

## THE USE OF LAW IN COUNTERINSURGENCY

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## I. Introduction

Almost no aspect of the current conflict has received as much attention as the “rule of law”.<sup>1</sup> The “rule of law” has had its presence felt from the legal contests over detention that started almost immediately after the invasion of Afghanistan and the opening of the detention facility at Guantanamo Bay,<sup>2</sup> to the breakdown of law and order in the lost “golden hour” following the invasion of Iraq in 2003,<sup>3</sup> to the debates over the legality of interrogation techniques practiced by the United States,<sup>4</sup> to the blood and treasure expended rebuilding the Iraqi justice system and building the Afghan justice system.<sup>5</sup> There have been

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<sup>1</sup> In U.S. military doctrine, “Rule of Law” is defined as “a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1-24 (2008) [hereinafter FM 3-07].

<sup>2</sup> The first detainees were transferred to Guantanamo Bay in January of 2002; the first petition for habeas corpus arising out of a Guantanamo Bay detention was filed on January 20, 2002. See *Gherebi v. Bush*, 374 F.3d 727, 728–29 (9th Cir. 2004).

<sup>3</sup> See William B. Caldwell IV & Steven M. Leonard, *Field Manual 3-07, Stability Operations: Upshifting the Engine of Change*, MIL. REV., June 2008, at 56.

<sup>4</sup> Barack Obama, Protecting Our Security and Our Values, Address at the National Archives (May 21, 2009) (“I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander-in-Chief, I see the intelligence. I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation. What’s more, they undermine the rule of law.”).

<sup>5</sup> On the relationship between “rule of law” as a set of development efforts and “rule of law” as an imperative for U.S. military operations, see Thomas B. Nachbar, *Defining the Rule of Law Problem*, 12 GREEN BAG 2d 303, 318 (2009) (“[T]he definition of the rule of law that drives the development effort may not be as important as the one that defines the approach that U.S. forces take to their own operations. Successfully establishing the rule of law has less to do with one’s definition of the rule of law than it has to do with one’s commitment to the rule of law.”).

countless rule of law advisors, multiple rule of law handbooks,<sup>6</sup> “rule of law green zones,”<sup>7</sup> rule of law coordination cells,<sup>8</sup> and most recently in Afghanistan, both a rule of law ambassador<sup>9</sup> and a one-star command—the NATO Rule of Law Field Support Mission / Rule of Law Field Force-Afghanistan<sup>10</sup>—dedicated to the rule of law.

Whether the rise of law’s role in this conflict is a good thing is the subject of considerable debate. Many have derided the use of law by our adversaries as underhanded and claimed that legal constraints weaken the United States’ ability to conduct war, a view held not only by commentators but by the executive branch itself.<sup>11</sup> Over the last ten years, law has become so heavily intertwined with warfare as to spawn not only a new term—“lawfare”—but entire conferences debating the significance of the term.<sup>12</sup> Moreover, efforts to establish the rule of law

<sup>6</sup> CENTER FOR LAW AND MILITARY OPERATIONS, *THE RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES* (2011 ed.) [hereinafter *RULE OF LAW HANDBOOK*]; UNITED STATES JOINT FORCES COMMAND, *HANDBOOK FOR MILITARY SUPPORT TO RULE OF LAW AND SECURITY SECTOR REFORM I* (2011) [hereinafter *JFCOM HANDBOOK*].

<sup>7</sup> See, e.g., Robert Chesney, *General Martins on Rule of Law Green Zones, Afghan Criminal Prosecution, and Other Updates from the ROLFF in Afghanistan*, *LAWFARE* (Feb. 10, 2011), <http://www.lawfareblog.com/2011/02/general-martins-on-rule-of-law-green-zones-afghan-criminal-prosecution-and-other-updates-from-the-rolff-in-afghanistan/> (discussing rule of law Green Zones in Afghanistan); Michael R. Gordon, *Justice From Behind the Barricades in Baghdad*, *N.Y. TIMES*, July 30, 2007, at A1 (discussing rule of law Green Zones in Iraq).

<sup>8</sup> See Colonel Richard Pregent, *Reconciling Security and Rule of Law While Coordinating US Military and Civilian Efforts*, in *RULE OF LAW HANDBOOK*, *supra* note 6, at 274–85 (discussing the “Interagency Rule of Law Coordination Cell” in the U.S. Embassy, Iraq).

<sup>9</sup> *Coordinating Director of Rule of Law and Law Enforcement*, EMBASSY OF THE U.S., KABUL, AFGHANISTAN <http://kabul.usembassy.gov/klemm.html> (last visited Dec. 4, 2012).

<sup>10</sup> See Mark Martins, *Rule of Law in Iraq and Afghanistan?*, *ARMY LAW.*, Nov. 2011, at 21, 24.

<sup>11</sup> See, e.g., NATIONAL DEFENSE STRATEGY OF THE UNITED STATES 6 (Mar. 2005) (“Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”); David B Rivkin, Jr. & Lee A. Casey, *Lawfare*, *WALL ST. J.*, Feb. 26, 2007, at 15.

<sup>12</sup> The term is generally attributed to Charles Dunlap, one-time Deputy Judge Advocate General of the Air Force. See Charles J. Dunlap, *Does Lawfare Need an Apologia?*, 43 *CASE W. RES. J. INT’L L.* 121 (2010) (providing an overview of the term and its lifecycle. Gen. Dunlap originally defined “lawfare” simply as “the use of law as a weapon of war” but his definition has evolved over time to a “strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective”). *Id.* at 1. See, e.g., Michael P. Scharf & Shannon Pagano, *Lawfare!: Are America’s Enemies Using Law Against Us as a Weapon of War?*, 43 *CASE W. RES. J. INT’L L.* 1 (2010) (providing information from conferences on the term).

in Iraq and Afghanistan have been painted with the brush of “nation building”—a red-headed stepchild of military operations since the days of Vietnam.<sup>13</sup>

The confluence of law as a constraint on war and law as a means of war over the last decade is largely due to the United States’ choice of strategies in the current conflict. The United States has alternatively relied on counterterrorism and counterinsurgency strategies, both of which are closely tied to law—counterinsurgency doubly so. Unlike conventionally understood forms of war, counterinsurgency is not a contest to control territory or destroy an enemy’s ability and will to fight but rather is a competition between two opposing groups to be recognized by a particular population as their legitimate government.<sup>14</sup> Thus, law has a dual use in counterinsurgency, both as a tool for defeating criminal insurgents themselves (by imprisoning them) and as a means for governments to build legitimacy. As a tool for counterinsurgents, though, law is poorly understood, leaving a serious gap in counterinsurgency theory and practice. Although “rule of law” is frequently invoked in the context of counterinsurgency (as exemplified by the phrase’s many appearances in the *Counterinsurgency Field Manual*),<sup>15</sup> counterinsurgency doctrine lacks a comprehensive description of how law figures in counterinsurgency. At the same time, the use of law as a means of counterinsurgency warfare has raised concerns over a separate problem of legitimacy: whether such uses undermine the authority of the law itself.

