); JORIS VOORHOEVE, *FROM WAR TO THE RULE OF LAW: PEACEBUILDING AFTER VIOLENT CONFLICT* 96 (2007) (noting the growth of international assistance for legal reform during the 1990s and the importance of recognizing the different legal systems to which such assistance is provided); Grant Kippen & Scott Worden, *Election Aftermath and the Rule of Law in Afghanistan*, FOREIGN POL’Y, AFPAC CHANNEL (Jan. 21, 2011, 10:47 AM), [http://afpak.foreignpolicy.com/posts/2011/01/21/election\\_aftermath\\_and\\_the\\_rule\\_of\\_law\\_in\\_afghanistan](http://afpak.foreignpolicy.com/posts/2011/01/21/election_aftermath_and_the_rule_of_law_in_afghanistan) (discussing how corruption in Afghanistan’s 2011 elections undermines the rule of law).

<sup>8</sup> STROMSETH, *supra* note 4, at 70–71 (noting that the minimalist conception of the rule of law emphasizes formal and structural components whereas the substantive theories insist on particular substantive commitments, for instance, to human rights).

<sup>9</sup> Thomas B. Nachbar, *Defining the Rule of Law Problem*, 12 GREEN BAG 303, 306–307 (2009).

<sup>10</sup> VOORHOEVE, *supra* note 7, at 91.

<sup>11</sup> In fact, Nachbar’s article was developed from Chapter 2 of *Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates*, published in 2008 by The Judge Advocate General’s Legal Center & School, U.S. Army and the Center for Law and

### 1.1.2. *Insurgency and Counterinsurgency*

In contrast to the debate surrounding the meaning of the term rule of law, the meanings of the terms “warfare” and “insurgency” remain relatively stable. Carl von Clausewitz famously stated in his work *On War* that “war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means.”<sup>12</sup> This definition holds true for all wars, but perhaps most so for the subsets of irregular warfare known as insurgency and counterinsurgency. As the U.S. Army field manual on counterinsurgency notes, insurgencies are “politico-military struggle[s] designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control.”<sup>13</sup> Thus, insurgencies (and counter-insurgencies—actions taken to oppose an insurgent movement) are violent struggles for political supremacy between an insurgent group and an incumbent.

Clausewitz defines war as “an act of force to compel our enemy to do our will.”<sup>14</sup> Compulsion and will are at the heart of conflict. The ability of one party to outlast the other and to persist in conflict beyond the ability or will of its opposition provides that party with victory. Insurgencies are set apart from other conflicts by the resources that both the incumbent and the insurgent use to fight the conflict. Rather than seeking to achieve a political end primarily through the control of territory, the two sides are competing for control over and support of the population.<sup>15</sup> The populace functions as both the resource and the objective for the

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Military Operations. The *Handbook* has since been superseded by the 2010 edition, to which this Comment will refer. Nachbar, *supra* note 9, at 303.

<sup>12</sup> CARL VON CLAUSEWITZ, *ON WAR* 99 (Michael Howard & Peter Paret eds. and trans., 1993) (1832).

<sup>13</sup> DEPARTMENT OF THE ARMY, FM 3-24/MCWP 3-33.5, COUNTERINSURGENCY, (2006), available at [http://usacac.army.mil/cac2/coin/repository/FM\\_3-24.pdf](http://usacac.army.mil/cac2/coin/repository/FM_3-24.pdf).

<sup>14</sup> CLAUSEWITZ, *supra* note 12, at 83.

<sup>15</sup> See Octavian Manea, *Interview with Dr. John Nagl*, SMALL WARS J. 1, 2 (Nov. 11, 2010, 10:35 AM), <http://smallwarsjournal.com/blog/journal/docs-temp/599-manea.pdf> [hereinafter *Nagl Interview*] (“The counterinsurgent and insurgent are both competing to win the support of the population.”).

two sides,<sup>16</sup> with both insurgent and incumbent attempting to obtain and secure the population's allegiance.<sup>17</sup>

This unique dynamic is why the reporter and counterinsurgency expert Bernard Fall noted from his observations in Vietnam that "[w]hen a country is being subverted it is not being outfought; it is being outadministered."<sup>18</sup> Fall saw the North Vietnamese National Liberation Front seeking to neutralize the Saigon government's administrative power, and thus its already tenuous connection with the populace, by eliminating village chiefs and replacing them with their own leaders.<sup>19</sup> Fall's observation gets to the heart of one of the crucial dynamics in counterinsurgency—a competition to provide the population with control and an established government.<sup>20</sup>

Clausewitz also mentions that "the defensive form of warfare is intrinsically stronger than the offensive" because of several factors: delay benefiting the defender, the conservation of force in defense, and the passive objective of defense.<sup>21</sup> In considering the dynamics of insurgencies, it is important to consider that the incumbent generally assumes the role of the attacker rather than defender. Even though the incumbent may appear to have political and military control over its territory, and will certainly claim such, the blunt truth is that, if this were the case, there would be no insurgency. The incumbent must persuade the population that its control and government are superior; the insurgent is successful if they are capable of frustrating the incumbent's design. The

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<sup>16</sup> See DAVID GALULA, *PACIFICATION IN ALGERIA 1956-1958*, at 246 (2006) (explaining that destroying an insurgent's forces and occupying its territory is ineffective without gains in support from the population under control).

<sup>17</sup> See DOUGLAS PIKE, *VIET CONG: THE ORGANIZATION AND TECHNIQUES OF THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM* 287 (1966) ("Administration in the liberated area, above all else, was an effort to create and maintain a population devoid of disenchantment, immune to GVN influence, and in fact hostile to any anti-NLF activity regardless of source.").

<sup>18</sup> BERNARD FALL, *LAST REFLECTIONS ON A WAR* 220 (1967).

<sup>19</sup> See *id.* at 218-219 (noting that the village chiefs' deaths were clustered in areas where the Communists alleged violations of a cease-fire agreement).

<sup>20</sup> See, e.g., David Axe, *New Afghanistan Plan: Hole Up in Fortress Districts*, WIRE (Mar. 29, 2011, 2:00 PM), <http://www.wired.com/dangerroom/2011/03/new-plan-for-afghanistan-fortress-districts/> (examining divisions between supporters of the NATO and Afghan coalition and the insurgency in Afghanistan's Baraki Barak district).

<sup>21</sup> CLAUSEWITZ, *supra* note 12, at 428.

incumbent is generally forced into the position of the attacker, of being presented with a positive task (establishing governance), because of prior circumstance that has already cost it the support of the population.<sup>22</sup>

There is a school of counterinsurgency strategy that this Comment does not address. In 1982, in response to a growing revolt by the Muslim Brotherhood in the city of Hama,<sup>23</sup> Syrian President Hafez al-Assad ordered a brutal strike on the city, killing up to 20,000 people<sup>24</sup> and halting the Brotherhood's revolt, which was comprised of an estimated two hundred fighters.<sup>25</sup> While certainly effective at quelling the insurgency, the human costs were appalling. The mass killing of a population, as seen at Hama, is fundamentally against the laws of war as practiced by the international community, and violates the Hague Convention, which enshrined the laws of war,<sup>26</sup> and the Fourth Geneva

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<sup>22</sup> See ANTHONY JAMES JOES, *RESISTING REBELLION: THE HISTORY AND POLITICS OF COUNTERINSURGENCY* 24 (2004) (explaining how a popular election can bring about peaceful power transitions, but can also, in its absence, bring about insurgency). When referring to Joes's work, one must take caution in his use of the term "guerrilla warfare" as being synonymous with an insurgency. Cf. FALL, *supra* note 18, at 210 ("[R]evolutionary warfare equals guerrilla warfare plus political action. . . . [E]verybody knows how to fight small wars. . . . Political action, however, is the difference."). While Fall rejects the terms "insurgency" and "counterinsurgency" in favor of "revolutionary warfare," *id.*, counterinsurgency has gained enough traction in discourse that it is preferable in this context to "revolutionary warfare." See, e.g., DAVID C. GOMPERT & JOHN GORDON IV, *WAR BY OTHER MEANS: BUILDING COMPLETE AND BALANCED CAPABILITIES FOR COUNTERINSURGENCY* 76 (2008) ("[T]he U.S. government tends to come to grips with insurgencies only after they become threatening.").

<sup>23</sup> See David Hirst, *Stability Without Hope*, *GUARDIAN* (Manchester), Dec. 21, 1982, at 11 (examining the legacy of the 1982 Hama massacre in Syria).

<sup>24</sup> See Robert Fisk, *Freedom, Democracy and Human Rights in Syria*, *INDEPENDENT*, Sept. 16, 2010, <http://www.independent.co.uk/opinion/commentators/fisk/robert-fisk-freedom-democracy-and-human-rights-in-syria-2080463.html> (discussing the Hama massacre and interviewing the son of the Syrian commander at Hama).

<sup>25</sup> See SYR. HUMAN RIGHTS COMM., *THE MASSACRES OF HAMA: LAW ENFORCEMENT REQUIRES ACCOUNTABILITY*, <http://www.shrc.org/data/asp/d0/1260.aspx#D1> (last updated Feb. 19, 2004) (detailing the atrocities that occurred at Hama, and examining whether these atrocities were "committed to enforce the law and preserve order or just to save the regime").

<sup>26</sup> See Hague Convention with Respect to the Laws and Customs of War on Land art. 25-27, Jul. 29, 1899, 32 Stat. 1803 (discussing the treatment of sieges in international law, prohibiting assaults on undefended towns, and stating that "all necessary steps should be taken to" avoid destruction of non-military targets).

