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The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness

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Frédéric Gilles Sourgens

Abstract

This Article has five parts. Part I sets out and adopts the basic premises of the jurisprudential perspective championed by Professor Reisman and sketches his argument that legal solutions can always be fashioned in a meaningful and realistic manner. Part II discusses the development of ISIL in the Middle East. Part III analyzes the lawlessness problem created by ISIL for the affected local communities and explains how loss of control, left unattended, transforms into a loss of authority of prescription by destroying the social fabric needed for legal processes to have meaning. Part IV develops how municipal lawlessness has a contagion effect on the international plane through what this Article calls the transnational transference of lawlessness by comparing international legal reactions to ISIL's putative establishment of a caliphate in Syria and Iraq. Part V sketches how the contagion effect can be stopped by means of the diagnostic tools developed in Parts III and IV. The Article demonstrates that both public debate and scholarly engagement so far have focused on the wrong question: whether or how to use force to wrest control of territory from ISIL. Given the progression of lawlessness from loss of control to loss of authority mapped in Part III of the Article, this incorrect focus is understandable. But to be effective, the debate instead must focus directly on how authoritative decision-making processes can be rekindled and protected in Syria, Iraq, and beyond. These structures were degraded not just by ISIL, which may well be a symptom of failing authority structures rather than its proximate cause; in fact, these structures were sabotaged by Western and Ottoman colonial powers long before ISIL sought its opportunity on Arabian soil. Perhaps counter-intuitively, use of force that does not also address and re-strengthen the social fabric in the region could well be worse long-term than no use of force at all. Given the human toll in the region—and the role as other than an innocent bystander of Western powers—the normative end of law should inspire us towards more effective—and more authoritative—forms of intervention.

KEYWORDS: ISIL; Lawlessness; case study; problem; Syria; Consent-Based; Iraq; International Law; threat

ARTICLE

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*Frédéric Gilles Sourgens**

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INTRODUCTION

Can the United States respond lawfully to persistent and intense episodes of lawlessness in the face of United Nations Security Council gridlock? The global reaction to the Daesh (or “Islamic State of Iraq and the Levant” or “ISIL”) occupation of Syrian territory makes this more than an academic question. As it stands, significant weight of authority supports that US air strikes in Syria are unlawful despite the documented atrocities committed by ISIL (as well as Syrian government forces) upon the Syrian civilian population.

This Article submits that academic and political commentators ask the wrong question. Lawlessness such as that currently witnessed in Syria is both absolute and impervious to legal response. Speaking of a lawful response in such circumstances is meaningless. This Article provides the first fully theorized account of lawlessness. This account begins with the domestic progression of lawlessness in three stages: (1) pragmatic lawlessness, constituting a temporary loss of control by the government apparatus; (2) formal lawlessness, constituting a loss of authority of the government apparatus; and (3) functional lawlessness, constituting a loss of the social fabric necessary to support any authoritative social decision. It theorizes that international law progressively loses its own authority to address lawlessness because of a transnational transference of lawlessness; this transference becomes complete at the functional lawlessness stage. The Article submits that lawlessness in Syria has reached functional levels. The Article theorizes finally that the United States must act to counteract the corrosive effect of functional lawlessness extra-legally in order to protect its national security interests and

forestall more serious systemic losses of authority on the international plane.

Deploying this theoretical construct, the Article argues that academic and political commentators focus on a tool that is inefficient and potentially counterproductive, namely the escalation of purely coercive responses. The Article concludes that only policy responses specifically tailored to restore authority by strengthening the capabilities of those affected by lawlessness can be successful and provides specific policy proposals how to achieve this end.

Der Knabe seufzt über's grüne Meer,
 Vom fernenden Ufer kam er her,
 Er wünscht sich mächtige Schwingen,
 Die sollten ihn ins heimische Land,
 Woran ihn ewige Sehnsucht mahnt,
 Im rauschenden Fluge bringen.
 - Franz Schubert, *Atys*, D.585.¹

When men commit unspeakable horrors before our eyes and we are powerless to stop them, the Western canon from Thucydides' *History of the Peloponnesian War* onwards has mourned the end of law.² What is more, the Western canon fears lawlessness as a contagious, consuming, and covetous force.³ ISIL, or Daesh, as it is

1. "The boy sighs over the green sea,/ From a far shore came he here./ He wishes for mighty wings:/ They should bring him to his home-country,/ Of which eternal longing reminds him./ On sweeping pinions." FRANZ SCHUBERT, *ATYS*, D.585 (1883), in SCHUBERT: *MAYRHOFER-LIEDER*, VOL. 2 (Naxos 2003), <http://www.naxos.com/sungtext/PDF/8.554739.pdf>. Johann Baptist Mayrhofer authored the original poem.

2. THUCYDIDES, *THE PELOPONNESIAN WAR* 302 (Martin Hammond trans., Oxford University Press 2009) (431-404 B.C.) ("You know as well as we do that when we are talking on the human plane questions of justice only arise when there is equal power to compel: in terms of practicality the dominant exact what they can and the weak concede what they must."); *see id.* at 172 ("With all life thrown into chaos at this time of crisis for the city, human nature triumphed over law . . .").

3. The linkage between lawlessness and plague are powerful in Western history and literature. *See, e.g.*, RANDAL P. GARZA, *UNDERSTANDING PLAGUE: THE MEDICAL AND IMAGINATIVE TEXTS OF MEDIEVAL SPAIN* 19 (2008) ("In Thucydides' view, such disregard of funerary practices combined with the human being's inability prevent or cure the disease to lead to a general decline in the perceived value of human life. As a result, general lawlessness followed."); ROBERT HOLLANDER, *BOCCACCIO'S DANTE AND THE SHAPING FORCE OF SATIRE* 121 (1997) (discussing the attempts by Boccaccio to re-theorize law from the lawlessness engendered by the plague through a social reconstitution of community).

known in the Middle East, now again brings us face to face with that force: ISIL proudly trumpets the vilest forms of cruelty it inflicts on those within its grasp.⁴ Daesh is not a transient terrorist threat but is conquering territory in the Middle East and beyond—and has succeeded in displacing weak and failing states in the region.⁵ The West appears singularly powerless to respond to ISIL;⁶ but averting its eyes is no longer possible either when the children of those fleeing from the massacres are washing dead upon our shores rather than dying in the ruins of a far off land.⁷

Tragically, the West seems to be lost midway between continued isolationist denial and renewed interventionist fervor in its attempts to grapple with the crisis.⁸ International law, the straightforward path to address international lawlessness, has no manifest means to guide decision-making to face this new threat absent Security Council action, which as of today is unlikely to be decisive.⁹ So how can, and

4. See Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES, Aug. 13, 2015, <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html> (discussing the organized use of rape as a policy tool by ISIS); The Editorial Board, *The Crimes of Palmyra*, N.Y. TIMES, Aug. 25, 2015, <http://www.nytimes.com/2015/08/26/opinion/the-crimes-of-palmyra.html> (“The Islamic State, the ultrafundamentalist group better known as ISIS, has laid a trail of unspeakable horrors in its march through Syria and Iraq – videotaped beheadings, ritualized rape and all manner of grisly torture and murder of anyone who does not subscribe to its extreme version of Islam.”).

5. Christina Pazzanese, *The Islamic State of Play*, HARV. GAZETTE, Oct. 24, 2014, <http://news.harvard.edu/gazette/story/2014/10/the-islamic-state-of-play/> (noting that what is distinctive about ISIL is its ability to hold territory).

6. See Mark Mazzetti & Matt Apuzzo, *Analysts Detail Claims That Reports on ISIS Were Distorted*, N.Y. TIMES, Sept. 15, 2015, <http://www.nytimes.com/2015/09/16/us/politics/analysts-said-to-provide-evidence-of-distorted-reports-on-isis.html> (detailing ongoing concerns that U.S. military reports on the success of air strikes against ISIL were exaggerated); see also Anne Barnard, *Turkey’s Focus on Crushing Kurdish Separatists Complicates the Fight Against ISIS*, N.Y. TIMES, July 28, 2015, <http://www.nytimes.com/2015/07/29/world/turkeys-focus-on-crushing-kurd-extremists-complicates-isis-efforts.html> (noting that Turkish forces nominally allied with the U.S. in the fight against ISIL are attacking Kurdish fighters combatting ISIL); Krisztina Than & Ivana Sekularac, *Hungary Shuts EU Border, Taking Migrant Crisis Into Its Own Hands*, REUTERS, Sept. 16, 2015, <http://in.reuters.com/article/2015/09/15/europe-migrants-crisis-hungary-border-eu-idINKCN0RF1E120150915> (reporting moves made by Hungary to undermine relief efforts for the growing migrant humanitarian crisis).

7. See Robert Mackey, *Brutal Images of Syrian Boy Drowned Off Turkey Must Be Seen, Activists Say*, N.Y. TIMES, Sept. 2, 2015, <http://www.nytimes.com/2015/09/03/world/middleeast/brutal-images-of-syrian-boy-drowned-off-turkey-must-be-seen-activists-say.html>.

8. See *supra* note 6.

9. See Krishnadev Calamur, *Obama Has Support For Syria Strikes, But Are They Legal?*, NPR (Sept. 25, 2014), <http://www.npr.org/sections/parallels/2014/09/25/351433505/obama-has-support-for-syria-strikes-but-are-they-legal> (summarizing the academic positions

should, the United States and its allies react to the specter of ISIL's apparently expanding lawless rule?

Two opposing options come readily to mind. One approach is to abandon all hope of law and act decisively and unconstrainedly to purge the threat. Niccolò Machiavelli observed that "experience shows that in our times the rulers who have done great things are those who have set little store by keeping their word, being skillful rather in cunningly deceiving men; they have got the better of those who have relied on being trustworthy."¹⁰ The "times" Machiavelli described were marred by deep crisis—law and civil society in Machiavelli's native Florence had been eviscerated entirely by civil strife and war when Machiavelli wrote *The Prince* for Florence's new ruler.¹¹ In such times, Machiavelli advised, faithfulness—law—is a dangerous myth and rulers would be well advised to treat it as little more than one tool among others to re-establish order.¹² The end—and only the end—excuses the means.¹³

regarding the questionable legality of strikes against ISIL in Syria under international law); Michelle Nichols, *UN Security Council Adopts Resolution Stifling ISIS, Nusra Front Cash Flows*, HAARETZ, Feb. 12, 2015, <http://www.haaretz.com/news/middle-east/1.642279> (noting the geopolitical voting blocs obstructing more effective resolutions in the Security Council).

10. NICCOLÒ MACHIAVELLI, *THE PRINCE* 61 (Quentin Skinner & Russell Price eds., 1988) (1532). Machiavelli has had an enduring impact on relevant legal scholarship. *See, e.g.*, Kenneth R. Mayer, *Executive Power in the Obama Administration and the Decision to Seek Congressional Authorization for a Military Attack Against Syria: Implications for Theories of Unilateral Action*, 4 UTAH L. REV. 821, 832 (2014) (discussing Machiavelli in the context of unilateral action against Syria); Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45, 90-91 n.121 (2014) (discussing the impact of Machiavellian thought on executive action).

11. *See* John Parkin, *Dialogue in The Prince*, in NICCOLÒ MACHIAVELLI'S *THE PRINCE: NEW INTERDISCIPLINARY ESSAYS* 65, 71 (Martin Coyle ed., 1995) ("The metatextual reference to aiming high cited above, for example, is at once an introduction to further predictable examples of regal virtue (Moses, Cyrus, Romulus among them) and an incitement to the Medici to cultivate their *virtù* in the Machiavellian terms of energy, initiative, constitutional reform and armed force in whatever political context (Florence or elsewhere: it isn't clear) they operate. . . . The point for him is to use this freedom to convert humanist commonplaces into something else while retaining some contact with humanism via for instance the classical notion of *virtù* itself."); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 160-61 (2d ed. 2003) (noting the relationship between *The Prince* and overthrow or innovation in the context of a "society [that] is atomized into a chaos of unreconciled and conflicting wills").

12. *See* 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 186 (1978) ("Machiavelli invariably sees the world of politics as one in which the rational methods of the law-giver must be supplemented at all times with the ferocity of the lion and the cunning of the fox."). This, of course, is not the only possible interpretation of Machiavelli but one that has gained prevalence in contemporary political theory. While I adhere to this interpretation of

Professor W. Michael Reisman, a leading international legal theorist, rejects this answer. In his 2012 work, *The Quest for World Order and Human Dignity in the Twenty-first Century*, he adopts a functionalist approach.¹⁴ This approach allows him to diagnose and correct the problem of formalist legal analysis: crises reveal a clash between sovereignty-based and human-rights-based reasoning.¹⁵ Professor Reisman's approach is uniquely relevant because it is that very clash that perplexes the predominant academic responses to the policy choices made by Western powers in seeking to counter ISIL.¹⁶

Noting the adage "*silent enim leges inter arma*" ("the laws fall mute in times of violence"), Professor Reisman submits that true

Machiavelli, the Machiavellian point is intended as a conceptual starting point rather than purely textual exegesis.

13. See *id.* at 184 n.1 (noting that the translation to make Machiavelli say the end justifies the means "is perhaps over-eager" because the "verbs Machiavelli uses – in characteristically epigrammatic juxtaposition – are *accusare* and *scusare*. The action itself accuses, but its outcome excuses (rather than justifies) its performance.").

14. W. MICHAEL REISMAN, *THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT* (2012). On the importance of Michael Reisman in US legal scholarship, see Siegfried Wiessner, *Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman*, 34 *YALE J. INT'L L.* 525, *passim* (2009); Larry May, *The UN Charter, Human Rights Law, and Contingent Pacifism*, 23 *J. TRANSNAT'L L. & POL'Y* 37, 52-53 (2014) (noting the influence of Michael Reisman on questions of the use of force).

15. See REISMAN, *supra* note 14, at 386-87 (discussing how such clashes can be reconciled).

16. See Louise Arimatsu & Michael Schmitt, *The Legal Basis for War Against ISIS Remains Contentious*, *GUARDIAN*, Oct. 6, 2014, <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state> ("Most, if not all, international law experts agree that military operations against Isis in Iraq comport with international law. The same cannot be said of the operations against Isis in Syria."); Mary Ellen O'Connell, *Obama's Illegal War, The Islamic State Never Attacked Us. So Why Are We Attacking Them?*, *POLITICO*, Sept. 11, 2014, http://www.politico.com/magazine/story/2014/09/obamas-illegal-war-10863_Page2.html (O'Connell teaches international law at Notre Dame); Dapo Akande & Zachary Vermeer, *The Airstrikes Against Islamic State and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, *EJIL: TALK!* (Feb. 2, 2015), <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>; Raphael Van Steenberghe, *The Alleged Prohibition on Intervening in Civil Wars Is Still Alive After Airstrikes Against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer*, *EJIL: TALK!* (Feb. 12, 2015), <http://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/#more-13063>; Jennifer Trahan, *Pesky Questions of International Law: What's the Basis for Air Strikes in Syria*, *OPINIO JURIS* (Sept. 23, 2014), <http://opiniojuris.org/2014/09/23/guest-post-pesky-questions-international-law-whats-basis-air-strikes-syria/> ("Thus, while it is not impossible that air strikes in Syria could be justified under international law, the Administration still needs to demonstrate a solid legal foundation for them.").

lawlessness, “transposed to the international political realm and international law [would be] utterly destructive.”¹⁷ Consequently, his treatment “reject[s] the notion that there are areas or sectors of international life in which *lawful* decisions which are contextually meaningful and yet realistic are not demanded and cannot be designed.”¹⁸ Professor Reisman explains that the problem is not one of lawlessness, as such, but one of “offshore zones” of international law in which the constitutive configuration of the process of authoritative international decision-making does not reflect highly effective hierarchical institutions.¹⁹ In these offshore zones, he submits, the design of a lawful decision does not, and cannot, follow a traditional textual-rule-based mode (determining and applying a relevant rule of law to the situation at hand) thus leading to the impression of lawlessness;²⁰ instead, the non-hierarchical constitutive configuration of the international decision-making process requires a policy-context-based mode of decision-making (determining the appropriate goals for the problem being addressed and providing a strategic approach how best to make them effective).²¹ This mode, he submits, will maintain the ability to fashion international decisions that remain at the same time authoritative and controlling, and thus lawful.²²

This Article disagrees with Professor Reisman’s assessment and seeks to revise it in order to respond to current events. It submits that current events provide the exception that tends to prove Professor Reisman’s rule;²³ here, the specific context of a terrorist network

17. REISMAN, *supra* note 14, at 21.

18. *Id.* This statement has some overlap with constructivist theory. See Shima Baradaran et al., *Does International Law Matter?*, 97 MINN. L. REV. 743, 756-60 (2013) (summarizing constructivist theory of international norm creation and compliance). For the constructivist heritage of the New Haven School, see Anthony D’Amato, *Non-State Actors from the Perspective of the Policy-Oriented School*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 64, 67 (Jean d’Aspremont ed., 2011); Philip A. Karber, “Constructivism” as a Method in *International Law*, 94 AM. SOC’Y INT’L L. PROC. 189, 189, 192 (2000).

19. REISMAN, *supra* note 14, at 117.

20. See *id.* at 169-71.

21. See *id.* at 169, 183-86. This feature is not accidental but one that is very much in the interest of the international community in order effectively to engage thorny policy issues defying ready codification.

22. See *id.* at 433-54.

23. See *id.* at 21 (noting as the threat to lawful order, “Carl Schmitt’s sovereign, ‘he who decides on the exception,’ decides when to step outside the law”). Schmitt remains an important, if controversial, figure in legal discourse. See, e.g., Robert Knowles, *National*

operating in an environment of failing municipal and transnational governance structures has provided an example in which lawlessness has so eviscerated the social fabric of the Syrian community as to destroy the necessary basis for legal authority and as to require the re-establishment of legal order wholesale. True lawlessness exists and, as a matter of definition, cannot be lawfully combatted.²⁴ Law in a lawless space ceases to be meaningful;²⁵ adherence to it runs the risk of misunderstanding the problem and proposing the kinds of solutions that further exacerbate it.²⁶

But, as the Article concludes, not all is lost for law. Lawlessness points out the “end” of law in both its descriptive and normative meaning of terminus and purpose respectively. Descriptively, lawlessness points out the conceptual limit of law and how social processes are pushed beyond it.²⁷ Here the Article rejects Professor Reisman’s invocation of law as a meaningful yet realistic guide for decision-making.²⁸ As a descriptive matter, the choice between means

Security Rulemaking, 41 FLA. ST. L. REV. 883, 890-91 (2014) (noting that “Schmitt’s perspective . . . has dominated national security law scholarship at least since September 11, 2001”); Nomi Maya Stolzenberg, *Political Theology with a Difference*, 4 U.C. IRVINE L. REV. 407, 413-14 (2014) (proposing a reconciliation of Schmittian political theology with liberal political theory); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1098-1101 (2009) (discussing Schmittian account of exceptions in the context of administrative law).

24. See CARL SCHMITT, *POLITISCHE THEOLOGIE* 19-20 (Duncker & Humblot eds., 2004) (“Every general norm demands normal living conditions that form the factual predicate to which it is to be applied and which are in turn subjected to its normative rule. Norm needs a homogeneous medium. This factual normalcy is not just an ‘external condition’ that a jurist could ignore; quite to the contrary, it is part of its immanent validity. There is no norm that could be applied to chaos. Order must be established for rule of law to make sense.”) (author’s translation).

25. See *id.*

26. See Gertrude Leighton, *The Legal Community of Mankind: A Critical Analysis of the Modern Concept of World Organization*, 103 U. PA. L. REV. 1114, 1117-18 (1955) (book review) (noting the inherent relation between international legal norm creation and application and the social processes in which they are embedded).

27. Unlike the classic discussion between positivists like Raz and constructivists like Dworkin about the limits of law, the point is not so much to distinguish between legal and social rules. Rather, the point is that legal decision-making reaches its terminus (even in a Dworkinian conception) when the social fabric itself disintegrates. See Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 842-53 (1972) (laying out the positivist position that law has limits); Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, *passim* (1967) (providing the counterpoint to Raz’s argument). On the continued importance of the Raz-Dworkin argument, see Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1254-55 (2015).

28. See REISMAN, *supra* note 14, at 21.

to address this crisis cannot be discerned by references to legal rules or decision-making processes.²⁹

But normatively, lawlessness reveals that the “end” or purpose of law is precisely to root out such states of crisis and re-establish social processes that are once again authoritatively governable. Lawlessness from this vantage point is not a black hole in the sense of dispensing with the values of the rule of law in formulating policy prescriptions, as some have argued.³⁰ Quite to the contrary, any such view would risk extenuating the corrosive effect of lawlessness and swallow more and more weight-bearing elements of authoritative decision-making, i.e., law, as such.³¹ The Article thus submits that Professor Reisman’s analysis is normatively apt—law *strives* for a world in which lawful decision can always be contextually meaningful yet realistic.³² Not yielding to this normative demand degrades the authority of law, and, over time, its ability to constrain, at all.³³ This Article goes on to make a contribution by developing a coherent theory of how this corrosive effect of lawlessness operates beginning on the municipal stage and, through transnational transference, ending on the international plane.

Using this theory, the Article concludes that the key to developing a policy response to ISIL lies in addressing the cause of lawlessness in Syria and Iraq, namely the severe and ongoing deterioration of social structures lending authority to legal decision. No matter the coercive choices made, it is this authority gap that imperatively must be closed to stem the contagion of lawlessness in the region and to protect U.S. and Western national security interests. This authority gap must first and foremost address the growing

29. *See id.*

30. *See* Vermeule, *supra* note 23, at 1149 (arguing that thick rule of law values must cede before the exception).