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<sup>13</sup> Both Presidents in office during the conflict have derided “nation building” while simultaneously committing extensive resources to building host nation institutions as part of a counterinsurgency strategy, alternatively in Iraq and Afghanistan. See David Morgan, *Gibbs on Afghanistan: Not Nation-Building*, CBS NEWS, (Dec. 1, 2009), [http://www.cbsnews.com/8301-503544\\_162-5848072-503544/gibbs-on-afghanistan-not-nation-building/](http://www.cbsnews.com/8301-503544_162-5848072-503544/gibbs-on-afghanistan-not-nation-building/) (“This can’t be nation-building,” Gibbs said. “It can’t be an open-ended, forever commitment, and I think that’s what the president will outline.”) (quoting Robert Gibbs, White House Press Secretary). *October 3, 2000 Transcript*, COMM’N ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=october-3-2000-transcript> (George W. Bush, as a candidate, said, “The vice president and I have a disagreement about the use of troops. He believes in nation building. I would be very careful about using our troops as nation builders. I believe the role of the military is to fight and win war and therefore prevent war from happening in the first place.”).

<sup>14</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-3 (2006) [hereinafter FM 3-24] (“Political power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as legitimate”).

<sup>15</sup> See *id.* at 1-4, 1-119, 1-143, 1-150, 5-6, 5-38, 5-44, 5-46, 5-52, 5-74, 5-87, 6-21, 6-29, 6-90, 6-97, 6-102, 8-42, 8-48, D-15, and D-38 to 39.

I have elsewhere written on the nature of legitimacy in counterinsurgency and the ways that law can be used to build legitimacy.<sup>16</sup> In this article, I examine the question from the other side—from the perspective of law. Although counterinsurgency doctrine is consumed with building both legitimacy and the rule of law, it lacks a clear understanding of how law contributes to legitimacy. Moreover, law is useful to counterinsurgents in a variety of ways. Although law can be used to build legitimacy, not all uses of law necessarily do so. The question remains, then, whether the ways counterinsurgents actually use law contribute to legitimacy. Even more disturbing is the possibility that the use of law as a means to conducting counterinsurgency is not only counterproductive to building legitimacy but may actually undermine the authority of the law itself. Recognizing the complex relationship between law and legitimacy requires counterinsurgents to temper their rush to law as a means of war with consideration of the second- and third-order effects generated by introducing a complex and morally contingent concept like law as a means to obtaining operational advantage in armed conflict.

The article proceeds by first describing the relationship between law and legitimacy as suggested by U.S. counterinsurgency doctrine. The rule of law and legitimacy are not the same thing, though, and so the second part of the article addresses how the “rule of law” can actually build legitimacy. Because building legitimacy is not the only way law is used in counterinsurgency, a complete answer to the law/legitimacy question requires an understanding of how law is actually used in counterinsurgency. That question is addressed in the third part of the article, describing the four ways law is used in counterinsurgency and how those various uses relate to legitimacy and thereby to the authority of the law. A complete understanding of how law is used by counterinsurgents reveals that the many uses of law in counterinsurgency fall along a continuum of legitimacy. Keeping that continuum in mind has implications for practice, which are covered in the fourth part of the article, followed by a brief conclusion.

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<sup>16</sup> Thomas B. Nachbar, *Counterinsurgency, Legitimacy and the Rule of Law*, PARAMETERS, Spring 2012, at 27.

## II. Law and Legitimacy in Counterinsurgency

The United States Department of Defense defines counterinsurgency negatively as “[c]omprehensive civilian and military efforts taken to defeat an insurgency and to address any core grievances.”<sup>17</sup> Consequently, in order to know what counterinsurgency is, it helps to know what insurgency is. The DoD defines insurgency as “[t]he organized use of subversion and violence by a group or movement that seeks to overthrow or force change of a governing authority.”<sup>18</sup> In essence, then, an insurgency/counterinsurgency<sup>19</sup> is a struggle outside of normal political channels (such as elections) between a government and an insurgent group for control of the state. The nature of insurgencies distinguishes them from “traditional” war (if there truly is such a thing) in several important ways.

First, as the use of different words (“insurgency” and “counterinsurgency”) for two sides of the same conflict suggests, insurgency is asymmetric. Although both sides of an insurgency are party to the same conflict, the conflict is viewed completely differently by those two sides. Insurgents usually lack the economic, commercial, military, or political infrastructure that counterinsurgents have by virtue of being the established government. Counterinsurgents, on the other hand, have to not only fight insurgents, they have to do so while simultaneously operating and defending the large economic, commercial, military, or political infrastructure on which they depend for support. The support that counterinsurgents receive from their infrastructure may be outweighed by the cost of defending it; the lack of an infrastructure frequently allows insurgents to choose the time and place of engagements. “The trouble [in counterinsurgency] is that the enemy holds no territory and refuses to fight for it. He is everywhere and nowhere.”<sup>20</sup>

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<sup>17</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 84 (as amended through July 15, 2011).

<sup>18</sup> *Id.* at 174.

<sup>19</sup> The author generally uses the term “counterinsurgency” when describing the conflict from the perspective of the established government of the host nation and “insurgency” when describing it from the perspective of insurgents. When describing the conflict in abstraction, rather than rely on the ungainly “insurgency/counterinsurgency,” the author simply uses one of the two alternative terms.

<sup>20</sup> DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 50 (2006 ed.).