Convention, which set protections for civilian populations.<sup>27</sup> Destroying an entire city in order to halt the actions of two hundred individuals violates all principles of proportionality and is fundamentally illegitimate. While the massacre may have secured al-Assad's regime against the Muslim Brotherhood, this Comment presupposes that the incumbent is acting in pursuit of legitimate ends and within the bounds of international law.

A counterpoint to this line of reasoning is that the Hama massacre was initiated by a state against its own populace and therefore the conventions discussed above do not apply.<sup>28</sup> However, this thinking is fundamentally shortsighted. The Hague and Geneva Conventions have entered the realm of customary international law; as they were designed and intended to provide constraints on the use of force by states, it is only logical that these constraints be applied to internal conflicts, such as insurgencies.

### 1.2. Rule of Law and Counterinsurgency – Why is There Tension?

A successful counterinsurgency generally requires winning the loyalty of the population away from the insurgency through superior provision of security and governance—two criteria that integrate well with the factors required for establishing the rule of law.<sup>29</sup> However, the incumbent's methods for establishing security for the population, especially the use of force against the insurgency, can often cut against, or even directly oppose, the requirements of legitimate governance. For example, the enforced uprooting and resettling of populations, as was done throughout twentieth-century insurgencies (to deny insurgencies population

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<sup>27</sup> See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (discussing grave breaches of the Convention, including willful killing not justified by military necessity).

<sup>28</sup> See Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV 1, 33–34 (2008) (suggesting, through analogous reasoning, that “customary law, not treaty law,” governed America’s 2003 invasion of Iraq).

<sup>29</sup> See Nagl *Interview*, *supra* note 15, at 2 (discussing the challenges counterinsurgents face in winning over the population). *But see* Octavian Manea, *Thinking Critically about COIN and Creatively about Strategy and War: An Interview with Colonel Gian Gentile*, SMALL WARS J. 1, 1 (Dec. 14, 2010, 7:37 PM), <http://smallwarsjournal.com/blog/journal/docs-temp/625-manea.pdf> [hereinafter *Gentile Interview*] (suggesting that population-centric counterinsurgency is not the only way to combat counterinsurgencies).

centers to subvert or control),<sup>30</sup> cuts against the 'property security' and 'constraint of state action' categories within Nachbar's categorization of the rule of law. Insurgent groups are not as constrained by the same need for legitimacy, and are thus more likely to "use violence, intimidation, and terror to coerce support from the population."<sup>31</sup> Furthermore, the use of force against insurgents often leads to destruction of infrastructure and civilian casualties, hampering the counterinsurgency effort, but also inhibiting establishment of the rule of law (particularly the components of security and human rights guarantees).<sup>32</sup>

Requirements of the rule of law can also pose problems for the practice of counterinsurgency. For example, it is difficult to say that a judicial system is fair or reliable where former insurgents are allowed to go free and to avoid any legal punishment for actions they may have taken as insurgents. However, to achieve a cease-fire and provide security, an incumbent may be forced to extend amnesty and forego holding insurgents accountable, as well as co-opt less committed insurgents through political accommodation and acceptance.<sup>33</sup> Similarly, requiring criminal prosecution significantly complicates the procedure for detaining suspected insurgents. Along with planning the use of force required to capture the insurgent, the incumbent will also need to

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<sup>30</sup> See, e.g., JOES, *supra* note 22, at 106-113 (detailing resettlement efforts in countries with significant guerilla insurgencies); see also NEIL SHEEHAN, A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM 309 (1988) (discussing the Strategic Hamlet Program of forced relocations instituted by the South Vietnamese government).

<sup>31</sup> Nagl Interview, *supra* note 15, at 2.

<sup>32</sup> See Spencer Ackerman, *Twenty-Five Tons of Bombs Wipe Afghan Town Off Map*, WIRED (Jan. 19, 2011, 3:45 PM), <http://www.wired.com/dangerroom/2011/01/25-tons-of-bombs-wipes-afghan-town-off-the-map/> (noting that "property destruction . . . reset[s] the clock on any nascent positive impressions"). But see Paula Broadwell, *Travels with Paula (III) Arghandabis Like the Coalition Reconstruction Efforts*, FOREIGN POL'Y, THE BEST DEFENSE (Jan. 23, 2011, 12:26 PM), [http://ricks.foreignpolicy.com/posts/2011/01/23/travels\\_with\\_paula\\_iii\\_arghandabis\\_like\\_the\\_coalition\\_reconstruction\\_efforts](http://ricks.foreignpolicy.com/posts/2011/01/23/travels_with_paula_iii_arghandabis_like_the_coalition_reconstruction_efforts) (arguing that property destruction from airstrikes does not "necessarily lead to setbacks in the operational design or overall strategy").

<sup>33</sup> See Nagl Interview, *supra* note 15, at 3 (noting that "insurgencies are rarely defeated militarily" but instead "end through political accommodation"); see also ANGELIKA SCHLUNCK, AMNESTY VERSUS ACCOUNTABILITY: THIRD PARTY INTERVENTION IN DEALING WITH GROSS HUMAN RIGHTS VIOLATIONS IN INTERNAL AND INTERNATIONAL CONFLICTS 248 (2000) (citing the "long tradition in Latin and Central America" of providing amnesty to those who commit political crimes).



consider additional factors, such as whether the insurgent has committed a crime or whether there is sufficient evidence for a court to convict the insurgent.<sup>34</sup>

## 2. THE RELATIONSHIP BETWEEN COUNTERINSURGENCY AND THE RULE OF LAW

The process of establishing the rule of law after a conflict occurs has been investigated by many scholars. Unfortunately, a dichotomy is often presented between armed conflict and the rule of law,<sup>35</sup> suggesting that efforts to establish the rule of law can only begin once a conflict has ended<sup>36</sup>—a viewpoint made especially ironic by citing examples of ongoing conflicts under the post-conflict heading.<sup>37</sup> The argument goes that the rule of law requires social order and that social order requires an established government with all conflict ended.<sup>38</sup>

This theoretical approach ignores the practical realities of a society and its existence; any society, even one embroiled in conflict, will still require some method of a legal system. The process of establishing the rule of law, or indeed any major change within the system of a society, cannot be taken in a strictly linear fashion.<sup>39</sup> As Charles Norchi notes, “[s]ecurity is the precondition

<sup>34</sup> See Richard Morgan, *The Law at War: Counterinsurgency Operations and the Use of Indigenous Legal Institutions*, 33 HASTINGS INT’L & COMP. L. REV. 55, 67 (2010) (indicating that precursors to arrest in a criminal justice system may threaten the secrecy of counterinsurgency operations and that detention by a foreign military may disrupt criminal prosecution of the detained).

<sup>35</sup> See, e.g., Fairlie Chappuis & Heiner Hänggi, *The Interplay Between Security and Legitimacy: Security Sector Reform and State-Building*, in FACETS AND PRACTICES OF STATE-BUILDING 31, 32–33 (Julia Raue & Patrick Sutter eds., 2009) (describing security sector reform as a means of re-establishing security and restoring legitimacy in a post-conflict environment).

<sup>36</sup> See VOORHOEVE, *supra* note 7, at 53–54 (analogizing “[p]ost-conflict peacebuilding” to emergency care, where there is a brief crucial time in which re-establishing security and public order is often carried out “without a complete legal basis”).

<sup>37</sup> See, e.g., STROMSETH ET AL., *supra* note 4, at 85–133 (examining instances of “post-conflict governance” but extending this term to ongoing conflicts).

<sup>38</sup> See VOORHOEVE, *supra* note 7, at 121–22 (noting that the role of social order in small group societies and the subsequent growth of modern states is a good development only if these states contribute to a “high quality of human life”).

<sup>39</sup> See FRANK HERBERT, DUNE 30 (Ace Books 1999) (1965) (“A process cannot be understood by stopping it. Understanding must move with the flow of the process, must join it and flow with it.”).

of effective legal reform, yet security itself is dependent on the formal existence, at least, of operational law and state institutions.”<sup>40</sup> Security and the rule of law operate in a synergistic relationship, with success (or failure) in one directly affecting progress in the other. Scott Dempsey, a former development officer in Afghanistan’s Helmand province, has commented that “the only meaningful metric for success [in counterinsurgency] is a transfer of sustainable sovereignty to the institutions we can easily create, but which the Afghans must learn to run.”<sup>41</sup> This resumption of state function can only happen if the rule of law is incorporated as a simultaneous goal of counterinsurgency, rather than a task to be undertaken after security has been established.

### 2.1. Counterinsurgency and Legitimacy – Why Establishing the Rule of Law Assists Counterinsurgency

As discussed *supra* Section 1.1.2, counterinsurgency is focused on “out-governing” the insurgency—ensuring that the population is provided with security, stability, and access to effective governance. By taking measures to promote the rule of law, an incumbent can provide a population with more effective and trustworthy institutions, increasing the incumbent’s legitimacy and making an increasingly persuasive case that working with the incumbent is the best option available to the population. Establishing trustworthy, fair, and reliable governance is one of the most compelling ways to encourage popular support for the incumbent, or, at a minimum, to prevent the insurgent from establishing its own reputation for governance and superseding the incumbent’s control.<sup>42</sup>

By supplying the population of an area with a government that it considers legitimate and capable of providing essential services in basic and fundamental areas, the population will be more likely

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<sup>40</sup> Charles H. Norchi, *The Legal Architecture of Nation-Building: An Introduction*, 60 ME. L. REV. 281, 291 (2008).