31. *See* SCHMITT, *supra* note 24, at 19 (“The exception reveals the essence of state authority with greatest clarity. It separates decision from the legal norm; and (to formulate in the form of a paradox) authority proves that to create rights, it does not have to be in the right.”) (author’s translation) (translator’s note – the German word is “Recht” which refers both to “law” as in the legal order and rights. The word “rights” is chosen to maintain the linguistic aporia intended by Schmitt). The point thus is that the exception always seeks to create rights/ law rather than further eviscerate them. *See id.* (“Autorität ... um Recht zu schaffen”/ “authority ... in order to create law” designates a teleology of authority as by definition jurisgenerative). If the reaction to the exception fails to do so, it simply fails to be authoritative by Schmitt’s construct of authority. *See id.*

32. *See* REISMAN, *supra* note 14, at 21.

33. *See id.* at 213-16.

displacement of refugees from the area and their continued participation in decisions about their homeland. Any other response will lead to the emergence of renewed and more severe forms of lawlessness from a region already left in a state of social decay and developmental jeopardy.³⁴

This Article has five parts. Part I sets out and adopts the basic premises of the jurisprudential perspective championed by Professor Reisman and sketches his argument that legal solutions can always be fashioned in a meaningful and realistic manner.³⁵ Part II discusses the development of ISIL in the Middle East. Part III analyzes the lawlessness problem created by ISIL for the affected local communities and explains how loss of control, left unattended, transforms into a loss of authority of prescription by destroying the social fabric needed for legal processes to have meaning. Part IV develops how municipal lawlessness has a contagion effect on the international plane through what this Article calls the transnational transference of lawlessness by comparing international legal reactions to ISIL's putative establishment of a caliphate in Syria and Iraq.³⁶ Part V sketches how the contagion effect can be stopped by means of the diagnostic tools developed in Parts III and IV.

The Article demonstrates that both public debate and scholarly engagement so far have focused on the wrong question: whether or how to use force to wrest control of territory from ISIL.³⁷ Given the progression of lawlessness from loss of control to loss of authority mapped in Part III of the Article, this incorrect focus is understandable. But to be effective, the debate instead must focus directly on how authoritative decision-making processes can be rekindled and protected in Syria, Iraq, and beyond. These structures were degraded not just by ISIL, which may well be a symptom of failing authority structures rather than its proximate cause;³⁸ in fact,

34. See Josh Feng, *How Successful Were the Millennium Development Goals? A Final Report*, NEW SECURITY BEAT (July 28, 2015), <http://www.newsecuritybeat.org/2015/07/successful-millennium-development-goals-final-report/> (“Conflict and displacement is taking a toll as well. While hunger has fallen in most areas, projections indicate that the prevalence of undernourishment in the Middle East will rise by 32 percent between 2014 and 2016 due to war, civil unrest, and increasing numbers of refugees.”).

35. REISMAN, *supra* note 14, at 21.

36. See *infra* Section IV.A.

37. See *supra* note 16.

38. See Press Release, John McCain, Senator, Statement on President Obama's Proposed AUMF (Feb. 11, 2015), <http://www.mccain.senate.gov/public/index.cfm/2015/2/statement-by-senator-john-mccain-on-president-obama-s-proposed-aumf> (demanding “a more coherent,

these structures were sabotaged by Western and Ottoman colonial powers long before ISIL sought its opportunity on Arabian soil.³⁹ Perhaps counter-intuitively, use of force that does not also address and re-strengthen the social fabric in the region could well be worse long-term than no use of force at all. Given the human toll in the region—and the role as other than an innocent bystander of Western powers—the normative end of law should inspire us towards more effective—and more authoritative—forms of intervention.

I. DECODING LEGAL DECISION—THE NEW HAVEN APPROACH

The New Haven School of International Law (the “School”) is one of the most influential legal theories in international legal discourse.⁴⁰ It is also one of the most misunderstood.⁴¹ This potential for misunderstanding is regrettable from a theoretical point of view; the School is a direct relation of two of the most important American legal theories, American legal realism and pragmatism.⁴² The School, founded by Myres McDougal and Harold Lasswell, is closely related to notable figures in American jurisprudence such as Karl Llewellyn of UCC Article 2 fame, or, more distantly, Justices Oliver Wendell Holmes and Benjamin N. Cardozo.⁴³ More pragmatically, the School

comprehensive strategy, and a recognition that ISIL is a symptom of the disease spawned by Bashar Assad’s war on the Syrian people”).

39. See Tarek Osman, *Why Border Lines Drawn with a Ruler in WWI Still Rock the Middle East*, BBC (Dec. 14, 2013), <http://www.bbc.com/news/world-middle-east-25299553> (explaining the effect of colonial French and British ambition on current Middle East conflicts).

40. See Anne Peters, *Realizing Utopias as a Scholarly Endeavour*, 24 EUR. J. INT’L L. 533, 541 (2013) (noting that the School is one of the two “most influential academic schools of our time”).

41. See Richard Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 2001 (1995) (noting the common perception that the New Haven School’s prescriptions would simply coincide with State Department needs).

42. See Harold Hongju Koh, *Michael Reisman, Dean of the New Haven School of International Law*, 34 YALE J. INT’L L. 501, 501-02 (2009) (noting the legal realist origin of the school); Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 862 (1981) (noting the importance of pragmatism and legal realism).

43. Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 446 (2004) (“Realism owes its name to Llewellyn’s 1930 article *A Realistic Jurisprudence*.”); John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1451-52 (1999) (reviewing ANDREW L. KAUFMAN, *CARDOZO* (1998)) (noting the relationship between Holmes, Cardozo and legal realism); 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY, STUDIES IN LAW, SCIENCE AND POLICY*

is the best-developed international legal theory advocating a capabilities approach to human development—an approach adopted in economics and political theory convincingly to point out the myopia of formalist measures of macroeconomic development and decline.⁴⁴ The School thus assists in designing legal strategies to foster such development.

This Part first lays out the analytical framework of the School, which the Article adopts.⁴⁵ It second develops the argument against lawlessness proposed by the School's most important current champion, Professor Michael Reisman.⁴⁶ Parts III to V explain why this proposal is the only means to address the flaws in current legal responses to the Syrian crisis. But as also discussed in Parts III to V, the Syrian conflict causes the central assumption of even his capacious proposal to fail; there is thus no escaping lawlessness.

A. *The Framework of Legal Decision*

1. Law as a Communicative Process

As a jurisprudence deeply indebted to legal realism, the School is directed against legal formalism.⁴⁷ It rejects that legal rules could be divined, derived, or applied in a vacuum.⁴⁸ The School instead understands law as a particular form of process of decision.⁴⁹ The idea, simply, is that law is a means of communication.⁵⁰ This communication must be understood within the larger social context of which it forms a part.⁵¹ Because this social context and the legal perspective interpenetrate each other, statements about law must take

13-14 (1992) (associating the key tenets of the School with Justice Holmes, Judge Jerome Frank, and legal realism).

44. Compare LASSWELL & MCDUGAL, *supra* note 43, at 171-77 (specifying the different features of each particular value process to be protected in global public order), and REISMAN, *supra* note 14, at 360 (same), with MARTHA C. NUSSBAUM, *CREATING CAPABILITIES, THE HUMAN DEVELOPMENT APPROACH* 33-34 (2011) (specifying ten central capabilities at the heart of the capabilities approach).

45. See *infra* Section I.A.

46. See *infra* Section I.B.

47. See LASSWELL & MCDUGAL, *supra* note 43, at 249 (“An important preliminary contribution, in which most proponents of the frame joined, was in demythologizing the positivist paradigm, and in demonstrating that logical derivation, when taken alone, is a most inadequate instrument for the clarification of policy.”).

48. See *id.*

49. See *id.* at 119.

50. REISMAN, *supra* note 14, at 135.

51. See LASSWELL & MCDUGAL, *supra* note 43, at 30.

a functional perspective—law does not have a separate and distinguishable substance from non-law, only a different function within the broader array of social processes.⁵² Derisively, opponents of legal realism have submitted that legal decisions are made not by reference to black letter law, but what the judge ate for breakfast.⁵³ Of course, less derisively, US jurisprudence has long accepted with the near canonization of Ronald Dworkin, a thinker with an ambivalent relationship to legal realism, that social context is inextricably intertwined with legal interpretation and application.⁵⁴ It is such a less radical claim to which the School subscribes.⁵⁵

The focus upon social processes naturally entail the inclusion of a wide array of inconsistent values of the various groups and individuals in society that law must somehow manage to accommodate.⁵⁶ The School is clear about the fact that no single denominator can be found by which law could harmonize these

52. See *id.* at 22-25.

53. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 944 (1995) (“The polar case for such individual-oriented descriptions of judicial decision-making is extreme legal realism, which supposes that judges’ decisions depend on a large number of factors – including what the judge ate for breakfast on the morning of a decision – so numerous and relating to outcomes in so complex a manner as to obscure the actual basis for decision.”). This is a caricature of legal realism—and that one that most sophisticated adherents to the school reject. Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 145 (2014).

54. See GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT* 72 (2005) (noting Dworkin’s role as an influential adversary of legal realism). Compare Tom Lininger, *On Dworkin and Borkin*, 105 MICH. L. REV. 1315, 1317 n.8 (2007) (“An empirical study has shown that Dworkin is the most influential scholar in legal philosophy today.”), with RONALD DWORKIN, *LAW’S EMPIRE* 225 (1986) (“The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.”). Whether one views Dworkin as an adversary of realism or a continuation of its insights, Dworkin has showcased that social context and legal decision cannot meaningfully be separated.

55. The School has significant points of disagreement with Dworkin. LASSWELL & MCDUGAL, *supra* note 43, at 242. They agree, however, on important elements of the frame how social processes and legal processes relate to one another. Michael Reisman, *A Jurisprudence from the Perspective of the “Political Superior,”* 23 N. KY. L. REV. 605, 625 (1996) (“The responsible applier must be careful to avoid the nihilism of deconstructive theories, the irresponsibility of theories that purport to liberate appliers from all social controls, and the sterility (from this perspective) of a jurisprudence of strict obedience. Metaphors such as Dworkin’s ‘chain novel’ may express the spirit of the activity, but do not supply policy guidelines for its execution.”). On an articulation of disagreement with some forms of realism from Dworkin’s side, see Dworkin, *supra* note 27, at 15-17, 23.

56. See LASSWELL & MCDUGAL, *supra* note 43, at 13; REISMAN, *supra* note 14, at 181, 185.

different values.⁵⁷ There is no logical derivation of the correct answer.⁵⁸ Instead, law becomes a tool for conflict resolution made famous in *Getting to Yes* in that it seeks to find mutual gain by balancing shared interests, dovetailing differing interests, and sustainable apportionment of (joint) losses.⁵⁹ Again, this frame is sometimes derided by some as requiring the comparison of whether a rock is heavier than a line is long.⁶⁰ But again, US jurisprudence has incorporated it in the most common place of judicial tools: the balancing test.⁶¹

The School relevantly proposes that there are two modes of participation in legal communication. The first is the textual-rule-based mode.⁶² This mode is the most familiar and communicates simply about how we read and apply law, typically in the context of legal dispute or litigation.⁶³ This mode at first blush looks like an adoption of a formalist or quasi-formalist frame.⁶⁴ It varies from it by insisting that the gathering of facts deemed relevant for determination of the dispute, the demarcation and interpretation of legal rules deemed triggered by these facts, and the final application of the law so determined to the facts so gathered is heavily dependent upon the broader social context in which the dispute takes place and to which it makes reference.⁶⁵ One might surmise that the recent marriage equality decision is an example of just such an application of the textual-rule-based mode.⁶⁶

57. See LASSWELL & MCDUGAL, *supra* note 43, at 13; REISMAN, *supra* note 14, at 181, 185.

58. See LASSWELL & MCDUGAL, *supra* note 43, at 249.

59. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 72-77 (Bruce Patton ed., 3d ed. 2011).

60. See, e.g., *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

61. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 856-59 (1994).

62. See REISMAN, *supra* note 14, at 177-83.

63. See *id.* at 176.

64. See *id.* at 177 (“Some scholars liken the application function in legal arrangements to the decisions of a referee or umpire in a sports match.”).

65. See REISMAN, *supra* note 14, at 177-78.

66. See *Obergefell v. Hodges*, 135 S.Ct. 2584, 2608 (2015) (“It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”); accord W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575, 576 (2007) (“A public order of

The School further proposes a context-policy-based mode.⁶⁷ This mode is less familiar.⁶⁸ It communicates about how the law should be developed,⁶⁹ typically though certainly not exclusively in the context of legislation or codification of the law (such as in the context of multilateral treaty drafters or the International Law Commission's work systematically to gather and develop international law),⁷⁰ appraisal of the functioning of existing legal rules to determine whether these rules should be terminated or modified (such as in the context of current debates relating to investor-state dispute settlement),⁷¹ or, in some instances, in the execution of broad mandates such as the U.N. Security Council's function to safeguard international peace and security.⁷² This mode seeks to determine first the ultimate goals the legal order aspires to follow in a given situation,⁷³ establish trends towards or away from those goals,⁷⁴ deduce which factors were most relevant in past decisions involving the same goals,⁷⁵ establish the cost of doing nothing,⁷⁶ devise creative alternatives that minimizes as much as possible unwanted consequences of potential actions and maximizes the goals in question.⁷⁷ In short, this mode turns on deeply prudential concerns rather than principally interpretive concerns.⁷⁸

2. Authority and Control

The core elements of the process of legal decision or communication in both modes of principled decision-making are

human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude. This, in a nutshell, characterizes the contribution the New Haven School has made to the law's academic and policy enterprise.”).

67. See REISMAN, *supra* note 14, at 183-90.

68. See *id.* at 173.

69. See *id.* at 170-71.

70. See *id.* at 173.

71. See *id.*

72. See *id.* at 201.

73. *Id.* at 185.

74. *Id.*

75. *Id.* at 186.

76. *Id.*

77. *Id.*

78. See Joshua P. Davis, *Legality, Morality, Duality*, 2014 UTAH L. REV. 55, 92 (2014) (discussing the role of prudential concerns while employing a similar dualist frame of reference to modes of legal decision-making).

control and authority.⁷⁹ Both are empirically observable features of the social process.⁸⁰ Control refers to the “effective participation in the making and enforcing of decision; choice in outcome must be realized in significant degree in practice.”⁸¹ It relates to “operations,” which are ultimately a question of power, or, more precisely, the application of power.⁸²

Authority refers to the level of predictability or anticipation of uses of power, or control operations, in society.⁸³ The School defines authority as “participation in decision in accordance with community perspectives about who is to make what decisions, by what criteria, and by what procedures; the reference is empirical, to a certain frequency in the perspectives of people who constitute a given community.”⁸⁴ Authority thus makes relevant “perspectives.”⁸⁵ These perspectives refer to community “expectations about both authority and control, and inquiry will be made about both patterns of authority and patterns of control in fact.”⁸⁶

Authority, thus, does not refer to abstract moral or metaphysical principles of right and wrong. Instead, authority answers the down-to-earth question of whether, for instance, a police officer has the “authority” to exit a car and forcibly throw the driver to the ground for failing to extinguish a cigarette and “back-talking,” having stopped the driver for failure to indicate a turn;⁸⁷ do we as a society consider

79. *The New Haven School: A Brief Introduction*, *supra* note 66, at 576 (“The New Haven School defines law as a process of decision that is both authoritative and controlling.”).

80. See LASSWELL & MCDUGAL, *supra* note 43, at 26.

81. *Id.*

82. Myres S. McDougal, *Legal Bases for Securing the Integrity of the Earth-Space Environment*, 8 J. NAT. RESOURCES & ENVTL. L. 177, 182 (1992) (“[B]ehavioristic operations, the choices in fact made and enforced by threats of severe deprivations or promises of extreme indulgences.”)

83. LASSWELL & MCDUGAL, *supra* note 43, at 26.

84. *Id.*

85. See *id.*

86. *Id.* at 24.

87. See Holly Yan et al., *Sandra Bland’s Family ‘Infuriated’ at Video of Her Arrest*, CNN (July 23, 2015), <http://www.cnn.com/2015/07/22/us/texas-sandra-bland-arrest/>.

this aberrant behavior⁸⁸—whether or not, on some interpretation of law, the officer is broadly empowered to do so.⁸⁹

Decision without control lacks legal quality because it is simply pretense.⁹⁰ It has no means of finding application to the real world.⁹¹ It is the ultimate form of wishful thinking.⁹² This form of wishful thinking might over time of course alter the reality which it describes if it is sufficiently prevalent.⁹³ In such instances, it simply reconstructs normative communication until even the actors with control themselves recoil from exercising power in a certain way.⁹⁴ Such instances are exceedingly rare.

On the other hand, decisions which lack authority are simply premised in naked power.⁹⁵ They are not accepted or integrated into the social matrix of reciprocal decision-making that make up our day-to-day lives in as much as they do not become part of the perspectives or expectations of how control will be exercised in the relevant society.⁹⁶ By lacking authority, these decisions are ultimately not predictable.⁹⁷ By being unpredictable it is further not possible to provide them with any form of normative superstructure that might explain or justify the use of power to make effective a decision by means of a control apparatus.⁹⁸ The assertion of control without

88. Interestingly, in the case of Sandra Bland, the most firebrand presidential contender for the Republican Party, Donald Trump, addressed the incident through precisely this lens. Janell Ross, *Donald Trump's Intriguing Comments about Sandra Bland. Yes, Really*, WASH. POST, July 23, 2015, <http://www.washingtonpost.com/blogs/the-fix/wp/2015/07/23/donald-trumps-intriguing-comments-about-sandra-bland-yes-really/>.

89. See Richard Winton, *Can a Police Officer Order You Out of Your Car? Experts Weigh in on Sandra Bland Case*, L.A. TIMES, July 22, 2015, <http://www.latimes.com/nation/la-na-sandra-bland-arrest-experts-20150722-story.html> (“He certainly has the legal authority to get her to step out of the car,” Stoughton said. “But in this case, if he is exercising his authority because she [is] defying his direction to put out the cigarette, then that is more based on his ego than public safety. Just because it is legal to order her out of the car doesn't make it a professional approach in modern policing.”).

90. See LASSWELL & MCDUGAL, *supra* note 43, at 26.

91. *See id.*

92. *See id.*

93. See Myres McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. WORLD PUB. ORD. 250, 251 (1980) (“In certain marginal situations, authority may constitute the sole base value for a particular process of prescription.”).

94. *See id.*; see also FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS passim* (Walter Kaufmann trans., 1989).

95. LASSWELL & MCDUGAL, *supra* note 43, at 26.

96. *See id.* at 24.

97. *See id.*

98. *See id.*

authority is the breaking down of social discourse until its ultimate dissolution.⁹⁹

3. Constitutive and Public Order Processes

The New Haven School is express that it views authoritative decision as part of an iterative social process. Thus,

Law will be regarded not merely as rules or as isolated decision, but as a continuous *process* of authoritative decision, including both the constitutive and public order decisions by which a community's policies are made and remade. The processes of authoritative decision in any particular community will be seen as an integral part, in an endless sequence of causes and effects, of the whole social process of that community. Every particular community will, finally, be observed to affect, and be affected by, a whole complex of parallel and concentric, interpenetrating communities, from local through regional to global.¹⁰⁰

In this process, pride of place is given to constitutive process as opposed to public order processes. These are each defined in turn as follows:

the 'constitutive process' of a community may be described as the decisions which identify and characterize the different authoritative decision makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions . . . necessary to making and administering general community policy.¹⁰¹

In turn, "basic community policies" refer to "basic values that ought to inform the more general community" as determined by the relevant perspectives.¹⁰² In contrast, "the 'public order' decisions of a community may be described as those, emerging in continuous flow

99. See JACQUES DERRIDA, *DE LA GRAMMATOLOGIE* 18 (1967).

100. LASSWELL & MCDUGAL, *supra* note 43, 24-25.

101. *Id.* at 28.

102. Winston P. Nagan, *Economic Sanctions, U.S. Foreign Policy, International Law and the Anti-Apartheid Act of 1986*, 4 *FLA. INT'L L.J.* 85, 97 (1988); see Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 *N.C. J. INT'L L. & COM. REG.* 375, 386 (2013) (explaining the relationship between perspectives and basic community policies in the New Haven School).

from the constitutive process, which shape and maintain the protected features of the community's various value processes."¹⁰³

B. Professor Reisman's Lawlessness Argument

Professor Reisman submits that within such an authoritative process of decision making conceived by reference to the pillars laid out in Part I.A, the law never runs out.¹⁰⁴ He explains the appearance of lawlessness by reference to four types of constitutive configurations: (1) constitutive processes without hierarchical institutions, (2) constitutive processes with manifestly ineffective hierarchical institutions, (3) constitutive processes with partly effective hierarchical institutions, and (4) constitutive processes with highly effective hierarchical institutions.¹⁰⁵ A constitutive process relying solely upon ineffective hierarchical institutions relies entirely upon unilateral action determined by the law of the strongest.¹⁰⁶ A constitutive process relying upon ineffective hierarchical structures relies upon operational codes of a shadow process behind the myth system of an officially-sanctioned constitutive process; in short, the greater this gulf, the closer we are to confirming the conspiracy theorist's warning that functions of government are carried out by figures unauthorized to carry them out and no formal authority to stop them.¹⁰⁷ A constitutive process with partly effective hierarchical institutions is built around a system of apparent complete hierarchy—but permits a number of exceptions in which a principal means of vindication of rights is unilateral action such as, for instance, the right of self-defense.¹⁰⁸ A completely effective hierarchical system displaces even these spheres of unilateral empowerment.¹⁰⁹

Lawlessness appears problematic in only two of the four configurations, which Professor Reisman calls offshore zones—constitutive processes with manifestly ineffective hierarchical institutions and constitutive processes with partly effective hierarchical institutions.¹¹⁰ Lawlessness—or wanton unilateral

103. LASSWELL & MCDUGAL, *supra* note 43, at 28.

104. *See* REISMAN, *supra* note 14, at 21.

105. *Id.* at 117.

106. *See id.* at 118.

107. *See id.* at 118-19.

108. *See id.* at 121.

109. *See id.* at 122-23.