Second, the objective in an insurgency is not to defeat an opposing force or to militarily control a specific territory; it is a struggle to govern. What the winner in an insurgency gets is the right to govern, and so the ultimate question is not who is better able to marshal military force but rather who can make the better case for being the legitimate government, a contest more susceptible to political acumen than military supremacy.<sup>21</sup>

These two characteristics of insurgency combine in important ways to upend many traditional intuitions about how one fights wars. A simple example is that counterinsurgents cannot rely on static cost-benefit analysis to determine whether they choose to maintain and defend infrastructure. Unlike the insurgent, the incumbent regime is expected to simultaneously govern and fight the insurgency, making any success the insurgency enjoys two-fold: insurgent victories not only harm the regime's ability to fight, but demonstrate the regime's weakness, undermining its claim to govern. "In an asymmetric conflict, the weaker insurgent gains from having a large, cumbersome and vulnerable target to attack, with each successful assault augmenting the insurgent's credibility and following."<sup>22</sup> Receiving support from other nations can actually put a government fighting a counterinsurgency at a disadvantage because the need for external support demonstrates the government's weakness. On the other hand, when insurgents receive foreign support from societies with which the local population feels political or cultural affiliation, the fact of support can bolster the insurgent's cause as much as the support itself. The effects of external support can be asymmetric partly because the local population will not expect the insurgents to operate as independently as would the formal government.<sup>23</sup>

Perhaps nothing better exemplifies the strange nature of counterinsurgency than the centrality of law's role in the theory underlying such conflicts. The *Counterinsurgency Field Manual* mentions "rule of law" thirty times, including an entire section on "Establishing the Rule of Law."<sup>24</sup> Rule of law features in counterinsurgency doctrine in two distinct but related ways. First,

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<sup>21</sup> FM 3-24, *supra* note 14, at 1-1 (2006) ("Political power is the central issue in insurgencies and counterinsurgencies").

<sup>22</sup> Paul Cornish, *The United States and Counterinsurgency: "Political First, Political Last, Political Always,"* 85 INT'L AFF. 61, 77 (2009).

<sup>23</sup> See U.S. DEP'T OF ARMY, FIELD MANUAL 3-2.2, TACTICS IN COUNTERINSURGENCY 2-54 (2009) ("Accepting external support can affect the legitimacy of both insurgents and counterinsurgents. The act of acceptance implies the inability to sustain oneself.")

<sup>24</sup> FM 3-24, *supra* note 14, at D-38 to D-39.

developing the rule of law is an element of building the government's ability to operate effectively:

The primary tasks to accomplish during clear-hold-build are—

- Provide continuous security for the local populace.
- Eliminate insurgent presence.
- Reinforce political primacy.
- Enforce the rule of law.
- Rebuild local [host nation] institutions.<sup>25</sup>

In this sense, establishing the rule of law is primarily achieved through building the capacity of host-nation institutions, and as the list above suggests, much of that work has little to do with lawyers. Indeed, even the rebuilding of legal institutions is likely to rely as heavily on skills related to development as on skills related to law. The rule of law is also relevant to building the host nation government in ways not directly related to legal institutions. For instance, the rule of law can improve the effectiveness of government generally, and not just legal institutions, by limiting corruption.<sup>26</sup> United States military doctrine recognizes the value of the rule of law for bringing stability and security to a civilian population as part of U.S. operations, even beyond the specific case of counterinsurgency.<sup>27</sup>

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<sup>25</sup> *Id.* at 5-52. *See also id.* at Foreword.

Soldiers and Marines are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law.

<sup>26</sup> *See id.* at 5-45 and tbl.5-5 (listing considerations for developing governance generally, including creating means for citizens to petition the government for redress of government wrongs).

<sup>27</sup> *See* FM 3-07, *supra* note 1, at 1-17 (“Failure to ensure continuity of rule of law through [the] transition [from military occupation to local civilian control] threatens the safety and security of the local populace, erodes the legitimacy of the host nation, and serves as an obstacle to long-term development and achieving the desired end state.”), and 2-11 (“Long-term development aims to institutionalize a rule of law culture within the government and society”).

United States doctrine also claims that counterinsurgents improve their positions by following the law in their prosecution of the counterinsurgency itself. Put quite simply:

Efforts to build a legitimate government though illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. Moreover, participation in COIN operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is party, and certain [host nation] laws. . . . Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.<sup>28</sup>

In this sense, compliance with the law in conducting counterinsurgency operations is itself is a tool to winning the counterinsurgency.<sup>29</sup> Again, the operational benefits of compliance with established norms are hardly limited to counterinsurgency; the operational benefit of complying with established norms has long been recognized in a wide range of conflicts.<sup>30</sup>

Given its importance in current operations, it is no surprise that the rule of law has received much attention from both the military and the U.S. government civilian development community. As defined by the Army's field manual on stability operations,

Rule of law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law,

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<sup>28</sup> FM 3-24, *supra* note 14, at 1-132.

<sup>29</sup> Nachbar, *supra* note 5, at 315.

<sup>30</sup> *See, e.g.*, WILLIAM SHAKESPEARE, HENRY V act 3, sc. 6 ("When lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner."); SUN TZU, THE ART OF WAR, ch. 2 (Lionel Giles trans. 1910) (ca. 500 B.C.) ("The captured soldiers should be kindly treated and kept. This is called using the conquered foe to augment one's own strength").



equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decisionmaking, and legal certainty. Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency.<sup>31</sup>

For those who favor bulleted lists, the same manual clarifies:

In general terms, rule of law exists when:

- The state monopolizes the use of force in the resolution of disputes.
- Individuals are secure in their persons and property.
- The state is bound by law and does not act arbitrarily.
- The law can be readily determined and is stable enough to allow individuals to plan their affairs.
- Individuals have meaningful access to an effective and impartial justice system.
- The state protects basic human rights and fundamental freedoms.
- Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.

Effective rule of law establishes authority vested in the people, protects rights, exerts a check on all branches of government, and complements efforts to build security.<sup>32</sup>

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<sup>31</sup> FM 3-07, *supra* note 1, at 1-40. This definition follows one offered in the context of the United Nations. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* at 4, U.N. Doc. S/2004/616 (2004), and U.S. AGENCY FOR INT'L DEV., U.S. DEPT. OF STATE, U.S. DEPT. OF DEFENSE, SECURITY SECTOR REFORM 4 (Feb. 2009), available at <http://www.state.gov/documents/organization/115810.pdf> (interagency agreement within the U.S. executive branch uses a very similar definition).

<sup>32</sup> FM 3-07, *supra* note 1, at 1-41. See also THE RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 6 (Lieutenant Vasilios Tasikas, Captain Thomas B. Nachbar & Charles R. Oleszycki, eds., 2007 ed.); JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 76 (2006).

For a definition of “rule of law” adopted by a military force in the middle of a war, the Army’s definition is rather ambitious. It assumes not only accountability but security institutions, complete with internal checks on those institutions. It is also decidedly substantive, insisting upon the presence of certain basic rights.<sup>33</sup> Given its development as a tool to be used in armed conflict, the U.S. national security establishment’s conception of rule of law is unsurprisingly security-centric.<sup>34</sup> That is largely a consequence of the context in which it is being developed. The emphasis on security goes beyond simply providing security (referred throughout the nascent post-conflict rule-of-law development literature as the “three-Cs” of “courts, cops, and corrections”).<sup>35</sup> Rule of law goes beyond physical manifestations of security and, as most clearly captured by the seventh element above, includes an internal commitment to the law rather than simply obedience to a set of rules.