<sup>41</sup> Scott Dempsey, *The Fallacy of COIN: One Officer’s Frustration*, SMALL WARS J. 1, 2 (Mar. 11, 2011, 10:50 AM), <http://smallwarsjournal.com/printpdf/10354>.

<sup>42</sup> See, e.g., Abu Muqawama, *Special Abu Muqawama Q&A with Nick Blanford*, CTR. FOR A NEW AM. SEC., ABU MUQAWAMA (Nov. 28, 2011, 11:41 AM), <http://www.cnas.org/blogs/abumuqawama/2011/11/special-abu-muqawama-qa-nick-blanford.html> (discussing the provision of social welfare services, education, and medical aid as part of a non-state actor’s strategy for building long-term popular support).

to consider the incumbent as being capable of providing security and governance in the long term.<sup>43</sup> Furthermore, by demonstrating that the government is legitimate and functioning in a clear and above-board manner, the incumbent may begin to dispel some of the complaints that may have initially fueled the insurgency. Success often leads to further success; by gaining popular support, an incumbent is increasingly capable of exerting greater political control over the population and controlling the insurgency.

2.2. *Counterinsurgency and Security – How a Successful Counterinsurgency Assists the Rule of Law*

As a counterinsurgency provides increased security and safety to a population,<sup>44</sup> it strengthens societal institutions that relate directly to the rule of law. The basic provision of security requires not only military control, but political control as well—a control established through a functional police force and judiciary.<sup>45</sup> While support for the police and judiciary is primarily intended for increasing individual security by curtailing crime and ensuring that the populace retains confidence in the government, this support also aids rule of law efforts by ensuring that the tools for expanding and supporting the rule of law are secured and extant.<sup>46</sup>

However, merely strengthening institutions is insufficient to properly help establish the rule of law.<sup>47</sup> Along with providing

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<sup>43</sup> See Octavian Manea, *Interview with Dr. David Kilcullen* (Nov. 7, 2010, 6:43 PM), SMALL WARS J. 4, <http://www.smallwarsjournal.com/blog/journal/docs-temp/597-manea.pdf> [hereinafter *Kilcullen Interview*] (“Deiokes is a story about how a local tribal elder becomes powerful in his own area, by mediation and dispute resolution, and issuing judgments that gain the support of population.”).

<sup>44</sup> See *Nagl Interview*, *supra* note 15, at 3 (examining ways that an incumbent can gain popular support by providing security through political accommodation).

<sup>45</sup> See STROMSETH ET AL., *supra* note 4, at 142–44 (noting that security tasks vary among post-conflict environments, but that they usually entail protection of political leaders, demobilization of belligerents, control of crime, and protection of local infrastructure).

<sup>46</sup> See *id.* at 184 (noting that support for these judicial bodies with the aim of encouraging security may risk compromising other goals of an effective judicial system).

<sup>47</sup> See, e.g., Chappuis & Hänggi, *supra* note 35, at 45 (“[R]eforms aimed solely at modernising and professionalising the security forces and thereby increasing their capacity without ensuring their democratic accountability are not consistent with the [Security Sector Reform] concept.”).

direct support to rule of law institutions like the police, prison, and judiciary, a successful counterinsurgency is also likely to increase the efficacy of governmental administration and the provision of justice. For example, the RAND Corporation's 2010 volume *Reconstruction Under Fire: Case Studies and Further Analysis of Civil Requirements* identifies the provision of "equal access to justice for all Iraqis"<sup>48</sup> as a critical area for improving Iraq's Anbar province. RAND calls for direct assistance to rule of law institutions,<sup>49</sup> but also identifies access to justice for the Sunni population as a fundamental need for establishing security in the area. The report further provides suggestions for how Sunni access to justice in the long term can be implemented.<sup>50</sup> This effort to strengthen the rule of law may be a part of counterinsurgency operations by happy accident, rather than explicit design, but it is present nonetheless.

### 2.3. *Entwined Failures – How Failures in One Branch Affect the Other*

Just as successes in counterinsurgency can assist the rule of law and vice versa, failures in one can lead to ongoing problems in the other. Failures in providing security can result in catastrophes in implementing the rule of law. One stark example of this is Iraq in the wake of the American invasion. As Phillip James Walker describes:

Through looting, Iraq lost its law. Literally, no intact copy of the Iraqi law remained in the Ministry of Justice or any other public location in Baghdad. Iraq lost 80 years of reported cases. Iraq lost property records. It lost records of government proceedings. In the months after the looting,

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<sup>48</sup> BROOKE STEARNS LAWSON ET AL., *RECONSTRUCTION UNDER FIRE: CASE STUDIES AND FURTHER ANALYSIS OF CIVIL REQUIREMENTS* 118 (2010).

<sup>49</sup> The RAND study identifies among the civil requirements of counterinsurgency activities:

Establish a rule-of-law complex [which] would be a "heavily fortified compound to shelter judges and their families and secure the trials of some of the most dangerous suspects". . . . Deliver . . . desks, podiums, beds and housing shelters for judges and their families, lawyers, legal assistants, prisoners, and witness . . . . Train . . . civil servants involved in the judicial process . . . with high professional and ethical standards . . . . Provide technical assistance . . . in the form of legal advice . . . .

*Id.* at 120.

<sup>50</sup> *Id.* at 119 (arguing in support of decentralized justice and noting that a majority of the judiciary and police appointees are Shi'a and located in Baghdad).

Ministry of Justice employees reassembled some of the lost documents, painstakingly collating the thousands of pages scattered haphazardly throughout the Ministry of Justice. However, even with a heroic effort by Ministry staff, a great deal had been lost. In a sense, Saddam, war, and looting undermined the very foundations of the Iraqi state. Not only did Saddam's government collapse; the building blocks of government—all government—also collapsed. Saddam took the state down with him.<sup>51</sup>

While Walker attributes this failure to Saddam Hussein rather than the American forces present, he does concede one page later that this was a "Coalition failure to stop the looting."<sup>52</sup> This failure to provide sufficient security led to a disruption of the entire state governance apparatus, destroying the continuity of the state.

Conversely, failures in hewing to the rule of law can lead to disasters in the counterinsurgency. In June 1956, Robert Lacoste, the French governor-general of Algeria, executed two members of the National Liberation Front (FLN) insurgency, in reprisal for an ambush and destruction of a French platoon the month before.<sup>53</sup> Lacoste's action, taken in large part to placate the  *pied-noir* population's desire to exact revenge,<sup>54</sup> ultimately spurred many Algerians to join the FLN and helped to spark the FLN bombing campaign known as the Battle of Algiers.<sup>55</sup>

One problem that can arise in counterinsurgency is that the population avoids commitment to one side or the other, but prefers to "hedge [its] bets" and utilize the governance of both insurgent and incumbent, depending on which party is ascendant at the time.<sup>56</sup> This does not arise from a desire to prolong the conflict, although it will likely have that effect; instead, it is a survival

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<sup>51</sup> Phillip James Walker, *Iraq and Occupation, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 259, 271 (David Wippman & Matthew Evangelista eds., 2005).

<sup>52</sup> *Id.* at 272.

<sup>53</sup> See ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962*, at 153 (1977) (detailing the challenges associated with the counterinsurgency in Algeria).

<sup>54</sup> See *id.* at 183 (examining Lacoste's possible motives).

<sup>55</sup> See *id.* at 153, 185 (examining the fallout from Lacoste's response).

<sup>56</sup> See Benjamin Wittes, *More Response to Brig. Gen. Martins*, *LAWFARE* (Dec. 7, 2010, 10:59 AM), <http://www.lawfareblog.com/2010/12/more-response-to-brig-gen-martins> (explaining the strategic dimension to counterinsurgency and alliance formation).

strategy based on the fact that these civilians “are surrounded from all sides by . . . people demanding their allegiance—and willing to hurt them if they don’t get their allegiance.”<sup>57</sup> However, this does not necessarily mean that the population is equally likely to support either side. It can just as easily be that the population is balancing the risks of supporting the insurgency<sup>58</sup> against striking out against a government it despises.<sup>59</sup> Even if the incumbent manages to gain control over a territory, there is no guarantee that this control will persist once the incumbent’s forces leave.<sup>60</sup> Great care must be exerted to ensure that any changes wrought by incumbent forces will persevere once direct military presence in a territory is withdrawn.<sup>61</sup>

### 3. PITFALLS—POSSIBLE CONFLICTS BETWEEN COUNTERINSURGENCY AND THE RULE OF LAW

#### 3.1. *Detention, Interrogation, and Torture: Short-term Security or Legitimacy?*

An incumbent is faced with extremely difficult choices during a counterinsurgency. While external threats are relatively easy to isolate and deal with directly, an insurgent group is an amorphous and inherently clandestine organization. Engaging a successful insurgent movement primarily through military force may be analogized to punching water—while there may be significant impact at given points, the bulk of the insurgent forces will seek to

<sup>57</sup> *Kilcullen Interview*, *supra* note 43, at 3.

<sup>58</sup> See DAVID W.P. ELLIOTT, *THE VIETNAMESE WAR: REVOLUTION AND SOCIAL CHANGE IN THE MEKONG DELTA 1930–1975*, at 127 (2007) (noting that the populace of the Mekong Delta favored the Communist insurgency, but were not willing to directly support it when this meant risking the security and safety of the village).