110. *See id.* at 20, 123.

action—is not a problem in the first configuration lacking hierarchical institutions because unilateral action is all there is; law is defined by strength and all participants in such a social process, hypothetically, expect as much.¹¹¹ In the fourth configuration, lawlessness has no chance to arise as unilateral action is simply unlawful and will be swiftly treated as such.¹¹² Where the problem does arise, Professor Reisman diagnoses that “the uncertainty with regard to the lawfulness of unilateral action or its normative ambiguity arises from the cognitive dissonance caused by the realization that the constitutive process to which the prerogatives of action has been assigned is either generally or momentarily unable to implement rights which it is supposed to have guaranteed. . . .”¹¹³

The lawlessness problem in the second and third configurations is ultimately resolved by reference to the policy-context-based mode of decision to justify or condemn unilateral action.¹¹⁴ Where there is no hierarchical institution that would prescribe certain conduct that could be applied in a textual-rule-based mode of decision-making, the question is one of making new rules for the case and further develop the normative fabric for future decisions.¹¹⁵ As goals can always be extrapolated and strategies developed to make effective those goals, law can self-propel itself out of any morass.¹¹⁶ Just like a language, it incorporates and adapts with blinding speed to new social phenomena precisely because law as a social process is inextricably intertwined in the process of creating these new social realities.¹¹⁷ This, of course, will lead to a certain amount of indeterminacy (the enterprise is creative and balancing multiple alternative values at the same time – permitting reasonable minds to differ and differ violently as to the appropriate strategy to adopt).¹¹⁸ But this indeterminacy is accounted

111. *See id.* at 118, 123.

112. *Id.* at 123.

113. *Id.*

114. *See id.* at 190-91 (“As general matter, when controlling practice is distinct from the institutions of formal authority, as is often the case in the offshore zones, functional analysis is required. The international lawyer, operating in the policy-context-based mode, needs a more explicit conceptual technique for mapping the relevant processes, the most critical of which may not conform to the myth system.”).

115. *See id.* at 170, 190-91.

116. *See id.* at 188 (“These intellectual constructs of alternative futures serve to indicate what steps should be taken to increase the probability of the eventuation of a preferred future while minimizing the likelihood of the eventuation of the dystopias.”).

117. *See* Ludwig Wittgenstein, *Philosophical Investigations* ¶ 18, in 1 LUDWIG WITTGENSTEIN, *WERKAUSGABE* 225, 245 (Joachim Schulte ed., 1997).

118. *See* REISMAN, *supra* note 14, at 188.

for within the capacious confines of law (and its policy-context-based mode).¹¹⁹

Given the ultimate commitment to the deeply constitutive value of human dignity, there is much to commend this approach.¹²⁰ It keeps law (and lawyers) engaged in international crisis de-escalation.¹²¹ It provides a language, or appropriately a structure, forum, or grammar, in which to collaborate across frontlines towards a common solution.¹²² And it creates a meaningful and meaning-generating buffer to rash and perhaps irremediable unilateral action by one of the members of the international community thinking itself at liberty to act with impunity by the sheer absence of law to stop it.¹²³ As the remainder of this Article will discuss, as strong and desirable as this conception is, it has an Achilles heel: it operates only as long as there is a robust web of social processes to support it.¹²⁴ As the ISIL crisis showcases, this web of social processes is far more fragile than one might hope—with potentially catastrophic consequences.

II. THE ISIL PROBLEM

ISIL is a loose military and quasi-political network organized around an extreme form of Wahhabi dogma.¹²⁵ The group originally

119. *See id.*

120. *See The New Haven School: A Brief Introduction, supra* note 66, at 576.

121. *See* REISMAN, *supra* note 14, at 477.

122. *See* Richard B. Bilder, *The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 680 (1962).

123. *See* REISMAN, *supra* note 14, at 21.

124. One notes that the first scenario of unorganized and non-hierarchical constitutive structures functions only for so long as one assumes that such structures can in fact maintain authoritative decisions at all, i.e., to the extent one presumes that social processes will form in a world of such total instability. REISMAN, *supra* note 14, at 118. One can seriously call such an assumption into question. And if the effective use of naked power erodes both authority and the social fabric, it is simply not true on the terms of *The Quest for World Order and Human Dignity in the Twenty-first Century* that authoritative decisions can be furnished for any situation. *See id.* at 21.

125. *See* David D. Kirkpatrick, *ISIS' Harsh Brand of Islam Is Rooted in Austere Saudi Creed*, N.Y. TIMES, Sept. 24, 2014, <http://www.nytimes.com/2014/09/25/world/middleeast/isis-abu-bakr-baghdadi-caliph-wahhabi.html> (“For their guiding principles, the leaders of the Islamic State, also known as ISIS or ISIL, are open and clear about their almost exclusive commitment to the Wahhabi movement of Sunni Islam.”); Graeme Wood, *What ISIS Really Wants*, ATLANTIC, March 2015, <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/>. For a discussion of the critical reception of Wood’s Atlantic article in Islamic studies circles, see Jack Jenkins, *What the Atlantic Gets Dangerously Wrong About ISIS and Islam*, THINK PROGRESS (Feb. 18, 2015), <http://thinkprogress.org/world/2015/02/18/3624121/atlantic-gets-dangerously-wrong-isis-islam/>.

formed in April 2004 as an al-Qaida affiliate to attack United States and coalition forces in Iraq.¹²⁶ The group was founded by Abu Mus'ab al-Zarqawi.¹²⁷ Mr. al-Zarqawi was not himself an Iraqi national.¹²⁸ Membership in his group similarly drew on significant international membership.¹²⁹ This raised issues of identity and purpose of the group at a relatively early stage.¹³⁰ The original goal of the group was to pressure the United States and its allies to leave Iraq.¹³¹ Al-Zarqawi ultimately led one of the most deadly and brutal terrorists groups in Iraq.¹³² Al-Zarqawi was killed by a US airstrike north of Baghdad in June 2006.¹³³

Following al-Zarqawi's death, the group eventually came to be led by Abu Bakr al-Baghdadi.¹³⁴ Al-Baghdadi, born Ibrahim Awwad Ibrahim Ali al-Badri al-Samarrai, is an Iraqi national.¹³⁵ He was initially deemed comparatively insignificant—reports tell of his detention in 2005 and release by US forces in 2009.¹³⁶ Al-Baghdadi rose to a leadership position in April 2010 following the deaths of the

126. NATIONAL COUNTERTERRORISM CENTER, *Al-Qa'ida in Iraq (AQI)*, <http://www.nctc.gov/site/groups/aqi.html> (last visited Nov. 13, 2015).

127. *Id.*

128. Lee Hudson Teslik, *Profile: Abu Musab al-Zarqawi*, COUNCIL ON FOREIGN REL. (June 8, 2006), <http://www.cfr.org/iraq/profile-abu-musab-al-zarqawi/p9866>.

129. Mary Anne Weaver, *The Short, Violent Life of Abu Musab al-Zarqawi*, ATLANTIC, July 2006, <http://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983/> (noting the international nature of the force recruited by al-Zarqawi's network).

130. *See Al-Zarqawi's Successor Chosen*, MILITARY.COM (June 12, 2006), <http://www.military.com/NewsContent/0,13319,100732,00.html> (noting that "there were tensions between homegrown Iraqi insurgents and the Jordanian-born al-Zarqawi over strategy, and U.S. and Iraqi officials sought to fuel the differences by painting al-Zarqawi as a foreign killing Iraqis for his own purposes").

131. *See Al-Qa'ida in Iraq*, *supra* note 126.

132. *See generally* Laura Smith, *Timeline: Abu Musab al-Zarqawi*, GUARDIAN, June 8, 2006, <http://www.theguardian.com/world/2006/jun/08/iraq.alqaida1> (detailing the killings attributed to al-Zarqawi's group).

133. *See* John F. Burns, *U.S. Strike Hits Insurgent at Safehouse*, N.Y. TIMES, June 8, 2006, <http://www.nytimes.com/2006/06/08/world/middleeast/08cnd-iraq.html>.

134. *See* Janine Di Giovanni, *Who Is ISIS Leader Abu Bakr Al-Baghdadi?*, NEWSWEEK, Dec. 8, 2014, <http://www.newsweek.com/2014/12/19/who-isis-leader-abu-bakr-al-baghdadi-290081.html>.

135. *See id.*

136. *See* Ruth Sherlock, *How a Talented Footballer Became World's Most Wanted Man, Abu Bakr al-Baghdadi*, TELEGRAPH, Nov. 11, 2014, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10948846/How-a-talented-footballer-became-worlds-most-wanted-man-Abu-Bakr-al-Baghdadi.html>.

group's previous leaders.¹³⁷ At this time, the group's strategy became increasingly more violent, launching what a U.N. Security Council committee called "a wave of AQI/ISI suicide attacks [which] began in Mosul, Iraq, [and] which culminated in over 70 deaths." Further, the group "pledged to carry out 100 attacks across Iraq in retaliation for Bin Laden's death."¹³⁸

ISIL rose to prominence outside of Iraq particularly in the context of the Syrian Civil War.¹³⁹ This civil war began as an outgrowth of the larger Arab Spring movement.¹⁴⁰ In contrast to the results of the Arab Spring movement in some other countries, Syrian President Bashar al-Assad did not ultimately relinquish power but instead began a military campaign against the movement to remove him from office.¹⁴¹ The use of military force by Syria led to the formation of a large variety of insurgent military groups fighting the Syrian government.¹⁴²

137. See U.N. Security Council Al-Qaida Sanctions Committee, Narrative Summary of Reasons for Listing Ibrahim Awwad Ibrahim Ali Al-Badi Al Samarrai (June 3, 2014), <http://www.un.org/sc/committees/1267/NSQDi299E.shtml>.

138. *Id.*

139. Even prior to the Syrian Civil War, the group was internationally active. During al-Zarqawi's leadership, the group had an international profile of its own, noted even to rival al-Qaeda's. See Bruce Crumley, *Is Zarqawi the New Bin Laden?*, TIME, Aug. 28, 2005, <http://content.time.com/time/magazine/article/0,9171,1098950,00.html>. The current prominence of ISIL, however, came only following the outbreak of the Syrian conflict and the petri dish it provided to a group like ISIL. At this stage, the Yemeni conflict promises to provide a similar safe haven to ISIL and other terrorist groups. See Zachary Laub, *A Guide to ISIS, the Group That's Tearing Up Iraq*, DEFENSE ONE (June 13, 2014), <http://www.defenseone.com/threats/2014/06/guide-isis-group-s-tearing-iraq/86470/> (noting that "[m]eanwhile, in 2012 the group adopted its new moniker, ISIS (sometimes translated as Islamic State of Iraq and the Levant, or ISIL) as an expression of its broadened ambitions as its fighters have crossed into neighboring Syria to challenge both the Assad regime and secular and Islamist opposition groups there.").

140. See, e.g., Ayodeji K. Perrin, *Introduction to the Special Issue on the Arab Spring*, 34 U. PA. J. INT'L L. i, iii (2013) (noting the relationship between the Arab Spring and the Syrian uprising); Khaled Abou El Fadl, *The Praetorian State in the Arab Spring*, 34 U. PA. J. INT'L L. 305, 306 (2013) (analyzing the similarity in power structure in place in countries with Arab Spring revolutions).

141. See *Syria: The Story of the Conflict*, BBC (Oct. 9, 2015), <http://www.bbc.com/news/world-middle-east-26116868>.

142. See *generally Guide to the Syrian Rebels*, BBC (Dec. 13, 2013), <http://www.bbc.com/news/world-middle-east-24403003> (noting that "[t]here are believed to be as many as 1,000 armed opposition groups in Syria" at that point in time and introducing the key groups).

The conflict in Syria led to a significant number of killed and displaced Syrian citizens and residents.¹⁴³ Killings were targeted to decapitate the insurgent movements or loyalist strongholds on the ground.¹⁴⁴ Killings by Syrian forces in particular also could be indiscriminate—using chemical weapons or other munitions intended to maximize damage to as a large group of the population as possible.¹⁴⁵

ISIL entered the Syrian theater in 2011.¹⁴⁶ Al-Baghdadi instructed Abu Mohammed al-Jawlani to establish a Syrian presence.¹⁴⁷ ISIL stepped into the conflict and fast became one of the more successful groups in the region, fighting back Syrian forces and holding territory in Syria proper.¹⁴⁸ Following upon its successes in Syria, ISIL also continued its efforts in Iraq.¹⁴⁹ ISIL secured defeats of the Iraqi army in the north and west of Iraq.¹⁵⁰ At one point, ISIL

143. See *Syrians Flee Idlib, Fearing Government Reprisals*, ASSOC. PRESS (March 29, 2015) (placing the current number of dead as a result of the Syrian civil war at 220,000 and recounting the displacement occurring as a result of the conflict).

144. See Sylvia Westall, *Syrian Military on Offensive as Conflict Enters Fifth Year*, REUTERS (Mar. 15, 2015), <http://www.reuters.com/article/2015/03/15/us-mideast-crisis-syria-south-idUSKBN0MB0BI20150315> (providing a current snapshot of the fighting).

145. See Rick Gladstone, *Militants Add Cluster Bombing to Tactics, Rights Group Says*, N.Y. TIMES, Sept. 1, 2014, <http://www.nytimes.com/2014/09/02/world/middleeast/militants-add-cluster-bombing-to-tactics-rights-group-says.html> (reporting use of “cluster bombs, the banned weapons that kill and maim indiscriminately” by ISIL); Rick Gladstone, *Heavy Use of Banned Cluster Bombs Reported in Syria*, N.Y. TIMES, Aug. 27, 2014, <http://www.nytimes.com/2014/08/28/world/middleeast/monitor-reports-heavy-cluster-bomb-use-in-syria.html> (reporting on significant use of cluster munitions by the Syrian government); Lisa Lambert, *U.S. ‘Deeply Disturbed’ by Reports of Chemical Weapons in Syria: Kerry*, REUTERS (Mar. 19, 2015), <http://www.reuters.com/article/2015/03/19/us-syria-crisis-kerry-idUSKBN0MF20Q20150319> (noting renewed allegations of use of chemical weapons by Syrian forces following a 2013 agreement by Syria to destroy its chemical weapons stockpile).

146. See U.N. Security Council Al-Qaida Sanctions Committee, *supra* note 137 (reporting that ISIL entered the Syrian conflict in 2011).

147. See *id.*

148. See *Some Signs of Tension Emerge Among Islamic State Militants*, ASSOC. PRESS (Feb. 19, 2015) (noting that “[t]he extremists remain a formidable force, and the group's hold on about a third of Iraq and Syria remains firm.”).

149. See Ghazwan Hassan, *Iraq Insurgents Take Saddam’s Home Town in Lightning Advance*, REUTERS (June 11, 2014), <http://www.reuters.com/article/2014/06/12/us-iraq-security-idUSKBN0EM11U20140612> (reporting the fall of Tikrit to ISIL); Ahmed Rasheed & Isabel Coles, *Obama Warns of U.S. Action as Jihadists Push on Baghdad*, REUTERS (June 12, 2014), <http://www.reuters.com/article/2014/06/13/us-iraq-security-idUSKBN0EO15R20140613> (detailing ISIL advances in Northern Iraq); Deb Riechmann, *Iraq City Falls Fully Into Hands of Al-Qaida Group*, ASSOC. PRESS (Jan. 4, 2014) (reporting the fall of Fallujah to ISIL).

150. See Hassan, *supra* note 149 (reporting the extent of ISIL conquests).

advanced close to the Iraqi capital, Baghdad.¹⁵¹ As ISIL moved through Iraq, it similarly sought to control territory in its own right.¹⁵²

ISIL's rule over the territories it held is particularly brutal.¹⁵³ ISIL has been implicated in genocide, mass murder, the slave trade, and torture.¹⁵⁴ The atrocities committed by ISIL make clear the extreme predicament in which those subject to its rule find themselves.¹⁵⁵ The acts of ISIL do not follow any standard of legality and appear to be the very opposite of acts in compliance with the rule of law given their arbitrary and barbaric nature—in many instances subjecting even children to unspeakable cruelty.¹⁵⁶ As detailed further in this Article, these atrocities have led to a mass exodus under unspeakable conditions of the populations threatened by ISIL.

At the same time, it is similarly clear that there is no readily effective means to counter ISIL in place. ISIL has successfully rebuffed the traditional government forces of both Iraq and Syria.¹⁵⁷ It

151. *Id.* (“Having also taken two small towns north of Baghdad, Dhiluiya and Yathrib, the insurgents are in control of between 10 and 15 pct of Iraqi territory, excluding Kurdistan, and have led many Iraqis to fear they have the capital, Baghdad, in their sights.”).

152. *See id.*

153. *Abuse ‘Rife in Secret Al-Qaeda Jails in Syria’*, BBC (Dec. 19, 2013), <http://www.bbc.com/news/world-middle-east-25440381> (reporting that according to Amnesty International, “ISIS forces had committed numerous serious rights abuses, including some that amount to war crimes, such as abductions, arbitrary detention, torture and other ill-treatment, and unlawful killings.”).

154. U.N. Human Rights Council, *Rep. of the U.N. High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and The Levant and Associated Groups*, ¶ 16, U.N. Doc. A/HRC/28/18 (Mar. 13, 2015), www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_18_AUV.doc (“The mission gathered reliable information about acts of violence perpetrated against civilians because of their affiliation or perceived affiliation to an ethnic or religious group. It is reasonable to conclude that some of these incidents, considering the overall information, may constitute genocide. Other incidents may amount to crimes against humanity and war crimes. Ethnic and religious groups targeted by ISIL include Yezidis, Christians, Turkmen, Sabea-Mandean, Kaka’e, Kurds and Shi’a.”)

155. *See generally id.*

156. *Id.* ¶ 35 (“Accounts indicate that ISIL views captured women and children as spoils of war which they own. Numerous interviews conducted with Yezidi women and girls who fled ISIL captivity between November 2014 and January 2015 provided reliable information of killings, widespread and systematic enslavement, including selling of women, rape, and sexual slavery, forced transfer of women and children and inhuman and degrading treatment. Many of the women interviewed were able to identify the origin of their ISIL captors, belonging to a wide range of countries.”).

157. *See* Kareem Fahim, *Signs of a Push Against ISIS, Amid Doubts on Iraqi Troops*, N.Y. TIMES, Feb. 13, 2015, <http://www.nytimes.com/2015/02/14/world/middleeast/amid-talk-in-iraq-of-anti-isis-push-doubts-about-troops-readiness.html>; Tom Perry & Mariam Karouny, *Islamic State in Syria Seen Under Strain but Far From Collapse*, REUTERS (Feb. 6, 2015),

is thus not subject to easy ouster from the territory it holds.¹⁵⁸ Any such action when successful requires significant foreign military aid and assistance from the United States and—according to reports—Iran.¹⁵⁹ Moreover, at this point additional actors have entered the scene in addressing the chaos in the region, with Russia and Iran sending forces and China contemplating to do the same.¹⁶⁰

ISIL's strategic use of violence particularly against fellow Muslims caused al-Qaida to sever ties with ISIL.¹⁶¹ This severing of ties is not a matter of political convenience but represents a significant dogmatic difference on how al-Qaida and ISIL view the role of violence. The extreme Wahhabi dogma to which ISIL subscribes views violence as "an end in itself" rather than a means to the end of ejecting unbelievers from Islamic countries—and most importantly the Middle East.¹⁶² In other words, ISIL is more reactionary in theological and political outlook than al-Qaida to the point of creating irreconcilable dogmatic differences with its prior umbrella organization.

III. LAWLESSNESS ON THE GROUND

The particular circumstances surrounding the rise of ISIL showcase trenchantly how lawlessness evolves and deepens from a pragmatic to a functional problem. As explained below, this evolution begins with a temporal loss of control towards a full loss of structures

<http://www.reuters.com/article/2015/02/06/us-mideast-crisis-syria-islamicstate-ins-idUSKBN0LA0NF20150206> (noting the inability of Iraqi army units to defeat ISIL, the current state of ISIL's Syrian occupied territory, and the "firm grip over its Syrian stronghold in Raqqa province").

158. See *supra* note 156.

159. See Helene Cooper, *U.S. Strategy in Iraq Increasingly Relies on Iran*, N.Y. TIMES, Mar. 5, 2015, <http://www.nytimes.com/2015/03/06/world/middleeast/us-strategy-in-iraq-increasingly-relies-on-iran.html> (reporting that "[t]he only way in which the Obama administration can credibly stick with its strategy is by implicitly assuming that the Iranians will carry most of the weight and win the battles on the ground").

160. Neil MacFarquhar, *Assad makes Unannounced Trip to Moscow to Discuss Syria with Putin*, N.Y. TIMES, Oct. 21, 2015, <http://www.nytimes.com/2015/10/22/world/middleeast/assad-putin-syria-russia.html>; Rob Virtue, *Putin's Boost in Battle Against ISIS: China Preparing to 'Team up with Russia in Syria.'* EXPRESS (Oct. 8, 2015), <http://www.express.co.uk/news/world/610286/China-preparing-to-team-up-with-Russia-in-Syria-Boost-for-Putin-in-battle-against-ISIS>.

161. *Al-Qaeda Disowns ISIL Rebels in Syria*, AL JAZEERA (Feb. 3, 2014), <http://www.aljazeera.com/news/middleeast/2014/02/al-qaeda-disowns-isil-rebels-syria-20142385858351969.html>.

162. See Kirkpatrick, *supra* note 125.

capable of supporting authoritative decisions. This Part shows the key features of each stage of lawlessness and how it can quickly develop from one stage to the next.