Although the rule of law is certainly a laudable concept, to counterinsurgents, establishing and maintaining the rule of law is not an end in itself but rather is a means to an end, to be employed alongside other means such as building the host nation’s ability to dispense non-legal services.<sup>36</sup>

Counterinsurgency is not a contest for law but rather is a contest for “legitimacy”. If the number of mentions is any measure, the *Counterinsurgency Field Manual*’s use of “rule of law” 30 times suggests attachment to the concept, but the 124 references to legitimacy (along with a section entitled “Legitimacy Is the Main Objective”<sup>37</sup>) suggest something closer to devotion. Like the rule of law, legitimacy both encourages acceptance of the government in its own right and

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<sup>33</sup> See STROMSETH, WIPPMAN & BROOKS, *supra* note 32, at 70–71 (on the substantive vs. formalist distinction). See also FM 3-24, *supra* note 14, at D-8 (describing three aspects of the rule of law as “A government that derives its powers from the governed,” “Sustainable security institutions,” and “Fundamental human rights”).

<sup>34</sup> See, e.g., FM 3-07, *supra* note 1, at 1-17, 1-83 (“While military forces aim to establish a safe and secure environment, the rule of law requires much more: security of individuals and accountability for crimes committed against them.”). Even in terms of expanding the rule of law beyond physical security, the doctrine anticipates a connection between the law and general security.

<sup>35</sup> See *infra* note 63.

<sup>36</sup> FM 3-24, *supra* note 14, at 6-1 (Success in counterinsurgency requires “the host nation to defeat insurgents or render them irrelevant, uphold the rule of law, and provide a basic level of essential services and security for the populace.”).

<sup>37</sup> *Id.* at 1-113 to 120.

increases the government's ability to provide services. By doing so, it also improves the government's ability to respond to the insurgency—to go beyond normal governmental functions to resolve the disputes that may have led to the insurgency in the first place.<sup>38</sup> Legitimacy is the bottom line of accepted counterinsurgency theory: “The primary objective of any COIN operation is to foster development of effective governance by a legitimate government.”<sup>39</sup>

### III. Law as a Means of Building Legitimacy

Although legitimacy is central to counterinsurgency, counterinsurgency theory lacks a comprehensive understanding of how law (or the “rule of law”) affects legitimacy, although the *Counterinsurgency Field Manual* offers at least some traction:

The presence of the rule of law is a major factor in assuring voluntary acceptance of a government's authority and therefore its legitimacy. A government's respect for preexisting and impersonal legal rules can provide the key to gaining it widespread, enduring societal support. Such government respect for rules—ideally ones recorded in a constitution and in laws adopted through a credible, democratic process—is the essence of the rule of law. As such, it is a powerful potential tool for counterinsurgents.<sup>40</sup>

The *Stability Operations Field Manual* provides a more detailed description of how the rule of law affects legitimacy:

Rule of law enhances the legitimacy of the host-nation government by establishing principles that limit the power of the state and by setting rules and procedures that prohibit accumulating autocratic or oligarchic power. It dictates government conduct according to prescribed and publicly recognized regulations while

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<sup>38</sup> *Id.* at 6-1 (“Success in counterinsurgency (COIN) operations requires establishing a legitimate government supported by the people and able to address the fundamental causes that insurgents use to gain support.”).

<sup>39</sup> *Id.* at 1-113. As is the case with many aspects of counterinsurgency, the role of legitimacy has general application as well.

<sup>40</sup> FM 3-24, *supra* note 14, at 1-119.

protecting the rights of all members of society. It also provides a vehicle for resolving disputes nonviolently and in a manner integral to establishing enduring peace and stability.<sup>41</sup>

In combination, the two manuals suggest two very different ways in which the law affects legitimacy.

First, the rule of law represents government restrained by law, the government's own willingness to be restrained by law being the most convincing argument it can make to the people for why they should be willing to be restrained by (this government's) laws. There is considerable social science demonstrating this effect. The adoption and observance of legal procedures (or "procedural justice") substantially increases the population's perception of the government's legitimacy.<sup>42</sup> Although easily derided as "technicalities," most procedures are grounded in widely held notions of fairness, and the operation of the government through those procedures therefore builds an association between the government and those notions of fairness.<sup>43</sup> Moreover, procedural justice has particular value for building the *kind* of legitimacy valuable to counterinsurgents. The form of legitimacy most valuable to counterinsurgents presents itself as a form of discretion—or a "cushion of support"<sup>44</sup>—that allows the government to make decisions in tension with popular views about the content of the law.<sup>45</sup>

Second, the rule of law builds legitimacy by providing benefits to the population much in the same way as other government services—the rule of law as a useful tool for enhancing security and resolving disputes. Of course, the law's value goes beyond security and dispute resolution; law also allows individuals to order their affairs with each other, as through contract. As I have written elsewhere, providing benefits to the

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<sup>41</sup> FM 3-07, *supra* note 1, at 1-41.

<sup>42</sup> TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 272 (2006 ed.) ("[T]he basis of legitimacy is the justice of the procedures use by legal authorities."); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 118–21 (1975).

<sup>43</sup> TYLER, *supra* note 42, at 109; THIBAUT & WALKER, *supra* note 42, at 115 (noting that experiment participants in France, Germany, and the U.S. had similar preferences regarding procedural rules).

<sup>44</sup> TYLER, *supra* note 42, at 107 ("The important role of procedural justice in mediating the political effects of experience means that fair procedures can act as a cushion of support when authorities are delivering unfavorable outcomes.").

<sup>45</sup> *Id.* at 275 ("Through legitimacy, procedural justice encourages deference."). *See generally* Nachbar, *supra* note 16.

population through the operation of a legal system is different from providing other benefits and may be more valuable for building legitimacy than other services the government might provide. Providing the service of “dispute resolution,” for instance, is fundamentally different from providing the service of trash removal.<sup>46</sup> The authority to resolve disputes can necessarily be exercised by only one body (pursuant to the state’s “monopoly on the use of force” that is the first element of the rule of law)—imagine the systemic breakdown that would result from two competing bodies claiming the power to resolve disputes. Thus, when the government provides dispute resolution services it is both providing a beneficial service and simultaneously claiming the authority to resolve disputes. If the population accepts that claim by using the government’s dispute resolution services, their perception of the government is likely enhanced by the value of the service and the government’s legitimacy is simultaneously enhanced as against all rivals.<sup>47</sup>

These two mechanisms for building legitimacy through law operate quite differently, although they are easily conflated because they are frequently present in the same case. Thus, a government that imprisons criminals—such as insurgents—according to established law and procedure doubly enhances its legitimacy, both by setting an example of abiding by legal constraints (as opposed to punishment without due process) and by increasing security by incapacitating the imprisoned criminal. Nevertheless, it is important to keep the two effects distinct, because the way they operate has important implications for the ways that law is used in counterinsurgency.