<sup>59</sup> See Stathis N. Kalyvas & Matthew Adam Kocher, *How “Free” is Free Riding in Civil Wars? Violence, Insurgency, and the Collective Action Problem*, 59 *WORLD POL.* 177, 191 (2007) (concluding that nonparticipation in an insurgency can be even more costly than siding with either insurgent or incumbent).

<sup>60</sup> See Josh Boak, *In Rural Afghan Village, Local Security Takes Root*, *WASH. POST*, Mar. 1, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030103947.html> (“‘As soon as the Marines leave Helmand province, the people will fight the government,’ said Commander Sarwar . . . [of] the Afghan National Police.”).

<sup>61</sup> See *id.* (noting the transience of counterinsurgency efforts in Afghanistan’s Helmand province).

flow away from the engagement, disperse and strike other areas.<sup>62</sup> Because of this elusive nature inherent to insurgencies, it becomes crucial for the incumbent to gain intelligence about the insurgency. This will generally involve the detention and interrogation of suspected insurgents.

The detention policies applied to suspected insurgents have become a point of significant controversy in the United States, especially as a result of the prisoner abuses perpetrated at the Iraqi prison Abu Ghraib<sup>63</sup> and the legal questions regarding detainee treatment and due process at Guantanamo Bay.<sup>64</sup> Indeed, the detainee abuse present at Guantanamo and Abu Ghraib has led to a significant loss of trust and faith—both at home<sup>65</sup> and, crucially, abroad<sup>66</sup>—in the capacity of the American government to act in an

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<sup>62</sup> Cf. CLAUSEWITZ, *supra* note 12, at 581. Clausewitz offers a charming alternate analogy:

A general uprising, as we see it, should be nebulous and elusive; its resistance should never materialize as a concrete body . . . . On the other hand, there must be some concentration at certain points: the fog must thicken and form a dark and menacing cloud out of which a bolt of lightning may strike at any time.

*Id.*

<sup>63</sup> See, e.g., Former Vice President Al Gore, Address at New York University (May 26, 2004) (transcript available <http://www.moveon.org/pac/gore-rumsfeld-transcript.html>) (alluding to the reputational toll the Abu Ghraib incident imposed on the United States).

<sup>64</sup> See, e.g., *Vatican Calls Prison Abuse a Bigger Blow to U.S. than Sept. 11*, USA TODAY, May 12, 2004, [http://www.usatoday.com/news/world/iraq/2004-05-12-vatican-iraqi-abuse\\_x.htm](http://www.usatoday.com/news/world/iraq/2004-05-12-vatican-iraqi-abuse_x.htm) (condemning the United States for its detention practices in Guantanamo Bay).

<sup>65</sup> See, e.g., Thomas L. Friedman, *Just Shut It Down*, N.Y. TIMES, May 27, 2005, <http://www.nytimes.com/2005/05/27/opinion/27friedman.html> (urging for the closure of the Guantánamo facility).

<sup>66</sup> See *id.* See also Maajid Nawaz, *The Islamist Narrative*, DAWN.COM, June 21, 2010, <http://archives.dawn.com/archives/26584> (discussing the corrosive effect of Abu Ghraib and Guantanamo on both trust for the United States and respect for human rights); Spencer Ackerman, *Five Years Later*, AM. PROSPECT, Mar. 19, 2008, available at [http://www.prospect.org/cs/articles?article=five\\_years\\_later](http://www.prospect.org/cs/articles?article=five_years_later) (determining that torture images from Abu Ghraib were prime motivators for drawing recruits to Al-Qaeda in Iraq).

honest fashion.<sup>67</sup> Indeed, one commentator has dubbed it “the U.S. military’s most serious setback since 9/11.”<sup>68</sup>

The tendency for incumbents to react harshly towards captured insurgents (or suspected insurgents) is perhaps most graphically seen in the memoirs of General Paul Aussaresses. Aussaresses served as the primary counterinsurgency implementation officer for General Massu, the prefect of the city of Algiers during the Battle of Algiers (Jan–March 1957),<sup>69</sup> and was most directly responsible for French action against the FLN insurgency there.<sup>70</sup> Aussaresses’s extremely candid memoir provides a great deal of insight into the position of a determined incumbent willing to target a civilian population. A conversation he had with a superior officer, Colonel de Cockborne, places the issue of insurgent treatment in the starkest light possible:

“And how do you handle the suspects afterwards?” asked the colonel.

“You mean once they’ve talked?”

“That’s right.”

“If they’re connected to the crimes perpetrated by the terrorists, I shoot them.”

“But you do understand that the bulk of the FLN is involved in terrorism!” answered de Cockborne.

“Yes, I know that.”

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<sup>67</sup> See JANE MEYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 312–313 (2008) (discussing public perception of American detention practices).

<sup>68</sup> Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 *JOINT FORCE Q.* 34, 34 (2009).

<sup>69</sup> HORNE, *supra* note 53, at 188 (chronicling Governor-General Lacoste’s assignment of General Jacques Massu, a seasoned warrior commander, to confront the *pied noir* counterinsurgency “with total force . . . backed by the will to use it”).

<sup>70</sup> PAUL AUSSARESSES, *THE BATTLE OF THE CASBAH: TERRORISM AND COUNTER-TERRORISM IN ALGERIA 1955–1957*, at 72 (Robert L. Miller trans., 3d ed. 2006) (describing Aussaresses’s role as a deputy in charge of maintaining close ties to the police departments, regimental commanders, and intelligence officers).



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“Wouldn’t it be better to hand them over to the judicial system rather than execute them? We can’t just go around knocking off every member of an organization! It’s crazy!”

“But, Colonel, that’s what the highest governmental authorities have decided. The courts don’t want to handle the FLN precisely because there are too many of them, because we wouldn’t know where to put them, and because we can’t just send hundreds of people to the guillotine. The justice system is set up to handle a peacetime situation in metropolitan France. This is Algeria, where a war is about to start. . . . One thing is very clear: our mission demands results, requiring torture and summary executions, and as far as I can see it’s only beginning.”<sup>71</sup>

While public opinion was certainly a factor to the French counterinsurgents in Algeria, as witnessed by Aussaresses’s comment (quoted above) that “we can’t just send hundreds of people to the guillotine,” this did not deter the French government from sanctioning the extralegal execution of captured FLN members.<sup>72</sup> Aussaresses mentions a magistrate reporting directly to the Minister of Justice who all but instructed Aussaresses to kill FLN leader Larbi Ben M’Hidi:

“That’s exactly what I mean. If you didn’t search him [the captured Ben M’Hidi], you didn’t find his cyanide capsule.”

“What are you talking about?”

“Well,” said Bérard, pronouncing each word carefully, “I won’t be teaching you anything you don’t already know. All the top leaders [of the FLN] have a cyanide capsule. It’s a well-known fact.”

What Bérard wanted to say, since he represented the judiciary, was extremely clear to me . . .<sup>73</sup>

The Algerian case is an example of counterinsurgency practice supplanting the rule of law. As Aussaresses’s quotes indicate, the

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<sup>71</sup> *Id.* at 21–22.

<sup>72</sup> *See id.* at 15 (“[Policemen] spoke in hushed voices but were not ashamed of using methods that everyone in the government back in Paris was well aware of . . .”).

<sup>73</sup> *Id.* at 136–37.

French authorities, both civil and military, considered the French judicial system inadequate for dealing with FLN members.

It is a blunt reality that any counterinsurgency must and will engage in both detention and interrogation of suspected insurgents. Some commentators, like Aussaresses, suggest that torture is another one of the blunt realities presented in such a situation, commenting that "once a country demands that its army fight an enemy who is using terror to compel an indifferent population to join its ranks and provoke a repression that will in turn outrage international public opinion, it becomes impossible for that army to avoid using extreme measures."<sup>74</sup> Others take the approach of Alistair Horne, who notes that along with the corrosive moral effects associated with torture,<sup>75</sup> the long-term costs from torture to French strategic goals in Algeria were tremendous: the anger from French torture neutralized any moderate Algerian Muslims (described as the "*interlocuteurs valables*" by Horne) who might have been able to achieve peace earlier, and also weakened domestic public opinion in France to a degree that continued efforts in Algeria were unsustainable.<sup>76</sup>

Neither Horne nor Aussaresses addresses directly, or in any great detail, the effect of torture policies on the rule of law in particular. Given Aussaresses's distaste for the capabilities of the judicial system ("Even if the law had been enforced in all its harshness, few persons would have been executed . . ."<sup>77</sup> "[T]o hand the attorney over to the judicial system . . . meant, in effect, granting him impunity . . ."<sup>78</sup>), this is understandable. However, Horne does include a response from a French paratrooper commander that highlights why the decision to torture is so pernicious to establishing the rule of law, stating "the army had come to regard a prisoner as 'no longer an Arab peasant' but simply 'a source of intelligence.'"<sup>79</sup> The prisoners were no longer

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<sup>74</sup> *Id.* at xxxiv.

<sup>75</sup> See HORNE, *supra* note 53, at 200-01 (examining the effects of French torture practices in Algeria on the torturers).

<sup>76</sup> See *id.* at 206-07 (analyzing the long-term effects that a policy sanctioning torture in Algeria had on public opinion of France in Algeria and within France itself).

<sup>77</sup> AUSSARESSES, *supra* note 70, at 128.

<sup>78</sup> *Id.* at 146.

<sup>79</sup> HORNE, *supra* note 53, at 198.

individuals entitled to the protection of the law, but simply intelligence resources.