A. *The Pragmatic Problem*

The first form in which lawlessness can manifest itself is pragmatic lawlessness. There is “rampant misbehavior.”¹⁶³ Such rampant misbehavior occurs particularly if groups or individuals destroy or misappropriate property, or, in severe cases, do bodily harm or kill members of the local population.¹⁶⁴ What distinguishes rampant misbehavior as a state of pragmatic lawlessness from the simple commission of a crime is its scope and duration.¹⁶⁵ For a relevant period of time, the responsible authorities are not able to stop or curb the misbehavior in question.¹⁶⁶

Pragmatic lawlessness concerns simply the loss of control or power over a specific and important area for a short but significant period of time.¹⁶⁷ The relevant authorities are deprived of the physical ability to regulate in the area.¹⁶⁸ The authoritative expectation remains that the lawless actors will in fact be held to account of their actions for violations of the relevant local law.¹⁶⁹ This expectation is typically backed by a long memory of similar prosecutions in the past.¹⁷⁰

Tracking the distinctions in Professor Reisman’s *Quest for World Order and Human Dignity*, pragmatic lawlessness exists because any legal system is to a point reliant upon only partly

163. Paul H. Robinson, *Natural Law & Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors*, 2013 U. ILL. L. REV. 433, 436 (2013) (“The term ‘lawlessness’ has two quite different meanings. It is used to refer to rampant misbehavior and also, less commonly, to situations in which there exists no governing legal system.”).

164. For a discussion of examples see Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177, 224 (2004).

165. *See id.*

166. *See id.*

167. *See* REISMAN, *supra* note 14, at 105.

168. In the sense that the state is no longer able to deliver (or control) minimum order in that area. *See* LASWELL & MCDUGAL, *supra* note 43, at 153.

169. *See* Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1151 (2007) (discussing the concept of looting in the law in post-Katrina New Orleans).

170. *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1448-49 (2004) (detailing the Court’s response to 1968 riots and critiquing the response as too focused on a law-and-order mentality).

effective hierarchical constitutive configurations.¹⁷¹ In other words, even in the most developed of legal systems, self-defense and defense of property are affirmative defenses to criminal prosecutions even for manslaughter or murder.¹⁷² Unilateral action is permitted because the state (thankfully) is not equipped with a “Precrime squad” capable of stopping each and every crime before it occurs.¹⁷³

For a time, the acts of ISIL exhibited typical signs of pragmatic lawlessness. Its actions could not be stopped by the relevant municipal authorities in either Syria or Iraq.¹⁷⁴ This included both military forces of the respective governments, as well as other security forces that ordinarily would have responded to reports of a crime.¹⁷⁵ It is further significant that ISIL’s actions are exceptionally brutal and further uniquely arbitrary.¹⁷⁶ From the point of view of those suffering its rule, it is thus not always clear how they are to behave to avoid the most gruesome forms of torture, rape, enslavement, and execution.¹⁷⁷

B. *The Formal Issue*

The pragmatic problem is not the only problem. The issue is not only that there is no *de facto* governmental authority that could stand up to ISIL’s lawlessness as of right now.¹⁷⁸ ISIL provides a test case for a different form of lawlessness—one when there is no satisfying formal answer to re-establishment of lawful rule. In this case, the

171. See REISMAN, *supra* note 14, at 20 (“In practice, however, except for those systems which are completely totalitarian, legal reach is patchy.”).

172. See generally Ray Taylor et al., *Self-Defense in Homicide Cases*, 42 AM. JURIS. TRIALS 151 (1991).

173. See *Minority Report Plot Synopsis*, IMDB, <http://www.imdb.com/title/tt0181689/synopsis> (last visited Oct. 29, 2015).

174. See *supra* Part II.

175. See *supra* Part II.

176. See *supra* Part II.

177. See *Abuse ‘Rife in Secret Al-Qaeda Jails in Syria’*, *supra* note 153 (“Former detainees accused him of presiding over grotesquely unfair trials lasting no more than a few minutes, and of handing down death penalties which were subsequently carried out.”); Simon Tomlinson & Amy White, *‘This Is Our Football, It’s Made of Skin #World Cup:’ After Posting Sickening Beheading Video of Iraqi Policeman, ISIS Boast of Slaughtering 1,700 Soldiers*, DAILY MAIL (June 13, 2014), <http://www.dailymail.co.uk/news/article-2656905/ISIS-jihadists-seize-two-towns-bear-Baghdad-U-S-tanks-helicopters-stolen-fleeing-western-trained-Iraqi-forces.html> (describing videos posted by ISIL in which fighters indiscriminately machine gun motorists and pedestrians in conquered territories).

178. See *supra* Section I.B.

actor who is formally supposed to return lawful rule to the territory in question is itself lawless.¹⁷⁹

The formal perspective thus does not look to the current state of affairs on the ground but rather looks to a hypothetical.¹⁸⁰ If the current pragmatic lawlessness subsides, whose sovereignty is implicated?¹⁸¹ This sovereign's laws remain formally applicable, meaning that the goal is simply to push back pragmatic lawlessness and return the area in question to the lawful rule of that formally applicable legal system—and do so with its consent.¹⁸²

In the context of the formal perspective of lawlessness, the issue at hand must be carefully drawn. The point of formal lawlessness is not that a state as a legal fiction has failed—an issue as to which there has been significant discussion in the literature.¹⁸³ Rather, the insightful distinction drawn by Judge Crawford in *The Creation of States in International Law* is sufficient to create the formal lawlessness problem:

The perils of the expression [failed state] go back to a conceptual confusion at its core. The situations described by some writers as 'failed States' are, evidently, crises of government or, if the vaguer term be preferred, governance. None of the situations so described – Somalia, the Congo, Liberia, etc. – has involved the extinction of the State in question, and it is difficult to see what possible basis there could be for supposing otherwise. No doubt in many cases the *regime* has failed – either in the narrow sense of the group of thugs and cronies controlling the Presidential palace or in the broader sense of the governmental system, civil service, army, opposition and all.¹⁸⁴

The legal fiction of statehood is less important in the context of formal lawlessness than the problem of failed governance.¹⁸⁵ A failure

179. See *supra* Section I.A.

180. See Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT'L L. 35, 58-61 (2012) (discussing the unsuccessful invocation by Uganda of a right of self-defense against non-state actors in DRC).

181. See *id.*

182. See *id.*

183. See JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 719-23 (2006).

184. *Id.* at 721-22 (emphasis in original).

185. See Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 411 (2011) (distinguishing between "common lawlessness" and "lawlessness cutting to foundational promises of liberal democratic governance" in the context of the anti-terrorism policies instituted during the Bush administration).

of the governmental system in the relevant area means that on a formal level, it is not only true that the actors effectively in charge of the area are themselves lawless, but that there is no government to which one could look for the re-introduction of order once bad non-state actors in question have been expelled.¹⁸⁶ In this context, the fiction that the bad actors were always subject to some (municipal) law that, though under-enforced, could be used as a measure of their conduct in the future fairly gives out.¹⁸⁷

In other words, the formal perspective presents a second problem logically unrelated to the pragmatic perspective. The pragmatic perspective demonstrates that the bad (non-state) actor responsible for lawlessness has to be expelled to reintroduce the protections of the rule of law to the population in question.¹⁸⁸ The formal perspective adds that the governance structures that must step in the bad actor's place still remain to be built.¹⁸⁹ There is no sovereign who could immediately fill the void.¹⁹⁰

The distinction drawn at the formal level suggests that municipal law is a myth not just from the perspective that it is ineffective, or not in control.¹⁹¹ It is a myth also because whatever municipal structures of coercion lack any kind of authority.¹⁹² Formal lawlessness suggests that there is no structure of coercive decision-making that is in line with community expectations of how government is permitted to act.¹⁹³ Whatever decision-making still exists within the confines of the sovereign relies increasingly, if not solely on naked power rather than legal authority.¹⁹⁴ In Professor Reisman's terms, we are dealing with ineffective constitutive structures.¹⁹⁵ But because it is the regime in place that makes the constitutive structures ineffective, returning

186. See Hannah Woolaver, *State Failure, Sovereign Equality and Non-Intervention: Assessing Claimed Rights to Intervene in Failed States*, 32 *WIS. INT'L L.J.* 595, 602 (2014) (defining state failure as the "absence or near-total ineffectiveness of central government").

187. *See id.*

188. *See supra* Section I.B.

189. *See Woolaver, supra* note 186, at 602.

190. *See id.*

191. W. Michael Reisman, *Myth System and Operational Code*, 3 *YALE STUD. WORLD PUB. ORD.* 229, 230 (1977) ("Hence we encounter two 'relevant' normative systems: one which is supposed to apply and which continues to enjoy lip service among elites and one which is actually applied. Neither should be confused with actual behavior, which may be discrepant from both.").

192. *See LASSWELL & MCDUGAL, supra* note 43, at 16, 26.

193. *See id.*

194. *See id.* at 26.

195. *See REISMAN, supra* note 14, at 118-20.

more effective control to the regime does little to increase the lawfulness of governance.¹⁹⁶

ISIL's rule in Syria presents a dual pragmatic and formal lawlessness problem. It is not sufficient to turn over ISIL-held territory to forces loyal to Assad to restore lawful order.¹⁹⁷ These forces certainly nominally act on behalf of a sovereign that is formally in charge of the territory in question.¹⁹⁸ But simply ousting ISIL and leaving the territory in the hands of the Syrian army would do little to eliminate the underlying problem of rule by arbitrary force.¹⁹⁹

The Syrian experience is coming dangerously close to that of a failed state.²⁰⁰ The central government is certainly ineffective with

196. *See id.*

197. *See* Press Release, U.S. State Dep't, The Syrian Crisis: U.S. Assistance and Support for the Transition (Mar. 17, 2014), <http://www.state.gov/r/pa/prs/ps/2014/03/223955.htm> (noting that "[e]fforts to find a diplomatic solution to the Syria crisis are based on the Final Communiqué of the 30 June 2012 Action Group meeting in Geneva. The process set forth by the Communiqué is supported by the United States and the broad partnership of nations known as the 'London 11' that are pressing for a negotiated political solution to the Syria conflict. The United States has been working vigorously to advance Syria's transition through the 'Geneva II' international conference based on the Communiqué: the establishment of a transitional governing body formed by mutual consent, exercising full executive powers over all government institutions. The transitional governing body will also be charged with reviewing the constitutional order and legal system and preparing for and conducting free and fair elections. Yet through two rounds of U.N.-sponsored negotiations in Geneva, the Assad regime's refusal to engage in negotiations has stalled progress.").

198. *See* CIA, WORLD FACTBOOK: SYRIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (listing Assad as chief of state of Syria).

199. *See* Action Group for Syria, Final Communiqué (June 30, 2012), <http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf> (requiring "immediate, credible and visible actions by the Government of Syria to implement the other items of the six-point plan including: o Intensification of the pace and scale of release of arbitrarily detained persons, including especially vulnerable categories of persons, and persons involved in peaceful political activities; provision without delay through appropriate channels of a list of all places in which such persons are being detained; the immediate organization of access to such locations; and the provision through appropriate channels of prompt responses to all written requests for information, access or release regarding such persons; Ensuring freedom of movement throughout the country for journalists and a non-discriminatory visa policy for them; Respecting freedom of association and the right to demonstrate peacefully as legally guaranteed.") Russian claims to the contrary are addressed further below. As a matter of analysis, the Russian claims of supporting the Syrian regime do nothing to address the authority vacuum currently experienced in Syria. It is thus not an effective prescription to address the ISIL problem (if it was ever actually intended as such in the first place.).

200. *See* Joel Slawotsky, *Partnering with Despots and Failed Regimes: Rogue Banking as a Primary Violation of International Law*, 16 SAN DIEGO INT'L L.J. 73, 100 (2014) ("Another example of a failed state is Syria where the current leader, President Assad, has engaged in a civil war with Syrian citizens with an estimated death count in the thousands.");

regard to large areas of territory that are currently embroiled by civil war.²⁰¹ This civil war at least so far has not led to a decisive victory of either Assad's forces or the rebels.²⁰² Simply removing ISIL from the equation is likely going to do little to change this dynamic. It would simply put Raqqa and other Syrian territory held by ISIL back in play for conquest and re-conquest by either side in the civil war.²⁰³

Critically, in this context one can see how the reaction to the loss of control or power by the Syrian regime effectively eroded, and continues to erode, the regime's authority.²⁰⁴ The response of the Syrian government to loss of control—facially pragmatic lawlessness—was to ratchet up a coercive means to re-establish control.²⁰⁵ This increase in coercive force revealed that the government was far less effective in controlling its territory than

Joshua A. Frey, *The New Communication: Leveraging Community Relations to Transition from Wars Amongst the People to Peace Amongst the People*, 38 FLETCHER F. WORLD AFF. 213, 218 (2014) (listing Syria as a failed state alongside Somalia and Libya); *Ex UN Envoy Predicts Syria Will Be 'Failed State'*, BBC (June 8, 2014), <http://www.bbc.com/news/world-middle-east-27754732> (reporting a statement by Lakhdar Brahimi that Syria could become a failed state); Karl W. Eikenberry, *A Grand Strategy for Failed States*, DEFINING IDEAS (Feb. 17, 2015), <http://www.hoover.org/research/grand-strategy-failed-states> (including Syria in the list of failed states for which the United States needs a containment strategy).

201. Compare Woolaver, *supra* note 186, at 602 (defining ineffectiveness as key trait of failed state), with Raja Adbulrahim, *Syria Steps up Airstrikes in Rebel-Held Areas of Aleppo*, WALL ST. J., Apr. 16, 2015, <http://www.wsj.com/articles/syria-steps-up-airstrikes-on-rebel-held-aleppo-1429204918> (discussing Syrian government use of shrapnel bombs to regain Aleppo), and Anne Barnard & Hwaida Saad, *Islamists Seize Control of Syrian City in Northwest*, N.Y. TIMES, Apr. 25, 2015, <http://www.nytimes.com/2015/04/26/world/middleeast/islamist-militants-capture-syrian-town.html> ("President Bashar al-Assad has hung on during a four-year insurgency, but his forces have been unable to retake control of large parts of Syria, and in recent weeks insurgents opposed both to his rule and to the Islamic State, also known as ISIS or ISIL, have made advances in the north and south.").

202. See *supra* notes 156-58.

203. See Yaroslav Trofimov, *In Islamic State Stronghold of Raqqa, Foreign Fighters Dominate*, WALL ST. J., Feb. 4, 2015, <http://www.wsj.com/articles/in-islamic-state-stronghold-of-raqqa-foreign-fighters-dominate-1423087426> (noting the frontline between ISIL and the Free Syrian Army around Aleppo).

204. See *supra* Section I.A.2.

205. See Ben Hubbard, *An Ever-Bleaker Syria, From All Vantage Points*, N.Y. TIMES, Mar. 14, 2015, <http://www.nytimes.com/2015/03/15/world/an-ever-bleaker-syria-from-all-vantage-points.html>; Syrian Center for Policy Research, *Syria Alienation and Violence: Impact of Syria Crisis Report 2014*, at 10 (Mar. 2015), http://www.unrwa.org/sites/default/files/alienation_and_violence_impact_of_the_syria_crisis_in_2014_eng.pdf ("As the institutions of violence have expanded and been reinforced they have spread hatred, extremism and polarization. These institutions primarily serve the objectives of the powers of subjugation through oppression, fanaticism and fundamentalism, regardless of the will of people. This created a fissure and great divide between Syrians and different dominating institutions that has significantly aggravated estrangement and alienation among the majority of people.").

might have been presumed—and thus undermined the government’s authority by undermining the community perception that the state could swiftly re-establish itself.²⁰⁶ This increase in coercive force further made the application of power by the Syrian regime increasingly arbitrary and barbaric thus further removing the Syrian regime’s actions from the authoritative expectations of the Syrian population.²⁰⁷ The reaction to a loss of control through increasingly barbaric uses of force was precisely what undermined the authority of the Syrian regime and confirmed that its rule introduces not just a pragmatic lawlessness problem, but a formal one.

C. *The Functional Dimension*

The problem gets more complex still. The issues presented by the Syrian crisis transcend pragmatic and formal lawlessness—the presence of a lawless non-state actor with no authoritative government to step in its place.²⁰⁸ ISIL’s presence in Syria showcases a third, functional, form of lawlessness—one in which pragmatic and formal lawlessness are symptoms of a deeper functional problem: there is no social process in place out of which lawful governance could re-emerge.

Much like there is a readily identifiable distinction between the pragmatic and formal perspectives of lawlessness, there is a readily available distinction of the functional perspective, as well.²⁰⁹ Both the pragmatic and the formal perspectives are focused primarily upon law as an autonomous subject of inquiry.²¹⁰ Lawlessness is defined by its relationship to law and legal process.²¹¹ Both the pragmatic and the formal perspectives thus focus upon certain qualities of the absence of law and legal process that can be ascertained by lawyers and legal scholars from within their respective discourses.²¹²

But lawlessness is not only—and not even principally—a legal phenomenon.²¹³ It is a social problem.²¹⁴ Meaningful engagement of

206. See Syria Crisis Report 2014, *supra* note 205, at 10.

207. See *id.*

208. See *supra* Section I.B.

209. See *supra* Section I.B.

210. See *supra* Section I.B.

211. See *supra* Section I.B.

212. *Id.*

213. See, e.g., Robin West, *Reconstructing the Rule of Law*, 90 GEO. L.J. 215, 218 (2001) (“The lawyer professionally committed to the moral value of the Rule of Law, so

lawlessness must look not only to the pragmatic and formal aspects of lawlessness as they arise within the legal discourse itself.²¹⁵ Rather, they must also situate lawlessness in the larger context of social processes in which such lawlessness exists.²¹⁶ So far, lawlessness has been addressed as if there were a clean dividing line between legal discourse and social discourse.²¹⁷ Lawlessness provides an intuitive case that such lines simply cannot be drawn: when law encounters its own putative absence, it is asked to lift itself up as if by its own bootstraps to provide a legal response to the problem. “Law” can function in this manner if it is a frame of social processes into which legal process is interwoven—as opposed to being an entirely autonomous social (or metaphysical) process of its own.²¹⁸

From this broader functional perspective, lawlessness emerges when the broader social processes to which law contributes are themselves eviscerated. Law arises because there are stable expectations, which community members place in social decision.²¹⁹ These expectations are anchored in the social fabric that otherwise binds community members to their respective communities and, thus, to each other.²²⁰ When this fabric frays, or worse, disappears, so does law or legal process;²²¹ the predicate for the stability of expectations—the network of social interaction that gives meaning to the relationship between persons, objects, obligations, and status—is itself no longer present.²²² Absent this predicate, law becomes a meaningless assertion.

understood, has a critical (in both senses) role to play in decrying the peculiar form of social injustice that is found in lawlessness.”).

214. *Id.*

215. *See* Section I.B.1-2.

216. LASSWELL & MCDUGAL, *supra* note 43, 130-01 (discussing the relationship between law and other social processes in realist jurisprudence).

217. *See* Section I.B.1-2.

218. *See* Pierre Legrand, *Siting Foreign Law: How Derrida Can Help*, 21 *DUKE J. COMP. & INT’L L.* 595, 609 (2011) (eschewing the crude binary distinction of law and non-law).

219. LASSWELL & MCDUGAL, *supra* note 43, at 63-4.

220. *Id.*

221. *See* SCHMITT, *supra* note 24, at 20; Pocock, *supra* note 11, at 70, 75.

222. *See* *A Jurisprudence from the Perspective of the “Political Superior,” supra* note 55, at 617 (“A distinction can be drawn between decisions which are taken entirely on the basis of naked power without regard to the expectations of rightness of the people influenced by them and decisions which conform to those expectations, but lack all effectiveness. From the perspective of a jurisprudence of social choice, the word “law” is reserved for those processes of decision which are both consistent with the expectations of rightness held by members of a community (authoritative decisions) and which are effective (controlling

It is this form of lawlessness that hides in the background of Professor Reisman's treatment of lawlessness—but, as if an evil jinn—is never permitted to escape into the open.²²³ Current events in the Middle East have certainly opened the door for it to escape. What functional lawlessness describes is a fifth constitutive configure in addition to constitutive processes (1) without hierarchical institutions, (2) with ineffective hierarchical institutions, (3) with partly effective hierarchical institutions, and (4) with highly effective hierarchical institutions.²²⁴ It is a configuration that eviscerates constitutive configurations themselves by uprooting individuals from a context in which they could form authoritative expectations—and as such have the capacity to hold constitutive commitments of whatever kind.²²⁵

Syria provides a sad example for such a functional lawlessness problem. The carnage and displacement of Syrian citizens brought about by the civil war has not only had a devastating cost in terms of human life, it has had a deep social cost.²²⁶ More than eleven million people of Syria's 22 million population are reportedly displaced by the conflict.²²⁷ This displacement has severe repercussions for the expectations Syrian nationals can have in leading their day-to-day lives; in the short-term, their expectations of how to formulate strategies for survival is frequently as dim as it is a struggle for bare personal survival (depending in part on where in Syria they reside or

decisions). These are, one might add, likely to be the most efficient decisions, for they draw, for their support, both on effective power and on the expectations of authority of those to whom they are directed. While the particular mix of authority and control may vary widely, a conception of law as authoritative and controlling decision protects the person making choices from exercises in irrelevance, whether because of absence of authority or absence of control.”).

223. It is the catastrophe presaged in the alternative future in which law is not vigorously defended. See REISMAN, *supra* note 14, at 21, 477.

224. *Id.* at 117.

225. One might call functional lawlessness the paradigmatic corrosive disadvantage. See NUSSBAUM, *supra* note 44, at 44 (“corrosive disadvantage is the flip side of fertile capability; it is a deprivation that has particularly large effects in other areas of life.”).

226. See Somini Sengupta, *U.N. Calls on Western Nations to Shelter Syrian Refugees*, N.Y. TIMES, Apr. 17, 2015, <http://www.nytimes.com/2015/04/18/world/middleeast/un-calls-on-western-nations-to-shelter-syrian-refugees.html> (noting that “the war in Syria is creating the worst global refugee crisis in decades . . .”).