Although legitimacy is the watchword of counterinsurgency, not all uses of law in counterinsurgency build legitimacy (just as not all offensive operations contribute to legitimacy). That raises an important question for governments undergoing insurgencies (and potential interveners like the United States): Can law be used instrumentally as a tool to fight insurgencies without undermining its ability to build legitimacy, or are attempts to use law in counterinsurgency counterproductive? If the population’s commitment to the law is somehow tied to the law’s fairness, will attempts to use the law as an instrument of counterinsurgency strain the law’s perceived fairness in

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<sup>46</sup> See FM 3-24, *supra* note 14, at 5-70 (listing trash removal as one of the tasks government can undertake to increase legitimacy).

<sup>47</sup> Nachbar, *supra* note 16.

such a way as to undermine its authority? If so, then employing law as a means to fighting counterinsurgency could not only reduce its ability to lend legitimacy to the government but also could diminish its power to constrain behavior and order social relationships. Do instrumental uses of law by the government to fight insurgents help the government or hurt the law?

#### IV. Law's Use in Counterinsurgency and a Continuum of Legitimacy

Drawing conclusions about law's role in counterinsurgency requires describing how law and legal institutions are used in counterinsurgency. In doing so, it is possible describe the ways law is used in counterinsurgency as falling along a continuum of legitimacy.

##### A. Four Uses of Law in Counterinsurgency

Law and legal institutions are used in counterinsurgency in four distinct ways:

First, counterinsurgents use the criminal law, with all of its normal retributive, deterrent, and incapacitory effects, as a weapon against insurgents. In this sense, the criminal justice system is essentially a substitute for lethal targeting as a means of affecting those who take part in the insurgency. This is a major distinction from conventional war, in which combatants are privileged, a distinction that explains much of the emphasis on law in counterinsurgency that is absent in conventional wars. Sometimes this will result in short-term victories for insurgents—what some might call the insurgents' "unfair" use of law to hinder military prosecution of the conflict.<sup>48</sup>

Second, counterinsurgents engage in capacity building of the host nation's criminal legal institutions because of those institutions' value in using the law against insurgents (described immediately above). This use is similar to the first use; the difference is in scale and method. Building legal institutions affects the insurgent movement as a whole, not just particular insurgents. Building the capacity of the local justice system provides a direct benefit to military commanders, shifting responsibility for things such as detention from the military to local civilian authorities

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<sup>48</sup> See, e.g., *supra* note 11 and accompanying text.

and freeing up military resources for other tasks. In this way, local civilian legal institutions are direct substitutes for military power, potentially a more efficient and almost always a less controversial one. Having institutions like detention facilities operated by the military (especially a foreign military) is normally considered a second-best to having them operated by local, civilian organizations.<sup>49</sup>

A more significant difference from the first use of law is at the practical level of method. Those who use law in the first sense are the normal participants in the legal system; lawyers rightly claim a central role in such uses. Building the capacity of legal institutions has less of a connection to the practice of law, though, and a closer connection to the skills necessary for international development generally. The overlap in skills between using legal systems and building their capacity has led to many disagreements over who should do it and how it should be done.<sup>50</sup>

Third, counterinsurgents build the capacity of criminal legal institutions because using those institutions to fight insurgency enhances the legitimacy—and therefore the strength—of the government's side in the insurgency (as opposed to the government itself). This can happen in at least three ways: First, using the criminal justice system can give the government the rhetorical advantage of labeling insurgents as criminals.<sup>51</sup> Second, as described in the previous section, relying on the legal system to punish insurgents is a form of compliance that actually increases the legitimacy and hence the effectiveness of the legal system itself.<sup>52</sup> Third, the population might view the procedures and rules of criminal justice as being more likely to lead to fair or accurate outcomes than the raw assertion of force that characterizes military action. That is, the population may have more faith in the accuracy in the outcomes of legal proceedings than they do in the accuracy of targeting decisions made by the executive alone. There is no shortage of criticism of the accuracy of legal proceedings, but in the context of an insurgency, the introduction of an impartial adjudicator in what is essentially a self-

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<sup>49</sup> See FM 3-24, *supra* note 14, at 1-154 (“It is just as important to consider who performs an operation as to assess how well it is done.”).

<sup>50</sup> Cf. JFCOM HANDBOOK, *supra* note 6, at I.

<sup>51</sup> FM 3-24, *supra* note 14, at 1-131 (“When insurgents are seen as criminals, they lose public support.”).

<sup>52</sup> See *id.* at D-15 (evidence collected against insurgents during operations and preserving it for use in criminal courts “will be used to process the insurgents into the legal system and thus hold them accountable for their crimes *while still promoting the rule of law*”) (emphasis added).

interested conflict between the executive and insurgents may be enough. Even if the population does not have much faith in the accuracy of judicial proceedings, the procedure itself is likely to legitimize to the government's actions even if by calling upon general notions of fairness, whether or not it leads to better outcomes.

The fourth way counterinsurgents use the law is by relying on law for its value in enhancing the government's legitimacy rather than for any instrumental contribution to a particular outcome. These uses of law may have little to do with the insurgency or criminal law at all and instead capitalize on the ways that well-functioning legal systems generally increase political and social stability.<sup>53</sup> Anti-corruption efforts, even those having little direct effect on the insurgency,<sup>54</sup> are an instance of this use of law and legal institutions in counterinsurgency.

Perhaps the most meaningful indicators of the legitimacy of any state are the rules (and even more importantly the degree to which the state follows them) that govern its exertion of force, especially exertion of force against its own citizens. By announcing and demonstrating their commitment to these rules, counterinsurgents can enhance the government's legitimacy and weaken the insurgents. As Brigadier General Mark Martins, commander of an organization specifically formed to support "rule of law" operations in Afghanistan argues, "[c]ompliance with law is what legitimates the actions of our troops and separates their actions—sometimes necessarily violent and lethal—from what very bad people in criminal mobs do."<sup>55</sup> If General Martins is

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<sup>53</sup> See FM 3-07, *supra* note 1, at 1-43 (highlighting the rule of law as "a vehicle for resolving disputes nonviolently and in a manner integral to establishing enduring peace and stability").