This trend towards dehumanization becomes even more pernicious when one considers that false identification of insurgents is a relatively common phenomenon. As Kalyvas & Kocher point out, during an insurgency “[s]tates (as well as challengers) rely on individual informants who have incentives to denounce their personal or local enemies.”<sup>80</sup> Even without personal incentives like those mentioned by Kalyvas & Kocher (informants extorting women for sexual favors and threatening to term them Viet Cong members, or naming a loan holder a Viet Cong member in order to avoid paying a debt<sup>81</sup>), the counterinsurgent is likely to provide incentives for naming insurgency members. For a current example, the BBC reported in 2006 that most detainees at Guantánamo Bay were not brought in by American forces, but instead by bounty hunters, and only eight percent (42 of the then 517 detainees at Guantánamo) were confirmed al Qaeda fighters.<sup>82</sup>

If taken to its extremes, the depersonalization of the populace can ultimately result in Hama-like policies. The Guatemalan counterinsurgency campaign—the period between 1980 and 1983 dubbed ‘*la violencia*’—contained an estimated 422 massacres committed by the belligerent parties.<sup>83</sup> Of the 422 massacres, which resulted in approximately 14,000 deaths, it is estimated that the Guatemalan government committed ninety percent of the killings.<sup>84</sup>

One of the difficulties with reforming detention practices is the potential for conflict between detention goals. It may seem like

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<sup>80</sup> Kalyvas & Kocher, *supra* note 59, at 207.

<sup>81</sup> *Id.* at 207-08 (discussing the incentives used to extract information in raids).

<sup>82</sup> John Simpson, *No Surprises in the War on Terror*, BBC NEWS (Feb. 13, 2006, 3:02 PM), [http://news.bbc.co.uk/2/hi/middle\\_east/4708946.stm](http://news.bbc.co.uk/2/hi/middle_east/4708946.stm) (“Some 86% [of detainees] were handed over in Afghanistan and Pakistan after a widespread campaign in which big financial bounties were offered in exchange for anyone suspected of links to al-Qaeda and the Taleban.”).

<sup>83</sup> Nathanael Heasley et al., *Impunity in Guatemala: The State’s Failure to Provide Justice in the Massacre Cases*, 16 AM. U. INT’L. L. REV. 1115, 1121-22 (2001) (describing data compiled by the Recovery of Historical Memory Project on the Guatemalan massacres).

<sup>84</sup> *Id.*

aggressive detention policies are most likely to be effective at curtailing an insurgency by removing the insurgents from the population quickly. However, this can easily backfire if the incumbent is not careful and discriminating in detention policies. Over-broad detention of the populace can easily cause the population to begin supporting the insurgency.<sup>85</sup>

### 3.2. *Uniting Traditional Sources of Law and Governance with Establishing the Rule of Law*

Due to the extreme pressures placed upon a society that is undergoing an insurgency, an incumbent is placed in a position of significant power over the legal framework and construction of the society. Yet, for an incumbent's governance to be considered legitimate, it must be a method of governance that is met with a certain amount of approval from the populace. The governance promulgated by an incumbent must be integrated into the cultural and social mores of a given society.<sup>86</sup> In situations where alternative means of governance have been established, such as local institutions not established by the incumbent, an incumbent may be forced to accommodate these alternative means in order to establish its own legitimacy and promote stability.<sup>87</sup> While the incumbent may seem to be the dominant actor on the scene, they must bow to the political and practical realities of the situation; only by using overwhelming force against a populace can the populace be coerced into accepting a legal framework that it finds to be fundamentally illegitimate.<sup>88</sup>

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<sup>85</sup> See JOES, *supra* note 22, at 156 (discussing the consequences of indiscriminate severity against the population during a counterinsurgency).

<sup>86</sup> See Rachel Kleinfeld & Kalypso Nicolaidis, *Can a Post-Colonial Power Export The Rule of Law? Elements of a General Framework*, in RELOCATING THE RULE OF LAW 139, 148 (Gianluigi Palombella & Neil Walker eds., 2009) ("The rule of law is about the relationship between state and society, and citizens must generally follow the law without enforcement; only a despotic state will have the power to enforce an 'alien' rule of law.").

<sup>87</sup> See Christopher J. Coyne & Adam Pellillo, *The Art of Seeing Like a State: State-Building in Afghanistan, the Congo, and Beyond*, REV. OF AUSTRIAN ECON. (forthcoming), available at [www.ccoyne.com/The\\_Art\\_of\\_Seeing\\_Like\\_a\\_State.pdf](http://www.ccoyne.com/The_Art_of_Seeing_Like_a_State.pdf) (discussing the role of non-governmental institutions and governance, particularly in the Democratic Republic of Congo and Afghanistan).

<sup>88</sup> See Mark Martins, *Lawfare: So Are We Waging It?*, LAWFARE (Nov. 19, 2010), <http://www.lawfareblog.com/2010/11/lawfare-so-are-we-waging-it/> ("Security rooted in such force may earn a government a short season of willing allegiance

However, this does raise potential tensions with some of the principles of the rule of law discussed at the outset of this Comment. Several societies possess mixed legal systems, combining civil codes with religious legal frameworks.<sup>89</sup> Furthermore, the legal system itself may be bifurcated, with parallel judicial and dispute-resolution systems existing simultaneously, as is the case in regions of both Pakistan and Afghanistan; the traditional *jirga*, a tribal council, often issues legal rulings and resolves disputes, rather than sending them to the state's justice system.<sup>90</sup> The degree of bifurcation can vary: an April 2009 investigation of Afghanistan's Helmand Province found that in some districts, judges integrated elements of the *jirgas* into their courts, while in others, the formal judicial system is virtually non-existent.<sup>91</sup> The informal justice system is estimated to "deal with at least 90% of all dispute resolution in Helmand."<sup>92</sup>

Bifurcation of the judicial system can be a significant problem for the incumbent during a counterinsurgency. As discussed *supra* Section 1.1.2, an insurgent will seek to out-administer the incumbent, and the judiciary plays a significant role in the governance of any given territory. By exploiting the tensions that inherently exist between the components of a bifurcated legal system, an insurgent can carve out a socially accepted role for its own governance. For example, the Taliban exploited the tensions between the official Afghan legal system (the formal tool of the government) and the *jirgas* (the informal, traditional method of resolving disputes) to create its own traveling courts,<sup>93</sup> which were

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from a population grateful to be relieved of attacks, but legitimacy—and effectiveness beyond the near term—comes from more than power alone.”).

<sup>89</sup> See THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY & CTR. FOR LAW & MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 114 (2010), available at [http://www.au.af.mil/au/awc/awcgate/law/rule\\_of\\_law\\_hdbk.pdf](http://www.au.af.mil/au/awc/awcgate/law/rule_of_law_hdbk.pdf) [hereinafter RULE OF LAW HANDBOOK] (discussing mixed legal systems, including civil, common law systems and civil law and religious legal systems).

<sup>90</sup> See Niloufer Siddiqui, *Broken Justice*, FOREIGN POL'Y, AFPAK CHANNEL (Feb. 1, 2011, 10:43 AM), [http://afpak.foreignpolicy.com/posts/2011/02/01/broken\\_justice](http://afpak.foreignpolicy.com/posts/2011/02/01/broken_justice) (examining the bifurcated legal system of Pakistan's Federally Administered Tribal Areas).

<sup>91</sup> See RULE OF LAW HANDBOOK, *supra* note 89, at 268–71.

<sup>92</sup> *Id.* at 274.

<sup>93</sup> See Gary Anderson, *The Closers (Part III): Civilians in the Hold Phase*, SMALL WARS J. 1, 9 (Mar. 3, 2011, 3:39 AM), <http://smallwarsjournal.com>

then perceived to dispense speedier and fairer justice than either pre-existing legal system.<sup>94</sup>

When faced with a bifurcated judicial system, an incumbent may opt to integrate the bifurcation into the existing formalized legal system, as was done in Helmand Province. By explicitly authorizing the use of the informal justice system for non-criminal dispute resolution or minor crimes, while funneling serious cases to the formal system,<sup>95</sup> both the traditional and the formal systems ideally gain legitimacy. The traditional system will hopefully be recognized as a part of the nation's legal infrastructure, while leaders of the traditional system (religious leaders of the community and tribal leaders) become more willing to support the formal legal system. The danger in this approach is that instead of enhancing legitimacy for both sides, this may present the incumbent as weak, unable to fully enforce the use of its judicial system. The flip side of this is that attempting to interfere too much with the informal justice system may be perceived as government over-interference with the traditional beliefs, values, and mores of the population, and may cause an upswing in insurgent support.

Even without systemic issues such as bifurcation of the judicial system, rule of law actions taken in a counterinsurgency campaign have the potential to make major changes to the fabric of a society.<sup>96</sup> The incumbent must therefore be cognizant of the legal basis and the sources of law that are being used to establish governance for a population. What if the pre-existing sources of law conflict with components of the rule of law which the government is seeking to establish? For example, utilizing traditional sources of law regarding the status of women or of

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/blog/journal/docs-temp/685-anderson.pdf (explaining how the Taliban courts have filled the void left by unresponsive government courts).

<sup>94</sup> See Andrew Garfield, *What Afghans Want* 1, 5-6, FOREIGN POL'Y RES. INST., E-NOTES, (November, 2009), <http://www.glevumassociates.com/doc/WhatAfghansWant.pdf> (describing corruption in the central government and limited judicial access as areas of primary concern to Afghans); RULE OF LAW HANDBOOK, *supra* note 89, at 205, 269 (suggesting reasons that Taliban judicial systems were sometimes favored by Afghans).