227. *Local Ceasefires Could Be Path to Peace in Syria*, OXFAM (Mar. 13, 2015), <http://www.oxfamamerica.org/explore/stories/local-ceasefires-could-be-a-path-to-peace-in-syria/> (“Nearly four years of bloody civil war have torn the country apart, driving more than 11 million people from their homes and leaving about half of Syria’s 22 million citizens in need of humanitarian assistance.”).

by which route they have been able to flee).²²⁸ Their long-term expectations appear similarly intractable given the lack of meaningful policymaking even with regard to the refugee crisis by Western powers.²²⁹

This social cost prevents a strategy of local resistance of sorts to lawlessness. Such a resistance would look to community leaders to continue the task of bringing some form of lawfulness to the day-to-day lives of the local community.²³⁰ Thus, local elders, judges, and lawyers could functionally support an organized and authoritative form of prescription even when there are no governmental processes to fall back on.²³¹ Law would be kept alive in the interactions between

228. Rick Lyman, *Winter Poses New Danger for Migrants*, N.Y. TIMES, Oct. 18, 2015, <http://www.nytimes.com/2015/10/19/world/europe/refugees-face-winter-as-new-danger-for-europe-migration.html> (reporting that “[b]ut with fall winds carrying the first hints of frost, and the situation along the borders unresolved, the migrants, aid workers and government officials are anxiously looking ahead. If the numbers increase drastically or, worse, if there are more border closings, there would be an almost immediate backup that would quickly repopulate border camps within a week — some of them open-air, others consisting mostly of unheated tents”); Maher Samaan & Anne Barnard, *For Those Who Remain in Syria, Daily Life Is a Nightmare*, N.Y. TIMES, Sept. 15, 2015, <http://www.nytimes.com/2015/09/16/world/middleeast/for-those-who-remain-in-syria-daily-life-is-a-nightmare.html> (detailing the internal civilian casualties by region in Syria); Nick Cumming-Bruce, *Number of Syrian Refugees Climbs to More than 4 Million*, N.Y. TIMES, July 9, 2015, <http://www.nytimes.com/2015/07/09/world/middleeast/number-of-syrian-refugees-climbs-to-more-than-4-million.html> (reporting the number of internally displaced at 7 million and reporting further that “‘This is the biggest refugee population from a single conflict in a generation,’ Antonio Guterres, the United Nations high commissioner for refugees, said in a statement. Mr. Guterres, once again, warned that international aid was not keeping pace with the scale of the crisis, and that many refugees were ‘sinking deeper into poverty.’”).

229. See Tim Arango, *Merkel Links Turkey’s E.U. Hopes to Stemming Flows of Refugees*, N.Y. TIMES, Oct. 18, 2015, <http://www.nytimes.com/2015/10/19/world/merkel-links-turkeys-eu-hopes-to-stemming-flow-of-refugees.html?ref=topics> (detailing the potential role of Turkey to stem the migrant crisis); Andrew Higgins, *Migrant Crisis Leads to Calls for Tighter Borders in Europe*, N.Y. TIMES, Oct. 15, 2015, <http://www.nytimes.com/2015/10/16/world/europe/migrant-crisis-europe.html> (“The meeting, which stretched late into the night, signaled a shift from the message of open-armed welcome conveyed over the summer by Chancellor Angela Merkel of Germany toward what critics describe as a ‘fortress Europe’ approach.”).

230. See Sophie de Schaepdrijver, *Occupation, Propaganda and the Idea of Belgium, in EUROPEAN CULTURE IN THE GREAT WAR: THE ARTS, ENTERTAINMENT AND PROPAGANDA 1914-1918* at 267, 270 (Aviel Roshwald & Richard Stites eds., 2002) (discussing such Belgian efforts when the Belgian central government failed during World War I).

231. See *id.* (“The only ongoing ‘Belgian’ authority under occupation was local. As had obtained in earlier centuries, it now devolved upon the country’s 2,633 *communes* to defend their citizens against the encroachments of invading powers. Four years of occupation would see an unending series of clashes between the German military and local Belgian powers. In a steady stream, hundreds of recalcitrant burgomasters, aldermen, and councilmen joined what Brand Whitlock, the US minister to Belgium, called ‘that patriotic colony in German prisons.’

those subjected to lawlessness.²³² By empowering the local community leaders “through forms of interim or contingent international governance,” it would thus be possible to re-establish some form of legal order once the external threat from ISIL and the Syrian government has been removed.²³³

The Syrian problem is that no such strategy will prove effective. The carnage and displacement in Syria has been too severe and too prolonged to permit recourse to such a strategy.²³⁴ The very local leaders whom one could count on to maintain the vestiges of lawful government are precisely the persons targeted for killing by any means necessary.²³⁵ There are few local structures left intact in order to maintain any kind of authoritative governance on the ground.²³⁶

The areas held by ISIL in Syria are not only pragmatically and formally lawless.²³⁷ They are not currently capable of maintaining any indigenous processes of proto-legal decision in day-to-day life.²³⁸ They are lawless from a functional point of view, as well as from a

A constant level of low-key resistance was kept up for the duration of the war, even as occupation life settled into a makeshift routine.”)

232. *See id.*

233. *See REISMAN, supra* note 14, at 254-55.

234. *See* Somini Sengupta, *U.N. Calls on Western Nations to Shelter Syrian Refugees*, N.Y. TIMES, Apr. 17, 2015, <http://www.nytimes.com/2015/04/18/world/middleeast/un-calls-on-western-nations-to-shelter-syrian-refugees.html> (noting that “the war in Syria is creating the worst global refugee crisis in decades ...”); *see also* Oliver Holmes, *More Than 2,000 Killed by U.S.-Led Airstrikes in Syria, Monitor Claims*, HAARETZ (Apr. 23, 2015), <http://www.haaretz.com/news/middle-east/1.653267> (reporting a recent 22,000 death toll in the Syrian conflict); *see* Fatih Karimi & Salma Abdelaziz, *Syria Civil War Deaths to Top 160,000, Opposition Group Says*, CNN (May 20, 2014), <http://www.cnn.com/2014/05/19/world/meast/syria-civil-war/> (reporting a total death toll of more than 160,000 for the Syrian conflict through May 2014).

235. *See* Kim Sengupta, *How Assad Chose His Killing Fields*, INDEPENDENT (Sept. 10, 2013), <http://www.independent.co.uk/news/world/middle-east/how-assad-chose-his-killing-fields-the-greatest-threat-to-the-syrian-leader-lies-on-his-doorstep--in-the-district-of-ghouta-which-was-targeted-by-his-chemical-weapons-8807534.html> (noting chemical and other attacks on civil leaders hostile to Assad); Neil MacFarquhar & Hala Droubi, *In Syria’s Civil War, Doctors Find Themselves in Cross Hairs*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/world/middleeast/on-both-sides-in-syrian-war-doctors-are-often-the-target.html> (noting targeted killings of medical professionals *Seeking to come to the aid of the Syrian population*).

236. *See* citations in *supra* notes 225-26.

237. *See supra* Sections I.A.1-2.

238. *See* LASSWELL & MCDUGAL, *supra* note 43, at 66 (discussing decision processes premised upon authority and control in primitive societies).

pragmatic and formal point of view.²³⁹ And in this state of functional lawlessness, legal decision is and must be meaningless.

D. *The Progression of Lawlessness*

Conceiving of lawlessness as a progression of pragmatic, formal, and functional lawlessness showcases how lawlessness evolves from a momentary loss of control to a potential for the total loss of social fabric and thus complete lawlessness. It has also shown that the typically easiest prescription to a momentary loss of control—get control back by coercive means—is precisely one of the accelerants for the progression of lawlessness.²⁴⁰ The explanation of lawlessness by reference to its effects on both the axioms of control and authority can explain why and how this is so.²⁴¹ By using both axioms of control and authority, it has further showcased that an overplaying of control decisions can have the effect of completely eroding the capacity for authoritative decision making in society.²⁴² It has mapped both the decisions that dissolve legality or lawfulness (first formal legality or lawfulness than functional legality or lawfulness) and the social processes pursuant to which these decisions can have that effect.²⁴³

IV. *LAWLESSNESS AND INTERNATIONAL LAW*

International law appears at first blush to fare better in its engagement of lawlessness. Thus, it is certainly safe to say that both the acts of ISIL on the one hand and the Syrian government on the other hand run afoul of international legal norms.²⁴⁴ From an

239. *See supra* Sections III.B-C.

240. *See supra* Sections III.B-C.

241. *See supra* Section I.A.2.

242. *See supra* Section III.C.

243. LASSWELL & MCDUGAL, *supra* note 43, at 25 (discussing the importance of such mapmaking).

244. *See* Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-called Islamic State in Iraq and the Levant and Associated Groups, U.N. DOC. A/HRC/28/18, at 15 (Mar. 19, 2015) [hereinafter Report of the Office of the United Nations High Commissioner for Human Rights] (making the case for international legal criminal responsibility for ISIL members for the commission of genocide, crimes against humanity, and war crimes); “*Flagrant*” *Violations of International Law Continue in Syria, Top UN Relief Official Warns*, U.N. NEWS CENTER (July 30, 2014), <http://www.un.org/apps/news/story.asp?NewsID=48375#.VT1aNJOKhVc> (detailing violations of international law by the Syrian regime in its engagements in the Syrian civil war).

international legal perspective municipal lawlessness is simply a violation of an existing international legal order and can thus be made sense of as such.²⁴⁵

But this conclusion is too facile. The assertion that the acts of ISIL and the Syrian government violate international law do very little to help the current victims of their respective atrocities.²⁴⁶ In the case of ISIL at least, it is safe to say that the protestations of unlawfulness not only failed to stem violence but apparently fueled it.²⁴⁷ In the context of humanitarian crises like Syria, statements of international legality on their own are thus relatively meaningless unless they are backed by some cognizable sanction that would tend to have a real-world ability (as opposed to a moral exhortation) to change facts on the ground.²⁴⁸ Addressing lawlessness from the perch of an armchair academic as fully resolved because of the presence of some metaphysical order conjured in the laboratories of the law review article or op-ed piece runs the risk of mistaking law for theology and the plight of millions for a hypothetical in a final examination.²⁴⁹

245. See *supra* Sections III.B-C.

246. See Human Rights Watch, *Human Rights Report Syria* (2015), <http://www.hrw.org/world-report/2015/country-chapters/syria> (“The government also persisted in dropping large numbers of high explosive barrel bombs on civilians in defiance of UN Security Council resolution 2139 passed on February 22. These unguided high explosive bombs are cheaply made, locally produced, and typically constructed from large oil drums, gas cylinders, and water tanks, filled with high explosives and scrap metal to enhance fragmentation, and then dropped from helicopters. Between February and July, there were over 650 new major impact strikes in Aleppo neighborhoods held by armed opposition groups. Most of the strikes had damage consistent with barrel bomb detonations. One local group estimated that aerial attacks had killed 3,557 civilians in Aleppo governorate in 2014.”).

247. Musa Al-Gharbi, *ISIL's Barbaric Acts Are Highly Effective Propaganda*, AL JAZEERA (Feb. 23, 2015), <http://america.aljazeera.com/opinions/2015/2/why-did-isil-burn-the-jordanian-pilot.html> (“It is naive to assume that ISIL did not foresee Jordan’s military response or the outrage among Muslims at the burning of a fellow Muslim or the sensationalism of Western media. These were rather obvious consequences. Jordan’s deepened engagement, the heightened polarization of the Muslim community and the increasing U.S. support for intervention serves ISIL’s strategic interests. In fact, it burned Kassasbeh to death to provoke such responses.”).

248. *The Prescribing Function in World Constitutive Process: How International Law Is Made*, *supra* note 93, at 251 (“In certain marginal situations, authority may constitute the sole base value for a particular process of prescription. This may be treated as prescription only if the requisite element of control is subsequently brought into play, thus creating in the audience the expectation that certain behavior not only should be followed but will indeed be required.”).

249. See LASSWELL & MCDUGAL, *supra* note 43, at 126 (noting that even attempts to rid pure legal inquiry from metaphysics backfired because Kelsen “in his effort to cleanse

To ascertain the ability of international law to resolve the lawlessness problem on its own terms it is thus necessary to get one's hands dirty.²⁵⁰ It is a question of what sanction international law actually permits to rid the world of lawless actors and assist those previously ruled by the thugs in question to return to a form of relatively lawful governance.²⁵¹ When we consider international law from this functional perspective, the Syrian Civil War provides a stark example that international law provides little more comfort in dealing with ISIL's lawlessness than the formal myths of municipal law.²⁵² Worse still, upon closer analysis, international legal argument validly relies upon formal perspectives of sovereign rule that are contradicted outright if viewed through the municipal legal lens.²⁵³ The lawlessness afflicting social processes on the ground thus must transfer to the international legal plane.

This Part will map this transnational transference of lawlessness by comparing the response to ISIL in Iraq and in Syria. It will lay out the robust response in Iraq first.²⁵⁴ It will then look to the far less robust response in Syria.²⁵⁵ It will then dissect that the comparison reveals how an increasing loss of authority in-country leads to an increased transnational transference of lawlessness from the municipal to the international plane.²⁵⁶ This transnational transference has the effect of corroding the authority of international decision making processes in a proportionate amount to the loss of authority on the domestic scale.²⁵⁷

jurisprudence of metaphysical elements and value judgments, has cleansed it of any helpful reference to what he describes as 'natural reality.'").

250. See REISMAN, *supra* note 14, at 100 (discussing the importance of dirty work in the context of international law).

251. It looks for the operational code, the actually practiced form of authoritative decision making by relevant decision makers with their proverbial "hand on the button" as opposed to the idealized version of the normative world order distributed for public consumption. See *Myth Systems and Operational Code*, *supra* note 191, at 231 (discussing the distinction between myth system and operational code); Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework*, 56 *NAVAL L. REV.* 1, *passim* (2008) (discussing the change of the operational code of international law in the fight against terrorism following the 9/11 attacks based upon the actions of the United States and its allies).

252. See *supra* section III.B.

253. See *supra* Section IV.B.

254. See *supra* Section IV.A.

255. See *supra* Section IV.B.

256. See *supra* Section IV.C.

257. *Id.*

A. *International Response to ISIL in Iraq*

The problem international law faces in dealing with lawlessness is already apparent in the context of the current international efforts to expel ISIL from Iraq. At first blush, it appears that the international legal order can anchor the legality of intervention against ISIL in Iraq's consent to and request for military aid.²⁵⁸ But even this apparent consensus is problematic given the contextual factors currently in play in Iraq.²⁵⁹

1. The Consent-Based Case

As discussed in Part II, ISIL is active in both Iraq and Syria.²⁶⁰ ISIL held and continues to hold territory in Iraq close to the Syrian border and into the Kurdish regions of northern Iraq.²⁶¹ At one point, ISIL even militarily threatened Baghdad.²⁶²

ISIL's conduct in Iraq is well-documented.²⁶³ It does not differ significantly from ISIL's conduct in Syria.²⁶⁴ Thus, ISIL in the Iraqi context similarly is accused of substantive violations of basic international norms—most notably, ISIL is in most likelihood committing genocide within Iraq.²⁶⁵ ISIL also stands accused of the same arbitrary conduct discussed in the Syrian context above.²⁶⁶ ISIL

258. *See supra* Section IV.A.1.

259. *See supra* Section IV.A.2.

260. *See supra* Section II.

261. *Battle for Iraq and Syria in Maps*, BBC (Apr. 24, 2015), <http://www.bbc.com/news/world-middle-east-27838034>.

262. Alastair Beach, *Iraq Asks for US Ground Troops as ISIL Threaten Baghdad*, TELEGRAPH (Oct. 11, 2014), <http://www.telegraph.co.uk/news/worldnews/islamic-state/11156264/Iraq-asks-for-US-ground-troops-as-Isil-threaten-Baghdad.html> (reporting ISIL's military threat).

263. Report of the Office of the United Nations High Commissioner for Human Rights, *supra* note 244, at 15 (making the case for international legal criminal responsibility for ISIL members for the commission of genocide, crimes against humanity, and war crimes); Nick Cumming-Bruce, *United Nations Investigators Accuse ISIS of Genocide over Attacks on Yazidis*, N.Y. TIMES, Mar. 19, 2015, <http://www.nytimes.com/2015/03/20/world/middleeast/isis-genocide-yazidis-iraq-un-panel.html> (making the same case); Amnesty Int'l Rep. 2014/15, The State of the World's Human Rights 3 (2015), <https://www.amnesty.org/en/documents/pol10/0001/2015/en/> (making the same case).

264. Amnesty Int'l Rep. 2014/15, The State of the World's Human Rights 3 (2015), <https://www.amnesty.org/en/documents/pol10/0001/2015/en/> (dealing with ISIL's atrocities in both Iraq and Syria in one section and drawing no distinctions between them).

265. *See supra* Section IV.B.

266. Section II.A.

in both contexts, Syria and Iraq, thus presents the same pragmatic lawlessness problem.²⁶⁷

Unlike in the Syrian context, Iraq continues to have a functioning government.²⁶⁸ This government is reasonably representative of the various ethnic and religious groups making up Iraq.²⁶⁹ Although the government is still under some scrutiny in its ability to provide a stable and reasonable framework for the governance of Iraq,²⁷⁰ the international community by and large recognizes it as a far more effective governance structure than the current Syrian central government.²⁷¹ Judging from the point of view of municipal formal rule of law, Iraq has far stronger credentials to offer than Syria.²⁷²

Iraq has waived its sovereignty in asking for international assistance in defeating ISIL on its territory.²⁷³ Premised upon this

267. *Id.*

268. U.S. State Department, *U.S. Relations with Iraq, Fact Sheet* (Sept. 7, 2012), <http://www.state.gov/r/pa/ei/bgn/6804.htm> (“Iraq has functioning government institutions including an active legislature, is playing an increasingly constructive role in the region, and has a bright economic future as oil revenues surpass pre-Saddam production levels with continued rapid growth to come.”).

269. See Madeleine Snyder, *Post-War Iraq: The Triangle of Ethnic Tensions*, 35(4) HARV. INT’L REV. (June 14, 2014), <http://hir.harvard.edu/archives/5766> (“The new Iraqi government shows signs of successful power sharing and limitation, as a Shia Prime Minister and a Kurdish President must authorize executive decisions and have those decisions approved by a Sunni speaker of parliament and the Iraq Council of Representatives. This federalist model of government does little to smooth over the ethnic divides so prominent in the politics of the country, but it allows for each ethnic group to preserve its autonomy, protect vital interests, and provides the inclusive representation necessary to support the nascent Iraqi government.”).

270. *Id.*; see also Amnesty International Report 2014/15, *The State of the World’s Human Rights* 41 (2015), <https://www.amnesty.org/en/documents/pol10/0001/2015/en/> (“In Iraq, the government’s response to IS’s advance was to stiffen the security forces with pro-government Shi’a militias and let them loose on Sunni communities seen as anti-government or sympathetic to IS, while mounting indiscriminate air attacks on Mosul and other centres held by IS forces.”).

271. Tom Malinowski, *Seizing the Post-ISIL Opportunity for Democracy and Inclusion*, U.S. STATE DEPT. (Feb. 11, 2015), <http://www.state.gov/j/drl/rls/rm/2015/237814.htm> (discussing planning for a post-civil war Iraq).

272. See Section II.B.

273. See Martin Chulov & Spencer Ackerman, *Iraq Requests US Air Strikes as ISIS Insurgents Tighten Grip on Oil Refinery*, GUARDIAN (June 18, 2014), <http://www.theguardian.com/world/2014/jun/18/iraq-request-us-air-strikes-isis-baiji-oil> (“Iraq has asked the US to stage air attacks on Sunni insurgents as the Islamist fighters edged closer to full control of Iraq’s largest oil refinery and continued to hold out against troops trying to retake the city of Tal Afar”); Julian Borger & Patrick Wintour, *Obama Vows to Destroy ISIS’ “Brand of Evil” As Iraq Requests Help from Britain*, GUARDIAN (Sept. 24, 2014), <http://www.theguardian.com/world/2014/sep/24/obama-isis-brand-of-evil-uk-air-strikes-iraq> (“Cameron met the Iraqi

request, a broad international coalition has in fact agreed to come to the aid of the Iraqi government in addressing the ISIL threat.²⁷⁴ The declarations of many of the relevant governments participating in the coalition in fact refer expressly to the consent in question.²⁷⁵ State consent arguably would vitiate any claim that international action in the territorial borders of Iraq would constitute an internationally wrongful act.²⁷⁶ There is little diplomatic protest over international assistance to Iraq in fighting ISIL, thus suggesting that, in this context at least, international law would have a means available to combat a pragmatic form of lawlessness when the territorial sovereign is unable to do so on its own.²⁷⁷

prime minister, Haider al-Abadi, in New York to receive a formal request for military action, clearing a vital legal hurdle to UK involvement.”).

274. For a formal list of coalition partners, see Special Presidential Envoy for the Global Coalition to Counter ISIL, Index, <http://www.state.gov/s/seci/index.htm> (last visited Nov. 19, 2015) (stating that “over 60 coalition partners have committed themselves to the goals of eliminating the threat posed by ISIL and have already contributed in various capacities to the effort to combat ISIL in Iraq, the region and beyond.”). Although not technically part of the coalition, Iran has similarly worked as a partner in the fight against ISIL. See also Mohamad Bazzi, *Iran Will Do What it Takes to Fight ISIS*, CNN (Jan. 3, 2015), <http://www.cnn.com/2015/01/03/opinion/bazzi-iran-iraq/> (“Iranian officials have slowly acknowledged their covert operations inside Iraq. ‘Iran has helped Iraq in an advisory role and has quickly organized Iraqi militias,’ Gen. Amir Ali Hajizadeh, commander of the Revolutionary Guards’ Aerospace Forces, told the Fars News Agency in September. ‘Were it not for Iran, the Islamic State would have taken over Iraqi Kurdistan.’”).

275. See, e.g., *Background Briefing*, WHITE HOUSE (Aug. 8, 2014), <https://www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq> (“with respect to international law, we believe that any actions we would take, to include airstrikes, would be consistent with international law, as we have a request from the Government of Iraq. So we’ve essentially been asked and invited to take these actions by the Government of Iraq, and that provides the international legal basis”). For a summary and discussion of the statements of French, UK, Australian, and Belgian officials, see Raphael Van Steenberghe, *The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after Airstrikes Against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer*, EJILTALK! (Feb. 12, 2015), <http://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/#more-13063>.