<sup>54</sup> Of course, corruption is frequently a redirection of government resources to insurgents, providing them a direct benefit, and so anti-corruption efforts can also have a direct effect on insurgents themselves.

<sup>55</sup> Mark Martins, *Lawfare: So Are We Waging It?*, LAWFARE (Nov. 25, 2010), <http://www.lawfareblog.com/2010/11/lawfare-so-are-we-waging-it/>. See also FM 3-24, *supra* note 14, at 1-132:

Illegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. Efforts to build a legitimate government though illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. \* \* \* Any human rights abuses or legal violations committed by U.S. forces



correct that most people would rather live under a state that is governed by law rather than the will of men (and I think he is), this use of law may be the most powerful one in the conduct of a counterinsurgency—to again borrow General Martins’ terminology, this is the way the government outflanks insurgents.<sup>56</sup>

In a sense, the first two uses are “direct” in that law and legal institutions are used directly on insurgents and the insurgency to weaken it. The second two uses are “indirect” in that the law is a means to build legitimacy, and it is the enhanced legitimacy of the government that the law produces, not application of the law itself, that harms the insurgency. The direct/indirect distinction is important for those who think about how law is used in warfare—those taking part in the “lawfare” debate. Defining lawfare as “the use of law as a weapon of war”<sup>57</sup> is inclusive but conflates the distinction between different types of uses of law. The operational and moral consequences of prosecuting insurgents and terrorists, for instance, are different from those implicated by building robust legal systems as a means to build stability in countries subject to insurgencies or whose instability has made them terrorist safe havens, as U.S. rule of law capacity building operations in Iraq and Afghanistan seek to do.

#### B. A Continuum of Legitimacy

Thus counterinsurgency doctrine’s central place for legitimacy is doubly the case for uses of law in counterinsurgency because “legitimacy” is a necessary feature of not only the government but also of the law itself.<sup>58</sup> The legitimacy of the law arises from its connection to

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quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.

<sup>56</sup> Mark Martins, *Reflections on “Lawfare” and Related Terms*, LAWFARE (Nov. 24, 2010), <http://www.lawfareblog.com/2010/11/reflections-on-%e2%80%9clawfare%e2%80%9d-and-related-terms/>.

<sup>57</sup> See *supra* note 12.

<sup>58</sup> What it takes for laws to have this legitimacy is the subject of nearly endless debate among jurists and political scientists alike. Like the legitimacy that imbues a government, there is undoubtedly both a political and moral dimension to the legitimacy necessary for law. For instance, Lon Fuller famously debated the father of positivism, H.L.A. Hart, on whether fundamentally immoral laws should be regarded as “law.” Even Hart, who would call such properly enacted rules “laws,” conceded that they may be

the population's underlying normative commitments. Unlike other non-lethal tools of counterinsurgency (social welfare programs, infrastructure programs such as roads or electrification programs, or even most educational programs), the inextricable connection between this particular tool of counterinsurgency and the population's underlying normative commitments makes any attempt to use law without attention to its grounding in those commitments unwise and likely counterproductive, as the law can only achieve legitimacy if it is grounded in them:

The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong; a second factor is the person's feeling of obligation to obey the law and allegiance to legal authorities. . . . [W]ithin the range of everyday laws studies, these two sources of commitments to law-abiding behavior reinforce each other.<sup>59</sup>

The uses described above fall along a continuum of legitimacy, ranging from using the law directly as a substitute for lethal, traditionally military means (which neither requires that law be legitimate nor necessarily enhances the legitimacy of the law) to using the law primarily to build legitimacy and then relying indirectly on that enhanced legitimacy to counter an insurgency (which depends entirely on the law's legitimacy to bring about the desired effects). While using the law directly on insurgents (especially those whose struggle has some political salience for the population) may undermine the law's legitimacy and hence its authority, uses of the law at the other end of the continuum that are both dependent upon and intended to enhance legitimacy are unlikely to do so.

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unworthy of obedience, which strains the concept of "law" practically beyond recognition. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 73 (1983) ("[I]f laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience."). See also *id.* at 77 ("[L]aws may be law but too evil to be obeyed.").

<sup>59</sup> TYLER, *supra* note 42, at 64. See also FM 3-07, *supra* note 1, at 6-90 ("[Security Sector Reform] planners do not impose their concepts of law, justice, and security on the host nation. The host nation's systems and values are central to its development of justice system reform").

Uses of the law consistent with the nation's underlying normative commitments—commitments to both substantive rules and to the fairness underlying many procedural rules—increase both the law's authority and the government's legitimacy, in a self-reinforcing cycle.<sup>60</sup> Law's legitimacy is recursive with the government's legitimacy.

## V. Implications for Practice

Appeal to the rule of law as a source of operational advantage connects theoretical constructs like legitimacy with tangible effects<sup>61</sup> on the battlefield. A deeper understanding of how counterinsurgents can use the law has direct consequences for how we should use law in counterinsurgency.

### A. The “Three C’s” of Rule of Law

Rule of law programs have been viewed by counterinsurgents primarily as a way to improve security in areas undergoing active insurgency. As a result, the conception of the rule of law that has come to dominate military thinking has been limited to aspects of the criminal justice system, the so-called “courts, cops, and corrections” approach to the rule of law.<sup>62</sup> The focus on the “three Cs” is not limited to practitioners; a criminal-justice-dominated approach to the rule of law has found its way into doctrine as well.<sup>63</sup> Indeed, the military doctrine is so heavily focused on security and the criminal justice system that even

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<sup>60</sup> See FM 3-24, *supra* note 14, at 1-131 (“Using a legal system established in line with local culture and practices . . . enhances the [host nation] government’s legitimacy”).

<sup>61</sup> United States military doctrine has generally shifted toward an effects-based approach to conducting military operations in which all potential tools, kinetic and non-kinetic, are considered for their ability to produce the desired effect. The effort has been controversial. See generally General James N. Mattis, *USJFCOM Commander’s Guidance for Effects-based Operation*, PARAMETERS, Autumn 2008, at 18 (discussing the effects-based concept and its limits).

<sup>62</sup> See generally Lieutenant Colonel Porter Harlow, *Publishing Doctrine on Stability Operations and the Rule of Law During Conflict*, ARMY LAW., June 2010, at 65, 69.