<sup>95</sup> See RULE OF LAW HANDBOOK, *supra* note 89, at 274-75 (explaining why having a bifurcated justice system is reasonable in Helmand).

<sup>96</sup> See Note, *Counterinsurgency and Constitutional Design*, 121 HARV. L. REV. 1622, 1630 (2008) (arguing that counterinsurgency can function as de facto constitutional design).

minority groups may decrease the protection of human rights,<sup>97</sup> which (as discussed *supra* Sections 1.1.1, 1.2) is considered a significant component of the rule of law. One embarrassing example of poor selection of sources of law is evident in the 1999 UN intervention in Kosovo. To ensure that a legal system was in place, the head of the UN civilian administration issued a regulation stating that pre-intervention law, enacted before March 24, 1999 (the date of the intervention), would be the law of the land, without realizing that the bulk of the Kosovar population viewed the laws of the time as fundamentally oppressive and imposed upon them by a Serb minority.<sup>98</sup>

One solution advanced by some scholars to the problem of potential human rights violations in legal sources is to lay the grounds for systemic changes in society through a “bottom-up development policy” of strengthening institutions of civil society (such as the educational system, press, and non-government organizations).<sup>99</sup> This method has the potential for great effect, but it is intrinsically a long-term solution, focusing as it does on a gradual cultural change. An incumbent must seek both long-term and short-term solutions.

A legal framework will obviously be strongest when the population it governs believes that it is authentic and not externally imposed.<sup>100</sup> This applies to both peaceful situations as well as situations involving counterinsurgency. In an article for the blog *Lawfare*, Thomas Nachbar addresses this problem:

Codified rules or government practices that enhance security but lack a connection to a population’s normative commitments similarly lack legitimacy—such laws are what Hart described as mere rules backed by force, not law.

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<sup>97</sup> See RULE OF LAW HANDBOOK, *supra* note 89, at 270–71 (examining weaknesses in the informal judicial system of Helmand Province).

<sup>98</sup> STROMSETH ET AL., *supra* note 4, at 316–17 (describing how “well-intentioned rule of law promotion efforts can sometimes inadvertently undermine the rule of law”).

<sup>99</sup> See Kleinfeld & Nicolaidis, *supra* note 86, at 161–62 (discussing the “bottom-up” approach to development which employs indirect methods such as providing funding to NGOs).

<sup>100</sup> See, e.g., *id.* at 157 (noting that EU officials decided against conditioning funding on the passage of a law because the Albanian population would purportedly deem it illegitimate and unenforceable due to the presence of the external conditionality).

Thus counterinsurgency doctrine's central place for legitimacy is doubly the case for uses of law in counterinsurgency . . . . [T]he inextricable connection between this particular tool of counterinsurgency and the population's underlying normative commitments makes any attempt to use law without attention to its grounding in those commitments—its legitimacy—unwise and likely counterproductive.<sup>101</sup>

The incumbent must not overreach beyond the limits of the society it is a part of. As Stromseth and her co-authors note, "The rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes."<sup>102</sup> By overextending, the incumbent would decrease the chances for lasting rule of law reform.

### 3.3. *Legal Constraints on the Incumbent*

Due to the practical realities of counterinsurgency (or indeed, any sort of warfare), forces of the incumbent will commit crimes against the populace. The question then arises: How is the incumbent to respond to these crimes? The international law of occupation is considered to be encompassed in the Fourth Geneva Convention, the Hague Convention, and the nebulous area of customary international law,<sup>103</sup> but these do not provide significant guidance on the extent to which an incumbent is bound by its legal codes during a counterinsurgency.<sup>104</sup> A significant amount of tension exists on this point. While state accountability to its own legal system is a pillar of the rule of law, how much is an incumbent government willing to submit to constraints that may impede its ability to act?

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<sup>101</sup> Thomas Nachbar, *Lawfare and the Authority of Law*, LAWFARE (Jan. 4, 2011, 10:22 AM), <http://www.lawfareblog.com/2011/01/tom-nachbar-on-lawfare-and-the-authority-of-law>.

<sup>102</sup> STROMSETH ET AL., *supra* note 4, at 310.

<sup>103</sup> See Walker, *supra* note 51, at 260 (noting that the Geneva Convention, the Hague Convention, and customary international law traditionally make up the international law of belligerent occupation).

<sup>104</sup> See *id.* at 275 (noting that the Conventions are often silent regarding the scope of authority by occupiers in some realms).



Thomas Nachbar suggests that legal constraints on the incumbent can act as a significant force multiplier for the incumbent in the long term:

Sometimes that commitment will actually result in a short-term victory for insurgents—what some might call the insurgents’ “unfair” use of law to hinder military prosecution of the conflict. Perhaps the most salient measure of the legitimacy of any state are the rules (and maybe even more importantly the degree to which the state follows them) that govern its exertion of force, especially exertion of force against its own citizens. As General Martins argues, “[c]ompliance with law is what legitimates the actions of our troops and separates their actions—sometimes necessarily violent and lethal—from what very bad people in criminal mobs do.” If General Martins is correct that most people would rather live under a state that is governed by law rather than the will of men (and I think he is), this use of law may be the most powerful one in the conduct of a counterinsurgency—to again borrow General Martins’ terminology, this is the way the government outflanks insurgents.<sup>105</sup>

In other words, the tactical loss present in a delayed military prosecution of the conflict yields a strategic gain in the form of separating the incumbent from the insurgent, one where the rule of law provides a justification to the population as to why supporting the incumbent is the superior choice.

However, this cannot suffice on its own to demonstrate the worthwhile nature of a government. While curtailing its activities through the lens of the rule of law, an incumbent must also be able to effectively prosecute the armed conflict portion of counterinsurgency. As Mark Martins notes, “If a government lacks the power to defend itself and its people against violence and predatory corruption, it will be discredited and regarded as illegitimate even if it brings itself to adhere scrupulously to the law and otherwise comes to be deserving of allegiance.”<sup>106</sup>

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<sup>105</sup> Nachbar, *supra* note 101.

<sup>106</sup> Martins, *supra* note 88.

Peter Stirk suggests that equal treatment between an external incumbent and the population is impossible: "Even where occupiers have sought justice, it has never been a justice of the equality of all before the law, of common subjection to the same rules, for the rules and the structural nature of military occupation have assigned a different status to the occupier and inhabitant."<sup>107</sup> Some external incumbents have sought to constrain the actions of their own forces and provide accountability, but even these incumbents have consistently avoided placing their forces under the jurisdiction of the population's court system.<sup>108</sup>

While there are extreme legal constraints that an incumbent is not likely to apply to itself, it is in the best interest of an incumbent to ensure that the populace perceives it as being fair (along with the incumbent actually being fair), and legal constraints help to demonstrate this.<sup>109</sup> The United States Foreign Claims Act provides an example of the type of legislation which incumbents will likely use. The Foreign Claims Act takes some steps to provide legal constraints, by providing a method by which individuals may obtain redress for claims against the American military. However, the Act restricts claims to instances not arising in combat.<sup>110</sup>

It is not enough for an incumbent government to act in a legitimate manner; it must also be *perceived* to be acting in a legitimate manner.<sup>111</sup> Due to the likely antagonistic relationship between the incumbent and the population, this perception of legitimacy may be one of the most difficult tasks the incumbent faces. Even in circumstances where incumbent forces are held accountable for potential human rights violations and go through

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<sup>107</sup> PETER M.R. STIRK, *THE POLITICS OF MILITARY OCCUPATION* 195 (2009).

<sup>108</sup> *See id.* at 183-89 (discussing attempts by occupiers to exercise legal accountability over their own forces, but noting the occupiers' hesitance to prosecute their forces within the indigenous legal systems).

<sup>109</sup> Anthony James Joes's discussion of the concept of "rectitude," meaning right action towards the populace, mirrors this concept to some extent. *See* JOES, *supra* note 22, at 156-65 (detailing the concept of rectitude, which holds that forces should act lawfully and according to upstanding moral standards).

<sup>110</sup> 10 U.S.C. § 2734(b)(3) (2006) (stating that a claim may only be allowed if, *inter alia*, "it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat").

<sup>111</sup> *See* Dunlap, *supra* note 68, at 35 (noting that improper acts by an incumbent or lack of public support for an incumbent can undermine perceptions of its legitimacy).

trial procedures, the public may still not deem such recourse as legitimate. For example, after the 2005 Haditha massacre in Iraq (twenty-four Iraqis died from American fire after an American convoy was hit by an improvised explosive device (IED)),<sup>112</sup> all but one of the Marines involved in the incident either had the charges against them dropped or were found not guilty.<sup>113</sup> Due to the sensitive and shocking nature of the incident and the perceived lack of legitimacy on the part of the United States by the Iraqi people, the decisions to drop charges were met with skepticism and disbelief.<sup>114</sup> Because of the lack of legitimacy which the United States brought to the table, the entire trial mechanism was tainted in the eyes of the Iraqi populace.

### 3.4. *Amnesty versus Prosecution of Insurgents*

One of the most potentially problematic tensions between the requirements of counterinsurgency strategy and the establishment of the rule of law is the issue of amnesty towards insurgents, war criminals, and human rights violators. Insurgencies rarely end through an incumbent's application of force; instead, they usually end through co-opting less committed members of the insurgency and integrating them into the incumbent's society.<sup>115</sup> Joes points to

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<sup>112</sup> See *A Horror that Will Not Be Buried*, *ECONOMIST*, June 2, 2006, [http://www.economist.com/node/6999468?story\\_id=6999468&fsrc=RSS](http://www.economist.com/node/6999468?story_id=6999468&fsrc=RSS) (discussing an investigation which revealed that U.S. troops participated in a massacre and killed Iraqi civilians, many of whom were believed to be unarmed).