276. ILC Draft Articles on State Responsibility for Internationally Wrongful Acts, International Law Commission, Report on the Work of its Fifty-Second Session, UN GAOR, 55th Sess., Supp. No. 10, art. 20, U.N. Doc. A/55/10 (2000) (“Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”).

277. For a discussion of a similar issues in the context of US strikes in Pakistan with Pakistan’s consent, see Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1, 33-42 (2013) (arguing that “international law does not currently preclude a state from using consent as a basis for employing force in another state’s territory” but that “it may rely on consent use only that ‘quality of force’ that the host state could use”).

2. Problems with the Consent-Based Case

Formal questions could arise whether intervention in Iraq on the side of the Iraqi government constitutes an impermissible assistance in an internal war or civil conflict.²⁷⁸ As Professor Dapo Akande and Zachary Vermeer develop, “many scholars, and indeed some States, have suggested that there is a general prohibition on military assistance to governments in a situation of civil war or internal rebellion.”²⁷⁹ Civil war for purposes of the argument refers to “a non-international armed conflict” that is “between the established government of a State and one or more insurgent movements whose aim is to overthrow the government or political economic or social order of the State, or to achieve secession or self-government for any part of the State” or “between two or more groups contending for control of the State in the absence of an established government.”²⁸⁰

Professor Akande and Vermeer submit that the “conflict between the Iraqi Government and Islamic State seems to fall within the scope of the prohibition.”²⁸¹ Principally, the conflict falls within the putative prohibition because “[a]t the time the airstrikes commenced [ISIL] exercised control over a significant portion of Iraqi territory, allowing it . . . to carry out sustained and concerted military operations.”²⁸² This cautionary position gains the more traction when placed in the context of ISIL’s ability to hold majority Sunni ground in Iraq, exercise governmental functions in those areas, and enjoys a modicum of popular support from the Sunni-majority population—and, arguably, more support than the multi-ethnic Iraqi central government.²⁸³

Professor Akande and Vermeer’s argument has not gained significant traction in the response to ISIL in Iraq on the ground. In fact, current state practice in the fight against ISIL in Iraq may very

278. Dapo Akande & Zachary Vermeer, *The Airstrikes Against Islamic State and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, EJILTALK! (Feb. 2, 2015), <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>.

279. *Id.*

280. *Id.* (relying upon the work of the Institut de Droit International, Louise Doswald-Beck, Christine Gray, and Olivier Corten).

281. *Id.*

282. *Id.*

283. *ISIL Wins Support From Iraq’s Sunni Tribes*, AL JAZEERA (June 4, 2015), <http://www.aljazeera.com/news/2015/06/sunni-sheiks-pledge-allegiance-isil-iraq-anbar-150604074642668.html>.

well suggest that the rule is, as a matter of form, inapposite to the conflict. The intuition underlying Professor Akande and Vermeer's thought nevertheless is functionally insightful: it points out the first elements of a transnational transference of lawlessness; there is a weakening of the authority of an international coercive response to lawlessness arising directly from the weakening of the authority of the domestic government the coercive action is supposed to assist.²⁸⁴ As comedian Jon Stewart acerbically put it, the Sunni population of Iraq prefers a brutal, repressive, medieval Taliban-like state to the government the US left it with.²⁸⁵ This preference begins to have international legal repercussions.²⁸⁶

B. *Intervention in Syria*

The problem becomes more pronounced in the context of armed action against ISIL in Syria. At an early point in the campaign, many of the coalition members who participate in strikes against ISIL in Iraq did not participate in the US campaign against ISIL in Syria.²⁸⁷ The reason for the distinction is, on its face, straightforward: action against ISIL in Iraq is supported by the request and consent of the Iraqi government.²⁸⁸ Action against ISIL in Syria by Western forces is not supported by a similar request and consent of the Syrian government.²⁸⁹ Though the initial resistance of US coalition members has softened in light of perceived foreign policy needs since the

284. See Section IV.C.1.

285. The Daily Show (July 27, 2015), <http://thedailyshow.cc.com/full-episodes/mtwqqq/july-27--2015---david-mccullough>, at minute 6:45-6:59.

286. See Section IV.C.1.

287. Tom Bowman, *Despite Coalition Partners, U.S. Has Done Most Airstrikes Against ISIS*, NPR (Feb. 6, 2015), <http://www.npr.org/2015/02/06/384345873/despite-coalition-partners-u-s-has-done-most-airstrikes-against-isis> ("The U.S. is doing more than 90 percent of all the bombing runs in Syria."); Stephen Castle & Steven Erlanger, *3 Nations Offer Limited Support of Attack on ISIS*, N.Y. TIMES, Sept. 26, 2014, <http://www.nytimes.com/2014/09/27/world/europe/british-parliament-vote-isis-airstrikes.html> ("Britain, Belgium and Denmark lined up Friday behind the United States in its fight against the Islamic State group, agreeing to military operations in Iraq — but drawing a line for now against direct intervention in Syria.").

288. See Section III.B.

289. Alastair Jamieson & Jim Miklaszewski, *Syria Given Information About U.S.-Led Airstrikes Against ISIS: Assad*, NBC NEWS (Feb. 10, 2015), <http://www.nbcnews.com/storyline/isis-terror/syria-given-information-about-u-s-led-airstrikes-against-isis-n303381> ("In a rare interview, he also ruled out joining the U.S.-led coalition against ISIS as long as Washington was supporting rebels battling his regime, calling them 'terrorists.' 'We don't have the will and we don't want [to] for one simple reason: because we cannot be [in] alliance with the country [that] supports the terrorism,' Assad told the BBC's Jeremy Bowen.").

beginning of the campaign, their original legal qualms remain largely unresolved.²⁹⁰

Since the campaign against ISIL in Syria by Western forces without the consent of the Syrian government, the Syrian government has requested – and received – aid from Russian and Iranian forces.²⁹¹ These forces have since commenced armed interventions in Syria independent of Western efforts.²⁹² These efforts, while facially justified by reference to the fight against ISIL, have instead targeted rebel forces fighting both ISIL and the Syrian government – and in some instances rebel forces equipped and trained by the US.²⁹³ The effect of Russian targeting decisions so far has been to strengthen

290. See, e.g. Alissa J. Rubin, *France Says It Will Join Air Campaign Against ISIS in Syria*, N.Y. TIMES, Sept. 16, 2015, <http://www.nytimes.com/2015/09/17/world/europe/france-isis-syria-airstrikes.html> (reporting a change in French policy towards conducting airstrikes in Syria because “the Islamic State had recently enlarged its territory to the point that it threatened rebel groups near Aleppo, and the major road network that leads to the Syrian capital, Damascus, and Lebanon”); Dan Bilefsky, *British Pilots Have Been Conducting Airstrikes in Syria, Defense Ministry Confirms*, N.Y. TIMES, July 17, 2015, <http://www.nytimes.com/2015/07/18/world/middleeast/british-pilots-have-been-conducting-airstrikes-in-syria-defense-ministry-confirms.html> (confirming British airstrikes in Syria “even though Parliament voted two years ago against military action there). For a discussion of the British municipal and international legal conundrum see Dapo Akande, *Embedded Troops and the Use of Force in Syria: International and Domestic Law Questions*, EJILTALK! (Sept. 11, 2015), <http://www.ejiltalk.org/embedded-troops-and-the-use-of-force-in-syria-international-and-domestic-law-questions/>.

291. MacFarquhar, *supra* note 160; *Russia’s Lavrov Says so far Only Syria Requested Direct Military Assistance*, REUTERS (Oct. 14, 2015), <http://www.reuters.com/article/2015/10/14/us-mideast-crisis-syria-russia-requests-idUSKCN0S812820151014> (detailing Syrian request); *Russia Parliament Approves Military Move in Syria*, BBC (Sept. 30, 2015), <http://www.bbc.com/news/world-middle-east-34400193> (detailing Russian strikes in Syria).

292. MacFarquhar, *supra* note 160 (“The lack of enthusiasm from Washington to Russia’s initiatives on Syria has been a disappointment to the Kremlin, and the meeting with Mr. Assad might put new pressure on the Obama administration to engage. Russia expressed displeasure on Tuesday that an agreement signed between the Pentagon and the Ministry of Defense earlier in the day had not gone further in forging cooperation in Syria”); Helene Cooper, Michael R. Gordon & Neil MacFarquhar, *Russian Strike Targets in Syria, but Not ISIS Areas*, N.Y. TIMES, Sept. 30, 2015, <http://www.nytimes.com/2015/10/01/world/europe/russia-airstrikes-syria.html>. As of Oct. 21, 2015, Russia and the US have agreed upon very limited co-ordination solely for the purpose of engagement directly between US and Russian forces in the area. See Neil MacFarquhar, *U.S. Agrees with Russia on Rules in Syrian Sky*, N.Y. TIMES, Oct. 20, 2015, <http://www.nytimes.com/2015/10/21/world/middleeast/us-and-russia-agree-to-regulate-all-flights-over-syria.html> (“At a Pentagon briefing, Peter Cook, the department’s press secretary, said the agreement, called a memorandum of understanding, established safety protocols requiring the Russians and the United States-led international coalition fighting the Islamic State in Syria to maintain professional airmanship at all times, use specific communication frequencies and establish a communication line on the ground.”).

293. *Russian Strike Targets in Syria, but Not ISIS Areas*, *supra* note 292.

ISIL rather than weaken it, thus adding an additional layer of complexity to the international response.²⁹⁴

The academic response to the US bombing campaign in Syria has been pronounced.²⁹⁵ Thus, commentators state that in the absence of Syrian consent, use of force in Syria would require U.N. Security Council authorization.²⁹⁶ This Security Council authorization, of course, is not forthcoming due to the alignment of the Russian Federation with the Assad regime and alignment of the US with opposition forces.²⁹⁷ Authorization of action in Syria would thus appear to depend upon Syrian consent to military action.²⁹⁸ In the current geopolitical environment, this would in essence mean that the US campaign against ISIL within the scope of Syrian authorization would free up Syrian forces to fight the Free Syrian Army more effectively—thus supporting one lawless actor in the attempt to degrade another.²⁹⁹ Contrary to Russian interests in the area, the US and its Western allies for obvious reasons seek to act in Syria without so strengthening the hand of the Assad regime.³⁰⁰ Consequently,

294. Anne Barnard & Thomas Erdbrink, *ISIS Makes Gains in Syria Territory Bombed by Russia*, N.Y. TIMES, Oct. 9, 2015, <http://www.nytimes.com/2015/10/10/world/middleeast/hussein-hamedani-iran-general-killed-in-syria.html>; Kareem Fahim & Anne Barnard, *Russia Makes an Impact in Syrian Battle for Control of Aleppo*, N.Y. TIMES, Oct. 20, 2015, <http://www.nytimes.com/2015/10/21/world/middleeast/russia-makes-an-impact-in-syrian-battle-for-control-of-aleppo.html> (reporting that Russian and Iranian operations significantly strengthened pro-government forces and the rebel groups are calling upon each other to unite against the pro-government advance). Developments are currently fluid and could lead to a greater role of ISIL in the wake of rebel casualties or even a uniting of certain rebel and ISIL forces against Iranian, Russian, and pro-government forces.

295. See, e.g., Louise Arimatsu & Michael Schmitt, *The Legal Basis for War Against ISIS Remains Contentious*, GUARDIAN (Oct. 6, 2014), <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state> (“Most, if not all, international law experts agree that military operations against Isis in Iraq comport with international law. The same cannot be said of the operations against Isis in Syria.”); O’Connell, *supra* note 16; Trahan, *supra* note 16 (“Thus, while it is not impossible that air strikes in Syria could be justified under international law, the Administration still needs to demonstrate a solid legal foundation for them.”).

296. See O’Connell, *supra* note 16.

297. See ‘*Re-energized Diplomatic Effort*’ Needed to Break Deadlock Over Syria, *New Security Council President*, UN NEWS CENTER, Sept. 4, 2013, <http://www.un.org/apps/news/story.asp?NewsID=45774#.VUD0DNF0wdU>.

298. See discussion *supra* Section III.A.

299. See Jamieson & Miklaszewski, *supra* note 289.

300. Dennis Ross, *A Strategy for Beating the Islamic State, How to Build a Regional Coalition of the Willing Against the Terrorist Group*, POLITICO, Sept. 2, 2014, <http://www.politico.com/magazine/story/2014/09/a-strategy-for-beating-isis-110524.html> (“Small wonder, therefore, that the administration is struggling now to decide what it should do against ISIL in

much of the academic response has been stridently against the use of force in Syria.

1. Collective Self-Defense

Key defenders of the action in Syria point predominantly to the right of collective self-defense.³⁰¹ Iraq has requested military aid in combating ISIL.³⁰² ISIL is operating in both Iraq and Syria.³⁰³ Thus, effective intervention requires combating ISIL in both places.³⁰⁴ In order for Western powers to intervene in Syria, collective self-defense proponents submit, it must be shown that Syria is unwilling or unable to stop ISIL from attacking Iraq from Syrian bases and/or that ISIL fighters are targeted as part of a spill-over effect into Syria.³⁰⁵

As champions of the collective self-defense rationale readily admit, the weakest link of their argument is proof with regard to the unwilling-or-unable prong of the self-defense argument.³⁰⁶ Thus, it is legally questionable whether a host state's unwillingness or inability to interdict non-state actors from launching attacks from its territory into a neighboring state's territory gives the neighboring state a right to launch military operations in the host state.³⁰⁷ To the extent that

Syria. It wants to weaken ISIL without strengthening Assad, and yet not be drawn into the Syrian civil war. Avoidance as a strategy in Syria, however, is no longer tenable.”).

301. Jennifer Daskal, Ashley Deeks, & Ryan Goodman, *Strikes in Syria: The International Legal Framework*, JUST SECURITY, (Sept. 24, 2014), <http://justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman/> (“The U.S. government received a letter from the Iraqi government explicitly asking for U.S. help in the fight against ISIL, thus supporting a claim of collective self-defense. According to the U.S. notification to the United Nations, Iraq has specifically requested that the United States lead international efforts to strike ISIL sites inside Syria to suppress continuing attacks on Iraq and protect Iraqi citizens. Under a theory of collective self-defense, the United States is assisting Iraq in responding to the direct and ongoing threat posed by ISIL; the threat stems in part from ISIL forces in Syria; and Syria is either unable or unwilling to quell the threat, thereby justifying an incursion into Syria’s territory.”); Harold Hongju Koh, *Obama’s ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?*, JUST SECURITY, (Sept. 29, 2014), <http://justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really/> (agreeing with Daskal, Deeks, and Goodman’s assessment).

302. See articles cited *supra* note 283.

303. *Id.*

304. *Id.*

305. *Id.*

306. See Daskal, *supra* note 301 (“The weakest link in the chain is the unwilling or unable test.”).

307. *Id.* (As one of us has written, “The ‘unwilling or unable’ test is now a fairly well settled part of the US government’s legal position. Nevertheless, it remains controversial under international law.”) (quoting Ryan Goodman, *International Law on Airstrikes in Syria*, JUST SECURITY (Aug. 28, 2014), <http://justsecurity.org/14414/international-law-airstrikes-isis->

international law does not recognize a right to self-defense against non-state actors under such circumstances absent proof of complicity of the host state in the actions of the non-state actors thus making the acts of the non-state actor attributable to the host state, this argument is dead on arrival as an international legal defense of the armed response to lawless actors in Syria.³⁰⁸

Even assuming that the argument is sound as a matter of international law,³⁰⁹ it would further have to be established that the action in question is necessary and proportionate to protecting against and suppressing the threat in question – or that the fight against ISIL in Syria represents a true cross-border spill-over of the fight in Iraq.³¹⁰ The premise that action against ISIL in Syria are necessary and

syria/); see also Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 9 INT'L L. STUD. 1, 3 (2015) (“Efforts to clarify the law on the use of defensive force against non-State actors are premature. The evident ambiguities and inconsistencies in the practice reflect an ongoing struggle over the law’s proper content. This struggle cannot neatly be resolved because the international legal system is, at bottom, decentralized.”).

308. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, Dec. 19, 2005. For a discussion of the current state of I.C.J. jurisprudence, see Christian Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 385 (2009) (“In between strict adherence to tradition and radical departure, the more convincing way to accommodate the new practice is to opt for an approach which retains the traditional understanding of self-defence as a justification for the use of force between states, but recognizes the existence of special rules on attribution of terrorist activities. This more moderate (but still important) re-reading indeed *Seems* to be borne out by state practice: states invoking self-defence do make an effort to identify links between the territorial state and the terrorist organization in question. What they no longer *Seem* to do is to identify links that are strong enough to amount to ‘effective control’ as required by the Nicaragua test. Instead, contemporary practice suggests that a territorial state has to accept anti-terrorist measures of self-defence directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory—either because of its support below the level of direction and control or because it has provided a safe haven for terrorists. In short, pursuant to this more moderate re-reading, modern practice points towards a special standard of imputability in relations between terrorist groups and host states, arguably most closely resembling international rules against ‘aiding and abetting’ illegal conduct.”).

309. Hakimi, *supra* note 307 (“The operations in Syria have accentuated three preexisting trends on the use of defensive force against non-State actors. First, the claim that international law absolutely prohibits such force is losing ground. The reaction to the operation against the Islamic State in Syria has been positive. Second, States are still floundering on *when* to permit such force. Many States *Seem* unsure about the correct legal standard or uncommitted to advancing a particular legal standard. Third, there is still a significant gap between the norms that are actually implemented and the ones that are legitimized as law. Most States tolerate operations that they are not yet willing to validate with legal language”).

310. See Daskal, *supra* note 301 (“Assuming, arguendo, acceptance of the unable or unwilling test, the U.S. legal argument is sound, so long as the force used is necessary to protect against the direct threat that ISIS poses to Iraq, and that the amount and nature of force is proportionate to suppressing that threat.”).

proportionate to protecting and suppressing ISIL's threat in Iraq is factually questionable given that ISIL currently appears to be taking largely defensive positions.³¹¹ Further, the strikes undertaken against ISIL by the US appear on their face to target areas away from the Iraqi border.³¹² It would thus need to be substantiated that the strikes in Syria are defensive in nature, e.g., intended to cut off supply lines or other relief efforts for ISIL fighters in Iraq.³¹³ As facts appear at the moment, it seems rather that many of the strikes launched in Syria had the different objectives of weakening ISIL's presence in Syria, as such—rather than supporting Iraqi self-defense efforts.³¹⁴ These strikes are largely consistent with the stated purpose of degrading and destroying ISIL in its own right (as opposed to as an immediate military threat to Iraq) and, though more tacitly, the United States hopes to support Syrian rebel forces against the Assad regime, as well as against ISIL.³¹⁵

2. Humanitarian Intervention

Alternatively, it may also be possible to defend strikes against ISIL as a humanitarian intervention.³¹⁶ Humanitarian intervention is not always clearly defined but typically refers to “the use of force by a state (or group of states) in another sovereign state's territory to protect the host state's citizens from . . . human rights abuses, mass

311. Oren Dorell, *ISIL Takes Body Blows in Iraq While Affiliates Grow Elsewhere*, USA TODAY (Apr. 22, 2015), <http://www.usatoday.com/story/news/world/2015/04/21/isil-isis-taking-body-blows-while-arms-grow-elsewhere/26134545/> (reporting that ISIL is taking “body blows” in Iraq and is rapidly losing territory in Iraq).

312. *Military Strikes Continue Against ISIL Terrorists in Syria and Iraq*, DEPT. DEFENSE NEWS (Oct. 20, 2015), http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve (detailing strikes near Ar Raqqa).

313. See Matthew Craig, *Targeted Killing, Procedure, and False Legitimation*, 35 CARDOZO L. REV. 2349, 2375 (2014) (“Proportionality requires that force be defensive and used only to the extent necessary to meet defensive military objectives. Necessity demands that there be no alternatives to the use of military force in response to the attack or threat.”).

314. *Coalition Continues Airstrikes Against ISIL in Syria, Iraq*, DEP'T DEFENSE NEWS (Apr. 30, 2015), <http://www.defense.gov/news/newsarticle.aspx?id=128700> (“The strikes were conducted as part of Operation Inherent Resolve, the operation to eliminate the ISIL terrorist group and the threat they pose to Iraq, Syria, the region, and the wider international community. The destruction of ISIL targets in Syria and Iraq further limits the terrorist group's ability to project terror and conduct operations, officials said.”).

315. *More than 400 Military Personnel to Train Syrian Rebels*, AL JAZEERA AM. (Jan. 16, 2015), <http://america.aljazeera.com/articles/2015/1/16/syria-rebels-training.html> (reporting US decision to train Syrian rebels as part of the fight against ISIL).

316. Trahan, *supra* note 16 (noting the potential humanitarian intervention justification).

atrocities, crimes against humanity, or genocide.”³¹⁷ One particular form of humanitarian intervention, Responsibility to Protect, or R2P for short, has been invoked in the Syrian context.³¹⁸ This rationale would look directly to the atrocities committed by ISIL against the civilian population in the areas it currently holds.³¹⁹ This rationale has the benefit of a more genuine link to the concern of many of the coalition partners in fighting ISIL in the first place—i.e., to destroy a network sowing lawlessness and committing unspeakable human rights violations wherever it takes hold.³²⁰ But this rationale is similarly as fraught with legal difficulties as the collective self-defense rationale. Thus, its status in international law remains highly contested.³²¹ And, one might wonder, what is the need for a humanitarian intervention against a non-state actor to the extent the state in which non-state actor is perpetrating grave crimes is in fact willing and able to conduct operations against that non-state actor?³²²

317. Jonathan E. Davis, *From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT'L L. 217, 221 (2011); see also Daphné Richemond, *Normativity in International Law: The Case for Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. L.J. 45, 46-7 (2003) (discussing the ambiguity of the current state of international law regarding humanitarian intervention).