<sup>63</sup> *Id.* at 69. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 2-6 (Sept. 29, 2006).

when cautioning against inordinate emphasis on security, it does so by emphasizing . . . security and criminal accountability.<sup>64</sup>

Recognizing the dynamic connection between legal systems and legitimacy can inform both practice and doctrine by including aspects of security that a static approach to rule of law would neglect. Commanders faced with security threats have a strong incentive to adopt whatever means will quickly and efficiently neutralize that threat. Building the capacity of a local criminal justice system without an eye to how that system contributes to the overall legitimacy of the government—for example, by propping up judges and police who reliably support the counterinsurgency, but are corrupt—sacrifices the long-term for the short-term.<sup>65</sup> Legitimate institutions will not only provide better security; they are themselves the ultimate objective. Even if U.S. troops were able to provide the host nation’s security without building legitimate local institutions, it would be a mistake to do so because the counterinsurgency will not end, since it’s legitimacy, not security, that determines the outcome of an insurgency. And because building legitimacy takes longer than providing security, programs whose success is measured solely in terms of enhanced security are likely to operate on a timeline that is too short to provide any real benefit to legitimacy.

#### B. The Role of Traditional and Informal Justice in Counterinsurgency

The connection between law and legitimacy works the other way, as well—just as attempts to use the law in illegitimate ways to bolster stability will undermine the legitimacy of the regime, attempts to use law in ways viewed as legitimate by the population but that fail to contribute to the legitimacy *of the regime* are potentially problematic for counterinsurgents. Recent attention paid to “bottom-up” efforts in counterinsurgency<sup>66</sup> and (specifically for law) the potential value of

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<sup>64</sup> See, e.g., FM 3-07, *supra* note 1, at 1-83 (“While military forces aim to establish a safe and secure environment, the rule of law requires much more: security of individuals and accountability for crimes committed against them.”).

<sup>65</sup> Nachbar, *supra* note 5, at 316.

<sup>66</sup> See, e.g., Peter Choharis & James Gavrilis, *Counterinsurgency 3.0*, PARAMETERS, Spring 2010, at 34, 42 (“Rather than thinking of COIN as a top-down approach to establish security for national government administrators and foreign aid workers to arrive and provide services and development aid to win the hearts and minds of poor and primitive people, COIN 3.0 would engage a broad spectrum of society with a bottom-up approach.”).

traditional and informal justice systems in post-conflict environments<sup>67</sup> potentially falls prey to this error. In many areas, such customary justice (often dispensed by village elders or councils) is recognized as legitimate by the local population; the stability offered by resort to such systems is potentially very valuable to counterinsurgents hoping to improve the security situation in a country with a weak central government.<sup>68</sup> Some have gone so far as to take a “first do no harm” approach with regard to traditional justice—arguing that even a bad traditional justice system is better than no justice system.<sup>69</sup>

The more moderate view is that traditional and informal justice is best approached with caution. Many have recognized the potential substantive deficiencies of traditional justice, which tends to reinforce existing social norms that may be inconsistent with acceptable human rights standards.<sup>70</sup> The focus on the *substantive* deficiencies of traditional justice systems, though, ignores the real problem that such systems present to counterinsurgents, especially foreign intervenors: the effect of traditional justice systems of the national government.

While traditional justice systems can help to improve stability, and with it the legitimacy of the central government, if they are perceived as alternatives to the central government, they will provide stability at the expense of the central government’s legitimacy. Unlike the institutional legitimacy that counterinsurgents seek to build, traditional justice systems tend to rely upon and improve the personal legitimacy of the

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<sup>67</sup> “Traditional justice” is a term used in a variety of contexts. I am using it here to describe traditional or informal systems for resolving normal disputes (sometimes civil, sometimes criminal) among civilians. Traditional justice systems (specifically ones emphasizing reparation and the restoration of the social order rather than retribution) have been advanced as a means for facilitating transitional justice as an alternative to formal mechanisms such as criminal trials before the International Criminal Court. *See generally* Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 439–40 (2011). Such extraordinary forms of justice are beyond the scope of my analysis.

<sup>68</sup> *See* FM 3-07, *supra* note 1, at 6-92 (“Traditional justice systems may enjoy high levels of legitimacy with host-nation populations and may possess unique advantages as a means of promoting [security sector reform] in a broader contest”); JFCOM HANDBOOK, *supra* note 6, at D-29 to D-34.

<sup>69</sup> JFCOM HANDBOOK, *supra* note 6, at D-34 (“Do not do anything that will disrupt or degrade the traditional or informal systems unless there is a functioning formal system capable of replacing it.”).

<sup>70</sup> FM 3-07, *supra* note 1, at 6-92; JFCOM HANDBOOK, *supra* note 6, at D-33 to D-34.

local leader dispensing justice.<sup>71</sup> A key component of the “rule of law,” and of the legitimacy of the government, is the government’s monopoly on the coercive power to make rules and resolve disputes;<sup>72</sup> the threat presented by traditional justice systems is a threat to that power, not just to national or international substantive commitments or the risk that the local leaders dispensing justice might not be politically aligned with the central government.<sup>73</sup> The legitimacy enhanced by informal justice is both local and personal, not central and institutional, and therefore at least *prima facie* inconsistent with the objectives of counterinsurgents.<sup>74</sup> Traditional justice, even if legitimate in its own right, potentially exhibits exactly the same failure as illegitimate uses of law in the name of security—sacrificing long-term legitimacy in the name of short-term stability.

That is not to say that traditional, informal systems do not have a role or that counterinsurgents should not study them carefully. Traditional and informal systems generally reflect social norms (in substance and even procedure) and so provide a direct source of information<sup>75</sup> about how to align legal rules with popular morality, a key way to build legitimacy. It is only to say that the security benefits of traditional and informal justice must remain secondary to the ultimate goal of building the legitimacy of the central government. The legitimacy of the central government is enhanced by traditional or informal justice systems only if they operate under the auspices of that government. A direct way for the government to establish that relationship is by reserving the power to

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<sup>71</sup> JFCOM HANDBOOK, *supra* note 6, at D-32 (“What tends to make a customary system work is its decentralized, local character, and the personal legitimacy and authority of the traditional leaders who apply it”).

<sup>72</sup> FM 3-07, *supra* note 1, at 1-41 (“The state monopolizes the use of force in the resolution of disputes.”). *See also supra* text accompanying notes 46–47.

<sup>73</sup> *Cf.* JFCOM HANDBOOK, *supra* note 6, at D-33 to D-34 (“Traditional systems may follow customs that Westerners and others outside the community view as contrary to internationally accepted human rights standards. Traditional systems may fall under the control of warlords, insurgents, and other non-compliant actors.”).