<sup>113</sup> See Tony Perry, *Court Hearing Begins for Marine in Iraqi Civilian Deaths*, *L.A. TIMES* (Mar. 11, 2009, 1:50 PM) <http://latimesblogs.latimes.com/lanow/2009/03/court-martial.html> (noting that of the eight marines initially charged, "[c]ases against six of them [were] dropped, and one was found not guilty").

<sup>114</sup> For example, one Iraqi lamented:

I'm not satisfied with the outcome because the punishments don't come close to the crimes committed in Haditha. We expected that the soldiers would be exonerated. From the first moment, we expected that. I thought the soldiers would be let off or claim insanity. All of these excuses we expected from the beginning.

*Frontline: Rules of Engagement* (PBS television broadcast Feb. 19, 2008) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/haditha/etc/script.html>).

<sup>115</sup> See Nagl *Interview*, *supra* note 15, at 3 (noting that "political accommodation," and not military defeat, causes insurgencies to "fade away"); see also Joes, *supra* note 22, at 166-70 (noting that amnesty programs can be used as effective means of ending insurgencies).

the Chieu Hoi program operating during the Vietnam War—an amnesty program which “had the most favorable cost/benefit ratio of any counterinsurgency operation in Viet Nam,”—to suggest that an amnesty can be an extremely powerful tool for an incumbent.<sup>116</sup> On the other hand, as Voorhoeve notes, “It is particularly bitter to the population if war criminals are given amnesty as part of a cease-fire agreement or peace deal. This is one of the harshest examples of the trade-off between peace and justice.”<sup>117</sup>

The trade-off between peace and justice trends towards peace in the eyes of most scholars considering the question. As Schlunck notes, “As long as those who are responsible for brutal crime either still hold positions with the government or form an influential constituency [like former members of an insurgency], they participate in the negotiations and the transition process.”<sup>118</sup> And even Schlunck, one of the drafters of the International Criminal Court, is forced to concede that “the precondition for effective conflict management is the cessation of hostilities . . . . [N]egotiators will probably still take recourse to amnesties for massive human rights violations with a view to stopping the fighting.”<sup>119</sup> Joes suggests an alternate route for those uncomfortable with the idea of amnesty for insurgent leaders, proposing that “no amnesty should be available to guerrillas accused of personal criminal acts; instead huge cash bounties should be placed on their heads.”<sup>120</sup> While this may seem attractive, the purpose of offering amnesty is to whittle away support from the insurgency and provide alternatives to its members; without the possibility of this amnesty, the most personally dangerous members will likely remain the most intransigent.

An example of the amnesty process can be seen in Iraq’s “Anbar Awakening.” In 2006, several (minority) Sunni tribes

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<sup>116</sup> JOES, *supra* note 22, at 169 (quoting JEANNETTE A. KOCH, THE CHIEU HOI PROGRAM IN SOUTH VIETNAM, 1963-1971, at vi (RAND, R-1172-ARPA, 1973), available at <http://www.rand.org/content/dam/rand/pubs/reports/2006/R1172.pdf>).

<sup>117</sup> VOORHOEVE, *supra* note 7, at 111.

<sup>118</sup> SCHLUNCK, *supra* note 33, at 249.

<sup>119</sup> *Id.*

<sup>120</sup> JOES, *supra* note 22, at 167.

began seeking to move away from their former Al Qaeda in Iraq (AQI) partners and instead partner with the United States and Iraqi governments.<sup>121</sup> In some cases, members of the tribes had been former insurgents,<sup>122</sup> but after noting that AQI seemed to be intent on supplanting the tribal structure for control of both smuggling operations in Anbar and tribal territory itself, they concluded that it was in their best interest to turn on AQI.<sup>123</sup> In others, the AQI brutality towards family members and loved ones spurred them to throw in with the incumbents.<sup>124</sup>

The incumbents took the opportunity presented by the cooperative tribes to bring them into the fold by using tribal forces as “neighborhood watch groups,”<sup>125</sup> as well as integrating them into Iraqi police forces.<sup>126</sup> With American funding, Sunni tribes were convinced to either switch allegiance to the incumbents or to, at the very least, remain neutral parties and refrain from aiding AQI. While the prior actions of the Sunni tribal leaders were cause for concern, incumbent leaders ultimately concluded that the tribes would likely be “reliable partners,” given their self-interested position of allying against al Qaeda.<sup>127</sup> As tribes shifted allegiance,

<sup>121</sup> See Dave Kilcullen, *Anatomy of a Tribal Revolt*, SMALL WARS J. BLOG (Aug. 29, 2007, 1:52 AM), <http://smallwarsjournal.com/blog/anatomy-of-a-tribal-revolt> (describing how the self-interest of certain Iraqi tribes aligned with the interests of the United States and Iraqi governments against al Qaeda).

<sup>122</sup> See Colin Freeman, *Iraqi Neighbours Rise Up Against al-Qa'eda*, TELEGRAPH Apr. 12, 2008, <http://www.telegraph.co.uk/news/worldnews/1584898/Iraqi-neighbours-rise-up-against-al-Qaeda.html> (explaining that many Iraqis, previously sympathetic with al Qaeda's anti-occupation message, began to view al Qaeda not as “resistance fighters,” but as “liars and terrorists”).

<sup>123</sup> See John A. McCary, *The Anbar Awakening: An Alliance of Incentives*, 32 WASH. Q. 43, 47–48 (2009) (explaining that al Qaeda's violent political takeover of Anbar pushed some tribal leaders to ally with the United States).

<sup>124</sup> See Freeman, *supra* note 122 (detailing various incidences of brutality leveled by al Qaeda against the tribes).

<sup>125</sup> *Id.*

<sup>126</sup> See Thomas R. Searle, *Tribal Engagement in Anbar Province: The Critical Role of Special Operations Forces*, 50 JOINT FORCE Q. 62, 65–66 (2008) (noting that tribal support led to a surge in police force volunteers, which was crucial for defeating al Qaeda).

<sup>127</sup> See Jim Michaels, *An Army Colonel's Gamble Pays Off in Iraq*, USA TODAY, May 1, 2007, [http://www.usatoday.com/news/world/iraq/2007-04-30-ramadi-colonel\\_n.htm](http://www.usatoday.com/news/world/iraq/2007-04-30-ramadi-colonel_n.htm) (stating that a trust based on mutual self-interest developed between U.S. forces and tribal leaders; for example, U.S. forces gained “an Iraqi police force,” while tribal leaders secured protection for their families).

insurgent attacks in their territory decreased dramatically.<sup>128</sup> However, by 2010 this promising picture had changed considerably. The (largely Shia) Iraqi government took over administration of the Awakening program in 2008, prompting concerns from Sunnis that the government would start disbanding their units or even arresting former insurgent leaders.<sup>129</sup> In September 2010, hundreds of Sunni tribesmen police, who had been integrated into Iraqi security forces, were dismissed by the Iraqi Interior Ministry,<sup>130</sup> and many began rejoining AQI.<sup>131</sup> As of the time of this Comment, the ultimate results of the Anbar Awakening remain to be seen.

The amnesty offered to the Anbar Awakening members, along with the falling out between AQI and the Awakening tribes, caused the initial shift in the Awakening tribes from nominally insurgent-allied to allying with the incumbent. This co-opting of the Sunni tribes did in fact provide greatly increased security to Anbar while the partnership was in effect.<sup>132</sup> However, it is important to consider the ramifications of the Anbar Awakening beyond the increased security provided. Firstly, the amnesty provided to the various tribal forces went beyond direct amnesty – insurgency fighters were actually co-opted by the incumbents. However, the method by which the Sunni tribes were brought to

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<sup>128</sup> See Kilcullen, *Anatomy of a Tribal Revolt*, *supra* note 121 (discussing a reduction in improvised explosive device (IED) and other attacks throughout various regions).

<sup>129</sup> See Erica Goode, *U.S. Military Will Transfer Control of Sunni Citizen Patrols to Iraqi Government*, N.Y. TIMES, Sept. 1, 2008, <http://www.nytimes.com/2008/09/02/world/middleeast/02iraq.html> (describing some of the problems foreseen in a transfer of control over “the Sunni-dominated citizen patrols known as Awakening Councils” to the Shiite-dominated Iraqi government).

<sup>130</sup> See Leila Fadel, *Sunni Awakening Officers are Kicked Off Police Force in Iraq*, WASH. POST, Sept. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/26/AR2010092603533.html> (detailing a plan by the Iraqi Interior Ministry to remove scores of officers from the American police force).

<sup>131</sup> See Timothy Williams & Duraid Adnan, *Sunnis in Iraq Allied With U.S. Rejoin Rebels*, N.Y. TIMES, Oct. 16, 2010, [http://www.nytimes.com/2010/10/17/world/middleeast/17awakening.html?\\_r=1&ref=global-home](http://www.nytimes.com/2010/10/17/world/middleeast/17awakening.html?_r=1&ref=global-home) (describing a change in loyalty by many members of the Awakening Councils, many “rejoin[ing] Al Qaeda in Mesopotamia”).