318. On the definition of R2P, see *International Law – The Responsibility to Protect – Draft Security Council Resolution Referring Syrian Conflict to the International Criminal Court Vetoed by Russia and China (13 in Favor, 2 Against)*. – U.N. SCOR, 69th Sess., 7180th Mtg. at 4, U.N. DOC. S/PV.7180 (May 22, 2014), 128 HARV. L. REV. 1055, 1059 (2015) (“In 2001, the International Commission on Intervention and State Sovereignty (ICISS) proposed R2P, an international norm that answered this question by recasting sovereignty as a responsibility. The doctrine is not consistently defined, but the basic agreed-upon principles are: (1) a state has the primary responsibility to protect the individuals within it; (2) if the state is unable or unwilling to do so, the international community has a secondary responsibility to protect, acting primarily through the U.N.; and (3) the norm's foundational purpose—to bring to life ‘the notion that regardless of states' singular interest or lack of interest in intervention, individuals should never be allowed to suffer at the hands of their governments.’”). On recent developments regarding R2P in the Syrian context, see *id.* at 1055-59.

319. Trahan, *supra* note 16 (noting the potential humanitarian intervention justification).

320. See *supra* note 305.

321. See, e.g., Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT'L L. 824, 824 (1999) (“In my view, unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful.”); Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CAL. L. REV. 1171 (2009) (discussing the moral hazard in a humanitarian intervention rule because of the temptation of minority provocation of a majority group to force humanitarian intervention).

322. See discussion *supra* Section III.B.1. This concern is particularly pressing in the R2P context, which appears to incorporate an unwilling-and-unable element into proposed R2Ps norms. See *supra* note 318.

The logic would be that the situation requires a humanitarian intervention against both the non-state actor (ISIL) and the state actor (Syria).³²³ It is questionable as a matter of policy whether a humanitarian intervention rationale is available without the commitment fully to see it through as a half-hearted humanitarian intervention does little to alleviate the problem and does a tremendous amount of additional damage.³²⁴

3. Threat to the Integrity of International Law

No matter the rationale, it seems that as Professor Craig Martin pointed out in the context of threatened military action against the Assad government for the regime's use of chemical weapons, it appears that it is necessary to violate international law to protect international legal principles.³²⁵ In other words, it is not possible to maintain all international laws; the integrity of international law is threatened no matter how one acts.³²⁶ We have to choose between which international legal norms (sovereignty or basic international legal rights of the Syrian population) we wish to uphold and which international legal norms we wish to violate.³²⁷

It thus again appears that lawlessness presents a particularly trenchant problem: under the current geopolitical circumstances at least, it is not formally possible to deal with lawlessness lawfully. From an international legal perspective, we are asked to choose between which fundamental rule of international law we wish to honor in the breach.³²⁸ It is thus not a question of "if" lawlessness is transferred from the municipal to the international plane, but of "how" this occurs.

323. See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <http://justsecurity.org/1506/koh-syria-part2/> (arguing that intervention by the United States in Syria against the Syrian government could be justified on the ground of humanitarian intervention).

324. See McCain, *supra* note 38 (pointing out this problem in proposed US military action in Syria).

325. See Craig Martin, *When Should We Violate International Law to Enforce It?*, HUFFINGTON POST (Sept. 9, 2013), http://www.huffingtonpost.com/craig-martin/when-should-we-violate-in_b_3891117.html.

326. See *id.* ("I would suggest that the fundamental criteria for determining if a violation of international law may be justified or excused on the grounds that it is necessary to address some other violation of the law, is the relative effects that the two illegal actions would have on the integrity of the legal system itself.")

327. See *id.*

328. See *id.*

C. *The Transnational Transference of Lawlessness—Comparing Syria and Iraq*

When the international legal issues of addressing the ISIL problem in Iraq and Syria are viewed individually, one might fairly surmise that the underlying problem is not so much ISIL's lawlessness and more the indeterminacy of international law more generally.³²⁹ The comparison of both scenarios—the response to ISIL in Iraq and ISIL in Syria—reveals that lawlessness in fact presents a bigger challenge that exceeds the ordinary substantive indeterminacy of international law.³³⁰ The ISIL scenario permits one to isolate the various constitutive factors of lawlessness because of the cross-border implications of ISIL's actions.³³¹ In doing so, it is possible to map the transnational transference of lawlessness from the municipal to the international plane.

1. Transnational Transference of Pragmatic Lawlessness

The response to ISIL in Iraq showcases that pragmatic lawlessness of its own right does not create significant problems on the international plane.³³² In principle, state consent to assist in the removal of the pragmatically lawless situation will permit international actors to assist.³³³ The control/authority dichotomy readily explains why.³³⁴

At an early stage at least, pragmatic lawlessness simply represents a loss of control rather than a loss of authority of the requesting government.³³⁵ This loss of control threatens the capability of the requesting government to maintain basic law-and-order for its citizens internally and, in the context of serious instances of pragmatic lawlessness, to participate with the same efficacy in

329. For a discussion of a similar problem in the context of Ukraine, see Frédéric Gilles Sourgens, *Functions of Freedom, Privacy, Autonomy, Dignity, and the Transnational Legal Process*, 48 VAND. J. TRANSNAT'L L. 471 (2015).

330. See *id.*

331. MARK CHANG, PRINCIPLES OF SCIENTIFIC METHODS 50 (2014) (“A key concept in experimentation is the factor isolation technique: the experimenter manipulates the experimental condition so that the outcomes come from two different conditions, with and without the main putative causes (independent variables), while other nuisance variables are balanced balanced using the technique called randomization.”).

332. See *supra* Part IV.A.1.

333. See *supra* Part IV.A.1.

334. See *supra* Part I.A.2.

335. See *supra* Part III.A.

international decision-making processes.³³⁶ The intervening state thus simply re-establishes the *status quo* already part of, and deemed authoritative through, the current state of international law. In this context, an international actor has the same authority in assisting the municipal government in establishing control as the municipal actor has itself.³³⁷ In a purely pragmatic lawlessness scenario, this suggests that both the international and municipal actor have full authority supporting their respective actions.³³⁸

Two questions can arise. First, what would occur if municipal authoritative processes of decision support radically different constitutive values from those incorporated in international authoritative decision-making.³³⁹ Pragmatic lawlessness might erupt in a Taliban-like State (assume a gang of narco-traffickers seeks to use part of the country as a base of operations and terrorizes the local population without the ability of the Taliban-like State to re-assert control).³⁴⁰ Would an international actor be entitled to assist a Taliban-like regime that does not subscribe to basic human rights guarantees to all kinds of minorities in re-establishing its control over the area in question?³⁴¹ The transnational transference thesis would answer this question in the affirmative in the sense that it is not the pragmatic lawlessness that creates the problem of intervention; it is rather the question whether any aid can be given to the Taliban-like regime. This question has little to do with the pragmatic lawlessness erupting in such a scenario.

Second, what about situations, in which loss of control begins to affect loss of authority? The longer pragmatic lawlessness is permitted to exist, the stronger its effect on authority can become.³⁴²

336. Compare *supra* Part I.A.2 (defining control), with *supra* Part III.A (defining pragmatic lawlessness).

337. See *supra* Part III.A.

338. See *supra* Part III.A.

339. See *supra* Part I.A.3.

340. Such a scenario is not far-fetched. See Najibullah Gulabzoi, *The Narco-State of Afghanistan*, DIPLOMAT (Feb. 12, 2015), <http://thediplomat.com/2015/02/the-narco-state-of-afghanistan/>.

341. A similar question arguably arose in the context of disaster relief in Myanmar following a major earthquake. See DREF Operation Update, Int'l Fed. Red Cross & Red Crescent Soc'y, Myanmar: Earthquake, Update No. 1 (May 5, 2011), <http://www.ifrc.org/docs/appeals/11/MDRMM00401.pdf>. At the time, Myanmar had not yet begun a historic program of reforms and was therefore subject to significant international sanctions. See OFAC Fact Sheet, Dept. of the Treasury, Burma Sanctions Program (Jan. 29, 2014), at 3, <http://www.treasury.gov/resource-center/sanctions/Documents/burma.pdf>.

342. See *supra* Part III.B.

People lose faith in a government incapable of exercising control for a prolonged time; this loss of faith is exacerbated if the government unsuccessfully uses ever more indiscriminate means to re-establish control, thus giving rise to a question whether formal lawlessness might not ensue.³⁴³ This scenario showcases that the lines between pragmatic and formal lawlessness are fluid.³⁴⁴ In fact, the situation in Iraq at the moment suggests, as Professor Akande and Vermeer correctly presaged, a loss of control that is at the tipping point towards formal lawlessness.³⁴⁵ Answering this question will begin to make relevant the concerns of a transnational transference of formal lawlessness discussed in the next Part, if to a lesser degree.³⁴⁶ Loss of authority transfers because the international actor can act only with the authority commensurate to the municipal actor. A loss of authority on the municipal level thus has international consequences. A simple return of the state actor to the same control as it had before the eruption of pragmatic lawlessness no longer would return the international community to the *status quo ante* precisely because of the intervening loss of authority of the home government with all the social consequences this entails.³⁴⁷

2. Transnational Transference of Formal Lawlessness

The Syrian situation readily demonstrates the first means by which formal lawlessness transfers from the municipal to the international plane. The consent of a formally lawless actor (the Syrian regime) is not a sufficient basis for an international actor to combat even serious pragmatic lawlessness (ISIL) on that regime's formally sovereign territory (Raqqqa).³⁴⁸ The transnational transference of pragmatic lawlessness looks to the authority of the home regime as a guarantee of the authority of international intervention.³⁴⁹ In a formally lawless regime, this is precisely absent.³⁵⁰ Pragmatic

343. *See id.*

344. Cognitively, it is not possible to automate relevant responses. *See* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 881 (2012) (noting the importance of fluid intelligence in legal decision in contradistinction to automated responses to input).

345. *See supra* Section IV.B.2.

346. *See infra* Section IV.C.2.

347. *See supra* Section I.A.2.

348. *See supra* Section IV.B.

349. *See supra* Section IV.C.1.

350. *See supra* Section III.B.

lawlessness on the territory of a formally lawless actor thus requires some additional authority than simply the authorization of the formally lawless regime.

This first consequence of transnational transference is practically instructive. It means that Russian intervention on the side of the Syrian regime against, for instance, the Free Syrian Army cannot be justified by reference to the consent of the Syrian regime.³⁵¹ There would be no authority for such intervention because of the loss of authority of the Syrian regime.³⁵² In this sense, formal lawlessness acts as a limit to subjective theories of the recognition of governments – as a matter of logic, it is impossible to recognize the government of a failed state as such a state is defined by the absence of effective or legitimate governance structures.³⁵³

The Syrian situation also demonstrates a second, more significant means of transnational transference of lawlessness. Formal lawlessness sets up a clash between the sovereign (i.e., the state *de jure* ruled by the lawless regime) and core rights of its residents (i.e., their civil and political rights).³⁵⁴ The role of sovereignty in the international system has a constitutional nature.³⁵⁵ The UN system is premised upon the role of states, their formal equality, and the non-interference in internal affairs of equal sovereigns.³⁵⁶ The role of core

351. Suleiman al Khalidi & Laila Bassam, *In Moscow, Syrian Minister Says Russia Promises Aid*, REUTERS, June 29, 2015, <http://www.reuters.com/article/2015/06/29/us-mideast-crisis-hasaka-idUSKCN0P90VZ20150629> (“Syria’s foreign minister said in Moscow on Monday Russia had promised to send political, economic and military aid to his country, where the army is coming under some of the heaviest pressure since the start of the civil war.”); Michael R. Gordon & Eric Schmitt, *U.S. Moves to Block Russian Military Buildup in Syria*, N.Y. TIMES, Sept. 8, 2015, <http://www.nytimes.com/2015/09/09/world/europe/us-moves-to-block-russian-military-buildup-in-syria.html> (detailing both the Russian military buildup in Syria and the US attempts to thwart that buildup).

352. *See supra* Section III.B.

353. *Compare* CRAWFORD, *supra* note 183, at 722 (quoted above) *with* CRAWFORD, *supra* note 183, at 80 (discussing the distinctions between *de facto* and puppet governments). The thrust of the theorized account of formal lawlessness developed above is that by the time that an area has become not only pragmatically but fully formally lawless, any regime claiming to rule it has the international character of a puppet regime only (a regime that cannot request annexation or intervention) because the government is no longer *de facto* or otherwise *de jure* in power except for the support of the foreign power seeking to prop it up. *Id.*

354. Dustin N. Sharp, *Addressing Dilemmas of Global and Local in Transitional Justice*, 29 EMORY INT’L L. REV. 71, 74 (2014) (noting a similar clash in the context of transitional justice development programs).

355. Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society*, 20 MICH. J. INT’L L. 1, 12 (1998) (noting the constitutional nature of sovereign equality in international law).

356. *See id.*

human rights similarly is gaining constitutional value.³⁵⁷ It is one of the hallmarks of formal lawlessness or failed states that they precisely do not provide their residents with even the most basic guarantees such as the absence of arbitrary rule through imposition of sheer and brutal coercion, as, for instance, in the current Syrian scenario.³⁵⁸

The transnational transference of formal lawlessness thus consists of requiring the resolution of a fundamental clash between weight-bearing parts of the international legal order.³⁵⁹ This is no longer possible by simply “applying” the law by means of a textual-rule-based mode of decision-making.³⁶⁰ There is no rule that can remediate the clash.³⁶¹ To answer the question thus requires application of a context-policy-based mode of decision-making.³⁶²

The goals relevant to this inquiry include returning those subject to formally lawless power structures to authoritative rule, i.e., rule that is consistent with “participation in decision in accordance with community perspectives about who is to make what decisions, by what criteria, and by procedures; the reference is empirical, to a certain frequency in the perspectives of people who constitute a given community.”³⁶³ They also must include protecting regional stability, as well as global peace and security.³⁶⁴ They finally must look to finding a solution that is realistic in the sense of being enforceable so as to avoid a loss of authority of international law for failing to deal effectively with the crisis.³⁶⁵ Balancing these various goals will require significant creativity and vision as the goals themselves can run counter to each other in many instances.³⁶⁶ That being said, the greatest achievements in international peacekeeping of the late 20th century certainly have shown that such tasks can in fact be accomplished within legal confines.³⁶⁷

357. *See id.*; *see also* Destaw Yigzaw, *Hunger and the Law: Freedom from Hunger as a Freestanding Right*, 36 HOUS. J. INT’L L. 655, n.97 (2014) (“Human rights possess constitutive value and must be protected regardless of instrumental considerations.”).

358. *See supra* Section III.B.

359. *See* Petersmann, *supra* note 355, at 12.

360. *See supra* Section I.B.

361. *See supra* Section I.B.

362. *See supra* Section I.B.

363. LASSWELL & MCDUGAL, *supra* note 43, at 26.

364. *See* Jeremy Farrall, *The Future of UN Peacekeeping and the Rule of Law*, 101 AM. SOC’Y INT’L L. PROC. 160, 163 (2007).

365. REISMAN, *supra* note 14, at 213.

366. *Id.* at 185.

367. *Id.* at 386.

3. Transnational Transference of Functional Lawlessness

The transnational transference of functional lawlessness stakes out the limit of what international law can achieve. Functional lawlessness causes one of the constituent goals of the policy-context-mode of decision-making to fail.³⁶⁸ This failure means that no legal decision can be fashioned in even this capacious mode of decision-making.³⁶⁹ Instead, decisions must be made unaided by legal guidance—decisions that in ultimate consequence will be, in the sense of Niccolò Machiavelli or Carl Schmitt sense, dictatorial but, if well executed, ultimately vindicated.³⁷⁰

The principal problem of applying a policy-context-based mode of decision making to functional lawlessness is that functional lawlessness has eviscerated the social fabric binding individuals together.³⁷¹ Civil war has eviscerated the structures and processes necessary to recreate “participation in decision in accordance with community perspectives about who is to make what decisions, by what criteria, and by procedures” because “the reference is empirical, to a certain frequency in the perspectives of people who constitute a given community.”³⁷²

The evisceration of authority within the local community means that the goal of returning a people to a government that is authoritative has now become logically impossible—the empirical reference point has been removed.³⁷³ This failure cannot be compensated for by simply focusing on the other goals of the policy-context-based mode of decision-making such as regional stability, international peace and security, and maintaining the authority of international law.³⁷⁴ Blocking out the return of a people to authoritative governance structures is to treat it as a simple means towards international peace and security.³⁷⁵ Such a course of action is

368. Section IV.C.3.

369. *See supra* Section I.B.

370. SCHMITT, *supra* note 24, at 42; SKINNER, *supra* note 12, at 184. Carl Schmitt is a highly influential German right-wing critic of public international law (and public law in general). MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS, THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* at 239 (2001). For discussion of Schmitt, *see supra* notes 23-24 above. For a discussion of Machiavelli, *see supra* note 12.

371. *See supra* Section III.C.

372. LASSWELL & MCDUGAL, *supra* note 43, at 26.

373. *Compare id.*, with *supra* Section III.C (defining functional lawlessness).

374. *See supra* Section IV.C.2.

375. *See supra* Section IV.C.2.

ultimately inconsistent with the demands of human dignity.³⁷⁶ Any course so deeply inconsistent with human dignity in turn cannot but corrode the authority of the decision making process adopting it.³⁷⁷

This means that in the context of functional lawlessness, one must fashion a decision-making process that will *become* authoritative without a point of reference to existing community practices.³⁷⁸ It is to make the most fundamental form of decision for a community without its participation or consent.³⁷⁹ It can only be justified with hindsight.³⁸⁰ This constitutes one of the most intrusive forms of paternalistic domination imaginable.³⁸¹

This does not mean that inaction is an option. Both inaction and over-reaction are likely to corrode the authority of international legal processes.³⁸² Most immediately, international law would visibly fail to take effective action to protect regional stability and international peace.³⁸³ In the case of inaction, law would lose authority because it would appear too weak to be meaningful in addressing the most significant international crises of our day.³⁸⁴ In the case of overreaction through excessive use of force, international law would lose authority by endorsing strategies that would seem patently unjust to most observers and thus create doubts about the legitimacy of international prescription in general.³⁸⁵ Functional lawlessness or configurations nearing it thus make action—decision—imperative to re-establish authoritative decision structures in the functionally lawless space.³⁸⁶ Dangerously, it requires the establishment of authority without authority for doing so.

It is in this sense that the maintenance of international law requires a fundamental deviation from it. Schmitt (and Machiavelli)

376. NUSSBAUM, *supra* note 44, at 29-35 (defining dignity and its place in political decisionmaking).

377. *Id.*

378. LASSWELL & MCDUGAL, *supra* note 43, at 26.

379. See Stanley Ingber, *Judging Without Judgment; Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1479 (1994) (noting the importance to constitutive process of the involvement of the citizenry in constitutional deliberation).

380. SCHMITT, *supra* note 24, at 21.

381. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998).

382. See Section I.A.2.

383. See Farrall, *supra* note 364, at 163.

384. REISMAN, *supra* note 14, at 213.

385. *Id.* at 159.

386. *Id.* at 159, 213.

are correct in noting that in such exceptional circumstances, “from the point of view of content of the underlying norm, the constitutive and specific moment of decision is both new and foreign. Decision, normatively, is born from nothingness. The legal force of decision is other than the result of its justification.”³⁸⁷ This decision is, as Schmitt predicted, both exceptional and dictatorial because it at the same time lacks and creates authority.³⁸⁸ With regard to such decisions, it is the end of successfully finding structures that can become authoritative that justifies the means to put them place – and nothing else.³⁸⁹ Even on the international level, law has met its end.

*CONCLUSION: A SKETCH FOR DEALING WITH LAWLESSNESS
IN THE ISIL CONTEXT*

The Article so far has been largely critical. It has pointed out that the hope for municipal or international legal decision in dealing with ISIL is slender, if it exists at all.³⁹⁰ It has also pointed out that failure to act or overreaction would have disastrous consequences for international law more broadly.³⁹¹ Lawlessness, far from being a license to do as one pleases, is an exception to lawful order that requires a tight rope act if one is to avoid doing lasting damage to all lawful order.³⁹² But how is one to act in response to ISIL?

What this Article has elucidated is that both scholarly exchanges and public debate focus on the wrong question: whether and how to wrest control of Syrian and Iraqi territory from ISIL.³⁹³ They thus focus on control.³⁹⁴ This focus on control loses something important from view: the underlying problem of both formal and functional lawlessness concerns authority, and not control;³⁹⁵ the Article has further shown that a reaction that is tailored first and foremost in terms of regaining control at all costs tends to exacerbate lawlessness rather than to cure it.³⁹⁶

387. SCHMITT, *supra* note 24, at 42.

388. *Id.* at 83.

389. *Id.* at 42; SKINNER, *supra* note 12, at 184.

390. *See* Sections III.C & IV.C.3.

391. *See* Section IV.C.3.

392. *Cf. Vermeule, supra* note 23, at 1149 (defending a Schmittian black-hole theory).

393. *See* citations in *supra* note 14.

394. *See* Section I.A.2 (defining control).

395. *See* Sections III.B-C.

396. *See* Sections III.B-C.

The question thus becomes: how do we re-establish authority in the face of the calamities suffered by the peoples afflicted by formal and functional lawlessness in the Middle East?³⁹⁷ Conceptually, the answer to this question looks to defending and bolstering the capabilities for human development of the affected population both *in situ* and in diaspora.³⁹⁸ As human development research has shown, it is these capabilities that permit the bolstering of social structures in a fertile or exponential manner.³⁹⁹ The best answer thus looks to encouraging the capabilities of this population to self-govern again in the personal, economic, social, and political sphere.⁴⁰⁰

The concluding Part of this Article sketches four strategies that, if combined, could be central to any project to protect the capabilities of the afflicted population and permit re-establishment authoritative decision-making processes in the future. *First*, it is imperative to maintain as much of the affected social fabric as possible so as to protect the predicate for future authoritative decision-making.⁴⁰¹ This is currently not possible in-country in Syria and arguably beyond.⁴⁰² It thus requires a concerted effort to treat refugees from the area responsibly, respectfully, and with a view to foster their human development.⁴⁰³ Failure to do so irreversibly destroys the ravaged social fabric and thus any chance for the re-introduction of authoritative decision-making through it. Just like in a ten-car pile up on a busy highway, the loss of a limb cannot be remedied at the scene; it is nevertheless important to keep as much of the severed limb intact to permit its later re-attachment to the body. Central to the success of any such endeavor is to provide educational opportunities to the refugees and the ability to earn a living wage while away from home.⁴⁰⁴ It further requires that every effort be undertaken to save as many people as possible from the clutches of the worst fighting rather than leaving the management of refugee streams to human

397. See Section IV.C.3.

398. NUSSBAUM, *supra* note 44, at 29-35.

399. *Id.* at 44-45.