<sup>74</sup> *See* RULE OF LAW HANDBOOK, *supra* note 6, at 212 (“Further, non-governmental law enforcement challenges the state’s monopoly on the use of force.”). Nor is an account of the potential political relationship between local leaders and the national government adequate. *Cf.* JFCOM HANDBOOK, *supra* note 6, at D-34 (“Take into account whether the leaders that are empowered will support the long-term policy goals of the HN government and the US.”). The point is not whether the individuals empowered through their role in traditional justice systems are political supporters of the central government, it’s whether the system itself enhances the legitimacy of the central government.

<sup>75</sup> JFCOM HANDBOOK, *supra* note 6, at D-33 (“Traditional systems usually are very accessible, reflect the values of the community, and are trusted by the people.”).

appoint local decisionmaking bodies (even if that appointment power is exercised to ratify local preferences, it ties the traditional system to the central government). Less directly, the central government can establish criteria for the enforcement of decisions made by traditional or informal bodies in the formal justice system.<sup>76</sup>

### C. Law and Other Forms of Asymmetric Warfare—The Case of Counterterrorism

Keeping legitimacy in mind helps to preserve the law's authority when used as a tool in armed conflict. As discussed above, counterinsurgency presents little threat to the authority of the law because counterinsurgents seek both to use law and to increase it—and consequently the regime's—legitimacy. Conversely, limited strategies such as counterterrorism<sup>77</sup> (frequently abbreviated “CT”), which rely on law strictly as a means to fulfill the operational objective of incapacitating and deterring adversaries, are more likely to eventually undermine the authority of the law than a complete counterinsurgency strategy. While counterterrorism can use law, it need not. Counterterrorism seems to be the preferred U.S. strategy in places like Yemen and Pakistan precisely because the U.S. does not think it likely that long-term investments in building host nation legal institutions will pay off there.<sup>78</sup>

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<sup>76</sup> Conversely, an absolute prohibition on traditional or informal justice that is widely ignored by the population is likely to undermine the legitimacy of the government. On the relationship between alternative and formal systems, see generally Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISPUTE RESOLUTION 67, 74–78.

<sup>77</sup> Counterterrorism is “Actions taken directly against terrorist networks and indirectly to influence and render global and regional environments inhospitable to terrorist networks.” JP 1-02, *supra* note 17, at 86.

<sup>78</sup> See Michael J. Boyle, *Do Counterterrorism and Counterinsurgency Go Together?*, 86 INT'L AFFAIRS 333, 344 (2010).

A strict CT approach to military force does not involve a state-building component and makes no assumption of the need for territorial control. Such operations are often conducted in regions in which the state has little capacity to maintain order (such as the recent strikes in ungoverned spaces in Yemen and Pakistan). Arguably, a resort to a CT model of warfare is premised on a lack of effective control over territory and of capacity for self-policing by the state.

Even if law does not feature centrally in counterterrorism strategy, nations engaged in counterterrorism are happy to use legal and political institutions when they can. Thus, even though the U.S. has adopted a “war” model for its struggle against terrorism, it still charges and tries terrorists (and pressures allies to as well). But if coalition forces view law only as a means to direct effects on opponents, the temptation will be to use the law selectively when it has the desired effect and to rely on other means when the law would point to a different outcome.

It is that selective use of law, not the use of law more generally, that animates critics of the use of law in war and potentially undermines the legitimacy of law itself.<sup>79</sup> A counterterrorism strategy, by so closely tying military and legal means with the limited goal of direct effects on individual terrorists or insurgents, presents a serious threat to the authority of law. The consequences for counterterrorism go beyond the threat to law; it is a strategy that harms the stability of already-unstable governments by calling upon them to undertake unpopular actions (such as strikes against terrorists who to the local government are insurgents<sup>80</sup> and frequently enjoy some local popularity) without building the legitimacy necessary to make those unpopular actions sustainable.<sup>81</sup> Counterinsurgency, by focusing on long-term legitimacy rather than incapacitating any particular insurgent or terrorist, minimizes the threat that the exigency of armed conflict presents to both the authority of the law and the legitimacy of the government.

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<sup>79</sup> Martins, *supra* note 56 (explaining that the possibility for undermining authority arises when law “merely becomes subordinated as a ‘tool’ or ‘weapon’ in the service of warfare”).

<sup>80</sup> The Taliban, for instance, presents a terrorist threat to the United States but an insurgent threat to both Afghanistan and Pakistan.

<sup>81</sup> See Boyle, *supra* note 79, at 350:

A central tenet of the modern thinking on counterinsurgency holds that success will require a strong and representative central state that can command the loyalties of the population. By contrast, counterterrorism depends on a state conducting, authorizing or at least tolerating potentially costly strikes against dangerous operatives on its territory. Both counterinsurgency and counterterrorism, then, depend on political capital, but in different ways. A counterinsurgency strategy is designed to build the political capital of the local government, while a counterterrorism strategy requires that government to use its political capital in authorizing costly or unpopular missions. Seen in this light, these missions work at cross-purposes, for one builds political capital while the other uses it.



## VI. Conclusion

To say counterinsurgents can use law to fight insurgents is not to say that they should. Law is a complex and morally fraught tool for accomplishing any particular end, certainly for winning a war. Wise use of the law as a means of war—most recently and directly to build legitimacy as part of a counterinsurgency strategy—requires an understanding of how law (or the “rule of law”) operates to build the legitimacy of a government fighting an insurgency. Recognizing the relationship between the uses of the law in war and the law’s own authority has implications for both counterinsurgency and other forms of war. Because law operates in counterinsurgency by enhancing the regime’s legitimacy, counterinsurgents should avoid using the law solely to improve security, for example by overrelying on traditional or informal legal systems that provide security without regard to how they affect the legitimacy of the central government. The use of law in forms of war in which legitimacy features less prominently, such as counterterrorism, presents a more serious threat to law’s legitimacy.

Although we are over ten years into the current conflict, we are at the beginning of a new era in understanding how law relates to—and is used—in war. The rise of law’s role in war is undoubtedly tied to strategies like counterinsurgency and counterterrorism. Tomorrow’s conflicts may not resemble today’s—war is ever-changing. Some things do not change, though. Both law and war have been around for as long as there have been governments, and the lessons we are learning in today’s counterinsurgency and counterterrorism campaigns will likely play out for generations as, in each new conflict, law finds its place as both a constraint on war and a means of warfare.