<sup>132</sup> See McCary, *supra* note 123, at 55 (noting the “unprecedented level of cooperation and coordination” between U.S. military commanders and local tribal heads).

work with the incumbents meant that not only did the sheikhs continue to function as the local power brokers,<sup>133</sup> but they began to function as a separate power bloc within Iraq. The amnesties offered to the Sunni tribes were also possible in part because of their limited direct support for AQI; as one American officer noted, “There might be a few guys among them who were shooting at us before, but I would say that for most, the worst thing they might have done is maybe made the odd phone call on behalf of the insurgents.”<sup>134</sup>

Above all, it must be remembered that past counterinsurgency efforts in one nation do not necessarily translate to efforts in another. American attempts to engineer an “Afghan Awakening” amnesty and reintegration program based on the Anbar Awakening have resulted in a miniscule yield; an estimated three percent of Taliban fighters have chosen to engage with the Afghan Peace and Reintegration Program.<sup>135</sup>

#### 4. CONCLUSIONS

##### 4.1. Synergistic Nature of Counterinsurgency and the Rule of Law

As we have seen, counterinsurgency and the rule of law operate in a synergistic manner. Safeguarding the rule of law demonstrates that a state is capable of governing effectively and in a legitimate fashion, which increases the willingness of a population to support the government. A population-centric counterinsurgency will likely strengthen existing instruments of the rule of law, and take steps to ensure that the population is provided with governance they perceive as being authentic and legitimate.

Furthermore, failures in one will harm the other. By presenting a populace with illegitimate governance, an incumbent indicates that the insurgency is capable of providing better government – or

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<sup>133</sup> See Kilcullen, *Anatomy of a Tribal Revolt*, *supra* note 121 (explaining the parallel power structure that exists in Iraq, with tribal leaders competing for power with the formal national government).

<sup>134</sup> Freeman, *supra* note 122.

<sup>135</sup> See Spencer Ackerman, *A Year in, Amnesty Deal Lures Only Three Percent of Taliban*, WIRE (Jan. 3, 2011, 10:36 AM), <http://www.wired.com/dangerroom/2011/01/a-year-in-amnesty-deal-lures-only-3-percent-of-taliban/> (detailing the relatively modest success of an amnesty program in Afghanistan).

at least an equivalent form. By failing to protect a population and ensure that security issues are dealt with, an incumbent will weaken societal reliance on governmental institutions such as the police or the courts.

#### 4.2. *Strictly Short-Term Security Gains Damage Both Counterinsurgency and the Rule of Law*

An incumbent is put in a difficult position regarding its conduct in response to a counterinsurgency campaign. If the violence of an insurgency is allowed to persist then the populace is likely to lose faith in the government,<sup>136</sup> or possibly support the insurgent.<sup>137</sup> However, the more direct measures the government takes to quell the insurgency, the more it may approach indiscriminate violence as described by Kalyvas & Kocher;<sup>138</sup> the al-Assad method of counterinsurgency provides an extreme example.

Co-opting the rule of law to the needs of a counterinsurgency effort may seem desirable for an incumbent, but this is ultimately penny-wise and pound-foolish. Using the rule of law strictly as a method for strengthening a counterinsurgency, without paying heed to its aspects of accountability for the state or protection of human rights, would fatally wound the legitimacy of the rule of law.<sup>139</sup>

A focus on measures designed to maximize short-term efficiency will also lead to a lack of sustainability. Chappuis & Hänggi point to security sector reform in Afghanistan, where a “focus on operational capacity-building to the neglect of long-term

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<sup>136</sup> See DAVID L. PHILLIPS, LOSING IRAQ: INSIDE THE POSTWAR RECONSTRUCTION FIASCO 158 (2005) (“As violence mounted, Iraqi resentment of the United States also increased.”).

<sup>137</sup> See Kalyvas & Kocher, *supra* note 59, at 189-90 (explaining that when indiscriminate state violence increases, the population may look to the insurgent for protection from the state or even join the insurgent, who is more capable of selective violence).

<sup>138</sup> *Id.* at 210 (presenting data from the Greek Civil War indicating that noncombatants in the Argolid perished at higher rates than combatants because they were “between two fires” – targeted by both sides simultaneously).

<sup>139</sup> See Kilcullen *Interview*, *supra* note 43, at 3 (noting that because the Afghan government abused and oppressed the local population, town elders had expelled the government officials and embraced the Taliban in 2008; assessing the challenge of the Marjah operation begins with understanding the Taliban presence in the town as a symptom of Afghan government abuse).



training . . . led to a contradiction between human security and state security as the ability of the state to protect itself increased with the efficiency of the army but human security deteriorated in great part due to unsuccessful police reform.”<sup>140</sup> A surge requires the presence of large numbers of troops, forcing an incumbent to keep significant resources committed to that effort. Successes in establishing security after a sudden influx of force may be potentially short-lived; successes in establishing the rule of law, with its requirements for equal treatment of citizens and constraints on the use of state power, will probably be even shorter in duration.

#### 4.3. Final Conclusions

Some counterinsurgency experts are dubious about the utility of legitimacy to the incumbent. When John Nagl was asked whether an illegitimate government could defeat an insurgency, he responded that “the government only has to be seen as more legitimate and better for the population than the insurgents.”<sup>141</sup> This is not entirely accurate. While Nagl may be correct that the bare minimum legitimacy necessary for the government is simply to be “better” than the insurgents, it is misleading to think that this bare minimum is likely to be an effective method of concluding a counterinsurgency. Nagl’s suggestion may be a possible method for convincing the populace of a nation to side with the incumbent, but it will not effectively demonstrate that the incumbent can provide security and legitimacy in the long term, and may even foster the conditions for another potential insurgency in the future.

One criticism that may be levied against this work is that the suggestions for incumbents presented here represent objectives that are more aspirational than pragmatic.<sup>142</sup> One commentator

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<sup>140</sup> Chappuis & Hänggi, *supra* note 35, at 52.

<sup>141</sup> Nagl *Interview*, *supra* note 15, at 4.

<sup>142</sup> See Interview by Maria Costigan with Jaqueline Hazelton, Former Research Fellow, Harvard Kennedy Sch. Belfer Ctr. for Sci. & Int’l Affairs in Cambridge, Ma. (Dec. 3, 2010) (video and transcript available at [http://belfercenter.ksg.harvard.edu/publication/20860/interview\\_with\\_jacqueline\\_jill\\_hazelton.html?breadcrumb=%2Fexperts%2F2085%2Fjacqueline\\_1\\_hazelton](http://belfercenter.ksg.harvard.edu/publication/20860/interview_with_jacqueline_jill_hazelton.html?breadcrumb=%2Fexperts%2F2085%2Fjacqueline_1_hazelton) (arguing that the process of counterinsurgency as a form of state building, including limiting the use of military force to prevent alienating civilians through casualties, is an ideal model that has never been successfully implemented).

has suggested that population-centric counterinsurgency “doesn’t bear any resemblance to what has succeeded in counterinsurgency in the past.”<sup>143</sup> In some ways this is true; population-centric methods have had mixed results while strongly coercive methods applied against the population certainly have been successful in the past, such as the actions of al-Assad in Syria and Aouissas in Algeria. At the same time, it is very possible that a population-centric counterinsurgency is the only one that a nation even somewhat concerned with human rights and the rule of law can hope to wage effectively. One of the most fundamental determining factors in warfare is the willingness of a nation to continue engaging in the conflict.<sup>144</sup> If an incumbent government adopts a strategy fundamentally hostile to the norms of its population base, concern over the nature of the conflict will ultimately sap the incumbent’s willingness to continue fighting and render the entire conflict pointless.

When writing of the French army’s defeat at the hands of the Wehrmacht during the Second World War, historian Eugenia Kiesling noted that “Daladier and Gamelin worked within the institutions of the Republic they served. . . . [The French army] was an army unready for war against the Wehrmacht in 1940, but it could not have been different and remained the army of the Third Republic.”<sup>145</sup> Similarly, any incumbent power will be constrained by the de facto limits that its society imposes upon it. As Alistair Horne suggests, by 1962, the violence of the Algerian War, and in particular, the actions of the Organisation de l’armée secrète (O.A.S.), a right-wing French nationalist group fighting for French control of Algeria, were the tipping factors in the ultimate loss of public support for a French presence in Algeria.<sup>146</sup> Turmoil over French conduct in the Algerian war had already contributed to the

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<sup>143</sup> *Id.*

<sup>144</sup> See CLAUSEWITZ, *supra* note 12, at 90 (discussing the varying ability of political objectives to mobilize the forces required for war, including public support).

<sup>145</sup> EUGENIA C. KIESLING, *ARMING AGAINST HITLER: FRANCE AND THE LIMITS OF MILITARY PLANNING* 188 (1996).

<sup>146</sup> See HORNE, *supra* note 53, at 504 (discussing anti-government sentiment of the French public following police violence at a civilian rally protesting O.A.S. violence in Algeria).

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French government collapse in May 1958.<sup>147</sup> It is not unreasonable to suggest that if an incumbent goes beyond a certain threshold of brutality in a counterinsurgency campaign, it will likely face domestic difficulties similar to the French government.

How, then, can a democratic incumbent effectively wage a counterinsurgency? The best option is to engage in population-centric counterinsurgency while continuing to support the rule of law. This is not an easy process. No war is. But support for the rule of law within counterinsurgency efforts affords the incumbent the best chance for a successful counterinsurgency campaign—of removing incentives for insurgency and building a lasting peace.

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<sup>147</sup> *Id.* at 273–98 (examining the Algerian impetus to de Gaulle’s 1958 assent to power).