400. *Id.* at 29-35.

401. See Section IV.C.3.

402. See Section III.C.

403. T. Alexander Aleinikoff & Stephen Poellot, *The Responsibility to Solve: The International Community and Protracted Refugee Situations*, 54 VIRG. J. INT'L L. 195, 207-10 (2014) (discussing the problem of refugee situations from a human development perspective).

404. See NUSSBAUM, *supra* note 44, at 44, 98, 152 (noting that education and economic independence are dominant fertile capabilities).

smugglers.⁴⁰⁵ It finally requires that the view of these refugees be taken into account in military and foreign policy decisions affecting their home to lessen the authority gap discussed in the previous Part.⁴⁰⁶

The West, and particularly Europe, has been slow in taking the necessary steps to maintain the chance of future authoritative decision-making in the area. Middle Eastern and African refugees in France live in such horrid conditions as to attempt fleeing once again—this time from France to England.⁴⁰⁷ Refugees in East Germany are exposed to unacceptable xenophobic and anti-Semitic threats.⁴⁰⁸ Refugees from the Middle East drown on a regular basis by attempting passage to safer European shores because they rely on smugglers rather than other means of egress.⁴⁰⁹ Although European states have made facial strides to accept refugees from the area,⁴¹⁰ so far the response has been to interdict safe-passage by land (and force refugees to take their own lives and the lives of their children in their own hands) rather than to ease this humanitarian crisis.⁴¹¹ In contrast

405. See Orlando Crowcroft, *ISIS: Worst Refugee Crisis in a Generation as Millions Flee Islamic State in Iraq and Syria*, INT'L BUS. TIMES (Jun. 17, 2015), <http://www.ibtimes.co.uk/isis-worst-refugee-crisis-generation-millions-flee-islamic-state-iraq-syria-1506613> (discussing the severity of the refugee crisis and the role of human smugglers).

406. See Section IV.C.3.

407. See Stephen Castle & Aurelien Breeden, *Britain and France Scramble as Channel Becomes Choke Point in Migrant Crisis*, N.Y. TIMES, July 29, 2015, <http://www.nytimes.com/2015/07/30/world/europe/britain-and-france-scramble-as-channel-crossing-attempts-by-migrants-continue.html> (detailing the refugee crisis in Northern France).

408. *A Disgrace for Tröglitz, Refugee-Home Fire Spurs Xenophobia Fears*, DER SPIEGEL (Apr. 7, 2015), <http://www.spiegel.de/international/germany/a-refugee-attack-and-the-specter-of-xenophobia-in-germany-a-1027345.html> (noting arson attacks on refugee facilities in Saxony-Anhalt).

409. Sarah Almukhtar et al., *Mediterranean Sea*, N.Y. TIMES, May 21, 2015, <http://www.nytimes.com/interactive/2015/04/20/world/europe/surge-in-refugees-crossing-the-mediterranean-sea-maps.html> (detailing the crisis).

410. Compare Melissa Eddy, *Angela Merkel Calls for European Unity to Address Migrant Influx*, N.Y. TIMES, Aug. 31, 2015, <http://www.nytimes.com/2015/09/01/world/europe/germany-migrants-merkel.html> (reporting German Chancellor Dr. Angela Merkel's call for inclusion of refugees from the Syrian conflict), with Melissa Eddy, Rick Lyman & Alison Smale, *Germany Orders Curbs at Border in Migrant Crisis*, N.Y. TIMES, Sept. 13, 2015, <http://www.nytimes.com/2015/09/14/world/europe/germany-emergency-measures-european-migrant-crisis.html> (reporting that “[w]ith record numbers of migrants pouring across the Hungarian border and rushing west, Germany, the country that had been the most welcoming in Europe, suddenly ordered temporary border restrictions on Sunday that cut off rail travel from Austria and instituted spot checks on cars.”).

411. Sarah Almukhtar, Josh Keller & Derek Watkins, *Closing the Back Door to Europe*, N. Y. TIMES, Sept. 18, 2015, <http://www.nytimes.com/interactive/2015/09/15/world/europe/migrant-borders-europe.html>.

to a military defeat of ISIL, changing these policies is eminently in Western control.⁴¹² Failing to change them is not to take seriously the erosion of authority structures in the Middle East and the dire need to combat it.

The strides made—and unmade—in dealing with the refugee crisis are significant not only in the context of the humanitarian crisis for the Syrian civilian population.⁴¹³ Rather, addressing this issue has significant implications for the national security of member states of the European Union and the United States. Policy efforts so far have not addressed this crucial link between the refugee crisis and the fight against ISIL, treating it instead as a migratory threat in its own right.⁴¹⁴ A failure to continue to do so lends itself to disastrous consequences in medium and longer term.

Second, authority-building strategies must be put into place while any war on ISIL is going on. This engagement is not one principally about territorial control;⁴¹⁵ it is one about creating accountable and sustainable governance structures in a region deeply divided by sectarian distrust.⁴¹⁶ Any successful attempt at re-introducing authoritative decision-making processes must bridge this distrust and prejudice between Shi'ites and Sunnis, Kurds and Turks, Christians and Muslims, men and women, gay and straight in the region.⁴¹⁷ One cannot hope to achieve this end quickly. But it must be attempted such as by expanding existing educational and outreach programs in the region so as to permit emergence of civic structures capable of supporting authoritative decision-making in the future.⁴¹⁸

412. *Id.*

413. Andrew Higgins, *Migrant Crisis Leads to Calls for Tighter Borders in Europe*, N.Y. TIMES, Oct. 15, 2015, <http://www.nytimes.com/2015/10/16/world/europe/migrant-crisis-europe.html> (quoted in *supra* note 229).

414. *Closing the Back Door to Europe*, *supra* note 411 (depicting efforts to disrupt refugee flows).

415. See Sections III.B-C, IV.C.2-3.

416. *Id.*

417. See Tim Arango, *Sunnis Fleeing ISIS Find Few Doors Open Elsewhere in Iraq*, N.Y. TIMES, May 27, 2015, <http://www.nytimes.com/2015/05/28/world/middleeast/sunnis-fleeing-islamic-state-fight-turned-away-in-iraq.html> (discussing the sectarian problems underlying Sunni refugees in Iraq).

418. On the role of education in overcoming sectarian prejudice, see CLIVE HARBER, EDUCATION AND INTERNATIONAL DEVELOPMENT: THEORY, PRACTICE, AND ISSUES 92-3 (2014); see also USAID, *Iraq – Complex Emergency, Fact Sheet #6* (Jun. 26, 2015), http://www.usaid.gov/sites/default/files/documents/1866/iraq_ce_fs06_06-26-2015.pdf (detailing ISIL-responsive aid programs including educational programs in Iraq).

Third, coercive strategies must be aimed not only at military targets but also at protecting assets important to future authority structures. ISIL is actively destroying the human, intellectual and cultural patrimony of the region in order to erase any physical memory of a more inclusive social past.⁴¹⁹ Interdicting this destruction has significant importance.⁴²⁰ Re-establishing authoritative decision-making processes will be a less difficult task the more of the patrimony can be saved and incorporated.⁴²¹ And without those decision-making processes in place, ISIL (or its successor organizations) will quickly be able to raise both more troops and monetary support to maintain them.⁴²²

To date, the response to ISIL has not addressed the protection of this important patrimony. In failing to do so, important myths and symbols of a unified, multi-religious and multi-ethnic Middle East are lost. Ceding the ground to ISIL's purposeful destruction of these symbols is to allow ISIL to succeed in its attempts at re-definition of the local discourse that cannot be over-estimated; it is the erasure of millennia of history and regional identity central to the re-establishment of authoritative governance structures. Or, to put it differently, one wonders what the state of European integration today would be had General Choltitz followed rather than refused the order to destroy Paris and make it "nothing but a blacked field of ruin" rather than letting it fall into Allied hands.⁴²³

Fourth, international assistance must remain available in the long haul and must be aimed at re-growing local social structures rather than simply transplanting Western superstructures in their place.⁴²⁴ Such efforts require long-term economic, legal and

419. See Susan Gonzalez, *ISIS' Destruction of Cultural Antiquities: Q&A with Eckart Frahm*, YALENEWS (Mar. 16, 2015), <http://news.yale.edu/2015/03/16/isis-destruction-cultural-antiquities-qa-eckart-frahm> (detailing the scope of cultural destruction by ISIL).

420. See *id.* ("ISIS tries to eradicate Assyrian sites because the ancient civilization they represent was used by previous political leaders in Iraq to build some kind of national identity across religions, sects, and ethnic groups — something to which ISIS is strongly opposed.").

421. *Id.*

422. See REISMAN, *supra* note 14, at 245.

423. COLIN JONES, *PARIS, THE BIOGRAPHY OF A CITY* 424 (2004). The importance of the protection of cultural patrimony in WWII was recently made into a motion picture, *The Monuments Men*, starring George Clooney (Columbia Pictures, Smokehouse Pictures, Studio Babelsberg 2015).

424. For a fuller discussion, see Sharp, *supra* note 354, *passim* (discussing the problem of the local-global mix in rebuilding post-conflict transitional societies).

development support.⁴²⁵ Failing to commit now to such a long-term approach is again a failure to understand an authority problem and mistaking for a problem of insufficient control instead—with potentially as disastrous consequences as when the US failed to provide such assistance to Afghanistan following the mujahedeen’s military success to cause a withdrawal of Soviet forces in 1989.⁴²⁶

In sum, lawlessness as such does not represent a simple absence of control mechanisms as current policy responses to ISIL would have one believe.⁴²⁷ Lawlessness instead eviscerates the social fabric without which authoritative decision-making becomes impossible.⁴²⁸ This loss of authority transfers transnationally with alarming speed not just in its corrosion of international legal mechanisms, as discussed in the Article so far, but socially; most noticeably in the current crisis, the inflow of Western fighters with no ties to the region or Islam on ISIL’s side of the conflict is just one symptom of such a broader contagion.⁴²⁹

The current response even in the context of this social contagion has been to identify a source to attack and then apply coercive measures, in the case of Western fighters, social media and the Internet.⁴³⁰ As one famous semiotics professor pointed out in a

425. See Camelia Minoiu & Sanjay G. Reddy, *Development Aid and Economic Growth: A Positive Long-Run Relation* 4 (IMF Working Paper, WP/09/118, 2009), <https://www.imf.org/external/pubs/ft/wp/2009/wp09118.pdf> (connecting even growth in GDP (rather than human development) to development aid).

426. RICHARD GRANT & JAN NIJMAN, *THE GLOBAL CRISIS IN FOREIGN AID* 40 (1998) (noting that with the end of the Cold War in 1990, the “biggest losers were former Cold War allies Pakistan, the Philippines, and Afghanistan.”).

427. See citations in *supra* note 14.

428. See Sections III.C and IV.C.3.

429. See, e.g., Andrew Higgins, *A Norway Town and Its Pipeline to Jihad in Syria*, N.Y. TIMES, Apr. 4, 2015, <http://www.nytimes.com/2015/04/05/world/europe/a-norway-town-and-its-pipeline-to-jihad-in-syria.html> (detailing the recruitment of Norwegian troubled youth by ISIL); Jessica Stern & J.M. Berger, *ISIS and the Foreign Fighter Phenomenon*, ATLANTIC (Mar. 8, 2015), <http://www.theatlantic.com/international/archive/2015/03/isis-and-the-foreign-fighter-problem/387166/> (“According to Scott Atran, Western volunteers are often ‘immigrants, students, between jobs or girlfriends . . . looking for new families of friends and fellow travelers. For the most part they have no traditional religious education and are ‘born again’ into a radical religious vocation through the appeal of militant jihad.’ Social acceptance and reinforcement are important factors.”).

430. Compare Jeff John Roberts, *Google Warns of “Viral Moment” for ISIS on Social Media*, FORTUNE (Jun. 24, 2015), <http://fortune.com/2015/06/24/google-isis/> (“European authorities have created a new police unit whose goal is to scour social media for ISIS accounts and remove them within two hours”), with Melissa Eddy, *Germany Bans Support for ISIS*, N.Y. TIMES, Sept. 12, 2014, <http://www.nytimes.com/2014/09/13/world/europe/>

different context, this again is to fall prey to entirely too facile a misdiagnosis:

The wretches who roam around aimlessly in gangs and kill people by throwing stones from highway bridges or setting fire to a child – whoever these people are – turn out this way not because they have been corrupted by computer “new speak” (they don’t even have access to a computer) but rather because they are excluded from the universe of literature and from those places where, through education and discussion, they might be reached by a glimmer from the world of values that stems from and sends us back again to books.⁴³¹

If we wish to turn back the national security threat that is ISIL, we can hope to succeed only if we combine this social perspective with the more traditional intelligence and military panache currently on display on both sides of the Atlantic. We must take seriously the corrosive effect of lawlessness on authority. And we must take seriously that this corrosive effect cannot be geographically contained but transfers transnationally entirely uninhibited by the coercive barriers placed its way until authoritative social structures have been repaired in their own right.

POSTSCRIPT

Shortly before this Article was due to go to press, three teams of extremists on November 13, 2015, committed several coordinated mass shootings and bombings in Paris.⁴³² The mass shootings and bombings killed more than 132 persons and injured 415.⁴³³ ISIL/Daesh has since claimed responsibility for the atrocities.⁴³⁴ French President François Hollande called the November 13 events “*un acte de guerre*”—an act of war—and promised that France would

germany-bans-support-of-isis.html (“Under the new restrictions, all displays of support for ISIS, and all efforts aimed at enticing Germans to join the group, are prohibited.”).

431. UMBERTO ECO, *ON LITERATURE* 4 (Martin McLaughlin trans., 2002).

432. Adam Nossiter, Aurelien Breeden, and Katrin Bennhold, *Three Teams of Coordinated Attackers Carried Out Assault on Paris, Officials Say; Hollande Blames ISIS*, N.Y. TIMES, Nov. 14, 2015, http://www.nytimes.com/2015/11/15/world/europe/paris-terrorist-attacks.html?ref=world&_r=0.

433. Aurelien Breeden, *Death Toll in Paris Attacks Rises to 132, Hospital Says*, N.Y. TIMES, Nov. 15, 2015, <http://www.nytimes.com/live/paris-attacks-live-updates/death-tolls-rises-to-132-paris-hospital-system-says/>.

434. Rukmini Callimachi, *ISIS Claims Responsibility, Calling Paris Attacks ‘First of the Storm,’* N.Y. TIMES, Nov. 14, 2015, <http://www.nytimes.com/2015/11/15/world/europe/isis-claims-responsibility-for-paris-attacks-calling-them-miracles.html?ref=world>.

act “*sera impitoyable*”—without mercy—in its response.⁴³⁵ French Prime Minister Manuel Valls elaborated that “*nous devons anéantir les ennemis de la République*”—“we must annihilate the enemies of the Republic.”⁴³⁶ Much of what happened on November 13, 2015, at the time of writing this postscript, remains unclear. But a few salient points have even now emerged:

First, Daesh’s lawlessness has found its way from Syria to Europe. Some of the November 13 murderers were radicalized French nationals inspired by Daesh,⁴³⁷ and others may have been hiding amongst the refugee population making its way from Syria to Europe.⁴³⁸ This suggests that the transnational transference of lawlessness latches both onto existing trends of radicalization in the West and refugee streams coming from the Middle East and Africa. As it stands, the events of November 13, 2015 have placed the refugee crisis brought on by Daesh center stage as a national security concern for the West. But a reaction that chiefly seeks to exclude refugees, kill terrorists, and control Middle Eastern territory, as advocated by some,⁴³⁹ will itself only fuel the transnational transference of lawlessness for much the same reasons as discussed above in the Syrian context: attempts to gain coercive dominion in the face of losses of authority in the affected social fabric, be it French or

435. *Attaques à Paris: la France ‘Sera Impitoyable’ Contre l’EI, dit Hollande*, LE MONDE, Nov. 14, 2015, http://mobile.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-francois-hollande-evoque-un-acte-de-guerre-commis-par-une-armee-terroriste_4809867_3224.html.

436. *Manuel Valls: ‘nous devons anéantir les ennemis de la République,’* LE MONDE, Nov. 14, 2015, http://mobile.lemonde.fr/attaques-a-paris/article/2015/11/14/manuel-valls-nous-devons-aneantir-les-ennemis-de-la-republique_4810179_4809495.html.

437. Aurelien Breeden, Adam Nossiter & Kimiko de Freytas-Tamura, *Manhunt Underway as Investigation of Attacks Widens*, N.Y. TIMES, Nov. 15, 2015, <http://www.nytimes.com/2015/11/16/world/europe/paris-terror-attack.html?action=click&pgtype=Homepage&clickSource=story-heading&module=span-abc-region®ion=span-abc-region&WT.nav=span-abc-region> (“The Paris terrorist attacks were carried out with the help of three French brothers living in Belgium. . . . The first attacker to be identified by the authorities was Ismaël Omar Mostefai, 29, a native of Courcouronnes, France, who had been living in Chartres, 60 miles southwest of Paris, and who, along with two other gunmen, killed 89 people at the Bataclan concert hall.”).

438. *Id.* (“One attacker — whose nationality is not yet known — evidently posed as a Syrian migrant.”).

439. See Ben Schreckinger, *GOP Candidates Link Paris Attacks to Immigration*, POLITICO (Nov. 15, 2015), <http://www.politico.com/story/2015/11/paris-attacks-republicans-immigration-trump-cruz-215895> (advocating exclusion of refugees and other immigrants from the U.S.); Theoderic Meyer, *Rubio Sees a ‘Clash of Civilizations,’* POLITICO (Nov. 15, 2015), <http://www.politico.com/story/2015/11/marco-rubio-paris-attacks-isil-215905> (advocating significantly increased coercive responses).

Syrian, only weaken the authoritative structures of the government seeking to apply coercive measures.⁴⁴⁰ The reaction ignores that much of the problem stems from the domestic disaffection that gives rise to homegrown radicalization and in so doing makes room for the transnational transference of lawlessness in the first place.

Second, the French bellicose rhetoric suggests a French and/or NATO self-defense rationale for attacks in Syria against Daesh targets.⁴⁴¹ This logic fails to convince for much the same reason as the collective self-defense rationale already utilized in the Iraqi context: there is little sense that attacks on Daesh in Syria will have any positive impact on ending future Daesh or Daesh-inspired violence in either Iraq or France.⁴⁴² The alternative scenario of joint NATO and Russian use of force to support Assad's regime might be a tempting military response to the perceived threat.⁴⁴³ It will do little to address the underlying causes of the lawlessness in the region. It will merely repress it for another day.

Third, crimes such as the ones committed in Paris, in Beirut, in Syria, Iraq, Egypt, Libya, Nigeria and beyond put us face to face with the dreaded powerlessness to stop atrocity and feel safe in our homes. It should instill a sense of solidarity in our shared loss. Instead, our dread turns to a thirst for unchecked violence against anything alien,

440. See Section III.D.

441. Katrin Bennhold & Michael Schmidt, *French Warplanes Strike Islamic State Militants in Syria*, N.Y. TIMES, Nov. 15, 2015, <http://www.nytimes.com/2015/11/16/world/europe/france-islamic-state-syria.html?module=Notification&version=BreakingNews®ion=FixedTop&action=Click&contentCollection=BreakingNews&contentID=54593430&pgtype=Homepage>.

442. Compare Graeme Wood, *ISIL: Who's Calling the Shots*, POLITICO (Nov. 14, 2015), <http://www.politico.com/magazine/story/2015/11/isil-whos-calling-the-shots-213360> (“One explanation for this hurried claim of credit or endorsement may be that there exists a third possibility, somewhere between ‘IS did it’ and the increasingly far-fetched ‘IS didn’t.’ That possibility is something like ‘IS was surprised by what its supporters did—and maybe not altogether pleased.’”), with Katrin Bennhold and Michael S. Schmidt, *Paris Attackers Communicated with ISIS, Officials Say*, N.Y. TIMES, Nov. 15, 2015, <http://www.nytimes.com/2015/11/16/world/europe/paris-attackers-communicated-with-isis-officials-say.html?action=click&pgtype=Homepage&clickSource=story-heading&module=span-abc-region®ion=span-abc-region&WT.nav=span-abc-region> (“While the information made available so far about the links between the Islamic State and the Paris attackers was not definitive, it suggested at a minimum that the assailants had not acted totally on their own.”).

443. See *France's Sarkozy Urges West, Russia Tie-Up vs. ISIS*, REUTERS (Nov. 15, 2015), <https://www.dailystar.com.lb/News/World/2015/Nov-15/323098-frances-sarkozy-urges-west-russia-tie-up-vs-isis.ashx> (quoting former French President Nicolas Sarkozy as saying “We must draw on the consequences of the situation in Syria. We need everyone in order to exterminate Daesh, including the Russians. There cannot be two coalitions in Syria”).

our “words had to change their ordinary meaning”—crime becoming war, revenge self-defense, victim collateral damage—and counsel frantic violence on all parts and moderation on none.⁴⁴⁴ It is still in our power to react with empathy and prudence so as to protect the authoritative nature of the very constitutive values of human dignity, which guided legal decision making since at least the end of the Second World War—but time is decidedly running short.

Topeka, Kansas
November 15, 2015

444. THE LANDMARK THUCYCIDES, A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 199 (Robert Strassler ed., 1996).

